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Faculty of Law
University 17 Agustus 1945 Semarang

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ICLEH 2018

"HARMONIZATION ON LAW, ECONOMY, AND HEALTH TOWARDS SOCIAL JUSTICE SOCIETY"

Grasia Hotel Semarang - Indonesia
January 29th - 30th, 2018

Proceeding Book
International Conference on Law, Economy and Health (ICLEH 2018)

Theme:
"*Harmonization of Law, Economy and Health Towards Social Justice Societ*

Editor:
Nindy Dwi Pratiwi
Elang Satmoko
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Grasia Hotel Semarang, Indonesia
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Editor: Nindy Dwi P.**,** Elang Satmoko**,** Ichsan Muhajir**,** Galih Prna Pasca Y.

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FOREWORD

The growing public awareness of health at this time has an impact on the increasing need of available resources, especially funds, which so far the economic sector associated with planning, implementation and evaluation in health services is still rarely or slightly gained attention. Economic sectors therefore need to be included in the planning, implementation and evaluation of the health sector through arrangements that provide certainty, benefit, and justice. In the sense that there is a harmonization between Law, Economiy and Health that provides Social Justice for Society.

Based on that thinking, Faculty of Law UNTAG Semarang on 29 - 30 January 2018 held an international conference as well as holding Call for paper, inviting scientists both in law, economy, and health at the national and international level with the theme of "Harmonization of Law, Economy and Health to Social Justice Society" This International Conference is a valuable opportunity for academics, researchers and practitioners so that 120 papers are formed in the development and delivery of ideas, research results and experience related to the issue of harmonization between law, economy and health of social justice in the global society.

As guest speakers include Prof Vugar Mamadov, European WAML President from Azerbaijan, Prof. Irene Calboli from Singapore College, Prof. Agus Sardjono from University of Indonesia, Prof. Park Ji Hyon from Youngsan University South Korea, Prof. Seo Jo Hwan from Dong A University South Korea , Dr Haniff Ahamat from Malaysian SMEs, dr Nasser, SpKk.D.Law, President of W AML Asia Pacific Region, Prof. Dr.Liliana Tedjosaputro, SH, MH.MM from Master of Law UNTAG Semarang.

On this occasion, the organizing committee would like to thank:

1. Dean of the Faculty of Law UNTAG Semarang (Dr Edy Lisdiyono, SH.MH), who gives much encouragement, encouragement and trust to the committee.
2. Dean of Faculty of Economy and Business Untag Semarang (Dra Nur Chayati, SE.MM.Ak.Ca)
3. Rector of the University of 17 August 1945 Semarang (Dr.Drs.H.Suparno.Msi)
4. Wold Medical Law Association (WAML), Intellectual Property Law Teachers Association (APHKI), Persatuan Perakit Indonesia (PERSI) Central Java, Kariadi Hospital Semarang, PDAM Jember
5. All members of the committee as well as the parties who contribute to the contribution of the event.

Finally, we thank you for the attention of all readers. Hopefully this Proceeding International Conference on Law, Economics and Health (ICLEH 2018) can provide benefits to advance the Indonesian nation and our education in particular.

Semarang, February 2018

Committee

Dr. Anggrani Endah Kusumaningrum, SH., MHum

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Agus Sardjono
Professor at Faculty of Law, Universitas Indonesia

Introduction

An online site (web page) reported a lot of events of 'malpractice cases' in the field of health care.[1] Regardless of the substantive truths of the news posted on such page, what is certain is that in health care, it is not impossible that there is a mistake or negligence committed by the healthcare provider.[2] The problem is, mistakes in providing health care have a significant impact or risk considering the victim is human. Victims of mistakes in health care, in particular curativehealth care, can suffer from disability or even loss of life. Therefore, discussing health care from the perspective of contract law becomes very important, as it relates directly to the health or even life of a person, who legally has specific rights and obligations in relation to the contract law itself. Indonesia has stipulated a Law concerning Health, enacted under No. 36 of 2009, (hereinafter referred to as the Health Law 2009).[3] In this Law, the provision of proper health care is regulated. The Health Law 2009 introduced 5 categories of health care, they are : promotive,[4] preventive,[5] curative,[6] rehabilitative,[7] and traditional health care. This paper mostly discusses about curative health care that is most directly related to contracts in the field of health care. However, this paper is not intended to discuss malpractice cases occurring in Indonesia. This article will talk more about the ideal of how contracts in the field of health care should not only be based on the principle of freedom of contract as taught in law faculty, but how humanitarian and justice ideas should become the main consideration in the formation and execution of those contracts.

Contract Law and Health Care in Indonesia

The doctrine of 'freedom of contract' places the contracts in a sterile position from any social influences existing in the process of its formation and implementation.[8] The jurists strongly believe that in the formation of a contract, such principle is the spirit of the contract itself. If the contracting parties have no freedom to contract, then the contract will be said to contain a defect, which does not qualify as a binding contract. In history, freedom of contract is related to the development of free market and the ideals of political economist.[9] Economic freedom was desired at that time. Everyone wanted to be free in running any business activities, including to be free in determining what to do in the economic activities. In the legal order, the view was then manifested in the form of freedom to contract.

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[1] Seehttps://daerah.sindonews.com/read/862555/27/seorang-caleg-terpilih-meninggal-dunia-setelah-jalani-operasi-1399825076. Accessed on 4 January 2018.

[2] In 2012, it was reported that the number of health care malpractices reached 182 cases. See https://nasional.tempo.co/read/469172/sampai-akhir-2012-terjadi-182-kasus-malpraktek. Accessed on 4 January 2018.According to Poskota News, cases of malpractice allegations during 2006 to 2015,out of the 317 cases of malpractice allegations reported to the Indonesian Medical Council (KKI), there were 114 cases involvedgeneral practitioners, followed by surgeons with76 cases, obgyn doctors (obstetricians) with 56 cases and pediatricians with 27 cases. Seehttp://poskotanews.com/2015/05/20/dokter-umum-paling-banyak-lakukan-malpraktik/. Accessed on 4 January 2018. See also https://aplikasiergonomi.wordpress.com/2014/05/22/malpraktek-medis-di-indonesia/, accessed on 5 January 2018.

[3] Law No. 36 of 2009 concerning Health LN-2009-144. Hereinafter referred to as the Health Law 2009.

[4] Promotive health care is an activity and / or a series of activities of health care prioritizing health promotion activities. See Article 1 point (12) of the Health Law 2009.

[5] Preventive health care is a preventive activity against a health problem / disease. See Article 1 point (13) of the Health Law 2009.

[6] Curative health care is an activity and / or a series of activities of treatmentaimed at the cure of disease, relief of disease-related suffers, disease control, or control of deformity so that the quality of the sufferer can be maintained optimally. See Article 1 point (14) of the Health Law 2009.

[7] Rehabilitative health careis anactivity and / or a series of activities to return the former sufferer backto the community that he/she can resume his/her functions as the member of the community who is useful for him/herself and the community to the best he/she is capable. See Article 1 point (15) of the Health Law 2009.

[8] This concept is especially followed by those who embrace the positiveism and legism ideology, which strongly holds to the normative content of the text of the law. The positiveism ideology holds that what becomes law is what is established as law by the legislator. Meanwhile, legism ideology holds that what constitutes as law is what is governed by the law.

[9] P.S. Atiyah, *The Rise and Fall of Freedom of Contract*, (Oxford: Clarendon Press, 1979), p. 398. Atiyah deeply discusses the philosophical aspect of this principle of freedom of contract. See pages 219 – 304. Part II (*The Age of Freedom of Contract*) from the book mentioned above. The role of individualism ideologygreatly affects the formation of legal norms.

What is interesting is that in *Burgerlijk Wetboek* (BW), such concept is not explicitly stated as a freedom from the parties to formulate a contract. The formulation used, among others, is as mentioned in Article 1321: "*there is no valid consent if such consent is given by mistake. or is obtained by violance extortion or by fraud*".[10] In other words, BW does not explicitly state that one of the conditions for a legitimate contract is not the freedom to contract of the parties, but its negative formulation, that in the prepation of a contract there should be no *mistake*, *violance extortion*, and *fraud*.

Furthermore, the formulation of Article 1338 of BW which has so far been wrongly concluded, as if this article is the embodiment of the doctrine of freedom of contract, also not mentions a single word that states that the parties have the freedom to form a contract. The formulation of the article is somewhat revolving, i.e. that "*All vallid agreements apply to the individuals who have concluded them as law*".[11] Meanwhile, all valid agreements refer to what is stipulated in Articles 1320 to 1337 of BW.

Article 1338 of BW is an affirmation that if a contract has been legally prepared, in the sense of fulfilling the conditions prescribed by law, then such contract is enforceable by the law. Instead, this article affirms that there is a limitation of freedom in its formation, that is, it must meet the requirements prescribed by law.
According to the Law, an agreement is valid if :[12]

(1) It is prepared by persons having legal capacity and authority to make an agreement. Elements of this legal capacity include : age (adults according to law), an ability to understand the legal consequences of an act (among others marked by mental health), and authority according to law.[13]
(2) In preparing such agreement there are no elements of fraud, mistake, and violance extortion. It means that there must be free will from the parties preparing the agreement. Any elements of fraud, mistake, and violance extortion will result in the disability in free will.[14] This article specifically tries to formulate the doctrine of freedom of contract into a law.
(3) The object contracted must be a freely tradable, and clearly identifiable object, either in terms of type (goods or service) or size (quantity, volume, length, weight, etc.).[15]
(4) The agreement is not contrary to law, morals, and public order.[16]

The latter refers to the law, morals, and public order as elements that limit the freedom of the parties in making a contract. In other words, freedom becomes very conditional (being relative) because it must not violate the law, morality, and public order. In the context of a contract in the field of health care, such provision is very good considering the object of such contract is something related to health, safety, and even the lives of others. Agreements on health care, especially those that are curative, should not be built on the principle of freedom of contract alone, but they must meet the standards of safety and quality of care, in fact they should prioritize more on the safety of patients.[17]

In general, health care contracts are performed orally. Patients only come to the hospital or to a doctor they 'know'. They come to complain about their pain in the hope of getting an accurate diagnosis and getting a proper treatment. In the academic realm, the form and nature of such contracts are usually identified as informal and implied contracts. They are said to be *informal*because the law does not require certain formal or written forms. It is said *implied* because the contracted achievement clause is not expressed explicitly by the parties.[18]

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[10]See the Civil Code, which is a translation of *Burgerlijk Wetboek* by Prof. R. Subekti and Tjitrosudibio. In the Dutch language is as follows: "*Geene toestemming is van waarde, indien dezelve door dwaling is gegeven, door geweld afgeperst, of door bedrog verkregen*". See*De Wetboeken, Wetten en Verordeningen, Benevens de Grondwet van de Republiek Indonesie*, (Jakarta: Ichtiar Baru – Van Hoeve, 1989), d/h/ *Engelbrecht*, p. 326.

[11]Article 1338 of BW: "*Alle wettiglijk gemaakte overeenskomsten strekken dengenen die dezelve hebben aangegaan tot wet*". *Engelbrecht*, p. 327.

[12]Article 1320 to Article 1337 of Burgerlijk Wetboek.

[13]Article 1329 of Burgerlijk Wetboek expressly states that all persons are deemed to have the authority or ability (legal capacity) to perform a legal act, unless the law otherwise provides. BW itself states that an immature person and a person who is placed under the capability otherwise can not perform a legal act. Furthermore, in the Limited Liability Company Law, it is expressly stated that the Board of Directors has the authorisation to represent the company. This means that any persons who are not members of the Board of Directors do not have the legal capacity to conduct legal actions on behalf of the company. Similarly, the CooperativesLaw, the Foundation Law, and even the Book of Commercial Law (KUHD) with respect to Firms, CV, and so forth..

[14]See Articles 1321 to 1328. These articles explain at length what the free will means. This term means that the word "agree"does not necessarily means that the agreement becomes legitimate. Agree means that there is no element of mistake, violance extortion, and fraud. Even if a person has puttheir signature in the agreement document, not necessarily the agreement is valid and binds those who make it. Company Law addresses this issue at length.

[15]See Articles 1332 and 1333 of*Burgerlijk Wetboek*.

[16]See Articles 1335 to 1337 of *Burgerlijk Wetboek*.

[17]See Articles 53 and 54 of the Health Law 2009.

[18] Agus Sardjono, *et al*., *Pengantar Hukum Dagang*, (Jakarta: Rajawali Pers, 2014), p. 8-9. This book discusses various contracts, among others from Ralph C. Hoeber, *et al*., *Contemporary Business Law, Principles and Cases*, 3rd ed.,

Specific achievements in curative health care contracts are generally more common in the part of doctors or hospitals. While the patients usually do not have too specific achievements. Patients' most important achievement is paying for medical expenses or treatment. In addition, they also provide correct and true information about how they feel, although this is not very significant, because there are also patients who have been unable to provide information because of their condition. Later on, in fact, the doctors who are obliged to diagnose what the illness suffered by the patient also unable to provide sub information. In addition, patients are also obliged to follow instructions, information, or procedures for the use of drugs or medical devices.[19]

In contrast, the obligations of Doctors and Hospitals are widely regulated, not only in the Code of Medical Ethics, but also in some laws relating to curative health care.[20] Article 58 paragraph (1) of the Health Law 2009 explicitly states the rights of patients, include to demand compensation from any party providing health care which due to their mistake or negligence the patients suffer losses. To determine the mistake or negligence of health care providers, especially doctors, there are rules in the Medical Law 2004 regulated this matter, in particular Articles 44 and 45. In addition to those articles, the magnitude of such mistakes or negligence may also be determined by the Code of Medical Ethics. That is, if there are cases that cause harm to the patients, especially due to curative health care provided by the doctors, then if the mistakes can be proven, it can be determined that such doctors violate the Code of Medical Ethics in carrying out their profession.

Just for example, Article 14 of the Code of Medical Ethics states: "*A doctor must be sincere and use all his knowledge and skills for the benefit of the patient, that when he is unable to perform an examination or treatment, upon the consent of his patient / family, he shall refer the patient to a doctor who has the expertise to do so*". This provision is very closely related to the issue of competence. A doctor in carrying out his profession must be based on his own scientific standards and skills (competence). If, in conducting curative health care, he was struck by the fact that he did not have the knowledge or skills related to the illness suffered by the patient, he should refer his patient to another more skilled doctor. There should be no elements of try and error.

Competence of doctors even become a major element that must be proven in advance by 'prospective doctors' before they get a practice license. Article 44 of the Health Workers Law 2014 requires a Registration Certificate or *Surat Tanda Registrasi* (STR) for a doctor or other health worker who wishes to provide health care. To obtain such STR, a Certificate of Competence or a Certificate of Profession is required. These requirements are stipulated to further ensure that health care is actually performed by a competent doctor or healthcare provider.

In principal, the contract law, particularly the one relating to curative health care contracts, is not only governed by the principle of freedom of contract as is the doctrine of contract law itself. Contract law in the field of health care is heavily colored by the rules of the relevant law, the primary objective of which is the inner and outer health of the related parties, especially the patients. To better understand how legislative regulations in the field of health affect any contracts in the field of curative health care, the following describes how the State stipulate the provisions of law concerning health care.

Health Care According to Law in the Field of Health

There are at least three laws directly related to the health care system in Indonesia. The first is the Health Law 2009. Second, the Health Workers Law 2014, and the Medical Practice Law 2004. These three laws are followed by implementing regulations, and are still supplemented by the Code of Medical Ethics that is directly related to the standard of health care itself.

The Health Law 2009 regulates more about the State policy in the national health system, including with regard to health care systems that fall into two categories: individual health care and public health care. [21]In the context of this article, the individual health care system set forth in this law more or less relates to individual health care contracts, that governs the relationship between a doctor or hospital with a patient. This is evident from the regulations set about the patient rights in relation to doctors and hospitals. At least this law becomes one of the legal sources governing contractual relations between patients and doctors and between patients and hospitals.

(McGraw-Hill Book Company, 1986), p. 148 – 149. We can also see in F. William McCarty & John W. Bagby, *The Legal Environment of Business*, (Irwin, 1990), 215.

[19] Titik Triwulan Tutik & Shita Febriana, *Perlindungan Hukum Bagi Pasien*, (Jakarta: Prestasi Pustaka Publisher, 2010), p. 30.

[20]Some of the laws in question are Law no. 36 Year 2009 concerning Health (Health Law 2009), Law no. 29 of 2004 concerning Medical Practice (Medical Law 2004), and Law no. 36 of 2014 concerning Health Workers (Health Workers Law 2014).

[21]Article 52 paragraph (1) of the Health Law.

When contractual relationships between doctors and patients are more likely to arise through implied contracts, this law becomes an important source for determining essential clauses,[22]that should be stated in curative health care contracts, but not expressly stated by both parties. Furthermore, the Health Workers Law 2014, among others, regulates the competence and authority of doctors in conducting curative health care practices. For an example, about the Registration Certificate (STR) and Practice License (SIP) for health workers, including doctors.[23] Competence of a doctor is an important element with regard to the contractual relationship between patients and such doctor. When a patient has placed so much confidence in the doctor to be able to cure his illness, without having to ask himself whether the doctor has the ability to do so, there should be a rule that ensures that the doctor really has the competencies required by such patient.

Meanwhile, the Medical Practice Law 2004 seeks to provide a regulatory basis for patient protection, quality improvement of medical services, and also to provide legal certainty for the community and for the doctors themselves.[24] It is important to provide certainty to the doctors in the context of their roles in the field of curative health care. One of the most important is the standard of medical education, including for dentists, and regulations on the conduct of medical practice.[25] Both are very important to be regulated, so that the doctors themselves understand what their rights and responsibilities are.

By the three laws as mentioned above, the contractual relationships between doctors and patients have sufficiently been regulated. At least to the aspect of the rights and obligations of both, which in practice have never been formulated explicitly in the curative health care agreements. In other words, in the context of curative health care, the relationship between doctors and patients is more likely to be regulated in health legislation than on the terms of the agreement between the two. It may be argued that the principle of freedom of contract does not entirely work in the contractual relationships in the field of curative health care. Even if there is a freedom, then such freedom is more prevalent in the patients, especially the freedom to choose certain doctors to whom they will seek treatment. Furthermore, after they choose, their position then becomes inferior to the doctors, since the specific achievements are then more prevalent in the doctors. That is why the law on consumer protection also talks a lot in relation to the relationship between doctors on the one hand and the patients as the customers.

Consumer Protection

As mentioned above that when patients comes to a hospital or to a doctor, they only think how to cure the illness they suffer. They never questions whether the hospital has the means and infrastructure to take care of them. They also never questions whether the doctorthey come to or who is appointed by the hospital really has the skills in doing the treatment for the illness they suffer.[26]

In curative health care practice, treatment service contracts have never been made in writing. Similarly with regard to what should be done by the doctors that was never beenpromised in such contracts. In the perspective of contract law, the understanding of "certain things" in the contractual relationships in the field of health care have really never been specifically agreed upon. The doctor's achievement known to the patient is simply "cure" the illness. It's very common. About what to do, how to do, how long it takes, even the measurable results are never promised. There was never a doctor who promised that the patient would be healed with the treatment he was taking. Even if there are doctors who promise so, it can be qualified as violating ethics, especially if it is associated with the amount of service payments concerned.

This "not certain" condition makes the patients' position a healthcare customers become very vulnerable. That is why consumer protection laws are becoming highly relevant in the context of healthcare contracts. Although health laws have been very helpful with the normative preconditions for curative health care, the enforcement process still requires some legal efforts. One of these legal efforts is by enforcinga consumer protection law. Patient is a curative health care consumer. While hospitals and doctors are "business actors"[27] who provide services.

Although somewhat controversial and appears to beforcing the qualify doctors as "business actor", but if the review is based on the relationship between curative health care providers and patients, it is not wrong to state that doctorsar service providers. Moreover, taking into account Article 4 point (a) stating that consumers

[22]*Essence of contract* means any condition or stipulation in a contract which is mutually understood and agreed by the parties to be a such of vital importance that a sufficient performance of the contract cannot be had without exact compliance with it is said to be 'of the essence of the contract'. See *Black's Law Dictionary*, p. 546.

[23]Articles 44, 45, and 46 of the Health Workers Law 2014.

[24]Article 3 of the Medical Practice Law 2004.

[25]See Chapters IV, V, and VII the Medical Practice Law 2004.

[26]In the Code of Medical Ethics it has also been stated that patients fully believe in the doctors. See the *Preamble of the Code of Medical Ethics of 2012*.

[27]It is somewhat controversial to qualify doctors as business actors, since the definition of business actors may not be applicable to the doctors. Article 1 point (3) of the Consumer Protection Law 1999 states that: "Business actor is an individual person or a company, in the form of a legal or non-legal entity established and domiciled or engaged in activities within the legal territory of the Republic of Indonesia, conducting various kinds of business activities in the economic sector through contracts, both individually and collectively".

have "*the right to comfort, security and safety in consuming goods and / or services*", it is clear that a doctor is a party who, according to the Consumer Protection Law 1999, should provide services conveniently andsafely, and should ensure the patients safety.

On the other hand, doctors also have the right to obtain legal protection in their efforts to provide curative health care.[28] This protection is, among others, regulated through arrangements on standard procedures to be complied with, for example about STR, SIP, informed consent, exceptions in life-saving efforts, and so on.[29] STR and SIP are associated with the authority that doctors have in providing curative health care. Prior informed consent relates to the procedures for certain actions which, when approved by the patient or the patient's family, in some way relieve or reduce the burden of liability on the doctor's shoulders. These may affect the enforcement of consumer protection, when patients experience certain events related to the implementation of curative health care.

The Consumer Protection Law 1999 affirms that business actors, who in this context may be doctors and hospitals, have the following obligations :[30]

1. to act in good faith in conducting the business;
2. to provide correct, clear end honest information with regard to the condition and warranty of the goods and/or services and provide explanation on the use, repair and maintenance;
3. to treat and serve the consumers properly and honestly and nondiscriminatively;
4. to guarantee the quality of goods and/or services produced andor traded based on the prevailing quality standard provisions of the goods and/or services;
5. to provide the opportunity to the consumers to test and or/try on certain goods and/or services and provide warranty and/or guarantee on the produced and/or traded goods;
6. to provide compensation, indemnification and/or substitution for the damages caused by the use, consumption and application of the goods and/ or services;
7. to provide compensation, indemnification and/or substitution if the goods and / or services received or used do not accord with the agreement.

Items (1) and (3) are closely related to ethics. Doctors must be ethical. One form of ethical manifestation is that doctors in providing services should not be affected with bad or reprehensible motives. The main intention is to cure. Item (2) requires the doctors to be honest and provide clear information to the patients about their illness and treatment measures. This relates to the patients' right as mentioned in Article 4.c of the Consumer Protection Law 1999, and Article 56 paragraph (1) of the Health Law 2009, which reads : "*Everyone shall be entitled to accept or reject part or entire aid measures to provide to them after receiving and understanding the information concerning such measures completely*". This article also deals with the prior informed consent doctrine.[31]

Item (4) relates to the competence of the doctors. While it is not possible to ensure that the doctors' actions can cure the patient's illness, at least the doctors must be confident that they have the competence and authority to provide the intended health care. The beliefs here relate to both administrative and substantive aspects. The administrative aspect refers to administrative requirements such as STR and SIP and the like, i.e. whether or not the doctors have fulfilled them. While the substantive aspect refers to the competence the doctors have, whether or not they can make a diagnosis and medical treatment correctly to patients who seek treatment.

Item (5) relates to the standard of curative health care concerned. Among other things, the selection of certain drugs that should be consumed by patients. Of course, it is not the patients who have to prove whether or not the drugs are suitable, but on the basis of science or any known research findings, is it appropriate for such certain drugs to be consumed by the patients? Sometimes there is a doctor who immediately gives the harshest drug for a particular type of illness, so that in time even the patient is unfavorable, for example, the patient becomes immune to more "low" drugs.

Items (6) and (7) relate to the possibility of mistakes or negligence by the doctors concerned. In practice, it is rare that anyone directly admits his mistakes or negligence. This article is an important basis for enforcing the law, especially in protecting patients from a doctor's mistakes or negligence in providing curative health care.

The provisions concerning patient protection drawn from the above mentioned Consumer Protection Law are important legal sources in relation to vulnerable or weak patient positions. These rules provide a basis for a patient to do something (legal actions) when he suffers a loss due to curative health care not as it should be. However, it does not mean that all consumers will take legal action when they are harmed by a doctor. There

[28]See Article 27 paragraph (1) of the Health Law 2009, Article 58 paragraph (2) of the Health Law 2009, andhttps://www.ncbi.nlm.nih.gov/pmc/articles/PMC2840885/, particularly related to the informed consent. See also Tutik &Febriana, *Perlindungan Pasien*, h. 32-33.

[29]See Articles 29, 30, and 36 of the Medical Practice Law 2004.

[30]Article 7 of the Consumer Protection Law 1999.

[31]Refer to*footnote* 27, supra.

are also many patients who "heart-whole" to the suffering they experienced due to the unfulfillment of the best service standards they should be received. This is where the importance of the role of the Government as an authority that has the task to protect all parties, including weak consumers.

Roles of the Government in Individual Health Care Contracts

There are three main actors that have important roles in the national health system in Indonesia. First is the Government, as the holder of the constitutional mandate in the welfare of the nation. The Health Law 2009 Specifically specifically determines that the Government's responsibilities in relation to the national health system are as follows:

1. To plan, regulate, implement, cultivate, and supervise the implementation of well distributed and affordable health for the people.[32]
2. To ensure the availability of environment, arrangement, health facilities, physically or socially, for the people in order to achieve maximum health degree.[33]
3. To ensure the availability of fair and evenly distributed resources of health for all people in order to achieve maximum health degree.[34]
4. To ensure the availability of access to information, education, and health care facilities in order to improve and maintain maximum health degree.[35]
5. To empower and encourage active participation of the people in any form of health efforts.[36]
6. To ensure the availability of any form of qualified, safe, efficient, and affordable health efforts.[37]
7. To implement community health insurance through national social insurance system for individual health efforts.[38]

Of the 7 Government responsibilities, there is one responsibility directly related to curative health care, i.e. : to oversee the implementation of health efforts that are equitable and affordable by the people. The affordability aspect relates to freedom of contract concerning the achievement of the cost of health care itself. Of course this is not intended to limit the right of doctors as individuals in setting a certain tariff. When a patient comes to a private practitioner, such as at home or in a particular hospital, there is no requirement for the doctor to charge "cheap" rates. The word 'affordable' becomes very relative. This term, by the law in relation to the Government's responsibilities, means that the people should get health care at reasonable prices. One of the most important thing is related to the role of the second actor in the health service system, i.e. the health care providers. If health care is fully devolved to the market mechanisms, then what happens next is the vulnerability of access of disadvantaged members of society to affordable health care.

The role of the Government, particularly in relation to curative health care, is to reduce the market mechanisms related to tariffs that are not like the idea of freedom of contract. The Government has important access to health care providers in order that these institutions are not entirely free to set tariffs of medical or care costs. In the Regulation of the Minister of Health of the Republic of IndonesiaNo. 159b/MenKes/Per/II/1988 it is said that: "*every hospital shall carry out its social function by providing facilities to care for patients who are not / less fortunate ...*".[39]

This responsibility of the Government is also very closely related to the efforts to uphold ethics in health care. Seran and Setyowati indicated that the noble mission of hospitals as a health care provider is getting faded. Hospitals developed into a labor-intensive and capital-intensive institution. Hospitals are no longer just a matter of doctors and nurses. The use of high technology for diagnosis has become part of hospital management. In fact this can be used as a selling point from the relevant hospitals.[40] This condition is certainly vulnerable to the rising cost of health care. If then the health care contractsare left entirely to the market mechanism and to the principle of freedom of contract, it is not impossible that hospitals will be further away from its noble mission of helping the sick. That is an important mission of the role of the Government in the context of health care.

[32]Article 14 of the Health Law 2009.
[33]Article 15 of the Health Law 2009.
[34]Article 16 of the Health Law2009.
[35]Article 17 of the Health Law 2009.
[36]Article 18 of the Health Law 2009.
[37]Article 19 of the Health Law 2009
[38]Article 20 paragraph (1) of the Health Law 2009.
[39]See Marcel Seran & Anna Maria Wahyu Setyowati, *Dilema Etika dan Hukum Dalam Pelayanan Medis*, (Bandung: Mandar Maju, 2010), p. 9.
[40]*Ibid*., h.10.

Closing

From the brief summary above can be drawn some conclusions, that : (1) Curative health care contracts may not be left entirely to the principle of freedom of contract and market mechanism. (2) The applicable legislative regulations provide arrangements and limitations in relation to curative health care contracts. (3) Contract law of health care places the Government to take an important role, particularly in order to ensure qualified, safe, efficient, and affordable health care.

Like it or not, jurists must accept the fact that a contract law no longer entirely relies on the principle of freedom of contract. The ethical aspect, especially the aspect of justice, is increasingly important to note. This is the effort of constitutionalizing the contract in Indonesia. Indonesia, with Pancasila as its National Ideologythat prioritizes humanity and justice, should not implement the views of individualism and capitalism and market mechanism alone. Philosophically, contract law should not be entirely based on market mechanism or freedom of contract. The basis of philosophy on the basis of humanity and social justice must be embodied in certain contracts, especially in the field of health care. Hopefully. ***

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INTELLECTUAL PROPERTY LAW AND MEDICINE IN PATENT

Lessons from Korea-U.S. FTA

Jihyon Park*

ABSTRACT

Pharmaceuticals drugs concern the medical aspects of marketing of medicines for the benefits of patients and the health of the community as well as the profit of the investors. The patented products of pharmaceutical companies will be replicated by generic drugs soon after the expiration of the patent. Also getting marketing approval is a separate procedure. Patent process takes a year in Korea. However, even if the pharmaceutical company gets a patent right granted, it takes 6~10 years up to get a market approval. Because of this unintentional delay of an exclusive right by the patent holder, the term of a patent on an invention may be extended up to five years to compensate for the period during which the invention cannot be practiced in Korea.New medicines also hold data exclusivity rights for producing confidential data during the process of the pre-clinical and clinical trial.Having medicine-patent linkage provision in the regulation influenced pharmaceutical companies to practice different ways. Now pharmaceutical companies are more keen on the intellectual property from patent to design as well as competition law. Korea-U.S. FTA provisions reflect the interest of the originator pharmaceutical companies and generic companies. The right to excess to the medicine, right to have lower price medicine, right to excess fundamental health and welfare system must be an important leverage to the government policy too.There has been a great debate in International society on the life and medicine and ultimately contributed to world peace. Like the reason why the medicine was created, intellectual property law should have a common goal to do much for peace of mankind.

Keywords:Intellectual property law, medicine in patent

Introduction

The role and R&D of New medicine

Pharmaceuticals drugs concern the medical aspects of marketing of medicines for the benefits of patients and the health of the community as well as the profit of the investors. Pharmaceutical companies may deal with generic or brand medications and medical devices. The patented products of pharmaceutical companies will be replicated by generic drugs[1] soon after the expiration of the patent[2].

For pharmaceutical drugs, capital investment in laboratory research and clinical trials takes astronomical amounts of money[3]. As shown by the Pharmaceutical Research and Manufacturers of America ("PhRMA") report, of 5,000-10,000 compounds under research, only one will be approved by the FDA and be brought to market[4]. Still, massive flows of investment come into the pharmaceutical companies because of the prospect of a return on investment.

1. Extension of Patent period for new medicine

KOREA–U.S.FTAArticle 18.8: Patents
6. (b) With respect to patents covering a new pharmaceutical product[5] that is approved for marketing in the territory of the Party and methods of making or using a new pharmaceutical product that is approved for marketing in the territory of the Party, each Party, at the request of the patent owner, shall make available **an adjustmentof the patent term** or the term of the patent rights of a patent covering a new

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[1]FDA defines generic drugs "copies of brand-name drugs and are the same as those brand name drugs in dosage form, safety, strength, route of administration, quality, performance characteristics and intended use. These similarities help to demonstrate bioequivalence, which means that a generic medicine works in the same way and provides the same clinical benefit as its brand-name vesion." .https://www.fda.gov/Drugs/ResourcesForYou/Consumers/QuestionsAnswers/ucm 100100.htm#q1 last visited on Jan. 15. 2018.

[2] There are several kinds of the patent relating to the drugs. Substance patent is a patent given because of the novel chemical structure of the drug.Process patent is a patent given chemical or other process used to manufacture the drug. Burden of proof is on the claimed infringer that the patented process is not being used. Formulation patent is for the pharmaceutical dosage form on the drug and manufacturing processes used to make the formulation.Method of use patent is to claim the use of the drug to treat a certain disease

[3]The entire drug development process from discovery to marketing takes an average of 10 years and costs, on average, $500 million in industrialized countries." Encouragement of New Clinical Drug Development: The Role of Data Exclusivity", International Federation of Pharmaceutical Manufacturers Association, 2000. Recent data show it has increased to ranges from USD 4 billion to as high as USD 11 billion. InnoThink Center for Research In Biomedical Innovation; Thomson Reuters Fundamentals via FactSet Research Systems. 2015.

[4] Crystal J. Chen, "Patent vs. Data Exclusivity in Pharmaceuticals", Lexology, 2015.

[5] For greater certainty, **new pharmaceutical product** in subparagraph (b) means a product that at least contains a new chemical entity that has not been previously approved as a pharmaceutical product in the territory of the Party.

pharmaceutical product, its approved method of use, or a method of making the product to compensate the patent owner for unreasonable curtailment of the effective patent term as a result of the marketing approval process related to the first commercial use of that pharmaceutical product in the territory of that Party. Any adjustment under this subparagraph shall confer all of the exclusive rights, subject to the same limitations and exceptions, of the patent claims of the product, its method of use, or its method of manufacture in the originally issued patent as applicable to the product and the approved method of use of the product.[6]

Patent Act
Article 89 (Extension of Patent Terms by Permission, etc.)
(1) Notwithstanding Article 88 (1), the term of a patent on an invention may be extended only once by **up to five** years to compensate for the period during which the invention cannot be practiced, if the invention is specified by Presidential Decree and requires permission, registration, etc. under any other statute (hereinafter referred to as "permission, etc.") to practice patented invention but it takes a long time to undergo necessary tests for validity, safety, etc. for such permission, registration, etc.
(2) For the purposes of paragraph (1), the period required **due to a cause attributable to the person who has obtained permission**, etc. shall not be included in "period during which the invention cannot be practiced" in paragraph (1).

Complex interest comes in when several procedures intermingle each other. The new drugs are protected by patent, having exclusive right to manufacture, market and make a profit from it. However, the company applies for a patent long before the clinical trial to assess a drug's safety, efficacy has commenced. Also, a patent for a drug does not guarantee market approval. Starting from a drug discovery, efficacy confirmation, preclinical work, clinical trials (phase I, II, III) and review of the government authority are vital steps that pharmaceutical companies have to take to get a market approval. Patent process takes a year in Korea. However, even if the pharmaceutical company gets a patent right granted, it takes 6~10 years up to get a market approval. To sell the drugs at the market, the company needs approval on the safety and efficacy. Therefore, the effective patent period for new drugs after the approval is often around seven to twelve years out of 20-year+*a* patent protection perioddepending on the country.

Because of this unintentional delay of an exclusive right by the patent holder, the term of a patent on an invention may be extended up to five years to compensate for the period during which the invention cannot be practiced in Korea[7]. In December 2017, the Korean Patent Court[8] ruled that the extension period calculated as "period during which the invention cannot be practiced" for drug Betamiga(active ingredient: Mirabegron) produced by the Japanese Pharmaceutical company, AstellasPharma Inc. is justified. AstellasPharma Inc. asked for 48-day extension counting between the day of the patent grant to the end of the clinical test period and 334-day extension counting between application of permit to import and decision. The Patent court said the loss of 382-days can be included in the "period during which the invention cannot be practiced" as in paragraph (1) of Art. 89. The Patent Court said those 382-days delay is caused because of the standard procedure of authority. It is not due to a cause attributable to the person who has obtained permission. The Supreme Court confirmed the Patent court's decision. This case is the first kind of Korea providing a specific guideline for the patent extension period.

2. Data exclusivity and limitation on effects of Patent

KOREA-U.S. FTA ARTICLE 18.8: PATENTS

Each Party may provide **limited exceptions** to the exclusive rights conferred by a patent, provided t hat such exceptions do not unreasonably conflict with a normal exploitation of the patent and do not unreasonably prejudice the legitimate interests of the patent owner, taking account of the legitimate i nterests of third parties. Consistent with paragraph 3, if a Party permits a third person to use the su bject matter of a subsisting patent to generate information necessary to support an application for ma rketing approval of a pharmaceutical product, that Party shall provide that any product produced und er such authority shall not be made, used, or sold in its territory other than for purposes related to generating such information to support an application for meeting marketing approval requirements of that Party, and if the Party permits exportation of such product, the Party shall provide that the pro duct shall only be exported outside its territory for purposes of generatinginformation to support an

[6] For purposes of subparagraph (b), **effective patent term** means the period from the date of approval of the product until the original expiration date of the patent.
[7] Patent Act Art. 89(Extension of patent Terms by Permission, etc).
[8] The Intellectual Property Trial And Appeal Board (IPTAB) make a ruling or decision at initial stage. A suit seeking a review of a ruling or decision made by the Intellectual Property Trial and Appeal Board (IPTAB) should be filed to the Patent Court. Any appeal of the Patent Court's decisions should be brought directly to the Supreme Court, as the Patent Court is an appellate-level court.

application for meeting marketing approval requirements of that Party.

Patent Act Article 96 (Limitations on Effects of Patents) (1) The effects of **a patent shall not extend** to the following: 1. Practice of a patented invention for the purpose of **research or testing** (including research and testing for obtaining permission for items of medicines or reporting items of medicines by under the Pharmaceutical Affairs Act or for registering pesticides under the Pesticide Control Act);

Data exclusivity is an independent intellectual property right and should not be confused with the patent. It guarantees the confidential data holder the data will not be referred to or used by another person or company for a protected period of time. This confidential data includes the result of the extensive pre-clinical and clinical testing on animals and humans. Data exclusivity right guarantees disclosure of the date will be conducted only by the originator when required by government authorities to obtain marketing approval and prevents the unfair commercial use of the original data."Unfair commercial use" steps in whenever the government does not provide required protection to those data. In this sense, a government has to decide the level and scope of the protection of the data.

This also means that government does not exclude the use of the data entirely. A government only excludes "unfair commercial use" of the original data and using it for the purpose of researching and testing purpose is not within this circle. For Korea, data exclusivity stops at the practice of a patented invention for the purpose of research or testing[9]. Korea-US FTA Article 18.8(5) also includes experimental exemption from the data exclusivity right.

KOREA-U.S. FTA ARTICLE 18.9: MEASURES RELATED TO CERTAIN REGULATED PRODUCTS (a) If a Party requires or permits, as a condition of granting **marketing approval** for a new pharmaceutical or new agricultural chemical product, the submission of information concerning safety or efficacy of the product, the origination of which involves a considerable effort, the Party shall not, **without the consent of a person** that previously submitted such **safety or efficacy information** to obtain marketing approval in the territory of the Party, authorize another to market a same or a similar product based on: (i) the safety or efficacy information submitted in support of the marketing approval; or (ii) evidence of the marketing approval, for **at least five years** for pharmaceutical products and ten years for agricultural chemical products from the date of marketing approval in the territory of the Party.

Korea has a data exclusivity right in medicine guaranteed in Pharmaceutical Affairs Act specifying that data on "efficacy and domestic use" were required for drugs and clinical trial data or proof of bioequivalence data should be submitted again within the six-year re-examination period. This new drug data exclusivity protection is done through the process of post-market surveillance, not through the patent law or specific law designated to protect medical data. With this law, although other generic pharmaceutical companies may apply for market approval after five years of data exclusivity by referring to the same data, market approval for other generic companies won't be issued until the exclusive six years are up.

In Korea-US FTA, this new drug data exclusivity developed to a provision called " a new chemical entity exclusivity " which includes pesticides in the regulation. Although Korea-US FTA Art. 18.9(1) articulates 5 years for data protection, new drug data is still protected 6 years through Pharmaceutical Affairs Act. A New Clinical Studies Data Exclusivity also lies in Article 18.9(2).

3. Medicine-Patent Linkage

Korea-U.S.FTA Article. 18.9 Where a Party permits, as a condition of approving the marketing of a pharmaceutical product, persons, other than the person originally submitting safety or efficacy information, to rely on that information or on evidence of safety or efficacy information of a product that was previously approved, such as evidence of prior marketing approval in the territory of the Party or in another territory, that Party shall: (a) provide that the patent owner **shall be notified** of the identity of any such other person that requests

[9] However, cases like Whittemore v. Cutter, 29F. Cas. 1120 (C.C.D Mass. 1813)(No.17,600) and Roche Prods, Inc. v. BolarPharm.Co., 733 F.2d 858 prove that recognized scope of research and testing is extremely limited. After Bolar case, well-known 'Hatch-Waxman Act' was enacted in 1984. This law has been modified as Medicare Act 2003(Medicare Prescription Drug, Improvement, and Modernization Act of 2003).

marketing approval to enter the market during the term of a patent notified to the approving authority as covering that product or its approved method of use; and
(b) implement measures in its marketing approval process **to prevent** such other persons from marketing a product without the consent or acquiescence of the patent owner during the term of a patent notified to the approving authority as covering that product or its approved method of use.

A duty of notification to patent holder has been enforced right after implementation of Korea-US FTA. Article 50-4(Notice of Application for Marketing Approval)[10] has been inserted in March 13, 2015 to the of Pharmaceutical Affairs Act. FTA.Article 18.9(b) has been reserved for 18month until March of 2015 due to the revision process of Pharmaceutical Affairs Act. From March of 2015 when the Minister of Food and Drug Safety notify the patentee, a patentee may file an application for the prevention of marketing of notified drug with the Minister of Food and Drug Safety. Minister of Food and Drug Safety shall not grant the relevant marketing approval or revised approval as well as take a step to prevent marketing of such drug for 9 months. With these two new provisions, Pharmaceutical Affairs Act also included two new provisions for generic pharmaceutical companies. That is called "Application for Exclusive Marketing Approval"[11]provision. With this new provision, generic pharmaceutical companies are actively using court process to get a marketing approval. Since PAA requires exclusive marketing approval applicant to file a trial on invalidity of a patent, a trial to invalidate registration for extension of a patent or a trial to confirm scope of rights of patent holder[12], before applying for exclusive marketing approval. Medical patent lawsuit has dramatically increased right after the enforcement of Korea-US FTA Article 18.9(b) and Article. 50-7,50-8 of Pharmaceutical Affairs Act. Most of the generic pharmaceutical companies have used a trial to invalidate registration for an extension of a patent. Before 2015, a case on this issue was 0%. In 2015, kicking 505 cases.
Up to now, the medicine-related lawsuit is evolved from a patent lawsuit to unfair competition law, trademark to design of the drugs.

4. Balance between right to excess to the medicine and property right

The government has to control two sides in terms of drugs. One is developing new drugs for the long futures to come and the other is keeping citizens healthy. To fulfill this, regulations and regulatory bodies have to focus on quality, safety, and efficacy and accessibility of the drugs. What obligation the do government owe to the citizen? Article 36(3) of the Korean constitution guarantees the right to health[13][14]. United Nations(UN) member states also recognized the right to health in the Universal Declaration of Human Rights at Art.22 'Social Security' with the phrase of "we all have the right to affordable housing, medicine, education, and childcare, enough money to live on and medical help if we are ill or old" in 1948[15]

The level and scope of constitutional protection of the health varies from protecting health, protecting rights to public health or medical care to guaranteed rights to free medical cares. Protection provided by the Korean constitution merely reach to the aspirational promise of the government to try their best[16]. With the

[10]Pharmaceutical Affairs Act. Article 50-4 (Notice of Application for Marketing Approval, etc.)
(1)Each person, who has filed an application for marketing approval of a drug pursuant to Article 31 (2) or (3) based on the information on safety and efficacy of a listed drug, or who has filed an application for approval of the change of the efficacy and effectiveness pursuant to paragraph (9) of the same Article, shall notify the registered patentee and patentee, etc. of a listed drug of the matters prescribed by Ordinance of the Prime Minister, such as the fact that the application for marketing approval has been filed and the filing date of the application.
[11]*Ibid*., Article 50-7 (Application for Exclusive Marketing Approval) (1) Where a person, who shall notify pursuant to Article 50-4, files an application for marketing approval or revised approval of a drug, he/she may also file an application for exclusive marketing approval of the drug with the Minister of Food and Drug Safety, prior to the marketing of drugs meeting all of the following requirements (hereinafter referred to as "exclusive marketing approval")
[12]*Ibid*., Article 50-7. (2) Each person, who intends to obtain exclusive marketing approval, shall file a petition for any of the following trials:
1.A trial on invalidity of a patent pursuant to Article 133 of the Patent Act;
2.A trial to invalidate registration for extension of a patent pursuant to Article 134 of the Patent Act;
3.A trial to confirm scope of rights pursuant to Article 135 of the Patent Act.
[13]Article 36(3) "The health of all citizens shall be protected by the State(모든 국민은 보건에 관하여 국가의 보호를 받는다)."
[14] In addition to that, Article 34(2) writes" The State shall have the duty to endeavor to promote social security and welfare"
[15] Besides International Covenant on Economic, Social and Cultural Rights (1966) The Convention on the Elimination of all Forms of Discrimination Against Women (1979), Convention on the Rights of the Child (1989), Convention on the Rights of Persons with Disabilities (2006), International Convention on the Protection of the Rights of All Migrant Workers and Members of their families (1990) have mentioned a specific right to health.
[16] Jody Heymann, AdèleCassola, Amy Raub&Lipi Mishra, "Constitutional rights to health, public health and medical care: the status of health protections in 191 countries", Global Public Health, Vol.8 2013.

creation of the World Trade Organization(WTO), the agreement on Trade-Related Aspects of Intellectual Property Rights(TRIPs) established a comprehensive IP regime that imposed minimum IP requirements on all member states.

The TRIPS Agreement gave least developed countries a long grace period before they were required to provide patent protection for pharmaceutical products. In December 2001, the WTO Council agreed to extend this grace period until 2016. Then again, the waiver has now been extended to 2033[17]. Although EU and NGO has supported for the indefinite extension, US has only agreed on the extension to 2033. According to the UN agencies, UNDP and UNAids, the proportion of people with HIV who are not receiving antiretroviral reduced from 90% in 2006 to 63% in 2013 thanks to the availability of drugs made by LDCs[18].

The Doha Declaration on the TRIPs Agreement and public Health was adopted by the Fourth WTO Ministerial Conference of 2001 in Doha.In Paragraphs of 4 to 6 of the Doha Declaration, government agreed that:

"4. The TRIPS Agreement **does not and should not preventMembers from taking measures** to protect **public health**. Accordingly, while reiterating our commitment to the TRIPS Agreement, we affirm that the Agreement can and should be interpreted and implemented in a manner supportive of WTO Members' right to protect public health and, in particular, to promote access to medicines for all.
In this connection, we reaffirm the right of WTO Members to use, to the full, the provisions in the TRIPS Agreement, which provide flexibility for this purpose.
5. Accordingly and in the light of paragraph 4 above, while maintaining our commitments in the TRIPS Agreement, we recognize that these flexibilities include:
(a) In applying the customary rules of interpretation of public international law, each provision of the TRIPS Agreement shall be read in the light of the object and purpose of the Agreement as expressed, in particular, in its objectives and principles.
(b) Each Member has **the right to grant compulsory licences** and the freedom to determine the grounds upon which such licences are granted.
(c) Each Member has **the right to determine what constitutes a national emergency** or other circumstances of extreme urgency, it being understood that public health crises, including those relating to HIV/AIDS, tuberculosis, malaria and other epidemics, can represent a national emergency or other circumstances of extreme urgency.
(d) The effect of the provisions in the TRIPS Agreement that are relevant to the exhaustion of intellectual property rights is to leave each Member free to establish its own regime for such exhaustion without challenge, subject to the MFN and national treatment provisions of Articles 3 and 4.
6. We recognize that WTO Members **with insufficient or no manufacturing capacities** in the pharmaceutical sector could face difficulties in making effective use of compulsory licensing under the TRIPS Agreement. We instruct the Council for TRIPS to find an expeditious solution to this problem and to report to the General Council before the end of 2002."

These provisions in the Doha Declaration ensures that governments may exercise compulsory licenses practices in the field of medicine. After Doha Declaration, WTO General Council had made a decision to give a waiver to the least developed countries by setting aside a provision of the TRIPs Agreement[19] and WTO members approved changes to the TRIPs agreement on Dec. 6 2005[20]. This amendment was formally built into the TRIPs Agreement on Jan. 23 2017 after two thirds of the WTO's members accepted the Protocol amending the TRIPs Agreement[21].

This amendment allows exporting countries to grant compulsory licenses to generic suppliers exclusively for the purpose of manufacturing and exporting needed medicines to countries lacking production capacity. Pharmaceutical product defined in the TRIPs Agreement Annex is any patented product, or product manufactured through a patented process, of the pharmaceutical sector needed to address the public health problems as recognized in paragraph 1 of the Declaration on the TRIPs Agreement and Public Health[22].

If the government blocks citizen's right to have lower price medicine, citizen's right to excess fundamental health and welfare system might be breached. Some say this kind of denial to the lower price medicine is the result of lack of a source of funding for the purchase of drugs for those currently too poor to buy them themselves. With this reasoning, Bush Administration took a measure to subsidize purchase money of HIV

[17]Those are 48 poorest nations classified by the United Nations as "Least Developed Countries"
[18]"World's poorest countries allowed to keep copying patent-protected drugs"The Conversation, 2015. 11. 24.
[19] WT/L/540 and Corr.1. 1 Sept. 2003.
[20] Press/426, WTO 2005 press releases. https://www.wto.org/english/news_e/pres05_e/pr426_e.htm. Visited on Jan. 10. 2018.
[21] "WTO IP rules amended to ease poor countries' access to affordable medicines". https://www.wto.org/english/news_e/news17_e/trip_23jan17_e.htm
[22] WT/MIN(01)/DEC/2.

medicines by public health authorities in poor countries[23]

Conclusion

Competition and cooperation between originator pharmaceutical companies and generic pharmaceutical companies are the norms. Optimal strategies to achieve healthy society is the ultimate goal for both. The Korean government has inserted new provisions considering two side interests. The provisions of Pharmaceutical Affairs Act seemingly provide a balance between rewarding the holder of data exclusivity and simplifying the procedure for other generic companies to obtain market approval for the same drug.

In reality, making different healthcare systems through intellectual property law, the extension of the patent period for a new medicine, data exclusivity, and medicine-patent linkage influenced pharmaceutical companies to practice different ways. Korea-U.S. FTA provisions reflect the interest of the originator pharmaceutical companies and generic companies. The right to excess to the medicine, right to have lower price medicine, right to excess fundamental health and welfare system must be an important leverage to the government policy too. There has been a great debate in International society on the life and medicine and ultimately contributed to world peace. Like the reason why the medicine was created, intellectual property law should have a common goal to do much for peace of mankind.

[23]Bruce Lehman "The Pharmaceutical Industry and the Patent System",2003.

MARKET COMPETITIVENESS IN THE CONSUMER PACKAGED GOODS INDUSTRY

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Research Question

The HHI has a crucial role in explaining firm-specific heterogeneity of trade promotions. To be more specific, the heterogeneity of firm-specific variables is associated with market competitiveness (HHI), and their impact on trade promotions differs with the given level of HHI.

H1: Firms with high market power (high HHI) spend less in trade promotion. This explains differences in the trade promotions of large and small manufacturers: small manufacturers are likely to pay up-front for trade promotions to keep products from failing and disrupting their business (Sudhir and Rao 2006), whereas large manufacturers negotiate more favorable contracts and hence, are likely to pay smaller fees (Rao and Mahi 2003)

H2: A firm is less willing to pay for trade promotions when a firm when a firm size is as large as recognized by a market within the CPG manufacturing industry.

H3a: The effect of advertising expenditures on trade promotions as the complementary function is positive in a concentrated market.

H3b: The effect of advertising expenditures on trade promotions as the substituted function is negative in a competitive market.

Method And Data

For U.S. CPG manufacturers who sell through supermarket retailers to consumers, we collect data from various sources, such as Securities and Exchange Commission (SEC) filings and COMPUSTAT. The dataset consists of 109 manufacturers, which we divide into 20 different sub-groups using the 3-digit SIC code. We collect data over a four-year period, between 1998 and 2001, and the final balanced panel data contains a total of 436 observations.

First, we use the fixed effect panel regression for testing the impact of some variables including the amount of intangible assets normalized by net sales, advertising expenses, R&D expenses, net profit margin, and total SGA.

After testing the relationship between trade promotions and the predetermined advertising expenditures, we use GMM model suggested by Hansen (1982) and Hansen and Singleton (1982). The GMM model is similar to the instrumental variable (IV) regression model but is different by using the only estimated advertising. The variance covariance matrix of heteroskedastic errors is robustly estimated. More importantly, the GMM models relax the assumption of linearity and normality of errors, so that they provide a better fit, especially when parameter heterogeneity exists and therefore they are considered to be more advantageous than classic regression models.

Summary Of Findings

First it is still hard to confirm H1 because the coefficients of HHI dummies are negligible and insignificant. Second, with the small-firm-sample, the sign of the impact of advertising expenditure remain supporting H3b. In the CPG industry, most firms with small number of employees are in a competitive market environment. Subsequently, the results cannot support H3a.

By combining these findings with the results on advertising, we infer that advertising expenditure's substitution impact on trade promotions is limited for those in highly concentrated. The results on the role of advertising in determining trade promotions according to the market competitiveness are substantiating H3a and H3b.

Third, because the number of employees represents the firm size, the results confirm the hypothesis H2, by implying that the negative impact of the firm size on trade promotions. The size of the impact is not statistically significant because trade promotions have been viewed as marketing strategies.

Key Contributions

This study makes a unique contribution to the literature on trade promotion by using dollar-value measure of expenditures on trade promotions per firm in the CPG industry. We hand-collected the data from changes in a firm's balance sheet by exploiting accounting rule change in 2001.

First, the results indicate that market concentration is a crucial factor in understanding the relationship between market processes and trade promotions. Here, we specifically make the case for parameter heterogeneity in variables like relative firm size as number of employees, gross profit margin, SGA, HHI, advertising, R&D, interaction advertising and R&D, and HHI dummy variables. Thus, this study's results can help capture firm-specific variables more accurately than previous studies.

Second, managerial considerations and strategic tradeoffs are important in determining trade promotions. The allocation of resources to advertising and R&D is associated with different market circumstances, from competitive to highly concentrated. This study describes the factor to change the shape of the relationship according to the level of market competitiveness.

Third, market signal, power, and channel phenomena considerations are intermixed in the CPG manufacturing industry environment. For example, the absolute difference in trade promotions according to the level of HHI is not obvious.

ACCESS TO MEDICINE IN MALAYSIA: LEGAL ISSUES AND CHALLENGES

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First and foremost, I thank UNTAG for inviting me to give inputs in this plenary session of the ICLEH 2018. I will talk about access to medicine in Malaysia from the lenses of a legal academic. Before I proceed, I need to confess that my areas of specialisation are not medical law per se. Further, I need to make a caveat that issues on intellectual property rights will not be covered in-depth as I am also not an IP law specialist. But I have done considerable research endeavours in International Trade Regulation (particularly WTO and FTA rules) and Competition Law. The implementation of legal principles within these disciplines have direct consequences on access to medicine. It is from this baseline that I will analyse selected legal provisions of Malaysian laws and inquire into how they shape the discourse on public access of medicine.

The right of access to healthcare is a very important topic as it a life or death matter for the millions of population in each country in the world, regardless of nationalities. Its debates are not confined to the least developed countries. The recent repeal of the Patient Protection and Affordable Care Act (aka the Obamacare) by the current US Government shows that even the most powerful country in the world has to grapple with the challenges faced by Governments due to fast-changing political, economic, technological and social factors that are no less unpredictable than before, shaping what is inside and outside the nation.

According to the World Health Organization (WHO), access to medicine is part of the right to health whichis already a well settled principle in international law. “The right to health first emerged as a social right in the World Health Organization (WHO) Constitution (1946) and in the Universal Declaration of Human Rights (1948”). The binding International Covenant on Economic, Social, and Cultural Rights (ICESCR) of 1966 details the progressive realization of the right to health through four concrete steps, including access to health facilities, goods and services.”

The term access to health facilities, goods and services has been further clarified by the WHO (the authoritative General Comment 14 (2000)). It refers to the accessibility, availability, appropriateness and assured quality to goods and services. Health goods and services include essential medicines "as defined by the WHO Action Programme on Essential Drugs".

It is now important to see how Malaysia fares when it comes to providing access to medicine to its people. First, as a sovereign State, despite the international law principle guaranteeing access to essential medicines (as part of economic and social rights), States have much leeway in implementing it, as long as they do not violate the rights of other States. Second, the implementation of economic and social rights obligations under the ICESCR is not as solid as civil and political rights under the ICCPR, despite both being covered by the Universal Declaration of Human Rights (UDHR).

Malaysia is a federal constitutional monarchy. That means power is shared between federal and State Governments. The hereditary rulers maintain symbolic role in the Government although some real powers are still vested to a limited extent in the Sultans and the Yang Dipertuan Agong.

Malaysia has a population of 31.19 million in 2016. Economically, Malaysia can be considered as an upper middle income country. Its GDP per capita in 2016 is9,502.57 USD. However, there is a wide gap between high-income and low-income States. The State with the highest income is Kuala Lumpur with GDP per capita24,872 USD (2016). Kelantan has the lowest income GDP per capita which is 3,141 USD (2016). Kuala Lumpur is the most urbanised State or territory while Kelantan is among the least urbanised State in Malaysia.

The question that may arise now is whether access to essential medicines is guaranteed by the Malaysian Constitution which is rather known as the Federal Constitution 1957. The Federal Constitution does not have philosophical underpinnings. Unlike the Undang-Undang Dasar Republik Indonesia 1945, the Federal Constitution does not clearly entail specific provisions that ensure social security to be provided by the Government to the people. Chapter II which is on Fundamental Liberties only spells out the negative obligations of the State towards persons, not positive obligations. There is no constitutional guarantee with regards to the right to healthcare. Further, provision of healthcare in Malaysia in general is not a mattergoverned by a legislation. There are healthcare-related legislations, but nothing requires the Government to provide access to healthcare. One of them regulates private hospitals and another one regulates the medical profession. Thus, the Government does not have a constitutional or statutory duty to ensure each person has access to healthcare services. The performance of government functions on provision of such services is rather a matter of policy. In this connection, Malaysia practices a two-tier universal health service system, which means government hospitals and private hospitals operate in parallel with each other.

Malaysian total health care expenditure has increased steadily to RM49.7 billion (4.5% of GDP) in 2014. In 1997 it was 2.9% of Malaysia’s GDP. Compared to other countries however, such expenditure can be considered low. China for example spent 5.6% while the Philippines spent 4.7% for the same year. There is balance between public and private healthcare spending (in 2014, RM25.8 billion was spentin relation to

public healthcare and RM23.9 billion for private healthcare, which accounted for 52% (public) and 48% (private)). This balanced ratio is quite remarkable compared to other ASEAN Members as can be seen below:

Country	Public Healthcare Expenditure	Private Healthcare Expenditure
Thailand	86%	14%
Malaysia	55%	45%
Singapore	42%	58%
Indonesia	38%	62%
Philippines	34%	64%

The main source of expenditure (in 2014) was the Ministry of Health (44%), out of pocket (39%), private insurance (9%), and from other agencies (8%). This paper however focuses on access to medicine. Thus, the scope will be on how to increase the availability, affordability and accessibility of medicines. It must be noted pharmaceutical sales contributed 16% of Malaysian total healthcare expenditure in 2016. There is balance in the sales of patented and generic medicines. The value of generic medicines amounted to RM3.75 billion while patented drugs amounting to RM3.05 billion. The share of imports is steadily declining (from 68% of all pharmaceutical products in 2006 to 63% in 2016). However, exports of pharmaceutical products have been stagnant.

It is important to identify the component of the pharmaceutical product market. The market comprises prescription medicines and over the counter medicines. There are two channels for supplying medicines into Malaysia. First, companies which have been issued license from the National Pharmaceutical Regulatory Agency (NPRA) of Malaysia manufacture medicines locally. In 2016, there are about 37 companies which manufacture controlled medicines and they are generic medicines. Second, companies which are mainly multinational corporations (MNCs) hold licenses issued by NPRA and imported pharma products. 74% of those products which are mainly originator medicines were supplied by MNCs. To know where they supply their medicines to, parties that dispense medicines in Malaysia and perhaps other countries are:

(a) Private hospitals
(b) General practitioners (GPs) and specialist clinics
(c) Retail pharmacies, and
(d) Public hospitals and clinics.

These different parties dispense different types of medicines to the public. Private hospitals are one of the major purchasers of patented and originator drugs. While 40% of patented drugs were bought by private hospitals (in 2016), 22% of pharmaceutical sales in 2016 involved private hospitals. The ability of private hospitals to buy medicines Private hospitals do not dispense generic drugs due to the perception that their customers can afford more expensive originator drugs. Government hospitals on the other hand preferred generic medicines. For pharmacies, there is difference between community pharmacies and chain pharmacies.

Due to the ability of chain pharmacies to buy patented medicines in bulk, they can get better prices for the medicines hence they could also afford to sell originator medicines. The smaller community medicines however do not enjoy such an advantage. Some of them bought their stock from chain pharmacies which got discounts in their bulk purchase of medicines from principal importers or distributors. Due to their economic capacity, most of them supplied generic medicines.

Now it is important to assess how accessible, available and affordable medicines are to end users in Malaysia. There can be considered balanced distribution of originator and generic medicines in Malaysia. Looking at the medical charges in Malaysian government hospitals (2018), the rates charged to patients are more than reasonable.

Ward Class	Charge (per night)
First Class	IDR 150 – 400 thousand
Second Class	IDR 83 thousand
Third Class	IDR 10 thousand

Ward Charges:
Out-patient charges:

- IDR 3,327 (general practice)
- IDR 16,638 (specialist)

Charges for medicines
Registration fee: IDR 3,327 (for categories A – Z) (after diagnosis)

The rates above indicate the level of subsidy given by the Malaysian government with regards to the supply of healthcare-related goods and services including medicines. However, out-of-pocket as a source of healthcare expenditure was 39% in 2014. At the same time, the pressure on Government's treasury due to various factors has led to calls to reduce such subsidy. This includes proposed introduction of the National Health Insurance scheme in 2018. There is also proposal by the Government to separate dispensation of medicine from medical services disallowing hospitals and clinics from dispensing medicines requiring patients to purchase medicines from pharmacies.

The question now, how these developments affect access to medicine especially for the poor. At the moment, the current policy that charges RM1.00 registration fee to Malaysian citizens for A-Z categories medicines benefits those who use public hospitals and clinics but the benefit is limited to primary medical care. Problems will occur when patients experience secondary or tertiary care, and worse stilltheir cases involve chronic illnesses and diseases such as cardiovascular diseases, cancer etc. Anecdotal evidence shows that as medicines for some chronic illnesses and diseases are sky-rocketing, public hospitals and clinics will merely make this statement: "such and such prescribed medicine is not in our stock, we will issue prescription, but you have to buy the medicines in the pharmacies yourselves".

This brings us to this very important question i.e. whether the policy mentioned before really ensures access to essential medicine. Essential medicines are defined as medicines that serve priority healthcare needs of the population. It is the medicines to cure for example cardio-vascular diseases, cancer, HIV that have to be made accessible, available and affordable to members of the public.

Production, distribution and sale of medicines (whether directly or indirectly) are a lucrative business. It is not surprising that pharma companies are making a lot money from licencing of IP rights particularly patents in the medicines. The Martin Shkreli saga involving a person who bought IP rights in medicines and increased such medicines' prices by almost a thousand percent shows how commerce involving essential medicines can make the pocket of capitalists deeper but at the same time endanger the life of thousands of people who are poor or cannot afford expensive medicines.

At the end of the day, non-essential medicines or medicines that do not meet the quality and safety requirements, if I may, end up being dumped in the market. The very low medicine-related medical charges as mentioned above, can back-fire to the welfare of the people as it may lead to wastage in government money and resources.

Then what is the best way to regulate commerce in essential medicines in a manner that will enhance public access to such products? I am not going to explain in detail the different ideologies or schools of thought on this matter. But there is a need to discuss how to fill the gaps left by weak constitutional and human rights safeguards of the public interest in access to essential medicines particularly in Malaysia. I believe that such a need can be satisfied by law that regulates the trading terms of commerce in medicines. But in almost all countries in the world, intellectual property law particularly patent law has been put in place to protect products of innovation and invention from being "pirated". This can pose a very significant challenge to access to essential medicines because patents can prevent the entry of generic medicines.

Protection of IP rights is not only a matter for domestic law to be concerned with. International law also provides for such protection and in the context of international trade, there is the Trade-Related IP Rights (TRIPS) Agreement which provides for a doctrine called "exhaustion of IP rights". It is a doctrine that determines when IPR holder's right to control product in which IP is embodied ends.Only applies to the right to resell the product after it has been put on the market by means of IP rights.It does not affect the essence of the IP right (i.e. to exclude others from exploiting the right without consent of the right holder). The TRIPS Agreement allows States to choose between 3 possible approaches to exhaustion of IP rights:

- National exhaustion of rights – lawful sale of product exhausts IP rights to control resale of product only on national market.
- Regional exhaustion of rights - lawful sale of product in a country that is a party to regional agreement exhausts IP rights to control resale in other parties to the regional agreement.
- International exhaustion of rights – once a product is lawfully sold on domestic market or foreign, IP rights to control resale of product are exhausted both domestically or internationally.

International exhaustion of rights allows parallel importation. Malaysia chose international exhaustion of patent rights but many technology-producing countries such as the US and Europe continued to opt for national exhaustion of rights. This prevents medicines which are sold at lower prices in a relevant country from being reimporting into another country.

Prices of medicines differ from one country to another. The prices of medicines in a country also do not necessarily reflect the level of development of that country. Whatdetermine the prices of medicines could be the arrangement between the seller and the buyer of the medicine. Chain pharmacies and chain private hospitals could play a role in shaping the price patterns of originator medicines if they buy in bulk from importers or distributors. However, MNC producers of medicines will normally import them through their own subsidiary hence determination of prices can be rather insulated.As most generic medicines are purchased by government hospitals, the issue of their pricing may not be that significant at the moment

because the cost is absorbed by the Government. But unnecessary cost can arise from prices charged by local manufacturers of generic medicines to public hospitals can arise if better prices can be offered by the competitor of the company that is given the contract to supply the medicines to all hospitals. Here the procurement of medicines can be subject to scrutiny.

What law can or rather could regulate the pricing of essential medicines? Government regulation on the processing, packaging, marketing, labelling and even administering of the medicines is already in placing seeking to ensure safety to medicines users. Nevertheless the pricing issue also needs to be addressed because access to medicine involves affordability of the medicines.

The Price Control and Anti-Profiteering Act 2011 prohibits seller or supplier of goods or services from making profit unreasonably high (Section 14). However, medicines are not subject to the current enforcement of this Act (Ministry of Domestic Trade, Cooperatives and Consumerism, 2018). Then the only viable mechanism would be the Competition Act 2010. The Competition Act 2010 (CA 2010) prohibits anti-competitive agreement (Section 4) and abuse of dominant position (Section 10). By virtue of Section 4 of the CA 2010, pharmacies are no longer allowed to fix prices of medicines that they charge to consumers. At a higher level that is at the level of manufacturing, exportation and importation, cases of vitamin cartels by drug companies have been well documented. If they operate with their subsidiaries, Section 4 cannot be used. As said 74% of the drugs are supplied by MNCs. This may lead to a situation where the MNCs may have a dominant position in the market. Hence Section 10 will be relevant. If the answer is yes that is the importers have a dominant position, they can be prohibited from exploiting their dominance or use their dominance in a way to exclude their competitors from the market.

Competition law is only one aspect. Other laws and policies can also have repercussion on the whole process from the manufacturing of a medicine until it reaches the consumer. They include IP law, anti-corruption law, public procurement policy and the possible new policy introduced for the National Health Insurance scheme. Any changes to these laws and policies must ensure that access to medicines particularly to essential medicines will not be impeded.

IMPLEMENTATION OF LAW NUMBER 44/2009 REGARDING HOSPITAL BASED ON PRIVATE HOSPITAL MANAGEMENT IN INDONESIA

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ABSTRACT

A hospital is an institution which formed to serve public health. There are 2 types of hospital managements which are public hospital and private hospital. Public hospital can be managed by government, local government, and any non-profit legal entity, whereas private hospital can be managed by legal entity like private limited, foundation, or association. Any foreign investment hospital has to be under private limited legal entity. This research aims to know and understand the implication of whether private hospital is better manage by legal entity with profit purposelike private limited, by foundation, or by association. The research method used isyuridis normative law research. Data type and source being used is primary data which is obtained directly from source and secondary data which is obtained from study on literature or literature data that includes expert opinion,legislation, anddocket. This data will be analyzed with qualitative method. The result of the research showed that hospital can be managed by foundation or association instead of only private limited. With Constitutional Court decision on hospital legislation requested by Muhammadiyah on 22 May 2014 in which non-profit public hospital like Muhammadiyah did not have to be in a legal entity which deal only in hospital activity, therefore private hospital can be managed by foundation or association except those with foreign investment has to follow foreign investment rules and in private limited legal entity type.

Keywords: Private Hospital, Foundation, Association, Private Limited

Introduction

Hospital is personal health service institution. Regulation of Hospital exertion is important because it aims to:

a. Ease community access to get health service.
b. Give safety protection for patients, community, hospital environment and human resources.
c. Promote and maintain hospital service standards, and
d. Provide legal assurance for patient, community, hospital human resources and hospital.

Hospital management can be divided into Public Hospital and Private Hospital. Public Hospital which manage by Government and Local Government organize base on Public Service Agency or Local Public Agency management according to law convention. Private Hospital management in form of legal entity with profit purpose which take form of Private Limited (Article 21 Law Number 44 year 2009).

Main Problem

Is Private Hospital management have to be a legal entity with profit purposes?

Research Method

This research used yuridis normative law research method, that emphasize on literature study as study material about hospital management entity in the form of Private Limited company or Foundation or Association. Research data will be analyzed with descriptive analysis qualitative method which describe data derived from primary and secondary data.

Primary data is data that obtained directly from the source and secondary data is data that obtained from library data or literature research and other references e.g. law, law suit and jurist opinion[1].

Secondary Data comprised of primary legal entity such as 1945 Constitution of the Republic of Indonesia, Law Number: 44 Year 2009 about Hospital, Indonesia Health Ministry Regulation Number: 147/MENKES/PER/I/2010 about Hospital Licensing, Republic of Indonesia Constitutional Court decision Number: 38/PUU-XI/2013. Secondary law material that explain about primary law material such as research result, jurist opinion, journals, books that relevant with proposition of this research. To clarify the understanding and study about secondary law material thus tertiary law materials in the form of dictionary and encyclopedia was used.

[1] Mukti Fajar dan Yulianto Achmad. 2009. *Dualisme Penelitian Hukum Normatif dan Empiris*. Yogyakarta : Pustaka Pelajar. p 36-37

Discussion.

Convention Article 7 clause 4 Law Number: 44 Year 2009 about Hospital states that Hospital that founded by private must take form of legal entity which business activity only about hospital sector.

Legal entity, is an entity besides individual person that consider can act legally and have rights, obigations and legal interest toward other person or entity. Most important part is there is wealth separation from individual wealth and must considered owned by an entity apart from an individual thus cannot happen that an individual act as he wish toward that wealth.[2]

Legal entity theories:

1. Fictie theory from Von Savigny suggest that legal entity is just a product of government.
2. Purposeful Wealth Theory from Brinz suggest that only human being can be legal subject but it is irrefutable that there is rights toward wealth whereas no single human being as rights holder. Rights of legal entity actually are rights that have no holder and as an alternate that wealth is bind to or belong to particular purpose.
3. Organ Theory from Otto Von Gierke suggest that Legal Entity are real reality in legal society just like human personality trait. And anything that they decide are will of the legal entity. This theory describe legal entity as something indifferent with human being.[3]
4. Theory of communal wealth from Rudolf von Jhering. Members are owner of something that cannot be divide, thus as individual they are not owner but together, they become an owner. That all the members are one unity and become an entity that called legal entity. Thus legal entity is just a yuridis construction.
5. Yuridis reality theory from E.M.Meijers which suggest legal entity is something that support rights and obligations.

Supporter of rights and obligations are legal subject:

a. Human being with legal personality, and
b. Everything that based on community need demand approved by law as supporter of rights and obligations.

In other word, legal entity is legal subject, like human being. Legal subject is something that according to the regulation can do legal act or become subject/party in legal relation.[4] Thus legal entity can take form as Foundation, Association or Private Limited and this accordance to the regulation. Article 21 Law Number 44 Year 2009 states that Private Hospital manage by Private Limited legal entity with profit purpose. Private Limited divided into :

a. Limited Liability Company or in Dutch "Besloten Vennootschappen" is a company in which not everyone can involve in funding by buying one or a few shares and is a legal entity with limited obligation and its shares cannot be shift freely because the shares are under name.
b. Public Company is an open company for everyone and anyone can join in funding by buying one share or more.[5]

Organ of Private Limited are General Meeting, Directors, and Board of Commisioners. Private Limites used to regulated in Commercial Code and the purpose is to gain profit and now is regulate in Law Number 40 Year 2007 about Private Limited. In Indonesia, there are legal entity in the form of Foundation and Association which are non profit and can be Hospital management entity accordance to Point 2 of Ministerial Decree Number 2264/MENKES/SK/XI/2011 about Hospital Licensing Administration.

Foundation used to regulate by customary law and yurisprudensi. Next in practical life and legality, Foundation is linked and affected by Article 899, 908, 1680 dan 365 BW (Civil Code) and Article 6 clause (3), 236 RV (Rechts Vordering).

That Foundation in legal life before Foundation Law Year 2001 is include as Legal Entity, is developed and affected by jurist opinion.[6]

Article 1 clause (1) Law of Republic of Indonesia Number 16 Year 2001 about Foundation stated that Foundationis legal entity that divide its wealth with purpose to active in social, religion and humanity sectors. Organ of Foundation are Governing Board, Executive Board and Supervisory Board (Article 2 Law Number 16 Year 2001).

Article 11 clause (1) Republic of Indonesia Law Number 16 Year 2001 about Foundation stated that Foundation will be Legal Entity after the deed of establishment legalized by Minister of Law and Human

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[2] Wirjono Prodjodikoro. 1975. Hukum Perkumpulan Perseroan dan Koperasi di Indonesia. Jakarta : Dian Rakyat. p 8

[3] Ali Rido. 1983. *Badan Hukum dan Kedudukan Badan Hukum Perseroan, Perkumpulan, Koperasi, Yayasan, Wakaf*. Bandung : Alumni.p 15-17

[4] Hardijan Rusli. 1989. *Badan Hukum dan Bentuk Perusahaan di Indonesia*. Jakarta : Huperindo p 2-3

[5] Rochmat Soemitro, 1993. *Hukum Perseroan Terbatas, Yayasan dan Wakaf*. Bandung : PT.Eresco p 15-17

[6] Ignatius Ridwan Widyadharma. 2001. *Badan Hukum Yayasan (Undang-Undang nomor 16 Tahun 2001)*. Semarang : Badan Penerbit Universitas Diponegoro p 1.

Rights of Republic of Indonesia which legalization not more than 30 (thirty) days after registered in Ministry of Law and Human Rights of Republic of Indonesia.

Before establishment of Law Number 28 Year 2004 about the changing of Law Number 16 Year 2001 about Foundation, foundation legalization is done by registration at District Court and in Dutch called Stichting.

IN practical, Foundation founded with Notary Deed by dividing wealth from founder which afterwards cannot be owned again by the founder. Notary deed contain Foundation's article of association so conventions in the article of association are the conventions that bind the foundations and its executive board and if any, also contain conventions about people that can benefit from foundation's wealth. Jurisprudency help to form customary law about Foundation. What apply in Indonesia is set of conventions that happen by itself and turn into rights, customs or what regulated in foundation's article of association and if there's any judge decision that happen repeatedly and become jurisprudency so will be a law that followed by everybody.[7]

Foundation cannot changed into association. Association is an agreement in which two or more person bind theirselves to incorporate something into alliance with purpose to share profit that gain. (Article 1618 Civil Code). This alliance is regulated in article 1618 – article 1652 Civil Code.

Elements of Association/Maatschap :

1. There are 2 persons or more.
2. Make an agreement to conduct activities with particular purpose.
3. There's obligation to incorporate something.
4. Gain profit that will be shared between members.
5. Do not need legalisation.[8]

Association comprise of association in broad and narrow sense.4 (four) element to create an association are:

a. Mutual interest;
b. mutual volition;
c. mutual goal;
d. cooperation;

So association in broad sense is the origin of alliance etc. because that 4 (four) elements are found in every association include alliance and cooperation. Association in narrow sense is an association that is not the origin of alliance etc. The assosciation is independent and usually regulated in law and regulation. These type of association called by term:

1. Veregining in Dutch;
2. Verein in German;
3. Association in English;
4. Union in French.

This association in narrow sense do not have profit purpose and not running a company. The purpose of association in narrow sense is non economic and one of it regulated in article 1653 – article 1665 Civil Code.[9] Association (in narrow meaning which is not company nor cooperation) article 1 from Staatsblad 1870-64 specified that these associations are not legal entity, except those acknowledged by Government (Direktur van Justitie in Indies-Netherlands era, now Judiciary Minister). Article 2 clause 1 Pasal 2 ayat 1 emphasized this acknowledgement can be approval (goedkeuren) or authorization of article of association (statute) of the association and according to article 2 in the article of association must contain the purpose, principles, sector and other rules of the association.[10]

That association based on article 1663-1664 od Civil Code is not a legal entity whereas based on article 1 Staatsblad 1870-64 is a legal entity. Management entity of Private Hospital can be a Foundation or Association because in Republic of Indonesia Minister of Health Decree Number 2264/MENKES/SK/XI /2011 About Hospital Licensing Administration on point 2 stated that private hospital with legal entity as Foundation and/or Association is allowed as long as the administration of hospital activity is included in article of association.

Republic of Indonesia Minister of Health Decree Number 2264/MENKES/SK/XI/2011 re-stated convention in Republic of Indonesia Law Number 44 Year 2009 about Hospital in article 7 clause (4) which stated Hospital founded by private must take form of legal entity which business activity only active in

[7] Rochmat Soemitro, op,cit..p 165-166

[8] Henricus Subekti, 2012.Badan Usaha (Pengertian, Bentuk dan Tata Cara Pembuatan Akta-aktanya). Yogyakarta : Cakrawala Media p 6

[9] H.M.N.Purwosutjipto 1992. *Pengertian Pokok Hukum Dagang Indonesia*. Jakarta : Djambatan. p 9-10

[10] Wirjono Prodjodikoro. op,cit..p11

hospital sector and Republic of Indonesia Minister Of Health Regulation Number 147/2010 about administration of hospital operational license renewal.

Republic of Indonesia Constitution Court decision dated 22 May 2014 have fulfilled part of trial appeal of Law Number 44 Year 2009 about Hospital which propose by Muhammadiyah with finding as stated below:

1. Fulfilled part of the appeal:
   a. Article 7 clause 4 Law Number 44 Year 2009 incompatible with 1945 Constitution of the Republic of Indonesia as long as not interpreted as "Hospital that founded by private like stated in clause (2) must take form of legal entity with business only active in hospital sector, **except public hospital that run by non profit legal entity".**
   b. Article 7 clause 4 Law Number 44 Year 2009 do not have binding legal force as long as not interpreted as "Hospital that founded by private like stated in clause (2) must take form of legal entity with business only active in hospital sector, **except public hospital that run by non profit legal entity".**
   c. Article 17, Article 25, Article 62, Article 63 and Article 64 Law Number 44 Year 2009 which refer to Article 7 clause 4 Law Number 44 Year 2009 incompatible with 1945 Constitution of the Republic of Indonesia as long as not interpreted like what stated in this finding point 1.1 and point 1.2.
   d. Article 17, Article 25, Article 62, Article 63 and Article 64 Law Number 44 Year 2009 which refer to Article 7 clause 4 Law Number 44 Year 2009 do not have binding legal force as long as not interpreted like what stated in this finding point 1.1 and point 1.2.

2. Ordered this finding to be published in Republic of Indonesia Official Gazette as proper.

Private hospital management entity better take form of non profit association ot Foundation because private hospital in form of Private Limited make service investation expensive and costly for community, but there is assumption that private hospital management entity in form of Private Limited will improve efficiency and service quality. [11]. Actually hospital is responsible to provide decent health facility and public facility and hospital function is to cure sick people not as a profit entity.

Accordance to article 21 clause 1 Law Number 44 Year 2009 About Hospital which stated that Private Hospital runs by legal entity with profit purpose that take form of Private Limited and article 26 Law Number 44 Year 2009 About Hospital which stated that Foreign investment Hospital License will be approve after it has recommendation from institution which manage foreign investment affair thus private hospital with foreign investment or local investment must take Private Limited form and fulfill Law Convention about Investment and Republic of Indonesia Constitutional Court decision dated 25 March 2008 Number: 21,22/PUU-V/2007 which stated eliminate the words "before at the same time" and "in the form of" to grant Cultivation Rights Title for 90 (ninety) Years, Building Rights Title for 80 (eighty) years and Rights of Use for 70 (seventy) years.

Closing

Conclusion

Private Hosipital management entity can take form as Private Limited, Foundation or Association, whereas Private Hospital with foreign investment or local investment must take form as Private Limited accordance to Law Convention about Investment and Republic of Indonesia Constitutional Court decision dated 25 March 2008 number: 21,22/PUU-V/2007.

Suggestion

Private Hospital can choose it management to be Private Limited legal entity, Foundation or Association depend on each Private Hospital needs by considering profit and tax.

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FOSTERING CLEAN AND HEALTHY ENERGY IN RURAL COMMUNITIES: LESSONS FROM THE INDONESIA CSI PILOT PROGRAM*

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ABSTRACT

It is fact that rural people still use traditional wood-fired stoves in their daily cooking but unfortunately it was classified as unclean, unhealthy, and inefficient. Indoor air pollution caused by the burning of solid fuels in traditional stoves is one of the leading risk factors attributed to mortality and burden of disease. Motivated by involvement in the Indonesia Clean Stove Initiative (CSI) Result-Based Financing (RBF) Pilot Program, this paper is aimed to reveal efforts to promote using of clean cook stove among households in rural areas in order to achieve a higher degree of health. Clean stoves are claimed based upon technological touch followed by laboratory tests in order to ensure its efficiency in fuel use and its capacity on reducing negative impact levels for its users such as suppress levels of carbon dioxide, fine dust, and smoke. By reaching out to three pilot areas of the program: Yogyakarta Special Province, Central Java, and East Nusa Tenggara, it is expected that lessons learned from the pilot program would create sustainable market for clean cook stoves in Indonesia. The dynamics of project implementation will be analyzed as well as its lesson learned will be presented. One of the facts found is most of consumers respond positively to the presence of a clean, healthy and energy-efficient stoves. That is why this pilot program considered successful by stakeholders, including the government, and it will be expanded to other regions in Indonesia; and of course by improving in some aspects in order to optimizing its impacts. One of them is the need for raising of knowledge and consumer awareness relating to clean energy consumption patterns.

Keywords: Clean Energy, Clean Stove, End-Users.

Introduction

Right to health as a human rights shall be respected, protected, and fulfilled by the state without exception. It has clearly been stated in the International Covenant on Economic, Social, and Cultural Rights (ICESCR) that has been ratified by the Government of Indonesia by Law No. 11 of 2005. Article 12 point 1 of the ICESCR confirms that the States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. Therefore efforts to achieve higher health condition should be developed by the state through the concrete programs that could be felt its result(s) by the public.

Meanwhile, in consumer protection point of view, right to healthy environment is one of essential consumer right. In this case government intervention is strongly required to encourage the improvement of public health degree. The right to environmental health confirmed that consumers should be protected from the devastating effects of air, earth, and water pollution that may result from the performance of daily marketplace operations. Consumers have the right to live and work in an environment that does not threaten the well-being of present and future generations.

However it is fact that rural consumers still use traditional wood-fired stoves in their daily cooking. In rural Indonesia, household incomes and living standards are significantly lower; electricity is rarely used for cooking, and three-stone stoves utilizing traditional biomass fuels are quite common.[1] Unfortunately it was classified as unclean, unhealthy, and inefficient. Indoor air pollution caused by the burning of solid fuels in traditional stoves is one of the leading risk factors attributed to mortality and burden of disease[2]. Indeed there are many reasons behind their unhealthy cooking habit such as poverty, lack of awareness, and limited access

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[1] Yabei Zhang and Norma Adams, "Results-Based Financing to Promote Clean Stoves: Initial Lessons from Pilots in China and Indonesia", *Live Wire – a Knowledge Note Series for the Energy and Extractives Global Practices*, 97845, 2015/46

[2] Today, about 2.8 billion people worldwide—more than a third of the world's population—still use solid fuels to meet their cooking and heating needs. Household air pollution resulting from the incomplete combustion of solid fuels is linked to some 4 million premature deaths each year. *See*: Yabei Zhang and Norma Adams, *ibid*.
Another research by the World Bank found that around 100 million people in Indonesia still used traditional stoves whose smoke contributed to the early deaths of 165.000 people every year. *See*: *Tempo Weekly*, 25 September 2016, p. 42.

to clean stove. Therefore without government intervention (and other potential parties)[3] it is difficult to change and increase their health degree.

On top of that this article aims to describe one of the program initiated by the World Bank in collaboration with Directorate of Bioenergy of the Ministry of Energy and Mineral Resources that is Indonesia Clean Stove Initiative (CSI) launched in early 2012. To support the CSI, a pilot program is being launched with the following objectives: (1) to pilot the Results Base Financing (RBF) approach and (2) to generate lessons learned for the future national scale-up that aims to achieve universal access to clean cooking in Indonesia. Indonesia CSI purposes to scale up access to clean and efficient cooking solutions in Indonesia through capacity building, policy development, and support of government action plans. In the context of Indonesia CSI program, it comprises of four phases. The first part centers on initial stock taking, which is critical for developing the intervention strategy, designing subsequent program phases, and establishing policy dialogue with the country's institutional focal point. The second stage focuses on required institutional strengthening, capacity building, and piloting the program. The third one scales up program implementation, while the fourth centers on program evaluation and dissemination of lessons learned[4].

However this paper will merely be focused on the implementing of piloting the program in which RBF was chosen as an approach. RBF is a concept comprising a range of public policy instruments, whereby incentives, rewards, or subsidies are linked to the verified delivery of pre-defined results. RBF is often used to enhance access to and delivery of basic infrastructure and social services, such as improved access to water and sanitation, energy, and health care. In most cases, the funding entity—typically a government, development agency, or other agent—deals directly with the service provider (e.g., private firm, public utility, civil society organization, or financial institution)[5].

The fundamental idea for RBF subsidy method is that subsidy payments that would otherwise be made automatically are made contingent on delivery of pre-agreed result(s), with achievement of the result(s) being subject to independent verification. Based on this idea, the main objective of monitoring and verification activities are to independently monitor and verify that certified clean stoves are sold by market aggregator[6], and are bought and used by end-users/ households. The confirmation from independent monitor and verification team will allow participating market aggregator who promote and sell certified clean stove under RBF subsidy pilot program receive subsidy payment from the program.

Based upon the authors experience who get involved in the Indonesia CSI Pilot program, especially in carrying out the assignments of monitoring and verification process [which is an fundamental part in RBF subsidy approach], this paper would like to show and identify interesting facts in distributing and using of clean stoves in consumers' level. The dynamics of project implementation will also be analyzed as well as its challenges. Respectively will be presented the General Scheme of Indonesia CSI Pilot Program, Fact Finding and its discussion as well as lesson learned which can be taken during the implementation of the pilot, and Conclusion.

General Scheme Of Indonesia Csi Pilot Program

Spreading the Use of Healthy and Energy-Efficient Biomass Stove

It is fact that potential renewable energy such as: biomass[7], geothermal, solar energy, water energy, wind energy, and ocean energy, to date not many utilized. To encourage the development and utilization of renewable energy, especially biomass, and to improve the efficiency of energy use in Indonesia, it is needed

[3] According to Marian Radulescu and Violeta Radulescu, healthy environment is no longer regarded as an area that falls exclusively under the control of government or community, but rather a responsibility shared by a number of interest groups: enterprises, financial institutions, managers, creditors, contractors, consumers as well as the public at large. See: Dragos Marian Radulescu and Violeta Radulescu, Educating the consumer about his right to a healthy environment, *Procedia Social and Behavioral Sciences* 15 (2011) 466–470, available online at www.sciencedirect.com.

[4] Voravate Tuntivate, *Operation Manual for Monitor and Verification of Results-Based Financing Subsidy- Indonesia Clean Stove Initiative Pilot Program*, 4/10/2014, p.1.

[5] Yohanes Iwan Baskoro, *Terms of Reference Monitoring & Verification of Result Based Financing Subsidy-Indonesia Clean Stove Initiative Pilot Program*, GERES, 2014, p. 5.

[6] Market Aggregators are defined as those who apply for the pilot program subsidy incentives and are willing to take investment and performance risks. They may include stove producers, wholesalers, retailers, and other private companies which ensure that the stoves meet the technical requirements set forth in the stove testing certification criteria.

[7] Biomass energy includes wood, agricultural / plantation / forest waste, organic components from industry and household, animal waste. Biomass converted into energy in the form of liquid fuels, gas, heat, and electricity. The conversion technology of biomass into solid, liquid and gas fuels, including pyrolysis (bio-oil), esterification (bio-diesel) technology fermentation (bio-ethanol), anaerobic digester (biogas). And conversion technology biomass into heat energy which can then be converted into energy mechanical and electrical, including combustion and gasification technologies. *See*: Department of Energy and Mineral Resources, 2003. "Policy on Renewable Energy Development and Energy Conservation", Jakarta 22 December 2003.

for renewable energy and energy conservation policies as a reference for the development of renewable energy and energy conservation in Indonesia to support sustainable development.

However development of renewable energy must reach rural consumers as well. Therefore using of traditional wood-fired stoves in rural consumers' daily cooking (that was classified as unclean, unhealthy, and inefficient), should be intervened so that it becomes clean, healthy and efficient. To mitigate the negative impacts of the above conditions, one effort may be to develop a healthy and energy-efficient biomass stove (TSHE) taking into account that rural and remote households will continue to use biomass stoves. TSHE are claimed based upon technological touch followed by laboratory tests in order to ensure its efficiency in fuel use and its capacity on reducing negative impact levels for its users such as suppress levels of carbon dioxide, fine dust, and smoke.

Nevertheless availability of TSHE is still very limited. One of the obstacles is that today's traditional marketed stoves manufactured by crafters provide very low profit margins from the entire supply chain value process. This condition leads to the need for a new business model that can provide a better and sustainable profit margin.

Developing of TSHE is according to the Regulation of the Minister of Energy and Mineral Resources No. 39 of 2017 on the Implementation of Physical Activity Utilization of New Energy and Renewable Energy and Energy Conservation. This regulation states that one of the Scope of Physical Activity for Utilization of New Energy and Renewable Energy and Energy Conservation as referred to in Article 3 (c) in the form of development, procurement and / or installation is: energy efficiency equipment. In addition, according to Article 11 (1c) Government Regulation No. 79 of 2014 about National Energy Policy, priority of energy development is done by prioritizing local energy resources. The development of TSHE will be increasingly important as it can support Indonesia in achieving Sustainable Development Goals (SDG), which include poverty alleviation, health quality improvement, gender equality and climate change.[8]

1. Result Based Financing (RBF) Scheme in the Energy Sector

   The design of the pilot program's results-based financing approach includes selecting eligible stoves for promotion based on a trial stove performance assessment system, allocating performance-based incentives, and implementing a monitoring and verification system. A public campaign was conducted to raise awareness and stimulate demand for clean cooking technology. Advisory services related to stove designs, technology and marketing also be available to assist stove producers and designers.

   The fundamental idea of RBF approaches is that payments that would otherwise be made automatically are made contingent on delivery of a pre agreed (set of) result(s), with achievement of the result(s) being subject to independent verification. There has been increasing interest in whether and how they could be used within the energy sector to deliver more, or more cost-effective, results but, to date, relatively little work has been done on the circumstances in which different versions may be best employed. RBF can be used as a means to disburse subsidies in a market. In turn, subsidies should primarily be used to address the problem of positive externalities: when there are benefits to society as a whole from greater production or consumption of a good or service but this is not taken into account by those making the production or consumption decision. In these circumstances, subsidies can align private and social interests, and boost output in a market.[9]

   As the main component for the second phase of Indonesia CSI, the pilot program is piloting RBF subsidy which aims to provide incentive to participating Market Aggregators to promote the sales of clean cook-stoves. It is expected that lessons learned from the pilot program using RBF subsidy would enable Indonesia CSI to fine tune the third and fourth phase of Indonesia CSI and ultimately create sustainable market for clean cook-stoves in Indonesia.

   The methodology used to monitoring and verification is vital to reliably confirm that end-users/households have bought and used certified clean stove. Moreover, monitor and verification is fundamental for RBF subsidy. However, monitoring and verification are relatively difficult to implement, costly, and time consuming. Therefore, adopting reliable methods that make difficult task a little bit easier and faster to implement as well as cost less is a challenge.

2. Area Coverage of the Pilot Program

   Despite substantial progress on achieving universal electricity access in the region, almost half the population in Southeast Asia continues to rely primarily on biomass to meet their cooking needs. Actually not only in Asia region but it also happened in across sub-Saharan Africa.[10] Within

[8] Draft of Roadmap Initiative of Healthy and Energy-Saving Stove Indonesia, October 2016.

[9] ESMAP, 2013. *RBF in the Energy Sector-An Analytical Guide*, Technical Report 004/13, Washington: The World Bank Group.

[10] Presently, biomass is widely used for cooking and industrial use and to a little extent for power generation. Bagasse residue was in 2011 the most important source of energy for Africa, corresponding to 94% of the 860 MW of installed bioenergy power generation capacity and could be further developed. Fuel wood and charcoal as well as agricultural residues are widespread energy sources used in households across Sub-Saharan Africa. Around 2.6 billion people

Southeast Asia there are a number of country-level initiatives that are aimed at the dissemination of improved cook-stoves. Many of these initiatives, for example in Cambodia, Lao PDR, and Myanmar, are supported by international donors like the European Union. In Indonesia the World Bank has been working closely with the Indonesian government to support the dissemination of high-quality improved cook-stoves.[11] It means that efforts to increase healthy degree of households by disseminating improved cook-stoves have become general program in the Southeast Asia region.

In the beginning area coverage of the Indonesia CSI Pilot Program covers two provinces that is Yogyakarta Special Province and Central Java (2015). Both regions are characterized by high population density, abundant biomass resources, coverage by the LPG conversion program, and a good logistics network. In these two provinces, the rate of fuelwood use is about 40 percent; yet the region's high population density means that this percentage represents a large number of households. An estimated 4 (four) million households in these areas still rely on biomass as their primary household fuel. Owing to the Indonesian government's Kerosene-to-LPG Conversion Program, which heavily targets provinces in Central Java and Yogyakarta, LPG is taking a greater market share, while kerosene use has decreased sharply.[12] And in the second phase (2016), the pilot program is expanded to the East Nusa Tenggara (NTT) province. This province has low population density, high reliance on scarce biomass resources, and a poor logistics network. It is not covered by the LPG conversion program (It was proven in the implementation of the pilot program in Central Java and Yogyakarta, the existing of LPG in the market especially three kilos bright green gas tube quite influenced people to buying and using of clean stove). By comparing among those regions, the achievement and dynamic of the program implementation (along with its different conditions and cultures) will be more attractive.

3. Parties who get involved and each responsibility

   Pilot program under the World Bank's Clean Stove Initiative implemented in China and Indonesia. The World Bank in collaboration with Directorate of Bioenergy of the Ministry of Energy and Mineral Resources launched Indonesia Clean Stove Initiative (CSI) in early 2012. However implementation of the pilot just runs in late 2014 because its preparations such as laboratory testing of cook-stoves, inviting Market Aggregators who's interested in this project, defining independent body who will responsible as monitoring and verification team, and so on.

   Indonesia CSI Pilot program involving several parties with each responsibility. They are:

   a) GERES (*Groupe Energies Renouvelables, Environnement et Solidarités*) is a French non-profit NGO created in 1976 that provide support through the Stove*Plus* program. Funded by the French Global Environment Fund (FGEF or FFEM), Stove*Plus* aims at facilitating access to improved cooking solutions, by providing technical support to project developers around the world. Stove*Plus* offer service packages designed to respond to the most pressing needs of project developers working in Southeast Asia and West Africa. GERES Biomass Energy Lab (G-BEL), based in Cambodia, provide technical support to the pilot testing laboratory. In participating into this pilot program Stove*Plus* positions itself as a facilitator between policy makers and project holders on the field;
   b) Yogyakarta Consumer Institute (Lembaga Konsumen Yogyakarta/LKY) is an Indonesian consumer organization established in 1978. The vision of LKY is to realizing justice for the entire consumer society. To achieve this, LKY has some missions: to develop critical awareness of consumers; to build of consumer solidarity; to encourage establishing of strong and critical consumer groups; to assist of weakness and poor consumers; and to struggle for consumer justice. In this pilot, LKY appointed as an independent body who has responsible in monitoring and verification process. Because of specific reason, especially in NTT area, LKY develop cooperation with Alfa Omega Foundation/AOF (an NGO based in Kupang) in implementing monitoring and verification stage.
   c) Dian Desa Foundation (Yayasan Dian Desa/YDD) or "light of the village foundation" is a non-governmental organization (NGO) active in community development activities with a special focus on the development of appropriate technology. In 1972 that group was registered as a formal organization and become YDD. In the Indonesia CSI pilot program YDD responsibly in stoves testing and promoting Energy Saving Healthy Stoves to people so

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relied worldwide on the traditional use of biomass for cooking in 2010 (49% of the population) while the traditional use of biomass for cooking in Africa covers 698 million people (68% of the population), of which 696 Million people live in Sub-Saharan Africa; accounting for a population share ranging between 75% and 96% in different African countries. *See*: N. Scarlat, et.al. 2015. "Evaluation of Energy Potential of Municipal Solid Waste from African Urban Areas", *Renewable and Sustainable Energy Reviews* 50 (2015) 1269–1286.

[11] Smart Village, 2015. *Sustainable Dissemination of Improved Cookstoves: Lessons from Southeast Asia*. Workshop Report 13, Yangon, Myanmar.

[12] GERES-YDD, 2009 as quoted by Yohanes Iwan Baskoro, *op.cit*. p. 5

that people will replace their traditional stoves with healthier, energy-efficient stoves with less smoke and less fuel. The various stoves that have been developed and passed the test are then disseminated to the public. The socialization of energy-efficient energy stove is done by direct demonstration. What is demonstrated is the cooking activity by using a stove that has passed the test. Focused on cooking demonstrations, peoples can see things like: fuel efficiency, speed / cooking time, smoke burning, and structure or interior of the stove.

d) Bank Rakyat Indonesia. Bank BRI appointed to manage the RBF fund or subsidy payment agency. Based upon each monitoring and verification report issued by LKY, BRI provide subsidy to each Market Aggregator according to their sales achievement. The amount of the subsidy is determined based on the type of stove sold and the quantity of the sales.

e) Market Aggregators (MA). Market Aggregators are defined as those who apply for the pilot program subsidy incentives and are willing to take investment and performance risks. They may include stove producers, wholesalers, retailers, and other private companies which ensure that the stoves meet the technical requirements set forth in the stove testing certification criteria. In this pilot program there are ten MAs who get involved in marketing clean stove, they are: Kopernik Foundation, PT. Ditana Energy Solutions, CV. Bedog Education Center, CV. Kedung Artha Abisatya, UD. Dian Handycraft, CV. Agro Jawa Dwipa, PT. Pancaran Sinar Berkah, CV. Kaya Wahana Sentosa, CV. Cito 13, and PT. Ivy Lentera Lestari.

4. Monitoring and Verification (M&V) Framework

M&V is one of the most important activities for RBF subsidy pilot program since subsidy payments are tied with verifiable results. To ensure that this key activity is carried out, M&V team be assembled to basically monitor and verify that certified clean stoves are sold and bought and used by the end-users/households. To insure independent and impartiality, M&V team be out-sourced to work independently. However, the World Bank team and pilot program partner Group for the Environment, Renewable Energy and Solidarity (GERES) closely supervise as well as provide technical guidance to the team to carry out the assignment.[13]

To ensure that certified clean stove sold to consumers can be monitored and verified, MAs that promote and sell certified clean stove under the RBF subsidy pilot program are required to develop and submit sales report. The sales report works like a tracking system which will enable monitor and verification team to follow up and confirm that clean stove sold under the pilot program are actually bought and used by end-users/households. Sales report at a minimum include: (1) total numbers of certified clean stove sold under the pilot program, (2) serial number of all stoves sold, and (3) name, address and telephone number of end users/households that bought clean stove. It is critical that sales report must include all necessary information to locate end-users/households and stoves bought under the pilot project are actually used.

Methods to be employed for monitoring and verification involve three steps processes:

a) First stage verification requires active effort of MA to inform monitoring & verification team on the quantity and types of clean stoves have been purchased and delivered into their warehouse. Some purchasing and delivering documents needed to be verified by M&V team;

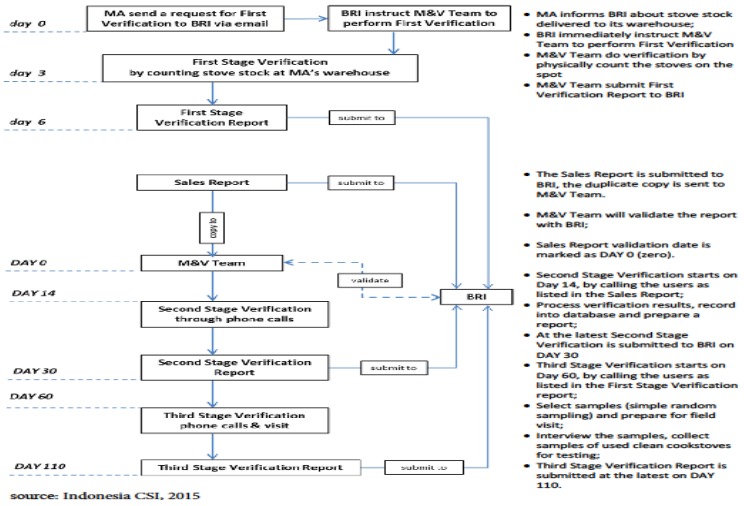
b) Second stage involves seeking confirmation from end- users/households whether they have bought certified stoves under the pilot program. This stage is conducted by calling each stove buyer as reported on the sales report by phone;

c) The third verification involves verifying whether end-users/households have been using the certified stove that they have bought. In this step M&V conducts sampling process based on certain criteria then conducting direct visit to each consumer who has been specified as a sample.

The general process of monitoring and verification can be seen in Figure 1.

[13] Indonesia CSI, 2015. *Operation Manual for Monitor and Verification of Results-Based Financing Subsidy-Indonesia Clean Stove Initiative Pilot Program*, Updated version 10/07/2015

Figure 1. Operational Charts for Monitor and Verification



source: Indonesia CSI, 2015

Discussions

The CSI program start from February 2016 to April 2017 located in 3 (three) areas; Central Java-Yogyakarta Special Province (CJY) and East Nusa Tenggara (NTT). The MAs marketing 6 (six) types of clean stove; Prime Square Fuelwood (PSF), Prime Square Granular (PSG), UB Pellet (UBP), UB Kayu (UBK), Amarta (ART), and Keren Super two (KS2). And the 10 (ten) MAs who marketing clean stove are ; PT. Ditana Energy Solutions (DES), Kopernik Foundation (KOP), CV. Agro Jawa Dwipa (AJD), CV. Bedog Education Center (BEC), UD. Dian Handycraft (DIH), CV. Kaya Wahana Sentosa (KWA), CV. Cito 13 (CIT), CV. Kedung Arta Abisatya (KAR), CV. Pancaran Sinar Berkah (PSB), and PT. Ivy Lentera Lestari (IVY). However there are only three of MA have selling the stove in East Nusa Tenggara (NTT); e.g PT. Ditana Energy Solutions, CV. Agro Jawa Dwipa, and Kopernik Foundation (Figure 5. MAs of CSI Program).

The total respondents are 2160 (who buyer the clean stove) consists of 47% women and 53% men (Figure 2. Sex of The Respondents). The characteristic of respondents CSI's profession varies from, goverment official, entrepreneur, farmer, architect, poultry, teacher, construction laborers, midwife, and housewives. The respondent purchase the clean stove from resellers/agents, the nearby houses (demo how to use the stove are available), office offering with variety of price, approximately IDR 50.000 - IDR 500.000, either cash or with installments. Some of the clean stove however are given for free[14].

Figure 2. Sex of respondent

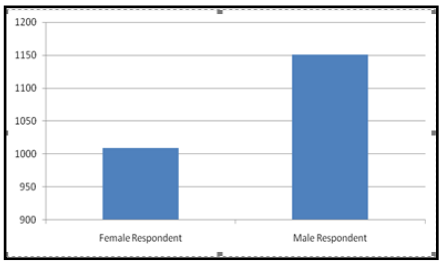
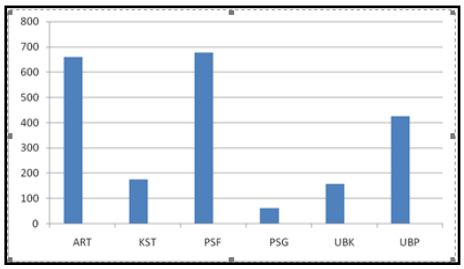


Figure 3. Type of Clean Stoves



From Figure 2, it shows men respondents a bit higher than women, this probably due to the price of clean stove are related to gender relation in terms of purchasing goods[15]. For an amount of < IDR 50.000 women or the wife can decide by themselves. And the decision making on the hands of the wife or women decrease by the increase of the amount to be spent, when the clean stove amount is above IDR 50.000 most decision have to be taken together by the husband and wife

In Figure 3, it shows the respondents are consisting of owners of 31% Amarta (ART) stoves, 31% Prime Stove Fuelwood (PSF) stoves, 20% UB Pelllet (UBP) stoves, 8% Keren Super two (KST) stoves, 7% UB Kayu (UBK) stoves, and 3% Prime Stove Granular (PSG) stoves.

[14]LKY, Febr 2017. *Third Stage Verification Report of the 3rd Sales Report of CV. Agro Jawa Dwipa (AJD)*
[15]YDD, 2017. *Survey Analysis Result Study in Yogyakarta Report*

The respondents quite satisfied with the using of Prime Stove Fuelwood stove and intend to buy the stove again when it is broken[16]. While the number of Prime Pellet Stoves are small because it is not easy to find the fuel pellet[17]. The Amarta stove seemed to be the most unwanted commercially as some respondent is free gifts, and the rest stove sold at IDR 50.000-100.000[18]. The respondent also get the UB Pellet stove for free[19].

Figure 4. Piloting Areas of CSI Program

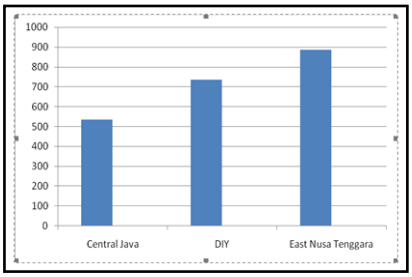
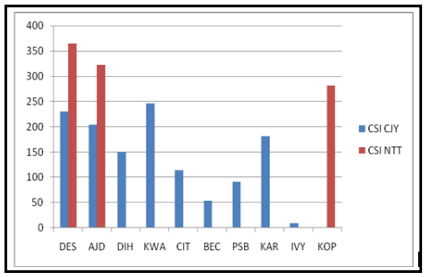


Figure 5. MA of CSI program in Pilot Areas Program



In Figure 4, it shows the cover areas of clean stove. 25% clean stove purchase in Central Java, 34% DI.Yogyakarta, and 41% East Nusa Tenggaran (NTT). In Central Java areas, this including: Semarang Kota and Kabupaten Semarang (Semarang Regency), Salatiga, Sukoharjo, Solo, Pati, Kudus, Jepara, Purworejo, Magelang, Banjarnegara, Blora, Boyolali, Klaten, Rembang, Banyumas, Kendal, Temanggung, Demak, Ambarawa, Cilacap, Kebumen, Grobogan, Tegal, Purbalingga, Wonogiri, Pemalang, Brebes, and Wonosobo. In DI.Yogyakarta, it cover 5 regencies; Bantul, Sleman, DI.Yogyakarta Kota, Kulon Progo and Gunung Kidul. In East Nusa Tenggara, it consist of 5 islands; Timor Island (Kupang Kabupaten, Kota Kupang, Belu, Timor Tengah Selatan, Timor Tengah Utara), Flores Island (Manggarai Barat, Manggarai Timur, Ngada, Sika, Nagakeo, Ende, Flores Timor), Rote Island (Rote Ndao), Sumba Island (Sumba Barat), Lomlen Island (Lembata).

The dynamic of submitting sales report by MA shows that each MA has different ability to prepare and arrange it. It can be seen on their business scale and/or company structures in which the bigger company will get better stove's selling achievement. Figure 5 shows MA's cover areas in selling clean stove. From 2160 clean stove, PT. Ditana Energy Solutions (DES) sell 27,5% of clean stove both in Central Java, DI. Yogyakarta and NTT; Kopernik Foundation (KOP) sell 9,2% of clean stove only in NTT areas; CV. Agro Jawa Dwipa (AJD) sell 24,4% of clean stove in CJY and NTT areas; CV. Bedog Education Center (BEC) sell 2,5% of clean stove in CJY areas; UD. Dian Handycraft (DIH) sell 6,9% of clean stove in CJY areas; CV. Karya Wahana Sentosa (KWA) sell 11,3% of clean stove in CJY areas; CV. Cito 13 (CIT) sell 5,3% of clean stove in CJY areas; CV. Kedung Arta Abisatya (KAR) sell 8,4% of clean stove in CJY areas; CV. Pancaran Sinar Berkah (PSB) sell 4,2% of clean stove in CJY areas; and PT. Ivy Lentera Lestari (IVY) sell only 0,4% clean stove in Central Java.

Meanwhile for MA categorized as small and medium enterprises or local company faces some difficulties to sell clean stove, at least it could be seen from their selling achievement. Moreover this project did not consider the various ability of each MA; all of them have to follow the same rules and requirements. Another indicator that showing different performance of MA was the correctness and accuracy in completing sales report. Albeit many factors could influences degree of sales report accuracy, one of the main element related to the designing of sales report was availability and readiness of MA's human resources.

Figure 6. Participation of Respondent Verification Stage 2

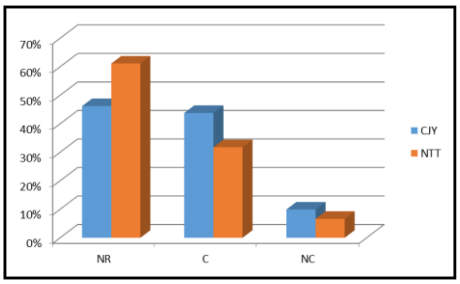
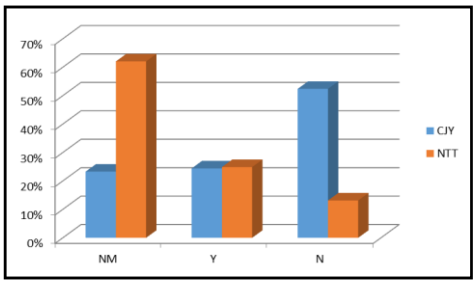


Figure 7. Participation of Respondent in in Verification Stage 3



[16]LKY, March 2017. *Third Stage Verification Report of the 10rd Sales Report of PT. Ditana Energy Solution (DES)*
[17]YDD, 2017. *op.cit.*
[18]LKY, Dec 2016. *Third Stage Verification Report of the 1st Sales Report of CV. Agro Java Dwipa (AJD)*
[19]LKY, Febr 2017. *op.cit.*

Figure 6 shows the participation of the respondent captured by LKY in Verification Stage 2. M&V team have to make phone call to all clean stove purchasers in 3 times calls on different days and hours and accompanied by sending text. The results confirm of the second stage verification categorized/classified into 3 grups: NR (Not Reached) for respondent not reached, NC (Not Confirmed) for respondent stating no purchase/not cooperating, and C (Confirmed) for respondent confirms the purchase of the clean stove. From figure above it shows the percentage of participation respondent/end-users in Central Java and Yogyakarta (CJY) also East Nusa Tenggara (NTT). In CJY, there are 45% NR; 44% C; 10% NC; while in NTT: 61% NR; 32% C; 7% NC. The Not Reached categorized is very high, both in CJY and NTT. This factors related to the contact number of the end-users is not available or it is not the end-users telephone number on the list of sales report but the re-seller/agent . Yet, the respondents is not answer the calls/texts from M&V team. Other issues is that the consumers/buyers answer the phone but cannot substantiate the clean stove serial number which is the requirement procedur in second verification stage. As mention above, the issue of accuracy and correctness of sales report from MAs is a matter of concern.

Meanwhile Figure 7 shows participation of respondent in Verification Stage 3. In this Third Stage Verification, not all of the buyers of the clean stove must be verified. Statistical sampling technique used as represent the number of households to be visited for interviews[20]. And the sample selection conducted by purposive random sampling methods, i.e selecting the sample with specific purpose and proporsional from cluster/region that has the largest number of clean stoves. The result of the third verification that is confirmation of continue use of the stove categorized into 3 (three) groups; NM (Not Met) for respondents that could not be reach/found; Y (Yes) for respondents who state using and continued use the stove; N (No) for respondents that state not use or not continue use the stove. The M&V team found that in CJY there are 23% NM; 24% Y; and 53% N, in NTT; 62% NM, 25% Y; and 13% N.

In CJY, the number of Not use or Not continue use the stove quite high. This is due to the available of LPG stove (clean stove was as a back-up stove when LPG was not available). Other reason it that the clean stove was difficult to use/impractical (difficult to lit and difficult to fill the fuelwood - need to cut the fuelwood into small piecies). That following reasons for those who never use to stove or ever use the stove then STOP to use the stove are quite similar with the survey conducted of YDD related to the result and impact of the CSI implement programme[21]. Meanwhile, in NTT, the reason why respondent not use or not continue use the clean stove because the available of kerosene stove. Almost all household in NTT have kerosene stove[22]. The use of kerosene stove to emit less smoke if comparing with the traditional stove (permanent/brick). However, kerosene stove is more expensive to use. Since the local housewives reject LPG stove for fear of explosion, the CSI is one solution. This is why the use of clean stove in NTT a bit higher than in CJY, or even higher than the Not use or not continue use presentage in NTT.

However, the Not Met condition in NTT is very high (more than 50%). This is because of incomplete address of the buyers, and the buyers/end-users contact number is not available. In this case, the accuracy in completing sales report is a matter of concern. Others concern is that, the respondent/buyer is not the end-users of the clean stove. It is agent/re-seller who purchase the clean stove. As has been reported in one of the Third Verification Report, in this case the sales report from PT. Agro Java Dwipa, where only one name listed for 322 clean stove[23].

In many documents of Third Verification Report, M&V team found that the respondents satisfied with the use of the clean stove. They state that the clean stove is efficient and economist. The clean stove can use less fuel compared to LPG and kerosene. This finding inline with the YDD survey report of the impact of the CSI programme in Yogyakarta, July 2017. The respondents also favour that the clean stove can be moved (moveable) especially in NTT which the majority respondent are farmers so that they can cook in the field.

Based upon the experiences in managing the whole M&V process and related to the target specified in this project, it seems that there are many interesting things to note. In M&V team point of view, the most challenging is changing and developing the guidance of M&V tools and process, in the name of pilot program. Without neglecting the implementation of the pilot program, all aspects were evaluated and criticized along with stakeholders and (if needed) it could be changed. This has an impact on changing of Operation Manual of M&V for several times. However generally the implementation of M&V process was in accordance with a period of time table specified in this pilot project. It can be noted that time constraints at the end of the project period, forcing the M&V team to carry out their duties by ignoring the specified time period, especially at the third stage verification. This occurs because of the flexibility given to the MA to hand over more Sales Reports / exceed the specified time limit. Another thing that must be ignored at the end of the project, especially in NTT province, was sampling process for third verification phase.

[20] Indonesia CSI, 2015. *Operation Manual for Monitor and Verification of Results-Based Financing Subsidy-Indonesia Clean Stove Initiative Pilot Program, Addition of NTT, Sampling and methodology changes to include lessons learnt.* Updated version 04/29/2016

[21] YDD, 2017 *op.cit*

[22] Tempo Weekly, *Thinning Out The Smoke.* Sept 2016.

[23] LKY, Febr 2017. *op.cit*.

Considering the limited time, bad weather condition, and limited human resources owned by M&V partners at NTT, then the verification only prioritized / selected for the stove sold in the City / County around Kupang. In conducting M&V process in NTT, the key success was getting support from local organization (in this case AOF) and developing effective communication. M&V team is fortunate to have experienced local partner in conducting survey so that communication constrains because of different cultures can be resolved. AOF also have some field researchers and experienced. Support from AOF's management was also got although this project merely has limited budget. In addition one of the most challenging of M&V process in NTT was distribution of the stoves that extent to many districts of NTT. Initially, stipulated in the contract between the World Bank and LKY, the third stage verification in NTT will only be conducted in 2 districts and 2 islands. In fact the stove is distributed to many islands. One example is a stove sold by the Kopernik Foundation, spread over 3 islands, namely Timor Island, Sumba Island (West Sumba), and *Lembata.*[24] Meanwhile AOF office was in Kupang city. Indeed, finally, budget determination was the main reason in conducting M&V process so that need to be adjusted.

Closing

The dependency of the Indonesia CSI program to MA was so high. In the future, if this scheme will remain be used, tight selection towards the performance of MA is needed. However efforts to encourage the usage of biomass through using of clean stove must be continued because generally consumer agreed that these stoves are quite satisfactory and efficient in use (although some types of stoves were examined not easy to be operated or difficult to lit).

If the attempt to encourage the use of biomass through using of clean stoves will be developed in national level, consumer education program on using of clean stoves should be implemented first before the stoves thrown into the market. Raising of consumer awareness on using of clean stoves in their daily life is strongly important to be conducted. In other words, increasing consumer awareness relating to fossil energy crisis and the need for the development of renewable energy is absolutely required, so that when they choose to use clean stove, it should come from their awareness and knowledge that they have to participate and responsible in changing energy consumption pattern.

The development of renewable energy consumption pattern also requires involvement of potential parties such as local government, community leaders, NGOs, and universities. Various scheme should be developed to encouraging and spreading the use of clean stoves. Besides RBF system that focusing to the performance of MA, this program could also be applied by different approach such as by providing subsidy for clean stove's users. This subsidy is not necessarily a discount of stove price but also availability of fuel and spare parts of stove. However, the increased awareness of consumers for healthy cooking should also be supported with concrete facilitation such as financing, capacity building, and access to other household interest.

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OPTIMALIZATION COORDINATION AND SUPERVISION'S FUNCTION OF KPK FOR INTEGRATED ACTIVITIES AGAINST CORRUPTION

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ABSTRACT

Activity of against corruption has been still found a lot of constraint and facing many obstacles, although there are many paradigm chances in this reform era. It could be happened because there are many law enforcement institutions seek there own justification themselves, that arrived conflict among the law enforcement institutions as well as the result the enmity between them. This show that activities of coordination between the law enforcement not yet done and there is no supervision's function to all of process the criminal justice systems against cooruption. The criminal justice systems against corruption placed KPK as coordinator, supervision, trigger mechanism institution besides as investigators and prosecutor corruption as like Attorney Instititon. Finally, it will only weaken the nation's effort in preventing and eradicating corruption and the effort to reformed clean and good governance became unsuceed and to make a free state of collusion, corruption and nepotisme (KKN) will be difficult .

Keywords: Coordination And Supervision's Function-Kpk-Integrated Activities Against Corruption.

Introduction

Since the declaration of the Indonesian people's determination to eradicate corruption in the MPR RI No.XI / MPR RI / 1998 on the Clean and Free State Administration from KKN, there is a paradigm changes in eradicating corruption in Indonesia. The paradigm's changes are: (1). The establishment of law enforcement agencies named the Corruption Eradication Commission (KPK) as stipulated in Law No.30 Year 2002 on the Commission for the Eradication of Corruption; (2).Involved the community in an effort to eradicate corruption through participation the community as regulated in Law No.28 Year 1999 on the Implementation of a Clean and Free State of KKN and Law No.31 Year 1999 on the Eradication of Corruption *jo* Law No.20 Year 2001, and (3). In doing its prove upside-down on money laundering crime originating from criminal act of corruption in Law No. 31 Year 1999 on Eradication of Corruption Law No.20 Year 2001. Some of the above has at least been more succeeded in eradicating corruption significantly compared to the New Order period.

As one of the factors causing the collapse of the New Order in May 1998 was the widespread practice of corruption in the New Order era. It is even suspected that the President also engaged in corrupt criminal practices (although this allegation could never be proven in the hearing because of the permanent pain suffered by the Supreme Administrator of the Country).[1]

However, the change of paradigm in eradicating corruption crime from old paradigm to new paradigm in its journey has not been realized or experienced by law enforcement apparatus supporting system / mechanism of eradication of corruption crime either individual or intitusional. The most concrete example is the conflict between POLRI and KPK which started when one of leader KPK, Chandra M.Hamzah was examined by Polda Investigator regarding wiretap conducted by KPK on Nasrudin and Rani Juliani telephone numbers. The request was filed by KPK's Chairman Antasari Azhar related to the terror he continues to face. It happened on 19 June 2009 which then continued with the emergence of comments Kabareskrim Headquarters POLRI Komjen. Susno Duadji in the period of 6 to 12 July 2009. The comments sparked a prolonged conflict known to the public as "Cicak versus Crocodile Volume I".

The conflict is increasingly tapered by the arrest and detention of Bibit Samad Riyanto and Chandra M.Hamzah by POLRI Headquarters since 29 October 2009. Conflict reemerged in the case of alleged corruption procurement of SIM simulator's tool in Korlantas POLRI involving General Inspector Djoko Susilo that rise to the polemic "Cicak versus Crocodile Volume II" in mid-July 2012.[2] The conflicts also occurred between the KPK and the Supreme Court in late September 2005 in the case of the Chief of Staff of the Supreme Court of Sinoaji and friends on the alleged bribery of Probo Sutedjo amounting to Rp 5 billion. Conflict also occurred between the Attorney General and the KPK in the case of Urip

[1] Mochtar Pabottinggi in Preface: Towards Skalpel on Corruption in Saldi Isra, 2009, Kekuasaan dan Perilaku Korupsi, Jakarta, Penerbit Kompas, pages xii-xiii.
[2] Suara Merdeka, 10 September 2009; Kompas, 30 Oktober 2009, Kompas, 2 November 2009 and Media Indonesia, 3 November 2009.

Tri Gunawan for accepting Rp.6 billion from Artalyta Suryani. The conflict between KPK and BPKP occurred when the Head of BPKP Didi Wiyadi who wanted to involved 25 auditors from the KPK,[3] and others cases. In some cases indicates the abandonment of the coordination and supervision function of the KPK.

Method And Materials

This research used normative approach. Its operationalization was carried out according to positivism paradigm. The research was contracted with two strategies namely library research and case study. The secondary data base were obtained through library research and legal document. Secondary law materials, consisting of books. The primary data base were obtained through field research conducted by observations and interviews in PN Semarang, PT Semarang and the supreme court. The analysis is also carried out quantitatively by tabulating incoming data obtained from interviews with respondents and data obtained from the relevant agencies to facilitate a qualitative analysis with the support of related literature. Qualitatively, because the data relevant to the research material is inventoried and then critically reviewed with positive law norms.

Discussion

If we look at the history of the Indonesian nation itself, then It turns out the name of the reform is not only happened once. First, In 1945 there was a reformation because with the Proclamation of the Republic of Indonesia (NKRI) on 17-8-1945 has born the Unitary State of the Republic of Indonesia, which is the second orderly colonial law enforcement as well as the second development of the order of national law. Secondly, then on 27-12-1949 with the enactment of the Constitution of the United States of Indonesian Republic (KRIS) there has been a fundamental change from the Unitary Republic of Indonesia to RIS. Third, Further on 17-8-1950 the form of this federation state changed into a unitary state again with the enactment of the Law of the State of the Republic of the Republic of Indonesia and the Year 1950. Fourth, After that with the issuance of Presidential Decree on 5-7-1959 reformation from the liberal period to guided democracy.Fifth, Then in March 1966 reform occurred with the emergence of the New Order which are committed to implement the 1945 Constitution of the State of the Republic of Indonesia in a purely and consistent manner. Sixth, in the end of May 1998 there was a reformation with the emergence of the Reform Order which also had the same commitment that is to implement Pancasila purely and consequently. The New Order's commitment seemed similar to the commitment of the Reform Order, so the New Order's correction of the Old Order was the same as the Reform Order's reform of the New Order.[4]

After Indonesia's monetary crisis that followed the economic crisis and the people suffer from the hard of life as if it did not get the natural attention from the government, anxiety and restlessness buried in the community exploded through the university campus where life freedom of the speech, ending the tragedy of Soeharto's power with no respect on May 21, 1998. Its similar with the opinion of H.A. Arjoso , that the various policies and regulations created by the New Order regime deviantly according to the spirit and soul of Pancasila and the 1945 Constitution, suddenly turn into the misery of many people led NKK, hypocrisy, political or economic serakahisme[5] by subjecting them to rules. While rules may not be able to solve the problem of power because the rules themselves create new opportunities for policy (Gouldner, 1954).[6]

Law is the embodiment of the soul and the way of thinking of the people concerned, which is the spiritual structure of society earlier. The success of the function of law within the community depends on the legal consciousness of the community which may decrease, because they can not see and perceive that the law can not protect their interests. Officials who are less aware of the objectives and functions of law in development make things worse. It should be realized that there are factors and forces outside the law will give the burden of its influence on the law and the process of legal work. The so-called law is a function of various things: (1). The rules themselves; (2). Provision of facilities to enable the regulatory system to be carried out; (3) the application of sanctions; (4) The behavior of persons in connection with the law there, (5). Things or circumstances that affect technology.[7]

The focus in reform is the establishment and development of Good Governance because with Good Governance political, economic and legal reforms and processes can be effective. Good and true according to the moral measure of Pancasila and the provisions of the 1945 Constitution. Good Governance is good

[3] Suara Merdeka, 21 Juli 2009, Kompas, 1 Agustus 2012, 4 Agustus 2012, 6 Agustus 2012 and 8 Agustus 2012.
[4] Bambang Dwi Baskoro, 2001, Bunga Rampai Penegakan Hukum Pidana, Semarang, BP UNDIP, pages 55-56.
[5] HA. Arjoso, 1998, Hakikat Reformasi Total, Tanggapan atas Tulisan J.B. Mangunwijaya, Kompas, Selasa 21 Juli 1998, page 4.
[6] Philip Selznick & Philippe Nonet, 1978, Law and Society in Transition, Toward Responsive Law, New York, Harper & Row Publisher Inc, pages 14 and 36.
[7] Satjipto Rahrdjo,1980, Hukum, Masyarakat dan Pembangunan, Bandung, Penerbit Alumni, pages 150-151.

in its function demands consistency, transparency, credibility, accountability and predictability in the implementation governance and in its policies and arrangements. To be able to function properly also needed a good and correct bureaucracy, a professional, healthy mental, guaranteed welfare and career and free from corruption and politicization efforts. Good in the system is in accordance with and based on the provisions of the 1945 Constitution.[8]

The reforms launched in May 1998 resulted in commitments as outlined in the MPR RI No.XI / MPR RI / 1998 and MPR RI No.VIII / MPR RI / 2001 on Recommendation of Direction of Corruption Eradication and Prevention of Corruption, Collusion and Nepotism. In Article 2 MPR RI Decree No.VIII / MPR RI / 2001 said that the policy direction of eradicating KKN is:

1. Accelerate the legal process against the government apparatus primarily law enforcers and state organizers allegedly committed.
2. Establish laws and implementing regulations to assist the acceleration and effectiveness of the implementation of eradication and prevention of corruption whose contents include: Corruption Eradication Commission;[9]

The eradication of corruption through penal means is done through a criminal justice system that begins the investigation process that can be done by POLRI (Law No.2 Year 2002 on Indonesian National Police), Public Prosecutor Office (Law No.16 Year 2004 on Public Prosecution) or KPK . Furthermore, it is followed by prosecution process conducted by the Prosecutor (using the principle of opportunity) or KPK (using legality principle) and ends with examination and trial by Corruption Court (Law No.46 Year 2009 on Corruption Court) specializing in General Court . The entry of new institutions (KPK) in the eradication of corruption mentioned in the Considerance of Law No.30 Year 2002 on the Corruption Eradication Commission, among others:

1. Eradication of criminal corruption that happened until now can not be implemented optimally so it needs to be improved professionally, intensively and continuously. Therefore, the Corruption Eradication Commission (KPK) was formed;
2. The government agency that handles corruption crime cases has not function effectively and efficiently in combating corruption so that the Corruption Eradication Commission (KPK) is formed;
3. In accordance with the provisions of Article 43 of Law No.31 Year 1999 on the Eradication of Corruption as amended by Law No.20 Year 2001 on Amendment to Law No.31 Year 1999 on Corruption Eradication provide the mandate for the establishment of the Corruption Eradication Commission (KPK) as an independent law enforcement agency with the duty and authority to eradicate corrupt acts.

Furthermore, in the General Explanation of Law No.30 Year 2002 Also mentioned the background of the establishment of the Commission, among others:

(1) The criminal act of corruption can no longer be classified as a common crime but it has become an extraordinary crime for that extraordinary law enforcement method is required through a special body that has wide authority, independent and free from any power of the KPK;

(2) In order to realize the efforts to eradicate corrupt acts which are implemented optimally, intensively, effectively, professionally and in continuous development, a special body is established namely KPK, and so on.

In addition, the formation inside of KPK formed by the things as follows:

(1) The allegation that the President during the New Order era committed a criminal act of corruption. If the President committed a criminal act of corruption then who will conduct investigations and investigations. In such case it is impossible to conduct investigations by the Attorney General of Indonesia or the State Police of the Republic of Indonesia because both institutions are "prolonged" of the President of the Republic of Indonesia;

(2) The existence of some obstacles faced by the Attorney General or the Indonesian National Police in eradicating corruption which resulted in ineffective and not optimal eradication of corruption in the New Order government. For this purpose, a special body is created which is given freedom to break through the constraints;

(3) The need for specialized agencies authorized to design and construct networking designers in the eradication of corruption as well as supervision of law enforcement agencies as well as in "monitoring" the performance of state officials.

Based on the Law of the Republic of Indonesia Number 30 Year 2002 on Corruption Eradication Commission, KPK has several functions as follows:

(1) Law enforcement networking in efforts to eradicate corruption (see Elucidation of Law No. 30 Year 2002);

[8] Frans Seda, 1998, Sebuah Dialog Tentang Reformasi, Kompas, Jumat 10 Juli 1998, page 4.

[9] Ermansyah Djaja, 2010, Meredesain Pengadilan Tindak Pidana Korupsi, Implikasi Putusan Mahkamah Konstitusi Nomor 012-016-019/PPU-IV/2006, Jakarta, Penerbit Sinar Grafika, pages 12-13 dan 88-89.

(2) Become a trigger mechanism institution against existing institutions in the eradication of corruption without monopolizing the duties and authorities of investigation and prosecution (See General Elucidation of Law No. 30 of 2002);

(3) To be a counter partner conducive to existing institutions so that the eradication of corruption can be carried out efficiently and effectively (see General Elucidation of Law Number 30 Year 2002): and

(4) Coordinate with agencies authorized to eradicate corruption, for which the KPK is authorized (See Article 6 letter a *jo* Article 7 and Article 42 of Law No. 30 Year 2002 and General Elucidation of Law No.30 of 2002):
a) to coordinate investigations and prosecutions of corruption;
b) establishing a reporting system in anti-corruption eradication activities;
c) request information on corruption eradication activities to the relevant agencies;
d) conducting hearings or meetings with agencies authorized to eradicate corruption;
e) requesting reports of relevant agencies on the prevention of criminal acts of corruption.

(5) To supervise the agency authorized to eradicate corruption, for which the KPK is authorized (See Article 6 letter b *jo* Article 8 of Law No. 30 Year 2002 and General Elucidation of Law No. 30 Year 2002):
   a) conduct supervision, research or review of the agency performing its duties and authorities relating to the eradication of corruption offenses and to agencies conducting public services;
   b) take over the investigation or prosecution of the perpetrators of corruption perpetrated by the Police or Public Prosecutor. Acquisition of investigation and prosecution as intended by KPK on the grounds (See Article 9 *jo* Article 10 of Law No. 30 Year 2002):
      1) community reports on corruption are not followed up;
      2) the process of handling corrupt crime is prolonged or delayed without a justifiable reason;
      3) the handling of criminal acts of corruption is aimed at protecting the perpetrators of the true criminal act of corruption;
      4) the handling of criminal acts of corruption contains elements of corruption;
      5) barriers to the handling of criminal acts of corruption by interference from the executive, judicial or legislative, or
      6) other circumstances which, according to the Police or Public Prosecutor's considerations, the handling of corruption is difficult to implement properly and accountable.

(6) Conducts investigations and prosecutions of corruption. The KPK is authorized to conduct investigations and prosecutions of corruption (see Article 6 letter c *jo* Article 11 of Law No. 30 Year 2002 and General Elucidation of Law No.30 of 2002), which : (a).involves law enforcement officers, state officials and other persons connected with corruption acts committed by law enforcement officers or state administrators; (b).gaining attention that disturbs society, and/or (c).concerning state losses of at least Rp.1,000,000,000.00 (one billion rupiah).

(7) Undertake acts of prevention of corruption, for which the KPK is authorized (See Article 6 letter d *jo* Article 13 of Law Number 30 Year 2002): (a).conducting registration and examination of state assets assets report; (b).receive reports and establish gratuity status; (c).conducting anti-corruption education programs at every level of education; (d).to design and encourage the implementation of socialization programs to eradicate corruption; (e).conduct anti-corruption campaigns to the general public; (f).conduct bilateral or multilateral cooperation in eradication of criminal corruption; and

(8) monitoring the implementation of state government, for which the KPK is authorized (see Article 6 letter e *jo* Article 14 of Law No. 30 Year 2002): (a).conduct assessment of administrative management system in all state and government institutions; (b).advise the leaders of state and government agencies to make changes if based on the results of the assessment, the administrative management system is potentially corrupt; and (c).report to the President of the Republic of Indonesia, the People's Legislative Assembly of the Republic of Indonesia and the Supreme Audit Agency if such suggestions concerning such amendment are ignored.

Furthermore, there are also some KPK's authority, among others:

(1) In the event that the KPK takes over the investigation or prosecution, the Police or the Prosecutor Office shall submit the suspect and the entire file of the case along with the necessary evidence and other documents within 14 (fourteen) working days from the date of receipt of the KPK request. The submission shall be made by signing the minutes of submission so that all duties and authorities of the Police or Prosecutor Office shall be transferred to the KPK (see Article 8 paragraph (3) and (4) of Law No.30 Year 2002); and

(2) In the event of a criminal act of corruption occurring and KPK has not conducted an investigation while the case has been investigated by the Police or Public Prosecutor, the concerned agency shall notify the KPK at the latest 14 (fourteen) working days from the date of commencement of the investigation. The investigation conducted by the Police or Public Prosecutor as intended shall be carried out ongoing coordination with the KPK (see Article 50 paragraphs (1) and (2) of Law No. 30 Year 2002). In the event that the KPK has already initiated an investigation, the Police or Public Prosecutor is not authorized to conduct investigations (see Article 50 paragraphs (1) and (3) of Law No. 30 Year 2002). In the event that the investigation is conducted simultaneously by the Police and /or Public Prosecutor and KPK, the investigation conducted by the Police or Public Prosecutor shall be terminated immediately (see Article 50 paragraph (4) of Law No. 30 Year 2002).

In view of Article 6.7, 8, 9, 10, 11, 13, 14 and Article 42 and related articles, the KPK is designated and arranged a network of activities against corruption; triggers mechanism and empowerment; coordinating agencies; and institutions that supervise, it can be said indirectly forming act put the KPK as Top Leader in Criminal Justice Systems of Eradication Corruption. Even according to the Law, the KPK is placed as the supervisor of the Supreme Administrator. However, it is unfortunate that this provision is ignored by other law enforcement agencies, since the KPK is a non-permanent institution and is not regulated in the 1945 Constitution.

According to Denny Indrayana, several reasons why KPK is given the mandate to focus to eradicate political corruption and justice: (1) .KPK is relatively cleaner than other law enforcements, and (2) .KPK is an independent state commission, unlike the Attorney and Police under the supervision of the President.[10] Ahmad Syafii Maarif in the "Preface" book written by Denny Indrayana states, that Without the eradication of corruption, all the reform efforts towards a democratic Indonesian state is impossible. The country that holds the title of champion of corruption will never become a democratic country. If this corruption eradication movement fails then the more perfect the failure of the Indonesian nation to create a corruption-free country fails.[11].

However, efforts to eradicate corruption, especially the act of collusion or nepotism in practice, encountered many threats, challenges, obstacles and disturbances so that until now the ranking of Indonesia as a corrupt country has not shown any significant change. Conflicts between law enforcement agencies will undermine the efforts of the Indonesian people in preventing and combating corruption practices and making corruptors feel happy resulting in intentions to agitate the atmosphere. The conflict should not have happened if law enforcement officers really understood: (1). That the Order of the Reformation was built to replace the fallen New Order because it was undermined by KKN's practices in all aspects of social life, nation and state; (2). That one of the reform agenda is the reformation of law instruments, law enforcement apparatus, legal system, legal culture so as to be able to prevent and combat KKN practices effectively and efficiently; (3). That one of the reform agenda is the establishment of an independent, special institution which has the extraordinary authority to prevent and combat corruption practices and to design the state to be clean and free of KKN; and (4). That law enforcement officials must be professional, consistent, objective, non-discriminatory and seek their own justification, thus forgetting the direction of national strategies in the prevention and eradication of KKN practices.

Closing

Thus it can be concluded that:

1. Reform era emerged as a shared commitment of all elements of the nation to make corrections to the New Order that was uprooted because it was gnawed by KKN practices in all areas of national and state life which resulted in the misery of the masses. The Reform Order performs correction to realize Clean and Good Governance.
2. KPK emerged as an institution to prevent and eradicate criminal acts independent corruption by involving the active participation of the community at in efforts to prevent and eradicate corruption. With the main focus on handling corruption cases conducted by law enforcement officers, state organizers and others concerned with criminal acts of corruption committed by law enforcement officials or state organizers. The goal of national strategy in the prevention and eradication of criminal acts of corrupture is forming a special law enforcement network to Prevent and eradicate corruption in which the KPK is placed as: coordinator, supervisor, grand designer, trigger mechanism institution, even become the top leader of law enforcement for prevention and against all corruption activities.

[10] Denny Indrayana, 2008, Negeri Para Mafioso, Hukum di Sarang Koruptor, Jakarta, Penerbit Kompas, page 75.
[11] Ibid., page 11.

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THE STUDY OF THE RELATIONSHIP BETWEEN THE UN SECURITY COUNCIL AND THE INTERNATIONAL CRIMINAL COURT IN THE PROSECUTION OF INTERNATIONAL CRIME[1]

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ABSTRACT

The International Criminal Court is a permanent institution and has the power to exercise its jurisdiction over persons for the most serious crimes of international concern, and a complement to the jurisdiction of national crime. Serious crimes set forth in the ICC Statute include crimes of genocide, crimes against humanity, and war crimes. The jurisdiction of the Court to try perpetrators of such crimes if: a situation (case) in which one or more crimes have been committed to the Prosecutor by a State Party, a situation (case) in which one or more crimes have been committed to The Public Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; and by the Prosecutor by conducting an investigation. In relation to the Security Council's authority to submit a criminal case to the Public Prosecutor, it is essentially a Contract Approval between the International Criminal Court (ICC) and the United Nations (Relationship Agreement between the ICC and the United Nations). Under the Agreement the Security Council through its resolution may submit a case of offense which becomes the jurisdiction of the Court to the Prosecutor of the International Criminal Court.

Keywords : International Criminal Court, Prosecution, Crime.

Introduction

The United Nations (UN) was established with the Charter of the United Nations and was officially established on 24 October 1945,[3] having six major organs: the General Assembly, the Security Council, the Economic and Social Council, the Trusteeship Council, the Secretariat and the International Court of Justice.[4] The purpose of the founding of the United Nations as stated in the Preamble of the Charter of the first paragraph "*to save succeeding generations from the scourge of war .....",*[5] thus the objective of the United Nations is to save the successor generation of the disaster against war.

The further objectives of the United Nations are outlined in Article 1 (1) of the Charter, which includes: "maintaining international peace and security, and for that purpose: taking effective joint measures to prevent and eliminate threats to violations of peace; and shall settle in a peaceful manner, and in accordance with the principles of justice and international law, seeking resolution to international disputes or circumstances that may interfere with peace ". To achieve this objective, the Charter contains provisions which are regulated details on peace and security.[6]

Maintenance of international peace and security within the framework of the UN as defined in Article 1 of the Charter is vast and the duty of the United Nations key bodies, the Security Council, the General Assembly, and the Secretary-General of the United Nations. In addition, it is also the duty of all UN member states[7] as well as non-member countries of the United Nations.[8]

The duty and functions of the United Nations in the maintenance of international peace and security are generally related to inter-state disputes or international armed conflicts as well as internal armed conflicts such as civil wars. However, before the disputing parties hand over their disputes to the UN's main bodies, they are recommended to resolve them peacefully through the procedures set out in international law.

Resolving conflicts between countries peacefully has been regulated in the UN Charter, namely Chapter VI on the Peaceful Dispute Settlement Article 33 paragraph (1) which determines: "parties involved in any dispute which, if perpetuated, may jeopardize the maintenance of international peace and security , must first seek a settlement by way of negotiation, inquiry, by mediation, conciliation, arbitration, legal settlement

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[3] History United Nations, diakses melalui http://www.un.org/en/sections/history/history-united-nations/index.html
[4] Piagam PBB, Pasal 7 https://unic.un.org/aroundworld/unics/common/documents/publications/uncharter/jakarta_charter_bahasa.pdf
[5] Charter of the UN, https://treaties.un.org/doc/publication/ctc/uncharter.pdf
[6] Sri Setianingsih Suwardi, Penyelesaian Sengketa Internasional, UI-Press, Jakarta, 2006.
[7] Pasal 43 ayat (1) Piagam : Semua anggota PBB agar turut serta membantu pemeliharaan perdamaian dan keamanan internasional, ...".
[8] Pasal 2 ayat (6) Piagam : Organisasi ini menjamin agar negara-negara bukan anggota PBB bertindak dengan prinsip-prinsip ini apabila dianggap perlu demi perdamaian dan keamanan internasional.

through regional bodies or arrangements, or by any other peaceful means of their own choosing ".

Under these provisions, parties to the dispute should be able to resolve their dispute through such means. However, if the ways in which the disputing parties fail, and the conflict situation jeopardizes international peace and security, one party to a dispute may draw attention to the UN Security Council. In addition, the UN Security Council may convene to settle the dispute on its own initiative,[9] at the request of a member country[10] or not a member state,[11] or at the request of the General Assembly,[12] or at the request of the Secretary-General of the United Nations.[13]

If an inter-state dispute is discussed in the Security Council then in accordance with Article 34 of the Charter *the Council may investigate any dispute, or any situation which might lead to international friction or give rise to a dispute, in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security."* In addition, the Security Council may provide recommendations for peaceful settlement under or in accordance with the provisions of article 33 of the UN Charter,[14] whereas for inter-law disputes relating to law, the Security Council may advocate dispute resolution through the International Court of Justice.[15]

As the body responsible for the maintenance of international peace and security, the Security Council may adopt Chapter VII of the UN Charter on Actions Relating to Threats to Peace, Violations against Peace and Aggression Acts. Concerning this the Charter regulates it in Articles 39 - 49. The application of Chapter VII This Charter is generally carried out by the Security Council in connection with inter-state disputes or domestic disputes that use armed violence.

Regarding the role of the United Nations in particular the Security Council in internal disputes that become the domestic affairs of a country is actually limited by the provisions of the Charter of Article 2 paragraph (7) which determines: *"Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially with in the domestic jurisdiction of any state or shall require the members to submit such matter to settlement under present Charter; but the principle shall not prejudice the application of enforcement measures under Chapter VII."*

Under the above provisions of countries in which internal conflicts (such as civil wars) may occur, may denounce interference in the internal affairs of the United States, including settling such matters under the Charter. However, if in this internal armed conflict there is a violation of international humanitarian law or violation of human rights law, then the Security Council either on its own initiative or at the request of other States may intervene in such domestic affairs, and shall exercise its powers under Chapter VII of the Charter.

In internal conflicts that use armed violence in which this dispute has become a concern of the Security Council, in accordance with Article 39 of the Charter of the Security Council will first determine whether or not there is a threat to peace, a violation of peace or an act of aggression, and would advocate, or decide what actions should be taken in accordance with Articles 41 and 42, to safeguard or restore international peace and security.

Furthermore, the Charter also provides that "to prevent any further adverse situation, the Security Council prior to providing such suggestions or decisions concerning such acts in Article 39 may request the parties to receive temporary measures deemed necessary or appropriate. Such temporary measures shall be exercised without prejudice to the rights, demands, or positions of the parties concerned. The Security Council is careful to pay proper attention if there is defiance of the implementation of such temporary measures ".[16] These temporary or perceived necessary or appropriate acts may be interpreted that the Security Council may issue a resolution on weapons arms to defuse armed conflict, or establish an inquary commission.

The next role of the Security Council in implementing Chapter VII of the Charter as stipulated in Article 41 is the application of sanctions, namely the termination of all or part of economic relations, including railway, maritime, air, postal, telegraphic, radio and other communication means, termination of diplomatic relations. This action must be implemented and implemented by UN members. Whereas the role of the Security Council in implementing Chapter VII is stipulated in 42 to 49 Charter, covering the use of air, sea or land forces, including demonstrations, blockades and other measures to restore international peace and security,[17] the establishment of peacekeeping forces,[18] and the use of armed violence.[19] In connection with the establishment of the International Criminal Court under the Rome Statute of July 17, 1998, the UN Security

[9] Article 34, UN Charter
[10] Article 35 (1), UN Charter
[11] Article 35 (2), UN Charter
[12] Article 11, UN Charter
[13] Article 99, UN Charter
[14] Article 36 (1), UN Charter
[15] Article 34 (3), UN Charter
[16] Article 40, UN Charter
[17] Article 42, UN Charter
[18] Article 43, UN Charter
[19] Article 44, UN Charter

Council has a role in handing over international criminal cases that fall within the jurisdiction of the Court to the Prosecutor.

The Court according to the Statute has limited jurisdiction over the most serious crimes involving the international community as a whole. This jurisdiction includes the following offenses: (a) The crime of genocide; (b) Crimes against humanity; (c) War crimes; and (d) The crime of aggression.[20] However, for the crime of aggression until now has not formulated its definition, so it can not be applied. Furthermore, regarding the exercise of jurisdiction over the offenses mentioned above, the Statute determines that the Court may exercise its jurisdiction if: (a) A situation (case) in which one or more of the apparent crimes has been committed is forwarded to the Public Prosecutor by a State Party; (b) A situation (case) in which one or more of the apparent crimes have been committed is forwarded to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or (c) the Prosecutor may initiate an investigation in respect of the offense.[21]

Based on the above provisions it is clear that the UN Security Council has the authority to submit cases of international crimes to the Public Prosecutor, in which the Security Council acts under Chapter VII of the UN Charter. However, the Statute of the Court does not further regulate the procedure of the Security Council acting under Chapter VII of the Charter to forward cases of international crimes to the Public Prosecutor, thus raising the question of how the Security Council proceeds to transfer these international offenders to the Prosecutor.

With regard to the authority of the Security Council to submit an international criminal case that has occurred to the Prosecutor and to act in accordance with Chapter VII of the Charter, the authors have conducted a study entitled The Study of the Relationship between the UN Security Council and the International Criminal Court in the Prosecution of International Crime.

Main Problem

Based on the above description of the problem formulated as follows:

1. What international crimes can be submitted by the UN Security Council to the Prosecutor of the International Criminal Court?
2. How does the UN Security Council mechanism submit an international criminal case to the International Criminal Court Prosecutor?

The objectives are

1. Explain and analyze the international crimes that the Security Council may submit to the Prosecutor of the International Criminal Court.
2. Explain the mechanism of the UN Security Council in submitting international criminal cases to the Prosecutor General of the International Criminal Court.

International crimes that may be submitted by the UN Security Council to the International Criminal Court Prosecutor

The Rome Statute on the Establishment of the International Criminal Court (ICC) was adopted by the United Nations Diplomatic Conference of the Plenipotentiary Ambassador on 17 July 1998. This Statute consists of 128 articles, in which Article 1 of the Rome Statute provides that the International Criminal Court is a permanent institution and has the power to exercise its jurisdiction over persons for the most serious crimes of international concern, and a complement to the jurisdiction of national crime.

The Rome Statute 1998 on the International Criminal Court in addition to regulating the types of crimes that enter the jurisdiction of the Court, also regulates the procedural law, and the organs of the Court. The organs of the Court in accordance with Article 34 of the Statute consist of: (i) Presidency; (ii) the Appeals Division; Division of Justice and Pre-Trial Division; (iii) the Office of the Prosecutor; and (iv) The Registrar.

The ICC's jurisdiction theoretically includes the following:

a. Material Jurisdiction

   The material jurisdiction of the International Criminal Court covers the most serious crimes of concern to the international community, it is clarified in Article 5 that the jurisdiction of the International Criminal Court is limited to crimes of aggression, war crimes, crimes of genocide and crimes against humanity.[22] However, specifically for the crime of aggression can't be implemented pending formulation of the definition of crime of aggression.

b. Temporal Jurisdiction

   The Rome Statute of 1998 determines that in principle the ICC is authorized to adjudicate international crimes that occurred after the 1998 Rome Statute became effective on 1 July 2002 when 60 States have ratified the Rome Statute. In addition, the ICC's temporal jurisdiction also applies to a State party to the

[20] Article 5 (1), Rome Statute
[21] Article 13, Rome Statute
[22] Article 5, Rome Statute

Rome Statute after the Rome Statute becomes effective, in that context the ICC has sole authority only on international crimes committed after the country is bound by the Rome Statute.[23]

c. Personal jurisdiction
In this regard, the ICC also expressly expresses its jurisdiction over individuals. However, the Rome Statute also makes strict exemptions related to the age of individuals who may be tried by the ICC. The ICC Statute provides that the ICC does not have the authority to try individuals under 18 years of age at the time of the offense.[24]

d. Territorial Jurisdiction
Unlike ICTY and ICTR, the ICC's territorial jurisdiction is not clearly regulated in the Rome Statute. In connection therewith, there are several articles in the relevant Rome Statute 1998 concerning the territorial jurisdiction of Articles 12 and 13. Based on the provisions of those articles, it can be interpreted that the ICC may exercise its authority over anyone (whether citizens of the Statute of the Rome Statute 1998 or not citizens) as long as the crime is committed in the territory of the Rome Statute of 1998 and the ICC may also exercise its authority over international crimes in any territory of any country (whether the territory of the Party of the Rome Statute of 1998 or not a party state) as long as the perpetrator is a resident of the State Party.[25] In addition, the ICC also has the authority to try an international criminal incident in a non-State party and the suspect of the perpetrator is not originating from a State party but with reference from the UN Security Council as contained in Article 13 of the Rome Statute of 1998.

Regarding the Implementation of Jurisdiction is provided for in Article 13 of the Statute, which provides that the Court may exercise its jurisdiction in respect of the offenses set forth in article 5 in accordance with the provisions of this Statute, if:

a. A situation (case) in which one or more crimes have been committed to the Prosecutor by a State Party in accordance with article 14;
b. A situation (case) in which one or more crimes have been committed to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or
c. The Prosecutor may initiate an investigation in respect of such crimes in accordance with article 15.

Based on the provisions of Article 13 of the Statute, it can be concluded that those who can file a case to the International Criminal Court are the Public Prosecutor (Prosecutor); whereas parties who may file a criminal offense provided for in Article 5 of the Statute to the Public Prosecutor are the states (where the crime occurs) which is a member of the Statute, the Security Council of the United Nations, and on the initiative of the Prosecutor himself.

Below will be described on the procedure for submitting cases to the ICC Prosecutor by the state and at the initiative of the ICC Prosecutor.

a. The Submission of a Situation (Case) by a State Party.
Regarding this matter is stipulated in Article 14 of the Statute which determines:
(1) A State Party may submit to the Prosecutor a situation where one or more crimes within the jurisdiction of the Court appear to have been committed while requesting the Prosecution to investigate the situation (case) in order to determine whether a particular person or more should be charged has committed the crime.
(2) To the extent possible, a submission specifies the relevant circumstances and is accompanied by supporting documentation as it is available to the State which submits the situation (case).
Based on the above provisions it is known that the transfer of cases of international crimes which fall within the scope of the Statute by a country to the Public Prosecutor, if in that country there has been an international crime in which the country is unable to adjudicate its own perpetrators. In submitting a case to the Prosecutor should be accompanied by supporting documentation of a criminal offense in violation of the Rome Statute.

b. The Prosecutor.
In the Statute regarding the Public Prosecutor, Article 15 is as follows:
(1) The Prosecutor may initiate a *proprio motu* investigation on the basis of information concerning crime in the jurisdiction of the Court.
(2) The Prosecutor analyzes the seriousness of the information received. For this purpose, he may seek additional information from States, specific agencies of the United Nations, intergovernmental organizations or non-governmental organizations, or other reputable sources deemed appropriate, and may receive written or oral testimony at place of the Court.

[23] Arie Siswanto, *Hukum Pidana Internasional, Op.,Cit,* p. 340
[24] Article 25 and 26, Rome Statute.
[25] Arie Siswanto, *Hukum Pidana Internasional, Op.,Cit,* p. 342

(3) If the Prosecutor concludes that there is a reasonable basis for proceeding with the investigation, he submits to the Pre-Trial Session a request for authority to conduct an investigation, together with a supporting material collected. Victims may submit their representatives to the Pre-Trial Session, in accordance with the Procedural Law and Evidence.
(4) If the Pre-Trial Session, after examining the application and supporting materials, considers there is a reasonable basis for proceeding with the investigation, and that the case appears to enter the jurisdiction of the Court, the Court shall have the authority to commence an investigation, subsequent decisions of the Court with regard to jurisdiction and acceptance of a case.
(5) Rejection of the Pre-Trial Session to authorize the investigation shall not preclude a petition filed by the Prosecutor based on new facts or new evidence of the same (case) situation.
(6) After the preliminary examinations referred to in paragraphs 1 and 2, the Prosecutor concludes that the information provided does not constitute a reasonable basis for an investigation, he notifies it to the persons who provide the information. This does not preclude the Prosecution from considering further information submitted to him regarding the same (case) situation based on new facts or evidence.

Approval of Relations between the International Criminal Tribunal (ICC) and the United Nations (UNC) As the Foundation for the Transfer of a Situation (Case) of the UN Security Council to ICC Prosecutor.

Approval The relationship between the International Criminal Court and the United Nations is a working relationship between the International Criminal Court (ICC) and the United Nations (UN) governing the working relationship between two organizations, and establishing a legal foundation for cooperation in power (mandate) each of them. The ICC is an independent international body with a mandate to support the UN Charter to combat crimes that threaten international peace and security. The Treaty of Relations therefore illustrates a harmonious balance between freedom and cooperation, of autonomy and between the two institutions.[26]

According to the Relationship Agreement, the ICC and the United Nations recognize their respective mandates and statuses, and agree on cooperation and consultation with one another on important issues on a reciprocal basis. the Relationship Agreement covers two important categories and procedures.

First, approval refers to relatively standard procedures and includes changes to representatives, exchange of information and documentation, administrative cooperation, conference and facility provisions, and use of official travel documents (laissez passer) by some ICC officials.

The Relationship Agreement includes a unique procedure for the Court as an independent judiciary that focuses on international criminal law. This is the specific nature of reflection of cooperation that will occur between elements of the UN system and the ICC. In particular, The Relationship Agreement provides information on the manner in which the Security Council submits (referral) and requests not to submit (dereferral) forwarded to the Court and the manner in which the ICC may inform the Security Council of the failure to cooperate with its application. The Relationship Agreement also provides a framework for cooperation between the UN and the Prosecutor of the ICC and the need for agreements to facilitate such cooperation. In addition, The Relationship Agreement also refers to issues of privileges and immunity and protection of confidentiality.

The Relationship Agreement will cover only certain aspects of the overall relationship between the ICC and the UN. Another aspect of the relationship, the role of the two institutions is parallel, expressly mentioned in other articles of the Rome Statute.

The Relationship Agreement took effect on October 4, 2004, following the signing of ICC President Hakim Philippe Kirsch and UN Secretary General Kofi Annan. The draft of The Relationship Agreement was approved by the State Assembly for the Rome Statute during its first session in September 2002. The draft was prepared as a basis for negotiations between the UN Secretariat and the ICC, after the General Assembly adopted a resolution on the ICC in December 2003 inviting the Secretary-General The United Nations and the International Criminal Court (ICC) to discuss draft agreements to the General Assembly for approval. The United Nations and the ICC approved the final draft of The Relationship Agreement on 7 June 2004. Approval was adopted by the ICC Assembly of States Parties in the Hague, the Netherlands on 7 September 2004 and by the UN General Assembly at the closing of the 58th Session on 13 September 2004.

In The Relationship Agreement on cooperation between the UN Security Council and the Court is set forth in Article 17 as follows:

[26] *See the Preamble of the Rome Statute of the International Criminal Court, which recognizes that "such grave crimes threaten the peace, security and well-being of the world," and the Preamble of the Charter of the United Nations, which pledges to "unite our strength to maintain international peace and security."*
2 A/Res/58/79 adopted 9 December 2003.

(1) When the Security Council, acting under Chapter VII of the Charter of the United Nations, decides to refer to the Prosecutor pursuant to article 13, paragraph (b), of the Statute, a situation in which one or more of the crimes referred to in article 5 of the Statute appears to have been committed, the Secretary-General shall immediately transmit the written decision of the Security Council to the Prosecutor together with documents and other materials that may be pertinent to the decision of the Council. The Court undertakes to keep the Security Council informed in this regard in accordance with the Statute and the Rules of Procedure and Evidence. Such information shall be transmitted through the Secretary-General.

(2) When the Security Council adopts under Chapter VII of the Charter a resolution requesting the Court, pursuant to article 16 of the Statute, not to commence or proceed with an investigation or prosecution, this request shall immediately be transmitted by the Secretary-General to the President of the Court and the Prosecutor. The Court shall inform the Security Council through the Secretary-General of its receipt of the above request and, as appropriate, inform the Security Council through the Secretary-General of actions, if any, taken by the Court in this regard.

(3) Where a matter has been referred to the Court by the Security Council and the Court makes a finding, pursuant to article 87, paragraph 5 (b) or paragraph 7, of the Statute, of a failure by a State to cooperate with the Court, the Court shall inform the Security Council or refer the matter to it, as the case may be, and the Registrar shall convey to the Security Council through the Secretary-General the decision of the Court, together with relevant information in the case. The Security Council, through the Secretary-General, shall inform the Court through the Registrar of action, if any, taken by it under the circumstances.

While the cooperation between the United Nations and the Prosecutor of the ICC is regulated in Article 18 as follows:

(1) With due regard to its responsibilities and competence under the Charter of the United Nations and subject to its rules, the United Nations undertakes to cooperate with the Prosecutor and to enter with the Prosecutor into such arrangements or, as appropriate, agreements as may be necessary to facilitate such cooperation, in particular when the Prosecutor exercises, under article 54 of the Statute, his or her duties and powers with respect to investigation and seeks the cooperation of the United Nations in accordance with that article.

(2) Subject to the rules of the organ concerned, the United Nations undertakes to cooperate in relation to requests from the Prosecutor in providing such additional information as he or she may seek, in accordance with article 15, paragraph 2, of the Statute, from organs of the United Nations in connection with investigations initiated proprio motu by the Prosecutor pursuant to that article. The Prosecutor shall address a request for such information to the Secretary-General, who shall convey it to the presiding officer or other appropriate officer of the organ concerned.

(3) The United Nations and the Prosecutor may agree that the United Nations provide documents or information to the Prosecutor on condition of confidentiality and solely for the purpose of generating new evidence and that such documents or information shall not be disclosed to other organs of the Court or to third parties, at any stage of the proceedings or thereafter, without the consent of the United Nations.

(4) The Prosecutor and the United Nations or its programmes, funds and offices concerned may enter into such arrangements as may be necessary to facilitate their cooperation for the implementation of this article, in particular in order to ensure the confidentiality of information, the protection of any person, including former or current United Nations personnel, and the security or proper conduct of any operation or activity of the United Nations.

Security Council Practices in Delivering a Situation to the Prosecutor of the International Criminal Court

In order to know how the Security Council submits a situation to the International Tribunal Court (ICC), the authors present two UN Security Council resolutions, referral in Sudan (resolution 1593/2005) and Libya Arab Jamahiriya (resolution 1970/2011).

(1) Resolution 1593 (2005)

This resolution was approved by the Security Council at its 5158 trial on 31 March 2005.

The Security Council,

Taking note of the report of the International Commission of Inquiry on violations of international humanitarian law and human rights law in Darfur (S/2005/60),

Recalling article 16 of the Rome Statute under which no investigation or prosecution may be commenced or proceeded with by the International Criminal Court for a period of 12 months after a Security Council request to that effect, Also recalling articles 75 and 79 of the Rome Statute and encouraging States to contribute to the ICC Trust Fund for Victims, Taking note of the existence of agreements referred to in Article 98-2 of the Rome Statute,

Determining that the situation in Sudan continues to constitute a threat to international peace and security, Acting under Chapter VII of the Charter of the United Nations,

1. *Decides to refer the situation in Darfur since 1 July 2002 to the Prosecutor of the International Criminal Court;*
2. *Decides that the Government of Sudan and all other parties to the conflict in Darfur, shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution and, while recognizing that States not party to the Rome Statute have no obligation under the Statute, urges all States and concerned regional and other international organizations to cooperate fully;*
3. *Invites the Court and the African Union to discuss practical arrangements that will facilitate the work of the Prosecutor and of the Court, including the possibility of conducting proceedings in the region, which would contribute to regional efforts in the fight against impunity;*
4. *Also encourages the Court, as appropriate and in accordance with the Rome Statute, to support international cooperation with domestic efforts to promote the rule of law, protect human rights and combat impunity in Darfur;*
5. *Also emphasizes the need to promote healing and reconciliation and encourages in this respect the creation of institutions, involving all sectors of Sudanese society, such as truth and/or reconciliation commissions, in order to complement judicial processes and thereby reinforce the efforts to restore longlasting peace, with African Union and international support as necessary;*
6. *Decides that nationals, current or former officials or personnel from a contributing State outside Sudan which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to operations in Sudan established or authorized by the Council or the African Union, unless such exclusive jurisdiction has been expressly waived by that contributing State;*
7. *Recognizes that none of the expenses incurred in connection with the referral including expenses related to investigations or prosecutions in connection with that referral, shall be borne by the United Nations and that such costs shall be borne by the parties to the Rome Statute and those States that wish to contribute voluntarily;*
8. *Invites the Prosecutor to address the Council within three months of the date of adoption of this resolution and every six months thereafter on actions taken pursuant to this resolution;*
9. *Decides to remain seized of the matter.*

Resolution 1593 (2005) was approved on the basis of considerations including the International Commission's report on inquiry on violations of international humanitarian law and human rights law (S / 2005/60). Observing Article 16 of the Statute that no investigation or prosecution can be commenced or continued under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has filed an application to the Court to do so; the application may be updated by the Council under the same conditions. Also take note of Articles 75 and 79 of the Rome Statute, where Article 75 (Indemnification to Victims) provides as follows: (1) The Court shall establish principles relating to redress to, or in connection with, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court, on request or on its own behalf under exceptional circumstances, may determine the scope and extent of any damage, injury or injury to, or relating to, the victims and shall state the principles used by the Court to Act. (2) The Court may make an order directly to a convicted person by detailing appropriate compensation, or in respect of, victims, including restitution, compensation and rehabilitation. Where appropriate, the Court may decide that the indemnification is made through the Trust Fund set forth in article 79. Article 79 (Trust Fund) The Rome Statute determines the following: (1) A Trust Fund is established by a decision of the Assembly of State Parties to benefit the victims crimes in the jurisdiction of the Court, and the families of the victims. (2) The Court may order money and other property collected by fines or redemption to be transferred, on the order of the Court, to the Trust Fund. (3) The Trust Fund is administered in accordance with the criteria established by the Assembly of States Parties.

Determine that the situation in Sudan continues and poses a threat to international peace and security. Acting under Chapter VII of the UN Charter, (1) Decides to refer the situation in Darfur since 1 July 2002 to the Prosecutor of the International Criminal Court; (submitting the situation in Darfur from 1 July 2002 to the Prosecutor of the International Criminal Court).

Further on how the next action of the Security Council after submitting the situation in Darfur to the Prosecution of the ICC, it is decided in the next chapter: (2) Decides that the Government of Sudan and all other parties to the conflict in Darfur shall cooperate fully with and provide any necessary assistance for the Court and the Prosecutor pursuant to this resolution and, while recognizing that States not party to the Rome Statute, urges all States and concerned regional and other international organizations to cooperate fully; hereinafter (3) of the Prosecutor and of the Court, including the possibility of conducting proceedings in the region, which would contribute to regional efforts in the fight against impunity;

(2) Resolution 1970 (2011)

Adopted by the Security Council at its 6491st meeting, on 26 February 2011. The Security Council, Expressing grave concern at the situation in the Libyan Arab Jamahiriya and condemning the violence and use of force against civilians, Deploring the gross and systematic violation of human rights, including the repression of peaceful demonstrators, expressing deep concern at the deaths of civilians, and rejecting unequivocally the incitement to hostility and violence against the civilian population made from the highest level of the Libyan government, Welcoming the condemnation by the Arab League, the African Union, and the Secretary General of the Organization of the Islamic Conference of the serious violations of human rights and international humanitarian law that are being committed in the Libyan Arab Jamahiriya,

Taking note of the letter to the President of the Security Council from the Permanent Representative of the Libyan Arab Jamahiriya dated 26 February 2011, Welcoming the Human Rights Council resolution A/HRC/RES/S-15/1 of 25 February 2011, including the decision to urgently dispatch an independent international commission of inquiry to investigate all alleged violations of international human rights law in the Libyan Arab Jamahiriya, to establish the facts and circumstances of such violations and of the crimes perpetrated, and where possible identify those responsible, Considering that the widespread and systematic attacks currently taking place in the Libyan Arab Jamahiriya against the civilian population may amount to crimes against humanity, Expressing concern at the plight of refugees forced to flee the violence in the Libyan Arab Jamahiriya, Expressing concern also at the reports of shortages of medical supplies to treat the wounded, Recalling the Libyan authorities' responsibility to protect its population, Underlining the need to respect the freedoms of peaceful assembly and of expression, including freedom of the media, Stressing the need to hold to account those responsible for attacks, including by forces under their control, on civilians, Recalling article 16 of the Rome Statute under which no investigation or prosecution may be commenced or proceeded with by the International Criminal Court for a period of 12 months after a Security Council request to that effect, Expressing concern for the safety of foreign nationals and their rights in the Libyan Arab Jamahiriya, Reaffirming its strong commitment to the sovereignty, independence, territorial integrity and national unity of the Libyan Arab Jamahiriya. Mindful of its primary responsibility for the maintenance of international peace and security under the Charter of the United Nations, Acting under Chapter VII of the Charter of the United Nations, and taking measures under its Article 41,

1. *Demands an immediate end to the violence and calls for steps to fulfil the legitimate demands of the population;*
2. *Urges the Libyan authorities to:*
   - *(a) Act with the utmost restraint, respect human rights and international humanitarian law, and allow immediate access for international human rights monitors;*
   - *(b) Ensure the safety of all foreign nationals and their assets and facilitate the departure of those wishing to leave the country;*
   - *(c) Ensure the safe passage of humanitarian and medical supplies, and humanitarian agencies and workers, into the country; and*
   - *(d) Immediately lift restrictions on all forms of media;*
3. *Requests all Member States, to the extent possible, to cooperate in them evacuation of those foreign nationals wishing to leave the country;*
4. *Decides to refer the situation in the Libyan Arab Jamahiriya since 15 February 2011 to the Prosecutor of the International Criminal Court;*
5. *Decides that the Libyan authorities shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution and, while recognizing that States not party to the Rome Statute have no obligation under the Statute, urges all States and concerned regional and other international organizations to cooperate fully with the Court and the Prosecutor;*
6. *Decides that nationals, current or former officials or personnel from a State outside the Libyan Arab Jamahiriya which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that State for all alleged acts or omissions arising out of or related to operations in the Libyan Arab Jamahiriya established or authorized by the Council, unless such exclusive jurisdiction has been expressly waived by the State;*
7. *Invites the Prosecutor to address the Security Council within two months of the adoption of this resolution and every six months thereafter on actions taken pursuant to this resolution;*
8. *Recognizes that none of the expenses incurred in connection with the referral, including expenses related to investigations or prosecutions in connection with that referral, shall be borne by the United Nations and that such costs shall be borne by the parties to the Rome Statute and those States that wish to contribute voluntarily;*

The events that took place both in Sudan (Darfur) and in the Libyan Arab Jamahiriya were civil wars between the rebels and the government troops who, according to Article 2, paragraph 7 of the UN Charter, were not authorized by the Security Council United Nations Interference in the domestic affairs of a country. However, in both cases of civil war both in Sudan and in Libya Arab Jamahiriya there have been violations of

international humanitarian law and human rights law. In international law there is an obligation for states that are members of the Human Rights Council (the subsidiary body of the UN General Assembly) to protect the human rights of the population (doctrine to protect). The existence of violations of international law is to report the International Commission of Inquiry both events in Sudan (Darfur) as well as in Libya Arab Jamahiriya which then submitted to the UN Security Council. The reports of the Commission provide the basis for the United Nations (Security Council) to intervene in resolving internal disputes; because the violations committed by both countries have threatened international peace and security, for Sudan the Security Council acts according to Chapter VII, while for the Libyan Arab Jamahiriya Security Council acts according to Chapter VII Article 41 of the UN Charter which essentially cedes the situation in Sudan (Darfur) and Libyan Arab Jamahiriya to ICC Prosecutor.

Closing

The conclusions that can be drawn based on the problems formulated as follows:

1. The jurisdiction of the Court provided for in Article 5 of the Statute is a material jurisdiction limited to the most serious crimes involving the international community as a whole, namely (i) the crime of genocide; (ii) crimes against humanity; and (iii) war crimes; while the crime of aggression has not been implemented considering the definition has not been formulated.
   The offenses set forth in Article 5 of the aforementioned Statutes are individual responsibilities, this is affirmed in Article 25 of the Statute as follows:
   (a) The Court has jurisdiction over persons (natural persons) in accordance with this Statute.
   (b) A person committing a crime within the jurisdiction of the Court is individually liable and may be liable to punishment in accordance with this Statute.
   (c) In accordance with this Statute, a person is criminally liable and may be liable for a crime in the jurisdiction of the Court, if the person:
      (1) Committing a crime, either as a person, with another person or through another person, irrespective of whether the other person is criminally responsible.
      (2) Ordering, seeking or causing such a crime to occur in fact or experiment;
      (3) For the purpose of facilitating the commission, assisting, abetting or even assisting or attempting to do so, including providing means to do so.
      (4) By any other means contribute to the commission or trial of the commission of such crimes by a group of persons acting with a common goal. Such donations shall be intentional and shall: (i) be committed with the intention of continuing the criminal offense or criminal purpose of the group, in which the activity or purpose includes the commission of a crime in the jurisdiction of the Court; or (ii) Conducted by knowing the intent of the group to commit a crime;
      (5) With regard to the crime of genocide, directly or indirectly inciting others to commit genocide;
      (6) Seeks to commit such a crime by committing an act which commences its execution through an important step, but the crime does not occur because of circumstances independent of that person's intent. However, a person who abandoned an attempt to commit a crime or otherwise prevent the proceeding of a crime shall not be liable under this Statute for the trial of committing the crime, if such a person at all and voluntarily leaves the criminal purpose.
   (d) Nothing in this Statute relating to individual criminal liability shall affect the State's responsibility under international law.

2. As to how the mechanism of the Security Council submits a situation to the ICC Prosecutor, it is concluded that it is based on The Relationship Agreement in which the cooperation between the Security Council of the United Nations and the Court is regulated in Article 17 as follows:
   (a) When *the Security Council, acting under Chapter VII of the Charter of the United Nations, decides to refer to the Prosecutor pursuant to article 13, paragraph (b), of the Statute, a situation in which one or more of the crimes referred to in article 5 of the Statute appears to have been committed, the Secretary-General shall immediately transmit the written decision of the Security* Council to the Prosecutor together with documents and other materials that may be pertinent to the decision of the Council. The Court undertakes to keep the Security Council informed in this regard in accordance with the Statute and the Rules of Procedure and Evidence. Such information shall be transmitted through the Secretary-General.
   (b) When the Security Council adopts under Chapter VII of the Charter a resolution requesting the Court, pursuant to article 16 of the Statute, not to commence or proceed with an investigation or prosecution, this request shall immediately be transmitted by the Secretary-General to the President of the Court and the Prosecutor. The Court shall inform the Security Council through the Secretary-General of its receipt of the above request and, as appropriate, inform the Security Council through the Secretary-General of actions, if any, taken by the Court in this regard.

(c) Where a matter has been referred to the Court by the Security Council and the Court makes a finding, pursuant to article 87, paragraph 5 (b) or paragraph 7, of the Statute, of a failure by a State to cooperate with the Court, the Court shall inform the Security Council or refer the matter to it, as the case may be, and the Registrar shall convey to the Security Council through the Secretary-General the decision of the Court, together with relevant information in the case. The Security Council, through *the Secretary-General, shall inform the Court through the Registrar of action, if any, taken by it under the circumstances.*

The referral practice of a situation by the Security Council can be read in resolution 1593 (2005) in Sudan (Darfur) and 1970 (2011) resolution in Libya Arab Jamahiriya. Regarding further discussion both resolutions will be discussed in other scientific papers.

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ASSET FORFEITURE OF PERPETRATOR OF CORRUPTION CASE WITH CIVIL FORFEITURE SYSTEM

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ABSTRACT

The civil forfeiture system has the advantage of facilitating the assets forfeiture through reverse proofs where the defendant must prove that his property is not derived from a criminal act of corruption. The problem is: 1. How is the assets forfeiture of the perpetrators of corruption through the civil forfeiture system?, 2. What is the advantage of the use of civil forfeiture system in the appropriation of assets of the perpetrators of criminal acts of corruption? The method used in this study is juridical normative research that refers to the norms and legal principles contained in legislation and court decisions.
The forfeiture of assets belong to perpetrator of corruption through the civil forfeiture system can be done in criminal and civil, so that the assets of the perpetrators of corruption can be deprived for the state.

Keywords: Corruption case, Asset Forfeiture, Civil forfeiture

Introduction

Corruption is not only a national issue of a country, but it is also an international problem. Purwaning M. Yanuar, states that "many developing countries are suffering losses due to corruption, therefore, the problem of corruption as a matter of serious concern."[1]

Since the enactment of Law Number 31 Year 1999 concerning the Eradication of Corruption on 16 August 1999, which was amended by Law Number 20 Year 2001 regarding the Amendment of Law Number 31 Year 1999 concerning the Eradication of Corruption which was enacted on 21 November 2001 (hereinafter written UUPTPK), eradication of corruption has not yet reached the expected point of success in Indonesia.[2] Koentjaraningrat, stated that corruption has become the nation's culture.[3]

The corruption crime committed by former President Commissioner of Bank Harapan Sentosa, Hendra Rahardja, amounted to US $ 9.3 million deposited in a bank account in Hong Kong, Irwan Salim US $ 5 million in Swiss Bank, in the form of funds in the United States, China, Australia and Singapore are estimated to reach Rp.6-7 trillion.[4] Corruption of Bank Indonesia Liquidity Assistance (BLBI) abroad is around Rp.18.5 trillion in accounts of several banks in the United States.[5] Gayus Tambunan corruption case with the amount of Gayus assets seized approximately Rp.109 billion, including accounts worth Rp.28 billion and assets of US $ 659,800, Sin $ 9.680.000, and 31 gold bars (@ 100 grams) worth Rp.74 billion.[6] The cases of corruption described above, only a small part of the number of corruption cases that have occurred in Indonesia. The cases of corruption mentioned above, are classified as a lot of corrupted state assets.

Based on the facts, it can be said that corruption is never exhausted even thrives. Marwan Effendy, said that corruption in Indonesia is inexhaustible, the action is increasingly widespread, even its development continues to increase from year to year, both in the number of cases, the amount of state financial loss and quality. Even the modus operandi is increasingly patterned and systematized, its scope has penetrated to all aspects of community life and across national borders, national corruption is agreed as an extraordinary crime (extra ordinary crime) and transnational crime.[7]

The return of state funds or state assets resulting from corruption in its implementation is difficult to implement because in general, corruption both on a small scale and large scale is done in a very secret, covert, involving many parties with solidarity to protect each other or cover up the act of corruption through legal manipulation, legal engineering, and ignorance of state officials against the interests of the people. Even the assets of the spoils of corrupt people have crossed the country through transfers between accounts to other countries as anticipatory and to obscure the origins of the wealth.[8] Therefore, it must be done a remarkable way that is by way of seizure of the assets of the corruption.

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[1] Purwaning M. Yanuar, Pengembalian Aset Hasil Korupsi Berdasarkan Konvensi PBB Anti Korupsi 2003 Dalam Sistem Hukum Indonesia, (Bandung: Alumni, 2007), p. 10.
[2] Ario Wandatama dan Detania Sukarja, "Implementasi Instrumen Civil Forfeiture di Indonesia Untuk Mendukung Stolen Asset Recovery (StAR) Initiative", Makalah dalam Seminar Pengkajian Hukum Nasinal, 2007, p. 1.
[3] Koentjaraningrat, Bunga Rampai Kebudayaan, Mentalitet dan Pembangunan, (Jakarta: Gramedia, 1974), p. 75.
[4] http://www.sinarharapan.co.id/berita/0601/09/nas10.html, diakses tanggal 8 Januari 2018.
[5] http://kontak.club.fr, accessed in January 8th, 2018.
[6] Metanews.com., "Kasus Gayus Diusulkan Dilebur", on January 8th, 2018.
[7] Marwan Effendy, "Pengadilan Tindak Pidana Korupsi", Lokakarya, Anti-korupsi bagi Jurnalis, Surabaya, 2007, p. 1.
[8] Oka Mahendra, "Kerjasama Bantuan Timbal Balik Dalam Pengembalian Aset Hasil Korupsi", Makalah dalam Seminar Sinergi Pemberantasan Korupsi, Jakarta, on Tuesday April 4th, 2006. p. 9.

With regard to the civil forfeiture system, the term acquisition or return is less relevant to use, it should be emphasized that in the context of civil forveiture it is more appropriate to use the term for deprivation or asset deprivation. The object is the state assets on the other hand who are not entitled to have it because of related criminal offenses.

Bismar Nasution, said that the civil forfeiture system can be more effective in returning assets stolen by corruptors than through the criminal system. This is because the civil forfeiture system has advantages in facilitating the taking of assets through the proving process in the trial. Civil forfeiture uses a civil law system that uses a lower standard of proof than the standard used by criminal proceedings. Civil forfeiture uses a reverse evidentiary system whereby if the government has sufficient initial evidence that the asset to be seized is the result of a criminal offense, then the offender must prove it is his property and not of a criminal offense.[9]

This is what causes the civil forfeiture system to be an excellent alternative if the criminal lane is unsuccessful. Even in practice, it was found that civil forfeiture procedures were judged to be more effective in retrieving stolen assets, although this procedure did not escape such weaknesses and high costs.[10]

Main Problem

1. How is the appropriation of assets belonging to the perpetrators of corruption through the civil forfeiture system?
2. What are the advantages of using the civil forfeiture system to deprive the assets of the perpetrators of corruption?

Discussion

Deprivation of assets belonging to the perpetrators of corruption through the civil forfeiture system.

There are two types of appropriation that are used internationally to recover the proceeds of criminal acts of corruption, namely according to criminal law and according to civil law. Civil forfeiture is often called "*in brake forfeiture*", whereas confiscation under criminal law known in the criminal forfeiture is referred to as "*in personam forfeiture*".

Criminal law or criminal forfeiture referred to as "*in personam forfeiture*" is not widely discussed here, simply reminding that the deprivation under the Criminal Code is a criminal (additional) to property (*vermogensstraf*) intended to "harm" the convict (by reducing his wealth). Civil forfeitures are considered "*in rem actions*", based on the unlawful use of the res, irrespective of its owner's culpability. The deprivation of civil forfeiture model assets in the United States is used because it is encouraged to combat drug trafficking and is currently a criminal act of terrorism that is basically used by civil procedure law. That's why in the United States, civil forfeiture still get constitutional guarantees. The constitutional guarantee in Indonesia is contained in Article 28G of the 1945 Constitution:

1. Everyone is entitled to personal, family, honor, dignity and property protection under his control, and is entitled to a sense of security and protection from the threat of fear to do or not to do something that is a human right.
2. Everyone shall have the right to be free from torture or degrading treatment of human dignity and entitled to obtain political asylum from another country.

Based on the provisions of Article 28G of the 1945 Constitution above, the assets of a person shall not be arbitrarily searched or seized, since property is included in the protection of criminal law and civil law. This constitutional guarantee is not to abolish the formation of Draft Law on Deprivation of Corruption Assets. The Basel Institute on Governance, the International Center for Asset Recovery[11], states that the advantages of appropriation procedures of corruption offenses through special procedures of legislation are as follows:[12]

1. The defendant has passed away. Traditional criminal law based on criminal liability of a perpetrator causes the illegal assets of the perpetrator can not be deprived of the state. Through civil forfeiture the brake process can be carried out on the assets or illegal possessions may be seized.
2. The accused is free in criminal justice and therefore confiscation under criminal law is not possible. So civil forfeiture makes it possible to rob the proceeds of the crime by not reopening the case, since civil forfeiture is not intended to hold the defendant accountable, but rather to prove the origin of the asset.
3. The defendant can not be found in the "victim country", because he has fled abroad.
4. The owner of the related asset is uncertain. Economic crime is usually followed by money laundering,

[9] Bismar Nasution, "Stolen Asset Recovery Initiative dari Perspektif Hukum Ekonomi di Indonesia", paper presented on Seminar Pengkajian Hukum Nasional 2007, Pengembalian Aset (Asset Recovery) Melalui Instrumen Stolen Asset Recovery (StAR) Initiative dan PerundangUndangan Indonesia, held by National Law Comission in Hotel Millenium Jakarta 28-29 November 2007, p. 6.

[10] Ibid., p. 7

[11] **http://www.baselgovernance.org/icar/, accessed on January 8th, 2018.**

[12] Ibid.

if it succeeds, then the ownership (suspect) is difficult to prove. Non-Conviction Based Forfeiture or civil forfeiture deprivation is expected to be very useful.

5. The expiry provisions require a criminal act of corruption, not allowing the investigation of this act. Civil forfeiture greatly enables seizure of proceeds of crime because there is no expiry.

Asset deprivation can be done using civil forfeiture according to Non-Conviction Based Forfeiture (NCBF) version if the cases are related to the following:[13]

1. The suspect or defendant has died. Because traditional criminal law focuses on a person's responsibility in the usual way to take the proceeds of a criminal offense after an action on the persona. When a person dies and therefore the possibility of adjudication has been impossible, the illegally acquired assets are unlikely to be recoverable.
3. The suspect or defendant has been released in the criminal justice process, and seizure is not possible. A non-confiscatory belief process based on the likelihood of recovery of the proceeds of a crime.
4. There are also cases where the defendant can not be found within the jurisdiction for having fled, having been jailed overseas or for other reasons.
5. The owner of the asset is uncertain. Money laundering usually follows a commission of economic crime to hide the origins of assets. If effective money laundering processes even ownership can be difficult to prove.
6. Legal restrictions to prevent forms of offenses are being investigated particularly in corruption-stricken countries.

The Civil forfeiture system uses a lawsuit against an asset (*in rem*) while criminal forfeiture is a lawsuit against a person (*in personam*).[14]

This second difference makes a difference in terms of proof in court. In Criminal forfeiture, the Prosecutor must prove the fulfillment of elements in a criminal act such as a personal culpability and a mens rea from a defendant before being able to seize the assets of the defendant. Due to its criminal nature, criminal forfeiture also requires the Prosecutor to prove it by an beyond reasonable doubt standard.[15]

Civil forfeiture is civil, so it is not required by the Public Prosecutor to prove the elements of the wrongdoing of the person who committed the crime (personal culpability), simply proves the allegation that the defendant's asset is related to a criminal act of corruption. The claimant is sufficiently proved by the standard of evidence of a preponderance of evidence that an offense has occurred and an asset has been generated, used or involved with a crime.[16] The owner of the asset must then prove to the same standard that the asset being sued is not a result, used or associated with a claimed offense (reversed proof).[17]

Although the procedure used is civil, however, civil forfeiture uses a slightly different procedure than ordinary civilians in which the owner of the asset required is not the litigant's property but also the third party of the proceedings such as the other person and / or his / her family. In addition, civil forfeiture uses an inverted evidentiary system in which the owner of a deprived asset must prove that the owner is innocent or unaware that the asset is the result used or related to a criminal act of corruption. This is certainly slightly different from the general civil lawsuit that requires the prosecution to prove the existence of an unlawful act and the harm it undergoes.[18]

The proof of the asset owner in the civil forfeiture relates only to the relationship between a crime and a claimed asset or in other words the owner only needs to prove that "the asset is innocent". If the owner can not prove that "the asset is innocent" then the asset is seized for the country. So the asset owner does not have to prove himself innocent or not involved in a crime. The relationship between the alleged crime and the owner's involvement with the offense is irrelevant in the trial and only the relationship between the owner and the required asset is the focus of the trial.[19]

The Advantages of Civil Forfeiture System in Depriving the Assets of the Owners of the Criminal Acts of Corruption

Civil forfeiture can be a very useful tool to confiscate and take over the assets resulting from corruption in Indonesia. At least there are several uses of civil forfeiture to assist law enforcement officials in the process of returning assets resulting from criminal acts of corruption. Some of the advantages of the civil forfeiture system are described as follows:

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[13] **http://www.assetrecovery.org/kc/node/3518064a-a345-11dc-bf1b-335d0754ba85.12, accessed on January 8th, 2018.**

[14] **Ario Wandatama dan Detania Sukarja, Op. cit., p. 4.**

[15] **Kanter, E.Y. dan S.R. Sianturi, 2002, *Asas -Asas Hukum Pidana di Indonesia dan Penerapannya*", Jakarta: Storia Grafika, 2002. p. 192.**

[16] **Stefan D. Cassella, "Provision of the USA Patriot Act relating to Asset Forfeiture in Transnasional Cases", *Journal of Financial Crime,* Vol. 10, No.4, 2003, p. 303.**

[17] Ibid.

[18] **Kuntoro Basuki, "*Pengembalian Aset Korupsi dalam Persfektif Hukum Perdata*", paper presented on *Seminar Pengkajian Hukum Nasioal (SPHN 2007)*, Hotel Millenium, Jakarta, on 28 - 29 November 2007, p. 14.**

[19] **Ario Wandatama dan Detania Sukarja, *Op. cit.*, pp. 6-7.**

Civil forfeiture is unrelated to a criminal offense so that foreclosures can be quickly requested to the Court rather than criminal forfeiture. Unlike foreclosures in criminal proceedings that require a suspect or conviction, the seizure of civil forfeiture can be done as soon as possible as the government suspects a link between an asset and a corrupt offense, it can immediately be requested to the Court for theft.

Civil forfeiture uses special civil evidences standards not based on ordinary civilians in the Civil Code. In accordance with the provisions of Article 1365 of the Civil Code, an act against the law must contain elements: There is an act; It is against the law; There was a mistake from the perpetrator; There are casualties; and There is a causal relationship between deeds and losses.[20] Civil forfeiture does not necessarily have to prove in advance the Act of Against the Law, but directly taken the asset if there is a strong suspicion that the asset is related to the criminal act of corruption. So that it can facilitate the seizure of assets in Indonesia because the standard of civil evidence is relatively lighter to be met than the standard of criminal proof. Moreover, this civil forfeiture system adopts reverse verification system so that it can ease the burden of the government to prove the lawsuit filed.

Civil forfeiture uses a reverse verification system whereby the owner of the required asset must prove that he or she is innocent or unaware that the asset demanded is a result related to a criminal act of corruption. This is certainly a bit different from the general civil lawsuit that requires the prosecution to prove the existence of an Act against the Law and must prove the financial loss of the state.

The proof of the asset owner in the civil forfeiture relates only to the relationship between a crime and a claimed asset or in other words the owner only needs to prove that "the asset is innocent". If the owner can not prove that "the asset is innocent" then the asset is seized for the country. So in the civil forfeiture the asset owner does not have to prove that he is innocent or not involved in a crime. The relationship between the alleged crime and the owner's involvement with the offense is irrelevant in the trial and only the relationship between the owner and the required asset is the focus of the trial.

Civil forfeiture is a lawsuit against assets (in rem). Means civil forfeiture is only dealing with assets that allegedly originated, used or have links with a crime. The perpetrator of the criminal act itself is irrelevant here so the fleeing, the disappearance, the death of a corrupt person or even the existence of a free verdict for the corruptor is not an issue in civil forfeiture. [21]The trial may continue and be undisturbed by the conditions or status of the corrupt. Frequently the corruptors flee or sick in the corruption criminal proceedings in Indonesia, civil forfeiture is a very lucrative alternative to the process of returning assets of the corrupt.

Civil forfeiture is very useful for cases where criminal prosecution is impeded or impossible to do. Often governments face corruption cases closely linked to politics so that law enforcement officials face difficulties in prosecuting them. Civil forfeiture is very profitable because political and social costs can be ruled out by law enforcement officials in depriving the assets of the perpetrators so that a criminal charge can be minimized.[22]

There are times when an asset related to a criminal act of corruption is unknown to the owner or the perpetrator. Civil forfeiture has advantages in this condition, because the one being sued is an asset not the owner. If using an ordinary criminal system, no man's assets are difficult to extract, because the seizure in criminal law relates to the offender of a criminal offense. So that if within a certain period of time after the seizure of no other party object, the state can immediately seize the non-possessed assets.

Civil forfeiture is a lawsuit against assets (in rem) while criminal forfeiture is a lawsuit against a person (in personam). This distinction makes a difference in the evidence in court. Criminal forfeiture, the prosecutor generally must prove the fulfillment of elements in a crime such as personal culpability and mens rea from a defendant before being able to seize assets from the defendant.

Civil forfeiture does not require the claimant to prove the elements and errors of the person who committed the crime (personal culpability). The claimant is sufficient to prove the existence of a probable cause or the suspicion that the defendant's asset is related to a crime. The claimant simply proves by the standard preponderance of evidence that a criminal offense has occurred and an asset has been generated, used or involved with a crime. The owner of the asset must then prove to the same standard that the asset being sued is not a result, used or associated with a claimed offense.[23]

Civil forfeiture may deprive all assets of corruption offenses from perpetrators including third party assets, their families, relating to such offenses. Even civil forfeiture can impoverish the offender until it has absolutely no possessions. One consideration is to promote social justice that the disadvantaged assets are the rights of the people and must be restored.

The solution to implement civil forfeiture in Indonesia, there are several solutions that need to be considered by the government.

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[20] Kurtanto Purnama., "Teori Perbuatan Melawan Hukum Secara Perdata". Article on *Progresif Jaya Suara Kita Bersatu*, Jakarta, on May 21, 2006, p. 1-3.

[21] Casella, *op.cit*, pp. 2-5.

[22] Adnan Topan Husodo, Catatan Kritis Atas Usaha Pengembalian Aset Hasil Tindak Pidana Korupsi, *Jurnal Legislasi*, Vol. 7, No.4, Desember 2010, p. 2

[23] Ibid. p. 20

First, the need for a special law on civil forfeiture in the Indonesian national legal system. If adopting the civil forfeiture system in UUPTPK amendment, it is not appropriate. because civil forfeiture requires a civil law system different from Indonesian civil law. Income in UUPTPK amendment is feared can not facilitate this. It is necessary to have a special law that fully regulates the provision of civil forfeiture from the start of the basis and legal framework, procedural law and procedures in foreclosure.[24]

The separation of civil forfeiture from UUPTPK is intended to make the civil forfeiture system clear. Establishment of a special regulation to regulate the legal basis and procedure of civil forfeiture as practiced by Australia or the United States. This is important because civil forfeiture requires a procedural law and procedure that is different from common civil law. Procedures and procedural laws in such special regulations can be a *lex specialis* of civil procedure law in Indonesia. Similar to the enactment of UUPTPK as *lex specialis* of Criminal Code Procedures in case of court *in absentia*.

Secondly, there needs to be a strong political will from the government and law enforcement agencies in implementing the civil forfeiture system.

Third, the need for amendments to Law no. 1 of 2006 on Mutual Legal Assistance in Criminal Matters. Therefore, under Article 2 and Article 3 Mutual Legal Assistance in Criminal Matters only regulates legal aid in criminal matters.

The government must empower Mutual Legal Assistance (MLA) by progressively making MLA agreements with other countries. Currently Indonesia is still very lagging when compared with other countries such as the US, the Philippines or Thailand which has made approximately 50 MLA agreements. In addition, bilateral and multilateral agreements that have already been signed are still not ratified, such as bilateral agreements with Korea or multilateral agreements at the ASEAN level. In the absence of such ratification, Indonesia can not seek assistance to ASEAN countries such as Singapore which is presumed to be the storage of corrupt assets. MLA development should be undertaken by the Indonesian government by intensifying cooperation with other countries.

Fourth, the need for socialization to the public at large and law enforcement officers in particular regarding the concept and legal framework of civil forfeiture. Civil forfeiture in the United States is a controversial system. It is feared that without a good understanding to the community and law enforcement officials, it will experience many obstacles.

Fifth, it is necessary to designate a special body authorized to file a civil forfeiture lawsuit.

Sixth, it is necessary to make a deep study of economic, social and political aspects before implementing the system in Indonesia.

Closing

Conclusion

The appropriation of assets belonging to the perpetrators of corruption through the civil forfeiture system may be conducted in criminal and civil proceedings simultaneously, and may be directly through a special civil lawsuit against an asset (*in rem*) that has no relation to the offense. The presence or absence of the criminal element, need not be questioned but by focusing on the strong suspicion that the assumed asset has something to do with the criminal act of corruption means that assets are litigants. So the reverse proof does not need to be charged to JPN but only charged to the defendant. JPN is sufficient to prove the allegation that the defendant's assets are closely related to a criminal act of corruption. Because civil forfeiture adopts the principle of reversed proof of pure because the parties who feel objection that proves that the assets that are sued have no relationship with corruption. The advantage is, civil forfeiture places the treasure as the litigant.

Suggestion

Suggestions to be expected are: to be revised to Article 18 by enacting civil forfeiture and revision of Article 19 section (1) of Law No.39 of 1999 on Human Rights; so that the confiscation of assets belonging to the perpetrators of corruption through the civil forfeiture system can be done. Establishment of a separate institution concerning asset deprivation because the arrangement of civil forfeiture is so wide that a law is required; for the Indonesian government to seriously impoverish the corruptors through anti-corruption legislation policies.

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IMPROVING LECTURERS PERFORMANCE WITH RADICAL CHANGES COMMITMENT : Case Study at Private Higher Education in Central Java, Indonesia

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ABSTRACT

The objective of this study proving and analyzing the effects of job satisfaction through radical changes commitment. The improvement of the radical changes commitment would bring good effects for professional competence, service innovation, and lecturer performance. The population of this study was lecturers of Private Higher Education in Central Java, Indonesia. There were 2027 lecturers who was taken as a sample of 230 to be respondents. The analysis technique used for this study was Structural Equation Model (SEM) using the Amos version 21 Software.The result showed that was a positive and significant effect of job satisfaction variables on the lecturer performance. It also revealed that radical changes commitment, professional competence and service innovation positively and significantly influenced on the lecturer performance..The new finding of research was to improve the lectures performance was needed several aspects to reach it, such as : high professional competence, radical change commitment, and job satisfaction.

Keywords: Job Satisfaction, Radical Change Commitment, Professional Competence, Lecturer Performance.

Introduction

The phenomenon of competition among organizations happens so sharply in Indonesia, at this time, the condition makes, even, established organizations feel the need to defend themselves from competitors that develop a range of new products and services, as well as entrepreneurs who have innovative offers. Business was characterized by the rapid changes that occur in the customers, technology, and competition (Canning and Hanmer-Lloyd, 2007; Lee and Sukoco 2007). Therefore, organizations need a continuous renewal in order to survive. Successful organizations are organizations that can transform them selves to respond to the competition. The one who can move fast will be able to develop new products and give quick responds to adapt to constantly changing conditions fast and radically.

Human resources (human capital) are the assets of most reliable organization in creating a sustainable competitive advantage since they meet the criteria factors of competitive advantage that is difficult to duplicate and can be developed in a sustainable manner. The more rapid flow of today's competition tends to make the management approach through a humanistic perspective as organizational commitment become relevant to the changes that occur in the environment of the organization. Humanistic perspective puts human resources as one of the strategic factors in the effort of improving the excellence of an organization (Boudreau 2005; Kagaari and Munene, 2007; Kang and Snell, 2009).

A cursory look at the global and the Private Higher Education (PTS) in Central Java seems that there is no problem because the number of students enrolled and the number of teachers or lecturers remain from year to year has already increased. However, further investigation may turn out and if so, there will be found problems within the PTS. For example, the number of private universities that exist from year to year increase, but actually it can be said to be apparent because every year many new PTS are standing and, on the other hand,not a few private universities were closed.

Viewed in terms of the development of the number of private universities from year to year, it is indicating a fairly rapid growth. As a result, this condition led to the rapid development in high intensity competition. Competition occurs not only among private universities (called as PTS) but also with public/state universities (called as PTN). This condition resulted in stiff competition to the number of students enrolled in each of the most PTS from year to year to decrease.

During the last ten years, there has been greatly competition prevailing in the world of PTS. It is characterized by a large PTS symptoms which can develop rapidly because each of the PTS is able to attract new students in large numbers. While there is little middle class and small private universities increasingly smaller due to various reasons that surrounded them. In other words, there has been a difficulty experienced by some private universities in Central Java, particularly those who are in the category of medium-sized and small private universities. One of the difficulty is the decrease of the number of annual student entry. Many factors affect the performance of PTS, both internal factors and external factors of the organization. Internal factors derived from such human resources, organizational culture, quality of work life, and leadership. Meanwhile, in addition, more over external factors consist of competition, government regulations, economic development, political change and the tastes of the public and many others. In this study, the factors affecting the performance of PTS focused on only the internal factors. The role of human resources determines the success and sustainability of Private Higher Education. The quality of Higher Education is based on human resources, especially the quality of the lecturers.

One of the elements that determine the sustainability of private universities in the future is the existence of sufficient amount and high quality of human resources (HR), especially its tenured faculty. In this regard, the existence of human resources, especially human tenured faculty who have a strong commitment to the organization, becomes a strategic factor for PTS concerned to face stiff competition in the future. Committed staff/ human resources, will always try to participate in developing the organization and be loyal to the institutions where they feel as their shelter. Thus, a teacher's commitment will determine the viability of the private universities.

Turnover of tenured faculty at private universities in Central Java during the ten year period showed a fairly high rate, indicating unfavorable conditions. Turnover, (Podsakoff et al. 2007; Kabungaidze et al. 2013), is a significant issue to the organization's strategy today. The opinion is also supported by (Kemery et al., 1987; Sagie et al., 2002; Parker and Kohlmeyer, 2005), which suggested that a high employee turnover can be detrimental because it creates the potential range of costs, such as the cost of training and development has been invested, the level of work that had to be sacrificed because of the departure of employees who have received training, and recruitment and retraining costs to fill the place left by employees who have gone.

The preliminary study on five private universities conducted by the author has made an assumptions whether a high turnover of staff lecturers remain, especially for those who have passed the higher education, due to several reasons such as: a) obtain a higher income, b) be accepted as civil servants later moved to government agencies, c) other good facilities given at another institution, d) an internal problem at the PTS where the lecturers work, e) family factors, f) distance of the workplace, and so forth.

In addition to the turnover, another indicator that indicates a problem with the commitment of human resources at PTS indicated by the low quality of the lecturers in terms of the functional academic positions they have. As it has been known that in order to achieve a certain level of functional academic positions,lecturers should perform basic tasks of Tri Dharma (three basic activities) of university level consisting of education and teaching, research, and community service. For lecturers who have reached or have a high academic position, it means they have been doing basic tasks as the lecturers well, and vice versa. The findings of the preliminary study showed that most of the private universities in Central Java had more lecturers stick with low academic functional position, namely:without assignment 44.77% and assistant experts 22.5%.

Review of Related Literature and Hipothesis

Job Satisfaction

Job satisfaction is an individual's general attitude toward his work, namely the difference between the amount of rewards received by a worker and the amount they believe they should receive (Lane et al., 2010; Machado et al. 2011;Nojani et al. 2012). Therefore, job satisfaction is influenced by variables which can be classified into three groups:1) the characteristics of the job, 2) the characteristics of the organization, and3) the characteristics of individuals or workers. Job satisfaction can make the employees achieve organizational goals, so as more interested in the work and honored to be part of their organization.

Assessment of performance was closely linked with the wage system, in which each employee's contribution in line with there ward will be given (Fisher et al., 2010; Hatch and Dyer, 2004; Iqbal,2012). He also explained that the performance-based remuneration and accurate performance measurement will be an important tool in achieving organizational excellence.

A research conducted by Albrecht et al., (1991) stated that the work pressure that comes from organizations such as the salary received, the style of the supervisor, as well as the possibility of training and career development in the future is enough pressure felt by the employees so as to cause a decline in job satisfaction. Job satisfaction is an individual orientation that affects the role of workers in the work place.

Lack of management commitment is the main reason to the failure of efforts to improve the quality unless the management is fully committed to excellence of service of any remedial efforts which will be spared from the early failure (Fei Tsai et al., 2007; Felfea and Yan, 2009). He also explained that asynthesis of the relevant literature suggests that reward or award and training and empowerment are the best indicators for constructing the top management commitment to service quality. Mulky (2012) described a significantly positive effect of job satisfaction on organizational commitment. Erbaşı & Way (2012) indicated that financial incentives and non-financial positive gave big influence on the employee’s performance.

Radical Change Commitment is a confidence and strong support for the goals and values of the organization of an individual who has the ability to change the reference, direction, order, policy organization, means and methods of work, and available mindset which become more valuable and better than ever in an attempt to achieve the organizational goals.Another point of consideration for the employee to be in a company is perceived as fair compensation given (Giannikis and Michail, 2011). Thus, the office boy is definitely not to be given a compensation equal to the cashier. Based on the above explanation, the author has formulated the first and second hypothesis, as follows:

According to Hackman and Oldham (1980), there was a positive effect of job characteristics to the commitment. The job characteristics mentioned are skill variation, autonomy, task, task, feedback. Shah et al., (2012) stated that the job is a significant effect on organizational commitment.

Porras and Robertson (1992) said that the key factors in the work environment combined with the individual role of knowledge, attitudes and beliefs, and perceptions of managers would determine the behavior of the individuals in the work which then generates individual performance and company performance.

Yousef (2002) examined 361 workers in the UAE and concluded that job satisfaction influenced the affective commitment to the positive and strong direction, while the influence of job satisfaction to the low alternative commitment and the high sacrifice commitment went to the weakly positive direction. Moreover, the higher the job satisfaction of employees, the stronger the desire of employees to remain in the organization.

Employees with highly high sacrifice commitment consider that being persistant in an organization, only,because the sacrifices exceed the benefits if the employee is out of the organization and it usually comes from a high job satisfaction.

This means that the higher the job satisfaction of employees, the higher the high sacrifice commitment that employees are concerned. In the same condition, it is true that employees with low alternative commitment would keep on staying at the organization because the low chances of getting a relatively same job outside of the organization where he currently resides. The larger the greater of the job satisfaction is low alternatives commitment. In the other hand, the lower the job satisfaction, the greater the desire of employees to find other jobs outside from the organisation. Based on the above explanation, the author has formulated the first and second hypothesis, as follows:

H1:Job satisfaction will positively influence the radical change commitment

Radical Change Commitment

Commitment is the power in the mind of a member, which is derived from the process of self-identification of a member of his team to the team, which resulted in a high involvement to wards the implementation of the tasks, so that the team members wish to remain a member of the team (Lopez et al., 2005; Marshall et al. 2005; Reichers,1985).

The changes of Higher Education reflect the new demands in society because it comes from the campus which elites of a nation are produced. If the business world has already changed but the education system has not, then, a country will be in danger. And so, several steps of changes in demand can not be stopped. It is been such a high demand for to day's environment in which to be able to make changes to the organization which have a human resources committed to radical change, in order to adjust for changes that might occur. Each step of the changes is to maintain and sustain the life conditions.

A change means to adapt, adjust, and become more empowered to maintain and continue life. Conditions, for change it self, are the process of learning and all the people who are in the company are learners. The core of the learning organization is information which is available and accessible and always enriched through a condusively interactive process.

Humans in the organization should always be close to the information, see the new facts, and be challenged to create a new one. Organizational learning is reflected by the four things, namely managerial commitment, perspective systems, openness and experimentation, as well as the transfer and integration of knowledge (Hocking et al. 2007; Hopkins and Bilimoria, 2008; Reynolds and White,2000). One element of managerial commitments in the form of the organization's commitment is to provide a quality of work life which is good for its employees. With the availability of good quality of work life, it enables an organization to retain its employees to remain and build organizations where they work.

In general, an employee who has had a good working life will attempt to retain his job. Learning is the way companies build and enrich the knowledge on which to base of the development of technology, marketing, products and processes, and the development and improvement of the use of the expertise of its employees (Friedman, 2009;Hosseinkhanzadeh et al. 2013).

Employees who have a commitment to radical change will push him self and his institute to enhance the realization of learning in order to increase their knowledge and skills to improve the quality of work and performance.

H2: Radical change commitment will positively influence the professional competence

H3: Radical change commitment will positively influence Service innovation

Lecturer's Performance

Fauske and Raybould (2005) stated that the function of organizational learning is an antecendent of organizational competence. Learning process carries out the members of the organization to gether with other resources to build a process in which competence is established, and the employees continuously apply the knowledge and their expertise to strategic issues or operational problems so that a deeper knowledge a wakened and will further improve the competences.

Explorative learning focuses on knowledge in the context of a product or a service which reaches the absorption of the external knowledge (Janjua etal., 2012; Jensen,2005;Shah et al. 2012). Explorative learning, as a process of organizational learning, emphasizes the process of change that has absorbed the knowledge associated with previous experience. A company may fail to apply the knowledge that has been absorbed because of the limited learning (Juceviien and Leonaviien,2007; Maidina and Hamzah, 2010; Man et al., 2008).

The level of organizational learning has a significant effect on knowledge integration, knowledge management capability, and the ability of the company's innovation (Joseph and Roumani, 2014; Song et al., 2009). Prahalad and Hamel (1990) explained that the competence is expressed as the ability to organize job tasks and deliver the values which may include communication competence, involvement, and commitment to work a long the boundaries of the organization. Professional competenceis the ability, knowledge and attitude which focus on the development of competencies required in a job or a business career.

Cameron and Quin (1999) suggested that competencies were required in building a market culture. They are managing competitive advantage, encouraging the workers, and well managing customer service. Capability or competence is the ability and knowledge of the company that become the basis of everyday problem solving. Competence is one of the important resources in the company because the company requires competence to be used with other resources (Mantesso et al., 2008; Margerison,2005; Spendlove,2007).

An organization or a company that can perform organizational learningis a company which has expertise in creating, retrieving and transferring knowledge, modifying its behavior to reflect new knowledge and experiences. Companies which are able to manage knowledge better through the absorption of a variety of important information will be better and more successful than other companies.

Schroeder et al., (2002) described that the organizational learning process will create new competencies, such as technological capabilities, marketing capabilities, and manufacturing capabilities. Organizational learning process which involves a wide range of functional capabilities will further enhance the knowledge and capabilities to improve effectiveness and efficiency.

Innovation is inseparable from knowledge itself as one of the key resources that must be owned by a minimum of human resources. Innovation is 90% learning and driven by knowledge and innovation process, as a whole of a series of learning cycles.

Performance can be interpreted as an achievement which is the result of work that can be accomplished by a person or a group of people in an organization in accordance with the authority and responsibilities of each in order to achieve organizational goals legaly and it does not violate the law in accordance with the moral value and work ethic. Performance is an outcome achieved by the workers on the job according to specific criterias that apply to a particular job and evaluated by certain people.

Maslow (1970), stated that the individual performance must be able to develop the individual competence as to what the individual wants, according to his or her potential. The concept of work that uses positive approaches and individual perspectives, some how, they make the individuals feel treated fairly by the organization and its agents. This situation will create a sense of mutual trust which can bring the performance that beyond of the expectations.

Luke and Farrell (2000), explained that marketing and innovation are a means to drive competitive advantage. Companies, which have implemented the innovation, have already applied the new ideas to develop their products. Crespell and Hansen (2008), expressed their view that the company needed to bring success to the innovation in their management. It required the synergistic effect of management to actively steer innovation in building success through a healthy working environment and organizational commitment, interest in innovation and innovation strategy.

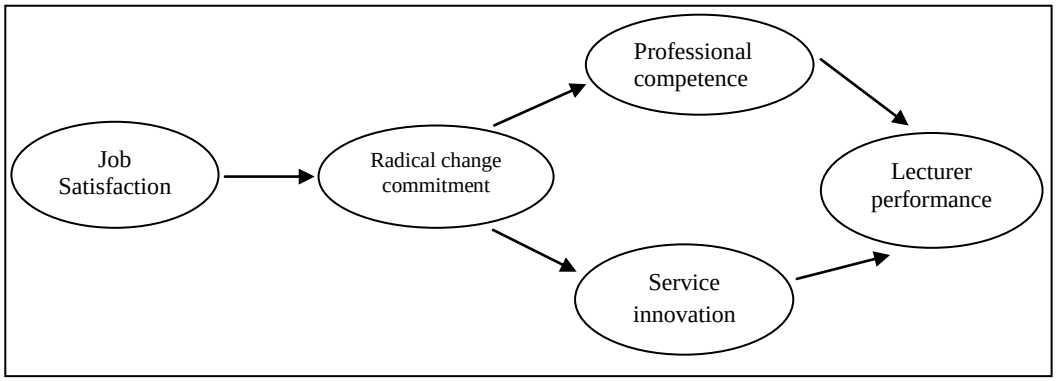
Many results of the study show clearly that the innovation has a great effect on performance (Damanpour et al., 1989; Zahraetal., 1988). Baker and Sinkula (1999) suggested that innovation strategy is influenced by the presence of strategic assets, combined with the external and internal organizational learning. Their research finding sindicated that the company's innovation strategy improve the company’s performance. Li et al., (2001) conducted a study in an industrial area in China with the findings of the positive influence of innovation to the company’s performance variables.

Based on the previous descriptions, it can be concluded that a company or an organization, especially private universities which gives the service, will be able to improve organizational performance if they can enrich the professional competence and innovative services.

H4: Professional competence will positively influence the lecturers’ performance

H5: Service innovation will positively influence the lecturers’ performance

Figure 1: Research Model



Research Methods

The method used in this study was a survey method in which the author distributed questionnaires to the respondents who were the tenured faculty, both civil servant lecturers and private lecturers, and work at 8 (eight) private universities which have done radical change in Central Java province.

Only 244 copies, out of the total 400 questionnaires distributed, got by the author and he got a response rate of 61%. After processing and modifying the data, only 230 respondents used as the main resources analyzed by using Structural Equation Model (SEM).

Hypothesis Testing

To test the null hypothesis be tween the relationship of the regression coefficient is equal to zero by*t* test was prevalent in the regression models. The results of the data analysis with AMOS 21.0 software were presented in Table1.

Statistical tests of the hypothesis 1 (H1) showed that the estimated parameter valueswas 0.190, with a standard error of estimate parameters of 0.071, the value of the critical ratio of 2.274 with a probability value of an error rate of 0.023. Using an alpha significance level of 0.05, it could be concluded that the hypothesis 1 (H1) which stated that the higher the degree of job satisfaction, the higher the radical change commitment was acceptable. This indicated that the variable degree of job satisfaction may increase the radical change commitment of the lecturers in Private Higher Education in Central Java. These results support the organizational commitment theory, which explained that the satisfaction of the team members in the organization can generate organizational commitment members (Yousef, 2000; Metcalfe and Dick, 2002).

Statistical tests of the hypothesis 2 (H2) showed that the estimated parameter valueswas 0.176, with a standard error of estimate parameters of 0.105, the value of the critical ratio of 2.108 with a probability value of an error rate of 0.035. Using an alpha significance level of 0.05, it could be concluded that the hypothesis 2 (H2) which stated that the higher the degree of radical change commitment, the higher the degree of the professional competence was acceptable.This indicates that the variable degree of radical change commitment can improve the degree of the professional competence. The hypothesis-testing results support the research conducted by Frank, R.H (2003).

Statistical tests of the hypothesis 3 (H3) showed that the estimated parameter valueswas 0.191, with a standard error of estimate parameters of 0.086, the value of the critical ratio of 2.201with a probability value of an error rate of 0.028. Using an alpha significance level of 0.05, it could be concluded that the hypothesis 3 (H3) which stated that the higher the degree of radical change commitment, the higher the service innovation was acceptable.This indicates that the variable degree of radical change commitment can improve the service innovation. The results of this hypothesis support the research conducted byYoesef (2000) and Frank, R.H (2003).

Statistical tests of the hypothesis 4 (H4) showed that the estimated parameter valueswas 0.169, with a standard error of estimate parameters of 0.078, the value of the critical ratio of 2.067 with a probability value of an error rate of 0.030. Using an alpha significance level of 0.05, it could be concluded that the hypothesis 4 (H4) which stated that the higher the degree of professional competence, the higher the lecturers' performance was accepted.This indicates that the variable degree of professional competence can improve the performance of the lecturer. The results of this study support the results of the research conducted by Diefendorff, (2008).

Statistical tests of the hypothesis 5 (H5) showed that the estimated parameter valueswas 0.226, with a standard error of estimate parameters of 0.078, the value of the critical ratio of 2.726 with a probability value of an error rate of 0.006. Using an alpha significance level of 0.05, it could be concluded that the hypothesis 5 (H5) which stated that the higher the degree of service innovation, the higher the lecturers performance was accepted.This indicates that the variable degree of service innovation can improve the performance of the

lecturer. The results of this study support the research conducted by Saxton, et al., (1992) which states that the innovations consists of incremental innovation and radical innovation are an important issue that is used to gain competitive advantage, which in turn will improve the performance of the company.

Table 1: Results of the regression analysis

			Estimate	Standardized Estimate	C.R.	SE	P	Label	
RC	<---	JS	,234	,190	2,274	,071	,023	par_29	Sig
PC	<---	RC	,222	,176	2,108	,105	,035	par_28	Sig
SI	<---	RC	,236	,191	2,201	,086	,028	par_31	Sig
LP	<---	PC	,169	,181	2,166	,078	,030	par_15	Sig
LP	<---	SI	,214	,226	2,726	,078	,006	par_20	Sig

Job Satisfaction (JS); Radical change commitment (RC); Professional competence (PC);
Service innovation (SI); Lecturer performance (LP)

Findings

The findings of this study indicate relatively equal importance to the radical change commitment, service innovations and professional competence in improving to the lecturers' performance.

It is said that confirmatory testing among variables of Full Model was fit. It can be seen from the chi-square value of 346.481<354.18 (chi square table at the level of $\alpha = 0.05$; DF=312, it could be obtained that the Chi-Square value was 354.18), in which CMIN/DF, GFI, TLI, CFI, REMSEA, were with in the range of values expected although AGFI was marginally acceptable. Thus, it was indicating that the model could be declared fit. While the value of 0.05 Hoelter's test results=231and the value of Hoelter's 0.01=243, and 219 samples in this study, so it could be said in the fit category.

The independent variables of this study were the job satisfaction. While the dependent variables were the radical change commitment, professional competence, Service Innovation , and the performance of lecturers .

Managerial Implications

The implication of the study is the balance role of those three variables which must be managed asa mutual benefit instrument, and there fore its improvement must be also balanced. Radical change commitment can be treated as capital to drive lecturers' performance, where as commitment is a radical change in the engine to perpetuate a high lecturers' performance.

The factors of job satisfaction are quite a big role in generating lecturers' performance. The management of private universities is advised to always understand these two factors not only from the perspective of the institution, which is a priority in terms of interest lecturers, but also periodically evaluate the environmental development and the faculty needs.

Professional competence is a very important instrument for generating lecturers' performance. Investment, in these areas, should receive more attention from management because the private universities have a character with a high human involvement in which the role of professional competence is essential.

Social assets owned by private universities also determine the lecturers' performance, and, of course, depending on how well the assets have been selected and developed continuously. Conducting the development of social assets routinely and continuously will result in a strong social asset and should be an important part of management that managed private universities.

Limitations Of The Study

The samples of the study consisted of lecturers from eight (8) Private Universities (PTS) that meet the specified criteria which have been doing the radical change. It is possible that there are many private universities in Central Java were actually eligible for inclusion in the study, but was not done due to the limitation of the research.

This study only used private universities tenured faculty who have a radical change, therefore the implications of the findings of this study may not be extended to private universities which do not change radically. The findings of this study were also limited to Central Java province, as an answer to the survey instrument which reflects the socio-demographic characteristics of country-specific feature.

Closing

Conclusion

The aim of the study was to analyzing the effects of job satisfaction through radical changes commitment. The improvement of the radical changes commitment would bring good effects for professional competence, service innovation, and lecturer performance.

Analysis has showen a positive and significant effect of job satisfaction variables on the lecturer performance. It also revealed that radical changes commitment, professional competence and service innovation positively and significantly influenced on the lecturer performance.

This proves that radical changes commitment are important determinants of professional competence, service innovation, and the lecturer performance. Radical change commitment is an important factor for performance, but does not automatically result in lecturers' performance. It has to be improved and developed with a variety of efforts, especially that led to increase job satisfaction of the lecturers.

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DEVELOPMENT OF ECONOMIC ACTIVITIES THROUGH COMMODITIES SOUVENIR TOURS WITH VALUE CHAIN MODEL BASED ON A TOURIST EDUCATION

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ABSTRACT

Indonesia has natural attractions scattered in almost all regions. Tourists who visit will be interested in the uniqueness and natural beauty has to offer. Feelings of satisfaction with the sights visited, giving rise to a desire to have a memories, as a sign of ever visiting a tourist area. The tourists want a souvenir that can be brought home for themselves or distributed to relatives and friends. Souvenirs are made interesting, diverse with affordable prices, will encourage tourists to buy in large quantities. This can lead to public interest around the tourism object to participate in providing souvenirs desired by tourists. The Value Chain model will guide the souvenir producing community, create attractive, satisfying, affordable souvenirs. The Value Chain concept is a concept that reveals how an input is transformed into an output that has a competitive value. In making souvenirs based on educational tour, meaning souvenirs produced can educate the buyers. A satisfying souvenir will increase the demand of tourists. eventually will be able to develop the economic activities of society, will ultimately increase income and welfare.

Keywords: Souvenir, Value Chain and Tourist Education

Introduction

Indonesia, especially Central Java has a variety of natural attractions. Focus Nature tourism objects that can be enjoyed by the community, for example the uniqueness of waterfalls, natural beauty, caves, mountains, hills, beaches. Natural tourist objects are generally located in remote areas. Communities in the area are generally low income. They are not yet aware of tourism, assets in the form of natural attractions have not been utilized to improve their standard of living. This condition is also experienced by countries whose communities do not understand the existence of business opportunities that have the potential for improvement of life. Communities need a companion to be able to take advantage of the potential that exists, including assistance in producing quality local products and their continuity (Steck, Wood, and Bishop 2010). Public awareness of using business opportunities will emerge with the assistance. Local products that exist in tourist sites can be developed into a diverse product that matches the characteristics of the tourist location, which distinguishes the product of tourism elsewhere. This product will be a souvenir for tourists because there is no other place. The uniqueness of this product is sought after by tourists who later can be a souvenir that encourages tourists to visit these attractions. S

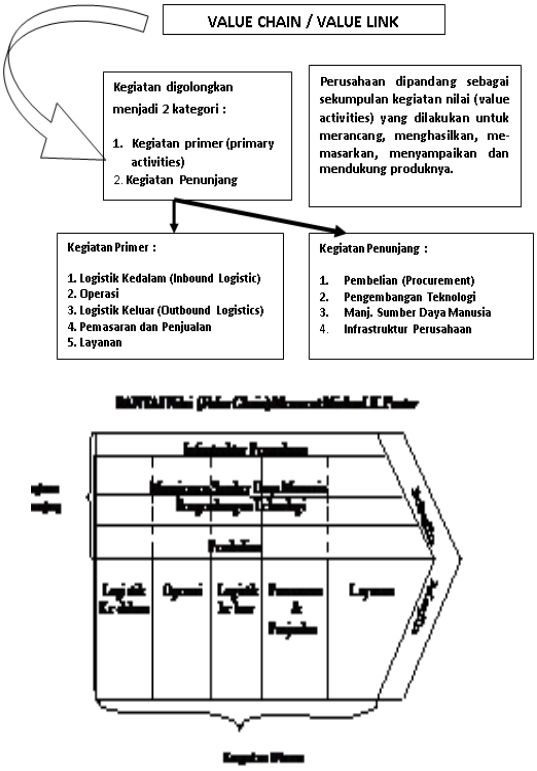
ouvenirs favored by tourists, such as T-Shirt, miniature replicas in Paris for example miniature replica of the Eifel tower. Souvenirs have a very big meaning, for memorable travelers memories when visiting when visiting an interesting sights, for people in souvenirs tourism object is a very important merchandise needed by the tourists, Souvenir is also a commodification, the goods originally not commodities into a commodity through a process (Swanson and Timothy 2012). Commodification at tourist sites is not only a product but also a way of life that was originally considered normal, through certain modifications can attract tourists to try the way villagers resort to livelihood. Example: how the villagers feed the goats, how to squeeze cow's milk and how to feed the goats. For the people of the village this is a common thing because it is part of life. But for the tourists is very interesting, and want to try.Hal this can be used as a livelihood, because it generates income from renting cattle, goats or sell food for fish. The development of the commodification of the way of life will lead to a tourism-based education. On holidays, school schools may schedule tours containing educational or eduwisata elements. Students can learn about the ways to live in a tourist attraction. This tourist object is a commodification between the ways of living. Based on servey shows that every tourist village scattered almost all over Indonesia has a chance to commodify the products that have.

Value Chain concept

Value Chain is a series of activities undertaken by a company to produce a product or service. A collection of activities or activities within a company undertaken to design, manufacture, market, transmit, and support the existence of products, summarized in a value chain analysis. Thus, VCA is an analytical tool that can be used to open business processes. With a value chain, companies can identify what key processes are important, and which processes are simply supporters. To understand the analysis of the business value chain, must first know what its value chain. A value chain is a range of activities - including design, production, marketing and distribution - effort through to bring the product or service from conception to

delivery. For companies that produce goods, the value chain begins with the raw materials used to make their products, and consists of everything that is added to it before it is sold to consumers.

The Value Chain concept was introduced by Michael E. Proter of Harvard Business School. He began to discuss the concept of the value chain in his book "Competitive Advantage: Creating and Sustaining Superior Performance", which was launched in 1985 ago. According to Porter, competitive advantage will not be understood by looking at the company as a whole. "It comes from the many different activities that a company does in designing, producing, marketing, delivering, and supporting a product. Each of these activities can contribute to each other's cost position in the company and create the basis for differentiation" Porter said. Based on Learn Marketing, Porter's statement shows that activities within an organization also incorporate value elements in the services and products that the company generates. This means all of these activities must be run at an optimal level if the organization wants to gain a real competitive advantage. If they run efficiently, the value earned must exceed the cost incurred. For example, customers always return to the company and transact freely and voluntarily. In summary, the value chain network can be described as follows:



Closing

VCAs can assist companies in identifying areas that can be optimized for maximum efficiency and profitability. For example in the banking business, the value chain is very important is on the side of fundraising and lending. In the manufacturing industry, of course, the most important is the procurement process chain of raw materials, quality assurance, production process, marketing & sales, and service. While in the consulting services business, the most value chain process is the material / module, facilitator, and sales.

In tourist services, the process of value chain analysis is used to find out in what areas there is a process that provides the most valued added for the performance of tourism services. Once it has identified an area that can provide a high value-added product, all resources to support the process must be optimized. From the equipment resources, technology, operating system, to the human resources that run it..

Products that make it possible to work on natural attractions are products that are close to the daily life of the community. This type of product uses materials originating from local tourism areas, so that people are easier to use and develop. For example souvenirs from coconut shells and fibers, water hyacinth, local

culinary. Tourists will feel happy if they can see and learn to make products in the tourist area. Much can be learned from the lives of villagers who are not encountered in daily life for people living in the city. This is the educational tour, which is very useful for the knowledge of the tourists and provide business opportunities for residents in tourist areas. Through Value Chain will be able to know which products can be developed and products that have the potential to be developed.

In Value Chain analysis can be known in detail the need to develop a product. Not only in the form of merchandise but also products in the form of services such as providing cultivation education, poultry breeding or large or small animals (feeding goats, fish or squeezing cow milk) From here will happen what is called Commodification. In Value Chain activity is divided into 2 namely primary and secondary activities. This activity should be done in detail, including each operator's involvement in each activity. From this activity will be known weakness and excellence of each element of activity. Commodities can be determined immediately after obtaining activity data including operators conducting activities. potentially superior products can be worked on immediately.

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THE EFFECT OF FINANCIAL POLICY AND INSTITUTIONAL OWNERSHIP ON FIRM'S VALUE
(Empirical Study on Manufacturing Companies Listedin Indonesia Stock Exchange 2009-2012)

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Abstract

The purpose of this study was to analyzethe influence of Institutional Ownership, policy leverage, dividend, investment policyon firm value. The populationin this study are manufacturing companies listed in Indonesia Stock Exchange (IDX) during the years 2009 to 2012. The sample was selected by purposive sampling method, the method of sample selection by using certain criteria.The data used is the data that is pooled data involving the data time series and cross section data. Data used in this researchis secondary data. The data obtained from the annual financial statements in the period 2009 to 2012 and published in the Indonesian Capital Market Directory (ICMD) 2010-2013. Data analysis was conducted on data normality test, classical assumption (multi collinearity, Heterocedasticity, auto correlation, Goodness Test of Reseach Model (F Test and the coefficient of determination), the hypothesistest (test). The research concluded that the institutional ownership and investment policyhada significant positive effecton firm value.

Keywords : Institutional Ownership, Policy Leverage, Dividend, Investment Policy, Book Value.

Introduction

Basically, the firm's goal is to optimize the value of the firm as reflected in its share price. Thus, the higher the firm's profit the higher the firm's value. According to Fama and French (1998) the company's objectives can be achieved through the implementation of the financial management function carefully and appropriately, since any financial decisions taken will affect other financial decisions that impact the value of the firm. Some policies that can be done by firms such as by doing financial policy, such as dividend policy, investment policy and leverage policy.

Between company managers and business owners are often encountered in some issues or conflicts because of differences of interest. According to Jensen and Meckling (1976) the causes of conflict between managers and shareholders are due to decision-making relating to financing decisions and decision-making related to how the funds obtained are invested. Husnan (2001) also states that corporate governance issues arise because of the separation of ownership and control of the company. This agency conflict can lower the value of the firm as reflected in the stock price in the capital market. The costs incurred to overcome the agency conflict are known as agency costs.

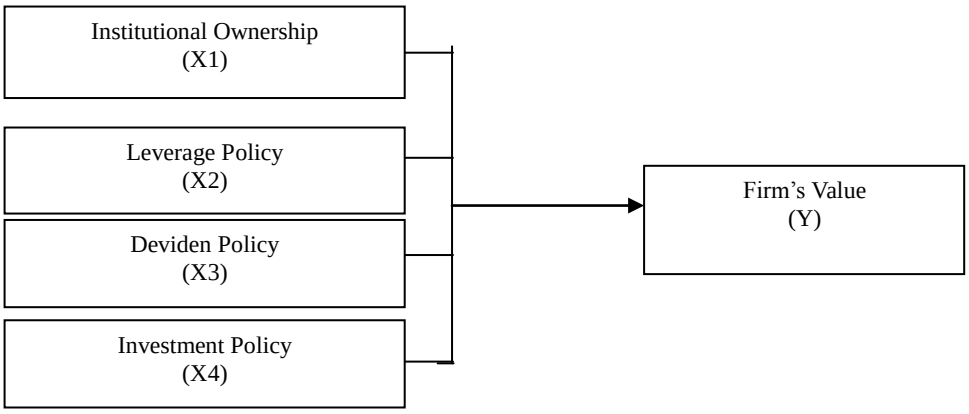
Copeland and Weston (1988) state that agency costs can be reduced by "inviting" third parties, ie bondholders and / or debtholders. Debtholders will lead to a new policy that is the policy of leverage (debt).

Agency Problems by some researchers may be affected by the ownership structure (managerial ownership and institutional ownership). Because the ownership structure is able to influence the way the company ultimately affects the company's performance in achieving the company's goal of maximizing firm's value. The term ownership structure is used to show that the important variables in the capital structure are not only determined by the amount of debt and equity, but also by the percentage of ownership by managers and institutional investors (Jensen and Meckling, 1976).

The agency cost between manager and owner is a very complex and complicated condition and very difficult to minimize. One way to control these costs is by issuing debt. According to Meginson (1997: 335) debt policy will lower agency costs. Increased dividends are expected to decrease agency costs arising from the relationship between managers and shareholders. Large dividends will cause the retained earnings ratio in the corresponding period to be small, so the company in order to execute its business strategy requires additional funds from external sources, such as new share emissions. The addition of funds through the issuance of new shares causes the performance of managers to be monitored by the stock exchange and new fund providers. Performance controls cause managers to act in the best interests of shareholders thereby reducing the costs associated with new share emissions Based on the main problem, the research problem is as follows: How is the influence of institutional ownership, leverage policy, dividend policy, investment policy towardfirm's value?

The research model describes as follows :

Figure 1. Reseach Model



Research Methods

Population And Sample

The population in this study is a manufacturing companies listed on the Indonesia Stock Exchange (IDX) during the year 2009 to 2012. The selected sample with purposive sampling method, which is the sample selection method using certain criteria as follows:

1. Publish annual financial reports consistently during the study period.
2. Issue the annual financial statements ending December 31.
3. Have no profit and total negative equity during the study period
4. Conducting dividend policy during the study period

The data used is data pooled data that involves time series data and cross section data.

Types and Data Sources

The type of data used in this study is secondary data. The data is obtained from the annual financial statements of the period 2009 to 2012 and published in Indonesian Capital Market Directory (ICMD) 2010 – 2013

Definition and Variable Measurement

Institutional Ownership Level (INST)

Institutional ownership is the ownership of shares of a company owned by parties / institutions outside managerial. The proxy measurement variable as follows:

$$INS = \frac{Institutional\ S\square are\ Owners\square ip}{Number\ of\ outstanding\ stocks}$$

Leverage Policy (LEV)

A leverage policy or financing policy is defined as a policy by a management that is related to the financing composition selected as a company decision. The funding policy in this research uses Book Debt to Equity Ratio (BDE) proxy. Book Debt to Equity Ratio (BDE) is the ratio between financing and leverage through debt with equity financing (Brigham and Gapenski, 1999).

$$BDE = \frac{total\ debt}{Total\ equity}$$

Dividend Policy (DIVD)

The dividend policy relates to the determination of the percentage of net income of the company distributed as dividends to shareholders (Ningrum, 2006). The dividend policy in this research uses Dividend Payout Ratio (DPR) proxy. ie the percentage of profits paid to shareholders in cash (Brigham and Gapenski, 1999).

$$DPR = \frac{\text{Dividend per share}}{\text{Earning per share}}$$

Investment Policy (IOS)
Investment decisions as a combination of assets owned and investment options in the future (Ningrum, 2006). The proxy used in this study uses the Market to Book Value of Asset (MVA / BVA) Ratio. This proxy can be formulated as follows:

$$MVA\ /BVA = \frac{\text{Asset} - \text{Total Equity} + (\Sigma \text{ outstanding stock x Closing Price}}{\text{Total Asset}}$$

Firm's Value (PBV)
Dependent variable used in this research is Firm's Value (NP). The value of a firm can give its shareholders maximum prosperity if share prices increase. The value of the firm in this study is measured using price book value (PBV) which is the comparison between the closing market price of the company's stock at the end of the year with the book value of the shares. This proxy can be expressed as follows:

$$PBV = \frac{Market\ Price\ per\ s\square are}{Book\ value\ per\ s\square are}$$

Data analysis
Data analysis performed include data normality test, classic assumption test (multicolinierity, heterocedasticity, autocorrelation, test model research (F test, coefficient of determination), and hypothesis test (t test).

RESULTS AND DISCUSSION
The process of data processing using SPSS 16 tools produce the following regression equation:
LN_PBV = 0,210 + 0,611LN_INS + 0,248LN_BDE - 0,019LN_DPR + 1,138LN_IOS + e

Normality test
Normality test results are shown in Table 1.

Table 1. Normality Test Results

One-Sample Kolmogorov-Smirnov Test

		Unstandardized Residual
N		44
Normal Parameters[a]	Mean	.0000000
	Std. Deviation	.66698467
Most Extreme Differences	Absolute	.180
	Positive	.180
	Negative	-.180
Kolmogorov-Smirnov Z		1.194
Asymp. Sig. (2-tailed)		.116

a. Test distribution is Normal.

Based on Table 1, it appears that a significance value of 0.116 greater 0.05 (0.116> 0.05) indicates normal distributed residual data, so that the regression model is eligible for use as an analytical tool.

Multicolinearity Test
To know the presence or absence of multicollinearity in the regression model can be seen from the Tolerance and Variance Inflation Factor (VIF) values contained in each variable as shown in Table 2.

Table 2. Multicollinearity Test Results

Coefficients[a]

Model		Unstandardized Coefficients		Standardized Coefficients	t	Sig.	Collinearity Statistics	
		B	Std. Error	Beta			Tolerance	VIF
1	(Constant)	.210	.224		.940	.353		
	LN_INST	.611	.276	.226	2.214	.033	.965	1.036
	LN_BDE	.248	.144	.181	1.726	.092	.913	1.095
	LN_DPR	-.019	.052	-.037	-.369	.714	.970	1.031
	LN_IOS	1.138	.155	.748	7.342	.000	.965	1.036

a. Dependent Variable: LN_PBV

Table 2 shows that INS, BDE, DPR and IOS have a greater tolerance value than the specified value of 0.10 and the VIF value is below number 10, so it can be concluded that all variables have met the tolerance threshold and VIF , meaning there is no multicollinearity problem.

Heteroscedasticity Test

To further ensure the absence of heteroscedasticity, another analytical tool used is the Glejser test by regressing the independent variable with the absolute value of unstandardized residuals, with the following results:

Table 3. Heterocedasticity Test Results

Coefficients[a]

Model		Unstandardized Coefficients		Standardized Coefficients	t	Sig.
		B	Std. Error	Beta		
1	(Constant)	.401	.159		2.519	.016
	LN_INST	-.029	.196	-.024	-.149	.883
	LN_BDE	.071	.102	.114	.697	.490
	LN_DPR	.012	.037	.053	.330	.743
	LN_IOS	.126	.110	.182	1.142	.260

a. Dependent Variable: ABS_RES2

Based on Glejser test results, it is seen that all independent variables have significance value> 0,05, so there is no heteroskedastisitas in regression model.

Autocorrelation Test

Autocorrelation test aims to see whether or not there is autocorrelation in a regression model. If there is a correlation it is called an autocorrelation problem. A good regression model is free of autocorrelation (Ghozali, 2011). To find out whether or not autocorrelation is used Durbin Watson test. Durbin Watson test results as shown in Table 4.

Table 4. Autocorrelation Test Results

dU	DW	4-Du	Kesimpulan
1,770	2,051	2,336	No autocorrelation

Source: Secondary data processed, 2014

Based on the results shown in Table 4, the Durbin-Watson value of this study was 2.051. Since the D-W model is between the D-W tables dU = 1,770 and 4-dU = 2,336 with n = 76 and k = 5, there is no autocorrelation in the regression model.

Goodness Of Fit

The Adjusted R^2 value of the model is 0.569, this means that the variability of Firm's Value is explained by 56.9% by the independent variables of Institutional Ownership, Leverage Policy, Dividend Policy, and Investment Policy. F value count of 15.199 with a significance of 0.000 <0,05 indicating that the regression model is fit so it can be used to predict Firms's Value.

Hypothesis Testing Results

Institutional Ownership Positively effects on Firm's Value

Based on the calculation that has been done as in Table 2, then obtained t value for institutional ownership is 2.214 with the result of significance of 0.033 <0.05. This shows that institutional ownership affects the firm's value. Thus it can be said that the hypothesis that institutional ownership positively affects the firm's value is accepted

Leverage Policy Positivelyeffects on Firm's Value
Based on the results of calculations that have been done as in Table 2, the obtained t value for leverage policy is 1.726 with a significance of 0.092> 0.05. This shows that leverage policy has no effect on firm's value. Thus it can be said that the hypothesis that leverage policy has a positive effect on firm's valueis rejected.

Dividend Policy Positivelyeffects on Firm's Value
Based on the results of calculations that have been done as in Table 2, the t value obtained for the leverage policy is -0.369 with a significance of 0.714> 0.05. This shows that dividend policy has no effect on firm's value. Thus it can be said that the hypothesis that the dividend policy has a positive effect on firm'svalue is rejected.

Investment Decision Positively effect on Firm's Value
Based on the results of calculations that have been done as in Table 2, then obtained the value of t arithmetic for investment decision is 7.342 with a result of significance of 0.000 <0.05. This shows that investment decision has an effect on firm's value. Thus it can be said that the hypothesis stating investment decisions have a positive effect on firm's value isaccepted.

Discussion
The Effect of Institutional Ownership on Firm's Value
Test results show that Institutional Ownership has a positive and significant influence on firm's value. The results of this study are similar to the results of the research put forward by Swandari (2003), Wahyudi and Pawestri (2006) and in accordance with the principle of Agency Theory. Jensen and Meckling (1976) argue that Institutional Ownership has a very important role in minimizing agency conflicts between managers and shareholders. The existence of institutional investors is considered capable of being an effective monitoring mechanism in a strategic decision taken by the manager, so it is not easy to believe in the act of profit manipulation.

The Effect of Leverage Policy on Firm's Value
The test results show that there is no positive influence and significant leverage policy to firm's value. The results of this study differ from the results of research put forward by Taswan and Soliha (2002), Hasnawati (2005), and Wahyudi and Pawestri (2006) stating that the leverage policy has a positive and significant impact on corporate value. This is in contrast to Modigliani and Miller's (1963) opinion which states that if there is a corporate income tax then the use of debt will increase the value of the firm because the interest cost of the debt is the tax deductable expenses. The results of this study are also not the same with the results of research Wahidahwati (2001) which suggests that one alternative to reduce the agency cost arising due to agency conflict is to increase funding with debt.

Effect of Dividend Policy on Firm's Value
The result of hypothesis testing shows that there is no influence of dividend policy toward firm's value. The results of this study are not in accordance with the results of research Hasnawati (2005) and Sujoko and Soebiantoro (2007) stating that the dividend policy made by the company has a positive and significant impact on firm's value

Effect of Investment Policy (IOS) on Firm' Value
The result of hypothesis testing shows that there is positive and significant influence of investment policy to firm's value. The results of this study are similar to the results of the research put forward by Hasnawati (2005) and Wahyudi and Pawestri (2006) which suggests that there is a positive influence of investment policy on corporate value. Based on signal theory, the increasing investment made by the company, it represents a management choice to continue to grow, and is a projection of the future prospects of the company, thereby increasing the value of the firm.

Closing
Conclusion
Based on the results of data analysis and discussion that has been done, can be drawn conclusion as follows:
1. The results show that institutional ownership has a positive and statistically significant effect on firm's value. This means that the increasing share ownership of the company by the institution will result in increasing firm's value.
2. The results show that leverage policy does not affect statistically significant to firm's value. This means that the higher the level of leverage that is formed, it does not cause the increasing of firm's.
3. The results show that dividend policy has no significant effect on firm's value. This shows that the increasing value of dividends distributed to shareholders, then does not cause the increasing of firm's value.

4. The results show that investment policy (IOS) has a positive and statistically significant effect on firm's value. This means that the increasing level of investment made by the company, then the value of the firm that is formed will also increase.

Suggestions

Although this research is well designed and executed, there are still some limitations and shortcomings. Suggestions submitted for further research purposes are as follows:

1. This study only takes samples on manufacturing companies listed on the BEI and publishes financial statements in ICMD period 2009 to 2012, so this sample is not representative enough in showing the condition of the company in Indonesia today. Likewise, the limitation of sample criteria used also causes this research is still not able to represent more deeply about the phenomenon that occurs. For future research, it is hoped that the sampling and criteria should be expanded to provide a more up-to-date description of the company's condition in Indonesia.
2. In this study only take the manufacturing company as the object of research, while companies with other characteristics have not been included in the study. For future research, should expand the object of research, not only on manufacturing companies, but in companies with different characteristics, so it can give different results.
3. For subsequent researchers to use financial policy as intervening variables in assessing the relationship between corporate ownership structure and financial policy to firm value. The use of control variables to clarify several factors that affect the firm'svalue for further research should be developed, both from internal and external companies so as to explain the phenomenon that occurs better.

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ISLAM AND JUSTICE IN THE PHILOSOPHY PERSPECTIVE

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ABSTRACT

Islam and justice are two (2) sides that cannot be separated in the dimensions of human life. God's commands to mankind that justice over others is the command of Allah as embodied in the Qur'an and As-Sunnah. Therefore, the law in Islam is built on the aspect of justice to mankind. Legal justice is essentially a paradigm as the human condition. In Islamic philosophy itself, justice cannot be separated from the law, then the concept of *"al-adl"* is the basic symbol in all aspect of human life, it can refer to some verses of the Qur'an and As-Sunnah. The main aspect in Islam is that the doctrine of Islam are the doctrine of "*rahmatan lil alamin"* (blessing for mankind) and avoiding harm to mankind. This study uses a doctrinal approach with the aim of analyzing aspects of Islam and justice in philosophical perspectives.

Keywords: Islam, Justice, Law and Philosophy.

Introduction

A broad definition of justice, of course, is to render to everyone his due. Islam, however, proceeds further in its definition of justice. It lays down that to maintain a proper standard of justice it is necessary that recompense of good should in no case be less than what a person has earned, and that, on the other hand, the penalty for a wrong should not exceed the wrong or transgression committed. A contravention of either of these principles would amount to injustice. It has sometimes been suggested that the first part of this concept, namely that reward or recompense should not fall short of that which has been earned, is just so far as it goes, but that a strict concept of justice demands that reward or recompense should not be in excess of what may have been earned. Islam does not accept this limitation. It proceeds upon the principle that good multiplies itself and has the quality of prevailing against, or of driving away, evil and that, therefore, the beneficence put in motion by good has no limit. Consequently, there is no reason to put a limit upon the reward or recompense of good.[1] The more obvious dimension is that justice is the main source of the survival of mankind. These decades we witnessed the principle of life producing diverse human acts.[2] Various kinds of human actions based on the principles that are believed, where one of them is the principle of justice which is the teachings of religion.

In reality, justice is one word that is difficult to define, but can only be perceived as a real impact. Similarly, the definition of law; until now no one is able to provide a complete and satisfactory definition for all parties. Although the definition put forward by someone is considered true, but others can express another definition which is also considered true and so on. Justice is of course not the same as equality, for justice demands a balance on every side of life with logical, reasonable and fulfilling a desire for healthy inner satisfaction. Justice often shows itself to the attitude of one's life and morality. Justice sometimes seems relative because it is measured by a standard of human experience, although essential justice must be acknowledged as absolute, but only God knows it. There is no perfect justice in this world.[3] But from the side that became the main basis in justice, it is not denied justice is a doctrine in religion and one of which is mentioned of Allah in surah An-Nahal:

إِنَّ اللَّهَ يَأْمُرُ بِالْعَدْلِ وَالْإِحْسَانِ وَإِيتَاءِ ذِي الْقُرْبَى وَيَنْهَى عَنِ الْفَحْشَاءِ وَالْمُنْكَرِ وَالْبَغْيِ يَعِظُكُمْ لَعَلَّكُمْ تَذَكَّرُو

Allah hath commanded you to do justly and to do wisdom, to give unto you kin, and Allah forbid from evil, evil and enmity. He teaches you so you can take lessons. (An-Nahl: 90).

وَأَقْسِطُواْ إِنَّ اللَّهَ يُحِبُّ الْمُقْسِطِيْنَ

Behold, God loves people to do justice (al-Hujurât/49:9)

Qawaid Fiqh:

العَدْلُ وَاجِبٌ فِي كُلِّ شَيْءٍ وَالْفَضْلُ مَسْنُوْنٌ

Al-'Adl (Justice) is Compulsory for everything and *Al-Fadhl* that Sunnah

Therefore, from this approach of language presumably has started a bright spot about the intent of "fair" and "justice" in the Qur'an. But the meaning of justice as a basic concept is broader than the meaning of

[1] Sir Muhammad Zafrullah Khan, *the Concept of Justice in Islam*, Published by: Bait-ul-Zafar, p. 1, accessed through https://www.alislam.org/library/books/The-Concept-of-Justice-in-Islam.pdf.

[2] Ary Ginanjar Agustin, Rahasia Membangun Kecerdasan Emosional dan Spiritual, ESQ, Arga Pubishing, Jakarta 2008, p. 55.

[3] Nurdin, *Konsep Keadilan Dan Kedaulatan Dalam Perspektif Islam Dan Barat*, Media Syariah, Vol. XIII No. 1 Januari – Juni 2011, p. 121-122.

language. There are four meanings of justice put forward by religious scholars: 1. Justice in the same sense 2. Justice in a balanced sense 3. Justice is "attention to the rights of the individual and grant those rights to the owner" 4. Justice that is attributed to Allah it is also a concept or theory of justice has been much discussed in the history of mankind, or at least after humans know and build their civilization. In recorded history of Ancient Greek philosophers, especially Socrates, Plato and Aristotle, they discussed much about justice from the level of ideas and concepts to the practical level where and when justice is applied or enforced. Likewise, the Western philosophers afterwards spoke much of justice, but they were inseparable from the ancient Greek philosophers, at the very bottom of the footing.[4] The basic substance of justice as an understanding based on natural law.

Discussion

Islam and Justice in Philosophy Dimension

The Muslim theologians and philosophers, justice is an abstract and idealist concept. They made no serious attempt to view it from a positive concept and analyze it from the existing social conditions. Abu Bakr al-Turtushi (520/1127), Najm al-Din al-Tawfi (716/1316) and Ibn Taymiyah (728/1325) while remaining faithful to Revelation, employed a form of inductive method which reached its full development in the writings of Ibn Khaldun (806/1408). Turtushi considered justice as the very foundation of polity, the 'foundation of foundations'.[5] Al-Ghazali (450/1058) discusses the concept of justice from several dimensions, focusing mainly on distributive justice. He emphasized that for justice to prevail, the state must remove poverty and distress in the society. Mawdudi (1903-1979) however claimed that the disregard of the role of moral values in the efficient and equitable allocation and distribution of scarce resources may be the reason for the lack of emphasis placed on the reform of the individuals as market players. Contemporary Muslim scholars, Umar Chapra (1981) and Nejatullah Siddiqui (1986) initiated creative ways to incorporate the relevance of justice in distributive functions. They began to steer attention towards distribution in Islamic scholarship. In discussing distributional issues in Islam, the literature is limited to studies related to income inequalities. The absence of academic works in the formulation of a theory of distributive justice, gives the main purpose to the current mission. The lack of preference to develop an Islamic theory of distributive justice could be attributed to the normative nature of the issue in itself.[6] Walter Benjamin explains: "justice objectives can be achieved through legitimate means, legitimate means can be directed toward just goals",[7] the means which has legitimacy is the state.

One thus gets the impression that in an Islamic economy the attainment of substantive justice would be a procedural matter.[8] Regardless of economic and social conditions, the two substantive principles of justice would be met by having members of society follow the specified injunctions. This position harbors two distinct claims. First, that just behavior entails conformity to the stated Islamic injunctions. Second, that these injunctions are just, in the sense that they are better suited than other sets of injunctions to serve the principles of equality and fairness. I wish here to evaluate the second claim-to question, that is, whether the injunctions put forth by the Islamic economists can reasonably be expected to secure their two principles of justice.[9]

In the study of justice, then in the criminal law one of the studies in Islam. Islamic criminal law divides crimes into categories that are distinct from those employed in most common law and civil law countries. The *qisas* crimes are particularly interesting for restorative justice studies because the victims retain a central role in the prosecution and sentencing of defendants. In most versions of classical Islamic jurisprudence, the prosecution of the *qisas* crimes must be instigated by the victim. The victims of *qisas* crimes are given a choice as to the punishment that will be imposed. They may choose to forgive the defendant and demand no punishment at all, or they may demand a payment, known as *"diyya,"* as compensation for the crime. In this sense, the law of *qisas* has something in common with the small-scale societies that advocates of restorative justice study to find inspiration for their practices. Furthermore, the law of *qisas* fulfills some of the

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[4] Agus Romdlon Saputra, *Konsep Keadilan Menurut Al-Qur'an Dan Para Filosof,* p. 186-187, accessed through Http://Jurnal.Stainponorogo.Ac.Id/Index.Php/Dialogia/Article/Download/310/265 on January 1, 2018.

[5] *The Islamic Conception of Justice by Majid Khadduri* (1984), on Shafinah Begum Abdul Rahim, *A Conceptual Framework Of Distributive Justice In Islamic Economics*, AL ALBAB - Borneo Journal of Religious Studies (BJRS), Volume 4 Number 1 June 2015, p. 21.

[6] Shafinah Begum Abdul Rahim, *Ibid.*, p. 21.

[7] Absori, etl.al. *Hukum Profetik, Kritik Terhadap Paradigma Hukum Non-Sistematik,* Genta Publishing, Yogyakarta2015, p. 229.

[8] On the question of substance versus procedure, a very illuminating discussion relating to Islamic thought can be found in Majid Khadduri, The Islamic Conception of Justice (Baltimore, 1984), ch. 6. For general treatments, see John Rawls, A Theory of Justice (Cambridge, Mass., 1971), esp. pp. 83- 90; Brian Barry, Political Argument (London, 1965), ch. 6; Geoffrey Brennan and James M. Buchanan, The Reason of Rules (Cambridge, England, 1985), ch. 7. See p. Timur Kuran, *On the Notion of Economic Justice In Contemporary Islamic Thought,* Cambridge University Press is collaborating with JSTOR to digitize, preserve and extend access to International Journal of Middle East Studies., Int. J. Middle East Stud. 21 (1989), p. 176

[9] Timur Kuran, *Ibid.* p. 176.

objectives of the restorative justice movement by allowing victims to participate in sentencing and encouraging forgiveness and reconciliation. There is, however, one glaring difference between the law of *qisas* and restorative justice; the victims of the crimes may also demand retaliation in kind: an eye for an eye, a life for a life. Nevertheless, *qisas*' emphasis on forgiveness and inclusion of the victims and the community in the prosecution and sentencing of perpetrators are significant characteristics which warrant an examination of the law of *qisas* as a form of restorative justice.[10]

In Islam the command is justly addressed to every indiscriminately. True words must be spoken as they are even though they will harm their own relatives. The necessity of justice must be enforced in the family and Muslim society itself, even to the infidels of the Muslims were ordered to be fair. For social justice to be established without distinction because of the rich, the officials or the common people, women or noble, they should be treated equally and get the same opportunity.[11] The problem is how the application of the concept in finding the value of justice? In this case the concept must be able to find and resolve the actual facts through philosophical analysis of the problems at hand. This is because the law or rule of law should be fair, but in fact often not. Justice can only be understood if it is positioned as a state to be realized by law. The effort to bring about justice in the law is a dynamic process that takes a lot of time. This effort is often also dominated by forces that fight in the general framework of the political order to actualize it.[12] Therefore, that justice must be built in the level of social life of society.

Islamic Law is derived from Quran and sunnah. Therefore, it is believed that making policies and decisions as per the divine law will ensure justice to mankind in both worlds (Usmani, 1937). Moududi (r.a) has also explained in his commentary of Surah-e-Maida verse 45-47 that those who violates the divine law are categorically been declared in the Holy Quran as unjust and transgressors (Moududi, 1972). Modern thinkers like Khudduri also seem to agree that it is the divine law, enshrined by Quran and Sunnah, abidance to which ensures justice to mankind.[13]

The major themes of the Qur'an include God-consciousness, fairness, equity, justice, equality and balance in all our dealings. It stresses the doing of what is right because it is the truth and The Truth represents one of the ninety-nine "beautiful names" of God. As a reflection of His attributes of *Al-'Adl* and *Al-Muqsit*, we are urged to establish justice and deal with all in a manner that assures equity, fairness and balance and safeguards the rights, property, honor and dignity of all people. God assures us that even though He is All-Powerful and none can challenge His Authority, He deals with all with truth, kindness, justice, and the rights of none will be transgressed on the Day of Judgment.[14]

The narrow dictionary equivalents for Justice and Equity are the words *Insaaf, 'Adl* and *Qist*. The first of these, *Insaaf*, is commonly used in the meaning of Justice in Persian, Urdu, Turkish and other Muslim languages that have borrowed heavily from Arabic. But the word *Insaaf* has its root in the concept of dividing equally in halves. This is not always just or equitable. The Qur'an, therefore, does not use this word in the sense of Justice or Equity. The words *'Adl* and *Qist* are more comprehensive, represent two of God's ninety-nine Beautiful Names and are extensively used in the Qur'an. The words *'Adl* and *Qist*, in their various forms, are used in the Qur'an about twenty seven times each. If justice is juxtaposed with the rule of law, the two are like two inseparable currencies. Justice will be realized if supported by the enforcement of the rule of law. Similarly, justice will be worsened if the rule of law is not enforced. Justice comes from the Arabic language *"'adl"* which means to behave and apply in balance. The balance includes a balance between

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[10] Susan C. Hascall, Restorative Justice in Islam: Should *Qisas* Be Considered a Form of Restorative Justice?, Berkeley Journal of Middle Eastern & *Islamic* Law, Volume 4 Article 2, p. 36-37. The Islamic theory of punishment derives from the Holy Quran and the Hadith. On the whole, the Holy Quran has about 200 verses dealing with the legal issues). The main goal of Islamic Penology is to secure human welfare, maintain peace and to establish a righteous society. It is very clearly enunciated in the Holy Quran that Allah has sent His messengers and the Holy Quran, so that men can establish justice. It is categorically expressed as: "God commands justice, righteousness, and spending on ones relatives, and prohibits licentiousness, wrongdoing, and injustice…" Though Islamic law is based on divine sources, it is a living body of law that addresses the needs of Islamic society. In the light of the parameters laid down in the Quran, the science of Fiqah has developed a detailed legal system whereby complex issues can be examined. The Islamic Penal system describes three types of punishments: prescribed punishments, retribution and discretionary punishments. See Shazia Ramzan, et.al. *Punishment from Islamic Perspectives*, FWU Journal of Social Sciences, summer 2015, Vol.9, No.1, p. 54.

[11] Satjipto Rahardjo, *Ilmu Hukum*, (Bandung : PT. Citra Aditya Bakti, 2000), H. 3., on Muhammad Helmi, *Konsep Keadilan Dalam Filsafat Hukum Dan Filsafat Hukum Islam*, Jurnal Mazahib, Jurnal Pemikiran Hukum Islam, Vol. XIV, No. 2 Desember 2015, p. 134.

[12] Juhaya S. Praja, *Filsafat Hukum Islam*, (Bandung: Pusat Penebitan Universitas LPPM UNISBA, 1995), p. 73, on Muhammad Helmi, *Ibid.*, p. 134.

[13] Khudduri, M. *The Islamic Conception of Justice*. John Hopkins University Press, 1984, p. 3. On Omar Javaid and Mehboob ul Hassan, *A Comparison Of Islamic And Capitalist Conception Of Economic Justice*, The International Islamic University Malaysia, International Journal of Economics,Management and Accounting 21, no. 1 (2013), p. 8.

[14] Mohammad Shafi, *Justice and Equity in the Qur'an,* http://www.daralislam.org/portals/0/Publications/Justiceand EquityintheQuran.pdf.

rights and duties and harmony with fellow beings. Justice is essentially treating a person or another person in accordance with his / her right to the duty that has been done. The right of every person is to be recognized and treated according to his or her dignity and equal in the eyes of God. Human rights are the rights people need for their survival in society.[15]

Justice is the norm of life that everyone in their social order desires. Social institutions called states and international institutions and organizations that bring together seemingly nations have the same vision and mission to justice, although their perceptions and conceptions may differ in that matter. Justice is a relative concept. The scale of incidence varies greatly from country to country, and each of the justice scales is defined and defined by society according to the social order of the society concerned.[16]

Judging from the source of justice,[17] can be classified into two; positive justice and revelation justice. Positive justice is the concepts of human products formulated on the basis of their individual interests as well as their collective interests. The scales of justice - in this case - evolve through tacit approvals as well as short formal actions, this kind of justice is the product of the interaction between expectations and conditions. While revelation justice is justice that comes from God called divine justice. This justice is considered to apply to all human beings, especially to devout believers.[18]

Al-adl, one of the qualities that must be possessed by man in order to enforce the truth to anyone without exception, although it will harm himself.[19] Etymologically al-adl means not one-sided, impartial; or convey one with the other (*al-musawah*). Another term for *al-adl* is *al-qist al-misl*. Fairly terminologically means to "liken" something to another, both in terms of value and in terms of size, so that something is not one-sided and not different from one another. Fair also means "taking sides or holding to the truth".[20] Justice is more focused on the notion of putting things in place if justice has been achieved, then it is in place if justice has been achieved, then it is a strong argument in Islam as long as no other postulate list has opposed it.[21]

The concept of justice as is known the term justice always opposed with the term of injustice. Where there is a concept of justice then there is also the concept of injustice. Usually both are juxtaposed and in the context of the law there are many instances of injustice which constitute the antithesis of justice in the field of law such as in Indonesia, such as: injustice in the Poso case, against minority, Prita case, injustice of preaching, Direct Cash, gender inequalities in local communities, injustice in solving legal problems, and so forth.[22] Even Susanto say, something unusual in interpreting justice, which is related to the substance in it. Justice will be bumped with doubt and injustice, that truthfulness is not powerless without injustice and doubt.[23] Therefore, Liang Gie argues the meaning of justice in a broader relationship is a fairness that comes close to the meaning of worthiness. Justice traits in the sense of worth or deserve for example is in the expression justice price or justice wage. When the element or moral consideration is more emphasized on the notion of justice and considered superior to legal justice, the meaning of equity for justice grows. Equity has a meaning that resembles justice according to moral values. When all the ideals of morality or the whole policy as a single whole as if included in the sense of justice, then its meaning then becomes righteousness which when translated can mean as truth based on goodness, not truth as a science.[24]

In his book *Al-'Adalah al-Ijtima'iyyah fi al-Islam* (Social Justice in Islam) Qutb does not interpret Islam as an obsolete morality system. But he is a concrete social and political force throughout the Muslim world. Here Qutb fights Ali Abd al-Raziq and Taha Hussein stating that Islam and politics are not compatible. Qutb

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[15] Afifa Rangkuti, *Konsep Keadilan Dalam Perspektif Islam,* TAZKIA, Jurnal Pendidikan Islam, Vol.VI, No.1, Januari-Juni 2017, p. 2-4.

[16] Tamyiez Dery, *keadilan dalam islam*, Jurnal Mimbar, Jurnal Sosial dan Pembangunan, Volume 18, No. 3, Tahun 2002, p. 337-338.

[17] It is said that principles of natural justice are of very ancient origin and was known to Greek and Romans. The notion of a natural justice system emerges from religious and philosophical beliefs about how we see ourselves with respect to nature. Kluckhohn's (1953) analysis provides one of the most noted descriptions of the philosophical principles that govern our relationship with nature. He claimed that humans think of themselves as being 1) subjugated to nature, 2) an inherent part of nature, or 3) separate from nature. Each of these views shapes a particular natural justice belief and thus a distinct moral stance toward nature. See Mustafa Rashid Issa, *Natural Justice in Islam and Humans Law,* Journal of Philosophy, Culture and Religion, Vol.15, 2016, p. 7.

[18] Majid Khadduri, 1999, *Teologi Keadilan Perspektif Islam*, Surabaya, Risalah Gusti, p. 1, on Tamyiez Dery, *Ibid*., p. 338.

[19] Anonim, *Ensiklopedi Hukum Islam* Jakarta: Penerbit PT Ichtiar Baru Van Hoeve, 1996, p. 50, dalam Nurlaila Harun, *Makna Keadilan Dalam Perspektif Hukum Islam Dan Perundang-Undangan,* Jurnal Ilmiah Al-Syir'ah Vol 11, No 1 (2013), p. 2

[20] Anonim, dalam Nurlaila Harun, *Ibid*., p.2

[21] Nurlaila Harun, *Ibid.*, p.2

[22] Inge Dwisvimiar, *Keadilan Dalam Perspektif Filsafat Ilmu Hukum,* Jurnal Dinamika Hukum Vol. 11 No. 3 September 2011, p 523.

[23] Anthon F. Susanto, *"Keraguan dan Ketidakadilan Hukum (Sebuah Pembacaan Dekonstruktif)", Jurnal Keadilan Sosial*, Edisi 1 tahun 2010, hlm. 23, dalam Inge Dwisvimiar, *Ibid.*, p. 523.

[24] The Liang Gie, *Teori-Teori Keadilan,* Supersukses, Yogyakarta, 1982, p. 16, dalam Popon Srisusilawati dan Nanik Eprianti, *Penerapan Prinsip Keadilan Dalam Akad Mudharabah Di Lembaga Keuangan Syariah*, Jurnal Law and Justice Vol. 2 No. 1 April 2017, p. 14-15.

says there is no reason to separate Islam from different manifestations of society and politics. Qutb's thought of social justice in Islam is based on his view that the principle of Western social justice is based on a secular Western view, where religion serves only the education of consciousness and the purification of the soul, while the temporal and secular laws are in charge of organizing society and organizing human life. Islam is not the case, Qutb said: ... we have no basis to affirm the animosity between Islam and the struggle for social justice, like the existing hostility between Christianity and Communism. Because Islam has prepared the basic principles of social justice and confirms the claims of the poor on the wealth of the rich; it provides the principle of justice for power and money, so there is no need to sedate human thought and invite them to renounce their earthly rights for the purpose of their hope in the afterlife.[25]

In Islam, doing justice is the command of Allah swt and Allah is the ultimate Ruler and Legislation that is why the Qur'an is the primary source to govern the life of mankind. The assumption is a proposition for any adherents of Islamic teachings that should not be violated, the main philosophy that can be taken from the assumption was put forward by Madjid Khadduri,[26] that: "The principles and origins of justice derived from divine revelation and wisdom are considered absolute and inviolable, designed for all ages and most likely applicable to all mankind." The argument contains a very profound meaning, why Allah swt. Decreases to man a doctrine which contains the perfect arguments and is designed to be practiced throughout the ages. One of the propositions that are part of Islamic teachings is the doctrine of justice.[27]

Justice can only be understood if it is positioned as a state to be realized by law. The effort to make it happen is a time-consuming dynamic process, and this effort is dominated by the power of fighting within the general framework of the political order to actualize it. One can regard justice as an idea, and or call it an absolute reality. When the relation between man and the creation of the law is understood, this means that justice is an objective, trans-personal and non-subjective reality, but this means that justice must be understood as an ever-changing reality, and the change takes place in response to the process of societal dynamics and political dynamics.[28]

Kahar Mansyur suggests there are three things called Justice:[29]

1. "Justice" is: put something in the right place.
2. "Justice" is: accepting rights without more and giving others without less.
3. "Justice" means: to grant the right of every entitled to a fuller without more without more without less between the same fellow who is entitled in the same circumstances, and the punishment of the wicked or unlawful, in accordance with the error and the offense. "The notion of justice is the will is permanent and continuous to give everyone what is appropriate for them.[30] This justice is rational justice does not require transcendental institutions, but rather relies on the understanding of human reason for the world of experience.[31]

Natural thought of justice in Islam is built based on the meaning based on the reality contained in the teachings of the Qur'an and As-Sunnah which must be followed by all humanity. Justice in the perspective of law in Islam must be upheld by all Muslims, because justice as which in Surah An-Nahl: 90, is a command to be in the stand by all mankind.

Closing

Justice can only be understood if it is positioned as a state to be realized by law. The effort to make it happen is a time-consuming dynamic process, and this effort is dominated by the power of fighting within the general framework of the political order to actualize it. In Surah An-Nahl: 90, it is clear that justice is the main command that is used as the basis in the life of the people, therefore justice must give benefit to mankind.

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[25] M. Taufiq Rahman, *Teori Keadilan Sosial Sayyid Qutb*, diakses melalui https://insists.id/teori-keadilan-sosial-sayyid-qutb/ pada tanggal 3 Januari 2018.

[26] Khudduri Madjid, *Teologi Keadilan, Perspektif Islam.* translated from book *"The Islamic Conception of Justice"* by H. Mochtar Zoemi Cet. I, Surabaya : Risalah Gusti, 1994, p.. 4, dalam Hamzah, *Kontekstualisasi Teologi Keadilan Dalam Hukum Kisas*, Jurnal Al-Qadāu Volume 1 Nomor 1/2014, p. 87.

[27] Hamzah, *Ibid.*, hlm. 87. In the context of justice, then the Qur'an is one of the basis for mankind. Al-quran as divine guidance for human life that exist in this earth. See Syaukat Hussain, *Hak Asasi Manusia dalam Islam*, translation of Abdul Rochim, Gema Insani Press, Jakarta 1996, p. 8.

[28] Kiljamilawati, *IMPLEMENTASI NILAI-NILAI KEADILAN DALAM MASYARAKAT (Suatu Kajian Filsafat Hukum)*, Jurnal Ecosystem Volume 16 Nomor 1 Januari Juni 2016, p. 2.

[29] Kahar Mansyur, *Membina Moral dan Akhlak*, Jakarta: Kalam Mulia, 1985, p. 71, on Minollah, *Telaah Asas Keadilan Dalam Pemungutan Pajak Rokok*, Jurnal IUS, Kajian Hukum dan Keadilan, Vol V Nomor 1 April 2017, p. 3.

[30] Satjipto Rahardjo, *Hukum Dalam Perspektif Sejarah dan Perubahan Sosial, Pada Pembangunan Hukum Dalam Perspektif Politik Hukum Nasional*, Jakarta: Rajawali Press, 1986, hlm. 159, dalam Minollah, *Ibid.*, p. 3

[31] Budiono Kusumohamidjojo, *ketertiban yang Adil (Problematika Filsafat Hukum)*, (Jakarta: Gramedia Widiasarana Indonesia, 1999), hlm. 129, on Minollah, *Ibid.*, p. 3

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LEGALITY OF RIBAWI DEBT CONTRACT

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ABSTRACT

According to Article 1320 of the Civil Code (Civil Code), an agreement is valid if it meets four conditions, namely (1) the existence of their binding agreement; (2) the ability to make an engagement; (3) a certain subject matter; and (4) an unlawful cause. The requirements in (3) and (4) are called an objective requirement. It is called an objective requirement because it deals with the object of the agreement. The legal consequences of non-fulfillment of any objective consequence are contracts made null and void. This means that since the contract was made the contract has been canceled and is considered never existed. One type of contract that is often done by the people of Indonesia is the contract debt-receivable by wearing interest. According to the Fatwa of the Indonesian Council of Ulama (MUI) No. 1 of 2004 on Interest, Interest (fa'idah) is an additional levied in money loan transactions (al-qardh) calculated from the principal of the loan without considering the utilization / yield of the principal, the time, calculated exactly in advance, and generally based on percentage. The current flowering practice has met the criteria of interest that occurred in the time of the Prophet Muhammad (peace and blessings be upon him), ie Riba Nasi'ah. Thus, this flowering practice is one form of Riba, and Riba is forbiden. Practicing interest is haram (forbiden), whether done by Bank, Insurance, Capital Market, Pawnshop, Cooperation, and other Financial Institution or conducted by individual. Referring to the MUI Fatwa, the contract of interest-bearing debts does not meet the requirements of halal causation as stipulated in the Civil Code Article 1320. The impact of such contracts is null and void so that they must be considered as never before. The solution required renegotiation of the contracts of interest-bearing debts.

Keywords : Validity, Debt Contracts, Interest

Introduction

Humans are both economic and social beings. As *Homo Economicus*, human has a tendency to not be satisfied with what he has and constantly strive to complete his life. The nature at first glance seems very un-Islamic[1] but in fact the theory is developed from Islamic philosophy which one embodied in the speech of Ibn Az Zubair which stated "O people, actually the Prophet *sallallaahu 'alaihi wa sallam* said, if human is given a valley full of gold, they still wanting a second valley like that. If has given the second valley, he still wanted the third valley. The human stomach is not full but with the ground. Allah certainly receives repentance for anyone who repents. "[2]

In the subsequent development of human theory as an economic being developed based on the philosophy of individualism. Individuals come from the word *in* and *devided*. In English *in* one of them means no, while *devided* means divided. So individual means not divided, or unity. In Latin language, individual derives from an individual word meaning indivisible, so it is a term that can be used to express the smallest and infinite unity.[3] This is where individualist traits get justified or at least deciphered.

On the other hand, humans are also social beings which mean part of a larger unity of society. The term Social term comes from the Latin root of *Socius*, which means friend or community. Social has a general meaning that is society and in the narrow sense of priority to the interests of the community or together. Simply referred to human as social being, it is creature that lives in society because basically every individual life cannot be separated from other humans. In relation to humans as social beings, humans always live together with other human beings. In short humans need other human beings to fulfill their needs.

From the community relations established norms or rules for orderliness and mutual protection of each individual's interests. These set of norms or rules ultimately form the law. Since the law in that context is used to protect the interests of individuals, the law is then known as private law or civil law.

One important part of the civil law is the law of covenant. This treaty law is very helpful to people to meet their needs. Things that cannot be fulfilled by humans in cash[4] can be fulfilled by way of promising them first. The law of the treaty is a law formed by the existence of a party that binds itself to the other party.[5]

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[1] The meaning of Islam is in accordance with Islamic values. Human theories as economic beings seem very un-Islamic because impressive contrary to Islamic values. In this paragraph it is evident that this theory comes from the hadith al quran.

[2] Hadith History of Bukhari no. 6438.

[3] https://adhibarfan.wordpress.com/2015/11/05/manusia-sebagai-makhluk-individu-dan-sosial/ accessed on December 8th, 2017 at 16.09 WIB

[4] According to Big Indonesian Dictionary (*KBBI)* cash can be interpreted "on the spot", not cash means not on the spot.

[5] http://srirahayu-myblog.blogspot.co.id/2013/06/hukum-perjanjian.html accessed on December 9th, 2017 at 09.17 WIB.

It can also be said that the law of covenant is a law that is formed by someone who promises to others to do something. In this case, both parties have agreed to enter into a treaty without coercion or decisions that are merely one-sided.

According to Article 1320 of the Civil Code, an agreement is declared valid if, it is necessary to meet four conditions, namely (1) the existence of their binding agreement; (2) the ability to make an engagement; (3) a certain subject matter; and (4) an unlawful cause. The requirements in (3) and (4) are called an objective requirement. It is called an objective condition because it deals with the object of the agreement. The legal consequences of non-fulfillment of any objective consequence are contracts made null and void. This means that since the contract was made the contract has been canceled and is considered never existed.

One type of contract that is often done by the people of Indonesia is the contract debt-receivable by wearing interest. This type of debt is widely channeled through banking institutions. The issue *The Indonesian Ulema Council* has issued a fatwa on the prohibition of interest on debt. In theory, the illegitimate status of the object of the treaty makes the objective requirements of the treaty law unfulfilled. Therefore worth reviewing how the legality of debt contracts that contain *riba*.

Discussion

Debt Agreement According to the Civil Code

The Covenant under the Civil Code (BW) in book III can be found on general engagement. Engagement has a broader understanding of the agreement because the engagement may be a contract called an engagement sourced from the agreement. In addition there are also engagements that are sourced from the law.

According to R. Subekti gives a definition, the covenant is "An event in which a person promises to another or where the two men promise to do something.[6] She gave the theory that for the parties who engage the engagement have an attachment to do something that each of the interests that have been agreed. This means that each party engaging in the engagement must be held accountable for the rights of the other party. The strength of the engagement is directed against the law to prosecute other parties who neglect their obligations as a remedy to guarantee the rights of the parties to the engagement event.

With the holding of an agreement, the pledged parties shall be subject to the matters which have been agreed upon. All agreements must be made in good faith and should not be done against the judgments and justice.

According to Yahya Harahap agreement is a legal relationship of wealth/ property between two or more persons who give power to a party to perform the achievement.[7] From this understanding of the element of the agreement there must be a legal relationship concerning the law of wealth between two or more persons giving the right to a party laid on the other. Thus this agreement is commonly called a one-sided agreement in addition to a unilateral agreement also known as mutual agreement in this agreement each side have mutual rights and obligations. The definition is also indicated that there is a right for the other parties, who enter into an agreement, in addition to their obligations. In order to guarantee the power of the treaty, it is said that the treaty is an opportunity to act as a law for those who enter into an agreement.

Matters that must be considered in the implementation of the agreement, namely to implement an agreement must first pay close attention to what the contents of the agreement, or in other words what are the rights and obligations of each party.[8] And according to Article 1339 of the Criminal Code that a treaty is not only for things expressly stipulated in the covenant, but also for everything that by nature of the treaty is required by propriety, customs and laws.[9] The terms of the validity of the agreement are stipulated in Article 1320 of the Civil Code. A legitimate agreement means an agreement that has fulfilled the conditions prescribed by the Act, so it is recognized by law. An agreement is declared valid, if it has fulfilled four conditions, namely:[10]

a. Their binding agreements

   With the principle of *consensualism* in the law of agreement that is "the principle that the covenant is legitimate and binding on the moment of reaching consensus, is a universal principle". With the conclusion of an agreement it means that both parties must have freedom of will. Basically this agreement happens freely or with freedom. The existence of freedom of consent to legal subjects or persons may occur by:

   1) Firmly either by saying a word or writing
   2) Quietly, either with an attitude or with a gesture.[11]

[6] Subekti, 1993, *Pokok-Pokok Hukum Perdata*, Cet. XXVI, Intermasa, Jakarta, pp. 122-123.
[7] Yahya Harahap, 1986, *Segi-Segi Hukum Perjanjian*, Cet II, Alumni Bandung, p. 6.
[8] J. Satrio, 1993, *Hukum Perikatan (Perikatan Pada Umumnya*), Alumni, Bandung, p. 57.
[9] Subekti, *Op. Cit.*,p. 44.
[10] Subekti, 1993, *Perbandingan Hukum Perdata*, Cet. XII, Pradnya Paramita, Jakarta, p. 40.
[11] C.S.T. Kansil, 1995, *Modul Hukum Perdata*, Cet. III, Pradnya Paramita, Jakarta, p. 208.

b. The ability to create an engagement
   In Article 1330 Civil Code referred to as persons who are not competent to make an agreement are:
   1) An immature person
   2) Those who are placed under forgiveness
   3) All persons who are prohibited by law to make certain agreements.
c. A certain thing
   According to Article 1332 of the Civil Code which provides that only tradable goods alone may be subject to an agreement. An agreement must be about a certain thing, meaning that the object in the form of goods or rights and the price must be certain and can be determined so that clearly also what the rights and obligations of the parties in a treaty.
d. A lawful cause
   According to Article 1337 of the Civil Code states that a cause is prohibited if by law it is contrary to morality and public order. The consequence of the law of a covenant that is not lawful is that the covenant is null and void. It means that there is no basis to demand the fulfillment of the agreement before the judge, since from the beginning the agreement was never considered.

Debt is a liability which is declared or cannot be expressed in the amount of money either directly or in future, arising out of the agreement or law and which the debtor must comply with, and if not fulfilled give the right to creditors to get fulfillment from debtor's property.

Receivables are creditor claims to the debtor on the money; goods or services determined and if the debtor is unable to fulfill the creditor shall be entitled to receive the fulfillment of the debtor's property. The definition of accounts payable is similar to the borrowing and lending agreement encountered in the Civil Code Article 1721 which reads: "Borrowing is an agreement with which one party gives another party a certain amount of goods and exhausted on condition that these days will return the same amount of the same kind of circumstances"

Thus, accounts payable is to perform an enforced achievement through an agreement or through a court. Accordingly, the payables payable agreement is the activity between the person who is indebted to another person/other party of the debtor or called the offender of the receivable, where the obligation to concern the law on the basis of a person expects the achievement of another person if necessary by legal intermediaries.

The Character of Against the Law According to Civil Law

In the Civil Code the definition of unlawful acts is not stated clearly and definitely. The Civil Code only regulates the conditions that must be met if a person, who suffers a loss due to an unlawful act committed by another person, wishes to file an indemnity to the court. As for Article 1365 of the Civil Code states that:

> "*Every act which is unlawful, which carries harm to others, obliges the person who because of the wrong to issue the loss is compensating for the loss*".[12]

The occurrence of unlawful acts creates harm to certain parties so that the claims arise from the parties who are harmed or feel harmed. Doctrinally according to the laws that live and thrive in Indonesia, civil lawsuits are distinguished in two types, namely: a lawsuit of infringement and lawsuit. The legal basis of each of the two lawsuits is based on the provisions of Book III Article 1243 of the Civil Code for *wanprestasi* (negligence) and Article 1365 of the Civil Code for lawsuits of unlawful acts.

Therefore, the filing of the lawsuit of *wanprestasi* and unlawful acts in practice are always separate. Unless the basis of default against unlawful conduct is of great relevance, in such circumstances it is still permissible to combine a lawsuit between default and unlawful acts, but its incidental nature depends on the judge's judgment in examining, hearing and deciding cases.

Normatively juridical, the Civil Code does not explain explicitly what constitutes *wanprestasi* and unlawful acts. However, in the Civil Code there are articles regulating juridical consequences in the event of misconduct and / or unlawful acts.

Understanding of *wanprestasi* and unlawful deeds develop through the theory and teachings of law with the understanding described by jurists. This understanding must be fully understood materially for the creation of good judicial practice. Often, because of the widespread understanding of the definition of default and unlawful acts, the judge who decides the case refuses or does not accept a lawsuit if the legal basis of the lawsuit is deemed to be fundamentally obscure or obscure.

Understanding unlawful acts in the opinion of experts vary, but in general each gives a picture of the characteristics of nature against the law itself. According to Article 1365 of the Civil Code, what is meant by unlawful acts is an unlawful act perpetrated by a person by his/ her guilt resulting in adverse effects on the other party.

It also defines unlawful acts as a collection of legal principles aimed at controlling or regulating hazardous behavior, to assign responsibility for a disadvantage arising out of social interaction, and to provide compensation for the victim with an appropriate claim

[12] Munir Fuady, 2002, *Perbuatan Melwan Hukum Pendekatan Kontemporer*, Print I, PT. Citra Aditya Bakti, Bandung, p 3.

As for the point of departure to distinguish the lawsuit of *wanprestasi* and the lawsuit of unlawful deeds is usually that the lawsuit of *wanprestasi* always rests on the existence of a contractual relationship between parties, resulting in the birth of legal rights and obligations. Rights and duties here are called achievements. At the time of achievement not fulfilled or executed in accordance with the contents of the agreement of the parties, then born what is called *wanprestasi* or can be mentioned as a pledge injury.

While unlawful acts the basic starting point of the lawsuit is the interests of certain parties who are harmed by the actions of the other party, although among the parties there is no contractual legal relation law.[13] In this case the grounds of his lawsuit are sufficiently proved whether the acts of the true offender have harmed the other party. In other words, the filing of a lawsuit against the law is merely oriented to the consequences that resulted in the loss of another party.

In accordance with the provisions in Article 1365 Civil Code, then an act against the law contains elements as follows:

a. There must be a deed which is meant by this act either of a positive or a negative nature, meaning any behavior of doing or not doing;
b. It must be against the law.
c. An error (*Schuld*).
d. The existence of a causal relationship between the unlawful act and the loss;
e. Loss.[14]

The juridical consequences in the case of the unlawful act are regulated in Articles 1365 to 1367 of the Civil Code as follows:

a. According to Article 1365 of the Civil Code
   "Any act that violates the law, which carries harm to another person, obliges the person who because of the wrong to issue the loss is liable for damages".
b. According to Article 1366 of the Civil Code
   "Everyone is responsible not only for the loss caused by his actions, but also for the harm caused by his negligence or lack of caution".
c. According to Article 1367 Civil Code
   "Not only shall one be held liable for damages caused by his own deeds, but also for damages caused by the deeds of his dependents, or caused by those under his control ..."

Based on the above quotation, the article generally provides an overview of the scope of the result of an act against the law. The consequences of illegal acts have juridical consequences on the perpetrators as well as those who have legal relationships in the form of work that causes the occurrence of unlawful acts. Thus, the consequences arising from an act against the law will be manifested in the form of compensation for the victim who suffered losses.

Indemnification as a result of any unlawful act, as mentioned above, may be material and immaterial compensation. In practice, compensation is calculated by money or equalized with money, in addition to the demand for the replacement of objects or goods deemed to have been damaged / seized as a result of an act against the law of the perpetrator.

Theoretically, the indemnification as a result of an act against the law is classified into two parts, namely: actual loss and future losses. It is said that the actual loss is a loss that is easily seen in real or physical, both material and immaterial. This disadvantage is based on the concrete things that arise as a result of the unlawful acts of the perpetrator.

While future losses are losses that can be expected to arise in the future due to unlawful acts of the perpetrators. This disadvantage is like filing a demand for the recovery of a good name through announcements in print and or electronic media against the perpetrator. This future compensation shall be based on actual losses to be imagined in the future and will occur in a real way.

The position of Fatwa of *Indonesian Ulema Council* in Legal System in Indonesia

Fatwa by meaning (*lughawi)* is an answer in an event (giving a firm answer to all events that occur in society). According to Imam Zamahsyari in his book "*al-kasyaf*" the definition of fatwa is a path that is roomy / straight. In Arabic al-fatwa; the plurality of *fatāwa* means advice, advice, answers to questions relating to Islamic law. In the science of *ushul fiqh*, the fatwa means the opinion expressed by a *mujtahid* or *fiqih* (*mufti*) in response to a request made by a *fatwa* (*mustafti*) in a non-binding case, ie the person who requests the fatwa either personally, nor the group, the community, should not have to follow the fatwa, because the fatwa has no binding power.[15]

[13] In *Kamus Besar Indonesia*, it means based on agreement; according to contract.
[14] *Ibid. p. 11*
[15] M. Erfan Riadi, 2010, *Kedudukan Fatwa Ditinjau Dari Hukum Islam Dan Hukum Positif (Analisis Yuridis Normatif)*, Jurnal Ulumudin, Volume IV, p. 474.

While the fatwa according to the shari'a meaning is a legal explanation sharia in answering a case submitted by someone who asks, both explanation is clear / clear or uncertain (hesitant) and the explanation leads to two interests namely personal interests and the interests of society a lot. The Fatwa occupies a strategic position and is very important, because the *mufti*, as mentioned by Imam Asy-Syathibi, is the Caliph and heir of the Prophet (SAW), as the hadith narrated by Abud Daud and Tirmidhi that "the ulema are the heirs of the Prophets" in convey shari'a law, teach people, and warn them to be aware and careful.[16]

The fatwa occupies an important position in Islamic law, since the fatwa is an opinion expressed by the jurists of Islamic law (*fuqaha*) about the legal standing of a new problem arising among the people. When a new problem arises that there is no legal provision explicitly, both in the Qur'an, *Sunnah* and *ijma* 'as well as previous *fuqaha* opinions, the fatwa is one of the normative institutions that are competent in answering or determining the legal position the problem. Because of its position which is supposed to establish the law on a particular case or problem, Western scholars of Islamic jurists categorize fatwas as Islamic jurisprudence.[17]

In relation to the above, the fatwa can be interpreted as an explanation of the Shari'a law on certain issues, so the method of taking fatwas is not unlike the method of exploring the laws of Shari'a from the arguments of the Shari'a (*ijtihad*). The reason, the only way to know the Shari'a law from the shari'ah arguments is by *ijtihâd*, and there is no other way. Therefore, a mufti (giver of fatwas) is like a *mujtahid* devoting all his abilities to find the law from the source of Islamic law, namely the Qur'an and the Hadith.

Functionally, the fatwa has the function of *tabyin* and *tawjih*. *Tabyin* means to explain the law which is a praxis regulation for the people, especially the people who do expect their existence. *Taujih*, which provides guidance (guidance) and enlightenment to the wider community about contemporary religious issues.[18]

Based on the legal sources applicable in the national legal system, in the national legal system there are formally five legal sources as follows: laws, customs, judges (jurisprudence), treaties and doctrines (expert opinion/lawyer). Then to be able to know the order of the rules of legislation applicable in Indonesia, it can be seen in Law No. 10 of 2004 on legislation, precisely in article 7 as follows: 1945 Constitution, laws/regulations government substitutes for laws, government regulations, presidential regulations, regional regulations, which include: provincial regulations, regional regulations, district/city, village regulations. The source of positive law in the national legal system above and in the order of legislation, as mentioned in Law No. 10 of 2004 on legislation, does not mention fatwas as part of the legal basis in this country, so the fatwa does not can be used as legal basis.

Fatwa only as an opinion or advice submitted by Islamic jurists who joined in a container organization, such as *MUI, Muhammadiyah, NU*, and other institutions. So that fatwas can be correlated with the source of formal law in the national legal system, namely the position of fatwa is the same as the doctrine which is the opinion of experts or opinion of the experts in the field of positive law. In practice, doctrine (Law expert opinion) much affects the implementation of state administration, as well as in litigation. A judge is permitted to use expert opinion to serve as a judge's consideration in deciding a case, then for a lawyer / defender who is conducting his defense in a civil case, often citing expert opinions as an advocate of his defense.

Similarly with the fatwa, in the history of the Religious Courts in Indonesia, the Religious Courts to be able to examine, handle and decide civil cases (kinship, inheritance, divorce, etc.), the Religious Courts use fatwas as the legal basis, ie fatwas agreed by The Supreme Court with the Religious Courts. Then as an example that the fatwa has also been used by the judge as a consideration in deciding civil cases namely the law no. 3 of 2006 on Religious Courts stated that the Religious Courts are authorized to resolve the dispute of sharia economy, therefore the MUI fatwa products serve as the basis for breaking up before there is a law on syariah economy, for example MUI fatwa no 21 year 2001 about guidance general insurance sharia, MUI fatwa no 3 year 2003 about zakat income, and other fatwa-fatwa about syaria-based economy.

A judge also uses INPRES no. 1 year 1991 which is often referred to as KHI (Compilation of Islamic Law) as the basis of law, whereas in history mentioned that KHI is the result of *ijtihâd* scholar of *mahzab*, that is *Shafi'i mahhab*, it is mentioned that *ijtihâd ulama* as a fatwa has colored the existence of law in Indonesia. Fatwa as expert opinion in Islamic law and doctrine as expert opinion in positive law can be used as judge's consideration in deciding civil case, but not all fatwas products or doctrines are used by judges, but only a small part of the fatwa of ulama and doctrine (opinion of jurist positive).[19]

Contract Legality (*Akad*) as opposed to MUI Fatwa

The term "*akad*" in Islamic Covenant law is called "agreement" in civil law. The contract comes from the word *al-aqd*, which means binding, connecting or connecting. In the Encyclopedia of Islamic Covenant law it is argued that the contract is an *ijab* relationship (statement of bonding) and *qabul* (statement of acceptance of the bond) in accordance with the will of the sharia which affects the object of the engagement.

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[16] *Ibid*, p. 474.
[17] Yusuf Qardhawi, 1997, *Fatwa Antara Ketelitian dan Kecerobohan*, Gema Insani Press, Jakarta, p. 13.
[18] M. Erfan Riadi, *Ibid*, p. 472.
[19] *Ibid.* p. 475

The meaning of "in accordance with the will of the shari'a" is that all engagements by two or more parties shall not be inconsistent with the will of the *syara'*.[20]

The Law of the Islamic Covenant is a law which views a matter / contract as something very important without a true agreement and sahih a contract (contract) / contract does not become legitimate and unlawful in the eyes of religion, because the importance of the contract is described in the Qur'an as stated in Surah An Nisa 'verse 29. Which became the legal basis of the contract / covenant itself in Islam.

> It means: *O you who have believed, do not consume one another's wealth unjustly but only [in lawful] business by mutual consent. And do not kill yourselves [or one another]. Indeed, Allah is to you ever Merciful*."[21]

The purpose of the defect contract is the things that damage the contract because of the non-fulfillment of voluntary elements between the parties concerned.[22]

Jumhur ulama other than Hanafiah argue that a contract is not valid if it contains elements of *riba*. There are some things that can eliminate the *ikrah* (coercion), drunk, hazl (spoken out of desire), *ghalath* (mistaken), *tadlis* (hid shame) and *ghabn* (deceit).[23]

The legality of the contract in Islamic law is twofold. The first *shahih* or *sahih* which means all the pillars of the contract and all conditions are met, the second, vanity is if one of the rukun akad not fulfilled then those *akad* be void or invalid, especially if there are elements *Maisir, Gharar and Riba* in it. These three elements should be avoided in transactions using the sharia contract.

Maisir is any game that contains a bet element, whereas the winning side take the property or material from the losing party. *Gharar* is likened to a situation that does not provide sufficient information about the subject or object of the contract. While *Riba* is any excess that is not *syar'i* between the value of goods given and the value received. As an example of Wahbah Az-Zuhaili's review of the forbidden sale and purchase in several categories.[24]

a. Disability and imperfection of the person making the contract. Such as buying and selling done by crazy people, small children, people who are threatened or forced, and a *mahjur 'alaih*.
b. Disability and imperfection of requirements from *sighah*. Like buying and selling with conditions that are prohibited, there is no match between the *ijab* and *qabul*, and buying and selling with words or gestures that are not understood.
c. Disability and imperfection requirements of *mahallul'aqd*. Like buying and selling goods that are forbidden and unclean, buying and selling *ma'dum*, goods sale and purchase that cannot be received directly, including buying and selling that contain elements of *gharar*.
d. Disability because there are properties or conditions that are prohibited, such as *riba*, buying and selling city people with high prices for villagers who do not know the price, buying and selling during the Friday prayers and so forth.[25]

In the Law of the Covenant there are three causes which make the consent to be non-free: three things: coercion, mistake and deceit.[26] While in Islamic jurisprudence there are four things destroyer state of mutual willingness, namely:

a. Coercion
b. Erroneousness
c. Fraud; and
d. There is a marked exchange rate inequality between the two goods exchanged for the perdayaan or deceit (*al-Ghubn al-Fahisy ma'a al-Taghrir*).[27]

In the concept of sharia a contract or contract shall not contain the following five (five) points:

a. Make and sell unclean goods.
b. Making things useless in Islam.
c. Contains *gharar* (uncertainty).
d. Contains *riba* (interest money).
e. Contains *maisir* (gambling).

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[20] Cut Lika Lia, *Akad yang Cacat dalam Hukum Perjanjian Islam*, Diakses dari https://media.neliti.com/media/publications/14022-ID-akad-yang-cacat-dalam-hukum-perjanjian-islam.pdf accessed on January 1st, 2018 at 15.10 WIB.

[21] _____, *Al Quran dan Terjemahannya*, Syamil Quran, Bandung, 2012, p. 83.

[22] Hasballah Thaib, 2004, *Kapita Selekta Hukum Islam*, Pustaka Bangsa Press, Medan, p. 133.

[23] *Ibid.* p. 134

[24] Wahbah az-Zuhaili Hafizhahullah Muhaqqiq, *al-Fiqh al-Islami wa Adillatuhu (Translation)*, Daar al-Fikr, p. 123.

[25] Jumal Ahmad, "Teori Akad Transaksi dalam Hukum Islam", *http://www.fimadani.com/teori-akad-transaksi-dalam-hukum-islam/* accessed on January 1st, 2018.

[26] Subekti, 1998, *Hukum Perjanjian*, Intermasa, Jakarta, p. 23.

[27] Muhammad dan Alimin, 2004, *Etika dan Perlindungan Konsumen Dalam Ekonomi Islam*, BPFE, Yogyakarta, p. 174.

These five restrictive materials can be used as an explanation for the concept of causal halal as the terms of the validity of an agreement under Article 1320 of the Civil Code which is now used in standard contractual agreements in banking and insurance.

For a Muslim, obligated in his religion to *muamalah*[28] according to the religious syari'a, because the relationship *muamalah* (sharia economy) part of the religious shari'a which also includes the form of worship of a servant to his Lord, Allah SWT. For that, a Muslim is instructed to follow the Islamic guidance in *muamalah*.

The main principles in *muamalah* is the occurrence of elements of mutual willingness between the two sides. The principle has been explained by Allah swt in the letter of An-Nisaa verse 29 above. Based on that paragraph, contracts *(akad)* that are not in accordance with Islamic Shari'a, also called contracts that violate halal causes. Thus, a Muslim must try to break away from all contracts that occur by violating the Shari'a, so to obtain the blessings and happiness of the Hereafter world according to the command of Allah SWT.

Settlement of Riba Debt Contract

As explained above, *ribawi* debt is one of the forbidden contracts in Islam. But sometimes, a Muslim is ensnared *riba*. Yet to run his conviction completely and avoid sin, a Muslim must leave *riba* (usury). As the word of Allah in Al Quran letter Al Baqarah verse 275 which means:

> *Those who consume interest cannot stand [on the Day of Resurrection] except as one stands who is being beaten by Satan into insanity. That is because they say, "Trade is [just] like interest." But Allah has permitted trade and has forbidden interest. So whoever has received an admonition from his Lord and desists may have what is past, and his affair rests with Allah . But whoever returns to [dealing in interest or usury] - those are the companions of the Fire; they will abide eternally therein*.[29]

Allah is very curse to those who do usury; therefore a Muslim must break away from usury after the science to him. There are many other verses of the Qur'an that prohibit usury, because riba ensnares a life so difficult to gain blessings of life. However, if it is already trapped in usury, a Muslim can take two steps. For those who have given usury, of course problem solving can be easier with the willingness of lenders that contain usury. That is, by taking a loan repayment only the principal. But it is different if you want to escape from usury is the borrower. Then the dispute resolution can be done through 3 (three ways):[30]

a. By Peace (*Al-Shulh*)

   This path is the safest way, without risk in solving every problem of life. No exception in the issue of economic dispute sharia. Although the contract or business contract has been created or formulated in such a way, complete, meticulous and perfect, but in its journey often experience constraints and obstacles that will ultimately bring harm to one or even both parties are bound in the contract.

   The concept of *shulh* (peace) is the main doctrine in Islamic law in the field of *muamalat* to settle a dispute, and it is a conditio sine qua non in the life of any society, because in essence peace is not a mere positive order, but in the form of the *fitrah* of man.[31]

   Dispute resolution by way of deliberation and peace in the world of positive law is often referred to as "mediation".[32] The present world trend is an effective judiciary. The point is how to make the court effective. Only civil disputes that really require a court decision are filed with the Court, while other disputes are pursued by the peace so that the Court is more focused on the particular dispute.

b. Arbitration (*Al-Tahkim*)

   In the arbitration manner (*tahkim*), the disputing parties show their respective representatives (*hakam*), to resolve their dispute. On October 21, 1993, the *Indonesian Ulema Council* established the Indonesian Muamalat Arbitration Agency. Then on 24 December 2003 stood the National Syariah Arbitration Board in place of the Indonesian *Muamalat* Arbitration Agency authorized to resolve the civil dispute in Islam.[33]

   The Fatwa of the National Sharia Council stipulates that disputes or disputes between the parties in sharia economic activities are resolved through National Syariah Arbitration Board. In the fatwa it is stipulated that if one party does not fulfill its obligations, the settlement is made through National Syari'a Arbitration Board, after no agreement is reached through deliberation.

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[28] *Muamalah* comes from the word *aamala*, yuamilu, muamalat which means the treatment or action against others, the relationship of interests. If defined in term, muamalah are all rules that regulate the relationship between fellow human beings, both religious and non-religious, between humans with their lives, and between humans and the natural surroundings.

[29] Al Quran surah Al Baqarah verse 275.

[30] Didiek Noeryono Basar, https://www.researchgate.net/publication/305201478_pelaksanaan_prinsip_syari%27ah_dalam_akad_dan_penyelesaian_sengketa_pada_lembaga_perbankan_syari%27ah_di_indonesia accessed on January 1st, 2018 at 08.00 WIB.

[31] Dadan Muttaqien, 2008, *Penyelesaian Sengketa Perbankan Syariah*, Kreasi Total Media, Yogyakarta, p. 60.

[32] Mediation = way of dispute settlement through negotiation process to get agreement of the parties assisted by mediator (PERMA NO 1/2008 on Mediation Procedure in Court).

[33] Abdul Kadir, *Ibid*.

The settlement of economic disputes through the Indonesian National Arbitration Board (for conventional economics) and the National Sharia Arbitration Board (for sharia economics) relate to Law No. 30 of 1999 on Arbitration and Alternative Dispute Settlement. The agreement to submit a dispute resolution to National Syariah Arbitration Board may be made by the parties at the time of entering into an agreement before the dispute arises.[34]

c. Through the Court (*Al-Qada* ')

If the first and second ways are not able to resolve the dispute, then can take the next process, its is namely litigation process.[35] This process results in agreements that are often incapable of embracing common interests, tending to create new problems, slow in their completion, costly, unresponsive, and hostile between the parties to the conflict. Weaknesses in the litigation[36] process make the parties are advised to solve the problem in non-litigation for a win-win solution.[37]

Closing

Conclusion

According to Article 1320 of the Civil Code, an agreement is declared valid if, it is necessary to meet four conditions, namely (1) the existence of their binding agreement; (2) the ability to make an engagement; (3) a certain subject matter; and (4) an unlawful cause. The requirements in (3) and (4) are called an objective requirement. It is called an objective condition because it deals with the object of the agreement. The legal consequences of non-fulfillment of any objective consequence are contracts made null and void. This means that since the contract was made the contract has been canceled and is considered never existed.

One type of contract that is often done by the people of Indonesia is the contract debt-receivable by wearing interest. According to the Fatwa of the Indonesian Ulema Council No. 1 of 2004 on Interest, Interest (*fa'idah*) is an additional levied in money loan transactions (*al-qardh*) calculated from the principal of the loan without considering the utilization / yield of the principal, the tempo of time, calculated exactly in advance, and generally based on percentage. The current flowering practice has fulfilled the criteria of *riba* that occurred in the time of the Prophet Muhammad (peace and blessings be upon him), i.e *Riba Nasi'ah*. Thus, this flowering practice is one form of *Riba*, and *Riba* is forbidden

Referring to the MUI's Fatwa, the contract of interest-bearing debts does not meet the halal causal requirements as stipulated in the Civil Code of Article 1320. The impact of such contracts is null and void so that they must not be considered originally.

Suggestion

Basically every contract is a law for its makers. This is the application of the principle of *pacta sund servanda*. However, given the legislation laws can be changed the agreement[38] can be changed. This alteration is called the *ribawi* contract renegotiation. The change of the *ribawi* contract must be done both to protect the economic interests of the creditor as well as the spiritual interests of the debtor who object to the imposition of such *riba*.

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[34] Look *fatwa DSN* Nomor 04/DSN-MUI/IV/2000 on *Murabahah*; fatwa DSN Nomor 05/DSN-MUI/IV/2000 on Share sell and purchase; fatwa DSN Nomor 06/DSN-MUI/IV/2000 on *Istishna'* sell and purchase; fatwa DSN Nomor 07/DSN-MUI/IV/2000 on *Mudharabah* Funding (*Qiradh* and the other fatwa)

[35] Litigation = the process of dispute resolution through administrative and judicial processes i.e the disputing parties facing each other to defend their rights.

[36] The opposite of litigation.

[37] Equally beneficial.

[38] which is formally lower than the law.

M. Erfan Riadi, 2010, *Kedudukan Fatwa Ditinjau Dari Hukum Islam Dan Hukum Positif (Analisis Yuridis Normatif)*, Jurnal Ulumudin, Volume IV.
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JUDICIAL REVIEW AS A MECHANISM OF CHECKS AND BALANCES

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ABSTRACT

In accordance with the principle of checks and balances, the legislature, executive, and judiciary need to be positioned to control each other to realize a balance of power. The establishment of law as a competence of legislative institution can not be separated from the political interests of the institution itself. The strong influence of various political interests to establishment of law can make the law not in accordance with the constitution. Therefore, it is necessary to have a judicial institution authorized to review the law. In Indonesia according to The 1945 Constitution, the authority to review the law against the constitution called judicial review is granted to the Constitutional Court. The judicial review is conducted due to an appeal of certain parties whose constitutional rights is violated by the law. In implementation, Constitutional Court in addition authorized to make the decision that the law contrary to constitution (negative legislation), is also possible to make the regulatory decision, i.e. the decision which determines the formulation of new legal norm (positive legislation).The latter decision is taken in order to realize the subtantive justice, legal certainty, and to avoid a legal vacuum that potentially causes the chaos.

Keywords: Checks and balances, judicial review, Constitutional Court.

Introduction

The realization of a democratic government, is determined by the existence of mutual control and balance of power among one state institution and anothers. With mutual control, no state institution can take action arbitrarily, and conditions of mutual control will be realized by a balance of power. In the absence of arbitrary action of state institution, the rights of people will be protected and the their aspirations can be channeled. There is a mutual relationship between the function of control and the balance of power. Well function of control will be able to realize the balance of power among the state institution; in contrary, the balance of power will support controling functions among the state institution. When there is a control function and balance of power, the country will be escaped from the authoritarian government.

As stated by Lord Acton that "power tends to corrupt and absolute power corrupt absolutely".[4]. He thinks that power has a tendency to be abused, and when a person or an institution has absolute power, abuse of power is inevitable. Therefore, to realized well ordered state don't let absolute power is given to one institutions or individuals. The power of the state needs to be distributed in such a way, so there is no concentration of power on certain institution and mutual control among the institution can be realized. As in the constitutional there are legislative, executive, and judiciary institution, the balance of power and mutual control among the institutions to be a very important one.

With regard to the authority of the judiciary, there is a mechanism of judicial review. Judicial review can be defined as review of the law by the judiciary, to determine whether be a contrary between the law and the constitution. Thus, judicial review can be regarded as a control mechanism on law as a legislative product. In Indonesia, According to The 1945 Constitutioan, judicial review refer to the examination of ordinances and regulations made under any law against such law, which is the authority of the Supreme Court (Article 24A); and examination of the law against the constitution which is the authority of the Constitutional Court (Article 24C). This paper limits the discussion to the judicial review of the law against the constitution which is the competence of the Constitutional Court.

The issue will be discussed is, how far the implementation of judicial review can realize checks and balances, especially between legislative institution and judiciary in term of establishment of the law.

Discussion

1. Principle of Chekcs and Balances in Indonesia Government

As stated in the Cambridge Advanced Learner'r Dictionary, "*checks and balances rules intended to prevent one person or group from having too much power withing organization: A system of checks and balances exists to ensure that our government in truly democratic"*.[5] So the principle of checks and balances

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[4] Miriam Budiardjo. 2010. *Dasar-dasar Ilmu Politik*. Jakarta: Gramedia. Page: 107.
[5]Cambridge University. *2008. Cambridge Advanced Learner'r Dictionary.* Cambridge: Cambridge University Press. Page: 231.

is intended to prevent the person or institution have too much power and to support the realization of a democratic government.

According to Berman, "Checks and balances are the constitutional controls whereby separate branches of government have limiting powers over each other so that no branch will become supreme". Another view put forward by RE Neustadt, which states that checks and balances is adalah *"system that ensure that every power in government there is an equal and opposite power placed in separate branch to restrain that force"*[6]

The principle of checks and balances is often associated with the United States' Government where the legislative, executive, and judiciary institution are placed in a position of mutual control each others and there is a balance of power among these institutions. As a governmental principle, the checks and balances later becomes the reference in other countries. With this principle, it is expected that a democratic system will be implemented in which no state institution has too much power and will be separated from the control of others. Such conditions not only be expected of the United States people but also of the other countries one.

In the United States, the doctrine of checks and balances is inseparable from the principle of separation of powers. As written by Robert Weissberg[7], "A principle related to separation of powers is the doctrine of checks and balances. Whereas separation of powers devides governmental power among different officials, checks and balances gives each official some power over the others. For example, Article II, section 2 gives the President the power to make treaties and to appoint ambassadors and Supreme Court Justice, but these appoinments require Senate approval. Likewise, the President is commander-in-chief of the armed forces, but Congress is responsible for declaring war and authorizing the money to fight war. The President is also given the power to veto legislation. A President who oversteps his power or commit other crimes may be impeached (indicted) by the House and tried by the Senate. Checks and balances also apply to the court. It is the President – with the consent of the Senate – who appoint all federal judges, while Congress creates new court system and defines many areas of court jurisdiction. Here again the basic constitutional design allows some afficials to resist or oversee the actions of othes officials."

In accordance with the principle of checks and balances in the United States, the functions of the president are designed to permit each state institution to limit other powers. The president can veto the steps of Congress, and his veto can not be demolished without two-thirds of the House and Senate vote. The President uses his oversight on federal courts through his power to appoint federal judges and Supreme Court judges. But checks and balances also limit the prerogative of the presidency, in which the presidential executive order must be in accordance with the law, and otherwise it will not be enforced by the federal court. Presidential appointments for high positions must be approved by a majority of the Senate vote.[8]

The Indonesian government has adopted the principle of checks and balances by the Amendmend of The 1945 Constitution. As stated by The People Consultative Assembly, that one of the objectives of The 1945 Constitution amendmet is to improve the basic rules of democratic and modern government, through the sharing of power, a system of mutual control, and more strict and transparent checks and balances.[9]. Although it must also be stated that the implementation of checks and balances is not only determined by the provision of the constitution, but also by the political factors around the government.

The reason behind the amendment of The 1945 Constitution is that The 1945 Constitution establishes a constitutional structure based on the highest authority of The People Consultative Assembly, which fully exercises the people's sovereignty. It has caused the absence of mutual control and the balances of power among the state institutions. Supremacy of the The People Consultative Assembly has caused the state government has no relation with the people.[10]

.According to The People Consultative Assembly, by amendment of The 1945 Constitution, theoretically, there is a fundamental change in the government, from a *vertical-hierarchical* system based on supremacy of the The People Consultative Assembly into a *horizontal-functional* system with the principle of mutual balance and mutual control among the state institution.[11]. In accordance with the principle of checks and balances in the The 1945 Constitution, the constitution do not placed the The People Consultative Assembly on the highest position holding the people's sovereignty. It'is by means that the people's sovereignty is distributed on the legislative, executive, and judiciary institution; and among of them can control each other to realize the balance of power.

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[6] R.M.A.B. Kusuma, 2004, "*Sistem Pemerintahan dengan Prinsip Checks and Balances*, Jurnal Konstitusi Volume 1 Nomor 2 Desember 2004, Page 143.

[7] Robert Weissberg, 1979, *Understanding American Government*, New York: Holt Rinehart and Winston, Page 35.

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[11] Setjen MPR RI, *Ibid*, Page 49.

The mechanism of checks and balances in a democracy is necessary to avoid the abuse of power by a person or institution, to avoid concentrating power on a person or institution, because with such mechanism, among of them can control each other.[12]

The principle of checks and balances can be implemented through the following ways:[13]

a. Giving authority to take certain action to more than one branch of power. For example the authority of making the law granted to the president and parliament.
b. The granting of authority to appoint the certain officials to more than one branch of power, for example to the executive with the legislature;
c. There is the possibility of an impeachment by one branch of power to another;
d. There is controling of one branch of power to another, such as legislative control executive in using of the state budget;
e. The granting of authority to the court to resolve disputes between the state institution.

The amendments to The 1945 Constitution have laid a foundation for establishing and enforcing the principle of checks and balances. The nature of executive heavy attached to The 1945 Constitution has been amended. The authority to make a law which was mainly the authority of President, has been shifted to the authority of the People Representatives Council. Several authorities previously authorized by the President, after the amendment must with regard to the opinion of the People Representatives Council. Such constitution provisions are intended to realize the checks and the balances among the state institution.

The giving of take action authority to more than one branch of power has also been regulated by The 1945 Constitution. The such authority is to make the law (Artikel 20) and to determine the State Budget (Article 23). To appoint ambassadors and receive the accreditation of ambassadors of foreign nation, the President shall have regard to the opinion of People Representatives Council (Article 13). To grant clemency and restoration of rights, the President shall have regard to the opinion of the Supreme Court. While to grant amnesty and the dropping of charges shall have regard to the opinion of the People Representatives Council (Article 14). By this constitutional provision, there is no state institution can take action only to fulfill their political interest.

The granting of authority for the appointment of certain officials to more than one branch of power, have been stipulated by constitution. In accordance with The 1945 Constitution; Member of Supreme Audit Board shall be chosen by the People Representatives Council, which shall have regard to any considerations of the Council of Representatives of The Region, and will be formally appointed by the President (Article 23F); Candidate justices of the Supreme Court shall be proposed by the Judicial Commission to the People Representatives Council for approval and shall subsequently be formally appointed to office by the President (Article 24A); The Constitutional Court shall be composed of nine persons who shall be constitutional justices and who shall be confirmed in office by the President, of whom three shall be nominated by the Supreme Court, three nominated by the People Representatives Council, and three nominated by the President (Article 24C); The members of the Judicial Commission shall be appointed and dismissed by the President with the approval of the People Representatives Council (Article 24B).

The possibility of an impeachment by one branch of power to another also has been stipulated by The 1945 Constitution. The President and/or the Vice-President may be dismissed from his/her position during his/her term of office by The People Consultative Assembly on the proposal of the People Representatives Council, both if it is proven that he/she has violated the law through an act of treason, corruption, bribery, or other act of a grave criminal nature, or through moral turpitude, and that the President and/or Vice-President no longer fulfilled the qualifications to serve as President and/or Vice-President (Article 7A).

2. Judicial Review as a Control of The Legislature

The government is based on the system of rules that consist of many kinds. That system is a hierarchy of the lowest to the highest level of rules. In Indonesia, accoding to The Law No. 12 of Year 2011 on The Making Rules, kind and hierarchy of rules consists of:

a. Constitution of the Republic of Indonesia of 1945;
b. People's Consultative Council Decree;
c. Law/Government Regulation In Lieu of Law;
d. Government Regulation;
e. Presidential Regulation;
f. Province Regulation; and
g. Regency/Municipality Regulation.

(Article 7)

Realizing the legal certainty and orderly society requires the consistency in the system of rule, the internal consistency as well as the external consistency. The internal consistency is consistency within the

[12] Affan Ghafar, Page: 89.
[13] Munir Fuady. 2009. *Teori Negara Hukum Modern (Rechtstaat)*. Bandung: PT Refika Aditama. Page: 124-125

rule itself and the external consistency is consistency between the rule with anothers. Whitout consistency in the system of rule, it is difficult to realize the legal certainty and orderly society.

In the law enforcement there is a principle namely *leg superior derogat legi inferiori*, in meaning that higher rules can override the lower rules. When there is a contradiction between the lower and the higher rules, the lower should be adjusted. If not adjusted it is devoid of legal binding force and effect.

Judicial review can not be separated from the discussion of system of rule, because the implementation of judicial review is based on hierarchically rules. Judicial review can not be operationalized without any hierarchically rule.[14] According to Hans Kalsen, A "norm contrary to a norm" however is a self-contradiction; the legal norm which might be said to be in conflict with the norm that ditermines its creation could not be regarded as a valid legal norm – it would be null, which means it would not be a legal norm at all. That which is null cannot be anulled. To annul a norm can not mean to annihilate the act whose meaning is the norm. Something that actually happened can not be made to unhappen.[15]

In order to have conformity between one law and another, it requires mechanism to control legislation. The form of such control is the authority of other institution to review the law against the constitution. Such institutions may be legislative, executive, or judiciary institutions. Therefore, with regard to the control of legislation, there are several terms, i.e. "toetsingrecht", "constitutional review", "judicial review", "legislative review", and "executive review".

The term of "toetsingrecht" is popular in the Continental European legal system, which means review of the law. The term has two meanings i.e. formal review and material review[16]. Formal review is the review whether the law have been formulated consistently the provision as laid down by the constitution. While the material review is the review whether the material substance of law is conformed with the constitution. Both of them are required because of every law must be formulated consistenly with provisions procedure of constitutioan and the material substance do not contrary to the constitution.

While the term of "constitutional review" refers to the review of the constitutionality of a law, whether its material substance are contradictory or not with the constitution. Such constitutionality may be reviewed by a judiciary, legislative, or executive institution depend on the legal system of the country. Review of the constitutionality, if it becomes the authority of the judiciary, is called "judicial review"; if it is the authority of the legislative, is called "legislative review"; and if it is the authority of the executive, is called "executive review".[17]

If the term "constitutional review" is compared to a "judicial review", it can be stated that the object of the constitutional review relates to a narrower object, i.e. to review the constitutionality of the law against the constitution. Whereas judicial review is related to a broader object, i.e. review various regulation whether there is a contradiction with higher regulation. But with regard to the subject, the constitutional review may be an authority of judiciary, legislative institution, or executive institution, depend on the norm in the constitution. While judicial review related to the narrower subject that is the judiciary.[18]

Judicial review refers to 'the invalidation of laws enacted by the normal or regular legislative process, because they are in conflict with some superior law, typically a constitution or treaty'[19] In Indonesia according to The 1945 Constitution, judicial review to ordinances and regulations made under law against such law, is the authority of Supreme Court, while judicial review to law against the constitution is the authority of Constitutional Court (Article 24A and 24C).

Historical background Judicial review in the government system is often far traced back from the government of Ancient Greece. As Mauro Cappelletti writes, in ancient Greece there was a "nomoi" that could be likened to the constitution, and the "psephism" which can be likened to the law. The "psephism" should not be contradictory to "nomoi", and if the "psephism" is contrary to the "nomoi", "psephism" is considered to be invalid.[20]

With regard to the judicial authority to interpret of the constitution, there is a difference between one country and another about the institution authorized to do. In the United States the authority is granted to the Supreme Court. In Austria, Federal States of Germany, Italy, and Hungary are granted to the institution called the Constitutional Court. In France by an institution called the French Constitutional Council, and in Taiwan by the Council of Grand Justices.[21] In connection with that authority CF. Strong distinguishes the judiciary

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[14] Moh. Mahfud MD. 2011. *Membangun Politik Hukum, Menegakkan Konstitusi*. Jakarta: PT Rajagrafindo Persada. Page 123.

[15] Hans Kelsen. 1978. *Pure Theory of Law*. *Berkeley*: University of California Press. Page 267.

[16] *Zainal Arifin Hoesein. 2009. Judicial Review di Mahkamah Agung: Tiga Dekade Pengujian Peraturan Perundang-undangan.* Jakarta: Raja Grafindo Persada. Halam 6.

[17] Jimly Asshiddiqie. 2010. *Model-model Pengujian Konstitusional di Berbagai Negara*. Jakarta: Sinar Grafika. Page 6.

[18] Jimmly Asshiddiqie. *Ibid*. Page 4.

[19] Marc Hertogh and Simon Halliday. 2004. *Judicial Review and Bureaucratic Impact: International and Interdiciplinary Dimension*. Cambridge: Cambridge University Press. Page 16.

[20] Jimly Asshiddiqie. 2010. *Model-model Pengujian Konstitusional di Berbagai Negara*. Jakarta: Sinar Grafika. Page 10.

[21] Jimly Asshiddiqie. 2012. *Peradilan Konstitusi di 10 Negara*. Jakarta: Sinar Grafika. Page 36-172.

within 2 (two) types, namely the judiciary that can interpret the law, as in the United States; and judiciary that must apply the law unconditionally, as in the United Kingdom.[22]

The existence of various terms above indicates no law can't be reviewed, whether it's material substance are contradictory or not to the constitution. The authority to review may be at legislative institution, executive institution, or judiciary. Such authority is the part of the control over legislation, in order the law established does't contradictory to the constitution.

Another case is happened in United Kingdom with the principle of parliamentary supremacy. Among the various rules made by parliament, isn't distinguished over the fundamental and non-fundamental rules. It is means that all rules established by parliament have the same level. Therefore, in United Kingdom there is no rule or charter called The Constitution. In relation with the regulatory control, AV. Dicey stated that in the British Empire there is no executive, legislative, or judiciary that can declare invalidity of the rule made by parliament, unless it is annulled by parliament itself.[23]

According to Dicey, the idea of the sovereignty of Parliament was long seen as the core of democratic practice. The superior position of the popularly elected legislature and its corollary of majority rule have been central principles for democratic revolutionaries since the notion was appended to the unwritten English constitution. At that time, the threat to liberty was monarchical power, and the subjugation of monarchical power to popular control was the primary goal. The resulting doctrine was that Parliament had "the right to make or unmake any law whatever; and further, that no person or institution is recognized by the law of England as having a right to override or set aside the legislation of Parliament."[24]

Judicial review has spread around the globe in three waves. The first wave was that of the United States and the constitutions of its various constituent states. Although judicial review was adopted in a couple of European polities thereafter, particularly after Kelsen's reconceptualization of constitutional review in the early twentieth century, it was not until a second wave of constitution writing after World War II that the practice spread broadly. The *third* wave of judicial review has been the recent adoption of judicial review in the postcommunist world and other new democracies. In discussing cases from these three waves, we will review successful cases as well as an instance where judicial review failed to contribute to democratic development and consolidation, namely postcommunist Russia. For each, we will consider the extent of political diffusion as the environmental condition supporting judicial review.[25]

The justification for judicial review has been looked for in the principle that powers granted to a public institution must not be exceeded. This is the ultra vires principle: the act of a public authority that falls outside the limits of its jurisdiction or powers is unlawful and will be prevented or, after the event, set aside by the reviewing court. Where power is conferred by law it will be for the court to determine what limits Parliament has imposed on the use of the power and whether those limits have been exceeded.[26]

No political institution, even a democratically legitimate one, ought to be able to suppress basic liberties. Postwar constitutional drafting efforts focused on two concerns: first, the enunciation of basic rights to delimit a zone of autonomy for individuals, which the state should not be allowed to abridge; and second, the establishment of special constitutional courts to safeguard and protect these rights. These courts were seen as protecting democracy from its own excesses and were adopted precisely because they could be countermajoritarian, able to protect the *substantive* values of democracy from procedurally legitimate elected bodies.[27]

This famous problem focuses on the propriety of unelected judges, who lack democratic legitimacy, overturning duly enacted decisions of democratic assemblies. This normative challenge has been bolstered by theorists of democracy who argue that judicial power comes at the expense of representative institutions. Judicial review, from these perspectives, is not only unnecessary for democracy, but in fact suspect. In the face of these critiques, most legal scholars discussing judicial review have self-consciously adopted a defensive tone at the outset, trying to justify the role of courts in terms of democratic theory.[28]

According to the perspective of democracy, there is a problem with judicial review in which the products of legislative institution should be examined by judge who haven't democratic legitimacy because it is not elected by people. But in perspective of checks and balances, judicial review must be viewed as a control mechanism to the legislative institution for the law does not contrary to the constitution and violate the constitutional rights of certain parties.

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[22] CF. Strong. 2008. *Konstitusi-konstitusi Politik Modern* (Terjemahan). Bandung: Nusa Media. Page 103.
[23] A.V. Dicey. 2014. *Pengantar Studi Hukum Konstitusi*. Bandung: Nusamedia. Page 172.
[24] Tom Ginsburg. *Op. Cit*. Page 1.
[25] Tom Ginsburg. 2003. *Judicial Review in New Democracies: Constitutional Court in Asia Cases.*New York: Cambridge University Press. Page 90.
[26] Colin Turpin and Adam Tomkins. 2007. *British Government and The Constitution*. New York: Cambridge University Press. Page 656.
[27] Tom Ginsburg. *Loc Cit*. Page 90.
[28] Tom Ginsburg. *Op. Cit*. Page 21.

In the United States, judicial review (or, at least, scholarship about judicial review) is overwhelmingly preoccupied with controlling the activities of independent regulatory agencies.[29] Whereas in England is most commonly understood in terms of the concept of the rule of law. According to this approach, the prime function of judicial review is to police the legal boundaries of executive power, whether laid down by Parliament in laws, or by the courts in the 'grounds' of judicial review.[30]

Judicial review relates to doctrines which authorizes judges to review the law whether the material substance of the law contravenes constitution or the formulation of a law is inconsistent with the Constitution. Behind the judicial review there is the idea to control the legislative power from the possibility of a "tyrant" based on majoritarian principle. Otherwise, according to democratic principles, law is viewed as the "product" of parliament and manifestation of govenrment by people.

The conventional move to solve the problem of courts in democratic theory is to celebrate the role of judicial review in democracy as a check on majority power. Judicial review in this view can facilitate the democratic process by clearing out obstacles to its advancement.[31]

3. Judicial Review in Indonesia as A Checks and Balances Mechanism

The authority of the judiciary to judicial review brings the problem pertaining with 2 (two) principles i.e. principle of power distribution and principle of checks and balances.[32] In regard to the principle of power distribution, the question that arise is, why the judiciary is authorized to interfere the making of law which is the authority of the legislature. Whereas related to the principle of checks and balances, arise the question why the judiciary is given an enormous authority over the the legislature and the executive. Proponents of the judicial review have argued that the judiciary is an independent institution, so it is regarded as "the least dangerous branch" for carrying out the judicial review.[33]

Urgency of judicial review can be traced from the study that the nature of law is largely determined by the political configuration when the law was made. This means that the dominant group (the ruler) can make the law according to their own vision and political interest which is not necessarily conforms to the spirit of constitution.[34]

In Indonesia it is realized by presence of a new institution based on the 1945 Constitution amendment namely Constitutional Court. The urgency of the presence of the Constitutional Court can not be separated from the authority to review the constitutionality of the law established by People Representatives Council and President.[35]

According to The 1945 Constitution of The Republic of Indonesia, there are two institutions that are authorized for judicial review, namely the Supreme Court and the Constitutional Court. The Supreme Court is authorized to review ordinances and regulations made under the law against such law (Article 24A), and Constitutional Court is authorized to try a case at the first and final level and shall have the final power of decision in reviewing laws against the Constitution (Article 24C). As mention above this paper limits the discussion to the judicial review by the Constitutional Court. The existence of the Constitutional Court is then regulated by The Law No. 24 of Year 2003 on Constitutional Court as amended by The Law No. 8 of Year 2011. According to mentioned law, Constitutional Court has authority in among holds jurisdiction of first and final instance, whose decisions shall be final to review a law against The 1945 Constitution of the Republic of Indonesia (Article 10).

With regard to the principle of checks and balances, judicial review authority is important because People Representatives Council is a political institution in which can not be separated from temporary political interests. Members of People Representatives Council are came from different parties, region, ethnic, religy and other different backgrounds. All of difference will influent the political interests, and in turn influent the law making. It is possible that political interests among the member of People Representatives Council are more preferred than the people interests.

As a "political product" the content of law will be strongly influenced by the political constellation or political configuration when the law is arranged. Law can be viewed as a crystallization of political thinking that interacts among politicians. Although from the "das sollen" politics must be subordinated to the law, but empirically or in "das sein" the law is often subordinated to the political configuration.[36]

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[29] Marc Hertogh and Simon Halliday (Editors). *Judicial Review and Bureaucratic Impact: International and Interdiciplinary Dimension*. Cambridge: Cambridge University Press. Page 20.
[30] Marc Hertogh and Simon Halliday. Op. Cit. Page 17.
[31] Tom Ginsburg. *Op. Cit*. Page 21.
[32] Munir Fuady. 2009. *Teori Negara Hukum Modern (Rechtstaat).* Bandung: Refika Aditama. Page 86.
[33] *Ibid.* Page 87.
[34] Moh. Mahfud MD. 2011. *Politik Hukum di Indonesia*. Jakarta: Rajawali Press. Page 348.
[35] Firdaus. 2015. *Constitutional Engineering: Dersain Stabilitas Pemerintahan Demokrasi dan Sistem Kepartaian.* Bandung: Penerbit Yrama Widya. Page 380.
[36] Moh. Mahfud MD. 2011. *Membangun Politik Hukum, Menegakkan Konstitusi*. Jakarta: Rajawali Press. Page: 64.

In other words, the content of law as a "political product" can not be separated from political interests when it is established. Related to the hierarchy of rule, it is very likely that there are laws whose contents are contrary to the constitution. In this case, judicial review is required to realize a balance of power and to control parliament so not lead to tyranny. Through the judicial review, law as product of legislative can be canceled by judiciary for reason contrary to the constitution.

Moreover, judicial review is conducted for the appeal of the certain parties. It means that the parliamentary authority to established the law can be complained by the certain parties through the Constitutional Court. Therefore the people can indireclty control the law established by legislature. Thus checks and balances built through judicial review is at least related to two important things. The first, people in the democratic system can control legislative institution in making the law. The second, judicial review by the Constitutional Court embodies checks and balances by which the legislature should be more carefully in establishing the law. The eksistence of the Constitutional Court also plays a role in guarding the Constitution i.e. to mediate a dispute constitutionality between the government and the citizens.[37]

The Constitutional Court is in addition authorized to make the decision that the law contrary to constitution (negative legislation), is also possible to make the regulatory decision (positive legislation). The regulatory decision is the decision which determines the formulation of new legal norm. Regulatory decision of Constitutional Court is intended to realize the subtantive justice, legal certainty, and to avoid a legal vacuum that potentially causes the chaos.

Closing

Conclusion

The principle of checks and balances requires mutual control among the state institution, so there is no state institution can take action arbitrary. The establishment of law by legislative institution also needs to be controled in order the law does not serve only their own interests and such law contrary to the constitution. The law in addition is the legal product is also the "political product". As a "political product" it's content can't be separated from the political constellation when it is established as well as the influence of political interests of the dominant group in the legislature. The strong influence of their own interest, can make the law contrary to the constitution. Therefore, it is necessary to have a control mechanism of establishing of the law through the judicial review. In Indonesia, judicial review of the law becomes the authority of the Constitutional Court. According to The 1945 Constitution, the Constitutional Court has the authority to review the law against the Constitution. The Constitutional Court is in addition authorized to make the decision that the law contrary to constitution (negative legislation), is also possible to make the regulatory decision, i.e. the decision which determines the formulation of new legal norm (positive legislation).The latter intended to realize the subtantive justice, legal certainty, and to avoid a legal vacuum that potentially causes the chaos.

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[37]Firdaus. *Op.Cit*. Page 381.

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LEGAL POLITICS: RECONSTRUCTION OF LEGAL RESOURCES AUTHORITY OF LOCAL AUTONOMY ON SPECIAL GOVERNMENT OF ACEH

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ABSTRACT

Constitution in Indonesia acknowledges and respects regional administration unit which is special or specific in nature, one of them is Aceh Administration. Besides specific reason, specialty of Aceh is given as a materialization of justice and effort of conflict resolution which has occurred more than 30 years. This research is using approaches of normative, legal history and legal comparison. The assessment is limited on issues of norms and practice of regulating in harmonization of two legal document instruments which ever applied in the past, namely, Adat Meukuta Alam (AMA) legal resource and Law Number 11/2006 on Aceh Administration. Law on Aceh Administration comes from peace treaty of Indonesia government and Free Aceh Movement signed in Helsinki, 15 August 2005. Philosophically, there are two main goals to be achieved from application of political harmonization policy and justice. First, democracy goal positions regional government as politic education instrument at local level on macro side will contribute to national interest from basic element creating nation and state unity and accelerating the creation of civil society. Second, it indicates regional government to improve local society welfare through equilibrium of special autonomy and state life interest in the global era. It means it requires a kind of willingness and honesty of intention of all parties to build mutual trust among nation stakeholders.

Keywords: Legal Politics, Reconstruction, Local Autonomy, Special Government.

Introduction

This research focuses on assessment on state institutions regulated in legal instrument or document applicable in Aceh, in Law Number 11/2006 on Aceh Administration[1]. Such document assessment is centralized by observing reconstruction state concept of *good public governance*. The power to regulate society no longer lies in the hands of the rulers, government management is not oriented on only power (from government) but management process (to govern) and market orientation. A strong government no longer lies on the size of authoritarian centralistic government organization, but on *small and less government* and democracy.

Management of good governance emphasizes on the role of leader (manager) in giving quality public service, improving autonomy, decreasing government intervention (*steering than rowing*), and participating to enhance public accountability transparency. This assessment is important, because in essence the effort to explore the past time law searching for the future, is none other than the effort of a process of big change which influences the fate of human being to shape nation character (nation building). This certainly is considered important to strengthen the role of state and significant in the journey of Indonesia constitutional history.

History constitutes a basis for enlightenment in order to put forward ideas of change. Although there are differences between state and community, both cannot be separated. History moves dynamically. Law as history is subject to changes and stability; something which grows is stable[2].

Ideas of traditional concept of state and power[3], both traditions strengthen each other, where freedom and people welfare is impossible to achieve without the presence of state which is able to play its role effectively. On the other hand, strong state without guaranteeing freedom and people welfare cannot survive long, marked with ability to guarantee legal certainty and policy made is followed by community, without excessive threat, force and anxiety. Basic element of strong state is effective and institutionalized authority.[4]

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[1] Republic of Indonesia, Law on Aceh Administration (UUPA), Law Number 11 of 2006, State Gazette of 2006, Addendum of State Gazette Number 4633.

[2] Deliar Noer, *Ideas of Western State Politics*, revised edition, (Bandung: Mizan Pustaka, 2001), p. 71, 134. Also see L.J. Van Apeldoorn, *Introduction to Legal Science: Inleiding Tot de Studie van het Nederlandse Recht*, (Jakarta: Pradnya Paramita, 2001),p.417.

[3] Noer, *op. cit*, p. 134.

[4] Francis Fukuyama, *State Building: Governance and World Order in the Twenty-First Century*, (London: Cornell Universty Press, 2005), p. 14-15.

In connection with a part of the state, Aceh Province at present is a part of The Unitary State of the Republic of Indonesia. In connection with specialty of Aceh, Law on Aceh Administration Number 11 of 2006 prevails, as written legal source *(geschreven recht)*[5].

This study is in the frame of comparing how far legal source which prevailed during Aceh Sultanate time can be implemented in atmosphere of Law Number 11 of 2006 on Aceh Administration.

Focus and Issues of Study

Research in this study focus highly requires a reconstruction[6], because it analyzes past legal event in order to find the future (exploring the past time law searching for the future), as a process of big change which can determine the fate of human kind to shape nation building. This is certainly considered important to strengthen the role of local government and meaningful in the long journey of Indonesia constitutional history which greatly influences adat values in Aceh community life and co-strengthening among the existing values as long as they are not related to main and fundamental aspects. So that an agreement can be built based on mutual preparedness between central government and Aceh government and adhered to and implemented. Therefore arrangement and practice of authority distribution in written legal source namely Law Number 11 of 2006 on Aceh Administration abbreviated into UUPA in the Unitary State of the Republic of Indonesia[7], which is also influenced by written legal source Adat Meukuta Alam[8], tradition as unwritten legal source in Aceh administration of sultanate era.

The content of Law Number 11 of 2006 on Aceh Administration is influenced by old elements which had prevailed in Aceh administration of Sultan Iskandar Muda era (1607-1636) and Sultanah Nurul Alam Naqiatuddin Syah (1675-1678) such as *gampong* administration, *mukim* administration, *nanggroe* administration, *sagoe* administration and *wali nanggroe*. How far can both legal sources which once prevailed in Aceh administration during sultanate era be implemented in the atmosphere of Law Number 11 of 2006 on Aceh Administration at present? Moreover, this study is also in the frame of comparison to enrich the horizon of Indonesia constitutionalism.

Based on the above background, the issue of this research is to assess legal norms for the future of Aceh administration. Aspects of legislative regulations, distribution of power which occurred in the past and the existing ones in Aceh administration, whether they are through written legal source (*geschreven recht*) Adat Meukuta Alam (AMA)[9] as well as tradition of unwritten legal source (*ongeschreven recht)*[10] which prevailed in the past. Besides, the present written legal source (*geschreven recht*) is Law Number 11 of 2006 on Aceh Administration.[11]

Theory and Concept.

Aceh History

The present Aceh administration is a part of the Unitary State of the Republic of Indonesia (NKRI) which constitutes Aceh Darussalam Sultanate area which began in early 16th century established by Sultan Ali Mughayat Syah (±1514-1528)[12] and ended in 19th century when attacked by Dutch Indies Government which began in 1873.[13] The era of Aceh sultanate administration ever had glorious time, achieving prosperity and welfare which was managed according to legislation[14]

Such idea basically has great optimism to re-develop legal transformation mechanism which had ever flourished according to era growth. Aceh administration united into the Unitary State of the Republic Of Indonesia on 3rd October 1945, Aceh became *Keresidenan* or regency under Sumatera Province in Bukit

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[5] Republic of Indonesia, Law on Aceh Administration (UUPA), Law Number 11 of 2006, State Gazette of 2006, Addendum of State Gazette Number 4633.

[6] In the context of era change, reconstruction can be defined as reading method which is very intolerant to historical facts or *reconstruction according to original behavior*, in answering state failure as well as challenges, justice, democracy, human freedom as individual and obligation to his environment. Compare S.W. Couwenberg, *De Omstreden Staat: Ontwikkeling en Problematiek Van De Staatstheorie In De 20Ste Eeuw*, (Samsom Uitgeverij Alphen aan den Rijn, 1974), p.84.

[7] Republic of Indonesia, Law on Aceh Administration, *loc. cit.*

[8] Langen, *op. cit.* p. 10.

[9] K.F.H. van Langen, *De Inrichting van het Atjehsche Staatsbestuur onder het Sultanat:* dalam (Bijdragen tot de Taal, Land-en Volkenkunde van Ned, Indie 5, Volume III, s' Gravenhage, 1888), translated by Aboe Bakar, *Structure of Aceh Administration During Sultanate Era*, Aceh Information Serial, Year IX Number 1, (Banda Aceh: Aceh Documentation and Information Center, 1986), pp. 56-67.

[10] Muhammad Zainuddin, *Aceh and Nusantara Era*, first printing, (Medan: Pustaka Iskandar Muda, 1961), pp. 340-309.

[11] The Republic of Indonesia, Law on Aceh Administration, *loc. cit.*

[12] Raden Hoesein Djajadiningrat, *Critisch Overzicht van de in Maleische Werken Vervatte Gegevens Over de Geschiedenis van het Soeltanaat van Atjeh (1908)*, translated by Teuku Hamid, *Kesultanan Aceh*, (Banda Aceh: Department of Education and Culture, Aceh Special District Museum Development Project, 1982-1983), p.19.

[13] G. B. Hooyer, De Krijgsgeschiedenis van Nederlandsch-Indie van 1811 tot 1894, Deel III, (Den Haag Batavia: De Gebr, van Chef/g. Kolff & Co, 1897), p. 5.

[14] Alfian, *Gold Currency of Kingdoms in Aceh op.cit* .p. 87.

Tinggi. Finally effective since 1st January 1950 Aceh got a specific position. Keresidenan Aceh was excluded from North Sumatera Province and its status was uplifted into Aceh Autonomous Province.[15]

Distribution of Power Theory

To understand the terms of regional government role must refer to the theories of law and state, division and distribution of power. Because, John Locke mentions, an organ can have one function and can only be implemented by one organ. Locke included judicative power into executive power.[16] The origin of division of power lies in the distribution of power so that 1 (one) person or group of persons shall not have the 2 (two) rights which is the maker and executioner of law and provides direction of constitutional interpretation.[17]

John Locke's idea was continued by Montesquieu (1689-1755) by developing the concept of *trias politica* which distributes state power into 3 (three) branches of power, namely (a) legislative, (b) executive, and (c) judicative powers.[18]

So that in essence, one organ can only have one function, or on the contrary one function can only be exercised by one organ. Actually the early concept of division of power or distribution of power come from Montesquieu as the pioneer of *trias politica* theory based on his research on British constitution. *Trias Politica* is a normative principle where functions are not given to the same person in order to prevent power abuse by the ruler.[19]

Montesquieu theory basically wants to have a guarantee for individual freedom against arbitrary action of the ruler. This can be re-traced in John Locke's writing which has the opinion that, *Second Treatise of Civil Government* is power to determine legal regulation cannot be held by one person himself.[20] Further it developed into *General Theory of Law and State* of Hans Kelsen which represented thinking tradition on law and state, which describes distribution of power which is practical in nature, concerning politics as well as governance. The concept of distribution of power shows the principle of political organization. This concept regulates that the three branches of power, executive, legislative and judicative can be determined by three functions of state, coordinated differently which separates each function.[21]

Theory of Justice

John Rawls basically through *theory of justice* (the principle of greatest equal liberty) is, where the main method of social institutions distributes basic rights and obligations and determine profit distribution from cooperation and social goods, including rational, free and equal in wealth income, freedom and opportunity and self-esteem. The task of justice as fairness is to determine the right and obligation proportionately/balanced. Therefore, freedom must be accompanied by awareness of responsibility. Without such balance it will bring people into chaotic legal civilization. Theory of justice as fairness can only be applied in an idealistic community, namely democratic community. It means the community must subject to legal regulations which are made, accepted, acknowledged their effectiveness by community. One of the interesting aspects of justice principle is guarantee there is equal protection of freedom for every citizen of state.

John Rawls divides 2 aspects of constitution in democratic system: First, constitutional democracy marked by a representative body elected through fair election which is accountable to its voters. People representative as legislative makes regulations and social policy. Second, constitutional protective democracy which is strong based on freedom of thinking, speaking and freedom to associate.

Justice as balance provides strong argumentation for equal liberty of conscience. John Rawls has an assumption that:

Argumentation is conducted to elect government regime to guarantee moral liberty, freedom of thought and belief, freedom of religious practice. The state must uphold moral and religious liberty.[22]

Analysis

Philosophy of Hadih Maja, theory and practice (1607-1678)

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[15] Nazaruddin Sjamsuddin, *Revolution In Mecca Verandah: the Fight for Freedom and Political Feud in Aceh 1945-1949, first edition, first printing,* (Jakarta: UI-Press, 1999), p.47.

[16] Cornelius F. Murfhy, JR, *Theories of World Governance: A Study in the History of Ideas*, (Washington DC: The Catholic University of America Press, 1999), p. 31.

[17] Winkfield F. Twyman Jr, *Losing Face But Gaining Power: State Taxation of Interstate Commerce,* Virginia Tax Review Winter, (Virginia Tax Review Association, 1997), p.19.

[18] *Ibid,* pp. 187-188.

[19] Charles Louis de Secondant di La Brede Montesquieu, *The Spirit of Law,* (California: University ofCalifornia, 1977). p.186.

[20] *Ibid.*, p. 13.

[21] Hans Kelsen, *General Theory of Law and State,* (New York: Russel and Russel, 1971), Translated by Raisul Muttaqien, *Teori Umum Tentang Hukum dan Negara,* first printing, (Bandung: Nusamedia, 2006), pp. 382-383.

[22] John Rawls, *A Theory of Justice*, translated by Uzair fauzan dan Heru Prasetyo, Teori Keadilan Dasar-Dasar Filsafat Politik untuk Mewujudkan Kesejahteraan Sosial dalam Negara, cet.1, (Yogyakarta: Pustaka Pelajar, 2006), p.6.

A question arises, does philosophy and practice of Hadih Maja constitute a theory? Let the history and fact answer it. Temporary result of research conducted by the writer reveals Hadih Maja constitutes a theory and practice which is beyond doubt in Aceh society life, before the birth of Distribution of Power theory introduced by Montesquieu (1689-1755)[23] and the theory of John Locke, Hans Kelsen and theory of justice of John Rawls on distribution of power and justice.

The reason is, in fact this kind of theory and practice had been applied and developed in Aceh Administration during the era of Sultan Iskandar Muda through the theory of Hadih Maja (1607-1637) concerning law and state, it produced legal norms in distribution of power to execute Gampong Mukim government, Nanggroe and Sultanate. While in the era of Sultanah Nurul Alam Naqiatuddin Syah (1675-1678) she created *Tiga Sagi Aceh Administration (Aceh language: thee sagoe),* through continuing what had existed such as Gampong Mukim administration, *Nanggroe, Sagi* and Sultanate (Aceh language: sagoe). There are differences and similarities between the two, namely era of Sultan Iskandar Muda created Mukim government and Sultanah Nurul Alam Naqiatuddin Syah created *Aceh Tiga Sagi* government (Aceh language: *Aceh Lhee Sagoe*). This prevailed until the end of Aceh government during sultanate era, and re-adopted in Law Number 11 of 2006 on Aceh Administration at present.

This is shown in old manuscripts of Aceh and Melayu.[24] As described in the content of Hadih Maja theory which is juridical in nature through written source (*geschreven recht*) of Adat Meukuta Alam abbreviated into AMA and *Sarakata* (decision letter), as well as unwritten legal source (*ongeschreven recht*) in the form of tradition. Based on the two legal sources, it has shown the life of society and state in Aceh, it can regulate unique, equal, sustainable society life in preparing worldly and spiritual life.

Hadih Maja is life philosophy of Aceh people and guidance (theory) on power distribution which has been implemented in Aceh administration during the era of sultanate, becomes guidance in personal, family and society life in general. In this relation came up expression which is juridical in nature *Adat Bak Poteu Muereuhom,* meaning *Adat* (Government, Law), its reference is according to *Poteu* (Sultan), while *Muereuhom* is(the late) Sultan Iskandar Muda. After Sultan Iskandar Muda died *Adat Meukuta Alam* is also called *Adat Poteu Muereuhom* which means The Law of the late Sultan Iskandar Muda, which is always adhered to by the next sultans and considered as sacred by people of Aceh, although after the death of Sultan Iskandar Muda *Adat Meukuta Alam* is mentioned in it additional Articles on government of Panglima Sagoe (Sagi) and uleebalang in Greater Aceh during the second administration of Woman Sultanat Nurul Alam Nakiyatuddin Syah (1675-1678).

Philosophy (theory) of Hadih Maja in Aceh administration during sultanate era distributed power into 4 (four) state high institutions as follows: First, *Adat Bak Poteu Muereuhom,* (Indonesian language: political power holder and adat is sultan as ***Executive Institution.*** Second, *Hukum Bak Syiah Kuala,* (Indonesian language: legal power holder is ulama (religious leaders) as ***Judicative Institution.*** Third, *Qanun Bak Putro Phang* (Indonesian language: law maker power holder) is putri Pahabang symbol of people as ***Legislative Institution.*** Fourth, *Reusam Bak Lakseumana/Bentara* (Indonesian language: all regulations made by Armed Forces Commander) during the state is in war (emergency), all powers are in the hand of the Supreme Commander of the Armed Forces) as ***Reusam Institution.***[25]

This is a theory which describes power distribution and concept of justice. The two theories had been implemented sustainably in Aceh government during the sultanate era. *The concept of distribution of power* as had been implemented in written legal source (*geschreven recht*) in the form of tradition. Whereas theory of Justice Concept has been clearly seen in the currency/coins by quoting king's expression as a just ruler, such as *al-sultan al-adil* and *al-malik al-zahir*. It means Melayu Kings try to rule according to their position as Muslim kings which follow Allah's commands.[26]

Such theories strengthen each other, where freedom, welfare to improve people's life cannot be achieved without the presence of state which is able to play its role effectively. On the contrary, strong state without guaranteeing its people's welfare freedom cannot survive long. It is marked with ability to secure legal certainty and policy which is made, adhered to by society, without spreading excessive threat, force, and anxiety. Basic element of strong state, effective authority and institutionalized.[27] Such structure of life is highly probable to be conserved in the life of nation and society in the Unitary State of the Republic of Indonesia which adopts the motto of Bhinneka Tunggal Ika.[28]

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[23] Montesquieu, *op.cit.*, chapter 1. p. 5.

[24] G.W.J. Drewes dan P. Voorhoeve, *Adat Aceh,* Verhandelingen van Het Koninklijk Instituut Voor Taal, Land en Volkenkunde, Reproduced in Facsimile from a manuscript in the India Office Library 21 March 1919, Dell XXIV, ('s-Gravenhage: Martinus Nijhoff, 1958), p.28.

[25] Ali Hasjmy, *Puteri Pahang dalam Hikayat Malem Dagang: Armada Cakra Donya Mara ke Malaka, dalam Seulawah Antologi Sastra Aceh,* (Jakarta: Yayasan Nusantara, 1995), pp. 538-539.

[26] Teuku Ibrahim Alfian, *Reflection Into National Disaster of Earthquake-Tsunami in Aceh 26 December 2004.* (Paper presented in Seminar of Unsyiah Dies Natalis, Banda Aceh: 9 April 2005), p. 44.

[27] Fukuyama, *op.cit.*, pp. xii-xiii.

[28] Melalatoa, *op.cit.*, pp. 65-66.

Aceh Administration

Aceh administration is regulated through Law on Aceh Administration Number 11 of 2006[29], constitutes an extraordinary breakthrough in regional autonomy political democratization and decentralization in Indonesia. The Law on Aceh Administration Number 11 of 2006 as written legal source document is the first to answer prolonged conflict issue in Aceh after various efforts to bring peace underwent deadlock.

Memorandum of Understanding of Helsinki has become a historical shrine of peace between the Government of the Republic of Indonesia and Aceh Free Movement (GAM), which mandates a formation of a new law to regulate extensive autonomy for Aceh administration. Therefore, the formation of Law on Aceh Administration Number 11 of 2006 has become a very good opportunity to design future good governance. The essence of all of these is it requires willingness and honesty of all parties, commitment or all parties to build confidence and mutual trust of fellow national stakeholders. The authority of central government to Aceh as a whole has been distributed though Law on Aceh Administration Number 11 of 2006, except for the aspects which automatically become the authority of central government. It means Aceh administration power at executive and legislative level is very high.[30] Decentralization is implemented at the same time as de-concentration principle, duty of assistance and delegation. Territory decentralization appears in the form of an institution based on area (*gebiedscorporaties*), whereas functional decentralization is with certain goals (*doelcorporaties*).[31]

To understand various dimensions of arrangement of Law Number 11 of 2006 on Aceh Administration in the frame of the Unitary State of the Republic of Indonesia, then the role of state must be recognized in two dimensions, namely scope as well as strength or capacity.[32] Confirmation as state based on law is strengthened in the 1945 Constitution, Article 1 clause (3) which says: *the state of Indonesia is a state based on law*[33], state idea is the deepest truth in providing the form into the state.[34] Familial state idea of unity is taken from the life which has been long planted in village community organization based on ascribed status in the whole territory of Indonesia in its various names and forms.[35]

History of Indonesia constitutionality cannot forget rationally has chosen Republic, in the living facts of Indonesia Nation, the national political cultural system is still influenced by feudalism, paternalism which constitutes characteristics of kingdom system. Therefore, Republic becomes rational choice which must be cultivated /developed.[36]

The present Aceh administration through Law on Aceh Administration Number 11 of 2006 must be understood in 2 (two) dimensions, namely: First, present Aceh Administration basically lies on philosophical ground firmly on corridor and principle of the Unitary State of the Republic of Indonesia (NKRI) in accordance with the 1945 Constitution. Second, it utilizes full authority to dig, take advantage and distribute all existing potentials in the society, whether they are on land, sea as well as human resources with wide dimensions namely, politics, culture, religion, education and culture[37]

Talking about Aceh always incites argumentation which can make people become emotional, certainly it invites international as well as national interests, controversy and even misinterpretation to conflict issues.[38] Aceh society in Sultanate era has experienced golden time, enjoying prosperity and welfare. Then the disappearance of Aceh Sultanate which ever has international relation,[39] is because of serious war with Dutch colony (1873-1903) for 30 years. Aceh people, men and women fought bravely defending the interest of religion and nation against the Dutch,[40] followed by Japan army occupation 1942-1945.[41] To study past legal events constitutes an effort for the future as a process which can determine the fate of human kind in

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[29] The Republic of Indonesia, Law on Aceh Administration, *loc.cit.*

[30] Farhan Hamid, *op.cit.,* p. 243.

[31] Bagir Manan, *Relation Between Central and Regional According to 1945 Constitution,* first printing (Jakarta: Pustaka Sinar Harapan, 1994), p. 21.

[32] Fukuyama, *op.cit*, p. xii.

[33] Indonesia, the 1945 Constitution, *the fourth amendment.*

[34] Azhari, *Indonesia, the state based on law: Normative Juridical Analysis on its Elements,* first printing (Jakarta: UI Press, 1995), p. 72.

[35] A. Hamid Attamimi, *The Role of Decision of President of the Republic of Indonesia in Organizing State Administration,* in dissertation, (Jakarta: Post Graduate Law Faculty of Universitas Indonesia, 1990), pp. 80-91.

[36] Jimly Asshidiqie, *Fundamentals of Indonesia Constitutional Law,* first printing, (Jakarta: Bhuana Ilmu Populer, 2007), pp. 65-66.

[37] *Ibid.,* p. 213.

[38] M. Junus Melalatoa, *Understanding Aceh: A Cultural Perspective,* in *Aceh Returns Into Future,* first printing (Jakarta: IKJ Press, 2005), p.2.

[39] Teuku Ibrahim Alfian, *Gold Currency of Kingdoms in Aceh, Serial 16,* (Banda Aceh: Department of Education and Culture, Museum Development Project, 1986), p. 87.

[40] H.C. Zentgraff, *Atjeh,* translated by Aboe Bakar, *Aceh,* first printing, (Jakarta: Beuna, 1983), p. 2.

[41] Anthony Reid, *The Contest for North Sumatera Acheh, the Netherlands and Britain 1858-1898,* translated by Masri maris, *The Origin of Aceh Conflict: From East Sumatera Coast Fight until the End of Aceh Kingdom 19th Century,* first edition, (Jakarta: Yayasan Obor Indonesia, 2005), p. 88.

character building of a nation. This certainly is considered important to strengthen the role of Aceh governance through written legal source (*geschreven recht*) the present Law Number 11 on Aceh Administration (UUPA), and has a meaning in the long historical journey of Indonesia constitutionalism.

People's participation and Aceh government during revolution era of defending as well as participating in the freedom of the Republic of Indonesia since 1945 until 2008, cannot be separated in all power struggles. It means, the essence of series of conflict issues was originated from central government with some important events as follows: (1) In 1945 Aceh became Karesidenan, an excess from Cumbok event.[42] (2) After that, in 1949 from Karesidenan Aceh status was changed into Aceh Province through Decision of Deputy of Prime Minister in lieu of Government Regulation Number 8/des/WKPM/1949 effective 1 January 1950. (3) Later on, in 1951 the change of status of Province was decreased into Aceh Karesidenan merged into North Sumatera Province (Sumut). (4) Why is its status returned to karesidenan? This action caused the emergence of DI/TII conflict event (1953-1957).[43] (5) In 1956 Karesidenan became Aceh Special District Province stipulated through Law Number 24 of 1956. Hardi Mission Number 1 of 1959 concerning Aceh Specialty. Why did this mission appear?, because to follow up implementation of Lamteh Pledge (1957) through peace accord between the Government of the Republic of Indonesia and Aceh Darul Islam (1959).[44]

The event of Free Aceh declaration (AM) in 1976, in the years of 1981-1986 Aceh became stable, in 1987 reappeared upheaval of Free Aceh (AM). Its excess was in the form of justice issue between central and regional. During 1988-1998 the Implementation of Military Operation Area (DOM) in Aceh. In early 1998 revocation of Military Operation Area (DOM) in Aceh post Soeharto fall.

Execution of Aceh specialty was strengthened through Law Number 44 of 1999,[45] which juridically such specialty still exist and not yet revoked, an excess of referendum for Aceh. In the year of 2000 Free Aceh Movement began to appear, of which the efforts for peace between the Republic of Indonesia and Aceh Free Movement (GAM) had been conducted several times, among others are peace through Mutual Memorandum of Understanding in Geneva, Switzerland on 12th May 2000 which produced Humanity Break Off for Aceh, the next meeting is in Geneva, Switzerland on 9th January 2001 which produced Cessation of Hostilities Agreement (CoHa) 2002, continued with a meeting in Tokyo, Japan on 18th May 2003,[46] in 2003 Megawati Soekarno Putri on behalf of the President implemented Military Emergency I, and in 2004 Military Emergency II. Finally, memorandum of understanding of peace was achieved known as Helsinki MoU conducted by Indonesian government and Aceh Free Movement parties.[47]

Legal development in Indonesia systematically has destroyed local initiative and institution. Behind post reformation on amendment of 1945 Constitution in 2002, and post MoU Helsinki one of them is reconstruction of legal source of local genius in Law Number 11 of 2006 on Aceh Administration.

Therefore, national legal development and reform becomes more important in the life of nation and state.

Aceh constitutes one of the provinces in the Unitary State of the Republic of Indonesia which co-participates in influencing the development of constitutionalism history since the freedom of the Unitary State of the Republic of Indonesia. To understand Aceh, we have to observe its historical track in the past. This is because in the history of Aceh society life is marked with various upheavals of social culture, politics, economy, law and governance structure which has national and even international impact.[48] Talking about Aceh always inflicts argumentation which can make people emotional, of course it can invite national and international interests, controversy and even misinterpretation to conflict issues.[49] People participation and Aceh administration in revolution era of defending and participating in freedom time of the Republic of Indonesia since 1945 until 2008, cannot be separated from all interests. It means, series of conflict issues originated from the struggle of power.

Eventually, peace agreement note can be achieved by the government of Indonesia and Aceh Free Movement (GAM) parties through the signing of MoU Helsinki on:

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[42] Hasan Saleh: *Why Aceh is in Upheaval: Fighting for Nation Interest and Fighting for Regional Interest,* (Jakarta: Pustaka Utama Grafiti, 1992), p. 37.

[43] Nazaruddin Syamsuddin, *Rebellion of Republic Group: Aceh Darul Islam Case,* (Jakarta: PT. Pustaka Utama Grafiti), p. 204.

[44] Sjamaun Gaharu, *Snapshots of Struggle in Capital Region: An Autobiography*, by Ramdhan KH, Hamid Jabbar, first printing, (Jakarta: Pustaka Sinar Harapan, 1995), p. 337.

[45] The Republic of Indonesia, Law on Execution of Aceh Specialty, Law Number 44 of 1999, State Gazette of the Republic of Indonesia of 1999 Number 172, Addendum of State Gazette of the Republic of Indonesia Number 3893.

[46] Ahmad Farhan Hamid, *Opportunity, Challenge and Strategy of Process of Creating Law on Administration in Aceh in National Political Dynamics,* (paper presented in Seminar Raya of Draft of Law of the Republic of Indonesia on Executing Governance in Aceh, organized by Government of Nanggroe Aceh Darussalam Government (Pemda NAD), Banda Aceh: 11-12 October 2015), p.1.

[47] Ahmad Farhan Hamid, *Peace Road of Nanggroe Endatu: Notes of Aceh People Representative,* first printing, (Jakarta: Suara Bebas, 2006), p. 83.

[48] Ismail Suny, (ed), *Various Aspects on Aceh,* (Jakarta: Bhatara Karya Aksara, 1985), p. 131.

[49] Melalatoa, *op.cit.,* p.2.

> "Monday dated 15th August 2005, at 12.00 local time or at 16.00 WIB (Indonesia Western Standard Time), on Smolna Etelaesplanadi 6, The Government Banquet Hall Helsinki Finland, by the government of the Republic of Indonesia and Aceh Free Movement (RI-GAM) through negotiation table or better known as MoU Helsinki. The party of the Republic of Indonesia is represented by Head of Delegation Minister of Law and Human Rights Hamid Awaludin, while GAM party is represented by GAM Prime Minister Malik Mahmud, and witnessed by ex-Finland President Martti Ahtisaari which also as Head of Executive Board of Crisis Management Initiative, as facilitator of peace negotiation for Aceh."[50]

This agreement has become mutual reference as an effort of political process of the spirit which becomes foundation which created Law on Aceh Administration Number 11 of 2006. Certainly it is not for if it is being criticized from one side only which does not accommodate all interests, however, it is more fair if we view it as a whole which means good intention of all parties who want to develop Aceh with more fairness, welfare, democratic and with dignity.

In the beginning this process was started by a request of central government to regional government of Nanggroe Aceh Darussalam province to immediately follow up one of the points of peace agreement of MoU Helsinki, namely the creation of draft of Law on Aceh Administration.[51] The process of filtering manuscripts was conducted transparent, participative, accountable, comprehensive and timely manners. Academic draft of Aceh Administration Law (RUUPA) proposed by various institution or organizations. The process of composing RUUPA becomes one of the entrance doors of development and reform as well as legal instruments based on the principle of *good governance* namely, transparent, accountable, professional, efficient and effective with maximum efforts for Aceh society prosperity.[52] Philosophically there are two main goals which will be achieved from the application of decentralization policy namely, *First*, democracy goal positions regional government as instrument of local level political education instrument which in aggregate contribute into national political education as basic element of creating unifying unity of nation and accelerate the materialization of civil society. *Second*, indicating regional government to improve local society welfare through provisions of effective, efficient and economical public services.[53]

To implement transformation of democracy,[54] based on value of freedom,[55] and people sovereignty,[56] it is clear that the implementation of Aceh governance its existence is acknowledged and valid according to the law based on Law Number 18 of 2001,[57] changes Special District Province into Nanggroe Aceh Darussalam Province. While Law Number 11 of 2006 on Aceh Administration changes the name of Nanggroe Aceh Darussalam Province into Aceh Province.

Reconstruction of Legal Source of Local Genius

Regulating refers to direction of legislative regulation substance where some aspects being regulated in accordance with the goal of the said regulation formation together with its implementation. Therefore, to view

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[50] Farhan Hamid, *op.cit.,* p.83.

[51] Regional People Representative Assembly of Nanggroe Aceh Darussalam Province on Delivery of Draft of Aceh Administration, in the Plenary Session of DPRD NAD, (Banda Aceh: DPRD NAD Assembly Secretariat), 4 December 2005).

[52] See *General Explanation*, Law on Aceh Administration, Law Number 11 of 2006, State Gazette of the Republic of Indonesia of 2006 Number 62, Addendum of State Gazette of the Republic of Indonesia Number 4633, (Banda Aceh: DPRD NAD Secretariat, 2006), p. 4.

[53] See Document of Socialization Team of Law Number 11 of 2006 on Aceh Administration, (Jakarta: Legal Bureau of Regional Secretary of Nanggroe Aceh Darussalam Province, Dated 10-12 August 2006), p.3.

[54] Robert A. Dahl, *Democray and Its Critics*, volume 2, (Jakarta: Yayasan Obor Indonesia, 1992), p. 3. See George Von der Muhll, Article, *Robert A. Dahl and the Study of Contemporary Democracy: A Review Essay*, volume 71, Issue 3, September 1977, American Political Science Review, Published online: 01 August 2014, (Cambridge University Press: American Political Science Association, 2014). https://e-resources.perpusnas.go.id:2234/core/journals /american-political-science-review/article/robert-a-dahl-and-the-study-of-contemporary-democracy-a-review-essay/6462A756583D0CEEA83BFF01E75CD85F, Dated 05 November 2017.

[55] Freedom which becomes foundation of democracy must have positive freedom, not anarchy freedom. Freedom in democracy must protect all human rights contained in it. Freedom in democracy supports and has power to protect democracy itself, meaningful for the life of state and nation. Diane Ravitch dan Abiagil Thernstrom, (editor), *The Democracy Reader: Classic and Modern Speeches, Essays, Poems, Declaration and Document on Freedom and Human Rights Worldwide*, translated by Hermoyo, *Demokrasi Klasik dan Modern*, first edition, first printing, (Jakarta: Yayasan Obor Indonesia, 1994), pp. 8-9.

[56] Sovereignty is a concept on highest power in a state, includes scope of power, and domain of power. The source of highest power is law. Actually those who sovereign in every state is people, people's intention is the only source of power for every government. Jimly Asshiddiqie, *Ideas of People Sovereignty In Constitution and Its Implementation in Indonesia,* first printing, (Jakarta: Ichtiar Baru Van Hoeve, 1994), p. 9-1.

[57] The Republic of Indonesia Law on Special Autonomy for Aceh Special District as Nanggroe Aceh Darussalam Province, Law Number 18 of 2001, State Gazette of 2001 Number 114, Addendum of State Gazette of the Republic of Indonesia Number 4134.

the relation of arrangement of Law on Aceh Administration Number 11 of 2006 as written legal source of the present Aceh government in the Unitary State of the Republic of Indonesia,[58] is closely connected with Adat Meukuta Alam as written legal source, as well as Tradition in the form of Unwritten Legal Source of Aceh administration of Sultanate era,[59] not only covering substance content of legislative regulation, but also considering the goal of creating its implementation. To develop the future of Aceh administration requires comprehensive understanding to what had happened in the past of hundreds of years, is the basic foundation to better manage modern Aceh.

The administration system of the Unitary State of the Republic of Indonesia acknowledges and respects regional governments which specific or special in nature. Its main consideration of implementation of specific nature for Aceh province is in accordance with constitution, including special region category and has special characteristics. Policy towards Aceh is implemented asymmetric of other decentralization policy in general.[60]

Indonesia Constitution firmly adopts the principle of people sovereignty (*volkssouvereiniteit*),[61] Indonesia nation at present witness phenomenon and big changes after the development of reform, one of them is autonomy in its widest sense, emergence of regionalism phenomenon. This aspect is added by pluralism of ethnicity cultural heritage owned by the nation. In reality, we have to adjust to the demand for uniformity of globalization.[62] As long as democracy constitutes an idealism-aspiration, then shift of governance system always takes place, followed by development of politics, economy, science and technology, and influencing changes of shapes and governance system.[63]

The above description shows analyzed relations of written legal source Law Number 11 of 2006 on Aceh Administration at present in each period of Aceh governance in the Unitary State of the Republic of Indonesia,[64] in connection with Adat Meukuta Alam as written legal source, as well as Tradition in the form of Unwritten Legal Source in Aceh administration during sultanate era and its implementation practice.[65]

Legal events related to Aceh special autonomy arrangement constitute one of the efforts for providing *justice* as achievement of regional autonomy goal through written legal source Law Number 11 of 2006, which is to achieve welfare in democratic fashion in Aceh province.

Aceh constitutes a name of big multicultural community,[66] in such community there are also several languages.[67] Islam is Aceh community religion which influences various aspects of life, behavior, social economy, politics, law and government.[68] Aceh province in the past was the area of Aceh Darussalam Sultanate beginning in early 16th century until 19th century when dragged into war with Nederland Indie Government (1873-1874).[69]

Aceh government known at present is the government of regional province in the Unitary State of the Republic of Indonesia based on the 1945 Constitution, implements governance matters conducted by Aceh government and Aceh People's Representative Assembly (DPRA) in accordance with each respected authority.[70] One has to understand the term of legal source reconstruction as well as local genius of Aceh government during sultanate era which was adopted in Law Number 11 of 2006 on Aceh Administration.

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[58] The Republic of Indonesia Law on Aceh Administration, *loc.cit.*

[59] Langen, *op.cit*,, p. 15.

[60] Bagir Manan, *Welcoming the Dawn of Regional Autonomy*, first printing, (Yogyakarta: Legal Study Center of Law Faculty of Indonesia Islamic University, 2001), p. 3.

[61] Ismail Suny, *Shift of Executive Power*, 6th printing, (Jakarta: Aksara Baru, 1986), p. 14.

[62] Jimly Asshiddiqie, *Indonesia Constitution and Contemporary Constitutionalism*, first printing, (Jakarta: The Biography Institute, 2007), pp. 71-73.

[63] Arend Lijphart, *Parliamentary and Presidential Government*, first printing, (Jakarta: Raya Grafindo Persada, 1995), pp. v-vi.

[64] The Republic of Indonesia, Law on Aceh Administration, *loc.cit.*

[65] Langen, *op.cit.*, p. 15.

[66] Ibrahim Alfian, *Face of Aceh in Historical Line*, first printing, (Yogyakarta: Gajah Mada University Press, 2005), p. 223.

[67] Aceh languages include among others: Aceh language of Greater Aceh dialect (Greater Aceh), Aceh Pidie, and North Aceh. Besides Aceh language there are also Gayo language (Gayo Lut, Gayo Deret, and Gayo Lues). Aneuk Jamee language (Padang language) in South Aceh Regency, Alas language (Kuta Cane of Southeast Aceh), Tamiang language (East Aceh), Simeulue language (Sinabang), Singkil language and Kluet language (South Aceh). See Secretariat Team of Aceh Special District Province, *Aceh the Past, Present and Future,* (Banda Aceh: Aceh Province Regional Secretary, 1995), p. 111.

[68] Melalatoa, *op.cit.*, pp. 1-2.

[69] Djajadiningrat, *op.cit.*, p. 19.

[70] See *General Provisions*, Law on Aceh Administration, Law Number 11 of 2006, State Gazette of the Republic of Indonesia of 2006 Number 62, Addendum of State Gazette of the Republic of Indonesia Number 4633.

Closing

Based on the above analysis, it can be summarized as the followings: First, to view the relationship of arrangement between written law and unwritten legal source one must observe the context of the past from Aceh history until at present time. The state acknowledges and respects regional government units with special or specific nature. The main consideration of implementing specialty specific character for Aceh province is in accordance with constitution, including the category of Special region and has specific nature. Second, legal events connected with regulating Aceh special autonomy constitutes one of the efforts to create the presence of justice in achieving the goal of regional autonomy, which is to achieve welfare democratically in Aceh Province.

INTELLECTUAL PROPERTY ASPECTS ON FRANCHISING AGREEMENT BASED ON SYARIAH SYSTEM RELATED WITH EMPOWERING MICRO, SMALL, AND MEDIUM ENTERPRISE (MSDE) IN NATIONAL ECONOMIC GROWTH

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ABSTRACT

This article is written with the purpose to find the results of the analysis of the relevant regulatory support in the empowerment of micro, small and medium enterprises (MSME), found a balance analysis for the franchisor and the franchisee based on Sharia system, found an analysis of the aspects of intellectual property in the franchise agreement is based on the Sharia system, found an empowerment model of MSME through the franchise agreement by Sharia system in the national economic growth. The approach method used is normative judicial with descriptive analytical research. The research phases include library research and field research with the data collection technique through literature review and interview with resource persons. The data which had been collected were analyzed by using a qualitative normative analysis. The results showed that: the first, MSME related regulations that made by various department still no harmonize one and other, so are not able to be a tool of MSME Empowering based on Sharia System yet. Second, the franchise agreement is based on the Sharia system is able to provide a balance of rights and obligations for the franchisor and the franchisee. Third, aspects of intellectual property in the franchise agreement is based on the Sharia system in the form of copyright, trademark, patent and trade secret get all the legal protection from the country. It does not conflict with Islamic' law as long as there is no maisir element, gharar and usury and is used for the good benefit. Four, Model empowerment of MSME with a franchise agreement with the Islamic system which emphasizes the concept of mutual help and the use of limited company based on sharia system as form of business of franchisor, cooperative based on sharia as master franchisee and member of cooperative as franchisee be able to contribute to national economic growth with social justice of the people of Indonesia.

Keywords : Empowering, Franchise, Sharia

Introduction

Empowerment of micro small medium enterprises (MSME) is an important issue to do. Why, cause, lot of in quantity and have a potency in economic growth. But, Legislation in empowering MSME are lots and involves various departments. MSME are often unable to compete with big enterprises because they have three fundamental weaknesses are capital, human resources and market.[1] For that we need big enterprise in the form of partnership with MSME. One of them through franchise.

Franchise agreements in general are standard agreement so that franchisor more dominance than franchisee. It is seen in conventional franchise agreement but what about franchise agreement based on sharia system. At the core of what the franchise business is intellectual property. Existing intellectual property in franchising is usually in the form of copyright, trademark, patent, industrial designs and trade secrets. The intellectual property is more individual nature that comes from the concept of a liberal economy. When its franchise based on the Sharia system will certainly influence on intellectual property that exists in the franchise also had to adjust to the Sharia system.

The empowerment model MSME through conventional existing franchise turns out to be not much help MSME to grow and thrive. Dependency of franchisee from franchisor are still continues. Growing and developing not only the franchisor but also the franchisee. The growth of franchising including franchise with Sharia principles enough developed so that already come in contributing to a national economic growth. Economic growth alone is not enough if it is not followed by the even distribution of income.

Research Methods

The method of the approach used in this study is the juridical normative.[2] The Juridical normative, i.e. an approach that prioritizes libraries research to acquire library materials that serve as the basic data with the support of other research, such as interview obtained in the field with some a resource person.[3] Juridical normative is used for searching, researching and reviewing the object through its legal principles of franchise , intellectual property and MSME Empowerment. Moreover done a comparative law method also between conventional and Sharia franchise.

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[1] Sandiaga Uno, "Jumlah UMKM Republik Indonesia 2 kali lipat Malaysia,"‹http://www.detikfinance.com›[6/04/2011].
[2] Sunaryati Hartono, *Penelitian Hukum di Indonesia Pada Akhir Abad ke-20*, Bandung: Alumni, 1994, hlm.140-143.
[3] Soerjono Soekanto, *Pengantar Penelitian Hukum*, Jakarta: UI Press, 1986, hlm.10.

Its research is a descriptive analysis because this research will reveal and analyze the symptoms of the existing law at the moment. This research is describe a variety of issues and facts related to aspects of intellectual property rights in empowerment of micro, small and medium enterprises through franchise agreements based on the Sharia system in the development of the national economy.

This research was conducted in two stages, namely the library research and field research. Libraries research are done in an attempt to find secondary data, i.e. materials law binding on issues that will be examined are composed of primary legal materials, secondary legal materials and tertiary legal materials.

Field research is intended to support the secondary data that is by way of collecting, researching and selecting data through interviews in directional or interviews with the speakers. Determination of the speaker is done based on the level of accuracy (validity) sources of information, namely those who have connectedness either directly or indirectly in this research. The technique of data collection is done in the form of documents study against secondary data to get a basic theory, in the form of opinions or writings of experts or other parties in the form of information, whether in the form of formal or data via script official. Interviews were used to collect primary data. The interview that is held a question and answer directly to the speaker by preparing a list of questions with answers-type open or closed as a guide.

Data that has been collected is analyzed using the methods of normative qualitative, i.e. the form of the exposure of the overall portrayal of issue is examined.

Discussion

Existing Regulations related Empowering of MSME with Franchise Agreement Based on Sharia System

The law according to Mochtar Kusumaatmadja serves as a means of renewal of society and means of development. The law must be able to change people's behaviour.[4] The community here belongs to a group of micro, small and medium enterprises. In Indonesia, legislation is the primary regulatory means, public renewal by way of law means legal renewal, especially laws and regulations. The legislative regulation as a formal legal source has legal force that can be imposed by law enforcement officials. It is believed to be able to change the behaviour of society among others from the behaviour of society that is not orderly to be orderly, from the behaviour of irregular society to be regular and / or from the behaviour of the society that is not law-abiding become law-abiding society.[5]

The laws and regulations on MSME, namely Law No.20 of 2008 and Government Regulation No.17 of 2013, do not specifically refer to franchising based on sharia principles, Law No.20 of 2008 and Government Regulation No.17 of 2013 provide support in the empowerment of UMKM through the provisions of Article 29 of Law No.20 of 2008 and Article 16 and Article 17 Government Regulation No.17 of 2013.

Implementation is that if there is a micro business actors, small business actors, there are middle business actors, or there is a big business actor with the same ability, then the franchisor will make MSME as franchisee.

But the MSME regulation related are more and made by different institution. The fact that between one regulation and other not inline with other so there is not harmonization. This condition can be a barrier for MSME empowering. In Indonesia, the institution related not only MSME Department, but also other department like department of trade and department of finance.

Franchise Agreement based on Sharia, the balance principle, and MSME Empowering

The contract law in Islam still emphasizes the need for balance, both the balance between what is given and what is received and the balance in taking the risk.[6] The balance is seen from the amount and quality of the rights and obligations of both the franchisor and the franchisee. Not only from the amount of rights and obligations, the balance can be seen from the responsibility of risk from both parties.

The balance will be able to provide justice for the parties. Justice is able to provide welfare for the parties. Franchise agreements based on sharia system are able to provide balance for franchisor with franchise recipients so that it can be a means of empowering micro, small and medium enterprises. Moreover, the principle applied in a contract is the principle of equality. This principle lies behind a norm. For that the principle that has become the norm has the same binding power as the norm. Franchisor with franchise recipient in preparing and executing a contract of course cannot be separated from the principle of equality so as to create a balance of rights and obligations to the parties.

The franchise agreement is based on the Sharia system put more emphasis on the balance of rights and obligations of both parties. The principle of balance in the contract associated with the Division of rights and responsibilities. Agreements in Islam law still stressed the need for balance, good balance between what is given and what is received as well as a balance in bear the risk.

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[4] Mochtar Kusumaatmadja, *Konsep-Konsep Hukum Dalam Pembangunan*, Bandung: Alumni, 2003, hlm.88

[5] *Ibid*, hlm.89

[6] Syamsul Anwar, *Hukum Perjanjian Syariah, Studi Tentang Teori Akad Dalam Fikih Muamalat,* Jakarta: RajaGrafindo Persada, 2007,Hlm.90

The balance of rights and obligations of the parties is the implementation of "Pancasila Justice" that justice based on the Almighty Godhead, just and civilized humanity, the unity of Indonesia and populist in representation. Equitable the balance of "Pancasila" clearly visible in the clause-clause of franchise agreement based on the Sharia system. One of the dominant parties are not compared to the other party.

Intellectual property rights In Franchise Agreements based on the Sharia System According KHES and Fatwa MUI

David I Bainbridge said that Intellectual property law is the area of law which concerns legal rights associated with creative effort or commercial reputation and goodwill[7]

1. Compilation of Sharia Economic Law (KHES)

Intellectual property in franchising agreements related with ownership of the "Amwal". This matter regulated in article 19 of the Compilation of Islamic Economy. The ownership of intellectual property in franchise is based on the mandate of God Almighty. Intellectual property in franchising in fact does not belong to the giver of the franchise but belongs to Allah SWT. As a party that is mandated, the party has to protect and to use for benefit of good living.

Ownership of intellectual property in franchising agreements is based on the principle of infiradiyah, that the ownership of intellectual property in franchising essentially individual and unification of intellectual property may be made in the form of a business entity or the Corporation. Ownership of intellectual property in franchising agreements is based on the principle of ownership, that intellectual property in franchising does not only have the function of fulfillment of necessities of franchisor life but at the same time in it for the rights of the community. This can be done by giving the license to franchisee for use the intellectual property, so that the benefits of intellectual property not only enjoyed by the franchisor but also by the franchisee.

Ownership of intellectual property in franchising is based on the principle that possession, Benefit of intellectual property in franchising are basically directed to magnify the benefits. Intellectual property in franchising should be used as a tool for empowering MSME. Intellectual property in franchise does not be used as a tool for creating a franchisee dependency on the franchisor.

2. FATWA MUI

Intellectual property in Islamic law is seen as one of the huquq maliyyah who got legal protection as wealth. Intellectual property as a richness that can be owned by individuals. The protection of intellectual property is not incompatible with Islamic law. In other words, intellectual property that contradicts Islamic law have no legal protection.

Intellectual property is a tool of empowerment for the benefit of the "ummah". Intellectual property can be a public good if used as a means or tool to achieve the goals of production, distribution and consumption of the community in order to develop their quality. However, this is done without losing the identity of the inventor and is the responsibility of the government for its protection.

Intellectual property as a private property becomes obscure for others in consuming it when it is associated with personal goals and pleasure alone. In other words Intellectual Property becomes lawful if it comes from the source of the original owner is given as a gift. Or to be haram if its purpose for commercial both in production and distribution level without licencing from the owner. Something that has been established to be lawful will remove doubts

The Model of MSME Empowering in Franchising based on the Sharia In Economic National Growth

The role of Government in this country is very important in the concept of the welfare State. Bagir Manan said: State or Government does not solely as a security guard or public order of society, but the main bearers of the responsibility of realizing social justice, public welfare and prosperity of most people.[8] The state must play a lot in the empowerment of MSME that are able to contribute significantly to the economic growth. One of MSME empowerment model is franchise.

Franchising can be a means of entrepreneurial growth. Franchise model is currently divided into two i.e. conventional and sharia franchise model. In conventional franchise model, franchisor position more dominant than franchisee. Franchisee is very dependence to franchisor. For example, Bambang Rahmadi as master franchise of Mc Donald in Indonesia. When Mc Donald cut off relationship with Bambang Rahmadi. Bambang established franchise Tony Jack's, but it did not flourish. This model is not enough for MSME Empowering. It is necessary to model the franchise out of the conventional concept that rests on a conventional economy to become a new concept based on Islamic Economics. The proposed model i.e. the model of franchisor business is limited company based on sharia. As master franchise is Islamic Cooperative. Franchisee is member of master franchise. It is franchise based on sharia agreement.

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[7] David I Brainbridge, *Intellectual Propery*, England: Person Educated Limited, 2002, hlm.3.

[8] Bagir Manan, *Politik Perundang-Undangan Dalam Rangka Mengantisipasi Liberalisme Perekonomian*, Bandar Lampung, FH UNILA, 1996.

Limited company based on Sharia is limited company that business not content maisir element, gharar, and usury. Limited liability company has some advantage include ease to add capital, identic with big company, and can sell share to public in capital market.

Master franchise is Islamic Cooperative. Cooperative business model is selected cause cooperative as unit business and people economic movement. Cooperation is built for member welfare. Member of cooperative is not only owner but also consumer. Cooperative has any member. Master franchise can make member as franchisee. Cooperative members became franchisee. Cooperative members is a candidate for micro-entrepreneurs, and small. With a minimum of 20 member and a maximum of members not restricted, empowerment for the franchisee will quickly realization.

To anticipate the weakness aspects of capital of franchisee, there are two sources that could be used i.e. internal sources derived from deposit, deposit mandatory, voluntary deposit. External source of capital, came from Islamic banking or financial institution of sharia or Islamic program like linked program. Linked program can starts from channeling, continued with the executing program, and finaly with joint financing through the Save unit borrow in cooperative The Sharia. Funds may be withdrawn from government policies such as the US economic program of creative.

In anticipation of a weak point of managerial aspects and market access, empowerment must be by a professional management consultant. Professional management consultant help franchisor, master franchise and franchisee in growing human resources capability and market access. Franchisor, master franchise, and franchisee as big company, micro, small and medium enterprise can real contribute to national economic growth with empowering and partnership.

Closing

1. MSME related regulations that made by various department still no harmonize one and other, so are not able to be a tool of MSME Empowering based on Sharia System yet.
2. The franchise agreement is based on the Sharia system is able to provide a balance of rights and obligations for the franchisor and the franchisee.
3. Aspects of intellectual property in the franchise agreement is based on the Sharia system in the form of copyright, trademark, patent and trade secret get all the legal protection from the country. It does not conflict with Islamic' law as long as there is no maisir element, gharar and usury and is used for the good benefit.
4. Model empowerment of MSME with a franchise agreement with the Islamic system which emphasizes the concept of mutual help and the use of limited company based on sharia system as form of business of franchisor, cooperative based on sharia as master franchisee and member of cooperative as franchisee be able to contribute to national economic growth with social justice of the people of Indonesia.

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LEGAL PROTECTION OF INTELLECTUAL PROPERTY RIGHTS IN ORDER TO CREATING INVESTMENT CLIMATE IN INDONESIA

Henrikus[1]Renjaan & Robert KR. Hammar[2]

ABSTRACT

Protection of Property Rights Intellectual (IPR) in investment in Indonesia requires the importance of law enforcement for the whole society, both businessmen, law enforcement officers and the public as consumers as a consequence of Indonesia's participation as a member of the WTO signed the Multilateral Agreement GATT*(general agreement on Tariffs and* trade) Round Uruguay in 1994, and ratified by Act (Act) No. 7 of 1994. The need for Indonesia to establish and enhance its national law and is bound by the provisions of the Intellectual Property Rights (IPR), which is set in the GATT, which is one of the annexes of the agreement is the GATT TRIPs(Trade-*related Aspects of Intellectual property* rights)are efforts made by the government to provide legal certainty in Indonesia investment world.

Keywords: Legal Protection, Intellectual Property Rights, GATT / WTO, Investment

Introduction

The era of globalization and liberalization has encouraged interdependence between countries. This situation has created opportunities and threats that many countries feel the need to adjust policy measures to deal with it. And of course, Indonesia as part of the global community cannot be separated from changes that occur both at regional and global level. 2020 is regarded as a very important year with the formation of free trade both at regional and global level. In the field of IPR, Indonesia needs to prepare itself to take advantage of the change as an opportunity for the existence of the nation as well to create a society that is fair, and prosperous.[3]

In the practice of international relations, IPR has become one of the important issues that are monitored by the developed countries in the conduct of trade relations and/or other economic relations. Globalization is synonymous with a free market, free competition and transparency provide a considerable impact on the protection of IPR in Indonesia. Situations like this also presented a challenge to Indonesia, where Indonesia is required to be able to provide adequate protection on IPR thus creating a healthy competition which of course can give confidence to investors to invest in Indonesia.

Moreover, increased investment activity a little more involved in the transfer of technology protected its intellectual property rights will be implemented properly if there is sufficient protection on IPR itself in Indonesia. In the framework of the economic and legal development in Indonesia, the protection and enforcement of IPR (intellectual property right) must always be carried out. But in practice, this often faced with the question of the essence of the pattern of life in Indonesia is still low purchasing power so as to make Indonesia as a fertile field infringement of intellectual property rights (IPR). Conditions that result in piracy rates remain high. "People can not afford to buy genuine goods that are more expensive. They tend to buy pirated goods.

The impact of globalization is marked by a flood of various pirated products circulating in the market freely, these things tend to the practices of unfair competition in business activities, due to the influence of technological developments, information and transportation are the supporting infrastructures to expand the space for the flow of transactions goods, fine foreign products, and domestic products.

For this purpose is necessary to anticipate amoren adequate regulatory system for the protection of the products produced on the basis of the ability of the human intellect, and supported the readiness of law enforcement professionals in the field of IPR. In this case, the necessary awareness squarely to respect intellectual works as the right person. While Satjipto Rahardjo opinion, saying that the law is evolving to follow the stages of development of society, because it is the law as a social sub-system cannot be separated from the changes occurring in society, including in the economic changes. Here the law challenged to act as an integrating mechanism (law as the integrative mechanism) which can accommodate various dimensions of interest, both between nations and between the internal international interests.[4]

Economic globalization in the trade International and investment followed by the globalization of law, meaning that the legal arrangements of developed countries would or would not be followed by developing countries, while the globalization of law occurs through conventions, treaties International, commercial contracts and introduced Institusi new.

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[1] Lecturer Kopertis Region XIV Papua and West Papua, DPK, STIH Bintuni West Papua
[2] Lecturer STIH Bintuni West Papua
[3] Nindyo Pramono, "Anthology of Business Law Currents", PT. Citra Aditya, Bandung, 2006, p. 143
[4] Satjipto Raharjo: "The issue of Law Enforcement, BPHN, Department of Justice, 1980, p. 102

In fact, the provisions of laws or regulations countries emerging always trying to align themselves with the rules and regulations of developed countries, such as Indonesia in 1994 has participated in the membership of the *World Trade Organization* (WTO) and has also approved the establishment of World Trade organization to ratify and enact Law No. 7 of 1994 on Ratification of the *Agreement Establishing the World Trade Organization* (the Agreement Establishing the World Trade Organization). Participation in the *Agreement Establishing the World Organization* in 1994 is not legally will not result in Indonesia has been bound by the provisions of the Intellectual Property Rights in the GATT*(general agreement on Tariffs and Trade* or the general agreement on tariffs and[5]trade).

As part of the WTO, Indonesia fully subject to the provisions set out in the Agreement Establishing the World Organization with a few exceptions. One part of the formation of this organization is the Trade Agreement Aspects of Intellectual Property Rights(AgreementOn Trade-Related Aspects Of Intellectual Property Rights, Including Trade in Counterfeit Goods /RIPS).

As a consequence of the approval of aspects of trade in the field of IPR is then Indonesia should harmonize IPR system has with the IPR system in other countries, but are comparable or harmonized are basic principles or minimum standards of the IPR system which is equally applicable to other countries and should be applied in the homeland.

Participation in the Agreement Establishing the World Trade Organization brought the result that Indonesia not only must establish laws and regulations regarding Intellectual Property Rights (IPR) and affect the judicial system and law enforcement in the field of IPR in Indonesia. In fact, the TRIPS is an agreement the Ithat detailed international has arranged things with regard to the intellectual property. Safeguard, a very strong enforcement against IPR is expected to create a conducive investment climate in Indonesia.

From the above it can be argued legal issuesto be studied more in depth, namely: Is Legal Protection in the Field of Intellectual Property can create an investment climate in Indonesia?

Discussion

1. Intellectual Property Right (IPR) Protection Systems In Respect GAAT / WTO

Intellectual Property Rights (IPR) is a daily problem that almost exists in all human life. In a world that continues to tighten regulation on IPR requires harmony between one country and another. The harmony that needs to be included in one system or corridor arrangements agreed upon nations. The harmony does not mean equalization or formal form, but only the wisdom of the concepts related to intellectual property. All International HKI has long been growing, driven by the two conventions which mark initial agreement regarding IPR nations. We know the *"Berne Convention For The Protection Of Literary and artistic* work" underlying RIGHTS Copyright and Paris *Convention for the Protection of Industrial Property* to the field of industrial property. The second core principle of the convention is: recognition of their exclusive rights for the owner/holder of the intellectual work of the two groups of IPR. Indonesia became the second party convention with its ratification through Presidential Decree No. 18 the Year 1997 and Presidential Decree No. 15 of 1997.

The[6]recent work of nations in relation to IPRs is the *Agreement On Trade Related Aspect Of Intellectual Property Rights* (TRIPs), which is one attachment of *establishing the agreement of the World Trade Organization (WTO Agreement).* TRIPS requires that compliance with the provisions - provisions contained in the *ConventionBarne.* and the Paris *Convention*TRIPs also refers to the *Rome Convention* and the*"Treaty on Intellectual Property in Respect Of Integrated*Circuits'.Moving on from these international agreements IPR implemented by countries contains areas of Copyrights, Patents, Trademarks, Geographical Indications, Industrial Design, Integrated Circuit Layout Design and Trade secrets and protection of plant varieties. And Indonesia has ratified the WTO agreement through Law No. 7 of 1994, thus, Indonesia bound by the rules issued by the WTO, including the TRIPS Agreement.

At its core is a legal protection of intellectual property rights as an incentive for inventors, designers, and creators by giving special rights to commercialize the results of kreatiftasnya. IPR encourage research and development activities to generate new discoveries in various fields of technology. Enhancement and protection of intellectual property will accelerate industry growth, create new jobs, encourage economic reform, improving the quality of human life are on the needs of the wider community. In general, IPR contains two (2) main parts: (a) relating to industrial property rights and (b) of copyright or related rights to copyright.

Property rights related to the industry itself is divided[7] into:

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[5] Nindyo Pramono, *Op* Cit,p. 158

[6] Arry Ardanta Sigit, "Policy Perspective System of Intellectual Property Rights In Indonesia and the Global Intellectual Property Protection Systems" Content Dissemination of Intellectual Property Management in Higher Education, 17 to 19 July 2006.Kupang

[7]Joko Kustono, "System of Copyright, Industrial Design, Secrets Trade, Layout Designs of Integrated Circuits, (Benefit, Steps, Terms, and Administrate Submission "Content Dissemination of Intellectual Property Management in Higher Education, 17 to 19 July 2006. Kupang

1. Patent (both regular patent or patent simple)
2. Industrial Design
3. Integrated Circuit Layout
4. Trademark
5. Services
6. Trade Secrets

While Copyrights itself consists of:

1. Art and Literature
2. Picture
3. Film
4. Photography
5. Computer Software
6. Architecture and others.

Legal protection in the form of laws and regulations of derivatives can be described as follows:

1. Act No. 12/1997 on Copyright
2. Law No. 14/2001 About Patent
3. Law No. 15/2001 on Trademark
4. Law No. 30/2000 About Trade Secrets
5. Law No. 31/2000 About the Industrial Design
6. Act No. 32/2000 About Integrated Circuit Layout

Through IPR protection as well, the holder is entitled to use, reproduce, publish, give permission to another to take advantage of their rights through licensing and assignment and included to prohibit others to use, reproduce and/or announced the results of the intellectual work. In other words, IPR gives monopoly rights to the owner of the rights by upholding the restrictions that may be imposed by the legislation in force.

Copyright provides protection for musical works, literary, dramatic and artistic works, including sound recordings, film and television sound broadcasting computer programs. In addition to copyright, there are also rights to the brand are basically providing protection for marks (in the form of letters, numbers, and so on) used in the trading of goods or services.

Industrial design is a creation of shape, configuration or composition of lines or colors, or lines and colors, or the combination thereof in a three-dimensional form which gives an aesthetic impression and can be realized in a pattern of three-dimensional or two-dimensional. It can also be used to produce a product, goods, industrial commodity or handicraft. For a new invention in the field of technology, patent protection can be given. In addition to these rights, the protection is given to other elements in the IPR, such as integrated circuit layout designs, trade secrets, and new crop varieties, to prevent others tapped for commercial purposes without proper authorization from the rights holder. Of all the rights mentioned above, almost all of them require registration of the owner of the rights in order to obtain legal protection as a consequence has ratified the conventions on Intellectual Property.

Generally clear that IPR crimes resulting from the decline in government revenue from tax sector, the decline in new jobs, and even disrupt the investment climate in Indonesia, as it also brings long-term impact, namely the artists became lazy to work for the nation. Piracy was just like narcotics, it feels good at first, but after a long time will destroy this nation[8] and certainly impact a loss for the country, as well as a detriment to society (consumers) itself. Piracy thrives in Indonesia due to weak law enforcement *(law* enforcement).There is no deterrent for counterfeiters because of the sanctions are too mild.

Some examples of pirated goods, among others, VCD, CD, DVD, handbags, t-shirts, compact discs, watches, glasses and cigarette brand Marlboro. This shows that in order to fight piracy, it takes the role of all elements of the nation, to actively campaign against piracy at least minimal raise awareness respecting the rights and the work of others around us. Efforts in prevention and law enforcement against IPR violations are often faced with the issues as [9]follows:

1. Aspects of Human Resources (HR) to enforce the law, relatively less compared with the vast area of the Republic of Indonesia with a large population.
2. The lack of adequate infrastructure for the operation of law enforcement, which in practice often faltered.
3. There are still differences in perception among law enforcement (police, prosecutor, and judge) the inability of the can or the continuation of a case to the court.
4. There is still a lack of public awareness not to purchase pirated goods because of their relative cost.

[8]Toby Glucksman (Economics and Trade staff the Embassy (Embassy) US) , in discussions on IPR "Cooperation American Corner and the University of Airlangga (Unair) Surabaya, Jawa Pos .com, Friday, October 6, 2006.

[9] Arry Ardanta Sigit, Op. Cit, p 2

Cheapening the price of goods - electronics, machines, VCD, CD, DVD, mainly products from China, Korea, Taiwan and were almost there and owned by every household today, this situation contributed to the rise of pirates, this condition is a very difficult dilemma for enforcement The law in Indonesia.

Problem-solving is a good IPR violations is the main condition for the implementation of law enforcement in order to create Ikim investment in Indonesia. Integrative function of law is very important to address the above issues. For the legal system can run integrative function effectively, according to Parsons, there are four issues that must be resolved first, namely:[10]

1. Legitimacy, which will be the basis for structuring the rules.
2. Interpretation, which will come to the determination of rights and obligations of the subject, through the process of determining certain rules.
3. The sanctions, which describes sanctions if that would arise if there are compliance and sanctions that would arise if whether there is binding to the rules, and while emphasizing who is going to apply sanctions.
4. Jurisdiction, which sets the lines of authority ruling upholding the legal norms.

Problems in the field of IPR enforcement is an issue that is not a simple problem, not only because of the complexity of the legal system itself, but also the complexity of the relationships with the legal system of social systems, economic, political, and cultural communities. Some of the issues are very prominent in the context of enforcement of intellectual property rights especially those relating to the substance, structure (institutional) and legal culture [11]is:

a. The key issue related to the substance of the law:
   1) Still, there is a rule of law that has not -regulation cook with the development of constitutional and legal interests of society,
   2) There are legal products which were strongly opposed by Colombo related interests, as it is considered not aspirational.
   3) The formulation of the legal provisions are not clear, multiple interpretations;
   4) The conflicting legal product, overlap giving rise to legal uncertainty.
   5) Regulations implementing the Act was not immediately published or contained within a long time between the enactment of Regulations undnag with the issuance of implementing regulations.
b. Key issues relating to the structure of (institutional) the law
   1) of decreasing confidence in the law enforcement officers;
   2) Law enforcement agencies were struggling to adjust to the demands of reform;
   3) The independence of the judiciary as the last bastion for justice seekers have not materialized.
   4) Diskriesoner authority possessed by legal institutions without control, so often disalahgunkan;
   5) Jurisdiction certain legal institutions overlap;
   6) Management handling legal cases have not been effective and efficient as well as transparent and accountable.
   7) Lack of coordination, due to strong sectoral egoism;
   8) Apparatus legal less professional and low integrity in expanding basic tasks.
   9) Funds, facilities, and infrastructure to support the implementation of tasks as well as law enforcement officers kesejahteraan inadequate.
c. Key issues relating to the legal culture:
   1) Weak exemplary of the leaders of the circles and law enforcement agencies to comply with the law.
   2) The level of public awareness is still low;
   3) Internalisation system and socialization of legal values to society have not been implemented in a systematic and integrated as a social movement.
   4) Their permissiveness tolerate any violation of law

Rule of law will support the creation of order and security in society anda stable security conditions support the efforts of law enforcement, especially in the field of IPR in order to restore the confidence of investors to invest in Indonesia.

2. IPR Legal Protection And The Investment Climate In Indonesia

Good investment climate provides opportunities and incentives to businesses to undertake productive investment, create jobs and expand business activities. Investment plays an important role in promoting economic growth and reducing poverty. Improving the investment climate is a critical issue facing the government in developing countries.

[10]Parsons in Bambang Sunggono:" Law and Public Policy ", PT. Gramedia, Jakarta, 1994, p: 95
[11]Oka Mahendra, AA: "Problems and Policy Enforcement" Legislation Journal of Indonesia, Vol No. 4 - December 2004

Providing employment important for menciptakan balance and[12]peace. The government's role in creating a favorable investment climate is needed to overcome the market failure (market failure) or failure to achieve efficiency laissez-faire. To cope with the failure of the government to intervene through laws and regulations. The government set up the business and to minimize transaction information asymmetries, and to prevent monopolistic practices. However, the government often fails to reduce the market failure, government intervention is not uncommon even worsens the investment climate. Therefore, the government needs to draw up a clear frame of reference in the form of legislation that competence goes well. The good regulatory framework will create a healthy and fair competition in the investment world.

Investment climate requires the support of various parties, especially in law enforcement in the field of IPR. The big problem facing the government in creating a good investment is the possibility of a clash between the interests of investors and the interests of the community. Step - ledge of the government's investment in Indonesia has created a label claim [13]is:

1) Limiting Hunters The interest (rent-seeking): Acting firmly against government officials, businesses, interest groups use the way - dirty way to take advantage and disadvantage investors.
2) Build credibility. : Uncertainty affects the desire of businesses to invest. The government must formulate and enforce clear rules. The point is the lack of credibility led to investor feedback will lower how baiknyapun regulations and government policies.
3) Increase public trust and strengthen legitimacy. The interaction between business and the government does not happen di ruang vacuum. Sesam build trust among market participants is a natural requirement for a transaction that is productive and lowers the cost of regulation and enforcement of contracts. Trust and public confidence in the market and the business world affect not only the feasibility of a change but also continuity (sustainability).
4) Ensuring that policies issued reflect the capacity of the institution.

Nowadays Indonesia needs more investment and to obtain investment must be able to compete with other countries and adhere to the rules of the game international in the investment field. Establishment of the WTO has consequences for Indonesia as one among 125 participating countries signed an agreement of WTO and has been ratified by Law Number. 7 1994. With diratifikasikannya entire provisions of the WTO must be carried out in Indonesia. Implementation of WTO provisions is done by adjusting all the provisions applicable in the field of trade/economy, especially investment, namely gaat provisions governing services trade and the Agreement on Trade-Related Investment Measures (TRIMs).

As for some basic principle principle-applicable in GAATS, among [14]others:

1. **Princip non-discriminatory or (Most Favored Nation /** MFN),is: A principle which states that the ease given to a country should also be given to other countries. This principle is immediate*(immediately)* and automatic*(unconditionally)*
2. **The principle of national** treatment,that is: That the treatment (treatment) provided employers or domestic companies must also be given to entrepreneurs or foreign companies without discrimination.
3. **Transparency**Princip, namely: Require all members of the public all the legislation, implementation guidelines and all applicable decisions and regulations are generally issued by central and local governments that have an impact on trade in services.
4. **Princip gradual** liberalization,namely: Requires that all members of the WTO to negotiate sustainable that aims to remove barriers to trade in services gradually. This means that such liberalization becomes a process that does not lead to a situation that may worsen the country's economy.

Besides, it also TRIMs agreement also stipulates that member states are forbidden to apply the rules of trade-related investment (TRIMs) which is contrary to the provisions of Article III of GATT on *"national treatment"* and the provisions of article XI of GATT on *"prohibition of quantitative* restrictions".At the core second *article* of the [15] prohibits:

1. The rules on *"Local content* requirement"which requires the purchase of domestic products in a certain amount by a company; or
2. rules about *"trade balancing requirements"* which specify the volume or value of imports that may be carried out by a limited company in or linked to the amount or value of the export of locally produced production. This means that Indonesia must harmonize, or at least sought to legislation in this area is consistent with WTO provisions.

[12]The World Bank, World Development Report 2005 A Better Climate Investments For Everyone, (Washington, DC .: World Bank and Oxford University Press, 2004) case 1.

[13] The World Bank, *Ibid*,p.36-37,

[14] Kartadjoemena HS *, 1996:"gaat and WTO" system, the Forum and the International Institute in the Field of Trade "*, UI-Press,, p. 106

[15] Kartadjoemena, HS, *Ibid*, p. 107

Protection of Intellectual Property Rights (hereinafter referred to as IPR) is a step forward for the people of Indonesia in 2020 entered the era of free markets. One implementation of the free market era is the State and the Indonesian community will be an open market for the product or the work of people/companies abroad (foreign), as well as the Indonesian people can sell products or works of creation abroad freely. Therefore, it is selayaknyalah products or other works that are already in circulation in the IPR and global markets required an effective legal protection of all offenses which are not in accordance with the TRIPs agreement and conventions that have been agreed.

The end of the multilateral negotiations GATT (the General Agreement on Tariffs and Trade) in the Uruguay Round (Uruguay Round), in December 1993, was born the organization to take care of international trade rules, the WTO (World Trade Organization). In addition to the establishment of the WTO, other agreements obtained in the Uruguay Round (which was inaugurated in Marrakech 1994) is an agreement on aspects related to trade and intellectual property rights or the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs).

Partisapasi Indonesia in TRIPs and the Convention - other conventions in the field of IPR is a necessity. And of course, the IPR system harmonization measures in order to accommodate the interests of owners/holders of IPRs on the one hand and the general public can be manifested in the participation of the international conventions. We know that there are two main things that need to be considered as a consequence of Indonesia's participation in various international conventions in the field of IPRs which are: first, Protection Law on Intellectual and secondly, Law Enforcement of the Right obtained as a result of such protection.

IPR is a legal instrument that provides protection for all the rights to an embodiment of the creativity and intellectual work and entitles the holder to enjoy the economic benefits of ownership rights. The results of the intellectual work in practice can be tangible creations in art and literature, the brand, the invention in the particular field of technology and so on.

No doubt that in the real sector, economic growth is strongly influenced by the stability of the national industry. In contrast, advances in the industry are considered the capital investment, both domestic and abroad, in the form of equity and medium and long-term credit. Their economic growth was supported by the strength of the national industry-based technology that can compete in the global market so that it can harden significantly increase the GDP figures. Therefore, it needs to be made of opportunities and a conducive environment for FDI for industrial investment in Indonesia. One sector that gets the attention is the issue of protection and enforcement in the field of IPR because it indirectly can help and promote economic growth in Indonesia itself.

This is certainly a guarantee for foreign investment would accelerate in investing in Indonesia. Investment in this context is recognized as a very good and interesting because it brings positive benefits to a country. In general, the benefits of a foreign investment, among [16]others:

1) Increase foreign exchange(foreign exchange) from the sale of exports.
2) Increasing the number of jobs for local residents
3) Allows the transfer of technology
4) Increase state revenues (public) sector through taxation
5) Enhance/create relationships in international markets
6) Development of local resource
7) Strengthening local industry

Indonesia in the context of IPR is proper in receiving foreign direct investment (FDI) must take into account the priorities so as to focus. As one of the developing countries, the objectives and priorities of the foreign investment is not solely the pursuit of increasing foreign exchange earnings but also the most important is the commitment of Indonesia to foreign investors on the issue of *transfer of technologies* for the development and empowerment of local human resources *(Indonesia).* Development of *High Technology* is a major prerequisite in building partnerships investing in Indonesia. But the strategy of the Government of Indonesia since diratfikasinyaAgreement *gaat/ WTO* in particular relating to the trading of investment called *"Trade-Related Investment Measure" (TRIM) and "Trade-Related Aspects of Intellectual Property Rights* (TRIPs)" does not take into account this aspect.

Some efforts have been undertaken in order to develop *hi-tech* a national border to provide opportunities and a conducive environment for FDI for industrial investment in Indonesia. For example, the government has been providing industrial clusters in several areas of development. However, all the above-mentioned industry could only be based industrial production*(production-based industry).*So it is more advantageous PMA industry, because it can freely wear local productive workers paid low compared to international minimum wage standards.

[16]M. Hawin: "Foreign Investment Law (PMA)" Hand out the Investment Law Law Faculty of the Graduate Program Gadjah Mada University, Yogyakarta. 2006

Therein lies the weakness of FDI itself if it is not carefully formulated appropriate measures and strategies to take advantage through the transfer of technology investments. Failure to get a splash of PMA technology industry for national technology development, can result from the following:[17]

1) The absence of industry and technology blueprint Indonesia long term. Industrial and technology policies are inconsistent, so it always turns corresponding power system. Even so, do not do the socialization process that could provide strategic direction and national technology industry. For example, Canada has a vision print industry that supports sustainable economic development.
2) Imitate the success of China, namely by making regulations so that every industry provides sharing at least 30 of its assets in the form of human resources and funding for new activities development and design must include products with the local workforce. So when there are foreign companies set up factories in Indonesia, has to commit at least 30 local staff for R & D and design. Local staff will be stationed in the country and abroad where FDI originates.
3) Determining to need new economic zones for foreign investors provided specifically for investors even ASEAN as Indonesia-ASEAN Economic Zone in the areas that are very strategic. The area of land in the zone would be for the imports-exports, transit logistics, the area of free trade, various types of industrial zones (pilot area of agriculture, electronics, machinery to *high-tech),* residential land, recreation and all the necessary infrastructure more,
4) Creating specific policies for investors (investors) for specific industries receive bank interest subsidies, exempted from various charges, especially extortion, except regulated central government and the autonomous region.
5) Investment procedures are also clearly defined, ranging from registration to implementation of the project.

With this policy, the PMA industry no longer is oriented industry for production, but encourage shifting towards technology-based industries *(technology based* industry).With this policy, it is hoped the technology transfer process is also effective. This can be realized if it is supported by all parties to implement the protection and enforcement of intellectual property rights khususnnya in consistently and continuously.

Conclusion

Globalization is synonymous with a *free market, free competition* and transparency provide a considerable impact on the protection of IPR in Indonesia. Indonesia is challenged and required to be able to provide adequate legal protection on intellectual property rights and thus creating a healthy competition which of course can give confidence to investors to invest in Indonesia. Moreover, increased investment activity a little more involved in transfer of technology protected its intellectual property rights will be implemented properly, if there is protection and enforcement of intellectual property law violations itself in Indonesia. Considering these things, without socializing in various walks of life, awareness of the preciousness of intellectual property rights will not be created. IPR socialization should be performed on all parties involved, such as law enforcement officers, students, the community of users, creators, and equally important is the press due to ink force journalists awareness of the importance of intellectual property efforts will be relatively easily realized. Dissemination efforts be made by all *stakeholder*s in a systematic, focused and sustained.

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LEGAL PROTECTION ON FAMOUS BRAND AS AN INTANGIBLE PROPERTY ASSET IN INDONESIA

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ABSTRACT

Intellectual Property is an intangible asset that a person or a legal person may have.An intangible asset may be possessed if it has been realized and is not an idea only and the ownership of the intangible asset is in the form of Intellectual Property, Copyright, or Industrial right, but in this case we discuss the Brand as an intangible asset and its legal protection. Indonesia, especially as a developing country,should empower its human resources, not only empower the depleted Natural Resources, since Intellectual Property Rights are an inexhaustible asset that isevolveable and renewable for the benefit of the community. In this paper there are several major issues, such as what is the determinative formulation for a well-known brandand how is the form of legal protection against a well-known brand in positive law in the brand registration system in Indonesia. In this normative analysis the approach used is a statue approach and conceptual approach as a source of legal material derived from library research with legal materials, namely primary legal material and secondary legal material. Technique of collecting data about law system as study material is done by discussing about legal theories, and legal protection to famous brand and brand in Indonesia. A brand, in particular, a well-known brand is an intangible asset that any legitimate individual or legal entity may possess, therefore a well-known brand or brand must have legal protection in the positive law of the government since most of the developed countries of the world have seen that intellectual property is a very promising asset for the advancement of society besides its natural resources. Based on this concept, the protection and legal certainty of a brand or a well-known brand that is one part of Intellectual Property Rights must be given more attention, especially from the government as the formulationmakeron the rule of law.

Keywords: Intellectual Property Protection, Famous Brand, Intangible Asset

Introduction

Intellectual Property Rights (hereinafter abbreviated asIPR) as intangible objects, IPRs have many different forms, but they also have a certain resemblance.The primary resemblance is the protection of intangible thing.These objects are called "Intangible" because they are ideas, inventions, signs, and information.This puts IPRin a position different from that of the "tangible" property which serves as the title of a tangible object, while the IPR, when is an intangible form as well as containing intangible rights.In other words, intangible property is contained in tangible objects (Bently & Sherman), a state of like this gave rise to the consequence of the Law.

The consequence that arises from the intangible nature of IPR is that the nature of this HKI limits the ability of the object owner to act on his property. The real mastery of an object does not at the same time give birth to the intellectual property of the object. In another part of the world, as in the EU member states and in the United States, the problem of intangibles of this HKI has reached a level of discussion on aspects of trade in goods and services, particularly with regard to the principle of 'exhaustion of right'.

In Indonesia there has been established a rule that can protect the production and the resulting production which is the result of intellectual human thought in the form of intellectual property law. Indonesia participating in part of the participating states of Word Intelectual Property Organization (WIPO) requires ratifying the treaty in a rule of law. In addition to WIPO, Indonesia also participates in a world trade organization known as the Word Trade Organization (WTO) which is one of the international agreements governing intellectual property rights in the Trade Related Intellectual Properties (TRIPs) agreement.

Indonesia as a member country of WTO-TRIP'S has ratified TRIP'S through ConstitutionNo. 7 of 1994 on Ratification of the Establishment of World Trade Organization (WTO) and Indonesia has an attachment to implement the provisions contained in TRIP'S. Until now, Indonesia has the provisions of legislation regulating the KI as follows:

ConstitutionNo. 20 of 2016 on Brandsand Geographical Indications, One of the governing constitutionsisthe one that governs the brand issue. The brand law is better known as constitutionNo. 20 of 2016 on Brands and Geographical Indications. Brands are part of an intellectual property system that has an influence in the commercial field that serves as a means of recognizing and distinguishing a traded product. Brands in intellectual property are able to provide allure of goods or products placed in the field of trade and services.

The development of goods and services trading activities in Indonesia in recent years has increased significantly due to the development of information technology and transportation facilities that cause activity in the trade sector, both goods and services experienced a very rapid growth. The increasing trend of trade in goods and services will continue in line with the increasing national economic growth.

The brand as one of the intellectual works of human beings familiar with economic and trade activities plays a very important role. With the growing strength of the current globalization in all areas, including the trade sector of goods and services, trade in goods and services is no longer recognize the boundaries of the state , so that regulations in the field of IPR including Trademarks must be adequate and effective because Indonesia has become a member of the World Trade Organization (WTO) through Law no. 7 of 1994 on the Establishment of Ratification of the World Trade Organization on November 2, 1994, which contains the Annex Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs Agreement).[1]Regarding IPR infringement, it is also a bit influenced by the nature of IPR as an intangible right.

It is not easy for people to understand why a person can not enjoy the full freedom of his possession, including obtaining economic benefits from him. A person may ask about rights born from his actions on an object (such as the purchase of goods). The owner of the object may ask, "Why do not I use this thing I bought to earn money and profit on the amount of money I have spent on the purchase?", But he can not do it without going through the IPRprocedure if he does not want to be charged with violating IPR.

Brand, briefly can be said a sign used by employers or producers to distinguish the results of their production with other producers for similar goods so that the consumer society is not fooled about the origin of goods produced or traded. Based on RI Law no. 20 of 2016, a Mark obtains legal protection if the Mark is already registered in the General Register of Marks, so that the Owner of Trademark has the exclusive right to a Trademark and this is in accordance with the principles adopted by RI Law no. 20 Year 2016, namely the constitutive system (first to file system).

From Background above then there are problems that is: (1) How formulative about the determination of a famous brand? (2) What is the form of legal protection against a well-known brand in positive law in the brand registration system in Indonesia?

Method

The research method used to examine the problem consists of the type of normative legal research, using approach approach used is the approach of Statue Approach (statue approach), and concept approach (approach concept), and use as source of law material sourced from research Library (Library research) with legal materials that is primary legal material and secondary law material with technique. The collection of legal materials is done by exploring the legal material, which discusses legal theories, and legal protection, and Analysis techniques used through the grammatical aspects of the discussion of the brand can be obtained an early description of the famous brand. Under current brand law.

Discussion

Formulative Of The Determination Of A Famous Brand

A well-known brand has a reputation and has a high marketing. This brand becomes the choice of every consumer anywhere. The percentage of sales is high in every corner of the world and becomes a valuable asset of wealth that can bring huge profits to the owner. However, at the same time it can cause harm to the owner and on the other hand is very profitable to other parties with bad faith by imitating or falsifying with a very low quality.[2]

Famous brand protection is not only given to goods or services of a kind, but also to goods or services that are not similar.

Topics related to the famous brand, is still a subject matter because until now there has been no concrete definition of a famous brand. However, there have been guide lines issued by WIPO which essentially concerns the factors in considering whether a brand is well known or not. As for things to be considered among others:

1. The level of knowledge or acknowledgment of the mark in the public sector concerned.
2. The period, range and geographical area of brand use.
3. The period, scope and geographical area of the brand promotion, including advertising and publicity as well as presentations on the exhibition of such goods or services.
4. The period and geographical area of each registration and each application of registration to a level so as to reflect the use or acknowledgment of the mark.
5. Notes of successful law enforcers on the rights attached to the mark to a level in which the mark is recognized as a well-known mark by a competent authority.

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[1]*Direktorat Jenderal Hak Kekayaan Intelektual, Kementerian Hukum dan Hak Asasi Manusia Republik Indonesia*,2011, *Buku Panduan Hak Kekayaan Intelektual*,Tangerang, p. 1.

[2]Yahya Harahap, 1996, *Tinjauan Merek Secara Umum dan Hukum Merek di Indonesia Berdasarkan Undang-Undang No. 19 Tahun 1992*, PT. Citra Aditya Bakti,Bandung, p. 98

6. Values associated with the brand. The well-known brand criteria are based on public knowledge, the determination is also based on the reputation of the mark concerned that has been obtained due to the promotion made by the owner and accompanied by evidence of the registration of the mark in some countries.[3]

A well-known brand criterion is based in addition to the general knowledge of society, its determination is also based on the reputation of the mark concerned which has been obtained due to the promotion made by the owner and accompanied by the proof of registration of the mark in several countries.

In the United States, in Article 43 (c) (1) of the Lanham Act to determine which brand has distinguishing and renowned properties, the court may consider such factors:[4]

(1) The degree of inseparability or character of the differentiating power of the mark;
(2) The period and scope of use of the mark relating to goods and services of the marks used;
(3) The period and scope of advertising and publicity of the mark;
(4) The geographical scope of the trading area in which the mark is used;
(5) The trade network of goods and services of the marks used;
(6) The degree of recognition of the mark from the trading and trading platform of the trademark owner and the prohibition against persons for the use of such marks is exercised;
(7) The general nature and scope of the use of the same mark by third parties; The existence of such trademark registration under the Act of 13 March 1981 or the Act of 20 February 1905 or the first registration.

Although the Act already governs the terms of the brand in such a way, but in practice there are often some problems in the examination of the brand. One of the most prominent issues is related to "equations". In the provisions of article 6 paragraph (1) letter a mentioned:

the application for a mark must be rejected by the Director General of KI if the mark has any similarity in essence or in its entirety with the other party's pre-registered mark for such goods and or services. How to determine whether there is a brand equation.

The overall equation of the elements is the standard for determining the existence of equations in accordance with the doctrine of entirentis similar. In this case the mark requested to be registered is a copy or reproduction of another person's brand. In order for a copy or reproduction of another person's mark so that it can be qualified to contain the equation in its entirety, it must at least meet the requirements:

1. There is an equality of the overall brand element;
2. Equality of type or production and class of goods or services;
3. Equality of region and segment of company;
4. Equality of manner and behavior of usage;
5. Equality of maintenance;
6. The equation of marketing channels.

The above conditions are cumulative, so to determine the existence of the equations should all be met. Nevertheless this standard of determination based on this doctrine is considered too rigid and can not protect the brand ownership especially for the famous brand. Equation in essence In the explanation of Article 6 paragraph (1) of Law no. 20 of 2016 on Trademarks and Geographical Indications, the meaning of the equation is substantially similar to the presence of prominent elements between one brand and another, which may give the appearance of equality in form (painting or writing) the manner of placement (ie elements arranged in such a way as to make an impression the same as other people's brands), the meaning and the combination of elements or sound equations in the utterances contained in the brands.

The meaning of the equation principally set forth in this explanation is in accordance with the doctrine of "nealy resembles", which assumes that a brand has an essentially similarity to another person's brand if the brand is identical or almost similar (neal resembles) with another person's brand, which can be based on the likeness of the image, wording, color or sound. Based on the above description, In accordance with the theory of Legal Certainty which contains two meanings, namely the first, the existence of a general rule makes the individual know what the actions that may or may not be done, and second, in the form of legal security for individuals from the abuse of the government because that the general nature of the individual can know what the state can be charged or done to the individual. Legal certainty is not only in the form of articles in the law, but also the consistency in the judge's decision between one decision with another judge's decision for a similar case which has been decided.

It should have a brand that is identical with its personality and is a new born. Open a renewed brand or something that fails to fix the fix for the better. The use of a brand is not just limited to reap the benefits. Brands have other goals that can not only be viewed in terms of the economy. Brands also have a role to facilitate trade activities of goods or services to carry out development. To require brand protection in order not to make *plagiarismactivists* more incentive with its dirty practice.

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[3]Achmad Zen Umar Purba,2005, *Hak Kekayaan Intelektual Pasca TRIPs*, PT Alumni Bandung, p. 74

[4]Sudargo Gautama dan Rizawanto Winata, 1997, *Pembaharuan Hukum Merek Indonesia (Dalam Rangka WTO, TRIPS)*, PT Citra Aditya Bakti Bandung, p. 57.

Because basically the protection of the brand not only for the interests of brand owners alone but also for the benefit of the wider community as a consumer. *Plagiarism activists* not only happen in Indonesia the problem of brand protection is also prevalent in various countries. The advantage gained in a way that is not difficult to encourage a brand to imitate or ride fame like an artist. Famous brand imitation is happening is based on "bad faith". The sole purpose is merely the material, making a profit with nebeng with the popularity of a brand. Such treatment is undeserved and undeserved for legal protection. Protection of famous brands can be done in various ways. In addition to responses and brand owner initiatives, it can also be done by the brand office by denying the same or similar brand registration request to a well-known brand. There are some things to note that, such as:

1. Not set the definition and criteria of famous brands.
2. Rejection or cancellation of the mark, or prohibition of the use of a mark which is a reproduction, copy or translation that may be misleading of an identical or similar goods or services if the statute of that State regulates or requests an interested party.
3. A lawsuit can be filed at least 5 (five) years from the registration, but there is no timeframe if the registration is done in bad faith.

Therefore, the formulation of a known trader must be clear to the appointment of the asset so as not to be offended by the newest registered registration which may also be detrimental to the registered trader as well as to the new trader who wishes to register his application. Therefore, the explanation of Article 21 of Law no. 20 of 2016 on Trademarks and Geographical Indications shall be more definitive clarity on the criteria of the Famous Mark in either its usage period or any other matters which may explain the description of a well-known brand. As well as in Article 6 bis of the Paris Convention (1967) applies, mutatis mutandis, to the service. In determining whether a well-known trademark, Members should consider the trademark knowledge in the relevant sectors of the community, including knowledge in the Member concerned that has been obtained as a result of a trademark promotion.

The Legal Protection Of Famous Brand In Positive Law On Brand Registration System In Indonesia

Implementation of Law no. 20 of 2016 on Trademarks and Indication ofGraphics, Registration of Marks is of the utmost importance in order to provide legal protection to the Rightsholder of the Mark. Brand registration using the constitutive system (first to file) ensures more legal certainty for the holder of the rights to the brand, but until now the first to file registration system in Indonesia has not been effective in creating harmony of justice and benefit guarantee, as there are still many brands that are registered not by the actual Brand owner. Referring to Law no. 20 of 2016 On Trademarks and Geographical Indications, a trademark is a sign in the form of images, names, words, letters, numbers, color arrangements, or combinations and elements thereof which have differentiating power and are used in trading activities goods or services.

According to Setiono, the protection of the law is an act or attempt to protect the community from arbitrary acts by a ruler who is inconsistent with the rule of law, to realize order and tranquility so as to enable humans to enjoy their dignity as human beings.[5]

According Muchsin, the protection of the law is a matter of protecting the subjects of the law through the applicable legislation and imposed its implementation with a sanction. Legal protection can be divided into two, that is:

1. Preventive Legal Protection Protection provided by the government with a view to preventing prior to the violation. It is contained in legislation with the intent to prevent a violation and to provide signs or limitations in the conduct of sutu obligations.
2. Repressive Legal Protection Repressive legal protection is ultimate protection in the form of sanctions such as fines, imprisonment and additional penalties provided in the event of a dispute or an offense committed.[6]

It can be seen that the protection of the law is any form of effort to protect human dignity and human rights recognition in the field of law. The principle of legal protection for the people of Indonesia derives from Pancasila and the concept of the State of Law, both of which prioritize the recognition and respect for human dignity and prestige. Legal protection means there are two forms, namely the means of preventive and repressive law protection.

1. Preventive Legal Protection by the Government

In the case of Preventive Legal Protection carried out by the government through the instrument of the country is done by giving hibauan about the importance of a right to Intellectual Property to be recruited in order to get a definite legal protection, Protection provided by the government with the aim to prevent before the violation. In this case the Government in providing Preventive protection through appeals to trade centers as well as through socialization on the importance of protection of intellectual property.

[5]Setiono. 2004 . *Rule of Law (Supremasi Hukum)*. Magister Ilmu Hukum Program Pascasarjana Universitas Sebelas Maret. p. 3

[6]Muchsin. 2003. *Perlindungan dan Kepastian Hukum bagi Investor di Indonesia*. Universitas Sebelas Maret. Surakarta. p. 20

It is contained in legislation with a view to preventing an offense and providing guidelines or limitations in the conduct of sutu obligations.

2. Repressive Legal Protection by the Government

Represive Legal Protection by the Government through PPNS and the Police of the Republic of Indonesia is to follow up all complaints of intellectual property rights owners by providing real legal protection. Repressive legal protection is the ultimate protection in the form of sanctions such as fines, imprisonment, and additional penalties provided in the event of a dispute or an offense committed.

Closing

Conclusion

Starting from the background of the problem, problem formulation, and research objectives, then there are conclusions that can be formulated, as follows:

1. Formulative about the determination of a well-known brand there is a vagueness in defining the Law of the Republic of Indonesia No. 20 of 2016 on Brands and Geographical Indications, the indication of:
   a. In the elucidation of Article 21 of the Law of the Republic of Indonesia No. 20 of 2016 concerning brands and geographical indications, the definition of Famous Mark is still indicated there are multiple interpretations.
   b. A Brand is considered reputed to still require an accredited and independent Agency in the determination and classification so that the submission of a new brand application, should be able to refer from the famous brand data base that existed in the Independent Institution, but until now the institution does not yet exist.
   c. While the determination of a brand is said to be famous in other countries that embrace the brand registration system has more clearly set the formulative determination of the brand can be said to be famous and more clear about what the criteria of famous brands.
   d. TRIPS, should be ratified into Law of the Republic of Indonesia No. 20 of 2016 on Brands and Geographical Indications and Indonesia Entitled to define a well-known brand refers to TRIPs
2. Efforts made by the government in providing legal protection against a well-known brand in positive law in the brand registration system in Indonesia namely:
   a. Through the provision of criminal sanctions for violators of the brand law
   b. The Indonesian government's efforts through the Intellectual Property Directorate have provided the ease of online registration of the system so that a brand or brand request that has been substantive examination can be given legal protection in first to file for the applicant.
   c. There are still many violations of the brand and famous brands, especially in Indonesia, which still require attention not only from government elements but also the public in demand more attention not to give gaps against fake brands as consumers are demanded more selective.
   d. Preventive and Repressive government protection: Preventative with a view to preventing prior to the offense. It is contained in legislation with a view to preventing an offense and providing guidelines or limitations in the conduct of sutu obligations.

Repressivethrough Civil Service Investigatorand the Police of the Republic of Indonesia is to follow up all complaints of intellectual property rights owners by providing real legal protection. Repressive legal protection is the ultimate protection in the form of sanctions such as fines, imprisonment, and additional penalties provided in the event of a dispute or an offense committed.

Suggestion

With all humility, there are some recommended suggestions:

1. The Government in this case needs to immediately determine the Independent Institution to inventory and determine a data base and criteria about a brand is said to be famous so that people who want to apply for the brand can get official information about any brand that has been registered as a famous brand so that in the future there are no brand permaslahan that intersect with existing brands.
2. Whereas it is necessary to immediately issue a Government Regulation after the issuance of Law of the Republic of Indonesia No. 20 of 2016 on Trademark and Geographical Indication and between the Government and the public in terms of providing brand protection must be synergized so that there is no gap or more narrow the circulation of fake brands so that the enforcement of protection and the benefits of a publication of Legislation, especially the Law of the Republic of Indonesia Number 20 of 2016 can be more felt by the public and the government can be more assertive in providing intellectual Property Rights Protection (IPR) as well as possible.

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CONSEQUENCES OF THE INTERNATIONAL CONVENTION TRADE-RELATED ASPECT INTELLECTUAL PROPERTY RIGHTS (TRIPs) AGAINST THE INTELLECTUAL PROPERTY PROTECTION SYSTEM

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ABSTRACT

The long journey in the fight for intellectual property rights has actually been done since the 18th century. At that time, the discourse to accommodate human intellectuality in the form of a more intrinsic and structured right in the legal corridor was increasingly emerging in Europe. The development of technology-oriented international trade makes the need for harmonization of industrial law (ownership of assets) increasingly urgent, especially in the field of patents and trademarks. It was these issues which gave birth to some basic principles, and ultimately led to the discourse that the patent should be regulated in an effective system. This strong desire then gave birth to the international convention of intellectual property rights with a number of provisions related to intellectual property rights. The established international intellectual property rights Convention must have consequences for intellectual property protection systems in each country that adhere to one of the international conventions of intellectual property rights, as is the case with the International Trade-Related Aspect Intellectual Property Rights Convention (TRIPs).

Keywords: Consequences, Trade-Related Aspect Intellectual Property Rights, Protection of Intellectual Property Rights.

Introduction

The fundamental foundation of intellectual property rights is the respect for property rights as individual rights. The right granted by the state to the creators, inventors or designers of the creations or findings is the most perfect right in the field of material rights of property rights. Man makes his findings his own. With hard work he combines the things that are available in nature, therefore the work is an indispensable property, and no one but himself can have the right to work.

Intellectual property rights began to be fought as individual rights in countries that have a Common Law or Anglo Saxon legal system in which property rights are truly championed as individual rights. The Common Law and Continental European legal system has a different understanding of property rights. In the Common Law legal system this can be seen in its Private Law where detailed legal property rules are in place, while the Continental European legal system does not.

That man has whatever is in him including his mind, his thoughts, ideas or ideas and his sensitivity then processed by combining, separating, reducing or adding to what is already in nature and claiming responsibly that it is he who has the idea. The right is granted by the state and authorized as his property because his ideas or products have commercial value and can be made private assets and used for the benefit and advancement and human welfare.

The long journey in the fight for intellectual property rights has actually been done since the 18th century. At that time, the discourse to accommodate human intellectuality in the form of a more intrinsic and structured right in the legal corridor was increasingly emerging in Europe. The development of technology-oriented international trade makes the need for harmonization of industrial law (ownership of assets) increasingly urgent, especially in the field of patents and trademarks.

Concerns from various circles about the absence of adequate legal protection occurred when the Austrian-Imperial government invited other countries to participate in the international exhibition of discoveries held in 1873 in Vienna. In reality, in this exhibition the level of participation was not significant because foreign tourists and inventors of new ideas were unwilling to show off their findings at the time.

These obstacles arise because this exhibition is deemed not to provide adequate legal protection to the exhibits on display. This eventually led to two major developments in Austria, the first Austrian Special Act assuring temporary protection to all foreigners who participated in the exhibition for their trademark and industry discoveries. And second, the holding of the Vienna Congress for Patent Reform was held that same year.

These two issues then gave birth to some basic principles, and ultimately led to the discourse that the patent should be regulated in an effective system. Then the government is also urged to immediately provide an international understanding of patent protection as soon as possible. As a follow up to the Vienna Congress, an International Congress of the Property Industry was held in Paris in 1878.

The main result is the decision that one of the governments should be required to hold an international diplomatic conference with the task of determining the uniform basis of the Act in the field of industrial

property rights. It was this strong desire that gave birth to an international convention of intellectual property rights with a number of provisions related to intellectual property rights.

The established international intellectual property rights Convention must have consequences for intellectual property protection systems in each country that adhere to one of the international conventions of intellectual property rights, as is the case with the International Trade-Related Aspect Intellectual Property Rights Convention (TRIPs). In connection with the above, it is necessary for the authors to review and examine the "Consequences of the International Trade-Related Aspect Intellectual Property Rights Convention (TRIPs) Against Intellectual Property Protection System".

Main Problem

What are the Consequences of the International Trade-Related Aspect Intellectual Property Rights (TRIPs) Convention Against the Intellectual Property Protection System?

Writing Method.

In order for a paper based on research can be said to meet the criteria as a scientific work, then needed a method. In relation to this matter, in the preparation of this paper, the author uses normative juridical method of research legislation and literature analysis and other legal materials such as books and legal journals.

Discussion

In order to manage and deal with matters relating to the protection of industrial and copyright property rights, the United Nations (hereinafter referred to as the United Nations) established an international institute called the World Intellectual Property Organization (hereinafter referred to as WIPO) on 14 July 1967 in Stockholm. It is one of the United Nations specialized agencies established for the purpose of encouraging creativity and introducing intellectual property protection worldwide.

Before WIPO was born there was a body called Bureaux Internationaux Réunis pour la Protection de la Propriété Intellectuelle (BIRPI) founded in 1893 in France to oversee the Berne Convention and the Paris Convention. In essence, WIPO was established to protect the copyright and culture owned by UN member states. This is especially important if there are cases where a country claims to have a machine tool or a design and a particular brand for example, but there are other countries that claim to be the original culture or belonging.

The establishment of WIPO is based on the Convention of Establishing the World Intellectual Property Organization. The tasks of WIPO in the field of Intellectual Property Rights (IPR), among others: Management of the administrative cooperation of the formation of treaties or international treaties in the framework of the protection of intellectual property rights; Develop and protect intellectual property rights worldwide; Cooperate with other international organizations, encourage the establishment of new international treaties or treaties and modernize national legislation, provide technical assistance to developing countries, collect and disseminate information, and develop administrative cooperation among member countries.

The red thread of intellectual property rights management struggle in the wake of the establishment of WIPO, a more complex mechanism is then re-initiated by developed countries led by the United States of Trade-Related Aspect Intellectual Property Rights agreement (hereinafter referred to as TRIPs). The formation of TRIPs as a legal instrument for the management of intellectual property rights of the world actually did not escape the implementation of Uruguay Round 1990. Canada as a member of the General Agreement on Tariffs and Trade (hereinafter referred to as GATT) formally proposed the establishment of an international trade body. This proposal was positively responded by GATT members.

The establishment of an international trade body eventually resulted in the World Trade Organization (hereinafter referred to as the WTO) and signed by GATT member states of 1947 on 15 April 1994 in Marrakesh, Morocco. The Agreement on the Establishment of the WTO clearly states the establishment of the WTO as an international trade organization.

The establishment of the WTO brought significant changes in the world trade system. There are four main attachments of approval of WTO establishment. One of them is the approval of TRIPs. These TRIPs are the culmination of intense lobbying by the United States which is also supported by the EU, Japan and developed countries. Approval of TRIPs is not due to US concern over protection and enforcement of intellectual property rights. From a United States perspective, the TRIPs agreement is a great achievement. Previously, a long debate over the implementation of TRIPs occurred by involving the interests of developed countries and developing countries.

Ultimately this debate was won by the developed countries where the approval of TRIPs was incorporated into approval in the formation of the WTO. The enforcement of TRIPs by some circles is also regarded as the victory and hegemony of developed countries as the owners of capital and technology rulers in the world. TRIPs notabene is a strategic victory that can be used as a tool to fight for their investment interests and effective protection in the international arena.

Thus, the TRIPs Agreement is not only understood as an international treaty instrument that eradicts the violation of IPR, but also as a technological and economic protection policy that benefits the developed countries. If you look at the characteristics of the TRIPs agreement, this policy is designed to combine two of its predecessor conventions, the Paris Convention and the Vienna Convention. The substantive provisions of TRIPs in terms of intellectual property rights in the fields of industry such as patents, trade mark provisions, trade names, utility capital, industrial design and unhealthy competition are adopted from the Paris Convention. In practice, TRIPs oblige each member state to provide strong protection of intellectual property rights. The TRIPs Agreement applies to all TRIPs members.

Objectives and Principles of Agreement TRIPs include:

1. Reduce the deviations and obstacles to international trade
2. Ensure that actions and procedures for enforcing intellectual property rights are not an obstacle to legitimate trade
3. Support innovation, transfer and technology for the mutual benefit of producers and users of technology knowledge in a manner conducive to social and economic well-being, as well as the balance of rights and obligations.

The principles of the TRIPs Agreement are as follows:

1. In the formation or amendment of its national law and legislation, member states may stipulate the necessary efforts to protect the health and nutrition of the people, and to promote the interests of the people in sectors critical to socio-economic and technological development, in accordance with the provisions of this Agreement;
2. To the extent consistent with the provisions of this Agreement, appropriate measures may be taken to prevent the misuse of intellectual property rights by rights holders or practices that unreasonably impede trade or adversely affect international technology transfer.

The consequences of TRIPs on the IP protection system, in this case the concept of TRIPs as a common pact in the fair management of intellectual property rights for all its members of course cause logical consequences That TRIPs approval for all countries is the most comprehensive agreement in protecting intellectual property rights.

That the points of agreement dealt with in a collective agreement are the basic reasons why the TRIPs agreement is considered the most comprehensive mechanism. Management arrangements TRIPs in each point of its approval look more detailed and decisive in regulating the regulatory mechanism of intellectual property rights in general. This is not encountered in any agreement or agreement regarding the management of intellectual property rights prior to the adoption of the TRIPs agreement. TRIPs material also does not focus on one particular theme or aspect issue because the scope of TRIPs regulates three important things, namely copyright, industrial property rights, and rights related to copyright.

TRIPs is a summary of previous agreement agreements in regulating the management of intellectual property rights. The TRIPs Agreement also implies the regulation of intellectual property rights in the respective national laws of each participating country in signing the TRIPs agreement. In Indonesia, the ratification and amendment of the law is also done by the government because it is one of the consequences of joining Indonesia in the agreement of TRIPs. This process is intensive started since 1997 until now. More comprehensive TRIPs agreement by many circles is also related to clear rules of the game in dispute settlement.

Along with the many conflicts over existing intellectual property rights, especially in developing countries which in fact are users of the output of intellectual property owned by developed countries, can be anticipated more clearly through TRIPs. The Paris and Berne Conventions are considered by some to be less able to bridge the disputes between stakeholders because of loose and unspecified rules of the game. So far, TRIPs are seen as the most perfect tools in solving the intellectual property rights issues today.

The flexibility of WTO member states, which in fact TRIPs members also can not avoid to not apply mechanisms in the domestic sphere. This is because in article 1, paragraph 1 of the TRIPs Convention states that countries that signed TRIPs (WTO member countries) must implement TRIPs. Furthermore, the agreement of TRIPs also does not provide wide space to its member countries because this mechanism does not require any additional requirements to the terms of the TRIPs agreement. That is, this obligation is carried out without any conditions, including when the member states ratified the TRIPs mechanism in its national law.

Thus, the arrangements contained in the TRIPs mechanism become the minimum standard of management of property rights in each WTO member country, including Indonesia in providing protection and dispute resolution mechanisms. Gradations of national law among member states related to the management of intellectual property rights are more or less the same as global because the approval of TRIPs is the minimum standard of law enforcement of intellectual property rights.

Closing

The substantive provisions of TRIPs in respect of intellectual property rights provide protection in the fields of industry such as patents, trade mark provisions, trade names, utility capital, industrial design and

unhealthy competition. In practice, TRIPs requires each member country to provide strong protection of intellectual property rights, TRIPs agreements apply to all TRIPs members. The consequences of TRIPs on the IP protection system, in this case the concept of TRIPs as a common pact in the fair management of intellectual property rights for all its members of course cause logical consequences That TRIPs approval for all countries is the most comprehensive agreement in protecting intellectual property rights. That is, this obligation is carried out without any conditions, including when the member states ratified the TRIPs mechanism in its national law. Thus, the arrangements contained in the TRIPs mechanism become the minimum standard of management of property rights in each WTO member country, including Indonesia in providing protection and dispute resolution mechanisms.

The need for synergy between consumers, business actors and government apparatus of a State, especially the State of Indonesia is concerned in the implementation of TRIPs, in this case must be obeyed and awareness of business actors and consumers and government to be honest and responsible so as to ensure business continuity and consumer protection this is because intellectual property rights are an exclusive right granted by the state to a person, a group of persons, or an institution to hold power in the use and benefit of intellectual property possessed or created.

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CUSTOMARY VILLAGE-BASED FOREST MANAGEMENT (CUSTOMARYSANCTION IMPLEMENTATIONPERSPECTIVE)

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ABSTRACT

Forests are natural resources that have a strategic role in human life. To that end, the government has issued Law No. 41 of 1999 on Forestry, even in preventing the destruction of the forest of the issuance of Law No. 18 of 2013. The existence of forest areas, many occur in the territory of customary law communities. The existence of recognition as regulated in Article 18 B paragraph (2) of the 1945 Constitution. For in Bali these provisions, manifested in the existence of customary village (pakraman). Ministry of Environment and Forestry Regulation No. P.83 / MENLHK / SETJEN. KIM.1 / 10/2016 Concerning Social Forestry. It is intended to reduce the imbalance / utilization of forest area. Therefore, it is necessary for Perhutani Social activities to provide legal access to local communities in the form of Forest Village management. The existence of forestry partnerships or the recognition and protection of indigenous and tribal peoples for the welfare of the people and the preservation of forest resources. Adat Village in Bali with Awig-awignya, is the whole law that regulates the way of life for indigenous villagers along with "sanctions" and the rules of execution. Sanctions in the form of adat sanctions, intended for all citizens (krama) obey and obey. Thus will materialize a safe, peaceful, orderly and prosperous life in the traditional village. Besides it also serves to regulate and control the behavior of its citizens in social life to achieve order and tranquility of the community. Then finally the forest remains sustainable and the community realizes its welfare. With regulatory intentions on the management of village forest areas conducted by adat villages through arrangements in each Awig-awig of each adat village. So it becomes a liability, in the framework of its management should not be reckless and need support of stakeholders in indigenous villages. The lack of seriousness in the management will be detrimental to the traditional village itself. With regard to the application of customary sanctions in village forest management it is justified if management is placed as part of the customary village autonomy in the care of its interests. However, there are external rules from the superiors that must be observed and followed.

Keywords : Village Forest Management, Customary Villages, and Implementation of Customary Sanctions

Introduction

Forests are natural resources that have a strategic role in human life. Bearing in mind the forests have a fundamental function of protecting life-support systems to regulate water governance, prevent erosion, flooding, preventing sea water illustration and maintaining soil fertility. Besides, it is also considered the largest oxygen producer because there are large plants / trees that take synthesis photos every day.

Regulation on forestry with the issuance of Law of the Republic of Indonesia Number 41 Year 1999, even so important to the forest, the government considers it necessary with the issuance of Law of the Republic of Indonesia Number 18 Year 2013 About Forest Prevention and Degradation. The birth of the Law is also based on the consideration of the 1945 Constitution of Article 33 paragraph (3).[1]In the provisions of Article 18 B paragraph (2) regulates the recognition of the existence of "indigenous and tribal peoples", from various groups of people who have original composition in the territory of the Republic of Indonesia. As a community of customary law, with recognition as a nation and a state. The traditional village, *Pakraman*, along with its traditional rights recognized by the state include making *awig-awig*, organizing its own government and solving legal problems in its territory.[2]

The existence of the Forest-related Law has also been issued the Regulation of the Minister of Environment and Forestry of the Republic of Indonesia Number P.83 / MENLHK / SETJEN.KIM.1 / 10/2016 Concerning Social Forestry. It is intended to reduce the imbalance / utilization of forest area. Therefore, it is necessary for Perhutani Social activities to provide legal access to local communities in the form of Forest Village management.

[1]PKPS. 2016. *Kumpulan Peraturan Perhutanan Sosial*, Direktorat Penyiapan Kawasan Perhutani Sosial. Dirjen Perhutani Sosial dan Kemitraan Lingkungan. Menhut LH RI. p.83

[2] I Ketut Sudantrra, 2008. *Pengaturan Penduduk Pendatang dalam Awig-Awig Desa Pakraman*. Piramida. Denpasar. p. 18

The existence of forestry partnerships or the recognition and protection of indigenous and tribal peoples for the welfare of the people and the preservation of forest resources. Regulation of Social Forestry as a follow-up regulation, issuance of Government Regulation Number 6 Year 2007 regarding Forest Management and Preparation of Forest Management Plan, and Forest Utilization. More specifically, on the setting of Village Forest, the issuance of Minister of Forestry Regulation No. P.89 / Menhut-II / 2014 on Village Forests.

The existence of customary villages, Pakraman, in Bali is a customary law community unity in Bali. Today in its development is inseparable from various fields of human life, including the political, economic and socio-cultural. The people still use customary law for certain matters, which customary law also will ultimately contribute to the development of national law that is generally accepted throughout Indonesia or will provide guidance on what does not need to be legalized and left alone as a local institution.[3]

Similarly, to maintain the preservation of protected forest and production forests, which have not been burdened with the right to manage or permit the utilization of forest products, and are within the administrative area of the village concerned. Then the village concerned, has been given authority to manage. Legal aspects that support the condition, through the issuance of the Decree of the Minister of Forestry of the Republic of Indonesia on the Establishment of Forest Areas as Forest Working Areas of the Village. To support the program, each customary village area is obliged to play an active role in guarding it from irresponsible attitudes and behaviors (*krama*) under the pretext of covering their economic and survival needs.

The concrete form shown by each adat village through the arrangement of each awig-awig. Every custom village in Bali, always has awig-awig that is between one adat village is different from other traditional village. Its existence formulates rules as life guide to behave in life within society of Customary village area. I Wayan Surpha pointed out *awig-awig* understanding that is "something that regulates the manners of social intercourse in society to realize the order of life in the community." *Awig -awig* adat village is the whole law that regulates the way of life for indigenous villagers along with "sanctions" and rules of execution. Sanction in the form of customary sanctions, intended for all citizens (*krama*) conform and obey. Thus, it will materialize a safe, peaceful, orderly and prosperous life in the traditional village. Besides it also serves to regulate and control the behavior of its citizens in social life to achieve order and tranquility of the community. Then in the end the forest remains sustainable and the community realizes its welfare.

In maintaining the effectiveness of the *awig-awig* power in the middle of the ages, all rules imposed on society to govern life in the framework of the state, all rules are always measured from the question of "the basis of enforceability". In this connection, of course, the basis of understanding will be retention of the rule that must also be measured from the way society accepts the rule. There are rules of life accepted by the community because the rules exist and are prioritized by the people concerned because it is perceived to provide the benefits of serenity and justice. People are concerned with this one rule because they feel they are receiving for peace and order in the community.

On the other hand, there is also a rule of life that is lowered down by the ruler as forced, even if it is contrary to the feelings of the law of the recipient or may not accept as a lawful. In this context it is known in legal science as termed by Gezag Authority and Macht power[4]. Hence, usually the rule of law is applied; the rule must have the power to be effective. While without power then the autumn will run aground or if obeyed is because of the unsusr violence coercion. Starting from that theory, returning to *awig - awig* in its practice of being inspired, "the closest order to that society", is naturally has the power of acting as a must to exist for tranquility and arena growing from below, obeyed as perceived as being must exist for the peace and life of the indigenous peoples themselves.

By adopting Van Vollenhoven customary lawyer, it is said that if it had been cut off from the customary law it would not apply, whereas in the villages, in the fields, in the markets the law was still strong and strong it was in vain that the ruler's actions.[5]

In relation to this, it can be clearly stated that *awig -awig* which originated from the base of the existence of adat village can grow and follow the development of society. Has the power to apply because he is attached and treated because it is perceived absolute for tranquility. Meanwhile, from the point of force of validity as stipulated in the legislation.

Based on the above exposure, the issues that need to be examined are as follows:

1. What is the Role of Indigenous Villages in the Management of Village Forest Areas?
2. How to adopt customary sanction on management of village forest area?

[3] T.O.Ihromi. 1984*Antropologi dan Hukum.*Jakarta, Yayasan Obor Indonesia, p. 39.
[4] I Ketut Artadi, 2007. *Hukum Adat Bali, Dengan Aneka Masalahnya*, Pustaka Bali Post, Denpasar. p. 81
[5]*Ibid*.p82.

Literature Review

1. The Concept of Forest Management

The enforcement of Law No. 41 of 1999 on Forestry as an instrument of forest protection has not succeeded in maximally protecting the forest from the damage caused by human actions. Forest protection policies that accommodate local forestry laws can increase the active participation of the community and will facilitate the government in building mass communication networks, both vertically and horizontally. Further implications will facilitate the government in social and political controls in the region. Therefore, in forest protection the government should pay attention to the diversity of local legal values living in the community as living law, so that the implementation of forest protection is reached to the maximum.

Andry Harijanto Hartiman states, the state of the forest is increasingly damaged by the encroachment of irresponsible people, is evidence of the unfavorable cooperation between the government and indigenous people. Therefore, sustainable and fair forestry development can be achieved, if there is a paradigm shift. The new paradigm of forestry development is a shift in orientation from forest management to resource-based management, centralized management to decentralization, and more equitable resource management. It is clear that indigenous peoples around the forest need to be involved such as the mandate of the law.[6]

In the context of the implementation of regional autonomy, consideration should be given to efforts to revitalize the role of indigenous and tribal people in the management, preservation of forests by reviewing, directing the pattern of forest protection by adopting local law values that have prevailed in pre- (state law). Opportunities to re-enforce the rules of local law, constitutionally have a foothold under the 1945 Constitution of the State of the Republic of Indonesia (Article 18 B) (2) stating that "the State recognizes and respects the unity of indigenous and tribal society along with their traditional rights throughout life and in accordance with the development of society and the principles of the Unitary State of the Republic of Indonesia, as governed by the law ". In addition, juridically the operational recognition of indigenous and tribal people has a legal basis in Law No. 5 of 1960 on the Basic Regulations on Agrarian Principles, in Article 3, essentially determining "... the exercise of customary rights and similar rights of indigenous and tribal people, insofar as they still exist, shall be such that in accordance with national and state interests ... ". In addition, Law No. 41 of 1999 on Forestry under Article 67 has given recognition to indigenous and tribal people.

Conception of forest in society in Bali cannot be separated from the trust structure of the community, so that the trust holds a key role in maintaining and preserving the existing forest area. In the Teachings of Regveda III.5 1.5 is stated with meaning; Protect natural resources such as the atmosphere, medicinal plants and herbs, rivers, water sources and forests - wilderness. These teachings are then implemented into their social system of *awig-awig* and pararem as a norm that must be obeyed by its citizens.

Furthermore, on the basis of the concept a variety of taboos or restrictions were developed and made the basis of "governance", which is part of the *awig-awig* of traditional villages governing human relationships with their natural environment.

Concept of Customary Village

The issue of adat village (pakraman village) is regulated in the provisions of Article 1 paragraph (4) of Bali Province Regional Regulation Number 3 Year 2001 regarding Desa Pakraman. Previously the village of Pakraman referred to as a traditional village. The concept of indigenous villagers who became the reference in this study comes from three syllables namely, community, village, and pakraman. The meaning of the word society is, the collection of several families who are bound in the customary law community in order to achieve the purpose of life in the form of inner welfare that has been established together. While the word village derived from the Sanskrit language has a meaning, unity territorial territory inhabited by several groups of people who are subject to the provision of the local area. None of the customary villages in Bali have the same rules or *awig-awig*. Although*awig-awig* is not the same, philosophical remains one, which is a reflection of the values that come from Hinduism. Furthermore, I Made Suasthawa Dharmayuda suggested that the definition of customary village (pakraman village) is[7]:

The unity of indigenous and tribal people who have a unity of tradition and manner of association of life in the bond of *Kahyangan Desa* (place of worshipingtogether), have a certain territory, have their own management, have their own tangible and intangible property, and can manage their own household.

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[6]Andri Harijanto Hartiman, 1998. *"Ketaatan Otomatis Spontan Pada Hukum Adat Studi Kasus Dalam Masyarakat Suku Enggano",* artikel dalam *Jurnal Penelitian Hukum*, Tahun III, Edisi VI, Nomor 1, Januari 1998, Fakultas Hukum Universitas Bengkulu, p. 21.

[7]I Made Suastawa Dharmayuda,2001.*Desa Adat Kesatuan Masyarakat Hukum Adat Di Propinsi Bali. (*Denpasar: Upada sastra. p. 6.

By referring to the Provincial Regulation of Bali Number 3 Year 2001, elements as well as the main characteristic of customary village, Pakraman,can be identified, namely:

1. Unity of customary law community in Bali Province.
2. Having a unity of traditions and manners of social life of Hindu society for generations.
3. Having a bond of heaven Three / Village Paradise.
4. Having a certain territory.
5. Having own assets.
6. Eligibility to take care of his own household.

Indigenous villages in Bali are customary law community units with special features not found in other types of customary law communities. This special feature is related to the Hindu philosophical foundation that animates the life of indigenous people in Bali, known as the *Tri Hita Karana* philosophy which etymologically means *tri* (three), *karana*(causes) *hita*(happiness), *Ida Sanghyang Jagatkarana* (God the Creator) , *bhuana* (universe), and *manusa* (human). With the belief of Hindus in Bali, prosperity will be achieved if there is harmony of the relationship between the elements of Tri Hita Karana, namely:

1. Harmonious relationship between man and God Almighty,
2. Harmonious relationship between man and his neighbor,
3. Harmonious relationship between man and the universe.

The atmosphere is concretely and harmoniously translated as safe, and peaceful atmosphere (*trepti, sukerta, sekala niskala*).[8]

Human, living in society, have been equipped to apply in accordance with and to sustain high cultural values. Cultural values which in certain societiy are considered to be of the highest value, but the highest value in society is not always regarded as a value by other societies. In general, these values include methods and social norms and have been recognized as a binding norm between one another, ultimately institutionalized in a particular society.

Working on the law within the community, according to Satjipto Rahardjo, cannot ignore the role human or members of the public who are subjected to positive law arrangement. In the end, itcan determine the attitudes, matches and values that members of the community need to live in behaving.[9]

In order to increase the need for community action in various types of rural development in a labor-intensive manner, with some development policies to stimulate the values that exist in society.[10]

In indigenous village communities there are "customary village leaders", (adat village administrators) and customs per consensus (customary agreement through pararem) which is the highest aspect in making decisions by the village communities concerned. Including implementing customary sanctions, where there are citizens (*krama*) who commit the *Awig-awig* violation.

Customary Village-Based Forest Management

As previously mentioned, the management of Village Forest by customary villages in Bali, especially in Buleleng Regency is based on the issuance of Forestry Ministerial Decree No. 629/Menhut-II/2010 concerning Stipulation of Area as Village Forest Area + 3,041 Hectares. The existence of protected forest areas and production forests, still within the administrative area of each village concerned. To maintain the preservation of village forests, through the Bali Governor's Decree No. 2017/03-L /H /2015 issues a Village Forest Management Permit (HPHD) on the Provision of Village Forest Management Rights in a Broad Forest Area + 3,041 Hectares. The existence of forest area of the villagedoes not escape also from the act of the hands of the villagers doing the exploitation and destruction on the forest. The existence of forest areas that are very close to the settlement of citizens, making a lot of interaction with the forest in their daily activities. This condition provides the potential for damage to the village forest area. In general, the forest area of the village, is part of the governance of each village custom village. To that end, as part of the territorial/territory (*palemahan*) of adat village, every citizen (*krama*and customary) is obliged to participate in the maintenance activity on forest area. The form of participation and the active role of adat village is shown to include the regulation of forest (*indik base*) into Awig Awig. Beginning the process of discussion through the consensus of all citizens through the great gospel (general meeting), the discussion and the *Awig-awig* mentioned, generally refer to Sargah VI Indik Wicara, Pamidanda, Kakleean Lan Alas (in Chapter IV, on the settlement of customary sanctions on forests).

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[8] I Wayan P. Windia, 2004. *Danda Pecamil Catatan Populer Istilah Hukum Adat Bali*, Denpasar, Upada Sastra,p. 45.

[9] Satjipto Rahardjo,1979.*Budaya Hukum Dalam Permasalahan Hukum di Indonesia*, (Seminar Hukum Nasional ke IV, BPHN, Jakarta).

[10] Hague, A. Rahman dan P. Wignapraja (*penerjemah*), 2013.*Towards a Theory of Rural Development Dialogue*dalam A. Irzal Rias. *Pengakuan Putusan Lembaga Kerapatan Adat Nagari Mengenai Penyelesaian Sengketa Sako dan Pusako Masyarakat Hukum Adat Minangkabau*, Disertasi Doktor pada FH Unibra, Malang. P. 73

Application of Customary Sanctions in Village Forest Management

According to Bushar Muhammad, customary village is a one-sided deed of a person or a group of individuals, threatening or offending or harassing balance and fellowship is material or immaterial, to one or to society in the form of unity. Such acts or per-manures will result in a customary reaction, in which it is believed can restore disturbed balance, among other things by various ways and ways, by paying customs in the form of goods, money, holding salvation, cutting large and small animals, etc.[11] Furthermore, R. Soepomo does not mention the term customary offense, in the customary law system. Any action that is contrary to the rule of customary law is illegal and customary law recognizes the efforts to remedy the law (*rechtshersel*) if the law is violated.[12] While the types of customary sanctions known in Bali, relevant to the writing of this title are; 1) Danda is the amount of money charged to a person who violates an *awig-awig* provision in *Banjar* or in the village. Secondly, Sin is a certain amount of money imposed on village or *BanjarKrama* if it does not carry out its duty properly.[13]

Considering that customarysanctions are generally terminated through *paruman* or through the wisdom of customary leaders who have recognized their ability, credibility, and support by the community, the customary sanctions imposed on certain village *krama* are generally supported by the whole village *krama*. Moreover, it is often found that, krama who do not support the sanctions imposed will actually receive sanctions.

Explicitly in the Provincial Regulation of Bali Number 3 Year 2001 concerning Desa Pakraman, the duties and authority of pakraman village are regulated in Article 5 and Article 6. In Article 5 stated that the duty of *Pakraman* village is as follows**;**

1. making*awig-awig*,
2. setting village manners,
3. arrange management of village property,
4. together with the government carrying out development in all major areas of religious, cultural and civic,
5. fostering and developing Balinese cultural values in order to enrich, preserve and develop national culture in general and regional culture in particular based on *"paras-paros, sagilik-saguluk, salunglung-sabayantaka*" (deliberation) protecting the village manners.

As for the authority of the village of Pakraman stipulated in Article 6, in this article stated the authority of Pakraman village covers:

1. Resolvingcustomary and religious dispute within their territory while *maintaining harmony and tolerance among villages in accordance with awig*-awig and local custom,
2. Participating and determining every decision in the implementation of existing development in its territory, especially related to Tri Hita Karana,
3. Conducting legal acts inside and outside Pakraman village.

With regulatory intentions on the management of village forest areas conducted by customary village through arrangement in each *awig-awig* of each adat village. So it becomes a liability, in the framework of its management should not be reckless and need support of stakeholders in indigenous villages. The lack of seriousness in the management will be detrimental to the traditional village itself.

Judging from the basic idea of the necessity of custom village need in the management of village forest area, there is indeed a thought base to apply customary sanction. Although there are several stakeholders outside the adat village with regard to forest management, but basically adat villages, the *Awig-awig* provision made it is the authority of indigenous village autonomy. In this context the application of customary sanctions can be seen as an interstate rule agreed upon by village manners in paruman (deliberation).

Conclusion

From the initial exposure it can be stated that with regard to the application of customary sanctions in village forest management it is justified if the management is placed as part of the customary village autonomy in the care of its interests. However, there are external rules of the superior body to be considered and followed. Adoption of customary sanctions should be placed as a last resort, if there is an indication that the non-compliance of obligation by villagers is due to *awig-awig*violations. Customary sanctions applied must also be linked to the value of justice and fairness, which means balanced with the obligations that are not merely punishable, but in the form of guidance in the framework of enforcement of the rules. Adoption of customary sanctions should be in line with respect for the fulfillment of Human Right.

[11]Busar Muhamad, 2000. *Pokok-pokok Hukum Adat*, Jakarta, Pradnya Paramitha. hlm.
[12] Soepomo, 1986. *Bab- bab Hukum Adat*, Jakarta, Pradnya Paramitha, p. 96
[13]Astiti, 1976. *Inventarisasi Istilah – Istilah Adat Agama Dan Hukum Adat Bali* (Laporan Penelitian). Denpasar: FH UNUD.

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THE IMPLEMENTATION OF THE GOVERNMENT POLICY ON THE ERADICATION OF SEXUALLY TRANSMITTED INFECTION AS AN EFFORT TO IMPROVE PUBLIC HEALTH

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ABSTRACT

Sexually transmitted infections (STI) is one of the infectious diseases that must be overcame, this has been arranged in Health Minister's Decree (Kepmenkes) Number 1285 in 2002 about The Prevention of HIV-AIDS and Sexually Transmitted Diseases in Chapter V.4 through prevention and treatment of STIs. Some programs have been running optimally but periodic STI checking activity on Sex Workers in location/localization, bar/karaoke and massage parlors has not been done. The problem in this research is how is the implementation of government policy on the handling of STI, as well as obstacles and solutions. This study uses normative legal approach, using secondary data as the main data and primary data as supporting data with qualitative analysis methods. Implementation of the government policy on the eradication of STI as an effort to improve public health according to Kepmenkes Number 1285 in 2002 is not yet maximum, where there is a program that is not yet done, which is regular check by Health Center team. Factors that influence the implementation of STI management are the juridical factor and non-juridicial factor. Constraints in the implementation of STI management of primary stakeholders are the laziness of the Sex workers inspection, Sex workers bad sexual behavior, lack of participation and understanding of the STI and its eradication. From secondary stakeholder, the constraints are : the lack of coordination among stakeholders, poor guidance and supervision of the health office, the lack of infrastructure, lack of human resources as well as sanctions that are not firm enough. Solutions that could be done is issuing a regulation from district government or from Minister of Health concerning the prevention and eradication of STI, the revitalization of program in cooperation with the City Health Office of Semarang, NGOs, Social Affairs Office Semarang and professional organizations, improve infrastructure, develop human resources in the examination and treatment of STIs, sanctions firm for the noncompliances, and to improve the understanding and public participation in the prevention of STIs.

Keywords: Government Policy, Sexually Transmitted Infections, Public Health

Introduction

Public health is a very important thing in the context of the development of the Indonesian people as a whole. In accordance with the Preamble of the Basic Constitution of Indonesian Republic in 1945 states that the development of the Indonesian people as a whole is a manifestation of the implementation of the national ideals of Indonesia. The state has an obligation to promote the common good. The general welfare in question covers all aspects of life, one of them is public health.

In Article 152 paragraph (2) of Act Number 36 in 2009 about Health explains that prevention, control and eradication of infectious diseases is done to protect the people from contracting diseases, reduce the number of sick, disabled and/or die, and reduce the impact social and economic consequences of infectious diseases. Sexually transmitted infections (STIs) are a major current national issue. This is evidenced by the increasing number of sexually transmitted infections. With social, demographic, and increasing population migration, high-risk populations contracting STIs will increase rapidly. The greatest burden will be borne by developing countries, but developed countries can also experience the burden of rising STIs by untreatable virus, risky sexual behavior and tourism development.

World Health Organization (WHO) estimates that 350 million new cases of STIs in developing countries annually include Africa, Asia, Southeast Asia, Latin America. STIs are the top 10 ranking reasons for treatment in many developing countries, and the costs incurred can affect household incomes. Services for STI complications result in a considerable cost burden, for example for screening and treatment of cervical cancer, handling liver tissue diseases, infertility examination, perinatal morbidity services, infant blindness, lung disease in children, and chronic pelvic pain in women. Social costs include conflicts with sexual partners and may result in domestic violence.[1]

Sexually transmitted infection is one type of infectious diseases that must be overcome which has been regulated in the Decree of the Minister of Health (Kepmenkes) Number 1285 in 2002 about the prevention of HIV-AIDS and sexually transmitted diseases. In Chapter V.4.f (attachment) which reads STI prevention and treatment programs with activities including periodic STI checks on Sex Workers at the location /

[1] Directorate General of Disease Control and Environmental Health, National Guidelines for Handling Sexually Transmitted Infections 2011, Jakarta: Ministry of Health, Page 1.

localization, bar / karaoke, and massage parlors. However, the fact that it is not maximally done until now in Indonesia the prevalence of STI patients is still very high, ranging between 7.4% -50%.[2]

Semarang city is one of the cities with high rates of sexually transmitted infections, because there are still many prostitutes (Sex Workers) who have potential as a source of sexually transmitted infections both locally and outside of localization. In January 2016 Semarang City Health Office found 122 commercial sex workers (CSWs) in Gambilangu Semarang resocialization infected sexually transmitted infections such as gonorrhea, lion king (syphilis), genital warts (kondiloma akumninata) and HIV-AIDS. This proves that 40-80% of STI transmission occurs in the localization.

Main Problem

How is the implementation of government policies on the prevention of sexually transmitted infections, what is factors influence the implementation of sexually transmitted infection prevention policies, and how are the constraints and solutions in preventing sexually transmitted infections in an effort to improve public health?

Research Methods

The method used for this research is the method of empirical normative law approach is done by using secondary data as the main data is data obtained by legislation, and primary data obtained directly at Mangkang Primary Health Care and Semarang Gambilangu Localization by interview as supporting data. This study will examine government policy through the Decree of the Minister of Health No. 1285/2002 about Guidelines on HIV / AID and Sexually Transmitted Diseases concerning periodic STI examinations in Localization and its regulation. The type of research used is descriptive analysis. Descriptive analysis with qualitative approach.[3]

Discussion

Implementation of Government Policy on the Control of Sexually Transmitted Infections

The epidemic of sexually transmitted infections has become a global problem, the Indonesian government is committed to implementing international agreements for STI control, promoting multilateral and bilateral cooperation, and expanding cooperation with neighboring countries in the STI Control Program. The legal basis of control is contained, among others, in the Decree of the Minister of Health Number 1285 on Guidelines for the Control of HIVAIDS and Sexually Transmissible Diseases.

In Chapter V.4 The Decree of the Minister of Health Number 1285 about Guidelines on the Control of HIVAIDS and Sexually Transmitted Diseases, the STI prevention and treatment program, with the following activities:

a. Advocate for decision makers to understand that STIs are closely related to HIV infection so need to be allocated funds to combat STIs
b. CIE prevention of STIs including condom use
c. Conducting Communicating, Information and Education (CIE) to improve community behavior in order to check themselves and treat STI early
d. Conducting training for health workers in diagnosing and treating STI sufferers based on syndrome approach
e. Developing STI clinics either in locations/localization, as well as private clinics
f. Periodic STI checks on Sex Workers at location/localization, bar/karaoke and massage parlors
g. Make an appropriate diagnosis and treatment of STI

In the implementation of the policy of preventing sexually transmitted infections, the government is responsible for public health officials in this case is the Health Office with an extension of the hand through the technical implementation unit of the Primary Health Care. In Article 5 of Regulation of the Minister of Health Number 82 in 2014 about the Control of Communicable Diseases states that the Government, Local Government, and the public are responsible for carrying out the Management of Infectious Diseases and their consequences. It is organized through community health efforts and individual health efforts.

Most cases of STIs occur in high-risk behaviors groups that are marginalized, then STI prevention and control programs require consideration of religious, customs and prevailing community norms in addition to health considerations. Transmission and spread of STIs are closely related to risky behavior, therefore control should take account of the factors that influence the behavior.[4]

[2] Indonesia Ministry of Health, 2014, Indonesia Health Profile 2014, Jakarta: Ministry of Health.
[3] Sugiyono, 2014, Management Research Methods, Matter to 3. Bandung: Alfabeta, Page 40.
[4] Directorate of Occupational Health Supervision, 2005, ILO/WHO Joint Guidelines on Health Services and HIV/AIDS, Jakarta: Ministry of Manpower and Transmigration.

After the research, it was proven that the Health Office of Semarang City through the Mangkang Health Center had implemented the policy implementation in accordance with the Decree of the Minister of Health Number 1285/2002 about HIV/AIDS Prevention and Sexually Transmitted Diseases according to the prevention and treatment program of STI there are seven programs to be performed.

Semarang City Government through the Health Office of Semarang City has made efforts to overcome sexually transmitted infections in high-risk community groups in the Gambilangu Localization including the sixth program of STI prevention and treatment of regular STI examination every week. But in fact every time periodic STI examination by Primary Health Care Team, not all follow series of inspection conducted by officer.

There are several reasons expressed by sex workers who do not want to follow the examination are:

1) The narrowness of the examination room so that it can not cover all Sex Workers for each examination.
   Each time the checks that come to the Clinic STI only about 30 people. While total Sex Workers in Localization Gambilangu about 150 people. This shows that every time the examination only covers 20% of Sex Workers of total Sex Workers in Localization Gambilangu Semarang City.
2) Lazy sex workers await in periodic STI examinations.
   Sex workers prefer to stay home while waiting for customers rather than queuing for inspection. But there are also many sex workers who want to wait for periodic STI checks.
3) Lack of strict sanctions against sex workers who do not want to take part in the series of periodic checks.

If Sex Workers is not present in periodic STI examination then Sex Workers is not given special sanction from the responsible Localization. Actually from the responsible localization Gambilangu already scheduled for the turn of periodic STI checks. However, when it is scheduled and the Sex Workers arrives the customer, the Sex Workers inevitably does not participate in regular STI checks.

Information obtained from STI program holders, periodic STI checks on Sex Workers in Gambilangu Localization is done twice a week ie Monday and Wednesday, the fact in the field of information obtained from one of the Sex Workers states that regular STI checks for Sex Workers in Localization only conducted once a week on Monday. In the early establishment of STI clinic 2005, regular STI examination was done twice a week. But due to lack of resources and busy program holder, so the examination is only done once a week.

Periodic STI health check should be done at least twice a week, given the risk of transmission of STDs in localization can occur every day because Sex Workers are active sex actors. This becomes one of the problems that must be addressed so that the number of STI sufferers can be minimized. As a result, the number of STI patients in the Localization of Gambilangu Semarang City has not decreased significantly and even increased.

Government policies in the management of STIs can be said to fail, because the number of patients with STIs more than 10% of total Sex Workers in Gambilangu Localization Semarang City. Where every month the number of sex workers who suffer from STIs at least 20 people (13%), while the number of sex workers alone as many as 150 people. Should be in accordance with existing policies, the number of STI patients should be less than 10% of total Sex Workers in a Localization. During the year 2016 at the localization of Gambilangu Semarang only done once for HIV counseling and testing services. Where should counseling and HIV service itself should be done monthly, as it sees their vulnerability as a group with high risk. This could be the cause of the high spread of HIV in Localization.

In the localization of Gambilangu Semarang itself for anamnesis and physical examination is not done by doctors but by STI program holders who only graduate Bachelor of Public Health. Although he is a national facilitator, it is important for anamnesis and physical examination to be performed by a physician who knows more about a patient's physical diagnosis. There could be a misdiagnosed STI that the therapy provided is also wrong. As a result the Sex Worker will suffer an untreated STI and will infect it to its customers.

Similarly for consultations and checks that should be performed by doctors and nurses/midwives, the reality is only done by Program Holders who are not a doctor or nurse / midwife. In counseling should be carried out by a counselor but the reality is not the case. Based on information obtained from STI Community Primary Health Care Mangkang program holders that this is actually due to the lack of health personnel resources. As a result, no doctors who go directly to the STI Clinic in Gambilangu Localization, so the number of STIs are not likely to change even tends to increase. The government should in this case the Health Office of Semarang to pay attention to this matter so that the program of prevention of STI running optimally.

In accordance with Regulation of the Minister of Health Number 82 in 2014 Article 19 explains that the handling of cases in infectious diseases intended to break the chain and or treatment of patients carried out by health authorities in health care facilities in accordance with the provisions of the legislation. In order to break the chain of transmission, public health officials are entitled to collect and collect health data and information from case-handling activities. The Health Officer who handles cases shall provide health data and information required by Public Health Officials. Where Public Health Officer is a Civil Servant in health environment who has duty and authority in the field of prevention of infectious diseases.

Government in this case Mangkang Primary Health Care which become Technical Implementation Unit of Semarang City Health Office do not implement policy with maximal. There are still programs that should be run in accordance with the Regulations and the Minister of Health but are not implemented with various causative factors. If viewed from the legal aspect, Primary Health Care does not perform its obligation where according to Regulation of Minister of Health Number 75 in 2014 Article 35 states that Primary Health Care organizes first level public health effort and first level individual health effort integrated and sustainable.

In accordance with Government Regulation Number 30 in 1980 about Discipline of Civil Servants Article 2 which stipulates obligations and prohibitions for civil servants, among others, carry out the duty of service with the best with full dedication, awareness and responsibility as well as provide the best service to the community according to their duties each. Penalties that can be imposed as sanctions for violations of civil servant discipline are verbal reprimands, written warning, disgruntled statements, periodic salary delays, postponement of promotion, demotion, transfer as punishment, assignment and dismissal. Where the holder of the STI program as public health officials in this case the State Civil Apparatus (ASN) has violated the discipline and must be punished.

On Decision of the Chief Justice of the Supreme Court Number: 071/KMA/SK/V/2008 About Provisions of Enforcement of Work Discipline in the Implementation of Special Allowance Performance Judge and Employee Performance State At The Supreme Court And The Judicial Bodies That Are In Below Article 7 describes the types of disciplinary punishment, namely Oral Warning, Written Warning, and Offenses. It should be Public Health Officers as State Civil Apparatus pay attention to the provisions of existing legislation so that it can carry out an implementation of the policy optimally and will get strict sanctions if not do responsibilities properly and correctly.

Semarang City has two Localization that is Localization of Gambilangu and Localization of Argorejo. In Argorejo Localization Semarang, STI prevention is done by Griya ASA Clinic. Where the Griya ASA Clinic STI to provide information about STIs, HIV / AIDS to CSWs (Commercial Sex Workers) and its customers, and how to prevent it through an outreach approach, under the auspices of the PKBI. Since 2007, Griya ASA PKBI Kota Semarang has expanded coverage to reach all high risk women and clients in Semarang City WPS in Localization (Sunan Kuning and Gambilangu-Semarang) women call, Massage Prayer, Karaoke, Bar and 53.000 Commercial Sex Workers clients at hot sport level.

In Argorejo Localization Semarang City STI screening activities are held once a week on Wednesday. For women usually a disease that is more often encountered is leucorrhoea. Whitish is meant here with the characteristics of smelly, itchy, yellow to greenish. As for men who often suffered a disease such as chicken comb, in the genital area when urinating pain, pus out, warts or Herpes. This service is to know how the overall health of the reproductive organs. And it is advisable for the already infected immediately do care and treatment on a regular basis. There are also reproductive health consultations that follow up the activities. In contrast to the localization of Gambilangu, at the Griya Asa Clinic Argorejo Localization there are doctors who participate in periodic inspections.

Factors Affecting the Implementation of Government Policy Regarding the Control of Sexually Transmitted Infections in Efforts to Improve Public Health

Juridical Factors

Lawrence M. Friedman argues that the effectiveness and success of law enforcement depends on three elements of the legal system, namely the substance of the law, the structure of law and the legal culture. The substance of the law includes the instruments of legislation, the legal structure of law enforcement officers, and legal culture is a living law adopted in a society.

When viewed from the substance of law, in the implementation of the policy of prevention of sexually transmitted infections have been listed in various laws and regulations, among others, Act Number 36 in 2009 about health, Minister of Health Regulation Number 82 in 2014 about the Control of Communicable Diseases, Minister of Health Regulation Number 21 in 2013 about HIV and AIDS Control, Decree of the Minister of Health Number 1285 in 2002 about HIV / AIDS and Sexually Transmitted Diseases. However, the legislation has not specifically addressed the prevention of sexually transmitted infections and sanctions for responsible public health officials.

When viewed from the legal structure, law enforcement for public health officials who do not perform the task in this case the prevention of sexually transmitted infections has not been done to date. Several factors that cause law enforcement have not been done, among others, in the legislation of prevention of sexually transmitted infections has not clearly set the sanctions to be given. In addition it is still very lack of guidance and supervision of relevant agencies.

When viewed from the perspective of the culture (culture) law, is a determinant in the effectiveness or absence of the implementation of the policy, so that attitudes and behavior of public health officers in the prevention of sexually transmitted infections and high-risk groups in Localization affected by values that are less attention to legal aspects. So if the STI prevention program is not done has become a common thing and not to worry about.

The rise of legal culture is related to the role of structures or institutions of law in society, therefore the loss of supremacy of law is not only caused by the lack of autonomy of judicial institutions, but also due to legal certainty which is not supported by the doctrine of legal precedent. In addition, the cultural factors prevailing in society are also very influential.
The basis of health development is the value of truth and the basic rules on which to think and act in the implementation of health development. Every project activity, health program must be based on humanity that is imbued, driven and controlled by faith and piety to God.

Non Juridical Factors

a. Supporting Facilities, Infrastructure and Human Resources
   The minimum standards apply to established STI clinics to improve the overall diagnosis and treatment of STIs at all STI clinics in Indonesia. To do this, every STI clinic should do things like safe sex and condom promotion, targeted services for high-risk groups, such as sex workers and their customer "liaison" groups, effective services ie prompt treatment for people with symptoms, screening, and prompt treatment of asymptomatic STIs in the high-risk group targeted. If seen from the minimum requirements required then Clinical STI in Localization Gambilangu not meet the requirements are:
   1) Inadequate inspection room.
      Periodic STI checks should be performed in STI clinics but performed within the Village Hall in inappropriate conditions. This became one of the lazy factors of the Sex Workers periodically checked themselves. As a result, the number of sexually transmitted infections in Localization is not reduced even tends to increase.
   2) Officers who are not trained.
      Periodic STI checks should be performed by a doctor but in Gambilangu Localization is performed only by Program Holders who are not doctors, nurses or midwives. As a result the detection of STIs in Localization is not running maximally.
b. Culture Factors
   Condom use is one of the most powerful ways to control the spread of STIs. In Lokalisasi Gambilangu Semarang is required to use condoms, but in fact there are still many customers who do not want to wear condoms. In order to keep getting customers, Sex Workers sometimes allow it, as a result of STI transmission will still occur. Each periodic STI examination is done by dividing the condom. Each sex worker is given two condoms. However, it does not reduce the incidence of STIs in Gambilangu Localization.
c. Environmental factor
   1) Demographic Factors
      Demographic conditions of localization where prostitution becomes very common. Living in the neighborhood of prostitution will allow or make it difficult for Sex Workers to stay away from that field. As a result the transmission of sexually transmitted infections will continue.
   2) Socio-Economic Factors
      Prostitution is closely related to social problems. Poverty often forces people to do anything to meet the needs of life including prostitution to prostitution circles. This is usually experienced by middle-class women down. Other causes of which do not have the capital for economic activity, do not have the skills or education to get a better job so that becoming sex worker is an option.[5]
      In the localization of Gambilangu itself the Sex Workers claim to want to wrestle the field due to economic problems that encourage them to work as Commercial Sex Workers. It is none other than because they come from lower middle economic class. In addition, social factors are very influential. Some Sex Workers claim to want their social status in society is also good. The average of them wants their families are also fulfilled their needs so that the family's social status will be good in the eyes of the community.
   3) Religious / Moral Factors
      In Gambilangu Localization itself can be said that the Sex Workers experience a spiritual vacuum. Proven that they think that prostitution is not a sin. So to have sexual intercourse with tens to hundreds of sexual partners is natural so there is no guilt and sin to God.

Constraints and solutions in the implementation of prevention of sexually transmitted infections

1. Constraints in the implementation of prevention of sexually transmitted infections in the Localization of Gambilangu Semarang City

[5] Rika Hesti Bangun, 2008, Perception of High Risk Groups Infected with Hiv/Aids About Clinic of Sexually Transmitted Infections and Voluntary Counseling & Testing at Padang Bulan Puskesmas Medan (on-line). http: repository.usu.ac.id, Retrieved on August 23, 2016.

Constraints involving multiple stakeholders, from secondary stakeholders consisting of government agencies, and primary stakeholders are vulnerable people, infected people, and the general public. When viewed from the primary stakeholder factors constraints that arise include:

a) The laziness of Sex Workers regularly checks STIs for various reasons including inadequate examination rooms.
b) Bad sexual behavior of Sex Workers in Localization is not using condoms during sexual intercourse.
c) Lack of public participation in the prevention of sexually transmitted infections. Communities tend to be indifferent to life in Localization.
d) Low level of understanding from the public at risk and the general public to STI or reproductive health education is still very minimal.

Meanwhile, when viewed from secondary Stakeholder constraints that arise, among others:

a) Lack of coordination among stakeholders makes less maximal realization of the program to be implemented.
b) Weak supervision and guidance from the relevant agencies in this case the Health Office of Semarang City through the Mangkang Community Health Center of Semarang City.
c) Lack of facilities, infrastructure and human resources provided by Primary Health Care
d) Sanctions that are not so firmly applied by the government itself to sex workers who are lazy to perform periodic STI checks that have been provided.

2. Solutions in the implementation of prevention of sexually transmitted infections in Sex Workers in Localization Gambilangu Semarang City

Semarang City Government should be wise in responding to the problem of sexually transmitted infection, especially on Sex Worker in Localization. So far, the only regulation is Decree of the Minister of Health (Kepmenkes) Number 1285 of 2002 on Guidelines on HIV / AIDS and Sexually Transmitted Diseases. Many things can be done Semarang City Government, namely:

a) Issue a special Regional Regulation (Perda) in the prevention and eradication of STIs, can even submit a request to the House of Representatives to make the Minister of Health Regulation on the Control of Sexually Transmitted Infections so that guidance and supervision can go much better.
b) Revitalize the STI prevention program. Where Semarang City Government through Health Department (Health Office) Semarang City and Non Governmental Organization (NGO) to solve problem of STI which every year continue to grow. With some changes in plans and strategies in the prevention and eradication of STIs that have been less than the maximum. With the establishment of STI Clinic (Sexually Transmitted Infections) in some health care work areas in Semarang City, especially in Localization. Semarang City Health Office has authority to increase the Regional Budget Plan (RABD) every year. In addition, campaigns can be carried out or counseling to be able to touch the wider community. Communication, information and education to sex workers is enhanced, especially the use of condoms during sexual intercourse.
c) Improve facilities and infrastructure and increase the number and quality of human resources in the examination and treatment of STIs so that the prevention program runs optimally.
d) To give strict sanctions to sex workers who violate the rules in the case of periodic STI examinations and the use of condoms during sexual intercourse. Firm sanctions can be made by establishing cooperation between the Health Office of Semarang City with the Social Office of Semarang City and the NGO.
e) Increasing community understanding and participation in supporting STI prevention programs, both vulnerable / risky and the general public.

Closing

1. Implementation of Government Policy on the Control of Sexually Transmitted Infections in an effort to improve public health that is in accordance with Decree of the Minister of Health (Kepmenkes) Number 1285 of 2002 on the prevention of HIV-AIDS and sexually transmitted diseases by making efforts to overcome sexually transmitted infections in the form of STI prevention and treatment. There are seven STI prevention and treatment programs that need to be done, but there is one program that has not been done that is periodic STI examination by Puskesmas Team and not all follow the series of inspection conducted by the officer.
2. Factors influencing the implementation of government policies on the implementation of the prevention of sexually transmitted infections consist of juridical and non-juridical factors. From the juridical factors of policy implementation is influenced by the substance, structure and culture (culture) law. Non juridical factors are influenced by supporting facilities, infrastructure and human resources, culture and environment (demography, social economy, and religion / moral).
3. Constraints in the implementation of prevention of sexually transmitted infections involve primary stakeholders and secondary stakeholders. From primary stakeholders consisting of vulnerable people, infected people, and the general public, namely the laziness of sex workers to conduct examinations, the poor sexual behavior of sex workers, the lack of participation and understanding of the community about

STIs and the prevention. While from secondary stakeholders consisting of government institutions such as lack of coordination between stakeholders, lack of guidance and supervision from the Health Office, lack of facilities and infrastructure and lack of human resources and unequivocal sanctions. Solutions that can be done in the implementation of the prevention of sexually transmitted infections, among others, can issue a special Regional Regulation (Perda) or Regulation of the Minister of Health (Permenkes) in the eradication and eradication of STIs, revitalization program by doing good cooperation with the Health Office of Semarang City, NGOs), Semarang City Social Offices and Professional Organizations, improving facilities and infrastructure, increasing human resources in the examination and treatment of STIs, giving strict sanctions to those who violate, and increasing understanding and participation of the community in the prevention of STIs.

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DIRECTION OF REVISION ON BROADCASTING LAW IN ECONOMIC LAW PERSPECTIVE

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ABSTRACT

Entering the year 2018, interesting issues in the National Legislation Program by RI with the Government of Indonesia are not yet determined the changes of Law Number 32 of 2020 About Broadcasting, it can be understood that the issue of material substance and various interests there is a correlation that eventually becomes very complex, resulting in stagnant and/or deadlock. Academically it needs to be presented a problem and drawn in a conclusion, so that it can be depicted as a contextual answer to the revision of Law number 32 on the broadcasting. It should be noted, however, that in the perspective of history, at least there are several reasons for the establishment of the Broadcasting Law in Indonesia, namely the demands of broadcasting democratization and/or independence of conveying and obtaining information through broadcasting in Indonesia; secondly, as an answer to the historical dynamics specific situation of putting the previous broadcasting system on a typical configuration of repressive power services subject to the wishes of a ruler or government (instrumentalism repressive) with its estuary to be a government instrument or mouthpiece; third is the response to economic liberalization that has changed the market structure and the rapid growth of the broadcasting industry in Indonesia. There is a major problem in the direction of the Broadcast Act changes in depth that the content of legal material or legal instruments therein illustrates the media accountability framework by placing two lattices of Rule Centered Type Modules of Rules, which are the orientation of the broadcasting system arrangement by focusing on the regulatory compliance of the legislation , correct procedure, explicit jurisdiction and authority, and Type Model Legal Realism is a broadcasting system arrangement with morality dimension of public responsibility, economic value, sovereignty of the country. In addition, the Broadcasting Act is actually more directed to form a legal mind or mind that includes knowledge in the social context and professional responsibility that come into contact with technology that involves the application of knowledge (technology involves the application of knowledge) through broadcast programming, broadcasting service or coverage area of the entire territory of Indonesia, the principle of diversity of ownership and diversity of content into something relevant, konevergassi in the context of New Era Media is the synergy between broadcast platform with other digital medium, digitalization of broadcasting system. The dynamics of authority between the Indonesian Broadcasting Commission and the Government of the Republic of Indonesia in this case *Depkominfo*, which becomes the most important part in the search for legitimacy in depth so that it is included in the content of the regulatory changes in the Broadcasting Law by orchestrating the authority or monopoly (*eigenrichting*) of the Government in the arrangement broadcasting system in Indonesia covering technical aspect, administration aspect of licensing, sanctioning to revocation of broadcasting permit, while Indonesian Broadcasting Commission is given the main authority to supervise the contents of the broadcast, making rule of conduct and/or rule of etic related to broadcasting content and given authority to drop. The direction of the amendment of the Broadcasting Law must be convergent, which does not bring up interconnected aspects so as to ensure the Certainty, Justice and Benefit of the Law and ensure the protection of the public.

Keywords: Justice and Benefit of the Law and ensure the protection of the public.

Introduction

Law No. 32 of 2002 on Broadcasting is currently undergoing a process of revision by the House of Representatives of the Republic of Indonesia (DPR RI). The revision stage of the Broadcasting Law has been running long enough for more than 10 years. During that time, the Broadcasting Act was even repeatedly included in the list of laws that became the priority of the House of Representatives to be finalized so that the discussion of the Broadcasting Law was included in the agenda of the National Legislation Program (*Prolegnas*) of the House of Representatives but until now the revision of the Broadcasting Law has not been completed and endorsed by DPR RI.

The length of the discussion period of the revision of the Broadcasting Act certainly raises various views that are still strange in the mind. Why the revision of the Broadcasting Act does not go away and what are the causes. More substantive questions are important to ask, where the revision of the Broadcasting Law is going. These fundamental questions are the authors try to elaborate on the basis of logical argument, scientific analysis, especially based on the perspective of economic law.

Discussion

Before discussing further about the substance of the revision of the Broadcasting Act, the authors will submit in advance the basic matters of the Broadcasting Law. The philosophical-historical Broadcasting Act was born with three powerful reasons. First, democratization demands broadcasting and / or guaranteed freedom of expression and information through broadcasting in Indonesia. Secondly, as an answer to the specific historical dynamics of putting the preceding broadcast system on the typical configuration of servants of repressive power subject to the wishes of the ruler or government (instrumentalism repressive) whose estuary becomes an instrument or mouthpiece of government. Third, form of response to economic liberalization that has changed the market structure and the rapid growth of broadcast media industry in Indonesia.

Here are three powerful reasons for the birth of the Broadcasting Law. From a legal perspective, the content of legal materials or legal instruments in the Broadcasting Act should describe the framework of media accountability. In terms of Broadcasting Act when mapped have different dimensions. The first is the model of rules. This model is of rule-centered dimension, which is the orientation of broadcasting system arrangement by focusing on proper regulation and procedural compliance. Strong jurisdiction and authority are also included in this model. The second is the type of legal realism. In the form of this model is an arrangement of broadcasting system dimension of morality public responsibility, economic value and sovereignty of the country.

Thus, this means that the Broadcasting Act actually shapes the mindset or legal reasoning that includes knowledge in the social context and professional responsibility that come into contact with technology that involves the application of knowledge (technology involves the application of knowledge) through the creativity of the broadcast program, the transmission power of the broadcast besides that , we substantially understand and agree that broadcasting law is a law which presents the principle of diversity of ownership followed by the diversity of broadcast content, classifies radio and television broadcasting services with categories of public, private, community, subscribers and delegates the authority of the state in his role as a regulator to an independent institution called the Indonesian Broadcasting Commission (KPI).

But in the course of the 15-year period, the Broadcasting Act has a tremendous dynamics in its execution, and is arguably stagnant for a long time, so it cannot run effectively and does not provide legal certainty. This occurs as a result of a restrictive interpretation within the scope of authority that ultimately enters the realm of conflict of authority among state institutions, with the conclusion that its settlement must pass through the Constitutional Court. After the Constitutional Court's decision on 28 July 2008 has brought about the implication of the tension of authority and institutional relationship between the governments in this case the Ministry of Communication and Informatics (*Kemkominfo*) with KPI. Thereby strengthening the KPI's perspective that must respect the decision of the Constitutional Court and should not ignore the important nature of the passage of the Broadcasting Law, so that the public and the Broadcasting Institution do not feel disadvantaged. The conflict episode of agency authority between KPI and *Kemkominfo* ended on the basis of the decision of the Constitutional Court and gave birth to Government Regulation (Government Regulation number 11, 12, 13, 49, 50, 51 and Government Regulation number 52 of 2005), ministerial regulation in the framework of maintaining an in-depth search for legitimacy (legitimacy in depth) by constructing the authority or monopoly (*eigenrichting*) of the government in regulating the broadcasting system in Indonesia covering the technical aspects, administrative aspects (granting of permits), sanctioning to the revocation of broadcasting licenses. Meanwhile KPI is only given the main authority to supervise the content of broadcasting, making of Broadcasting Behavior Guidelines and Broadcasting Program Standard and imposing administrative sanction on violation of broadcast content as well as KPI duties and functions in the licensing process is only secondary.

Direction of Changes to the Broadcasting Act

Talking about the exact direction of the Broadcasting Act to test, assess and initiate changes to the Broadcasting Act stems from the demands and at the same time the support of the stakeholders of social forces in society and political power (DPR). Thus the agenda for changes to the Broadcasting Law should be addressed rationally as it stands on three pillars of stakeholders namely: government, broadcasting industry and society.

Substantively there are some things that become industry concerns included in the agenda of change or refinement of Broadcasting Law, namely:

1. Dynamics of communication technology development and mobility of society so fast, of course the regulatory and/or legal matter content is no longer in accordance with the intended development;
2. Encouraging the strengthening of infrastructure and institutional functions of KPI is important, considering that in the context of democratization, KPI as a public representation is expected to have an adequate role as the spirit and spirit of the Broadcasting Law.
3. Organically or institutionally, Central KPI with Regional KPI (KPID) is in the composition of one structure financed by ABPN, so that there is no overlapping of authority and policy.

In addition, the changes to the Broadcasting Law are expected to provide directionality of the broadcasting system and not to weaken the existence and role of KPI. On the contrary, the changes to the Broadcasting Act should be more straightforward to formulate the position of KPI as an institution:

- first, its institutional morality is measured from its integrity to the implementation, enforcement of the Broadcasting Act
- Second, it plays a role in achieving cognitive competence approval for broadcasters in terms of maintaining the quality of itself as a self-preserving consent.
- Third, prioritizing efforts to encourage broadcasters' understanding of their relationship with the public interest
- Fourth, focus on applying development perspective through study, research, enhancement of the broadcasting in cooperation with civil society

To achieve the above a number of things to note in the process of discussion of Broadcasting Bill:

1. Philosophically
   - Broadcasting industry is socio-cultural industry and economic value dimension;
   - Concentration on content and production of cargo;
   - The purpose of the national broadcasting system contextually has the orientation of maintaining the sovereignty of the Unitary Republic of Indonesia, maintaining the morality of the nation, as a medium of education and encouraging creativity and mediating local wisdom.
2. As a legal manifestation that designs a new digital broadcasting system, convergence, broadcasting business model (multi-platform), construct the social aspect of the media culture within a nation's frame.
3. from regulatory side and law enforcement
   a. Regarding the position of KPI and KPID (hierarchy); position of government
   b. Duties and authorities; government domain infrastructure affairs and IBC domain content affairs
4. in the era of digital broadcasting and migration
5. Convergent broadcasting world settings become indispensable

There are two approaches to the Broadcasting Act change, namely, the integration approach (Broadcasting Act, Telecommunications Law, and Convergence Act). Second, only perfect, revise or revise the articles that are interfaces. Convergence of media and technology will further complicate the implementation of standards and regulations, especially to the latest technological media, so that it can make the existing Law become obsolete and incompatible. Examples that occur in America include: Disney makes TV broadcast programs (ABC) can also be viewed on the Internet; NBC in collaboration with YouTube.com provides TV programs can be watched on the Internet. Meanwhile, Web-based operators offer hundreds of video services. Google and Apple have an online video store, while thousands of other sites provide TV programs or amateur video clips. Another thing that is quite inspiring is that the owners of the Microsoft Xbox 360 gaming platform can now download pop movies and broadcast TV programs via the "Xbox Live" service.

Logic Scarcity Spectrum Frequency and Regulation

The explanation written in Consideration (point b., Page 1) of Law Number 32 states that "*the radio frequency spectrum is a limited natural resource and is a national asset that must be protected and protected by the state and used for the greatest prosperity of the people in accordance with the ideals of the proclamation of 17 August 1945."*

The current development of broadcasting technology may make such considerations no longer plausible. In America, the logic of broadcast spectrum scarcity as mentioned above is considered unreasonable or very weak if used as a groundbreaking thought in regulating licensing to broadcasters. All natural resources are essentially limited in number. Oil, coal, tin, and other mining properties are also limited. In other words, the arrangement or regulation based on the scarcity is actually worsening the scarcity itself. We can now see that market purchasing power and property rights actually increase innovations in the use of spectrum quantities. Technicians and engineers in the field of telecommunications are constantly trying to find new ways to take advantage of limitations or increase the capacity of the existing spectrum so that previously unusable spectrum is now a very lucrative business commodity.

On the one hand, we must honestly acknowledge that broadcasting regulation always stands on the basis of the Law which is not strong, always faltering and changing with the development of technology. Today, the constitutional foundation has collapsed in many countries, especially developed and democratic countries, due to the rapid development of law and technology. Using old regulation to set up media with new technology will surely be a big problem. In addition, allowing broadcasting institutions to languish because they often have to pay a fine violation of the code of conduct or the Act is also a mistake. However, on the other hand, the scarcity of the spectrum becomes a blessing. The case in America can be an interesting

example. Precisely because of the scarcity of this spectrum, the number of TV stations in America has doubled, while the number of daily newspapers has continued to decline. Now it is a daily newspaper that is less than the number of TV.0 stations

The number of American radio stations has also doubled since 1970. Meanwhile, technology and other media outlets are also growing rapidly, for example: satellite TV, cable TV, satellite radio, Internet TV, blogs, and so on. So, with remarkable technological advances, Americans now have an enormous amount of access to information, entertainment and news. Everywhere there is media broadcasting, present and serves the needs of people's lives. "Access to that information is now everywhere, like the air we breathe," says Stephen T. Gray (http://www.csmonitor.com/2005/0509/p09s01-coop.html).

Back to the Broadcasting Law, the division of authority in the Broadcasting Act encourages the growth of industry or economic sector through advertising. In an economic perspective, a healthy industry is a revenue-generating industry, more productive advertising expenditure. In that context the regulatory relationship with the economic sector has a very strong correlation, especially in the field of broadcasting. It is at this point that it is important to convey economic laws in relation to the broadcast industry.

First the author will describe the definition of broadcasting. The definition of broadcasting based on these laws and regulations is very important to establish the role of the law as a beacon in achieving the goals and justice. The role of law in justice issues is to bring the idea of justice into concrete form in order to provide benefits for human relationships. Therefore Lili Rasyidi in his book states: "For verily justice exists among the people whose material relations are governed by the law, and the law is made manifest to those in whom there is injustice, for injustice according to law is what difference the fair and unfair.[1]

Law is a social order born of the will of man himself to safeguard human dignity and Humanity as stated by Sri Redjeki Hartono; the existence of the law therein is as a general rule whereby a person or a group as a whole is determined the limits of rights and obligations. Referring to the rights and obligations, the most appropriate rule is what is called the law.[2]

Providing economic law is relevant because of its relation to the fact that broadcasting and regulatory aspects in the context of the system are related to the operation of economic law. Fajar Sugianto in his book discusses that Law and Economics is said to have many experts starting from Bentham's teachings (1789, 1827, 1830), which offer a middle ground of certainty and justice by presenting this doctrine of usefulness, which came to be known as utilitarian. Benthan's writings systematically explore how humans will behave in the face of law, as well as evaluate its effect collectively and its causal relationships in the context of social welfare. The law in this case is categorized as incentive, not merely as an instruction, prohibition, etc. as it is generally taught by law. Along with the growth of this discipline, legal theories have assimilated economic concepts, such as incentive effects, opportunity costs, risk aversion, transaction costs, free-riding, regulatory capture, credible commitment, etc.[3]

The synergy of law and economics is a scientific phenomenon, grounded in scientific justification as Aristotle conveys as an explanation of the elements which are synonymous with regard to being related, interconnected and interconnected. The elements are:

1. As the double stands to the half and the threefold to the third; more generally, in the way that anything that is many times something stands for that thing divided many times which is what an excess stands for that over which it has access.
2. As what heats stands to what is heated, what cuts to what is cut and, more generally, produces to what is acted on.
3. As what is a measurable stand to the measure, what is knowable to knowledge and what is perceptible to perception.

This kind of scientific interaction is said by Aristotle as the main character of scholarship. It is important to express them as a unified whole in philosophical thinking. The presentation of the two previous scientific constituencies provides clarity that the existence of law science and economics are both scientifically related to human behavior. Broadly speaking, the science of law regulates human behavior, while economics studies human behavior in meeting its needs, so that both have a close correlation, interdependence with each other, need each other and not stand alone.[4]

Liliana Tedjosaputro in his lecture material said[5] that law is defined as a regulating institution and a development institution. Economic law is a written regulation made by the government with a view to regulating, supervising and protecting all business activities including industrial activities, trading and service execution, as well as all matters relating to financial activities and other business activities.

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[1] Lili Rasjidi, Fundamentals of Philosophy and Legal Theory, PT. Citra Aditya Bakti, Bandung, 2012, p. 115.
[2] Sri Redjeki Hartono, Lecture Material of Economic Law, PDIH UNTAG Semarang, 2017.
[3] Fajar Sugianto, Economic Approach to Law, Economic Series About Laws, Series II, Kencana Prenada Media Group, Jakarta, 2013, p. 3-4
[4] *Ibid.* p. 17
[5] Liliana Tedjosaputro, Lecturer material on *Kebijakan Hukum Ekonomi*, Doctoral Program of Law Science University of 17 Agustus 1945 Semarang

The National Economic Law System is based on the 1945 Constitution, which forms the basis of reference of all economic activities in the country, where article 33 section (1) states that the economy is prepared based on a joint effort based on a joint effort based on the principle of kinship, article 33 section (2) to affirm that the production branches that are important for the state and which affect the livelihood of the people are controlled by the state; while article 3 (3) states that the earth, water and natural resources contained therein shall be used as much as possible for the welfare of the people.

This can be interpreted, theoretically there is a legal and economic relationship, shown that the economic rights of the people within an Indonesian State are guaranteed and protected by law, namely the Basic Law or the Constitution of the 1945 Constitution; The Constitution is defined that "the Constitution is the basic law which is used as the guideline in the administration of the state which can be a written constitution which is commonly called the Constitution and can also be an unwritten basic law."[6]

Basically, Law Number 32 of 2002 on Broadcasting is part of a written legal system that regulates legal relations between private citizens and members of the public with a public state. This is in line with the words of Sunaryati Hartono, that in Indonesia the law is said to be.[7] ".... a series of rules, rules, ordinances, both written and unwritten..., which determine or regulate the legal relations between the members of the community"

In the formulation, the emphasis is placed on the law as a series of rules, rules and rules concerning processes and procedures. Article 5 of the Broadcasting Act as mentioned above, it can be understood comprehensively that the content of its legal matter is related to economic law because it touches the regulation of economic activity, which has orientation to regulate business or broadcast industry with an emphasis on preventing ownership monopoly and supporting healthy competition in the broadcasting field in both broadcasting and broadcasting business.

Sri Redjeki Hartono[8] gives the limits of economic law is a series of set of rules that regulate economic activities undertaken by economic actors. From this definition there are two interrelated elements: first: the regulatory tool is a series (from the Law to its implementing regulations) that substantially governs all or part of economic activity in general, secondly: the most important economic activity is the production and distribution activities. This activity is basically in the two sphere of legal field of private law and public law.

Related to economic law, it is clear that the position of private broadcasting institution as regulated in implementing regulation is Government Regulation Number 50 of 2005 concerning Broadcasting of Private Broadcasting Institution Article 1 paragraph (2) stating: Broadcasting Institution is a commercial institution Indonesian law, whose field of business only operates radio or television broadcasting services. According to Broadcasting Law Broadcasting is broadcasting organizers, whether public broadcasters, private broadcasters, community broadcasters and subscribing broadcasting institutions that in carrying out its duties, functions and responsibilities are guided by the prevailing laws and regulations.

Basically through Law Number 32 of 2002 regarding Broadcasting Article 46 regulates Commercial and Public Service Ads, Broadcast Advertising Content, and broadcast time restrictions, especially for Private Broadcasting Institutions or for Public Broadcasting Institutions. The Limitations of Commercial Ads Private Broadcasting Part shall be at most 20% (twenty per cent), while the Public Publishing Institution shall be at most 15% (fifteen percent) of all broadcasting time. Public Broadcasting Service Public Service for Private Broadcasting Service shall be at least 10% (ten percent) of the broadcast of commercial advertisements, while for Public Broadcasting Institution shall be at least 30% (thirty percent) of its advertising broadcast. For applying reinforced by the implementation rules in the form of Government Regulations and KPI Regulations on the Guidelines of Broadcasting Behavior Chapter XXIII Advertising Broadcast Article 43, 44 and Broadcast Program Standard Chapter XXIII Article Submission Article 58, 59, 60, 61, 62, 63, 64, 65 and Article 66. Commercial Ads Broadcasting arrangements in particular are commercial or business spaces within the broadcasting world of television which affects income, income and profit related to finance or finance of overall business results or economic value.

Closing

Thus it can be drawn a conclusion that the legal institutions that encourage economic growth from the existence of business or broadcasting industry is television broadcasting institutions that include infrastructure and content investment, advertising expenditure, and revenue television business. It all boils down to a healthy television business. Healthy television business will affect the economic growth of society.

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[6] Jimly Asshiddiqie, *Konstitusi & Konstitusionalisme Indonesia*, Cetakan Kedua, Sinar Grafika, Jakarta, 2011, hlm. 29

[7] CPG Sunaryati Hartono, *Hukum Ekonomi Pembangunan Indonesia*, BPHN Dep. Kehakiman TI, Bina Cipta,Bandung 1988, p. 53.

[8] Sri Redjeki Hartono, *Hukum Ekonomi Indonesia*, *Banyumedia*, Malang, 2007, pp. 9-10

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RECONSTRUCTION OF NATIONAL HEALTH INSURANCE REGULATION ON PATIENT'S SAFETY RIGHT IN HEALTH SERVICE

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ABSTRACT

National Health Insurance in Indonesia is organized by BPJS, based on UU No 24 /2011 on BPJS (BPJS Law). The birth of BPJS also remembered the 1945 Constitution (UUD NRI 1945) and National Social Security Act (SJSN Law). The organization of BPJS works together with health facilities (Hospital and Puskesmas), as well as health workers, including doctors. The existence and sustainability of health facilities and health personnel based on health-focused regulations that focus on patient safety. In its implementation, there is a discrepancy between what happened to what should be in accordance with the law. These findings are related to non-compliance with the patiens's right to safety and service quality, ie limiting the number of drugs, the provisions of control times that are inconsistent with the patient's needs, the refferal provisions of primary health facilities to advanced health facilities, and internal refferals at advanced health facilities. In the review, the regulatory construction in BPJS Law does not focus on patient safety. This is not sync with the regulation of health facilities and health personnel that focus on patient safety. As a result, there is a discrepancy in what is expected in the service, which involves the patient, health worker, and health facility. This could potentially lead to a risk to patient safety. It takes the regulatory reconstruction of BPJS Law on the right of patient safety in health services.

Keywords : Reconstruction, BPJS Law, Regulation, Patient Safety, Health Services

Introduction

An exciting news when at the beginning of 2014 launched a health guarantee for all Indonesian people. Health insurance is in the form of National Health Insurance (JKN) which its implementation is based on National Social Security System (SJSN) through Social Security Administrator (BPJS).

In a sociological view, although the program seems to be continuing as though unimpeded, it is still tainted by controversial views, including cracks prone to its implementation and evaluation. Why patients, hospitals and health workers had a turbulent response to this BPJS stretch? Of course it still be remembered, various controversy and different views and understanding about the implementation of JKN BPJS in various places in this country.

We still hear about BPJS policies that are felt to be detrimental to the patient.[1] Similarly, the news about people who do not want to use JKN.[2] The reappearance of attention to the ethical profession of doctors in the era of JKN,[3] is there a different in the era of JKN? In other places appeared news about private hospitals that no longer serve BPJS participants.[4] News about drug spending restrictions by BPJS still exists, right?[5] Why is there still continuous controversy over the next three years of organizing BPJS?

Often the emergence of rejection or upheaval of the emergence of new regulations or implementation in the field, can indicate the existence of "irregularities" in it, as well as in this case with what happened to the implementation of JKN BPJS.

Philosophically, the National Health Insurance has an understanding of the realization of the overall health condition through the design and policies that provide humanitarian, justice and nationality benefits, both in terms of service availability, service access, service acceptability, and service quality. How the process of realizing patient safety is closely related to the nature of patient safety, namely that human beings as rational beings have free will with the highest moral principles, as Kant's philosophy is expressed.[6] Patient safety as part of the truth and its embodiment is also part of the effort for the benefit of human beings. As the notion that the essence of truth is for the benefit of man, must not change the nature of man, should not divide, and should not damage the earth, nature, and environment.[7]

The emergence of a program is certainly a mandate of the provisions, in this case is the legislation. In the case of the implementation of JKN BPJS there are several parties that play, including BPJS, Health Facilities (Hospital, Community Health Care/*Puskesmas*), Health Workers (doctors, nurses, midwives) in which each party carries out its own mandate of legislation.

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[1] http://m.wartabuana.com/read/inilah-kebijakan-bpjs-yang-rugikan-pasien.html
[2] http://pewarta-indonesia.persisma.org/ppwi/alamat-kontak/15869-warga-curhat-tak-mau-pakai-jkn-rumit.html
[3] http://dental.id/etika-profesi-dokter-dalam-era-jkn/
[4] http://www.radarlombok.co.id/banyak-rs-swasta-tidak-layani-peserta-bpjs.html#
[5] http://www.suaragresik.com/2014/01/pembatasan-pengeluaran-obat-bpjs.html?m=1
[6] Wulf HR, Pedersen SA, Rosenberg R, *Philosophy of Medicine-Filsafat Kedokteran Suatu Pengantar*. Oxford London Edinburgh, Blackwell Scientific, 1986. Terjemahan:Pasaribu S, Yogyakarta, CI Press, 2012, p.296.
[7] Lisdiyono E, *Materi kuliah Filsafat Ilmu 2017* PDIH UNTAG 1945, Semarang.

The mandate of the world of health is the focus on patient safety. It is contained in legislation related to Hospital, Health, Medical Practice, Health Manpower, and Pharmaceutical. So the focus of patient safety should be the synergistic goal of all parties who play a role in the implementation of JKN BPJS. Based on this understanding, the consistency of the implementation of JKN BPJS materialized, when the construction of legislation that became the basis for the parties related to the public health insurance to make the element of patient safety as the focus. In this case, the patient's safety focus becomes the synergistic goal of law enforcement construction involving BPJS and the service element, both hospitals and health workers.

In order to review the construction of regulation related BPJS, at this time we should look into the history of the birth of BPJS. Juridically, in the birth process of BPJS, it is necessary to submit several provisions as follows:

First, is article 5, section 1 of Law No. 40 of 2004 on SJSN, which states that the Social Security Administering Agency should be established by law.[8] Second, is article 52 of Law Number 40 Year 2004 regarding SJSN, that Social Security Workers (JAMSOSTEK), Savings and Insurance Funds of Civil Servants (TASPEN), Social Insurance of Armed Forces of the Republic of Indonesia (ASABRI), and Health Insurance Indonesia (ASKES) shall remain in force as long as it has not been adjusted to the SJSN Law, by not later than 5 (five) years to comply with the SJSN Law.[9] Both of these are used as the basis for consideration of the transformation of the four State Owned Enterprises (SOEs) that organize the social security (JAMSOSTEK, TASPEN, ASABRI, ASKES) into BPJS.

In addition, the provisions on BPJS also remember:

- Article 28H section 1, article 28H section 2, article 28H section 3 of the 1945 Constitution, which is included in Chapter XA and speaks of human rights.10
- Article 34 section 1, Article 34 section 2 of the 1945 Constitution.

The aforementioned articles state the rights of the people and the guarantee of the fulfillment of rights by the state. These rights include: prosperous and spiritual life, residence, and gaining a healthy and healthy living environment and obtaining health services, obtaining convenience and preferential treatment to obtain equal opportunities and benefits to achieve equality and justice, and the right to guarantee social enabling self-development as a dignified human being. Here the rights are very closely related to human rights, which means health is a fundamental right for humanity. Human rights or better known as Human Rights are human rights / rights / absolute rights belonging to humanity, person by person, is owned by person from birth to death, while in the implementation accompanied by obligations and responsibilities. [11]

In addition, the state is also obliged to fulfill the following rights: the maintenance of the poor and neglected children, the development of social security systems for all people and empowering the weak and incapable of humanity.

Public safety, in this case patient safety becomes a substantial element in the implementation of health insurance in Indonesia. To see where the construction of patient safety begins, we can look back to the mandate of the 1945 Constitution of the Republic of Indonesia as follows[12]:

- Preamble to the 1945 Constitution of section 4 (four) stating that: "Later than that to establish an Indonesian state government that protects the whole nation and the entire blood of Indonesia and to promote the common prosperity, ... and so on".
- This mandate shows that the welfare of society, including public health, is the responsibility of the Indonesian government to organize it.
- Article 28A: Every person shall have the right to live and have the right to preserve his life and life.

  This understanding includes:
  1. The right to life, including seeking, achieving, and obtaining life or safety in health.
  2. The right to survive, including survival and safety.
  3. The right to sustain life includes conducting Activities in order to maintain life and safety and seek treatment.

This means that in the context of the implementation of welfare, including health and social security, the state is responsible for providing facilities, both general and health, as well as for its safety. BPJS cooperation with health facilities, such as hospitals, of course related to hospital related regulations, such as Law of the Republic of Indonesia Number 44 of 2009 regarding Hospitals. In addition, the organization of BPJS is also concerned with various other provisions related to hospital resources, such as with the Law on Health, the Law on Medical Practice, the Law on Health Personnel, the Medical Code Ethics (KODEKI), the Government Regulation on Pharmaceutical Works, and so on.

[8] Law No. 20 of 2004 regarding SJSN
[9] Ibid. Article 52
[10] 145 Constitution of Republic of Indonesia
[11] Efendi HAM, *Hak Asasi Manusia Dalam Hukum Nasional Dan Internasional*, Bogor: Ghalia Indonesia, 1993, p. 143.
[12] Ibid, Preamble, paragraph 4.

There are various provisions relating to the regulation of other parties (health facilities/hospitals, doctors' professionalism, general health and pharmaceutical), within the framework of national health care services. At the hospital, the patient's safety construction is inherent in the provisions of the Law of the Republic of Indonesia Number 44 of 2009 regarding Hospitals.

Some of the mandates of the Law of the Republic of Indonesia Number 44 of 2009 on hospitals, which relate to public health insurance which focus on patient safety are as follows[13]:

a. Article 2
   Hospitals are held on the basis of Pancasila and are based on human values, ethics and professionalism, benefits, equity, equality and anti-discrimination, equity, protection and patient safety, and social functions.
b. Article 3 point b
   The organization of the organization aims to provide protection for the safety of patients, the public, the hospital environment and human resources in the hospital.
c. Article 13 section 3
   Every health worker in a hospital must work in accordance with professional standards, hospital service standards, applicable operational procedures standards, professional ethics, respect for patients and prioritize patient safety.
d. Article 29 section 1b
   each organization has the obligation to provide safe, quality, anti-discrimination and effective health services by prioritizing the interests of the patient in accordance with hospital service standards.
e. Article 32
   each patient has the right to obtain his or her safety and safety during hospitalization.
f. Article 43 section 1
   the hospital shall apply the patient safety standard.
g. Article 54 section 2c
   guidance and supervision of the organization is directed to patient safety.

Thus, based on the foregoing description, it should be:

a. Implementation of JKN BPJS ensures focus on patient safety.
b. The provisions in JKN BPJS contain a sharper substance concerning patient safety.
c. Synchronization and harmonization between JKN BPJS stipulations on various provisions underlying agency, institution, professional, or other party, shall be implemented, expressed and felt in the implementation of this JKN, in relation to the patient's safety focus.

While what is happening in fact at this time, where it is experienced, seen and maintained in the implementation of JKN, not as expected as it should be. Some events that potentially neglect patient safety are common. Various facts that occur in the service JKN BPJS, can be associated with patients and professionalism of health personnel, especially doctors. It is also related to health facilities, such as hospitals. While the fakor tends to be ignored is the focus of safety, service quality, patient rights, and professionalism ethics. Events that arise and potentially neglect patient safety include:

a. Limitations on the amount of drugs given to patients that are not in accordance with the needs of patients and those written on the prescription. Under these circumstances, the patient's condition has the potential to deteriorate, so that the patient's safety element is neglected, as well as for the physician, potentially a violation of professional ethics, in this case a violation of KODEKI, which prioritizes the patient for the safety and interests of the patient.[14]
b. Patients complain of pre-control control difficulties, for example when a complaint arises in relation to the illness and treatment being administered by a specialist. By applying such a "control time-appropriate control" requirement, which means applying "prohibition controls before control time", the potential for deterioration and suffering of patients is higher, and of course patient safety is ignored.
c. Patients find it difficult to request referral to an advanced referral health facility (FKRTL) from a first-rate health facility (FKTP), while experiencing unresolved complaints while in FKTP has been treated many times. The state of the patient is certainly potentially getting worse. Such provisions clearly ignore the patient's safety.
d. In the case of internal referrals or internal consultations (consultation or referral among specialists within a health facility / hospital), patients are not allowed to undergo internal referrals or consultations within one day. With the rejection of the patient for internal consultation within that day, then of course it has the potential to make the disease worse, and patient dissatis faction arises.

In fact, there are findings in the field of health services related to JKN BPJSdi Hospital Outpatient Installation. The findings are related to patient safety, patient satisfaction, and patient rights, which indicate a discrepancy in what should be expected or aspired to be. If it is related to the bioethical rules, which are

[13] Law No. 44 on 2009 regarding Hospitals
[14] Code of Medical Ethics Indonesia

related to the quality of life, health services should always be inherent with science and biological sciences. As stated in the bioethanic sense, science is to survive and focus on the use of biological sciences to improve the quality of life.[15] Bioethics as a study of ethical, social, legal, philosophical and other related issues arising in the management of health and biological sciences.[16]

Main Problem

Based on the description of the background, the authors identify problem issues to be studied and discussed, as follows:

1. What is the construction of health-care regulation that focuses on patient's safety in the hospital?
2. How is the current JKN regulatory structure in health services?
3. How does the reconstruction of JKN's regulation protect the patient's right to health care?

DISCUSSION

Construction of Health Services Regulation Focused on Patient Safety.

Patient safety in regulation and regulation.

Discussion on the construction of health-care regulation that focuses on patient safety can not be separated from the provisions of patient safety in regulation and regulation. So in this section delivered a variety of health care regulations that contain clearly about patient safety in it.

1. The Preamble of the 1945 Constitution, section 4, which states that: "Later than that to establish an Indonesian state government that protects the whole nation and the entire blood of Indonesia and to promote the common prosperity, ... and so on"
   The fourth section of the Preamble of the 1945 Constitution of 1945 is the basic values of Pancasila, namely divinity, humanity, unity, democracy, and justice. This mandate shows that the welfare of society, including public health and safety, is the responsibility of the Indonesian government to administer it.
2. Law Number 44 Year 2009 regarding Hospital.
   Some of the mandates of Law No. 44 of 2009 on Hospitals related to public health insurance that focus on patient safety are as follows:

Article 2: Hospitals are held on the basis of Pancasila and are based on human values, ethics and professionalism, benefits, equity, equality and anti-discrimination, equity, protection and patient safety, and social functions.

- The value of humanity is that the conduct of hospitals is done by giving good and humane treatment by not distinguish tribe, nation, religion, social status, and race.
- The value of ethics and professionalism is that the organization of the hospital is carried out by health personnel who have professional ethics and professional attitude, and adhere to hospital ethics.
- The value of benefits is that the organization of hospitals should provide the greatest benefit to humanity in order to maintain and improve the degree of public health.
- The value of justice is that the organization of hospitals is able to provide a fair and equitable service to everyone with affordable costs by the community as well as quality services.
- The value of patient protection and safety is that the organization of hospitals not only provide health services alone, but must be able to provide improved health status with attention to the protection and safety of patients.The value of patient safety is that the organization always strives to improve patient safety through risk management efforts.

Article 3: The organization of the organization aims to:

- Facilitate public access to health services;
- Providing protection to the patient's safety, society, hospital environment and human resources in the hospital;
- Improve quality and maintain hospital service standards.

Facilitate public access to health services means ensuring uncomplicated, uncomplicated, non-complicated, procedure, procedures, procedures, workflow, methods, procedures and requirements. More in the service of the sick, where patients come to the hospital of course is suffering, so that when going to treatment directly confronted with the complexity of the process, it will certainly add to the suffering and potentially aggravate the disease.

Patient safety is a process in a hospital that provides safer patient care. Includes risk assessment, identification, and risk management for patients, incident reporting and analysis, ability to learn and follow up incidents, and implement solutions to reduce and minimize risks.

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[15] Putra S, *Materi kuliah Medikolegal, Bioetik dan Teknologi Kedokteran* S3 PDIH UNTAG 1945 Semarang, 2017

[16] Clados MS, *Bioethics in International Law: An Analysis of the Intertwining of Bioethical and Legal Discourses*, inaugural dissertation, der Philosophie an der Ludwig-Maximilians-Universitat Munchen, 2012, p. 12.

Article 13 section 3:

- Every health worker in a hospital must work in accordance with professional standards, hospital service standards, applicable operational procedures standards, professional ethics, respect for patients and prioritize patient safety.

Article 29 section 1b:

- each organization has the obligation to provide safe, quality, anti-discrimination and effective health services by prioritizing the interests of the patient in accordance with hospital service standards.

Article 32n:

- each patient has the right to obtain his or her safety and safety during hospitalization.

Article 43 section 1:

- the hospital shall apply the patient safety standard.

Article 43 section 2:

- the patient safety standard as referred to in article (1) is carried out through incident reporting, analyzing, and establishing problem solving in order to reduce unexpected events.

Article 54 section 2c:

- coaching and supervision of the hospital is directed to patient safety. The guidance and supervision of hospitals is carried out by the government and local government by involving professional organizations, hospital associations, and other community organizations.

In addition to the above regulation, the patient's safety content is also contained in the following health regulations:

i. Article 53 section 3, Article 24 section 1, and Article 54 section 1 of Law No. 36 of 2009 on Health.
ii. Article 2 of Law Number 29 Year 2004 regarding Medical Practice.
iii. Article 58 section 1a, article 69 section 1 of Law No. 36 of 2014 on Health Personnel.
iv. Article 1 section 1, article 1, section 4, article 3 Government Regulation No. 51 of 2009 on Pharmaceutical Works.
v. Preamble of Code of Medical Ethics Indonesia, article 8, article 10, article 11 of Code of Medical Ethics Indonesia.

Looking at the construction of the regulation related to the above health, it all clearly states the safety of the patient or the focus of the patient's interest in the substance. The clear loads listed will greatly facilitate the implementers of the provisions in the field to understand and apply them in health services. In other words, there is a harmonization in the process of formulating legislation. Related to harmonization between legal products, National Legal Development Board gives understanding of harmonization of law as scientific activity to toward process of harmony of written law which refers either to philosophical, sociological, economic, and juridical values.

Patient Safety In Health Services.

In addition to the construction of health-care regulation that focuses on patient safety in hospitals, then how is patient patient safety review going on in the hospital so far. According to Law Number 44 of 2009 on Hospital, in the explanation of article 3 point b, the meaning of patient safety is a process in a hospital that provides safer patient services. In the context of occupational safety, the patient's safety refers to a program that seeks to prevent the occurrence of patient errors due to treatment measures, resulting in unpleasant events or longer treatment or resulting temporary disability and may also be permanent. Still according to the same source, this patient safety program involves identifying potential hazards / potentials of wrongdoing, taking precautions for mistakes, and learning from mistakes in order to facilitate unsafe service processes. In the hospital's accreditation standards, the patient's safety understanding is related to overall quality in minimizing risk to patients and staff on an ongoing basis, both in the clinical process and in the physical environment.

The quality of health services in hospitals is closely related to service user satisfaction, in this case the patient. Means, quality health services is a service that gives satisfaction to patients, both in the process and the results. In the context of organizing there are two major things, namely health services and management of health and treatment. Health service is a sequence of activities that the patient undergoes from the beginning of admission to hospital out of the hospital, where it is closely related to hospital management. While the management of health is a series of activities related to disease in patients, including medication and medical treatment undertaken by the patient, where it is related to the professionalism of health workers, including doctors, nurses, and midwives.

Construction of JKN Regulation in Health Services.

BPJS, in addition to departing from the provisions of the 1945 Constitution as already mentioned before, also carries out the mandate of article 5 section 2 of the SJSN Law stating that: "Since the enactment of this Law, the existing social security organizing body is declared as Social Security Administering Body by This Law ". In addition, BPJS has various provisions in the SJSN Law as follows:

- Article 1 section 6:
  Social Security Administering Body is a legal entity established to organize a social security program.
- Article 2:
  SJSN is organized on the basis of humanitarian principles, principles of benefit, and the principle of justice for all Indonesians.
- Article 3:
  The National Social Security System aims to provide guarantees for the fulfillment of the basic needs of a decent life for each participant and / or family members.
- Article 4 point i:
  SJSN shall be conducted on the basis of the principle: the results of the management of the social security fund shall be used wholly for the development of the program and for the maximum interests of the participants.
- Article 24 section 3:
  BPJS develops health service system, service quality control system, and health service payment system to improve efficiency and effectiveness.

As the organizing body, BPJS also has various provisions in Law No. 24 of 2011 on BPJS which must be implemented.

- Article 6:
  The scope of BPJS Health organizes a health insurance program.
- Article 9:
  BPJS is functioning to organize a health insurance program.
- Article 11h:
  In performing its duties, BPJS is authorized to cooperate with other parties in the framework of the implementation of social security programs.

As is known, that the implementation of this health insurance, in its implementation requires health facilities, including hospitals where the Hospital is also bound by various regulations and regulations, including professional health professionals who work in it, among them are doctors. Several provisions related to cooperation between BPJS with other parties, especially health facilities are as follows:

- Article 11h of Law No. 24 of 2011 on BPJS:
  In performing its duties, BPJS is authorized to cooperate with other parties in the framework of the implementation of the social security program.
- Article 2 section 1 Permenkes Number 71 Year 2013 On Health Services On National Health Insurance:
  The providers of health services cover all health facilities in cooperation with BPJS Health in the form of first-rate health facilities and advanced health referral facilities.
- Article 14 section 1 Permenkes Number 71 Year 2013 About Health Services On National Health Insurance:
  Health services for participants are implemented in stages according to medical needs starting from first level health facilities.

In relation to regulations that focus on patient safety, the provisions of the BPJS Law do not contain any clauses or clauses that express sharply the focus of patient safety as part of his ministry. This of course affects the formation of regulations under it, as well as executors in the field. Ultimately, the important thing is, that it will affect the interests of patients, especially patient safety.

Reconstruction of JKN Regulation on Patient Safety Right.

As Satjipto Rahardjo puts it, unless it seems normative, the law also still has another side, which is apparent in reality, where the meaning here is not a reality in the form of the article of the law, but rather states how the law is run everyday. In this case how the construction of JKN BPJS regulation is capable to ensure patient safety in the implementation of JKN BPJS. Thus, to understand this, it is not enough to just read and hear, but also to observe directly what is happening and involved in the implementation of JKN BPJS.

As is known that there are regulations related to the field of health services, and related to BPJS. Regulation on both sides certainly has an impact on the implementation and implementation of the regulation by implementers in the praxis level, and of course to the interests of the patient.

Implementation of regulation on both parties, both health service agencies and BPJS, each run its own regulation. In some cases, for the sake of fulfillment of the administrative requirements and enforcement of BPJS regulations, the health care providers often have to comply with the requirements of the BPJS regulation, although in the future it is not appropriate or against the regulation of the health sector itself. Why ? Because health services require financing, where the financing is controlled entirely by BPJS. So the findings obtained mainly related to the absence of the spirit of health care is the absence of substance of patient safety in the implementation of JKN BPJS. This happens because BPJS regulation is more highlighted in service with the strength of its regulation which increasingly seems to squeeze the regulation of health

service, especially patient safety spirit. While the health sector stakeholders, especially in health facilities, can not seem to do much, considering, the structure of BPJS administrative organization is different and higher than the health service agencies. BPJS appears to have more power compared to health service agencies in carrying out the function of providing health services. Whereas the regulation, BPJS Law issued after the Health Law runs.

Each team or implementer of both BPJS and health field, although already carry out their respective functions, but still there are inequality of process and its impact. When each of them is confronted, why they are doing so, each of them declares that they follow the rules according to their respective regulations, and so it should be.

When in the study, it was found no root problem at the level of implementation, then the study should be drawn towards the philosophical direction that will lead to the level of instrumentation is how the formation of legislation. Thus, the potential root causes of the problem are found in legislation.

It is said that in fLaw, incidents of inconsistency in the praxis level of health services and the management of JKN BPJS, the root of the problem is not necessarily at the level of regulatory implementation of each field, but it can happen that the root of the problem is on the level of regulation instrumentation above it. This is where the need for reconstruction of a regulation so that it is in sync and harmonious with other previously created regulatory products.

When the review is done on the regulation of both parties, it turns out that in regulation related BPJS there is no clause or clause that explicitly contains about the patient's safety as the focus in the provision of health services whose funding is supported by this BPJS. There is no major substance of health services, ie the spirit of patient safety in BPJS regulation.

At the time of the formation of the BPJS Law, the principles of synchronization and harmonization should take precedence, since it has first published the Law on Hospital, Health, Medical PrLawice, Pharmaceutical, all of which contain the substance or spirit of patient safety in its provisions. By synchronization and harmonization, the focus of the provisions of the social insurance provider body will not be far from the target of the service to be addressed, ie the patient and the interests of safety, healing and patient satisfLawion. Thus all the regulations below will follow. This is as stated by Hans Kelsen about the legal order, in which norms that regulate the creation of other norms are higher, while the norms created are lower. Thus the legal order is not a system of coordinated norms of the same rank, but a hierarchy of legal norms with different levels. Similarly, the implementer of the regulation will hold firm and implement the provisions. In the process these things become mutually contribute to the realization of patient safety in the management of JKN BPJS.

This nation has hope in the future, related to the implementation of JKN BPJS which focuses on patient safety. Hope it is:

- Establishment of law and regulatory structures related to the establishment of JKN BPJS legislation that concerns synchronization and harmonization of other related and pre-existing regulations, such as the Law on Hospital, Health, Medical Practice and Pharmaceutical, particularly concerning the focus of patient safety focus in inside. Regulatory construction that includes patient safety as the substance content inherent in BPJS legislation, will make the provision and implementation of JKN BPJS in the field also focus on patient safety. With all parties focusing on patient safety, all elements will synergize in service, including quality assurance services and patient satisfaction and service users. Thus, the control over the implementation of JKN BPJS in the Hospital will maintain the consistency of service to stay in accordance with the patient's safety corridor.
- The construction of regulations on the praxis level is the actualization of the above rules. In this case, the formation of patient safety design in hospitals and health facilities, which is very meaningful in supporting the implementation of health services system based on JKN BPJS that focuses on patient safety. This design is a matter of awareness and response of Hospital to the management of JKN BPJS, so that fulfillment related to patient's safety fulfillment beside the implementation of JKN BPJS also can run well. The built-in design of this process helps ensure the patient's focus on patient safety. Thus, the patient-centered service process will be guarded from primary referral to follow-up services in the hospital, whether in the planning, implementation, or controlling stages.
- Reconstruction of JKN regulation related to the following matters:
  i. Reconstruction is required by noting that the problematic findings on the praxis level are not always rooted in the implementation of the regulation, but rather on the instrumentation level.
  ii. Reconstruction is an option because the root of the problem is in the instrumentation level and concerns the substance of the written provisions of JKN regulation, in this case the BPJS Law, where there is no substance of patient safety in it.
  iii. Reconstruction is necessary, so that the substance substance between regulation of health field there is harmonization and synchronization, especially patient safety substance. Thus, service at the praxis level is also harmoniously synchronous and not conflicting.

iv. Reconstruction includes material substance on the written provisions of the BPJS Law where there are revised statements to state its focus on patient safety, or other parts that play a role and influence when there is a patient's safety charge in it.

Closing

a. The construction of health service regulation includes patient safety on the substance written in the terms of each health sector regulation. With the same focus regulation, ie patient safety, the various provisions of the regulations under it including its implementation by officers are not conflicting interests.
b. JKN's regulatory construction does not contain patient safety on the substance contained in the JKN BPJS regulatory provisions. With regulation that focus is not the same, that is about patient safety, then the various regulation provisions under it termsuk implementation by officers potentially causing conflict of interest.
c. JKN's regulatory reconstruction includes material substance on the written provisions of the BPJS Law where there are revised statements to state its focus on patient safety, or other parts that play a role and influence when there is a patient's safety charge in it.

Suggestions and expectations in the future are urgent to be realized, so the solution related to the implementation of JKN BPJS that focuses on patient safety are:

a. Government:
   i. Reports the regulatory reconstruction through the loading of substance regarding the patient's safety focus on the provisions of the BPJS Law, as a means of attaching the humanitarian value of Pancasila. The regulatory reconstruction of JKN BPJS is needed to ensure the existence of the patient's interest charge in this case the patient's safety focus in its provisions. Given the patient's safety content in the regulation, the rules below will follow, and the implementers at the implementation level are also more focused in carrying out their responsibilities.
   ii. Ensure control through monitoring and evaluation of synchronization and harmonization in the formation of legislation, including in the reconstruction of this BPJS Law.
   iii. To ensure the socialization of reconstructed legislation, whether through health facilities or information and communication media.
b. Related agencies:
   i. BPJS:
   BPJS must realize the function of synchronization and harmonization of the provisions of JKN in the BPJS Law against various provisions underlying agencies, institutions, professionals, or other parties, especially FKTP and FKRTL, among others in RS. Synchronization and harmonization must be implemented, expressed and felt in the implementation of this JKN, related to the focus of patient safety.
   ii. Hospital and other health facilities:
   Health facilities, both FKTP and FKRTL, including hospitals, should be able to voice and realize the interests of patient safety in the implementation of JKN in its environment, based on its provisions.
   iii. Establishment of integrated patient safety design in the implementation of JKN BPJS in Faskes, including in RS.
c. Society: Communities, professionals, community leaders and academics must support the state through awareness, legal culture and socialization to realize the fulfillment of patient's right to health care, in accordance with the regulations of the reconstruction.

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MALPRACTICE: INJUSTICE DOCTOR - PATIENT
(Creating a Transparent Health System)

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ABSTRACT

This study examines malpractice in the field of health through legal science perspective, especially focused on systems that result in malpractice. MKDKI rejected the term, and replaced it with the terms of medical discipline violations. Malpractice is considered a doorway to the criminalization of doctors. A written protective legislation, both for the doctor and for the patient, has guaranteed both parties. Begin reporting MKDKI, mediation, civil suit to criminal reporting. This study uses the Sociology Approach of Health Law, to uncover the formulation of the problem and provide solutions to the problem. Two formulations of malpractice problems: physician-patient injustice, first, how does the system predominate and influence the incidence of malpractice and physician-patient dependence on malpractice vulnerability? Second, How Malpractice Complaint Process ?. Two solutions, firstly, malpractice is avoided by applying a transparent healthcare system, to physicians, (1) clarity of doctors' scientific track records through government official websites accessible to patients, and (2) every doctor included with government legal counsel. For the patient, (1) understanding and knowing the medical record during the honest treatment and (2) the ease of malpractice complaint by following transparent patterns in malpractice cases. Implementing this solution will significantly eliminate malpractice drastically because previously the official malpractice complained to MKDKI by patients since 2013 until february 2017 there are 9 complaints only.

Keywords: Malpractice, Sociology of Health Law, Transparent, track record, medical record

Malpraktice, is it considered a doorway to the criminalization of doctors?

Malpractice in health, in general understanding, is often returned to one or more of the injuries and losses suffered by the patient from the cause of the physician's negligence. Although not always like that. The linkage of health malpractice cases, closely related to the procedure of approval of medical action, which regulates the rights and obligations of both parties. A professional doctor with expertise in his field and an honest patient in explaining the state or perceived pain. Both, doctors and patients are protected by law from being the victim of a malpractice.

What is the real malpractice problem?

Patients can be regarded as victims of malpractice when they meet the elements that cause injury and damages to patient. It should be noted, however, that these injuries and damages are not from the disobedience and undisciplined of the patient, meaning the patient follows all the advice given by the doctor. But if on the contrary, the patient does not follow the doctor's advice, for example the drug must be drunk five times a day but only drunk three times a day, or must be drunk three times a day but in fact drink five times a day, then the patient who actually has done malpractice on himself, by doing a medical negligence. Learn Vest in Forbes writes :

> *A malpractice claim exists if a provider's negligence causes injury or damages to a patient. However, experiencing a bad outcome isn't always proof of medical negligence. Also, on occasion, health-care providers will inform a patient that the person has received negligent medical care from a previous health-care provider and—presumably in an effort at complete honesty—will sometimes tell a patient that they, themselves, have made a mistake*[1].

In the United States, malpractice indications are evidenced through the inadvertence of the doctor and result in disadvantages in the patient. And there are four things for lawsuits :

> *The injured patient must show that the physician acted negligently in rendering care, and that such negligence resulted in injury. To do so, four legal elements must be proven: (1) a professional duty owed to the patient; (2) breach of such duty; (3) injury caused by the breach; and (4) resulting damages. Money damages, if awarded, typically take into account both actual economic loss and noneconomic loss, such as pain and suffering.*[2]

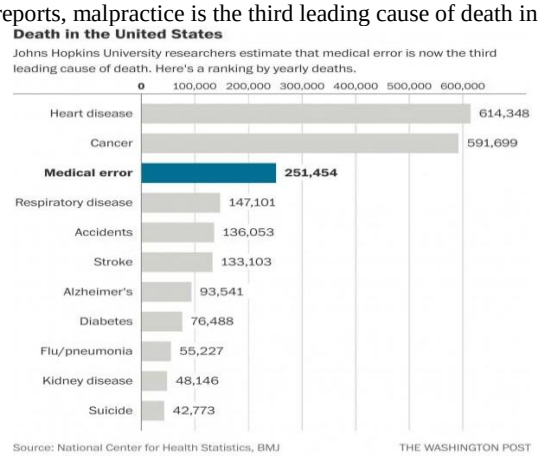
[1] LearnVest, *10 Things You Want To Know About Medical Malpractice*, (https://www.forbes.com/sites/learnvest/2013/05/16/10-things-you-want-to-know-about-medical-malpractice/)

[2] B. Sonny Bal, *An Introduction to Medical Malpractice in the United States*, (https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2628513/)

The problems in malpractice relate to three main points : a complaint of losses suffered by patients and doctors in the case of malpractice, the transparency of the physician's ability to handle health problems and the patient's honesty in uncovering matters related to the illness.

The three things I mentioned are issues that must be solved in order to balance and comfort in health transactions in terms of economic, legal, social and psychological psychology. If there is no malpractice that is categorized as 'killer' factor of patient and doctor.

The Washington Post reports, malpractice is the third leading cause of death in America [3] :



Negligence deeds were included in the Law of Tort. Tort is breach, an act that causes others to be injured or hurt by not being carefully or break the discipline or violating the rules of the people[4]. Law of Tort entered in the field of civil law. Unlike other countries, including Indonesia, which makes the act of 'negligence' health malpractice included in the criminal category. This difference, in the analysis of researchers is a long glimpse of the history of law and the adaptation of legal development to the customs and cultures of each country. The punishment imposed by a country from a legal case would be varied according to the understanding and experience of the punishment itself.

And the average American health malpractice 200,000/year, only 15% claimed with consideration. Learn Vest states in Forbes :

> *It's estimated that medical errors kill roughly 200,000 patients in the U.S. each year. Yet only 15% of the personal-injury lawsuits filed annually involve medical-malpractice claims, and more than 80% of those lawsuits end with no payment whatsoever to the injured patient or their survivors.Consequently, most experienced medical malpractice attorneys will not pursue a case unless the injuries and damages documented in the records—after they've been reviewed by an expert in the pertinent specialty—are substantial and justify it.*[5]

In the New York Times, malpractice occurs because of **'overtreatment'** done by both parties, the patient's desire for excessive examination or some doctors who tend to pursue deposits. This is the beginning of the malpractice. Both are excessive in the face of health problems. Nicholas Bakalar stated :

> *Most physicians in the United States believe that overtreatment is harmful, wasteful and common. Researchers surveyed 2,106 physicians in various specialties regarding their beliefs about unnecessary medical care. On average, the doctors believed that 20.6 percent of all medical care was unnecessary, including 22 percent of prescriptions, 24.9 percent of tests and 11.1 percent of procedures. Nearly 85 percent said the reason for overtreatment was fear of malpractice suits, but that fear is probably exaggerated, the authors say. Only 2 to 3 percent of patients pursue litigation, and paid claims have declined sharply in recent decades. Nearly 60 percent of doctors said patients demand unnecessary treatment. A smaller number thought that limited access to medical records led to the problem. More than 70 percent of doctors conceded that physicians are more likely to perform unnecessary procedures when they profit from them, while only 9.2 percent said that their own financial security was a factor*[6].

There are two ways to reform the rules related to malpractice: first, health reforms that malpractice can be prevented by focusing on the health system first and then on the legal system. Medicine first, the law later,

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[3] (https://www.washingtonpost.com/amphtml/news/to-your-health/wp/2016/05/03/researchers-medical-errors-now-third-leading-cause-of-death-in-united-states/)

[4] Murry Darmoko M, *Legal English Compilation*, Surabaya : Ubhara Press, 2017, p. 25

[5] LearnVest, *10 Things You Want To Know About Medical Malpractice*

[6] Nicholar Bakalar, *Overtreatment Is Common, Doctors Say*, (https://www.nytimes.com/2017/09/06/well/live/health-care-overtreatment-doctor-survey.html?rref=collection%2Ftimestopic%2FMedical%20Malpractice&action=click&contentCollection=health&region=stream&module=stream_unit&version=latest&contentPlacement=2&pgtype=collection)

because of the high cost of filing a lawsuit over the occurrence of a malpractice and the difficulty of proof and evidence in the filing and error of the procedure to be charged with guilt. Second, the main focus on the legal system governing malpractice, providing rules and sanctions that provide a sense of security for both parties. Aaron E. Carrol states :

> *You don't have to look too hard to find backing for the notion that some malpractice claims lack merit. A 2006 New England Journal of Medicine study reviewed a random sample of 1,452 claims from five malpractice insurers. Its authors found that 37 percent of these cases involved no errors, and 3 percent involved no verifiable injuries. It's also undeniable that defending against malpractice suits gets costly. Other research shows that providers and hospitals spent $81,000 to $107,000 (in 2008 dollars) to defend cases that went to verdict, on average. Even defending claims that were dropped, withdrawn or dismissed cost $15,000 per claim. But it is not so clear that the best way to solve malpractice lawsuits is through changes focused on the legal system rather than the medical one.*[7]

In the UK, the health suit was divided into two lawsuits. First, a public lawsuit against the National Health Service (NHS) and second, personal claims. Public lawsuit is given the opportunity for its citizens to file a lawsuit on the following six points :

> *For public claims against care received under the NHS or NHS-affiliated providers, UK medical malpractice laws permit claims to be filed under the following rubric: (1) Claims will be made against the National Health Service and if awarded, paid via the budget of the Department of Health (2) Claims payments made by NHS toppled 12,000 claims made in 2013/2014 and had seen a significant increase in the past decade (3) NHS pays out UK citizen claimants billions of pounds annually for claims of clinical negligence made by patients, with the payouts in light of several recent public scandals at the NHS relating to poor-quality care only increasing payout sums over time (4) These claims of clinical negligence apply a reasonable standard of care metric per the nationwide NHS clinical standards, which are frequently breached during the course of ordinary care under the NHS healthcare system (5) Damages claims for increased health risks, wrongful diagnosis, failure to diagnosis, surgical mistakes, prescription drug errors, and other medical harms sustained by patients are common complaints made against the NHS and its employed medical professionals (6) Claims can be filed for NHS-covered dental and vision service providers that fail to provide a reasonable standard of care*[8]

Personally filed suit for a personal treatment must at least meet the following requirements as set forth in the UK Medical Malpractice Law :

> *For private claims against care received under private medical practitioners in the UK, UK Medical malpractice laws permit claims for compensation to be filed in the following cases : (1) Most private clinical negligence claims in the UK fall under breach of contract agreements between the patient and private practitioner (2) Most private clinical negligence claims will be subject to the terms of the contract between the patient and provider, though most case-specific contracts outline specific procedures with reasonable standards of care defined by the law and medical experts (3) Claims that possess sufficient merit for compensation include traditional medical services, as well as dental and vision services obtained via private practitioners (4) If violated, a solicitor or legal advocate can assist you with moving forward with a claim against a private medical service provider.*[9]

In the United States, a medical lawsuit can be brought to two courts, *"Lawsuits alleging medical malpractice are generally filed in a state trial court. Such trial courts are said to have jurisdiction over medical malpractice cases, which is the legal authority to hear and decide the case... under limited circumstances, a medical malpractice case may be filed or moved to a federal court. This can occur if the underlying case invokes a federal question or federal constitutional issue or if the parties live in different states"*[10]. As for the process of lawsuit until the verdict, each country has its own way which is not discussed in this research

Closing

The solution given by previous researchers, legal reform first then health or otherwise, in my study, that solution still leaves a problem that will often re-occur. Because both are related to rights and duties and contains 'cure' factors (malpractice has occurred before, then sued, in this case neither doctors nor patients feel safe and necessarily subject to material and non-material harm), not a solution to the prevention rate of an event will occur.

The solutions I offer are two things: first, the establishment of an official government transparency system (from health ministry) applied to computer applications or android apps and iOS that display complete

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[7] Aaron E. Carroll, *For Malpractice Reform, Focus on Medicine First (Not Law)*, (https://www.nytimes.com/2017/04/17/upshot/real-malpractice-reform-investing-in-patient-safety.html?rref=collection%2Ftimestopic%2FMedical%20Malpractice&action=click&contentCollection=health&region=stream&module=stream_unit&version=latest&contentPlacement=5&pgtype=collection)

[8] (http://malpracticecenter.com/states/uk)

[9] (http://malpracticecenter.com/states/uk)

[10] B. Sonny Bal, An Introduction to Medical Malpractice in the United States

information about all doctors curriculum vitae and all medical actions that they perform, whether in college at the faculty medicine and post inaugurated as a doctor. This system can be read by all patients who install this application. The application also includes health laws and regulations relating to rights and obligations, both to patients and to physicians. And for each one doctor is provided a lawyer who deals with legal matters relating to doctors in the law, *"One Doctor One Lawyer"*.

The second solution, like the doctor, the patient gets his medical record intact in one entity from the beginning of his illness in the form of an app (secret pin) that he and his physician can open. This application can be accessed via computer or android and iOS, like atm pin bank in android system or iOS system, *"One Patient One Medical Record"*. Especially for patients, the ease of complaint in the event of malpractice provided by the government through transparent applications of computers or smartphones that can be accessed easily by patients and regulated by law, like go-jek apps, can give award stars and suggestions or criticism columns.

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RESEARCH THERAPY CELL BLOOD PUNCA THROUGH CENTER IS RELATED TO THE PRINCIPLES OF UTILIZATION

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ABSTRACT

The use and development of stem cells as a means of health restoration is a complicated issue as it relates to the legal and ethical issues that shadow it. This happens along with the development of human civilization that produces a breakthrough in the field of science and technology, especially in the field of health by using Human Stem Cell (Human Stem Cell). Human Stem Cell is a cell that has the potential to grow, able to divide continuously and develop into different types of cells as needed. The technology associated with stem cells becomes phenomenal because it is in contact with ethical, social, and legal issues from the research phase to its utilization. From the point of view of legal problems, Stem Cell is divided into two, namely Embryonic Stem Cell, and Non-Embryonic Stem Cell and in its development this should get attention, regulation and legal protection. The use of Stem Cell should be polemic because on the one hand there is ethical and legal issues, while on the other hand health is also important to be sought. Indonesia as a State welfare law should create regulations that have aspects of regulation, supervision and protection against the use of Stem Cell for the purpose of health improvement. Based on Law no. 36 Year 2009 on Health stipulates that the healing of illness and health restoration can be done through organ transplantation and / or tissue, drug implants and / or medical devices, plastic surgery and reconstruction, and stem cell usage. Then stem cell usage can only be done for the purpose of healing illness and health restoration, and prohibited to be used for reproduction purposes. These stem cells should not come from embryonic stem cells. Based on the above description then becomes polemic when health is a product of scientific research where the material used is human embryo. From the humanitarian aspect it is clear that health is a human right but from a legal aspect whether the utilization of human stem cells is illegal or prohibited. Even the use of stem cells should also not be used for scientific research materials. For that then how the government as a regulatory agency can bridge between health interests with legal interests.

Keywords : Stem Cell Development, Health Research

Introduction

Not even one year Act of the Republic of Indonesia Number 36 of 2009 on Health promulgated, this Act is a renewal of Law No. 23 of 1992. The new law aims to provide legal umbrella for other laws and regulations, certainty law for both Indonesian recipients of health services and health workers as health providers.

Just a century ago, in 1908, the term "stem cell" or stem cells was first proposed by the Russian histologist Alexander Maksimov at the Hematology Congress in Berlin. He postulates the presence of stem cells that form blood cells (haematopoietic stem cells).

In 1978, this theory proved true with the discovery of stem cells in the blood of the human spinal cord. The development of treatment with stem cells is very promising, where many diseases that can not be treated again with conventional medicine today provide good results with the use of stem cell therapy, but in addition to promising this therapy also still leaves controversy in the field of bioethics and also the absence of an umbrella adequate law in addition to the treatment in this way can only be enjoyed by a handful of people just because of the very expensive cost resulting from the high cost of technology used, ranging from storing the stem cell material itself to its use when needed.

Stem cells are stem cells that have not undergone differentiation so that it has the potential to undergo differentiation into other cell types and improve the body system, as long as the organisms that receive it live. Stem cells are commonly found in the spinal cord and have the ability to split continuously into the desired cells, such as heart cells, nerve cells, and muscle cells. As for the stem cell transplants allowed in medicine in Indonesia, only adult stem cells from bone marrow, placental blood, peripheral blood cells, and other fat tissues and tissues are not derived from embryos or embryonic remains from the tube-making process.

Problem Formulation

Based on the above Background Research, it can be formulated research problems as follows: What is the comprehensive provision of cord blood stem cell therapy causes the fulfillment of the principle of benefit?

Objectives Of Research

1. To get an overview of the elements of the comprehensive provisions on umbilical cord blood cell research.
2. To get an idea of the elements of the benefit principle.

3. To get an idea of the comprehensive provisions of the study of umbilical cord blood stem cell therapy is associated with the principle of expediency.

Research Method

To conduct a study of course required a certain method, the chosen method is certainly closely related to the procedures, tools and research design that will be used. According to Nasir the method is widely used in research in accordance with the sequence of its popularity experimental methods, historical methods, descriptive methods and methods of philosophy.According Soerjono "Legal research conducted by examining library materials or secondary data only, can be called normative legal research or legal research literature ".[1]

Normative legal research or literature includes research on legal principles, research on systematic law, research on the level of vertical and horizontal synchronization, comparative law and legal history.

Legal research has a generally normative or doctrinal nature that is generally referred to as normative legal research. In legal research generally alwaysrelated to the causal relationship between the law itself and the behavior in the society based on the imputation principle that is as formulated by the formula "If X, then Y" or the existence of relationship between X and Y.

The meaning of descriptive legal research analysis here is to make a description or description of legal phenomena in society systematically, factually and accurately dengenai facts, nature and relationship between phenomena or symptoms that are being investigated by doing the analysis is looking for a cause and effect relationship of a legal phenomenon and describe it consistently, systematically and logically.[2]

This research is a type of qualitative or normative research in accordance with this type of research then the data used is the type of secondary data, then the method of collecting data in use is literature study.Data analysis to collected secondary data and primary data obtained, qualitative analysis. This analysis was chosen not only because this study is a normative juridical study, but also because of its nature.

Research Result And Discussion

Stem cell therapy is currently undergoing rapid advancement in research and its application as the treatment of degenerative and non degenerative diseases, but in fact the success of stem cell treatment can be said to be still in the experimental stage despite sufficient clinical evidence to support the success of the therapy.

In the philosophy of law that often lead to discourse is a matter of justice related to the law, this can happen due to laws or legislation that should provide a sense of justice for all but in reality often the sense of justice is not there or can not be felt by the community itself .

Research stem cell therapy in Indonesia is still very lagging compared to other countries in the world even in ASEAN itself, while research in Indonesia has begun to be done by experts in the field is different from other countries, stem cell research in Indonesia is much started by the industrialists who on generally develop the utilization of stem cells originating from cord blood, see such developments in Indonesia and with the Regulation of the Minister of Health of the Republic of Indonesia No. 833 / Menkes / Per / IX / 2009 on Stem Cell Prevention and Decree of the Minister of Health of the Republic of Indonesia No. 834 / Minister of Health / SK / IX / 2009 on Guidelines for Stem Cell Medical Service Administration, it is necessary to review whether the ministerial union and ministerial decree can accelerate the progress of therapy and stem cell research or vice versa.

1. Understanding Therapy

Therapy comes from the English language that he said is "therapy which means therapy, treatment." While according to Arabic therapy is commensurate with the word "Shafa-Yashfi-Syifaan, which means treatment, cure, heal." Then according to KamusBesarBahasa Indonesia, therapy means "the effort to restore the health of the sick, the treatment of disease, the care of the disease."The purpose and use of therapy is to cure illness and restore health, this is done to restore the health status resulting from the disease, also aims to restore body function due to disability or eliminate defects caused by the disease.[3]

2. Definition of Cord Blood Stem Cell

The cord blood stem cells are stem cells taken after the birth of the baby, the umbilical cord and the placenta will usually be removed. However, it is now known that the blood contained in the umbilical cord and placenta is a very rich source of stem cells that can be stored in a stem cell bank for use when needed.

Like stem cells derived from bone marrow, stem cells from cord blood can be used to treat various diseases. Stem cells are like building materials that make up various systems in our body. These cells can

[1] Soekanto Soerjonodan Sri Mamuji, 2009, *PenelitianHukumNormatifSuatuTinjauanSingkat*, Jakarta, PT Raja GrafindoPersada, p. 13-14.

[3] Nazir, 2009, *MetodePenelitian*,Gp.ia Indonesia, Jakarta, p. 62-63, 374-377.

[3]Redaksi New Merah-Putuh, 2009, *Undang-UndangKesehatanDanPraktekKedokteran*, Yogyakarta, Best Publisher, p. 19

develop into other cells in our body. Research has proven that this umbilical cord blood transplant is an excellent substitute in lieu of bone marrow transplantation.

Cord blood contains a number of meaningful stem cells and has an advantage over stem cell transplants from bone marrow or from peripheral blood. Stem cell transplantation from umbilical cord blood has changed the waste material from the birth process into a source that can save lives sianak and family.

Stem cells from cord blood are easier to take. The process of taking it yourself is not at risk for both the baby and the mother. Taking stem cells from bone marrow requires a general anesthesia procedure, which of course is at risk. Intake of the bone marrow also results in pain, when compared with the removal of stem cells from the cord blood without pain.

3. History of Blood Cell Stem Cell Therapy And Its Usefulness

Stem cell therapy precisely began a century ago, in 1908, the term stem cells for the first time proposed by the histology of Russia named, Alexander Maksinov, at the congress hematology in Berlin. Alexander introduced his findings on the presence of stem cells that make up blood cells (haematopoietic stem cells). In 1978, this theory proved to be true with the discovery of stem cells in the human spinal cord region.

In fact, in the human and animal bodies there are two types of cells namely; somatic cells (sex) and sexual cells (sperm and egg). Each cell type can be traced either from an egg cell fertilized by the sperm that forms the morula and within five days to the blastocyst, which can then be used to make stem cells.

4. Legal Aspect Of Cell Punca Therapy Through Center

Legal Aspects of Health Services

Rights and duties that exist in man is a right that exists in every human being means that he as a human being has a privilege that opens the possibility for him to be required in accordance with the privilege, the existence of an obligation on a person means that requested from him an attitude or action in accordance with the privilege that is in others:[4]

a) Right which is deemed to be attached to every human being as human being, because it is relatedwith the reality of human life itself. Therefore this right is called "human right". It is also said that the right is present in man, because man must be judged according to his dignity.
b) Rights that exist in humans due to regulation; namely the right that is based on the law. These rights are not directly related to human dignity, but are entitled, because they are accommodated in legitimate laws.

The above rights need not be seized, because they are already there, independent of the consent of the people, and can not be annulled by anyone in this world. Indeed certain human beings are not always acknowledged by the people in their society, so the need for awareness

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Health care is basically an effort that can be done forimproving health, both individual and cohesive and community. Inimprove the health status, this health service can be interpreted at leastby Lavey and Loomba, as every effort to improve and maintain health aimed at both individuals and groups.[5]

Regarding the relationship between health law and medical law, according to WilaChandrawilaSupriadi is the relationship between lex generalist and lex specialist, namely medical law (medical law) is part of health law (public health law). The medical law is a set of rules governing the health of the individual, which includes the arrangement of hospital relations with the physician as a medical profession providing medical services, hospital relationships with patients as recipients of medical services, and deokter relations with the patient. The term medical law refers to a set of legal rules governing health services aimed at the health of an individual. While the term health law refers to a set of legal rules governing health services that are focused or aimed at public health.[6]

Doctor and Patient Legal Relation

The legal relationship between physician and patient can be incorporated juridicallythe class of agreements of an engagement or contract. It is said that a contract ismeeting of minds of two people on a matter (solis). Where is the partyfirst bind themselves to provide service, while the second party receivesservice delivery. Patients who come to the doctor to be given treatment services while the doctor receives to provide services.[7]

As according to WilaChandrawilaSupriadi, legal relations always give rise to rightsand mutual obligations in which the right of physician becomes the patient's duty and the patient's rightbecome a doctor's duty, so that with this situation will place the doctor's positionand the patient at the same position and equal.

[4]Abdul GhofurAnshori, 2009, *FilsafatHukum*, Yogyakarta, Gajah Mada University Press, p. 110-112
[5]Veronica Komalawati, 1999, *Peran informed Consent dalamTransaksiTerapeutik*, Bandung, Citra AdityaBakti, p. 77.
[6]WilaChandrawilaSupriadi, 2001, *HukumKedokteran*, Bandung, MandarMaju.
[7]J Guwandi, 2007, Dokter*PasiendanHukum*, Jakarta, FakultasKedokteranUniversitas Indonesia, p. 19-20

Like the service delivery relationship, there are rights and obligations of the service providers that are the mutual rights and obligations of the recipient.

Doctor and patient legal relations are what are known as attachments (verbentenis). The foundation of the engagement is the agreement, but may constitute an engagement under applicable law.[8]

Principleutilization In Health Law

1. Utilitarian Philosophy Underlying the Principle of Utilization1. Utilitarian Philosophy Underlying the Principle of Utilization

Bentham's thinking is based on moral doctrine based on the principle of utility. The doctrine comes from the "greatest happiness of the greatest" phase proposed by Bentham in a pamphlet written by Joseph Priestley, in which it is put forward as follows: "Priestley was the first to teach my lips to speak this sacred truth ... .That the greatest happinessand most are the basis of morality and legislation.[9]

Where, according to the ethical theory (utility), the value of this usefulness or usefulness is the most important and important legal objective. This ethical theory is embraced by the flow of utilitarianism which believes that the sole legal purpose is to achieve the utility in law that can provide optimal benefits for human beings.

Justice can only be understood if it is positioned as a state to be realized by law. The effort to bring about justice in the law is a dynamic process that takes a lot of time. This effort is often also dominated by forces that fight in the general framework of the political order to actualize each other's interests.

2. Principle of Utilization in the Implementation of Stem Cell Therapy

On Decree of the Minister of Health No. 834 Year 2009 explained that the principle of stem cell service must meet the three basic principles that include:

1. Autonomy which includes:
    a. Persons who are competent and have the ability to bear the consequences of decisions that have been taken autonomously or independently (officers taking, storage, managers, therapists and research)
    b. Protect those who are weak, in the sense that we are required to provide protection in the care, guardianship, care for children, youth and adults who are in a weak condition and do not have autonomy (independent)
2. Characteristic and good deeds to clients. This means that the action is not harmful and should be beneficial.
3. Justice. This principle aims to provide justice in transactions and treatment between people. Every human being has the right to health care without exception. In this case means covering the stem cell service.

The principle of benefits in the field of stem cell health means that health development must provide the greatest benefit to humanity and healthy living for every citizen.[10]

One of the fulfillment of the health needs of the era in the constitution is the cord blood stem cell treatment which is one of the latest medical technologies in the field of treatment of degenerative chronic diseases that can not be cured by conventional tester. To meet the need for cord blood stem cell treatment, the government regulates it in Article 70 paragraphs (1), (2) and (3), which are translated into one Permenkes, namely Regulation of the Minister of Health of the Republic of Indonesia No. 833 / MENKES / PER / IX / 2009 on the Implementation of Stem Cell Services and two health ministers namely the Decree of the Minister of Health of the Republic of Indonesia Number 834 / MENKES / SK / 2009 concerning Guidelines for Stem Cell Medical Service and also in Decree of the Minister of Health of the Republic of Indonesia Number 159 / MENKES / SK / 2009 on the appointment of Dr. National Center General Hospital. CiptoMangunkusumo Jakarta As a Research Center, Development and Stem Cell Medical Service.

In the regulation, the government discriminatory attitude in terms of openness to all citizens can access the stem cell technology because of limited access to these technologies, which can only be accessed by certain Education and Educational Institutions, thus closing the possibility of other parties such as the private sector developing the technology, the impact of this regulation can cause Indonesia to lag more far from other countries in mastering stem cell therapy technology, besides it can cause a lot of research developed by private parties or other parties who feel obstructed by the regulation will conduct research overseas, which may impact skilled experts in this field doing the same to go abroad for technological development.

[8]WilaChandrawilaSupriadi, 2001, *Op.Cit*,,p. 29-30

[9]Diane Collinson, 2001, *Lima PuluhFilosofDunia yang Menggetarkan*diterjemahkanoleh:IlzamudinMa'mur& Mufti Ali, Jakarta, MuraiKencana, p. 138

[17] Tim RedaksiNuansaAulia, 2009, *Undang-undangRepublik Indonesia Nomor 36 Tahun 2009*, Bandung :PenerbitNuansaAulia, p. 6.

Closing

1. The study of cord blood stem cell treatment
    a. The therapy of umbilical cord blood cells became known in the medical world since the early 1970s, which is one of the curative health efforts to treat people with chronic diseases that can not be cured with ordinary medication.
    b. The umbilical cord blood stem cell is a stem cell originating from placental cord blood taken at the time of delivery and then stored in a stem cell bank for later use up to decades later for the curative treatment of the owner of the cord blood stem cell.
    c. The legal relationship between physician and patient performing stem cell therapy is a legal relationship of the engagement or otherwise known as verbentenis, where in this legal relationship arises a reciprocal right and obligation in the field of law, the union of the type of engagement that occurs is a cooperative effort or verbintenis inspection.
    d. The law underlying and used as a guide in stem cell therapy is regulated in Health Act No. 36 of 2009 Article 70 and described in Regulation of the Minister of Health No. 833 / MENKES / Per / IX / 2009, Decree of the Minister of Health of the Republic of Indonesia No. 834 / MENKES / SK / 2009 and Decree of the Minister of Health Number 159 / MENKES / SK / 2009, in which there are three discriminatory provisions in the three regulations, which only give opportunity to the National Hospital of Drs. CiptoMangunKusumo alone can conduct stem cell research, development and therapy, where other parties outside the Education Hospital who want to do research and development should get a designation from the Education Hospital. It is feared that it could hamper the development of stem cell treatment and therapy in Indonesia to the detriment of society because of its violated constitutional rights.
    e. The Ministerial Regulation and Ministerial Decree as mentioned above are contradictory to the Constitution 45, which guarantees the freedom of every citizen to health and freedom from any discriminatory act, whereby the State is obliged to protect its citizens.

2. Utilization Principle
    a. When viewed from the aspect of the legal objectives outlined in the 1945 Constitution is to establish an Indonesian State that protects the entire nation of Indonesia and the entire blood of Indonesia, and to promote the general welfare, educate the life of the Indonesian nation and participate in implementing the world order based on independence, peace and social justice , then the regulation is contradictory to the 1945 Constitution in the essence of intellectual life of the nation and social justice.
    b. The above rule when viewed in terms of legal principles also contradicts the principle of justice which is one of the most important legal principles in the theory of social justice in Pancasila, the ethical theory that aims to create justice and the theory of justice adopted by John Rawl, whose core theory is that equality and freedom should not be sacrificed for social and economic benefits.
    c. From the point of view of the principle of utility or utility theory known as Utilism's litter, Jeremy Bentham's disclosure of this stem cell legislation does not provide optimal benefits due to articles that are contrary to the principles contained in Utilitarianism which are false a basic theory in the formation of legislation and other legal products.

3. Research Center for Blood Stem Cell Therapy Linked to Utilization Principle
    a. The current regulation on stem cells when examined in terms of legal functions aimed at creating order and justice in society, there is an unmet element of justice for society and individuals.
    b. The principle of benefits in the field of stem cell health is the development of health that must provide the greatest benefits as humanity and healthy life for every citizen, in addition to providing benefits must also provide justice or fair and equitable services for all levels of society.
    c. Cord blood stem cell therapy is a new therapy that promises new hope for people with certain diseases that should be enjoyed by all layers of society without exception.
    d. In the implementation of stem cell therapy should be supported by the existence of legislation and regulations that are fair for all levels of society and can provide the principle of maximum benefit for many communities.
    e. Therapeutic stem cell cord blood is one of the promising alternative treatment that needs to be supported by the existence of a comprehensive law so that it can be fulfilled the principle of expediency in law.
    f. A temporary answer to this study, if the stipulation of umbilical cord blood stem cell therapy is carried out in accordance with the law, then the principle of expediency is fulfilled.

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JURIDICAL STUDY ON THE TRANSFORMATION OF PT ASKES (PERSERO) INTO THE SOCIAL INSURANCE MANAGEMENT AGENCY ON HEALTH (BPJS KESEHATAN)

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ABSTRACT

Health insurance is a type of insurance product that specifically guarantees the cost of health or care of the insurance members if they are sick or have an accident. There are two types of care offered by insurance companies, in-patient and out-patient treatment. PT Askes is a State-Owned Enterprise (BUMN) specially assigned by the government to provide health care insurance for Government Civil Servants, TNI (Indonesian National Army), POLRI (Indonesian National Police), pensioners, veterans, families of the pioneers of Indonesian independence and other Business Entities. Implementation of social security is a state obligation mandated by the 1945 Constitution. The issuance of the Social Insurance Management Agency (BPJS) act as the implementer of the National Social Security System act (SJSN) resulted in PT Askes transforming into Social Insurance Management Agency on Health (BPJS Kesehatan). When BPJS Kesehatan started to operate, PT Askes was closed. Health insurance programs organized by PT Askes were transferred to BPJS Health Care with National Health Insurance (JKN) program. This transformation will change the form of legal entity of PT Askes (Persero) which was originally a State Owned Enterprise in the form of a PT into a public legal entity under the Act and directly responsible to the President. Act no. 40 of 2004 regarding SJSN explains that the national social security system is a procedure for the implementation of social security programs by several social security providers. The National Social Security System is organized on the basis of humanitarian principles, principles of benefit, and the principle of social justice for all Indonesians. The National Social Security System aims to provide and guarantees the fulfillment of a decent life base for each participant and / or his family member. The National Social Security System is organized on the basis of such principles: mutual cooperation, non-profit, disclosure, prudence, accountability, portability, mandatory membership, trust fund, and the social security fund will be used entirely for program development and for the interest of participants. Although the preparation and implementation of the National Social Security System is quite well, but in reality there are still various impacts and problems encountered in the operation of BPJS Kesehatan such as lack of socialization, service facilities, inappropriate data, and personnels who are still lacking in giving a good services and information.

Keywords: Transformation, PT Askes (Persero), BPJS Kesehatan.

Introduction

Health insurance is a type of insurance product that specifically guarantees the cost of health or care of the insurance members if they are sick or have an accident. Health insurance is a type of insurance product that specifically guarantees the cost of health or care of insurance members if they fall ill or have an accident. Health insurance products are usually provided by social insurance companies, life insurance companies, and general insurance companies. In Indonesia, PT Askes Indonesia is one of the social insurance companies that organize health insurance for its members in need both for civil servants and non-civil servants. Their children will also be financed until the age of 21st. It also applies to pensioners.

PT Askes (Persero) is a State-Owned Enterprise specially assigned by the government to provide health care insurance for Government Civil Servants, TNI (Indonesian National Army), POLRI (Indonesian National Police), pensioners, veterans, families of the pioneers of Indonesian independence and other Business Entities. Health Insurance Program (ASKES) which is organized under Government Regulation No. 69 of 1991 is mandatory for civil servants / recipients of pensions / pioneers of independence / veterans and members of their families.

Over the last few decades, Indonesia has implemented several social security programs. The law that specifically regulates social security for private workers is Law No. 3 of 1992 on Social Security of Workers (JAMSOSTEK) which includes health care insurance program, accident insurance, old-age insurance and death insurance. For Civil Servants (PNS), there are savings fund program and Insurance of Civil Servants (TASPEN) which were established under Government Regulation No. 26 of 1981. Besides that, there is also Health Insurance Program (ASKES) which is based on Government Regulation No. 69 of 1991.

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For Indonesian National Army (TNI), members of the Indonesian National Police (POLRI), civil servants of the Department of Defense / TNI / POLRI and their families, the Indonesian Armed Forces Social Insurance (ASABRI) program has been implemented in accordance with Government Regulation No. 67 of 1991 which is a change from Government Regulation No. 44 Year 1971.

Programs mentioned above cover only a small percentage of indonesian, while the majority of them have not received adequate protection. In addition, the implementation of various social security programs has not been able to provide fair and sufficient protection to the participants in accordance with the benefits of the program which are the rights of participants. In relation to the above, it is deemed necessary to develop a social security system capable of synchronizing the various forms of social security implemented by some organizers in order to reach wider membership and provide greater benefits for each participant.

Act 4 of the BPJS Law (No. 24 of 2011) contains BPJS principles such as mutual cooperation, non-profit, disclosure, prudence, accountability, portability, mandatory membership, trust fund, and the social security fund will be used entirely for program development and for the interest of participants.

The nonprofit principle in BPJS is different from the goal of the establishment of state-owned enterprises, which is to pursue profits to improve the company. The principles set forth in the BPJS law will change many things in the implementation of social security in Indonesia. The preparation period of the transformation from PT ASKES (Persero) to BPJS Kesehatan was starting from November 25, 2011 to January 1, 2013. It has started on January 1, 2014 and also explained the purpose of the transformation is to make it easier and improve health insurance services to the public. One of the principles of BPJS Health is the principle of mutual cooperation which means to help each other so that the social security system is in accordance with the basic philosophy of 5th principle of Pancasila (Social Justice for all Indonesian people).

The focus of this paper will discuss the implementation of Article 57 of the BPJS Law concerning the transformation of PT ASKES (Persero) into the BPJS Kesehatan and the juridical implications of its' transformation.

Discussion

Pancasila and the 1945 Constitution of the Republic of Indonesia mandated that the state has a responsibility to protect the entire Indonesian and promote the general welfare in the context of realizing social justice for all Indonesian people. It is to realize a decent and dignified life and to fulfill the right to the basic needs of the citizens for the achievement of social welfare, the State organizes the service and development of social welfare in a planned, directed and sustainable manner.

State and social security are components that integrate with social protection systems. National social security systems include health insurance, life insurance, accident insurance and pension benefits financed by employer contributions and employee contributions. The National Social Security System (SJSN) is a lifelong social program that forms a social protection system composed of parts of the approach system in the provision of social security and as an effort to create jobs by the government and empowerment of the marginal community to become a prosperous self-reliant community.[4]

The National Social Security System which is based on Law No. 40 of 2004 (about the National Social Security System / SJSN) is a state program for a lifetime that must be held by a public legal entity with permanent legal force. To answer the problem of juridical study of the transformation of PT Askes (Persero) into BPJS Kesehatan, the writer uses Utilitarianisme Theory and Social Change Theory.

1. Theory of Utilitarianism

This theory was conceived by Jeremy Bentham and his student John Stuart Mill in the 19th century. This theory says that the law is made to benefit the society and the law should be based on benefits for human happiness.[5] So, this understanding assesses whether it is good or not in terms of usefulness or benefits that it comes. The basic principle of utilitarianism is a moral act or regulation that can support the happiness of all concerned so that it can benefit all citizens.

2. Theory of Law and Social Change

According to Max Weber, the development of material law and procedural law follow certain stages, ranging from simple form to the most advanced stage in which law is organized systematically. He states that the changes of the law are in accordance with the changes that occur in the social system of society that supports the legal system. The law is said to be a tool for changing society, as it is known that the law was born by man and to guarantee the interests and rights of man himself. From this man the color of law and its application will determine what he will experience in the association of his life.[6]

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[4] Sulastomo, *Sistem Jaminan Sosial Nasional, Sebuah Introduksi,* Rajawali Pers, Jakarta, 2008, p. 1

[5] Bernard L. Tanya et al., *Teori Hukum Strategi Tertib Manusia Lintas Runag dan Generasi,* Genta publishing, Yogyakarta, 2010, p. 91

[6] Soedjono Dirdjosisworo, *Sosiologi Hukum,* Rajawali Pers, Jakarta, 1983, p. 15.

Law is a tool to change society. It means that the law is used as a tool by the agent of change or a pioneer of change (a person or group of people who gain the trust of the community as the leader of the community institutions). A planned social change is always under control of the pioneer of the change. Therefore, if the government wants to establish bodies that have function to change society, then the law is required to establish the body to determine and limit its power. [7]

Implementation of Article 57 BPJS Law on Transformation of PT Askes (Persero) into BPJS Kesehatan.

The definition of policy implementation according to Van Metten and Van Horn is acts committed by individuals, officials, government, or private groups directed to achieve the objectives outlined in policy decisions.[8]

As it is known that PT Askes (Persero) is a State-Owned Enterprise (BUMN) that organizes a social security program, its capital is partly or wholly owned by the government. There are 3 kinds of BUMN:

a. *Perjan* is a BUMN whose capital is owned by the government. Perjan is service-oriented towards the community.
b. *Perum* is a Business Entity managed by State whose purpose is to gain profit and provide services to the public.
c. *Persero* is one of the Business Entities managed by State or Region. Unlike Perum or Perjan, the main purpose of establishing a Persero is to seek profit (commercial).

At the beginning, the form of business entity of PT Askes (Persero) was in the form of a public company (Perum) under the name of Perum Husada Bhakti and based on Government Regulation No. 6 of 1992, the status of Perum was changed to a company (PT) and then on January 1, 2014 PT Askes (Persero) changed its name to BPJS Kesehatan based on Law Number 24 of 2011 on BPJS.

Characteristics of BPJS Kesehatan that different from other BUMNs is to pursue profit in order to increase the value of the company. BPJS Kesehatan is oriented to serve community. It has a nonprofit principle, the management of trust funds by BPJS Kesehatan is not for profit (for profit oriented) but to meet the maximum interests of participants. Funds collected from participating are trust funds which is managed for the welfare of the participants. So the results of its development will be utilized as much as possible for the benefit of participants.

As a private legal entity, a Persero Company is not established by a state authority with a law but established by an individual, as any other public company should be registered with a Notary and authorized by the Ministry of Justice and Human Rights.

In contrast, the establishment of the Social Insurance Management Agency (BPJS) by state authorities is established under National Social Security System Act and Social Insurance Management Agency Act. The establishment of BPJS is not registered with a notary public and does not require the authorization of a government agency.

The main obstacle encountered by BUMN Persero is the ineffectiveness of social security law enforcement because there is no authority to regulate, supervise or impose sanctions on participants. On the contrary, the BPJS as a public legal entity has the power and authority to govern the public through the authority to make public binding regulations. As a public legal entity, BPJS is obligated to convey responsibility for the performance of its duties to the President. BPJS deliver its performance in the form of annual program management and financial report audited by a public accountant to the President with carbon copy to the National Social Security Board, no later than June 30th of the following year.

In 2004 the government established and enacted Law Number 40 of 2004 on National Security System as the implementation of Article 5 paragraph (1) and Article 52 of the National Social Security System Law after the Constitutional Court's decision No. 007 / PUU-III / 2005 dated 25 November 2011 and enacted Law Number 24/2011 on the Social Insurance Management Agency. BPJS Kesehatan starts to operate on January 1st, 2014 and PT Askes (Persero) was closed without liquidation. At the same time, the Minister of BUMN through the General Meeting of Shareholders approved the report on closing financial position of PT Askes (Persero) after the audit at the public accounting firm and the Minister of Finance authorized the opening financial position of BPJS Kesehatan and the opening social security fund report. For the first time, the Board of Commissioners and the Board of Directors of PT Askes (Persero) was appointed as BPJS Kesehatan Supervisory Board for a maximum period of 2 years since BPJS Kesehatan started to operate.

The final change from the transformation processes of BPJS is the change of organizational culture.[9] In Article 40 paragraph (2) of BPJS Law, it requires BPJS to separate the assets of BPJS and the assets of the Social Security Fund.

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[7] Selo Soemardjan, *Sifat-sifat Panutan di dalam Pandangan Masyarakat Indonesia. Masalah-masalah Ekonomi dan Faktor-faktor IPOLSOS, LEKNAS, MIPI,* 1965, p. 26.
[8] *http// : www.el kawaqi.blogspot.com, Artikel Implementasi Menurut Para Ahli,* 2012, accessed on 15th of Januari 2018.
[9] Sulastomo, *op.cit.*, p. 15.

Article 40 paragraph (3) of the BPJS Law affirms that the assets of the Social Security Fund are not an asset of BPJS. This assertion ensures that the Social Security Fund is a trust fund of all participants and not the assets of BPJS.

Furthermore, in Article 4 of BPJS Law, it regulates BPJS principles: principles of mutual cooperation, nonprofit principles, principles of openness, prudential principles, accountability principles, portability principles, compulsory membership principles and trust fund principles.

Juridical Implications of the Transformation of PT Askes (Persero) into BPJS Kesehatan.

The legal basis for the transformation of PT Askes (Persero) into BPJS:

1. Law Number 40 of 2004 regarding National Social Security System;
2. Law Number 24 of 2011 on BPJS.

Furthermore, the Government Regulation (PP) which regulates the implementation of BPJS Kesehatan are:

1. PP No. 90 of 2013 about revocation PP No. 28 of 2003 on Subsidies and Government Contributions in the Implementation of Health Insurance for civil servants and pension recipients;
2. PP no. 89 of 2013 about revocation PP no. 69 of 1991 on Health Maintenance of Civil Servants, Pension Recipients, Veterans of Independence Pioneers and Their Families;
3. PP No. 88 of 2013 on Procedures for Imposing Administrative Sanctions for Members of the Supervisory Board and Members of the Board of Directors of BPJS;
4. PP No. 87 of 2013 on Procedures for the Management of Social Security Assets;
5. PP No. 86 of 2013 on Procedures for Imposing Administrative Sanctions to the Procuring Entity other than the State Operator and Everyone, other than the Employer, Worker and Beneficiary of the Contribution in the Social Security Provider;
6. PP No. 85 of 2013 on Relationship between each BPJS.

Presidential Regulation (Perpres) which regulates BPJS Kesehatan are:

1. Perpres No. 32 of 2014 on Management and Utilization of National Health Insurance Capitation Fund at First Level Health Facility Owned by Local Government;
2. Perpres No. 11 of 2013 on Amendment to Perpres No. 12 of 2013 on Health Insurance;
3. Perpres No. 110 of 2013 on Salary or wages and other Additional benefits and Incentives for Members of the Board of Supervisors and Members of the Board of Directors of BPJS;
4. Perpres No. 109 of 2013 on Completion of Social Security Program Participation;
5. Perpres No. 108 of 2013 on Form and Content of Social Security Program Management Report;
6. Perpres No. 107 of 2013 on Certain Health Services Relating to the Operations of the Ministry of Defense, Indonesia National Army, and Indonesia National Police;
7. Perpres No. 12 of 2013 on Health Insurance.

From the various legal basis underlying the transformation of PT Askes (Persero) into BPJS whether it is based on the Law, Government Regulation, or Presidential Regulation, there are various impacts or consequences of it:

1. Impact for the company:
   a) The Company must register its employees to BPJS Kesehatan.
   b) Company are required to allocate funds to pay contributions to BPJS Kesehatan.
2. Impact for society:
   a) Membership is mandatory.
   b) Participants must pay the contribution.

Factors that impede the implementation of the National Health Insurance currently encountered by BPJS Kesehatan are:

1. Lack of socialization.
2. Inadequate number of health service facilities and uneven distribution, especially for remote areas, borders and islands with low service levels due to geographical conditions and poor health facilities in the area.
3. Lack of treatment room facilities resulting in many patients experiencing delay in handling because they have to wait for an empty treatment room to be served (especially at government hospitals).
4. The number of health personnel is less than the required amount.
5. The problem will arise in the contribution participants (PBI) because the data is not in accordance with conditions in the field so this causes serious problems.

Closing

1. Based on Government Regulation No. 6 of 1992 the status of Perum is changed to a Persero company and from January 1, 2014, PT Askes changed its name to BPJS Kesehatan based on Law no. 24 of 2011. At that time PT Askes (Persero) was closed without liquidation and also accompanied by the transfer of assets, rights and obligations of PT Askes (Persero) and its employees moved into BPJS Kesehatan. Characteristics of BPJS is oriented to serve community. Funds collected from participants' contribution are trust funds that will be managed for the welfare of participants.
2. The juridical implications of PT Askes (Persero) transformation into BPJS Kesehatan is affecting the company where it is required to register its employees to BPJS Kesehatan and the company must allocate funds to pay the contribution of BPJS Kesehatan. Impact for participants or communities is participants must pay contributions to BPJS Kesehatan except for whose premium paid by the government.

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IMPLEMENTATION OF GOVERNMENT POLICY IN OWNERSHIP REGULATIONS OF LAND RIGHTS IN INDONESIA
(Strategic Thinking of Land Development And Management Of Agriculture & spatial Planning Ministry)

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ABSTRACT

This writing has background problem in land policy on land registration system centralistic to mastery setting, use, ownership, and utilization right on land cause ineffective and inefficient bureaucracy and public service. It isn't also supported yet in structure, substance, and good of bureaucratic culture. Land law product source on custom law and it must understand local autonomy concept and local wisdom well. Formalization of local autonomy constitution and authority of local government state that land field isn't affair of central government. In fact Agrarian minister policy and ATR? Head of National Land Agency or BPN, is inconsistent on basic law that is law for justice and society welfare. Finally that policy causes problem. Bureaucracy and state apparatus should have function to solve the problem, policy reality and land management are source of the problems. System which is built has marginalized the role of UUPA, on the process, the Ministry of Agrarian and spatial hasn't manifested totally yet vission, mission, function and the important meaning of UUPA. The policy is still bias. The methodology of the study is socio legal with qualitative study with constructivism paradigm. The discussion is clone comprehensively with progressive law approach on social justice achievement. Strategic issue to solve the problems of professionalism SDM ATR and strategic governance thought, management system, and the quality guarantee of public service. It needs a radical agent, a visioner leader who has strategic thought, development and land management, who is clear, assertive and brave to do rule breaking or fundamental breakthrough on conventional land law system.

Keywords: Bureaucracy, Policy and Land management

Introduction

The direction of land law policy needs to be designed to support democratization and the establishment of clean and good governance, characterized by rational government, transparency, and competition among departments in providing services, encouraging law enforcement, and providing public accountability regularly.

Guarantees of legal certainty on mastery, ownership, use and land utilization, arrangement related to land are sectoral ego among government departments. To solve those problems, the government needs to establish a "General Framework of National Agrarian Policy" as a guideline for all ; both government, private sector, and community / role occupant in dealing with land issues. The objective of national land policy should be the realization of the condition of people's prosperity as mandated by Article 33 Paragraph (3) of the Constitution of the Republic Indonesia, UUPA and MPR Decree IX / 2001 as a consequence of the Right to Control the State (HMN) on land management and other natural resources in a fair, transparent, participatory and accountable.

Empirical facts show that the implementation of the Right to Control the State on land is more dominated by foreign investors as well as domestic entrepreneurs who are more business oriented than sustainable development. The weakness ofpolicy and land management bring bad impacts. This Republic continues to be deprived and depleted its natural resources, and destroyed its social capital. Since OrdeBaru, every inch the archipelago has been broken down in the unit of economic sector policy which is ego sectoral. Land issues that arise from the surface need not only a handling of conflict resolution and dispute that can provide justice, but also how a system can provide a continuous or sustainable guarantee of social justice, so it can be felt by all the people of Indonesia. Conflict such as Mesuji land case in Lampung, also Bima land case, and other which is countless. Showing the weakness of our land system.

The land of Javanese philosophy is known as "*sedumuk bathuk senyari bumi, tan lakoni pecahing dada lutahing ludhira*". Land in understanding of the Javanese people is as the honor of a husband to the wife, where the honor of a wife must be maintained by the owner (husband), though only one touch of forehead, it is considered a harassment of moral ethics, as well as the land even though only inch will be struggled with the spill of blood and the spiral of life.

The land law policy covers the fundamental aspect that is the principle of fulfilling the people's constitutional rights in order to fulfill everyday need and appreciate the principle of human equality. The state basic, Pancasila, the Constitution of the 1945 Constitution and the legal basis of UUPA requires that the political direction and land management policy be able to make a real contribution in the process of realizing social justice and for the greatest prosperity for all Indonesian people.

New directions of land law reform especially on land law policy must lead to the achievement of better Land Development and Management. The program needs to be designed to support democratization and the establishment of clean and good governance. The step which must be done soon is "President" must dare to assert a rational government, transparency and competitiveness among departments, in providing services, and encouraging law enforcement and willing to give public accountability regularly

Methodology

This study can be broadly grouped into socio-legal research approach. There are two aspects of research, first, the legal research aspect, that is the object of research still exist in the form of law in the meaning of "norm" legislation, and second, socio research, that is used methods and social knowledge theory about law to assist researcher in do the analysis (Zamroni: 1992). This approach is done to understand the law in the context of society that is a non-doctrinal approach. Through this approach, the object of law will be interpreted as part of the social subsystem among other social subsystems. The understanding that law is a set of norms independent of social unity will only deny law attachment as the norm and the social basis.

Discussion

The fundamental change on Jokowi- JK cabinet is "Mental Revolution". It encourages and gives motivation for progressive lawyers to contribute on mental revolution, because it is very synchronized with the ideals of progressive lawmakers,SatjiptoRahadjo. The policy implementer must have a revolutionary soul of change. Policy makers (decision makers) must dare to do rule breaking against the imposition of laws on people and unfair. So implementer of the policy --- in this case is the Minister of Agrarian & Spatial Plans --- must be a person who has a radical agent who has a vigilant character, or a fighter who has volkgeist or nation soul. The essence of the legal system is as a reflection of people soul (nation soul) that developed the law.

1. Strategic Issues of Human Resources & Strategic Thinking of Human Resource Development Program of ATR Ministry.

The Strategic Issues of Land Affairs are 1) Professionalism problem of Land Affairs Office; the inability to understand the land law by the existing human resources becomes a problem for the slow of public service in the land field , 2) the vulnerability of corruption, collusion and nepotism in the Land Affairs is more caused by the land arrangement and management systemically (bureaucratic system and public services in the Land office open great opportunities the occurrence of corruption, collusion and nepotism), 3) bureaucratic culture of the Land office that create to begging mentally, under the pretext of acceleration fees and others.

Strategic program thinking has aims to improve the ability of the Land Office officers in implementing the functions of good public services and governance functions in the framework of creating good governance, especially public services in the land field. The main activities of the strategic thinking of the human resources development program of the land office are: (1) the arrangement of human resources management guidelines of the Land office through the provision of information systems, analytical instruments, and reward and punishment systems; (2) facilitation of training to the relevant institutions, by developing the access of STPN and Academic Cooperation (BKS Prodi MKn PTN & PTS all Indonesia), in the form of guidance, standard, and manual such as bureaucracy competency standard and public service in Land Office environment , as well as having the courage to develop human resource competence with the best comparative public service study in developed countries; (3) the implementation of technical and functional guidance of human resources to create quality of human resources (with Mental Revolution) free of corruption, collusion, and nepotism; (4) developing public complaints information system services by on line system; and (5) preparing and evaluatingthe policy framework of the national human resources training of Land office (thereby establishing integrityhuman resources mentality).

2. Issues and Governance Strategic Thinking *(Pamong / Governance)*, Management System, and Quality Assurance of Land Public Service;

The National Workshop on National Land Policy Framework (KKPN) every five years is held, and reveals some of the strategic issues of land governance, but until now they have not been well resolved yet, they are:

a. Non-conducive legislation
b. Limited public access on mastery, use, ownership and land utilization in fair
c. An effective and efficient land institution doesn't realization yet
d. Implementation of land registration is not optimal yet
e. Land stewardship is not optimal yet
f. The weaknessof land-based information systems
g. Conflict resolution and land disputes are inadequate
h. The weakness system of land taxation
i. Inadequate protection of community rights on land

The challenges in land field management are: (1) the lack of legal certainty of land rights; (2) the unfinished implementation of land decentralization due to the lack of synchronization of existing regulations; (3) the lack of inequality and injustice in mastery, ownership, use and land utilization; (4) it doesn't resolve yet incorrect land utilization in accordance with its function and land function transfer of technical irrigated into non-agricultural land (Industry, Service and Housing / property); and (5) land service is not optimal yet.
The problems are: (1) incomplete and inharmonious the existing land legislation, with other regulation (overlapping and causing sectoral egos); (2) limited capacity of district / municipal Land Office, both in regulatory, institutional, human resources, information and financing aspects, in providing land services to communities in implementing land management (unintegrated); (3) there is still a concentration of mastery, ownership, use and land utilization by certain parties; (4) insufficient capacity of district / municipal land office human resources and lack of community participation in controlling land use and utilization; and (5) the low level of land services performance, the lack of proper land administration, the slow process of land certification and much uncertificated land. The Solution is Strategic Thinking on Land Management:

a. Reform of Legislation should be immediately compiled and completed, and must be integrated with the mineral and energy natural resources arrangement, and should be in sync with the Regional Autonomy Law on Regional Government and Village Law.
b. Improving Public Access in mastery, ownership, use and land utilization fairly, can be achieved by the application of land rights principle.
c. Development of Land Institutional, need to improve the performance of land officeinstitutions through organizational structuring and working relationships, so, work relations and inter-department functions run harmoniously. The main activities of this program should be able to create: (1) structuring and stabilizing the institutional structure and land management, especially those that can increase the institutional credibility to be free of corruption, collusion and nepotism, to support the realization of good governance; (2) to develop institutional working relationships within the district / municipal Land Office horizontally and vertically as well as between the district / municipal Land Office and the community; (3) carry out institutional evaluations which is developed in the context of adjustments to support national policy interests in more comprehensive framework; (4) increase the institutional capacity of the Land Office (more effective and efficient if it can cooperate and integrate with local government by implementing land pre-registration system at village / urban village); and (5) establishing the working standards on each unit of the land office and minimum service standards (should involve local governments, in order to integrate public services in the land sector, especially establishment of land pre-registration systems at the village / urban village).
d. Increased land registration is a land registration system that has accountability and ensures legal certainty. Need to change land registration stelsel system from negative publicity stelsel (positive element) to progressive publicitystelsel. Initial steps require to be held immediately on mapping and inventory in mastery, use, and land utilization (P4T). It should be underlined in the rules of implementing the land registration system about "accuracy principles" and should arrange the concept of land pre-registration system at the village / urban village immediately, in each region (need to coordinate with local government), in accordance with Law number 23 year 2014 and Law number 6 year 2014.
e. Development of Land Use, it is necessary to coordinate and synchronize with policy formulation, framing and integration of land use program cross-sectoralwithin the National Agrarian Development and Management Policy Board.
f. Development of Land Based Information System, is impossible if it doesn't not built a new system based on modern technology. So government should do and should not be delayed is the development and management of land public services by on line system. Land should be able to open the widest possible information about mastery, ownership, use, and land utilization (P4T).
g. Conflict and land dispute resolution, can only be resolved by the amendment and revamping of land right registration system: 1) system changes from negative publicity stelsel (positive element) to progressive publicity stelsel, 2) application of land pre-registration system at the village / urban village, responsively by accommodating customary law system growing and developing at MHA (local wisdom), 3) every village / urban village under the coordination of the local district and municipality/city Land Office needs to be established a mediation institution (need to be developed concept about communityand Land Office partnership forum as Alternative Dispute Resolution in Land Dispute Resolution).
h. The development of the Land Taxation System, especially the tax on land and building acquisition fees (BPHTB), received directly by the local government, is appropriate but in relation to land use, it is necessary to review about the clarity of tax implementation in national agricultural development and management. Land rights taxes have not been properly targeted and appropriate, because of the absence of an integrative arrangement between the Land Office and the local government. The implementation of the land taxation system is not well coordinated (there is no clarity of

implementation rules) so it is not transparent, arising because of sectoral ego, which is emerged because each department or institution guided by its own rules.

i. Protection of people rights on land, is still pseudo, marked by the emergence of the regional regulation about recognition and protection of indigenous people rightswhich became the legal umbrella of the existence of Indigenous People (MHA). The existence of the local regulation actually clashed with the law or other regulations about land, natural resources, minerals and energy.

3. Strategic Issue of Land Registration System &Strategic Thinking of Development Program on Land RightPre-Registration System to Agrarian Reform

The strategic issue of the land registration system is in the "Agrarian Reform" issue, which hasn't yet to get a point. The government seems not to side with the people (small peasants), but instead uses people right to serve the ruler interests and the capital owners.

Suharto transformed populist Agrarian strategy (the Soekarno concept), into capitalist agrarian politics, through a development ideology closely linked to world capitalism. The era of President Soekarno, "Agrarian Reform" is the foundation for the development of the universe in Indonesia, which is preparing a socialist society based on Pancasila. In addition, Sukarno believes that the Agrarian Reform will provide justice and prosperity for the people of Indonesia which the majority are farmers. On September 24, 1960, the Basic Agrarian Law (UUPA) was adopted, with the goal of creating the prosperity of the Indonesian people through the Agrarian Reform.

President Jokowi-JK must dare to make major changes to the Ministry of Agrarian, which is no longer in line with other ministries but the Ministry of Agrarian should be same level to the coordinating ministry, which is not only on the land affairs but also will be comprehensive in one roof with natural resources, mineral and energy. The second step is the Ministry of Agrarian must dare to do rule breaking on land registration system that is no longer relevant in Indonesia. Negative publicity stelsel (positive element) is no longer worth defending, because it is the source of problems and land conflicts in the country.

Land law policy on choice of Negative Publicity Stelsel (positive element), has many weaknesses, they are: 1) the deviation of land registration principles, 2) the absence of good oversight, 3) the absence of accuracy of certified products, 4) the absence of accountability for certified products, 5) inadequate standardization of bureaucracy and data base, at pre-registration and registration level, 6) long process to overcome the land cases, 7) the absence of legal certainty to holders of land title certificates; 8) no independent settlement of land offices against land cases; 9) there is no legal relations balance value between stakeholders (the community) with the government (Land office), 10) deviations from the right to social function land, 11) mastery and possession of land over limit, 12) provision of HGB / HGU / HP which is not match with the period of time, and its designation.

The causes that affect the value of social justice in use, mastery, ownership and land right utilization doesn't realization yet, they are: 1) Internal factors is unequal land distribution and more dominated by state and private entrepreneurs (through the granting of HPL and HPH), the weakness of supervision over land stewardship, land tenure office performance on land management and stewardship is not maximal due to authority overlapping, - the dispute settlement institution in the land office which is mediated but not yet firmly regulated and does not have a clear concept and does not yet have a strong legal umbrella. 2) External Factors is - pressure from personal social forces, both economically and politically, authority overlapping of land right mastery by and among departments, insensitive state in taking choice of land law policy, - negative effects of regional autonomy.

The impact of land law policy choice on negative publicitystelsel (positive element), are: 1) the emergence of social inequality, 2) high land management fees and rigid processes, 3) land dispute settlement time-consuming, inefficient and ineffective, 4) mastery, ownership, use and land utilization, inconvenient and secure for landlord, 5) land use is incompatible with the mapping, resulting in reduced employment so it effects in structural impoverishment, 6) land mapping is not working properly, resulting in a mixed land arrangement, inconsistent with its designation, 7) it does not produce accurate certificate and there is no legal guarantee of the land, 8) the emergence of land monopoly (overlapping land mastery and it does not pay attention on community interests that result in social inequality), 9) unfulfilled standardization of data base bureaucracy at both the pre-registration and registration process, 10) land conflicts become quite high, unable to be solved systemically.

The construction of land law policy on progressive publicity stelsel starts from culture construction that is mental and professional performance improvement, state and government officials, also human resources to implement bureaucratic system and public service of land office, Notary-PPAT, sub-districts and urban village officials. Mental construction occurs because it is formed by a state policy system that is leaning towards liberalist / capitalist ideology. Culture construction (mental) can be started since the recruitment of Land Office officials / officers, sub district officials / officers, urban village officials / officers, and the appointment of Notary-PPAT. The bureaucratic culture of the land office is slow, convoluted, inefficient and prone to rigidity, due to the strong system of feudalism and the herarchyrational bureaucracy system that develops in transitional societies, the bureaucratic culture that occurs tends to lead to the traditional

bureaucratic cultural concept with the strong influence of the system modern bureaucracy. So it needs a comprehensive construction of the land registration system, the bureaucracy's structure that puts more emphasis on an egalitarian rational bureaucracy, therefore it requires a thorough mental revolution in the ATR ministry's including stake holders and related institutions.

Second, construction of the institutional structure arrangement, among departments to HAT, so,structurally the arrangement of land does not occur overlap between agencies or departments. The existence of administrative arrangement (data base) on the bureaucratic system and public services in accordance with modern bureaucracy standards. There is more focused supervisory function in the process of land registration, from pre-registration to registration process on the implementation of bureaucracy system and public service of Land Office and Notary-PPAT and at sub-district and urban village level, and substantially there is responsibility on physical data and juridical data certified products.

Third, substantive constructions is legal principles implementation of land right registration system must be realized include simple principle, safe, affordable, current and open and should be emphasized to basic land rights principle, and accuracy principle. The implementation substance of land right registration is carried out systematically (mature planning and stipulation by the Minister of Agrarian) and sporadically (on the request of an individual or legal entity carried out by the head of the Local Land Office).

The implementation of HAT registration according to progressive publicity stelsel, is can be interpreted with terms and conditions apply, it is fulfill the elements of implementation and implementation of the law, they are: Law Justice, Law Certainty and Law Utilization. Fulfill the justice principle and social justice, that is, the law must be effective, efficient and economical and achieve substantive justice, both individually and communally. Fulfill substantive justice principle (legal protection for HAT holders: security, health, safety and comfort / happiness). Affirmation of land rights accuracy principles, has aim to ensure the accountability of bureaucratic performance and public service of Land Office.

Recommendation from the result of this research is land law policy in land registration system in implementation of negative publicity stelsel (positive element) in bureaucratic system and public service of land office, does not supported by correcting of substance, structure and good culture, and the result of research is recommended as follows :

a. The State and all components in charge of land affairs shall immediately conduct "Agrarian Reform" by reconstructing the culture (mental) started from the recruitment of Land Office officials / officers, sub district officials / officers and urban village officials / officers, and appointment of Notary-PPAT and do reconstruction land law policy in the choice of an ideal publicity stelsel (progressive publicity stelsel) in the land registration system to support the rule of law in the bureaucratic system and public service of the Land Office, so it can provide legal certainty, legal justice and legal benefit to the mastery, ownership, use and utilization of HAT .
b. The House of Representativeand President must immediately arrange the institutional structure, between departments and HAT, so that structural arrangement of land does not occur overlap between agencies or departments. The House of Representative and the President must expressly authorize to the Minister of Agrarian for the arrangement and management of all agribusiness affairs. The House of Representatives and the President is expected to form a legal umbrella and at the same time make the policy of forming an ad-hoc judge to settle land dispute cases in the Land Office itself, especially related to the settlement of land disputes with a penal mediation model through ADR agency which will be established at land right pre-registration.
c. Legislative Institutions with the Government and Stakeholders as well as community support jointly do the reconstruction of land law policy, on structuring the structure, substance and culture of the bureaucratic system and public service of the Land Office. The results of the study provide findings and analysis to know, identify, describe, and explain the various concepts of building a bureaucratic system and land public service, synchronized (with technology progress, to firmly recommend to the government that the Land Office is obliged and must dare immediately doing / implementing/applying public services with the concept of on-line service system on land registration system) and harmony with Indonesian legal culture (integrated with local government), so in the formulation of policies and legislation in the land field, will be able to guarantee certainty and legal protection. Especially in the form of land law policy reconstruction on bureaucratic system and public service of Land Office; including there is needed the reconstruction of land law policy, in addition to accuracy principle and basic land right principle (while respecting the strengthening of people's rights and social functions of the HAT including the rights of indigenous and tribal peoples to land rights), it is necessary to thoroughly reform the data base as a standardized form of land bureaucracy both on pre-registration of HAT, implementation of HAT registration, as well as clarity of accountability form in HAT post-registration, with improvement on more responsive control system.

Closing

The next government must dare to do the rule breaking of the overall land system arrangement, with realization the real of agrarian arrangement, and is designed in the land law policy covering the fundamental aspect (General Framework of Agrarian Policy &National Spatial Planning) that is the principle of fulfillment of rights constitutional people in order to fulfill everyday needs and appreciate the principle of human equality. The most important of land systemic reform is generally the Agrarian Reform (proclaimed by Sukarno) must be implemented; Land Office does not only return to the Ministry of Agrarian (Agrarian & Spatial Planning), but it must be with the policies breakthrough of agrarian and natural resources for the achievement of the people's welfare, with the autonomy of the land and integrate with the regulation of natural resources, minerals and energy; it needs comprehensive system change, including the application of progressive publicity stelsel, land pre-registration system, the determination of accuracy principle and basic land rightsprinciple, the implementation of on line system in all land fields, the establishment of mediation institutions (ADR) at the village level and ad hoc judges at the MA level.

INTERNATIONAL INSTRUMENTS OF RECOGNITION OF INDIGENOUS AND TRIBAL PEOPLESON LAND MASTERY

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ABSTRACT

Recognition of the existence of indigenous peoples has ups and downs, both at the local, national and international levels. The international instrument of recognition of indigenous and tribal peoples in the realm of land tenure has been clearly regulated and internationally agreed. In Indonesia the recognition of indigenous and tribal peoples in the control of land in the provisions of article 18B paragraph (2) of the 1945 Constitution of the State of the Republic of Indonesia. The provisions of article 6 paragraph (1) of Law No. 39 of 1999 on human rights states in the framework of enforcement human rights, differences and needs in indigenous and tribal peoples must be observed and protected by law, society and government. From the above description, it is clear that the instrument of national provision which becomes the juridical basis for the recognition of indigenous and tribal peoples in land tenure, but whether the international instruments of recognition of indigenous and tribal peoples on land tenure is also regulated in international provisions in providing protection to indigenous and tribal peoples across countries .

Keywords: International Instruments, Indigenous And Tribal Peoples, Land Mastery

Introduction

Society is a social system, which is a container of patterns of social interaction or interpersonal relationships and relationships between social groups. So a society is a life together, whose citizens live together for a long period of time, resulting in a culture. The customary law community is a group of people who remain alive in order and within which there is a system of power and independently, possessing tangible or intangible wealth.

Indigenous and tribal peoples are also referred to as "indigenous peoples," in daily life more often and popularly referred to as "indigenous peoples". Indigenous and tribal peoples are human communities obedient to the rules or laws that govern human behavior in relation to each other either in the form of a whole of the habits and morals that actually live because it is believed and adopted, if violated the perpetrator gets sanction from the adat ruler.

On the instrument of national provisions in Indonesia based on the provisions of the Minister of Home Affairs No.52 of 2014 on guidelines for recognition and protection of customary law communities in Article 1 number 1 states The customary law community is an Indonesian citizen who possesses distinctive characteristics, harmonious living in accordance with customary law, has a bond to the ancestral origins and / or similarities of residence, there is a strong relationship with the land and the environment, and the value system that determines the economic order , political, social, cultural, legal and utilizing a particular area from generation to generation. The international instrument adopted in Indonesia in this case the word indigenous is a translation of the English word "indigenous people". Indigenous people are also defined as indigenous people or indigenous people.

The state of Indonesia is built on a society that has been historically and culturally existed since the ancient centuries have not known the writing, so the culture that is rooted in the hearts of the people is a culture of speech hence the customary law built on the culture said, most of these customary law norms are not written, thus as well as their communal rights of land rights. Indigenous and tribal peoples are, in essence, historically philosophical prior to the birth of the Indonesian state. In the opinion of Edy Ikhsan, recognition of the rights of indigenous and tribal peoples should be done in line with respect for the customs, traditions and tenure systems of the customary law community concerned.

Recognition of the existence of indigenous peoples has ups and downs, both at the local, national and international levels. The international instrument of recognition of indigenous and tribal peoples in the realm of land tenure has been clearly regulated and internationally agreed. In Indonesia the recognition of indigenous and tribal peoples in the control of land in the provisions of article 18B paragraph (2) of the 1945 Constitution of the State of the Republic of Indonesia (hereinafter referred to as the 1945 Constitution of the Republic of Indonesia).

Article 18B paragraph (2) of the 1945 Constitution states that the State recognizes and respects the unity of indigenous and tribal peoples along with their traditional rights as long as they are alive and in accordance with the development of society and the principle of the Unitary State of the Republic of Indonesia, as governed by law. And in the provisions of Article 28I Paragraph (3) of the 1945 Constitution of the Republic

of Indonesia states that cultural identity and the rights of traditional communities are respected in harmony with the development of the times and civilizations.

Whereas in the provisions of Article 6 paragraph (1) of Law No. 39 of 1999 on human rights (hereinafter referred to as Law No.39 / 1999) states that in the context of human rights enforcement, the differences and needs of indigenous and tribal peoples shall be observed and protected by law, society, and government. Article 6 Paragraph (2) of Law No.39 / 1999 states that the cultural identity of indigenous and tribal peoples, including the right to ulayat lands is protected, in line with the development of the times.

From the above description, it is clear that the instrument of national provisions is the basis for the recognition of indigenous and tribal peoples in the control of land, but whether the international instruments of recognition of indigenous and tribal peoples in the control of land are also regulated in international provisions in providing protection to indigenous and tribal peoples throughout the coun- country. In connection with the above, it is necessary for the authors to review and examine the "international instruments of recognition of indigenous and tribal peoples in the control of the land".

Problem Formulation.

What is the international instrument of recognition of indigenous and tribal peoples in land tenure?

Writing Method.

In order for a paper based on research can be said to meet the criteria as a scientific work, then needed a method. In relation to this matter, in the preparation of this paper, the author uses normative juridical method of research legislation and literature analysis and other legal materials such as books and legal journals.

DISCUSSION

International Instrument Recognition of Indigenous People's Law on Land Control

The definition of indigenous and tribal peoples is a society that arises spontaneously in certain areas, whose establishment is not established or commanded by the higher authorities or other rulers, with a great sense of solidarity among the members of the community as outsiders and uses its territory as a source of wealth only fully utilized by its members.

Indigenous and tribal peoples are a unity of humanity that is interconnected with a fixed repetitive pattern, that is, a society with the same behavioral polapola, in which the behavior grows and is manifested by society, from the pattern embodied rules to regulate the association of life. An association of life with the same social pattern, will only occur if there is a community relationship with the pattern repeated fixed.

The soil in the juridical sense is the surface of the earth, while the right to the land is the right to a certain part of the earth's surface, which is bounded, two-dimensional with length and width. Therefore, the definition of land rights refers more to the interpretation of rights to land.

The definition of land rights is contained in Article 4 Paragraph (1) of the Basic Agrarian Law (UUPA), which states, "On the basis of the right of control of the state, as referred to in Article 2, it is determined that various rights to the earth's surface called the land, which can be given to and possessed of persons, either alone or together with other persons and legal persons ".

All persons are given the opportunity to obtain the right to land (Article 4 UUPA) whether individual persons (jointly or jointly), and Legal Entity. This understanding shows that in the conception of the National Land Law, the lands can be controlled and used individually and there is no necessity to control and use them collectively (Article 16 Paragraph (1) of the LoGA). However, in this case the customary law community is not yet clear of its legal status in land tenure, this is because the customary law community is not a legal entity based on Government Regulation No. 38 of 1963 on the appointment of legal bodies that can have ownership rights to land (hereinafter referred to as PP No. 38/1963).

Article 1 the following legal entities may have title to the land:

a. Banks established by the State
b. Agricultural Cooperative Societies
c. Religious bodies
d. Social agencies

In PP no. 38/1963 indigenous and tribal peoples are not legal entities that can own land rights.

The government can make the basis of lex superiori derogate inperiori principle in terms of legal status whether indigenous and tribal peoples can gain control over the land. In principle it can be owned, this is because it refers to the principle of lex superiori derogate inperiori (higher legislation overrides the lower legislation) in this case the status of Article 16 Paragraph (1) of the BAL is higher than PP. 38/1963.

In lex superiori, the recognition of indigenous and tribal peoples on the control of land is stated in Article 18B paragraph (2) of the 1945 Constitution of the Republic of Indonesia which states that the State recognizes and respects the unity of indigenous and tribal peoples as long as they are alive and in accordance with the development of society and the principle of the Unitary State Republic of Indonesia, as governed by law. And in the provisions of Article 28I Paragraph (3) of the 1945 Constitution of the Republic of Indonesia states that cultural identity and the rights of traditional communities are respected in harmony with the

development of the times and civilizations. Article 6 (1) of Law No.39 / 1999) states that in the context of human rights enforcement, the differences and needs of indigenous and tribal peoples shall be observed and protected by law, society and government. Article 6 (2) of Law No.39 / 1999 states that the cultural identity of indigenous and tribal peoples, including the right to ulayat lands is protected, in harmony with the times.

In addition to the national provisions, international instruments of recognition of indigenous and tribal peoples on land tenure are contained in the International Labor Organization Convention (No. 169 of 1989 on formulating indigenous and tribal peoples as citizens who live in independent states where their social, cultural and economic conditions distinguish them from other parts of society in the country, and their status is governed in whole or in part by indigenous customs and traditions or with special laws and regulations.

The international instruments on indigenous and tribal peoples particularly in respect of land have been recognized in the United Nations Declaration on the rights of indigenous and tribal peoples in article 16, that customary law communities have the right to lands. Insturmen Convention on International Labor Organization (ILO) no. 169 of 1989, explains that customary law communities have rights over lands. The international instrument adopted in Indonesia in this case the word indigenous is a translation of the English word "indigenous people". Indigenous people are also defined as indigenous people or indigenous people.

Understanding of indegenous peoples based on international instrument that according to ILO Convention Number 169 Year 1989 is peoples in independent countries who regarded as the formation of conquest or colonisations or irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions. Indegenous people are also translated as indigenous and tribal peoples (translated from rechtsgemeenschap by van Vollenhoven and ter Haar), remote indigenous communities or isolated communities, traditional societies, local communities.

Justice according to Plato, justice exists in the law made by the state is the only source of law, all aspects of individual life under the supervision of law and state administration, justice is good in the sense of harmony and balance. Justice needs balance, harmony and harmony between personal interests, common interests or the interests of the people, including the state.

The principle of equality of position is as a principle of justice, the idea of equality as the essence of justice, the principle that all things being equal should be treated equally or in other words that all things equally deserve the same.

In the context of land tenure rights to customary law communities based on the principle of justice, the theory of justice put forward by Plato and John Rawls it can be understood that the state ie the government as a watchdog of the law and run the state administration must run a good principle of justice in the sense of harmony and balance between government with the community and or customary law community, the existence of land tenure in indigenous and tribal peoples must be harmonious and balanced, and the protection of the state to the land in customary law community there must be balance, harmony, and harmony between private interests, , including the State.

Conclusions.

The international instrument of recognition of indigenous and tribal peoples in land tenure is contained in the International Labor Organization (ILO) Convention No. 169 of 1989 on formulating indigenous and tribal peoples as citizens who live in independent states where their social, cultural and economic conditions distinguish them from other parts of society in the country, and their status is governed in whole or in part by indigenous customs and traditions or with special laws and regulations. The international instruments on indigenous and tribal peoples particularly in respect of land have been recognized in the United Nations Declaration on the rights of indigenous and tribal peoples in article 16, that customary law communities have the right to lands. Insturmen Convention on International Labor Organization (ILO) no. 169 of 1989, explains that customary law communities have rights over lands.

Suggestions.

The need for synergy between the government of a State and the customary law community in particular the State of Indonesia is concerned in the implementation of the International Labor Organization (ILO) Convention. 169 of 1989 and the United Nations Declaration on the rights of indigenous and tribal peoples, in this case shall be complied with and the harmonization of instruments of national provisions with international instruments in protecting customary land rights.

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HARMONIZATIONOF ECONOMIC LAW TO SUPPORT THE PUBLIC ECONOMIC POLICIES OF GOVERNMENT OF INDONESIA

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ABSTRACT

Harmonization of legislation is one of the important processes that must be passed in the formulation of legislation. Harmonization as an activity that becomes one of the main stages for the formulation of legislation can't be viewed simply or viewed lightly. This is because the harmonization has its own characteristics which are not owned by other activities or stages in the whole process of legislative formation (According Widodo Ekatjahjana). To understand the characteristics of harmonization must be understood various other aspects, among others, Pancasila as the basic or ideology of the state, the 1945 Constitution of the nature of the constitution, legislation both vertically and horizontally, the legal system and the purpose of the state. The establishment of regulations and legislation in the economic field often reap the constraints in its implementation, this is partly due to the existence of ego sectoral and cultural diversity that must be integrated in the era of regional autonomy. In addition, the low level of community participation in the drafting process, so that when applied is not in line with their expectations. To realize acceptable regulations and legislation in its implementation so as to require contributions or community involvement. The main basis of the harmonization of the law in the economic field is still referring to the Pancasila and the 1945 Constitution of the Republic of Indonesia (Article 1945), namely: (1) The economy is structured as a joint effort based on the principle of kinship. (2). Production branches that are important to the State and which affect the livelihood of the public are controlled by the State. (3). Earth, water and natural resources contained therein are controlled by the State and used for the greatest prosperity of the people. (4). The national economy is organized on the basis of economic democracy with the principle of togetherness, fair efficiency, sustainability, environmental insight, independence, and by maintaining a balance of progress and national economic unity. (5). Further provisions on the implementation of this article is regulated in the law in realizing the Unitary State of the Republic of Indonesia (NKRI) amidst various tribes, religions, languages and cultures have been manifested in Pancasila. This Pancasila with its own character has been proven to unite the differences or dynamics of politics, ethnicity, religion and culture. The application of Pancasila values in the process of harmonizing the laws and regulations, especially the economic field can't be separated one by one, but must be 'holistic', that is, the government policy in harmonizing the legislation must make all the values of Pancasila as the formulation of the norm law to produce the expected harmonization.

Keywords : Harmonization, Government, Economic Policies, Sectoral And Cultural Diversity, Pancasila Values

Introduction

If we speak between law and economy will make something very close in the sense of understanding to the issues that the economic field requires certain rules or other rules so the economic development can be more established and harmonious if regulated more effective by law or other provisions. The definition of harmony in this paper can be interpreted also with the term harmonization of the law in the field of economics as proposed by Prof. Dr. Widodo Ekatjahjana, SH., M.Hum (Director General of Legislation Regulation of the Ministry of Law and Human Rights of the Republic of Indonesia) which states that: *"Harmonization of laws and regulations is one of the important processes that must be passed in the formulation of legislation. Harmonization as an activity that becomes one of the main stages for the formation of legislation can't be regarded only one term or seen lightly. Because the harmonization has own characteristics are not owned by other activities or stages in the whole process of formulating legislation ".*

He also stated that the characteristics of harmonization has specific formulation that cannot be understood by various other aspects or among others, Pancasila as the basic or ideology of Indonesia, the Constitution of 1945, the Regulation both vertically and horizontally, the legal system and the purpose country. This matter will be useful to help concerning scrutinizing or government understanding to make the policy related this topic.[1]

To conduct harmonization of law including the law in the field of economics, the authors see the main basis in alignment / adjustment or to conduct harmonization of law in the economic field must still refer to the Pancasila and the Constitution of the Republic of Indonesia 1945 Constitution), especially Article 33, namely:

[1]Prof.'s paper Dr. WidodoEkatjahjana, SH., M. Hum, *Government Policy In Harmonizing Economic Regulation Legislation*, delivered in Round Table Discussion (RTD) in Lemhannas RI.

1) The economy is structured as a joint effort based on the principle of kinship.
2) Production branches that are important to the State and which affect the livelihood of the public are controlled by the State.
3) Earth, water and natural resources contained therein are controlled by the State and used for the greatest prosperity of the people.
4) The national economy is organized on the basis of economic democracy with the principle of togetherness, fair efficiency, sustainability, environmental insight, independence, and by maintaining a balance of progress and national economic unity.
5) Further provisions regarding the implementation of this article shall be governed by law.

As mentioned above that conducting harmonization of laws and regulations in the economic field based on Pancasila as the source of all sources of law in Indonesia. The statement of common of Indonesian nation will base on Pancasila as the basis of the state is certainly a necessity that it has been through various processes that are not easy or light. And the process occurs as the struggle of Indonesian to realize the Unitary State of the Republic of Indonesia (NKRI) in the midst of the unity of Bhinneka Tunggal Ika. The meeting point of nation understanding (common denominator) consists of various elements the variety in terms of tribe, religion, language, and culture has been manifested in Pancasila. This Pancasila with its own character has been proven to unite the differences or dynamics of politics, ethnicity, religion, and culture.[2]

In an effort to place the law as an authoritative instrument to support economic development, it seems necessary to know what role the economic sector wants the existence of law in the society. Some economists expect the development of economic law should be directed to accommodate the dynamics of economic activities, by creating activities, efficient and productive also containing the power predictable. Douglass C. North, at 1993 as Nobel Prize winner of economics, in an essay writing entitled *"Institutions and Economic Growth: An Historical Introduction,"* he says that the key to understand role of law in developing or even suppressing economic growth lies in understanding the concept of "*economics transaction cost "*or transaction costs. Transaction cost in this context, is non-productive costs that must be borne to achieve an economic transaction. High transaction costs have an impact on increasing the selling price of the product, thus burdening the consumer society. The very important role of law in economic life is its ability to influence the degree of certainty in the relationships between people in society.[3]

As said by H.W. Robinson, the modern economy increasingly holds the expectations of individuals are the determinants of economic acts and by hence the dominating factors in the person determining the economic equilibrium and the achieved equilibrium stability. The entrepreneur, the giver of capital, the landowner, the worker and all the consumers do according to the plan that he is expected to deliver maximum results. In the complex atmosphere results of the modern world most determined by how precisely future events can be predicted earlier.

Pancasila is intended the fundamental values, philosophy, mind, and spirit of desire as deep as the establishment of an independent Indonesia as listed in the fourth paragraph of the Preamble of the 1945 Constitution of the State of the Republic of Indonesia (UUD NRI 1945), namely (1) The Almighty; (2) Just and Civilized Humanity; (3) Indonesian Unity; (4) Democracy Leaded by Wisdom in Harmony / Representation; and (5) Social Justice for All Indonesians. These five precepts are the foundation, foundation, and moral aspiration in the life of nation and state. These five precepts are also the principal points of morality and direction in the harmonizing legislation, including economic laws and regulations. The reason is the government's policy base in harmonizing legislation, including economic laws, 'mandatory' based on the five principle of Pancasila. The values of the five principle can be put forth below.

First principle (Sila) is the divine values as a spirituality source and ethics that are essential for the harmonization of law, including economic laws and regulations. The second principle is a universal humanitarian value as the source or political fundamentalist in harmonizing laws and regulations, including economic laws and regulations. The third principle is the values of unity as a source of national unity which overcomes group, sector and individualism in the implementation of harmonization laws and regulations, including economic laws and regulations. The fourth principle is the values of popular sovereignty in the spirit of deliberation led by the wisdom in harmony as a decision source making in the unity for implementation harmonization laws and regulations, including economic laws and regulations. The fifth principle constitute the values of social justice as a source of justice for all the people of Indonesia in the implementation of harmonization laws and regulations, including economic laws and regulations.

The application of the values of the five principle of Pancasila are in government policy in the process of harmonizing the laws and regulations, including the laws and regulations of the field the economy can't be released by one by one its values, but must be 'holistic'. That is, government policy in harmonizing the legislation should make all the five values of Sila in Pancasila embodied in the formulation of legal norms as a result of harmonization.

[2] Isharyanto, Law of Public Economic Policy, Thafa Media Yogyakarta, 2016 p. 28.
[3]Ibid p. 28.

a. Understanding of Economic Law.

According to Sunaryati Hartono, the meaning of Economic Law is *the overall rules and legal decisions that specifically regulate the activities and economic life in Indonesia.*[4]According to Soedarto, Definition of Economic Law is *the whole regulation, especially that made by the government or government agency, either directly or indirectly aimed at influencing the economic comparison in the market, embodied in the economic legislation*. Rochmat Soemitro reveals that the notion of Economic Law is *part of the overall norm made by the government or the ruler as a personification of the society that governs the life of the economic interests of the people who are facing each other*[5]As the definition of economic law presented by the experts above, it can be concluded that the Definition of Economic Law is the whole rule of law that regulates and affects everything that is related to and the national economic life of the state, whether the private or public law, both written and unwritten, which regulates the activities and life of the national economy of the country.[6]

In the legislation, harmonization also regulates the economic life of the country including its people. Rochmat Soemitro reveals that the definition of Economic Law is part of the overall norm made by the government or the ruler as a personification of the society that governs the life of the economic interests of the people who are facing each other. From the understanding of economic laws conveyed by the experts above, it can be concluded that the Definition of Economic Law is the whole rule of law that regulates and affects everything related to and the national economic life of the state, both private and public legal rules, written and unwritten, which regulate the activities and life of the country's national economy. The economic laws are due to the rapid growth and development of the economy. In this case, the law serves to limit and regulate economic activities in the hope that economic development does not neglect the rights and interests of society.

As a welfare state, the government is obliged to protect the rights and interests of the community, generally set out in the form of formal law. This formal law also that will realize the goals and objectives to be achieved in economic development. Thus all economic activities will be governed by the formal law as a means to realize the policies of economic development which in turn will improve the standard of life and intelligence of the Indonesian nation.

b. Economic Law as a Branch of Jurisprudence.

Some argue that economic law only covers the rules of public law which is the direction of government in the life of national economy. On the contrary there is the view that economic law includes all the civil and public rules governing economic life. Furthermore, there are differences of opinion regarding the position of economic law as a branch of jurisprudence. Then there is also the opinion of economic law as a branch of legal science that stands alone and some who regard as a mere classification term.

Economic law can be defined as a causal relationship or the linkage of economic events that are interconnected with each other in everyday economic life in society. Alternatively, economic law is a causal relationship or linkage of economic events that are interconnected with each other in everyday economic life in society. In addition, economic law is born due to the rapid growth and development of the economy. According to Sunaryati Hartono, economic law is the elaboration of economic development law and social economic law, so the economic law has two aspects:[7]

1) Aspects of regulation of economic development efforts.
2) Aspects of the regulation of efforts to share the results of economic development equally among all layers of society.

However, the scope of economic law can't be applied as one part of a branch of jurisprudence, but is an interdisciplinary and multidimensional study. On that basis, economic laws are spreading in laws that are based on Pancasila and the 1945 Constitution, so the aspects of economic laws in Indonesia are based on some principle, for instance : the principle of faith and devotion to God Almighty; the principle benefits; the principle of Pancasila democracy; the principle is fair and evenly distributed; the principle of balance, harmony, and harmony in life; the legal principle; the principle of independence; financial foundation; the principle of science; the principle of togetherness, kinship, balance, and continuity in prosperity ; the principle of sustainable and environmentally sound economic development; the principle of self-reliance with statehood.[8]

Main Problems

1. Is the harmonizing the economic regulation according with the values of Pancasila and the Indonesian Constitution? What is factors relating the cause of that ?

[4] Hartono, Sunaryati. 1991,*Political Law Towards One National Legal System*. Bandung: Alumni Publisher, Bandung.
[5] RochmatSoemitro, 2002*"Brief Introduction to the Tax Law"*,Eresco, Bandung, hal 56.
[6] Ibid hal 75.
[7] Anna Yunita Wijaya, *Legal Aspects of Economics*, www.academia.edu, taken on Wednesday 24 January 2017 page 4.
[8] Ibid p. 7.

2. Why are the rule of economic still overlapping on other regulations ? Is there any foreign interference in the making of economic laws?

Discussion:

Harmonization.

The meaning of harmonization is a process to achieve harmony, conformity, harmony, suitability and balance between elements in the drafting of legislation, as a unified, compact whole of ideas that becomes an integral part of the whole systematic regulatory system.[9] Basically, the realization of the harmonization of laws and regulations in the economic field against the constitution is intended to improve efficiency and effectiveness economy, so to create the increase in people's welfare. In order to such efforts to be directed, it is necessary to formulate a guideline the basic instrument of the National Paradigm consisting of Pancasila as the foundation of ideology, the Constitution of the Republic of Indonesia 1945 (UUD NRI 1945) as the foundation is the Constitution, Wawasan Nusantara as the Visional basis, and National Resilience as a Conceptional foundation.

The aim of basic instrument is to provide direction for the concepts and policies aren't carried out of the corridor contained in the national paradigm. To describe the issue of law harmonization and regulations in the implementation of economy against the constitution is closely related to the national paradigm as the main foundation, so that its policies must be in harmony with the values contained in Pancasila, the 1945 Constitution, the Archipelago Insight, and National Resilience. The operational basis used in the embodiment is the various regulations and related legislation.

Hans Kelsen (expert of jurisprudence) argued law is a system of norms where normative values can be compared differently with the normative value of religion. The validity of the legal system depends on its actual practices, the legal rules are valid if the norm is effective in all of aspects. On the other hand, pure legal expert John Austin in *The Province of jurisprudence* (1832) argues that law is the command of the ruler or the holder of supreme power / sovereign holders. This means that the law stems from a writing law authorized by a governmental authority or a state in which there are elements of sincerity, command, duty, and sanction.[10]

In addition to the above, the theoretical foundation is close and relevant is the theory of the harmonization of rules and legislation. In this harmonization there are three principles: *lex superiori delogat legi inferiori, posterior lex delogat legi priori, and lex specialist delogat legi generali.* The principle meaning of *lex superiori delogat legi inferiori*, is the higher legislation overrides the lower legislation. While *the posterior lex* principle *delogates* the legion of priori and the new legislation overrides/overcomes the old legislation; and the principle of *lex specialist delogat legi generalis*, a special invitation to override general laws and regulations.[11]

The national economic system is based on Article 33 of the 1945 Constitution of the State of the Republic of Indonesia, which states that:[12]

1) The economy is structured as a joint effort based on the principle of kinship.
2) Production branches that are important for the state and which affect the livelihood of the people are controlled by the state.
3) Earth and water and natural resources contained therein are controlled by the state and used for the greatest prosperity of the people.
4) The national economy is organized on the basis of economic democracy with the principles of togetherness, fair efficiency, sustainability, environmental insight, independence, and by maintaining a balance of progress and national economic unity.
5) Further provisions concerning the implementation of this article shall be governed by law.

The harmonization process is based on Law Number 12 Year 2011 on the Establishment of Laws and Regulations, particularly in Article 47 paragraph (3), Article 54 paragraph (2), and Article 55 paragraph (2). In Article 47 paragraph (3) mandates that harmonization, rounding, and consolidation of the draft Law that comes from the President is coordinated by ministers who organize government affairs in the field of law. Whereas in Article 54 paragraph (2) reads further provisions concerning procedures for formation of committees between ministries and / or among non-ministries, harmonization, compilation, and submission of the Draft of Government Regulations shall be regulated by a Presidential Regulation. Article 55 paragraph (2) reads harmonization, rounding, and consolidation of the draft of Presidential Decree coordinated by the minister who conducts government affairs in the field of law.

In the preparation of regulations and legislation the national economic system must comply with the principles of formulation of rules and regulations as well as principles. The principle in the formulation of

[9] Great Dictionary of Indonesian Language, 2014, Ministry of National Education, Jakarta.
[10] Lemhannas RI Review 2016 on Harmonization of Laws and Regulations in Economy, Lemhannas RI, 2016.
[11] Ibid p. 10.
[12] Article 33 of the 1945 Constitution of the State of the Republic of Indonesia.

legislation and legislation is Law Number 12 Year 2011 which has mandated that to establish a good regulation must consider at least 7 principles namely:

1) Clarity of purpose.
2) The appropriate institutional or forming authority.
3) Conformity between type, hierarchy, and content material.
4) Can be implemented
5) Usability and usefulness.
6) Clarity of formulation.
7) Openness.

Halomoan Tamba argues that the basic principle used the *"principle of action" (het beginsel van uitvoerbaarheid)*, any formation of legislation should be based on a clear calculation / study the legislation established will be effective in society because it has received support philosophically, jurisdiction, and sociologically from the beginning of the stage arrangement. Commitment of this *"principle can be implemented"* is essential, especially if it is linked to the number of laws established without the follow-up of its derivative rules that inhibit and often lead to multiple interpretations in the implementation, including in the establishment of regulations related to the national economy.[13]

The consistency aspect of the regulations and legislation of the national economic system on the constitution is the consistency of drafting on academic legislation and legislation, drafting of regulations and legislation, with discussion, and its implications in the field. In this case also related to the existence of the system of regional autonomy and community participation.

The aspects of academic manuscripts correlate closely with the rules and legislation to be produced. Good academic texts should consider the content alignment with the values of Pancasila and the 1945 Constitution. In this case the Ministry of Justice and Human Rights (2015) reminded that to formulate a chapter should thoroughly study, examine, and consider various scientific aspects related to the norm . Moreover, in the abolition, addition, and modification of a passage, it must be based on scientific studies, so a scientific debate not a clear pointless debate which is often resolved through a closed lobbying mechanism, so it is not recorded in the treatise regulations and legislation.

The formation of regulations and legislation in the economic sector often reap the constraints in implementation, this is partly due to the existence of sector ego and cultural diversity that must be accommodated in the era of regional autonomy. In addition, the community often lacks participation in the preparation, when implemented is not in accordance with their expectations.

In order to realize acceptable regulations and legislation in its implementation, a contribution or involvement of the community is required. It is as stipulated in Law Number 12 Year 2011 on the Establishment of Laws and Regulations *(Pembentukan Peraturan Perundang-undangan/PUU)*, Article 88 which mandates the need for community input and stakeholders in the preparation. In addition, Article 96 explains that the public has the right to give oral and / or written input in the formation of PUU; input conducted through meetings and hearings, working visits, socialization, seminars, workshops, and discussions (public consultation).

Inconsistency of Regulations and Legislation in the Implementation of Economy Against the Constitution.

The harmonization of a regulation of economic laws on the constitution can be seen from the foundation that causes a law to be established which is the philosophical, sociological and juridical foundation.[14] Philosophical foundation is needed to consider the reasons or views that live in society, awareness, and ideals that include the atmosphere of spirit *(kebatinan)* and the philosophy of the Indonesian nation that originated from Pancasila and the Preamble to the 1945 Constitution of the Republic of Indonesia. The sociological foundation describes the formation or renewal of legislation - the invitation is to meet the needs of the community in various aspects. The juridical foundation is established to overcome legal problems or fill the legal void by considering existing rules, to be changed, or to be revoked to ensure legal certainty and sense of community justice.

It was also mentioned that the harmonization of a regulation of economic legislation can also be seen from vertical harmonization and horizontal harmonization.[15] Vertical harmonization is the harmonization of legislation with other laws and regulations in different hierarchies. The legislature-forming apparatus shall establish a legislation consistent with the articles in the higher laws and constitute the articles as the basis for

[13] HalomoanTamba, 2001, *Cooperative and Practice*, Erlangga Jakarta, 2001.

[14] Dr. Agus Budianto, SH., M. Hum; *Renewal of Indonesian Trade Law Code. Freelance Papers, delivered in the FGD Academic Draft Law on Trade Law*, Yogyakarta (in Halomoan Tamba, 2015).

[15] SetioSaptoNugroho, *Harmonization of the Formation of Legislation; Bureau of Legislation on Economic Sector of the State Secretariat of Jakarta*; 2009. Documentation and Legal Information, Legal Section, Legal and Public Relations Bureau.

the establishment of such legislation. Horizontal harmonization is harmonization of laws and regulations in the same or equal hierarchical structure.

Some inconsistencies of economic laws and regulations.

From the above with the variety of rationales as mention the above matters, several cases of inconsistencies of regulations and legislation in the field of economy, as follows:

1) Constitution of the Republic of Indonesia 1945 Article 33 Paragraph 1.
   The form of joint effort is based on the principle of kinship *(Koperasi).* Decision-making based on each member has one vote. Nevertheless, there is now a push to turn into decision-making based on cooperative shareholding.
2) UUD NRI 1945 Article 33 Paragraph 2.
   Noted that "the branches of production that are important to the state and which affect the livelihood of the people are controlled by the state". Nevertheless, as if forgotten, water is now privately owned; PLN is currently a Limited Liability Company that is subject to Limited Liability Company Law, so it is necessary to clarify Public Service Obligation conducted by PLN, for example: whether the poor can enjoy free electricity; People's Housing is not clear the government's allegiance to the poor, or to the low-income people because the mortgage of public housing through the banking is for those with fixed income and not the poor.
3) UUD NRI 1945 Article 33 Paragraph 3.
   It is stated that "The earth and the water and the natural wealth contained therein are controlled by the state and used for the greatest prosperity of the people". There has been a Constitutional Court decision that water is controlled by the state, therefore the government should have management rights. So also in the field of oil and gas and mining, now the government should have the right of mastery, but apparently managed by the private.
4) UUD NRI 1945 Article 33 Paragraph 4.
   It is noted that "The national economy is organized on the basis of economic democracy with the principles of togetherness, fair efficiency, sustainability, environmental insight, independence, and by maintaining a balance of progress and national economic unity". But what happened Electrical and Housing is not yet clear the government's alignment, the poor people have not been able to enjoy electricity and homes for free or cheap. Social Security System is the assistance of recipients of contributions only for participants BPJS Health, no for workers (as participant BPJS Employment). In the fisheries sector, there is still a need for regulatory consistency and implementation, particularly between the role of government and the private role (ie, ethical enforcement allows bureaucrats as fisheries entrepreneurs). On the other hand there is also no clarity of the meaning of independence for food and energy security.
5) Law Number 7 Year 2004 regarding Water Resources.
   Removed because it is considered not to guarantee the restriction of water management by private parties, and revive the Law no. 11 Year 1974 on Watering to prevent legal void until the establishment of new law.
6) Law Number 4 Year 2009 regarding Mineral and Coal Mining.
   Clash of authority between local government and central government in determining mining area, mining business area and special mining permit area.
7) Law of Number 30 Year 2009 of Electricity.
   Causing policy changes from state monopoly to competition.
8) BI Regulation Number 17/3 / PBI / 2015 concerning the obligation to use rupiah in the territory of NKRI.
   This regulation is difficult to apply because the calculation of contracts, cooperation agreements generally have long been done in the form of US Dollar.
9) The Ministry of Cooperatives and Small and Medium Enterprise *(Kementerian Koperasi dan Usaha Kecil Menengah)* specifies several issues concerning the disharmony of legislation in the national economic system with the locus of cooperative law and small and medium enterprise, as follows:
   a) The aspirations of the people as stipulated in the drafting of economic laws and regulations are not in accordance with the actual views of the society.
      This is felt in the preparation of Law No.17 of 2012 on Cooperatives where the needs of the cooperative society is not accommodated optimally so that they file a lawsuit (judicial review) to the Constitutional Court. As it is known that the Constitutional Court finally canceled Law no. 17 of 2012 and to establish Law no. 25 of 1992 (replaced) for temporary use. From the point of philosophical study, the content contained in Law no. 17 of 2012 is not harmonious and less reflects the atmosphere inner society.
   b) Standard Operational Procedure (SOP) harmonization of legislation of national economic system does not yet exist.

The absence of a standard reference framework or SOP on "harmonization of legislation of the national economic system" resulted in the pattern of attitudes, patterns of attitudes, and patterns of actors of central and local government in implementing a legislation to be asymmetrical and inconsistent. This implicates the disharmony between the Act, the Presidential Decree (the government) with local government regulation *(Perda).* At the implementation level, the Presidential Regulation which is a derivative of a Law and or a Government Regulation also occurs disharmony with the Regional Regulation in both provinces and districts. This disharmony leads to the goal of economic law that is for the economic actors to get certainty and protection of trying not achieved. Examples of current locus are Small Business License (IUMK) licensed under Presidential Regulation no. 98 Year 2014 About Licensing for MSEs. The legal message is very clear and firmly that the Small Micro Business actor needs to be protected in the effort through the provision of IUMK in the form of 1 sheet of manuscript and is given free of charge within one day. The Presidential Regulation was issued on September 15, 2014.

However, until now (July 1, 2015) only 30 districts / municipalities or only 5.6% of the total 515 districts in Indonesia have adjusted their local government regulation *(Perda)* or Regent / Mayor Regulation by Presidential Regulation 98 / 2014. This data is an indicator that from the point of view of the juridical foundation, there is a disharmony between the higher legislation and the regulations under it. According to the rules, the law should be adjusted to the existing Presidential Regulation. But in fact, many local regulations are still implemented on the one hand, and on the other hand, the Perpres remains as a Presidential Regulation. Between mindset, attitude pattern, and pattern of act of central and regional government organizers are not in line or not harmonious.

c) Economic legal sanctions for implementers in areas that do not adapt their laws and regulations with higher laws and regulations are not strict.

There are no strict sanctions for regions that continue to implement their local regulations despite being counterproductive to higher regulations on them such as the Presidential Decree *(Peraturan Presiden/Perpres)* and government regulations. The number of local government regulation *(Perda)* that is problematic because it is considered contrary to the law, cumulatively since 2002 to 2009, there are as many as 1,878 *Perda* a and has been canceled by the Ministry of Home Affairs. The local regulations were canceled by most local regulations that hampered investment, regional levies, and the groundwater law. The number of abandoned local regulations is an indicator of legislation drafting harmonization in the national economic system.

10) Deputy Minister of Economic Affairs Minister of National Development Planning / Board of *Bappenas* on July 6, 2015 in a directed discussion in the Indonesian National Resilience Institute *(Lemhannas RI)* argued that the amendment of the 1945 Constitution of the Republic of Indonesia has eliminated the 1945 Constitution NRI 1945, causing multi interpretation. In general, multi-interpretation occurs in terms of defining some substance / sentence such as the principle of kinship, production branches that are important for the state and which affect the livelihood of the people, the earth and water and natural resources contained therein, controlled by the state, economic democracy, principles togetherness, the principle of fair efficiency, maintaining the balance of progress, and understanding of the definition of national economic unity.[16]

Purpose of Harmonization.

The main objective of harmonizing legislation is to establish orderly and consistent legislation based on Pancasila and NKRI, providing legal certainty in the administration of government tasks, and to avoid overlapping or inconsistent policies among institutions state / government, both horizontally and vertically. Harmonization of regulations and legislation can be done formally or materially. Formally done on the establishment of regulations and legislation. As materially done to the material content of the legislation.

The purpose of harmonizing in the content of draft laws and regulations is to harmonize the draft laws and regulations with the principles of the establishment of legislation, harmonize the content of draft laws and legislation with the principles of content material, harmonize the content of the draft regulation and legislation with Pancasila and higher legislation *(vertical harmonization)* or with equitable legislation *(horizontal harmonization),* harmonize the content of draft laws and legislation with international conventions / treaties, and harmonize material the draft of laws and regulations with the Constitutional Court's Decision on Judicial Review.

Due to harmonize regulations and legislation have so far encountered some obstacles such as the lack of a data base, the low quality of academic texts as the basis for the drafting of regulations, many sector ego rules,

[16] Opcit p.15.

effective harmonization deadlines (substance and administration), regulations that serve as the basis of reference but is irrelevant to current conditions, the lack of public participation in the process supervision and lack of capacity of the supporting apparatus. The Ministry of Justice and Human Rights, which has the authority to harmonize regulations and legislation, also encounters many problems that are difficult to resolve.

Many of the debates on the difference of regulatory system and legislation in the field of economy should be disputed at the end point is the accommodating values contained in Article 33 of the 1945 Constitution of 1945. But apparently it is not easy, because the desire of the capitalists who requires Article 33 of the 1945 Constitution of the Republic of Indonesia to be abolished or twisted, so that their wishes can be accommodated.

The hope of successful harmonization of the laws and regulations in the economic field is as follows:

a) The realization of various regulations and legislation in the field of economy that is in line with the values of Pancasila and the 1945 Constitution of the Republic of Indonesia, especially Article 33.
b) The realization of various laws and regulations of state institutions / institutions that are in harmony with the hierarchy as contained in Law no. 12 Year 2011.
c) The absence of overlapping or inconsistent regulations and legislation in the economic field either horizontally or vertically.
d) The absence of institutional sector ego aspects that bias the implementation of laws and regulations in the economic field.
e) The various regulations and legislation in the economic field are in line with the principles of economic independence and its implementation in accordance with Article 33 of the 1945 Constitution of the Republic of Indonesia.
f) Realized law enforcement apparatus and law enforcement institutions and has a high nationalism in preparing and implementing laws and regulations in the field of economy.

Closing

Based on the data, facts, and analysis of the studies that have been done, it can be concluded several things as follows:

a. There are still many laws and legislation in the field of overlapping economy, inconsistency, and even contradictory to the constitution.
b. Many laws and regulations in the economic field are not in harmony with the hierarchy as set forth in Law no. 12 Year 2011 concern Establishment of Law and Regulation (Pembentukan Peraturan Perundang-undangan) especially Article 7 of paragraph 1.
c. The realization of harmonization of regulations and legislation in the field of economy should be done immediately. This is because the President of RI, Ir. H. Joko Widodo has stressed that the government will cut regulations that are considered inefficient in order to advance the nation's economy. There is no foreign party intervention for the Indonesian government when making regulations in the economic field.
d. The commitment of all elements of government both ministries and institutions related to harmonization of regulations and legislation in the field of economy is needed. Various sector egos and institutional interests of the class should be minimized and still prioritize the interests of the state.

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REPRESHIP OF CREDIT IN PEOPLE'S BUSINESS CREDIT WITH DEED OF SALE AND PURCHASE AGREEMENT

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Abstract

Credit guarantees are generally required in a credit extension of some of the prevailing provisions in banking. But in practice it is often found that the provision of credit guarantee in the form of material, land and or building is not in the form of proof of ownership of land certificate, but still in the form of deed of sale and purchase of land which is used as collateral for credit. Based on the provisions of the rules in the provision of credit guarantees then it will certainly cause a result when the debtor is unable to pay its obligations to the creditor (bank). As a result of the execution of the guarantee beyond that provision. On the other hand the government has issued a policy on the acceleration of the real sector and the empowerment of UMKMK in order to increase the economic growth of Indonesia. So to support the program, the executing bank may issue a sale deed of sale policy which can be used as an additional guarantee from the credit given by the consideration and the reason for the business condition that is financed feasible to be given.

Keywords: Represhіp of Credit, Deed of Sale and Purchase Agreement

Introduction

Credit is the process of bank asset formation. Every bank wants and strives for the quality of healthy assets in a productive sense. However, the credit given to the debtor is always a risk that the form of credit cannot be returned in time, called problem loans. The existence of bad debts will be the burdens of the bank because of bad loans become one of the factors and indicators determining the performance of a bank.

Credit according to Article 1 number 11 of Law no. 10 of 1998 concerning Banking shall be the provision of money or equivalent claims based on a loan-borrowing agreement or agreement to repay the debt after a certain period of time with interest. To obtain confidence in the ability and ability of the debtor, credit analysis must be able to analyze from various aspects, namely economic aspect, legal aspect, marketing aspect, environmental aspect, finance, technical aspect and social aspect and other related to loan application.

The credit agreement is one of the most important legal aspects of lending. The loan agreement is binding between the bank and the debtor whose content determines and regulates the rights and obligations of both parties in relation to the guarantee agreement as an additional agreement or accesoir, meaning the existence and termination of the warranty agreement is subject to the principal agreement.

Both are made separately, but the position of the guarantee agreement is very dependent on the principal agreement. This needs to be done to provide protection to the creditor so that if the debtor tort the creditor still get the right to the receivables.

The function of the grant of guarantee is to grant the right and power to the bank to obtain repayment with such guarantee goods, if the debtor has default injury not repay the debt at the time specified in the agreement. To the guarantee submitted by the debtor, the bank as the creditor has the obligation to protect the debtor, because it is related to the interests of the bank as well as the recipient of the guarantee.

Banking institutions that play an important and strategic role is one proof that banking institutions are one of the main pillars for economic development in supporting the implementation of national development. Therefore, in its role, the national banking institution is required and obliged to realize the national banking objectives as stipulated in Article 4 of the Banking Law, and in line with the objectives of the welfare state.

To achieve the goals of the welfare of the people within the welfare state that the state is required to interfere in all aspects of social life, so that none of the aspects of community life are separated from the Government's interference. It can be concluded that inter-state relations and law on the one hand, created state attachment to law and on the other hand created legal attachment to the state.

The existences of rules made by the state into limits for the community in the burden or take action against individuals and the implementation of these rules cause legal certainty. The normative-dogmatic school assumes that the law is basically solely to create legal certainty. The adherents of this genre are based on positivism, in which the flow is more to see the law as autonomy or law in the form of a written agreement, meaning that the law is autonomous, so the purpose of the law is solely for the certainty in legalizing the certainty of one's rights and obligations. Van Kan further argues that the purpose of the law is to maintain every human interest so as not to be disturbed and guaranteed certainty.

Not only does society want to see justice created in society and its interests are served by law, but society also wants to have rules that provide assurance of certainty in individual relationships with each other. Thus, the law is required to fulfill various works and by Gustav Radbruch in the law must contain the basic Values.

The basic values in addition to the form of justice and usefulness there is also legal certainty. Furthermore, the main thing of legal certainty is the existence of the regulation itself.

The Bank also extensively channeled its credit to the real sector. Various productive credit products are offered, one of which is the credit of the People's Business Credit program hereinafter called KUR with one of collateral that can be guaranteed is the Deed of Sale and Purchase hereinafter called AJB. So far, customers can not access bank credit because they are unable to provide collateral.

Normally the bank makes the collateral as a factor that determines the value of the loan to be approved and how much interest is charged to its credit customers. KUR is a credit program with the aim to accelerate the development of economic activities in the real sector in the context of poverty alleviation and expansion as well as expansion of employment opportunities.

Provision of collateral or collateral by the debtor to the creditor is only as a guarantee in returning credit facilities that have been enjoyed by the debtor if the debtor tort. One way to do is to take the proceeds from the sale of the guarantee goods. So the basic concept of granting collateral by the debtor is not to be owned by the creditor. This guarantee is only additional to find a way out for the bank in order to remain able to finance UMKMK, If the bank is not yet convinced with the ability and seriousness of the debtor to return the loan, especially related to the debtor's character, the bank needs some kind of commitment from the debtor in the form of additional guarantee.

The practice of distributing banking credit is guided by the principle of prudence which is a principle which confirms that the bank in carrying out business activities both in the collection especially in the distribution of funds to the public must be very careful. The objective is that the bank is always in good health to run its business well and comply with the provisions and legal norms prevailing in the banking world. The precautionary principle is contained in Article 2 and Article 29 paragraph (2) of Law no. 10 Year 1998 About Banking.

The legal relationship between the bank and the debtor is a civil law relationship, then there are provisions in some parts of the Civil Code, especially those governing the agreement. Furthermore, it is contained in the Law on Banking that is Act No.10 of 1998. This principle shall be applied in order to protect the public funds entrusted to the bank. This principle is also re-emphasized in Article 29 paragraph (2) of the Banking Law, stating that banks are required to conduct business activities in accordance with the principles of prudence.

Based on the above matter then the problems that arise is about the settlement of bad debts in the People's Business Credit with collateral Sale and Purchase Deed and legal protection for creditors in settling bad credit..

Discussion

Settlement of non-performing loans in People's Business Credit with collateral of Sale and Purchase Deed

People's business credit, hereinafter abbreviated as KUR, is credit / financing to micro small and medium enterprises cooperative (UMKM) in the form of working capital and investment supported by guarantee facility for productive business. KUR is a program launched by the government but the source of funds comes from bank funds.

The government guarantees the risk of KUR by 70% while the remaining 30% is borne by the executing bank. KUR guarantee is provided in order to improve access of UMKM to financing sources in order to encourage the growth of national economy. KUR is distributed by 6 implementing banks: Mandiri, BRI, BNI, Bukopin, BTN, and Bank Mandiri.

1. Purpose of KUR Program

The objectives of the KUR program are as follows:

a. Accelerate real sector development and empower micro, small, medium and cooperative enterprises

b. Improve access to finance and develop MSMEs and Cooperatives to Financial Institutions

c. As an effort to overcome / alleviate poverty and expansion of employment opportunities.

In the implementation of this program there are three important things:

The first is the government of Bank Indonesia and the technical departments (finance, agriculture, forestry, marine and fisheries, industry, cooperatives and SMEs). The Government functions to assist and support the implementation of the granting and credit guarantees,

The guarantee institution serves as the guarantor of credit and financing channeled by banks.

Banking as the recipient of collateral serves to channel credit to MSMEs and Cooperatives

2. Target of KUR program

The business sectors that are allowed to obtain KUR are all productive sectors are:

a. A micro enterprise is a productive enterprise owned by an individual and or an individual business entity that meets the following criteria: Having a net worth of at most Rp. 50,000,000 (excluding land and building of business premises)

b. Small Business is a stand-alone productive economic enterprise, conducted by an individual or a business entity that is neither a subsidiary nor a branch of a company owned

c. A medium-sized enterprise is a stand-alone productive economic enterprise, carried out by an individual or a business entity that is not a subsidiary or a branch of a company owned
d. Obligations of KUR borrowers are as follows:
1. Meet the existing KUR requirements of the implementing bank
2. Submitting collateral to the Bank
3. Paying Liabilities (principal and interest)

Clients who have received credit from the bank are not entirely able to return well as promised time, in fact there are always some customers for a reason cannot return the credit that has been given. Default by either party or both parties are reasonable. The increasingly dynamic life of the community, has confronted the banking world in a difficult situation, namely the occurrence of clashes or disputes of legal interest. Nonperforming loans are always present in bank credit activities. Because banks are unlikely to avoid the existence of problem loans. Banks are only trying to minimize the magnitude of problem loans.

Based on Bank Indonesia Regulation (PBI) No.9 / PBI / 2007, one of collateral that can be used as collateral for credit is land, building and residence which are bound by mortgage rights. According to Law No. 4/1996 on the Land and Property Rights related to land, Article 4 which is the object of mortgage are Property Right, Right of Use, Right of Building and Right of Use on state land. In practice, however, it is often found that the provision of credit guarantee in the form of property of Land and / or building is not in the form of proof of ownership of land certificate, but still in the form of the Sale and Purchase Deed of the land which is used as collateral for credit. Based on the two rules mentioned above, there is no mention that AJB can be used as collateral for credit. Because AJB has no legal force as a proof of legal land ownership issued by the state. So, the provisions of the rules in the provision of credit guarantee mentioned above, it will certainly cause a result when the debtor is unable to pay its obligations to the bank (creditor).

The government has provided guarantees through a 70% guarantee company in the hope that banks will be more willing to channel loans. But the fact remains that banks are still afraid because 30% guarantee of loan will be borne by the executing bank. 70% covered by the guarantor company should still be billed to the debtor who has received the insurance claim. If the purpose of the government is only on the amount of credit distribution value, then the guarantee value should not only be 70% but 100% and the nature of the insurance is pure full cover so there is no more reason for the banks to refuse credit requests directed by UMKMK even without any additional collateral. Collateral shall be required to comply with credit requirements with a ratio determined by Bank Indonesia. If this is done by the government, banks will benefit greatly. Because if the high collateral value the debtor seeks to save the guarantee by applying to the bank not to sell the guarantee or ask to be allowed to sell the guarantee itself.

The existence of bad debts will become a burden because of bad loans become one of the factors and indicators determining the performance of a bank. To solve problem loans there are two strategies that can be taken:

1. Credit Rescue

That is with the settlement of nonperforming loans through renegotiation between creditors and debtors by mitigating the terms of credit repayment so that the debtor has the ability to return to complete the credit.

2. The settlement of bad debts

The emphasis on credit rescue through legal institutions is directed to the sale of collateral goods which proceeds to pay off debtor's debts, called liquidation, namely the sale of goods used as collateral for debt repayment. The liquidation process can be done by handing over the sale of the goods to the respective customer. As for state-owned commercial banks, the process of selling collateral goods and bank assets may be submitted to IBRA for subsequent execution or auction.

Legal Protection for Creditors in Completing Bad Credit in People's Business Credit

Talking about this credit problem certainly cannot be released with the issue of security law, because between the two problems are closely related to each other. On the one hand, efforts should be made to provide various facilities to encourage economic development of the community through bank credit facilities, on the other hand it is necessary to provide legal certainty and balanced legal protection in the granting of credit facility itself, either to creditor / mortgage holder, debtor / dependent rights or to third parties. Experience proves that the difficulty of solving the problem of bad debts, caused by several factors that originated from the lack of attention to the provisions relating to the law of guarantee.

Bank as Creditor must take the means to perform Credit rescue. On the type of loan found or guaranteed by the Guarantee Institution, the Bank may apply for Claims payment by the guarantor of the credit. The Guarantee Institution cannot accept claims of liability with the status of collectability 1 or current, collectability 2 or Special Attention, collectability 3 or Substandard but may only be filed when it has entered the collectability of 4 or Doubtful. The Guarantee Institution can guarantee the loan but does not abolish the debtor's obligation to keep payments. In order to avoid further losses and aim to compensate for the Bank's losses, the Bank subrogates loans secured by the underwriting institution. In this subrogation process, the Bank as Creditor should have clear and firm legal protection.

In the Subrogation process, the Bank will submit a Claim to the Guarantee Institution covering the Credit Facility (applicable to KUR Credit or Laguna Credit) with the following requirements:

1. Claims Report
2. A Debtor's Liability Letter
3. Credit Approval Letter (SPPK)
4. Credit Agreement
5. Certificate of Guarantee
6. Credit analysis / discussion
7. Identity Legality Requirements
8. Debtor Information System (SID) and Certificate of Paid
9. Movements of Current Account (Loan Inquiry)
10. Settlement Effort (Call Memo, Warning Letter)

Submission of Claims shall be made by the Bank after the Debtor has at least Collect 4 status or Doubtful status or after more than 180 days there is no payment by completing the terms submitted by the Underwriting Institution. News of Claim contains the arrears and the interest of the debtor, Credit Agreement between the Bank and the Borrower, the collateral held by the debtor in the Bank, as well as the Policy Number and all information concerning the Guaranteed Certificate. In addition, the claimant must include any credit cause

Submission of Claims shall be made by the Bank after the Debtor has at least Collect 4 status or Doubtful status or after more than 180 days there is no payment by completing the terms submitted by the Underwriting Institution. News of Claim contains the arrears and the interest of the debtor, Credit Agreement between the Bank and the Borrower, the collateral held by the debtor in the Bank, as well as the Policy Number and all information concerning the Guaranteed Certificate. In addition, the claimant must include the reasons for the credit jam.

In Article 1131 and Article 1132 the Civil Code contains principles relating to credit guarantees. Article 1131 of the Civil Code: "Any material possessions of a debtor, whether mobile or immovable, existing or new, will be thereafter, as a guarantee for any personal engagement of the debtor. This means that if the debtor is owed to the creditor then the debtor's entire property automatically becomes the guarantee of his debt, although the creditor does not ask the debtor to provide the collateral of the debtor's property.

Article 1132 of the Civil Code reads that the Material in article 1132 becomes the guarantee of the creditor to execute the guarantee that was born due to the law. On the basis of the two articles, the lender may confiscate the assets of the debtor, then the object is sold, the proceeds of the sale are used to pay off the bank's debts. However, the implementation of the use of the above is back again at the firmness in making the policy to settle bad credit in the People's Business Credit, considering that KUR is a program credit with limited debtor criteria.

Closing

Conclusion

From the above discussion, it can be concluded that,

1. Implementation of non-performing loan settlement in People's Business Credit by collateral of sale and purchase deed can submit claim to guarantee company and reschedule and sell asset that becomes collateral that can be executed collateral.
2. Legal protection in the settlement of non-performing loans is contained in Article 1131 and Article 1132 Civil Code which can be used as legal umbrella by creditors to confiscate the assets of KUR debtors with collateral of sale and purchase deed in order to accelerate the settlement of bad debts.

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Kitab Undang-undang Hukum Perdata (KUH Perdata)

Undang-undang NO. 10 Tahun 1998 tentang Perbankan

ARBITRATION IN INDONESIAN LAW SYSTEM WITH LEGAL CERTAINTY

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ABSTRACT

The birth of arbitration act in Indonesia No. 30 Year 1999 is giving fresh air for business society in Indonesia. However, Arbitration as an alternative in the settlement of business disputes in Indonesia, but, in its enforcement has experienced many obstacles. In 2017, out of 10 foreign decisions filed for execution in Indonesia, only two decisions have been executed by the Central Jakarta District Court. This paper aims to determine how far the process of enforcement of arbitration law in Indonesia. The method used in this study is a normative research method, where this research examines the study documents using various secondary data such as legislation, court decisions, legal theory and other sources. The results of this study indicate that enforcement of arbitration act has not been able to provide legal certainty for justice seekers. In addition there is disharmony of arbitration law in the legal system in Indonesia.

Keywords : Arbitration, Dispute, Business

Introduction

The introduction of AEC (ASEAN Economic Community) particularly in Indonesia and ASEAN countries, generally open business opportunities both goods and services more advanced than ever before. Trading goods and services is no longer in small scope but has crossed the country. This is also supported by the ease of technology where trading is not only done by manual and face to face, but technology makes the trade is also done through online media. These conditions have a positive impact on the development of national economy. But on the contrary, one of the negative side is the arising legal problems and business disputes caused by unhealthy competition or others that gave birth to disputes.

There are many ways that business society can do in solving the case. The usual way is through litigation process in court. However, in business, businesspersons nowadays prefer to settle disputes through non-litigation channels such as negotiation, mediation, conciliation or arbitration. The choice of law is done considering that most business people are bona fide companies that are reluctant to open legal issues to the public.[1] Through the settlement of the non-litigation dispute, it is expected that the verdict issued will be faster and of course it is expected that this decision will be more satisfactory to the parties.[2] The next reason for dispute resolution in court will find who is wrong and who is right, and the results will be able to stretch trade relations between the parties. Settlement through non-litigation is deemed to give a compromise verdict, which can be accepted by both parties to the dispute.

The way of settling through arbitration is more logical because foreigners are generally less likely to agree and will be worried if the legal issues arising from their trade contracts will be decided by other state judges. This is because as a foreign entrepreneur somewhat less understanding of litigation formalities. Moreover, place of legal procedures and legal materials, and the forum ensures confidentiality and material disputes.[3]

However, in addition to the advantages of arbitration, there are also considered to have deficiencies. One of them is an arbitral award will completely lose its power if one of the parties involved in the dispute does not meet the requirements of bonafidity (good faith).[4]

Arbitration as one of the out-of-court dispute resolutions has long been used in Indonesia, as evidenced by at least the participation of Indonesia as a member of the 1958 New York Convention on Recognition and Implementation of Foreign Arbitration Decisions and ratifying the ICSID Convention concerning the settlement of disputes between foreign investors and the Indonesian government in the field of investment.

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[1] Yeni Widowaty dan Fadia Fitriyanti, *Inkonsistensi Putusan Mahkamah Agung dalam Membatalkan Putusan Arbitrase*,Jurnal Media Hukum Volume 23 No. 2 Desember 2016, p. 2

[2] Huala Adolf ,*Arbitrase Komersial Internasional*, Jakarta, Grafindo, 2002. p. 48

[3] Bozari, Elois Henderson "*Public Policy Exeption to International Arbitral Award*," Texas International Law Journal, vol. 30, 1995, page 209: "*International acceptenace of the New York Cionvention, reflected the growing appreciation to the benefits of arbitration as relatively inexpensive, quick means of private dispute resolution.*

[4]Ni GustiNyoman Shanti Prameswaridan C.I.A Pemayun *Alternatif Penyelesaian Sengketa Arbitrase Internasional Bagi Perusahaan Multinasional*, Jurnal Kerta Negara Volume 01 Nomor 05 Juli 2013, FH Universitas Udayana Bali, p.4.

Then, Indonesia ratified the ICSID Convention with Act No.5 Year 1968 (State Gazette Book Number 32 Year 1968), namely the law on the Convention on the Settlement of Disputes between the State and Foreigners regarding investment.[5] Then, in 1999 was born the law on Arbitration and Alternative Dispute Resolution in Indonesia Act No. 30 Year 1999.

Arbitration as an institution has been used long before the *Common Law* began. Some say that arbitration is a way of resolving the oldest dispute between people.[6] In Indonesia since the birth of Act No. 30 Year 1999 until today, arbitration is considered unable to provide legal certainty.

Research Methodology

This research is using normative juridical research method, where the research point is on secondary data and study document using various secondary data such as legislation, court decision, legal theory and other sources To complete this research also briefly review about arbitration and ADR in Indonesia before the Act 30/1999.

Discussion

From an economic point of view, the development of economic law in Indonesia is very wide. Started from the reformation era of Indonesian Nation in 1999 where at that time was born new regulations in the economic field . One of them is Act No. 30 Year 1999 concerning Arbitration and Alternative Dispute Resolution (ADR).

Arbitration dispute resolution is not a new issue in the dispute resolution system in Indonesian law.[7] However, in the past, the arbitration was less attractive and less popular despite the fact that it has long been regulated in the Indonesian legal system.[8] Even in the early independence of arbitration commonly used among businessmen.[9]

The background of the development of arbitration law against Indonesia actually began when the New York Convention in 1958 (New York Convention on the Recognition and Enforcement of foreign arbitral awards of 1958). Where arbitration has been described and applied to member countries that join the New York convention. Indonesia at that time participated in ratifying the convention and then poured through Presidential Decree No. 34 Year 1981. The consequence of the ratification of the convention is the recognition and implementation of the arbitral award becomes the obligation of Indonesia.[10]

Since the establishment of ICSID in 1965 until June 2014 there are 159 countries registered and only 9 countries have not ratified.[11] ICSID is an administrative body and not a judicial body, but also as an international legal entity similar to the International Council. ICSID is also not a commercial arbitration center such as the ICC (International Chamber of Commerce), but an arbitration center that provides an investment dispute resolution mechanism between a foreign investor and one member country of the ICSID

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[5] Huala Adolf, *Sengketa Penanaman Modal antara Investor Melawan Pemerintah Indonesia di Arbitrase ICSID*, Jadjadjaran Jurnal Ilmu Hukum, Volume 1 Nomor 3 Tahun 2014, FH Universitas Padjadjaran, p.. 429.

[6] Kantaatmadja, Komar "*Beberapa Permasalahan Arbitrase Internasional*," *Serangkaian Pembahasan bagi Pembaharuan Hukum Ekonomi di Indonesia* pada Temu Karya Hukum Perusahaan Dan Arbitrase, kantor Menko Ekuin dan Wesbang, Bekerjasama dengan Departemen Kehakiman, Fakultas Universitas Indonesia, yayasan Pusat Pengkajian Hukum, Jakarta 22-23. Januari 1991, hal 4-5 :"...Also Timing in arbitration brings the possibility of avoiding a lengthy dispute resolution process as well as saving the cost of corporate dispute resolution and "overhead". One thing that is not possible from a dispute settlement by way of litigation". also page 2 : "Arbitration as an institution is not new, having been in use many centuries before the beginning of the Englisg Common Law. Indeed one court has called arbitration "The oldest know method of settlement of disputes between men.

[7] Elkouri Frank et. al,. *How arbitration Works*, (Wasingthon, 1974), page 2 as quoted by Soebekti, "Memahami Arbitrase". Seminar sehari Arbitrase, 16 November 1988, Yayasan Triguna, Kadin, Beni di Jakarta, November 1988, Varia Peradilan, Majalah Hukum Bulanan, Tahun IV No. 40, januari 1989. P. 1110 : *Arbitration is a simple proceesing voluntary chosen by parties who want adisput determined by an impartial judge of their own mutual selction, whose decision, based on the merit of the case, they agreed in advance to accept as final and binding.* quoted from book of Dr. Tineke Louise TuegehLogdong, *AsasKetertibanUmum Dan Konvensi New York 1958*.

[8] Although there has never been an arbitral award in the past, it can be found that its legal rules fall into the civil procedure law in *Raad van Justitie* (RvJ) in the Dutch Colonial period in the *Reglement op de Burgerlijke Rechtsvordering* (Rv) S 1847 No. 52 jo. S. 1849 No. 63. The rules are contained in chapters 615-651 Rv. Article 615 Paragraph (1) Rv includes, among other things, determining "*Ieder de geschillenomtrent de regterwaaroverhij de vrijebeschikking heft, aan de uitspraak van scheismannenonderweroen*" (is permitted to whom I am involved in a dispute concerning the rights in his power to relinquish it, to submit such dispute decisions to a person or several referees). R. Subekti, *ArbitrasiPerdagangan*, Bandung, BinaCipta, 1981. p.. 39.

[9] Setiawan, *Aneka Masalah Hukum dan Hukum Acara Perdata*, Bandung, Alumni, 1992, p.. 71.

[10] Umar Haris Sanjaya, *Pembangunan Hukum Arbitrase (Politik Hukum) Sebagai Upaya Penyelesaian Sengketa (Tinjauan atas Undang-Undang Nomor 30 Tahun 1999 Tentang Arbitrase dan Alternatif Penyelesaian Sengketa),*JurnalYuridis Volume 2 Nomor 2 Desember 2015, p.. 224.

[11] http://icsid.worldbank.org/ICSID/&gt, diaksestanggal

(contracting state) or a member of an ICSID member who has signed a preliminary agreement called BIT (Billateral Investment Treaty) to choose ICSID as a dispute resolution institution in the future.

Related to Act No. 30 of 1999, this codified rule has certainly aborted the rule of law concerning previous arbitration. But in the application of the law precisely this Arbitration Act just become a tool not problem solver as expected. This is evident in the various business dispute settlements committed on a resolution by arbitration process. The problems with the application of this Act are also not far from the scope of the Act itself.[12]

Although arbitration resolution are believed to have advantages over court, but settlement through Arbitration also has drawbacks. Some of the disadvantages of Arbitration and ADR in general are, First, Arbitration is not widely known, either by ordinary people, or the business community, even by the academic community itself. For example, there are still many people who do not know about the existence and work of institutions such as BANI, BASYARNAS and P3BI. Secondly, the Society has not put enough trust, so it is reluctant to include the case to Arbitration institutions. This can be seen from the few cases filed and resolved through the existing Arbitration Centers. Thirdly, the Arbitration and ADR Institutions do not have the force or authority to execute their verdicts. Fourth, the lack of compliance of the parties to the settlement results achieved in the Arbitration, so they often deny in various ways, both with time-lapsing techniques, resistance, dismissal suits and so on. Fifth, Lack of parties holds business ethics. As an extra judicial mechanism, Arbitration can only rely on business ethics, such as honesty and fairness.[13]

Therefore, what interesting is the disagreement about the separation of the arbitration agreement in a principal agreement. One example is where the court opposes the arbitration institution. In Article 3 of Act No. 30 Year 1999 on arbitration, stated that the court shall not interfere with the disputes of the parties which have been bound by the arbitration agreement. Then, are there any reasons that justify the court examining the cases of the parties that have been bound by the arbitration clause, because in fact the court has tried many cases that have been included in the process of Arbitration settlement.[14]

In the United Kingdom, for example, all disputes over the amount of insurance are settled through arbitration, whereas contract/policy wording is still possible through general judiciary. This is why, as the way to settle disputes over insurance contracts through arbitration is considered as the fairest way for the parties to the dispute.[15]

These issues need to be addressed given the high expectation of business actors in dispute in solving their business problem through arbitration institution in Indonesia. The author argues that it is time for some weaknesses in Act No. 30 Year 1999 concerning Arbitration and Alternative Dispute Resolution to be addressed.

Closing

Based on the description above, it can be concluded that the arbitration is an alternative solution to disputes outside the court (non-litigation) in the civil field, especially concerning trade and rights which according to law and legislation are fully controlled by the parties to the dispute. However, in the enforcement practice of Arbitration has weaknesses such as in Articles 3, 7, 11 and 70 that need to be changed by the government in order to create legal certainty in the enforcement of arbitration Act.

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[12] Ibid.,p.. 222

[13] Muhibuthabary, *Arbitrase Sebagai Alternatif Penyelesaian Sengketa Ekonomi Syariah Menurut Undang-Undang Nomor 30 Tahun 1999*, Jurnal Asy-Syari'ah Vol. 16, Nomor 2, Agustus 2014. FH Syariah dan Hukum UIN Ar-Raniry Aceh, p.. 108.

[14] Hetty Hassanah, *Penyelesaian Sengketa Perdagangan Melalui Arbitrase Secara Elektronik (Arbitrase Online) Berdasarkan Undang-Undang Nomor 30 Tahun 1999 Tentang Arbitrase dan Alternatif Penyelesaian Sengketa*, Jurnal Wawasan Hukum, Vol. 22 Nomor 01 Februari 2001, p.. 2.

[15] Agung Subakti, *Tinjauan Yuridis Terhadap Konsep Negosiasi Sebagai Alternatif Penyelesaian Sengketa dalam Sengketa Bisnis di Indonesia Yang Berlandaskan Nilai Pancasila*, Jurnal Nestor Magister Hukum UNTAN, Volume 2 Nomor 3 Tahun 2013, p.. 4

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CHARACTER BUILDING TO OVERCOME THE MULTIDIMENSIONAL CRISIS

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ABSTRACT

Currently Indonesia is in a multidimensional crisis, and it's will spread to our young generation. Start from these problems the government makes character development as one of the national development priority programs. The spirit is implicitly asserted in the National Long-Term Development Plan of 2005-2025, in which character education is placed as the foundation for realizing the vision of national development, namely "Creating a society of noble, moral, ethical, civilized and civilized based on the Pancasila philosophy."Character education aims to form a nation that is strong, competitive, noble, moral, tolerant, mutually cooperative, spirited patriotic, dynamic, science-oriented and technologically all animated by faith and piety to God Almighty based on Pancasila. Character education emphasis on: (1) religious values and tolerance among religious people. Politically, the state is based on religious values, (2) the implementation of Pancasila values. The values of Pancasila become the values of politics, law, economy, society, culture, and art, (3) Must be instilled nationalism and love the noble values of Indonesian culture itself among the citizen. Such an important cultural position in the life of society requires that culture be the source of values of cultural education and character of the nation

Keyword : Character Building

Introduction

At present, Indonesia is facing a multidimensional crisis. A multidimensional crisis is a situation where the nation and state are being plagued by many conflicts in politics, economic, social, and moral degradation. This crisis can caused various important damaged of nation's life.Most of the crises occurring in Indonesia are due to human beings themselves due to the character crisis. Therefore, it needs character building which is a prerequisite for nation-state building.

Some of the notes that show that Indonesia is facing the crisis include: based on corruption perception index, conducted by survey institute Transparency International, Indonesia is still included in the ranks of corrupt countries with ranked 118th of 174 countries. (Kompas, 2012). In the same daily, the Honorary Board of the House of Representatives reports that 28 board members are involved in ethical issues. Student strikes, free sex behavior, drug abuse, shameless culture, values and norms are declining not only in urban areas but have penetrated into the countryside (Zuriah, 2007) it shows that the moral crisis also hit young people and has spread to various regions.

Against the multidimensional crisis and the realities of the current nationality problems, such as: disorientation and the unfolding of Pancasila values; the limitations of integrated policy instruments in realizing the values of Pancasila; shifting ethical values in the life of nation and state; waning awareness of the nation's cultural values; threat of disintegration of the nation; and the weakening of the nation's independence, the Government makes character building as one of the national development priority programs. The spirit is implicitly asserted in the National Long-Term Development Plan (RPJPN) of 2005-2025, in which character education is placed as the foundation for realizing the vision of national development, namely "Creating a society of noble, moral, ethical, civilized and civilized based on the Pancasila philosophy . "

Related to the effort to realize character education as mandated in the RPJPN 2005-2025, in fact it has been stated in the function and purpose of national education, namely "National education function to develop and form the character and civilization of dignified nation in order to educate the nation, for the development of the potential of learners to become human beings who believe and cautious to God Almighty, have noble character, healthy, knowledgeable, capable, creative, independent, and become citizens of a democratic and responsible.

Discussion

As a preventive measure, character education is expected to develop the quality of the nation's youth in various aspects that can minimize and reduce the causes of various cultural problems and national character.

The definition of character according to Language Center of Ministry of education is "innate, heart, soul, personality, character, behavior, personality, nature, temperament, temperament". The character is personality, behavior, nature, character, and character. " Williams & Schnaps (1999) defines character education as "any deliberate approach by which school personnel, often in conjunction with parents and community members, help children and youth become caring, principled and responsible".

According to T. Ramli (2003) character education has the same essence and meaning with moral education and moral education .. The goal is to form a child's person, in order to be a good human being, citizens, and good citizens. As for good human criteria, good citizens, and good citizens for a society or nation, in general are certain social values, which are heavily influenced by the culture of the people and the nation. Therefore, the essence of character education in the context of education in Indonesia is the value of education, namely the noble values education that comes from the culture of the Indonesian nation itself, in order to foster the personality of the younger generation.

Character education is one of the answers to the various problems of the nation that are now widely seen, heard and perceived, in which many problems arise which are identified by the failure of education to build moral values to the students, because the purpose of education is not only to give birth to intelligent people, but also to create a strong character. As Martin Luther King said that, the "intelligence plus character that is the goal of true education".

In Strategic Planning Of Ministry of Education 2015-2019 character education is intended to foster character, build character, and develop the personality of learners. Meanwhile, civic education is intended to increase national insight among school-aged children, thereby establishing an understanding of social plurality and cultural diversity in society, which affects the willingness to build social harmony, foster tolerance, and maintain unity in diversity.

According to Sartono (2011), the character that is meant in education is the character of the Indonesian nation in accordance with the values of Pancasila, among others, religiousity, honesty and celan, polity and smatr, rresponsible and work hard, discipline and creative, caring and helpfull. So with the character education is expected for character education is integrated in each subject so that with the education of the character is expected future of Indonesia better. Furthermore, according to Sartono (2011, p.9) character education is sourced from religion, Pancasila, culture, and national education goals, namely: religious, honest, tolerance, discipline, hard work, creative, independent, democratic, curiosity, nationality, homeland love, respect for achievement, friendly / communicative love of peace, love to read, caring environment, social care, and responsibility.

Thomas Lickona in (Marzuki, 2012), terminologically the character is "A reliable inner dispotion to respond to situations in a morally good way." Lickona further added, "Character so conveived has three interrelated parts, moral knowing, moral feeling, and moral behavior ". This means that good character must include knowledge of goodness, then cultivate commitment (intentions) to goodness and ultimately do the good themselves. In other words, a good character education must involve good knowledge (moral knowing), good feelings or loving good (moral feeling) and good behavior (moral action) so that the formation of unity of behavior and attitude of life of learners. This is also supported by Sartono's research (2011, p.8) that there are four basic pillars of character education moral values: intellectual development, spiritual and emotional development, sports and kinesthetic development (physical and kinestetic development), and taste and affection and creativity (development).

On the basis of what has been disclosed above, character education is not just teaching what is right and what is wrong. More than that, character education is an effort to instill good habituation so that learners are able to behave and act on the values that have become personality. These values must be nurtured in each learner until it develops into a school culture.According to Lickona there are seven reasons why character education should be delivered:

1. It is the best way to ensure that children (students) have a good personality in their lives;
2. It is a way to improve academic achievement;
3. Some students can not form strong characters for themselves elsewhere;
4. Preparing students to respect others or parties and to live in diverse societies;
5. Departing from the root of problems related to social-moral problems, such as immodesty, dishonesty, violence, sexual activity violations, and a low work ethic (study);
6. It is the best preparation to welcome behavior in the workplace; and
7. Teaching cultural values is part of the work of civilization.

Character education has a strategic function for the progress of the nation, there must be a commitment to run character education as part of national identity. Commitment that we must run all, referring to the 5 values of the nation's character to become a superior man delivered by SBY (Dewangga, 2012) are:

1. Indonesian man who is moral, morally and behave well;
2. Achieving a smart and rational society;
3. Indonesian people in the future become innovative human beings and continue to pursue progress;
4. Strengthen the "Must Do" spirit, which continues to seek solutions in every difficulty;
5. Indonesian man must be a true patriot who loves his nation, country and country.

Character education at its core aims to form a nation that is strong, competitive, noble, moral, tolerant, mutually cooperative, spirited patriotic, dynamic, science-oriented and technologically all animated by faith and piety to God Almighty based on Pancasila.

Besides character education functions:

1. Develop the basic potential to be good-hearted, good-minded, and well-behaved;
2. Strengthening and building multicultural nation behavior;
3. Increasing the civilization of a competitive nation in the association of the world. Character education is done through various media that includes family, educational unit, civil society, political community, government, business world, and mass media.

Character education as education reform will be realized by cooperation from central government as policy maker, school as field education implementer that integrates character education in curriculum used and teacher as role model, parent as first character forming child, and society or environment which reflects the application of culture and character of the nation in everyday life. The effectiveness of character education is determined by the existence of teaching, modeling, reinforcing, and habituating simultaneously. This strategic approach to implementation enables three components that are interconnected with one another, namely school (campus), family and community.

Method

We raise this theme based on issues that are evolving in the community as well as an overview of the data obtained through mass media coverage. Furthermore, through literature study presented some opinions of experts related to character education and we finally convey the analysis and input in the implementation of character education.

Closing

Some things that need to be emphasized on character education include the following:

1. Must be emphasized of religious values and tolerance among religious people. Indonesian society is a religious society. Therefore the lives of individuals, societies, and nations are always based on religious teachings. Politically, state life is based on values that come from religion. On the basis of these considerations, the values of cultural education and the character of the nation must be based on values and principles derived from religion.
2. Implementation of Pancasila values. The values that exist in Pancasila become the values that govern the life of politics, law, economy, society, culture, and art. Cultural education and character of the nation aims to prepare learners to become better citizens and better citizens are citizens who apply the values of Pancasila in their life as citizens.
3. Must be instilled nationalism and love the values of Indonesia's culture. Culture is a truth that no human being lives in a society that is not based on the recognized cultural values of that society. Cultural values are used as a basis in giving meaning to a concept and meaning in communication among members of the community. Such an important cultural position in the life of society requires that culture be the source of values of cultural education and character of the nation.

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DEFINING EXPRESSIVE THEORY OF PUNISHMENT TOWARD TRADITIONAL OPTIMAL PUNISHMENT OF CRIMINAL LAW: LAW AND ECONOMICS PERSPECTIVE

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ABSTRACT

Sanctions and punishments are independent of legal penalties. Although the need for heavy punishments are widely accepted, but they also matter what kind of punishments there are and how they are administered in order to provide efficient legal outcome so that there will be enough punishment to deter and enough punishment to eliminate all offenses. Such activities are costly, especialy enforcing every single offenses for every single offender. Hence, the big question is, how to provide sufficient amount of deterence? It can be explained by a central theory in Law and Economics called expressive law theory that focuses on altering behaviour, not by threatening sanctions or promising rewards but by changing individual preferences, and in some cases, by affecting social norms and values. Therefore, this writing concentrates three central issues: What is the central concept to the study of Law and Economics toward theory of punishment? How to distinguish expressive law theories of punishment from traditional theories? and How to justify expressive theory punishment as traditional optimal punishment in the court of justice?

Keywords: expressive law theories of punishment, incentive, efficient, deterence.

INTRODUCTION

In general criminal law perspective, someone commits a crime, he is arrested and punished. That is the legal consequence to him, hence a reason not to commit the crime. Seen from this perspective, the explanation of universal criminal law is simple: it is a way of enforcing rules. Simply put, there are two common models for criminal law: enough punishment always to deter and enough punishment to eliminate all offenses.

A good legal system requires good enforcement. To deter crime, we must catch offenders and punish them. But both activities are costly, so we should take those cost into account in deciding what punishment to impose. From time to time, the reason we do not catch all offenders is that doing so would cost more than it is worth. Part of the cost would be in extra, say, police and courts. Part of it would be in the punishment of innocent defendants. A standard of proof low enough to convict everyone who is guilty will also convict some who are not.

Meanwhile, in Law and Economics perspective there is a concept known as efficient punishment to determine how efficient a punishment on the convicted person. This concept derives from the expressive law theories. Expressive law theories revisit the traditional price theory conceptions of law as an incentive mechanism, developing a richer theory of how legal rules can affect human behavior. According to this theory, the expression of values is an important function played by the law. [3] Through expression the law can trigger the emergence of other incentives by the internalization of the values it embodies. Expressive laws affect behavior, not by threatening sanctions or promising rewards but by changing individual preferences, and in some cases, by affecting social norms and values.

Having this said, there are three central issues to consider: 1. What is the central concept to the study of Law and Economics toward theory of punishment? 2. How to distinguish expressive law theories of punishment from traditional theories? 3. How to justify expressive theory punishment as traditional optimal punishment in the court of justice?

The results of this paper clearly show that the efficiency of punishment is best analyzed by identifying the least costly way of achieving a given objective. Furthermore, it also shows that Law and Economics does not always require the expression of benefits and costs in money terms. In particular, it provides a choice among alternative means and address the preliminary questions of whether the end is worth pursuing, or which among alternative goals should be pursued.

The rest of the paper is organized as follows. Section 2 describes related theories and principles. Section 3 presents argument in defining expressive theory of punishment based on described theories from previous section. Section 4 concludes.

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Theories And Principles

Classical Utilitarian

The field of Law and Economics or as it is more commonly called, "economic analysis of law", may be said to have begun with Bentham. As utilitarian, he formulates one of the earliest versions of modern utility principle, arguing that the greatest happiness of the greatest number is the foundation of morals and legislation. Bentham's formulation is quite problematic, since it identified both quality and quantity of happiness as maximands without specifying the relative weight of each. He identified utility in terms of pleasure and pain, and devised a felcific calculus through which the total utility of an action could be weighed, taking into account such features as the intensity, duration, certainty, and proximity of the antecedent pleasure.

In his Principles of Morals and Legislation, the explanation is simple: happiness is just pleasure and the absence of pain. The value (or disvalue) of a pleasure (or pain) depends only on its intensity and duration, and can (at least in principle) be quantified precisely. Given this, we can reconstruct one line of Bentham's argument for the principle of utility as something like the following:

i. The good of a society is the sume of the happiness of the individuals in that society.
ii. The purpose of morality is promotion of the good society.
iii. A moral principle is ideal if and only if universal conformity to it would maximize the good of society.
iv. A universal conformity to the principle of utility would maximeze the good of society (always to maximize total net balance of pleasures and pains).

Therefore, this formulation of Bentham's imperative is prooved to be problematic since it identifies two maximands, that is degree of pleasure and number of individuals, without specifying the tradeoff between one and the other. The Principles of Morals and Legislation was intended as the intoduction to a (never completed) model penal code.

Theory Of Incentives

The theory of incentives is central to virtually any study in Law and Economics. In fact, the fields of Law and Economics could indeed be described as the theory of incentives. The economic analysis of law builds on the premise that law affects human choice by creating external incentives and promoting the individual internalization of the values expressed by the law.

According to the literature on the economics of deterrence, legal rules can create incentives by affecting the relative cost of alternative behavioral choices.[4] For example, by imposing and enforcing a fine for a given illegal activity, the law raises the "price" of this activity relative to others, which may lead to a substitution effect. In Economics perspective, price theory is concerned with explaining economic activity in terms of the creation and transfer of value, which include the trade of goods and services between economic agents.[5] Moreover, Friedman underlines that the core of price theory is the analysis of why things cost, what they do, and of how prices function to coordinate economic activity.[6]

Price theory models of deterrence focus on the role of law as an instrument for creating external incentives, such as taxes, sanctions, and rewards. When these incentives are at work, the law may modify observed patterns of behavior while leaving individual preference undisturbed. The right rule is to put incentive wherever it will do the most good.

Recent work in behavioral law and economics has brought to situations where the observed effects of legal intervention are at odds with the predictions of the price theory models.[7] Expert of behavioral law and economics had addressed these anomalies, emphasizing other important functions played by the law in the creation of incentives. Two trends in the literature can be identified in this respect: expressive law theory and countervailing norms theory. Another comperhensively related theories such as social sanction theory and efficiency are important ingredients for a more complete understanding of the role of law in affecting behavior in terms of punishment which described as the following.

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[4] David D. Friedman. *Laws Order-What Economics Has To Do With Law and Why It Matters*, Princeton University Press, USA, 2000, p. 68.

[5] Thomas A. Weber, *Price Theory in Economics*, The Oxford Handbook of Pricing Management, Oxford University Press, p. 1. http://econspace.net/papers/Price-Theory-OUP-Preprint.pdf

[6] http://www.daviddfriedman.com/Academic/Price_Theory/PThy_Preface.html

Adam Smith started a puzzling question addressed by price theory is why is water so cheap and diamonds are so expensive, even though water is critical for survival and diamonds are not? In a discussion of this well-known "Diamond-Water Paradox", Smith observes that, the word value, it is to be observed, has two different meanings, and sometimes expresses the utility of some particular object, and sometimes the power of purchasing other goods whis the possession of that object conveys. The one may called "value in use;" the other, "value in exchange."

[7] Cass R. Sunstein. *Behavioral Law & Economics*, Cambridge University Press, New York, 2007, p. 8.

[B]ehavioral Law and Economics explores the impact of human nature on legal matters ranging from tax compliance and voting behavior to corporate finance and crime. Ultimately it shows how, with clearer knowledge of human behavior, we might be better able to predict the actual effects and to assess the real, and poteltial, role of law in society.

Expressive Law Theory

As mentioned earlier that expressive laws affect behavior, not by threatening sanctions or promising rewards but by changing individual preferences. This distinguishes expressive law theories from traditional theories, focused as they are on the role of law as an instrument for creating external incentives, such as taxes, sanctions, and rewards. According to expressive law theory, internalized rules may trigger private enforcement mechanisms and change observed patterns of behavior even in the absence of other external incentives. Private enforcement mechanisms include three main interrelated situations, known as first-party (the rule violator), second-party (its victim), and third-party enforcement (other than the first and second). These three interrelated mechanisms are important elements of expressive effects of law by affecting social norms and values, even in the absence of other internal incentives.

First-party enforcement is a concept based on the idea that law abidance triggers first party enforcement mechanisms, meaning that, independently of the content of the law. Violations of legal commands become subjectively more costly. A sense of guilt and shame at committing illegal actions are examples of first-party enforcement. In other words, first-party enforcement requires no outlays of resources for monitoring and enforcement.

Second party enforcement can be carried out through the withdrawal of future cooperation and reputational and social sanctions and also through self-help and reprisal. In the absence of legal enforcement, people will engage in second-party enforcement against their violators, even when it is not cost-effective to do so. People demonstrate distaste for wrongful behavior and a willingness to punish violators of shared norms, even when punishment is materially costly and there are no plausible future benefits from so behaving.[8]

Third-party enforcement refers to situations in which punishment is carried out in a decentralized fashion by third-party members of society. In this context, third-party members include all members of community other that the rule violator (the first party), its victim (the second party), and those formally entrusted with law enforcement (central law enforcers). The law and its enforcement act as a signal for others witnessing violations, empowering members of a community to exert third-party enforcement against violators under the form of social sanctions and reprobations.

In terms of punishment, scholars have long debated the justifications for and purposes of criminal punishment. One explanation for punishment is the expressive theory of punishment. This holds that punishment holds a largely a communicative purpose.[9] Criminal punishment serves to condemn a criminal morality for his or her acts. This moral condemnation happens in plain sight of the rest of the world[10] and produces effects that exceeded the cost imposed by the sanction. Legal sanctions no longer operate as a "price" attached to a given behavior, but produce additional effects through expression and internalization[11]. Punishment rebukes the criminal for his or her sanctions in the eyes of society at large. Scholars disagree about whether this communicative function is right in and of itself and is focused backward on the crime and the criminal [12], or whether it is focused toward the future and results in desirable consequences[13]. Other scholars argue that a democratic state lacks the type of political and moral authority needed to justify condemnatory punishment.

Social Sanctions Theory

Scholars and legal policymakers, even law enforcement have long realized that legal rules and sanctions are not the only factors that impact behavior. Social norms and social sanctions also play an important role in influencing behavior.[14] Social sanctions are external, non-legal preassures to engage in certain behavior. Social preassures can come from oneself, friends, neighnors, or the community as a whole. The distinction of three forms of social sanctions (first-party, second-party, and third-party sanctions) is based on who enforces the sanction.

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[8] Herbert Gintis. "Beyond Homo Economicus: evidence from experimental economics", *Ecological Economics University of Massachusetts, Vol. 35,* USA, 2000, pp. 316-317. http://www.uvm.edu/~jfarley/EEseminar/readings/beyond%20 homo%20e.pdf

[9] Davis, Michael. "Criminal Desert, Harm, and Fairness," *Israel Law Review,*1991, p. 524.

[10] Bennet, Christopher. 2011. "Expressive punishment and political authority," *8 Ohio State Journal of Criminal Law,* pp. 299-301. http://moritzlaw.osu.edu/students/groups/osjcl/files/2012/05/Bennett.pdf

[11] Robert Cooter. "Three Effects of Social Norms on Law: Expression, Deterrence, and Internalization", *Berkeley Law Scholarship Repository, 1-1-2000, Or. L. Rev, Vol. 9,* pp. 4-6. http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=2548&context=facpubs

[12] Bennett, *loc.cit*

[13] Duff, R. Anthony, and Stuart P. Green. 2011. *Introduction: searching for foundations: Philosophical Foundations of Criminal Law*, Oxford University Press, pp. 2-5, 126-29.

[14] A fundamental insight of the economic analysis of law is the notion that legal sanctions are "prices" set for given categories of legally relevant behavior. This idea develops around the positive conception of law as a command backed by an enforceable sanction. It poses an essential question as to how the legal system can set efficient prices if there is no market process that generates them.

A fundamental question addressed by the recent law and norms literature considers the critical interaction between legal and social sanctions in promoting socially desirable behavior. When the legal system regulates a situation already governed by informal social norms, several possible dynamics may be triggered. In some cases, the creation of a legal sanction may trigger or reinforce preexisting social santions [15].

Countervailing Norms

Recent contributions to the Law and Economics have pointed out that the effects of law further depend on the social response triggered by the enactment and enforcement of a new rule.16 Social reaction may boost or weaken the effects of legal intervention.

A legal rule may be perceived as unfair in two alternative ways: excess or defect. Alaw fails in excess when it punishes conduct perceived as harmless or socially desirable; it fails in defect when it fails to provide adequate punishment for harmful and undesirable behavior. Legitimacy is undermined when the content of the law departs from social norms, be they based on moral, ethical, or merely cutural values.

According to this theory, absent such initial alignment between legal rules and social values, expressed social opinion and reaction to unjust laws may undermine the effect of legal incentives. A high number of people opposing the law may reinforce or weaken its deterent effect, depending on whether the law falls short or in excess of current social values.

Efficiency

Much of the economic analysis of law is informed by the goal of promoting efficiency. Several competing definitions of efficiency are utilized, including the notions of Pareto efficiency, Kaldor-Hicks efficiency, Nash efficiency, and Rawlsian maximin efficiency. Although in some situations these alternative criteria of efficiency lead to similar normative results, in most applications the choice of a specific criterion of efficiency drives most of the prescriptive results. Hence, the methodological choice in efficiency analysis carries important ideological significance. The concept of efficiency as a normative criterion should be distinguished from the concept of cost-effectiveness as an instrumental criterion. When used normatively, the efficiency criterion guides policy choices. Cost-effectiveness analysis takes the policy goal as given and is used as an instrument of cost minimization in the implementation of the policy objectives. The instrumental use of cost-effectiveness is therefore less controversial, and is accepted even by scholars who do not endorse the normative use of economic analysis.

Argument

Detterence

Detterence is a fundamental concept in law, and economic analysis has played an important role in shedding light on the use of law as an instrument of optimal detterence. Legal systems seek to deter harmful and undesiable acts and to incentivize socially desirable acts.

Criminal law attaches penalties to various illegal acts in order to deter individuals from engaging in criminal activities.[17] Straightforward as they may appear, the choice of legal instruments to produce optimal detterence is far from obvious. As Polinsky and Shavell point out, policymakers often have to consider the detterence effects of criminal sanctions before making decisions to increase penalties to reduce enforcement sanctions before making decisions to increase penalties to reduce enforcement costs. [18] Although policymakers might believe that raising the penalties on lower-level crimes will decrease the need to employ law enforcement officers, this reduction in the probability of detection will also affect high-level crimes, which already carry high penalties. Since these crimes also tend to carry higher levels of benefits, the increase penalties for lower-level offenses and the resulting decrease in law enforcement may reduce the law's detterent effect on high-level offenses.

Becker has pointed out that, when actors consider multiple harful acts, legal penalties should be designed to provide marginal detterence for each harmful act.[19] If the law attaches the most preserve penalty to less severe crimes, there may not be anything left to deter the commission of more severe crimes. As Polinsky and

[15] Cooter, *op. cit*, pp. 8-9. See also Eric Rasmusen. "Stigma and Self-Fulfilling Expectations of Criminality", *Journal of Law and Economics, Vol. xxxix*, The University of Chicago Press, 1996, USA.

[16] Francesco Parisi, Georg Von Wangenheim. "Legislation and Countervailing Effects from Social Norms", *George Mason Law and Economics Research Paper No. 04-31, SSRN*, pp. 4-12. http://papers.ssrn.com/sol3/papers.cfm?abstract id=569383

[17] Garry S. Becker, "Crime and Punishment: An Economic Approach", *University of Chicago and National Bureau of Economic Research*, pp. 23-50. http://www.nber.org/chapters/c3625.pdf

See also, George J. Stigler. "The Optimum Enforcement of Laws", *University of Chicago and National Bureau of Economic Research*, pp. 59-60, 66. http://www.nber.org/chapters/c3626.pdf

[18] A. Mitchell Polinsky, Steven Shavell. "The Theory of Public Enforcement of Law", *Elsevier B. V*, 2007, pp 407-410. http://www.law.harvard.edu/faculty/shavell/pdf/07-Polinsky-Shavell-Public%20Enforcement%20of%20Law-Hdbk%20LE. pdf

[19] Becker, *op. cit.*

Shavell point out, marginal detterence can sometimes affect detterence generally. In order to increase penalties enough on severe crimes to have a meaningful marginal detterence effect, the penalties on lower-level crimes might be so low that they serve no detterent effect.[20]

Marginal Detterence

The predominant schools in economics focus their analysis on small, incremental changes in variables. These incremental changes are known as marginal changes. Marginalism is the term used to refer to this type of analysis in order to make economic decisions.[21]

The logic of marginalism suggests that there is an optimal level for most activities. By focusing on small, incremental changes, certain techniques, ussualy mathematical, can be used in marginal analysis to determine maximum, minimum, or even optimum levels of an activity under certain ideal conditions

Law and Economics applies marginal analysis to people's interactions with the legal system. A thief will decide to steal a car by comparing his or her probability being caught and expected prison term if he or she is caught (marginal cost) with the resale value of the car, say, in the black market (the marginal benefit).

Marginal detterence can be described when actor consider multiple harmful acts and are likely to choose one, legal penalties should be structured in such way as to provide detterence for all harmful acts. Becker introduced the concept of marginal detterence, in his study of optimal penalties for multiple harmful acts.[22] The law attaches maximal penalties to the most severe harms and also attaches lower levels of penalties to less severe harms.

Enforcement Cost And Punishment Cost

To deter crime, we must catch offenders and punish them. But both activities are costly, so we should take those cost into account in deciding what punishment to impose. The cost per offense usually increases with both probability of apprehension and severity of punishment, so a higher expected punishment costs more per offense to impose. It may sometimes, however, cost less in total, since a higher punishment will deter some offenses, and offenses that are deterred do not have to be punished.[23]

It is obvious why the cost per offense increase with probability of apprehension: It takes more police to catch 50 murderers out of a 100 than to catch 25, and it takes more prosecutors and court time to convict them. To see why it also increases with the severity of the punishment, it is worth thinking a little more about punishment cost.

When a convicted criminal pays one million rupiahs fine to the state, the cost to him, which is what gives the punishment its deterrent effect, is one miliion rupiahs, but the net cost is zero. Every rupiah the criminal loses the state collects. Punishment cost defined as the difference between the cost of punishment imposes on the criminal and the benefit it provides to others, is zero.

Suppose the criminal cannot pay enough to provide the amount of deterrence we want to impose. Instead of fining him, we imprison him for a year, which is equivalent from his standpoint, to say, a million rupiahs fine the punishment costs him a million rupiahs, but the enforcement system receives nothing. Instead the rest of us must spend money in tax, say another one million rupiahs, to run the prison. The net cost of the punishment, the criminal's loss plus the enforcement system's loss, is two million rupiahs. It is as if he had paid a fine of one million rupiahs but we had collected a fine of minus one million.

As we increase the size of the punishment we wish to impose, the number of offenders who can pay it as a fine decreases, so we tend to shift to more costly punishments such as imprisonment. Hence increasing the severity of the punishment typically increases the punishment cost per offense punished.

Distinctive Theories And Concepts

The next question to discuss is how much deterrence that should be. How many offenses should be detered, and how many should we fail to deter? It is inefficient for me to steal a television set that is worth five million rupiahs to you and only four million rupiahs to me. But it is still more inefficient to prevent me stealing the set if the cost of doing so is two million rupiahs spent on police, courts, and prisons. The rule "prevent all inefficient offenses and only inefficient offenses" is correct only if doing so is costless. The correct rule in the more general case is to prevent an offense if and only if the net cost from the offense occurring is greater than the cost of preventing it. The economic reason we do not increase the punishment for murder may be, and probably is, that although we would like to prevent more murders than we do prevent, the cost of doing so is more than we are willing to pay.

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[20] Polinsky and Shavel, *op. cit.*

[21] For example, a rational consumer decides whether to buy one more unit of a good by comparing his or her marginal benefit derived from it to the marginal cost of acquiring it. A rational producer decides whether to hire another worker by comparing the worker's wage (the marginal cost) with the value of the output he or she will produce.

[22] Becker, *loc.cit.*

[23] Such costs can be defined as transaction costs. See Walter J. Wessels. *Economics*, Business Review Book, Barron's Educational Series, 2006, USA, p. 534.

Higher expected punishment deters some offenses. Increasing the expected punishment reduces total enforcement and punishment cost. The additional cost of deterring by increasing expected punishment is negative, making it efficient to prevent not only all inefficient offenses but some efficient ones as well in order to save the cost of punishing them. In the extreme one could imagine a society where the penalty for shoplifting was death, and say death penalty is the most preserve penalty, with the result that there were no shoplifters and nobody ever had to be executed. On the other hand, when more severe crimes happen, say again terrorism and corruption, there will be nothing left to detter. Therefore, we shall provide enough ammount of detterence we want to impose.

Justification:

Any theory of crime must answer two questions: "What acts should be punished?" and "To what extent?" The first question asks for the distinguishing criteria of a crime, and the second one question asks to calibrate punishment. A theory of crime must provide predictions about the effect of alternative criminal policies on crime rates and other policy values. I argue that the moral theory weakens the important questions or gives the wrong answers when applied to details of crime policy. Therefore, I propose four important aspects to consider in determining criteria of a crime in the court of justice. ***First,*** the criminal intent. Develop this concept with the idea of *mens rea* in knowing the distinctive between intentional harm and accidental. ***Second,*** public harm and public prosecution. It reveals the nature of the harms and views how crime harms the public. The traditional theory of public harm justifies punishing attempts to cause harm, even when they fail (*ex ante* punishment). ***Third,*** the standard of proof. In a criminal action in common law countries, the prosecutor must prove the case *beyond a reasonable doubt.* Satisfying a standard of proof increases expected punishment. ***Fourth***, the punishment. It can be constructed by using the following formulas:

*Framing the net damage**:***
Net damage=damage to victim-gain to criminal.

Marginal offense:
Gain to criminal=expected punishment.

Hence: **Net damage=damage to victim-expected punishment.**

For optimal punishment:
Cost of deterring one more offense=Net damage=damage to victim-expected punishment.

Framing expected punishment:
Expected punishment=damage to victim-cost of deterring one more offense.

Fifth, legal compliance. Compliance with law is driven not only by the legal threat of sanctions or the promise of rewards carried out by law but also by individuals internalization of the values it embodies[24].

Conclusion

The need for heavy punishments are widely accepted, but they also matter what kind of punishments there are and how they are administered in order to provide efficient legal outcome so that enough punishment to deter and enough punishment to eliminate all offenses. Starting from this point, I began this writing with a short discussion of the traditional characteristics of a crime, then recast the theories of crime in terms of theory of criminal behavior. These theories hold that rational criminals compare the benefits of crime with the expected punishment imposed by the criminal justice system. I conclude that these theories can be applied in the court of justice to develop a theory of optimal punishment, based upon the goal of minimizing the sum of the social harm caused by crime and the cost of deterring it. And again, the rule "prevent all inefficient offenses and only inefficient offenses" is correct only if doing so is costless.

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PSYCHOLOGICAL INTERVENTION AS ADDITIONAL SANCTION IN THE RESTORATIVE JUSTICE SYSTEM ON CHILD AS PERPETRATORS OF VIOLENCE

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ABSTRACT

Aggressive behavior by children who lead to the violent behavior is increasing. The settlement of child cases as perpetrators of violence as regulated in Law Number 11 Year 2012 on Child Criminal Justice System has not been effective yet. The question is why the legal approach is not effective. This question was answered by doing psychological legal research. The results showed that (1) the legal approach did not touch the basic psychological issues that become the psychological basis of the child's acts of violence; (2) there is no article that explicitly indicates the psychological intervention to change the child's behavior due to that the legal approach given still limited to the provision of vocational education, following one-way extension; (3) there was no standard operational procedure for the implementation and supervision of psychological interventions that facilitate the judge to implement it. Recommendation, it is necessary to add the article as the basis of psychological intervention in the legal and procedural operational standard for the supervision of such psychological intervention so that the background which becomes the basis of child abuse behavior can be eliminated.

Keywords : Violent Behavior, Psychological Intervention, Additional Sanctions, Law

Introduction

In general, the facts of life show that since human beings are born, they live undergothe growth, startedthe mentioned human growth at the time of human being baby, children, and adolescent, adult, old until come to its death. Each range of growth has its own character; the character is expressed in the logic of thinking, the way of speaking, the behavior, and the actions of the human being concerned. Humans are born and grow with increasing numbers of plural and interact with each other to form social creatures that are influenced by internal and external factors, such as their respective social environments.

However, human characters for each other in the same environment do not always form a uniform character. One is meant when interacting with others are integrative, harmonious, but also aggressive, conflict, and even destructive to others. The latter behavior, for example, there are those who categorize as delinquency, even there is also a mischief it leads to violations of social norms that have become the establishment of the community where they are. But there are also those that can be categorized as acts that violate written norms or public law, such as criminal law so that the concerned one can be brought into the realm of public law to determine whether it can be criminal action or not.

Once when a police (woman) Temanggung toldher story:

There is a male student a high school pregnant girlfriend. The victim's family declared that they could not accept, and proceed legally. The police then process the report, and call and check the suspect. Without difficulty, the suspect acknowledged all his actions, expressed his regret, but claimed to be ready to bear all risks, including to legally marry a woman who was pregnant because of his actions but the women did not want. They declare they cannot accept a son-in-law who has defamed her in society, and still wants to see the perpetrator go to jail.

If we do not process, he threatened to report us to the Police Commission. When we process, the conscience cannot bear to see the young girl gave birth to a child without a father. What should we do, because the perpetrators and the victims are the children? Our boss also does not provide clear direction. Finally, the case is in doubt, I hesitate to continue the Minutes of Examination (BAP) because I am sure, the way of peace is better, the woman has a husband, when the child is born also has a clear father. I often hear that there is a "restorative justice" in legal way, but I am not sure about this option, please advise me, "Police said

The legal restorative justice way as intended by such police is a model of justice seeking when the perpetrator of the crime is committed by the child or adolescent and the justice expected is restorative justice. In the model of restorative justice, the punishment of perpetrators persists, but the punishment is as part of the educational process, not as revenge and punishment. Punishment within the framework of the process of education is not a punishment that weakens the spirit of life let alone kill the future of the child, but instead serves to enlighten morally and mature as a personality person intact. Therefore, punishment is set not a criminal, but an act through what is called forced education.

Determination of the type of punishment is done through the mechanism established by the Law of Juvenile Justice System in which the involved are the community leaders themselves. The congregation is the confidential; they (the perpetrator, the victim, the parent, and the public figure) in equal positions openly to expose their contents, then decide what action the perpetrator should perform, once he understands the mistakes he has made. Some options theoretically depend on the lightness and severity of the misbehavior by a child such as:

1. The perpetrator is returned to the parent full of notes, for example the perpetrator comes to the victim's home to apologize and give the compensation after discussed in parallel position.
2. The perpetrator undergoes social work such as compiling archives, cataloging school libraries, sorting letters at the Post Office or other social work done after school hours, according to age, health condition, location of residence, physical abilities, and so on.
3. The offender is incorporated into social education institutions, social institutions, and places that are prepared to educate children with this behavioral disorder.

In the psychological perspective, the punishment which is born of a juridical mechanism with a restorative approach to a person committing a crime does not touch the basic factor that is the main cause of a person's growing criminal act. The research question, is any other concept other than the juridical concepts that can be applied to the perpetrators not to commit any further criminal acts? How do I apply the concept to work effectively?

Concepts and Methodology

Above questions was answered by doing psychological legal research. It means that doing research not only study to the relevant document on a series of act and other related regulations but also try to seek the basics of violent behavior. In relation to these question, interviewed to the related informant done. First step of all, based on Article 1 paragraph (2) of Law no. 11 Year 2012 on the Criminal Justice System of Children, prioritizing Restorative Justice and Diversion approaches.

Restorative Justice is the settlement of criminal cases involving perpetrators, victims, families of perpetrators/victims and other related parties to jointly seek a fair settlement by emphasizing restoration back to the original state rather than retaliation. While Diversion is the transfer of settlement of child cases from criminal justice process to process outside of criminal justice.

While in handling children in conflict with the law there are 7 (seven) Pillars of Juvenile Justice namely Police, Advocate, Prosecutor, Judge, Breath Officer, Prison Officer and Citizen. In general, the handling of cases of children in conflict with the law is still concerning whether caused by the lack of understanding of law enforcement officers. So it needs the other approach, such as a psychological approach.

Discussion

In the Developed Countries

In developed countries like England, the approach of restorative justice has long been practiced and other advanced countries (Saptomo, 2017. Similarly, other developed countries such as Canada as a former British colony state also has a legitimate paradigm of restorative justice practiced up to now. European countries such as Sweden, Norway, and in Australia, New Zealand, and even the United States themselves have mechanisms for practicing restorative justice. It has also been practiced in several countries in the Scandinavian region and Latin American countries such as Columbia, Chile and Brazil. In Asian countries, such as Japan, and developing countries, such as the Philippines including in Indonesia practice the same thing.

In Indonesia

Theft Case

On Wednesday, October 14, 2015 at around 24:00 pm Muhammad Ilham Saputra (17 years), Parma Man (15 Years), and Dwi walkedto Cijantung area. They passed in Kalisari area, Parma Man intended to buy cigarettes in a coffee shop, then Ilham Saputra waiting on the Roadside. By the time Parma Man entered the coffee shop, the owner was asleep. Then Parma Man tried several times to wake up but the victim still did not wake up. Parma Man then left the shop and abandoned his intention to buy cigarettes. But suddenly Parma Man saw a motorcycle contact lock belonging to the victim who was beside the victim and saw the Vario Brand motorcycles in front of the shop.

After that Parma Man returns to the place where Muhammad Ilham Saputra and Dwi wait and tell him what he sees inside the shop. Heard it arosed from the Dwi's intention to take the bike belonging to the victim's motorcycle and asked the Inspector and Parma Man to keep watch so that their actions are not known by others, while Dwi went to the victim's shop and managed to bring a motorcycle bolt belonging to the victim followed by Ilham and Parma Man from behind then clients and men go home respectively.

The next day at around 16:00 pm, Muhammad Ilham Saputra and Parma Man come to the empty land where the victim's motorcycle is stored. Until there's Dwi, then they dismantled the motorcycle in order not to be recognized by the victim again. Then Muhammad Ilham Saputra received information from Dwi if the

motorcycle owned by the victim has been offered Rp. 2.000.000, - then Dwi asked his other friends to clean the motorcycle because according to the plan will be sold tomorrow.
But when they were cleaning their bikes they were surprised by the arrival of several police officers who had been suspicious of their movements several hours earlier. Then Ilham Saputra was taken to Pasar Rebo Police for questioning, a day later Muhammad Ilham Saputra, Parma Man and Dwi were taken to the East Jakarta Police Office to underwent further examination while

The Juridical Approach

The Juridical Approach is anpureapproach on the legal tract. The mentioned one is an approach that implements the provisions of the Criminal Code (Kitab Hukum-Hukum Pidana-KUHP), for example,in context of theft ,Criminal Act can be applied Article 362, and if with the weighting then applied the provisions as referred to in Article 363 paragraph (1) to the 3rd and 4th Criminal Code. Muhammad Ilham Saputra will be applied such article and as inmate or prisoner. Below matrix is an example of a purely juridical approach the data as shown in the mention of prisoners' status.

Number of Inmates and Detainees

Age Group	Status	Male	Female	Total
Adult	Inmate	140.414	8.506	148.920
	prisoner	61.335	3.371	64.706
	Total	**201.749**	**11.877**	**213.626**
Children	Inmate	2.246	49	2.295
	Prisoner	898	19	917
	Total	**3.144**	**68**	**3.212**
Adults and Children Prisoners	Inmate	142.660	8.555	151.215
	Prisoner	62.233	3.390	65.623
	Total	**204.893**	**11.945**	**216.838**

Source:LembagaPemasyarakatan RI, 2018 (http://smslap.ditjenpas.go.id)

Restorative Justice Approach

Restorative Justice Approach is a criminal law approach that contains a number of traditional values into its judgments. A scholar named Jeff Christian, an international prison expert from Canada, argues that the restorative justice approach is a criminal act not only seen from the legal aspect but also related to moral, social, economic, religious and customary aspects-local rituals, as well as other considerations.Sociologically, Indonesia as an archipelagic State, both large and small islands decomposes from Sabang to Merauke. There is also a richness of traditional value and has a legal settlement mechanism based on local wisdom (Saptomo, 2017). This condition illustrates the richness and ease of applying the restorative justice approach in Indonesia.

In the context of the history of legislation in Indonesia, the settlement of child crime has been regulated in Act Number 3 Year 1997 on Juvenile Court. The law is valid since 15 years ago and during that time there has been a study where prisons are not a good place for children especially with the age of criminal responsibility is too low. Given the criminal offense in which the perpetrator is generally still a teenager, the effort of applying the criminal law using restorative justice approach so that with various efforts that have been done either through policy advocacy and defense against the perpetrator who classified child or adolescent done.

The theft case can be applied purely juridical approach. Criminal acts of theft, purely juridical, applicable provisions of the Criminal Code (Criminal Code), But by considering the perpetrators are by children, and then the application of restorative justice approach is very possible and opened.

Result of Restorative Justice Approach

In addition, jurisdiction with regard to Article 12 Jo Article 43 paragraph (3), Article 29 paragraph (3) Jo Article 7 paragraph (1), (2) and Article 10 (1) of Law Number 11 Year 2010 regarding Juvenile Justice System and Law Number 8 Year on Criminal Procedure Law has been stipulated agreement of East Jakarta Court, that is Diversity Agreement between child of Muhammad.Ilham Saputra and Parma Man hereinafter referred to as party I with assisted by parents, that is SitiHolidah and Donny Firmansyah hereinafter referred to as party II. The Diversion Agreement was conducted on Thursday, October 29, 2015 in the Children's Special Room at East Jakarta District Attorney, which contained the following matters:

a) That party I as the child's parents apologize to the II party;
b) That Parties II forgive the acts committed by the children of party I, party II and party I has been reached the agreement of child party I returned to party I as the parent to supervise and guide the child party I;

c) Whereas based on suggestions and conclusions of the Community Guidance, the child of the first party shall be returned to the parents with the obligation to report to the East Java-North Public Health Supervisors periodically for 6 (six) months;
d) That Party I promises to supervise and guide children and children promise not to repeat their actions and will not commit a crime;
e) Whereas if the child of I Party repeats and / or commits a criminal offense while still under the supervision of North East Jakarta Prison, then the party II will return the proceeding of the case.

Psychological Approach

Restorative justice approach still leaves the opportunity for the child to do the criminal act again considering the diversion agreement (abovepoint 5) there is a provision that "if the child party I repeat and or conduct a criminal act while still under the supervision of North East Jakarta Prison, then the party II will return the proceding of the case. It meant that the diversion agreement is not sure of the effectiveness of the deal itself. Considering this psychological approach is necessary considering the previous approaches (pure juridical and restorative justice) is an approach that comes from outside factors of the self-perpetrators so it is feared will do the act of repetition as in the agreement Diversion point 5.

In the psychological perspective, the view that the Restorative Justice approach still leaves the chance that the perpetrator will repeat again and the factors in which the basis of a person committed the crime have not been touched. Factor in referred to is the psychological area of the perpetrator so that it needs psychological approach in order to touch the main factor that became the basis of the cause of someone doing the crime so that the need for psychological intervention.

By understanding, then we think as the author, the fulfillment of factors in the form of psychological intervention should be included as an additional "sanction" in the judge's judgment or the decision of the diversion agreement. Such an approach would be more effective if the Juvenile Court determined the article that regulates the handling of children from the psychological point of view so that it is done simultaneously between restorative justice approaches with psychological approach as a treatment for the child to return intact as a normal human being.

Psychological intervention as Additional Sanction

According to psychological perspective,every period of human development has it owns uniqeness. Therefore, the the way to handletoddler, children, adolescents, and adults, will be very different. Adolescence can be said to be a transition from child to adult, and at this stage of development, there are some challenges that must be passed by the individual. Adolescenceusually very easy to imitate the behavior of others because they are looking for theiridentity.This need howeveris often used by certain parties to influence children/adolescents to take action against the law.

Hurlock (1999) divides adolescence into twostages,there are:early adolescence for those aged 11/12-16/17 and late adolescents for those aged 16/17-18. Sarwono (2011) explained that the age limit of adolescents in Indonesia is ranged from 11-24 years old and not married. This psychological perspective is certainly different from the legal perspective, where in Indonesia the concept of adolescence is unknown in some applicable laws. For example, it states in the juvenile court law, that a child is an individual who is <18 years old and has never been married, and if the child commits a crime at the age of 18 years but has not reached 21 years, he/she will still be brought to the hearing. Therefore, based on legal perspective, people in terms of age are only differentiated between children and adults.

Based on the above explanation, although children and adolescents have differences in the stage of cognitive, physical, psychological, and social development but in this research all individuals aged 12-18 years, at this case, Muhammad Ilham Saputra (17 years) and Parma Man (15 years) will be referred to as children, and this study will focus the discussion on criminally convicted children.

Santrock (in Putri and Hidayah, 2016) divides juvenile delinquency into 2 types: index violation in the form of criminal acts such as robbery, assault, rape, murder and others; and violation status, which is a delinquency often done by teenagers such as ditching, drinking alcohol, having sex and others. Scarpa and Raine (1997) also divides violence or aggression into two forms, namely instrumental/proactive agrression, a form of aggressiveness that does not involve emotion and is usually intended to achieve certain goals, and hostile/reactive aggression, which is a form of aggressive behavior associated with anger and increased emotional intensity.

Putri and Hidayah (2016) explain that the variable that connects aggressiveness or violence and violent behavior is anger. Therefore in children, the uncontrolled anger can lead to children's aggressiveness. It can lead children to do hostel aggression and a lot of index violation forms, and so at the extreme level it can make them commit a criminal offense and imprisoned. Anger and aggressive behavior can be very dangerous when not managed and can encourage someone to kill (Nasir&Ghanib, 2013). There are some negative consequences for imprisoned children.Negative consequences that can be felt by children are:poor health (physically and psychologically), loss of opportunities to learn, less interaction with parents and the previous social environment.

Putri and Hidayah (2016) found that the level of anger possessed by children in prison tends to be higher than children outside the prison. It means that being in the prison have not been able to defuse the anger of child prisoners, while this anger can trigger aggressive behavior, and it also means that violent behavior may recur once they get out of jail. It also found that self-esteem among children in prison with children outside the prison has no difference. It shows that imprisoned children may have the same high self-esteem as children outside the prison, as they may not immediately realize their mistakes. This can also be due to the fact that inside the detention center he is considered "great","brave","cool" by other prisoners, so he/she retains his/her aggressive behavior. Based on the above description, juridical punishment alone has not been effective to change children behavior. It takes deeper intervention that can change behavior, and in this area, psychology can collaborate with the law to help these children.

In order to provide the right intervention, we need to first understand the cause of aggressive behavior, likethe cause of aggresiveness that done by Muhammad Ilham Saputraand Parma Man.Why? Because of below argumentation such as Myers (in Rahmawati and Asyanti, 2017) says that factors that affect aggressive behavior are: frustration; learning aggression, rewards and social learning; environmental influences; the brain's nervous system; genetic or hereditary factors; and chemical factors in the blood (alcohol and drugs). The findings of Rahmawati and Asyanti's research (2017) complement this opinion, which is the factor causing aggressive behavior in children in one of the villages in Sukoharjaare: low education; low parental supervision;aggressive behavior examples from adults; unstable emotions, and impulsive thought. The reason for the child to do agressive behavioris: the curiosity to participate in the fight, friends, his self-esteem being offended, a quick way to solve problems, and for some,they have no specific reason. The above research can be a reflection of the factors and reasons forchildren involved in aggressive behavior in Indonesia.

Recognizing the cause of anger is very important to plan the intervention. For example, if unstable emotion in children can make them fight each other, then we have to teach them to regulate their emotion. One of the interventions that is considered quite capable of helping children is called anger management. According Wilkowski& Robinson (in Siddiqah, 2010) anger management programs need to be developed to improve self-control through cognitive processes. This is expected to reduce the tendency for anger and the emergence of aggressive behavior.

Some examples of the anger management programs, are design by: (1)Currie's research (in Siddiqah, 2010),the program name is Doing Anger Differently (DAD), it proven to effectively reduce aggressive behavior of risky teenagers by providing exercise for 10 weeks (20 sessions) through playing percussion instruments as means to divert anger expressions and train adolescents to seek alternative responses to anger other than to behave aggressively. Hermann &McWhirter, (in Siddiqah, 2010) design 15 sessions of the SCARE (Student Created Aggression Replacement Education) program, found that risky adolescents who had attended the program had significantly lower levels of anger and aggressive behavior and had higher levels of anger control. Siddiqah (2010),design "Stay Cool" anger management program, this program was consist of eight sessions, including the introduction of angry emotions, recognizing anger and anger triggers, using anger-reduction techniques, and finding alternative solutions to problems.

The influence of interventions in varying degrees in any given program can be a positive expectation that psychological interventions as additional sanctions to children in conflict with the law can lead to behavioral changes, particularly in the anger management and aggressive behavior.Intervention can prevent children from making the same mistakes and get criminal punishment.

Closing

Based on above psychological legal research, concluded that (1) the legal approach did not touch the basic psychological issues which is the psychological basis of the child's behavior of violence; (2) restorative justice still has weakness due to basic needs psychologically was not fulfilled yet; (3) needed other effective approach, that’s psychological intervention approach. Recommendations, due to there is no article that explicitly indicates the psychological intervention to change the child's behavior so that needs an article of regulation the psychological intervention as additional sanction and standard operational procedure for the implementation and supervision of psychological interventions in order to facilitate the judge to implement it. Psychological intervention is a need to treatment, so the basis of child’s behavior of violence can be eliminated.

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THE RECONSTRUCTION OF REGULATION SYSTEM PROOF TO CRIMINAL OFFENSE OF MONEY LAUNDERING

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ABSTRACT

This study aims to determine, review and analyze the reconstruction of regulation system in money laundering crime in terms of legal system aspect. This research is also a perspective to construct Reconstruction of the ideal and adactive verification system. This preparation is expected to make the legal bored in order pengutan return of state losses. The result of the research of the system and the mechanism of the criminal act of punishment of uanaga still not optimal in lakaukan by law enforcement apparatus. Various obstacles are encountered in the implementation verification systems. The unclear arrangement of reversed system in money laundering crime causes the applying has not been effective yet, can the fund result in contractualization. On the other hand, the institutional structure of law enforcement apparatus is not yet applied synergistically; especially in the activity of exposing the crime of fiber weakness of asset tracking has not yet revealed the crime from fiber weakness of trace of its original crime. Asset delineation has also not maximized the collection of evidence relating to money laundering criminal acts. The legal culture factor also supports the reconstruction of regulation verification system in money laundering crime. That the implementation of reverse evidentiary burden in money laundering crime is a new and good method to answer the problem of crime of origin in TPPU in Indonesia. The provisions in money laundering law need to be revised, by requiring original crime and money laundering in one union of examination in court. In the institutional aspects of law enforcement, it should be at the expense of the function of tracing assets with the carrying capacity of investigative audit.

Keywords : Reconstruction, Regulation Proof, MoneyLaundering, Synergy

Introduction

Money laundering is the most dominant type of crime or offense committed primarily through the financial system. The most common crime act done through a financial system service in a country is money laundering.[1] The use of financial institutions in money laundering crimes can be in the form of investing and transferring money from proceeds of crime such as money from corruption.[2]

The crime of money laundering is the result of a crime in the form of assets acquired from corruption. This indicates that money laundering has a very close relationship with other criminal acts including corruption as a predicate crime. All property allegedly derived from proceeds of crime that is hidden or disguised is a crime of money laundering.

In its development, money laundering crimes are increasingly complex, crossing the boundaries of a country's jurisdiction, indications of money laundering as organized crime and an increasingly varied mode, by utilizing institutions outside the financial system. To anticipate this, the Financial Action Task Force (FATF) on Money Laundering has issued an international standard that is a measure for each country in the prevention and eradication of corruption money laundering. Such standards include the extension of the Reporting Parties which include gems and jewelers / precious metals and motor vehicle traders. The release of this international standard is done because it is believed that preventing and eradicating Money Laundering crimes needs to be done regional and international cooperation through bilateral or multilateral forums so that the intensity of criminal acts that produce or involve large amount of assets can be minimized.

In practice, the people who do tend to commit the same crime over and over again if they analyze economically the profits to be gained will be greater than the cost incurred. Profits are calculated from the possibility of costs when caught and proven to commit crimes and the amount of punishment that will be imposed. If the cost of a crime that has been calculated is lower than the profit to be earned while committing the crime, then the person will respond by committing the same crime.[3]

Rapid steps have been made by the government by enacting Law No. 15 of 2002 which is refined to Law No. 25 of 2003 and is currently amended to Law No. 8 of 2010 on Prevention and Eradication of Money Laundering Crime. The establishment of the Money Laundering Law, is a form of commitment and political will of the Indonesian state to combat money laundering issues. Proof of acceptance, especially in the Anti

[1] Yunus Husein, *"Pembangunan Rezim Anti Pencucian Uang Di Indonesia DanImplikasinya Terhadap Profesi Akuntan"*, Paper presented on Economy Scientific Forum on Acoountant Study (FIESTA 2006) and National Gathering of Jaringan MahasiswaAkuntansi Indonesia (TN-JMAI, held by Faculty of Economy University BungHatta, in Padang, 8 May 2006, p. 1

[2] Ibid.

[3] Hikmahanto Juwana, Lecture Material on Law Theory, UI Press, p.152.

Money laundering and Corruption Prevention and Eradication Act is always faced with respect and guarantee of Human Rights. When associated with the principle of presumption of innocence, the application of proof has violated the principle of "presumption of innocence" and is at once contrary to Human Rights. This issue has always surfaced in law enforcement in the judicial process, especially in the court verification stage. The rejection of this limited application of proof will certainly be one of the obstacles in the enforcement of prime law, especially in money laundering crime related to corruption crime.

For this purpose, this paper focuses on the validity of the principle of proof in the Law on Prevention and Eradication of Money Laundering corruption, with reference to international rules, related laws and regulations as well as the theories and opinions of experts.

Main Problem

In writing this paper, the subject matter is presented, namely as follows:

1. How does the regulation of the System verify the non-criminal corruption of money laundering?
2. How is the Implementation of the System of Proof of Non-Crime of Money Laundering Corruption?
3. How to Reconstruct a System of Proof of Non-Crime of Money Laundering Corruption?

Discussion

Regulation of Proof System Against Non-Criminal Money Laundering Corruption.

Proof is a process of activity to prove something or state the truth about an event.[4] Provisions on valid evidence are provided for in Article 184 of the Criminal Procedure Code:

(1) Legal evidence is:
   a. Statement of witnesses;
   b. Expert information;
   c. Letter;
   d. Hints;
   e. Defendant's description.

(2) Things that are generally known do not need to be proven.

Proof is an important part in the search for material truth in the process of examining criminal cases. The Continental European System adopted by Indonesia uses the judge's conviction to assess the evidence with his own convictions. The judge in this proof must take into account the interests of the community and the defendant. The public interest means that the person who has committed a criminal offense must obtain sanctions for the achievement of security, welfare, and stability in the community. While the interests of the accused mean that he should be treated fairly in accordance with the principle of presumption of innocence.

To achieve this, then the law of evidence is required. The law of proof is the legal provisions that govern how the process of proof is done. Proof according to science can be divided into four systems, namely:

a. Confidence-based proof.

The system states that judges make decisions based solely on their personal beliefs. Although there is no evidence, the Judge may impose a penalty and the judge does not need to mention the reasons for his decision. In this system judges have full freedom to drop the verdict. The subjectivity of judges is very prominent in this system.[5] It was realized that evidence in the form of recognition of the defendant himself did not always prove the truth. The admission sometimes does not guarantee that the defendant has actually committed the alleged act. Therefore, it is necessary regardless of the judge's own convictions.[6] This system contains a big weakness. Just like a normal human being, a judge can be wrong in the belief he or she has established, since there are no criteria, certain evidences to use and the terms and means of the judge in shaping that belief. In addition, on this system there is great opportunity for arbitrary law enforcement practices, based on the reasons for the judges who have been convinced.[7]

b. Positive proof.

The evidence in this system is based on the limited evidence of evidence in the law, this system is the opposite of the conviction in time system because in this system if the act has been proven by means of evidence then the judge's conviction is no longer needed.[8] If, in the case of proving to be in accordance with what has been predetermined in the law, both of the evidence and the means of using it, the Judge shall draw the conclusion that the defendant's wrongdoing has been proven. The judge's conviction is utterly unimportant and not a matter to be considered in terms of drawing conclusions about the

[4] Adami Chazawi. *Hukum Pidana Materiil dan Formil Korupsi di Indonesia*, Bayumedia Publishing, Malang, 2005, p. 398.
[5] Andi Hamzah..*Hukum Acara Pidana Indonesia*, Cet. 1, Sinar Grafika, Jakarta, 2001, p. 248.
[6] Ibid. p. 248.
[7] Adami Chazawi. *Hukum Pembuktian Tindak Pidana Korupsi*, PT. Alumni, Bandung, 2008, p. 25.
[8] Ibid. p. 247.

defendant's wrongdoings.[9] The system is grounded in that the judge may only determine the guilt of the accused, if there is minimum evidence required by law. If such evidence exists, then the judge shall declare that the defendant is guilty and sentenced, irrespective of the judge's conviction. Anyway: if there is evidence (though a bit) to be blamed and punished.[10]

c. Verification based on the judge's conviction for logical reasons.
This system emerges as a middle ground with proven judgment based on limited judgment on logical grounds. The evidence in this system is not regulated by law. This system is also referred to as free verification because the judge is free to mention the reasons for the judgment.[11] Although the Act provides and provides evidence, but the system in terms of using it and putting the power of the evidence is up to the judge's judgment in terms of establishing his belief, provided the reasons used in his judgment are logical. That is, the reason he uses in terms of shaping judge conviction makes sense, meaning it is acceptable to the common sense of the people.[12] This proof still rests on the judge's conviction. A judge must base a judgment on a defendant on logical grounds acceptable to reason.

d. Negative proof by law.
According to this system, in the case of proving the guilty defendant's wrongdoing, the judge does not rely solely on the means of evidence and in the manner prescribed by law. It is not enough, but it must be accompanied by the belief that the defendant is guilty of a crime. This established belief must be based on the facts obtained from the evidence set forth in the law. Evidence of proof is based on two things, namely the tools of evidence and beliefs that are unity, not separated, which is not independent.[13]

The provisions of this system are adopted in the Criminal Procedure Code as stipulated in Article 183 of the Criminal Procedure Code:

> "The judge shall not impose a penalty on a person except where, with at least two valid evidences, he/she obtains the conviction that a crime is actually committed and that the defendant is guilty of doing so."[14]

From the sentence it is evident that the proof must be based on the law (Criminal Procedure Code), namely the legal evidence in article 184 on Criminal Procedure Code, accompanied by the judge's conviction obtained from the evidence. In fact, prior to the Criminal Procedure Code, the same provision has been stipulated in Law Number 4 Year 2004 regarding Judicial Authority Article 6 section (2) which reads as follows:

> "No one shall be criminally liable unless a court of lawful evidence of law proves that a person deemed accountable for the alleged conduct of him."

Evidence of guidance in formal criminal corruption is not only established through 3 (three) evidences as set forth in article 188 section (2) of the Criminal Procedure Code, but can be extended also beyond the three legal instruments as described in Article 26A of the Act Number 20 of 2001, namely:

a. Other evidence of information that is spoken, transmitted, received or stored electronically by optical means or similarly; and
b. Documents, i.e any recorded or readable, readable and / or audible data or information that may be issued with or without the assistance of a means, whether contained in paper, any physical object other than paper or electronically recorded in writing, voice , images, maps, designs, photographs, letters, signs, numbers, or perforations that have meaning. Special provisions concerning proof of formal criminal law of corruption formulated in Law Number 31 of 1999 Jo. Law Number 29 of 2001 and Law Number 8 of 2010 are exceptions to the law of evidence contained in the Criminal Procedure Code.

In addition, from another dimension of General Elucidation of Law Number 30 Year 2002 on the Corruption Eradication Commission, it also states:

> "The increased uncontrolled criminal act of corruption will bring disaster not only to the life of the national economy but also to the life of the nation and the state in general. The widespread and systematic criminal corruption is also a violation of social rights and economic rights of society, and because all this corruption crime can no longer be classified as a common crime but has become an extraordinary crime, and in its eradication efforts it can no longer be done normally, but it is demanded by extraordinary means.-Law enforcement to combat corruption done conventionally has been proven to experience various obstacles. Therefore, extraordinary law enforcement methods are required through the establishment of a special body with wide and independent authority and the limits of any power in the

[9] Adami Chazawi, *op.cit.*, p. 27.
[10] Wantjik Saleh. *Tindak Pidana Korupsi dan Suap*, Ghalia Indonesia, Jakarta, 1983, p. 70.
[11] Andi Hamzah (A), *op.cit.*, p. 249.
[12] Adami Chazawi (A), *op.cit.*, p. 26
[13] Ibid. p. 28
[14] Look at Article 183 on Criminal Procedure Code

effort to eradicate corrupt acts, which its implementation is done optimally, intensively, effectively, professionally and continuously. "

The criminal act of corruption is extra ordinary crimes, so extraordinary enforcement (extra ordinary enforcement) and extraordinary measures (extra ordinary actions) are required. From this dimension, one of the most comprehensive measures a criminal justice system can do is how ideally it can formulate a system of evidence that is relatively more adequate in legislation. It is said so because the proof is a whole of the elements of the law of evidence that relate and relate to each other and influence each other influence in whole or roundness.[15]

Then Law Number 31 of 1999 concerning the Eradication of Corruption as amended by Law Number 20 Year 2001 regarding the Amendment of Law Number 31 of 1999 concerning the Eradication of Corruption, Law Number 30 of 2002 concerning the Eradication Commission Corruption, Government Regulation Number 71 of 2000, Presidential Decree Number 11 Year 2005, Presidential Instruction No. 5 of 2004 and so forth. Thus, the enforcement of a criminal law policy including the acceptance of a system of evidence in a criminal act of corruption depends on the legal politics of a State.

In Law No. 15 of 2002, the background of the system of evidence in the General Explanation does not find an explanation which provides a good reason why the evidentiary system is applied to money laundering. It is as same as in Law Number 25 of 2003. In the General Explanation there is not a single sentence that can be used as a reference why the evidentiary system is applied. Because the General Elucidation of Law Number 25 of 2003 only explains that in essence Law Number 15 of 2002 needs to be changed considering the substance of the regulation still does not meet international standards in the prevention and eradication of money laundering crime.

Implementation of the Regulation of Proof System on Non-Criminal Money Laundering Corruption.

In Indonesia the steps to establish a positive law to deal with the problem of corruption have been done for several historical journeys and through several times changes in legislation. In essence, the provisions of the Criminal Act of Corruption turned out to be less effective in tackling corruption, such as Soedjono Dirdjosisworo's opinion cited by Lilik Mulyadi, as follows: "Corruption Crimes that can be imposed in the articles of the Criminal Code when it was felt less even ineffective the symptoms of corruption at the time. Thus, there is a need for a regulation that can give more flexibility to the authorities to act against the perpetrators."[16]

The evidentiary system in the provisions of Article 17 of Law Number 3 Year 1971 is known as the evidentiary division system, which is a principle requiring the defendant to prove his innocence, without letting the prosecutor do the same to prove the defendant's wrongdoing. The sound of Article 18 of Law Number 3 of 1971 concerning the ownership of the complete property of the offender reads as follows:[17]

1) Every defendant shall be obliged to provide information concerning all of his property and property of his wife / husband, child and every person, and body allegedly having relationship with the case concerned if requested by the judge.
2) If the defendant is unable to provide satisfactory information in a court of law concerning unbalanced source of wealth with his income or the source of his / her wealth, the information may be used to substantiate the witness's testimony that the defendant has committed a criminal act of corruption.

In Law Number 31 of 1999 has embraced the proof. But this Law is deemed ineffective because of the sophisticated modus operandi performed by organized, systematic, widespread Corporations and involving the organizers. This is further complicated by the adoption of a law-based verification system in a negative way. The punishment is based on multiple verification that is in the legislation and on the judge's conviction in accordance with Article 183 of the Criminal Procedure Code which is two valid evidences and the judge's own conviction.[18] The weakness occurred in the collection of two evidences given the sophisticated modus operandi of corruptors. Therefore emerged Law No. 20 of 2001 as a complement to Law No. 31 of 1999 which embraces a balanced proof that a defendant must prove his wealth is not derived from corruption, and judge based on evidence that justifies the defendant then decided he did not guilty.[19]

The proof of balance is also supported by the extension and addition of evidences given the sophisticated modus operandi of corruptors that is information or documents that are electronically supplied (Article 26A). Article 26A facilitates the verification of the Public Prosecutor which will be further proven by the defendant and is highly relevant to the progress of technology and information.

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[15] Martiman Prodjohamidjojo, *Penerapan Pembuktian Terbalik dalam Delik Korupsi (Law No.31 of 1999)*, Mandar Madju, Bandung, 2001, p. 98.
[16] Lilik Mulyadi, *Tindak Pidana Korupsi di Indonesia Normatif, Teoritis, Praktik dan Masalahnya*, PT. Alumni, Bandung, 2007, p. 156.
[17] Article 18 Law No. 3 of 1971.
[18] A Hamzah. *Hukum Acara Pidana Indonesia*, CV. Setiawan Indah Abadi, Jakarta, 1996, p.264.
[19] M. Akil Mochtar. *Memberantas Korupsi*, Q-Communication, Jakarta, 2006, p.87.

Proof of Law Number 31 of 1999 j.o. Law Number 20 of 2001, provided for in Article 37 which reads as follows:

1) The defendant has the right to prove that he has not committed a criminal act of corruption.
2) In the defendant's ability to prove that he did not commit a criminal act of corruption, the evidence is used by the court as the basis for stating that the indictment is not proven.

The legal analysis of the provisions of Article 37 of Law Number 31 of 1999 shows that against the evidence, the defendant has the right to prove that he is not committing a criminal act of corruption so that if the defendant can prove that he is not committing a criminal act of corruption, then the evidence is used by the court as basis to state that the indictment is not proven.[20]

The proof system in Article 37 shall be fully applicable to the criminal act of corruption or Article 12B section (1) letter a, namely the obligation to prove that he / she is not committing a criminal act of corruption, then Article 37 Section (2) is the result of proof that the defendant did not commit a crime corruption is used by the courts as a basis for stating that the indictment is not proven.[21] If it is viewed from the sole right, then the provision of Article 37 section (1) has no meaning whatsoever. The right is the basic right of the accused which by law has been inherent since he was appointed to be a suspect or defendant. The provisions of section (1) constitute a mere assertion of an existing defendant's rights. In fact, Article 37 section (2) which has significance in the law of evidence. This is what shows the core of the system, although not complete. Because in section (2) the legal consequences of the defendant have been proved, the defendant's evidence is used by the court to state that the indictment is not proven. However, it does not include the way in which the defendant proves, and what is the standard of measurement of the defendant's verification results to be declared as the result of proving and unsuccessfully proving.

Reconstruction of Regulatory System for Non-Criminal Proof of Money Laundering of Corruption.

Reconstruction of the Regulation of the Verification System on Non-Crime of Money Laundering of Corruption, the establishment of a pure / absolute verification law on all corruption offenses to be enacted nowadays progresses, one of which comes from the Chief Justice of the Constitutional Court, Mahfud MD, according to which the law of absolute proof must immediately enforced to be more useful for the success of the eradication of corruption. With the enactment of the law of evidence, investigators in the Attorney and in the Police need not bother to get evidence of a person's crime. According to him, as long as the proving law has not been enacted, law enforcement officers will continue to have difficulties in conducting proof of criminal cases in the field of corruption. On the other hand, after the law is enacted, there will be no reason for the investigators to reject the corruption crime files for reasons of lack of evidence.

The evidentiary system is also contained in the United Nations Convention against Corruption (adopted into Law No. 7 of 2006), Article 31 section (8) stating that the States Parties to the Convention may consider the possibility of requiring an offender to explain the legitimate source of the results allegedly derived from a crime. And in Article 31 section (2) stating that each participating country shall take measures which may be necessary to identify, track, freeze or confiscate all matters originating from a criminal act of corruption.

From the 2003 United Nations Convention against Corruption and Law no. 31 of 1999 jo Law no. 20 of 2001, the logical consequence of the application of the principle of "proof" which is purely or absolute, the principle used is the presumption of guilt principle, meaning that a person is considered guilty of committing a criminal act of corruption until the person concerned can prove his innocence criminal act of corruption.

Therefore, theoretically if there is a purely or absolute principle of proof, it is not necessary or required by the public prosecutor to prove the defendant's error. In practice, the practice of proof requires a sufficiently strong initial proof that the defendant is indicated to have committed a criminal act of corruption. This is made to minimize the chance of a suspect or defendant to prove otherwise, namely that he is innocent. Proof of course does not violate the principle of presumption of innocence as long as done by promoting the principles of truth and justice. This means that truth and justice become the principle or the highest principle (meta principle or meta theories) in disclosing and solving cases, so that if there is a conflict between one principle or principle with the principle or other principle (disagreement about principles of law) then the principle or principle of truth and justice which should take precedence.

Could it be possible that the absolute application of proof to all corruption offenses in legislation can be carried out, the answer is the same as that question that is possible? Politics, as Mahfud MD puts it in his Political Law in Indonesia, that the law as a legal product is essentially a contest scene in order that the interests and aspirations of all political forces can be accommodated in political decisions and become Laws. The law born out of such contestation is easily seen as a product of the political contest scene. This is the intention of the statement that law is a political product.[22] While legal politics is a legal policy that will or has been implemented nationally by the government of Indonesia, including: first, the development of law that focus on making and renewal of legal materials in order to be tailored to the needs: second, the

[20] Ibid.p. 197.
[21] Adami Chazawi, *op.cit.*, p.406.
[22] Moh. Mahfud MD, *Politik Hukum di Indonesia*, 3rd edition (Jakarta: LP3ES, 2006), p.2.

implementation of existing legal provisions including the affirmation of functions institutions and legal product coaching.[23]

It is said so because the proof is a whole of the elements of the law of evidence that relate and relate to each other and influence each other influence in whole or roundness.[24]

The state of Indonesia is a state of law (*rechtstaat*), not based on mere power (*machtstaat*). As a rule of law, all aspects of life in the field of society, nationality and state including the government must always based on the law and also based on *Pancasila* and the Constitution of the Republic of Indonesia Year 1945 with the legal system is the system of continental law as a legacy of the Dutch colonial government . The continental legal system prioritizes the written law of legislation as the main joint of its legal system. When a criminal law policy in this case the acceptance of the evidentiary system is accepted in the positive law of a country by the force of legislation within the level of the law, then the provisions apply.

In terms of progressive legal theory, the implementation of the burden of proof mechanism in money laundering cases can be strengthened in several ways, including:[25]

First, the philosophy and the nature of the law is that it exists not for itself, but the law exists to provide comfort and justice for humanity. The issue of state corruption, embezzlement and money laundering carried out by State organizers is an act of crime that has attacked the sense of community justice. To this end, the rule of law that is of the status quo, needs to be reviewed by not merely attached to the rules of the text alone. If the rule of law system prevents the process of seeking community justice, then it is imperative that we seek a way out by enforcing the principle of proof as a form of legal stance in our country. Progressive law should be viewed as a process of development and legal development that is not merely as a form of implementation of the rules, but as a manifestation of the basic essence of law as a means of human to obtain happiness and justice as a whole.

Secondly, if we interpret the act of misuse of state money, as extraordinary crime, then it is fitting that the principle of proof should be treated as an extraordinary way, albeit contrary to the principles of presumption of innocence. The logic of law is a remarkable legal effort to cover the weaknesses of our prosecuting institutions which tend to be weak in solving corruption cases. Thus, efforts to enforce the burden of proof, we must also mean as an extraordinary remedy in building a system of state administration which is free from Collusion, Corruption and Nepotism.

Closing

1. Regulation of the verification system against corruption money laundering. Proof of corruption in money laundering in the provisions concerning burden of proof is stipulated in Article 35 of Law No. 15 of 2002 j.o. Law Number 25 of 2003 and Article 77 of Law Number 8 of 2010. The proof of burden of proof is on the defendant. In the crime of money laundering of the proceeds of corruption which must be proven is the origin of property that is not derived from a crime. This proof is of a very limited nature, that is, it applies only to court proceedings, not to the stage of investigation. Also not on all crimes, only on a serious crime or a serious criminal act such as corruption.
2. Implementation of the regulation of the verification system of corruption money laundering, proving its application as regulated in Article 77 of Law Number 8 Year 2010 concerning Prevention and Eradication of Money Laundering Crime is limited. Limited here means that what must be proven by the defendant is only limited to the origin of property that is allegedly derived from a crime. As for other elements of the crime the burden of proof is in the Public Prosecutor. In practice the established system of proof does not use the principle of presumption of absolute guilt, but is limited and balanced where on the one hand the accused must prove that his property is not the result of a crime.
3. Reconstruction Regulation of verification system of corruption money laundering crime, In the proof need to apply mechanism and burden of proof to corruption money laundering crime, need revamping of legal system. Building a culture of law and public trust in law enforcement.

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[23] *Ibid*, p.9

[24] Martiman Prodjohamidjojo, *Penerapan Pembuktian Terbalik dalam Delik Korupsi (Law No.31 year 1999)*, (Bandung: Mandar Madju, 2001), p. 98.

[25] Herdiansyah Hamzah, http://anitasilalahi.wordpress.com (accessed on 10 October 2017 at 10.50 WIB).

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CONTRIBUTION OF TRADITIONAL VALUES TO CRIME PREVENTION IN INDONESIA

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ABSTRACT

Constitutionally, state's policy of political law is based on the provision of Article 1 (3) of the 1945 Constitution of the Republic of Indonesia stating "The state of Indonesia should be based on the rule of law". It is implied in the Article that Indonesia as a State of law no longer exists as rechstaat-a state which only complies with Law (the law of a state)-but the state of law in Indonesia exists as a pro-Indonesia State of law. In reference to the provision of Article 1 (3) of the 1945 Constitution of the Republic of Indonesia, the state of law of Indonesia embraces and put together the plurality of law in Indonesia in which not only does it settle the nation with the existence of law, but also it encourages the plurality of living law to coexist. According to what is stated in Article 1 (3) of the 1945 Constitution of the Republic of Indonesia, it is concluded that the era of positivism accepting only law as social control has, as a matter of fact, faded. The awareness of the importance of social orders outside the law of a state is inevitable, especially in Indonesia in which the existence of this nation is supported by cultural, ethnic, and religion diversity. Moreover, the provision of Article 1 (3) of the Constitution also marks the end of the monopoly of the law of a state in putting the law to work and the compliance with it. It means that in constitutional perspective, the state of law of Indonesia is not a regime which only acknowledges the law as social orders, but it is a nation that also accepts living law as a source of positive law.

Keywords: traditional values, counteracting criminal act

Introduction

An essential role of the state in tackling criminal has not brought satisfaction. Although it fluctuates, the incidence of crime tends to increase every year[1]. Law Number 8 Year 1981 on Criminal Code which plays an important role in the nation and highlights the participation of society in tackling criminal act has put the nation in dilemma. On one hand, the incapability of the nation in combating criminal act has received lots of criticism from society. On the other hand, the nation does not acknowledge the participation of society in combating the crime. Law Number 8 year 1981 agrees that a state is the only institution that monopolistically holds an authority to counteract crime.

Studies on valid Laws have brought a result showing that juridically, the contribution of traditional values to combating criminal act is possible to do. Laws themselves justify the possibility of this contribution. Generally, the contribution of traditional values to combating criminal act can be seen from material and formal perspective.

In material perspective, several Laws give justification of traditional values related to combating criminal act. Based on the context of material criminal law, there is possibility that making use of traditional values for combating criminal act is likely to be linked with the doctrine of acting against the material law in criminal law. This doctrine has given wider access to the contribution of traditional values to combating criminal act either in its positive or negative function. To seek for answers to the problems in this research, two research problems are presented: 1) how is criminal law utilized to combat criminal act by contributing traditional values? 2) What concept is applied in counteracting criminal act through traditional values-based criminal law?

Research Methods

Qualitative research was employed in this research, and no population was required in the research. However, there were some key informants with no certain numbers decided but this technique was used based on snowball principle[2]

This research was based on initial assumption in which constructivism paradigm was developed to find out the true knowledge about the concept of counteracting criminal act through criminal law which is based on traditional values seen from ontological, epistemological, methodological, and axiological aspect. This research also involved socio-legal approach[3] with the analyses by Strauss and J. Corbin,[4] and interactive

[1]The incidence of crime, looked at the number of criminals sent to jail, tends to increase every year.

[2]Suteki, 2008, *Rekonstruksi Politik Hukum Tentang Hak Menguasai Negara atas Sumber Daya Air Berbasis Nila Keadilan Sosial (Studi Privatisasi Pengelolaan Sumber Daya Air)*, Disertasi, Program Doktor Ilmu Hukum Universitas Diponegoro, Semarang. p. 3.

[3]SulistyowatiIriantodanShidarta (ed.), 2009, *MetodePenelitianHukum :Konstelasi dan Refleksi*, YayasanObor Indonesia, Jakarta, p. 175-176.

analysis model.[5] Secondary data was presented systematically for further analysis done descriptively and deductively.[6] The whole research activity took two years, in which in the first year, it was focused on constructing framework (body of knowledge) regarding counteraction done to tackle criminal act by contributing traditional values. In the second year, the focus moved to development of traditional values-based model used to counteract criminal act in the second year.

Theoretical Framework

Conceptually, counteracting criminal act could be conducted through several different ways: the application of criminal law, prevention without punishment, influencing views of society aboutcrime and punishment/mass media.[7] Counteracting criminal law by applying the law is also known as penal effort, while counteracting it without involving criminal law (prevention without punishment) and by influencing the views of society about criminal act and punishment through mass media is categorized as non-penal.[8]

While the concept of Hoefnagels concerning criminal act can be reached through penal and non-penal, the policy putting together these two ways is not yet made. In Indonesia, counteracting criminal act was distinguished diametrically. The counteraction of criminal act by using criminal law is only based on the law of the state, which not only abolishes the role of traditional values (living law), but it also eclipses other forms of power apart from the state power to participate in the counteraction of criminal act, especially in the context of resolving criminal cases. Enforcing law by relying on the state law is only based on the doctrine of positivism, while Werner Menski agrees that positivism/legality—assuming that the state law is the only tool that can be used to settle disputes in society—is insufficient or unsatisfactory perspective.[9]

Discussion

Contribution of traditional values to counteracting criminal act through criminal law seen from material and formal aspects.

a) Contribution of traditional values to counteracting criminal act through criminal law seen from material aspect

Studies on several Laws that are valid bring results implying that juridically, contribution of traditional values to counteracting criminal act is more likely to be given. There are several Laws which give access to justification of the contribution of traditional values to counteracting criminal act. Generally, the contribution to counteracting criminal act can be viewed from both material and formal aspect.

In terms of material, there are several Laws which justify the traditional values given to counteract criminal act. In the context of material criminal law, involving traditional values in an attempt to counteract criminal act is more likely to be linked with the doctrine that is against the material law in criminal law. Embracing this doctrine has brought to more possibility of contribution of traditional values to counteracting criminal law either in positive or negative function.[10]

Substantially, the doctrine that encourages any conducts against the material law with its positive function implies that a conduct done by an individual can be qualified as a conduct that is against the law (delict or criminal act) since it is not in line with the value of decency, compliance, custom, religion and others although the conduct is not explicitly provided in Laws and not punishable by law. In short, although an inappropriate conduct is not explicitly stated in Laws, the conduct is still considered against the law because it does not comply with values growing in society. In such a context, these growing values involve traditional values.

With such an understanding, the doctrine that is against the material law in its positive function acknowledges what is not regulated in Laws; it acknowledges the values growing in society as a positive source of law.

Positive function related to social values, including traditional values, is legitimated by the issuance of Emergency Law Number 1 Year 1951. The provision of Article 5 Paragraph 3 point b of Emergency Law Number 1 Year 1951 suggests: “Civil material law and temporarily material civil criminal law (material

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[4]A. Strauss and J. Corbin, Busir, 1990, *Qualitative Research : Grounded Theory Procedure and Techniques*, London, SAGE Publications, p. 19.

[5]Esmi Warassih, Metodologi Penelitian Bidang Ilmu Humaniora, Bahan Pelatihan Metodologi Penelitian-Bagian Hukum dan Masyarakat, Fakultas Hukum Universitas Diponegoro, Semarang, 1999, p. 52.

[6]Suteki, *op., cit*., p. 3.

[7]G. Peter Hoefnagels, 1969, *The Other Side of Criminology*, Deventer, Kluwer, p. 56.

[8]Barda NawawiArief, 1996, *Bunga Rampai Kebijakan Hukum Pidana*, P.T. Citra Aditya Bakti, Bandung, p. 48-49.

[9]Werner Menski, 2006, ***Comparative Law in a Global Context The Legal Systems of Asia and Africa***, Second edition, Cambridge University Press, Cambridge, UK, p. 72.see also : Marcella Elwina S, 2010, ***Sanksi Verbal : Alternatif Jenis Sanksi Pidana Dalam Pembaharuan Hukum Pidana Nasional***, Disertasi, Program Doktor Ilmu Hukum Universitas Diponegoro, Semarang., p. 22.

[10]Tongat, 2008, *Dasar-Dasar Hukum Pidana Indonesia dalam Perspektif Pembaharuan*, UMM Press, Malang, p. 197 *et seqq*.

criminal law) that are valid till now for local youth in self-governed regions and former people judged at customary court will still be valid for those people with the following conditions:[11]

1. When a conduct may be seen as a criminal act in the perspective of living law but it is not equal to the provision ofCivil Criminal Code,whoever commits a wrongful conduct is sentenced with not more than three-month imprisonment or to be fined as much as IDR 500. It is given as a substituting punishment when customary law applied is not obeyed by the defendant and this punishment is seen equal by the judge as measured based on the conduct committed.
2. In the perspective of the judge, when the punishment given based on customary law involves imprisonment, the defendant can be sentenced for ten-year imprisonment as a substituting punishment. This is based on the view of the judge that the punishment made by customary law is no longer valid and it deserves to be modified.
3. When a conduct is seen as criminal act according to living law and it is equal to what is stipulated in Civil Criminal Code, the defendant will be punishablewith a sentence closely equal to the act done.

Seen from material perspective, counteracting criminal act through criminal law is based on the provision of Article 1 (1) Criminal Code which asserts "No act shall be punished unless by virtue of a prior statuary penal provision." From positivism perspective, which is still dominant and becomes hegemony to date, counteracting criminal act by means of criminal law can be executed when there is a Law that regulates it, involving both determining element that is considered against the law and determining criminal sanctions. Schaffmeister, Keijzer, and Sutorius[12] agree that legal construction Article 1 (1) of Criminal Code largely known as legality, actually asserts that counteracting criminal act by means of criminal law is based on the following provisions:

1. A person must not be punished only according to custom
2. Unclear formulation of delict must not be allowed (lexcerta)
3. Punishment must not be made unless it is according to what is stipulated in the Law.
4. Punishing a defendant must be only based on what is stipulated in the Law.

The domination and hegemony of positivism are embedded in criminal law through the principle of legality. The principle of legality in Article 1 (1) asserts that statute issued from State's power serves as the only measure to determine whether there is a conduct seen as against the law. As a consequence, the provision of Article 1 (1) of Criminal Code gives no access to punishment which is only based on custom (traditional values). Punishment should be given based on what is clearly stipulated in the Law (to meet *lexcerta* principle) and the procedures in the Law. Seeing several principles found in Article 1 (1) of Criminal Code, it seems that there is the need to realize law that could provide legal certainty, recalling that positivism and legal certainty are both the main goal to be achieved.

b) Contribution of traditional values to counteracting criminal act through criminal law seen from formal aspect

As what is in material criminal law, formal criminal law also gives a chance to the contribution of traditional values to counteracting criminal act. Contribution of traditional values to counteracting criminal act is seen possible with the issuance of Law on the Principles of Judicial Authorities or Law Number 14 Year 1970.[13]Article 23 and 27 of Law Number 14 Year 1970 was also maintained and amended. It shows that there is a commitment given to traditional values involved to counteract criminal act, not to mention the last amendment made in 2009. In Law Number 48 Year 2009 on Judicial Authorities, traditional values are given more chance to be acknowledged. Some provisions in Law Number 48 Year 2009 on Judicial Authorities which give acknowledgement to traditional values related to counteracting criminal conduct comprise Article 5, 10, and 50 explicitly stating that:

1. Article 5 (1): "Judges and constitutional court judges are responsible to investigate, follow, or understand legal values and the sense of justice that grows in society".
2. Article 10 (1): "courts cannot reject to investigate, judge, and decide a case proposed because law is taken as inexistent and unclear, but they have responsibility to investigate and judge".
3. Article 50 (1): "the decision made by a court must contain certain Articles of related Laws or unwritten sources of law (coercion from the writer), which serves as the basis of judgment."

The responsibility of judges to find out, follow, or understand legal values and sense of justice in society assertively implies that traditional values have to be taken into account by judges in deciding a case. Judges should not only refer to Law in deciding a case. This responsibility is meant to realize justice in society. The

[11]*Ibid*., p. 35 *et seq*.
[12]J. E Sahetapy, (*ed*.), 1995, *HukumPidana,* Liberty, Yogyakarta, p. 6-7
[13]see Article 23 and 27 of Law No. 14 Year 1970. Article 23 (1) stating: "All court ruling...must consist of particular Articles of related regulation or *unwritten source of law."*, whilethe provision of Article 27 of Law Number 14 Year 1970 states: *"Judges as law and justice enforcers are responsible to investigate, follow and understand the values of living law."*

judges' decision that does not reflect any justice in society are usually opposed by the members of societyand it often encounters dead end.

The provision of Article 10 (1) of Law Number 48 Year 2009 on Judicial Authorities holds the same purpose in terms of reinforcing traditional values to counteract criminal act. The absence of possibility to reject to investigate, judge, and decide a case proposed because law is seen inexistent or unclear also implies that Judges are given an authority to figure out their own way to enforce law. To find out the way, traditional values also serve as a source the judges should refer to, meaning that when judges encounter dead end in handling a case with the Law used as the basis for the decision, the judges are then suggested to refer to unwritten sources of law, including traditional values. Therefore, in the provision of Article 50 (1) of Law Number 48 Year 2009 on Judicial Authorities, there is likelihood for unwritten source of law to be used as a basis of judging by judges.

It can be said that contribution of traditional values to counteracting criminal law has wider access to realization, but in reality, the involvement of traditional values used to counteract criminal act often raises some issues, such as the one caused by irrelevance of Laws used to counteract the criminal act. Moreover, the existing regulation of criminal law related to counteracting the act is not properly provided in the Legislation which should serve as the basis of law enforcement. In other words, Legislation needs to be strengthened and made more explicit in terms of to what extent traditional values function as the basis of the application of law enforcement.

Concept Reconstruction required to Counteract Criminal Act by Means of Traditional Values-based Criminal Law

Urgency of Concept Reconstruction required to Counteract Criminal Act by Means of Traditional Values-based Criminal Law

This paper follows a perspective implying that law is not a finite scheme, but it is a process.[14] As a consequence, the reconstruction of law is inevitable. It is an urgency to reconstruct concept of counteracting criminal act by using criminal law because of some reasons. **Firstly**, urgency is related to using criminal law as a tool to counteract criminal act. In this context, urgency of the reconstruction of criminal law is based on reality implying that criminal law has failed to counteract criminal act. This is marked by sharp criticism regarding its use and negative impacts. **Secondly**, urgency is related to the need of reconstruction itself. In terms of the need, urgency of the reconstruction of criminal law is mainly based on political and sociological reasons.[15]

Politically, the reconstruction of criminal law is an effort done to put the criminal law in line with the idea of national law which is according to *Pancasila* and the 1945 Constitution of the Republic of Indonesia. In other words, the reconstruction is aimed at realizing national criminal law coming from the perspective of the nation, while sociologically, this reconstruction is based on the demand which encourages the criminal law to become a reflection of values of life that grow in society; criminal law should become a tool to help to maintain the values of life growing in society. In a Vago language,Tamanah cited "*Every legal system stands in a close relationship to the ideas, aims, and purposes of society*."[16] Law that fails to reflect the idea and the intention of society will lose its essence as a law. It can be worse when in this condition law will only come as a burden and becomes counter-productive.

New Construction of Counteracting Criminal Act by Means of Traditional Values-based Criminal Law

Previously, it was mentioned that the state law has opened more possibilities for living law to be used to counteract criminal act, but in Law Number 8 Year 1981 on Criminal Procedure Code, the concept used to counteract criminal act by means of criminal law is only monopolized by the law of state. As a result, according to Law Number 8 Year 1981, the case is only handled based on Laws. The monopoly done by the law of state in the process required to settle criminal cases is clearly stated in the provision of Article 3 of Criminal Procedure Code: "Justice is only executed according to what is regulated in this Law". The monopoly of State law in the process of settling criminal cases is also strengthened by the provision of Article 284 of Criminal Procedure Code, stating:

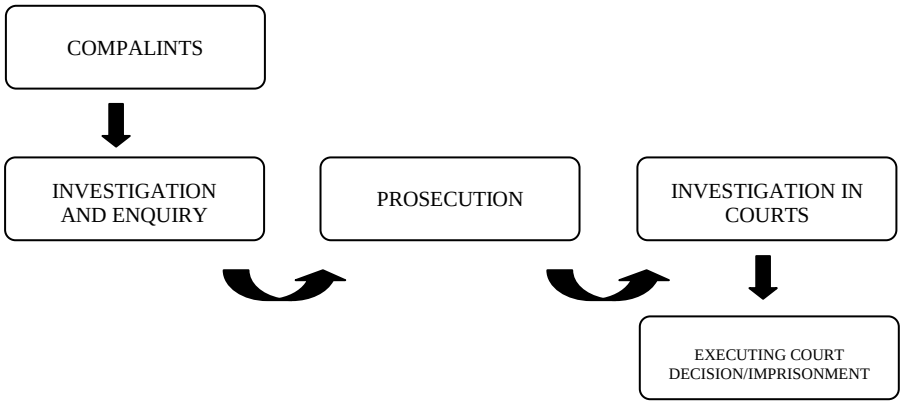
1. Related to any conduct that broke the law before the Law Number 8 Year 1981 was stipulated, this Law was already applied earlier.
2. Within two years after this Law was issued, all cases must comply with this Law, except temporarily for special provisions of criminal procedure involved in certain Laws until amendment or the Law is declared no longer valid.

From the provision of Article 3 in conjunction with Article 284 of Criminal Procedure Code, it is clearly reflected that counteracting criminal act using criminal law by complying with the mechanism of criminal justice can only be done in the compliance with the state law: Law Number 8 Year 1981 which does not give

[14]SatjiptoRahardjo, 2009, ***HukumProgrsifSebuahSintesaHukum Indonesia***, Genta Publishing, Yogyakarta, p. 5-6.
[15]Sudarto, 2007, ***HukumdanHukumPidana***, Alumni, Bandung, fifth edition, p. 62-65.
[16]SatjiptoRahardjo, 2008, *NegaraHukum Yang MembahagiakanRakyatnya*, (Yogyakarta : Genta Press, 2008), p. 32.

any possibility for living law as a means of counteracting any criminal cases. When the provision of Article 3 of Criminal Procedure Code is related to other Articles regulating the stages required to resolving criminal cases,[17] the counteraction of existing criminal act which complies with the Law Number 8 Year 1981 is described as follows:

Figure 1. Counteracting Criminal Act by Means of Existing Criminal Law



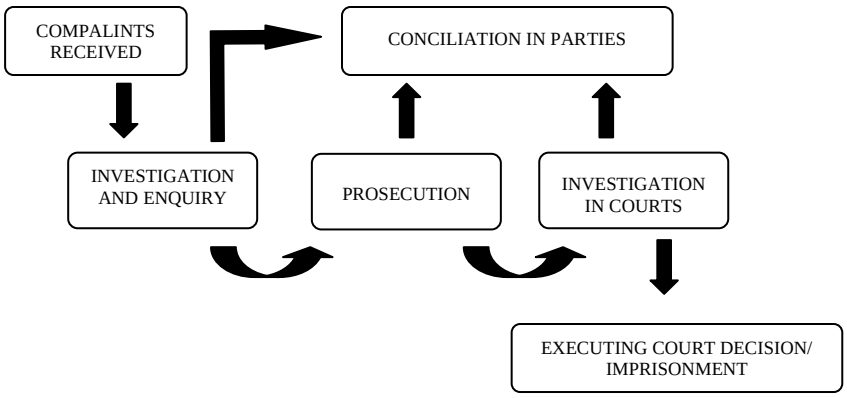
In terms of paying attention to international tendency in the form of settling the criminal case based on restorative justice and the negative consequence of criminal justice and social issues among society in Indonesia,the concept of counteracting criminal act in the future can be realized by reconstructing the provision of Article 3 of Law Number 8 Year 1981 by adding one Paragraph, so that the new formulation of the provision of Article 3 of Criminal Procedure Code is presented as follows:

Article 3 of Law Number 8 Year 1981 on Criminal Procedure Code:

1. Justice complies with the provisions of Law Number 8 Year 1981.
2. Each process required in the criminal justice must proceed with the process of reconciliation between the criminal and victim or anyone as a representative.

Based on the reconstruction of the provision of Article 3 of Criminal Procedure Code, the new reconstruction needed to counteract criminal act by means of criminal law is described in Figure 2:

Figure 2. New Construction of Counteracting Criminal Act by Means of Traditional-values Criminal Law



According to the provision of Article 3 (2) of Criminal Procedure Code that has been constructed, counteracting criminal act by means of criminal law does not only involve investigation/enquiry, charges, and investigation in courts, but reconciliation that involves parties, especially the criminal and victim, needs to take place before each stage. The concept of counteracting criminal act is actually based on basic assumption that implies that criminal act is a conduct that breaks the law individually and it also breaks the state law. As a consequence, reconciliation between the involved parties is highly recommended, while bringing the case to court is secondary.

[17]See : Article 102-136 of Criminal Procedure Code (KUHAP) on Investigation and Enquiry, Article 137-144 of KUHAP on Charges and Article 145-232 of KUHAP on Investigation in Courts.

Theoretically, the concept of counteracting criminal law by encouraging reconciliation between parties is relevant to the characteristic of criminal law itself, or it is known as remedial (the last solution). It means that criminal law must be used when no other solutions are effective to counteract criminal act. When the reconciliation which precedes each stage is considered effective, as mentioned previously, criminal law is just seen as secondary.

Closing

Conclusion

Based on the results of the research, it can be concluded that:

a) Contribution of traditional values to counteracting criminal act is given wider chance, but regulation should be made clearer to avoid any possible conflict when it is implemented.
b) New construction related to counteracting criminal act by means of criminal law is done by reformulating Criminal Procedure Code as an operational norm in counteracting criminal act.

Recommendation

a) There must be a clearer and more systematic regulation at operational level to counteract criminal act.
b) The existence of criminal justice should be acknowledged and its negative impacts should also be minimized. Criminal justice as a tool to counteract criminal act needs to be supported by the existence of traditional values as a basis of resolving criminal cases. It implies that in the mechanism of new criminal justice, efforts to resolve criminal act based on traditional values are still required, one of which is the reconciliation that has to be performed between two parties through discussion.

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CRIMINAL CASE POLICY APPLICATION IN DETERMINING STATUS OF TAXABLE ENTREPRENEURS IN THE NOTARY-LAND DEED OFFICIALS

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ABSTRACT

Tax is a contribution for people which is "forcing". If there is violation, there will be subject to taxation sanctions (administrative or criminal sanctions). The problem arises because the regulation of finance minister regulates the obligation of Taxable Entrepreneurs for business income of more than Rp 4.8 Billions per year, the General Provisions and Tax Procedures Law regulates criminal sanctions for those who intentionally do not register themselves / report their business to be confirmed by the Taxable Entrepreneurs. The Criminal Code regulates whoever do the act of implementing the provisions of the Act, shall not be penalized. Notary-Land Deed Officials is not willing to be confirmed by Taxable Entrepreneurs, because the difference of definition of Entrepreneur on Taxation Law, while Notary Public Law and Land Deed Officials Government Regulation, Notary-Land Deed Officials is Public Official. Problematic research: 1) how is the application of criminal law policy in determining the status of Taxable Entrepreneurs by Notary-Land Deed Officials? ; 2) What are the factors used in determining Taxable Entrepreneurs status?, and 3) Why should any violation of Taxable Entrepreneurs status be penalized? The results explain: 1) Criminal policy in the determination of Taxable Entrepreneurs on Notary-Land Deed Officials including applicative/judicial policy; 2) Factors in determining the status of Taxable Entrepreneurs is the type of goods/services subject to Value Added Tax (VAT) and business circulation of more than Rp 4,8 Billions per year; 3) Violation of Taxable Entrepreneurs status causes the unavailability of State Revenue in the form of VAT levy, it is subject to administrative sanction, criminal sanction in accordance with , the General Provisions and Tax Procedures Law. Notary-Land Deed Officials may request confirmation from the Directorate General of Taxation regarding the difference of definition of Entrepreneur to Notary-Land Deed Officials and Judicial Review to the Constitutional Court.

Keywords : Criminal policy, Determination of Taxable Entrepreneurs, Value Added Tax Regulation for Notary-Land Deed Officials

Introduction

Taxes are the largest part of country income and as one of the main sources of national development financing. The strategic role of the tax sector is reflected in the tendency of increasing targets set by the government in the State Budget.

Many factors that cause the low taxpayer compliance rates, which are partly due to inadequate social facilities and low quality of public services. In addition, there is unfair treatment and legal process that is not clear when there is a violation in the field of taxation.

Violation of tax obligation done by Taxpayer, as long as concerning violation of tax administration provision is subject to administrative sanction, whereas concerning criminal act in tax field is subject to criminal sanction.

Article 39 section 1 of Law Number 28 of 2007 concerning General Provisions of Tax Procedures stipulates that Every person who intentionally does not register to be given the Taxpayer Identification Number or not report his business to be confirmed as Taxable Entrepreneur with a minimum imprisonment of 6 (six) months and a maximum of 6 (six) years and a fine of at least 2 (two) times the amount of tax payable that is not or less paid and at most 4 (four) times the amount of tax payable that is not or less paid.

In fact, today many Notaries and/or Land Deed Officials have not been confirmed as Taxable Entrepeneur although the income of Notary/Land Deed Officials has reached Rp 4.8 Billion or more. Some Notaries and/or Land Deed Officials are of the opinion that they are State Officials, not Entrepreneurs therefore in the case of the determination of Taxable Entrepreneurs; the Notary/Land Deed Officials shall not be imposed. There is a different perception of understanding between Entrepreneurs and Officials.

Under Article 50 of the Penal Code it is stated that anyone committing acts to enforce the provisions of the Act shall not be punished. Here Notary/Land Deed Officials cannot be stipulated as Taxable Entrepeneur because of the difference of Law and definition of Entrepreneur where in the Law of Notary and Government Regulation No 24 of 2016, Notary/Land Deed Officials is Official.

FRAMEWORK OF CRIMINAL CASE POLICY APPLICATIONS IN STIPULATION OF TAXABLE ENTREPRENEURAL STAFF IN NOTARY/LAND DEED OFFICIALS

DAS SOLLEN

- Law no. 42 of 2009 on Third Amendment to Law no. 8 of 1983 concerning Value Added Tax (VAT) on Goods and Services and Sales Tax on Luxury Goods: "Taxable Person for VAT purposes is an entrepreneur conducting the supply of Taxable Goods and/or delivery of Taxable Services subject to tax under this Act."
- Article 3A of the VAT Law, an entrepreneur conducting the supply of Taxable Goods or Taxable Services, except a small entrepreneur whose limits are stipulated by the Minister of Finance shall report his efforts to be confirmed as Taxable Entrepeneurs and shall collect, deposit and report the VAT owed.
- Article 4A section (3) VAT Law jo. Article 5 PP 144 of 2000 concerning Types of Goods and Services Not Subject to Value Added Tax - (notarial service group subject to VAT)
- Article 39 section 1 of the Taxpayer Law concerning Taxpayers who intentionally do not register themselves to obtain Taxpayer Identification and report their efforts to be confirmed as Taxable Enterpreneur shall be subject to sanctions in the form of criminal sanctions for 6 months-6 years and a fine of 2-4 times of the amount of tax payable that is not or underpayment.
- Criminal Code Article 50: that is whoever commits an act to enforce the provisions of the Act shall not be punished.
- Regulation of the Finance Minister Number 197/PMK.03/2013 namely businessman with sales (omzet) more than Rp 4.8 billion per year must be a Taxable Enterpreneur. That is, the obligation to collect, deposit and report the VAT owed.
- Article 1 section 1 of Law No. 2 of 2014 on Notary Law, a Notary is a General Officer authorized to make an authentic deed and have other authorities as referred to in this Act or under other laws.
- Article 1 section 1 of Government Regulation No 24 of 2016 jo Government Regulation No 37 of 1998 on Land Deed Official, Land Deed Official is a public official authorized to make authentic deeds concerning certain legal acts concerning the right to land or the Property Right of Unit of Flats.

DAS SEIN

- The determination of Taxable Entrepeneurs referred to in the Taxation Law is "Entrepreneur", in contrast to the regulation concerning Notary Position and Land Deed Official stating they are Officials.
- Whereas Article 50 of the Penal Code explains whoever commits an act to implement the provisions of the Act, shall not be subject to criminal sanction. So the Notary can not be said to be against the law because of the difference between the VAT Act and the difference of definition of Entrepreneur, where in the Law of Notary and Government Regulation No 24 of 2016, Notary and Land Deed Official are Officials.

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GAP

According to Article 39 section 1 of the Taxpayer Law - Taxpayers who intentionally do not register themselves and report their efforts to be confirmed as a Taxable Entrepeneur will be subject to criminal sanctions. However, in Article 50 of the Penal Code explains whoever commits an act to implement the provisions of the Act, shall not be subject to punishment. Here Notary/Land Deed Official can not be said to do an act against the law if it will not be confirmed as Taxable Enterpreneur, because of the difference of VAT Law on the definition of Entrepreneur where in the Notary Law and Government Regulation No 24 Th 2016, Notary and Land Deed Official are Officials.

FORMULATION OF THE PROBLEM

1. How is the application of criminal law policy in determining the status of Taxable Entrepreneur to Notary and or Official Deed Official
2. What factors are used in determining the status of Taxable Entrepreneur
3. Why should there be a violation of the status of a Taxable Person for VAT purposes subject to criminal sanctions?

Research methods

Approach method used in this research is normative juridical that is a research deductively started from analysis to the articles in legislation regulating to the above problem. Juridical legal research means research that refers to existing literature studies or to secondary data used, while the normative meaning of legal research aimed in obtaining normative knowledge about the relationship between one rule with other regulations and implementation in practice.

The answer to the subject matter comprehensively then this research uses statutory approach (statute approach). Normative research should use statute approach because that will be studied are various rule of law which become focus as well as its central theme.

This legislation approach is conducted by reviewing all laws and regulations relating to legal aid issues under study. This approach focuses his research on practical interests, namely to seek synchronization. Analysis in this research is prescriptive, according to *Mukti Fajar* and *Yulianto Achmad* argued, prescriptive analysis intends to give argumentation of result of research which have been done. The argument has been put forward to provide prescriptions or judgments about right or wrong or what is legally appropriate about the facts or legal events of the research results.

Research Findings and Discussion

Research Findings

Under the taxation laws, Notary/Land Deed Official as taxpayers, other than income tax is imposed, it is also possible to impose value added tax, if the Notary/Land Deed Official has income above the minimum provisions stipulated by Minister of Finance Regulation No.19 / PMK. 03/2013 i.e. entrepreneurs with sales more than Rp 4.8 billion a year shall be a Taxable Entrepreneur. This means having the obligation to collect, deposit and report the VAT owed.

Definition of Taxable Entrepreneur according to Law No. 42 of 2009 on VAT and Sales Tax on Luxury Goods is an Entrepreneur conducting taxable goods and taxable services subject to tax under the Act.

Notary/Land Deed Official finds themselves as public officials under article 1, section 1 of Law No. 2 of 2014 on Notary, Notary is a Public Official authorized to make an authentic deed and has other authority as referred to in this Law or under other laws and Article 1 section 1 of Government Regulation No. 24 of 2016 j.o PP No. 37 of 1998 on Officials of the Land Deed Official, Land Deed Official is a public official authorized to make authentic deeds concerning certain legal acts concerning the right to land or property rights to the unit flats.

The determination of the Taxable Entrepreneur referred to in the Taxation Law is "entrepreneur" in contrast to the regulations concerning Notary Position and/or Land Deed Official which refers to them as general officials. Based on the article 50 Penal Code, those who commit acts to enforce the provisions of the Law shall not be subject to criminal sanction.

From this matter, it can be concluded that if based on article 50 on Penal Code, Notary/Land Deed Official cannot be said to be unlawful and cannot be punished if they refuse to be confirmed as Taxable Entrepreneur, because of the difference of definition of "entrepreneur" to the VAT Law, where in the Law of Notary Position No. 2 of 2014 and Government Regulation No. 24 of 2016 said that Notary/Land Deed Official is Public Official.

Here finally the gap arises because Entrepreneurs with a turnover of 4.8 Billion/year must become Taxable Entrepreneur. If not, will be subject to criminal sanctions of at least 6 (six) months to 6 (six) years, whereas here Notary/Land Deed Official is as Public Official, therefore Notary/Land Deed Official is not included as Entrepreneur and Notary/Land Deed Official can be said to be doing an act against the law if it will not be confirmed as Taxable Entrepreneur, because of the difference of VAT Law on the definition of Entrepreneur where in the Law of Notary and Government Regulation No 24 of 2016, Notary and Land Deed Official are Officials.

Discussion

1. Application Analysis on Criminal Law Policy in Determination of Taxable Entrepreneur Status in the Notary-Land Deed Official

An employer is an individual or an entity of any kind in the course of his business or work of producing goods, importing goods, exporting goods engaged in trading business, utilizing intangible goods from outside the Customs Area, engaging in services business including exporting services, or utilizing services from outside the Region Customs.

A Taxable Person for VAT purposes is an entrepreneur who undertakes the supply of Taxable Goods and /or the delivery of Taxable Services subject to tax under this Act (Article 1 section 15 of Law No. 42/2009).

The General Officer is a position held or assigned to those who are authorized by the rule of law in authentic deed making. Notary as a Public Official to him is authorized to make an authentic deed. Therefore, a Notary is definitely a Public Official, but a Public Officer is not necessarily a Notary Public, since a Public Official may be carried by a Land Deed Official or an Auction Officer.

Seen in Article 54 section (1) of Law Number 24 of 2009 regulates the usage of the State Coat, obviously very privileged, Notary as the only individual who can use the seal of the Garuda Bird (eagle) emblem on its name (the registered notary name), while on others, the use of the Garuda Bird cap can only be captured in the name of the institution/position (e.g position as Governor of Central Java, not as Mr. Ganjar Pranowo).

It should be emphasized that Notary is a position or Notary functional. This thing is one of ratio Notary in Indonesia wearing the symbol of Country that is *Garuda Bird*. The State assigns those who have been

appointed as Notary in the form of the position of the State so that the notary with the position is not so easy to be contested by the other party.

Judging from these criminal elements, an act carried out by a person must meet the requirements in order to be expressed as a criminal event the conditions that must be met as a criminal event are as follows:

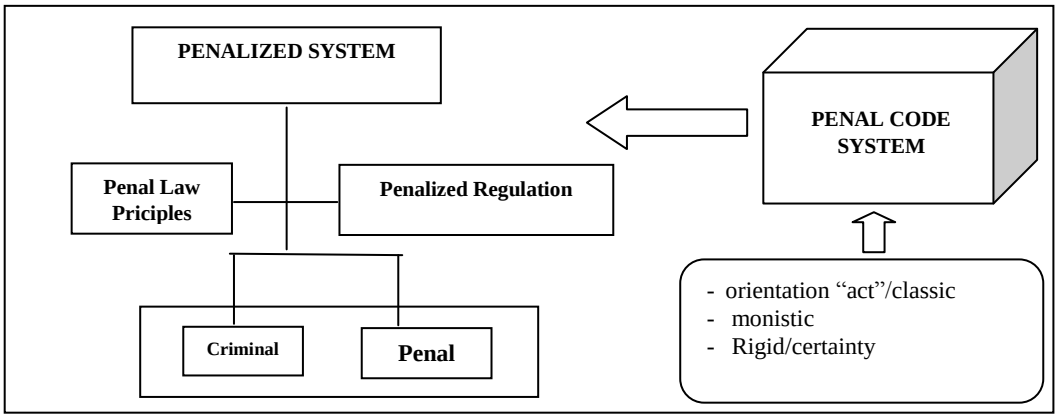
1. There must be an action. That is, there really is an activity done by someone or some people. The activity is seen as a certain act that can be understood by others as something that is an event.
2. The act shall be in accordance with what is described in the legal provisions. It means deed as a legal event fulfills the contents of the applicable law at that time. The culprit really has done as happened. The perpetrator must be accountable for the consequences of the action. With regard to this condition, it should be distinguished that any act which is not to be blamed may be caused by a person or other person who interferes with his or her safety and in an emergency;
3. Should be proven to be a mistake that can be accounted for. It means that the acts committed by a person or persons may be proven as an act that is blamed by the law.
4. Must be against the law. That is, an act contrary to the law meant that his actions were clearly contrary to the rule of law;
5. There should be a threat of punishment. That is if there are provisions that regulate the prohibition or necessity in a particular act, this provision contains penalty sanctions punishment. The threat of punishment is expressly stated in the form of maximum punishment that must be executed by the perpetrators. Where a provision does not contain the threat of punishment for a particular act, in a criminal case, the offender does not have to carry out a certain punishment.

Three main issues of criminal law are

- Formulation of acts that are unlawful (criminal act/*actus reus*)
- criminal responsibility (*mens rea*);
- Sanctions, either in the form of punishment (punishment) or action (*maatregel* / treatment).

In essence, criminal justice policy is part of the effort to protect the community from crime and efforts to achieve the welfare of the community. One of the efforts to overcome the crime that is through a criminal law policy or criminal law politics.

Criminal Law System Scheme in Indonesia can be seen in the picture below:



Picture 1 : Criminal Law System Scheme (Penal System) Criminal Code

Thus, criminal law policy can be interpreted by acting or policies of the state (government) to use criminal law in achieving certain goals, especially in tackling crime, and must be recognized many ways and efforts that can be done by each country (government) in tackling crime.

a. Criminal Elements

The determination of the status of Taxable Entrepreneur to a Notary/Land Deed Official may be referred to as a criminal offense which may be subject to criminal law, if it meets the elements of a criminal offense:

- Subjective elements
  The existence of errors caused by intent and negligence
  In this case, a Notary/Land Deed Official that already has income above the minimum requirement, cannot be said to have made a mistake if it does not register to be confirmed as a Taxable Person for VAT purposes, since Notary/Land Deed Official finds itself not as an entrepreneur (as contained in the definition Taxable Entrepreneur on Taxation Law), but as General Official (as regulated by the Notary Law No. 2 of 2014 and Government Regulation No. 24 of 2016).

- The objective element
  The objective element is an element of the outside of the self-perpetrators consisting of:
  a) Human actions (active deeds or positive deeds, and passive actions or negative deeds). The act of Notary/Land Deed Official which already has income above the minimum requirement, does not register itself to be confirmed as Taxable Entrepreneur, in this case is a passive act / negative act, which is a silent act or letting.
  b) Dangerous or destructive effects, even eliminating the interests held by law, such as life, body, freedom, property, honor, and others.
     In this case, this element is not fulfilled, because what the Notary/Land Deed Official does in the case of not registering to be confirmed as a Taxable Entrepreneur, does not result in any harm or damage, etc.
  c) Circumstances. This situation is distinguished, among others: the situation at the time the act is done; circumstances after the deed done.
     The circumstances that will arise are those where the Notary/Land Deed Official which already have income above the provisions, cannot be charged VAT because it has not been confirmed as Taxable Entrepreneur. This is seen by tax officials as state losses.
  d) Penalties and unlawful nature: The nature may be punished with respect to the reasons that free the offender from punishment. The unlawful nature of the law is when the act is against the law (with respect to prohibition or command).

The fulfillment of the nature may be punished with regard to the reasons that liberate the offender from punishment. In the First Penal Code Book, Chapter III provides for things that eliminate, reduce or criminalize (Article 44-Article 52a).

Based on the article 50 on Penal Code, those who commit acts to enforce the provisions of the Law shall not be subject to criminal sanction.

Notary/Land Deed Official cannot be said to be unlawful and cannot be punished if they refuse to be confirmed as Taxable Entrepreneur, because of the difference of definition of "Entrepreneur" to the VAT Law, where in the Notary Law No. 2 of 2014 and Government Regulation No 24 of 2016 said that Notary/Land Deed Official is a Public Official.

Notary/Land Deed Official is not willing to be confirmed as Taxable Entrepreneur, nor can it be said to be against the law because if his deed is materially unlawful, it cannot be said to be a crime and therefore cannot be punished.

Notary/Land Deed Official are Public Officials and not Entrepreneurs, but Notaries and or Land Deed Official may double positions as Entrepreneur, because Notary/Land Deed Official is person doing Free Work.

If this is the case, then the Value Added Tax may be other income from the Notary/Land Deed Official beyond its main income as a Public Official making an authentic deed.

If there is any difference of opinion/perception/interpretation, the taxpayer (in this case the Notary/Land Deed Official) may make a letter requesting confirmation to the Directorate General of Taxation, Jl. Gatot Subroto 40 - 4 Jakarta Up: Director of Taxation Rules

b. Criminal Law Policy

The criminal law policy is implemented through the concretization/ operationalization/functionalization stages of the criminal law which consist of:

- Formulative / legislative policy, namely the stage of formulation / drafting of criminal law;
- Applicative / judicial policy, i.e the stage of application of criminal law;
- Administrative / executive policy, i.e the implementation stage of criminal law

Judging from the criminal law policy in determining the status of Taxable Entrepreneur on Notary/Land Deed Official is included in the formulation / legislative policy.

At this stage the enforcement of criminal law *in abstracto* by the legislature body conducting voting activities in accordance with current and future circumstances and situations. Then formulating it in the form of the best legislation in the sense of fulfilling the requirements of justice and efficiency.

Here are two formulations of the specialist law, namely the Notary Law and the Tax Law (in this case the Value Added Tax Law). Where there is a condition that the definition in the VAT Law (in this case the Entrepreneur) if applied / enforced to Notary/Land Deed Official, it will be contrary to Notary Law mentioning as Public Official.

Planning (planning) at the stage of the formulation by *Nils Jareborg* includes three basic issues of the structure of criminal law, namely problems:

- Formulation of criminalization and criminalization and threatened punishment;
- Penalization (adjudication of punishment sentencing);
- Execution of punishment (execution of punishment).

Due to the formulation of two laws, one of the rules is contradictory, and then the first stage of the structure of the criminal law is formulation can be said not fulfilled. Therefore, the second stage of criminalization and the third stage of criminal conduct is also not applicable.

From the above explanation, in the case of stipulation of Taxable Entrepreneur Status to Notary/Land Deed Official (that is self registration to be confirmed as Taxable Entrepreneur) included in Administration Law, because of non-fulfillment of element of crime. Should if there is a violation in this case, may be subject to administrative penalties namely imposition of Administrative Sanctions (*Reparatory*), and not a prison sentence.

2. Analysis of the factors used in determining the status of Taxable Entrepreneurs

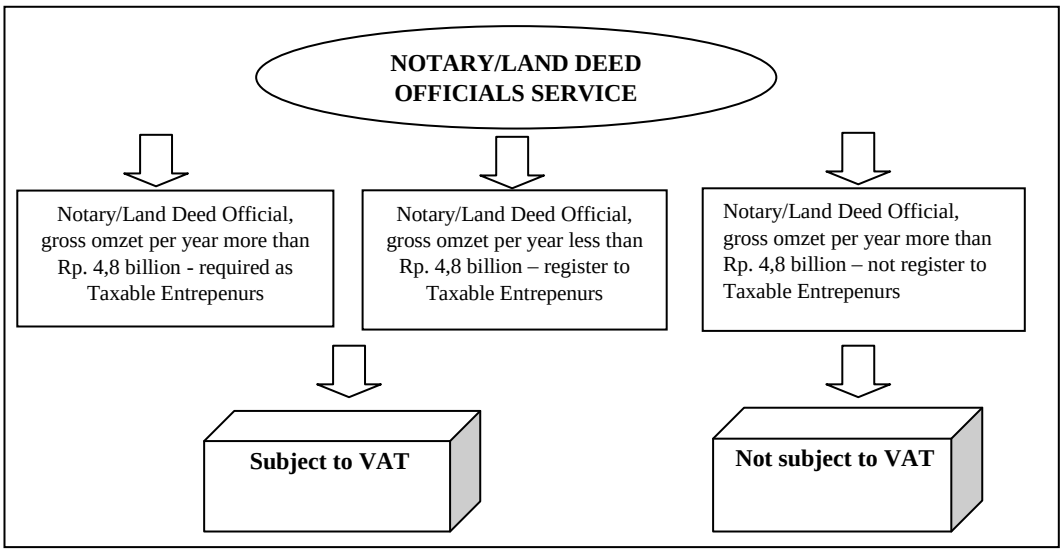
1) As stipulated by the VAT Law, the determination factor of Taxable Entrepreneurs status is among others:
   Type of goods and or Services
   The submission of services made by a Notary/Land Deed Official under the VAT Act is the delivery of taxable services in the field of law. Because non-service legal services are exempt from the imposition of VAT (excluding the services referred to in Article 4A section 3 of the VAT Law No. 42 of 2009).
2) Number of business circulation
   Notary/Land Deed Official which have gross income in a year more than Rp. 4.800.000.000,- (four billion eight hundred million rupiah), shall be confirmed as Taxable Entrepreneur.

Taxpayers and/or Taxable Entrepreneurs to register themselves and / or report their business activities, can be through a network of information systems that connect directly on line with the Directorate General of Taxation. The Government shall stipulate the Regulation of the Director General of Taxes on the Procedures for Registration of Taxpayer Identification Number and/or the Confirmation of Taxable Entrepreneur and the Change of Taxpayer and/or Taxable Entrepreneur with the e-Registration System.

Entrepreneurs conducting the supply of Taxable Goods and/or delivery of Taxable Services within the Customs Area and/or exporting of Taxable Goods in addition to reporting their efforts to be confirmed as Taxable Entrepreneur are also required:

1) Collect tax payable
2) Deposits the accrued VAT in case the Output Tax is greater than the Inputable Tax that can be credited, and deposits the outstanding VAT and Sales Tax on Luxury Goods
3) Report the tax calculation.

The following scheme is service of Notary/Land Deed Official services that may be subject to VAT and cannot be subject to VAT.



Picture 2 : Scheme of Notary/Land Deed Official services that may be subject to VAT and cannot be subject to VAT

Analysis if there is a violation of the status of Taxable Entrepreneur may be subject to criminal sanctions Notary/Land Deed Official is eligible to be stipulated as Taxable Entrepreneur because according to the

Notary Taxation Law is an Individual Taxpayer as an Expert who performs free work, which in his business activity or his work undertakes a service business. Notary/Land Deed Official not belonging to the category of Small Entrepreneur, pursuant to the General Tax Provosions and Procedures Law shall be confirmed as Taxable Entrepreneur and shall be obliged to impose VAT on the services they have been given, as the services delivered by the Taxable Person for VAT purposes are Taxable Services.

If there is a Violation of the Status of a Taxable Entrepreneur then a criminal sanction may be imposed, because if it fails to report its business to be confirmed as a Taxable Person for VAT purposes, it has not fulfilled the requirement to be confirmed as a Taxable Person for VAT purposes, VAT levy from consumers. Where should it be if confirmed as a Taxable Entrepreneur, the entrepreneur can do VAT levy. Therefore, there will be state revenues in the form of unrealized VAT levies, so that it is detrimental to the state and therefore may be subject to criminal sanctions.

Article 39 section (1) General Tax Provosions and Procedures Law = Any person who intentionally:

- not registering to be given a Taxpayer Identification Number or not reporting its business to be confirmed as a Taxable Person for VAT purposes; or misusing or using without rights Taxpayer Registration Number or Inauguration of Taxable Entrepreneur; or
- not submitting SPT; or submit SPT and / or information whose contents are incorrect or incomplete; or
- refused to be examined; or
- show false or falsified bookkeeping, recording or other documents as if they were true or not describing the actual situation; or
- not to store books, records or documents on which books and records are maintained and other documents including the results of data processing from electronically administered books or conducted on-line application programs in Indonesia; or
- not to deposit any withholding or withholding tax, which may result in a loss to the State's income, in a criminal manner with a minimum imprisonment of 6 (six) months and a maximum of 6 (six) years and a fine of at least 2 (two) times the amount of tax owed which is not or less paid and at most 4 (four) times the amount of tax payable that is not or less paid.

In addition, the Directorate General of Tax (DGT) has the authority (Law No. 28 of 2007 Article 2 section 4) issued a Taxable Employment Decision Letter in a position.

If a Taxpayer has been established through a Taxable Entrepreneur Decree by the DGT and the WP does not enforce VAT, the DGT may conduct tax audits and issue the VAT taxpayer to force the Taxpayer to pay the taxpayer. On the basis of certain considerations the DGT may raise the status of tax audits into proofs of taxpayer action.

Closing

Conclusion

Based on the descriptions given in the previous chapter, especially with regard to the subject matter of this thesis, some conclusions can be drawn:

1. Criminal Law Policy in Determination status of Taxable Entrepreneur to Notary/Land Deed Official. Based on Minister of Finance Regulation No. 197/PMK.03/2013, entrepreneurs with sales (omzet) more than Rp. 4.8 billion a year shall be a Taxable Entrepreneur. This means having the obligation to collect, deposit and report the VAT owed. Based on Article 1 section 1 of Law No. 2 of 2014 on Notary, Notary is a Public Official authorized to make an authentic deed and has other authority as referred to in this Act or under other laws. Based on the article 50 Penal Code, those who commit acts to enforce the provisions of the Law it shall not be subject to criminal sanction. Here there are differences in the formulation of two laws of specialist law, namely the Tax Law (in particular the VAT Law) and the Notary Law, which is one of its rules to the contrary. From above explanation, in the case of stipulation of Taxable Etrepeneurs Status to Notary/Land Deed Official (that is self registration to be confirmed as Taxable Entrepeneurs) included in Administration Law, because of non-fulfillment of element of crime. Should if there is a violation in this case, may be subject to administrative penalty namely the imposition of Administrative Sanctions, and not a prison sentence as set by Article 39 section 1 of Law No. 16 of 2009 General Tax Provosions and Procedures Law.
2. Factors used in determining the status of Taxable Entrepreneurs
   As stipulated by the VAT Law, the determination factor of Taxable Entrepreneur status is among others:
   a. Type of goods and or Services
      The submission of services made by a Notary/Land Deed Official under the VAT Law is the delivery of taxable services in the field of law. Because non-service legal services are exempt from the imposition of VAT (excluding the services referred to in Article 4A section 3 of the VAT Law No. 42 of 2009).
   b. Number of business circulation
      Notary/Land Deed Official which have gross income in a year more than Rp. 4.800.000.000,00 (four billion eight hundred million rupiah), shall be confirmed as Taxable Entrepreneur.

If there is a violation of the status of Taxable Entrepreneur may be subject to criminal sanctions this is because if they do not report their business to be confirmed as Taxable Entrepreneurs when they have fulfilled provisions to be confirmed as Taxable Entrepreneurs, then the Entrepreneur cannot conduct VAT charges from consumers.

3. In addition, the Directorate General of Tax (DGT) has the authority (Law No. 28 of 2007 Article 2 section 4) to issue a Taxpayer Decision Letter in a position. As consideration present DGT may increase the status of tax inspection into proof of taxpayer action.

Suggestions

1. Notary/Land Deed Official may make a letter to request confirmation to the Directorate General of Taxes (Jl Gatot Subroto 40 - 4 Jakarta, Up: Director of Taxation Rules), in the event that there is a difference of opinion / perception / interpretation of the taxpayer (Notary/Land Deed Official) on the definition of the entrepreneur, in which the Notary/Land Deed Official are the General Official.
2. Notary services are services that are required by all circles of society. Should the notary services be exempt from the imposition of VAT, so may apply for amendment to the applicable VAT Law, by firstly establishing Notary services as non taxable services (not subject to VAT). In addition, uniformity of Notary/Land Deed Official status as Taxable Entrepeneur and non Taxable Entrepeneur will cause unhealthy price competition between Notary/Land Deed Official where the difference of tariff will make people prefer to use Notary/Land Deed Official non Taxable Entrepeneur service because it is cheaper.
3. Notary/Land Deed Official which objection is stipulated as Taxable Entrepeneur, so it can make efforts of law:
    a. If a Notary/Land Deed Official has been confirmed as a Taxable Entrepreneur by the Directorate General of Taxation (DGT) through a Letter of Decision of the Constitutional Court, then may file a legal action for the cancellation of the Tax Assessment to the Tax Court (provided there is no dispute on the interpretation of the articles VAT Act).
    b. Judicial Review on Value Added Tax (VAT Law) no. 42 of 2009 in the Constitutional Court to examine the Law containing the article on "Taxable Enterprises" and add to the article explicitly mentioning the exceptions that the profession called Public Official is exempted from levying VAT on received service revenues.

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PROTECTION OF COPYRIGHT ON COPYRIGHTED WORKS BASED ON CREATIVE ECONOMY

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ABSTRACT

Intellectual Property as a system of legal protection that provides legal protection for the creator as the owner of creative economic products is needed to increase creator activity in creating. Intellectual Property law protection is an absolute requirement for the creator in the activity and then get legal certainty over the result of the copyrighted works it produces.Copyright Protection as a part of Intellectual Property is indispensable for creative-based copyrighted works, given the creative economy has a very important role as a major contributor to the Indonesian economy. With the protection of Copyright in creative-based creative works, it is expected to encourage the owner/creator of creative products, so as to produce products that can compete in local and global markets. Copyright Protection through Law No. 28 of 2014 on Copyright is instrumental as a policy tool to support creative business efforts in the development of the creative economy.

Keywords: Copyright protection, Copyrighted works, Creative economy

Introduction

The creative economy is seen as a sub-sector in economic activity. Development of Creative Economy Policy is the development of economic activity based on individual creativity, skill and talent to create creativity and creative power of individuals with economic value and influence on the welfare of Indonesian people, with the target, direction and strategy as contained in the attachment of Presidential Instruction Number 6 of 2009 about Creative Economy Development.

Beginning in the 1990s, in Australia there arise problems regarding funding mechanisms related to the policy of the arts and culture sector, so that the term came out when it was "Creative Nation" issued by Australia. Similarly, in the UK through the Department of Culture, Media, and Sport (DCMS) United Kingdom founded the Creative Industries Task Force in 1997. In 1998 DCMC formulated the following definition: "Creative Industries as those industries which have their origin in individual creativity, skill and talent, and which have a potential for wealth and job creation through the generation and exploitation of intellectual property and content". The British background formulated the policy of the Creative Industry, caused by the shrinking of industrial activity at that time in 1980, as unemployment increased, and the impact of the allocation of government funds on the art diminish. This is what lies behind the discovery of ideas and creative strata that is culture as an industry.

In Indonesia, the creative economy policy started in the reign of Susilo Bambang Yudhoyono, preceded by the President's statement to improve the nation's craft and creativity industry, the implementation of Indonesian Culture Product Week 2007, which changed its name to Creative Indonesia Product Week 2009.

In the development of creative economy there are several obstacles, one of which is the weakness of creative industry institutions, mainly due to the absence of legal umbrella governing the respective sub-sector of creative industries, business climate is not conducive enough, low appreciation and high piracy , and electronic transactions have not been well regulated.

Ministry for the Arts Australia drafted: creative industries have their origin in individual creativity, skill and talent. They have the potential to create wealth and job through the generation and use of intellectual property. This definition defines that the creative industry is based on individual creativity, skill, and talent. This is where the relevance of the importance of enforcing Intellectual Property Rights Act to protect creative individuals and ensure the development of creative industries.

The creative economy is closely related to copyright because the development of creative economy focuses on the creation of goods and services by relying on the skills, talents and creativity that can bring economic benefits to its creators. Some violations that occur related to copyright include piracy. Hijacking resulted in the creator suffering moral loss because he felt his work was not appreciated and the material losses because his work has been scattered but did not provide incentives to the creator.

Problems

How is copyright protection in creative-based creative work?

Discussion

As a concrete step and the government's commitment to improve the nation's economy in Indonesia, the President of the Republic of Indonesia has issued Presidential Instruction No. 6 of 2009 on creative economic development in 2009-2015. Therefore, in order to increase employment and alleviate poverty, it is necessary

to develop creative economy to overcome the number of poverty so as not to increase, where the development of creative economy is influenced by the development of creative industries in the country.

President of the Republic of Indonesia Ir. Joko Widodo in the middle of 2015 stated that "The era of today is the era of creative economy. Creative economy must be the backbone of the Indonesian economy ". This statement became a gesture from the stakeholders as a form of optimism in developing the creative economy. The growth of creative industry shows a pretty good improvement trend, creative economy or creative industry get more attention in Joko Widodo's leadership era, seen from establishment of Creative Economic Agency, a non-ministerial government institution that deals with creative economy or creative industry in Indonesia.

The Indonesian Creative Economy Body mapping the potential of creative economy in the region. "Sixteen (16) creative industry sub-sectors are: application and game development, architecture and interior design, visual communication design, product design, fashion, film, video animation, photography , crafts (crafts), culinary, music, publishing, advertising, performing arts, fine arts, television and radio. In the past year, the creative economy has contributed Rp 642 trillion or 7.05 percent of Indonesia's total gross domestic product (GDP). Currently, only three subsectors that contribute greatly to creative economic growth are culinary of 32.4 percent; fashion 27.9 percent; and craft 14.88 percent. By 2019, the government is targeting creative economy contribution to reach 12 percent. "To achieve the target contribution to GDP, then other sub-sectors should also be developed," said Triawan as Head of Creative Economic Agency.

The Grouping of Intellectual Property Rights (now called Intellectual Property) can be further categorized into groups as follows:

1. Copy Right
2. Industrial Property Right

First, copyright is copy right, the most widely used for the world of literacy, eg books, music, lyrics and other arts. Second, industrial property rights in the form of industry. This industry also includes many things, ranging from patents, trademarks, to integrated circuit layout designs, detailed in different laws

Intellectual Property Rights from the standpoint of case rights are divided into economic and moral rights. Economic rights are the right to economic benefits to the creation and associated rights products and may be transferred to other persons or legal entities. The moral right is the right of the creator who remains attached to his creation so that it can not be removed or deleted without any reason, even though Copyright or Related Rights have been transferred. The inventor is unique because of his integrity and reputation. If the inventor dies though, the findings are very attached to the inventor's figure.

Intellectual Property Rights are exclusive rights arising and/or granted by the State to a person or group of persons who become creators, inventors, designers, designers, stakeholders or breeders in the field of art, literature or science, invention of applied technology in industry, brands, geographical indications or indications of origin, trade secrets, industrial design, integrated circuit layout design, and new varieties of plants.

From a legal point of view, it should be understood that those protected by law are Intellectual Property Rights (IPR), not material things form the Intellectual Property Rights (IPR). The reason is Intellectual Property Rights is an exclusive right that only exists and is attached to the owner or right holder, so that the other party if wishing to utilize or use the hka to create or produce material of the form of jelmaannnya must obtain the license (permission) from the owner or right holder. The material form of the Intangible Intellectual Property (IPR) manifestation only serves as physical evidence in respect of the intellectual property rights (IPR) a person has violated by others.

In Law Number 28 Year 2014. Hereinafter referred to as Copyright Law 2014 mentioned in: Article 1 point 1 that copyright is an exclusive right of the authors that arise automatically on the basis of a declarative principle after a work is manifested in its tangible form without prejudice to restrictions in accordance with the provisions of the laws and regulations.

Article 4 of the Copyright Law 2014 stipulates that Copyright as referred to in Article 3 letter a is an exclusive right consisting of moral rights and economic rights.

The concept of copyright under Article 1 of the Copyright Law 2014 is an exclusive right that arises automatically after a Work is born in a tangible form consisting of economic and moral rights. Only exclusive rights of copyright holders are free to exercise the copyright, the other party is prohibited from carrying out the copyright without the consent of the copyright holder. Copy right is granted to the owner for his creativity work and is given protection from others who use without permission.

There are several criteria of copyright protection:

1. Must be "original" to distinguish the other copyright.
2. Expression must be real (a tangible form)
3. Should be some form of creativity that is the result of the practice of the intellect.

The copyright infringement forms include:

1. Copyright infringement in the form of quoting, plagiarizing, recording and announcing the creation of others without permission of the creator or not to include the source of the creator.

2. Commercializing photocopy of the work of others is prohibited, because it also counts as a violation
3. Piracy of video or music without the author's permission is also a form of violation.

The creative industry in Indonesia requires the protection of strong intellectual property rights, a strong legal framework of Intellectual Property will protect and encourage Indonesian inventors to develop new ideas which in turn will contribute to the development of the economy in Indonesia. Design hijacking in the Creative Industry is not a new thing and like mushrooms in the rainy season, this activity without shrink and shame continues to multiply. Though Contribution and growth of Creative Industry to national economy continue to rise.

The role of Intellectual Property in the Creative Industry is enormous because it will spur acceleration Creative Industry if run well. Indonesia's creative industry needs stronger Intellectual Property protection. A strong legal framework of Intellectual Property will protect and encourage Indonesian innovators to develop new ideas, which in turn will contribute to the Indonesian economy. Although creative industries have the potential to grow and increasingly need protection because they still have to face some challenges. "The products of pirated optical media, such as CDs, VCDs, DVDs, and CD-ROMs, still dominate the Indonesian market."

Legal Instruments become something that is needed because of the emergence of creative industries. In law, JD, Hart Hart argued that there are 6 concepts of law have an influence for the development of economic life, as follows:

a. The predictability of the law must have the ability to provide a definitive picture of the future in the present situation or relationship.
b. The legal system development factor must be a force that provides balance between contradictory values in society, the legal system provides awareness of equity in the efforts of the state to undertake Economic Development.
c. The definition and clarity of status besides the legal functions that provide predictability can be added that the function of law also provides assertiveness about the status of people and goods in society
d. Rapid change accommodation will in essence lead to a long loss of balance in the relationships between individuals and groups within the society, this state of necessity wants to restore that balance through one another. The point here is that the legal system governing the relationships between individuals, both materially and formally, provides an opportunity for the disturbed balance to adapt to the new environment as a result of the change, this restoration is made possible because in this shock the legal system provides tension through formulation clear and definitive formulation opens opportunities once justice is restored through an orderly procedure and so on.
e. The procedural ability of coaching in the field of procedural law allows the meterial law to be able to realize itself well into the meaning of the law of the event including not only the provisions of the law but also all the settlement procedures approved by the parties to the dispute eg forms of conciliation arbitration and so all such institutions can work efficiently if it is to be expected that the economic life wants to reach its maximum level.
f. Codification rather than statutory purposes can be seen as a codification of objectives and purposes as desired by the state in the economic field for example we will be able to meet such objectives as formulated in several legislation that directly or indirectly affect the economy

Furthermore, although there is no legal certainty regarding the creative economy is accumulated, but can be encountered in other regulations that regulate separately, among others:

a. Law Number 20 of 2008 on SMEs
b. Law Number 33 of 2009 on Film
c. Law Number 3 of 2014 on Industry
d. Law No. 7 of 2014 on Trade
e. Law Number 28 of 2014 on Copyright
f. Presidential Instruction No. 6 of 2009 Concerning Creative Economy Development
g. Presidential Regulation Number 6 of 2015 Concerning Creative Economy Body
h. Presidential Regulation Number 72 of 2015 Concerning Amendment To Presidential Regulation Number 6 of 2015 Concerning Creative Economy Agency
i. Policy Package Phase III (October 7, 2015)
j. Phase Policy Package IX (January 27, 2016)
k. Stage X Policy Package (February 11, 2016)

The essence of legal certainty is a matter of protection from tuaan arbitrariness. The concept of legal protection is a protection afforded to legal subjects in the form of both preventive and repressive legal instruments, both written and unwritten. In other words the protection of the law as a picture of the function of the law is a concept where law can provide justice, certainty and expediency.

Preventive protection of copyright on creative-based creative works is manifested in the form of protection afforded by the government with the aim of preventing prejudice. It is contained in legislation with a view to preventing an offense as well as providing signs or limitations in performing an obligation. Preventive protection is manifested in the form of rights transfer and licensing.

Repressive legal protection is the ultimate protection of snaknsi such as fines, imprisonment, and additional penalties provided in the event of a dispute or an offense has been committed. Repressive copyright protection on creative works based on creative economy can be done both Civil and Criminal.

Closing

Conclusion

To support the growth and development of the business world focused on the creative industry, the factor of law, especially the intellectual property law is very important to provide a clear legal certainty and firmly in protecting the interests of business actors and the community. The legal framework of strong intellectual property will protect and encourage Indonesian inventors to develop new ideas which in turn will contribute to the economic development in Indonesia

Law enforcement, especially intellectual property law in this case is copyright is expected to anticipate progress in every business sector, especially creative industry sector against the rampant lawlessness that happened.

Suggestions

With the protection of the law, the creative industry, with the advantages of its products, by itself will be able to survive and have added values that will be able to overcome the existence of violations of law against his business.

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LEGAL PROTECTION FOR COPYRIGHTS OF TRADITIONAL BATIK ART

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ABSTRACT

The legal protection of Copyright Traditional Batik Art has not yet been maximized, due to the low insight about the Copy rights of traditional batik art among batik entrepreneurs and law enforcement officers. However, in the event of a copyright infringement, usually the legal protection provided may pass through a court of law with a Provisional Decision, as well as through a court proceedings with criminal verdict to the maximum extent possible, or through an arbitration or alternative dispute settlement, where arbitration may be conducted by consultation, negotiation, mediation, conciliation or expert assessment.

Keywords : Legal Protection, Copyright, Traditional Batik

Introduction

As already known that *Batik* art in Indonesia began to get protection since the Copyright Law of 1987, 1997, 2002, until the Copyright Law of 2014. However, in all provisions of the Copyright Law there is no mention of explicit protection for traditional Indonesian batik art.

The Copyright Law 1987 and the Copyright Law of 1997[1] only provide protection for non-traditional batik art with the consideration that traditional batik art, such as *parang rusak*, *sidomukti* and so on, have become public property (public domein) so that all Indonesian people have the same right to use it.

The protection arrangements for traditional batik art are found in the Copyright Law of 2002 and 2014. In this new provision, although not expressly stated, protection is given to traditionally-made batik art.[2]

The element emphasized in the Copyright Law 2014 is the traditional manufacture of batik art. Based on this, it can be argued that traditional Indonesian batik art has only been protected under the Copyright Law of 2002.

Basically, even though batik art in Indonesia has been protected since the 1987 on Copyright Law, this does not mean that the creators of batik art have used the Copyright Law in order to get protection for their batik works.

This is because the Copyright Law does not clearly set out what matters are right for the holders of the copyrights of batik art. This is important because the lack of clarity of their rights will result in the mistrust of the batik to register the artwork. Moreover, when it comes to the art of batik produced or owned collectively because this batik is produced by more than one person batik so it must consider the interests of many parties.[3]

In addition to the lack of clarity of rights for the copyright holders of batik art, there are still many among the batik entrepreneurs who do not question the registration of Copyright or efforts to take action in connection with plagiarism and imitation of batik motifs among them.

Precisely what is important for them is how to make batik products made in the market. The case of imitation or plagiarism of the motifs that occurs among the batik is considered as something that is common and does not need to be exaggerated. So in practice, if a creator of batik motifs register the work of batik art, then he will be considered selfish and monopoly, consequently concerned will be suppressed and ostracized among fellow batik entrepreneurs.

If one wishes to enjoy the economic benefits of another's Copyright, he / she is required to obtain permission from the rightful person. The use of the copyrights of others without the written permission of the owner, or the faking / resembling the copyrights of others, is unlawful.[4]

It is therefore important to be given legal protection of copyright not only based on the theory of natural law, but the protection of copyright is needed to provide incentives for the creator to produce his works of creation. There is a passion to create then it can improve people's welfare. This is because, in practice, a lot of batik art in Indonesia is imitated, both by the people of Indonesia itself or by other countries.

Based on above description, the authors are interested to write a paper entitled *Legal Protection For Copyrights of Traditional Batik Art*.

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[1] Explanation of Article 11 section (1) letter f on Copyright Law of 1987 and Article 11 section (1) letter k on Copyright Law of 1997.

[2] Explanation of Article 12 section (1) letter i on Copyright Law of 2002

[3] Eddy Damian, 2002, **Hak Kekayaan Intelektual Suatu Pengantar**, Asian Law Group Pty Ltd cooperate with Alumni, Bandung, p. 101

[4] Abdulkadir Muhammad, 2001, **Kajian Hukum Ekonomi Hak Kekayaan Intelektual,** Publisher PT. Citra Aditya Bakti, Bandung, p. 143.

Main Problem

1. How is the legal protection given to the copyrights of traditional batik art?
2. What are the common barriers and how to overcome them?

Discussion

Copyright

Under the provisions of Article 1 section (1) Copyright Law of 2014 referred to as Copyright is the exclusive right of the authors that arise automatically on the basis of the Declarative principle after a work is manifested in its tangible form without prejudice to restrictions in accordance with the provisions of the laws and regulations.

The basic principles contained in copyright are:[5]

a. A copyrighted is a tangible and original idea. From this principle some principles are derived:
   - A work must have authenticity in order to enjoy the rights granted by law.
   - A copyright is copyrighted if the work in question is manifested in writing or other material forms.
   Since copyright is a special right, no one else can exercise that right except by the creator's permission.
b. Copyrights come by itself (automatically).
c. A work does not always need to be announced for copyright.
d. The copyright of a work is a right recognized by law that must be separated and differentiated from the physical mastery of a work.
e. Copyright is not an absolute right.

Basically protected by Copyright Law 2014 is the creator whose inspiration produces each work in its distinctive form and shows its authenticity in the fields of science, art and literature. There needs to be a creator's kealhian to be able to perform copyrighted works copyrighted.

Especially for batik art began to get the protection of copyright in Indonesia since Copyright Law of 1987, Copyright Law of 1997, Copyright Law of 2002, until of 2014.

The Copyright Law of 2014 distinguishes the duration of protection for a work that is protected by copyright.[6] For copyright of creation:

- Books, pamphlets, and all other written works; lectures, lectures, speeches, and other similar creations; props made for the benefit of education and science; songs or music with or without drama, musical, dance, choreography, puppet, and pantomime; works of art in all forms such as painting, drawing, carving, calligraphy, sculpture, sculpture, or collage; architectural works; map; and batik artwork or other motif art, valid for the life of the Creator and continue for 70 (seventy) years after the Creator dies, starting from January 1 of the following year. (Article 58 section (1) Copyright Law 2014).
- In the case of a Work as referred to in section (1) owned by 2 (two) or more persons, copyright protection is valid for the life of the last dead Creator and lasts for 70 (seventy) years thereafter, starting from 1 January next. (Article 58 section (2) Copyright Law 2014).
- Copyright Protection of Works as referred to in section (1) and section (2) owned or held by a legal entity shall be valid for 50 (fifty) years from the first announcement. (Article 58 section (3) Copyright Law 2014).
- Protection of Copyright on Creation: photography work; Portrait; cinematographic works; video games; Computer program; paperwork; translation, commentary, adaptation, arrangement, modification and work of transformation; translation, adaptation, arrangement, transformation or modification of traditional cultural expression; compilation of Creation or data, whether in a format that can be read by Computer Program or other media; and compilations of traditional cultural expressions during the compilation are original works, valid for 50 (fifty) years from the first announcement. (Article 59 section (1) Copyright Law 2014).
- Copyright Protection of Works in the form of applied artwork is valid for 25 (twenty five) years from the first announcement. (Article 59 section (2) Copyright Law 2014).
- The copyright on the traditional cultural expression held by the state referred to in Article 38 section (1) shall be valid without the time limit. (Article 60 section (1) Copyright Law 2014).
- Copyrights of Unknown Creative Works held by the state referred to in Article 39 section (1) and section (3) shall be valid for 50 (fifty) years since the invention was first made Announcement. (Article 60 section (2) Copyright Law 2014).
- Copyrights on Works carried out by the party making the Announcement as referred to in Article 39 section (2) shall be valid for 50 (fifty) years since the invention was first made Announcement. (Article 60 section (3) Copyright Law 2014).

[5] Eddy Damian, **Hukum Hak Cipta,** Alumni, Bandung, 2002, p. 99
[6] www.hukumonline.com

- Protection of economic rights for: Performers, valid for 50 (fifty) years since the show is fixed in Phonogram or audiovisual; For Producer Phonogram, is valid for 50 (fifty) years since its Phonogram is fixed; and For Broadcasting Institutions, is valid for 20 (twenty) years since its first broadcasting work. . (Article 63 section (1) Copyright Law 2014).
- The period of protection of economic rights as referred to in section (1) shall commence on 1 January of the following year. (Article 63 section (2) Copyright Law 2014).

During the copyright protection period the copyright holder has the exclusive right to announce and reproduce the creations that arise automatically after the creation is born.

Batik

According to Iwan Tirta, Batik is a technique to decorate cloth or textile by using wax in the process of color immersion, where all the process using the hand. Another notion of batik is the art of color that includes the process of waxing, coloring, and heating, to produce a smooth motif that all this requires high accuracy.[7]

Meanwhile, according to Hamzuri, batik is defined as painting or drawing on the mori created by using a tool called canting. People paint, draw or write on the mori wearing canting called batik (java mbatik). Batik produces batik or batikan in the form of various motifs and have special properties owned by batik itself.

At first batik is known only batik. Along with the increasingly widespread batik use, batik technology is also developing rapidly. Now in addition to traditional batik making, also known as the manufacture of batik in modern results are called modern batik. If the meaning of traditional and modern batik is used, then the batik cloth can be divided into:

1. *Batik Tulis*
   This batik is the batik which is considered the best and the traditional. The process of making it through the stages of preparation, pemolaan, pembatikan, coloring, pelorodan and perfection. In hard to find batik rework that is done exactly the same, there must be a glimpse of difference, for example a number of points or curved lines.[8]
2. *Modern* Batik that can be divided into:
   a. Stamp Batik
      The process of making it through the stages of preparation, printing, coloring, pelorodan and perfection.[9]
   b. Batik Combination
      Batik combination (write and stamp) made in order to reduce the weaknesses found in batik products Cap, such as large motifs and art streaks that can not be produced by hand.[10]
   c. Textile Batik Motif
   d. Textile batik motif produced by textile industry by using batik motif as textile design. The production process is done with a printing system so that the product is known as batik printing and can be produced on a large scale.

As a branch of fine art heritage of the past generation, batik has various uses in accordance with the needs of society in his day. In traditional batik its main role is as a fashion material while its shape is adjusted to its usefulness.

Each hand-written batik, the edges must be written "Batik Cap". Similarly, batik textiles, on the edges must include the words "Textile Motif Batik".

Through this provision is expected that consumers who are not experts in the problem of batik, will not be wrong choose. Similarly, batik producers, especially small entrepreneurs who are generally traditional batik craftsmen, are expected to be protected from the hijackers who are usually capital larger and stronger.

Actually there are various ways that have been taken by the government in an effort to preserve the culture of batik, among others by requiring the imposition of batik uniforms for school children on certain days. Likewise for civil servants, through the Corps of Civil Servants of the Republic of Indonesia are required to wear a long-sleeved batik shirt.

The Copyright Law of 1987 and the Copyright Law of 1997 only provide protection for non-traditional batik art with the consideration that traditional Indonesian batik art, such as broken machete, sidomukti, etc., have become public property (domein) the Indonesian people have the same right to use it.

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[7] Iwan Tirta, **Quo Vadis Batik Indonesia,** Makalah Dalam Konferensi Internasional Dunia Batik, Universitas Gadjah Mada, Yogyakarta, 1997, p. 2.

[8] Hasanudin, **Pengaruh Etos Dagang Santri Pada Batik Pesisiran,** Tesis, Program Magister Seni Rupa dan Desain, ITB, Bandung, 1997, p. 105.

[9] **Batik Tulis Masal**, Balai Besar Penelitian dan Pengembangan Industri dan Kerajinan Batik, Disperindag, Yogyakarta, 1989, p. 2.

[10] Ibid, p. 2.

Arrangements for protection of traditional batik art are contained in the Copyright Law of 2002 and the Copyright Law of 2014. In this new provision, although not expressly stated, protection is given to traditionally-made batik art.[11] There is no provision that batik art should be traditional and not traditional.

In the Copyright Law of 2014 the term "batik art" is a contemporary batik motif that is innovative, present, and not traditional. The work is protected because it has artistic value, both in relation to the image, style, and color composition. What is meant by "other motif artwork" is the motif that is the wealth of Indonesian nation that is found in various regions, such as songket art, ikat motive, tapis motif, ulos motif, and other contemporary motive, innovative, and continuously developed. (Article 40 Section 1.j)

The element emphasized in the Copyright Law 2014 is the traditional manufacture of batik art. Based on this, it can be argued that traditional Indonesian batik art has only been protected under the Copyright Law 2002.

But there are still many creators of batik art who do not know the Copyright Law, especially the batik entrepreneurs in the middle to lower level. This condition continues to this day (the Copyright Law 2014). Even among the batik entrepreneurs there are those who know the Copyright Law, but they do not really consider the importance of the law.

This view is not only found among batik entrepreneurs in the middle to lower level (SMEs) but also exist among batik companies that have been classified as large, such as PT. Batik Danar Hadi.

Many things that cause the creators of batik art do not take advantage of the Copyright Law, among them is the high cost of registration, the procedure is complicated, takes a long time, unclear rights and obligations of the holders of copyrights batik art, and there is no guarantee that although has been registered then the work of batik art will not be hijacked or imitated by other parties.

However, there are other factors that also make the Copyright Law is not considered as something that is important and useful for the creators of batik art, namely the existence of a common practice among the batik to imitate or copy the motives among fellow batik entrepreneurs.

Precisely what is important for them is how to make batik products made in the market. Based on this, if a creator of batik motifs register the work of batik art, then he will be considered selfish and monopolize, so that the concerned will be suppressed and ostracized among fellow batik entrepreneurs.

Whereas registration of Copyright will be useful to prove the truth of the party who is considered as the actual creator in case of court case dispute. As for which can be categorized as a violation of the Copyright of batik art is the act of imitation or plagiarism motive. In case of copyright infringement of batik art, the lawsuit can be filed to the Chairman of Commercial Court (Article 99 Section (1) Copyright Law No. 28 of 2014).

In addition, the Copyright Law no. 28 of 2014 also includes new provisions concerning interim decision to prevent greater loss to rights holders whose Copyright is violated by others. This provisional verdict may be issued by the Commercial Court (Article 106 of Copyright Law No. 28 of 2014) on the request of a party whose rights have been violated.

Many of the law enforcement officers who do not know that the act of imitation or plagiarism of batik motifs among batik entrepreneurs is also a criminal offense in the field of Copyright. It can be said that the knowledge and knowledge of law enforcers in the field of copyrights of batik art is still low so they override the cases of violations that occurred.

As an effort to protect the creators of traditional batik art, many hope that in addition to improved socialization of copyright for batik entrepreneurs, it is also expected that the government is more active in facilitating the registration of copyright, especially for SMEs who generally want the copyright for their batik work is provided directly for free and does not need to be requested.

Although rare cases of copyright infringement art batik, but that does not mean there is no case at all. One of the cases of copyright infringement of batik art completed through court lane is a motive case for PGRI uniform. The case concerns the use of traditional batik motifs of *Parang Tuding* and *Sawat/Gurda* which are modified with typical motifs of *Cirebon kembang patran*.

Traditional batik motif is recognized as a personal creation with the aim to monopolize batik products in various unhealthy ways. The case was resolved at the District Court of *Sumber*, Cirebon with the defendant H.Ibnu Hajar bin H.Mugni who is a batik entrepreneur and incorporated as a member of Batik Cooperative "*Budi Tresna*" Cirebon.[12] There is also another case that is the case between Ghea Sukasah with Batik Danar Hadi Cooperation (Ltd.).

In addition to the Court, the Copyright Case dispute can be resolved through an arbitration or alternative dispute resolution. How to settle disputes through arbitration can be done by: consultation, negotiation, mediation, conciliation, or expert judgment.

Both dispute settlements made by court and arbitration or alternative dispute resolution, all have advantages and disadvantages. Settlement through the court line takes a long time, but during the process, the

[11] Explanataion of article 12 section (1) letter i, Copyright Law of 2002

[12] This case description was obtained based on the Replic, Duplicate, Decision of the Source Court of Cirebon, the Decision of the Supreme Court of the Republic of Indonesia, and the results of an interview with Mr. B. Suherman, SH (Defense Attorney)

judge may establish a provisional decision to prevent greater loss to the copyright holder whose copyright is infringed by another party as provided for in Articles 106 - 109 of Copyright Law No . 28 of 2014.

While settlement through arbitration or alternative dispute resolution has the advantage of being fast, cheap and simple which is indispensable in a business relationship. So the understanding of some people about Intellectual Property especially Copyright for batik art, is still low. This is evident from the continuing confusion between the traditional motifs and contemporary motifs.

Based on the above description it can be argued that law enforcement that has been applied in order to protect the Copyright of batik art has not run optimally. This is due to the still low insight about the Copyright of batik art among batik entrepreneurs and law enforcement officers so that the act of imitation and plagiarism of batik motif that has been happening just this time. Consequently, rare cases of copyright infringement of batik art are resolved through court.

However, it is of concern because the Copyright Law no. 28 Year 2014 has not been understood and fully understood by all parties both community and law enforcement officers. Even among law enforcement officers there are those who know, but the rules in the Copyright Law no. 28 Year 2014 has not been implemented maximally, for example in terms of determination of criminal sanctions for Copyright Offenders so as not to deter the perpetrators. Through the determination of criminal sanctions to the maximum extent possible, is one of law enforcement efforts in order to provide protection of Copyright in general and the copyrights of batik art in particular.

As an effort to protect the creators of traditional batik art, many hope that in addition to improved socialization of copyright for batik entrepreneurs, it is also expected that the government is more active in facilitating the registration of copyright, especially for SMEs who generally want the copyright for their batik work is provided directly for free and does not need to be requested.

Therefore, the existing traditional batik belongs to the people of Indonesia. In addition, existing traditional batik copyrights are held by the state. This means that the state becomes the representative for all Indonesian people in mastering the existing traditional wealth.

Closing

1. **Legal protection granted to Traditional Batik Art Tradition**
   In the framework of protection against the copyrights of Traditional Batik Art, the legal protection applied in this time actually has not run maximally. This is due to the still low insight about the Copyright of traditional batik art among the batik entrepreneurs and law enforcement officers. However, in case of copyright infringement, usually the legal protection provided may:
   a. Through court proceedings with a provisional Decision issued by the Commercial Court, with a view to preventing the occurrence of greater losses to copyright holders whose Copyright is infringed by others.
   b. It could also be through court proceedings with criminal verdict to the maximum extent possible, because it is considered an offense, or
   c. Through an arbitration or alternative dispute settlement, the arbitration path can be pursued by consultation, negotiation, mediation, conciliation or expert judgment.
2. **Constraints that often occur and how to overcome them**
   There are still many creators of batik art who do not know the Copyright Law, especially batik entrepreneurs in the middle to lower level, the high cost of registration, the procedure is complicated, takes a long time, unclear rights and obligations of the holders of copyrights batik art, there is a guarantee that even though the copyrighted art of batik has been listed then the artwork of batik will not be hijacked or imitated, among the middle to lower level batik would be happy if among them can imitate or copy the motif among fellow batik entrepreneurs, for the creator who registers the work of his creation (batik art), then he will be oppressed and excommunicated, and his own law enforcement apparatus, the understanding of Intellectual Property is also very low.
   All that way overcome from the Directorate General of Intellectual Property through the central or clinic Intellectual Property in the areas must be active or often do socialization about Intellectual Property especially Copyright.

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Regulation

Indonesia Law No.7 of 1987 Tentang **Perubahan Atas Undang-Undang No. 6 Tahun 1982 Tentang Hak Cipta.**

Indonesia Law No. 12 of 1997 Tentang **Perubahan Atas Undang-Undang No. 6 Tahun 1982 Tentang Hak Cipta Sebagaimana Telah Diubah Dengan Undang-Undang No. 7 Tahun 1987.**

Indonesia Law No. 19 of 2002 on Copyright**.**

Indonesia Law No. 28 of 2014 on Copyright**.**

APPLICATION OF THE DEATH PENALTY IN INDONESIA UNDER THE PROVISIONS OF IN CIVIL AND POLITICAL RIGHTS

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ABSTRACT

Indonesia as a country that is known to uphold the laui of human rights, the rights included in the first paragraph of Article 281 paragraf (1) of the Constitution of 1945, however, normatively, Indonesia in several laws still provide space for national law to apply the death penalty . In this paper will be described application of the death penalty in Indonesia under the provisions of the national law and the International Covenant in Civil and Political Rights (ICCPR) which ratified by Law Number 12 Year 2005 on Ratification of International Covenant On Civil And Political Rights. The Covenant essence is asking abolish the death penalty. Imposition of the death penalty in Indonesia in accordance with Article 6, paragraph (1) of the ICCPR, although the death penalty is allowed as long as it is governed by national law, but the law must be legitimate, fair, can be used as a handle and reasonable.

Keywords : Death Penalty, National Law, Human Rights

Introduction

Indonesia as a legal state known to uphold human rights implies that right in Article 281 section (1) The Constitution of 1945 of Republic of Indonesia which states:

> Right to live, right to free from torture, right of expression, right to adhere religion, right to free from slavery, right to be legal person, and right to free from legal charge of retroactive law, are rights that cannot be denied in any circumstances.

The article states that the right to life is a human right which cannot be reduced in any circumstances, including after being tried in a serious criminal offense. However, normatively, Indonesia in some of its laws still apply the death penalty, including the Criminal Code (Penal Code), Law Number 35 of 2009 on Narcotics (Narcotics Act) and Law Number 31 of 1999 on Eradication Corruption as amended by Law Number 20 of 2001 (Law on Corruption Eradication), Law Number 15 of 2003 on Stipulation of Government Regulation in Lieu of Law Number 1 of 2002 on Combating Terrorism Crime and Law Number 26 on 2000 About Human Rights Court.

The Constitutional Court has also examined the application of capital punishment to the Constitution of 1945 and declared the decision that the death penalty is not contradictory to the constitution. In addition to the constitution, Indonesia strongly upholds the right to life by ratifying the International Covenant on Civil and Political Rights (ICCPR) through Law Number 12 of 2005 on the Ratification of the ICCPR. As such, Indonesia is legally bound by all the provisions of the Covenant.

Article 6 of the ICCPR essentially calls for the abolition of the death penalty. Indonesia as a party that has ratified the International Covenant on Civil and Political Rights must choose to abolish the death penalty or to continue applying the death penalty under the rule of national law.

Main Problems

Based on the background that has been described above, the subject matter in this paper is how the application of death penalty in Indonesia based on the provisions of national law and the ICCPR?

Discussion

Conceptual Framework

1. **The Theory of International Law Enforcement**
   a. **Dualism**

      The flow of dualism is based on the theory that the rule of international law sourced from the will of the state. International law and national law are separate systems or legal instruments. There are several reasons proposed by the flow of dualism to explain this:

      1) Source of Law
         This belief assumes that national laws and international law have different legal sources, national law is sourced from the will of the state, whereas international law comes from the common will of countries as an international legal society.
      2) Subject of International Law
         The subject of national law is a good person in civil law or public law, while the subject of international law is the state.

3) Law Structure
The institutions necessary to carry out the law in its reality are the tribunals and executive organs which are only found in national law. The same is not in international law.
4) Fact
Basically, the validity and power of national law is not influenced by the fact that national law is contrary to international law. Thus the national law remains effective even if it is contrary to international law.[1]
As a result of the theory of dualism, the rules of one legal instrument may not be sourced or based on other legal instruments. Thus in the theory of dualism there is no hierarchy between national law and international law because these two sets of laws are not only different and independent of each other but also separated from one another.
Another consequence is that there can be no conflict between the two sets of laws, which may be renvoi. Therefore, in applying international law in national law requires transformation into national law.

b. Monism

The theory of monism is based on the idea that one unity of all laws governs human life.[2]

Thus national law and international law are two parts within a larger unity of laws governing human life. This resulted in two legal tools having a hierarchical relationship. Regarding the hierarchy in the theory of monism gives rise to two different opinions in determining which law is more important between national law and international law.

There are those who consider national law to be more important than international law. This notion in monism theory is called monismism with the primacy of national law. Other understands that international law is higher than national law. This understanding is called monism with the primacy of international law. This is possible in the theory of monism.[3]

According to monism with the primacy of national law, international law is an extension of the national law or it can be said that international law is only a national law for foreign affairs.[4] This view sees that the unity of national law and international law is essentially international law out of national law. The reasons stated are as follows:

1) the absence of an organization above the governing countries the life of states;
2) the basis of international law can regulate relations between countries lies in the authority of the state to enter into international agreements derived from the powers granted by the constitution of each country.[5]

According to monism with the primacy of international law, national law derives from international law. According to this understanding national law is subject to international law which is essentially binding force based on the delegation of authority from international law.

In reality, both theories are used by countries in determining the enforceability of international law in countries.

Indonesia itself adheres to the dualism theory of applying international law in its national law.

2. The Theory of International Law Applications in National Law

a. Transformation Theory

Followers of the teachings of positivism recognize that the rules of international law provisions to be applicable as national legal norms must undergo a process of transformation or transfer of form either formally or substantially. Formally means to follow the form of regulations in accordance with the national legislation of the country concerned. Whereas substantially the material of the International Law shall be in accordance with the relevant material of the relevant national law. For example, in the case of an international treaty to become part of national law, it must be through the transfer of forms in accordance with the provisions of national law made both in the substance of the content and material of the treaty.

Followers of this doctrine declare that without a transformation it is impossible that international treaty law can be enacted in national law. This is due to differences in the character in which international law is based on state approval whereas national law is not. International agreements with national law there is a huge difference.

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[1]Mochtar Kusumaatmadja, *Pengantar Hukum. Intemasional,* Bandung: Alumni, 2003, p. 57-56.
[2] Ibid., p. 65
[3]Ibid., p. 66
[4]A Shearer, *Starke's International Law,* 1 1th ed., p. 61.
[5]Ibid

The international treaty is naturally in the form of promises, whereas the national law shows the commandments through its laws. Because of these differences, international law can not apply "*et propriovigcre*" in national law so it needs to be transformed through special adoption. This transformation is a substantive requirement for the enforcement of international law in national law.[6]

Given this issue is not regulated in the 1945 Constitution of the Republic of Indonesia, the only clue in an attempt to answer this question should be based on practices relating to the implementation of state obligations as participants of several international agreements. Muchtar Kusumaatmadja argues that Indonesia does not adhere to the transformation teen let alone the state system of the United States. Indonesia is more inclined to the tem sis of continental European countries, which directly consider themselves bound in the obligation to implement and comply with all provisions of treaties and conventions that have been passed without the need to hold more implementing legislation.[7]

b. Delegation Theory

According to the theory of delegation, the rules of functional international law delegate to every state constitution, matters to determine when the treaty or conversion provisions will apply and how to incorporate them into national law. So this is a continuation position of the closing of the treaty or convention so that there is no formation of a new national law.

Furthermore, in the theory of delegation also requires a special adoption in the enactment of international law in national law. This adoption is a continuation of a legal process that begins with the establishment of an international treaty until it becomes a general binding law in a country.

According to the theory of delegation, the implementation of international law is left to the respective states or national laws. So its implementation is delegated to national law. Therefore, each country has the authority to decide for itself which international law to apply in its territory, which is neither applied nor refused to be applied, and which is accepted to apply.[8]

c. Harmonization Theory

Adherent of the theory of harmonization is D.P.D. Cornell which states that international law and national law must be interpreted in such a way that between them there is harmony. The existence of international law and national law resides in a harmonious relationship. But that does not mean that there will never be a link between them. If there is a connection between the two, it could be preferred one of the two but it must still be interpreted in a harmonious relationship atmosphere.[9]

The provisions of the National Law of Death Penalty and the International Instrument on Death Penalty

1. Provisions on the Right to Life and Death Penalty in the International Covenant on Civil and Political Rights

The provisions on the death penalty are contained in Article 6 of the International Covenant on Civil and Political Rights which contains the provisions on the right to life. The provisions of Article 6 contain important provisions relating to the right to life and the death penalty.

Article 6 Section (1) of the International Covenant on Civil and Political Rights contains the following provisions concerning the right to life: "Every human being has the right to live inherent in him, and this right shall be protected by law." No one shall be deprived of his right to life (Every human being has inherent right to life). Seen from the formula, the right to life has a specificity. The specificity of the right to life can be seen from the inherent adjective, which in all the International Covenant on Civil and Political Rights is only used in this provision. The term 'inherent' used emphasizes the inherent nature of that right in man. Another important specialty can be seen in the use of the present tense of 'has' rather than 'shall have'. This formulation emphasizes that the right to life exists once human beings exist along with human nature. This formulation emphasizes and recognizes the nature of the right to life as a divine gift of God. Thus it can be stated that the inherent word and the suppression of the natural nature of the right to life in this provision emphasize the nature of the right to life as a gift of God that can not be abstracted by man.

In addition, the United Nations Human Rights Committee declares the right to life as a "supreme human rights", namely that without the fulfillment of the right to life, other human rights will have no

[6]Alma Manuputy, et.al., *Hukum Internasional,* Makassar: Rechta, 2008, p. 159-160.
[7]Mochtar Kusumaatmadja dan Etty R. Agoes, *Pengantar Hukum Internasional,* Alumni: Jakarta, 2002, p. 92.
[8]Alma Manuputy, *Internasional,* p. 160.
[9]Ibid

meaning.[10]

In the International Covenant on Civil and Political Rights, the regulation of the right to life occupies the foremost setting in the provisions governing the substantive rights in which the right to life is placed as the first substantive right to be governed and subsequently followed by other rights.[11]

The provision of Article 4 Section (2) of the International Covenant on Civil and Politic Rights also contains provisions on the prohibition of the reduction of rights, one of which is the right to life.[12] Thus, the right to life includes non-derogable rights even in emergencies that endanger the life of the nation.[13] That the right to life is an irredeemable right under any circumstances (non-derogable rights) is upheld by the UN Human Rights Committee through General Comment No. 6 stating that "this right [reads life] is an absolute right that should not be diminished even in an emergency public life threatening to the nation (Article 4 / ICCPR / pen) ".[14] However, the provision on the right to life contained in Article 6 section (1) does not contain explicitly the prohibition of capital punishment.[15]

This raises the question of whether Article 6 of the International Covenant on Civil and Political Rights implies a ban on capital punishment.

The question of whether Article 6 prohibiting the death penalty can also be traced from the third sentence in Article 6 section (1) that No one may be deprived of his right of life. "This phrase reflects the essence of the state's obligation to respect the right to life by not intervening. However, according to the jurist and special rapporteur of the United Nations for torture, Manfred Nowak, this obligation is not absolute, in which case only 'arbitrary deprivation / life' is deemed to violate Article 6 of the International Covenant on Civil and Political Rights. The death penalty may be declared in accordance with the provisions of Article 6 of the International Covenant on Civil and Political Rights when governed by national law.[16] However, according to Nowak, the word 'arbitrarily' must also be interpreted further. The arbitrarily deprivation of life contains elements of unlauwfulness and injustice.[17] National laws that contain the provisions of the death penalty should therefore also comply with these provisions and contain no elements of illegality and are unjust. Thus, the phrase 'no one can be deprived of his life arbitrarily' in Article 6 of the International Covenant on Civil and Political Rights indicates the intention that 'arbitrarily' is both illegally and unjustly.[18] It is also affirmed that the phrase calls for the absence of non-concealed elements (capriciousness) and unreasonableness[19]. Thus, even though the death penalty is allowed as long as it is governed by national law, it must be legal, fair, fair and reasonable. Therefore, the provisions on the right to life contained within

Article 6 Section (1) of the International Covenant on Civil and Political Rights can not be taken for granted as a prohibition on the death penalty. Under this provision, the death penalty as a revocation of the right to life is still recognized, only if regulated through national law which is fair, legitimate, can be a guide and also reasonable. Whereas Article 6 of the International Covenant on Civil and Political Rights still recognizes the death penalty also in view of the following provisions governing restrictions on the death law. The provisions of Article 6 section (1), namely Article 6 section (2) to section (6) of the International Covenant on Civil and Political Rights are:

(1) In countries which have not abolished the death penalty, the death sentence can only be imposed on the most serious crimes in accordance with the law at the time of the commission of the crime, and not contrary to the provisions of the present Covenant and the Convention on the Prevention and Punishment of the Crime of Genocide..
(2) Anyone who is subject to the death law has the right to receive a pardon or relief. Amnesty, forgiveness or reduction in the death penalty may be granted in all cases.
(3) The death penalty can not be imposed on a crime committed by a person under the age of eighteen, and is not applicable to a pregnant woman.

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[10]Ibid, p. 121.
[11]Ibid, p. 121
[12]In addition to Article 6 (right of life), certain rights which are also prohibited to be non-derogaule are Article 7 (right not to be tortured), Article 8 (paragraphs 1 and 2 / rights not enslaved)), Article 11 (right not to imprisoned for not merely fulfilling his contractual obligations), Article 15 (the right not to be punished under retroactive law), Article 16 (the right to be recognized personally before the law) and Article IS (free of thought, conscience, religion). ICCPR, 1966. See article 4 paragraph (2), International Covenant on Civil and Political Matters, 1966.
[13]Lihat Kovenan Internasional Hak Sipil dan Politik, Pasal 4 dan Nowak, p. 122.
[14]General Comment No. 06: The right to life (art. 6):30/04/82. CCPR General Comment No. 6, para 1.
[15]Sir Nigel Rodley, *"The United Nation's Work in the Field of the Death Penalty'* dalam *the Death Penalty Beyond Abolition*, (Council of Europe Publishing, 2004), p. 128.
[16]Ibid, p. 135
[17]Nowak, M., *U.N. Covenant on Civil and Political Rights, CCPR Commentary*, 2005, p. 128.
[18]Sir Nigel Rodley, *"The United Nation's Work in the Field of the Death Penalty'* dalam *the Death Penalty Beyond Abolition*, p. 137.
[19]Nowak, M., *U.N. Covenant on Civil and Political Rights, CCPR Commentary*, p. 128.

(4) Nothing in this Article shall be used to delay or prevent the abolition of the death penalty by States Parties to the present Covenant.[20]

The provisions do not prohibit the death penalty, but rather put a number of restrictions on its application [21].

Nevertheless, the provisions on the restrictions on the death penalty are preceded by the provision on the abolition of the death penalty. The phrase which precedes the provision of Article 6 Section (2) of the International Covenant on Civil and Political Rights, "in countries which have not abolished the death penalty ...", has a special significance, namely to agree upon the abolition of the death penalty. Following the provisions of restrictions on Article 6 sections (2) to section 5 of the International Covenant on Civil and Political Rights, the provisions of Article 6 Section (6) of the International Covenant on Civil and Political Rights strengthen the abolition of the death penalty by stating "Nothing in this Article shall used to delay or prevent the abolition of the death penalty by States Parties to the present Covenant ".[22]

Thus, while the International Covenant on Civil and Political Rights does not specifically contain the prohibition of capital punishment, the provisions contain and request its abolition. Furthermore, the provision which does not prohibit but limit the death penalty, nor does it remove the provision that the right to life is a right which can not be reduced under any circumstances.

The affirmation of the interpretation that the provisions of Article 6 of the International Covenant on Civil and Political Rights does require that the abolition of the death penalty be confirmed by the UN Human Rights Committee as follows:

> This Article also refers to the highly recommended abolition (sections 2 (2) and (6)) that the abolition of the death penalty is highly desirable. The Committee concludes that all steps of abolition should be regarded as progress in the enjoyment of the right to life.[23]

Furthermore, based on Article 6 section (6) and Article 6 section (2) of the International Covenant on Civil and Political Rights it can be concluded that reintroduction of the death penalty is incompatible with the Covenant. This conclusion is not found in the explicit formulation of Article 6 of the International Covenant on Civil and Political Rights or travaux preparatoires, but such conclusions are ensured in accordance with the purposes and objectives of the Covenant.[24] Therefore, all steps to eliminate the death penalty are the progress of the enjoyment of the right to life.[25] The UN Human Rights Committee implicitly holds that States parties to the International Covenant on Civil and Political Rights that have abolished the death penalty can not use the restrictions contained in Article 6 section (2) to section (6) of the International Covenant on Civil and Political Rights and, therefore, the law of that State party is prevented from re-enforcing the death penalty.[26]

The resolution of the UN Human Rights Committee together with the provisions of Article 6 of the International Covenant on Civil and Political Rights brings the initial conclusion that the death penalty is requested to be abolished. But its removal takes time. The restrictions contained in the provisions of the International Covenant on Civil and Political Rights apply to states that have not abolished the death penalty in this case asked to remove it. So the restrictions apply to countries that still apply the execution of the death penalty that should be removed. Accordingly, the restrictive provisions contained in Article 6 of the International Covenant on Civil and Political Rights can not be interpreted as such that the covenant permits the continuous application of the death penalty.

2. The Application of Death Penalty in Indonesia Under the Provisions of the National Law and the International Covenant on Civil and Political Rights

As explained at the beginning of the article, Indonesia has not abolished the death penalty. However, on the other hand Indonesia has to ratify the International Covenant on Civil and Political Rights without reservation. As such, Indonesia should be legally bound by all the provisions of the present Covenant. Since 1997 there have been five laws whose regulatory substances include the death penalty as a criminal threat:

a. Article 59 section (2) of Law Number 5 Year 1997 regarding Psychotropics;
b. Article 36 of Law Number 26 Year 2000 on Human Rights Courts;
c. Article 2 section (2) of Law Number 20 of 2001 concerning Amendment to Law Number 31

[20] *Kovenan Internasional Hak Sipil dan Politik, 1966.*
[21] Baderin Mashood A., *International Human Rights and Islamic* Law, Oxford: Oxford University Press, 2003.
[22] Sir Nigel Rodley, *"The United Nation's Work in the Field of the Death Penalty'* dalam *the Death Penalty Beyond Abolition*, p. 128.
[23] *General Comment No. 06: The right to life (art. 6) :. 30/04/82, section 6. See also idem,* p. 129.
[24] Nowak, M., *U.N. Covenant on Civil and Political Rights, CCPR Commentary, p 136*
[25] Ibid
[26] Ibid

Year 1999 concerning the Eradication of Corruption;

d. Article 6 of Law Number 15 Year 2003 regarding Stipulation of Government Regulation in Lieu of Law Number 1 Year 2002 concerning Eradication of Criminal Acts of Terrorism; and
e. Article 113 section (2), Article 114 section (2), Article 118 section (2), Article 119 section (2), Article 121 section (2), Article 144 section (2) Law Number 35 Year 2009 on Narcotics .

The law is a legislation that contains death threats imposed by Indonesia in the last eighteen years. The latest legislation containing the death penalty before the previous legislation is Law No. 4 of 1976 concerning the Amendment and Addition of Several Articles in the Criminal Code Law with the Extension of the Criminal Procedure of Criminal Procedures of Crime of Progress and Crime Aviation and Crime against Aviation Facility or Infrastructure. Thus, within approximately twenty-five years later, the new Indonesia adds to the law containing the threat of capital punishment. And within eighteen years, Indonesia enacted five laws and regulations. The five legislations all contain crimes of a new type threatened with death penalty. In terms of the number of laws and the year of endorsement, Indonesia is seen to have increased the death penalty and has no tendency to abolish the death penalty. In addition, Indonesia actually multiplies the types of crimes that threatened the death penalty. Even threatened crimes are not included in the most serious crimes under the International Covenant on Civil and Political Rights. It can be said that Indonesia has no desire to abolish the death penalty or to make efforts to limit the types of crimes that are threatened with capital punishment.

In this case it is necessary to see whether the legal norms and the practice of execution fulfill the restriction requirements set forth in Article 6 of the International Covenant on Civil and Political Rights and whether the legal norms and practices of execution in force in Indonesia have reflected the provisions of the International Covenant on Civil and Political Rights.

The death penalty is for the most serious crime (the most serious crime). Death penalties can not be applied to crimes such as property crimes, economic crimes, political crimes or nonviolent acts of resistance, and should also be abolished for drug-related crimes. The UN Human Rights Committee also believes that the death penalty can not be enforced for non-violent crimes such as financial crimes or religious practices and non-violent belief expressions. The UN Human Rights Committee through the state reporting mechanism states that the term "the most serious crime" in Article 6 section (2) of the International Covenant on Civil and Political Rights is limited only to premeditated murder and planned acts that cause painful physical suffering.

Of the five laws that include capital punishment, the threat of capital punishment also applies to economic crimes, political crimes, and drug-related crimes. This crime can not be categorized in the most serious crimes. Thus, for economic crime, political crimes, and drug-related crimes should not be enforced the death penalty as a criminal threat. It can be argued that the law containing the provisions of the death penalty as a criminal penalty for the most serious crimes does not conform to the limitations set forth in Article 6 section (2) of the International Covenant on Civil and Political Rights. Meanwhile, the practices and trends that occurred in the last decade of the death penalty in the past ten years in the case of narcotics have been different directions with the intent and purpose of these provisions.

Closing

Conclusion

The death penalty in Indonesia is in conformity with Article 6 section (1) of the International Covenant on Civil and Political Rights. Although the death penalty is permissible as long as it is regulated in national law, it must be legally, fairly (fair), can be a guide and reasonable.

Therefore, the provision on the right to life contained in Article 6 Section (1) of the International Covenant on Civil and Political Rights can not be construed as a prohibition of the death penalty. Under this provision, the death penalty as a revocation of the right to life is still recognized only if it is regulated through a fair, lawful, national law can be a guideline, and reasonable.

Whereas Article 6 of the International Covenant on Civil and Political Rights still recognizes the death penalty in view of the following provisions governing restrictions on the death law. The provisions of Article 6 Section (1) of the International Covenant on Civil and Political Rights namely Article 6 section (2) to section (6) of the International Covenant on Civil and Political Rights.

Suggestion

Differences and disagreements about the death penalty that occurred during this is a difference perspective that serve as the basis for thinking in addressing the entity and substance of death penalty. Therefore, the authors suggest to the reader to view the death penalty comprehensively by using as many approaches and perspectives as possible. In addition, studying the phenomenon and reality of capital

punishment is a very important part in decomposing the thread of the controversy of capital punishment.

Based on this, it is hoped that a common perception of the death penalty as part of the effort to uphold human rights and the rule of law will be realized.

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EXTRADITION AGREEMENT AS A MEANS OF LAW ENFORCEMENT FOR INDONESIA

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ABSTRACT

He issue of extradition has arisen and has been discussed in the international community as well as nationally, since the number of perpetrators who fled from one country to another, or the offenses that resulted in more than one country, or the perpetrators of more than one person and split over one country. In other words, the offender of the crime becomes the affair of two or more countries. The extradition treaty appears and is considered as a powerful legal means for solving the above problems. In order to know the above, it is necessary to know the extradition treaty in its function as a means to support law enforcement, and the implementation process of the extradition treaty 'The absence of extradition treaties between countries, makes the territory of the country a refugee and shelter of criminals who fled from country. So the extradition treaty can be a means of supporting law enforcement for Indonesia. As a result of the conditions or conditions contained in the extradition applications that are so numerous and very strict and the extradition process is very long due to the existence of a very long procedure, resulting in the process of law enforcement is slow so as not to meet the sense of justice of the community (the victim). So the extradition treaty as a means to support law enforcement for Indonesia is perceived as lacking effective results.

Keywords : Extradiction Agreement, Law enforcement, Indonesia

Introduction

In this century there has been a very rapid development of technology, be it in information technology, communication and transportation. This obviously makes humans easily access information, get in touch, and traveling throughout the world quickly. This is referred to as the era of globalization, as if the world without borders and small. However conveniences have been abused offenders in a country escape and hide in other countries in order impunity country.[1] One of the legal institutions which are thought to prevent and combat crime or to support law enforcement is an extradition agreement. Extradition issue arise and lively discussion among the international community and national levels, since the number of perpetrators of crimes who escaped from one country to another, or crime, arising from more than one country, or the culprit more than one person and were scattered more than one country. In other words, the perpetrator of the crime was a matter of two or more countries. Extradition agreement appears and is considered as if it was a powerful legal means to resolve these issues. To determine the above, please note extradition treaty in its function as a means to support law enforcement and the implementation process of the extradition treaty.

Discussion

The Extradition Agreement as a Means of Law Enforcement

Advances in science and technology and development on the one hand can improve the lives of human beings, on the other hand cause a variety of negative effects, such as the emergence of a new crime with consequences quite large and spacious.

Acts of crime and as a result, not only a matter for the victims and the community surrounding it, but often involves countries, even sometimes a question of humanity. So for the prevention and eradication required cooperation between countries,[2] for example by capturing the perpetrator fled and handed it over to the state which has jurisdiction to prosecute and punish him, at the request of that State. Here's where it appears that the extradition agreement could serve as a means to support law enforcement.[3]

The presence or entry of foreigners into the territory of a country can be divided into two groups:[4]

a. First group are those who really do not have a background that is not good in his home country or in the country where the original
b. Second group are those whose background is not well, for example, has committed a crime in their home country or in another country.

[1] Purbacaraka Purnadi dan A. Ridwan Halim, *Filsafat Hukum Pidana Dalam Tanya Jawab*, Jakarta, CV. Rajawali,1982. Page 2
[2] Parthiana I Wayan, *Pengantar Hukum Internasional*, Bandung, Mandar Maju, 1990. Page 184
[3] Parthiana I Wayan, *Ekstradisi Dalam Hukum Internasional dan Hukum Nasiona*, Bandung, Mandar Maju, 1990. Page 12
[4] *Ibid*, Page 6

Against the first group, if he did not displeasing to the country where it is located, for example, break the law or violate the security and order of the country concerned, certainly for him to legal action, for example, prosecute, and punish him, or allow him to leave the territory of the country. With two or more specifically invited, expel that person, then to the country finished the question. As for those who were expelled, it is up to him to determine the countries that will be going.

Against the second group, the problem is different. Its presence in the territory of a country is to avoid lawsuits in which he had committed a crime. So in this case caught the interest of other countries, as a country which has jurisdiction over the person or his actions. Despite the presence of such a person may also be undesirable by the state, for example because they presence can affect the good relations between the two countries or their fears that the two countries or their fear that the person will perform similar actions, although the eviction against such person can also be done.

Expulsion can be done as an act of unilateral state, but contains weaknesses, among others:[5]

1. If the perpetrators were expelled it will look for other countries that might be willing to accept it and if I can for as long as possible, to avoid lawsuits from the country where he has committed a crime. Thus he would get away from the demands of the law, so that the sense of justice of the victims or their family members or the community of the country, still has not been restored. It is certainly not desired by the country's own.
2. Act of expulsion does not help to prevent and combat crime, because the people of this sort fugitive escape justice and the law of the country where he committed the crime. In fact it can stimulate each offender to flee to other countries: although she could feel safe choose another country to seek refuge.
3. To the perpetrators themselves, even though his expulsion in his favor, but the state in which he fled also has jurisdiction to prosecute and punish him , Then after he was sentenced, he felt safe returning to their country of origin or to the country where the crime was committed in advance (locus delicti). But the country remains locus delicti prosecute and punish him under the national law of the country concerned. In other words, the state does not recognize the locus delicti previous state court decision or reject the principle of non bis in idem. So the offender was tried more than once, so that it is clearly detrimental to the perpetrator. Perpetrators can not hide behind the principle of non bis in idem, which the extradition was already accepted as a principle

By outlining some of the weaknesses of expulsion as a unilateral act, the alternative choice fell to extradition to obviate / mitigate the weaknesses of "expulsion" as unilateral measures as described above.

Extradition turned out to be a means to be able to prosecute and punish the perpetrators of crimes by the state locus delicti or the country where the crime occurred that has jurisdiction over crimes committed by the offender. Thus at once a sense of justice for the victim or members of the public can be recovered offenders who have the intention to flee to another country would probably think twice to carry out his intention, because he will be overshadowed by the extradition. The offender will be returned to the state having jurisdiction locus delicti. Thus the perpetrator is not impunity country locus delicti.

In general, the more pleased offenders serving sentences in their home country than in other countries, each for himself. With Extradition, the international community has to cooperate in preventing and combating crime.

Extradition is ensuring legal certainty, in comparison with other remedies[6], such as that described above. For the sake of legal certainty, the countries make an extradition treaty. Thus the extradition treaty it became the juridical basis if they are facing a case of extradition.[7]

Countries that are not willing to surrender the requested person in the absence of an extradition treaty, indirectly make the region as a shelter for criminals who escaped. This could hamper the efforts of the international community, especially Indonesia in preventing and combating crime.

Implementation Extradition Treaty

International law only gives jurisdiction to the states that if the terms of the national criminal law countries, the majority of the country's jurisdiction manifest themselves as the principles of law (criminal) each national state.[8] These principles are then translated again in the form of rules or criminal provisions. In this case the countries may differ in the rules or break them in the form of criminal provisions. There are countries that translating it full and wide, there are countries that describe it narrowly.

This problem is entirely located on the states respectively. It seems that the processes and mechanisms that determine the formation kaedah. Countries that process and mechanism of formation of legislation relatively quickly and certainly, the elaboration of the principles of criminal law in the form of rules or legislation relatively quickly and certainly, the elaboration of the principles of criminal law in the form of

[5] *Ibid*, Page 7
[6] Kabul Imam, *Paradigma Pengembangan Hukum di Indonesia*, Yogyakarta, Kurnia Kalam, 2005. Page 12
[7] Boermouna, *Hukum Internasional, Pengertian Peranan dan Fungsi dalam Era Dinamika Global*, Bandung, Alumni 2011. Page 135
[8] Buana Mirza Satria, Hukum Internasional Teori Dan Praktek, Bandung, Nusamedia, 2007. Page 62

rules or criminal law becomes a more complete and comprehensive.[9] The opposite will occur in countries that process and the formation mechanism of the law or national legislation is slow and uncertain.

Two or more countries that embrace the same principle, the explanations in the form of the criminal provisions of each can vary. In terms of international law, it is natural, because as a sovereign state, every country is entitled to determine fully the elaboration of those principles in the provisions of the criminal respectively.

The above description with respect to the application of the principles of jurisdiction within the scope of national law countries. If when reviewed in the implementation and application of the jurisdiction of the extradition, it is seen that the extradition treaty is a legal order that is ideal in support of law enforcement. Is said to be ideal, since it determines the extradition treaty discussions were very strict and severe in the process of requests and delivery of the perpetrator or in the extradition more popular with the requested term. Human rights of the requested person really respected and protected. Some evidence can be put forward to support the statement above.

The first evidence, how tough the conditions that must be met to be able to request, submit and prosecute the person sought or the perpetrator, which is essentially all that for the sake of respecting and protecting the rights of the person concerned. these requirements include:[10]

a. The crimes charged as a reason for the request for extradition, shall constitute a crime or a criminal offense under the criminal law of both countries (countries requesting and requested states). Based on the principle of dual criminality principle.
b. Requesting state promised to prosecute only limited to the crimes as a reason for requesting extradition (principle of specificity / principle of specialty)
c. People will be asked not to be passed if the reason is classified as a political crime (principle of non-extradition of political criminals).
d. People who asked not to be passed if the requested country nationals (principle of non-extradition of national / did not submit its own citizens).

Seeing the conditions associated with grounds and principles of extradition looks very tight and many other requirements:

Evidence of both processes or procedures to request it and submit it no less lengthy bureaucracy. Everything was in order to respect and protect the rights of human rights of the offender or the person who requested while the procedure is:

a. First, the state requester must collect documents relating to the person who will be asked and crimes that would be a reason to ask for it.
b. Then must evaluate all whether the documents are sufficient to file a request for the person concerned to the state requested and if all requirements have been substantially met or not.
c. If all this is complete, then the extradition request may be submitted to the state requested through diplomatic channels, by foreign ministers or ambassadors of each country.
d. Further states requested will consider a process or procedure in force in the country's national laws are required, for example, through the examination of the judiciary from the lowest level to the highest level.
e. After the state government requested party will take a decision whether the requesting state request is granted or not. If granted then be determined when and where people are asked to be submitted and determined officials who deliver and receive the requested.[11]

For example in the case of Hendra Raharja, an Indonesian conglomerate which is considered to have committed the crime of banking in Indonesia and had fled in Australia and was finally caught, requested for extradition by Indonesia to Australia. Hendra Raharja processed according to the laws in force in Australia, would be extradited or not. The court decision can first decide Hendra Raharja extradition to Indonesia. But when the case investigation Hendra Raharja in the inspection process at the level of the appeals court of Australia in order to request the extradition of Indonesia, Hendra Raharja died of illness, so his case fall void and of course the extradition request Indonesia can not be forwarded again

The extradition strict requirements, making efforts to prevent and combat crime, especially transnational crime through the extradition legal order becomes ineffective. Whereas at the present time to come cross-border crimes more and more countries.

This is a contradiction that is. On the one hand, the human rights of the perpetrator must be respected while in others the sense of justice of the community is very slow irreversible.

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[9] Parthiana I Wayan, *Hukum Pidana Internasional*, Bandung, CV.Yrama Widya, 2006, Page 110
[10] Parthiana I Wayan, *Ekstradisi Dalam Hukum Internasional Dan Hukum Nasional Indonesia*, Bandung, Mandar Maju, 1990. Page 28
[11] *Ibid*, Page. 119

While the development of various forms and types of crimes it more and more and more sophisticated, even with sacrifices that are sometimes beyond the limits of humanity. It takes speed to catch and prosecute and punish the perpetrators for the sake of the community's sense of justice irreversible (national and international). This is where it turns legal order named extradition could not answer.

Closing

Conclusion

The absence of an extradition treaty between countries, making the country's territory as a refuge and shelter for criminals who fled the country. So extradition agreement could be used as a means of support for Indonesian law enforcement and should not only bilateral but also multilateral. Due to the terms or conditions contained in the extradition request are so numerous and very tight and very long extradition process due to the very long procedure, resulting in the law enforcement process is running slow so it does not meet the demands for social justice (victim). So the extradition treaty as a means of support for Indonesian law enforcement felt still less bring effective results. Given the foregoing, the procedure needs to be simplified extradition treaty to formally sufficient checks only, no need inspection in material and evidence in state court requested.

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RECONSTRUCTION OF RURAL SYSTEM IN RURAL EFFORT ON CRIMINAL CORRUPTION IN INDONESIA

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ABSTRACT

Law enforcement is an important element in the state to achieve a clean government and free from corruption, collusion and nepotism that is by eradicating corruption, because corruption can damage the living order of the state and economy. Corruption can be done every state apparatus at the lowest level to the highest with authority and opportunity. A more comprehensive corruption eradication movement at various levels by making, improving and revising legislation. Facts in the field of corruption are still emerging and not deterrent, this is because not yet the maximum sentence imposed by the Judge. Problems: (1) How is the punishment system in an effort to criminalize corruption in Indonesia based on justice; (2) How to reconstruct the penal system in an effort to criminalize corruption in Indonesia based on justice. Discussion: (1) The penalty system in the criminal prosecution of the corruption-based criminal justice actors in Indonesia is implemented based on Article 2 paragraph 1 and Article 2 paragraph 2 of Law no. 20 Year 2001 on the Eradication of Corruption, in the hope to be able to eradicate corruption and cause deterrent effect. (2) The reconstruction of the penal system in an effort to criminalize corruption in Indonesia based on justice needs to reform the criminal system by revising Law no. 20 of 2001 is to merge Article 2 paragraph 1 and Article 2 paragraph 2 into one Article with the purpose of penalty of criminal punishment namely the sentence of capital punishment, life imprisonment, imprisonment of at least 4 (four) years and maximum 20 (twenty) to realize a sense of justice and making a deterrent effect. Conclusion: (1). The punishment system in an effort to criminalize corruption in Indonesia based on justice implementation based on Article 2 paragraph 1 and Article 2 paragraph 2 of Law no. 20 of 2001 with the hope to be able to eradicate corruption and cause deterrent effect. (2) The reconstruction of the punishment system in an effort to criminalize corruption crime in Indonesia based on justice by merging Article 2 paragraph 1 and Article 2 paragraph 2 into one Article with the aim of penalty corruption penalty namely capital punishment, life imprisonment, short 4 (four) years and 20 (twenty) longest to realize the sense of justice and making deterrent effect.

Keywords : Reconstruction, Penitentiary System, Corruption and Justice

Introduction

One of the most important elements of law enforcement in a country to achieve a clean government and free from corruption, collusion and nepotism is a war against corruption, because corruption can destroy all the joints of the life of the nation and state, including the economy and spatial structuring.

Efforts to strengthen the eradication of corruption by making, improving and revising regulations on Corruption Eradication so that there is no room for corruption to escape from the bondage of law, but the success of a law to ensnare criminals is also very depending on the law enforcement officers as executors and the layers of society who must continue to work diligently to overcome the threat of danger from corruption.[1]

State losses mean public losses because state finances should be used for public services and welfare, in other words if state finances are distorted (corrupted by state organizers), meaning that public services and public welfare are lacking, which is why if countries with high corruption levels many people are poor. Human behavior is indeed the initial intention is to corrupt money, because he is often trusted to manage the money then the level more and more corruption. We often hear the news circulating in the electronic and print media of an official who is corrupt to billions and even trillion, whereas that kind of money would be more useful when devoted to development rather than being swallowed for personal gain without thinking of the consequences later on.[2]

Guillance and eradication of corruption has not succeeded optimally because of the difficulty to present evidence, so that law enforcement is not easy to ensnare the parties and who participate in doing corruption so that adds to the financial losses of the state, therefore it is necessary to find a pattern and techniques in the formulation of criminal punishment of corruption and its legal basis to be able to ensnare and stifle and suppress the emergence of the perpetrators of future corruption in accordance with the expectations mandated in the anti-corruption law in the hope of improving prosperity and development in the governance community life in Indonesia.

The criminalization of corruption in Indonesia shall be guided by Article 2 paragraph (1) of Law no. Law No. 20 Year 2001 on the Eradication of Corruption, states that: Every person who violates the law performs an enriching act of self or another person or a corporation that may harm the State or State's economy, shall

[1] Yunara, Edi, 2005, *Corruption and Corporate Criminal Accountability*, PT. Citra Aditya Bakti, Bandung, Page. 29
[2] Hartanti, Evi, 2005, *Corruption, Sinar Grafika*, Jakarta, Page. 51

be liable to a life imprisonment or a jail for a minimum of 4) year and a maximum of 20 (twenty) years and a fine of at least Rp.200,000,000 (two hundred million rupiah) and a maximum of Rp.1,000,000,000 (one billion rupiah); and Article 2 paragraph (2) of Law no. 20 Year 2001 on Eradication of Action Criminal Corruption, states that: in the case of corruption as referred to in paragraph (2) shall be conducted under certain circumstances, capital punishment may be imposed. Certain circumstances in this provision are: the circumstances that can be used as a reason for the criminal sanction are committed against funds intended for the prevention of hazards, natural disasters, the prevention of widespread social unrest, the prevention of economic and monetary crises and the repetition of corruption, ensnare and prosecute corruption and to eradicate the growing corruption in Indonesia.

Implementation of the field in the application of Article 2 paragraph (1) and Article 2 paragraph (2) of Law no. 20 of 2001 on the Eradication of Corruption, shows that corruption has grown and developed is closely related because in Article 2 paragraph (1) it is proven to be able to ensnare corruption but can not make the crime of corruption while Article 2 paragraph (2) proven to be able to make the crime of corruption but can not ensnare the criminal act of corruption.

Eradication of corruption crime effectively and efficiently is the need to reconstruct the punishment system in an effort to criminalize corruption crime in Indonesia based on justice, that is by revision of Law no. 20 of 2001 in Article 2 paragraph (1) and Article 2 paragraph (2) because without reconstruction in the penal system it is not easy for Indonesia to be free from corruption crime with evidence to date there is still growing corruption in Indonesia.

With the above background the authors are interested to create a paper with the title: *"Reconstruction of the Penal System in Criminal Efforts Against Corruption in Justice-Based Indonesia"*.

Main Problem

Based on that background the formulation of the problem is:

1. How is the punishment system in an effort to criminalize corruption in Indonesia based on justice?
2. How is the reconstruction of the punishment system in an effort to criminalize corruption in Indonesia based on justice?

Discussion

A criminal punishment system for criminalizing corruption in Indonesia based on justice

The punishment system in an attempt to criminalize corruption in Indonesia based on justice can be explained as follows:

a) In Article 2 paragraph (1) of Law no. 20 of 2001 on the Eradication of Corruption, explains that the Criminal Act of Corruption is: any person who violates the law to enrich themselves or others or a corporation that may harm the State or State's economy, is punished by life imprisonment or the most imprisonment a maximum of 4 (four) years and a maximum of 20 (twenty) years and a fine of at least Rp 200,000,000 (two hundred million rupiah) and a maximum of Rp.1.000.000.000 (one billion rupiah).
   UU no. 20 Year 2001 on the Eradication of Corruption, also explained:
   (1) Additional criminal as referred to in the Criminal Code (Criminal Code), as additional criminal are:
      a. seizure of tangible or intangible goods or immovable property used for or derived from a criminal act of corruption, including a company owned by a convicted person in which a criminal act of corruption is committed, as well as from goods replacing the goods;
      b. repayment of a substitute amount equal to the amount of property derived from a criminal act of corruption;
      c. closing all or part of the company for a maximum period of 1 (one) year;
      d. revocation of all or part of certain rights or the deletion of all or any of the particular benefits which the Government may or may have provided to the convicted person.
   (2) If the defendant fails to pay the replacement money as referred to in paragraph (1) letter b within a period of 1 (one) month after the decision of the court that has obtained permanent legal force, then the property may be seized by the prosecutor and auctioned off to cover the replacement money the.
   (3) In the event that the defendant does not have sufficient property to pay the replacement money as referred to in paragraph (1) letter b, he shall be punished with imprisonment whose duration does not exceed the maximum threat of the principal penalty in accordance with the provisions of this Law and the duration the penalty is already determined in a court decision.
b) Furthermore, in Article 2 paragraph (2) of Law no. 20 Year 2001 on the Eradication of Corruption, stating that in the case of corruption as referred to in paragraph (2) is conducted under certain circumstances, capital punishment may be imposed. Certain circumstances in this provision are: the circumstances which can be used as a reason for the criminal sanction are applied to the danayang intended for the prevention of hazard, national natural disaster, prevention due to widespread social unrest, the prevention of economic and monetary crisis and repetition of corruption crime.

According to Guwandi must have limitation by using the size of proof as follows:[3]

a) In the application of a reversed evidentiary system there must be evidence in such a way that when measured has a greater power of truth. This is to minimize the chance of the suspect / defendant to prove otherwise, ie that he is innocent.
b) In the application of a reversed evidentiary system shall be defined as a measure of the size of evidence which will provide a strong legal force that will give an impression to the judge and the public a degree of measure championed by the claimant / plaintiff to genuinely entrap the perpetrator of the corrupt act.

The application of the principle of a reversed load of pure invention or absolute / absolute theoretical, normative and practical, it is necessary to have the conviction of the public prosecutor that the defendant through the evidence and evidence that there is a limitative right to commit a criminal act of corruption, and if this is ignored will result in the defendant successfully proving himself innocent commits a criminal act of corruption that would result in the defendant being freed (vrijspraak) by a judge before a court hearing both in the public court as well as in the Ad Hoc Court of corruption.

The reconstruction of the punishment system in an effort to criminalize corruption in Indonesia based on justice

The reconstruction of the punishment system in an attempt to criminalize corruption in Indonesia based on justice can be explained as follows:

In the present era, the application of each article has been established, namely Article 2 paragraph (1) and Article 2 paragraph (2) in Law no. 20 Year 2001 on the Eradication of Corruption, it is in fact unable and or not easy to ensnare the criminal act of corruption to be a deterrent especially against new corruptors and repetition of corruption acts even vice versa grow corruption in Indonesia this is due to the judge's verdict in the trial which is guided by Law no. 20 of 2001 in the imposition of criminal punishment of corruption is still mild and not yet weighting, the articles are:

a) Article 2 paragraph (1) of Law no. 20 of 2001 on the Eradication of Corruption, explains that the Criminal Act of Corruption is: any person who violates the law to enrich themselves or others or a corporation that may harm the State or State's economy, is punished by life imprisonment or the most imprisonment a maximum of 4 (four) years and a maximum of 20 (twenty) years and a fine of at least Rp 200,000,000 (two hundred million rupiah) and a maximum of Rp.1.000.000.000 (one billion rupiah).
b) Article 2 paragraph (2) of Law no. 20 Year 2001 on the Eradication of Corruption, stating that in the case of corruption as referred to in paragraph (2) is conducted under certain circumstances, capital punishment may be imposed. Certain circumstances in this provision are: the circumstances which can be used as a reason for the criminal sanction are committed against funds intended for the prevention of hazards, national natural disasters, prevention due to widespread social unrest, the prevention of economic and monetary crises and the repetition of criminal acts of corruption.

The next action to anticipate the growing corruption is to ensnare and trap especially against new corruptors in Indonesia, it is necessary to revise Law no. 20 of 2001 on the Eradication of Corruption, namely: reconstruct in Article 2 paragraph (1) and Article 2 paragraph (2) because in the implementation of Article 2 paragraph (1) can ensnare corrupt crime but can not make the crime of corruption while Article 2 paragraph (2) may make the crime of corruption but can not ensnare the criminal act of corruption, furthermore to make the hardening and harassment of corruption crime it is necessary to unite and or the merger of Article 2 paragraph (1) and Article 2 paragraph (2) to become one Article whose draft contains the following:

a. capital punishment;
b. imprisonment for life;
c. imprisonment for a minimum of 4 (four) years;
d. maximum imprisonment of 20 (twenty);
e. fine of at least Rp.200.000.000 (two hundred million rupiah) and at most Rp.1.000.000.000 (one billion rupiah);
f. any person who is unlawful commits an act of enrichment of himself or another person or a corporation that may harm the State's finances or the economy of the State;
g. the criminalization of corruption is adjusted to the classification of the level of state financial loss is important in order to establish an appropriate expectation mandated in Law no. 20 of 2001 on the Eradication of Corruption and the realization of a form of justice in the punishment of corruption.

The elements of criminal acts of corruption are 4 with explanations, namely:

(1) Everyone is a person or individual or including a corporation. Where such corporation means a collection of persons and / or assets organized, whether it is a legal entity or not a legal entity, is found in the general provisions of Law no. 31 Year 1999 Article 1 paragraph 1.

[3]Wiryono Projodikoro, 2011, *Certain Crimes in Indonesia*, Refika Aditama, Bandung, Page. 15

(2) Against the law, in contravention of the law is an act in which the action is contrary to the prevailing laws and regulations. Because in the Criminal Code (Book of Criminal Law). First book, general rule Chapter 1 (one). The limits of the enactment of criminal law in the legislation of article 1, paragraph (1) of an act can not be criminal, except under the force of existing criminal legislation.
(3) Action, referred to in Article 1 paragraph (1) of Law no. 31 Year 1999 is an act whereby committed by self or others or a corporation abuses the authority, opportunity or facilities available to it because of position or position which may harm the state finance or economy of the country, is punished with life imprisonment or shortest imprisonment 1 (one) year and a maximum of 20 (twenty) years and / or a fine of at least Rp.50.000.000,00 (fifty million rupiah) and a maximum of Rp.1.000.000.000,00 (one billion rupiah). This provision states that information about acts enriching yourself or others or a corporation by committing a criminal act of corruption is a very clear act that can harm the State.
(4) The perpetrator of a criminal act of corruption, the perpetrator is the person who commits an act. Conclusion The offender of a criminal offense is a person who commits an act or set of deeds that may be subject to criminal penalties.

Closing

Conclusion

1. The penalty system for criminalizing corruption in Indonesia based on justice is a system for committing crime by bepedoman on:
   - Article 2 paragraph (1) of Law no. Law No. 20 Year 2001 on the Eradication of Corruption, states that: Every person who violates the law performs an enriching act of self or another person or a corporation that may harm the State or State's economy, shall be liable to a life imprisonment or a jail for a minimum of 4) year and a maximum of 20 (twenty) years and a fine of at least Rp.200,000,000 (two hundred million rupiah) and a maximum of Rp.1,000,000,000 (one billion rupiah);
   - Article 2 paragraph (2) of Law no. 20 Year 2001 on the Eradication of Corruption, states that: in the case of the criminal act of corruption as referred to in paragraph (2) is conducted under certain circumstances, capital punishment may be imposed. Certain circumstances in this provision are: the circumstances which can be used as a reason for the criminal sanction are committed against funds intended for the prevention of hazards, national natural disasters, prevention due to widespread social unrest, the prevention of economic and monetary crises and the repetition of criminal acts of corruption.
2. The reconstruction of the punishment system in an attempt to criminalize corruption in Indonesia based on justice is a way of reconstructing the penal system, namely:
   To reform by revising Law no. 20 of 2001 on the Eradication of Corruption, namely: reconstruct in Article 2 paragraph (1) and Article 2 paragraph (2) because in the implementation of Article 2 paragraph (1) can ensnare corrupt crime but can not make the rampant of corruption while Article 2 paragraph (2) may make the crime of corruption but can not ensnare the criminal act of corruption, furthermore to make the hardening and harassment of corruption crime it is necessary to unite and or to unite Article 2 paragraph (1) and Article 2 paragraph (2) to become one Article whose draft contains the following:
   a. capital punishment;
   b. imprisonment for life;
   c. imprisonment for a minimum of 4 (four) years;
   d. maximum imprisonment of 20 (twenty);
   e. a fine of at least Rp.200,000,000 (two hundred million rupiah) and a maximum of Rp.1,000,000,000 (one billion rupiah);
   f. any person who is unlawful commits an act of enrichment of himself or another person or a corporation that may harm the State's finances or the economy of the State;
   g. criminal prosecution of corruption adjusted to the classification of the level of state financial loss is important in order to realize the expectations as mandated in Law no. 20 Year 2001 on the Eradication of Corruption and the realization of a form of justice in criminal acts of corruption in Indonesia.

Suggestion

1. In order to ensnare and guard against corruption in Indonesia in court in Judge Court must be able to implement the application of Law no. 20 of 2001 in relation to the punishment system, therefore the Judge is expected to be more courageous to give a verdict of a hearing or justice-based penalty against corruption so as to eradicate the growth of all forms of corruption in Indonesia.
2. The need for renewal by revising Law no. 20 Year 2001 is to combine Article 2 Paragraph (1) and Article 2 Paragraph (2) into one to ensnare and guard against corruption so as to anticipate the growth of corruption crime in Indonesia and to create a punishment justice by applying the classification of state financial loss level .

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THE CONCEPT OF LEGAL PROTECTION OF JAMU (HERBAL MEDICINE) BASED ON THE INDONESIAN WISDOM

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ABSTRACT

Jamu (Herbal Medicine) is an indigenous product of Indonesia as Indonesian cultural heritage (Indonesian wisdom) that needs to be developed by Indonesian people so that it is closed to foreign investment. Development of Indonesian herbal products in order to enter the world market, requires international commercial certification, which includes product system, halal guarantee and quality, however commercial certification of new herbal products in the form of Minister of Health Regulation. Therefore, in order to enter the world market, the product system, halal guarantee and quality must be regulated in legislation. In Indonesia, the agency authorized to grant commercial certification is (1) The Food and Drug Supervisory Agency / Badan Pengawasan Obat dan Makanan (BPOM) is competent in the field of benefit on Indonesian herbal medicine; (2) The Indonesian Council of Ulamas plays a role in guaranteeing the halal nature of a product, and; (3) The Ministry of Commerce is authorized to grant marketing authorization. If commercial certification Herbal products obtained then the legal protection is achieved, so that Indonesian herbal products can be accepted world market. To provide a quality assurance system, a regulation should be made, in the form of legislation which is set forth in a formulation of the Act. Given that the regulation has not been created, herbal medicine entrepreneurs only take refuge in a legal umbrella in the form of Ministerial Decree, therefore Jamu (Herbal Medicine) as original product of Indonesia need to get legal protection, so that original product of Indonesia in consumption of world community. The long-term objective of this study is the formulation of an Indonesian herbal medicine regulation. As a form of legal protection based on Indonesian wisdom.

Keywords: Saintifikation Herbs, Herbal Regulation System, Indonesian wisdom

Introduction

Indonesia with a population of more than 240 million people, has approximately 30,000 species of plants and 940 species of which include nutritious plants, is a potential market of herbal medicine and phytopharmaca. The use of natural materials as traditional medicine has been done by our ancestors since centuries ago, judging by the existence of old manuscripts on leaves palmy Husodo (Java), Usada (Bali), Lontarak pabbura (South Sulawesi), documents Fiber Jampi, Fiber The concoction of Boreh Wulang nDalem and reliefs of Borobudur temple depicting people are mixing herbs with plants as their raw materials.

Herbal remedies have been widely accepted in developing countries and in developed countries. According to WHO (World Health Organization) up to 65% of the population of developed countries and 80% of the population of developing countries have used herbal medicine. The driving force behind increased use of herbal medicines in developed countries is a longer life expectancy at a time when chronic disease prevalence increases, the failure of modern medicine for certain diseases such as cancer and the widespread access to information on herbal remedies worldwide. In the year 2000 estimated herbal medicine sales in the world reached US $ 60 billion. WHO recommends the use of traditional medicines including herbs in the maintenance of public health, prevention and treatment of diseases, especially for chronic diseases, degenerative diseases and cancer. This shows WHO support for back to nature which in some ways is more profitable. To improve the effectiveness of treatment and to reduce the influence of season and place of origin of plant to the effect, and more ease in standardization of drug substance, the active substance is extracted and then made the preparation of phytopharmaca or even purified until obtained pure substance In Indonesia.

The Capital Investment Coordinating Board (BKPM) stated with the suggestion that business fields related to traditional medicine can be open to foreigners. The proposal is submitted in relation to the process of preparation of the current Investment Guide. Where the proposal is supplemented by the argument that with the opening of foreign investment will bring new technology of traditional medicine processing to Indonesia to get better quality traditional medicine and opportunity to export traditional medicine from Indonesia, but Perpres 39 of 2014, traditional is 100% for Domestic Investment.

From the data conveyed by the Association of Herbal Medicine and Natural Medicines Indonesia (GP Jamu), traditional herbal medicine is not only produced for national consumption alone, but also has potential for export market. Herbal export destinations include Malaysia, South Korea, Philippines, Vietnam, Hong Kong, Taiwan, South Africa, Nigeria, Saudi Arabia, Middle East, Russia and Chille. According to BKPM data, there is a prohibition for foreign investors to invest in herbal medicine.

In an effort to safeguard the law of Indonesia's natural security material, POM cooperates with several universities to provide legal protection of Indonesia's natural ingredients, such as salam, sambiloto, turmeric, red ginger, jati dutch, temulawak, guava, and mengkudu, which is used as ingredients of traditional medicine by herbal medicine industry. Standardization of raw materials and finished drugs, proof of pharmacological effects and information on the safety level of herbal medicine is a challenge for pharmacists to make herbal medicine more acceptable to the wider community, both national society and the world community.

If herbs enter the world market, the world community as a consumer will nenentukan a commercial standard to be able to enter the world market, the conditions that must be met is the product system, guarantee and quality that must be poured in a legislation regulating the system of guarantee and quality, the guarantee and quality system is a certification from the authorized institution to determine the feasibility of quality assurance and halal product, which in Indonesia is outsourced by three institutions, namely (1) Food and Drug Control Agency (BPOM) where the institution has authority in the field of kasiat / kemanfaatan on Indonesian herbal medicine (2) Indonesian Ulema Council plays a role in guaranteeing the halal nature of a product and (3) the Ministry of Industry and Trade is the authorized institution to grant production permits. Based on the above background, it can be formulated: ***How the concept of herbal medicine regulation in realizing the Legal Protection of Jamu based on Indonesian Wisdom.***

Discussion

Saintifikasi Jamu System Product Regulation of Jamu Indonesia

Permenkes No. 03 / MENKES / PER / 2010 concerning Saintifikasi Herbal Medicine stated that one of the objectives of Saintifikasi Herbal Medicine is to provide an empirical basis for the use of herbal medicine through research conducted by health service facilities. In the Minister of Health there is a chapter describing the purpose of regulating saintifikasi herbal medicine (1). article 2 on the purpose of regulating the saintification of herbal medicine as well as (2). Article 4, Article 6, Article 7, Article 8, on Personnel (3). article 11 on Recording (4) of article 14 on the role of pharmacists in the saintification of herbal medicine.

On the other hand, according to Law no. 36 of 2009 Article 108 and Regulation of Government no. 51 of 2009 on Pharmaceutical Practice states that pharmaceutical practices include the manufacture including pharmaceutical quality control, safeguards, procurement, storage and distribution of drugs, prescription drug services, drug information services and drug development, medicinal and traditional medicines should be performed by health workers who have the expertise and authority in accordance with the legislation

Association of Herbal and Traditional Medicines Entrepreneurs in Indonesia (Gabungan Pengusaha Jamu/GP Jamu) with a membership of approximately 800 companies. GP Jamu is a container that consists of small traditional medicine industry, herbal medicine concoction, herbal medicine business carrying, distributors, retailers, including the field of simplicia. Since 2004, there have been 1,116 traditional medicine industries consisting of 129 Large Categories Industry (IOT) and the rest of 1,037 are Small Traditional Medicines Industry (IKOT) including Household Industr

Development of Indonesian Herbal Industry:[1]

a. Total turnover of Indonesian herbal medicine in 2009 reached 8.5 Trillion and is estimated until 2010 reached 10 trillion.
b. The tendency of the world community to quibble from modern medicine to natural treatment has brought the herbal medicine industry to a fierce competition, especially herbal products from abroad.
c. Through the Coordinating Ministry of Economy, on March 4, 2008, has established that Jamu is "Brand Indonesia".
d. On January 6, 2010 proclaimed "Saintifikasi Jamu", traditional medicine to be used is a traditional medicine that has been registered in BPOM and has been circulating in the market, but has passed the retest to be performed by the Board of Lirbangkes.

Problems faced

a. Education: Very few Health Personnel who understand the benefits of herbal medicine for the maintenance and improvement of health. GP Jamu proposes material on traditional drug identification lessons incorporated into the curriculum at the Faculty of Medicine.
b. Traditional Medicinal Research: An integrated research research institute is required to obtain a standard of quality raw materials so that it can be utilized by herbal medicine industries to get quality herbal production.
c. Herbal Products containing Medicinal Chemicals (BKO): GP Jamu produces herbs based on natural ingredients, but marketed widely distributed medicinal products mixed with BKO. This needs to be educated to the public about the hazards of the BKO and the application of maximum legal sanctions for violations of Law no. 32 of 1992 on Health and Law no. 8 of 1999 on Consumer Protection.

[1] LP. Hadena Hosita diwati, *Penyelesaian Sengketa Terhadap Pengguaan Obat Tradisional yang mengandung Bahan Kimai Berbahaya Berdasakan Undang-Undaang Nomor 8 tahun 1999 Tentang Perlindungan Konsmen*, Laporan Penelitian Universitas Udayana, Den Pasar, 2015

d. Socialization of Standardized Herbal Drugs and Phytopharmaca: Phytopharmaca Products that have been issued by BPOM. The product socialization involves the Government, Herbal Industry, Academics and Consumers. The government needs to socialize through the Institute of Health and Medical Education, the official information at the Hospital, Puskesmas, the doctor's office and other health services. It is proposed by the Government to have the Agency responsible for handling traditional medicine. Special Phytopharmaca is expected that the Minister of Health wishes to recommend and submit to the National Essential Drugs List for Health Insurance purposes.
e. Chinese Herbal Ad: The rise of herbal clinic ads from China in various mass media has violated advertising provisions for traditional people.
f. Herbal Exports: The existence of constraints in exporting herbs, among others:
   1). Very strict requirements, making it difficult to obtain permits.
   2). Indonesian Jamu abroad is polluted with the circulation of Jamu BKO thus damaging the image of Jamu Indonesia
   3). Absence of government reciprocal with other countries (G to G).
g. Harmonization and standardization of traditional ASEAN medicinal products (ACCSQ TMHS PWG) GP Jamu together with Traditional Herbal Manufacture Association of ASEAN countries have established ASEAN Alliance of Traditional Medicine Industries (AATMI).
h. ACFTA Enforcement With the adoption of the ACFTA on January 1, 2010, Indonesia's general level of readiness is under the Chinese side. This is very felt GP Jamu because long before the entry into force ACFTA, Chinese herbal products have flooded the Indonesian market, especially after ACFTA sevara officially enacted. GP Jamu expects the Government's efforts in protecting the market of Indonesian Jamu Industry from Chinese herbal products.
i. Hope GP Jamu to Commission IX DPR RI. GP Jamu hope if Jamu Indonesia can be used widely to nourish the nation and prevent people not easily sick, because it contains anti oxidant and immunomodulator.
j. GP Jamu always give attention by giving prosperity for all employees. Empirically Indonesian herbal medicine has been proven tested to give efficacy and do not have side effects, for example: turmeric and ginger. So the Government must determine 283 medicinal plants in Indonesia that have been cultivated by grouping the necessary and unnecessary. One kind of herbal medicine can cure various diseases, for example: turmeric, for digestion, antiseptic, and so on, while in medicine, one medicine can only cure one kind of disease. For example: paracetamol for headache.
k. GP Jamu has problems in exporting Jamu especially to Malaysia. In fact there are 80% of Indonesian herbal products that are controlled by Malaysia herbal products. This is due to the requirements that must be fulfilled by GP Jamu in exporting herbs especially to Malaysia, among others:
   1) .Must meet health regulations;
   2) .There must be a trade / marketing license;

Implementation of the Ministry of Health RI regulations, especially POM RI, there is less supervision, especially for Illegal Herbal Medicine (not GP GP member) who easily get registration from POM RI, so there are many illegal herbs in the market. Therefore GP Jamu must submit a list of herbal entrepreneurs who are not members of GP Jamu but get registration from POM RI to Commission IX DPR RI no later than 1 (one) week, to be acted upon,

Legal Protection of Indonesian Herbal Medicine Based on Indonesian Wisdom

The protection of the law is to provide a guidance to human rights that are harmed by others and the protection is given to the community so that they may enjoy all the rights granted by law or in other words the protection of the law is the various legal remedies which must be provided by law enforcement officers to give sense of security, both mind-and-body from interference and threats from any party[2]. Legal protection is the protection of prestige and dignity, as well as the recognition of human rights held by legal subjects under the legal provisions of arbitrariness or as a set of rules or rules that would protect one thing from another.

In relation to the consumer, the law provides protection for the rights of the customer from something that results in the non-fulfillment of such rights [3]. Legal protection is a narrowing of the meaning of protection, in this case only protection by law only. The protection afforded by law, also relates to the existence of rights and obligations, in this case which is owned by human being as the subject of law in its interaction with fellow human being and its environment. As the subject of human law has the right and obligation to perform a legal action. According to Setiono[4], the protection of the law is an act or attempt to protect the public from arbitrary acts by a ruler who is not in accordance with the rule of law, to realize order and tranquility so as to

[2]. Satjipto Rahardjo.*Ilmu Hukum* PT. Citra Aditya Bakti Bandung, 2000. hlm. 74
[3]. Philipus M. Hadjon. *Pengantar Hukum Administrasi Indo*nesia.Gadjah Mada University Press,2011 hlm. 25
[4] Setiono. Rule of Law (Supremasi Hukum). Surakarta. Magister Ilmu Hukum Program Pascasarjana Universitas Sebelas Maret. 2004. hlm. 3

enable man to enjoy his dignity as a human [5]. According Muchsin, the protection of the law is an activity to protect individuals by harmonizing relationships values or rules that incarnate in the attitude and action in creating the existence of order in the association of life among fellow human.Menurut Muchsin, the protection of the law is a thing that protects the subjects law through applicable legislation and enforced by a sanction. Legal protection can be divided into two, namely:

a. Preventive Legal Protection Protection provided by the government with a view to preventing prior to the offense. It is contained in legislation with the intent to prevent a violation and to provide guidelines or limitations in the conduct of obligations.
b. Repressive Legal Protection Repressive legal protection is ultimate protection in the form of sanctions such as fines, imprisonment and additional penalties provided in the event of a dispute or an offense committed[6]. According to Philip M. Hadjon, there are two kinds of legal means of protection of the Law: Preventive Preventive Measures In the protection of this preventive law, legal subjects are given an opportunity to file an objection or opinion before a government decision gets a definitive form. The goal is to prevent the occurrence of disputes. The protection of preventive law is especially meaningful for governmental acts based on freedom of action because with the prevention of preventive law laws the government is encouraged to be cautious in making decisions based on discretion. In Indonesia there is no specific regulation on preventive legal protection.

Repressive Law Protection Facilities Repressive legal protection aims to resolve disputes. Handling of legal protection by the General Courts and Administrative Courts in Indonesia includes this category of legal protection. The principle of legal protection of government action rests on the concept of recognition and protection of human rights because historically from the west, the concepts of recognition and protection of human rights are directed to limiting the limitation and laying of public and government obligations . The second principle underlying the legal protection of governmental action is the principle of the rule of law. Associated with the recognition and protection of human rights, the recognition and protection of human rights has a central place and can be linked to the objectives of the rule of law.7 The definition of protection under the provisions of Article 1 point 6 of Law Number 13 Year 2006 regarding Protection of Witnesses and Victims determines that protection is any effort to fulfill the right and provision of assistance to provide a sense of security to Witnesses and / or Victims that must be implemented by LPSK or other institutions in accordance with the provisions of this Act[7].

Justice is formed by right thinking, done fairly and honestly and is responsible for the actions taken. The sense of justice and the law must be enforced under the Positive Law to uphold justice in law in accordance with the reality of the people who desire the achievement of a safe and peaceful society. Justice must be built in accordance with the ideals of law (Rechtidee) in the rule of law (Rechtsstaat), not the state of power (Machtsstaat). The law serves as the protection of human interests, law enforcement must pay attention to 4 elements: a. Legal certainty (Rechtssicherkeit)

a. Legal benefit (Zeweckmassigkeit)
b. Legal justice (Gerechtigkeit)
c. Legal guarantee (Doelmatigkeit)[8].

Law enforcement and justice must use the proper course of thought with evidence and evidence to realize legal justice and the content of the law should be determined by ethical beliefs, whether fair or just a matter. Legal issues become apparent if the legal instruments perform well and meet, keep the rules that have been standardized so that there is no systematic misuse of rules and laws that have been done systematically, that is to use the codification and legal unification for the realization of legal certainty and legal justice [9].

The law serves as the protection of human interests, so that human interest is protected, the law h flow implemented professionally. Implementation of the law can be normal, peaceful, and orderly. Laws that have been violated must be enforced through law enforcement. Law enforcement requires legal certainty, legal certainty is a yustisiable protection against arbitrary acts.

The law serves as the protection of human interests, so that human interest is protected, the law h flow implemented professionally. Implementation of the law can be normal, peaceful, and orderly. Laws that have been violated must be enforced through law enforcement. Law enforcement requires those rules to be a limitation for society in burdening or taking action against individuals. The existence of such rules and the enforcement of these rules give rise to legal certainty. Thus, the legal certainty contains two meanings, namely first, the existence of a general rule making the individual know what deeds that may or may not be done and two, in the form of legal security for the individual from the abuse of the government because with the existence of a general rule that the individual can know what the State may charge or do to individuals.

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[5]. Muchsin. *Hukum Administrasi Indo*nesia.Gadjah Mada University Press,2011. hlm. 14
[6]. Ibid. hlm. 20
[7]. Philipus M. Hadjon. . hlm. 30
[8]. Ishaq. Dasar-dasar Ilmu Hukum. Jakarta. Sinar Grafika. 2009. hlm. 43
[9]. Ibid. hlm. 44

Legal certainty is not only a passage in the law, but also the consistency in the judge's decision between a judge's verdict with another judge's verdict for a similar case that has been decided upon astian law, legal certainty is a yustisiable protection against ill-treatment.[10].

Normative legal certainty is when a rule is created and enacted as it is clearly defined and logical. Clearly, in the sense that it does not create doubles (multi interpretations) and logical in the sense that it becomes a system of norms with other norms so as not to clash or cause conflict of norms. Conflicts of norms arising from uncertainty of rules may be contestants, norms, or norm distortions. The role of government and the courts in maintaining legal certainty is very important. Governments may not publish rules of conduct that are not regulated or are contrary to law[11]. In that case, the court must declare that the rule is null and void, meaning that it is considered never existed so that the consequences of such a regulation must be restored to normal. However, if the government still does not want to revoke the canceled rule, it will turn into a political issue between the government and the legislator. What is worse if the people's legislature as the legislator does not question the reluctance of the government to revoke the rules declared null and void by the court. Of course such a thing does not provide legal certainty and consequently the law has no predictibility[12]. Based on the above description can be seen that the protection of the law is any form of effort pengayoman against human dignity and human dignity and recognition of human rights in the field of law. The principle of legal protection for the people of Indonesia derives from Pancasila and the concept of the State of Law, both of which prioritize the recognition and respect for human dignity and prestige. Legal protection means there are two forms, namely the means of preventive and repressive law protection. Legal protection is protection given to legal subjects, both preventive and repressive to enforce the rule of law.

In the discussion of the role of pharmacists related to the protection of herbal law, the legislation on saintification of herbal medicine in realizing the protection of Indonesian herbal medicine law, they formulate there are 7 (seven) points of argumentation of law issue as follows [13]:

a. The role of pharmacist in the Minister of Health 003 / Menkes 2010 is still implied, not yet explicit. "The purpose of regulating saintifikasi herbs that mention encourage the formation of a network of doctors or dentists and other health workers as researchers in the framework of dst. .... need to add pharmacists before other health workers ". "Given that saintifikasi herbal medicine is a research, then its validity needs to be questioned. This means that the quality / quality of the sample being tested must be correct. So far the competent with traditional medicine is the pharmacist, so the personnel in clinic A is a pharmacist, so that later if become a form of traditional medicine services then a doctor only diagnose and write prescriptions, while to meracik, up to submit traditional medicine is the authority of a pharmacist. When talking about a traditional medicine a pharmacist must be involved from upstream to downstream, starting to produce the product up to the ministry. But in the regulation the role of the pharmacist is not touched upon at all ". "In one of the articles mentioned about STRA for pharmacists, but in front there is no pharmacist statement at all but only implied with other health workers. Proposed for legal certainty should be expressly pharmacist. The obviously heavy rules of conduct, let alone vague, may actually foil the government for lifting herbs ".
b. The role of pharmacist in the Minister of Health 003 / Menkes 2010 is still implied, not yet explicit. "The purpose of regulating saintifikasi herbs that mention encourage the formation of a network of doctors or dentists and other health workers as researchers in the framework of dst. .... need to add pharmacists before other health workers ". "Given that saintifikasi herbal medicine is a research, then its validity needs to be questioned. This means that the quality / quality of the sample being tested must be correct. So far the competent with traditional medicine is the pharmacist, so the personnel in clinic A is a pharmacist, so that later if become a form of traditional medicine services then a doctor only diagnose and write prescriptions, while to meracik, up to submit traditional medicine is the authority of a pharmacist. When talking about a traditional medicine a pharmacist must be involved from upstream to downstream, starting to produce the product up to the ministry. But in the regulation the role of the pharmacist is not touched upon at all ". "In one of the articles mentioned about STRA for pharmacists, but in front there is no pharmacist statement at all but only implied with other health workers. Proposed for legal certainty should be expressly pharmacist. The obviously heavy rules of conduct, let alone vague, may actually foil the government for lifting herbs ".
c. In the health service need to be distinguished between Care (by nurse), Cure (by doctor) and pharmaceutical care (by pharmacist). "If we refer to pharmaceutical care then pharmacists, doctors and patients are a team in the health effort. So in this case, at the clinic of a pharmacist as a barier evidence base medicine (EBM) should also be involved to give or decide whether the selection of therapy is appropriate or not ".

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[10]. Peter Mahmud Marzuki. Pengantar Ilmu Hukum. Jakarta. Kencana. 2008. hlm. 157-158

[11] Ibid hlm. 157-158

[12]. Ibid. hlm. 159-160

[13] Jurnal Pusat Humaniora Kebijakan Kesehatan dan Pembardayaan Masyarakat: *Kajian Hukum Peran "Apoteker" dalam Saitifikasi Jamu*, Universitas Widyamandala Surabaya

d. Pharmacists are involved in Saintifikasi Jamu "In accordance with the definition of herbal medicine Saintifikasi is a scientific verification of herbal medicine through research-based health services. So the point is an evidence base based on the herbal service itself. And when talking about herbs, pharmacists must be involved. So how can produce good herbs, then distribute the herb well, and last is the service to the patient, so in Saintifikasi herbal pharmacist must be involved ". "Clinic A classification is higher than Clinic B, but health workers other than doctors or dentists are listed as pharmacist systems. Whereas if high qualification should be BA (Bioavailability), BE (Bioequivalency) then there is preparation, the interaction, side effects where the knowledge is less owned or not accepted in the curriculum assistant pharmacist ". "When talking about a traditional medicine a pharmacist must be involved from upstream to downstream, starting to produce products to service. But in the regulation the role of the pharmacist is not alluded to. This research is proposed to Komnas Saintifikasi Jamu to be parallel. So in Clinic A, pharmacist assistants are replaced with pharmacists and pharmaceutical technical personnel. Similarly in Clinic B, plus pharmacists and pharmaceutical technical personnel. According to PP. 51 of 2009 stated that all clinics, or BP should have a pharmacist, so should pay attention to these rules although saintifikasi this herbal medicine for research ".
e. There is a discrepancy between the type of officer and the activities performed is the recording of medical records conducted by health personnel and other personnel."Health workers and other personnel who conduct research-based herbal medicine services to patients should make records in the medical record (medical record). So later there may be a legal force, administrative personnel, etc., but if the hospital, medical record is compulsory doctors who do, not other personnel, so integrated with the service. In pharmacists themselves there is a pharmaceutical record or medication record and the work is a pharmacist ".
f. The research required for saintification of herbs is not only qualitative research. "It should be added quantitative research in addition to qualitative because the evidence base must be really strong, so the evidence base many but also valid and good and must be in accordance with the good method".
g. The health service facilities are mentioned in the Jamu Clinic, although according to the Minister of Health Regulation number 028 / Menkes / Per / I / 2011 article 2, paragraph 1, it is stated that by type of health service (Fasyankes) is not in accordance with the legislation (outside the research context) services, clinics are divided into Primary Clinic and Main Clinic. While the Clinic of Jamu is divided into Clinic Jamu A and Clinic Jamu B based on the power and facilities owned but managed jointly herbal medicine. If in order to establish a good evidence base medicine (EBM), the criteria for health care facilities are adjusted to existing regulations such as PP. 51 or the Act which states about health services.

Indonesian wisdom is a policy that explores the values of "Local Wisdom" that exist, living and developing in Indonesia, is a life view and science as well as various life strategies in the form of activities undertaken by local communities in answering various problems in the fulfillment of their needs . Conceptualized as local wisdom policy or local knowledge local knowledge or local intelligence

Closing

In realizing the Legal Protection of Legal Medicine based on Indonesian Wisdom that must be met is the product system, guarantee and quality that must be poured in a legislation regulating the system of guarantee and quality. To provide the quality assurance system, a regulation should be made, in the form of legislation which is set forth in a formulation of the Act. Given the regulation has not been created, it is necessary to formulate a regulation of Indonesian herbal medicine. As a form of legal protection based on Indonesian wisdom.

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LEGAL PROTECTION TOWARDS PHARMACIST ON NARCOTICS AND PSYCHOTROPICS DRUGS MANAGEMENT

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ABSTRACT

Health is one of human rights. Everyone has the right to an adequate standard of living in his/her own health and wellbeing, as mandated in Universal Declaration of Human Rights article 25. One of the health workers is a pharmaceutical manpower. One of the pharmaceutical workers is a pharmacist. In carrying out its obligations, the pharmacist is governed by several regulations which authorize the pharmacist's profession to carry out its responsibilities. An interesting case had occurred in the city of Semarang, Central Java Province where a pharmacist was accused of criminal acts of embezzlement in the running of her profession. Charge experienced by the pharmacist went to court until the cassation level. This study aims to examine in terms of legal measures to analyze the legal protection that is good for pharmacists on narcotics and psychotropics. The results of this study revealed that the pharmacist can't be prosecuted criminally because the pharmacist action is in accordance with what is regulated by the juridical regulations related to Pharmaceutical Workers. Moreover, many parties support for the protection of pharmacist's rights and requested that the pharmacist's profession shall not randomly criminalized by parties who are without good intentions.

Keywords : Legal Protection of Pharmacist, Embezzlement in Profession

Introduction

The development of the health sector is basically aimed at raising awareness, willingness, and healthy living capability for every person to realize the highest degree of health as one of the elements of welfare as mandated by the Preamble of the 1945 Constitution of the State of the Republic of Indonesia, so also expressed in article 25 of the Universal Declaration of Human Rights explaining that everyone has the right to an adequate standard of living in the health and well-being of himself and his family. The right to health is also governed by article 12 of the International Convention on Economic, Social and Cultural Rights, provided that States following the United Nations Convention shall recognize the right of everyone to the enjoyment of the highest standards of physical and mental health.[1] The health aspect has always been the target that the government wants to improve in the nation's development efforts as one of the indicators of the nation's progress.[2]

In Indonesia, many regulations related to a profession are regulated in Laws, Government Regulations, and Ministerial Regulations. In addition to legislation, people who have a profession have a community container called the Professional Organization, and each profession has each Professional Organization. Professional Organizations have a role to safeguard, develop, and protect professionals who are under its auspices. The person who runs the job with that specific specification is said to be a person who has a profession.[3] Profession is a specific job that is specific to its function and has differentiating factors from other jobs so that each profession has its own rules and regulations. The focus of the study in this study is on cases experienced by pharmacists in the management of narcotic drugs and psychotropic substances.

In exercising its rights and obligations, the Pharmacist must fulfil them in good faith and with full responsibility. If a Pharmacist is guilty of not fulfilling that obligation, it becomes the reason for him to be prosecuted in order to compensate for any loss incurred in connection with the non-fulfillment of the obligation, meaning that the Pharmacist shall be legally liable for any errors or omissions in the performance of his obligations.[4]

A case related to the pharmacist's profession took place in Semarang and was enough to invite the attention of the public which caused a lot of comments popping up in social media and internet media related to the case. This case is experienced by a holder of the pharmacist profession which in 2012 pharmacist is entangled in cases related to the profession he runs. This case is an interesting case because of a combination of Criminal Law coupled with the Code of Professional Ethics and the origin of why there could be a professional violation in the case. Based on the above background description, this journal will be titled "Legal Protection towards Pharmacists on Narcotics and Psychotropics Drugs Management"

[1] *Jaminan Kesehatan Nasional. JKN, Hak atas Kesehatan dan Kewajiban Negara. Kontras*, Jakarta 2015. p. 7
[2] Johan Nasution, Bahder. *Hukum Kesehatan Pertanggungjawaban Dokter.* PT Rineka Cipta, Jakarta. 2015. p. 92
[3] Tedjosaputro, Liliana. Lecture material: *Kejahatan Profesi*. Universitas 17 Agustus 1945, Semarang. 2015.
[4] Ibid. p. 10

Main Problem

1. What is the legal remedy for Apothecary accused of embezzlement in the management of narcotics and psychotropic drugs?
2. How to Protect Good Laws on Pharmacists for optimal implementation of their professional duties?

Pupose Of The Research

1. To identify and identify legal remedies for Pharmacists accused of embezzlement in the management of narcotic drugs and psychotropic substances.
2. To know and analyse the good Legal Protection of the Pharmacist to be optimal in the implementation of professional duties.

Discussion

Case Explanation

There is a case of an Apothecary taking place in Semarang, a Pharmacist in charge of the Aerospace Apothecary. On 29 May 2010 before the Notary in the street Prof Hamka, Ngalian Subdistrict, Semarang City, Owner of Aerospace Pharmacy Facility entered into cooperation agreement with Pharmacist. That the contents of the cooperation shall regulate the rights and obligations of the parties as well as other terms as outlined or described in the contents of the agreement agreed by the Owner of the Facility of Pharmacy and the Pharmacist. In the agreement the right and obligation of the Pharmacist shall be established, among other things: receiving basic salary, receiving prescription, securing or storing medicine, the period of the agreement, the procedure for terminating the agreement, the procedure of one of the parties to resign and so on. in decision letter Number: 223/PID.B/2012PN. SMG, High Court Judgement Number: 312/Pid/2012PT.Smg, and on appeal level in decision No. 539 K/Pid/2013 is positioned as a defendant because of an incident that occurred on Wednesday 1 December 2010 located at *Aerospace Apotik* Jl. Prof. Dr. Hamka 30 Tambakaji Urban Village Ngaliyan Sub-district Semarang City.

The pharmacist at that time used the key in his power to open the medicine case in 1 box of narcotics type: Codein tablet (tab) 10mg 175.05 tablet, Codein tablet 20mg 199,675 tablet, Codipront Caps 45 cap, Codipront syrup 1 Bottle, Codipront Cum expo syrup 3 Bottles, Amitriptyline 25 mg 91 tablets, Carbamazepine 63 tablets, Haloperidol 110 tabs, CPZ 525,5 tablets, Clobazam 60 tablets, Danalgin 61 tablets, Metaneuron 60 tablets, luminal 30 mg 979.9 tablets, Stesolid Rectal 5mg 3 tablets and Tramal 15 Tablets. Based on Law No.5 of 1997 the drugs are listed in G (gevaarlijk / dangerous) which should not be traded. Pharmacists also carry other items in the form of a key narcotics ward, 2 narcotics report book and psychotropic, 1 bundle of narcotic and psychotropic stock card, 1 recipe book, 2 prescription bundles November and December 2010, 5 bundles of narcotic and psychotropic recipes in July up to November 2010 and 1 narcotic and psychotropic invoice, 1 Narcotics order, 1 bundle of narcotics and psychotropic reports from July to November 2010.

After the Pharmacist picks up the items, then takes them out of the Aerospace Pharmacy without the consent or approval of the owner of the pharmacist facility who is also the owner of the goods, then the pharmacist hands over all the items to the City Health Office of Semarang to be stored, and received by officers who in both decisions positioned as a witness. The owner of the pharmacy means that the losses experienced by the Aerospace Apothecary are estimated at Rp 2.213.675, -

The charges charged to the Pharmacist are based on Article 374 of the Criminal Code (embezzlement with a denunciation). Pharmacist Pharmacists were found guilty by the panel of judges of the District Court of Semarang. The purpose of his actions to secure the preparation of drugs of psychotropic substance is considered to violate Article 374 of the Criminal Code on embezzlement. Because of his actions, the pharmacist was sentenced to four months in jail or less than three months from the prosecutor's charges. Then the Apothecary appeals where in the High Court, the Pharmacist is exempt from any sanction and criminal punishment directed against him at the court at the PN level. At the appeals level the pharmacist is declared absolutely free.

Analysis and identification of legal remedies for pharmacists accused of embezzlement in the management of narcotic drugs and psychotropic substances.

A good legal form is with a good understanding of the pertinent rules of pharmaceutical labour. So that for pharmaceutical workers can well run their profession in accordance with the provisions of the Law of the Republic of Indonesia Number. 36 of 2009 on Health and Government Regulation Number. 51 of 2009 concerning pharmaceutical work that protects the Profession of Pharmacist. In addition, the understanding of law enforcement officers on the regulation of pharmaceutical personnel must be mature, because the pharmaceutical worker should be in running his profession protected by the Law of the Republic of Indonesia Number. 36 of 2009 on Health and Government Regulation Number. 51 of 2009 concerning pharmaceutical work that protects the Profession of Pharmacist.

So that the parties are not well-intentioned cannot casually penalized pharmaceutical personnel, such as the Code of Professional Pharmacist Profession also regulate and protect the Profession Pharmacist. A code of ethics that is a written value or professional rule expressly expresses what is right and wrong and what is not good and is not true for professionals, and the code of conduct states what is right or wrong and what actions to avoid and do. The goal is to regulate the moral behaviour of a pharmacist's profession so that when there is unprofessional action can be prevented. Professional code of ethics is a guideline of behavioural behaviour and deeds in carrying out day-to-day duties. So in performing pharmaceutical services must meet or comply with the rules of ethics, if the violation of the law of the government is active in setting legal sanctions, then the violation of government ethical code will be passive and only intervene when it is very necessary. The code of ethics is created by professional organizations and used as a guidance of a professional pharmacist in carrying out his profession, then all forms of violation of ethical code that occurs is the responsibility and the role of professional organizations in imposing sanctions, for example until the expelled from the organization. Code of ethics is created by professional organizations and used as a guideline for a person in carrying out his profession, then all forms of violation of the code of ethics that occurs is the responsibility and the role of professional organizations in imposing sanctions, such as until the expelled from the organization. If in violation of the law the government is active in setting legal sanctions, then the violation of government ethical code will be passive and only intervene when it is very necessary. Based on the Law of the Republic of Indonesia Number. 36 of 2009 Article 24 Paragraph 2 Concerning the code of ethics is regulated by professional organizations.

In performing the pharmacist's pharmacist service must fulfil the provisions in the code of ethics, a Pharmacist performs the oath or promise made a commitment to the moral foundations and dedication of his profession. Code of ethics is the set or values of principles that must be followed by the Pharmacist as a guide and guidelines and standards of behaviour in making decisions and acts in the provisions contained in the code of conduct of Pharmacists.

Violations of the Pharmacist's Code of Ethics may result in sanctions for Pharmacists. Sanctions may include coaching, warning, temporary membership revocation and permanent membership revocation. The Code of Ethics violation criterion is regulated in the Organizational Regulations, and determined after a thorough review of the Pharmacist Ethics Assembly Assembly (MPEAD). Furthermore, MPEAD presented its findings to the local Association of Apothecary (IAI) and the Pharmacist Ethics Development Assembly (MPEA).

The Indonesian Pharmacist Association is the only Professional Organization of Pharmacists present in Indonesia recognized by the Government of the Republic of Indonesia and established by Decree of the Ministry of Justice and Human Rights of the Republic of Indonesia Number: AHU-17.AH.01.07 Year 2013 dated 13 February 2013 on the Legal Entity Bond establish, authorize the Deed of Establishment: Indonesian Pharmacist Association abbreviated IAI. based on the XIX National Congress and XX Scientific Congress of 2014, on the Articles of Association and By laws. **Article 6**

The Indonesian Pharmacist Association has the intention to realize a professional Pharmacist, so as to improve the quality of healthy life for every human being, based on the XIX National Congress and XX Scientific Congress of 2014, on Articles of Association and By laws Article 9.

The Association has the main duty of uniting, empowering, protecting, nurturing, protecting all members of the Association, based on the XIX National Congress and XX Scientific Congress of 2014, on the Articles of Association and By laws, Article 11.

In order to advocate for the establishment of an Advocacy Team, the provisions on the avocation team are further stipulated in organizational rules, according to the XIX National Congress and XX Scientific Congress of 2014, on the Articles of Association and By laws, Article 18.

Answers concerning good legal protection of pharmacists for optimal implementation of their professional duties.

The Indonesian Pharmacist Association also provides legal protection and support in the realm of law if there is a Pharmacist who in carrying out its duties and responsibilities is actually prosecuted and criminalized by parties who are not in a good purpose. In addition, if there is a regulation that is not considered to support the performance of pharmacists so that the Pharmacist's performance can not be maximized, the professional organization of Apothecary IAI can file a Judicial Review to the Supreme Court so that provisions in pharmaceutical manpower regulations can be reviewed. Especially the case of the pharmacist where the pharmacist as a Pharmacist has run its Duties and Responsibilities well and in accordance with legislation regulations but by the PSA is not in good faith just criminalize the profession Pharmacist. There should be a process of seeking justice, law enforcers mastering the basic laws of pharmaceutical and health in general, so do not cause the pharmacist must pass a sentence sentenced by the District Court for four months.

In addition to professional organizations there is also MPEAD that has the authority to participate in examining and giving consideration to the presence or absence of professional ethical violations committed by the Pharmacist, should the results of consideration from MPEAD can be a supporter in judge consideration

when deciding about a case experienced by a Pharmacist. In addition, the IAI as an organization and MPEAD as the examining board of violation of professional code of pharmacist can also give certificate and order using warrant termination of investigation to criminalization cases experienced by pharmacist not prolonged to enter to the court.

The pharmacist makes an Appeal Law in the State Court, on the Ruling of the Pharmacist's District Court is released, then the PSA makes a Cassation on the Cassation Decision of the apothecary Absolute Free. The difference of decision between District Court, Court of Appeal and high court decision which is strengthened on appeal level in the case of pharmacist is on the completeness of basic law of law which is used, if in District Court only limited to use one legal basis that is Criminal Law especially in article 374 (Embarrassment with Divorce), then the pharmacist may be judged to have fulfilled the criminal elements contained in that article. Unlike the circumstances when considering its decision, the High Court judges also weigh the other legal grounds relating to pharmaceutical work, professional code of conduct, and professional ethics of a Pharmacist. Because if the judges consideration not only use the Criminal Code, but also the Health Act No. 36 of 2009, and the Indonesian Pharmacist Code of Ethics, mainly focused on the Law of the Republic of Indonesia Number. 36 Year 2009 on Health,

Article 98 paragraph 1 states "Pharmaceutical preparations must be safe"

Then article 108 states:

> "Pharmaceutical practices which include the preparation of, including pharmaceutical quality control, safeguards, procurement, storage and distribution of drugs, prescription drug services, drug information services and drug development, medicinal and traditional medicines should be performed by skilled health personnel and appropriate authorities with the provisions of legislation."

In another regulation, *Staatblad* No.419 of 22 December 1949 on the Drug Law:

Article 1 paragraph 1 letter b "Pharmacist leads a pharmacy"

Articles 3.4 and 5:

> "Pharmacists have authority over the delivery, supply, possession, storage, supply and supply of G and W lists".

Government Regulation Number. 51 Year 2009 on Pharmaceutical Works:

Article 1 number 1:

> "Pharmaceutical work is the manufacture including the control of the quality of pharmaceutical preparations, security, procurement, storage and distribution and distribution of drugs, drug management, prescription drug services, drug information services, and the development of medicinal, medicinal and traditional medicines.

Article 1 number 1:

> "Pharmaceutical personnel shall be personnel engaged in pharmaceutical work, consisting of Pharmacists and Pharmaceutical Technical Personnel".

Article 3:

> "Pharmaceutical work is undertaken on the basis of scientific value, fairness, humanity, equilibrium, and protection and safety of patients or communities related to pharmaceutical preparations that meet the standards and requirements of safety, quality and usefulness".

Article 25 paragraph 2:

> "In the case of Pharmacists who set up pharmacies in cooperation with the owners of capital, pharmaceutical work must be done fully by the pharmacist concerned".

Then from the Pharmacist Code of Ethics Indonesia uses the considerations of chapters 3, 5, 6 each of which reads:

Article 3

> "A Pharmacist must always run his profession according to the competence of the Pharmacist Indonesia and always prioritize and stick to the principle of humanity in carrying out its obligations"

A Pharmacist implements the article by understanding, living and practising competence in accordance with the competence standards of the Indonesian Pharmacist. Competencies in question are skills, attitudes, behaviour, based on science, law, and ethics. Standard measures of Apothecary competence are assessed from the competency test. In carrying out its profession, humanitarian interests should be the primary consideration in every action and decision of an Indonesian Pharmacist. Whenever an aspirer is confronted with a conflict of professional responsibilities, then from a variety of options, a pharmacist must choose the least and most appropriate risk.

Article 5

> "In performing his duties a Pharmacist must abstain from self-seeking efforts that are contrary to the dignity and noble tradition of pharmaceutical positions"

A Pharmacist in his professional action must avoid self-destructive actions or harm others. A Pharmacist in performing his or her duties may obtain rewards from patients and the public for the services provided while retaining the principle of prioritizing the patient's interests.

Article 6

"A Pharmacist must be virtuous and be a good example for others"

A Pharmacist must maintain public confidence in the profession he carries with honesty and integrity. A Pharmacist will not misuse his or her professional abilities to others. A Pharmacist must maintain his attitude and behaviour in public.

Based on the above explanation, it can be concluded that in doing its actions take and secure to the Health Office of Semarang City whose objects are narcotics drugs and group G psychotropic, the pharmacist is protected by the rules. So the pharmacist can not be said to violate the law because precisely the pharmacist's action is in accordance with the law that protects the Apothecary and the ethics of the pharmacist's own profession.

The weakness of the pharmacist's profession here is that Pharmacists do not have strong laws in protecting the Pharmacist profession. Pharmacists only take cover under the protection of Health Act No 36 of 2009 Article 108 and Government Regulation No. 51 of 2009 and also Regulation of Health Minister on Pharmaceutical Workers. Whereas here Government Regulation No. 51 of 2009 and also Regulation of Health Minister regarding Pharmaceutical Workers In the case experienced by the pharmacist, can not protect the Pharmacist of the case in nature because judges assess the status of Government Regulation No. 51 of 2009 and also Regulation of Health Minister on Pharmaceutical Personnel still under the Act, so that the regulations within it that precisely protect the pharmacist, can not have a significant impact on the judges' judgement.

Closing

Conclusions

1. The pharmacist should not be prosecuted by the PSA because the Pharmacist carries out its duties and authority in the management of the pharmacy preparations as set out in Regulation of the Minister of Health of the Republic of Indonesia Number 28/MENKES/PER/1978 on Narcotics Storage. That is the process of storing narcotic drugs in the pharmacy must be stored specifically and every pharmacy must have a special place to store drugs narcotics, special cabinet locks are controlled by the responsible pharmacist and other employees who are given power. And Law No. 35 of 2009 on Narcotics and Law of the Republic of Indonesia Number. 22 of 1997 on Psychotropic.
2. A good form of legal protection for pharmacists for pharmacists to be optimal in performing their duties is the first through the pharmacist's own professional organization. The Indonesian Pharmacist Association provides legal protection and support in the legal domain, besides if there is a regulation that is considered not to support pharmacist performance so that the pharmacist work can not be maximized, IAI can submit Judicial Review to the Constitutional Court. In addition to professional organizations there is also MPEAD authorized in examining and giving consideration to the presence or absence of professional ethical violations committed by Pharmacists. The results of MPEAD considerations can also be used as a consideration of judges in deciding a case related to the pharmacist profession.

Suggestion

1. Suggestions for the Pharmacist organization is the bond of the Indonesian Pharmacist
   Pharmacists should have a law on pharmaceutical work that protects Pharmacists in performing pharmaceutical work. So that can not be charged with indiscriminate because it has the protection of the Law. At the PN Court Level Government Regulation No. 51 of 2009 on Pharmaceutical Works and the Regulation of the Minister of Health does not have the strength, only the Law on Health Number 36 Year 2009 article 108 that protect pharmaceutical work. In addition, the Indonesian Pharmacist Association should standardize cooperation contracts between pharmacists and shareholders of pharmacies. So far the contract offered to the new prospective pharmacist is a one-sided contract by the pharmacist, so it is still unlikely that a new pharmacist candidate can gain strong legal certainty in his / her performance. For the future, it is expected that the Indonesian Pharmacist Association will enter into a contract of understanding with law enforcers or investigators in order that every case experienced by persons who work as pharmacists should be able to go through the ethical code justice process done by MPEA or MPEAD.
2. Suggestions for Pharmacists who have a similar incident in the pharmacy where they work We recommend that a Pharmacist has his own Pharmacy in performing his pharmaceutical work and Profession so as not to be uplifted and not influenced by the owner of the pharmacy's means of seeking personal benefit from people of bad faith.
3. Suggestions for pharmacists who want to work in pharmacies
   In order to avoid the arbitrary and fraudulent actions of PSA there should be a form of cooperation statement set forth in the cooperation contract which also contains legal protection clauses for pharmacists. This is to avoid the pharmacist's profession being criminalized if the pharmacist has acted according to the procedure.

REGULATION RECONSTRUCTION OF NON-COMMUNICABLEDISEASE CONTROL THAT CAUSE THE HEIGHT OF DEATH RATE BASED ON HUMAN VALUES

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ABSTRACT

In this current globalization era, there is often an increase of the number of deaths from non-communicable diseases caused by lifestyle changes such as unhealthy eating habits, smoking, alcohol consumption, lack of exercise that cannot be solved by ethical rules, in these circumstances the rule of law may be applied. Regulations on control and prevention of non-communicable diseases have not been maximized, society not satisfied with the legislation or other rules on control and prevention of non-communicable diseases. The purpose of this paper is to know and analyse the regulation on control and prevention of non-communicable diseases. To reconstruct the regulation of non-communicable disease control, the cause of the high mortality rate based on human values. From the results of research on non-communicable disease control regulation has not maximal yet and there is no good regulation for the control of non-communicable diseases, so it is still often the occurrence of high death rate caused by non-communicable diseases. There should be special regulations or strict rules to prevent the emergence of non-communicable diseases with the refinement of Law No. 18 of 2012 on Food; chapter XV on Criminal Provisions, from Articles 133 to 148, in the regulation tend to be less assertive, more emphasis on sanctions limited to the perpetrator or the board and its implementation does not exist. In Law No. 36 of 2009 on Health, Minister of Health Regulation No. 28 of 2013 on Inclusion of Health Warning and Health Information on tobacco product packaging, Government Regulation No. 109 of 2012 on Security of substances containing addictive substances in the form of tobacco products for health. Therefore, the government is expected to prioritize the efforts to control non-communicable diseases through good regulation in order to achieve a healthy society and improve the legislation in the field of health, especially food, tobacco/cigarettes based on human values.

Keywords : Height of Death Rate, Non-communicable Disease, Human Values

Introduction

Health is a human right and one of the elements of welfare that must be realized in accordance with the ideals of the Indonesian nation as referred to in *Pancasila* and the Constitution of the Republic of Indonesia Year 1945. Each activity in an effort to maintain and improve the health status of the community as high implemented on the basis of non-discriminative, participatory and sustainable principles in the context of the establishment of Indonesian human resources, as well as enhancing the nation's resilience and competitiveness for national development.[1]

In development activities should be based on health insight in the sense of national development should pay attention to public health and is the responsibility of all parties both Government and society. At present health development still faces the burden of controlling infectious diseases and less nutrition in the population, the burden of non-communicable diseases (PTM) and increased nutrition.

The development of PTM in Indonesia has not been well studied, due to the lack of systematic data that is routinely obtained in stages and integrated, both across programs and across sectors at the regional and national levels. The availability of complete and timely data is needed for the determination of effective and efficient policies in efforts to control PTM.

The high problems of PTM in Indonesia require adequate and comprehensive control efforts through promotion, early detection, treatment and rehabilitation. These efforts need to be supported by the provision of accurate and systematic and continuous data and information through a good surveillance system. In the provisions of Law Number 36 Year 2009 Article 158 on Non-Communicable Disease Control. The results of PTM surveillance is good, then the prevention and control program of PTM takes place more effectively both in terms of planning, controlling, monitoring and evaluation of the program as well as the initial idea of research.

Various efforts to control PTM and its risk factors require a cooperation with various related parties supported by adequate resources and good surveillance system. This surveillance system will generate accurate data and information and update as the basis for determining PTM policy, policy, strategy and program. The determination of PTM control program priority is also determined by accurate data and information.

[1] Consideration of Law of the Republic of Indonesia Number 36 Year 2009 on *Health*.

Non-contagious diseases are now of great concern to the public health sector, as they have a predicate as the cause of the high rate of morbidity and mortality. Based on the *Global Status Report on Non-communicable Disease*,[2] 63% of deaths in the world are caused by *non-communicable diseases*, such as cardiovascular disease, diabetes, cancer, and respiratory diseases, and 80% of them occur in *middle-low income countries income*. Non-infectious diseases provide a meaningful economic burden not only to individual employment growth, intelligence and productivity but ultimately leads to family income and economic growth.

According to the *World Health Organization* (WHO) estimates PTM causes 56 percent of all deaths and 44 percent of disease burden in countries in Southeast Asia. Almost half of deaths due to PTM occur at an earlier age, at the most productive phase of life (35-60 years), so this condition poses a serious threat to the socio-economic level of society. In the prevalence of PTM also tends to increase in developing countries, including the poor who are also very limited access to health services.

In the era of globalization and MEA when the law plays an important role in various aspects of community life and state. To realize the optimal health status for everyone, which is an integral part of welfare, legal support is needed for the organizers of various activities in relation to PTM and the health sector.

Various cases that are detrimental to the community have an impact on PTM as a result of limited legal policies such as circulation policy of processed and ready-to-eat foods, cigarette distribution, alcohol and policies in the field of industrialization, electronics and transportation that can cause PTM.

The phenomenon has not played a legal role in the health sector, and legal experts and health supervisors in the field of disease prevention are not contagious due to limited policy. This is because the Law Number 36 Year 2009 on Health identical more governs the community or victims, health providers, research and health equipment Non-communicable diseases. As for the perpetrators, producers, dealers and traders associated with PTM is very minimal arrangement. It is interesting to do research with the title "Reconstruction of Controlling Regulation of Non-Transmitted Diseases Due to Lifestyle Changes in the Era of Globalization".

Main Problem

Starting from the background of the problem mentioned above, it can be formulated the problem as follows:

1. What is the effective non-communicable disease control regulation in public health services?
2. How is the reconstruction of disease control regulation not contagious due to lifestyle changes in the era of globalization?

Discussion

Regulation of Non Communicable Disease Control Effective in Public Health Service

Non-communicable disease (PTM) is known as a chronic disease, not transmitted from person to person. Non-infectious diseases are non-infectious diseases because they are not microorganisms, but it does not mean that there is no role for microorganisms in non-communicable diseases such as injury due to unnoticed infections. Non Communicable Disease is *New Communicable Disease* because it is considered to be transmitted through *life style*, related to diet, smoking, alcohol consumption, sexual life and global communication. Non-communicable diseases in humans have a long duration and generally slow development.

PTM control can be performed by modifying risk factors with behavioral changes known as the acronym CERDIK. CERDIK activities should be conducted regularly and continuously as follows:

C : Check your health condition regularly and regularly;
E : Rid of cigarette smoke and other air pollution;
R : Diligent physical activity with sports and art movement;
D : A healthy diet with balanced calories (low in sugar, salt and fat and rich in fiber);
I : Adequate rest and priority of safety; and
K : Control stress and violence.

Behavior changes can only be done by the community independently. Community participation activities can be done through Posbindu activities. Posbindu is an integrated, routine, and periodic activity with the optimization of community participation to conduct early detection, monitoring / monitoring and follow-up of PTM risk factors independently and continuously.

Epidemiologically PTM has affected low and middle income countries where nearly 80% of PTM deaths or about 29 million deaths have occurred. PTM is the leading cause of death in all regions except Africa, but the current projection shows that by 2020 the greatest increase in PTM deaths will occur in Africa. Deaths occurring in African countries, PTM is projected to exceed the combined deaths from infectious diseases and nutrition, maternal and perinatal deaths, as the most common cause of death by 2030.

[2] *Global Status Report on Non-communicable Disease,* 2011, WHO.

In addition to the factors of poverty is also about the lack of regulation closely related to the epidemiological incidence rate of non-communicable diseases. The rapid increase of non-communicable diseases is expected to inhibit poverty reduction initiatives in low-income countries. Socially vulnerable and disadvantaged people will become sick and die faster than people with higher social positions, especially as they are at greater risk for harmful products, such as tobacco or unhealthy foods, and have limited access to health care.

Non-Communicable Disease Control Regulation Due to Lifestyle Changes in the Era of Globalization

Limited regulation in the regulation of production, distribution, monitoring of PTM risk factors as well as low resources, health costs for heart disease, cancer, diabetes or chronic lung diseases are very costly, thus pushing people into poverty. Expensive and long-term treatment costs, forcing 100 million people to fall into poverty each year.

Various perceptions that PTM is a problem in developed countries is not true. Estimates of PTM-related causes of mortality developed by WHO show that cardiovascular disease is the highest cause of death in Southeast Asian countries, including in Indonesia at 37 percent. The cause of death is 80 percent by cardiovascular disease and diabetes and 90 percent of deaths from chronic obstructive pulmonary disease occur in middle- and low-income countries. In addition, two-thirds of cancer deaths occur in middle-income countries.[3]

In a preliminary analysis of the *Sample Registration Survey* (SRS) 2014 organized by the Health Research and Development Agency showed a similar pattern. Nationally the top ten causes of death were brain vascular disease (21%), ischemic heart disease (12.9%), diabetes mellitus (6.7%), tuberculosis (5.7%), hypertension with complications (5.3% %), chronic lower respiratory disease (4.9%), liver disease (2.7%), transport accidents (2.6%), pneumonia (2.1%) and diarrhea (1.9%) (LitBangKes , 2015). Thus the highest cause of death is dominated by stroke, heart disease and blood vessels, diabetes mellitus and hypertension with its complications.

There is often a perception that PTM is a disease of the rich. There was no significant difference in the prevalence of stroke and hypertension among the poorest and the poorest 25 percent of the population. Meanwhile Chronic Obstructive Lung Disease (COPD) and asthma tend to occur in groups with lower economic status, this may be related to lifestyle changes, smoking levels and contaminated air environments, unhealthy housing in the poor. In contrast, cancer and diabetes mellitus are more prevalent in the higher economies, probably due to better health care insurance in the rich so that the disease is more detectable before death.

Basic Health Research collects information on some of the major lifestyle risk factors associated with major PTM in Indonesia such as smoking, inadequate activity and less consumption of vegetables and fruits and balanced nutrition. It was found that the prevalence of smoking among people over 15 years increased from 34.7 percent (2007) to 38.3 percent (2013). From this smoker is also known the presence of people exposed to cigarette smoke in the house or room. In 2007, 40.5 percent of the population of all ages (91 million) were exposed to cigarette smoke. While in 2010 the prevalence of passive smokers is experienced by two out of five residents with a total population of 92 million. By 2013, this number has increased to about 96 million people. Women were higher (54%) than males (24.2%) and exposed children aged 0-4 were 56%, or equivalent to 12 million children exposed to secondhand smoke.

In an effort to improve the understanding of society and the business world about balanced nutrition, through the Minister of Health Regulation (PERMENKES) No. 30 of 2013 the government requires the inclusion of information on sugar content, salt, and fat for processed food and ready-to-eat foods and health messages. The health message in question is consuming more than 50 grams of sugar, sodium / salt more than 2000 milligrams (mg), or total fat more than 67 grams per person per day increases the risk of hypertension, stroke, diabetes, and heart attacks.[4]

A society that changes faster than any other society. These changes can be changes that are not prominent or do not show any change. There are also changes that have wide and limited influence. In addition there are also changes that the process is slow, and changes that take place quickly.

Lifestyle is defined as a way of life that is identified by how people spend time (activity), what they consider important in their environment (interest), and what they think about themselves as well as the world around them. According to John[5] lifestyle affects a person's behavior which ultimately determines one's consumption pattern. Lifestyle more describes one's behavior, that is how to live, use the money and take advantage of the time it has (sumarwan, 2014).

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[3] World Health Organization, 2011, *Global Status Report on Noncommunicable Diseases* WHO, Geneva.

[4] Basic Health Research, 2013, *In Increasing Risk of Hypertension, Stroke, Ddiabetes, and Heart Attack*, p. 97.

[5] John, S K. and Peter, R. P., 2006, *Lifestyle Segmentation to Students Marketing Program of Petra Christian University*, Journal of Marketing Management Department, Faculty of Economics, Christian University of Petra.

Lifestyle is just one way of classifying consumers psychographically. The lifestyle in principle is how one spends time and money. There are people who like to seek entertainment with friends, some are happy to be alone, some are traveling with family, shopping, doing dynamic activities, and some are having and free time and excessive money for religious social activities. Haya style can affect one's behavior and ultimately determine one's consumption choices.

According to Bilson Simamora,[6] lifestyle is a person's behavior in showing the pattern of life that is reflected in the activities, interests, and opinions. The concept of lifestyle if used by marketers carefully, can help to understand these values affect consumer behavior.

Lifestyle is a way of life that is identified by how someone spend their time, what they consider important in their environment, and what they think about themselves as well as the world around them.[7]

Political issues can also influence consumer purchase decisions. Consumers within the same country usually have the same political environment, but politics can also affect business opportunities at the local and international levels. Some business firms have become severely susceptible by studying the political environment and devising strategies that take advantage of opportunities associated with changing political dimensions.

Reconstruction of Non-Communicable Disease Regulations Due to Lifestyle Changes in the Era of Globalization

Globalization is a term that has links to increasing interdependence and interdependence between nations and people around the world through trade, investment, travel, popular culture, and other forms of interaction so that the boundaries of a country become narrower. Globalization is a process whereby individuals, between groups, and between countries interact, interrelate, relate, and influence each other across national borders.

Based on the origin, the word "globalization" is derived from the word global, whose meaning is universal. According to Achmad Suparman states Globalization is a process of making something (thing or behavior) as a characteristic of every individual in this world without being limited by region Globalization does not have an established definition, except for a working definition, so depending on which side people see it .

Globalization is a special phenomenon in the human civilization that continues in the global society and is part of the global human process. The presence of information technology and communication technology accelerates the acceleration of this globalization process. Globalization touches all the important aspects of life. Globalization creates new challenges and problems that must be answered, solved in an effort to exploit globalization for the benefit of life. Globalization certainly has an impact on the life of a country, including Indonesia.

Implementation of non-communicable disease control in public health services requires serious attention by all parties, both stakeholders and the community. Increased PTM can be suppressed through the control of risk factors, namely reduction of cigarette consumption, alcohol, sugar and salt, increased consumption of fruits and vegetables, increase physical activity through exercise, prevent obesity, stress control with recreational activities and check blood pressure, regularly. Efforts to prevent PTM can be done by the community independently through Posbindu activities.

In the opinion of Armstrong in Nugraheni,[8] one's lifestyle can be seen from the behaviors undertaken by individuals such as activities to obtain or use goods and services, including the decision-making process on the determination of such activities. Furthermore it is said that the factors that influence a person's lifestyle there are 2 factors, namely factors that come from within the individual (internal) and factors that come from outside (external). Internal factors are attitude, experience, and observation, personality, self concept, motive, and perception with explanation.

The practical urban lifestyle allows modern society to find it difficult to avoid Fastfood and Junkfood. Fast Food is a term for food that can be prepared and served quickly. While any food that can be prepared immediately can be called fast food, it usually refers to food sold in a restaurant or store with low-quality preparations and served to customers in a package to take away.

A lifestyle change in the era of glaobalization is related to the pattern of community life both children, adults and parents to cigarette consumption. Cigarettes are one of the causes of the emergence of PTM. Cigarette is one of the main causes of death in the world and is the only legal product that kills as much as half its use. The 2007 Indonesian Public Health Association Survey said every hour about 46 people died from smoking-related diseases in Indonesia.

In one cigarette contains about 7,000 chemicals, 200 of which are carcinogenic, substances that damage genes in the body that trigger cancer, such as lung cancer, emphysema, and chronic bronchitis. Various other cancers, such as nasophary cancer, mouth, esophagus, pancreas, kidney, bladder, and uterus. Atherosclerosis

[6] Bilson, Simamora, 2002, *Consumer Behavior Research Guide*. PT. Gramedia Pustaka Utama, Jakarta.
[7] Sutisna, 2002, *Consumer Behavior*, Gramedia, Jakarta.
[8] Kotler, Philip & Amstrong, G., 2004, *Marketing Principles, Tenth Edition*, PT. Gramedia Index, Jakarta, p. 78.

or panderasan blood vessels can cause heart disease, hypertension, stroke risk, early menopause, osteoporosis, infertility, and impotence.

The biggest cigarette toxin is produced by the smoke that rises from the tip of a non-smoking cigarette. Because the smoke produced comes from incomplete burning of tobacco. Cigarette smoke contains harmful substances such as benzene, nicotine, nitrosamines, amines, aromatics, naphthalene, ammonia, oxidant cyanides, benzapirin carbon monoxide, and others. These particles will settle in the airways and are very harmful to the body. The sediment of cigarette smoke is also easily attached to objects in the room and can last up to more than 3 years, still dangerous.

Some investigations prove that children whose parents smoke are more likely to suffer from respiratory illness than children whose parents do not smoke. Parents who suffer from respiratory infections, their children are twice as likely to suffer from bronchitis and pneumonia under one year of age. Children of mothers who smoke are not only at risk before the birth, but during the age of less than one year are also at greater risk for serious illness. Increased among smokers in women, showing the intensity of lung cancer among women is increasing. Concerned smoking at the time of pregnancy affects the fetus and the baby is born and can cause premature premature birth.

They are in choosing food, no longer merely on price, nutrition, and delicacy, but whether or not the safety of the body's health is a top priority. As is known in the Minister of Health Number 30 Year 2013 Article 1 Paragraph (1) processed food is processed food or beverage in a certain way or method with or without additional materials including processed food of food additives, genetically modified food products, and iridiated food. In paragraph (2) Ready food is food and / or beverage that has been processed and ready to be presented directly at the place of business or outside the place of business on the basis of order.

Based on Article 3 Paragraph (1) and Article 5 Paragraph (1) it is mentioned that every person producing processed and ready-to-eat foods containing sugar, salt, and fat shall provide information on such content and health messages through information and promotion media. In Law Number 36 Year 2009 on Health, Regulation of the Minister of Health (PERMENKES) Number 28 of 2013 on Inclusion of Health Warning and Health Information on tobacco product packaging, Government Regulation No. 109/2012 on Security of ingredients containing addictive substances in the form of tobacco products for health.

Based on Article 3 Paragraph (1) and Article 5 Paragraph (1) it is mentioned that every person producing processed and ready-to-eat foods containing sugar, salt, and fat shall provide information on such content and health messages through information and promotion media. In Law Number 36 Year 2009 on Health, Regulation of the Minister of Health (PERMENKES) Number 28 of 2013 on Inclusion of Health Warning and Health Information on tobacco product packaging, Government Regulation No. 109/2012 on Security of ingredients containing addictive substances in the form of tobacco products for health.

In the regulation is more likely to regulate about PTM, victims, health providers, the form of cigarette packaging. Though the factor is very important because as the source of the emergence of PTM. Practice in the field many people affected by PTM and even tends to increase due to unbalanced and fair regulation. Therefore it needs to be renewed, or rebuild good regulation especially concerning PTM resulting from food and cigarette so that the creation of healthy society.

Closing

Based on the description of the above discussion, it can be drawn conclusion as follows:

1. Effective non-communicable disease control regulation in public health service using Law Number 36 Year 2009 Article 158 on Non-Communicable Disease Control is less effective, so it is necessary to further regulate for public health to be well guaranteed. It is proven that there is an increase of PTM in Indonesia so it requires adequate and comprehensive control effort through promotion, early detection, treatment and rehabilitation.
2. Reconstruction of non-infectious disease control regulation due to lifestyle changes in globalization era about PTM caused by food and cigarettes, considering that there are many people affected by PTM and even tends to increase due to uneven and unjust regulations. The regulation of PTM control is necessary to be more optimal in public health service in relation to the community life pattern of children, adults and parents to food and cigarette consumption. The survey results of the Association of Indonesian Public Health Experts in 2007 mentioned every hour about 46 people died of diseases associated with unhealthy food and smoking in Indonesia.

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ACCREDITATION: INSTRUMENTS MINIMIZE MEDICAL DISPUTE IN HOSPITAL

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ABSTRACT

This paper aims to identify and analyze hospital accreditation as an attempt to minimize medical dispute in the hospital. Hospital accreditation is an acknowledgment given by the independent organization of the accreditation organization to the hospital in connection with the assessment of the fulfillment of the quality standard of hospital services on an ongoing basis. The hospital as a complex organization because it is capital-intensive, energy, technology and various issues, covering the fields of law, economics, ethics, human rights, technology, and others with different principles and perspectives. Along with the increasing awareness of the community to get good health service, raises the attitude of the critical patient. Patients no longer hesitate to question the alternative treatment they will receive, whether in accordance with the cost incurred. It if not accomodated can certainly bring up a demand, either through civil or Criminal demand. Therefore, in order to improve the quality of hospital services, a valid and standard instrument is needed both nationally and internationally in the hope of increasing public trust in health services in hospitals as well as prevention of medical disputes.

Keywords: Accreditation, Medical Dispute, Hospital

Introduction

The cause of medical disputes often occurs in hospitals due to patient dissatisfaction with the services provided by hospitals and it is a bipolar opposite of satisfaction (streng.et.al, 1996 in Tjiptono, 2006). Hospitals as a means of health services are essentially complex, because they are capital-intensive, resource-intensive, technology-intensive, labor-intensive, regulatory and problem-intensive in areas such as law, economics, ethics, Human rights, technology, and others. It is as regulated in Law No.44 of 2009 on Hospital article 1 stipulates that the hospital is a health service institution that organizes a full range of personal health services by providing inpatient, outpatient, and emergency care services. Hospitals are service organizations that have specificity in terms of human resources (HR), infrastructure and equipment used. Therefore hospitals as a means of health services have an obligation to serve patients with complete facilities as well as fast and precise service. This can be achieved if the hospital management is carried out properly.

Therefor in hospital management, the main focus was on medical discipline, now coupled with legal, economic, social and management discipline, where each discipline has different principles and perspectives. Moreover nowadays people are increasingly aware of choosing good health services. Some examples are the current society is not hesitate to question the alternative care they will receive in accordance with their financial condition. Patients are now beginning to critically question the usefulness and side effects of the drugs that doctors prescribe to them, as well as the medical devices used to check them whether they are sterile or not, and sometimes some patients want to see the sterilization process. If there is a service that is not satisfactory, people today are not lazy again reprimanded the medical staff concerned or issued their unek-unek through suggestion box. In short the people want the best for themselves according to their current conditions. It is therefore necessary to prepare measures against the legal impact that may arise on hospital management due to demands from patients both Civil and Criminal.

The complexity of services in hospitals requires quality assurance and hospital service safety in the form of accreditation. At this time the government through the Ministry of Health has required the implementation of hospital accreditation to improve hospital services in Indonesia. The legal basis for the implementation of accreditation in hospitals is Law no. 36 of 2009 on health, Law no. 44 of 2009 on hospitals and Permenkes 1144 / Menkes / Per / VIII / 2010 on the organization and working procedures of the ministry of health. Accreditation arrangement of this hospital in the hope to improve the quality of hospital services, which with the improvement of service quality will certainly be able to improve patient safety and provide protection for patients as regulated in Article 2 Permenkes No.34 year 2017 on Hospital Accreditation in lieu of Permenkes No. 12 of 2012 stipulates that hospital accreditation aims to improve the quality of hospital services and protect patient hospital safety, improve protection for the community, human resources in hospitals and hospitals as institutions, support government programs in the field of health and improve the professionalism of hospitals Indonesia in international public.

In addition, with the changing social conditions, economic and political growth continues to require the hospital to improve in order to be able to compete in a healthy way. Data from KARS (Hospital Accreditation Commission) in 2015 was recorded 284 nationally accredited hospitals from 2,415 registered hospitals in

Indonesia. The number of unaccredited hospitals is 2,131 hospitals, thus a new proportion of 11.75% of hospitals are accredited in Indonesia.

Main Problem

Based on the above, the problem arises: Is the hospital accreditation can be used as an instrument to minimize medical dispute in hospital?

Discussion

Medical Dispute

Health as one of the elements of general welfare must be realized through various health efforts in the framework of health development as a whole and integrated which supported by a health system that side with the people.[1]

If a person knows or has interests harmed by the actions of a physician or dentist during his medical practice, he or she may lodge in writing to the Chairman of the Indonesian Medical Disciplinary Council (MKDKI), as set forth in Article 66 Paragraph (1) of Law no. 29 of 2004 on Medical Practice. Article 66 Paragraph (1) of Law no. 29 of 2004 implicitly explains that if the interests of patients harmed by the actions of doctors or dentists while running a medical practice can raise medical disputes.

The word disputes in the Third Edition of Indonesian Dictionary [2] is something that causes dissent; quarrels; argument; disputes and disputes. The difference between conflict and dispute. Conflict has a broader understanding and disputes that occur will last long and rarely rise, while the dispute arises, it can be said as a dispute. Disputes begin to arise, in which one of the parties or parties involved has acted in a way that makes the non-involved party aware or aware of a problem. Conflict is a situation where two or more parties are faced with different interests. A conflict changes or develops into a dispute if the disadvantaged party has expressed his dissatisfaction or concern either directly to the party deemed to be the cause of the loss or to the other party.

A dispute especially in the civil realm, at least there are two parties, namely the plaintiff who filed the lawsuit, and the defendant [3]. The relationship between a doctor and a patient or hospital relationship with a patient is a relationship between legal subjects and legal subjects, so that it is regulated in Civil law [4]. The party to the dispute in the medical dispute is a dispute that occurs between the patient with the doctor and / or dentist as well as the patient with the Hospital.

The relationship between the patient with the doctor and / or dentist and the hospital is therapeutic, ie not promising healing but related to the business or process performed according to standard operational procedure (SOP). In this connection there may be omissions or errors that may occur at any time. There are 3 forms of negligence namely malfeasance, misfeasance and nonfeasance. Malfeasance means unlawful or improper acts, such as performing medical acts without adequate indication. Misfeasance means taking the right medical action option but improperly performed, ie, for example doing a medical act in violation of the procedure. Nonfeasance is not taking any medical action that is obligatory to him.[5]

The above forms of negligence are consistent with the forms of error (mistakes, slips and lapses), but in negligence must satisfy the four elements of negligence in the law especially the loss, whereas the error does not always result in a loss. Similarly, the latent error does not directly cause adverse effects. Medical negligence is one form of medical malpractice, as well as the most common form of medical malpractice. Basically negligence occurs when a person by accident, doing something (commission) that should not be done or not doing something (omission) that should be done by others who have the same qualifications in a situation and the same situation. It should be borne in mind that in general negligence by individuals is not a punishable act, unless it is committed by a person who is supposed to by virtue of his or her professional nature of being cautious and has caused harm or injury to others.

An act or attitude of a doctor or dentist is considered negligent if it meets the four elements below is :[6]

a. Duty or duty of physician and dentist to perform any action or to not perform any particular action against a particular patient under certain circumstances.
b. Dereliction of the duty or deviation of such obligations.

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[1] The National Health System (SKN) is a form and mode of health development that combines the efforts of the Indonesian nation in a single step to ensure the achievement of health development objectives in the framework of realizing the people's welfare as defined in the 1945 Constitution, further see the national health system: The form and manner of health development is published by the Ministry of Health 2009, but in practice according to Prof Dr Azrul Azwar, the current national health system is not fully pro-poor. Compare with the General Explanation of Law Number 36 Year 2009 on Health.

[2] WJS Poerwadarminta, *Kamus Umum Bahasa Indonesia*, Balai Pustaka.2001, page: 1037

[3] Sudikno Mertokusumo, *Bab- Bab tentang Penemuan Hukum*, Citra Aditya Bakti, Bandung., 1993, page : 51

[4] Wila Chandrawila Supriyadi, *Hukum Kedokteran*, Bandung, Mandar Maju, 2001, page : 7

[5] http://www.hukor.depkes.go.id/?art=20 , on access on January 29, 2018

[6] Moh.Hatta, *Hukum Kesehatan dan Sengketa Medik*, Liberty, Yogjakarta, 2013, page : 188

c. Damage or loss, ie everything that a patient feels as a consequence of the health / medical services provided by the service provider.
d. Direct causal relationship.

In this case there must be a causal relationship between the deviation of the obligation and the loss which is at least a "proximate cause". The term "medical negligence" is implied by the definition of medical malpractice according to the World Medical Association (1992), namely: "medical malpractice involves the physician's failure to conform to the standard of care for the treatment of the patient's condition, or lack of skill, or negligence in providing care "The World Medical Association reminds us that not all medical failures are the result of medical malpractice. An unforeseeable unfortunate event that occurs when a standard medical action is performed but does not result in injury to the patient excluding malpractice or medical negligence. "An injury occurring in the course of medical treatment which is not the result of the lack of knowledge or the result of the treating physician is untoward result, for which the physician should not bear any liability"[7]

Therefore an unforeseeable adverse outcome is viewed from medical science and medical technology at that time in the circumstances and facilities available can not be accounted to the doctor. Thus adverse events may occur as a result of events without errors and may also be caused by errors. Adverse events or adverse events due to errors are considered preventable. Where such preventable side effects have caused a loss, they comply with all elements of medical negligence according to law, thus referred to as negligent adverse events. A side effect of unexpected outcomes in the medical field may actually be due to several possibilities:

a. The outcome of a course of his own illness, is not related to the medical action of the physician.
b. The result of an unavoidable risk, ie unforeseeable risk, or a foreseeable risk, but can not or may not be avoided (unavoidable), because the action taken is the only way therapy. The risk must be informed first.
c. Result of a medical negligence.
d. The result of a deliberate.

Explanation about the element of negligence in the medical world when faced into the realm of law, will cause a clash that is in the form of injustice felt by one of the parties in dispute in medical dispute. A medical world that can not promise a certainty will be demanded by procedures that require certainty through legal means, so that in the dispute of medical disputes conducted through legal channels will tend to find no common ground. The absence of an intersection is intended when the dispute over medical disputes is not examined from several aspects of the settlement, then there is only a sense of injustice both perceived by the patient and his family as a disadvantaged layman, and also felt by the implementers of health services such as doctors or other health workers as well as hospitals that feel they are also harmed. Therefore medical dispute is a dispute that occurs between the patient or the patient's family with the doctor as a health worker as well as the hospital as the health service provider due to the error of the health service procedure given to the patient or the negligence of the health professionals in this case the doctor.[8]

Hospital Accreditation

Hospital health care system needs to be built. Therefore, accreditation is one of the strategic steps that must be taken in order to improve the quality of health services. Understanding Hospital Accreditation is a process whereby an independent institution either from within or abroad, usually non-government, conduct assessment on the hospital based on accreditation standards in force. Accreditation by national encyclopaedia is a form of recognition given by the government to institutions or institutions. Meanwhile, according to the health department of Indonesia, the accreditation of the hospital is the recognition by the government to the hospital because it meets the predetermined standards. The philosophy of accreditation activities as a form of government attention and protection by providing professional services. The quality of service delivered in accordance with the standards is a professionalism that can lead to efficiency in service and competitive ability of positive hospitals.

Accreditation implies an acknowledgment given by the government to the hospital because it meets the established standards. Accredited hospitals, received recognition from the government that everything that is in it is in accordance with the standards of the guidelines that contain the level of achievement that must be met by the hospital in improving the quality of patient care and safety. (Article 1 paragraph 2 of Permenkes No. 34 of 2017 on hospital accreditation). Facilities and infrastructure owned by the hospital, is in accordance with the standards. Procedures performed to patients also are in accordance with the standards. Hospital accreditation is mandatory and necessary as an effective way to evaluate the quality of a hospital by setting standards of service quality.

Hospital accreditation aims to increase public confidence in hospital services because it is oriented on improving the quality and safety of patients. As well as administrative processes, the costs and resource use will be more efficient, creating a more conducive hospital internal environment for healing, treating and treating patients, listening to patients and families, respecting patient rights and engaging the brand is the

[7] http://www.hukor.depkes.go.id/?art=20 , on access on January 29, 2018
[8] Endang Wahyati Yustina, *Mengenal Hukum Rumah Sakit*, Bandung, 2012, page : 41

process of care and giving guarantee, satisfaction and protection to the public for the provision of health services (Article 2 of Permenkes No 34 of 2017 on hospital accreditation).

The implementation of hospital accreditation covers three ways, namely basic level, advanced level and complete level which is adjusted with service activity. Basic level accreditation assesses five hospital service activities covering administration and management, medical services, nursing services, emergency services and medical records. Advanced accreditation assessed 12 hospital service activities ie 5 basic level service activities plus pharmacy, radiology, surgery room, infection control, high risk services, laboratory and safety, fire and disaster awareness. While complete level accreditation assessed 16 hospital service activities that is 12 advanced service plus intensive service, blood transfusion service, medical rehabilitation service and gisi service. Accreditation with this system is not considered comprehensive because hospitals may choose accreditation for 5 (five), 12 (twelve) or 16 (sixteen) ministries, so that hospital quality standards may differ depending on how accreditation services are followed. It was the development of the 5 service accreditations in 1995, 12 services in 1998 and 16 services in 2002 evaluated with the 2012 version accreditation. Evaluation is a policy oversight mechanism.[9]

Evaluation is done if the policy has been implemented and assesses the extent to which the policy is effective and achieves the objectives. The 2012 version of the accreditation policy is a policy development that departs from the need for comprehensive service standards. The 2012 version accreditation is perfected to be better, comprehensive where the assessment standards are not stand-alone but include the continuity of the services of every service available in the hospital. The accreditation standard consists of 4 (four) groups: the patient-focused standard consisting of 7 chapters, a hospital management standard consisting of 6 chapters. The total chapters are 15 chapters consisting of each assessment element as a determinant of graduation. The graduation rate consists of basic, middle, primary and plenary levels. This accreditation standard refers to the International Principles for Healthcare Standards, A Framework of Requirements for Standards, 3rd Edition 2007, Joint Commission International Accreditation Standards for Hospitals 4th Edition of 2011, Instrument Accreditation of Hospitals in 2007 and supplemented with local content of National Priority Program in the form of Millennium Development Goals (MDG's) program including PONEK, HIV and TB DOTS and standards applicable to the Ministry of Health.

Furthermore, there is a 2017 accreditation policy. The accreditation standards for hospitals that came into effect in January 2018 are named as Standards National Accreditation Hospital Edition 1 and abbreviated to SNARS Issue 1 of 2017. National Standard Accreditation Hospital Edition 1 is a new national accreditation standard and applied nationally in Indonesia. Called the 1st edition because in Indonesia the first time set the national standard for hospital accreditation. The national standard of hospital accreditation edition 1 contains 16 chapters. This 1st edition of hospital accreditation, hereinafter referred to as SNARS 1st edition, also describes how the process of composing, adding important chapters to SNARS, references from each chapter as well as glossary of important terms, including the policy of hospital accreditation implementation.

Outline of the National Standard of Hospital Accreditation Issue 1 of 2017 is **first**, Patient Safety Goals: Correctly Identify Patients, Improve Effective Communications, Enhance the Security of High Alert Medications, Ensure Proper Surgical Location, Procedure Which True, Surgery In Correct Patients, Reducing Risk of Health-Related Infection, Reducing the Risk of Patient Injury Due to Falls. **Second**, Patient Focused Service Standards: Chapter 1. Hospital Access and Service Continuity (ARK), Chapter 2. Patient and Family Rights (HPK), Chapter 3. Patient Assessment (AP), Chapter 4. Patient Care and Care (PAP)), Chapter 5. Anesthesia and Surgical Services (PAB), Chapter 6. Pharmaceutical and Drug Use Service (PKPO), Chapter 7. Communication and Education Management (MKE).

One of the measurements used in the procedural dimension of hospital accreditation is the rights and obligations of patients, doctors and hospitals which is the charge of operational technical policy in hospital bylaws (HBL). Hospital bylaws consists of two words ie hospital which means hospital and bylaws which according to Guwadi means a set of laws or rule formally adopted internally by a faculty organization.or specified group of perseons to govern internal function or pratices within that group[10] .

Thus bylaws are defined as the rules and regulations that an organization or association makes to govern its members. The existence of this HBL plays an important role as the order and ensure legal certainty in the hospital because it is a rule of play from and in the management of the hospital. One feature of HBL is tailor made which means that the content of the substance and the detailed formulation of HBL is not necessarily the same in every hospital because each hospital has the background, purpose and purpose of ownership of different situations and conditions. Another feature of HBL is as an extension of the law, from the general to the special. HBL regulates areas relating to the entire hospital organization including administration, medical care, patients, doctors, employees, and others. As governing body HBL regulates the relationship between owner, manager and hospital staff (DepKes, 2002)

The benefits of this HBL according to KepMenKes No 722 of 2002 on Internal Hospital Management Guidelines as a reference law and legal certainty in the division of authority and responsibility both external

[9] Ayuningtyas . *Kebijakan Kesehatan Prinsip dan Praktik*. Rajawali Pers ,Jakarta , 2014, page : 39
[10] J Guwandi, *Dokter dan Rumah Sakit*, Fak. Kedokteran Universitas Indonesia, Jakarta. 1991, page: 34

and internal that can be a tool / means of legal protection for the hospital for the existence of lawsuits / lawsuits. In addition, the benefits as an official guide for hospital managers to develop operational technical policy. However, hospital internal regulations should not conflict with the above rules such as ministerial decisions, presidential decisions, government regulations and laws. Therefore, the interest of HBL can be seen from 3 angles. Firstly, to improve the quality of hospital services, there needs to be a standard that applies both to the level of the hospital and to each service. both seen from the legal side of HBL can be a benchmark of whether there is an omission or error in the case of medical law. Thirdly in terms of risk management, HBL can be a tool to prevent recurrence of adverse risks.

If the hospital has made HBL well, of course the hospital has already implemented the accreditation. Hospital accreditation in procedural dimension of service quality using Donabedian concept which explains the correlation between hospital accreditation with quality of health service.[11] In the concept of input-process-output and feedback this exercise of the rights and obligations of patients, doctors, and hospitals is measured through the implementation of HBL.

Closing

Hospital accreditation is not only not only as the completeness of documents in the licensing of a hospital and its extension permit. But in dimendsi procedural accreditation hospital is a process to maintain and improve the quality of service provided. If in the service process the patient provides the assessment and the assessment is a complaint that can lead to the demands of compensation, it can be responded as an input to improve the quality of service and as an opportunity to make changes in order to achieve better service quality.

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[11] Lumenta, *Citra, Peran dan Perilaku*, Kanisius , Yogyakarta, 2008 , page: 35

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LEGAL RESPONSIBILITY OF FREE BLOOD DONORS IN THE PRESPECTIVE OF HEALTH REGULATION

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ABSTRACT

Blood transfusion is a noble activity and is the one action which can save lives and alleviate someone's pain. Many patiens need blood transfusions but don't have chance to get the blood they need. The unavailability of this blood stock is often exploited by "personality" Who is not responsible for violating the rule of law. Donors who are supposed to be voluntary on the basis of humanity, changed the motivation to be materialistic, as if dancing on the suffering of others. The government's lack of attention to the fulfillment of blood needs And the practice of the donors who set targets in lieu of their blood Is a fact that needs to Researched, the provisions of the law clearly In order to provide comprehensive and simultaneous education So this violation does not keep happening and gives the impression of being ignored. The design of the study is a legal research with an approach "socio legal reasearch" Which is based on field research (empirical) with primary data to understand the legal symptoms Which includes the implementation of legal principles, legal rules, rule of law, which the relates to the responsibilities of free blood donors and the government's responsibility in maintaining the availability of blood stock, both in quality and quantity. Data retrieval using in-depth interview guide to informants. Research results suggest that the low legal liability of free donors, occurs as a result of the low level of donors knowledge of blood donation laws where they do not understand the laws governing blood donations And the consequences logically result in so low legal awareness among donors. The government's responsibility to regulate, nurture, and Supervise the blood service in maintaining the availability of blood in quantity Has not been optimally implemented because it is evident that many donors who have never received a socialization about the laws governing this blood donation, But the responsibility of the government in providing a safe blood stock (quality) so free from infectious diseases through blood transfusion, considered to have been quite well implemented. Recommended to the government, in this case "Palang Merah Indonesia"/ "Indonesian Red Cross" as a blood transfusion unit that organizes blood donors In order to pay more attention to the socialization of the law regulations related to blood donor, so there is no practice of buying and selling blood And the hospital is advised to optimize the role and function of Hospital Blood Bank (BDRS) So that by itself will break the blood search chain, from the patient's family with a free blood donors. And to free blood donors it is advisable to establish legal awareness And to enhance empathy for the patient's family, so as to keep the humanitarian principles, volunteer.

Keywords: Legal responsibility of free blood donors, buy and sale of blood, availability of blood stock in quality and quantity.

Introduction

Blood transfusion is a noble activity and is one of those actions that can save live and alleviate the pain of the person. Many patient need a blood transfusion but have no change of getting the safe blood they need . The need for blood transfusion is increasing in everywhere, but not a accompained by the availability of adequate blood units.[1]

The comparison between blood requirements and the availability of blood is still not appropriate. Data based from the Indonesian Red Cross (PMI) should have stock of blood about 5,5 million bags if blood annually. This mean that PMI is only able to provide 38% of blood need . The remaining 62% is still not answered properly.[2]

Other data based on interviews with PMI officers in Ciamis district claim that the need of blood in Ciamis district about 5000 bags annually. While the number of donors in Ciamis about 2400 bags only.[3] Of these data clearly illustrates the sane problem , namely the lack of blood stock at both the national and local levels.

The unavailability of this blood stock is often exploited by " person" who are not responsible for violating the rule of law. Donors who should volunteer on the basic of humanity , change motivation become materialistic , as if dancing of the siffering of othrs. This is evidenced by: *First*, the arrest of blood seller brokers, in Singkawang, West Kalimantan.

[1] Gamal Komandoko, *Donor Darah Terbukti Turunkan Risiko Penyakit Jantung & Stroke*,Media Pressindo, Yogyakarta, 2013 p. 9.
[2] Ibid, p. 8.
[3] Hasil wawancara dengan Petugas Unit PMI Kab Ciamis pada tanggal 7 Oktober 2016

Daily Pontianak Post on Monday, 25 April 2016 clearly raised the news of the arrest of blood brokers because it proved to sell blood at a price of Rp. 500,000 - 650,000 for regular blood, and can be up to Rp. 1000.000 for blood AB, because hard to get.[4] *Secondly*, PMI officers in Palembang, South Sumatra, were dismissed, as it proved to be selling blood to the patient's family.[5] *Third*, the Regional Representative Council (DPRD) of Medan said there were 6 non-governmental hospitals that violated the Minister of Health Regulation no. 83 year 2014 about Blood Transfusion Unit, Blood Bank Hospital, and Blood Transfusion Services Network. In articles 37 and 38 of Regulation of the Minister of Health no. 83 year 2014 mentioned for the sustainability and availability of blood, the manager is justified to charge the cost of replacement of blood processing, including the cost of service providers and operational costs. But on field practice, blood obtained from volunteer donors, then stored in blood bank and sold to patients at a price higher than the cost of blood processing, set forth in the Regulation of the Minister of Health 83 years 2014.Fourth, based on observations around the Regional General Hospital (RSUD) Ciamis District, the existence of "rogue" pedicab drivers and motorcycle taxi drivers who offer his blood by asking for a fee of about Rp. 150,000 - 250,000[6].

In the context of such a background, then "how is the legal responsibility of the donor free, in the perspective of Law no. 36, 2009 about health?" In this paper, the authors will describe and review the responsibilities of free blood donors, in the perspective of the Health Act.

Theoretical Review

Theory Of Legal Responsibility

One concept related to the concept of legal obligations, is the concept of liability. According to the Great Indonesian Dictionary (KBBI), the responsibility is the obligation to bear everything if something happens, be prosecuted, blamed, and held accountable.[7] Whereas in the legal dictionary, responsibility is a must for a person to carry out what has been obliged to him.[8] By law, responsibility is a consequence of a person's consequences of his or her deeds related to ethics or morals in performing an act.[9] So a person who is legally responsible for a particular act, that he may be subject to a sanction in the case of his deed, is against the law. Sanctions imposed deliquet, because his own actions that make the person must be responsible.

According to civil law there are two basic types of liability: accountability based on error (based on fault) and Absolute Responsibility (absolute responbility).[10] Absolute responsibility is an act of causing consequences that is deemed to be detrimental, by the legislator and there is a correlation between his actions and the consequences.There is no connection between the mental state of the offender with the consequences of his actions. In modern law also known other forms of mistakes made without intent or planning, namely negligence. Abandonment or oversight must have 4 elements as a benchmark in the criminal law, namely :[11]

1. Contrary with law*(wederrechelijkheid)*
2. The result can be imagined*(voorzienbaarheid)*
3. The consequences can be avoided*(Vermijdbaarheid)*
4. So his actions can be blamed on him*(verwijt-baarheid)*

Whereas Moral obligation, sourced from within oneself (autonomous norm).legal obligations and moral obligations can coalesce, in this stage legal obligations have been accepted as moral obligations.In the area of ethical discussion, Immanuel Kant describes the ethic of "categorical imperative" in which submission to law is an unconditional attitude, and there is no need for any reason to submit to the law.[12]

Theory of responsibility in tort liability is divided into several theories, namely :[13]

1. The liability due to unlawful acts is done intentionally (intertional tort liability), the defendant must have committed the act in such a way that, so harming the plaintiff or knowing that what the defendant did, will result in a loss.
2. Responsibility the result of negligence tort liability, is based on the concept of mistakes related to morals and laws that are mixed up.
3. The absolute responsibility of unlawful conduct, without questioning the error (strick liability), is based on his actions either intentionally or unintentionally. This means that although not his fault, but still responsible for the losses arising from his actions.

[4] Pontianak Post, *Calo Darah di Tangkap*, http://pontianakpost.com diakses 06 oktober 2016 pukul 20.00 WIB
[5] Yasin Habibi, *Jual Darah tiga oknum PMI dipecat*, http://m.republika.co.id diakses 06 oktober 2016 pukul 20.05 WIB
[6] Hasil Pengamatan terhadap lingkungan RSUD Ciamis pada tanggal 6 Oktober 2016
[7] Kamus Besar Bahasa Indonesia
[8] Andi Hamzah, ***Kamus Hukum***, Gp.ia Indonesia, 2005
[9] Hermien Hadiati Koeswadji, ***Hukum Untuk Perumahsakitan***, PT. Citra Aditya Bakti, 2002 Bandung. p. 187
[10] Ibid, p. 188
[11] J Guwandi, ***Hukum Medik***, Penerbit FKUI, 2007, Jakarta, p. 30
[12] Ibid p. 196
[13] Hermien Hadiati Koeswadji, ***Hukum Untuk Perumahsakitan***, PT. Citra Aditya Bakti, 2002 Bandung. p. 187

Unlawful acts in English are called (*tort*) and in Dutch are referred to as (*onrechmatigedaad*) which means civil error not of breach of contract. Unlawful acts have a wider scope than criminal acts.Unlawful acts not only include acts contrary to criminal law, but if such acts are contrary to other laws and even contrary to unwritten provisions. Whereas the purpose of the establishment of the legal system, which is then known to be against the law is to be able to achieve life honestly, not harming others and giving others their rights.

According to Hoge Raad's verdict, we can distinguish the development of the concept of criterion of action against the law. before World War II which meant unlawful acts were acts that violated written rules. But after World War II, what is meant by unlawful acts are acts that violate the rights of others, written law and unwritten law, legal obligations, and propriety and morals accepted by society.[14]

Unlawful acts *(onrechmatige daad*) are governed in Book III of the KUHPerdata. The formulation of the act against the law is contained in Article 1365 of the Civil Code namely: "Any act that is unlawful, which carries harm to another person, obliges the person who due to his error to issue the loss, compensates for the loss"[15]

According to Article 1365 of the BW, what is meant by unlawful acts is unlawful acts committed by a person who because of his or her fault has caused harm to others.

An act can be categorized as an act against the law required 4 conditions :[16]

1. Contrary to the obligations of the perpetrator
2. Contrary to the subjective rights of others
3. Contrary to decency
4. Contrary to propriety, precision and caution

If reviewed from the Indonesian Civil Code's regulation of unlawful acts, as well as the Civil Code in the Continental European system state, the model of legal liability is as follows:

1. Responsibility with elements of error (intentional and negligent), as regulated in Article 1365 of the KUHPerdata.
2. Responsibility with elements of error, especially the element of negligence, as provided for in Article 1366 of the KUHPerdata.
3. Absolute responsibility (without error) in the very narrow (limited) sense as set forth in Article 1367 of the KUHPerdata.

Blood Donor

According to wikipedia Blood donor is the process of taking blood from someone voluntarily or substitute to be stored in blood bank as blood stock for later use blood transfusion.[17]

How sad we are if we hear of someone who died from not getting the blood transfusion needed. The case of a mother's death during childbirth is one example, this birth bleeding becomes the biggest presentation of about 50%, not to mention deaths from traffic accidents, dengue fever, cancer, haemophilia etc. The WHO standard blood supply requirement is 2% of the total population. To achieve this amount is not easy it is necessary to struggle and work hard in reaching beginner donors and maintaining regular donors.[18]

A donor must meet the following requirements :[19]

1. Donors must be identified at registration and repeated each before a critical stage of the selection and retrieval process, or when moving from one officer to another.
2. New donors should be informed about the risks of blood donations, both for donors and patients, they should be informed of the need for honesty in responding to questions.
3. Fulfillment of donor requirements to donate blood should be assessed against the selection criteria during a confidential interview before donating blood.
4. Acceptance or rejection should be based on the donor response to detailed questions about health, family and lifestyle factors, history of donor travel, physical examination and treatment.
5. Donors should be advised on the grounds for any rejection.
6. Donors should sign informed consent forms, acknowledge the responsibilities, risks and potential complications of blood donations.
7. Donors should be required to notify the UTD as soon as possible if there is a slow reaction due to blood donation.
8. The donor, also should notify the UTD if there is additional information that is necessary and has not been submitted after the blood donation.

[14]Philipus M Hadjon, **Perlindungan Hukum Bagi Rakyat Indonesia**, peradaban,2007, Surabaya, p. 121
[15]R Subekti, **KUHPerdata**, Balai Pustaka, 2009, Jakarta, p. 346
[16]Rosa Agustina, **Perbuatan Melawan Hukum**, Penerbit FHUI, 2003, Jakarta, p. 117
[17] Wikipedia, Donor Darah, http://id.m.wikipedia.org diakses 04 juni 2017 pukul 12.45 wib
[18]Fitriana sidiqah rahman & dr Robby Nur aditya, Donor Darah, PT. Elex Media komputindo, Jakarta, 2013 p. XI
[19]PERMENKES No. 91 tahun 2015 tentang Standar Pelayanan Transfusi Darah

Juridical Review

Government in order to protect and guarantee the rights of the community as citizens, then realize the legal regulations of both legislation and other legal regulations. Legal regulations are not merely formulated in the form of legislation but have binding legal force as long as it is ordered by constitution. The law regulation relating to blood service are as follows :

1. Law Number 36 Year 2009 about Health
2. Government Regulation Number 07 Year 2011 About Blood Service
3. Regulation of Minister of Health Number 83 Year 2014 About Blood Transfusion Unit, Blood Bank Hospital and Network of Blood Transfusion Services
4. Regulation of the Minister of Health Number 91 Year 2015 about Blood Transfusion Service Standards

The Theory Of Jeremy Bentham

The legal purpose pioneered by Jeremy Bentham is to ensure the greatest happiness of humanity in the greatest number.[20] This is very appropriate and appropriate if the theory is used as a reference in describing the implementation of blood donors. So that the implementation of this blood donor can provide safety protection for donors and recipients of blood so as to obtain the greatest happiness. The basic principles of Jeremy Bentham's teachings are as follows :[21]

1. The purpose of law is that law can provide a guarantee of happiness to new individuals, peoples.
2. The principle should be applied qualitatively, because the quality of pleasure is always the same.
3. To realize the happiness of individuals and society, legislation must achieve four objectives :
   a. *To provide subsistence*
   b. *To provide abundance*
   c. *To provide security* (to provide protection)
   d. *To attain equity* (to achieve equality)

Discussion

Based on literature study, the researchers concluded that the legal responsibility of free blood donors in preparing Law number 36 of 2009 about Health is a blood donor to have consequences resulting from the act of blood donation can be imposed a sanction, according to Law number 36 of 2009 about Health in case of any violation / contradiction / unlawful act. Both the act of violating the law by intention (*intertional tort liability*), done with (*negligence tort liability*), especially violate the law without questioning the error (*strick liability*).

Pay attention to Law Number 36 of 2009 about Health, the Provisions Regarding Blood Service are set forth in the eleventh section of article 86 paragraph 1 as follows : "Blood service is a health service that utilizes human blood as a basic ingredient for humanitarian purposes and not for commercial purposes."

Based on the Act above, the researcher concludes that health service that utilizes human blood as the basic material must be humanitarian purpose only and not for commercial purpose. If there is intentionally to sell blood on any pretext it is punishable by a maximum imprisonment of 5 (five) years and a fine of not more than Rp500.000.000,00 (five hundred million rupiah).

Based on in-depth interviews conducted by researchers to informants related to whether or not to receive compensation from the families of patients who need blood.they all answered may, provided equally willingly, this illustrates there has been a practice of buying and selling blood between free blood donors and the patient's family, even with prior agreements with a variety of tariffs and who do not install rates (pay according to ability).

For more details, the responsibility of free blood donors in the practice of buying and selling blood related to the theory of legal responsibility can be distinguished as follows:

a. Intentional tort liability For those who do the previous price deal even with a varied rate.Also for those who already know of a law prohibiting the sale of blood. Such acts that include the type of paid blood donation are people who have the motivation to receive money or pay by donating blood.[22]
b. Neglience tort liability. For those who did not enter1 into an earlier price agreement but still receive the rewards thereafter, also for those who do not know of any laws that prohibit the practice of buying and selling blood. Even for those who have never received socialization. because it violates the principles of humanity and volunteerism that are not for commercial purposes.
c. Violate the law without the error of questioning,(*strick liability*). For all Blood donors must have the same legal responsibility that is bound by humanitarian principles and volunteers that are not for commercial purposes.

[20] Jeremy Bentham, dalam Esmi Warassih, *Pranata Hukum Sebuah Telaah Sosiologis*, Pustaka Magister, Semarang, 2015 p. 20

[21] Basilk w,*Jeremy betham bapak freethinker*, http://academia.edu diakses 5 juni 2017 pukul 14.35 wib

[22] Fitriana sidiqah rahman & dr Robby Nur aditya, **Donor Darah**, PT. Elex Media komputindo, Jakarta, 2013 p. 2

The legal responsibility of free blood donors in the practice of buying and selling of blood, when discussed with Jeremy Bentham's theory is to ensure the greatest happiness for human in the greatest number (*the greatest happiness for the greatest number*). So that the implementation of this blood donor needs to be regulated by the Law where it can provide :

1. protection of the donor, so that the donor will feel the happiness as much as possible because donated blood provides maximum benefits for patients in need, as well as the happiness he got for helping the fellow human beings who are in trouble by sticking to the principles of humanity and volunteerism.
2. Protection of the recipient of blood, so that happiness is obtained as much as possible because the recipient of blood can get blood safe, accessible, and in accordance with their needs.

Implementation of blood donors if the implementation in accordance with applicable legislation in accordance with the basic principles of the teachings Jeremy Bentham is as follows :

1. The purpose of the law is that the law can provide assurance of happiness to the new individuals of the people. The legal purpose in the law that regulates blood donation is to provide a guarantee of happiness both to the donor and to the donor recipients.
2. The principle should be applied qualitatively, because the quality of pleasure is always the same. The donor's and donor recipient's quality of pleasure is both accomplished when both of them have done blood donations, as they have carried out social relations in the form of help with the principles of humanity and volunteerism.
3. To realize the happiness of individuals, and society, thus the blood donor legislation is set forth in :
   a. Law No. 36 of 2009 about Health.
   b. Government Regulation No. 7 of 2011 about Blood Services.
   c. Regulation of the Minister of Health No. 83 of 2014 about Blood Transfusion Unit, Blood Bank Hospital and Blood Transfusion Services Network.
   d. Regulation of the Minister of Health No. 91 of 2015 about Blood Transfusion Service Standards.

All fourth of these legislation necessarily achieve the four legal objectives required by Jeremy Bentham include: *To provide subsistence*, *To provide abundance*, *To Provide security* (to provide protection), *To attain equity* (to achieve the equation).

Closing

Based on the discussion that has been done by the author, it can be concluded as follows Still the low responsibility of free blood donors in implementing their blood donors.This is evidenced by the still discovery of donors who ask for rewards from the blood given so that it becomes evidence of the practice of buying and selling blood.

The practice of buying blood is due to :

a. Donors do not know the rules of the donor, so they assume that the donor can receive the originary rewards based on volunteerism, but this is very contrary to the mandate of the law.
b. Donors do not know the legal sanctions for those who practice of buying and selling blood, this happens as a result of the lack of socialization to donors about the rules governing it.
c. The lack of legal awareness among donors. When In fact, this the practice of buying and selling blood is contrary to Health regulation.

Recommended to the government, in this case "Palang Merah Indonesia"/ "Indonesian Red Cross" as a blood transfusion unit that organizes blood donors In order to pay more attention to the socialization of the law regulations related to blood donor, so there is no practice of buying and selling blood And the hospital is advised to optimize the role and function of Hospital Blood Bank (BDRS) So that by itself will break the blood search chain, from the patient's family with a free blood donors. And to free blood donors it is advisable to establish legal awareness And to enhance empathy for the patient's family, so as to keep the humanitarian principles, volunteer.

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Peraturan Mentri Kesehatan No. 83 Tahun 2014 Tentang Unit Transfusi Darah, Bank Darah Rumah Sakit Dan Jejaring Pelayanan Transfusi Darah, Lembaran Negara Tahun 2014 Nomor 1756
Peraturan Mentri Kesehatan No. 91 Tahun 2015 Tentang Standar Pelayanan Transfusi Darah, Lembaran Negara Tahun 2016 Nomor 36

THE LEGAL RESPONSIBILITIES OF HOSPITAL IN THE IMPLEMENTATION OF NURSING STAFF BY LAWS TO IMPROVE NURSING SERVICES IN KARDINAH GENERAL HOSPITAL OF TEGAL

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ABSTRACT

Nurse is the profession of health workers mostly working in various health services by are no exception in the hospital. As a health worker, nurses are required for professionals in conducting nursing practice in hospitals. Therefore, it needs Nursing staff by laws are required in the hospital. The formulation of the problem include: 1. how is the responsibility of hospital law in the implementation of nursing staff by laws in an effort to improve health service in Kardinah Hospital of Tegal?, 2. How is the problem and solution of nursing staff by laws in an effort to improve nursing services in Kardinah Hospital of Tegal? The purpose of the study is to analyze and observe the hospital's legal responsibility, problems, and solutions in conducting nursing staff by laws in Kardinah Hospital of Tegal. The Research method is positivism paradigm, juridical normative empirical approach. The hospital's legal responsibility in the implementation of nursing staff by laws is conducted by director of Kardinah Hospital Tegal who has made a policy towards nursing staff by laws through establishing of nursing committee in order to carry out good clinical governance such as credential mechanism, Profession and enforcement of professional discipline. Nursing committees in conducting their duties and functions has never been in accordance with what is expected so, it is needed to be supervised and controled by no means of the director hospital. Based on the research findings can be concluded: the legal responsibility of the hospital in providing quality services, safe principles and protection for the community as users of hospital services conducted by nursing staff need supervision in the implementation of nursing staff by laws. It is recommended to the hospital's director to provide guidance and direction to the nursing committee and more selective again in the acceptance of employees (nurses) who will work in Hospital.

Keywords : Hospital's Legal Responsibility, Nursing Staff By Laws, Improvement Of Nursing Service

Introduction

The definition of a hospital based on Law Number 44 of2009, is a health service institution which organizes individual health services completely including services of inpatient, outpatient, and emergency.

The hospital has associated units for the implementation of existing services. One of them is the nursing service unit and nursing committee. The organization health services in hospitals has very complex characteristics and organization.

According to Virginia Henderson (1978), nursing is a unique function of nurses to help sick or healthy clients in providing health services by improving skills, strength, knowledge, and self-reliance of patients rationally, so that patients could recover or die in peace. This definition is the beginning of the basic nursing and medical science.

A nurse is one of healthcare workers that provides health services to people whose main duty is to provide cares or services based on their own abilities and skills. If we talk about the duties and function, then we will not be separated to discuss the roles of nurses in health services. The first role of nurses is as an executor. As the executor, he or she uses some methods to overcome problems faced by patients. The second role is an educator who provides counseling to clients or patients under his responsibility. The third role is a manager with the structural position in order to supervise and ensure the quality of nursing care. The fourth one is a researcher in its effort to develop the knowledge, so he or she should have skills to do a research in their field. But, sometimes nurses make a mistake doing their duties that give negative effects to the patients; for example, making mistakes of drug dosage, errors patient diet, errors handling emergency, errors post-operative care services and so forth. As well as doctors, every nurse's actions as a legal subject will deal with legal consequences of legal liability.

Reflecting on the various legal issues that arise in health care practices in hospitals involving the duties and roles of nurses in relation to the legal liability system which is born from every action undertaken, it should also be reviewed about the implementation of regulations regulating the law of nursing committee as a manpower experts at the hospital.

Nursing Staff By Laws (Internal Staffing) is a regulation of the nursing staff profession and the working mechanism of the Nursing Committee. The Internal Rules of Nursing Staff become a reference and as a legal basis for the Nursing Committee and the Director of the hospital in terms of making decisions to nursing staff. This includes arranging the Nursing Committee's accountability mechanism to the Director of the hospital on the professionalism of nursing staff in the hospital.

Credentials are the process of evaluation of nursing personnel to determine the eligibility of the Clinical Authority. In addition, based on applicable regulations that every nurses who will work in a health service is required to have a Registration Certificate (STR) and SIPP from a legitimate agency to conduct nursing in a hospital. In practice, however, many hospitals have employed nurses that are not yet in compliance with Article 34 paragraph 2 of the Law Number 36 of 2009 on Healthstating that: "The providers of health-care facilities are prohibited from employing unqualified health workers and permits to do so profession work. "And the Ministerial regulation of the Law Number 49 of 2013 on the Nursing Committee article 2 states: "The implementation of the Nursing Committee aims to improve the professionalism of nursing personnel and regulate good clinical governance so that the quality of nursing services and obstetric care oriented to patient safety that is guaranteed and protected in the hospital." Referring to the above explanation, it is very interesting to be studied and analyzed about the regulation and rule of law applicable in nursing staff by law and hospital accountability in the organization of nursing at the hospital, so that research entitled "The Legal Responsibilities of Hospital in the Implementation of Nursing Staff By Lawsto Improve Nursing Services in Kardinah General Hospital ofTegal".

Main Problem

Based on the background above, research questions can be formulated as follows:

1. What are the legal responsibilities of hospital in the implementation of nursing staff by laws to improve health services in the Kardinah General Hospital of Tegal?
2. What are the problem and solutions in the implementation of nursing staff by laws to improve nursing services in the Kardinah General Hospital of Tegal?

Objectives of the Study

Referring to the statements of the problem, the purposes of the research are intended as follows:

1. To analyze and observe the legal responsibilities of the hospital in the implementation of nursing staff by laws to improve health services in the Kardinah General Hospital of Tegal.
2. To know and analyze the problem and solutions in the implementation of nursing staff by laws to improve nursing service in the KardinahGeneral Hospital of Tegal.

Research Methodology

1. Research Paradigm

In this study, seeing the law is as a norm or rule that must be enforced then we use the paradigm Positivism. Not knowing any speculation, it is all based on empirical data. It argues that any methodology for discovering the truth must treat reality as an existent as an object which must be separated from all kinds of subjective, metaphysical preconceptions.

In the interest of providing legal certainty, legal positivism gives the philosophy of its speculative work and identifies laws with the regulations. The positivism underlies the normative legal research that makes the norms as the object of study which is neutral, objective and impartial, also value-free that is characteristic the positivism. The positivism prioritizes predictability in ensuring legal certainty.

2. Type of the Research

Type of the research in this study is a qualitative research, namely a special research object that can not be researched statistically or quantitatively. Qualitative research is aimed at describing and analyzing the phenomena, events of social activity, attitudes, beliefs, individual or group thinking and some descriptions to find principles and explanations that lead to inferences that are inductive.

3. Research Approach

This study uses the method of law-juridical normative-empirical approach (Applied law research) is a method of legal research approaches on the validity or implementation of normative legal provisions in action on any specific legal events that occur in society. The focus of the study is the validity or implementation of normative in concreto legal provisions on certain legal events and outcomes. The normative-empirical legal research stems from the provision of a positive written law that is treated in inconcreto law events in society.

Discussions

The Legal Responsibility Aspects of Hospital in Nursing Staff By Laws to Improve Nursing Services in the Kardinah General Hospital of Tegal.

1. The policies of Director in the Implementation of Nursing Staff By Laws inthe KardinahGeneral Hospital of Tegal.

Responsibility contains elements of skills, burden of obligations and deeds. A person is said to be proficient if he is mature and healthy mind. For legal entities are said to be proficient if he is declared not in a state of bankruptcy by court decision. The element of obligation contains the meaning of something to do or should not be exercised. So its nature must be there or necessity. The element of deed means everything that is done. Thus responsibility is a state of being competent according to the law of either person or legal entity, and able to bear the obligation to everything done.

According to Guwandi, the juridical responsibilities of a hospital include vicarious liability, responsibility for means that include the equipment and duty due to care.

In common sense, this principle of responsibility is acceptable because it is fair for the wrongdoer to compensate the victim. Regarding to the division of the burden of proof, this principle follows the provisions of Article 163 of the HerzieneIndonesischeReglement (HIR) or Article 283 RechtsreglementBuitengewesten (Rbg) and Article 1865 Civil Code, it is said that those who claim to have a right shall prove the right or incident (actorieincumbitprobatio).

The provision above is in accordance with the general theory of procedural law, namely the principle of the audietaltermpartem or the equal position of all the litigants. The matter that needs to be clarified in this principle is the subject of the offender in Article 1367 Civil Code. In the legal doctrine, the principle of vicarious liability and corporate liability is known. Vicarious liability (also known as respondeat superior, let the answer), contains an understanding, the employer is liable for the loss of another party caused by the persons / employees under his supervision. If the employee is lent to the other party, then the responsibility goes to the employee.

The corporate liability in principle has the same meaning as vicarious liability. In essence, the institution (corporation) which oversees a group of workers has responsibility for the personnel it employs. For example, in legal relationships between hospitals and patients, all responsibility for the work of medical and paramedical physicians is the responsibility of the hospital in which they work. This principle is applied not only to organic employees (paid by hospitals), but to monorganized employees (eg physicians contracted to work with revenue sharing). If a corporation (such as a hospital) gives the impression to the public (the patient), the person working there (doctors, nurses, etc.) are employees subject to the corporation's order / coordination, then sufficient conditions for the corporation shall be liable answer to the consumer.

In this research, it is done to analyze how the director's responsibilities in he implementation of the regulation of director of the KardinahGeneral Hospital of Tegal Number 188.3 / 001/2015 about Internal regulations of Nursing Staff By Laws in the Kardinah General Hospital of Tegal.

2. The arrangement of Nursing Staff By Laws in the Kardinah General Hospital of Tegal

Nursing Staff By Laws are structured so that the nursing committee can administer good clinical governance through credential mechanisms, professional quality improvement, and professional discipline enforcement.

a. Sub Credentials Committee

In carrying out the credential function, the Sub-Committee credentials compile a white paper which is a document containing the conditions that nurses must comply with which clinical privilege for nursing staffs because the white paper refers to the various norms of the nursing profession set by the Nursing Staff Group (KSKp) KardinahGeneral Hospital of Tegal.

Based on the results of the research, it turns out that the nursing committee of the Kardinah General Hospital ofTegal does not have a white paper, this causes the Clinical Authority Details (RKK) has not been in accordance with the area where the practice of nursing staff. . This is similar to that delivered by one of the nursing staff that they do not know about the white paper (White Paper) including the content and its function.

The process of a credential and precedential for nursing staffs will give nursing services in the hospital. The credential is an evaluation process of nursing staffs to determine whether staffs are reasonable to be offered the clinical nursing authority based own their own abilities or competences. Whereas, the precedential is a reevaluation process of nursing staffs who have owned the clinical nursing authority to determine whether staffs are reasonable to be offered it.

According to the research findings, it appears that the performance of credential sub committees is still low. The Data obtained from interviews with the head of the nursing committee, that it is done by restoration means the division of the clinical authority to nursing staff only based on work experience and education. The Nursing Committee in dividing the clinical authority in the hospital uses the term Clinic Nurse (PK) 1, PK 2, PK 3, PK 4 and PK 5. So, the Nursing committee in dividing the clinical authority uses the following:

1) Clinic Nurse (PK) 1: Working Experience 1-5 years (Minimum of DIII Nursing Education)
2) Clinic Nurse (PK) 2: Working Experience 6-9 years (DIII Nursing Education). Working Experience 3-7 years (Ners Profession)
3) Clinic Nurse (PK) 3: Working Experience at least 10 years (DIII Nursing Education) Working Experience 7-11 years (Ners profession) Working Experience 1-3 years (Double Degree in nursing)
4) Clinic Nurse (PK) 4: Working Experience minimum 12 years (Ners profession) Working Experience 4-8 years (Double Degree in nursing)
5) Clinic Nurse (PK) 5: Working Experience at least 9 years (Double Degree in Nursing). From that division, it is seen if the nursing staff is in Diploma III of nursing,it is only in the level of Clinic Nurse (PK) 3. Those who are S1 Kep + Ners profession, they are in the level of Clinic Nurse (PK) 4. And Clinic Nurse (PK) 5 can only be achieved by nursing staff who have S2 degree (Double Degree in Nursing).

The verdict is based on the skills that only competent and professional nursing staffs who can manage nursing care at Kardinah General Hospital of Tegal. But in fact, according to this research conducted at the KardinahGeneral Hospital of Tegal, there are some rules that are not run properly by the nursing committee related to the credentials such as there are 12 nurses who manage nursing carein the hospital do not have the STRor expired STR. The implementation of nursing audit that should be executed by the nursing committee has not been conducted optimally and thoroughly so that this makesproblemsto people ascustomers of the hospital. Whereas it is clear that in the regulation of the director of Kardinah General Hospital ofTegal Number: 188.3 / 001/2015 about nursing staff by laws Article 4 states that "The decision is based on the skills that only competent and professional nursing staff who are allowed to do nursing care in the hospital . "The director as the head of the hospital who make the Nursing Staff By Laws is also responsible if there are problems that occur to nurses who have not done credentials and has no STRbut have managed nursing care services.

The Juridical Consequences in Violation of Nursing Staff By Laws at Kardinah General Hospital of Tegal.

1. The consequences of Civil Law Accountability

The basis of accountability in civil law, there are two kinds namely on the basis of errors and risks. Thus, in civil law known liability based on fault and liability without fault known as risk liability or strict liability.

The principle of liability on the basis of error implies that a person must be held accountable because the person has been guilty of doing something harmful to others.

On the contrary, the principle of liability on the basis of no error / risk is the basis of accountability, the customer (the patient) as the plaintiff is no longer required to prove the mistake of the producer (nurse) as the defendant because according to this principle the basis of liability is no longer a mistake but the direct nurse is responsible as the risk of his endeavor.

The legal consequences of civil liability for violating the provision of nursing staff by laws when referring to the adequate theory can be applied to the nursing staff, if in fact the offense resulted in physical or psychological harm to the patient. Legal consequences that can be applied according to the Civil Code include:

First, the accountability for unlawful acts in accordance with the provisions of Articles 1365 and 1366 of the Civil Code:

"Any act that violates the law and brings harm to others, requires the person who caused the loss by his mistake to compensate for the loss".

"Everyone is responsible, not only for the harm caused by the acts but also for the harm caused by his negligence".

Unlawful acts in accordance with the provisions of Article 1365 of the Civil Code, the unlawful act must contain elements: the existence of an act, the act is against the law, the existence of the offender's wrongdoing, the loss for the victim and the causal relationship between the act and the loss.

Second, the accountability for default in Article 1239 of the Civil Code which states:

"Every engagement to do something or not to do something, must be settled by providing reimbursement of costs, losses and interest, if the debtor does not fulfill its obligations".

Third, the accountability for abuse of circumstances on the basis of legal doctrine. Errors made in the hospital are considered as the negligence of the institution (corporate negligence) to be borne by the institution because it is considered less able to supervise and control what is done by his subordinates, including negligence made by nurses. This doctrine has long been known inIndonesia on behalf of employee relationship.

The principle of this doctrine is the boss who is responsible for all the harm caused by subordinates. The hospital acts as superiors and hospital staff (nurses) who act as subordinates. The doctrine developed into hospital liability, based on this doctrine the hospital as an institution that provides itself to provide treatment and care (cure and care) is also responsible for any events that occur in the hospital. specifically, the first time the hospital is responsible, but if there is an error / negligence that is not fair, it could be the head of the hospital and then use the right regresnya (ask replaced again) to the doctor who has been negligent. Now it is common to be sued for being perceived as a deep pocket that is financially stronger.

2. The criminal Liability Consequences

Judging from the occurrence of prohibited actions, a person will be held liable for such actions, if the action is unlawful and there is no justification or exclusion of the unlawful nature of the crime he committed. And judging from the point of accountability, only a responsible person can be held accountable for his actions.

The criminal law adheres to the principle of "no crime without error". Furthermore, Article 2 of the Criminal Code states that, "criminal provisions in Indonesian law are applied to every person who commits a crime in Indonesia". The formulation of this article provides that any person within the jurisdiction of Indonesia may be held criminally liable for any wrongdoing. Based on the provisions in the formulation of

the regulation, the profession of health workers working in the hospital can not be separated from the provisions of the article.

The fundamental difference between ordinary criminal offenses and criminal offenses in the medical field lies in the focus of the offense. The usual criminal focussion lies in the consequences of a criminal offense, whereas in a criminal act in the medical field the focus is on the cause / cause of the offense. In criminal malpractice, criminal malpractice must be proven about professional error, such as mistakes in injecting, installing infusion / hose for food (NGT).

3. The consequences of administrative liability

The violation of the policy or provision of administrative law may result in administrative law sanctions which may include revocation of business license / operating permit or revocation of legal body status for the hospital, while for health professionals (nurses) may be oral or written warning, SIP revocation, periodic salary delays , or termination of employment.

The result of the research, there have been no reports of cases relating to civil, criminal and administrative cases that occurred between hospitals, patients and nurses. But it is necessary to realize together that as long as the nurses work to run the profession then the possibility of problems can occur. Therefore, there is a need for good legal awareness from the director, the management of the hospital, the Nursing Committee and all nursing staff that in performing their duties in the hospital the need to reaffirm the importance of nursing staff by laws.

The problem and Solutions in the Implementation of Nursing Staff By Laws in the Kardinah General Hospital of Tegal.

1. The problems to the Implementation of Nursing Staff By Laws

One of the problems in the implementation of internalnursing staff is the development of career ladder and nursing competence test to support the maximum health service. Career development is done by applying nursing career ladder by doing competency test which contains knowledge, skill and attitude aspect. The competency test is intended to acquire

Based on Ministerial Regulation No.49 of 2013 on nursing committee explained that the credential is a process to determine and maintain the competence of nursing. The credential process is one way the nursing profession maintains the standard of practice and accountability of the nurses. The methods used in the credentials are determined by each institution, and set forth in the Nursing Staff by Laws Internal Regulations. Some methods that can be used in the process of credentials include portfolio method and competency assessment. Nursing competency tests are conducted with the aim of testing the registered nursing competencies, ensuring the ability to provide nursing care and providing safety to the community. The nurse competence test also serves to establish uniform standards in testing nurse competence, facilitate the development of applicable nurse registration, facilitate nurse professional development through testing of competence and evaluate nurse's skill, and become the nurse's guidance on the competence that must be possessed according to his career ladder . The failure of competency test will have an impact on the competency mismatch which nurses should have with their duties and responsibilities. Incompetence of nurse competence with duty or job done in nursing service, make decrease of nurse motivation in improving its competence. The lack of competency tests also results in the difficulty of establishing fair incentives for each nurses. The nurse wants the distribution of nursing service incentives based on performance-related pay (PRP) according to performance appraisal and competence. The implementation of the competency test varies in each hospital. Some problems in the implementation of competency tests have not yet optimal leadership support where there has been no policy and provision of competency test as the stage of realizing career nurse. In addition, the varying application of career path nurses and nurses who have not understood career path well also be a problem to the implementation of competency tests.

Professional nursing has many complex and inter-twined relationships in the legal area that are important to identify and understand. This opinion states that the nursing profession is very complex in relation to laws, which is very important to know and understand. The recognition of the nurse as an independent entity profession has also been echoed for a long time; for example, in developed countries like the United States, nurses have been professionally recognized. The nurse already has its own rules, philosophical outlook, andposition in the health team. The nurses work with their own practice license by no means that the nurses are fully responsible for their work.

The legal provisions on nursing practice are relatively new in Indonesia. For nearly two decades, nurses campaigned on the paradigm shift from vocational work to professional nursing, and demanded the legitimate recognition that nurses were an independent profession that had its own uniqueness, responsibility and accountability, not as a medical "helper" as it is imagined by the layman. The struggle to fruition with the enactment of Law Number 38 of 2014 on Nursing.

2. The Solutions in the Implementation of Nursing Staff By Laws

A suggested solution is that there is a commitment from the nursing committee to be supported by hospital management not to employ nurses in managing uncredited nursing care / nursing audits including nurses without STR or inapplicable STR. As the result, the impactis not to provide incentives or nursing services.

This is in an effort to improve the professional service of nursing, so it is expected that people who use services in Kardinah General Hospital of Tegal get excellent service and guaranteed patient safety.

Closing

Conclusions

Hospital have responsibilities for every public health serviceswhich it provides. They are to provide affordable quality services based on the principle of safe, comprehensive, non-discriminatory, participatory, and provide protection for the community as health receiver, as well as health service providers in order to realize the highest level of health.

The Director decides Internal regulations about the Nursing Staff By Laws to conduct the good clinical governance through credential mechanisms, professional quality improvement, and professional discipline enforcement. The verdict is based on the skills that only competent and professional nursing staff who are allowed to do nursing care atKardinah General Hospital of Tegal.

The implementation of nursing staff by laws as guidance in nursing service in Kardinah General Hospital of Tegal;asmentioned above, nursing is one of the professions that plays an important roleto maintain the quality of health services in hospitals because it is the largest producer of the activity that reflects the quality of service. The nurse has an important position in producing quality health care in hospitals because it is a unique service, which includes a 24-hour and continuous bio-psycho-social-spiritual aspect which is a distinct advantage than other services. Nurses are also the largest group of service providers in the hospital about 40-60%. Many things can be doneto maintain the quality of health services including nursing services.

Based on Ministerial Regulation Number.49 of 2013 on nursing committee, it is explained that the credential is a process to determine and maintain the competence of nursing. The credential process is one way of the nursing profession to maintain the standard of the practice and accountability of the nurses. The methods used in the credentials are determined by each institution, and applied inInternal Regulations the Nursing Staff by Laws. Some methods that can be used in the process of credentials include portfolio method and competency assessment.

The enormous benefit for hospitals with Internal Regulations of the Nursing Staff is the existence of legal certainty in the management of nursing staff in hospitals, becoming atool / means of legal protection for hospitals, nursing workers and recipients of nursing care services.

Suggestions

1. The director of Kardinah General Hospital of Tegal.
   a. It is necessary to provide guidances and directions to the nursing committee to be able to implement the Internal regulation of Nursing Staff By Laws optimally.
   b. It is important to be more selective in hiring employees, especially the professional nurses who will work in Kardinah General Hospital of Tegal, based on the assessment on the needs, competencies, professionalism and their valid STR.
   c. It is necessary to give incentives for members of the nursing committee in accordance with the financial capabilities of the hospital.
2. The nursing committee
   a. Conducting standard credential and recredential procedures in accordance withapplicable provisions to all nursing staff who do the nursing care.
   b. Recommending the clinical authority for nursing staffs according to the clinical nurse level from the clinical nurse 1 (PK 1) to clinic nurse 5 (PK 5)
   c. Developing and implementing continuing education programs or Continuing Professional Development (CPD).
   d. Arrangingthe up datingStandard Operating Procedures (SPO) and Nursing Action Documents.

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LEGAL RECONSTRUCTION OF DRUG-RESISTANT TUBERCULOSIS CONTROL SYSTEM BASED ON HUMAN RIGHTS

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ABSTRACT

Tuberculosis is included as one of the top ten diseases that cause death in the world. Its cases in Indonesia are ranked second while in Central Java Province it has reached 118 per 100,000 populations. One of the causes of death due to tuberculosis is treatment failure known as drug resistant tuberculosis (DR-TB). Its cases are becoming a global health crisis that needs immediate treatment. The Indonesian Government through the Ministry of Health has established a policy on the management of DR-TB cases through the Integrated Management of Drug Resistant Tuberculosis Control as stipulated in the Regulation of the Minister of Health Number 13 of 2013. The implementation of the regulation includes, among others, health facilities in hospitals, center for community lung health, and community health center (CHC). The obstacles encountered in the implementation at the CHC level are the unavailability of infrastructure and facilities and competent human resources to implement the program. The management of DR-TB cases in a CHC is still questionable whether it as a first-level health facility can be medically justified (medicolegally) by specialist treatment. A CHC as a first-level health facility does not have the main duty and function to provide specialist services in accordance with the Regulation of the Minister of Health Number 75 of 2014, so that the services provided to patients have not complied with the standards. This causes the human rights to obtain quality health services to have not been met optimally. Therefore, a legal reconstruction of DR-TB control system based on human rights and virtues is needed. The reconstruction is expected to improve the accuracy of DR-TB case management that has long-term impacts on the decline in mortality.

Keywords : Human Rights, Medicolegal, Community Health Center, Legal Reconstruction, Drug Resistant Tuberculosis

INTRODUCTION

Tuberculosis (TB) as a contagious infectious disease caused by *Mycobacterium tuberculosis* is one of the top ten leading causes of death in the world. The World Health Organization (WHO) in 2016 recorded 1.7 million deaths caused by the disease from a total of 10.4 million cases with Indonesia as the second highest ranked country in the world, reaching 1,000,000 cases in 2014 and an estimated 110,000 deaths annually.[1] In Central Java Province, the number of recorded TB cases was 118 cases per 100,000 populations by 2016.[2]

One of the effects of TB treatment failure is drug-resistant TB (DR-TB), which should be treated promptly. The WHO estimates that there are 600,000 cases of TB in the world that are resistant to rifampicin and 490,000 cases have become DR-TB.[1] At the global level, Indonesia ranks eight of 27 countries with the world's largest DR-TB burden by an estimated 5,900 cases of new pulmonary tuberculosis and 1,000 cases of retreatment pulmonary tuberculosis.[3] In 2017, the recorded recurrent, default, and failed TB patients in Central Java Province were 263 cases, 36 cases, and 50 cases, respectively. This suggests that cases of DR-TB are on the rise and need immediate treatment.[2]

The Indonesian Government through the Ministry of Health has established a policy regarding the management of DR-TB cases with Integrated Management of Drug Resistant Tuberculosis Control or *Manajemen Terpadu Pengendalian Tuberkulosis Resisten Obat* (MTPTRO). This policy is contained in the Regulation of the Minister of Health of the Republic of Indonesia No. 13 of 2013 on MTPTRO implemented in health facilities in both hospitals and first-level health facilities such as Community Health Center (CHC). However, not all health facilities can automatically become the place for the treatment of patients with DR-TB.[4]

The management of DR-TB cases in a CHC is still questionable whether the CHC as a first-level health facility can be medically justified by specialist treatment. Therefore, an analysis of the legal reconstruction of infectious drug-resistant tuberculosis control systems based on human rights is needed. This literature review aims to conduct a legal reconstruction analysis of infectious drug-resistant tuberculosis control systems based on human rights.

DISCUSSION

DRUG-RESISTENT TUBERCULOSIS (DR-TB)

The resistance of *M. tuberculosis* to anti-tuberculosis drugs is a state of germ that can no longer be killed only with first-line anti-tuberculosis drugs alone. DR-TB is essentially a man-made phenomenon, as a result of inadequate treatment of TB patients as well as transmission from TB patients with anti-tuberculosis drug resistant. Resistant organisms can arise due to several factors; human error is as the biggest contributors. Drug resistance may occur due to inappropriate drug use in drug-sensitive TB patients, such as regimen irregularity, drug dosage, and length of treatment, as well as failure to influence patients to complete

treatment programs. Poor compliance of TB patients in taking medication regularly remains an obstacle to achieving high cure rates.[5]

The high number of DR-TB cases requires greater cost and length of treatment. Other impacts are physical and psychosocial. The physical impacts experienced by DR-TB patients are, among others, nutritional problems, immune status, and side effects of treatment while psychosocial effects include the presence of emotional problems associated with the disease such as feeling bored or being lack of motivation up to serious mental disorders such as severe depression. Other psychosocial problems are stigma in society, feeling of being excluded and not being confident and economic problems. Therefore, the treatment of DR-TB requires special and specialist treatment.[6]

DR-TB MANAGEMENT IN INDONESIA

The treatment of DR-TB patients aims for a patient centered care that is based on the patient's health needs and requires multidisciplinary elements such as doctors, nurses, nutritionists, and sanitarians. The human resources needed are the experts in the management of DR-TB patients. The human resources must also have expertise in providing psychological and social support, being able to provide appropriate information on DR-TB. The management of DR-TB patients also requires discussion or monitoring of specialists within 3-6 months. It is also necessary for a psychiatric specialist or psychologist to deal with the psychological effects that emerge.[7]

The treatment requires coordination and communication, taking into account both the patient and the availability of facilities and infrastructure that can protect health workers from exposure to DR-TB infection. The treatment also requires prevention, diagnosis and medication. Tuberculosis treatment should also synergize with the treatment of HIV/AIDS and diabetes.[8]

The development of DR-TB treatment models has been conducted in various countries. The results show that community-based treatment models are more effective than hospital-based treatment models. The community-based models can reduce dropout rates, improve cure rates, and reduce treatment time.[9] Indonesia is beginning to develop these community-based models involving the participation of first-level health facilities such as Community Health Center.

The management of DR-TB patients according to the Regulation of the Minister of Health of the Republic of Indonesia Number 13 of 2013 includes, among others, good health facilities for Hospitals, Center for Community Lung Health, and Community Health Center. The application of integrated management of DR-TB control uses the same framework as the Directly Observed Treatment Short course chemotherapy (DOTS) strategy with some emphasis on each component. The strengthening of MTPTRO is aimed at improving the quality of service and easy access to detection and treatment, so as to be able to break the chain of transmission and prevent the occurrence of other disease complications. The services of DR-TB patients include referral center health facilities, sub-referral, and satellites with emphasis on referral network function.[10]

A CHC in the management of DR-TB acts as a satellite, having activities ranging from suspect screening, diagnosis establishment, inpatient and outpatient treatment, side effect management, logistic management and its recording. In the implementation, a CHC still requires coordination and assistance from health facilities as the referral center, because there are some requirements that cannot be fulfilled yet by the CHC.[10]

The implementation of the Regulation of the Minister of Health Number 13 of 2013 on Integrated Management of DR-TB Control has an impact on CHC preparedness to handle it. A CHC as a primary health facility cannot function optimally in the management of patients with DR-TB. This can be seen from several aspects such as multidisciplinary human resource readiness, infrastructure, and ineffective communication between referral center, sub-referral, and satellite.[11]

In the implementation, human resources available in a CHC are general practitioners (doctors), whereas DR-TB patients require the treatment from specialists such as pulmonary specialists, internal medicine specialist, and psychiatric specialists. Inadequate facilities and infrastructure in a CHC such as unavailability of room or special infrastructure for Dr-TB patients performing outpatient examination cause the risk of transmission from the patients to the officers or health workers or to other visitors, thus indirectly increasing DR-TB cases. Another problem is concerning communication factors that have not been effective, for example, side effects that must be handled immediately at the CHC or the CHC that is difficult to consult with the referral facilities.[11]

LEGAL RECONSTRUCTION OF HUMAN RIGHT-BASED DR-TB CONTROL SYSTEM

In the implementation of MTPTRO in a CHC, it is still questionable whether the CHC as a first-level health facility can be justified medicolegally. This is because DR-TB is a tuberculosis disease that requires specialist special treatment, both in medicine and supervision, while a CHC is a first-level health facility that does not provide specialist services. The roles of each CHC in terms of tasks, functions, authority, prerequisites of establishment, and health efforts have been regulated in the Regulation of Health Minister No. 75 of 2014.[12]

In the Regulation Article 37 Paragraph (1), it is explained that the first-level individual health efforts are conducted in the form of outpatient, emergency services, one day care, home care, and/or inpatient based on consideration of health needs. Subsequently, Paragraph (2) explains that first-level individual health efforts are carried out in accordance with standard operational procedures and service standards. It can be concluded that the Regulation of the Minister of Health of the Republic of Indonesia Number 75 of 2014 explains that a CHC does not provide specialist services.[12]

Human resources in a CHC are under the authority of the doctors as set forth in Articles 1 and 2 of the Minister of Health Regulation No. 5 of 2014 on Clinical Practice Guidelines for Doctors at Primary Health Care Facilities. Article (1) explains that the guidelines aim to provide a reference for doctors in providing services at both government and private primary health care facilities in order to improve the quality of services as well as reduce the number of referrals. Further, Article (2) explains that the guidelines include guidelines for the management of diseases found in primary care based on criteria of disease with high prevalence, high risk illnesses, or diseases that require high financing.[13] Doctors with competency standards are commonly able to deal with patients with DR-TB, but these competencies need to be improved through training, especially to improve knowledge and skills in the treatment of DR-TB.[14] This explains that doctors in a CHC can handle cases of DR-TB patients but still need improvement in terms of their competencies through training. Besides, it is still necessary to complete the infrastructure facilities at the CHC considering that in carrying out the treatment of these patients, at any time side effects of drugs can appear so that immediate direct treatment is required.

The impact of the management of DR-TB patients at the CHC level is that patients do not receive health services that meet the standards of their health needs. This can violate human rights to obtain health services in accordance with the standards. Health is a basic need for human beings. This is stated in the United Nations (UN) Decree of 1948 on Universal Declaration of Human Rights, in which the right to health is governed. Furthermore, Article 25 states that each and every individual has the right to a standard of living that ensures the health and well-being of himself and his family.

When patients with DR-TB do not receive standardized health services, this may also violate the patients' right as regulated in the Regulation of the Minister of Health of the Republic of Indonesia Number 69 of 2014 on Hospital Liability and Patient Obligations. Article 24 Paragraph (2) explains the right of the patient is to obtain quality health services in accordance with professional standards and standard operating procedures.[15]

The management of DR-TB requires easy, effective, and efficient interventions; however, the interventions must be able to reduce dropout rates. The most effective intervention is comprehensive community level interventions since they consider human, economic, geographic, and infrastructure support resources. The treatment of DR-TB requires strict laws for each health facility by staying in harmony with the rights of patients as human beings.[16]

This systematic review shows that strict policy on regulation of health service quality improvement in accordance with national and international standards can decrease the delay of diagnosis. Improved health services can be undertaken by training health workers, creating effective communication mechanisms among health workers including doctors and DR-TB patients, and monitoring the knowledge and skills of workers as routine surveillance policies.[17]

Therefore, there is a need for the legal reconstruction of the DR-TB control system based on human rights. A strong legal foundation for the implementation of DR-TB in a CHC, for example in the regulation of human resources, facilities and infrastructure, and appropriate communication methods between satellite health facilities, sub-referral and referral centers, should be established. This can provide a clear area between satellite health facilities, sub-referrals, and referral centers that can improve the quality of DR-TB treatment in Indonesia.

Closing

The management of DR-TB patients in a CHC requires legal reconstruction of DR-TB control systems based on human rights and virtues. The reconstruction is expected to improve the management accuracy of DR-TB cases that have long-term impact on the decline in mortality.

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DISPUTE RESOLUTION FOR INTERNATIONAL CONTRACT TO ACHIEVE LEGAL CERTAINTY

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ABSTRACT

Globalization opens borders between countries to channel each other's industrial influence, economic integration, and enrich the culture, ideas and technology. The existence of relations between nations in this era of globalization requires a good international economic relations. Due to the existence of good international economic relations will further spur the development of the international economy. The existence of the international economy also forcing the world countries to compete in promoting prosperity and development of industry in each country. To achieve the above conditions, there must be legal certainty and agreement as outlined in an agreement called International Contract. An International Contract also poses a potential dispute. Disputes arising out of a contract are mostly due to a provision in the contract that is not fulfilled, or one of the parties violating the terms of the contract that already made. In principle, contracts are made to be adhered to based on the legal principle of the Latin language that describes the legal certainty of *Pacta Sunt Servanda*. *Pacta Sunt Servanda* means the treaty made in effect as a rule for those who make it, and if there is a dispute within the contracting exercise, then the judge based on his decision may force the infringing party to carry out in accordance with the obligations and rights in accordance with the agreement. The purpose of this paper is to identify and analyse alternatives that could be undertaken whenever a dispute arises in executing certain International Contract in order to achieve legal certainty. International Contract needs legal certainty in order to ensure that any contractual clause implementation even until the settlement of the dispute proceeds effectively and efficiently. The most important first step to be taken since the making of International Contract drafting is to write down and agree on the clause for the method of dispute resolution within the contract. It is also recommendable to use the method of dispute settlement with hybrid model.

Keywords: International Contract dispute, Hybrid dispute resolution

Introduction

The growing interaction of people between countries, increasingly affect the openness between nations through globalization. Globalization opens borders between countries to channel each other's industrial influence, economic integration, and enrich the culture, ideas and technology. The influence is possible to be distributed on a global scale with delocalization and over-territoriality.[1] The development of globalization is increasingly visible in the globalization of the economy. The national economy in each country is growing with the rapid increase in cross-border movement of goods, services, technology, and capital.[2] The existence of relations between nations in this era of globalization requires a good international economic relations. Due to the existence of good international economic relations will further spur the development of the international economy.

International Economics is the largest in scale to study trade relations. Consist of inter-state financial policies, implementation of import-export trade, inter-state economic cooperation. International economics is important in keeping the world economy as the international economy maintains market openness for product transfers, money flows, science and technology.[3] International economy activity consist of International Trade, International Finance, International Monetary Economics, International Macroeconomics, and International Relations.[4] The existence of the international economy also forcing the world countries to compete in promoting prosperity and development of industry in each country.

To achieve the above conditions, there must be legal certainty and agreement as outlined in an agreement called International Contract. The contract itself has a definition that is an agreement between two or more persons and is enforceable by law. A contract obviously must have certain information that binds each party related to it. There are 3 basic principles of contract: freedom of contract principle, bona fide principle, and real connection principle.[5] Because of globalization, now implementation of contract is being carried out troughout the whole world across countries. Contract that is done across countries is called International

[1] Cuterela, Sandu. *Globalization: Definition, Processes, and Concepts, Revista Română de Statistică*. National Defense University. 2012.
[2] Deese, David A. *Globalization: Causes and Effects*. AshGate, Boston. 2012.
[3] Hutabarat, Roselyne. *Transaksi Ekspor Impor*. Erlangga, Jakarta. 1991.
[4] Bjørnskov, Christian. *Basics of International Economics – Compendium*. Christian Bjørnskov & Ventus Publishing ApS, Frederiksberg. 2005.
[5] Goddard, Chris. *Basic Principles of Contract Drafting*. 2007.

Contract. International Contract is explained as legally binding agreements between parties which originated from different countries.

International Contracts are made in purpose of making the agreements clear. There are many types of International Contract, among them there are: International sale contract, International distribution contract, International agency Contract, International sales representative contract, International supply contract, International manufacturing contact, International services contract, International strategic alliance contract, International joint contract, International franchise contract.[6]

An International Contract also poses a potential dispute. Disputes arising out of a contract are mostly due to a provision in the contract that is not fulfilled, or one of the parties violating the terms of the contract that already made. In principle, contracts are made to be adhered to based on the legal principle of the Latin language that describes the legal certainty of *Pacta Sunt Servanda*. *Pacta Sunt Servanda* means the treaty made in effect as a rule for those who make it, and if there is a dispute within the contracting exercise, then the judge based on his decision may force the infringing party to carry out in accordance with the obligations and rights in accordance with the agreement.[7] But in reality not always a contract goes smoothly. It is important to resolve the issue in case of a dispute.

Based on the above background, the existence of an international dispute settlement becomes particularly important in resolving disputes over international contractual disputes. But because of the extent and complexity of international contracts, it is not a simple way to resolve disputes that must be done to solve the problem. This paper will explain about the dispute resolution arising from the existence of international contracts. This paper is entitled DISPUTE RESOLUTION FOR INTERNATIONAL CONTRACT TO ACHIEVE LEGAL CERTAINTY.

Main Problem

The problem that became the focus of the discussion in this study is: How to resolve disputes in International Contract to achieve legal certainty? The purpose of this paper is to identify and analyze alternatives that could be undertaken whenever a dispute arises in executing certain International Contract in order to achieve legal certainty.

Discussion

Contract

A contract is an agreement between two persons or more and is enforceable by law. The power of a contract is in it's clauses and informations. There are two forms of contact.[8] First is oral contract, oral contract is a contract which terms has been agreed by spoken communication. Second is written contract, written contract is an agreement declared in a written document and has been signed by each party agreed on the contract. Basically a contract emerges from a condition when a person offers to do one or more specified acts on certain terms and the offer is accepted by another person with mutual provision.

There are two different approach when we study about contract.[9] The first approach of contract is merely identifies the general nature of the ideas and results in proposing narrow contract definitions are based on existence, consistency, and integrity of each party making the contract. The second approach is more complicated than the narrow framework. It's focus is on the identification of exchanges leading to dependence.

A conract contains six essential elements which known as The Six Essential Elements of a Contract. Each of them are offers; acceptance, rejection, and counteroffer; consideration, gratuitous promises, and seals; intention to create a legal relationship; capacity of the parties, and finally legality. There are four requirements that must be fulfilled before a contract is valid. Those four requirements are:[10]

a. Definiteness of material terms
   One of the reqiirements for a contract to be considered valid is that the parties to the contract should fully agree on the terms they are making. Material provisions is the most important parts in a contract. Which state's law should be applied in deciding disputes relating to the contract would generally be considered to be a non-material provision.
b. Consideration

[6] Moss, Giuditta Cordero. *International Contracts between Common Law and Civil Law: Is Non-state Law to Be Preferred? The Difficulty of Interpreting Legal Standards Such as Good Faith, Volume 7, Issue 1*. University of Oslo, Oslo. Berkeley Electronic Press. 2007.

[7] Binder, Christina. *The Limits of Pasca Sunt Servanda in International Law*. MaxPlanckGesellschaft. 2013.

[8] Ademi, Flutra. *The United Nations Convention on Contracts for the International Sale of Goods in the Courts and Arbitral Tribunals of the Successor States of the SFRY*. University of Graz, Switzerland. 2014.

[9] Meer, Michael A. *International Contract Manual: Coutry Handbook Switzerland*. Grüninger Hunziker Roth Rechtsanwälte, Zürich. 2008.

[10] http://euro.ecom.cmu.edu/program/law/08-732/Types/ContractBasics.pdf (Accessed 27/9/2017)

Consideration can be defined as impulse for a contract, or in other word it's cause, motive, price, and influence that encourages parties in the contract to enter into a contract. A contract results from a bargain , this requires that each party in the contract to give something up in exchange for something from another party. Value of the consideration ina contract does not need to be equal as long as parties included in the contract agree to the clauses of the contract.

c. Legality
Third requiremen for a valid contract is legality. Legalit means the material provisions shuld be legal. Any contract containing material provisions that are not legal will be ruled to be illegal and unenforceable. Legality of material provisions in a contract is determined by Statutes. Non-material provisions that are not legas may well be disregarded by a court.

d. Competent parties
The last requirements of a contract is competent parties. For a contract to be enforceable itmust be made by comptent parties. A contract shold not be made by a person who has been adjudicated to be insane or otherwise not mentally competent, or with a minor.

International Contract and International Contract Law

International Contract is a contact which has foreign elements. Foreign elements is the connections of more than one nation's legal system which affect the contract and leads to the choice of law. This choice of law then agreed upon by contracting parties.[11] Theoretically foreign elements could be indicated as such:

a. Different nationality between parties
b. Different legal domicile
c. Selected legal standard is foreign law including regulations and even the principles of international contract
d. International contract dispute settlement is conducted overseas
e. The contract signing is done overseas
f. Material object of contract is located overseas
g. Language used in the contract is foreign language or internationally well known language
h. Foreign currency used as standard of transacton for the contract.

International Contract Law is a part of the International Civil Law which regulates the provisions in business transactions between businesses from two or more different countries through a contractual means made by an agreement by the parties bound in the business transaction. International Contract Law is based on seven forms of law, those seven forms of law are:[12]

a. National law
b. Contract documents
c. International trading cultures
d. Legal principles of contract
e. Court decision
f. Doctrine
g. International treaty or International Convention about contract

International Convention that become the basis of International Contract are from Contracts for the International Sales of Goods (CISG) and UNIDROIT Principle of International Contract. CISG applies to contracts of sale and purchase of goods whose parties have business premises in different countries. Menawhile the UNIDROIT Principle is a general principle for international commercial contracts that can be applied to the rule of national law or used by contract makers to govern international transactions as legal choice.[13]

There are few International Organizations that related to International Contract. There are UNCITRAL, UNCTAD, UNIDROIT, ICC, and lastly The Hague Conference on Private International Law.

a. The United Nations Commission on International Trade Law (UNCITRAL)
UNCITRAL was formed by the United Nation General Assembly in 1966. As the core legal body of the United Nation in the field of Law of International Trade.[14] The objective of UNCITRAL if to further promote the harmonization and univication of legal provisions in the field of International Trade.[15] The establishment of UNCITRAL is based upon consideration of the disparity of the various

[11] Huala, Adolf. *Dasar-dasar Hukum Kontrak Internasional*. PT. Refika Aditama, Bandung. 2008.
[12] Utama, Meria. *Hukum Ekonomi Internasional*. Penerbit PT. Fikahati Aneska, Jakarta. 2012.
[13] UNIDROIT. *Principles of International Commercial Contracts*. International Institute for the Unification of Private Law, Rome. 1994
[14] UNCITRAL. *Legal Guide on Drawing Up International Contracts for the Construction of Industrial Works*. UNITED NATIONS, New York. 1988.
[15] Jeffrey, Wah-Teck,Chan, SC, "UNCITRAL and E-Commerce", *Colloqium on Electronic Commerce*, 14-16 February 2011.

rules of National Law regulating international trade activities will create barriers for international trade flows, otherwise it is expected to UNCITRAL as UN agencies can play a more active role in reducing or getting rid of these obstacles.

b. United Nations Conference on Trade and Development (UNCTAD)
   UNCTAD was formed in 1964 to resolve the imbalances and asymmetry in the global economy, in particular in a trading system that obstruct the efforts of developing countries to boost growth and development path that is balanced. To achieve those objectives UNCTAD must deal with the monopoly of economic thinking that dominates various discussions on the international level that has been neglected or marginalized specific needs and interests of developing countries.[16]
c. International Institute for the Unification of Private Law/Institute International Pour L'Unification Du Droit Prive (UNIDROIT)
   UNIDROIT is an independent intergovernmental organization based in Rome. The purpose of UNIDROIT is to study the needs and methods for modernization, harmonization, and coordination of private law and especially commercial law between countries and between groups of countries and to formulate legal instruments, principles and uniform rules to achieve the goal.[17] UNIDROIT was formed in 1926, and is an auxiliary organ of the League of Nations. In connection with the dissolution of the League of Nations, in 1940 UNIDROIT reshaped under multilateral agreements.
d. The International Chamber of Commerce (ICC)
   ICC is the main international institution in the field of trade which has branches in almost all countries. ICC is also very active in developing rules in the field of international trade. ICC has developed the ICC Model Contract and Clauses, including: commercial agency, confidentiality, distributorship, force majeure, franchising, legal hand book for global sourcing contract, mergers and acquisition, subcontract model, occasional intermediary contract, sale of goods, technology transfer; trademark licensing; turnkey transaction.[18] ICC is also developing ICC DOCDEX (Documentary Credit Dispute Resolution Expertise) offering to international bankers and traders a way fast and cheap dispute resolution in the field of documentary credit.
e. The Hague Conference on Private International Law
   The Hague Conference on Private International Law since 1893 has been become a melting pot of various legal traditions have developed and serving various Conventions that respond to International needs such as International protection of children, family and material relations, International legal and litigation cooperation, International Trade and Financing.[19]

International Contract Dispute Resolution

Each day in global economic law scale, we are faced with uncertainties of transaction in International Contract. Sometimes a condition where a party in the contract failed to fulfill it's part of responsibility adequately. This condition can spark disputes, and cases of dispute is frequenty arise from the complexity of International Contract. Parties in the contract can minimize the disruptiveness in this kind of disputes by stipulating in the contract about the method to resolve potential disputes, but this also not always proven easy to do, because contracts involving parties from different countries which each has different law, culture, and perception on ways to solve disputes.[20]

Given the explanation above which shows that resolving International Contract disputes are complicated and not too well known by some, this paper primary objective is to explain and analyze every possible alteratives of resolving disputes for International Contract. Naturaly for prudent parties whom commited themselves to the contract, naturally they will agree on specific method for resolving potential disputes which might emerge when executing the contract. These are some International Contract dispute resolution alternatives:

a. Dispute Resolution using Contract Clauses
   It is critical to stipulate the method for resolving potential dispute and then legalized altogether within the contract. It is done for a purpose that when a dispute arises, parties in the contract understand how to resolve the dispute, for they know their rights and obligations, and the stipulation of dispute resolution method in the contract will be enforced.[21] Without a dispute resolution provision stipulated in the

[16] French, Robert. *International Commercial Dispute Resolution and the Place of Judicial Power*. International Commercial Law and Arbitration Conference, Sydney. 2013.
[17] Brödermann, Eckart. *The Impact of the UNIDROIT Principles on International Contract and Arbitration Practice*. Uniform Law Review. 2011.
[18] Öncel, Sİnan. *International Commercial Arbitration as an Alternative Dispute Solving Mechanism and Its Role in the Turkish Judiciary System*. Bilkent University, Ankara. 2006.
[19] HCCH. *Principles on Choice of Law in International Commercial Contracts*. The Hague Conference on Private International Law Permanent Bureau, Churchillplein. 2015.
[20] Azizah, Siti. *Penyelesaian Sengketa Kontrak Internasional*. Universitas Lampung, Lampung. 2011.
[21] ICC. *Developing Neutral Legal Standards for International Contracts*. ICC. 2014.

contract, the parties would have to rely on the uncertainties and difficulties of transnational litigation in foreign courts.

Dispute resolution provision in the contract provides alternatives wether negotiation, mediation, arbitration, or even hybrid mechanism. Hybrid mechanism allows settlement and enforcement while keeping the dispute out of litigation processes. This allows parties in the contract to preserve an ongoing business relationship while enjoying flexibility of dispute resolution process without having to worry about formal dispute resolution procedures.

It is not easy to formulate a provision of dispute resolution method in International Contract, its because several factors must be taken into consideration, including the nature of International Contract, the difference in culture of each party, and the expectation of each parties involved in the making of the contract. There are some benefits and drawbacks for each dispute resolution alternatives, but stipulating a dispute resolution in the contract will minimize the dispute to develop wildly and contain it in an enforced dispute settlement method.

b. Dispute Resolution using Litigation Method

Parties that form a contract may consent to litigation process to settle dispute. Litigation process involves court of particular city, state, or province to assure impartial adjudication of the dispute. [22]

c. Dispute Resolution using Arbitrational Method

Arbitration method is one of the most promising alternative to resolve International Contract disputes. Its because arbitration in general has six distinct advantages that litigation method cannot provide.[23] They are:

1) Predictability
   The result of arbitration as dispute resolution method is more predictable than litigation method. Because litigation method is done by a litigator whom heard generally from both parties equally. Arbitrational clause will also provide at least one of the parties with more predictable outcomes.
2) Neutrality
   Arbitration main characteristics are neutrality and firness, because the way of resolving dispute is mutually benefical and both parties has fair advantages. Arbitration is guaranteed to be neutral because it is conducted by someone outside of both parties and a professional.
3) Enforceablity
   When an arbitration has been concluded, a prevailing party may enforce the arbitral award in almost all countries. Although many states recognize the principle of comity of judicial awards, only the legislatures of the state are empowered to implement this principle.
4) Confidentiality
   Arbitration provides confidentiality to maintain secrecy, particularly to parties that sensitive about public exposure or the disclosure of proprietary information. It is also benefical for avoiding cost to recuperate commercial reputation.
5) Finality
   Arbitration awards are final and binding, also arbitration proceedings are shorter than that of juridical proceedings. Arbitration awards may be enforced to theinfringing party in the contract.
6) Expertise
   Parties in the contract can choose arbitrators with certain standard of expertise according to the subject matter of dispute. This enables the arbitrators to prepare for the complexities of the dispute on certain contract.

d. Dispute Resolution using Mediation Method

Mediation is a method for settling dispute, but the biggest drawback of this method is its decision is non-binding. Mediation involving third party or commonly called as "mediator" who is neutral.[24] Mediator's job is to find mutually agreeable solution n accordance to win-win principle. Actually many International arbitration institutions also provide mediation services as dispute resolution option.

e. Dispute Resolution using Hybrid Method (Arbitrations and Mediation)

Hybrid dispute resolution method sometimes called Negotiation-Mediation-Arbitration Model.[25] The concept of this method is each parties is encouraged to try to solve the dispute by themselves first. If the first step of renegotiating contract does not succeed, then proceed by utilizing the mediator as a neutral third party. Then resorting to third party decision maker or arbitrator.

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[22] Peter, Phillips. *The Challenges of International Commercial Dispute Resolution*. International Institute for Conflict Prevention and Resolution.

[23] International Trade Centre. *Settling Business Disputes: Arbitration and Alternative Dispute Resolution: Second Edition*. ITC, Geneva. 2016.

[24] Aliment, J. Brandy. *Alternative Dispute Resolution in International Business Transaction*. American Bar Association, USA. 2009.

[25] *Compendium, Dispute Resolution & Litigation.* Financier Worldwide. 2012.

Case Study and Analysis

A case of dispute happened in Indonesia in 2014, this case embroiled two great companies of two countries. One company originated from Indonesia, and the other one from South Korea. This dispute arise because of what basically an International Contract. These two companies agreed to bind themselves into three kinds of International Commercial Contracts. The first was Distributorship Contract, second was Supply Contract, and the third was Technical License Contract that signed by both parties in 2006. Unfortunately these contracts does not have dispute resolution method in it's clauses. So when a dispute surfaces in these International Contract between two companies, with unilateral decisions, the litigation process with the dispute resolution through the courts is directly pursued.

This case was won by South Korean company at the level of District Court. Then the Indonesian Company file an appeal to the High Court, and Indonesian Company won the case by the Decision of the High Court. Because of that, South Korean Company file a cassation to the Supreme Court. By the Supreme Court decision, the Korean Company won by absolute decision of the Supreme Court. Based on the outcome of inconsistent judicial decisions, it can be concluded that the judge's understanding of the International Contract dispute is still not good enough to ensure the maintenance of justice and has not been able to provide legal certainty. To each party in International Contract dispute, in the absence of legal certainty in law enforcement in the settlement of International Contract disputes through litigation, it will be difficult to obtain justice with only court decisions.

Therefore, it is important to establish a clause concerning the method of dispute settlement in any International Contract agreed upon by the contracting parties. In addition it would be nice if in the clause of dispute settlement method agreed by contracting parties is hybrid dispute resolution method. It is intended that if one method of dispute settlement is unsuccessful, there are still other non-litigation methods that can be pursued in order to unite the understanding in resolving International Contract dispute. Other reason than that the method of International Contract dispute settlement which is hybrid disputes that is done in stages might avoid the arbitrariness of one party to go through the non-litigation process only as a formality just to proceed to the litgation process.

Closing

International Contract needs legal certainty in order to ensure that any contractual clause implementation even until the settlement of the dispute proceeds effectively and efficiently. The most important first step to be taken since the making of International Contract drafting is to write down and agree on the clause for the method of dispute resolution within the contract in order for the International Contract dispute settlement phase to be clear. It is also recommended to use the method of dispute settlement with hybrid model. The reason is the hybrid dispute resolution method is done in stages might avoid the arbitrariness of one party, another reason is by implementing the hybrid method is because if one method of Alternative Dispute Resolution does not succeed, then there are still other stages that provide an opportunity for both parties to unite the understanding and to avoid and to avoid either party insisting to resolve the dispute directly through litigation.

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THE ROLE OF THE LAND OFFER OF LAND ACT (PPAT) IN ACTIVITY SERVICES REGISTRATION OF LAND

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ABSTRACT

Land is the main source of natural resources for the implementation of the National Development, the need for land tenure and utilization for the fulfillment of various purposes is increasing, so it will also increase the supporting needs in the form of legal certainty in the field of land, especially the availability of complete and clear written law instruments that are implemented consistently in accordance with soul and the contents of the provisions. The guarantee of legal certainty in land affairs by the government through the registration of land throughout the territory of the Republic of Indonesia is regulated in Article 19 paragraph (1) of Law Number 5 of 1960 on Basic Agrarian Law, and Government Regulation Number 24 of 1997 on Land Registration. Implementation of land registration by the Head of Land Office is assisted by the Land Deed Official and other officials assigned to carry out certain activities. Land Deed Official as an official carrying out duties in the field of land registration is always associated with a certain land registration area that becomes its working area. The expansion of this work area can provide the accuracy, certainty and veracity of authentic deeds made before the Land Deed Official as general officials

Keywords: Land Deed Official, Service, Land Registration

Introduction

Since the first land is very closely related to everyday human life and is a necessity of basic human life. Humans live and grow flowers, and perform activities on the ground, so that every human moment associated with the land. Everyone needs the land not only in his lifetime but at the time of his death man needs the land for his burial place. The importance of land for life, then people always try to own and control the land. Land tenure is done as much as possible to improve the welfare of his life.

Land is the main source of natural resources for the implementation of the National Development, the need for land tenure and use for the fulfillment of various purposes is increasing, so that will also increase the supporting needs in the form of legal certainty in the field of land, especially the availability of complete and clear written law instruments which are executed consistently in accordance with soul and the contents of the provisions.[1] In the face of concrete cases it is also necessary to have a land registration that allows the right holders to easily prove their rights.

The state as a power organization of all the people is given the right to control the land in order to realize the prosperity of the people, known as the right to rule the state.[2] The State as the governing body shall have the authority to the highest degree (1) to organize and administer the designation, use, inventory and maintenance of the earth, water and space; (2) to determine and regulate the legal relations between persons and the earth, water and space; (3) to determine and regulate the legal relationships between persons and legal acts concerning the earth, water and space.

Land registration in Indonesia is regulated in Article 19 paragraph (1) of Law Number 5 Year 1960 on Basic Agrarian Law (UUPA), namely to ensure legal certainty by the government held land registration throughout the territory of the Republic of Indonesia according to the provisions which is governed by government regulations. Implementation of land registration, for certain activities Head of Regency / City Land Office can't carry out its own, but need the help of other parties. In the provision of Article 6 paragraph (2) of Government Regulation No. 24/1997, namely in carrying out land registration, the Head of Land Office is assisted by the Land Deed Authority (PPAT) and other officials assigned to carry out the activities.

According to N.G. Yudara,[3] PPAT as a public official is an independent state organ and is authorized to make an authentic deed of all covenant deeds and stipulations in the field of civility required by a general rule or by interested parties desirable to be declared in an authentic deed, guaranteeing the date certainty, acknowledge and furnish grosses, copies and quotations, all during the making of the deed by a general rule not also assigned or excluded to the Official or any other person.

The role of PPAT as a public official assigned specifically for the execution of part of the land registration activity is that his appointment must comply with the requirements stipulated in Article 6 of Government Regulation Number 37 of 1998, except for Provisional PPAT without special examination and

[1] Boedi Harsono, *Indonesian Agrarian Law, History of the Establishment of Basic Agrarian Law, Content and Implementation*, Djambatan, Jakarta, p. 473
[2] Maria SW. Sumardjono, 1982, *Case Review of Problems of Agrarian Law, Faculty of Law* UGM, Yogyakarta, p. 13.
[3] N.G. Yudara, *Position of PPAT Deed as Authentic Written Proof Tool*, paper, Jakarta, 8 June 2001, p. 3.

education but because of his position as Head of Government Districts may be designated as PPAT in areas where there is not enough PPAT.

The existence of the Sub-district Head as PPAT While his position, actually has a noble purpose, namely to serve the community in making PPAT deed in areas that have not enough PPAT and help the implementation of land registration in district. During this time the community on the government at the district level, so that the function and position is still needed by the community. Sub-district Head as PPAT While the position is very strategic because he is very controlled the region and understand the character community, but in practice still must pay attention to applicable legislation.

Problems arising in the making of land transfer certificate in PPAT Temporary can be caused by several factors, either caused by errors in the implementation and lack of mastery of applicable legislation, such as not checking the original certificate in the Land Office and errors the making of parts of the deed in the form of authentic deeds that are sometimes not appropriate and violate the provisions stipulated either by Government Regulation Number 24 of 1997 and Government Regulation Number 37 of 1998, which ultimately result in legal consequences that harm the parties and the PPAT itself.

Problem Formulation

Based on the background of the problem, it can be formulated as follows:

1. What are the roles and responsibilities of PPAT in the service of land registration activities?
2. What is the authority of PPAT as a general official in making the deed of buying and selling land to realize the orderly administration of land?

Discussion

1. Task of PPAT as the Implementation Service of Land Registration Activity

Based on the provisions of Article 19 paragraph (2) of BAL that the registration of land includes:

a. Measurement, mapping and land-keeping;
b. Registration of land rights and transfers of those rights;
c. Giving letters of proof of rights, valid as a powerful evidentiary instrument.

Land registration is also regulated in Article 1 paragraph (1) of Government Regulation No. 24 of 1997 that Land Registration is a series of activities undertaken by the Government continuously, continuously and regularly, including collection, processing, bookkeeping and presentation as well as maintenance of physical data and data juridical instruments, in the form of maps and lists, concerning the plots of land and apartment units, including the provision of a certificate of title to the existing landrights and the rights of the apartment units as well as the certain rights that burden them.

In Article 2 of Government Regulation No. 24 of 1997 states that land registration is implemented based on the principle:

a. Simple Principles
   The simple principle is that the main rules and procedures can be easily understood by the parties concerned, especially the holders of land rights.
b. Secure Principles
   This principle is intended to show that the registration of the land needs to be carefully and accurately so that the result can provide assurance of legal certainty according to the purpose of land registration itself.
c. Affordable Principles
   This principle is meant affordability for the parties in need, especially by paying attention to the needs and abilities of the weak economic class. The services provided in the course of the registration of land must be accessible to the party in need.
d. Upgrades
   This principle is intended for adequate completeness in its implementation and continuity in the maintenance of its data. The available data should indicate the state of affairs. For that followed the obligation to register and recording changes that occur in the future.
e. Open Principle
   The open principle is the demand for continuous and continuous maintenance of soil registration data so that the data stored in the Land Office is always consistent with real circumstances in the field, and the public can obtain information on the correct data at any time and for that to apply the open principle.[4]

The purpose of land registration is regulated in Article 19 Paragraph (1) of the BAL in conjunction with Article 3 of Government Regulation No. 24/1997. In Article 19 Paragraph (1) of the LoGA it is determined that in order to ensure legal certainty by the Government there is a registration of land throughout the territory of the Republic of Indonesia according to the provisions which is governed by a Government Regulation.

[4] Boedi Harsono, 2003, *Indonesian Agrarian Law*, (National Land Law), Jakarta, p. 57.

Land registration activities in Article 19 Paragraph (2) of BAL are further elaborated in Article 11 of Government Regulation No. 24/1997, namely the implementation of land registration covering land registration for the first time and maintenance of land registration data. Based on these provisions, the registration of land is divided into 2 (two) parts, namely:[5]

a. Land registration for the first time (Opzet or Initial Registration).

   Land registration for the first time is a land registration activity conducted on the object of land registration that has not been registered based on Government Regulation Number 10 of 1961 or Government Regulation Number 24 of 1997 (Article 1 point 9 Government Regulation Number 24 Year 1997). The registration of land for the first time is regulated in Article 12 paragraph (1) of Government Regulation No. 24 of 1997, including:

   1) Collection and processing of physical data;
   2) Verification of rights and bookkeeping;
   3) Issuance of certificates;
   4) Presentation of physical data and juridical data;
   5) Storage of public lists and documents.

   Land registration is for the first time carried out through systematic land registration and sporadic land registration.

   1) Registration of land systematically is the registration of land for the first time conducted simultaneously covering all objects of land registration that have not been registered in the territory or part of a village (Article 1 number 10 Government Regulation Number 24 Year 1997).
   2) Sporadic land registration is the first land registration activity concerning one or more objects of land registration within the territory or part of a village individually or massively (Article 1 point 11 of Government Regulation No. 24/1997).

b. Maintenance activities of land registration data *(Bijhouding or Maintenance).*

Maintenance of land registration data is a land registration activity to adjust physical data and juridical data in registration maps, land lists, lists of names, letters, land books, and certificates with subsequent changes (Article 1 point 12 Government Regulation Number 24 Year 1997). Maintenance of land registration data is done in case of any changes to physical data or juridical data of registered land registration object. The rights holder concerned shall register such changes in physical data or juridical data to the local Land Office of the Regency / City to be recorded in the land books.

The maintenance of data on land registration is stipulated in Article 12 paragraph (2) of Government Regulation No. 24/1997, including:

a. The maintenance of data on land registration is stipulated in Article 12 paragraph (2) of Government Regulation No. 24/1997, including:
   1). Transfer of rights;
   2). Transfer of rights by auction;
   3). Transfer of rights due to inheritance;
   4). Transfer of rights due to merger or consolidation of a company or cooperative;
   5). Imposition of rights;
   6). Rejection of transition registration and imposition of rights

b. Registration of changes to other land registration data, including:
   1). Extension of the tenure of land rights;
   2). Solving, segregating, and merging land parcels;
   3). Distribution of collective rights;
   4). Deletion of land rights and property rights over apartment units;
   5). The transfer and abolition of Mortgage Rights;
   6). Changes in land registration data by court decision or decision;
   7). Name change.

Land registration is done by PPAT as regulated in Article 1 point 1 of Government Regulation Number 37 Year 1998 concerning Regulation of Position of Land Deeder which determines that official of land deed, hereinafter referred to as PPAT is a public official authorized to make authentic deeds concerning certain legal acts regarding land rights or ownership rights of apartment units.

The main task of PPAT is to carry out some activities of Land Registration by making deed as evidence of certain legal actions concerning land rights or ownership of apartment units that will be used as the basis for registration of changes in land registration data caused by legal action. The legal acts as referred to in Article 2 paragraph (1) of Government Regulation Number 37 of 1998 are as follows:

   a. Buy and sell;
   b. Exchange;
   c. Grant;

[5] Urip Santoso, 2010, *Registration and Transfer of Land Rights*, First Edition, Kencana Pernada Media Group, Jakarta, p. 32-36

d. Entry into company (inbreng);
e. Distribution of collective rights;
f. Provision of Right to Build / Use Right to Land of Property;
g. Giving Deposit Rights;
h. Authorization imposes an Insurance Right

2. Role and Responsibility of PPAT Against Registration of Land Rights Transfer

The Role of PPAT shall maintain the certificate and the relevant documents returned by the Land Affairs Office due to the rejection of registration properly and shall not arbitrarily submit the certificate to either party. In the case of a dispute between the seller and the buyer or with a third party, although there has been a transfer of land rights from the seller to the buyer based on the deed of sale but there is no return of the name of the seller from the name of the seller to the buyer's name, PPAT has no right to hand over the certificate to the buyer during the blocking . Under the provisions of Article 31 paragraph (3) of Government Regulation Number 24 of 1997, the PPAT may only submit a certificate to the party whose name is listed in the land book concerned as the holder of the rights or to any other party authorized by it.

PPAT shall be responsible and liable to keep the certificate until the blocking is revoked because the dispute can be settled by deliberation or until the seizure by the court of land rights is the object of the lawsuit in the Court. Moreover, because PPAT receives payment to make deed of transfer of land rights, by which receive and process the land certificate until the process of returning the name is to the Land Office is obligation and procedure of stages of registration of land transfer of rights including the making of deed which become the duties of PPAT concerned. The responsibilities of PPAT relate to its authority, including:

a. PPAT civil liability;
b. PPAT criminal liability;
c. PPAT administrative responsibilities;
d. The moral responsibility of PPAT is based on the code of ethics of PPAT.

Based on the theory of accountability used is the theory of *fautes personalles*, in private PPAT responsible individu or personal for act in the implementation of good positions to the deed he made. While the storage of the certificate as long as the land rights become the object of dispute in the case of the blocking of the certificate then used is the theory of fautes de services that is responsible for PPAT based on the position given to him. PPAT is obligated to provide services and is responsible for storing the certificates and documents returned by the land office during the blocking of the certificate. At the time of blocking it was unclear who was entitled to the certificate despite the transition of land rights but there was a land rights dispute.

Regarding the responsibility of PPAT is regulated in Article 55 of Regulation of the Head of BPN Number 1 Year 2006, PPAT is personally responsible for the implementation of its duties and positions in every act of deed. The responsibility of PPAT against all actions based on his position in the process of making the deed, the article states that the PPAT is personally responsible. In this case, PPAT is not only personally responsible for the deed, but also responsible for its position to provide services to documents including certificates used in the process of registration of land transfer rights until the process of registration of land title transition is completed and the certificate submitted to the rightful holder.

The study on the responsibility of PPAT on the registration of land rights transfers in addition to using the theory of accountability also uses the theory of legal certainty. PPAT under its authority and obligation has a responsibility to ensure legal certainty to the deed which it makes as evidence of certain legal acts concerning land rights used as the basis. This registrar is required to provide assurance of legal certainty and protection against new holder of land rights.

In the provision of Government Regulation No. 24 of 2016 amend some provisions of the articles contained in Government Regulation No. 37 of 1998. Provision in PP No. 24 of 2016 is contained good goals, namely to increase the role of PPAT in development, and to improve services to the community land registration. A good objective is still not accomplished if there is no regulation of implementation, for that now the good intentions contained in the regulation can't be done because of waiting for the implementation rules, namely Ministerial Regulation.[6]

Based on Government Regulation No. 24 of 2016 concerning Article 12 and Article 12 A concerning the Working Area of PPAT to become Provincial if it has been executed, the PPAT deed made for the working area of one province but the Minister's Regulation has not been issued then the PPAT Act is null and void under the deed hand and have no legal force or legal certainty. As long as the Regulation of the Minister of PP Number 24 of 2016 has not yet been issued, the working area of PPAT is still in the regency or city in accordance with Article 12 paragraph (1) PP 37 year 1998 which states that the working area of PPAT is a working area of the district / municipal land office.

[6] Habib Adjie, 2009, *Notary Public Notary and PPAT Indonesia*, Mandar Maju, Bandung, p. 33.

3. Authority of PPAT as Public Official in the Deed of Sale and Purchase of Land to Realize the Land Administration Order

Orderly land administration is the embodiment of Land Order Chess as set forth in Presidential Decree Number 7 Year 1979. The order of land administration is intended to expedite any affairs concerning the land in order to support the smooth development of land administration activities.[7]

The orderly activities of land administration are directed to the program:

a. accelerate the process of service related to land affairs.
b. providing maps and data on land use, the socioeconomic conditions of the land for development activities. Preparation of data and landlord list, land of maximum surplus, absent lands and state lands.
c. improve the list of activities both in the land office and in the PPAT office.
d. seeking land measurement in the context of land rights.

Based on its main tasks, PPAT is responsible for making deeds and submitting deeds made to the Land Office for the purpose of registering the transfer of land rights. In carrying out its duties and authorities, PPAT has several stages of work which include:

a. Preparation for the Deed of Sale and Purchase

In the drafting of PPAT deed, the parties that have legal action concerning Land Rights and Ownership of Unit of Flats shall be present in front of PPAT to convey the purpose and purpose to PPAT. After submitting the intent and purpose to the PPAT, the parties are required to complete the documents as an administrative requirement to make the deed of sale and purchase. Requirements that must be fulfilled by the parties in performing legal acts of buying and selling land of proprietary rights for the manufacture of the deed of sale and purchase, as follows:

1) Identity Card (KTP) Seller of husband / wife
   If a spouse has a different place of residence then a marriage certificate must be attached and if one of the spouses has died it must be attached a letter or deed of death.
2) Identity Card (KTP) Buyer of husband / wife
3) Original certificate of Right to Land
4) Proof of payment of PBB in the last 5 (five) years
5) Taxpayer Identification Number (NPWP)
6) Proof of payment of Land and Building Rights Acquisition (BPHTB)
7) Proof of payment of income tax

The making of the deed of buying and selling depends on the completeness of the conditions that must be met, if these conditions are complete data and there is no obstacle then the making of the deed can be completed. Before PPAT helps to register the change of transfer of land ownership data to Land Office, PPAT deed must be signed by each party (seller-buyer) and also 2 (two) witnesses, besides PPAT will read out the contents of the deed of sale and purchase has been made before the parties and witnesses.

b. Implementation of Deed of Sale and Purchase

After the administrative requirements have been fulfilled by the parties and the original certificate of land rights has been checked for compliance in the Land Office and if not found any problems, then PPAT can make a sale deed as evidence of the legal acts of sale and purchase of property rights.

The authority and obligation of PPAT is to receive a certificate related to the process of preparing the deed to arrive at the process of issuing a certificate from the Land Office that has been completed. PPAT is authorized and obliged in the process of preparing the deed until the certificate has been issued, PPAT has responsibility for it. In the event of loss from one of the parties related to the existence of blocking of the certificate because the right to land becomes the object of the dispute, the PPAT can't be held accountable unless the parties can prove it.

The authority of PPAT is regulated in Article 3 paragraph (1) and (2) of Government Regulation Number 37 of 1998 concerning Regulation of Position of Land Deeder which determines that: (1) Has authority to make authentic deed of all legal acts as intended in Article 2 paragraph 2) regarding land rights and ownership rights of apartment units located within the area; and (2) the Special PPAT is only authorized to make a deed of legal acts called specifically in its appointment. Furthermore, in Article 4 paragraph (1) the authority of PPAT is the PPAT only has the authority to make a deed on the right to land or Own Right over the apartment unit located within its working area.

The legal basis for the responsibility of the PPAT has been regulated in Government Regulation No. 24 of 1997 which grants the attribution authority to PPAT to issue certificates. In accordance with article 1 point 24 PP. 24 year 1997, that PPAT is Public Official who is authorized to make certain deed of land. Based on Article 1 point 1 of PP. 37 of 1998 states that PPAT is a public official authorized to make an authentic deed of certain legal acts concerning the right to land or the Property Right of the Flats Unit.

[7] Rusmadi Murad, 1997, *Land Administration*, Mandar Maju, Bandung, p.2

In carrying out the duties of agrarian or related to land as stipulated in RI Government Regulation no. 24 year 1997, the position of PPAT is very important, especially as a general official who has a role in performing part of the land registration activity by making deed as evidence of certain legal acts concerning the right to land because any agreement intended to transfer or transfer the right to land, pawn the land or borrowing money with land rights as dependents must be proven by a deed made by and in the presence of PPAT.

Closing

Based on the description of the above discussion, it can be concluded the problem as follows:

1. The role and responsibility of PPAT in the service of the registration of land rights as the hand of the government in controlling the rights of land owned by individuals and legal entities, by verifying the right in the form of certificates. Applicants who want their rights legally usually appoint a Notary and PPAT to file either the transfer of rights, ownership or the sale and purchase of an object of land right to be registered to the National Land Agency (BPN). In carrying out its duties, PPAT has a personal responsibility for the implementation of its duties and positions in every authentic deed making as stipulated in Article 55 of Regulation of Head of BPN Number 1 of 2006. In the performance of its duties, PPAT can't be prosecuted if it has exercised its authority and obligations in accordance with apply.

2. The authority of PPAT as general official in making the deed of sale and purchase of land to realize the order of land administration in accordance with Article 3 paragraph (1) and (2) of Government Regulation Number 37 Year 1998 concerning the Regulation of Position of Land Deeder which determines that: (1) an authentic deed of all legal acts as referred to in Article 2 paragraph (2) concerning the right to land and the Property Right of the apartment units located within its territory; and (2) the Special PPAT is only authorized to make a deed of legal acts called specifically in its appointment. Furthermore, in Article 4 paragraph (1) the authority of PPAT is the PPAT only has the authority to make a deed on the right to land or Own Right over the apartment unit located within its working area.

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LEGAL PROTECTION FOR CONSUMERS OF ELECTRONIC SERVICES IN E-COMMERCE TRANSACTIONS

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ABSTRACT

E-commerce "renovates" conventional trade between consumers and business actors, which previously done from direct into indirect, non-face, non sign, paperless and borderless, In Indonesia, consumer interests are often defeated by the voice of business actors, because the existing legal instruments are not sufficient to protect the interests of consumers, those are less assertive and have not provided a sense of security. The purpose of the study: to know, analyze how the validity of e-commerce transactions, constraints faced, and legal protection efforts that can be obtained by a consumer of electronic service in e-commerce transactions. Conclusions of the research: consumers and business actors have benefited from e-commerce transactions (effective, efficient, safe, flexible), lowering operating costs, widening the broad market share, no space and time constraints, not requiring large capital, work, quality, competitive price. E-commerce transactions place the consumers in a weak position in the face of legal issues (contract validity, digital signatures, standard contracts) made by businessman/online shop owner (virtual store), and cyber jurisdiction. The presence of the Information and Electronic Transaction Law complements the lack/void of the Consumer Protection Act in providing legal protection to consumers since before the transaction, during transactions and after-sales transactions, in order for consumers and business actors to have a balanced bargaining position and to ensure legal certainty in doing e-commerce transactions.

Keywords: E-commerce transaction, consumers protection

Introduction

Advances in technology are used to facilitate human life from the past, especially advances in information technology (including computer technology and telecommunications). Information technology that has made rapid progress in recent years has brought many changes in people's lives. Its advantages not only lies in its function as a means of communication but also as a means for dissemination and searching of data, entertainment facilities, teaching and learning activities or the world of education, providing services and services that began to bloom known to society lately as a means to conduct business transactions or trade.

The internet media cultivate a new form of commerce known as electronic commerce (e-commerce), where trading principles with traditional payment systems that bring together sellers and buyers are physically modified by long distance trading and no longer require meetings between business actors, and provide greater access to goods and services at lower prices.

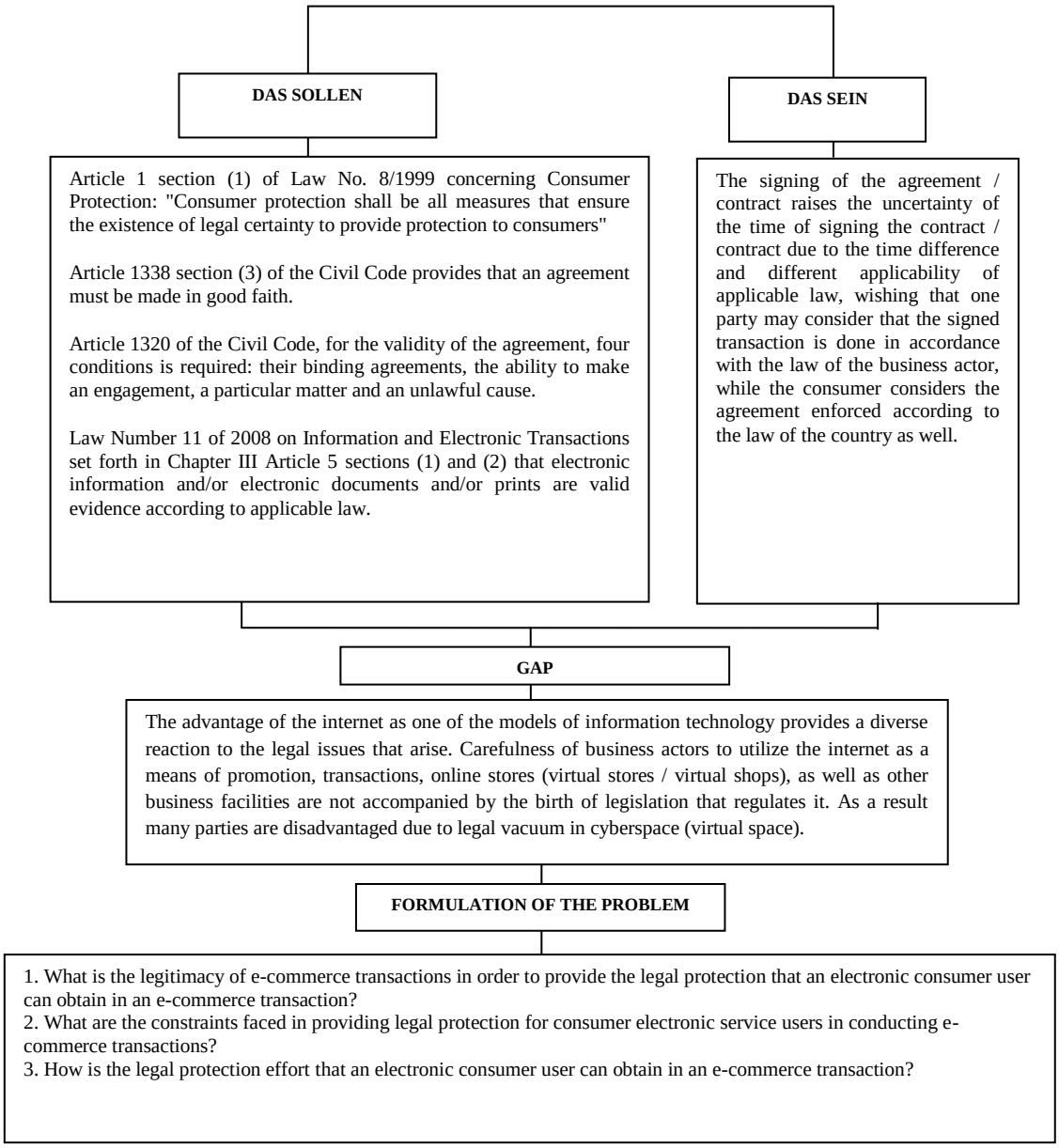
Carefulness of business actors to utilize the internet as a means of promotion, transactions, online stores (virtual stores/virtual shops), as well as other business facilities are not accompanied by the birth of legislation that regulates it. As a result many parties are disadvantaged due to legal vacuum in cyberspace (virtual space).

Thus the legal protection of consumers in Indonesia is absolutely necessary in conducting e-commerce transactions, given the increasing speed of science and technology so that consumers are the target business. Consumer Protection Law Number 8 of 1999 is one of the legal umbrella for consumers in Indonesia for the utilization of goods or services from producers or business actors, but it seems there are still many consumers who have never heard or do not know about the Consumer Protection Act, this became one of the obstacles to the implementation of legal protection for consumers in e-commerce transactions.

In practice, e-commerce has encountered several obstacles. One of them is in the field of law where there is no legal provisions that specifically regulate the legal protection of consumers in this e-commerce transaction. So far, this e-commerce transaction is conducted under the provisions of Article 1320 of the Civil Code on the validity of a contract, the principle of freedom of contract contained in article 1338 of the Civil Code, and Law No. 8 of 1999 on Consumer Protection and Law Number 11 of 2008 on Information and Electronic Transactions, which have been updated with the Law of the Republic of Indonesia Number 19 of 2016 About Amendment to Law Number 11 of 2008 About Information And Electronic Transactions.

Legal protection of consumers in conducting e-commerce transactions is absolutely necessary in order to meet the era of free trade that will come. Consumer protection itself pursuant to Article 1 section (1) of the Consumer Protection Act is any effort to ensure legal certainty to provide protection to consumers. The problem as in general that can be encountered in conventional transactions, e-commerce transaction and sale is also a contract of sale that is the same as conventional buying and selling commonly done by the community. The difference is only on the media used. In e-commerce transactions, the media used is electronic media is the internet, so the agreement or contract created is through online.

FRAMEWORK
LEGAL PROTECTION FOR CONSUMERS OF ELECTRONIC SERVICES IN E-COMMERCE TRANSACTIONS



Research Method

The method used in this research is normative juridical. Juridical means this research emphasizes the science of law, is normative is research that examines the rules of law applicable in society, in this case the protection of the law for consumer electronic service users in e-commerce transactions. Specification of the research used descriptive analytical, i.e research by describing the phenomenon or data obtained then analyzed in writing.

The required data sources are secondary data sources and primary data sources. To obtain a secondary source is done by literature study and Field Study. Library study is a review of relevant legislation and books or literature as a reading material, Law, which relates to this research. While Field Study is a direct interview with the owner of the online site as a business actor or owner of online stores and consumer electronics users as buyers associated with this research.

Data analysis in this research is conducted qualitatively is a way of research that produce analytical descriptive data, that is what is stated by respondent in written or oral and also its real behavior, researched, studied as one unity intact. The analysis is done by using legal theories, legal principles, legal doctrines and legislation related to the problem under study.

Research Findings

In a developing country like Indonesia, consumer interests are often overtaken by the power of the voice of business actors, this is because the existing legal instruments are inadequate to protect the interests of consumers, less assertive and yet can provide a sense of security. Yet on the other hand, the role of consumers in the development of business revenue is very meaningful, but in many ways consumers are often harmed and experienced barriers in protecting their rights.

Consumer protection itself pursuant to Article 1 section (1) of the Consumer Protection Act is any effort to ensure legal certainty to provide protection to consumers. The problem as in general that can be encountered in conventional transactions, e-commerce transaction and sale is also a contract of sale that is the same as conventional buying and selling commonly done by the community. The difference is only on the media used. In e-commerce transactions, the media used is electronic media is the internet, so the agreement or contract created is through online.

Consumers and business actors get a lot of benefits in e-commerce transactions, among others, effective, efficient, safe, cheaper, and flexible, so for business actors due to lower operating costs, widening the market share of a broad and global, there is no space limit and time, does not require large capital, labor efficiency, and quality and competitive pricing. But e-commerce transactions still put the consumer in a weak position in the face of various legal issues, namely in terms of contract validity and digital signatures, standard contracts made by the doers / shopkeepers (virtual store / virtual store) or producer, and the difference jurisdiction (cyber jurisdiction). Therefore, the presence of the Information and Electronic Transaction Law should be able to complement the shortage or void in the Consumer Protection Act in providing legal protection to the consumer since the time before the transaction, when the transaction and aftermarket so that consumers and business actors have a bargaining position balance and to ensure legal certainty in conducting e-commerce transactions.

Discussion

The Validity of E-commerce Transactions for Consumers of Electronic Users

1) The development of E-commerce in Indonesia

   The impact of the development of information technology and telecommunications significantly changes the way humans interact with their environment, in this case related to the trade mechanism. Business e-commerce growing in Indonesia, this is due to the increasing number of active Internet users, data salingsilamg.com mentions, in Indonesia there are 30 million - 36 million and very active. The proof is that Facebook members in Indonesia the second largest in Indonesia. The period of January - March 2011 generated 5 million blogs and 55 million Twitter users who make 95 million tweets (tweet). The large number is internet users and the high activity of attracting people into this business.

2) Characteristics of E-commerce Transactions

   E-commerce involves the activity of transactions of goods, services or information between business actors as sellers / owners of online stores and consumers as buyers through internet media, simply e-commerce can be interpreted as a form of trade or commerce through the internet media. Trade is done with electronic media, transactions are paperless, physical presence of both parties both sellers and buyers are not required (no face), the agreement / contract is done in the public network, does not require signature (no sign) and cross border).

   The sale and purchase transaction through e-commerce is usually preceded by selling offer, willingness to buy, delivery of goods, and receipt of goods by the buyer. E-commerce transactions can be done by:

   a. Through chat and video conference
   b. By e-mail (electronic mail / electronic mail)
   c. By websites

   Transactions through a person's chat can communicate directly with others such as by phone, it's just communication through chat is done through writing that read through each computer. While video conferencing is done through a computer where people can see directly the image and hear the voice of the other party in bargaining.

   E-mail transactions are conducted if parties, business actors/sellers/owners of online stores (virtual store) or consumers/buyers already know their e-mail address respectively. Transactions can occur via e-mail where the offer is sent to someone or too many people who are members of a mailing list, if the consumer is interested, then the consumer can make the e-mail contact. Furthermore, consumers can choose the type of goods and quantity to be purchased, shipping address and payment method desired. Thus the consumer will receive confirmation from the business actor / seller / owner of the online store (virtual store) on the order of goods ordered and desired.

Transaction model through web or website (e.g www.cathy.com, www.lariesmanis.com) that is business actor/seller/owner of online store (virtual store) provide list or catalog of goods sold along with product descriptions that have been made by the seller. Business actor / seller as an online store owner (virtual store) can display in the form of images, video, and digital catalog following payment method that will be sent by e-mail consumer / buyer. Usually in the offer is also provided form for reservations, so that consumers can fill out the form directly select the desired item. Common payment methods are via credit card, debit card, PayPal, and Bank transfer.

3) Parties Involved in E-commerce Transactions

E-commerce transactions involve multiple parties, namely;

i. Business actor / seller / owner of online store (virtual store) or often referred to as a term (merchant or e-vendor), i.e companies / producers who offer their products through the internet.
ii. Consumers, i.e people who want to buy good products in the form of goods / services online.
iii. Acquirer, i.e billing intermediary (between seller and credit card issuer) and payment intermediary (between credit card holder / buyer and credit card issuer).
iv. Issuer, a credit card company issuing a card, ie a Bank and a non-Bank financial institution. Not all credit card issuers may be issued, only Banks that have obtained permission from International Card may issue credit cards, such as Master and Visa Card.
v. Certification Authorities are neutral third parties who hold the right to issue certification to the seller/owner of the online store, to the credit card issuing company and in some cases awarded to the cardholder.
vi. Provider as internet access service provider.
vii. Shipping company.

If the e-commerce transaction is done is a combination, where only the transaction is online, while the payment is made in cash, then the acquirer, issuer and certification authority are not involved. And one more party that is not directly involved in e-commerce transactions but plays an important role of freight forwarding company (expedition).

4) Types of Transactions In Ecommerce

There are several types of transactions that can be done in e-commerce, namely:

a) B2B (Business to Business / Business to Business)
B2B (Business to Business) is better known as inter-agency or trading transactions, which are routinely performed, so that between the parties to each other have been aware of each other, done repeatedly and periodically and in capacity or large volume of products, eg between machine assembly companies and parts suppliers. The e-commerce activities within this scope are intended to support the activities of the business actors themselves.
b) B2C (Business to Customer)
Better understood as transactions between institutions and consumers, to meet a particular need and at a certain time, its nature is open to the public, service and mechanusmenya are general and used by the crowd and on request, for example in this case consumers buy goods from an e- commerce for your own use.
c) C2C (Consumer to Consumer / Consumer to Consumer)
d) In this case consumers who have a product desired by other consumers can sell it through the internet, so the segmentation is more special because the transaction is done by consumers with consumers who need the goods or services, eg a consumer who needs antiques, then he can use the site e-commerce as a mediator or facilitator to find consumers.

5) E-commerce Transaction Mechanism

The doer of the business / seller / owner of the online store (virtual store) may also offer the manufacturer through its website. If the consumer wants to buy it, then the consumer must first register (log in) into the site by mentioning the name, e-mail address, place and date of birth, domicile and telephone number that can be contacted. After consumers choose goods to be purchased, then the goods put into the shopping cart (shopping cart) by pressing the menu that has been provided.

Consumers should thoroughly examine the specifications of the goods to be purchased, terms and conditions of transactions, means of payment, the address of the business actor / seller / the owner of the online store (virtual store), the way and the cost of shipping as many are also impostors who impersonate online sales .

If everything is appropriate, then the consumer can click confirm order and make payment. After payment is done, then the consumer can notify the doer of business / seller / owner of online store so that business actor / seller / owner of online store (virtual store) can immediately send the goods that have been purchased.

6) When an Agreement occurs in an E-commerce Transaction

The issue of when the occurrence of the agreement in e-commerce transactions is closely related to the meeting of offer and acceptance through the internet media. An e-commerce transaction is also the same

as conventional sale and purchase agreement in general, the difference is only on the media used. In e-commerce transactions, the media used is electronic media is the internet, so the agreement or contract created is through online. In an e-commerce transaction also contains a principle of consensualism, which means the agreement of both parties. An agreement occurs when there is an offer from the business actor and there is an acceptance from the prospective consumer as a buyer. This offer and acceptance is the beginning of agreement between the parties concerned.

The ability to make an engagement, under article 1329 of the Civil Code, is "Everyone is capable of making attachments, if he by law is not declared incompetent." Whereas pursuant to article 1330 of the Civil Code , everyone is proficient except the immature person and the person who is put under the skill. In e-commerce transactions, it is difficult to know because between business actors / sellers / owners of online stores do not meet with consumers / buyers. The problem is if the consumer is a person who does not qualify for the birth of an agreement, such as immature, or disabled, how business actors can anticipate it? So far businesspeople have not questioned it because it is important for them that goods have been paid before they are sent.

7) Benefits of E-commerce Transactions

Basically, the advantages of using e-commerce can be divided into 2 (two) parts namely profit for business and profit for consumers. According to Josep F. P Luhukay (President Director of Capital Market Society, Doctor of Computer Science Philosophy in the United States), as quoted by *Info Komputer* magazine October 1999 edition, the benefits for business actors include:

i. Can be used as land to create a revenue generation approach that is difficult or can not be obtained through conventional means, such as direct marketing of products or services, selling information, advertising, banners and so on.
ii. Reduce operating costs.
iii. Shorten product cycle and supplier management.
iv. Widen reach (global reach) because consumers / buyers / customers can contact business actors / companies / sellers from anywhere around the world.
v. Unlimited operating time.
vi. Service to consumers / buyers / customers better.

While the benefits for consumers / buyers include:

i. Home shopping.
ii. Easy to do. There is no need for special training to bias shopping or make transactions via the internet.
iii. Buyers have a very wide choice and can compare the products or services they buy.
iv. Unlimited time.
v. Consumers / Buyers can look for products that are not available or difficult to obtain in traditional market outlets.

The obstacles faced in the E-commerce Transactions and its Addressing Efforts

E-commerce transactions raise juridical questions about whether agreements between businesses and consumers need to be signed because e-commerce transactions are a non-face, non-signature business model (non-signature business) , paperless, cross borderless and face-to-face, whether for which digital signatures can be legally recognized as valid evidence or can be said to be genuine or original writing.

A digital signature is an electronic signature that functions the same as a regular signature on a plain paper document. The signing of the agreement / contract raises the uncertainty of the time of signing the contract / contract due to the time difference and different applicability of applicable law, as one party may consider that the signed transaction is done in accordance with the law in the business actor, while the consumer considers the agreement enforced according to the law of the country as well.

1) Consumer Rights and Business Actors in E-commerce Transactions

To create business convenience for business actors and as a balance of rights granted to consumers to business actors are also granted the rights set forth in article 6 of the Consumer Protection Act, namely:

1. The right to receive payment in accordance with the agreement on the conditions and exchange value of goods and / or services traded;
2. The right to obtain legal protection from the actions of consumers of unlawful conduct;
3. The right to self-defense should be appropriate in the settlement of consumer disputes law;
4. The right to rehabilitate a good name if it is not legally binding that a consumer's loss is not attributable to the goods and / or services being traded;
5. The rights set forth in the provisions of other laws and regulations.

2) Clause Books Created Unilaterally By Business Actors

Business actors in offering goods and / or services for trading are prohibited from making or posting the book *kalusula* on each document and / or agreement if in its inclusion contains elements or statements as follows:

1. To declare the transfer of responsibility of the business actor to the consumer;
2. To declare business actors entitled to refuse the redemption of goods purchased by consumers;
3. Declare that the business actor is entitled to refuse the transfer of money paid to the goods or services purchased by the consumer;
4. To declare the granting of power from the consumer to the business actor either directly or indirectly;
5. Arranging the matter of proof of loss of usefulness of goods or utilization of services purchased by consumers;
6. Giving business entrepreneurs the right to reduce service benefits;
7. To declare the consumer's failure to regulation in the form of new rules;
8. To declare that the consumer is authorized to the doer of the imposition of mortgage, liens, guarantee rights to goods purchased by consumers in installments.

3) Consumer Protection Agency

According to Abdul Halim Barkatullah, a form of legal protection that can be offered to consumers in e-commerce transactions, including:

1. Legal protection phase before the transaction.
   a. Establish a consumer protection agency.
   b. Consumer Education E-commerce.
   c. Consumer caution in transactions.
   d. It needs a regulation for business actors on information and responsibility to consumers on the security of goods and services sold.
2. Legal protection phase of the transaction.
   a. Recognize data message, in the form of a digital signature as a legal transaction.
   b. The validity of an e-commerce transaction is subject to the fulfillment of the terms of the contract.
   c. The provisions concerning evidence must be written evidence (article 1338 of the Civil Code) need to be revised.
   d. Confidentiality of data message (message data).
   e. Security in transactions is an important issue.
   f. The availability of created information should be available whenever required.
   g. In e-commerce transactions must also be set about the issue of online payments.
3. Post-transaction legal protection phase.
   a. Business actors should listen to consumer complaints and be responsible for their production.
   b. In the future, it is necessary to consider the existence of an e-commerce law governing the choice of law and choice of forums in cross-country e-commerce transactions.
   c. In the settlement of an International Civil Dispute, if the parties have determined the choice of law, the court will apply the law; if the parties do not make a choice then the court will determine the law itself.
   d. Alternative Dispute Resolution.
   e. Online Dispute Resolution (ODR).

Legal Protection Efforts For Consumers In E-Commerce Transactions

Legal protection in electronic transactions should in principle place an equal position between online business actors and consumers. Article 2 of the Consumer Protection Law states that consumer protection is organized as a joint effort based on five principles in national development, namely:

1. The Principle of Benefit
2. The Principle of Justice
3. Principle of Balance
4. Principle of Consumer Safety and Safety
5. The Principle of Legal Certainty

Through these five principles, there is a commitment to realize legal protection for consumers, namely:

a. Increase awareness, ability and independence of consumers to protect themselves;
b. Raising the dignity of the consumers by avoiding them from negative access to the use of goods and / or services;
c. Increasing the empowerment of consumers in choosing, determining and demanding their rights as consumers;
d. Creating a consumer protection system that contains elements of legal certainty and information disclosure and access to obtain information;
e. Growing business actors awareness on the importance of legal protection for consumers;
f. Improving the quality of goods and / or services that ensure the viability of goods and / or services production, health, convenience, and security and consumer safety.

1) Jurisdictional Differences in E-commerce Transactions
   In the International Civil Code, the court is said to have jurisdiction over a person if the court has the authority to adjudicate a dispute involving that person and a decree binding the person. Thus the jurisdiction of the courts is based on territorial boundaries of the states or governments represented by the courts concerned. Cross-Country e-commerce transactions have no territorial boundaries. Someone in New York is doing e-commerce business with someone else in California just like doing it with someone in India. For some consumers the choice of law that requires disputes to be resolved at the place of the business actor, will cause losses because when the claim is small or medium, the consumer as the claimant often cannot afford the cost of filing a lawsuit in a foreign court forum.
   The main issue of jurisdiction (cyber jurisdiction) is only a very important thing if there arise disputes / disputes between consumers and business actors. This condition ultimately forces consumers to tend to prioritize the element of trust to business actors on online business before buying products / services.
   Jurisdiction and proof issues can be a barrier and consideration for consumers to file a lawsuit. Although in reality, consumer disputes in virtual space are actually very likely to occur anywhere in Indonesia. In the case of consumer e-commerce disputes occurring in Indonesia, consumers may take the role of the Consumer Dispute Settlement Agency. When looking at the rules governing the lawsuit in consumer disputes, it can be said that dispute resolution through the Consumer Dispute Settlement Agency (BPSK) will be faster than if the dispute is brought to the litigation path (court).

2) Legal Protection that should be Regulated in an E-commerce Transaction
   Legal Protection that should be regulated in the framework of legal protection of consumers in e-commerce transactions, namely:
   a. Legal protection to consumers from business side.
      1. Business actor is obliged to include identity in the website (online store / virtual store).
      2. The existence of the institution guarantees the validity of the doers of online store business / virtual store located in Indonesia.
   b. Legal protection of consumers from the consumer actors' side.
      The existence of assurance of protection of confidentiality of personal data of consumer
   c. Legal protection of consumers from the product side.
      In offering its products, business actors are required to:
      1. Provide clear and complete information about the products offered.
      2. Information about the product should be provided in a language that is easy to understand and does not lead to other interpretations.
      3. Provide assurance that the products offered are safe or convenient for consumption or use.
      4. Members guarantee that the offered product is safe or comfortable to be consumed or used.
   d. Legal protection of consumers from the transaction side.
      1. Terms that must be met by consumers in making transactions.
      2. Opportunity for consumers to review the transaction to be done.
      3. Information on whether or not the consumer returns the purchased item and the mechanism.
      4. Dispute resolution mechanism is very important to be clearly informed by the business actor to the consumer.
      5. Timely filing of a reasonable claim.
      6. A business actor must provide a recording of transactions that are accessible to consumers at any time.
      7. How to send goods mechanism.

Closing

Conclusion

1. E-commerce is a modern business that changes the way conventional / modern transactions become modern transactions with no face characteristics (non-physically present, no sign, paperless, borderless) cross country).
2. E-commerce transactions place consumers in a weak position in the face of various legal issues, namely in terms of contractual validity and digital signatures, standard contracts made by business actors / online store owners (virtual store) or producer, jurisdiction (cyber jurisdiction).
3. Legal protection may be given to the consumer from the time before the transaction, during the transaction and after the transaction.

Suggestion

1. The validity of an e-commerce transaction shall be based on the good faith of the business actor and the consumer and subject to the fulfillment of the terms of the contract.
2. Security in transactions is an important issue because its existence creates a sense of confidence for users and business people to keep using electronic media in transactions.

3. To strengthen the bargaining position of consumers and ensure legal certainty in conducting transactions, the Government should immediately and need to complete the Law on consumer protection.

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FRANCHISE AND BUSINESS WORLD

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ABSTRACT

The rapid development of economy as an effect of increased development has also affected on the trade sector. The real form of development of this economy is the proliferation of businesses such as alfamart, indomart, etc. especially in urban areas. In fact, the improvement of this market model is also due to a lifestyle shift in most of the younger generation who are no longer interested in shopping to traditional stalls.This is due to service, time of shopping, price, cleanliness and facilities provided. This business models use the franchise system, which we can see start from the model of place of business, outlets, model arrangement, even the same goods that sold between one store to another.Franchise is a special right owned by an individual or a business entity to a business system with a business characteristic in order to market goods or services. Franchising is not well known in Indonesian legal literature, as it does not exist in the culture or business traditions of Indonesian society. The entry of the franchise into the cultural fabric of Indonesian society is due to the influence of globalization in all areas due to technological advances.

Keywords : Franchise, Business World

Introduction

The progress of development has a significant effect on the development of trade. The marketing methods of goods and services that sold to the public also shift from traditional methods to modern methods with respect to their methods of management. One of the modern methods in the business world that we know today is the franchise or in its native language called by *frichise*. Business model with the current franchise method we met in many urban areas or even now have penetrated into the periphery. Among the examples of this franchise method is the widening of mini market businesses such as *alfamart* or *indomaret*. The widening of such sales model has a significant effect on the development of traditional sales models such as stalls that provide the needs of the community especially for the daily primary needs. The development of modern market with the franchise model also significantly influences the changes in people's lifestyle, especially the younger generation. The upper middle class people prefer to shop in the modern market like this than to the traditional market or to the stalls.

Convenience in shopping and differences that are not too high causes people prefer choose the modern market with this franchise model. The arrangement of items sorted according to the type, the cool room, the pleasant service of the educated clerk makes the buyers comfortable. This situation turned back to the conditions in traditional markets that in fact are less orderly and with modern management. Whereas in fact in the traditional market becomes a meeting place of the traders so that it will also affect the community perkonimian. In traditional markets the sellers and buyers meet to make transactions both on a large scale and on a small scale.

Traditional markets also provide benefits for service providers such as pelvis, carrying, parking etc., so in this traditional market there are actually multi interests that can be served, then it should grant permission to the establishment of new outlets should be considered by the government and relevant agencies so that the sustainability of the market as well as traditional stalls remain awake. The balance between the development of modern markets and traditional markets and traditional warungs will be balanced in business development.

Main Problem

1. How is the development of franchise in the business world?
2. How are regulatory arrangements that should be done in order to balance the development of franchises with the development of traditional markets in the business world?

Discussion

Franchise development in the business world.

Franchise or what is known in Indonesia as Franchise is not known in Indonesian legal literature, because Franchise institution is not contained in Indonesian business culture or tradition. The entry of Franchise into the cultural fabric of Indonesian society caused the influence of globalization in all areas. What happens in the northern hemisphere will soon occur also in the southern hemisphere.

The advancement of technology and transportation due to the advancement of science causes the spacing of places between the hemispheres to be closer as if there were no more restrictions. According to Dominique Voillement quoted by Felix O. Soebagjo in his book OK Saidin said that; Franchise is defined as a way of

doing business cooperation between two or more companies, one party as a Franchisor and the other as a franchisee. Meanwhile, Rooseno Harjowidigdo provides restrictions on Franchise, which is a business system that is typical or has the characteristics of business identifiers in the field of trade or services, in the form of products and forms cultivated, corporate identity (logos, designs, brands and even clothing company employees), plans marketing and operational assistance. The formulation given by Rooseno Harjowidigdo is more directed to the placement of this franchise or franchise within the framework of the legal system of things, which gives emphasis to the material aspects. The object here is a typical business that has the characteristic of the business in the field of trade. The object here is an immaterial object in the form of intellectual property rights. Perwujudaannya can be seen on the logo, design, brand (but not the right brand), clothes and appearance of employees and so forth. OK Saidin in his book entitled Legal Aspects of Intellectual Property Rights says there are 4 (four) elements of material rights contained in the context of franchise law, those are:

1. The right to engage in a particular business, usually the right is protected under a trade secret;
2. The existence of the right in the form of the use of business identification at the same time become identification, in the form of trademark or service mark;
3. Such rights may be transferred to another party by license, which is the use of plans and management assistance in addition to other undisclosed immaterial objects, which may be in the form of food, beverage or other products;
4. The right of the franchisor to obtain achievements in the license agreement such as royalties.

Article 1 section (1) of Regulation No. 42 of 2007 concerning Franchise explains that:

> "Franchising is a special right owned by an individual or a business entity to a business system with a business characteristic in order to market goods and or services that have proven successful and can be utilized and or used by another party under a franchise agreement".

The Franchisor is an individual or business entity granting the right to utilize and/or use the Franchise it owns to the Franchisee, as set forth in Article 1, section 2, of the Government Regulation 42 of 2007 mentioned above. Meanwhile, in section 3 it is said that the recipient of the Franchise is an individual or business entity that grants the right to utilize and / or use his / her Franchise to the Franchisee. Franchising can be held throughout Indonesia. Article 4 section (1) from Regulation No. 42 stipulates that the awarding of the franchise from the owner to the recipient must be made in a written agreement by closing the law of Indonesia. And in section 2, if the agreement is written in a foreign language it must be translated in Indonesian.

From the terms set forth in Government Regulation Number 42 of 2007, it can be deduced that Franchise or Fraction is a special right owned by a person or business entity to a business system with certain characteristics which may be given to another person or other entity by agreement. In other words this provision provides protection to the traditional economy, because in reality the economic strains that occur in traditional markets that can reach all levels of society ranging from the scale of trade in large turnover to small turnover by traders and buyers either from the strata of the middle to the community upper and lower middle.

The rapid current of globalization because of the advancement of time brings the development not only in the field of technology but also the development and shift of a multi-dimensional, one of which is the development in the field of economy and shifting lifestyles of people who want to adjust and keep up with the times. to shop in the super market or mini market like Indomart and Alfamart which is currently very easy to find around our residence, rather than having to shop to traditional markets that sometimes crowded, muddy and the possibility of pickpocketing and even the price is also not lower than the price is in Indomart for example. In addition, shopping at Indomart stores or similar ones is rationally more convenient because it is equipped with AC facilities and others, and now such outlets also not only provide services or provide basic daily needs but also serve the secondary needs that such as electricity payment, *PDAM*, *BPJS* and even also provide Railway ticket, ticket bus, etc. Toll card. With one way in the same place we can get service of some kind of requirement that we need. Indomart and Alfamart is one type of mini market that currently has stores spread across the country's territory both in urban areas and even extends to urban areas. But there are certain areas that do not allow mini market outlets to open their business in urban areas. This policy is taken by stakeholders in the region, of course, with the aim of protecting traditional markets in order to grow better. Business competition between two business system models between modern outlets and franchise systems with business models in traditional markets is very different. If this does not get the right arrangement then there will be unfair business competition.

Businesses with the franchise method recognize two forms:

1. Franchise distribution
2. Franchise format.

Franchise distribution is a franchise that in its activities only concerned with the distribution of goods or services and not produces goods or services, while the franchise format is a franchise in the activity of producing and distributing goods or services with the condition must follow the format specified by the owner (franchisor). So in the distribution franchise, the franchise only distributes goods produced by other companies, such as Bata shoe brand, the company only acts as a distributor while its production is done by another company. However, the franchise format is different, because the company concerned to produce and market the product, such as Mc Donald, Pizza Hut, Kentucky Fried Chiken, etc., but the formula of these products obtained by the franchise system, thus franchise or in Indonesia known as franchise is an engagement in which the object is Intellectual Property Rights.

Since the franchise business system is an engagement, the legal principles of the treaty and the object law will be the reference in the franchise business transaction. Although in Indonesia has been enacted Law No. 5 of 1999 on Prohibition of Monopolistic Practices and Unfair Business Competition, where the background of the issuance of this Act is because the creation of business opportunities that make people become more capable and participate in development in various sectors of economy. One of the causes is due to policy besides also because the development of private business at that time is largely a manifestation of the condition of unfair business competition where the implementation of the national economy is less referring to the mandate of Article 33 of the 1945 Constitution and shows a very monopolistic style.

The law is published to reorganize business activities in Indonesia, so that the business world can grow and develop in a healthy and correct, create a healthy business climate, and avoid economic concentration in individuals or groups such as monopolistic practices and unfair business competition that harm the community and contrary to the ideals of social justice.And in the framework of implementation of this Law, established Business Competition Supervisory Commission as an independent institution independent of the influence of government and other parties. This commission has the authority to exercise business competition control and is authorized to impose administrative sanctions, while criminal sanction becomes the authority of the judiciary.

From the above description it is clear that the mushrooming of mini market business with the franchise system must also meet the provisions as stipulated in the Law No. 5 of 1999 on Prohibition of Monopolistic Practices and Unhealthy Business Competition. Article 3 Letter b of Law no. 5 of 1999 stipulates that the objective of the formulation of this law is to create a conducive business climate through the regulation of fair business competition so as to ensure the certainty of equal business opportunity for big business actors, middle business actors and small business actors. Meanwhile, in Article 17 section (1) of Law Number 5 of 1999 states that: "Business actors are prohibited from controlling or producing and or marketing goods and or services which may result in monopolistic practices and or unfair business competition".

From what is outlined in the articles mentioned above can be concluded that the regulation of business implementation of business actors must be based on the purpose of the economy is to provide prosperity for the community fairly in accordance with the objectives of the independence of Indonesia as stipulated in the Preamble Act Basis of the Republic of Indonesia of 1945.

1. Regulation arrangements that should be done to occur a balance between franchise developments with the development of traditional markets in the business world.
2. The regulation of Franchise business develops in practice especially in countries that embrace the common low system. Franchise business contracts containing clauses refer to the principles of contract law, such as the principle of autonomy, freedom of contract, justice and the principle of good faith.
3. The main rules governing the franchise or franchise in America include:
   a. The national conference on the commissioners of uniform state lam in America in 1987;
   b. The uniform franchise offering circulair guidelines in 1975;
   b. Federal Trade Commission (FTC) in 1979.

Meanwhile in Indonesia the arrangement of franchise or franchise is regulated in:

1. Government Regulation Number 42 of 2007 regarding franchising;
2. Decree of the Minister of Industry and Trade No. 259/MPP/Kep/7/1997 dated 30 July 1997 on the provision and implementation of franchise registration.

From the terms set forth in Government Regulation Number 42 of 2007 it can be explained that, Franchise or Frachise is a special right owned by a person or business entity to a business system with certain characteristics that can be given to other people or other business entities by agreement. It must be done in writing with due regard to the legal provisions in Indonesia, and if the agreement is written in a foreign language it must be translated into Indonesian. If we consider from the provisions of the article regulating the Franchise test it can be concluded that the actual Franchise agreement is not to be out of the provisions that regulate the trade in Indonesia. In other words this provision provides protection to the traditional economy, because in reality the economic strains that occur in traditional markets that can reach all levels of society ranging from the scale of trade in large turnover to small turnover made by traders and buyers either from the strata of the middle to the community as well as middle down.

As conveyed that the franchise is a special right owned by individuals or business entities to business systems with business characteristics in order to market goods or services that have proven successful and can be utilized by other parties based on the franchise. From these provisions it can be concluded that the franchise can legally be given from the owner to the recipient to utilize the rights to the business system with the franchise agreement. Franchising as a special right to the business system must meet the criteria as set forth in Article 3 of Government Regulation Number 42 of 2007, namely:

1. Have a distinctive business;
2. Proven to provide benefits;
3. Has a standard for the service of goods and or services offered made in writing;
4. Easy to teach and publish;
5. There is continuous support, and
6. Intellectual Property Rights registered.

The franchise agreement is made in writing with regard to Indonesian law. The franchise agreement contains a clause (Article 5 of Government Regulation Number 42 of 2007), as follows:

1. Name and address of the parties;
2. Types of Intellectual Property Rights;
3. Business Activities;
4. Rights and obligations of the parties;
5. Assistance, facilities, operational guidance, training and marketing provided by the franchisor to the franchisee;
6. Business area;
7. Agreement period;
8. Procedure of payment of benefits;
9. Ownership, change of ownership and right of beneficiary;
10. Settlement of disputes;
11. Procedures for extension, termination and termination of agreement.

From the provision of Article 5 of Government Regulation it is implied and explicit that anything related to the granting of a special right to the business system should be written in writing, and if the agreement is written in a foreign language it must be translated into Indonesian.

Article 6 of the Regulation also provides that in the franchise agreement may contain clauses concerning the grant of the franchisee to appoint other franchisee, but it is required that the franchisee who is granted the right to appoint another franchisee shall own and execute 1 (one) place franchise business. This Statement gives the understanding that a franchisee can grant his/her right to the business system to other parties with the requirement to have and implement their own at least 1 (one) place of franchise business.

The franchisor has an obligation to provide franchise prospectus to the prospective franchise recipient at the time of bid, whereby the prospectus must contain a minimum of: Data identitas pemberi waralaba;

1. The legality of the franchisor's business;
2. History of its business activities;
3. The organizational structure of the franchisor;
4. The last 2 (two) financial statements;
5. Number of places of business;
6. List of franchise recipients; and
7. Rights and obligations of the giver and the franchisor.

In addition to providing prospectus of offer to prospective recipients when making an offer, the franchisor is also required to provide coaching in the form of training, management operational guidance, marketing, research, and development to the franchisee on an ongoing basis.

Prior to the franchise offering propectus offered to potential recipients, the prospective franchisor must register the prospectus of the pension to the minister by attaching documents containing a copy of the prospectus of the franchise offering and a copy of the legality of the business. Likewise, after an agreement between the franchisor and the franchisor, the franchisor is also obliged to register the agreement. The registration of the franchise agreement must be accompanied by a copy of the business license, a copy of the franchise agreement, a copy of the prospectus of the franchise offering and a copy of the Card of the Owner or Management of the company. Registration can be done alone by the franchisor or can be represented by other parties who are authorized by the franchisor. The Minister referred to herein is the minister who administers the governmental duties in the field of trade as referred to in Article 1 Section 4 of Government Regulation Number 42 on 2007 regarding Franchise.

The Minister shall issue a Franchise Registration License after all the requirements as stipulated in Article 12 section (1) letters a.dan b that is a photocopy of the prospectus of franchise offering and business legality. This Franchise Registration Certificate valid for 5 (five) years and if the franchise agreement has not expired Franchise Registration Letter may be extended for another 5 (five) years. The application and application process of Franchise Registration Letter is free of charge.

The franchising is carried out by the Government and Local Government, while the supervision of the franchising is carried out by the minister by coordinating with the relevant agencies. For the giver or franchisor who violates the provisions as mentioned in Article 8, Article 10 and Article 11 of Government Regulation Number 42 of 2007 is the provision on the obligation of the franchisor to conduct guidance related to the operational management etc., the registration of franchise registration and registration of the franchise agreement with all its provisions, may be subject to administrative sanctions. The sanctions may include written warnings, fines and/or withdrawal of Franchise Registration Letters. The warning can be given at most 3 (three) times within 2 (two) weeks since the previous warning letter is issued. This administrative sanction may be imposed by the Minister, Governor, Regent/Mayor in accordance with their respective authority. As for sanctions in the form of fines shall be granted to the franchisor who does not carry out the prospectus or may also be liable to the franchisor who does not register the franchise agreement after the issuance of a 3 (three) written warning letter. The amount of fine charged is Rp. 100.000.000, - (one hundred million rupiah). Meanwhile, the sanction of revocation of STPW is imposed on the franchisor who does not conduct guidance to the franchisee after the issuance of 3 (three) written letter of writing.

In the context of franchise law there are several types of rights that are shaped over immaterial objects. The owner of the franchise (franchisor) is in full control of the following rights:

1. The right to strive in a particular business;
2. The right to use corporate identity;
3. Right to master or monopolize operational skills, marketing management etc;
4. Right to locate the business area;
5. Right to determine the number of companies.

The above rights have the characteristics of absolute, absolute, and droit de suite properties. In these rights there are also management secrets, trade secrets, management secrets in the management of products and/services etc. So in the context of the franchise there is not only copyright, patent rights, brand rights, industrial design rights but also other immaterial rights such as the right to skills or skills.

In Indonesia has been enacted Law No. 5 of 1999 on Prohibition of Monopolistic Practices and Unfair Business Competition. The background of the issuance of this Law is due to the unavailability of business opportunities that make the community become more capable and participate in development in various sectors of the economy. One of the causes is due to the current government policy that is not appropriate so that the market becomes distorted. In addition to Karen business development private sector was in fact largely a manifestation of the condition of unfair business competition.

The implementation of the national economy was less referring to the mandate of Article 33 of the 1945 Constitution and showed a very monopolistic style. The law is published to reorganize business activities in Indonesia, so that the business world can tumbauh and grow in a healthy and correct, create a healthy business climate, and avoid economic concentration in individuals or groups such as monopolistic practices and unfair business competition that harm the community and contrary to the ideals of social justice. And in the framework of implementation of this Law, established Business Competition Supervisory Commission as an independent institution independent of the influence of government and other parties. This commission has the authority to exercise business competition control and is authorized to impose administrative sanctions, while criminal sanction becomes the authority of the judiciary.

Article 3 Letter b of Law no. 5 of 1999 stipulates that the objective of the formulation of this law is to create a conducive business climate through the regulation of fair business competition so as to ensure the certainty of equal business opportunity for big business actors, middle business actors and small business actors. Meanwhile, in Article 17 section (1) of Law Number 5 of 1999 states that: "Business actors are prohibited from controlling or producing and or marketing goods and or services which may result in monopolistic practices and or unfair business competition".

From what is outlined in the articles mentioned above can be concluded that the regulation of business implementation of business actors must be based on the purpose of the economy is to provide prosperity for the community fairly in accordance with the objectives of the independence of Indonesia as stipulated in the Preamble Act Basis of the Republic of Indonesia of 1945.

Closing

1. The development of business with franchise methods in urban areas even to the edge is very significant effect on the development of traditional markets. This is influenced by franchise business systems that can reach the needs of the community due to lifestyle shifts due to the rapid influx of globalization.

2. Business with franchise system system requires a more detailed arrangement, especially related to the permit it is intended to protect the business with traditional systems that occur in traditional markets. Modern business actors with franchise methods must be subject to the provisions of Law no. 5 of 1999 concerning Prohibition of Monopoly and Unfair Business Competition. The purpose of this is to protect businesses in all segments of society fairly.

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POLICY OF OWNERSHIP OF RIGHT ON LAND AND BUILDING FOR FOREIGN CITIZENS IN INDONESIA BASED ON JUSTICE VALUES

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ABSTRACT

The arrangement of the ownership of Land Rights already exists and it is set in the Basic Agrarian Law (BAL). Article 42 in BAL regulates the ownership of provisions Land Rights for foreign citizens, namely that the foreign national may have the right to use and lease rights. Regulation on Land Rights for Citizens foreigners in Indonesia stipulated in Government Regulation No. 41 of 1996 on the ownership House Live or Occupancy By Foreigners domiciled in Indonesia, government regulation stipulates that the right to use for foreigners can occur in the Land state Land Ownership and Land Management. Law No. 1 of 2011 on Housing and Settlement Region, in article 52 stipulated that foreigners could inhabit or occupy the house by way of lease rights or the rights to use. The regulation is intended to provide legal certainty for foreigners to possible possession of a house or dwelling domiciled in Indonesia, but the implementation has not been able to provide a clear legal for foreign nationals associated with property investment in Indonesia, as well the emergence of smuggling-smuggling law of the land by foreigners who have not been able to overcome due to the lack of oversight and follow-up sanctions.

Keywords : Legal Policy, Ownership of Rights on Land and Building, Justice Values

Introduction

Unitary State of the Republic of Indonesia based on the 1945 Constitution is a State of law that provides guarantees and protection of the rights of citizens, the right of citizens to obtain, own, and enjoy property. Land ownership as a kind of property rights, which is very important for the country, nation, and people of Indonesia as agrarian society.Tanah is a very important object in the formation of a country. A country is recognized de facto if it has territory, in other words the ownership of the land rights. Indonesia can be said to be an agrarian country so that land is one of the most important basic needs for the people of Indonesia.

Very strategic object of land for the nation of Indonesia, then this is stipulated in the 1945 Constitution of Article 33 Paragraph (3) which stipulates that the earth and water and natural resources contained therein are controlled by the State and used as much as possible for the welfare of the people. Paying attention to the ownership of land rights, there is a picture that land ownership is a matter that needs to be protected strictly so that the granting of the right status to individuals must be done by strict selection, in order to actually make the distribution of the status of the rights true.

Based on Law Number 12 of 2006 on Citizenship of the Republic of Indonesia, only recognize the difference of population of Indonesian Citizens (WNI) and Foreigners (WNA). Fundamentally, the land is everything contained in it is the property of the State and is used profusely for the prosperity of the people. In order to realize the mandate of the Basic Law of 1945, it was stipulated by Law No. 5 of 1960 on the Basic Regulations on Agrarian Principles. Ownership of land is manifested by the following rights: Property Right, Building Use Right, Right of Use, Right of Use, Right of Lease, Land Opening Right, Right to Collect Forest Products, Other Rights not included in those rights.

The passage of time, the shifting of land policies that originally characterized social change towards a policy that tends to be proportional, occurred due to the choice of economic policy orientation which at that time was more likely to emphasize equity, shifted towards the mainstream economic growth of the 1970s. The prohibition of ownership of property assets by foreigners as stipulated in Government Regulation No. 41/1996 concerning Ownership of Shelter House or Shelter by Foreigners domiciled in Indonesia.

The government is paying very serious attention to the ownership of the land so that the government does not allow the ownership of the land to be transferred to foreigners. The formal rules of law governed by the government's regulation are less desirable by the Foreign Citizens.

In fact, it is often time to smuggle punishments by Foreign Citizens in various ways, in general by making agreements, commonly referred to as nominee treaties.

Citizens of the State of Origin as the recipient of the power of attorney and citizen of the Indonesian Citizen as the authorizer, granting authority to the Foreign Citizen to control the right of property and to perform all legal acts against the land, which is legally prohibited by the Basic Agrarian Law. Javanese philosophy "sadhumuk bathuk sanyari earth, yen need ditohi starch" shows how closely the relationship between man and the land he has. Every inch of the land is a self-esteem that will be defended furiously with all body and soul. Indonesia, constitutionally, the regulation of land law (as part of natural resources) is affirmed in Article 33 paragraph (3) of the 1945 Constitution which regulates the earth and water and the natural resources contained therein is controlled by the State and used for the full- great prosperity of the people.

This chapter contains two decisive words that are "dominated" and "used". The word "dominated" as the basis of authority of the State. The state is a public legal entity that can have rights and duties like an ordinary human being. The word "used" contains a command to the State to use for as much as the welfare of the people. The provisions on the use of land and building use rights have a legal (legal) interest, especially with the developments in the global competition in the free market "Free Trade". With this global competition at least there is no imbalance in society.

The right to use on land and buildings seems to have no detail on the arrangements. Because in Article 4 paragraph (2) UUPA does not clearly regulate it is the freedom to use the land, so it is general. And in particular, the right of use can be controlled by the State according to the official decision, article 41 paragraph (l) of LoGA. Government Regulation no. 41 Year l996 about the ownership of residential house and residence by Foreigner who domiciled in Indonesia is said to give benefit for National development so that can have house as residence and built with status of right of use.

Government regulations are clear that foreigners in Indonesia are given a very wide range of freedoms related to land issues in Indonesia. So that is limited only about the ownership of Citizens of Foreign States that only the right to use the land. The acquisition of land ownership rights in the BAL means that land ownership rights can only be owned by Indonesian citizens (WNI). The freedom of foreigners in Indonesia in land tenure including use rights and buildings will be increasingly urgent for Indonesians who do not have sufficient capital, because foreigners who have large capital will take advantage of opportunities provided by the government through legal products. The Netherlands is much benefited that it can control the land of Indonesia as far as possible and certainly very harmful to the people of Indonesia.

Outline of the Problem

Based on the background of problems that have been described above, there are several issues that can be formulated, namely:

1. What is the policy of ownership of land and building rights for foreigners in Indonesia?
2. How is the arrangement of ownership of land and building rights of foreign citizens in Indonesia?
3. How to reconstruct the policy of ownership of land and building rights for foreigners in Indonesia?

Discussion

Definition of Policy Theory

Policy has many theoretical insights. Harold Laswell and Abraham Kaplan define it as a program projected with certain goals, certain values, and practices. David Easton defines it as a result of government activity. Carl I. Friedrick defines it as a series of actions proposed by a person, group or government in a particular environment, with threats and opportunities. The proposed policy is aimed at exploiting the potential as well as overcoming the existing obstacles in order to achieve certain goals. Policy is a strategic fact rather than a fact of politician or technical fact. As a strategy, policy has summarized the political preferences of the actors involved in the policy process, especially in the process of formulation. As a strategy, public policy is not only positive, but also negative, in the sense that decision choices always accept one and reject the other.

Definion of Justice Theory

The term justice (iustitia) comes from the word "fair" which means: not biased, impartial, side to right, rightly, not arbitrary. From some definitions it can be concluded that the notion of justice is all that is pleasing to the attitude and action in human relations, justice contains a demand for people to treat others in accordance with their rights and obligations, the treatment is not indiscriminate or favoritism; rather, everyone is treated equally in accordance with their rights and obligations. Justice according to Aristotle is a feasibility in human action. Eligibility is defined as the midpoint between the two ends of the extern is too much and too little. The two ends of the exterm involve two persons or objects. If the 2 persons have a similarity in a predetermined size, then each person must obtain the same object or result. If not the same, then there will be a violation of the proportion means injustice.

The division of justice according to Aristotle is:

a) Cumulative Justice is the treatment of someone who does not see the services he does, ie everyone gets his rights.
b) Distributive Justice is the treatment of a person in accordance with the services that have been made, ie each person gets the capacity with each potential.
c) Findgnive Justice is the treatment of a person according to his behavior, which is in reply to the crime committed.

Justice means not one-sidedness, putting things in the middle, being impartial. Justice is also defined as a situation where every person in the good life of society, nation and state obtain what is his right, so it can carry out its obligations.

Reconstruction Theory

Reconstruction which means to build or restore something based on the original incident, which in the reconstruction contained the primary values that must remain in the activity of rebuilding something in accordance with its original condition.

The above understanding invites some experts to express their opinions on the notion of reconstruction such as:

a) B.N Marbun

Reconstruction is the return of something to its original place, the compilation or redistribution of the existing materials and reconstituted as they are or the original event.

b) James P. Chaplin

Reconstruction is the interpretation of psychoanalytical data in such a way as to explain the personal development that has taken place, along with its present material meaning for the individual concerned.

General Review

Definition of Land and Land Rights

This definition means that humans as living creatures desperately need land or land, whether used residence, place of cultivation, or for other places of business. Therefore, there is a tendency that everyone seeks to control and defend certain areas of land or land, including to seek the status of their ownership rights.

Land plays an important role for human life so that there are provisions that regulate matters relating to land. This is intended to prevent any arbitrary act or act from one party to another. Given the importance of the role of land for human life, the right to property is absolute so that it indirectly excludes the possibility of property rights to a land disturbed by other parties who have no interest in the land.

Land rights consist of various kinds. Such rights may be obtained on the basis of transactions, legal acts, or statutory provisions governing them. Broadly speaking, the right to land there are only two:

1. Rights controlled by an individual.
2. Rights controlled by the state.

The agrarian legal system in Indonesia is known to exist several kinds of land tenure as defined in Article 16 of Law Number 5 Year 1961 concerning the Agrarian Principles, which are among others: property rights, usage rights, building use rights, use rights, lease rights, and land clearing rights, the right to collect forest products.

Based on the provisions of Article 19 of the LoGA, especially paragraphs (1) and (2), it can be seen that with the registration of land or registration of land rights, as a result of the law, the holder of the rights concerned will be given a land title and applies as a proving instrument strong against the holder of the land rights.

Definition of Land and Building Ownership

The notion of "possession" or "mastery" and "domination" can be used in a physical sense and in a juridical sense that has civil aspects and public aspect. Juridical control is based on rights protected by law and authorizes the right holder to physically control certain land and buildings.

The juridical authority authorizes the control of the physical land but in reality the physical control is exercised by others. For example, if the leased land is leased to another party, then the land is physically controlled by another party with lease rights. In this case the landowner by virtue of his juridical tenure is entitled to claim the physical relinquishment of the land to him / her.

The right to control land and buildings when it is connected to the land of a certain person, therefore, the right to control land is the right of domination based on a right or a power which in fact authorizes to do the law as the rightful person has the right.

Definition of Citizens of Indonesia

Citizens in accordance with the definition of Article 1 Sub-Article 1 of the Law on Citizenship is "Citizen of a country determined under the laws and regulations." Related to the Indonesian Citizen, Article 26 paragraph (1) of the 1945 Constitution of the Republic of Indonesia which is then reproduced in Article 2 of the Citizenship Law stipulates that, "Those who become Indonesian Citizens are indigenous Indonesian peoples and other peoples who are endorsed by Law as Citizens. "Understanding Indonesian Citizens is also contained in Article 4 of the Citizenship Law which details the mention of, Indonesian Citizens are:

a) Anyone who is in accordance with the laws and / or agreements of the Government of the Republic of Indonesia with other countries before this Act becomes a citizen of Indonesia;
b) a child born of a legal marriage of a father and mother of an Indonesian Citizen;
c) a child born of a legal marriage of an Indonesian citizen's father and a foreign national mother;
d) A child born of a legal marriage of a father of a Foreign Citizen and an Indonesian citizen's mother;
e) A child born of a legal marriage of a mother Indonesian citizen, but her father does not have the nationality or law of the country of origin her father does not grant citizenship to the child;

f) A child born within 300 (three hundred) days after his father dies from a legal marriage and his father is an Indonesian citizen;
g) a child born outside the legal marriage of a mother Indonesian citizen;
h) A child born outside the legal marriage of a mother of a Foreign Citizen recognized by an Indonesian Citizen's father as a child and the admission is made before the child is 18 (eighteen) years old or unmarried;
i) a child born in the territory of the Republic of Indonesia who at the time of birth is not clear the status of citizenship of his father and mother;
j) The newborn child found in the territory of the Republic of Indonesia as long as his father and mother are unknown;
k) a child born in the territory of the Republic of Indonesia if his or her father and mother have no nationality or unknown existence;
l) A child born outside the territory of the Republic of Indonesia from an Indonesian citizen's father and mother who due to the provisions of the country in which the child is born grants citizenship to the child concerned;
m) The child of a father or mother who has been granted his citizenship request, then his father or mother dies before taking an oath or declaring a pledge of allegiance.

Definition of Foreign Citizens

The definition of Foreign Citizens (Citizens) is contained in Article 1 number 17 of Law Number 20 Year 2009 on Degree, Service Signs, and Honorary Signs namely, "People of other nations that are ratified by Law as a Foreign Citizen."

The meaning of Article 7 of the Citizenship Law states that "Everyone who is not an Indonesian citizen is treated as a foreigner." Under the Foreign Citizenship Act a foreigner may become an Indonesian Citizen after fulfilling the requirements and procedures stipulated in the legislation.

Article 8 of the Citizenship Act states that, "Citizenship of the Indonesian Republic may also be obtained through nationality."
Citizenship is an ordinance for foreigners to obtain the Citizenship of the Republic of Indonesia through a petition. But the status of Indonesian Citizen, not only can be obtained by request. According to Gatot Supramono, there are three ways for foreigners to obtain the status of Indonesian Citizens, which is by naturalization, marriage, and by giving by the government of Indonesia.

Law Politics

The enforcement of laws in a country is determined by the Political Law of the country concerned, in addition to the legal awareness of the people within the country. To find out what is meant by the politics of law should be known first the meaning of Political Law. Etymologically, the term political law is an Indonesian term from the legal terms of Dutch rechtspolitiek, which is the formation of two words rech and politiek.

Padmo Wahjono defines the politics of law as the basic policy that determines the direction, form and content of the law to be established. The definition is still abstract and then translated into legal politics is the policy of state organizers about what is used as criteria to punish something. In this case the policy may be related to the formation of the law, the application of law and its own enforcement.

Soedarto defines the politics of law as the policy of the state through the state bodies authorized to establish the desired rules, which are supposed to be used to express what is contained in society and to achieve what is aspired to. Satjipto Rahardjo defines the politics of law as the activity of choosing and the means to be used to achieve a certain social and legal objective in society.

Based on the expert opinion above the authors conclude that legal politics is the basic policy of state organizers in the field of law that will, is and has been applicable, derived from the values prevailing in society to achieve the goals of the intended state.

Indonesian Law Politic

a) Legal Politics in Indonesia is the basic policy of state organizers (Republic of Indonesia) in the field of law which will, is and has been applied, derived from the prevailing values, derived from the values prevailing in society to achieve the goals of the state (Republic of Indonesia) are aspired to.The political objectives of national law include two interrelated aspects:
(1) As a tool or tool and measures that governments can use to create a desired national legal system; and (2) with the national legal system will be realized the ideals of a larger Indonesian nation. Thus, it can be asserted that the Preamble and the Articles of the 1945 Constitution are the source of the whole politics of Indonesian national law. The assertion of both as a source of national political law is based on two reasons:

b) The Preamble and Articles of the 1945 Constitution contains the objectives, basic, ideals and norms of the state of Indonesia which should be the objectives and the foothold of the legal politics in Indonesia.
c) The preamble and articles of the 1945 Constitution contain the distinctive values that originate from the views and culture of the Indonesian people inherited by the ancestors from centuries ago.

Object of Political Law Study

Political law seeks to establish rules that will determine how humans should act. The legal politics investigates what changes should be made in the current law in order to be compatible with social reality (sociale werkelijkheid). However, it is often also to remove the rule of social reality, that is, in the case of legal politics being a tool in the hands of a ruling class that is about to colonize without regard to social reality.

From a legal political perspective it can be argued that legal politics is a "policy" taken or "taken" by the state through state institutions or officials authorized to determine which laws need to be replaced, or that need to be changed, or which law need to be maintained, or the law of what needs to be regulated or issued in order to with the policy the administration of state and government can run well and orderly, so that the purpose of the state gradually can be planned and can be realized.

Pattern and Character of Legal Products

According to Moh. Mahfud there are two characters of legal products are: first, responsive or populistic legal product is a legal product that reflects the sense of justice and meet the expectations of society. In the process of making it play a big role and full participation to social groups or individuals in the community. The results are responsive to the demands of social groups or individuals in society. In the sense of character always involves all components of society (formal terms). Second, the conservative legal product is a legal product whose content reflects the social vision of the political elite, more reflective of the government's desire, is instrumentalist positivist, that is, the society becomes the instrument of state ideology and program. Contrary to the responsive law, conservative law is more closed to the demands of groups and individuals in society. In the making of the role and participation of the community is relatively small.

Particular Review

Right of Use Definition

The provisions on usage rights are mentioned in Article 16 paragraph (1) sub-paragraph d of the Agraraia Basic Law. Specifically regulated in Articles 41 to 43 of the Basic Agrarian Law. According to Article 50ayat (2) of the Basic Agrarian Law, further provisions on usage rights shall be governed by laws and regulations. The legislation intended herein is Government Regulation No. 40/1996, specifically regulated in Articles 39 to 58.

The definition of usage rights is provided in Articles 41 to 43 of the LoGA and Article 39 through Article 58 of Government Regulation Number 40 Year 1996. The definition of Right to Use is:

"The right to use and or to collect the proceeds of land directly controlled by the state or land of property of another person, giving the authority and duties specified in the decision of granting it by the competent authority to give it or in agreement with the landowner, which is not a lease agreement or agreement the processing of the land of all things of origin does not conflict with the soul and the provisions of this law."

This definition is very broad, because it is not only formulated about the definition of Right to Use, but also about the authority and obligations. Thus, the elements contained in the definition of Right to Use are:

a) The right to use and / or collect results;
b) Objects of land controlled by the state or property rights;
c) Who authorizes use of the right to use is the competent authority for it or the owner of the land; and
d) The requirement shall not be contrary to law.

The word "use" in use rights refers to the notion that use rights are used for building purposes, while the word "levy" in use rights refers to the notion that use rights are used for purposes other than constructing buildings, such as agriculture, fisheries, livestock, and plantations.

Subject of Right of Use

The Subject of Use Rights is regulated in Article 42 of BAL and Article 39 of Government Regulation Number 40 Year 1996 concerning Right to Use of Business, Right to Build, and Right to Use of Land. In Article 42 of the LoGA only four categories of legal subjects that can be granted the right to use:

a) Indonesian citizen;
b) a legal entity established under Indonesian law and domiciled in Indonesia;
c) Departments, Non-Departmental Government Institutions, and Local Governments;
d) Religious and social bodies;
e) Foreigners domiciled in Indonesia;
f) Foreign Legal Entity which has representative in Indonesia;

g) Representatives of Foreign States and representatives of international bodies.

For Rightsholders who do not qualify as holders of use rights, within 1 year shall release or transfer the right to life to other eligible parties. If this is not done, then the right to remove it because the law with the provisions of the rights of other parties related to the right to use is still considered (Article 40 of Government Regulation Number 40 Year 1996).

According to A.P. Parlindungan, Hak Pakai which is owned by and public legal entity is Right of Use which is right to use, that is use for indefinitely during execution of duty, but there is no right to disposal, that is not transferable in any form to third party and not can be the object of mortgage rights.

Occurrence of Rights by Origin of Land

In the case of origin of the use rights land, in Article 41 Paragraph (1) of the Basic Agrarian Law states that the origin of the land of use rights is land directly controlled by the state or land owned by another person, while Article 41 Government Regulation Number 40 Year 1996 is more assertive states that land that can be granted with usage rights is state land, management rights land, or land of property rights.

The occurrence of the right to use based on the origin of the land is as follows:

a) Right to Use on State Land.
b) Right to Use on Right of Management Rights.
c) Right to Use of Property Right.

Right to Use Period

Regarding the term of use rights, Article 41 Paragraph (2) of the Basic Agrarian Law does not specify how long the term of use rights. This Article only provides that the right to use may be granted for a specified period of time or as long as the land is used for a particular purpose. In Government Regulation No. 40 of 1996, the term of use rights is regulated in Article 45 to Article 49. The term of use rights varies according to the origin of the land, namely:

a) Right to Use on State Land. The Right to Use shall be for a maximum of 25 years, for a maximum period of 20 years, and renewable for a maximum period of 25 years. Particular rights of use which are owned by the Department, Non-Departmental Government Institution, Local Government, religious and social bodies, representatives of foreign countries, and representatives of international agencies are given unspecified periods during which their land is used for certain purposes.
b) Right to Use on Right of Management Rights. This use right for a period of 25 years at the latest, may be extended for a maximum period of 20 years, and may be renewable for a maximum period of 25 years. An extension of the term or renewal of this right may be made at the proposal of the management rights holder.
c) Right to Use of Property Right. This use right is granted for a maximum period of 25 years and can not be extended. However, the agreement between the landowner and the holder of the right of use may be renewed by granting a new right of use by a deed made by the Land Deed Authority and shall be registered with the local Land Office or municipal Office to be recorded in the land records.

Rights and Duties of Use Right Holder

In this right of use which is the obligation of the holder of the right to use under Article 51 of Government Regulation Number 40 Year 1996, is:

a) Pay the income which the amount and method of payment is stipulated in the decision on the granting of their rights, the agreement on the use of the land of management rights or in the agreement on the granting of the right to use the land of ownership.
b) Use the land in accordance with its designation and the conditions specified in its grant decision, or land use rights agreement or land right tenure agreement.
c) Maintain well the land and buildings that are above it and preserve the environment.
d) Re-deliver the land granted with usage right to the state, the holder of the management right or the land owner after the use right is removed.
e) Submit a certificate of use right that has been deleted to the head of the local district or municipal Land Office.
f) Provide roads or waterways or other facilities for yard or parcels of land that are confined by the use rights land.

While the rights of the holder of usage rights under Article 52 of Government Regulation Number 40 Year 1996, are:

a) Mastering and using the land for a certain period of time for personal or business purposes.
b) Transferring use rights to others.
c) Burden it with mortgage.
d) Mastering and Using the land for an unspecified period of time during which the land is used for a particular purpose.

Loss of Right to Use

Based on Article 55 of Government Regulation Number 40 Year 1996, factors causing the abolition of use rights, namely:

a) The expiration of the period specified in the award or renewal or in the agreement granting it.

b) Canceled by the competent authority, the holder of the management rights or the landowner prior to the expiry of his term, because:

1) The non-fulfillment of the obligations of the holder of the right to use and or the violation of the provisions in use rights.

2) Non-fulfillment of the terms or obligations set out in the agreement on granting the right of use between the holder of the use rights and the land owner or the agreement on the use of management rights

3) Court rulings that have permanent legal powers.

c) Released voluntarily by the rights holder before the term expires.

d) The right of life is revoked.

e) Abandoned.

f) The land is destroyed.

g) Right-holders do not qualify as holders of use rights.

Closing

Conclusion

Based on the description of the discussion, the authors can draw conclusions related to the problems studied as follows:

1. The arrangement of ownership of land and building by Foreign Citizens after the issuance of the Basic Agrarian Law is regulated in Article 42 which regulates the Right to Use and Article 45 which regulates the Right of Lease. So Foreign Citizens in Indonesia in principle only have the right of ownership of land and buildings with Right to Use and Right of Lease. The enforcement rules of the BAL are regulated through Government Regulation No.40 of 1996 on HGU, HGB, HPAT and PP No.41 of 1996 on Residential Housing Ownership by Foreigners, then followed up by Regulation of the Minister of Agrarian Affairs / Head of BPN No.7 Year 1996 concerning Housing Requirement, replaced with No.8 Year 1996 concerning Requirement of Ownership of Housing or Shelter by Foreigner, and followed by Minister of Agrarian Decree / Head of BPN No.110-2871 about Implementation of PP41 Year 1996.
2. Legal acts committed by foreigners, especially in the form of agreements, are legal smuggling, because their substance is contrary to the LoGA, especially Article 26 paragraph 2. If further understood, this agreement / nominee also contradicts the principle of good faith in making an agreement. The desire of the foreigners to own land in Indonesia by justifying any means is a bad faith, and then manipulating the existing law in order to own and control the land of property rights in Indonesia. It is clear that from the very beginning the intention of making this agreement / nominee is contrary to the principle of good faith, and the agreement made from the beginning is null and void.
3. Reconstruction of legal protection for foreign nationals domiciled in Indonesia is permitted only to use the property with the right to use or lease rights with a period of 25 years and can be renewed for a period of 20 years. If the ownership of property / residence for foreigners is opened / permitted in Indonesia, its ownership is based on the principle of horizontal separation that is limited to residential buildings only, and excludes land rights. Government Regulation No. 41/1996 on the ownership of residential or residential homes by foreigners domiciled in Indonesia, has not guaranteed the land acquisition system by foreigners in Indonesia, since almost 13 (thirteen) years would be long enough to prioritize the understanding of the provisions of Government Regulation Number 41 In 1996, input from interested parties coupled with comparisons with arrangements and practices in neighboring States may serve as a basis for the drafting of legislation relating to the rights of foreigners to land and buildings that are more comprihencive, future-oriented (pro-active), but still based on applicable laws and regulations. In addition, this may be due to the term of land rights granted to foreign citizens are not bankable ie only for a short term (25) years. The application of land rights for foreigners in Indonesia is inseparable from legal politics. Usage rights may be granted to foreigners and this right is a limited authority. Whereas the right to use in general the right to land authorizes use, so does the earth, water and space thereon for land-related purposes. And in particular the right to use is to use the land and may be authorized directly by the State or the property of others.

Suggestion

1. Ownership of land, residence or house by foreigners can encourage investment and support the domestic economy, for it requires a complete regulation of land ownership by foreigners, so that on one hand its existence is beneficial to the development and on the other hand the presence of foreigners are also guaranteed legal certainty. This can be done by adding or revising some provisions relating to the oversight aspects of land transactions by foreigners through government appointed

Banks / Banks. Another thing is very important to control the tax every unit / fund that goes through the appointed government bank / bank. In this way, it is able to provide accurate data to the Central Bureau of Statistics, where the accuracy of this data is very important to be used as an evaluation or subsequent consideration in decision-making or to create a new policy in land affairs concerning ownership for foreign citizens.

2. That the granting of Right to Use to foreigners shall not be granted at the same time for the 70 year period as desired by the business world, this is due to the principle of nationality of the land as stipulated in the provisions of Article 33 of the 1945 Constitution.

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LEGAL PROTECTION OF GENETIC RESOURCES BASED ON MATERIAL TRANSFER AGREEMENT

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ABSTRACT

The MTA provides for a contractual agreement between a provider and recipient of the material as tangible property which content the rights and obligations of all parties and also regulates the intellectual property rights, particularly patentas intangible property, the rights a rising from the use of such material. In international law, the Convention on Biological Diversity (CBD), Nagoya Protocol and FAO International Treaty on Plant Genetic Resources for Food and Agriculture (ITPRFA). All three agreements have been ratified by Indonesia. Regulation MTA in Indonesia is covered in the Regulation of the Minister of Agriculture under Regulation of the Minister of Agriculture No. 15/Permentan/OT.140/3/2009 on Guidelines for Preparation of Material Transfer Agreement and Regulation of the Minister of Health No. 657/Menkes/Per/VIII/2009 on Delivery and Use of Clinical Specimens, Biological Materials and Content the information. The research questions in this study is the provisions of the MTA under Indonesian laws related to international laws and and the legal protection of Genetic Resources in Indonesia by the MTA to Intellectual Property Rights. Method approach in this study is the juridical - normative approach. In this normative legal research, the author will use the statutory approach, the conceptual approach and the historical approach. Analysis of the data used in this study is a normative analysis-qualitative. Intellectual Property Rights regimes do not provide sufficient protection of access to genetic resources and traditional knowledge held by traditional communities. CBD and the Nagoya Protocol, ITPGRFA provide provisions regarding access to genetic resources is carried out based on mutually agreed terms, prior informed consent and fair and equitable of benefit sharing. Through MTA, the policies on access genetic resources and benefit sharing can be determined. However, the MTA has several weakness. Efforts to protect genetic resources can be added with several ways, such as Sui Generis System, provides the regulation Access and Benefit Sharing, optimizing negotiation of MTA to gain right of research result and maximize the benefits sharing, disclosure of origin to the patent requirement, Involving Government as facilitator and custodian and Empower NGOs as local communities representation.

Keywords : Material Transfer Agreement (MTA), Genetic Resources, Intellectual Property, Benefit Sharing, Convention on Biological Diversity

Introduction

The economic utilization of genetic resources by using biotechnology, especially in pharmaceutical and biotechnology can not be denied developing with the support of Intellectual Property Right (IPR) system. However, it turns out that IPR system has not been able to push the national economic potential with the utilization of genetic resources and even increasing the occurrence of misappropriation or biopiracy.

The Material Transfer Agreement (MTA) is a form of mechanism to implement Article 15 of the 1992 CBD (Convention on Biological Diversity) and Nagoya Protocols in the case of the sovereignty of the state providing access to genetic resources to other parties and also regulating the fair and equitable sharing of benefits arising from the utilization of resources the genetic power. Similarly, the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA) also determines the multilateral mechanism of the system through standard MTA. Following up on international agreements related to the MTA, the Indonesian government drafted the MTA guidelines in the Regulation of the Minister of Agriculture no. 15/Permentan/OT.140/2009 concerning Guidelines for Material Transfer Agreement and Minister of Health Regulation no. 657/MENKES/PER/VIII/2009 concerning the Delivery and Use of Clinical Specimens, Biological Materials and the Content of Information in.

Material Transfer Agreement is closely related to the protection of Intellectual Property Rights, especially in the patent. The CBD is a convention on biological resources that focuses on the protection of biological resources rather than the issue of Intellectual Property Rights. But the IPR Regime does not provide adequate protection for genetic resources and traditional knowledge. The patent system recognizes only individual ownership that is impossible to apply to traditional knowledge of genetic resources belonging to local communities. The existence of the MTA is expected to provide protection of intellectual property rights to genetic resources and traditional knowledge utilized by foreign parties, and through the MTA can provide benefit sharing to local communities for the utilization of genetic resources.

With such backgrounds and issues, the author is interested in conducting research entitled "Legal Protection of Genetic Resources under Material Transfer Agreement".

Outline of the Research

1. What are the terms of material transfer agreement under the CBD and FAO ITPGRFA, as well as Indonesian national laws?
2. What is the form of intellectual property rights protection (IPR) against Genetic Resources in the presence of material transfer agreement in Indonesia?

Literature Review

General Review on Legal Protection

Legal protection is a matter of protecting legal subjects through applicable legislation and enforced by a sanction. Legal protection can be divided into two, namely:

1. Preventive legal protection
   Protection granted by the government with a view to preventing prior to the offense. It is contained in legislation with a view to preventing offenses committed by business actors and provide signs or restrictions to business actors in performing their obligations.
2. Represive legal protection
   Represive legal protection is the ultimate protection of corporate responsibility, fines, imprisonment, and additional penalties provided in the event of a dispute or business actor committing an offense.

Review on Intellectual Property Right

Intellectual Property Rights (IPR) are property rights derived from intellectual abilities expressed in the form of creativity through various fields, such as science, technology, art, literature, design, and so on. Thus, this right is born out of human intellectual ability. IPR is a generic term of exclusive rights granted as a result derived from human intellectual activity and as a mark used in business activities, and belongs to an intangible right that has economic value.

Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) states that the meaning of Intellectual Property Right is all categories of Intellectual Property consisting of:

a. Copyright and other related rights
b. Trademark
c. Geographical Indication
d. Industrial Product Design
e. Patent
f. Lay-out (topography) design of Integrated Electronic Circuit
g. Protection of Undisclosed Information

Review on Genetic Resources

According to Article 2 on Convention on Biological Diversity 1992:

"Biological resources" includes genetic resources, organisms or parts thereof, populations, or any other biotic component of ecosystems with actual or potential use or value for humanity.

"Genetic material" means any material of plant, animal, microbial or other origin containing functional units of heredity.

"*Genetic resources" means genetic material of actual or potential value.*

In this case it states that the Biological Resource includes genetic resources, organisms or parts thereof, populations or components of biotic of other ecosystems with real or potential benefits or values for humanity. Genetic resources are genetic materials that have real or potential value. The genetic material is the material of plants, animals, microorganisms or other microorganisms containing the heredity functional units.

The Nagoya Protocol further refers to the "Utilization of genetic resources" means to conduct research and development on genetic resources, including through the application of biotechnology as defined in Article 2 of the Convention. Utilization of genetic resources means to undertake research and development on the genetic and/or biochemical composition of genetic resources, including through the application of biotechnology as referred to in Article 2 CBD.

ITPGRFA 2004 will define more specific genetic resources in terms of crops for food and agriculture. Article 2 ITPGRFA "Plant genetic resources for food and agriculture" means any genetic material of plant originating from actual or potential value for food and agriculture.

Material Transfer Agreement

The MTA is an agreement governing the rights of the materials givers and recipients of materials in respect of the transfer of Genetic Resources materials or their derivatives. The material of the genetic resource transfer agreement is a simple agreement that allows both parties (givers and receivers of genetic resources) to negotiate all aspects of research and development of agreed genetic resources. Under this agreement, both parties are expected to benefit from the conservation and utilization of genetic resources. "MTA define the rights and obligations of all parties, including third parties, involved in a transfer of

biological material. MTA can be used as a means of facilitating equitable collaborative research and development with genetic resources"[1].

Research Method

Approach method in this research is juridical-normative approach. In this normative legal research, the author will use the approach of legislation, conceptual approaches and historical approaches. This research is descriptive-analytical. This study uses secondary data. Data analysis used in this research is normative - qualitative analysis.

Research Findings And Analysis

MTA based on CBD, FAO ITPFGRFA and National Law

Genetic resource is a part of living things that are essential for human survival. Economic utilization of genetic resources by using biotechnology is increasing, especially in the field of pharmacy. Developed countries are the ones who benefit most from the utilization of genetic resources. This is evident from the increasing data of patent applications in the field of biotechnology in Europe and America.

The attention of developing countries to the issue of the utilization of genetic resources is growing in international forums. This is the background of the emergence of several international legal instruments that initiate the concept of access to genetic resources, fair and equitable benefit sharing on the utilization of genetic resources, prior informed consent and MTA.

MTA is a contract between researchers, between institutions and between countries that are used for research purposes, are negotiable and contractual. Standard MTA provided can be used as a reference in the framework of research agreement using genetic resources in the field of health, food and agriculture.

One of the activities utilization of genetic resources that utilize MTA is *bioprospecting*, is research collaboration for commercial and scientific interests. This *bioprospecting* activity will usually be related to traditional knowledge related to the genetic resources used, it aims to save time, effort and cost besides that the traditional knowledge has proven its usefulness and therefore no doubt as in the development of a product.[2]

MTA Under International Laws United Nation Convention on Biological Diversity

The privilege of this provision is the recognition of the sovereignty of the state as the owner of genetic resources which is entitled to regulate the utilization and granting of access to genetic resources. Article 15 section (1) states "recognizing the right of state power over its natural resources". Access arrangements do not necessarily restrict access, but instead create requirements that facilitate access to genetic resources for sustainable and eco-friendly utilization and encourage the sharing of benefits resulting from the utilization of the genetic resources.[3] This means there has been recognition of the sovereignty of the local community over natural resources at the rural community level. The CBD stipulates that access to the genetic resources, if granted, shall be based on Article 15 section (4) and section (5), namely:

(a) The existence of mutual agreement,
(b) Prior Informed Consent, and
(c) Distribution of benefits derived from the use of genetic resources in a fair and equitable manner, as mentioned in Article 15 section (5).

The access referred to in the CBD is related to the type of activity requiring approval. The activity is in the form of acceptance and use of genetic resources materials. It can be identified into two activities, i.e. for research (non-commercial) and for commercial purposes. Currently the conventional form of an access agreement is the MTA. So the MTA should include agreement between the provider and recipient regarding the transfer of the agreed material, based on the prior informed consent and the provision of benefit sharing subject to the laws of the country of the genetic resources owner.

The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity

In the 1992 Convention on Biological Diversity previously establishing the sovereign rights of states over the ownership of genetic resources, Nagoya Protocol further articulated an "Access and Benefit Sharing Regime" to determine the setting of how genetic resources can be accessed and what benefits can be shared between individuals, countries or other entities, arrangements at national, regional and global institutions.

[1] Daniel M. Putterman, 1996, *Model Material Transfer Agreement for Equitable Biodiversity Prospecting*, Heinonline, Citation: 7 Colo. J. Int'l Envtl. L. & Pol'y 149.

[2] Krisnani Setyowati, dkk. 2005, *Hak Kekayaan Intelektual dan Tantangan Implementasinya di Perguruan Tinggi*, Bogor: Kantor HKI – Institut Pertanian Bogor, p. 150.

[3] Background of redirection guidelines Material (Material Transfer Agreement) Permentan.

Nagoya Protocol further develops on the guidelines and obligations previously set in the CBD for member countries, that is to identify, monitor and protect the biological diversity of important genetic resources.

International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA)

In the framework of aligning the CBD, the Food and Agriculture Organization (FAO) establishes an Agreement on Plant Genetic Resources for Food and Agriculture (ITPGRFA) aimed at supporting sustainable food and agricultural sustainability through conservation and utilization on an ongoing basis of the Food and Agriculture Plant Genetic Resources (PGRFA) and fair and equitable sharing of benefits and protecting Farmers' Rights based on donations and contributions of farmers and local communities at the origin and center of agricultural crop diversity.

In ITPGRFA the parties agree that access is facilitated on plant genetic resources for food and agriculture under the Multilateral System. Under this Agreement, the Recipient is not permitted to claim any intellectual property rights or other rights that may limit facilitated access to plant genetic resources for food and agriculture, or genetic parts or components, in the form received from the Multilateral System. Article 12 section (4) instructs that any facilitated access, in accordance with the provisions of Article 12 section (2) and section (3), shall be provided in accordance with material transfer agreement.

MTA Under National Laws

Indonesia is a participant of the CBD and FAO Treaty. In order to fulfill its obligations, Indonesia has ratified the CBD, ITPGRFA and Nagoya Protocol. Indonesia has authorized the United Nations Convention on Biological Diversity through Law no. 5 of 1994 on 1 August 1994. Indonesia also authorizes the International Treaty on Plant Genetic Resources for Food and Agriculture through Law Number. 4 of 2006 on 20 March 2006. Likewise, The Nagoya Protocol On Access to Genetic Resources and the Fair And Equitable Sharing of Benefits The Arising from Their Utilization to the Convention on Biological Diversity is passed through Law Number 11 of 2013.

In addition to the three laws that endorse these international instruments, the provisions on access to genetic resources and benefit sharing on the utilization of genetic resources are supported by Law no. 32 of 2009 on the Protection and Management of the Environment. This Act has a role in the carrying out of Traditional Knowledge-Related Knowledge Policy. In Article 63 section (1) letter (i) of Law no. 32 of 2009 stipulates that in the protection and management of the environment, the Government is tasked and authorized: establish and implement policies on Biological and Biological Resources, biodiversity, Genetic Resources, and biological safety of genetically modified products.

In Indonesia, the arrangement regarding the Material Transfer Agreement is regulated more specifically in Regulation of the Minister of Agriculture no. 15/Permentan/OT.140/3/2009 concerning Guidance of Material Transfer Agreement and Minister of Health Regulation no. 657/Menkes/Per/VIII/2009 concerning the Delivery and Use of Clinical Specimens, Biological Material and Information Content. This Regulation of the Minister of Agriculture is a guide in the preparation of the implementation of the MTA to facilitate cooperation on research and development of Plant Genetic Resources for Food and Agriculture as specified in Attachment 1 of the ITPGRFA Agreement. The results of the analysis of the contents of the rules concerning the MTA Guidelines are outlined as follows:

- Ownership of Materials
  Both ministerial regulations state that the recipient must recognize that the rights, property and material interests are the property of the provider and the provider may retain ownership of the material. Accordingly, the recipient will not claim any intellectual property or other rights that may limit the granting of access to the Content provided in the Agreement, or the genetic part or component received from the Multilateral System. In the Regulation of the Minister of Health provides the possibility that the ownership of the material will be negotiated further by both parties in accordance with applicable laws and regulations. With regard to plant genetic resources for food and agriculture related to traditional knowledge as a community heritage, the Minister of Agriculture's Regulation recognizes the ownership of local communities.
- Use of Materials
  The MTA Standard in the Minister of Agriculture states that the recipient should ensure that materials will be used or preserved solely for research, breeding and training purposes for food and agriculture. The MTA standards under the Minister of Agriculture distinguish MTA applications for commercial and non-commercial purposes.[4] MTAs for non-commercial purposes prohibit recipients from distributing or distributing materials and derivatives to other parties. However, it is different with MTAs for commercial purposes that allow recipients to distribute their genetic material and derivatives to others, disseminate any genetic material and send genetic material to other locations.

[4] Regulation of Agriculture Minister No. 15/Permentan/OT.140/3/2009 p. 10 -14

The MTA Standard under the Minister of Health states that the second party (recipient) has agreed to use the Materials and Modifications solely for the purposes formulated in the MTA Regulatory / protocol planning plan under the Minister of Health shall oblige the recipient not to transfer, distribute, or disclose in any manner whatsoever, intentionally or unintentionally, of the material or modification thereof, or its use to any other party, except solely for the purpose of the 'research plan' under the supervision of the experts / scientists.[5] In addition, the Minister of Health's provisions regulate the return of materials and modifications.[6] It aims to limit the recipient in the use of the material transferred after the research is completed. For MTA contracts with foreign parties or commercial companies, there is a provision on the mechanism of compliance with the tracking system.[7]

- Intellectual Property
  In the MTA standards, Intellectual Property Rights (IPR) of the genetic material and test materials produced from the genetic material are the property of the provider, so the recipient shall not be entitled to propose proprietary rights and IPR protection of genetic material or its accepted components.
  "*The Recipient shall not claim any material or material that the material contained in the form provided by the Multilateral System*."[8]
- Benefit Sharing
  The MTA Standard of the Ministry of Agriculture provides that the benefit sharing of commercialization of products developed using transferred genetic materials shall be developed and mutually agreed upon in a separate agreement which is a part of this MTA. The amount of profit sharing is set out in detail in sMTA (standard Material Transfer Agreement) of The Minister of Agriculture Regulation, including those involving local communities.
  However, the regulation of the minister of health states that: "When clinical specimens, biological and / or contents of the material are treated as" MTA must be with benefit sharing agreements." Information or derivatives are patented and commercialized; the MTA shall be subject to a benefit-sharing agreement. The Regulation of Agriculture Minister does not regulate in detail the benefit sharing mechanism, the amount of profit sharing and distribution to third parties as regulated in the MTA under the Agriculture Minister.
- Local Communities
  Article 8 (j) The CBD determines that there is "equitable sharing" of benefits with indigenous peoples or local communities arising from the use of traditional knowledge, innovations and practices of that community. The MTA includes mechanisms that allow local communities to claim ownership of their traditional knowledge.
- Prior Informed Consent
  In the MTA standards, it is stipulated that any utilization of material or invention, including the traditional knowledge embedded in the material or invention, originating from the territory of the Community of Placement, shall first be discussed with the community, in their language, on the purposes and objectives of the study, Community Placements to participate and benefit from the research. This is a form of implementation of the prior informed consent as CBD rescued.
- Publication
  The recipient's obligation is to enter the name of the provider in published results. This provides benefits to both commercial and non-commercial providers. Non-commercial advantage in the presence of such publication is a means to strengthen the position of provider (state) as the owner of the material, to prevent misuse of unilateral material use by recipient and to open research cooperation opportunities through material transfer with other parties. Commercial advantage is in the form of research cooperation opportunities with various parties to gain profit (profit) further.
- Dispute Settlement
  Both MTA standards in Regulation of Health Minister and Regulation of Agriculture Minister stipulate that any dispute arising from the MTA should be resolved in the following manner: Amicable or familial dispute settlement referred to as negotiation. If the dispute is not resolved through negotiation, the parties may choose mediation. If the dispute has not been resolved through negotiation or mediation, each party may file an arbitration dispute under the Arbitration Rules of an international body agreed upon by the parties to the dispute. Failing from the agreement, the dispute ends under the Arbitration Rule of the International Chamber of Commerce, by one or more arbitrators appointed according to the rule.
- IPR Protection of genetic resources based on MTA
  The growing development of biological research has an impact on increasing biopiracy and misappropriation of genetic resources in resource-rich developing countries. Through the concept of intellectual property rights developed countries utilize the genetic resources and traditional knowledge of

[5] Article 3, Regulation of Health Minister No. 657/Menkes/Per/VIII/2009
[6] Point 6, Attachment I Regulation of Health Minister No. 657/Menkes/Per/VIII/2009
[7] Article17 Regulation of Health Minister No. 657/Menkes/Per/VIII/2009
[8] Article 6.2, attachment IIID Regulation of Agriculture Minister No. 15/Permentan/OT.140/3/2009 hal 34.

developing countries to obtain patents for their invention, then the results of their inventions are commercialized and inventors have the right to monopolize them. While the origin of the genetic resources does not benefit from the invention, even the developing country's population as the owner of the genetic resources is finding it difficult to buy such products, because of the high price. This is often the case with pharmaceutical products that most have been patented by the developed countries.

It cannot be denied that the concept of IPR is one of the factors that support the occurrence of biopiracy and misappropriation, especially the patent system. Patents are one type of IPR that is closely related to genetic resources; however TRIPs are only regulated in Article 27. Article 27 section (3) TRIPs states that good microorganisms that already exist in nature or genetically modified products are patentable subject matters. This means that TRIPs allow the grant of patent protection for genetic material (and its derivative products), but TRIPs does not govern how the patent is obtained. In addition, the TRIPs agreement does not provide patent provisions derived from traditional knowledge, whereas genetic resources are closely related to traditional knowledge. Traditional knowledge of genetic resources is usually owned by indigenous peoples or local communities that are incompatible with the patent system. The patent system recognizes only individual ownership, while traditional knowledge of genetic resources is group / communal.

The terms of a given product/process are patent-compliant (novelty), containing inventive steps and applicable in industrial processes. While traditional knowledge of genetic resources is a common heritage product and process, it is not a novelty. Some developed countries use traditional knowledge as a prior art to find their invention. This certainly does not provide justice for developing countries, especially indigenous peoples who have genetic resources and traditional knowledge. Thus, it is clear that the IPR system does not support the protection of genetic resources and traditional knowledge and with such a patent system it further supports the occurrence of one factor that supports the occurrence of biopiracy and misappropriation. This issue is a long-standing debate at the international level, as developing countries feel disadvantaged over IPR systems that do not accommodate the protection of genetic resources and traditional knowledge.

The attendance of the 1992 Convention on Biological Diversity provides little room for the protection of genetic resources. The CBD is a convention that gives sovereign right as the owner of genetic resources. Article 15 The CBD is an important article that initiates the concept of granting access to genetic resources from one country to another based on mutual consent, prior informed consent and fair and aquitable benefit sharing. The concept of access sharing within the CBD then gave birth to the Nagoya Protocol on Access to genetic resources and Equitable Fair Share Equity arising from its utilization of the CBD in 2010.

In contrast to the concept of intellectual property rights, the CBD in article 8 (j) protects traditional knowledge in the form of knowledge, innovations and practice of indigenous and local communities. However, this Convention is more focused on the protection of biological resources, so the focus is more directed to environmental issues than the issue of trade, especially in the field of IPR. The IPR issues mentioned in article 8 (j) CBD are only skin or superficial. CBD is not touching the main issue of how to protect the intellectual property of traditional local communities, especially in relation to the utilization of genetic resources in that community.[9]

CBD, Nagoya Protocol and ITPGRFA enables each participating country to make regulations related to access to genetic resources and profit sharing to suit the interests of individual countries. In ITPGRFA which gave birth to a multilateral system requested that the participating countries make a standard material transfer agreement for access facilitated by the multilateral system. Nevertheless, Indonesia does not currently have regulations regulating access and benefit sharing as it has been owned by some other developing countries. Indonesia is in the stage of Preparing the Bill on the Protection of Genetic Resources. Thus, material transfer agreements are the only mechanism available to facilitate the utilization of Indonesia's genetic resources with others, commercially or commercially.

The Material Transfer Agreement is one of the mechanisms that implement the CBD on access to genetic resources as determined by Article 15. In addition, the MTA includes an agreement on intellectual property rights, provisions on the rights of indigenous peoples or local communities, as well as on the benefit sharing arrangements sharing). With MTA contracts, providers and recipients have the freedom to determine the contents of the agreement because of its negotiable nature, but still must follow the standards provided in the country of the provider.

In the MTA standards regulated in Indonesia, namely the Regulation of the Agriculture Minister no. 15/PERMENTAN/OT.140/3/2009 and Regulation of no. 657/MENKES/PER/VIII/2009 contains the terms of intellectual property rights therein, including local community involvement and profit sharing.

According to the Agricultural High School of Agriculture that the IPR of the genetic material and its test material produced from the genetic material belongs to the provider, the recipient shall not be entitled to propose ownership and protection of intellectual property rights on the genetic material or its components received.

[9] Agus Sardjono, 2006, *Hak Kekayaan Intelektual dan Pengetahuan Tradisional*, Bandung: PT. Alumni, p. 68.

In the event that a recipient wishes to apply for intellectual property rights from the modification of its genetic material and/or its derivative, the right shall be mutually exclusive between the provider and the recipient and the provider is granted a permanent, non-exclusive and royalty-free sub license.

According to SMTA of Health Minister, material transfer agreements with foreign parties or commercial companies must contain provisions on the mechanism of compliance with the tracking system.[10] The research was conducted by the National Commission on Infectious Disease Research. This suggests an attempt to limit the use of biological material irresponsibly, thus protecting the ownership of biological material in the health sector from misappropriation.

With the regulation of Intellectual Property Rights in the MTA can make a means for IPR protection of genetic resources and genetic resources that have not been protected in IPR regime. Indonesia as the owner of genetic resources together with indigenous peoples can claim ownership of their genetic resources and traditional knowledge and prohibit recipients from acknowledging the accessed material as their own, limiting the recipient to disseminate the material to others and any invention found by the recipient of the results the materials used, the provider is also entitled to such intellectual property rights. This is supported by the agreement on the benefit sharing of the commercialization of the research products agreed in the MTA to the provider, in this case the government and/or with the local community. This will certainly provide benefits for the people of Indonesia as a provider.

Involvement of local communities in the agreement and each process of research is progress in the field of IPR that is individual. The local community will not be harmed by the taking of its genetic resources and traditional knowledge without clear advantages. The clarity is the prior informed consent determined before the agreement is agreed upon. This is in accordance with the CBD provisions.

However, there are some disadvantages associated with existing MTA standards in Indonesia today, some of which are:

1. There is no clear mechanism of local community involvement in the MTA standards, given that the ownership of traditional knowledge of genetic resources is considered a common property, making it difficult to condition them to be actively involved in this agreement.
2. In the MTA standard there is a clause regarding the benefit sharing on the utilization of transferred material. However, there is no regulation that regulates the standard of benefit sharing on the utilization of genetic resources as well as its sharing mechanism, especially to local communities.
3. The MTA standard provides restrictions on the recipient not to transfer material to third parties and other restrictions that attempt to prevent abuse of the use of such materials. However, there is no clear control and monitoring mechanism for the use of the material by the recipient.

There are several suggestions for strengthening Indonesia's position as a provider of genetic resources or biological material:

1. Through Material Transfer Agreement
   With the nature of a negotiable MTA, we can expand the definition of material coverage in the MTA, optimize negotiations to maximize the benefits of sharing and the government should establish an agency to actively monitor and monitor the implementation of the MTA.
2. Sui Generis System
   Currently WIPO has established Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (GRTKF), which protects traditional knowledge on defensive and positive protection of genetic resources. Defensive means the use of IPR systems for GRTKF protection, whereas positive protection means the establishment of a comprehensive whole system of protection or called sui generis.[11] So the choice of sui generis is the formation of a special legislation that can accommodate all the needs of traditional knowledge protection, such as access to genetic resources and benefit sharing.

   Thus, the government may enact a law on Access and Benefit Sharing in which regulates benefit sharing mechanisms and benefits from the utilization of genetic resources and traditional knowledge of Indonesia. As some other developing countries such as Philipine, Ethiopia, South Africa and Malaysia are currently in the form of the Access and Benefit Sharing bill.
3. The Role of Government as a Facilitator and Custodian
   Government as a custodian is expected to play a role in relation to the giving of prior informed consent and also as a party to the bioprospecting contract of a foreign party. In addition, the Government may become a representative of the public in relation to the occurrence of foreign misappropriation.[12]
4. Empowering NGOs as representatives of local communities
   The government can work with NGOs to socialize to the public about the development of law in the field of genetic resources and traditional knowledge, as well as folklore.

[10] Pasal 7 (m) Peraturan Menteri Kesehatan No. 657/MENKES/PER/VIII/2009

[11] Krisnani Setyowati, dkk. 2005, *Hak Kekayaan Intelektual dan Tantangan Implementasinya di Perguruan Tinggi*, Bogor: Kantor HKI – Institut Pertanian Bogor, p. 191.

[12] Agus Sardjono, 2006, *Hak Kekayaan Intelektual dan Pengetahuan Tradisional, Op. Cit,* p. 321-322.

5. In relation to the prevention of biopiracy and misappropriation of genetic resources and traditional knowledge, Indonesia may cooperate with some international communities, especially developing countries to require disclosure of origin, the obligation to disclose evidence of prior informed consent and Benefit Sharing agreement in a patent application.

Closing

Conclusion

The IPR regime does not provide adequate protection for genetic resources and traditional knowledge. TRIPs only stipulate that either existing microorganisms in nature or genetically modified products are patentable subject matters, but TRIPs does not govern how the patents are obtained. The patent system recognizes only individual ownership that is impossible to apply to traditional knowledge of genetic resources belonging to local communities.

In the Convention on Biological Diversity (CBD), Nagoya Protocol and ITPRFA provide provisions on access to genetic resources based on mutually agreed terms, prior inform consent and fair and equitable of benefit sharing. But the CBD does not accommodate intellectual property rights issues over genetic resources.

The MTA is one mechanism that can facilitate agreements on access to genetic resources, biology materials as well as intellectual property rights arising from the use of such materials. In Indonesia, the arrangement regarding the Material Transfer Agreement is regulated more specifically in Regulation of the Agriculture Minister no. 15/Permentan/OT.140 / 3/2009 concerning Guidance of Material Transfer Agreement and Minister of Health Regulation no. 657/Menkes/Per/VIII/2009 concerning the Delivery and Use of Clinical Specimens, Biological Material and Information Content.

The existence of MTA Arrangements provides many advantages for Indonesia as a provider, especially in protecting intellectual property rights in the field of genetic resources. Through the MTA, we can determine the benefits sharing, implement the prior inform consent; limit the recipient of the use of the material, thus preventing misappropriation because the recipient has no right to claim IPR freely. Some of the weaknesses of the MTAs in Indonesia are the lack of clear mechanisms for local community engagement, no regulation on benefit sharing and also unclear mechanisms for monitoring the implementation of agreements.

Suggestion

To strengthen the position of Indonesia as the owner of genetic resources and for things that may be done by other parties (foreign), there are several things that need to be done, namely:

1. With the Nature of a negotiable MTA, we can share the definitions contained in the MTA, a negotiating strategy to maximize the benefits of prayer and the government to shape the Content.
2. Sui Generis System, namely the establishment of Access and Benefit Sharing legislation
3. The Government as a facilitator, who plays a role in making agreements between beneficiaries and local communities and as custodians who play a role in the agreement with the provision of informed consent
4. Empowering NGOs as representatives of local communities
5. Indonesia may cooperate with some international communities, requiring the disclosure of origins, the obligation to prove the existence of informed consent and the Benefit Sharing Agreement in a patent.

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THE ROLE OF COOPERATION IN DEVELOPMENT ECONOMY IN INDONESIA

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ABSTRACT

Cooperatives as a pillar of the Indonesian economy increasingly perceived the role and benefits for members and society in general, if there is awareness and clarity in terms of membership of the cooperative. The cooperative unites the small economic and social forces into one great power, thus forming a more powerful dual-power (synergic). The spirit of helping together is the beginning of its momentum to be independent. The role of cooperatives in the economy in Indonesia is needed to improve the welfare of society. Cooperatives in realizing the welfare of the people still need help from the government, but in its development it is not necessary to cause the cooperative to continue to depend on the aid. The role of government in the development of cooperatives is limited to the effort to build cooperatives in realizing the independence of cooperatives towards equitable distribution of social welfare.

Keywords : Cooperatives, Development, Economy

Introduction

The development of the national economy aims to realize the economic sovereignty of Indonesia through the management of economic resources in a climate of development and empowerment of cooperatives that have a strategic role in the national economic order based on the principle of kinship. The development and empowerment of cooperatives in a Cooperative policy should reflect the value and principles of the Cooperative as a joint venture to meet the aspirations and economic needs. Cooperatives as a people's economic movement as well as business entities play a role to realize a developed, just and prosperous society based on Pancasila and the 1945 Constitution of the State of the Republic of Indonesia.[1]

Cooperative is a nation's economic pillar is still a complex problem that makes it difficult to develop. Cooperative movement has not been able to contribute greatly in the economic sector due to problems ranging from institutional to legislation so that cooperatives complicate their business.

In the provisions of Article 33 of the 1945 Constitution is not at all anti-big business and even need to build themselves into big. The provisions of Article 33 merely affirm that the large ones need to be owned by the people, those who are related in a common bond, ie in the connection of production, consumption, and territory. The existence of cooperatives in the face of globalization does require great efforts efficiently, without neglecting that small and efficient can be strongly survived.

Cooperatives are socio-economic institutions to help themselves together. This effort can grow in the community itself thanks to the emergence of self-empowering awareness, but can be grown from outside the community as an effort of empowerment of agents of development, either by government, community elite, students, universities or by community organizations, , etc., which are grassroots and bottom-up approaches. In other words, "self-help together" as Gemeinschaft's tendency, which if formalized (given face) toward Gesellschaft, will be a joint enterprise called Cooperative.

One of the functions of the cooperative to unite the small economic and social forces into one great power, thus forming a more powerful dual-strength (synergic). The spirit of helping yourself together is the beginning of its momentum to be independent. Mandiri is the result of self-empowerment activities. The effort to nurture society and students through cooperatives is not starting point, proceeding and ending firmly, ie to make it self-sufficient (either in terms of "economic added value" or "social-cultural added value"), then a fatal mistake will occur.

Economic and business development must always refer to and support the development of the people of the nation and state. Economic and business development requires entrepreneurship with a state of mind distinct from partial entrepreneurship that closes itself from the national interest, which is broader than the interests of the individual.

The Indonesian nation in developing the economy must be able to realize independence or economic degradation or sovereignty. The dimension of Indonesia's entrepreneurship challenge, again can not only refer to individualism, it must also refer to togetherness (based on participation) and the principle of kinship (which refers to emancipation) to form a solid and effective national consolidation of the national economy against globalization.[2]

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[1] Consideration of Law Number 25 of 1992 concerning *Cooperatives*
[2] Sri-Edi swasono, 2002, *Scientific Oration*, Jakarta.

The role of government in the development of cooperatives is still needed because many people do not understand about cooperatives because their education level is still very low and the information is not yet complete about the real nature of cooperatives. Government assistance to cooperatives does not need to cause the cooperative to continue to depend on the aid. The role of government in Cooperative development is only limited to the effort to build an independent cooperative. In the event that Cooperative has been self-sufficient, the next stage is that the government must completely stop its assistance and let the cooperative organization to live autonomously.

Main Problem

Based on the background of the above problem, it can be formulated the problem as follows :

1. What is the development of cooperatives in economic development in Indonesia?
2. What is the role of cooperatives in economic development towards equitable welfare of the people?

Discussion

The Development of Cooperatives in Economic Development in Indonesia

The history of cooperatives in Indonesia has been known during the transition of the 19th century, which means that more than a century later also practiced by the leaders of the national movement. After the proclamation of the role of the cooperative was included in the constitution, thus having a strategic political position, then in 1947 the cooperative movement united itself in the container of the cooperative movement, which is currently named Dekopin.

Various political support from the state and the single container of the cooperative movement, should the Indonesian cooperative be established as a strong and healthy economic and social institution. The fact shows that the cooperative on the basis of the constitution has been coveted as a "teacher of the national economy", is currently not experiencing significant development, so very far behind from cooperatives in other countries, including co-operatives in developing countries.

The precise idea of founding fathers for cooperatives to be the "ultimate actors" in the national economy by including the role of cooperatives in the constitution, translated by government to government in accordance with its political mission. Thus during the "old order" of the cooperative became the "political tool" of the government and the party in the context of nasakomisasi, during the "new order" the cooperative became "a tool and an integral part of the national economic development" abounded with various facilities. Indonesian cooperatives in this era of globalization generally have three challenges: The first challenge, improving its image as a collection of economically weak group of facilities hunters. Secondly, its contribution, although socially quite high, is nominally very low in the national economy compared to private enterprises. Third, the lower public awareness to cooperate through cooperatives in line with increasing modernity and individualism.

All members of the cooperative, should believe in the ethical values of honesty, openness, social responsibility, and caring for others. A good cooperative, will not let its members fall behind each other in improving their welfare. The determination to manage change intelligently and wisely with the spirit of nationality, democracy, and independence to be the master of the country itself. Based on these principles, the cooperative is the institutional manifestation of the anticapitalism movement which is the child of globalization. Raising cooperatives means stemming the negative effects of globalization. Let it, means to position the people to compete not with the equivalent. If it does not protect it, it wipes the welfare of millions of street vendors, laborers, fishermen, and peasants who are the people of most Indonesians. The results of Josua's research[3] stated that cooperatives in Indonesia still need government support but are placed within the framework of accelerating self-reliance of the cooperative itself.

Lazlo Valko's Theory View of government support in cooperative development.[4] This theory emphasizes the stages that must be passed in coaching the cooperative by the government, and any wisdom that can be taken at each stage. Rozi divides the stages of government support into three, namely the stage of offisialisasi, deoffisialisasi, and autonomous. At all three stages, government support should be reduced so that the cooperative can grow into an autonomous and member-oriented cooperative.

The policy that plays the role of government is very dominant in the development of cooperatives, making the cooperative movement becomes highly dependent on external assistance, which is very contrary to the nature of cooperatives as an independent social economic institutions. The dependence of the cooperative movement in this reform era is still very strong, which is reflected in the complete dependence of Dekopin, the single organization of the cooperative movement in the APBN (one thing that encourages prolonged conflict within the movement itself), not on the support of its members as a form of independence.

[3] Josua Murpin, 2012, Effect of Government Support, Member Participation and Organizational Culture on Strategy and Performance of Women Cooperative in East Java. Dissertation, Postgraduate of Airlangga University, Surabaya

[4] Rozi and Etha, 2002, *Economic Cooperatives*, Bintang, Surabaya, p. 71-73

The cooperative movement (cq Dekopin) and the Government (cq Ministry of Cooperatives and SMEs) that should be shoulder to shoulder in the development of cooperatives, as some neighboring countries do, it is very difficult to happen, so each has its own agenda, undirected. Including the development of agricultural cooperatives which after the KUD no longer empowered, not to mention there is a thought to build agricultural cooperatives.

The United Nations (with the United Nations Convention of 1999 and 2001) reaffirms its hope for the important role of cooperatives in the world in three ways: *poverty reduction, acceleration of employment, and strengthening social integration*. It's good that economists, technocrats and students want to open their eyes to reality in the world and not to disempowerment their own conscience and thinking ability. Cooperatives around the world are progressing. Only in Indonesia is the cooperative slumped by denying its true identity, adopting a *top-down* approach that should be *bottom-up*.

The existence of kopersi has perceived its role and its benefit to society, although its degree and intensity is different, there is at least a form of cooperative existence for society. First, the cooperative is seen as an institution that runs a certain business activity, and business activities are required by the community. Such business activities may be in the form of services of financial or credit needs, or marketing activities or other activities.

At this level, usually the cooperative providing business services that are not provided by other business institutions or other business institutions can't implement them due to regulatory obstacles, the role of the cooperative is also happening the customer does not have accessibility to the service from other institutions. Gems, the role of some Credit Cooperatives in the provision of relatively easy funds for its members compared with the procedure that must be taken to obtain funds from the bank.

Secondly, cooperatives have become an alternative for other business institutions. In this condition the community has felt that the benefits and role of the cooperative is better than the other institutions, the involvement of members (or non-members) with the cooperative is due to rational considerations that see the cooperative able to provide better service. Cooperatives that have been in this condition are considered to be at a higher level in view of its role for the community. Some KUDs for certain business activities are identified to be able to provide benefits and roles that are better than other business institutions.

Third, the cooperative becomes an organization owned by its members. This sense of belonging is considered to be the main factor causing the cooperative to survive in a variety of difficult conditions, namely by mengandalakan member loyalty and willingness to cooperate with members of the cooperative difficulties. At a time when banking conditions become erratic with very high interest rates, the loyalty of members of the cooperative to make the member does not transfer funds in the cooperative to the bank. The consideration is that communications with cooperatives have been running for a long time, it has been known that their ability to serve, member organizations, and the uncertainty of bank interest. Based on the above three conditions, then the actual role that is expected is that the cooperative can be a member-owned organization as well as able to become a better alternative than other institutions.[5]

The existence of cooperatives is strongly influenced by the pattern of cooperative relationships and members and society dominated by business relationships. This is very visible in the pattern of cooperative relationships and members in the KUD. As a result often become a cooperative that is not cooperative or also known as cooperative management and cooperative investors because cooperatives and members into different entities conduct transactions with each other, not even rarely different interests, managers and investors on the one party on the other.

Cooperative development seen that the pattern of cooperative relationships and members in accordance with the basic principles of cooperatives do require the process. Awareness of membership has been successfully grown, then the awareness will be the basis of motivation in which the pattern of business relationships can be sustainable through participation that later developed into loyalty. Patterns that are not only business relationships will then become a source of cooperative strength.

The Development of Cooperatives as a Business Entity Which Able To Build People's Economy

The development of cooperatives as a formidable business entity that is actually capable of participating in developing economic activities for the community needs to be discussed from two interrelated sides, namely the development of the economy itself and the direction of cooperative development. The development of the economic field explicitly wanted the realization of economic democracy for the welfare of the whole society. Economic growth should also be able to increase people's incomes and avoid imbalance. In this context, greater attention is needed to the economic development of the people. In harmony with the direction of economic development as it is intended this cooperative is directed to be able to act as a place of people's economy.

[5] Sukamdiyo, 1997, *Cooperative Management*, Erlangga Publisher, Semarang

Institutional engineering should be able to encourage the development of agribusiness entering the open market, but also capable of giving greater meaning to efforts to improve the welfare of farmers. Agribusiness as a rural-based business through institutional engineering should be more proportionally owned and enjoyed by rural communities. It is in this concept of institutional engineering that conforms to the conception of cooperative development in rural areas. The experiences of some relatively advanced countries of agribusiness development, such as Thailand, Denmark and the United States show that agricultural cooperatives are very close to agribusiness. Cooperatives in these countries have a representative rule in agribusiness institutions are clearly very impartial to producer farmers through cooperative institutions.

Based on observations in various cooperatives and exploring the aspirations of various parties related to the development of cooperatives, especially the participants of the cooperative itself.[6] The development of a permanent cooperative if there is a collective need to improve the economy independently. People who are aware of their need to improve themselves improve their welfare or develop themselves independently is a prerequisite for the existence of cooperatives.

According to Ima Suwandi[7] as part of the identification of various fundamental factors, it is necessary to realize that the fulfillment of these factors can indeed be trade off with consideration of short-term performance of a conventional organization. The process undertaken in the development of cooperatives does require a longer time with a variety of nonbisnis factors strong influence. Fulfillment of these fundamental factors can lead to other performance indicators, such as short-term business growth, to be sacrificed in order to gain a more fundamental interest in the long term.

The Role Of Cooperatives In The Development Of The Indonesian Economy Towards Equitable Community Welfare

Cooperatives in many developing countries are developed without having squeezed in the direction of the degree of consistency of the identity. Since the beginning of cooperatives developed through the mechanism of state intervention. Therefore the success of the business is not too in tandem with the degree of independence. The principle of identity is a source of cooperative power, but the principle of identity can also be a restriction for the cooperative itself. This happens if the cooperative has grown to be true and exceeds the needs of its members.

The success of the co-operative develops itself and raises the standard of living of its members will become uneconomical if only rely on service for its members only, so the identity of the customer owner is only one-sided. In this case members will still be able to meet the demands to be loyal to the cooperative as the implementation of the principle of identity. For the sake of efficiency the cooperative must develop out of its members in order to take advantage of its overcapacity. Based on this road, it is expected that the cooperative does not neglect the identity principle.

Cooperatives in developed countries respond to the phenomenon of change actively. One way is to develop new instruments to tie fixed members into its service network. The model that can be used as an example is a direct charge cooperative model that is widely developed in Canada. Basically this model is neutral because the principle is only possible to be developed in the presence of a pioneer or successful legacy of previous cooperatives. Because the cooperative is no longer initiated and dimodali by its members, but only maintenance for its continuity is maintained by cooperative mechanism.

The above empirical experiences show that the principle of identity is not always implicit in any cooperative, but will evolve according to the internal and external conditions of the cooperative. The principle of identity can also be maintained with a new innovation either in the field of technology or build another dependency. If the principle of identity can shift, then of course the value on which to defend it can also grow to meet the demands of organizational and environmental progress.

The government is actually aware of this but often, do not know the way out or even enough are caught in the view to save the cooperative agencies rather than securing the purpose of developing a cooperative mechanism. It is this disease that eventually leads to prolonged dependence and dragging the cooperative into burden rather than a member struggle tool.

Overcoming the disease is nothing else but to restore the cooperative to fully be able to hold on to its basic values especially concerning autonomy and democracy. The cooperative without such value will forever be dry and will not be able to produce a cooperative that can hold on to the principle of identity that is the source of its power. Globalization as a new development will indeed open up a new dimension that leads to interdependence and increasingly adhering to the principles of healthy competition. In such a situation the continuity of a business as well as the economic development of a country will depend heavily on the ability to create a *competitive advantage* and is no longer limited to the advantages gained by gifts from nature.

Cooperatives that were originally developed in market mechanisms will not experience significant problems. He will still be able to compete and run his business. Cooperatives in developing countries may experience a wide range of experiences.

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[6] Harsono Subyakto and Bambang Tri Cahyono, 1990, *Economic Cooperative II*, Publisher Kurnika, Jakarta

[7] Ima Suwandi, 2007, *Economic Social Organization Cooperative*, Bharata Karya Aksara Publisher, Jakarta.

The development of cooperatives that are out of control of the market creates sustainable dependence, both as part of the national economic policy as well as the specific policies for the protection of cooperatives. Cooperative without identity principle and business does not have a competitive advantage in a healthy market mechanism of a business activity.

In the social and economic conditions that are so characterized by the role of the business world, it is inevitable that the role and also the position of cooperatives in society will be largely determined by its role in business activities (business) and even the role of cooperative business activities then become a determinant for other roles, cooperative as a social institution.[8]

In responding to this experience actually the basic value of the cooperative can be a source to improve the position of its competitive advantage, especially if the poverty environment of its members has significantly reduced. Cooperative without returning to base value, it becomes a protective burden of prolongation and can not be a means of economic struggle of its own members. The source of the co-operative power lies in its concern and democracy. Such social content still makes the cooperative different from other business entities and with the character of democracy that knows no boundaries of capital owners, cooperatives can actually realize the equitable distribution of social welfare.

Closing

Based on the description of the above discussion, it can be concluded as follows :

1. The development of cooperatives in economic development in Indonesia through participatory institutional development approach and avoiding development based on compliance with the direction of other institutions, the community needs to grow their awareness to be able to make their own decisions for their own sake. Cooperative in realizing required a variety of indirect support but clearly have the spirit of leadership in the cooperative and people's economy. Revitalizing the role of government will be the most decisive factor in the perspective of participatory development in the future.
2. The role of cooperatives in economic development in the era of globalization in Indonesia is highly colored by the role of the business world, the role and position of cooperatives in society will be largely determined by its role in business activities (business), even the role of cooperative business activities then become a determinant for other roles , such as the role of cooperatives as a social institution. The strength of cooperatives lies in the awareness and character of democracy that knows no boundaries of capital owners, so that cooperatives can actually realize equitable distribution of the welfare of society.

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COOPERATION AGREEMENT BY PARTNERSHIP REGULATE WITH SUBCONTRACT FROM BETWEEN UMKM AND LARGE COMPANY

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ABSTRACT

Partnership is a cooperation in business interconnection, either directly or not, on basis of mutual need, trust, strengthen, and profitable that involves the main actors of micro, small and medium enterprises with large companies. A partnership manifested in a partnership agreement. Partnership Agreement is written agreement which at least regulate business activities, rights, and obligation each party, forms of development, the period and the settlement of disputes. Partnership between Micro, Small, and Medium enterprises with large companies includes the transfer of skills in the field of production and processing, marketing, investment, human resources, and technology. Regulate partnership reflection of the role of state actively in managing economic process and the legally is part of the responsibility of the state as regulator in bringing prosperity to micro, small and medium enterprises which cooperates in partnership with foreign capital companies.

Keywords : Agreement, Partnership, Subcontract

Introduction

Development of the business world, there are several forms, among other things through the form of company-large companies that use large capital, such as Limited Liability Company Commanditaire, and N V. Form of the company form an offender - perpetrator large companies with broad reach, both on capital , marketing and cooperation. However, there are mid-sized companies and small who are perpetrators of micro, small and medium enterprises. Business micro, small and medium enterprises are the kinds of businesses that are very real to sustain national economic development, including regional development. In order to develop mid-sized companies and small needs cooperation with major companies to be more far-reaching, more powerful in capital and marketing.

Micro, small and medium enterprises have accrued, and the potential of a very important role in realizing the objectives and strategic development, particularly in the economic field. Micro, small and medium enterprises (SMEs) is a business activity that is able to expand employment and provide economic services to society, play a role in the process of equalization and improvement of people's income, and promote economic growth in the realization of national stability and the stability of this economy. Sector (MSME) has long been the foundation of 92.72% of the workforce outside the government and large enterprises, should occupy an important place in the face of Indonesian economy post-crisis.[1]

Some examples of micro, small and medium enterprises, among others, printing, screen print shirts, business of making snacks (or catering), manufacture of sandals with used tire material, basket with attractive models or the waste basket from water hyacinth plant material, weaving / batik is simple and there are many types of businesses with capital to micro, small and medium-other. The forms of the business capital is not too large, the range for marketing is also not too wide, so that is not too large relative benefits.

The durability of micro, small and medium enterprises during the Indonesian economic crisis in 1997-1998, and in 2007 it is evident that SMEs can overcome the crisis storm, because it is real, and not dependent on raw materials from outside country. Pramajati Wiji research results and Widyarini (2007: 47) on "The role of SMEs (SME) in improving the economy of the People in Pekalongan" shows that SMEs are able to contribute greatly to the economy rakyat.UKM able to move people's economy, providing new jobs and even capable of initiating the establishment of hospitals, schools and repair places of worship. In such conditions it needed a larger SME development in order to reach a wider marketing that will require a larger capital development. The impact of the development of SMEs to become bigger and eventually become a large company will add benefit to people who are more especially for employment.

Development and empowerment of SMEs as an economic institution, through cooperation between entrepreneurs of large enterprises to small and medium entrepreneurs are business activities that can absorb a lot of labor to do with the transfer of technology and the improvement of product quality and quality improvement human technology. Over resources, may be the settlement originally done by human labor with mechanical power changed so much faster and neater. Improved product quality will be better, it must be adapted to the standard so that it can be expanded export marketing (need to control the quality of the product), as well as for the quality of human resources is necessary, in this case can be through training, counseling.

[1] Suzetta, National Planning Development of Micro, Small and Medium Enterprises, delivered in the event of Accelerated Development of SMEs in the Region, Jakarta, 20 February 2008

Training and education are not limited to products, but also SME financial management and marketing. Besides UMKM development can provide economic services to the wider community, to encourage economic growth and plays a greeting realize national stability.[2]

MSME development and this can be done with the partnership, especially between employers and large corporations with medium and small entrepreneurs. Employers big companies are no longer restricted to entrepreneurs and investors in the country but also including the foreign investors. Act No. 25 of 2007 on Investment no longer distinguish between domestic investors with foreign investors, both have the same rights and obligations, including foster and establish a partnership with SMEs. Partnership for the development of SMEs is particularly true for product marketing reach and technological development.

The partnership pattern is done to help increase the quality and quantity of Small and Medium Enterprises still face many obstacles and constraints, both internal and external, in terms of production and processing, marketing, human resources, design and technology, capital, and business climate , This partnership is realized in cooperation procurement agreements between small and medium enterprises with large employers in accordance with the needs of large enterprises for goods that can be made and supplied by SMEs.

Pattern Partner Between SMEs with the Investment

Law No. 25 of 2007 on Investment is a manifestation to better accommodate various interests, including the interests of domestic and foreign interests, especially regarding equal treatment of foreign investment by domestic investors, certainty and legal protection for investors. This same enactment, among others, capital, establishment of limited liability companies, business sectors, as well as the responsibility to develop and establish cooperation with SMEs.

Investment capital for micro, small and medium becomes part of the basic policy of investment whether using foreign capital and joint venture with a domestic investor (Article 1 point 3 No. 25 of 2007 on Investment). The partnership between Micro, Small and Medium by the Company of foreign capital include the transfer of skills in the field of production and processing, marketing, financing, human resources, and technology as stipulated in Article 25 point 3 of Law for Micro, Small and Medium and Article 13 paragraph 2 of Act No. 25 of 2007 on Investment. Partnership is mutually beneficial cooperation between big companies with SMEs, and to avoid the takeover of Micro, Small and Medium to be part of the foreign capital enterprise.

Micro, is a productive enterprise belonging to individuals and / or entities that meet the criteria of individual businesses, Micro as regulated in Law Number 20 Year 2008 on Micro, Small and Medium Enterprises. Small Business is a productive economic activities that stand alone, carried out by an individual or business entity that is not a subsidiary or not branches of companies owned, controlled, or be a part either directly or indirectly from businesses Medium or Large companies that meet the criteria of business small as stipulated in Law No. 20 Year 2008 on Micro, small and Medium Enterprises (MSME Act).

Article 13 of Law Number 20 Year 2008 on Micro, Small and Medium asserts that the concept of partnership is cooperation in business relations, either directly or indirectly, on the basis of the principle of mutual need, trust, strengthen, and profitable involving actors Micro, Minimum and Medium to large company. This partnership contained in the written agreement at least regulate business activities, rights and obligations of each party, the form of development, duration, and completion of the partnership dispute. Agreement must not conflict with the basic principle of the independence of Micro, Small and Medium Enterprises as well as not create dependency Micro, Small, and Medium to large. Companies are prohibited from possessing and / or control of micro, small and / or medium as a partner business in implementation of partnerships as referred to in Article 26 of the Law for Micro, Small and Medium Enterprises. Foreigners business who invest through an agreement for Micro, Small and Medium as provided for in Article 25 (2) of the Law for Micro, Small and Medium includes the transfer of skills in the field of production and processing, marketing, financing, human resources, and technology.

Article 35 (1) Big forbidden to own and / or control of micro, small, and / or Medium as business partners in the implementation of the partnership referred to in Article 26 of Law SMEs. The concept of partnership, as mentioned above reflect the active role of the state in managing the economy with the legislation is part of the responsibility of the state as a regulator in the welfare of the Micro, Small and Medium doing partnership with foreigners business. Capital pattern firms not only involve SMEs partnerships with companies great but it also requires an active role of government as regulator. The government's active role in order to realize the people's welfare through partnerships. Welfare of the people is a manifestation of the welfare state, because it basically refers to the "role of the state that is active in managing and organizing the economy." In order to promote the general welfare in a welfare state poses some consequences on governance which the government must play an active role to interfere in the field of socio-economic life of society (Julista Mustamu, 2011). Government obligations in the concept of the welfare state and the responsibility of the state

[2] Marzuki, 2005, the National Economy and International Analysis: Economic Policy, Economic Democracy, Banking, Credit, Money, Capital Markets, Enterprise, Privatization, Foreign Debt Entrepreneur, and Sectoral Economic Issues, Options Media Discourse, Jakarta, p 75

as regulator to bring welfare as social rights of citizens, requires that the state has the ability to adequately support the economic growth needed businesses.

Partnership arrangements for Micro, Small and Medium Enterprises with foreign capital investment in SMEs and UUPMAct

Criteria of micro, small and medium enterprises as stipulated in Article 6 of the Law of SMEs are:

(1) Criteria for Micro are as follows:
   a. have a net worth of at most Rp50,000,000.00 (fifty million rupiahs), excluding land and buildings; or
   b. has annual sales results Rp300,000,000.00 (three hundred million rupiah).

(2) Criteria for Small Business is as follows:
   a. have a net worth of more than Rp50,000,000.00 (fifty million rupiah) up to at most 500,000,000.00 (five hundred million rupiah) not including land and buildings; or
   b. has an annual sales turnover of more than Rp300,000,000.00 (three hundred million rupiah) up to at most Rp2.500.000.000,00 (two billion five hundred million rupiah).

(3) Criteria Medium Enterprises are as follows:
   a. have a net worth of more than Rp 500,000,000.00 (five hundred million rupiah) up to at most 10,000,000,000.00 (ten billion rupiahs), excluding land and buildings; or
   b. has an annual sales turnover of more than Rp2.500.000.000,00 (two billion five hundred million rupiah) up to at most Rp50.000.000.000,00 (fifty billion rupiah).

(4) The criteria referred to in paragraph (1) letter a, b, and (2) a, b, and paragraph letter a, letter b, the nominal value can be changed in accordance with the economic development that is regulated by Presidential Decree.

Furthermore, the Act of SMEs also described the sense big business as stipulated in Article 1 paragraph 4 of Law No. 20 of 2008 states that:

> Large companies are economically productive activities conducted by enterprises with total net assets or annual sales greater than Medium Enterprises, which includes state-owned enterprises or private national, joint ventures, and foreign businesses conducting economic activities in Indonesia.

Criteria for this great effort can be likened to large investors as stipulated in Law No. 25 of 2007 on Investment.

Investors, both domestic and foreign to be investing in Indonesia, both in the form of joint venture, partnership or independently, it must form a Business Entity as set out in Article 5 of Law No. 25 of 2007 on Investment, namely:

(1) Investors in the country can be in the form of business entity that is a legal entity, not a legal entity or individual, in accordance with the statutory provisions.
(2) Foreign investors shall be in the form of a limited liability company under the laws of Indonesia and domiciled in the territory of the Republic of Indonesia, unless otherwise stipulated by law.
(3) Investors in a foreign country and making an investment in the form of a limited liability company is done by:
   a. take shares when the establishment of a limited liability company;
   b. buy stocks; and
   c. perform other means in accordance with the provisions of the legislation.

The government's policy is implicit in Article 13 (1) of Capital Market Law requires that a foreign capital enterprise that will develop the business to establish business fields that are reserved for micro, small, medium, and cooperative and business sectors opened to large companies, subject to working together with the business micro, small and medium enterprises and cooperatives. Furthermore, in Article 13 (2) Capital Market Law, the Government of the coaching and development of micro, small, medium, and cooperatives through partnership programs, increased competitiveness, encouragement, innovation and market expansion, as well as the dissemination of information widely.

In principle, any form of business every establishment, whether micro, small, medium and large self-contained, meaning it runs its activities as an independent establishment. SMEs provide a significant contrision in the WTO world trade has provided opportunities by providing a community forum for the negotiation of SMEs (SMEs) to have access to markets, strategies and policies to develop themselves in the international market.[3]

Forum International Ministerial Conference on "Enhancing the Competitiveness of SMEs in Global's Cooperation and Development (OECD) which resulted in Bologna Charter which held in Bologna, Italy, also

[3] Sunil Bhargawa, *World Trade Organisation Regime:Impact onSmall And Medium Enterprises (SMEs),Commite onTrade Laws and WTO*, Institute of Chartered Accountants of India, sebagaimana dikutip Mukti Fajar, ND, *UMKM di Indonesia, Prespektif Hukum Ekonomi*, Pustaka pelajar, Yogyakarta, 2016, hlm .76

support the strengthening of the SME sector in the globalization of the restructuring of the economy, because it is considered a big impact on the structure of the world economy.[4]

This view is in line with the mandate of Act No. 20 of 2008 mandated to create a synergy, mutual cooperation, mutual strengthening and mutual benefit to achieve common prosperity.

The strength of SMEs in globalization is determined by two things, first the ability to perform Import export between nations. Second, the ability of SMEs to partner with a big corporation, which in practice is in dire need where SMEs.[5] The strength of the SMEs as well as a challenge, because of the consistency, capital and networks to carry out export-import is very important. To support power and face those challenges, the existence of large enterprises is very important, both to maintain the sustainability of the business of SMEs as well as to fulfill the needs of large enterprises. Mutually beneficial cooperation between SMEs with large companies is a form of partnership embodied in cooperation agreements between SMEs to large corporations.

Subcontracting the Cooperation Agreement between the SMEs to Large Enterprises.

Sub contract is part of the partnership, as stipulated in Law No. 20 of 2008 on SMEs (hereinafter referred to as Law SMEs), in article 26, which says:

Partnership carried out with pattern:

a. Nucleus-plasma;
b. Subcontracting
c. franchise
d. general trading;
e. distribution and agency; and
f. other forms of partnerships, such as: the operational result of cooperation, a joint venture (JV), and outsourcing.

Further sub-contract forms a partnership agreement described in article 28 which states:

Implementation of a business partnership with as well as the subcontract pattern referred to Article 26, paragraph b, to produce goods and / or services, large enterprises to provide support in the form of:

a. opportunity to do most of the production and / or components;
b. chance of obtaining raw materials produced on an ongoing basis with the amount and reasonable price;
c. guidance and technical capabilities of production or management;
d. acquisition, control, and improvement of the necessary technologies;
e. financing and payment system settings that are not detrimental to either party; and
f. Make a break effort not unilateral relationship.

The partnership agreement with the pattern of subcontracting, what it means is not regulated in the Act of SMEs, but can be interpreted simply as a treaty between SMEs with large companies to work and / or obtain something (by SMEs) arrives supposed to be done by someone else (big companies) that determines rights and obligations for both parties.

A cooperation agreement in the form of a subcontract between SMEs with large companies not only produce products required by large companies, but also the supply of raw materials, technology transfer, management guidance and capital development through financing and regulation of payment systems provided by large companies to SMEs, with the principle of mutually beneficial and does not terminate unilaterally. Besides, it also encourages the formation of market structure which ensures healthy growth that effort competition and protect consumers, and prevent market domination and concentration of effort by individuals or groups that harm Micro, Small and Medium Enterprises.

The position of SMEs and large companies should be at the level that is commensurate. Bargaining is meant is that in doing joint ventures with other parties have a position equivalent and mutually beneficial. MSME Law also regulates the status of the parties as set forth in article 35 which is advantageous:

(1) Big forbidden to own and / or control of Enterprises, Small and / or Medium as exercising their business partners in the partnership referred to in Article 26.
(2) Medium Enterprises are prohibited from possessing and / or control of the Micro and / or Small Business business partners.

Under the provisions of Article 35, then the partnership is a strong foundation for mutual support and avoid competition with large enterprises and SMEs do not happen the company's acquisition of SMEs by large companies does not happen the company's acquisition of SMEs by large companies.

The partnership agreement with the pattern of subcontracting, primarily procurement by SMEs to large corporate interests. Procurement of goods, raw materials can be obtained from large companies or all provided by SMEs. Goods produced can be semi-finished goods or finished goods in accordance with the agreement of the need for the provision of goods by SMEs.

[4] *Ibid*, p. 77
[5] *Ibid*, p. 78

Advantages of SMEs to subcontract patterns other than those mentioned in Article 28 of the Law on SMEs, it is also still possible to gain, among others:

a. expand greater production opportunities.
b. expand export opportunities;
c. technology development;
d. business development and enterprise;
e. transformation in the free market phase.

Than large companies benefits with their partnership agreement with sub contract patterns, among others:

a. can focusing on more promising business areas;
b. durability and greater competitiveness;
c. improve business organizations to gain a greater carrying capacity and strong;
d. have the opportunity to further develop;
e. value and income can be increased.

Thus the existence of an agreement with the pattern subcontracting is a mutual agreement between the SMEs to large corporations. Besides, it also will absorb a larger workforce in the public welfare.

Justice in the Partnership between the Micro, Small and Medium With foreign capital investment

Meaning of justice is divided into two elements, which is an element of formal and substantial elements, can be explained as follows:

1. Justice is the formal element that is
   a. Appropriate and comply with the rules or any applicable laws;
   b. The rules seek, guarantees, and provides a similar relationship in the fields of economic life, social, political, cultural, technological and so on;
   c. Equality is built to overcome the natural barriers that lead to the individual is not able to develop themselves;
   d. Such rules existed as procedures;
   e. There is a dependence or influence from the authority of shaper rule
   f. For what is understood as justice are dynamic and not well established
2. Substantial Justice
   a. Justice was born as the primacy of nature
   b. Ethical and moral weighs
   c. Is generally accepted as a good of another individual or group
   d. Give what he deserves someone on the results of his efforts
   e. Open access and participation for each individual..

Justice is not just a matter of giving something that deserves everyone else, but also call for and belief in the moral responsibility to fill the space of a life together with solidarity and dignity.[6]

Justice as fairness is fundamentally a political morality that gives attention to the distribution of rights and obligations in a fair for the creation of a relation of the most profitable among all members of society so that the concept of justice as fairness itself carries some of the demands of structuring social politically important, especially in accordance with spirit of democracy that puts the people's sovereignty as the cornerstone upholding the well-ordered society where sovereignty is not interpreted as a right to demand something from the other, but at the same time as well as the obligation to implement the sovereignty responsibly. As a political morality, fairness requires not only the importance of a fair distribution to all social resources available, but also emphasized the necessity to recognize the political rights of every citizen as equal rights to political participation, the right of citizens to non-compliance, as well as the rights of citizens to reject any policy or political decisions that are contrary to conscience [7]

justice fairness can be met if a human return to the home position in which this position is a position that hiptetif or active, but the assumption of this position is required lest the principles of justice sought mixed by considerations that are not honest. Meaning of Justice as fairness the original position resting on realized with procedural fairness, it means that justice must be based on certain values. Procedural fairness does not mean interpreting the values of substantial moral foundations, but it raised a substantial value of togetherness, namely the right of all people as human beings. So justice contains an equal da respect.. [8]

Social justice is one of several types of justice. Social justice can be interpreted not a question of individuals, but a moral issue related social problems of structural impersonal which means that the issue of social justice is not determined by the will of good to bad to specific individuals, but is dependent on the structures of power in society, such as structure economic, political and cultural. Social justice requires social

[6] Al Andang Binawan dan Tanius Sebastian 2012, *Menimbang Keadilan Eko Sosial*, Kertas Kerja Epistema No 7/ 2012, Epistema Institute Jakarta, hal 5-6
[7] Muhammad Ilham Arisaputra ,2015, *Reforma Agraria Indonesia, Sinar Grafika*, Jakarta, hal 231
[8] Ibid, 231

benefits available in the community should be distributed in such a way that touches the members of society's most disadvantaged.

Referring to the plurality of identity in society, Nancy Fraser [9] also presented a comprehensive sense of social justice. According to Nancy Fraser. Social justice refers to two (things), namely the issue of redistribution and recognition problems. The tendency that emerged in the socio-political development of the idea is to separate and distinguish the two types that view. Redistribution issue focuses on this injustice rooted in the economic structure of society. Efforts to address these issues include income distribution, regulation of labor organizations, democratization procedures for establishing the investment policy or change other basic economic structures. Target recognition problem has injustice that exist in the realm of culture is considered rooted in social problems such as problems patterned representation, interpretation and communication. Efforts to address the injustices in this view is a form of respect for the identity, cultural products of marginalized groups, including efforts to recognize the cultural differences that exist. All of it is done according to a radical conversion attempts against the existing social patterns, namely the transformation of forms and ways of representation, interpretation of communication, so as to change the public awareness of the diversity of identities. [10]

Based on this view, there are two (2) important idea, as follows:

a. The first idea is social justice in terms of the philosophical social normative theoretical and practical issues in it always contained a synthesis between politics and the distribution of political recognition. Nancy Fraser said "no redistribution without recognation and no recognation without redistribution". An example of this idea looks of welfare state programs. Social welfare state programs have targeted the poor example that not only require material assistance alone but also welcome and friendliness of the social environment. There is always a business entanglement between economic equality and social recognition
b. The second idea is the concept of equal participation. Based on this concept of social justice, especially justice requires a social rule that allows all members of society to interact with each other as a group. It is necessary for enabling conditions so that it can be achieved, namely:
    1. The distribution of the source material must be such as to Ensure the independence of participants and "voice"
    2. Instituionalized cultural patterns of interpretation and evolution equel express respect for all of participants an Ensure equel opportunity for Achieving social esteem.[11]

Justice in a partnership between micro, small and medium-sized foreign companies is fairness principle of Pancasila to 5 social justice. Social justice is connected with commutative and distributive justice Aristotle (A.Sonny Keraf, 1998: 141-142) that commutative justice in civil relations that are generally worth the cons accomplishment achievement is the essence of rights and obligations, the distributive justice applicable to relations between the community and the country, in particular to divide obligations or social burden with an emphasis on the aspect of proportionality. Social justice in economic perspective is proportional justice. The concept of proportional justice is each party's rights and duties in accordance with the proportions set forth in a contract.

As stipulated in Article 34 (1) of Capital Market Law that the partnership agreement set forth in a written agreement that at least regulate business activities, rights and obligations of each party, the form of the development period, and dispute resolution. Article 34 (3) The partnership agreement as referred to in paragraph (1) shall not be contrary to the basic principle of the independence of Micro, Small and Medium Enterprises and does not create dependency Micro, Small, and Medium to Large firms.

The mandate of Act No. 20 of 2008 in a partnership is the synergy, mutual cooperation, mutually reinforcing and mutually beneficial to realizing common prosperity among SMEs with great effort.

Foreign investors can make investments of 100% provided there is a partnership (running text Metro TV, clock 21:57, on Monday, January 18, 2016) .Pola partnership became one of the bridges to improve the national economy through cooperation between the investor (in this case the employer) great with SMEs.

Closing

Foreign investment in Indonesia can be 100%, but on condition that there is a partnership between a foreign investor as large companies with SMEs. Article 35 (1) Big forbidden to own and / or control of micro, small, and / or Medium as business partners in the implementation of the partnership referred to in Article 26 of Law SMEs.

[9] Nancy Fraser, Social Justice inthe Age of Indenitity Politics Redistriution , Recognition, and Paricipation, sebagaimana dikutip oleh Mohammad Ilham Saputra, Ibid, hlm 234

[10] Ibid 235

[11] Ibid , hlm235.

A partnership between big companies with SMEs need a container that is as institutions that are able to accommodate the interests of big companies with UMKM.Wadah is expected to inventory the various interests of SMEs and as a form of partnership between large companies with SMEs.

Justice in partnership between SMEs with great effort embodied by the position of SMEs and large companies should be at the level that is commensurate. Bargaining is meant is that in doing joint ventures with other parties have a position equivalent and mutually beneficial

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THE INHERITANCE RIGHT OF THE ADOPTED CHILD TO THE LEGACY OF THEIR PARENTS

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ABSTRACT

Adopting a child is basically an act of taking or bringing up a child of another person put into someone's family, so that between adopted child and his adoptive parent will arise a familial relationship such as a parent with his or her own child. The reason for married couples to adopt because they can not have children or offspring or having only specific gender of child whether it is male or female. While the adopted child or the subject is mostly taken from their own family or nephew or from the children of others or individuals. With the adoption of children will arise the effects due to law one of them is a matter of inheritance for adopted children. Weak positions of adopted children often become disputes for those who feel more entitled to inherit from the property left by the Heir. The legal consequences of the adoption of the child that the relationship between the adopted child and his or her family of origin is stopped but some are unbroken because they still get the inheritance from the parents of their original family. The right of adopted child's inheritance is to inherit the property of palimony only but in some case adopted child can also inherit a legacy of both property of palimony and original one.

Keywords : Inheritance Right, Adopted Child, Legacy

Introduction

Human as a creature of god (divine being) was created to be in pairs to form a family through the marriage. Marriage under article 1 number 1 of the 1974 Constitution concerning marriage is the inner birth bond between a man and a woman as husband and wife with the aim to forming an eternal and happy family (household) based on Believe in the one Supreme God.

Due to the existence of a marriage is the occurrence of the relationship between husband and wife, the relationship between parents with children and property. The relationship between parents with children will occur when on the family is born a child. But if in a family is nor blessed with a child, it will arise a problem, both concerning the continuation of descendant and the handling of wealth. This matter happens because the presence of a child is expected to function as a successor to the generation, place of hope of the parents, and the heirs of the parent's property.

The law of marriage is closely related to hereditary law, because hereditary law regulates the rights and obligations of a person in the field of property to their heirs, whereas who the heirs are determined by the family law, and the family law based on the law of marriage.

The existence of a marriage is expected to be born a child, because the child is the fruit of love in a marriage, is the desire for each of married couple to live a happier and prosperous life. Without the presence of a child in general there will be problems for the survival of a marriage and will make a thought for married couples to find ways to get a child.

The ways that can be done by the married couples to manifest their desire to get a child is various, one of them is by adopting children. Adoption is a legal act that diverts a child from a legitimate parent family or legal guardian or other person who responsible for the care, education and upbringing of the child into the family environment of the adoptive parents.

The nature of the act of adoption is an act of law which can't be regarded merely as the result of an agreement between the parties alone, the adoption of a child shall be regarded as an institution which is a legal relationship for an adopted child with an adoptive foster family environment based on the court's determination. It should be understood that the act of adoption is not an act of law that can take place at a certain time as in the case of the delivery of goods, but is a series of familial kinship events that indicate the sincerity, love and full awareness of the consequences of adoption.1

According to the provisions of Article 1 number (1) of Government Regulation No. 54 of 2007 on the Implementation of the Child Adoption it is mentioned that adopted Child is a child whose rights are transferred from the family power of parents, legal guardians or others responsible for care, education and raising the child, into the family environment of his adoptive parents based on a court decision or appointment. Whereas the adoption of the child itself is a legal act which diverts a child from the authority of

[1] HaedahFaradzdalam*JurnalDinamikaHukum* Vol. 9 No.2 Mei 2009, p..1.

a parent, legal guardian or other person responsible for the care, education and upbringing of the child into the family of adoptive parents (Article 1 number (2) of Government Regulation No. 57 / 2007).

The purpose of adoption can only be done for the best interests of the child and must be based on applicable laws and / or based on local customs. But unfortunately the purpose of child adoption spreaded out in the community is due to personal goals between the person who raised the child and the child's biological parents.

In Islamic law it does not recognize the adoption of a child in the sense of being an absolute child, and that there is only allowed to maintain with the aim of treating the child in terms of for the sake of livelihood, education or service in any need that is not treating as the biological child (nasab). While in Article 171 (h) Compilation of Islamic Law (KHI) stated that adopted child is a child who, in the case of maintenance for his daily life, tuition fees and so switch his responsibility from parent of origin to his adoptive parents based on court decision.

The longer the relationship provided the outpouring of love which existes between the parent and his or her adopted child generates a stronger inner bond like the child of his own. All the needs of adopted child will be fulfilled by the adoptive parents, including education, health and all the necessities of life.

The problem that sometimes arises in the case of adoption is a matter of inheritance for an adopted child. Weak positions of adopted child often become disputes of parties who feel more entitled to the inheritance of the property left by an heir. What is the implementation of adoption according to Islamic law and how is the law of adoption according to Islamic law, and what is the right of inheritance of the adopted child to the property of the parents?

Discussion

The adoption of a child in Islam known as *Tabbani*, is literally interpreted as someone who takes the child of another person to be treated like a biological child. The purpose is to give love, livelihood, education and others. Legally, the child is not his or her child at all, so it does not change the law, *nasab*, and *mahram* between the adopted child and his adoptive parents. Changes that occur in the Religious Courts under Islamic law are the transfer of maintenance responsibilities, the supervision of the original parents to the adoptive parents.

Regulations related to adoption are included in Law No. 23 of 2002 on Child Protection, Article 1 point (9) states that adopted child is child who is took care by a person or institution, to be given guidance, maintenance, care, education, and health, because the parents or one of their parents is unable to guarantee the child's natural growth and development.

The adoption of child in Indonesia has become a necessity of the community and a part of the family law system, therefore the adoption institution which has become part of the community will follow the development of the existing situation and conditions.

The definition of adoption develops in Indonesia as a translation of the English language "Adoption" which means appointing a child, the child of another person to serve as his own child and having the same rights as the biological child.[2] Whereas in a Great Dictionary of Indonesian Language, the term appointing a child is also called adoption, which means the appointing of someone else's child into legitimately his or her own. Adoption or *Tabani* is a legitimate appointment of another's child into his or her own, the child being appointed is called the adopted child, the legal event is called the adoption of the child. Islam does not prohibit the adoption of child for the purpose of child care, education and financing.

According to the Qur'an, Surah Al-Ahzab verses 4 and 5 described the adoption of child, whose translation is as follows:[3]

"Allah has not made for a man two hearts in his interior. And He has not made your wives whom you declare unlawful your mothers. And he has not made your adopted sonds your [true] sons. That is [merely] your saying by your mouths, but Allah says the truth, and He guides to the [right] way." [Al-Ahzab 33:4]

"Call them by [the names of] their fathers; it is more just in the sight of Allah. But ig you do not know their fathers then they are [still] your brothers in religion and those entrusted to you. And there is no blame upon you for that in which you have erred bu [only for] what your hearts intended…" [Al-Ahzab 33:5]

In the study of Islamic Law, there are two definitions of adoption[4]:

1. Taking the child of another person to be cared for and cared for with care and compassion, without being given the status of a biological child, to him or her only he or she is treated by his or her adoptive parents as his or her own child.
2. Taking the child of another person as a child of his own and he is given the status of a biological child, so he or she is entitled to use the name of the offspring of his or her adoptive parents and inherit each other's treasures, as well as the rights of others as a legal result between adopted children and adoptive parents.

[2] Simorangkir, 1987, *Kamus Hukum*, Jakarta, p..4.
[3] RachmadBudiono, 1999, *Pembahasan Hukum Kewarisan Islam di Indonesia*, Bandung: Citra AdityaBakti, p.. 192.
[4] NasroenHaroendkk, 1996, *Ensiklopesi Hukum Islam*, Jakarta : PT. IchtiarBaru Van Koeve, p.. 29.

Furthermore, MudaisZaini believes that according to Islamic law, adoption can only be justified if it meets the following requirements:[5]

a. Not terminating the blood relation between the adopted child and his or her biological parents and family;
b. The adopted child is not the inheritance of the adoptive parents, but remains the heir of his or her birth parents;
c. The adopted child may not use their adoptive parents' names directly, except as an identification or address;
d. The adoptive parents can not act as guardians in marriage against their adopted child.

The adoption of child is not only a social consequence, such as the emotional ties and affections that "eliminate" the origin of a child who is not from his or her biological blood. However, the consequence is the emergence of the adoption of the adoptive parents to the rights of the adopted child to the estate, which then culminate in the maintenance of property (inheritance) both from the adoptive parents and parents of origin (biological).[6]

The existence of the position and the right of the adopted child to the treasure property has been arranged in every stelsel of law (Islam, West and Cultural). According to the KHI, adopted child is a child who is in maintenance for daily life, the cost of education and so switch the responsibilities of parents of origin to adoptive parents based on court decisions. In Article 209 the KHI regulates the inheritance of adopted children and adoptive parents, in which Article 209 paragraph (1) regulates the treasures of the adopted child of their adoptive parents who does not receive the will, shall be given a will as much as 1/3 of the inheritance of their adopted child. Whereas Article 209 (2) KHI regulates the relics of the adopted child who does not receive the will, shall be given a will as much as 1/3 of the inheritance of their adoptive parents.[7]

This provision indicates that the adopted child does not obtain the inheritance from the treasures of his adoptive parents, so that the establishment of a mandatory will be instituted. So the must is mandatory is the a mandatory will legislation (KHI) to the adoptive parents as a solution for the adopted child to get a share of the treasures of his adoptive parents.

This provision in KHI raises philosophical problems related to justice. Because in the Law of Inheritance of Islam (*Fiqh*), has been determined who can be the heirs and has also determined their respective parts based on blood and marriage relationship, called *DzawilFurudl* and *DzawilArham*, with the portion of each part, respectively. While the adopted child is not included in the provisions of both groups of heirs. Therefore, when an adopted child is entitled to part of the property of his adoptive parents, it may either eliminate or at least reduce the part of the heirs including *DzawilFurudl* or *DzawilArham*. This is where the philosophical answer to the problematic of justice for the adopted child of the heritage of his adoptive parents is needed.

The adopted child is not the heir of their adoptive parents, therefore adopted child have no inheritance rights as well as biological child. However, it does not close the possibility of an adopted child receiving the treasures of his adoptive parents, either when his parents are still alive through the grant, or when his adoptive parents have died, namely through a will made by adoptive parents while alive.

According to the applicable adoption rules in Indonesia, the adopted child shall have the right to the property of his adoptive parents through a mandatory will set forth in Article 209 of KHI. Not only that because the adoptive parents can also accept the mandatory obligation on the estate of his adopted child, so that each is entitled to the property of each relic. In practice, the division of property of the adoptive parents through the Decision of the Religious Courts and some even up to the Supreme Court.

The legal consequences of adoption vary and are strongly influenced by the background, motivation or purpose of legal action of adoption. MudaisZaini stated that the purpose of adopting child is to continue the offspring if the marriage is not blessed with a child. Furthermore, it is said that in the development of society now the purpose of the institution of adoption is no longer solely motivation to continue the offspring only, but more diverse than that. There are various motivations that encourage a person to adopt a child, not infrequently also because of political, economic, social, cultural and so on.

According to the encyclopedia of Islamic Law there are two legal statuses related to the issue of adoption, which are:[8]

1. Inheritance.

   According to the *fiqh*ulama, in Islam there are three factors that cause one another to inherit, which are:

   a. Because of kinship or heredity *(al-qarabah),*

[5] MuderisZaini, 2006, ,AdopsiSuatuTinjauan Dari TigaSistemHukum, Jakarta : SinarGrafika, p..54.
[6] ThahirAshary, 2007, *AnakAngkatDalamPerspektifHukum Islam danKewenanganPeradilan Agama Dalam P. PengangkatanAnak*, dalamSuaraUldilag Vol.3 No.XI, MahkamahAgungLingkunganPeradilan Agama, Jakarta, p..2.
[7] -------,2001, *BahanPenyuluhanHukum*, Departemen Agama RI, DirektoratJenderalPembinaanKelembagaan Agama Islam, p..94.
[8] A. RahmanRitonga, 1997, EnsiklopediHukum Islam, Jakarta, p..28-29

b. Because of the legitimated marriage *(al-musaharah)*, and
c. Because of the trust factor between the servant and guardian who freed him or her or because of mutual help to someone with the person he inherited during his or her lifetime.

The adopted child is not included in the above three factors in the sense that neither a relative nor a descendant with his adoptive parents, nor is he born of a legal marriage of his adoptive parents, nor is it a trust relationship. But given the familiar relationship between adopted child and adoptive parents, especially if taken from circle in family itself, and pay attention to good services to the household of adoptive parents, then Islam does not rule out at all children get a share of the treasures of his adoptive parents. The provisions for a will in Islamic law are at most one-third of the property.

2. Marriage.

The adopted child remains the origin child of his biological parents, and therefore applies the legal status of inheritance and marriage to his biological parents and family. Against the treasures of his or her adoptive parents, he or she may obtain his or her portion under the testament or grant by the adoptive parents.

Citing the thought of Al-SayyidSabiq in the book of *Fiqh al-Sunnah*, Habiburrahman writes that in Islamic *fiqh*, the wills must be based on a thought, on the one hand intended to give a sense of justice to those close to the Heir but in no way acquire a share from the path of *faraidh*, on the other hand: the four *Imams* have forbidden it, if it will provide *madharat* for the heirs.[9]The meaning of the word *faraidh* is the part that has been set. This word is plural of *faraidhah* which means provision. By Shari'a, it means the provisions or divisions that are prescribed for the heirs.[10]

With the arrangement of the musts in the KHI, if the adoptive parents do not have time to give a will or give a grant, the adopted child is entitled to get as much as one-third of the inheritance of his adoptive parents. The use of the term inheritance is used to calculate the share of acceptable adopted children on the inheritance of their adoptive parents as much as one-third of the inheritance if the adoptive parents do not leave a will.

Implementation of a mandatory will in its implementation is done through the courts and some are done out of court. The Religious Court Judge in resolving the inheritance dispute of inheritance involving the adopted child shall refer to the provisions of Article 209 of the KHI, in which the adopted child's share shall be a maximum of one-third of the inheritance of his adoptive parents and other heirs to obtain parts in accordance with the section which is determined by the law of the Inheritance of Islam with the correspondence if there is a calculation of the wills of the obligatory.

Closing

Based on the above matters can be summarized as follows:

1. Implementation of adoption according to Islamic Law is "permissible" to the extent of maintenance, protection and education, and is "prohibited" to give the status of an origin child.
2. As a result of the adoption law of the adopted child, the adopted child may obtain the property of his or her adoptive parents by a testament not exceeding 1/3 (one third) of his or her adoptive parents' estate. If his adoptive parents do not leave a will, he or she may be given a mandatory will.
3. The right of inheritance of an adopted child to the property of his or her parents based on a mandatory will, shall not prejudice the rights of the heirs. The magnitude of the mandatory wills must not exceed the part of the heirs. If the treasures of the adoptive parents are few, not sufficient for the welfare of the heirs, then no will is mandatory for his or her adopted child.

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[9]Habiburrachman, p..167.
[10]*Ibid*, p..81.

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ECONOMY SYSTEM BASED ON THE STATE OF THE STATE OF THE REPUBLIC OF INDONESIA OF 1945

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ABSTRACT

The Indonesian nation has had its own economic system which the founders of the State have proclaimed, emphasizing the principle of togetherness and kinship, in the sense of emphasis on the aspect of common prosperity in addition to the prosperity of individuals and groups. This system has been constitutionally guaranteed in Article 33 of the 1945 Constitution, which states that the Indonesian economic system is structured as a joint effort based on the principle of kinship. Production branches that are important to the State and control over the life of the masses are controlled by the State. The earth and the natural resources contained therein are controlled by the State and used as much as possible for the welfare of the people. The system emphasizes that a joint venture means that every citizen has equal rights and opportunities in running the economy in order to make the nation prosperous. Therefore, the state must take an active part in the direction of the economy to achieve (1) economic growth while maintaining (2) the stability of the money value (avoiding inflation) and by ensuring (3) the low unemployment rate and (4) the foreign trade balance that is balanced. With a balanced policy of supporting the four goals of the national economy, governments have managed to avoid the serious crises of the modern market economy. As we know, the wisdom of cooperative development needs to be directed to two things. First, to consciously build a cooperative as a pillar or as the basis of Indonesia's economic system in the flow of thought Article 33 of the 1945 Constitution. Second, systemically and gradually restructuring the economy, starting from Article 33 non-cooperative forms of non-cooperative business the colonial legal system (BOOK TRADE LAW), in other words democratize all forms of the company. Thus, economic development which is a joint effort or a familial basis under the supervision of community members, motivates and actively encourages participation. The linkages and partnerships among actors in the economic activity container are government, state-owned enterprises, cooperatives and private business entities, and the informal sector must be pursued to realize economic growth, equity and stabilization in accordance with the Indonesian economic system (article 33 paragraph 1 of the 1945 Constitution)

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Keywords: Economic System, 1945 Constitution

Introduction

The field of economy merupakn a field of human activity in order to meet needs in addition to a tool of satisfying the needs of the limited. It is in economics concerning various economic fields such as demand, supply, production, distribution of goods and services.

In addition, the economic field can not be separated by other factors that are interconnected with the geographical area of a State, as well as natural resources, human resources, ideals of society commonly called ideology, the accumulation of power, power, and wisdom to be applied in the production and distribution activities, socio-cultural values, as well as the defense and security that provide guarantees for the smooth running of a nation's economic activities. The process will have a positive impact in the sense of improving the welfare of a nation when it operates in a balance position between demand and supply, production, distribution of goods and services.

This process is then determined by a system in which a particular nation takes a policy to determine how that balance can be realized. The capitalist economy will give freedom of competition (liberalism liberty) to the economic players, so that each individual has a chance to compete. Conversely the communist socialist economy emphasizes the equity aspect so that distribution is done by the State and in this case the role of the individual is determined by the State. Individual freedom is restricted and even excluded by the State. However today there has been a shift in the system, meaning it is hard to find in a State that is purely liberalism and or only one system that is purely socialist communist. Many countries embrace capitalism which is very concerned about equity, but also has many countries that formerly communism has applied the system of distribution of capitalism.

In this 21st century there has been another phenomenon that the economic system has entered the era of globalization. Indeed, in the narrow sense of globalization has begun to appear long ago, when the western countries to colonize other countries. Prior to the emergence of nation-states, trade and migration across the continent has also been long-standing. Regional trade has made native interactions occur naturally. Since modern history, especially before entering the 21st century, globalization is seen as the glorious future. Two

decades before World War II, international money flows have tied Europe more closely to the United States, Asia Africa and Central Timor.

Capital markets are booming on both sides of the Atlantic, while banks and private investors are busy diversifying their investments, from Argentina to Singapore. But in line with the world economic and political cycle, the wave of globalization is also experiencing ups and downs. One of the forces behind it is the attraction between nationalism and nationalism or isolationism.

The wave of globalization that has plagued the world's Saentero since 1980, is much different from its intensity and scope. The process of convergence that we see as a result of globalization today has practically touched various facets of life, not only of economic, political, social, cultural, ideological but also has touched systems, processes, actors, and events, even though the process did not go smoothly. This is very influential economic development, especially in Indonesia during the reform era today. Events in a State especially large countries that play a role in the economic field will affect the economic tidal wave of other countries. The tragedy of September 11 that struck the WTC twin buildings has been felt to bring the world's economic downturn. Therefore, today no country is capable of developing its economy based solely on that State, without the involvement of this State.

As explained above, although there are large economic systems such as liberalism and communist socialism, but in reality both systems have never been applied in a single state purely, so they interact with each other. Communist socialist economic system has also been using a system that is a characteristic of capitalist economy such as competition, capital ownership by individuals as well as capitalist system has also paid attention to equity and so forth.

In addition, the Indonesian nation has its own economic system which the founders of the State have proclaimed, that is emphasizing the principle of togetherness and kinship, in the sense of emphasis on the aspect of common prosperity in addition to the prosperity of individuals and groups. This system has been constitutionally guaranteed in Article 33 of the 1945 Constitution, which states that the Indonesian economic system is structured as a joint effort based on the principle of kinship. Production branches that are important to the State and control over the life of the masses are controlled by the State. The earth and the natural resources contained therein are controlled by the State and used as much as possible for the welfare of the people.

The system emphasizes that a joint venture means that every citizen has equal rights and opportunities in running the economy in order to make the nation prosperous. In this sense individupun have the opportunity to do a business, but also the state government as a living institution together also participate in economic activities for the welfare of the people together. So the economy is not only run by the government in the form of activities of state-owned enterprises, but also the public can participate in economic activities in the form of private businesses in various fields. but it should be noted however that the private sector has the freedom to make a business, in the system the Indonesian economy is not known for monopoly or monopsony practices, either by the government or by the private sector. Communities not included in state-owned enterprises or private entities still have the opportunity to form business entities in the form of cooperatives. Cooperative is an economic activity in the form of a business entity based on the principle of kinship. Society in groups can form business entities in the form of cooperatives. [1)]

To that end, this paper is more emphasis on the point of view about the Indonesian economic system that remains based on the Constitution of the Republic of Indonesia Year 1945

Discussion

Indonesian Economic System

Before entering the discussion, it is necessary to draw the boundary of the title as follows: a set of elements of the economy that are regularly interrelated so as to form a totality of actions, rules, economic means to achieve justice or mutual prosperity based on the 1945 Constitution.

In macro economic system in Indonesia can be called the system of populist economy. Earth, water and natural resources contained therein are controlled by the State and used for the greatest possible of the people. The prosperity of the people in question is the prosperity of the people all over Indonesia, including those on small remote islands, inland, on mountains as well as in other forest concessions. State in this case the government, should be able to prosper the local people through the utilization of natural resources in their respective areas. In the current era of reform where we develop regional autonomy there is often a dilemma constraint between the principle of togetherness with regional freedom to manage the natural resources in their respective territories. This is because the geographic structure of Indonesia, which consists of thousands of small islands spread in various regions, plus ethnic cultural diversity each often leads to premodial fanaticism. Therefore, we must return to the principle of togetherness, so that regional autonomy in reform today does not give rise to certain ethnic exluivism, but instead develops a sense of togetherness.

[1)] Hendroyono, et al, Citizenship Education (In Democratic Country Perspective), BPFH Untag Semarang, 2013, p. 207-209

In addition it should be remembered that in today's global era one Country can not be closed from the world's economic system. The macro economy of one State senasaasa can not be separated with other countries. Similarly, the economy in Indonesia, always open to the world economic system. The level of national economic integration with the global economy is very important, because it is a measure of the national economy to adapt to the rhythm and dynamics of the international market. Therefore, Indonesia also welcomes the forms of world economic cooperation such as GATS, AFTA, and APEC, which are expected to increase the national economic potential and will in turn increase the nation's prosperity nationally. So it must be realized that the Indonesian economic system can not be separated with the world economic system even an integral part of the international economic system. [2)]

As is known, in the Preamble and Body of the 1945 Constitution there are legal principles, both general and specific in the field of economic law and welfare.

1. The explicit and implied from the Preamble to the 1945 Constitution is as follows:
   a. The principle of recognition of the One Supreme Godhead.
   b. The principle of guidance against the homeland of the nation and state.
   c. The principle of fair and civilized prosperity.
   d. The principle of social welfare.
   e. The principle of humanity and justice.
   f. The principle of democracy for deliberation and consensus.
2. The explicit and implied in the Body Body of the 1945 Constitution is as follows:
   a. The principle of equal status in law and government.
   b. The principle of protection of economic interests that affect the livelihood of many people.
   c. The principle of the prosperity of the people.
   d. The principle of economic democracy.
   e. Equal rights to employment and livelihood principles.
   f. The principle of protection for the poor and neglected children.
   g. The principle of kinship.
3. Explicit and implied in the Elucidation of the 1945 Constitution are as follows:
   a. The principle of the rule of law.
   b. The principle of legal recognition is not written as a source of national law in addition to the law and fixed jurisprudence.
   c. Legal hierarchy of laws.
   d. The principle of noble character maintenance.

The principles of the law should be formulated in the article-by-article editorial on the legislature that was created and which could eventually be implemented in the legislative instrument below, which can then be applied to the implementing level. The application of these principles is a driving factor for the achievement of a just and prosperous society.

In the economic arena, society must struggle in the face of tug-of-war between one party and another in accordance with the interests and capacities that are represented for a particular interest. In the arena is not uncommon battle in the competition either healthy or unhealthy. In the "battle" there is always a disadvantaged party, the consumer.

Likewise, economic activities undertaken by society can basically be grouped into several areas of activity that have certain characteristics, namely the activities of production, distribution, marketing, and so on. These activities can still be detailed in each specification of product, media, distribution, marketing method, and so on. With these characteristics, each activity also requires a regulatory rating that has regulatory characteristics in accordance with the activity.

In general, the law has the purpose to create a balance of interests in the form of legal certainty so that justice is born proportionally in a prosperous society. The function of the law also covers the order of economic life of the community in order to meet its needs. Achieving such balance is very important in the order of life of economic activity.

As is known, the law should be able and able to function well in order to realize a dream society, that is a just and prosperous society in accordance with the philosophy of Pancasila. At least the achievement of the balance of the parties whose interests are facing.

The fact shows that the dream community has not been reached and why the law has not been able to make a proportional contribution. The law that values can work if there is a common perception in benchmarks of the same standard for all and by all. Economic welfare and justice can be achieved if all stakeholders in this country have a benchmark for the same value standard, Pancasila because Pancasila also serves as the ethical and moral control of the nation. [3)]

[2)] Ibid, p.210

[3)] Sri Redjeki Hartono, Indonesian Economic Law, Bayu Media Publishing, Malang, 2007, p. 32-35

Likewise, we need to realize an economic resilience that is one of the elements of the national resilience system that is vital to the existence of a nation in a state.

As is known, economic resilience is a dynamic condition of the nation's economic life that contains tenacity and resilience, national strength in facing and overcoming all challenges and dynamics of the economy both coming from within and outside Indonesia, and directly or indirectly guarantee the continuity and improvement of the economy of the nation and the State of the republic of Indonesia which has been governed by the 1945 Constitution.

The form of economic resilience is reflected in the living conditions of the nation's economy that is capable of maintaining healthy and dynamic economic stability, creating a highly competitive national economic independence, and realizing the prosperity of the people fairly and equally. Thus economic development is directed to the sustainability of economic resilience through a healthy business climate and the utilization of science and technology, the availability of goods and services maintenance of environmental functions and increased competitiveness in the scope of the global economy.

Achieving the desired level of economic defense requires the coaching of various things, among others:

1) Indonesia's economic system is directed to realize prosperity and prosperity that is just and equitable throughout the territory of the State of Indonesia, through populist economy and ensures the sustainability of national development and the survival of the nation and the State based on the 1945 Constitution.

2) Community economy should avoid from:

a. Free fight liberalism system that only benefits economic actors who have high capital and does not allow the development of populist economy.

b. The system of etatism, in the sense that the state and the state's economic apparatus is dominant and urges and disables the potential and creativity of economic units outside the state sector.

c. The concentration of economic power in one group in the form of a monopoly that harms the society and contrary to the ideals of social justice.

3) Economic structure is stabilized in a balanced and mutually beneficial in harmony and integrity between the agricultural sector of industry and services.

4) Economic development, which is a joint effort or familial basis under the supervision of community members, motivates and actively promotes participation. The linkages and partnerships between actors in the economic activities of government, state-owned enterprises, cooperatives and private business entities, and the informal sector should be pursued to realize economic growth, equity and stabilization.

5) Equity of development and utilization of the results are always implemented to consider the balance and harmony of development between regions and between sectors.

6) The ability to compete must be grown in a healthy and dynamic to maintain and enhance the existence and independence of the national economy. This effort is done by utilizing the national resources in an optimal manner and the appropriate science and technology tools in facing every problem, and with due regard to employment opportunities.

Similarly economic resilience is essentially a condition of the nation's economic life based on the 1945 Constitution and the basic philosophy of Pancasila, which emphasizes the common welfare and able to maintain healthy and dynamic economic stability and create national economic independence with high competitiveness. [4)]

Thus, the State must take an active part in the direction of the economy to achieve (1) economic growth while maintaining (2) the stability of the money value (avoiding inflation) and by ensuring (3) the low unemployment rate and (4) the foreign trade balance balanced. With a balanced policy supporting the four goals of the national economy, governments have managed to avoid the serious crises of the modern market economy.[5)]

The Economy Based on the 1945 Constitution of the State of the Republic of Indonesia

As is known, in the amended Rules of Article I of the amended 1945 Constitution, its primary mission is to transfer the old (leave) and "to hold a new one" in accordance with the spirit and spirit of the 1945 Constitution. Thus the forms of private capitalistic enterprises which, according to the Code, The Law of the Trade Law is individualistic and libelistic, temporary and its existence is transitional, thus it is necessary to be immediately Article-33 or democratized.

Therefore, the "legal validity" under the Transitional Rules of the capitalistic individualistic form of business should be supplemented temporarily with "mission validity" in accordance with the ideals of the establishment of this country. For that to all forms of non-cooperative effort should be included spirit and soul of the cooperative.

[4)] Op.Cit, p. 212

[5)] Franz Magnis Suseno, Karl Mark Thought Of Utopian Socialism Into The Dispute Revisionism, PT. Gramedia Pustaka Utama, Jakarta, 2000, p. 205-206

Incorporating the spirit and soul of the cooperative (togetherness and family principle) is what is meant by the words "economy is prepared" in paragraph 1 Article 33 of the 1945 Constitution that is:

1. The Economy Compiled

The word "compiled" in paragraph 1 of Article 33 of the 1945 Constitution is imperative, so the economy is not left to be self-contained, or to establish itself based on the existing economic forces or free market forces. The word "conceived" suggests a structural build-up through concrete action. Organizing thus is the duty of the state. The state carries out economic restructuring, from the colonial economic structure to the national economic structure, from capitalistic to socialistic structures (Indonesian socialism).

2. Togetherness (Joint Venture)

In the implementation of economic democratization, the element of "togetherness" is incorporated into private companies through a system such as the ESOP (Employee Stock Ownership Program), through the collective ownership of company shares by employees or employee cooperatives.

Togetherness is different from just a go public effort that has limited reach in economic democratization and in equity or justice. For that it is clear as stated by President Soeharto (from his autobiography as described by G. Dwipayana and Ramadhan K. H): "..... Now, in developed countries, in the framework of equity and justice, these companies "go public." The community is invited to participate in it. "But I now (1987) think, for here, in our country now, can not only be focused on 'go public'. That way because society is not yet strong, because the people have not been strong 'go public' it essentially will only fall on the strong individual "." ..... So I think, cooperatives should be informed and invited to participate. The cooperative must enter and own the company's company ... ".

3. The principle of kinship

The "family principle" is incorporated into a private company (PT) by placing employee position as a "production partner", not as a "production factor" in the context of Industrial Relations Pancasila (HIP). As a partner (partner), like "big family" employees or employee cooperatives are more justified to share the company's assets in the form of shares.

As we know, the wisdom of cooperative development needs to be directed to two things. First, to consciously build a cooperative as a pillar or as the basis of the Indonesian economic system in the flow of thought Article 33 of the 1945 Constitution. Second, systemically and gradually restructuring the economy, which starts to post Article 33 non-cooperative forms of non-cooperative business the colonial legislation (the Code of Trade Law), in other words democratizing all corporate forms.

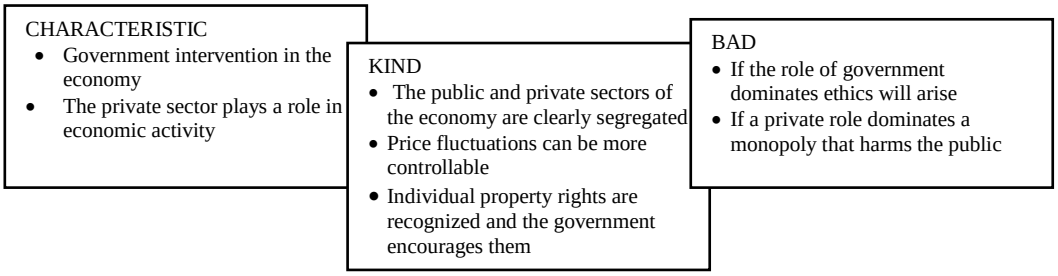
Obviously, if abroad, the system of share ownership by employees in the form of ESOP is seen as an employment incentive to increase motivation and dedication of work, in Indonesia more than that, in addition to work incentives, the ownership of company shares by employee cooperatives is the right of employees based on economic democracy.

Since the enactment of the 1945 Constitution actually applies "transitional period" in the Indonesian economy. The transition period towards the restructuring and economic reform is inherent in the 1945 Constitution. The Transitional Rules of the 1945 Constitution is to transfer, replace the old and make new ones in accordance with the ideals of the 1945 Constitution itself. In the transition period it takes a cultural reform, a mind-set revolution from an individualistic view to an integralistic view, eroding the capitalistic values that we often encounter with the argument of pragmatism. Some argue that the transition period is accelerated. Others agree that transitional periods are maintained temporarily or maintained by increasingly constraining disagreements and improving balance and harmony. This transitional period is deemed necessary to avoid the economic system of the Commercial Code developing in the direction of liberalism and capitalism before economic system based on Economic Democracy is realized. However, there are those who regard the opinions as inconsistent with the constitutional message, they are pragmatism, not ideological and permissive. Those who argue this demand to be more directly embodied a Basic Economic Act or a TAP MPR that can answer and describe the various crucial points that constitutional messages in our Economic Democracy. [6)]

Just to recall the growing economic system in some countries, the chart of the mixed economic system as below is now being developed in Indonesia.

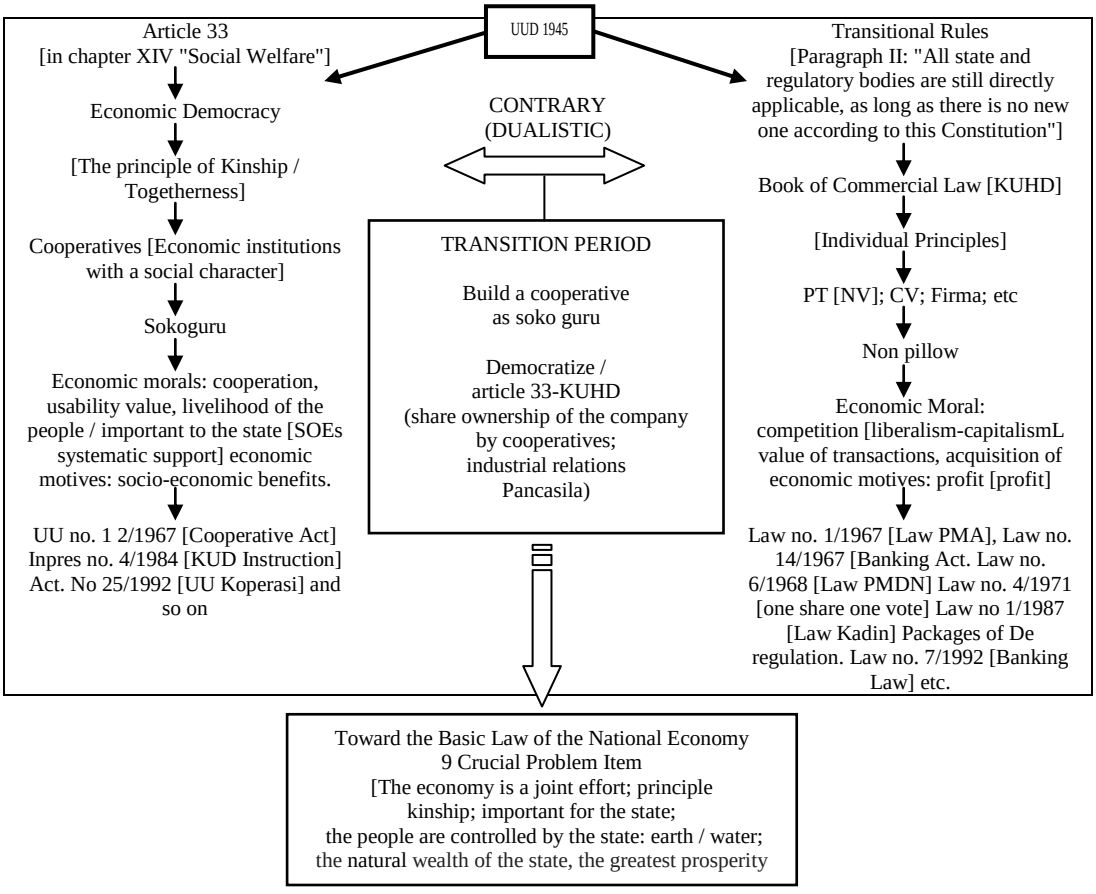
[6)] Sri Edi Swasono, Economic Democracy, Participatory Business Linkage VS Economic Concentration, Paper presented at Pancasila seminar as an ideology in various areas of social life, nation and state organized by BP-7 Jakarta, 24, 25 and 26 October 1989, pp. 25-29

MIXED ECONOMIC SYSTEMS
[SOSIALIST & LIBERAL] [7)]



Besides, it is also presented about the structure chart of the Indonesian economic system as mentioned below : [8)]

SYSTEM STRUCTURE
INDONESIA ECONOMY



[7)] Arif Rahman & Adi "Pay" Prabowo, Das Capital For Beginners, Narasi, Yogyakarta, 2013, p. 40
[8)] Ibid, p. 44

Closing

That the nation of Indonesia already has its own economic system which the founders of the State have proclaimed, that is emphasizing the principle of togetherness and kinship, in the sense of emphasis on the aspect of common prosperity in addition to the prosperity of individuals and groups. This system has been constitutionally guaranteed in Article 33 of the 1945 Constitution, which states that the Indonesian economic system is structured as a joint effort based on the principle of kinship. Production branches that are important to the State and control over the life of the masses are controlled by the State. The earth and the natural resources contained therein are controlled by the State and used as much as possible for the welfare of the people

The economic activities undertaken by the community can basically be grouped into several areas of activities that have certain characteristics, namely the activities of production, distribution, marketing, and so on. These activities can still be detailed in each specification of product, media, distribution, marketing method, and so on. With these various characteristics, each activity also requires a regulatory rating that has the characteristics of the arrangements in accordance with the activities concerned

Thus, economic development which is a joint effort or a familial basis under the supervision of community members, motivates and actively encourages participation. The linkages and partnerships among actors in the economic activity container are government, state-owned enterprises, cooperatives and private business entities, and the informal sector must be pursued to realize economic growth, equity and stabilization in accordance with the Indonesian economic system (article 33 paragraph 1 of the 1945 Constitution).

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ANALYSIS OF LAND SALE AND PURCHASE AFTER THE APPLIED BASIC AGRARIAN LAW

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ABSTRACT

Sale and purchase of land can cause problems in the future. This is caused in the process of purchasing and selling land that is implemented is not according to the rules that apply, such as the sale of land under the hands. There is still a lot of purchasing and selling of land that is done under the hand, because there is the assumption that if done in front of Land Deed Official will cost a lot, the management of the name of land that takes a long time, and the lack of knowledge about the importance of land certificates, so many people have land which has not yet certified it. Therefore it is necessary for the public to know the process of buying and selling land in accordance with the provisions in force, so as not to cause difficulties for interested parties.

Keywords: Land Sale and Purchase, Basic Agrarian Law.

Introduction

The lifestyle of the people of Indonesia to this day is very dependent on the activities and efforts of most of the agrarian so that the land is a hope for the people in order to carry out the order of life. In line with the circumstances, the policy on land affairs is explicitly regulated in the 1945 Constitution Article 33 section (3) whose contents "Earth, water and natural resources contained therein are controlled by the state and used for the greatest prosperity of the people".

In the meantime the direction of land policy conceptually based on the 1945 Constitution as mentioned above, has been regulated and outlined in Law No. 5 of 1960 (Basic Agrarian Law). In Law Number 5 Year 1960 on Basic Regulation of Agrarian Principles or referred to as Basic Agrarian Law and abbreviated as Basic Agrarian Law, it is clear that there is a concern from the Government, namely the provision that every person has the right to have land rights. However, those rights are burdened with social functions, as defined by Article 6 of Law Number 5 Year 1960 which states: "All rights to land have a social function". Consequently if the right land is used for public interest by the government then the owner must relinquish, in recognition of the right of the individual to be given compensation.

That since the enactment of the Act, dated 24 September 1960, in terms of legal development should be proud because Basic Agrarian Law is a national legal product. With the enactment of the Basic Agrarian Law there have been fundamental reforms in the field of agrarian law. The reform was in the form of unity (legal unification) in the field of land meaning that only one law applies. Prior to the coming into effect of the BAL in Indonesia, the West Land Law was based on Western Law and Indigenous Land Law originating from Customary Law. With various kinds of rights to the land, the rights are regulated by customary law, for example: *hak ulayat, hak druwe*, *hak norowito*, property rights and so forth. While subject to Western Law, for example: *Hak Eigendom, Hak Opstal, Hak Erfpacht, Hak gebruik*, and so on.

With the enactment of Basic Agrarian Law, these rights are converted into one of the rights under the Basic Agrarian Law, both land rights and land directly controlled by the state, aimed to achieve the greatest prosperity of the people, land that is not land rights is no longer a domain state status. Since the birth of the Basic Agrarian Law until now has been issued a lot of laws and regulations in the field of land implementation that objectively has actually set most of the land policy, especially those concerning the livelihood of the people, for example the exploitation of land for agriculture.

Today land law has evolved into one branch of legal science itself as the science of agrarian law. This indicates that the land problem in Indonesia has become or gets a very wide and deep attention among the people. It can be understood that the problem of this land is increasingly perceived more increased due to several factors, among others:

a. Uncontrolled population growth.
b. Limited supply of land, especially agricultural land.
c. Farms owned by the people can no longer meet the necessities of life.
d. The growing labor force of the agricultural laborers.
e. The narrowness of agricultural land area because of urgent development projects, such as housing, factories, irrigation, and so forth.

In practice there are still problems or disputes that occur in the community, therefore to overcome these problems would be the problem that is the starting point of the dispute is related to the status of land which in this case is the basis of the validity of land owned/controlled by people. For example, there are still land that

has not been certified and still the sale and purchase of land under the hands or the sale and purchase is not with the deed made and in front of Land Deed Officials, therefore the legal relationship between a person with the land can be made possible some things such as inheritance and buying and selling. In the sale and purchase of the land of course there are parties who stuck in it that the seller as a party who has land to be traded to other parties who are called as a buyer who wishes to have / have certain land in accordance with the desire, still found members of the community who do not understand what to do in buying and selling the land.

In addition there is also an agency or official who is also involved in it if there is someone doing a sale and purchase of land, that is as determined by Article 37 section (1) of Government Regulation No. 24 of 1997 on Land Registration stating that "the transfer of land rights and rights ownership of apartment units through sale and purchase, exchange, grant, income in company and other legal transfer rights, except the transfer of rights through auction can only be registered if evidenced by deeds made by Land Deed Officials authorized under applicable laws and regulations".

Subsequently Article 38 Section (1) of Government Regulation Number 24 of 1997 states that "the making of the deed is attended by the parties conducting the legal act concerned and witnessed by at least 2 (two) witnesses eligible to act as witness in legal action this". In addition there is an agency that has an authority as a follow-up of the sale and purchase, as regulated by Article 5 of Government Regulation No. 24 of 1997 on Land Registration stating that "Land registration is held by the National Land Agency".

The registration of land aims to provide legal certainty and legal protection to the holder of the right to a plot of land, so that it can easily prove himself as the holder of the rights concerned. The legal certainty in question is the certainty of the person/legal entity who is the holder of rights which is also called the certainty about the subject of rights, in addition to the certainty about the location of the boundaries and the extent of the land areas which is also called with certainty about the object of rights.

Sale and purchase of land under the hands can cause problems in the future. This is caused in the process of buying and selling land that is implemented is not according to the rules that apply. Therefore it is necessary for the public to know the process of buying and selling land in accordance with the provisions in force, so as not to cause difficulties for interested parties. Although the regulations used in the current sale and purchase of land are as mentioned in Law No. 5 of 1960 (Basic Agrarian Law), which is nationally applicable, it is necessary to know that prior to the entry into force of the Basic Agrarian Law has occurred pluralism / dualism of agrarian law, which is subject to western law and customary law.

Main Problem

According to the description above, then in this paper formulated the following problems: "How does the community buy and sell land after the coming into effect of the Basic Agrarian Law?"

Discussion

Sale and Purchase of Land Before the enactment of the Basic Agrarian Law

In essence, the sale and purchase of land is one of the forms of transfer of land rights to parties and / or other people who come from the seller to the land buyer. The transfer of ownership rights to this land not only covers or is due to the sale and purchase of the land, but the transfer of land rights may also occur due to grant, exchange, giving with testament and other legal deeds contained the intention of transferring ownership of the land.

In Indonesian society, it is known that the sale of land purchase is customary (customary law), which is meant by legal act of transferring land rights to other parties with light and cash. This means that land rights will be switched off as soon as there is a payment of the price at the same time in cash. With the delivery of the land to the buyer and the payment of the price to the seller at the time of sale and purchase is done, then the sale and purchase action is completed, meaning the buyer has become the new land holder. Thus it can be understood that the sale and purchase according to the law has been completed and automatically the buyer has become the holder of the new land rights, although in fact the land concerned is still controlled by the seller. Physical delivery of the land to the buyer from the seller needs to be understood not including one element of the act of buying and selling land.

Whereas pursuant to the provisions of Article 1457 of the Civil Code, the meaning of the sale and purchase of land is: "an agreement by which the seller binds himself (i.e promises) to surrender the rights to the land concerned to the buyer and the buyer binds himself to pay to the seller the price which he has approved. Thus it can be interpreted that buying and selling is a reciprocal agreement, the one party (the seller) promises to surrender property rights to a good, while the other party (buyer) promises to pay the price consisting of a sum of money in lieu of the acquisition of such property .Thus understandable, in the Civil Code of West there is a provision, that the agreement is already, indicating the occurrence of buying and selling even though the price has not been paid and the goods have not been submitted. Affirmed in Article 1458 of the Civil Code: "that the sale is considered to have occurred between the two sides parties immediately after they reach an agreement about the price and the goods, even though the item has not been paid the price.

In addition to the provisions of the sale and purchase according to customary law, the agreement has not been enough to buy land transactions occur, the agreement must be followed up with the down payment. Meanwhile, according to the West Civil Code, the sale and purchase of land does not make the right of the land directly move from the old owner to the buyer, but the transfer of rights to the new land moves to the buyer after doing with the so-called "juridical Delivery" and followed by the making of the *Deedback* by officials behind the name (Statsblad 1834 Number 27). According to the provisions of Government Regulation No. 24 of 1997 on Land Registration, in the sale and purchase of land is no longer known as the name behind the name, because with the sale and purchase, the right to land directly moves to the buyer. Thus the present is the registration of the land.

Analysis of Sale and Purchase of Land After the enactment of the Basic Agrarian Law

Any transfer of rights to land through sale and purchase can only be registered if proven by a deed made by the Land Deed Officials authorized. Thus the validity of the sale and purchase of land if evidenced by a deed made by the authorized Land Deed Officials, as set forth in Article 37 section (1) of Government Regulation No. 24 of 1997 which states:

> "The transfer of land rights and property rights to apartment units through the sale and purchase, exchange, grant, income in company and other legal transfer rights, except the transfer of rights through auction, can only be registered if proven by deed made by Land Deed Officials authorized according to the prevailing laws and regulations ".

By paying attention to existing land letters and remembering the stages in the sale and purchase of land, in fact up to now the practice of buying and selling land that is still valid in society in general still follow the practices in accordance with customary law, namely in the sale and purchase of land must have been preceded by cash payments, although judicially the acquisition of land rights due to buying and selling by itself has not occurred.

Payment in cash is done in advance remembering without cash payment will never occur buying and selling in front of Land Deed Officials. By buying and selling before the Land Deed Officials then the buyer obtain the deed of sale and purchase, this means automatically the transfer of ownership of the land has happened (from the seller to the buyer) in accordance with the applicable provisions. If the payment of land purchase is done by installment, then Land Deed Officials will only make the deed of buying and selling binding.

Before the Land Deed Authority makes the deed of sale and purchase, the Official first asks for a valid identity, to both parties (prospective buyer and seller). In the event that both parties are unable to present them before the Land Deed Officials, it may be represented by the power of attorney by showing authenticated power of attorney and/or at least by a power of attorney under the hand that has been authorized by the Authorized Officer. In case the land for sale has been certified, then the holder of the right/owner must bring the original land certificate, because after the sale and purchase of the certificate along with the deed of sale and purchase must be sent to the Land Office to request a request for property rights and registered on behalf of the buyer as the new owner. The need for certificates attached considering that without this certificate Land Deed Officials will not be possible to make the deed of sale and purchase.

In addition to the original certificate, the parties must attach a payment receipt which must be presented jointly (the seller and the buyer) in the presence of Land Deed Officials in the presence of two witnesses and the two parties signing the deed of sale and purchase. Things to consider in making the deed of buying and selling land, Land Deed Officials must question whether the price of land has been settled in accordance with the mutual agreement contained in the sale and purchase deed. If it has not been paid in accordance with the agreement then the payment must be made at the time before the parties signed the sale deed before the Land Deed Officials, or if the payment of land purchase is done by installment, then Land Deed Officials will only make the deed of buying and selling binding. This is given in the written deed of sale and purchase of land price and validity of payment.

Considering the importance of the deed of sale and purchase of land, especially for the buyer, it means that in the future, if there is any third party who feels the rights are exceeded, the new landowner can defend his/her right and be guaranteed his legal certainty. After the enactment of Government Regulation No. 24/1997 on Land Registration in lieu of Government Regulation No. 10 of 1961, there have been arrangements for the transfer of rights, as listed below:

Article 37

1. The transfer of land rights and property rights to apartment units through sale and purchase, exchange, grant, income in company and other legal transfer rights, except the transfer of rights through auction can only be registered if proved by deed made by Land Deed Officials which is authorized in accordance with applicable laws and regulations.
2. Under certain circumstances as the Minister may, the Head of the Land Office may register the transfer of rights to the parcels of land owned by an individual to an Indonesian citizen as evidenced by a deed which is not made by the Land Deed Officials, but according to the Head of the Land Office, enough to register the transfer of the rights in question.

Article 38

1. The act of deed as referred to in Article 37 section (1) shall be attended by the party conducting the legal act concerned and witnessed by at least 2 (two) witnesses eligible to act as witness in the legal act.
2. The form, content and method of making Land Deed Officials shall be regulated by the Minister.

Article 39

(1) Land Deed Officials refuses to make deed, if:
   a. concerning the registered plot of land or property rights of the apartment units, to which the original certificate of the rights concerned is not delivered or the certificate submitted is inconsistent with the lists in the Land Office; or
   b. regarding the plot of land not yet registered to him is not submitted:
      i. a letter of evidence as referred to in Article 24 section (1) or certificate of Village Head that states that the person concerned controls the plot of land as referred to in Article 24 section (2); or
      ii. a certificate stating that the parcel of land concerned has not been certified from the Land Office, or for land located in a region far from the Land Office, from the right holder concerned with being upheld by the Village Chief; or
   c. one or the parties that will commit the legal act in question or one of the witnesses as referred to in Article 38 shall not be entitled or ineligible to do so; or
   d. either party or parties acting on the basis of an absolute power of attorney which essentially contains a legal act of transfer of rights; or
   e. for legal action to be performed has not been obtained permission of official or authorized institution, if the permit is required according to the prevailing laws and regulations; or
   f. the object of the relevant act of law is in dispute concerning its physical data and / or juridical data, or
   g. Not complied with other conditions or violated the restrictions set out in the relevant legislation.

(2) The refusal to make such deed is notified in writing to the parties concerned with the reasons.

Article 40

(1) Not later than 7 (seven) working days from the signature of the relevant deed, Land Deed Officials shall submit the deeds made with the relevant documents to the Land Office for registration.
(2) Land Deed Officials shall be obliged to submit a written notice concerning the submission of the deed as referred to in section (1) to the parties concerned.

The process of buying and selling land that occurred in the community has not fully fulfilled the provisions of Article 37 section (1) of Government Regulation No. 24 of 1997, which requires the sale and purchase of land must be proven by deed made by Land Deed Officials authorized, this is because the sale and purchase of land is still under the hands. In the community there is still a lot of buying and selling of land that is done under the hand, because there is the assumption that if done in front of Land Deed Officials will cost a lot.

Considering the importance of the deed of sale and purchase of land, especially for the buyer, it means that in the future, if there is any third party who feels the rights are exceeded, the new landowner can defend his / her right and be guaranteed his legal certainty.

Closing

Conclusion

There is still a lot of buying and selling of land that is done under the hands, because there is the assumption that if done in front of Land Deed Officials will cost a lot, the management of the name of land that takes a long time, and lack of knowledge about the importance of land certificates so that many have land that has not yet certified their land. Therefore it is necessary for the public to know the process of buying and selling land in accordance with applicable provisions, so as not to cause problems in the future.

Suggestion

To avoid the practice of buying and selling land that is done outside the procedures that have been determined and to provide a clear picture of the procedure of buying and selling land to the community, there needs to be cooperation from relevant agencies such as Land Office with local Land Deed Officials to pro-active conduct counseling law on the procedure of buying and selling land to the community, and the need for a mass land certification movement so that in the future can be guaranteed legal certainty.

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RECONSTRUCTION OF ARTICLE 69 OF LAW NUMBER 6 OF 2014 ON VILLAGES RELATED TO THE MAKING OF VILLAGE REGULATIONS

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ABSTRACT

When we glance at the village we will find the conditions of concern. Anyone will admit that village development is far behind compared to the city. Many problems of structure and infrastructure from bad infrastructure condition, low quality and quantity of public facilities and infrastructure. We must realize that to realize the ideals of independence inflected by the founding father then the development of the village should be put forward. Village governments have a greater opportunity to encourage democracy. The village government is better able to realize the spirit of democracy, the government that comes from the people, by the people and for the people. Without the institutionalization of community participation at the local level, successful development is difficult to achieve. One of the efforts to increase the participation of the villagers is by generating juridical provisions so that every village regulation must be consulted to the village community is Chapter 69 verse (9) of the Village Law stating that the draft of village regulations should be consulted to the villagers. The problem then is juridically not regulated how the consultation mechanism. Philosophically-sociologically also arises because the de facto villagers do not have the competence or qualification as a consultant. Forcing the village community to become a village regulatory consultant is feared that it will create unclear legal products.

Keywords: Reconstruction, Consultation, Village Law Making.

Introduction

If we glance at the village, we will find the conditions that are negligible.[1] Anyone will admit that village development is far behind compared to the city.[2] Even negative conditions are also often attached to the word village. The latest even the President's son mocked his people with the word "*ndeso*" (tacky). Just imagine there is a son of the president[3] who still served how to brave and dare to ridicule his own people with the expression "*dasar ndeso*" (tacky). Perhaps it is a justification that as if everything associated with the village would be considered as negative thing.

In social affairs, the villagers are often identified with poverty, low education, unemployment, low productivity, low creativity and other bad attributes.[4] Villagers are labelled with negative stigma with "*dasar ndeso* " or "*dasar wong ndeso*" expressions. There are also many bad issues of structure and infrastructure from the poor condition of infrastructure, the low quality and quantity of public facilities and infrastructure. There are also issues about public services. Those are examples of concrete issues that we can see are in bad condition.

We must realize that to realize the ideals of independence inflected by the founding father then the development of the village should be put forward.[5] That's because the majority of Indonesian people live in the village. Most of the various problems that become development homework are also in the village. We must believe that by solving various problems in the village then automatically the national issue will also be much resolved. Village governments have a greater opportunity to encourage democracy.[6] Village government is better able to realize the spirit of democracy is the government that comes from the people, by the people and for the people. The leadership of the village government is not led by partisan[7] envoys but the villagers are the spirit of government from the people. The active participation of the village community also strongly reflects the democracy that is understood as government by the people.[8] Village administration is very democratic also seen from the orientation of the government is the interests of the village so fulfilled the rule of government (village) for the people (village).

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[1] Madekhan Ali, 2007, *Orang Desa, Anak Tiri Perubahan*, Averroes Press, Malang, pg. 3.
[2] R. Bintoro, 1989, *Interaksi Desa-Kota dan Permasalahannya*, Ghalia Indonesia, Jakarta, pg. 3
[3] On youtube video circulating Kaesang Pangarep bin Joko Widodo mocking his own people with the phrase "*dasar ndeso*". This case was reported but the case just evaporated without clarity. Even the reporter was arrested on another charge.
[4] Rostanto Wahidi, 2015, *Membangun Perdesaan Modern*, Indec, Jakarta, pg. 53.
[5] Hasrul Hanif, 2008, *Mengembalikan Daulat Warga Pesisir, Partisipasi, Representasi dan Demokrasi di Aras Lokal*, Pustaka Pelajar, Yogyakarta, pg. 5.
[6] Raharjo Adisasmito, 2006, *Membangun Desa Partisipatif*, Graha Ilmu, Yogyakarta, pg. 89
[7] Partisan envoys or party envoys allow for the import of leaders, for example Legislative candidates from Demak district are proposed to Dapil Purwodadi and vice versa.
[8] Such as villages experiencing irrigation problems then through village councils can be done to help overcome the problem of irrigation.

Manor states that local governance has a great opportunity to encourage democratization because decentralization processes are more likely to be responsive, representative, participatory and accountable.[9] Therefore, decentralization should simultaneously bring the strengthening of local institutional capacity and build a more responsive, participatory, transparent and accountable government system.[10] Affirmed by Michel Pimbert that the democratic potential of decentralization is most likely to be achieved when there is institutionalization of community participation at the local level.[11]

Without the institutionalization of community participation at the local level then when the decentralized government, the local elite's intellect will gain new powers that have the potential to gain its own advantage so as to bring up small kings.[12] According to Fung and Wright, the participation of society and beyond the conventional forms of democratic institutions on the very practical purpose of increasing the attitude of responsiveness and effectiveness of government.[13] At the same time, community participation can make things more just, participatory, deliberative, and accountable.

One of the efforts to increase the participation of the villagers is by generating juridical provisions so that every village regulation must be consulted to the village community is Article 69 Article (9) of the Village Law stating that the draft of village regulations should be consulted to the villagers. The problem then is juridically not regulated how the consultation mechanism. Philosophically-sociologically also arises because the *de facto* villagers do not have the competence or qualification as a consultant. Forcing the village community to become a village regulatory consultant is feared that it will create unclear legal products.

Many other interesting things related to the village that became the background of the author became interested in researching about the village. Therefore the author writes with the title "Reconstruction of Article 69 of Law Number 6 of 2014 on Villages Related to the Making of Village Regulations".

Discussion

Mechanism of the Arrangement of Village Regulations According to Law Village

According to Village Law Article 1 section 7, Village Regulation is a legislation established by the Village Head after being discussed and agreed with the Village Consultative Bureau. Village regulations are one of the rules in the village. In addition there is a Joint Regulation of Village Head and Village Head Regulation. The Village Head assigned the Village Head Regulation as the rule for implementing the Village Regulation.

The village head has the authority to submit the draft and establish the Village regulation; while Village Consultative Bureau has the right to propose a draft Village regulation. Village Consultative Bureau together with the Village Head then discuss and agree on the Village regulation Design. The Village Law mandates the Village regulation Draft to be consulted to the village community. The village community is entitled to give input to the Village regulation Design. Especially for the draft of Village Regulation on Village Revenue and Expenditure Budget, levy, spatial, and organization of Village Government, must get evaluation from Regent/Mayor before it is determined to be Village regulation.

Village regulations and village head regulations are enacted in Village News and Village Gazette by Village Secretaries. For Traditional Village, the Village Customary Rules are adjusted to customary law and customary norms prevailing in Traditional Village as long as they are not contradictory to the provisions of legislation. The Ministry of Home Affairs has provided guidance on the preparation of Village Regulation and Village Head Regulation through Regulation of the Minister of Home Affairs number 111 of 2014 on Guidelines for Technical Rules in the Village. In accordance with its objectives, the Minister of Home Affairs provides guidelines for the preparation of Village regulations, as follows:

Preparation of Village regulations made by the Village Head, draft of Village Regulation that has been prepared, should be consulted to the village community. Village regulation Design can also be consulted to the sub-district head to get input. Consultation is prioritized to the community or community groups directly related to the substance of the regulatory material. Input from village communities and sub-district heads is used by the village government to follow up the drafting process of village regulations. The draft Village Regulation which has been consulted submitted by the Village Head to Village Consultative Bureau to be discussed and mutually agreed upon.

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[9] James Manor, 1998, *The Political Economy of Demokratic Decentralization*, World Bank, Direction in Development, Washington, pg. 12.

[10] Andre Cornwall dan John Gaventa, 2001, *From Users And Choosers to Makers And Shapers: Respositioning Participation in Social Policy*, Institute of Development Studies, Brighton. pg. 21.

[11] Michel Pimbert, 2001, *Reclaiming Our Right to Power: Some Conditions for Deliberative Democracy*, International Institute for Environtment And Development, London, pg. 5

[12] Andy Fefta Wijaya, 2014, *Pembaharuan Pemerintahan Desa Melalui Partisipasi Masyarakat*, Setara Institute, Malang. pg. 9.

[13] Archon Fung dan Erik Olin Wright, 2001, *Deepening Democracy: Innovations in Empower Participatory Governance*, Politics and Society, vol. 29, pg. 1.

Preparation of Village regulations can also be initiated by Village Consultative Bureau. Village Consultative Bureau may draft and propose a draft Village regulation, except for the draft Village regulations on the village mid-term development plan, the draft Village Regulation on the Village Government's work plan, the draft Village Regulation on Village Budgets and the draft Village Regulation on accountability reports for the realization of Village Budget implementation. The draft Village regulations can be proposed by the members of the Village Consultative Bureau to the head of the Village Consultative Bureau to be designated as a draft Village Regulation of the proposed Village Consultative Bureau.

1) Village Consultative Bureau invites the Village Head to discuss and agree on the draft Village regulations.
2) In the case of the initiative draft of Village Regulations and a Village Consultative Bureau proposal on the same matter to be discussed within the same discussion time, prioritize the draft Village Regulation of the Village Consultative Bureau proposal while the Village regulation Design proposal of the Village Head shall be used as material to be compared.
3) Draft Village regulations that have not been discussed can be withdrawn by the proposer.
4) The draft Village regulations that have been discussed cannot be withdrawn except by mutual agreement between the Village Government and the Village Consultative Bureau.
5) The draft of village regulations agreed upon by the Head of the Village Consultative Body to the village head shall be stipulated as a Village Regulation no later than 7 (seven) days from the date of the agreement.
6) The draft of village regulations shall be stipulated by the village head by signature no later than 15 (fifteen) days from the receipt of the village regulation draft from the leadership of the Village Consultative Board.

Stipulation, Village regulation Design which has been signed by the Village Head is submitted to the Village Secretary to be enacted. In the event that the Village Head does not sign the Village regulations Draft, the Village Regulation Rules shall be promulgated in the Village Gazette and shall be valid as Village regulations. Promulgation, Village Secretary promulgated village regulations in village sheets. Village regulations are declared to come into force and have a binding legal force since its enactment. Dissemination was carried out by the Village Government and Village Consultative Bureau since the establishment of plans for drafting the Village Regulation, the drafting of the Village Regulation, the drafting of Village regulations, to the Enactment of Village regulations. Dissemination is conducted to provide information and / or obtain input from the community and stakeholders.

The Village Customary Rules are in accordance with customary law and customary norms prevailing in Traditional Village as long as they are not contradictory to the provisions of the Laws and Regulations. Techniques and procedures for the preparation of the Village Regulations set forth in this Ministerial Regulation shall apply mutatis mutandis to the techniques and procedures for the preparation of the Rules in traditional villages. Cancellation of Village regulations and Village Head Regulations. Village regulations and village head regulations that are contrary to the public interest and / or the provisions of higher laws and regulations are annulled by the regents / mayors.

Obstacles in the Process of Consulting Village Regulation

In Law Number 6 Year 2014 on Villages there is a vague norm as referred to in Article 69 section (9) stating that the draft of Village regulations should be consulted to the village community. Based on this problem, there is a legal issue that needs to be studied further, that is how the arrangement and formation in the making of village regulations and how the form of consultation and participation of the village community in the formation of village regulations. We therefore propose the need for further regulation which can be used as a legal basis for the regulatory and establishment of village regulations. According to Nyoman Serikat Putra Jaya, all parties especially the legal community need to think and fight for a reform in the field of law enforcement.[14] Enforcement of the intended law is given a broader meaning, not only concerning the implementation of law (Law Enforcement) but also including preventive measures such as legislation and socialization. According to Andi Hamzah, the term law enforcement is often misunderstood as if it were merely a criminal justice crime domain (*pro justitia*).[15]

According to Andi Hamzah, the term of law enforcement includes repressive and preventive.[16] The latest law enforcement also includes restorative or rehabilitative. So more or less the same meaning with the Dutch term *rechtshandhaving.* Unlike the English term law enforcement meaning repressive. While the preventive, in the form of giving information, persuasion and instructions called law compliance called the fulfillment or arrangement of the law.

[14] Nyoman Serikat Putra Jaya, 2005, *Kapita Selekta Hukum Pidana*, BP UNDIP, Semarang, pg. 49.
[15] Andi Hamzah, 1998, *Reformasi Penegakan Hukum*, Pidato Pengukuhan Jabatan Guru Besar pada Fakultas Hukum Unviersitas Trisakti, Jakarta, pg. 2.
[16] *ibid*

Sudarto means law enforcement is the concern and cultivation of lawless acts that really happen (*onrecht in actu*) as well as unlawful actions that may happen (*onrech in potentie*).[17] Unlawful acts that may occur must necessarily be anticipated by legislation mechanisms. Preparation of village regulations is also one form of legislation. Meanwhile, according to Satjipto Raharjo, law enforcement is an attempt to realize ideas and concepts into reality.[18] Law enforcement is a process for realizing legal desires into reality. Referred to legal wishes is none other than the minds of the legislatures formulated in these laws. In the preparation of village regulations, these thoughts are the thoughts of the leaders and members of the village community. Discussions about this law enforcement process extend to law-making. The formulation of the lawmakers' minds (laws) set forth in the rule of law will also determine how law enforcement is carried out.

According to Soerjono Soekanto, conceptually, the core and meaning of law enforcement lies in the activities of harmonizing the relationship of values described in the principles of steady and final manifestation and attitude, to create, maintain and maintain peace of life.[19] Law enforcement disturbances sometimes also occur when there is a discrepancy between "trinity" values, rules, and behavior patterns. The interference occurs between the paired values, which are incarnate in the confusing rules and unintended behavior patterns that interfere with the peace of life. Therefore it can be concluded that law enforcement is not merely the implementation of the law. But it also concerns the legislation process.

Obstacles in the legislative process of village regulations include:

a. The village government is lacking in legal knowledge, either because of educational qualifications, lack of information seeking, or lack of legal awareness.
b. Efforts made by the village government ie consultation with the Legal Department of the local District Government even extend the bureaucratic chain and often the district government does not understand the substance of the law in question.
c. Sometimes efforts to take village regulations from other villages as a reference. However, the implementation of these efforts is not all positive for the village government, as some villages actually do plagiarism by copying paste to village regulations from other villages.
d. The crucial constraint is that when planning the formation of village regulations includes the collection of content material, legal basis, legal interpretation.
e. Efforts made to try to unify the argument through deliberation just produce pro and contra protracted that even inhibit the decision-making process of deliberation.
f. Resource persons are also difficult to import in terms of affordability of location, cost, and capacity of the resource person who is often adequate in academic terms but unable to ground legal substance.
g. The village government's efforts with consensus and voting deliberations also have the potential to cause disunity among the citizens.
h. Implementation of village regulations often conflicts with customs, community habits, or higher law regulatory material.
i. Lack of rule enforcement because it lacks adequate structure for its enforcement.
j. And there are many other things that certainly cannot be mentioned one by one.

Reconstruction Article 69 Village Laws to Become Responsive Laws

a. The theory of responsive law

Nonet and Selznick pay special attention to the variables relating to law, namely: the role of coercion in law, the relationship between law and politics, the relationship between law and the state, the relationship between law and the moral order, the place of discretionary rules and objectives in decision - legal decisions, citizen participation, legitimacy and conditions of compliance with the law. Each of these variables is different if the context changes. In this connection Nonet and Selznick propose a theory that aims to explain systematic relationships in laws and specific configurations in which the relationships in the law take place. They distinguished three basic conditions of law in society:

1) Repressive law, the law as an instrument of repressive power.
2) Autonomous law, the law as an institution capable of neutralizing repression and protecting the integrity of the law itself.
3) Responsive law, the law as a means of response to social provisions and community aspirations.

Repressive Law

This law specifically aims to maintain the status quo of the rulers who are often put forward under the pretext of ensuring order. The rules of repressive law are harsh and detailed, but soft in binding on the makers

[17] Sudarto, 1986, *Kapita Selekta Hukum Pidana*, Alumni, Bandung, pg. 111.
[18] Satjipto Raharjo, 1983, *Masalah Penegakan Hukum: Suatu Tinjauan Sosiologis*, Badan Pembinaan Hukum Nasional, Jakarta, pg. 24
[19] Soerjono Soekanto, 1983, *Faktor-Faktor Yang Mempengaruhi Penegakan Hukum*, Fakultas Hukum Universitas Indonesia, Jakarta, pg. 2.

themselves. The law is subject to the politics of power, the demand for obedience to the law is absolute and disobedience is regarded as an aberration, while criticism of the ruler is considered a disloyalty.

Autonomous law

As a reaction to the repressive law and to limit the arbitrariness of the ruler, an autonomous law arises. Autonomous law does not question the domination of power in the existing order and the order to be achieved. Autonomous law is the legal model of "the rule of law". The legitimacy of autonomous law lies in the legal procedural truth, free from political influence so that there is a separation of powers, the opportunity to participate is limited by established ordinances. At this time seen in the various fields of life, the emergence of reactions to this autonomous law, namely in the form of criticism of the dogmatic satisfaction of the legislative rigidity and against the juridical tendencies that are foreign to the real world of public life.

Responsive Law

In many fields of life there arises a desire to achieve responsive laws that are open to changes in society with a view to dedicating the burden of social life and achieving social policy objectives such as social justice, the emancipation of neglected and abandoned social groups and protection to the environment. In the concept of responsive law emphasized the importance of the meaning of policy goals and juridical elaboration and policy reactions as well as the importance of the participation of the groups and individuals involved in policy determination.

Nonet and Selznick do not mean that the use of the law is a tool for achieving arbitrarily defined goals, but laws that lead to the embodiment of the values embodied in the ideals and the juridical will of all societies. These values are not things that have become government policy, but these values must be clearly reflected in the practice of the use and enforcement of the law, so that in appreciation these values are able to provide direction to political and legal life.

The expected village regulations are regulations that help to realize responsive laws. Village regulations are expected to be laws that lead to the realization of the values embodied in the ideals and the juridical will of all villagers. The values must be clearly reflected in the practice of the use and implementation of village regulations, so that in appreciation these values are able to give direction to the life of the village community.

Terms of Good Legal According to Law Number 12 of 2011

In the formulation of legislation needs to be guided by the principles of formulation of good and ideal rules. This is intended to avoid errors and defects in the formation of norms. Therefore the Law of the Republic of Indonesia Number 12 Year 2011 on the Establishment of Laws and Regulations, reminds the legislators to always pay attention to the principles of the establishment of good legislation and the principle of content material. In establishing the Laws and Regulations should be made based on the principles of the establishment of good legislation, which includes:

1) "the principle of clarity of purpose", that any Establishment of Legislation must have clear objectives to be achieved;
2) "the right institutional or forming authority", that any type of Legislation shall be made by a state institution or official of the Authorized Legislator, such Regulation may be nullified or null and void if it is made by a state institution or an unauthorized person;
3) "the principle of conformity between type, hierarchy, and matter of charge", that in the Formation of Legislation must really pay attention to the material content that is appropriate in accordance with the type and hierarchy of the Laws and Regulations;
4) "Principle is practicable", that any Establishment of Laws and Regulations shall take into account the effectiveness of such Law and Regulations in society, whether philosophical, sociological or juridical;
5) "Principles of Use and Utilization", that every Legislation is made because it is really necessary and useful in regulating the life of society, nation and state;
6) "the principle of clarity of the formula", that every Legislation must meet the technical requirements of the preparation of the Law, Systematics, choice of words or terms, as well as clear and understandable legal language so as to not result in various interpretations in the implementation;
7) "the principle of openness", that in the Formation of Legislation starting from planning, preparation, discussion, endorsement or stipulation, and enactment is transparent and open. Thus, all levels of society have the greatest opportunity to provide input in the Formation of Legislation.
8) The content of legislation should reflect the principle:
    a) a "guiding principle", that any Content of Regulatory Content shall serve as a safeguard to create public order;
    b) "the principle of humanity", that any Content of the Rules of Law and Regulation shall reflect the protection and respect of human rights and the proportionate value of the citizens and the citizens of Indonesia;

c) "the principle of nationality", that any Content of the Laws and Regulations must reflect the nature and character of a plural Indonesian nation while maintaining the principle of the Unitary State of the Republic of Indonesia;
d) "the principle of kinship", that any Content of the Rules of Law shall reflect deliberations to reach consensus in any decision-making;
e) "Principle of the archipelagon", that every Content of the Constitution shall always observe the interests of the entire territory of Indonesia and the content of the laws and regulations made in the regions shall be part of the national legal system based on *Pancasila* and the 1945 Constitution of the State of the Republic of Indonesia;
f) "*bhinneka tunggal ika* principle", that the Content of Regulatory Material must pay attention to the diversity of population, religion, tribe and class, special condition of region and culture in the life of society, nation and state;

9) "the principle of justice", that every Contents of Laws should reflect proportional justice for every citizen;
10) "the principle of equality of positions in law and government", that any Content of the Laws and Regulations Contents shall not contain things that are distinguishable based on background, such as, religion, ethnicity, race, class, gender or social status;
11) "the principle of law and order of law", that every Content of the Contents of Laws must be able to realize order in society through guarantee of certainty;
12) "the principle of equilibrium, harmony, and harmony", that every Content of the Laws and Regulations Content must reflect balance, harmony and harmony between individual interests, society and the interests of the nation and state;
13) "other principles in accordance with the field of law of the relevant Legislation", among others:
    a) in the Penal Code, for example, the principle of legality, the principle of no penalty without error, the principle of guiding the prisoner, and the presumption of innocence;
    b) in the Civil Code, for example, in the treaty law, inter alia, the principle of agreement, freedom of contract, and goodwill.

These principles form the basis for forming legislation and policy makers in formulating legislation. All of the above principles must be inseparable in the policy-makers who will form legislation that is usually manifested in the form of questions in every step taken. For example, what is the importance of establishing this rule? What is the purpose? Is it beneficial to the benefit of society? Have the other instruments enough? In formulating the substance desired by the policy-makers, legislators must always ask whether the formula is clear and not effect in interpretation or not?

Basically every village regulation is also a form of legislation, therefore the village regulations must follow also the rules that have been regulated by Law no. 12 of the year 2011. Article 8 section (1) states that "The types of laws and regulations as referred to in Article 7 section (1) include the regulations established by the People's Consultative Assembly, the House of Representatives, the Regional Representative Council, the Supreme Court, the Constitutional Court, , The Judicial Commission, Bank Indonesia, the Minister, the same body, institution or commission established by law or Government on the order of the Act, Provincial People's Legislative Assembly, Governor, Regency/Municipal House of Representatives, Regent / Mayor , Village Head or the same level. "

Law number 12 of 2011 Article 8 section (2) states that "the laws and regulations as referred to in section (1) are acknowledged to exist and have binding legal force to the extent ordered by a higher Legal Regulation or established under the authority."

In principle, the village community and its equipment (including the village head) would agree with the regulatory system of Law Number 12 Year 2011. This means that in terms of intention there is good intentions. But in terms of ability, it does not mean then able to arrange the legislative products in the form of village regulations in accordance with these principles. Because even the facts, until now the Constitutional Court is still busy convening on the examination of the law. This means that the law drafted by the government with the House of Representatives with all facilities and flexibility is still there are defects that must be retested in the Court. Especially with the village regulations solely prepared by the village community with all its limitations.

Amendment of Article 69 section (9) of the Village Law

The Village Law Article 69 section (9) states that (9) "The draft Village regulation shall be consulted to the village community." It means that if a Village regulation is not consulted with the village community there is a legal consequence to the regulation.

The term consultation is felt less appropriate because it is addressed to the village community. Consultation activities should be more appropriate with consultants. According to the Great Indonesian Dictionary, consultants are experts whose duties provide guidance, consideration, or advice in an activity (research, trade, etc.); adviser.

So the consultation activity is expected to get a guide or consideration or advice from a (or more than one) expert. The village community is clearly not a class of experts. Therefore, the terminology should not be consulted, but deliberation or public hearings. One of the characteristics of responsive law is its ability to respond to the demands of the times and perspective of the future. If the consultation obligation is imposed on the majority of villagers who are not adequately educated, the goal of achieving a responsive law will be difficult to achieve. How to form a responsive law when the concept of responsive law is not known, for example.

Closing

Based on the description of the discussion can be concluded that the mechanism of formulation of village regulations according to the Village Act is the proposing, discussion, determination, enactment, dissemination. Preparation of village regulations should be consulted to the village community as regulated in Article 69 section (9) of Law no. 6 of 2014 on the Village. The constraints that arise in the consultation process are the lack of resources, especially human resources and cost resources. the reconstruction of Article 69 of the Village Law to become responsive law is to convert the word consultation into deliberation.

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Undang-Undang Dasar Negara Republik Indonesia Tahun 1945

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Peraturan Menteri Dalam Negeri Nomor 111 tahun 2014 tentang Pedoman Teknis Peraturan di Desa

BUILDING LEGAL SYSTEM NATIONAL ECONOMY

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ABSTRACT

Economic activity is a series of activities undertaken by humans in order to meet their needs, both primary, secondary, and tertiary needs. The development of economic activity in society must necessarily be followed by legal development in order to cover the economic activities. Indonesian economic law must always maintain and ensure a balance between public and private interests, so that every rule of economic law, whether it is derived and ruling, or it is a decision of the private sector, must and must reflect a balance between private and public interests. The issues that will be raised in this paper is how legal role in economic development and reform of economic law in Indonesia? Research method in this paper The author uses the method of observation and literature. The ways used in this writing are: Library Studies. In this method the author reads books related to the topic or theme of writing this paper. The result of this research that is law and economic activity is a unity that can't be separated. The law arrangement in economic activity gives more free space but limited. That is, economic activities can be carried out freely without any doubt and fear of deviations in the process of economic activity because the law has anticipated and covering predicted relationships will occur in the future.

Keywords : Legal System, Economic Law, Economy

Introduction

Economic activity is a series of activities performed by humans in order to meet their needs, whether the needs of primary, secondary, and tertiary. Such activities have been started since the beginning of human civilization and continue to this day.[1] Economic development is a process that takes place in the long term and longer in a state of society which aims to increase the per capita income of a nation. Economic development also aims to maximize the ways in order to meet human needs in a way to transform the economic factors that exist in a state that is economically more beneficial to the community of nations.

In the implementation of economic activity, so that can be implemented in an orderly and a good impact for the community, the law is necessary to protect the business decisions (economic) conducted by the economic actors. In an effort to put the law as an authoritative instrument for supporting economic activity, need to know what role desired by the economics of the existence of law in society.

In this current development, the impact of globalization led to the development of economic activity in the community. The development of economic activities in society must necessarily be followed by clicking legal developments in order to cover the economic activity. Indonesian economic law should always maintain and ensure a balance between public interest and private interest, so that every economic rule of law, whether it comes from and the ruler, or whether it is a decision of the private sector, should and must reflect a balance between private interest and public interest. That presumably essential characteristics that distinguish Indonesian economic law and economic law developed countries. Therefore the legal system of economic (economic Law) should really be a legal system development (development law) which can provide guarantees to every citizen in accordance with the objectives of national law.

Their rapid development of life, particularly in the fields of economy, pushing more and more the need for the provision of more effective legal protection of the right to life and equality (equity) so that what the objectives of the welfare state can be achieved. However, this requires social, economic and mental readiness of the Indonesian nation, because in reality imitating it, we are still very difficult let alone innovate. Furthermore, how can we innovate when our capabilities in human resources, mental, economic ability and so do not support.

To transform the existing economy towards more beneficial conditions requires a formal arrangement and operation of the system of law. Indonesian judicial functions under the Act of 1945 is to provide legal protection, preserve, protect, provide justice for all people. Development of Indonesia fully to improve the welfare of Indonesian society. Thus the law as a tool of "Development of Indonesia and the National Economic Legal Reform."

The term Economic Law or Economic Law became known in Indonesia in about 1972. At that time there are still many among the legal experts who still oppose the presence of the law of economics as a field of study of law new and independent. Growing great attention to economic law can't be separated from the emergence of economic problems, both national and global scale that hit the world, especially Indonesia.

[1] Sri Redjeki Hartono, *Hukum Ekonomi Indonesia*, 2007: Malang, Bayumedia Publishing, page 113.

Renewal of basic thinking in the field of economics changes and determines the basics of the legal system, then the establishment and enforcement of appropriate legal principles will also facilitate the formation of the structure and economic system that is desired. But on the contrary, in the absence of principles and rules of law proper and complete enough, the achievement of economic structure is aspired it will be too late.

The proper method to carry out legal reforms Indonesian economy is through a transdisciplinary approach, namely framework which starts on economic thinking which also uses the ideas of other social sciences. So he explained that the Economic Law outcome renewal can no longer simply be regarded as part of the State Administration Law, or as an extension of the Trade Law or a set of legal principles concerning the economy, but the law of independent economy that is transdisciplinary combines not only a variety of approaches law (public and civil), but even combining legal approach to non-legal approach.

Based on the description of the background above, the problem in this paper is about how the role of law in economic development and renewal of economic law in Indonesia?

Objective Theory

Objective economics was to: (1) search for an understanding of the relationship of economic events, either in the form of causal relationships and functionally. (2) to be able to master the economic problems faced by the community.

In addition to the above purpose of this paper aims also to increase knowledge about the law of national economic renewal and review lessons Itself economics courses. It is also expected to be useful for us all.

Writing Method

The author uses the method of observation and literature. The means used in this paper are: Study Library. In this method the authors read books related to the topic or theme of the writing of this paper.

Discussion

The problems always arise from the use of economy of scarce resources to satisfy unlimited human wants in an effort to improve the quality of life. Due to scarcity, then a scramble for control of the scarce resources. Seizing be ruler over scarce resources can lead to disputes between economic agents could even spark a war both between regions and between countries.

These economic problems need to be set in order to use limited resources to work well with the principles-principles of justice. Economic law is one tool to address shared issues. This economic law even further regulate economic activity, so it would seem the role of law in economic activity.

Economic activity is any human activity that aims to meet the needs of everyday life. In essence, the economic activity is the activity of running a company, which is an activity which implies that the activity is meant to be done in several ways, including continuous and uninterrupted, blatantly illegal, and do in order to make a profit for yourself and others.

Each group of people have different needs depending on the level of life, culture, science and so on, as well as ways to meet their needs and maintain their life, is also different in every human group. This often creates a conflict of interest between groups with one other group. Because basically the requirements wanted though often will cause any harm to other community groups.

The development of economic activity in general is always followed by advanced and developing values, ethics, and morals of each culprit. The development of business ethics or the ethics and morals surrounding economic activity will bring welfare and prosperity. Ethics and moral will bear certain habits that will become the rule in a particular business.[2]

Douglass C. North, a holder of a Nobel prize in 1993 in the fields of Economics, in essay entitled **Institutions and Economic Growth: An Historical Introduction** to say that the key to understanding the role of law in developing or even suppress economic growth lies in understanding the economic concept of "transaction cost "or transaction costs.[3]

Some economists expect that the role of law geared to accommodate the dynamics of economic activity, by creating an efficient and productive activities, and contains the power of predictability. According Hernado de Soto, a good law is the law which ensures that economic and social activities are arranged to run efficiently, whereas a bad law is the law which disrupt or even preclude business activity, so that it becomes inefficient.[4]

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[2] Sri Redjeki Hartono, *Ibid.*, page 118.

[3] Adi Sulistiyono & Muhammad Rustamaji, Hukum Ekonomi sebagai Panglima, Sidoarjo:2009, Masmedia Buana Pustaka, page 18-19.

[4] Adi Sulistiyono & Muhammad Rustamaji, *Ibid*.., 18 & 58, Lihat juga Hernado de Soto, Masih Ada Jalan Lain, Revolusi Tersembunyi di Negara Ketiga, terjemahan oleh Masri Maris, Jakarta: 1991, Yayasan Obor Indonesia.

Thus, a series of economic activities require a good setting so that economic activity can be run efficiently. The law, which is required within the scope of economic laws essentially regulate economic activity, whether that includes the private sphere, as well as public domain. Legal arrangements do it also should pay attention to some elements that laws do not hamper economic activity. This is as disclosed by Burg's based on studies done about the law and development. These elements include the stability ,prediction (predictability), justice (fairness), education, and the specific development of legal scholars (the development special abilities of the lawyers). Furthermore Burg's suggested that the first and second elements is a requirement that the economic system functioning. Here the "stability" serves to accommodate and avoid interests competing. The prediction is a need to be able to predict the provisions relating to the economy of a country.[5] In other words, these predictions must be able to demonstrate the role of law in giving a clear picture of future regarding circumstances or relationships that do in the present.

The basic concept of the economic system adopted by the Republic of Indonesia, where the branches of production that are important and dominate the life of people controlled by the state and used for the greatest prosperity of the people. The state also recognizes the right of private property, but the public interest should be above personal and group interests. Economies that are organized in this form is a joint venture based on the principle of family. Joint venture on the basis of kinship can be implemented with the co-operative system in the economic life.

In the economic system that adheres to the balance between the protection of personal interests and the protection of national interests often lead to collisions. A conflict of interest is mainly due to the availability of qualified human resources and capital are limited in the management of economic resources forced the state we have to bring in outside investors. Investor interest is then analogous to the public interest, because investors are generally more capitalist by seeking the maximum profit. In this case used for the greatest prosperity of the people often can't be met.

If Burg's proposed rule of law as a condition for the proper functioning of the economic system, it is different to what is argued by Prof. Dr. Sri Redjeki Hartono, SH, M. Hum in his **Indonesian Economic** Law. In his book, he argues that the legal regulation of economic activity is very important in terms of the legal relationship of the parties. The role of law is very important in sustainable economic activity and very wide dimension. Later, he also argued that the rule of law in economic activities manage all aspects of the law covering the private sphere and the public in accordance with the role and authority of an activity as follows:

1. Device regulation in the private sphere consisting of various laws that are within and outside of codification, includes:
   a. All the legal principles that apply to the legal acts establishing the company as necessary;
   b. All the legal principles that include all types of contracts and execution of the transaction; and
   c. Provision of documents.
2. There are diversifying set of rules in the field of administrative law governing the preparation of the establishment of the company as follows:
   a. Device regulations that regulate the terms and procedures set up companies;
   b. Sets of rules governing the licensing of the requirements for establishing and filing procedures and so on;
   c. Set of rules governing the production process and quality standard; and
   d. Regulation devices packing and storage as well as distribution and marketing time span.
3. Device environmental regulations on business premises, the place of production, and waste management;
4. Device settings relating to labor, workplace safety and workers' rights and so on, including the protection of labor;
5. Device settings that govern the obligations of entrepreneurs / economic agents; and
6. device regulations governing liability in the field of taxation and the environment.

Some things that have been described above further indicates that the legal and economic activity is a unity that can't be separated. If one of the elements in between the two is lost, there will be an imbalance in the organizational structure of society, especially in the economic field. The existence of legal regulation of economic activity provide more free space but limited. This means that economic activity can be done freely without any doubts and fears deviations in the process of economic activity because the law has to anticipate and clicking cover relationships predicted to occur in the future.

Law is also present as a counterweight to the relationship between the economic actors. The legal system should be able to be a force to provide a balance between conflicting values in society. The legal system provides a "consciousness of balance" in the efforts of countries to economic development and the renewal of economic law.

[5] Adi Sulistiyono & Muhammad Rustamaji, *Ibid..*, page 19-20.

Our beloved country Indonesia in 1998 monetary crisis, the economic crisis and the crisis of confidence that any negative impact has been felt by the entire community. As a result of mistakes in the business sector that helped create the crisis earlier, it seems the time has come for business people, policy-makers, especially those engaged in decision-making, to have a "sense of risks" are strong enough to nature bumping risk of not again performed. Decision-making should not be caused by the logic of simple, but more because of the result of a sharp and deep analysis.

The tragedy of the financial crisis, the economic crisis continues in the confidence crisis that hit Indonesia in 1998 because of mistakes made by the decision makers in this case is a good leader or manager leadership of the company is also a leader in government channels. Everything is done on a competitive basis in business despite having a high risk. It is also the arrogance of the businesses that did not base it on purpose to promote the welfare of all the people of Indonesia, but the monopoly of economic conglomerates with the facts about how the proliferation of big companies that clearly shows of the economic situation of Indonesia tyranny and democratic.

The phenomenon of a handful of large companies that control more and half the national wealth does not reflect the growth of democracy in the macro economy. Where the state can't ensure even distribution of economic resources and a decent living for its citizens. The principle of joint venture on the basis of kinship was only in the constitutional text alone while implementation can't be applied. In this respect the democratic principles to be applied in the internal life of the corporation.

And in terms of company law, business conglomerate is none other than a collection of a limited liability company that is generally the integration by a holding company, which is usually limited liability. Because the rule of law on limited liability contained in the Commercial code from Article 36 to Article 56 and including Article 56 of the formerly applicable, replaced by Act No. 1 of 1995 on Limited Liability Company. However, in practice the level of this Act also cultivate the corporation, because the principle of individualism and capitalism take precedence in the establishment of a limited liability company. Limited liability company is a collection of capital(acumulasicapital)rather than a collection of people as expected by the constitution where the economy is a joint effort that is implemented by a collection of people or a cooperative.

Viewed and in terms of ownership, in addition to a private company, there is also a conglomerate which is a State Owned Enterprise (SOE) but have never encountered a conglomerate in the form of a cooperative, although it is certainly possible to open. Act of 1945 guarantees the existence of state-owned enterprises and cooperatives and in fact even less give place to the private sector. In practical terms, there was a relatively loose differentiation towards areas of business are allowed to enter each of the economic conglomerate, which is state-owned enterprises, cooperatives and the private sector.

The fields are very clear of public interest, such as petroleum, natural gas, electricity, rail, water, a business segment for SOE, as a logical consequence of the existence of Article 33, paragraph 2 and 33 paragraph 3 of the Constitution of 1945, namely as the embodiment and the word "controlled" by the state contained in the aforementioned article. Furthermore, Article 33, paragraph 2 of Act of 1945 signaled direct state control over the branches of production that are important to the state and public needs. While Article 33, paragraph 3 gives power to the state to direct control of the activities associated with the processing / management of the earth's resources, water and natural resources contained therein. Because it should not be justified any party other than state-owned companies operating in areas such as this. Or even if they operate, must be done with consideration of the welfare of the masses by the government as the authorities take control. In consideration of the welfare and justice, the state does not relinquish ownership, both legally and conceptually. For example, the forest is one example of the natural resources, the private sector should not be given concessions or other forms of tenure that is very widespread powers, to such an extent that the government does not only stay as the "licensor" solely. Another case if the concessionaire for example just given to SOEs.

Following up on the orders of President Jokowi, Coordinating Minister for Economic Affairs (CMEA) Nasution also formed a special team which is then coordinated with the Investment Coordinating Board (BKPM) and some relevant ministries and institutions. Some of the remedies is also outlined in the Economic Policy Package volumes ranging from 1 to 12 volumes, 12 volumes of the economic package announced by President Jokowi himself on Thursday, April 28, 2016, at the Presidential Palace in Jakarta. "It's a large and important package with comprehensive coverage," said Coordinating Minister Nasution, was quoted in the press release, Thursday, April 28, 2016. The

Determination of these packages originated from the determination of the level indicator 9 by the World Bank's ease of doing business. Each of these is:

1. SYB (Starting Business).
2. Related Licensing Building Establishment (Dealing with Construction Permit).
3. Tax Payment (Paying Taxes)
4. Business Credit (Getting Credit)
5. Enforcement of Contract (Enforcing Contracts)
6. Splicing Electric (Getting Electricity)

7. Trading Cross Country (Trading Across Borders)
8. Settlement Case Bankruptcy (Resolving Insolvency) and the
9. Protection of Investors Minorities (Protecting Minority Investors).

In an effort to stabilize the economic situation in Indonesia, Jokowi-JK government launched various programs to stimulate economic growth slow in the beginning of their reign. The most popular is bound economic policy package, because the package is composed of several volumes that have a different focus to target multiple targets that allegedly can stimulate economic movements.

The economic system is a system used by a country to allocate its resources to both individuals and organizations in the country. The fundamental difference between an economic system with other economic systems is how the system is set of factors of production. In some systems, an individual may not have all the factors of production. While in other systems, all of these factors held by the Government. Most systems in the world economy is in between the two extreme systems.

Indonesia's economic system is an economic system oriented to the Supreme Godhead (ethical and religious morality, not materialism); A just and civilized humanity (not knowing extortion or exploitation); Unity of Indonesia (enactment of togetherness, family principles, socio-nationalism and socio-democracy in the economy); Democracy (giving priority to the economic life of the people and the livelihood of the people); and Social Justice (equality / emancipation, the main prosperity of society, not the prosperity of the people).

The development of Indonesian Economic System Thinking, as we all know that what determines the form of an economic system unless the basic philosophy of the nation upheld, then the criterion is the institutions, in particular the economic institutions that became the embodiment or realization of the philosophy.

Melee thoughts on what economic system should be in applied Indonesia has started since Indonesia has not achieved its independence. Until now the struggle of these ideas are still ongoing, it is reflected in the development of thinking about Pancasila Economic System (SEP). According to Sri-Edi Suwasono (1985), the struggle thinking about SEP was essentially an interpretation of the dynamics of economic clauses in the Constitution

1945 Economy In 1945, Article 33 of the 1945 Constitution, which referred to the branches of production that dominate the life of many are goods and services that are vital to human life, and are available in limited quantities. Overview of the vital whether or not a particular item continues to change according to the dynamics of economic growth, improved living standards and increased demand. Thus the interpretation of clauses in ataslah much dominate the thinking of SEP. Thinking about the SEP, is a lot, but there are some that need to be discussed in detail because they are faunding father and also economic figures which also adds to our economic system, including:

1. **Thought Mohammad Hatta (Hatta)**
   Bung Hatta apart as leaders proclaimed the nation Indonesia , also known as the drafting of article 33 of the 1945 Constitution Bung Hatta drafting article 33 is based on the bitter experience of the Indonesian nation that for centuries colonized by foreign nations who embrace liberal-capitalistic economic system. The implementation of this system in Indonesia has led to misery and squalor, therefore according to Bung Hatta good economic system to be applied in Indonesia should be based on kinship.
2. **Thought Wipolo**
   Thought Wipolo delivered with Wijoyo Nitisastro debate about Article 38 Provisional Constitution (Article is identical to Article 33 of the 1945 Constitution), 23 September 1955. According to Wilopo, article 33 has a meaning SEP strongly rejects liberal system, therefore SEP also rejects private sector is a major driver of liberal-capitalistic economic system
3. **Wijoyo Nitisastro thought**
   Wijoyo Nitisastro thought this was a response to Wilopo thought. According Wijoyo Nitisastro, Article 33 UUD 1945 highly interpreted as a rejection of the private sector.
4. **Thought Mubyarto**
   According Mubyarto, SEP is not a capitalist economic system and socialist. One of the differences with the capitalist or socialist SEP is a view of man. In a capitalist or socialist system, humans are viewed as a rational being who has a tendency to meet the demand for material.
5. **Thought Emil Salim**
   Salim of the SEP concept is simple: the market economy system planning. According to Emil Salim, in tersebutlah system achieved a balance between the command system to a market system. "Typically an economic system depends closely to the ideas of the ideology adopted by a State. Sumitro Djojo Hadi Kusomo in a speech to the School of Advanced.

Renewal of the law which is preparing the legal system to be adjusted to changes in society. Legal renewal is also a conscious effort made to change a condition from a level that is considered unfavorable to a new condition at a level of quality that is considered good or best.

Renewal of the actual law implies that broadly covers the legal system. According to Friedman, "the legal system consists of the legal structure (structure), a substance / material law (substance) and legal culture (legal culture). Changes made and has a positive meaning would create new laws in accordance with the state of development and the values of community law.

Legal reform is a top priority, especially when that State is a newly independent State of imperialism / Other countries. Therefore, in developing countries, legal reforms always impress their dual role, namely:

1. An attempt to break away and circle the colonial structure, the effort consists of deletion, replacement and adjustment of the legal provisions in order to meet the demands of the colonial legacy of colonial society.
2. Legal reform also instrumental in encouraging the economic development process that is required in order to catch up with developed countries and more importantly for the sake of improvement of social welfare of citizens.

Legal smuggling often occurs by way of devolution and or ownership conglomerate to others with reasons:

1. Interested parties themselves do not have the time to do it yourself.
2. Interested parties themselves are not enough skills to do it themselves.
3. Interested parties themselves are not quite done legally, for example, he is immature or distraught.
4. Interested parties themselves are not authorized to do so because it is prohibited by law.

Smuggling law can occur to the latter possibility, namely in terms of the appointment of a trustee nominee to perform an act for the interested parties themselves are not authorized to perform such actions since the prohibition by law. With the smuggling of such laws, then one does not commit it self on an act because it is forbidden, but the prohibition may be smuggled by appointing another person to do the deed for the benefit of the party who appointed him. So someone who is prohibited by law to obtain certain facilities, eventually also can enjoy these facilities through the appointment of a trustee, which enjoyed no different facilities as enjoyed by parties who are by law authorized to it.

Seeing the socio-economic development and political this time, finally we also have to be realistic that the process of law reform, especially the law of economic reform is always difficult and long. Key importance of legal reform economic reform Indonesia actually restore the economic system to the constitutional mandate which the economy is organized as a joint effort on the principle of kinship and the state has the right to master the production branches are important and dominate the life of many and used for the greatest prosperity people.

It has become a necessity, that the economic development of a country, particularly a developing country, the law has a major role to contribute to bring economic development opportunities. Implementation of the wheels of government with democratic by using the law as an instrument for planning and implementing a comprehensive development program, will lead the country towards a society with welfare in all aspire. In an effort to provide relevant input as raw material to make the development of economic laws, please note the role of law to economics. With this step will be known the demands of the economy in the areas of law that can be used as valuable input to support economic growth.

Closing

Conclusion

Legal and economic activity is a unity that can not be separated. If one of the elements in between the two is lost, there will be an imbalance in the organizational structure of society, especially in the economic field. The existence of legal regulation of economic activity provide more free space but limited. This means that economic activity can be done freely without any doubts and fears deviations in the process of economic activity because the law has to anticipate and clicking cover relationships predicted to occur in the future.

Law is an authoritative instrument for supporting economic development, so you need to know what the desired role in the economic and legal presence in the community. Some economists expect that the development of economic laws should be directed to accommodate damika economic activity, creating an efficient and productive activities, and contains power predictability. Efforts towards development of the law seems to be more appropriate if directed at the development of the field of law and economics. Therefore, it is necessary to know in advance three aspects that directly affect the concept of economic law development, that is: First, The Role of Law in Economics; Secondly, the influence of Globalization of Law; and Third, the existence of the Economic System in Indonesia.

Law is also present as a counterweight to the relationship between the economic actors. The legal system must be a force that provides a balance between conflicting values within society. this legal system provides "awareness of balance" in the country's efforts to economic development.

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REGIONAL AUTONOMY IN ACTUALIZING MANAGEMENT OF GOOD LOCAL GOVERNMENT

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ABSTRACT

Providing the widest possible autonomy to regions in implementation of local government is directed to accelerate the realization of the community welfare through improving services, empowerment, and community participation. In addition, through broad autonomy, the region is expected to improve competitiveness by taking into account the principles of democracy, equity, justice, privilege and specificity and potential and regional diversity within the system of the Unitary State of the Republic of Indonesia. The devolution of authority to local government, is an absolute and inevitable requirement. Positive aspect of giving authority to the local government is the tasks of the government will be run better, because people in the region have a very understanding of the social, economic, and political context surrounding the environment. The local government understands the needs of its people and how to mobilize its resources and fund resources. Decentralization is a symbol of trust from the central government to the region. This is in accordance with the mission of regional autonomy as stipulated in Law Number 23 of 2014 on Regional Government that accommodates the involvement of the community in the framework of improving development. A good Regional Government means an orderly, undefiled Regional government. Parameters of good local government in the form of services to the community, community empowerment and community involvement in development,

Keywords: Regional Autonomy, Good Local Government

Introduction

Implementation of local government has run itno a very fundamental change since the enactment of Law No. 22 of 1999 which has now been amanded by Law No. 32 of 2004 and lastly amanded by Law Number 23 of 2014 on Regional Government. The principle used in this law is the broadest principle of autonomy in the sense that the regions are given the authority to administer and regulate all government affairs outside which are central government affairs.

The broadest granting of autonomy to the Region is directed to accelerate the realization of the welfare of the community through the improvement of services, empowerment, and community participation. In addition, through broad autonomy, in the strategic environment of globalization, the region is expected to improve its competitiveness by taking into account the principles of democracy, equity, justice, privilege and specificity and potential and regional diversity within the system of the Unitary State of the Republic of Indonesia (Explanation of point 1 of Law No.23 of 2014).

Since the enactment of the broadest autonomy policy through Law No. 22 of 1999, it has invited various debates and even entered controversial levels. This is according to Syaukani attributed to two things. *First*, the changes brought about by this Law are so great. A very strong mission of regional autonomy proclaimed through Law no. 22 of 1999 is the arrangement of local communities in the context of enhancing democratic capacity both locally and nationally, the return of dignity and self-esteem of the local community which has been long marginalized, even denied by the government and society at the center to be disturbed. Power with all its attributes must then be shared with local governments and communities in the region. Of course it is not easy for the government to give up that power to share, while the key word of decentralization and regional autonomy is the *devolution* of power to the regions. *Second*, as soon as this policy was announced, many people debated it. Emerge number of experts of local government or experts of decentralization that previously have not or not known. While debating the issue of regional autonomy all talked about the readiness of the government and the people in the region. "The region is not yet ready to be autonomy, because human resources and moreover financial resources are not at all supportive".[1]

Autonomy is often and always associated with how much money can be mobilized by the region to finance its activities. Often does not understand that in the administration of government there is no single government that is capable of by itself sufficient for its own needs. The key word of regional autonomy is "authority", how much authority is possessed by the region in initiating the policy, implementing it, and mobilizing the support of resources for the sake of implementation. With authority, the regions will be creative to create the advantages and incentives of economic activity and regional development.[2]

[1] Syaukani, et al, 2004, ***Otonomi Daerah Dalam Negara Kesatuan,*** Pustaka Pelajar, Yogyakarta, p. viii
[2] Syaukani, ***ibid ,*** p. 10.

It is therefore unreasonable to say that autonomy is a threat to national integration. On the contrary if the wisdom of regional autonomy fails to be delivered to the society, and even the tendency of centralization that arises, it is not impossible will cause the disappointment of people in the region and not impossible will lead to disintegration. Stigmatization of regional autonomy not only arises from executive officials, but also from the legislature. This has made local autonomy unable to develop well within the framework of a unitary state.

From the background of the problem, then the issue raised in this paper is: How the implementation of regional autonomy in realizing the implementation of good local government?

Discussion

Definition Of Regional Government

Article 18 section 1 of the 1945 Constitution states that the Unitary State of the Republic of Indonesia is divided into provinces and regions of the province divided into districts and municipalities, each of which the provinces, districts and cities have local government, invite. Furthermore, in section 2 it is stated that the provincial government of the regency and municipality regions to organize and manage their own governmental affairs according to the principle of autonomy and duty of assistance.

Furthermore, in Article 1 section 2 of Law no. 23 of 2014 on Regional Government states that the meaning of regional government is the implementation of government affairs by the local government and the Regional House of Representatives according to the principle of autonomy and duty of assistance with the principle of autonomy as widely as possible in the system and principles of the Unitary State of the Republic of Indonesia as referred to in Law -Undonesia Basic 1945. Furthermore, what is meant by the regional government is the head of the region as an element of the Provincial Administration that leads the implementation of government affairs which become the authority of autonomous regions.[3]

The enactment of Law Number 22 of 1999 regarding Regional Government revoked by Law Number 32 of 2004 and has been amended by Law Number 12 of 2008 and the last amended by Law Number 23 of 2014 there has been a fundamental change in the regulation of local government in Indonesia. As a logical consequence is the need to make arrangements on various elements related to local government as a manifestation of regional autonomy. According to Marsono, local government sometimes means the implementation of local government affairs and Regional People's Representative Council (DPRD) according to the principle of decentralization and deconcentration. The term local government above means process or activity.[4]

In the implementation of local government, the regional head has an important and prominent position in a regional government structure. The regional head is the first and foremost person in coordinating the representative aspects of the local governance process.[5] The regional head is a political office and a public office in charge of leading the bureaucracy, and moving the wheels of government. The functions of regional government are divided into protection, public service and pemabangunan. The regional head performs a policy-making function for these three functions of government. In the context of power structures, the regional head is the chief executive in the region.[6] Meanwhile, according to Hanif Nurcholis, the head of the region is the leader of the institutions that implement the legislation. In its concrete form, the implementing agency of regional policy is a government organization in its area. The head of a provincial region is called the governor, the head of a regency district called the bupati, and the head of a township called the mayor.[7]

In the context of the implementation of regional autonomy, a regional head in implementing the leadership pattern should not be oriented to the demand to obtain the maximum authority, regardless of the meaning of regional autonomy itself which is born from a need for efficiency and effectiveness of management of government administration aimed at providing services to community.[8]

Therefore, a good and intelligent regional leader must have good managerial skills in managing his / her government optimally effectively and efficiently by not having to demand too much of its authority. Because with the granting of autonomy the widest of this, local government should have been able to optimize potential area owned.

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[3] Article 1 section 2 Law No. 23 of 2014, Region hereinafter referred Autonomous Region is the unity of the legal community who have boundaries authorized to regulate and administer government affairs and public interests at its own initiative based on the aspirations of the people in the system of the Republic of Indonesia.

[4] Marsono,, 2005, ***Kepala Daerah Pilihan Rakyat,*** CV.Eka Jaya, Jakarta, p. 85

[5] Sarundajang, 2002, ***Pemerintahan Daerah Di Berbagai Negara,*** Pustaka Sinar Harapan, Jakarta, p. 126.

[6] Joko Prihatmoko, 2005, ***Pemilihan Kepala Daerah Langsung, Filosofi, Sistem, dan Problema Penerapan Di Indonesia***, Pustaka Pelajar, Yogyakarta, p. 203.

[7] Hanif Nurcholis, 2005, ***Teori Dan Praktek Pemerintahan Dan Otonomi Daerah,*** PT. Grasindo, Jakarta, p. 118.

[8] J.Kaloh, 2003, ***Kepala Daerah, Pola Kegiatan, Kekuasaan Dan Perilaku Kepala Daerah Dalam Pelaksanaan Otonomi Daerah,*** Gramedia Pustaka Utama, Jakarta, p. 15.

Decentralization and Regional Autonomy

Decentralization

Basically decentralization is the handover of government affairs by the central government to an autonomous region based on the Autonomy Principle (Article 1 point 8 of the Law No. 23 of 2014 on Regional Government). The main objectives of the decentralization policy are:

- Release central government from unnecessary burdens in handling domestic affairs, so the opportunity to learn, understand, respond to various glocal trends and take advantage of it. The central government is expected to be better able to concentrate on the formulation of national macro policies that are strategic.
- The regions will experience significant empowerment processes. The ability of their initiatives will be encouraged, so that their ability to cope with domestic problems will be stronger.

Decentralization is a symbol of trust from the Central Government to the regions. This is in line with the regional autonomy mission proclaimed through Law Number 23 of 2014 on Regional Government, namely the strengthening of local communities in order to improve democracy, both at the local and national levels. The return of dignity and self-esteem of the already marginalized, and even denied, central government has destroyed the central government's hegomonistic base with the regions. The existence of the division of authority and the availability of adequate space to interpret the authority given to lower government units (local government) is the most important difference between the concept of decentralization and centralization. But this clear distinction of concepts becomes dim when applied in the real dynamics of government.[9]

According to Henry Maddick, decentralization includes the process of deconcentration and devolution, a legitimate transfer of power to carry out specific and residual functions that are under the jurisdiction of local governments.[10] Among Indonesian legal experts, decentralization is defined in various ways. According to RDH Koesoemaharmadja, literally decentralization comes from two Latin word fragments namely: de = means off, centrum = central meaning. the literal meaning of decentralization is to break away from the center. in the sense of constitutionalization, decentralization is the transfer of power of government from the center to the regions. Decentralization is a *staatkundige decentralisatie* (decentralization of state administration), or more often referred to as political decentralization, not ambiguous *decentralisatie*, as is de-concentration.[11]

Amrah Muslimin differentiates decentralization into political decentralization, functional decentralization, and cultural decentralization. Political decentralization is the delegation of central government authority, which gives rise to the right to take care of self-interest of the household for political bodies in areas chosen by the people in certain areas. Functional decentralization is the granting of rights and authority to groups taking care of a kind or class of interest in the community, whether or not bound to a particular area, such as the irrigation stakeholders for the farmers in one or more particular areas (waterschap, subak Bali). Cultural decentralization (culturele deconsentralisatie) gives the right to small groups in society (minorities) to organize their own culture (governing education, religion etc.).[12]

Decentralization is a strategy of democratizing the political system and harmonizing the achievement of sustainable development which is an issue that always exists in the practice of public administration. Contrary to the centralization in which power and decision-making concentrate on central or upper echelons, decentralization permits lower or lower levels of governmental power in determining the number of issues they directly notice. In the view of Rondinelli, a decentralized government but its regularly elected officials is clearly more democratic than a decentralized government but tightly controlled by an authoritarian political party. This view does not escape the focus of Rondinelli's focus on administrative decentralization rather than political decentralization.[13]

The granting of the authority (devolution of authority) to units or units of government is lower and smaller, is an absolute and inevitable requirement. Positive aspect of giving authority to Local Government is the task of government will be run better, because society in area have deeply understanding of social life context, economy, and politics around its environment. Similarly, the Local Government understands the needs of its people and how to mobilize resources and resources in order to support government functions and

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[9] Riswanda Imawan, 2004, **Desentralisasi, *Demokratisasi, dan Pembentukan Good Governance***, in Syamsuddin Haris (Editor), ***Desentralisasi dan Otonomi Daerah Naskah Akademik dan RUU Usulan LIPI*,** Pusat Penelitian Politik LIPI 2003, cooperation with Partnership for Governance Reform in Indonesia (PGRI), Press, Jakarta, p. 40.

[10] Henry Muddick, 1966, ***Democracy, Decentralzation an Development, Reprinted London, Asia Publishing House***, hlm 23. Freely translated entitled, ***Desentralisasi dalam Praktek,*** Print I, Pustaka Kendi, Yogyakarta, 2004, p. 34

[11] RDH. Koesoemahatmadja, 1979, ***Pengantar Kearah Sistem Pemerintahan Daerah di Indonesia,*** Binacipta, Bandung. Quoted by M. Laica Marzuki dalam ***Berjalan-jalan di Ranah Hukum***, First Book, Revised Edition Print II, Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi RI, Jakarta, 2006, p. 151

[12] Amrah Muslimin, 1986, ***Aspek-Aspek Hukum Otonomi Daerah,*** Alumni, Bandung, p. 5

[13] Kacung Marijan, 2006, ***Demokratisasi Di Daerah : Pelajaran dari Pilkada Secara Langsung,*** published with Pustaka Eureka and Studi Demokrasi and Human Rights (PusDeHAM), Surabaya, p. 26.

tasks. Support to Local Government will be big and strong, because local political recruitment provides an opportunity for people to have a government that has a pesikologis and emotional bond with them.

The decentralization system authorizes delegation of authority from the central government to local governments, while centralization allows for only one central government to regulate whole region. Decentralization is a symbol of trust from the central government to the regions. This is in line with the regional autonomy mission proclaimed through Law Number 23 of 2014 on Regional Government, namely the strengthening of local communities in order to improve democracy, both at the local and national levels.

Regional autonomy

Regional autonomy is the essence of decentralized governance; the term autonomy comes from the Greek wording of autos which means self and monos meaning law. Autonomy means making self-regulation (*zelfwetgeving*), but in its development, the conception of regional autonomy besides the meaning of *zelfwetgeving* (making the regional regulations), also mainly includes *zelfbestuur* (self-government). Van Der Pot understands the concept of regional autonomy as *eigen huishouding* (household own).[14]

Within autonomy, the relationship of authority between the central and regional governments, among others, is related to the way in which the administration affairs are governed or the way of determining regional household affairs. The manner in this determination will reflect a form of limited autonomy or broad autonomy. Can be classified as limited autonomy if: First, local household affairs are determined categorically and the development is regulated in certain ways as well. Second, if the system of supervision is done in such a way that the region loses its independence to freely determine the means of organizing and managing its regional household. Third, the financial system between the central and regional governments that raises things such as the limitations of native finance capability will limit the space for regional autonomy.[15] Broad autonomy is usually derived from the principle: All government affairs are basically the affairs of the local household, except those determined as central affairs. in a modern state, more so when it is associated with welfare state understanding, government affairs are not recognized in number.[16]

Regional autonomy when viewed from the point of its territory, then the implementation is determined within the boundaries of the territory determined by the central government. Carved from the substance (material) of the implementation of regional autonomy, the matter is determined by the adopted household system (huishouding) of regional autonomy. For scholars, the term given to the division of urusana between the center and the regions in the context of autonomy is not the same. R. Trena refers to the term "authority to regulate the household". Bagir Manan mentions the term "local household system". Josep Riwu Kaho gives the term "system". Moh. Mahfud MD uses the term "principle of autonomy". Although they are used differently, they are grounded in the same sense that the teachings (form, material, and real) concern the order in relation to the way in which the division of authority, duties and responsibilities governs and administers central and regional governmental affairs.[17]

Decentralization as a policy of organizing the governance system is closely related to regional autonomy. The politics of autonomy in Indonesia has undergone a fundamental change with the amendment of the 1945 Constitution. Particularly to the editorial of Article 18 of the 1945 Constitution, which is now substantially and structurally become Article 18, Article 18 A and Article 18 B. Through the change, autonomy politics is centralized into autonomy politics which is decentralized. That is the constitutional basis of autonomy politics which is further elaborated in Law Number 22 of 1999 which has been replaced by Law Number 32 of 2004 and lastly replaced by Law Number 23 of 2014 on Regional Government. If decentralization is an act of delegation of authority from the central government to regional governments, regional autonomy according to Article 1 section 6 of Law no. 23 of 2014 on Regional Government is: "Rights, authority and obligations of autonomous regions to regulate and manage their own governmental affairs and interests of local communities in the system of the Unitary State of the Republic of Indonesia".

The delegation of authority of the central government to local governments is done by taking into account the capacity and capacity of local government in organizing the arrangement and management of the interests of local communities. The delegation of authority of central government to local government is done by considering the capacity and ability of local government in organizing arrangement and management of local community interest.

The role of central government in the context of decentralization is to supervise, monitor, monitor and evaluate the implementation of regional autonomy. This role is not light, but also does not overload the area excessively. Therefore, in the context of regional autonomy, an effective combination of clear vision and

[14] M. Laica Marzuki, **2006,** ***Berjalan-jalan di Ranah Hukum,*** First Book, Revised Edition Second Print, Sekretaris Jenderal dan Kepanitraan Mahkamah Konstitusi RI, Jakarta, p. 161.
[15] Ni'matul Huda, 2010***, Hukum Pemerintahan Daerah,*** Cetakan Ke II, Nusa Media, Bandung, p. 83.
[16] Bagir Manan, 2001, ***Menyongsong Fajar Otonomi Daerah,*** Pusat Studi Hukum FH UII, Yogyakarta, p. 37.
[17] Ni'matul Huda, ***Ibid***, p. 84-85.

strong leadership of the central government is needed, with the initiative and creativity of local governments.[18]

Furthermore Syaukani *et.al*,[19] stated that the vision of regional autonomy can be formulated in three main scope of interaction: Political, Economic, Social and Culture. In the field of politics, because of the fruitful autonomy of decentralization and deconcentration, it must be understood as a process of opening the space for the birth of democratically elected regional heads, enabling a government that is responsive to the interests of society at large, and maintaining a conscientious decision-making mechanism on the principle of public accountability. In this context, regional autonomy will allow the emergence of local government initiatives to offer investment facilities, facilitate business licensing processes, and build various infrastructure that support the economic turnaround of their region. Thus, regional autonomy will bring the society to a higher level of prosperity over time.

In the social and cultural field, regional autonomy must be managed as best as possible to create and maintain social harmony, while at the same time maintaining local values that are seen as conducive to the ability of the community to respond to the dynamics of life around them with local wisdom.

Local wisdom is the attitude, view, and ability of a community in managing its spiritual and physical environment that gives the community its endurance and power to grow within the territory in which it is located. In other words, local wisdom is a creative response to a geographical-political, historical, and situational situation that is local.[20] Therefore, the mastery of the art and science of leadership is an absolute requirement for a regional head because: First, leadership is something that is attached to a person's leader in the form of certain traits such as personality (personality), ability (ability), and capability (capability). Second, leadership is a series of activities (leaders) leaders that relate to the position (position) and the style or behavior of the leader itself. Third, leadership is a process of inter-relationship or interaction between leaders, subordinates, and situations. It's according to J. The leader must also have: First, intuition is the leader's involvement in looking at the situation, anticipating change, taking risks and building honesty. Second, the view, which is the leader's involvement in imagining a condition to improve the organization's environment.

Third, achieve harmony, namely the ability to lead to mengatahui and understand the values that grow in the organization, the values owned by subordinates, and can integrate these two values into an effective organization. Fourth, the certainty of purpose and direction.[21]

Regional Autonomy should be defined as autonomy for the people of the region and not "regional" autonomy in the sense of a particular territory / territory at the local level. Even if the implementation of regional autonomy is directed as the enlargement of regional authority, then the authority must be managed fairly, honestly and democratically. In that connection the head of the region must be able to manage the authorities received effectively and efficiently for the development and empowerment of local communities. This perspective is the right one to explain the relationship between the regional head and regional autonomy.[22] However, the implementation of regional autonomy is still questioning two things: First, about the procurement of funding sources that are perceived outside the ability of regions to implement them. Secondly, concerning the readiness of regional apparatus in the implementation of autonomy does not exist yet.[23]

The procurement of funds and preparedness of the regional apparatus is the problem in the implementation of local government. Many regions have a rich natural resource potential, but are unable to manage them well because they do not have reliable human resources. Thus vice versa many areas that have reliable human resources, but natural resources are less supportive to be developed as a source of regional income.

Principles of Good Governance

The term good governance became widely known after the reform era took place. Good government is the best practice in the process of organizing state power. In order for good governance to become reality and work as it should require commitment and involvement of all parties, namely government and society. Effective good governance calls for good alignment and integrity, professional and work ethic and high morale. Good governance principles include: the principle of legal certainty, the principle of proportionality, the principle of professionalism and the principle of accountability.

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[18] Syaukani, HR et al,2004, ***Otonomi Daerah Dalam Negara Kesatuan,*** Pustaka Pelajar Offset. Yogyakarta, p. 173.
[19] Syaukani, HR et al, ***Ibid***, p. 173-175
[20] Saini dalam R. Cecep Eka Permana, 2010, ***Kearifan Lokal Masyarakat Baduy Dalam Mitigasi Bencana,*** Wedatama Widya Sastra, Jakarta, p. 1
[21] J. Kaloh, 2009, ***Kepemimpinan Kepala Daerah. Pola Kegiatan, Kekuasaan, dan Perilaku Kepala Daerah dalam Pelaksanaan Otonomi Daerah***, Sinar Grafika, Jakarta, p. 9-11
[22] J. Kaloh, *ibid*, p. 15
[23] Afan Gafar, 2002, ***Otonomi Daerah Dalam Negara Kesatuan,*** Pustaka Pelajar, Yogyakarta, p.27.

The implementation of Good government is a major prerequisite for realizing the aspirations of the people in achieving the goals and ideals of the nation and the state. The development and implementation of an appropriate, clear and tangible accountability system is essential for the implementation of governance and development to be effective, efficient, clean and responsible and free of KKN. Therefore, there must be a linkage to the regulatory mechanism of accountability in every government agency and efforts to strengthen the role and capacity of parliament, as well as the availability of equal access to information for the wider community.

Accountability is defined as an embodiment of the obligation to account for the success or failure of the organization's mission in achieving the objectives and objectives that have been determined through the media of accountability carried out periodically.

The general principles of good government or algemene benisselen van behorlijk bestuur or the general of good administration are proposals from the Committee de Monchy. In the Indonesian dictionary, the notions are either identical with worthy or worthy. Good means no woe. Good governance means an orderly government, no woe. The general principles of good governance are customary law principles that are generally acceptable according to our sense of justice that is not formulated explicitly in the rules or applicable from jurisprudence and legal literature. While the principles of local governance as stipulated in Law Number 23 of 2014 article 58 consisting of:

a) The principle of legal certainty
b) The orderly principle of state administration
c) The principle of public interest
d) The principle of openness
e) The principle of proportionality
f) The principle of professionalism.
g) The principle of accountability
h) The principle of efficiency,
i) The principle of effectiveness, and
j) The principle of justice.

Closing

Conclusion

The enactment of the broadest possible autonomy policy in 1999 to local governments, in order to enable local governments to develop and self-govern in carrying out and governing their governments. However, often autonomy is always associated with how much money can be mobilized by the region to finance its activities. Actually the key word of regional autonomy is "authority", how much authority is possessed by the region in initiating the policy, implementing it, and mobilizing the support of resources for the sake of its implementation. With authority, the regions will be creative to create the advantages and incentives of economic activity and regional development.

Good Local Government is a service to the community and empowerment of citizens in every development. In order for good local governance to become a reality and work as it should be required commitment and involvement of the local government and the community actively. Therefore, in the implementation of local government it is necessary leadership of regional heads that have the ability, creative, responsive, honest, trustworthy, democratic, and obedient principle and have leadership insights that characterize local wisdom.

Mastery of art and science of leadership is an absolute requirement for a head of the region because: First, leadership is something that is attached to a person leader in the form of certain traits such as personality (personality), ability (ability), and capability (capability). Second, leadership is a series of activities (leaders) leaders that relate to the position (position) and the style or behavior of the leader itself. Third, leadership is a process of inter-relationship or interaction between leaders, subordinates, and environmental situations. Thus, the wheels of local government that run it with the principle of autonomy as much as it is able to create good local government and accountable.

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THE IMPORTANCE OF LOCAL REGULATION IN THE FILLING OF REKRUTMEN POSITION

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ABSTRACT

This research is based on the demands of the people for the implementation of democratic government and professional bureaucracy. The phenomenon of weakness of filling positions that are not in accordance with their competence such as the position of Secretary of the Regional People's Legislative Assembly (DPRD) is filled by a veterinarian, then Head of Legal Section (Kabag) filled with an economist becomes the agenda for immediate reform. The problem of filling the positions often creates small frictions that are very disturbing the way the implementation of government in the region. Friction will occur if the filling of the position is not done professionally, effectively and efficiently. The general objective of this research is to arrange the filling of positions in the local government to suit their competence and to restore bad image in filling position. The benefit of this research is to give thought contribution for government and local government in filling position in local government environment to be done professionally, effectively and efficiently. Because this will have an impact on policy making. The approach used sociological jurisdiction with qualitative analysis.

Keywords: Regulation, Recruitment position , local government

Introduction

The paradigm of decentralization began to be put forward in the current era of reformation, as the people's demand for governance that had once prevailed centrally. Regulations aimed at realizing a democratic government and a professional bureaucracy should begin to build and become the government agenda, especially the Regional Government. The issue of filling in positions often creates small frictions that seriously disrupt the running of local governance, when the filling of positions is not professionally, effectively and efficiently.

Almost every one or two years the government opens the opportunity to receive civil servants from various fields such as medical fields such as doctors, midwives, nurses and technical fields such as computer engineering, spatial, and environment, all citizens of course have the same opportunity to be accepted as a Civil Servant. Although the opportunity to be accepted as civil servants in Java is more intense than civil servants outside Java, especially in Central Java Province which is a densely populated province with a population of 36 million from the Indonesian population of 245 million in 2010 (BPS, 2010), yet again the issue of structural positions in areas where there is little or no attention to competence or expertise, consequently the officials who occupy positions are often incompatible with their competence, such as one of the districts in Central Java, an economist is given the position of head of legal section, and more tragic again once a veterinarian occupied the position as secretary of parliament. This has an impact on policy making so that regulation needs to be made in the regions about how a person will occupy a position in accordance with his competence.

Methods

Data was collected through interviews and discussions with stakeholders and policy makers. This study uses normative legal research as well as the nature of the descriptive and qualitative analysis. In addition, statute or regulation and historical approach were also used.

Discussion

In the formulation of legislation. Political legislation is a contextual condition in the legislation to be born, contextual conditions are indications of facts, real, and events that are happening in society. In forming legislation in general can not be separated from the social-political process that covers it.[1] Therefore, the development of Indonesian national law is closely related to the situation and condition of legal politics at the time when the legislation is formed. The development of political politics has always embraced the system of centralization as well as decentralization. The political direction of the law of centralization is more prominent in the New Order era than the politics of the law that embraces decentralization, so that it will be very influential for the product of legislation that it was born. ruler (government) rather than the will of the people.

[1] Philipus Hadjon, 2000, *Pengantar Hukum Administrasi Indonesia*, Gadjahmada University Press, Cet kedelapan, Yogyakarta, yang menyatakan bahwa dorongan dalam pembentukan hukum modern dari sudut politik dan pemerintahan bergantung dari apa yang dibayangkan oleh pihak politik sebagai tugas dari pemerintah walau tidak diputuskan secara otonom.

According Rouscou Pound is the law as a tool for social change (social engineering) and as social control (social control), so the good law in the era of centralistic is the law created through the approach top-down. But the good law of the democratic era is through the Bottom-Up approach. In the formulation of legislation that wants to put law as social change, it has been diverted for the sake of power or for the interests of certain majority class even for sectoral interest so that harmonization of legislation between government and society is rarely achieved in one container. As a result, the benefits of legislation tend to be seen only from the interests of power holders, ignoring the interests of the people and less attention to the benefits of prospective.Selama this happens more prioritize the function of law as a preventive and repressive approach rather than consider rehabilitative and restorative approach.

Political life and state administration have begun to change towards an increasingly democratic, yet the changes have not been able to significantly influence the formation and implementation of legislation. According to Satjipto Rahardjo: political life and state administration have appeared to have changed, but the change itself has not been fully responded to the formulation of legislation.[2] So from the delay in responding to the changes it makes legislation born in overlapping conditions (Hyper regulated). Hyper regulated rules with each other because of the prevailing laws and regulations that are not in line with the policy of politics and state administration that is growing. Society has wanted a democratic life, but in fact there are still found various laws and regulations such as local regulations that precisely has an authoritarian character.

Although the desire of the people to change the authoritarian Regional Regulation into a democratic Regional Regulation, but this is not easy, especially if the content of material contained in the Regional Regulation concerning limitation of authority of the ruler then this will be difficult to be realized. It should take the courage of the legislature to turn the authoritarian paradigm into democratization because it begins with the formation of legislation, and when the political situation of Indonesia is heading into a democratic life, but in fact there are still authoritarian-type Regional Regulations.

The political will to change the authoritarian paradigm to democratization has been initiated from the second Amendment of the 1945 Constitution namely in Article 20 paragraph (5): In the case of the draft of the law which has been approved together is not authorized by the President within thirty days since the draft law approved, the draft law is lawful and must be enacted, while the political will to change the system of governance from centralization into decentralization begins with the issuance of Law no. 22 of 1999 then revoked by the issuance of Law no. 32 of 2004 on Regional Government and its amendment is Law no. 12 of 2007.

Furthermore, although the will of the Law changed the system of government administration from centralization into decentralization, but antagonistic circumstances precisely happened because there are still many laws and regulations in regions such as Local Regulations governing the power of government in areas that are oriented to sectoral interests, power and class certain. As well as licensing, supervision, coaching and enforcement of sanctions are all organized by one institution, whereas in the appointment of structural positions in the region should be made one regulation to avoid excessive egos of power.

The provision of broad autonomy is directed to accelerate the growth of the welfare of the community through improving services, empowerment and community participation. The principle of real and responsible autonomy is a matter of government to be implemented based on the tasks, authorities, and obligations that in fact have existed and the potential to grow, live and develop in accordance with the potential and uniqueness of the region.

In connection with the implementation of regional autonomy, it is necessary to develop and implement the system of local government administration and recruitment of apparatus of government officials that can be accounted for, hence there needs to be good coordination, professional, work ethic, moral and high integrity for local government organizer. In order to carry out the tasks and functions of government in accordance with the demands of society in line with the increase of science and technology and the influence of globalization.

Therefore, the demands of change in the community is an obligation that must be initiated and carried out by the local government either in direct contact with the public service or in the internal activities of government organizations, so that in the implementation of government in the region will be able to walk powerless and successful use clean and responsible. In such implementation, it is necessary to have policies and mechanisms to make the regulation in recruitment of filling office in every local government agency to strengthen the role and capacity of local government supported by professional government officials.

RI Law no. 12 Year 2011 on the Establishment of Laws and Regulations, Regional Regulation is one type of legislation that exist in the rules of legislation, although the extent of its applicability is limited only to the region concerned (local). Furthermore, the local regulation is a product law from local governments where local government is an integral part of the central government.

[2] Quoted from Otje Salman dan Anthon F. Susanto, 2008, dalam *Teori Hukum* : Mengingat, Mengumpulkan dan membuka kembali.

Local Regulation is seen from the character then Perda is a product of regional legislation. The formation of local regulations is not merely linked to formal competence as an autonomous region or merely looking at the interests of the region concerned but should further be based on the unity of government administration and the national interest as a whole. This principle is closely related to the vertical normative consistency, although it remains open to the diversity of material content that will be poured into the law, but there must be a vertical normative relation. In line with that and in order to realize the professional state apparatus free from political interests, it is necessary to establish a regulation at the regional level aimed at realizing a professional democratic and bureaucratic government. So that development can illustrate that the effort to realize a professional, effective, and efficient bureaucracy becomes a very important government agenda.

Closing

In realizing the effectiveness and efficiency in Good Goverment, it is necessary to improve the quality and professionalism of Civil Servants who have the advantage and competitive ability in upholding the ethics of bureaucracy in implementing the implementation of clean and authoritative regional autonomy and can fulfill the demands of public service.

The provision of broad autonomy is directed to accelerate the growth of the welfare of the community through improving services, empowerment and community participation. The principle of real and responsible autonomy is a matter of government to be implemented based on the tasks, authorities, and obligations that in fact have existed and the potential to grow, live and develop in accordance with the potential and uniqueness of the region.

Furthermore, to create and enhance the role of empowerment for Civil Servants needed figure of a civil servant who occupies structural positions can meet the norms of the requirements that have been established according to the rules of the systemic and measurable legislation that will actually be able to display the figure of professional bureaucratic leaders to carry out the duties and functions of the administration, as the servant of the State and the public servant. Requirements to occupy structural positions for local civil servants in order to obtain professional guarantees and legal certainty are made regulations such as local regulations.

Content concerning the appointment, transfer and dismissal of civil servants in and from structural positions in order to ensure their objectivity, in placing civil servant personnel in structural positions must be in accordance with the requirements and fulfill the sense of justice for all parties, shall be obliged to be regulated in the Regional Regulation with arranging for appointment, transfer, dismissal, benefits, structural positions with due regard to impersonal values, openness and systematic requirements for the promotion and development of his civil servant's career.

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GOVERNMENT DUTY IN FULFILLING HEALTH STATUS AT WELFARE STATE OF INDONESIA

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ABSTRACT

The Universal Declaration of Human Rights, article 25 states: "Everyone has the right to live by standards that are appropriate for their health and well-being and their families, including the right gain to food, housing and health care." Therefore, each country always tries to improve the health status of the community. Especially for the welfare state, such as Indonesia, it must have become a commitment in the nation, state and society, that they should always prioritize health-minded development .Nevertheless, from the data obtained shows that the status of public health has never showed an encouraging figure. It is happened because it is not supported by the manifestation of commitments in the form of public health insurance arrangements and the allocation of development funds in the health sector that do not accommodate the fulfillment of health status. In the meantime, it is recommended to evaluate the concept of welfare state which gives a significant influence on the fulfillment of health status.

Keyword: government duty, health status, the realization of the state of welfare.

Introduction

Health status has always been a never-ending discourse for the country of Indonesia, since independence until now. Starting from outbreaks of infectious diseases, malnutrition, infant mortality, maternal mortality, and life expectancy. Yet the government feels that all efforts have been made continuously in a sustainable manner. In the meantime to implement the program health status fulfillment, there had always been held institutions that support the health departments and health agencies in every province and districts / cities in Indonesia, whose jobs are organizing and conducting government affairs in the field of health. Here the government has ensured that development in the health sector is never ignored, therefore, there is a big question; to what degree can health be well maintained and fulfilled? Upon this question, it is apparently up to now that no one can answer with certainty and convincing. The answer is really needed, because after 72 years of Indonesia's independence, it can never be realized, so people can become pessimistic and the state can be considered failed in carrying out the task of realizing the status of public health in particular and the welfare of society in general.

This issue should not be allowed to drag on, especially in the context of the welfare state, the people need health insurance from the state through its sustainable programs and have a clear target achievement, so there is a sense of comfort with the protection provided. It is not an easy job, but at least the state must provide guarantees by providing arrangements that oblige the state to always prioritize the welfare of its citizens, by providing facilities, means and infrastructure that can provide services to the public to obtain health status, that the health experts suggest about factors affecting health status as following: environment, behavior, health care and offspring (Hendrik L Blum: 1974). To create a program that can cover all of these factors or facts is not easy, it takes commitment of policy holder, arrangement, and budget that can support the implementation of health program.

Commitment to public policy holder for health, which is often criticized by many health communities, is still trapped by the concept of health that emphasize only on the sick people (patients), so there must be provided by some hospitals or health centers loaded with sick people. It is unthinkable that basic health is washing hands before eating, daily toothbrush, good nutrition, clean water with good environmental sanitation, healthy housing with enough windows for day or day light to enter, etc. (Farid A Moeloek : 2003). This is what is actually called the healthcare program. Errors in the health paradigm are still becoming problems in realizing the degree of health status, so it has not shown significant changes to make healthy living as a supporter of people's welfare. Efforts to transform into a healthy paradigm, should be implemented through programs that are more preventive and promotive, without abandoning curative and rehabilitative programs (Farid Moeloek: 2003). To make it happen, it does not rely on medical personnel only, but it requires the role of experts from other disciplines, including the important policy makers for development in the field of health. Meanwhile, change the thinking way of policy makers and the communities towards health paradigm, from ***"sickness care"*** to ***"health care"***, is a very important job to do, because it has a significant effect on success in achieving health status, although for that purpose, it gives big budget consequences. This program will be a development priority if health policy holders are able to intervene in the state budget politics. The excuse put forward is quite strong and undeniable, that health-minded development is a human right, that'w why, if it is ignored, it is considered as a violation of human rights, and the people have the rights to demand and sue it.

The Concept Of Indonesia Welfare Country In Answering Challenges, Until When Health Status Can Be Realized

It is the opinion of many health professionals and the understanding of many countries that to obtain a picture of health status, one of the measures is to use the Human Development Index (HDI), which is influenced by life expectancy indicators, education indicators which is represented by the literacy rate, the average indicator of school duration and the indicator by people's purchasing power. A country is said to be an advanced country from the index of human development. Therefore, the progress of the state is also much determined by the degree of health. If the state succeeds in realizing the degree of health, then the progress of the state can be demonstrated. Currently based on the report of the United Nations Development Program in 2016, Indonesia is at position of 113rd rank, a decline from 2015 which is ranked 110 out of 188 countries (UNDP: 2016). This condition illustrates that the embodiment of health status which is the main benchmark of welfare, is still far from the target. Therefore, in pursuit of the achievement of state objectives, the government should always use these indicators in preparing its development plan, and when those indicators are not achieved, it will always be sought for its causes, especially; whether the impetus for the proper implementation of these indicators has been sufficient and is able to realized? These questions certainly become the starting point to study the concept of welfare state formation.

Referring to the constitution, the welfare state concept embodied in the second paragraph in the opening of the Constitution of the Unitary State of the Republic of Indonesia 1945, which states: *"And the movement of Indonesia's independence has come to a happy moment of congratulating welcome to the people of Indonesia to the gate of independence of an independent, united, sovereign, righteous, and prosperous country of Indonesia."* The word "righteous and "prosperous" country is chosen as country forming choice to reveal that well-being (welfare) is the goal. Subsequently reiterated in the fourth paragraph of the Preamble of the Constitution of the Republic of Indonesia in 1945, which states: *"After these things to form a government of Indonesia that protect the entire of Indonesian nation people and the entire homeland of Indonesia and to promote the general welfare, educating the nation and participate in the implementation of a world order based on freedom , eternal peace and social justice, ... and so forth….. ,"* The words "general welfare" and "social justice" constitute the legal politics of the establishment of the state, which have to be carried out in the welfare state condition after that. In relation to social justice, every citizen should be treated fairly in accordance with his rights and obligations as a citizen, so discrimination is not desired at all. All activities of the state in realizing its goal of prospering its people must reflect justice.

"Founding fathers" political will of unitary state of Indonesia which intend to implement the welfare state, indicated that the nation put a fair (righteous) welfare, there is no exception at all and social interests would take precedence over personal interests. Tolerance is developed by providing subsidies to the underprivileged, but also the fulfillment of rights and obligations are not distinguished. For the implementations that are described in the articles of the Constitution torso unitary state of Indonesia in 1945, which in state practice can be seen as two regimes, i.e. the regime before the amendment and the regime after the amendment. The division of these two regimes based on reasons that the arrangements before and after the amendments occur different in settings and affirmations. Each has consequences in its management and commitment.

At the time before the amendment, it was seen that the state in the economic sector was played as ruler, owner and manager of the earth, water and natural resources, to be used for the greatest prosperity of the people. The state is the one that has full authority and obligations to carry out the wealth management of the country for the prosperity of the people. Nevertheless, in reality the government does not want to work alone, but delegates authority to the community through legislation, such as: education, health, employment and others. The tasks of the government and the welfare of the people are not limited, so the tasks are dynamic, covering all matters relating to the welfare of the people. Nevertheless, his spirits are limited only to those mentioned in his constitutional torso. Especially in the field of health that is not mentioned in the constitution, it gives impacts to the government not be pushed optimally in realizing the degree of public health. The impact is seen from the lack of provision in funding for health in the State Revenue and Expenditure Budget in 2016 which is only about 5 per cent. Whereas compared to the state health funding in Southeast Asia, Singapore 14 per cent, Thailand 13 per cent and Vietnam 13 per cent (World Health Organization, Report: 2014). To improve the health of the ideal budget, it takes 15-20 per cent of budget revenue and expenditure (WHO Global Health Expenditure Atlas, September: 2014). Even according to the results from the researcher of the social field Prakarsa Foundation, it is said that the budget allocation for health benefits is less than the poor country. Exemplified 22 out of 36 low income countries (GDP per capita less than S $ 1,025) have allocated 11 per cent of the state budget for health (Indonesia Health Policy Network: 2017). Assessing from the budget approach, it is advised if only 5 per cent provided for health development in Indonesia, then this country has not been able to raise its health status. Even though the degree of health is a major factor to implement welfare. Conditions like this, making the government criticized as parties who do not understand that the health sector is an investment for human development.

The era after the amendment, in the economic field of the country is still played as ruler, owner, and manager of the earth, water and natural resources to be used as much as possible prosperity of the people. It's just that in realizing the welfare of the people accompanied with recognition of the right of every citizen as a

human rights related to health status, the government increased duties, namely: providing physical and spiritual life welfare, housing, and getting a good and healthy life, as well as providing health care. This emphasis is actually an opportunity for the state to optimally be able to realize the health degree. In terms of social security, it is further developed in Article 34 paragraph (2), which reads: "The state develops social security system for all people and empowers the weak and incapable of humanity " in its achievement, so that the state is no longer as the sole responsible party, so in its operation determined in Law Number 40 Year 2004 on National Social Security Implementation, regulated health insurance only for premium payers and workers, which is only 70 per cent population, so it is questionable, about the rest, is the responsibility of whom? In relation to health insurance, it can arise the assumption of some citizens neglection. This is actually not contrary to the constitution, because the concept of the welfare state does not oblige the state through the government to provide health insurance to all citizens, but only develops social security system. Regarding the extent to which the system involves all or part of society, it is left to the government, which of course the choice should be aimed at the realization of people's welfare.

Based on the results of literature study (Amin , Muryanto : 2011), actually to this day, the concept of the welfare state is still philosophically and empirically pretty fierce debated. In another sense, social justice becomes an instrument to legitimize the state's role to intervene in markets. Considered the capitalist system is incapable of fulfilling its responsibilities of distribution, even pushing the gap, and causing a lot of poverty. From this point of view, it came the idea to formulate the concept of state laws that guarantee the welfare of the people or material known to the state law. But the harsh criticism of the welfare state also does not stop, which says that "there is no society, only individuals." Even in the extreme condition, it is said that the welfare state system in the era of globalization is no longer appropriately applied as an approach in the development of a country (Mishra: 2000). This opinion is unbelievable, because in fact many welfare states have given prosperity to their people today, such as Scandinavia, Western european countries, the United States, Australia, New Zealand and in many other countries (Edi Suharto: 2002)

Regarding the existence of adherents the welfare state mentioned above, it is not natural if the health degree is not fulfilled as a result of welfare state application. However, it should be studied, whether the concept of the welfare state applied has given the government a boost to prioritize the welfare of its people. This question becomes important when development priority is more emphasized in infrastructure program, but the human development index ranks is low. Based on this question, then the answer that can encourage the government to be able to accelerate health degree optimally, among others, the regulation on the following matters:

a. Budget politics on health development priorities ;
b. The right of every citizen to obtain health insurance
c. The right of every citizen to obtain optimal health services
d. The government's obligation to improve public health status.

The Need Of Changes In Law Health And Support Regulatory Compliance Policy To Health Status

As discussed in advance on the basis of the budgetary approach, the degree of public health has not been fulfilled because of the lack of a health budget, that is only 5 per cent, which according to World Health Organization standards should be between 15-20 per cent. Therefore, it is necessary to have budget politics on prioritizing development in health sector, so that the fulfillment needs of health degree can be realized. Referring to section 66 of Law Number 36 Year 2009 on Health, budget politics for the health sector is set as follows:

a. The amount of government health budgets are allocated at least 5 per cent of the state revenue and expenditure budget, excluding salaries;
b. The amount of pro-provincial , district / city government health budgets are allocated 10 per cent of the income and expenditure budget , excluding salaries;
c. The amount of health budget referred to above is prioritized for the benefit of public services of at least 2/3 of the state revenue and expenditure budget and the regional budget and expenditure budget.

The budget politics mentioned above cannot be sustained because it is not in accordance with the need, the percentage of the health budget must be raised, taking into account the standards of UNESCO and the comparison of other countries that have succeeded in realizing the degree of public health. In the meantime, there should be amendment of health law, in order to meet the health of society, and also implement the goals of the welfare state.

In fulfilling health insurance for all citizens without exception, then Law No. 40 in 2004 on National Social Security System was issued, which turns the load material is intended only to workers who pay insurance premiums, so that people who are not insurance premium payer workers, do not gain any protection. This kind of arrangement provides an illustration that the state only provides social security against some of citizen only. This reveals that the law does not fulfill social justice for all of the people in Indonesia and is not in line with the welfare state's goals. Of course this configuration cannot be left alone, because it does not support health improvement programs.

Under such circumstances, the government should conduct its own investigations without waiting for the amendment of the law by issuing a policy regulation (Dutch: beleidsregel), whose material content accommodates the interests of health insurance to the people who have not been protected by the social guarantee system law. If the government does not immediately initiate the issuance of a policy regulation, then on the basis of the principle of social justice, the public can file a judicial review to the Constitutional Court.

The policy rules was held to fill the void of law, as Thomas J Aaron said: …… is power or authority conferred by the law to act on the basic of judgement or conscience, and it idea of morals than law" (Thomas J Aaron: 1964). It is understood that existing laws and regulations will not be able to reach all people lives. Therefore, the government through the state administration officials who are carrying out the task of realizing the welfare of the people, are given the authority of discretion, namely the authority to regulate which is based on its own initiative, for the urgent need for service to the community, which has not been regulated in the legislation.

In relation to the lack or legal void of the law on the national social security system, which only regulates to workers and who pay premiums, then the government should be based on its commitment to realize the health status, not fixated on the law alone but must take the initiative use its discretionary authority by issuing a regulatory policy whose content regulates social health insurance to non-workers, underprivileged, non-income and poor communities. This policy regulation is in written form, known in the Netherlands as "pseudowetgeving" or "pseudo-legislation". Referred to as pseudo-legislation considering the form does not resemble the legislation, because it is not a legislation, but has the force of law such as legislation. Regulatory policy as a form of use of discretion authority, has some characteristics as the following (Manan: 1994):

(a) Policy regulations are not legislation;
(b) The principles of restriction and testing of laws and regulations cannot be enforced in the policy rules;
(c) The policy clause cannot be tested "wetmatigheid" because there is no basis for the legislation to invite the decision of the policy regulation;
(d) Regulatory policy is made based on the "Freies ermessen" and the absence of the relevant administrative authority to make regulations in making regulations;
(e) Testing of policy rules is more left to "doelmatigheid", so the test stone is the general principles of decent governance;
(f) In practice, the format is given in various forms and types of rules, namely: decisions, instructions, circulars, announcements, etc., even found in the form of rules.

Here it stands out, that its consideration is more focused on "doelmatigheid" (benefit) than on ***"rechtmatigheid"*** (legal validity). However, it does not mean that it is illegal, but must still be accountable under the law.

The policy regulation to be issued cannot also be contradictive to the existing law, namely Law No. 40 of 2004 on the National Social Security system, but its only complementary. However, it is not impossible, the policy regulation becomes the embryo of law changes for the foreseeable future. The use of discretionary authority for the issuance of regulatory policy, the legal perspective responsive, then the formulation should provide space to engage the community, from the process until the plan and its publication. In this case also, the possibility of the appearance of authority for the unbridled control of state administrators in implementing their authority, such as: contrary to laws and regulations , abuses of authority and acts of arbitrariness, will not occur. The opportunities are getting smaller, because with the character of the responsive policy regulation that has the quality of fulfilling the principles of transparency, participation, and accountability, become the essence of the realization of good governance.

Closing

The government's task in creating a welfare state health status in Indonesia, conceptually formulated in its constitution, namely the Constitution of the Republic of Indonesia in 1945, which the amendment is settled by the recognition of health as a human right. In its implementation there is a refraction of meaning passed through the law, namely the emergence:

a. percentage number for the benefit of development in the health sector, which is not balanced with the need to achieve the optimum health degree ; and
b. the membership of the social health insurance system, which is reserved only to workers and premium payers, does not involve unpaid , poor and inadequate communities.

The configuration does not support health improvement programs, which means that efforts to improve the human development index are hampered so that the welfare state's goal becomes a fantasy that is not easily predicted to achieve.

Under these conditions, the government should not be fixated on existing legislation alone, but must make a proposed amendment of the law, on the rule about the percentage of development interests in the health sector by raising the requirement that must be met, and comparing with the state - the "welfare state" followers who have made it happen. In addition, the government may use its discretionary authority to issue regulatory policies (wijaya: 2017), to fill a legal vacuum to regulate health insurance for non-workers or non-

income, and incapable or poor people. If this is not done, then the hope is that the public will conduct a judicial review of Law Number 40 Year 2004 regarding National Social Security System, to the Constitutional Court of the Republic of Indonesia.

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THE CHALLENGE FOR INDONESIA AIRSPACE LAW IN THE FACE OF THE ERA OF DRONE

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ABSTRACT

At the end of the twentieth century, appears a new phenomenon in the world of aviation, the first considered a children's toy, but now become a serious problem in countries a round the world, because everything as yet has the law to set it up including in the country of Indonesia that has only rhe rules of technical use of drone and not set the problem of the protection of the privacy of a person, legal entities and to the confidentiality and security of the states. and this is already a lot of cases the abuse of drones in the airspace of the state of indonesia. The Directorate General of Air Transportation Ministry of Transportation Republic of Indonesia already several times published the rule of law on the drone or aircraft without crew (unmanned aircraft), but when it is studied thoroughly the rules of law not provide the best protection for anybody, legal entities or for the country it self, and this is make the deisre of the author try to give discordant thoughts the importance of to be held reconsideration of the rule of law about the use of aircraft without crew so there is no longer the occurrence of cases that can be that can be detrimental to someone, the legal entity or the state

Keywords : Aircraft, Airspace Law, Drone, Transportation

Introduction

At the end of the twentieth century, appears a new phenomenon in the world of aviation that is aircraft without a crew and know by the term drone (unmanned aircraft), and thr first drone is used by the air force to train the aviators (pilot) and the army division arhannud (artillery air defense) to shoot the target in the air, and it eventually evolved into a spy plane using the camera namely, in the year 1959 United States of America use in Vietnam War and continuing in 1982 the state of Israel also using on the conflict in South Lebanon and in 1991, 2001 to 2006 the United States uses the war on Iraq and Afghanistan, and finally, almost all of the armed forces of the countries in the world have drone.[1]

At the beginning of the twenty-first century, the phenomenon of the use of aircraft without crew by civilians in all countries around the wotld including in the Indonesia state make a new problems in the law of the air [2], because most countries do not yet have rules of law that govern them, although some countries including Indonesia have rule of law about the air plane without crew, but everything is just set up about how to use the airctaft without the crew of course.

Problems

Appears a new phenomenon in the world of aviation with the use of aircraft without crew by thr civil become a serious problem in countries all over the world, because they do not have the legal tools to set it up icluding in the country of Indonesia which only have rules of technical use of drones and have not set about the problem of the protection of the privacy of a person, legal entity or against the confidentiality and security of the country, and this is already a lot of cases of misuse of drones, which happens in many countries inclusing in the country of Indonesia, and therefore it is necessary to immediately made a law about the use of drones in the airspace of the state of Indonesia.

Discussion

Before discussing about the necessity of the law about thr use of drone in the Indonesia airspace that also set about the protection of the privacy of a person, legal entity or against the confidentiality and security of the states, it would be good to first know about the air plane without crew or drones (unmanned aircraft).

The term air plane without crew that is used by many country is not the absence of uniformity and it can be seen the presence of some of the terms for thr aircraft without crew namrly there that use the term UAVs

[1] Louisa Brooke., ***Overview of Military Drones used by the UK Armed Force***, Birmingham : House of Commons Library, Briefing Paper Number 06493, 8 October 2015, p. 8., R.P. Ridderhof., ***Privacyvraagstukken bij het burgerlijk gebruik van drones***, Amsterdam : Universiteit van Amsterdam, 2013, p. 10., Chris Cole., ***Israel and the Drone War***, Oxford : Peace House, 2014, p. 7.

[2] Ben Hayes., ***Eurodrones Inc***, Amsterdam : Transnational Institute, 2014, p. 10.

(Unmanned Aerial Vehicles), RPVs (Remotely Piloted Vehicles), RPAs (Remotely Piloted Aircrafts), or commonly as drones, and the difinisi is as follows [3] :

1. Ann Cavoukian mentioned that Unmanned Aerial Vehicles is aircraft that fly under the control of an operator with no person aboard.
2. Drone are unmanned surveillance aircraft that is executed by the control center in a place by using a computer or also remote control.
3. Privacy Commission of Canada mentioned that drone to describe an aircraft without an on-board pilot, or unmanned aircraft.
4. R.P. Ridderhof mentioned that Unmanned Aerial Vehicles or drones is unmanned aircraft.
5. Ruwantissa Abeyratne mentioned that Unmenned Aircraft (UA) is a pilotless aircraft capable of flying autonomously or semi autonomosly with some pilot assistance from a ritome statio.
6. Attachment number : 1.2.2. Peraturan Menteri Perhubungan Republik Indonesia Nomor PM. 90 Tahun 2015 obout Pengendalian Pengoperasian Pesawat Udara Tanpa Awak Di Ruang Udara Yang Dilayani Indonesia mentioned that Unmenned Aircraft (UA) is a flying machine that works with a remote control by airman (pilot) or able to control it self by using the law of aerodynamics.
7. Attachment number : 1.2.1. Peraturan Menteri Perhubungan Republik Indonesia Nomor PM. 180 Tahun 2015 obout Pengendalian Pengoperasian Sistem Pesawat Udara Tanpa Awak Di Ruang Udara Yang Dilayani Indonesia mentioned that Unmenned Aircraft (UA) is a flying machine that works with a remote control by airman (pilot) or able to control it self by using the law of aerodynamics.[4]

The air plane without crew (unmanned aircraft) as a result of technological progress aerospace industry can be used to various interests that among others can be in
the form of as fallows [5] :

1. Facilitate for the police patrol to do in cities, village or on the highway.
2. Make it easy for the soldiers to perform defense and security and safeguards as well as monitoring of the state border.
3. Make it easy for the search and rescue in the giving of humanitarian aid in disaster areas or remote or in a state that requires speed or hard done by man.
4. Make it easy for the company of the courier service in sending the goods to remote areas that do not have means way.
5. Make it easy for the company's film, television or jurnalism in photography or film making.
6. Make it easy for the company building construction in the monitoring of the building that is being done or in case of repair damage to the building that are under his responsibility.
7. Make it easy for the electrical company to perform the detection of damage to the power pole high voltage.
8. Make it easier for mining companies and oil in the control pipes supplier the oil it still in good condition.
9. Make it easier for facilitate the department of waters to monitor, maintain or repair on tha giant dam.
10. Make it easier for facilitate the department of forestry to monitor, maintain or in the conduct of forest fire extinguishing.

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[3] Ann Cavoukian., ***Privacy and Drones : Unmanned Aerial Vehicles***, (Ontario : Information and Privacy Commissioner, 2012), p. 3., http://blog.indowebstore.com/mengenal-lebih-jauh-tentang-drone-yuk/ Download : Sunday, 14 Agustus 2016, At : 09.44 PM., http://www.merdeka.com/teknologi/apa-itu-drone-seperti-yang-dibicarakan-jokowi.html, Download : Sunday 14 Agustus 2016, At : 11.30 PM., Privacy Commission of Canada., ***Drone in Canada***, Victoria : Office of the PCC, 2013, p. 6., R.P. Ridderhof., ***op cit***, p. 8., Ruwantissa Abeyratne., ***Law and Regulation of Aerodromes***, Nc : Springer International Publising, 2014, p. 240.

[4] **Explanation :** Peraturan Menteri Perhubungan Republik Indonesia Nomor PM. 180 Tahun 2015 tentang Pengendalian Pengoperasian Sistem Pesawat Udara Tanpa Awak Di Ruang Udara Yang Dilayani Indonesia has lifted Peraturan Menteri Perhubungan Republik Indonesia Nomor PM. 90 Tahun 2015 tentang Pengendalian Pengoperasian Pesawat Udara Tanpa Awak Di Ruang Udara Yang Dilayani Indonesia.

[5] Privacy Commission of Canada., **log cit**., Hani Nur Fajrina., **log cit**., DHL., **log cit**., Oliver Wyman., **log cit**., Nations League of Cities., ***Cities and Droens***, Denver Colorado : Center of City Solutions and Applied Research, 2016, p. 1-7., Gito Yudha Pratomo., ***Cuma Drone Yang Bisa Eksplorasi Pelosok Papua***, Quoted from : ww.cnnindonesia.com/teknologi/20141128161042-199-14564/cuma-drone-yang-bisa-eksplorasi-pelosok-papua/ Download : Sunday, 7 Agustus 2016. At : 10.20 PM., Harian Jawa Pos., ***Kirim Paket Pos Pakai Drone***, Wednesday, 19 April 2017, p. 7., David Goldberg et al., ***Remotely Piloted Aircraft Systems and Journalism***, Oxford : University of Oxford, 2013, p. 21., *Gregory* Christophe & Franquis Laurent., ***A Business approch for the use of Drones in the Engineering and Construction Industries***, Accenture, 2016, p. 6-8., Parrot Company., ***Documenting a Large Dam with Sensefly Albris Inspection Drone***, Cheseaux-Lausanne : Sensefly, 2016, p. 1-8., Rizatus Shofiyanti., ***Teknologi Pesawat tanpa Awak Untuk Pemetaan Dan Pemantauan Tanaman Dan Lahan Pertanian***, Balai Besar Penelirian Dan Pengembangan Sumberdaya Lahan Pertanian, Bogor : Majalah Informatika Pertanian, Vol. 20, No. 2, Desember 2011, p. 59-60., Hani Nur Fajrina., ***Malaysia Perangi Malaria Dengan Drone***, Quoted from : http://www.cnnindonesia.com/teknologi/20141023184009-199-7716/malaysia-perangi-malaria-dengan-drone/ Download : Minggu, 7 Agustus 2016. At : 10.45 PM.

11. Make it easier for facilitate the department of agriculture and plantations to monitor, maintain or eradicate pests that can damage agricultural and plantation.
12. Make it easier for facilitate the healthe department to do the spraying extermination of the disease dengue fever or malaria.
13. Make it easy for the fire department to locate a fire in order to speed up the fire fighting so as not to extend.
14. A means for the community of aeromodelling lovers as a hobby or as a sport dexterity fly the aeromodel.

And much more of uses for the sake of human, the government and the state, but in its development happened abuse of unmanned aircraft like of them as follows :

1. Fly to free without pay attention to the procedure use that can be endangering safety of a man was in the land or in flying airplane.[6]
2. Arm on unmanned aircraft.[7]
3. Flying more that are permitted by regulations.
4. Spying for someone or on a event without a permit.
5. Use outside the frequency has are permitted by regulations.
6. Used to smuggling prohibited items.[8]
7. Enter the air forbidden or airspace other countries.[9]

Cases of the air plane without crew (unmanned aircraft) as is above also occurred in the Indonesia stete, among others like [10] :

1. On Thuesday 21 July 2015 a civil unmanned aircraft fell at public area in Bundaran Hotel Indonesia at center of Jakarta.
2. In the month December 2015 a civil unmanned aircraft flying over Adi Sucipto International Airport runway in Yogyakarta.
3. On Thursday 31 March 2016 a drone or a foreign airplane without crew found in the strain waters of Philip Batam.
4. On Tuesday 10 Mei 2016 a civil unmanned aircraft fly around the airplane field at Sultan Sharif Kasim (SSK) II Airport and Airbases Roesmin Nurjadin at Pekan Baru, Riau.
5. On Thursday 8 September 2016 around at 08.30 PM found a drones or airplane without crew in the area of Brenggeng Steril Area of the Detention Criminal Tanjunggusta Medan.

And there are many more cases that are not reported by the mass media, and with the existence of problems like the above this becomes a challenge for the law of the air especially in the Indonesia state.

The Directorate General of Air Transportation Ministry of Transportation Republic of Indonesia has several times issued a ministerial regulation on drone or aircraft without crew, among others as the the first is Peraturan Menteri Perhubungan Republik Indonesia No. PM. 90 Tahun 2015 tentang Pengendalian Pengoperasian Pesawat Udara Tanpa Awak Di Ruang Udara Yang Dilayani Indonesia revoked and replaced with Peraturan Menteri Perhubungan Republik Indonesia Nomor PM. 180 Tahun 2015 tentang Pengendalian Pengoperasian Sistem Pesawat Udara Tanpa Awak Di Ruang Udara Yang Dilayani Indonesia, and this ministerial regulation of changed with Peraturan Menteri Perhubungan Republik Indonesia Nomor PM. 47 Tahun 2016 tentang Perubahan Atas Peraturan Menteri Perhubungan Republik Indonesia Nomor PM. 180 Tahun 2015 Tentang Pengendalian Pengoperasian Sistem Pesawat Udara Tanpa Awak Di Ruang Udara Yang Dilayani Indonesia, but when it is studied thotoughly the rules of law not provide a guarantee of protection for the privacy of a person, legal entity or for the state it self thoroughly.

The problems as mentioned above this well have implications on some other law related such as :

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[6] Arthur Holland Michel and Dan Gettinger., ***Analysis of new Drone Incident Report***., Quoted from : http://dronecenter.bard.edu/on-the-drone/ Download : Monday, 28 Nopember 2016.

[7] Ryan Withwam., ***FAA is Investigation You Tube Video of a Drone Firing a Handgun***, 22 Juli 2015.

[8] http://news.detik.com/australiaplus/2994756/australia-perketat-aturan-penggunaan-drone-untuk-cegah-disalahgunakan/ Download : Saturday, 3 Desember 2016.

[9] Pesawat pengintai tanpa awak milik asing, jatuh di Batam - BIM 31_03 – YouTube. Download : Saturday, 3 Desember 2016.

[10] Maya Nawangwulan., *Drone Jatuh di Menara BCA Bundaran HI, Ini Isi Gambarnya*, Quoted from : https://m.tempo.co/read/news/2015/08/04/064689137/drone-jatuh-di-menara-bca-bundaran-hi-ini-isi-gambarnya Download : Wednesday, 27 Juli 2016, At 02.30 AM., Muh. Syaifullah., *Penggunaan Drone Berbahaya, Ini Kata TNI AU*, Quoted from : https://m.tempo.co/read/news/ 2016/04/27/108766382/penggunaan-drone-berbahaya-ini-kata-tni-au, Download : Wednesday 27 Juli 2016, At 01.48 AM., Yudha Manggala P Putra., ***log cit***., Parang Jati., *Drone Ganggu Proses Pendaratan Pesawat di Bandara SSK II Riau*, Quoted from :: http://www.flightzona.com/2016/05/12/drone-ganggu-proses-pendaratan-pesawat-di-bandara-ssk-ii/ Download : Wednesday 27 Juli 2016, At 09.09 AM., Samosir., **,** Quoted from :: http://poskotanews.com/2016/09/09/diduga-untuk-masukkan-narkoba-drone-ditemukan-di-rutan/ Download : Saturday, 10 September 2016, At 10.15 AM.

1. Civil Law :
   a. Article 571 Book of Legislation Civil Law mentioned :
      "Property rights over a plot of land contained therein, possession of all that is above it and in the land" The above mentioned chapter sounds almost identical to the principle of cujus est sdlum eyus est usque ad corlum et ad infinitum (whoever owns a plot of land, hence also has what lies above it and also which is underneath and unlimited).[11]
   b. Article 12 Undang-Undang Republik Indonesia Nomor 28 Tahun 2014 about Creation Rights mentioned :
      1)"Every person shall not engage in the commercial use, reproduction, announcement, distribution, and / or communication of portraits made for the benefit of commercial advertisement or advertising without the written consent of the person portrayed or the heir".
      2)"Commercial use, duplication, announcement, distribution, and / or portrait communications as referred to in paragraph (1) containing portraits of 2 (two) persons or more shall seek approval from persons present in the Portrait or heirs".
   c. Pasal 9 ayat 2 Undang-Undang Republik Indonesia Nomor 39 Tahun 1999 about Hak-Hak Asasi Manusia mentioned :
      "Property rights over a plot of land contained therein, possession of all that is above it and in the land".

   Pasal 21 Undang-Undang Republik Indonesia Nomor 39 Tahun 1999 about Hak-Hak Asasi Manusia mentioned :
   "Every person is entitled to a personal unity, both spiritual and temporal, and therefore should not be the object of research without his consent".
   Pasal 31 ayat 1 Undang-Undang Republik Indonesia Nomor 39 Tahun 1999 about Hak-Hak Asasi Manusia mentioned :
   "Anyone's residence should not be disturbed".
   And it is associated with the right to privacy of someone as well as legal entity.
2. Criminal Law :
   a. Article 111 bis 2, Article 113 paragraph 1, Article 117, Article 118 Book of the Criminal Justice Act on Crimes against State Security.
      Article 162, Article 163 bis paragraph 1 Book of the Criminal Justice Act on Crime Against Public Order.
      Article 187, Article 187 bis paragraph 1, Article 191 bis, Article 192, Article 194, Article 200, Article 202 Book of the Criminal Justice Act on Crimes That Endanger Public Security For People Or Goods.
      Article 338, Article 340 Book of the Criminal Justice Act on Crime Against Life.
      Article 369 paragraph 1 Book of the Criminal Justice Act on Blackmail and Pollution.
      Article 406, Article 408, Article 410 Book of the Criminal Justice Act on Destroying Or Damaging Goods.
      Article 489 paragraph 1, Article 493 Book of the Criminal Justice Act on Public Security Violations For People Or Goods And Health.
      Article 503 Book of the Criminal Justice Act on Public Order Offenses.
   b. Article 410 Undang-Undang Republik Indonesia Nomor 1 Tahun 2009 about Penerbangan mentioned :
      "Any person who operates an Indonesian or foreign civil aircraft arriving at or departing from Indonesia and landing and / or taking off from an airport not in accordance with the provisions of Article 52 shall be subject to imprisonment of 1 (one) year or a fine of Rp. 500,000,000.00 (five hundred million rupiahs) ".
   c. Article 411 Undang-Undang Republik Indonesia Nomor 1 Tahun 2009 about Penerbangan mentioned :
      "Every person intentionally flying or operating an aircraft that harms the safety of aircraft, passengers and goods, and / or residents or harms another's property as referred to in Article 53 shall be liable to a maximum imprisonment of 2 (two) years and the maximum fine many Rp. 500,000,000.00 (five hundred million rupiahs) ".

   From the provisions of the law as mentioned above relates to the order, protection and safety of a person, legal entity and the state.
3. State Administration Law :
   a. Article 33 paragraph 1 Undang-Undang Republik Indonesia Nomor 36 Tahun 1999 about Telekomunikasi menyebutkan :
      "The use of radio frequency spectrum and satellite orbit shall obtain government permission and must be in accordance with its designation and not interfere with each other".

[11] Priyatna Abdurrasyid., *Kedaulatan Negara Di Ruang Udara*, Jakarta : Pusat Penelitian Hukum Angkasa, 1972, hlm. 50.

b. Article 2 paragraph 1 of Regulation of the Minister of Communication and Information of the Republic of Indonesia Number 4 Year 2015 concerning Operational Provisions and Procedures for Licensing the Use of Radio Frequency Spectrum states:
"Every user of a radio frequency spectrum shall be subject to permission to use the radio frequency spectrum".

c. Appendix 1 Sub-Section 5.3 Regulation of the Minister of Transportation of the Republic of Indonesia No. PM. 47 Year 2016 on Amendment of Regulation of the Minister of Transportation of the Republic of Indonesia No. PM. 180 Year 2015 Trntang Control of Unmanned Aircraft Operations In Air Space Serviced Indonesia states:
   1) *"Directorate General of Civil Aviation, the sanctioner for unmanned aircraft systems operated at:*
      a. *Aviation Safety Operation Area.*
      b. *Controlled airspace.*
      c. *Outside of air space control at an altitude of more than 500 ft (150 mtr) above ground level.*
   2) *The Indonesian National Army, the sanctioner for the unmanned aircraft system operated at:*
      a. *Prohibited areas.*
      b. *Limited Air Area (restricted area) ".*

From the provisions of the law as mentioned above relates to the order, protection and safety of a person, legal entity and the state. From the descriptions of the discussion as mentioned above, it is clear that the legal regulation on the use of unmanned aircraft issued by the Directorate General of Civil Aviation of the Ministry of Transportation of the Republic of Indonesia is not yet complete, and this is a challenge for the state of Indonesia in regulating the territory Indonesian air sovereignty.

Closing

At the beginning of the XXI century the phenomenon of the use of unmanned aircraft known as drone (unmenned aircraft) conducted by civilians, and this has been a lot of countries in the world issued a rule of law to regulate it, but the use of the drone is sometimes used illegally which can disrupt the privacy of a person, legal entity and state security, therefore there is a need for a more complete legal regulation to regulate it, and this is a challenge for all countries in the world including the state of Indonesia in protecting the territory of air sovereignty.

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THE URGECY OF THE PANCASILA SETTING REGISTRATION AS THE IDEOLOGY AND THE BASIS OF THE STATE[1]

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ABSTRACT

The urgency of setting consolidation of Pancasila as a state ideology and constitution explicitly needs to be conducted in in the articles of the 1945 Constitution to provide the certainty for stabilizing the state ideology and constitution in constitutional life. By setting Pancasila explicitly in the articles would give a forced strength in grounding of the noble values of Pancasila through an organic law, and at the same time facilitate the grounding of the noble values of Pancasila as an ideology and constitution in everyday life. The formulation of the noble values of Pancasila as the guidance in positive law is highly urgent.

Keywords : Setting, Pancasila, Explicit.

Introduction

After the 1998 Reform, there was a fundamental change in the constitution of the Republic of Indonesia, namely the four-time amendments of the 1945 Constitution. It originally consisted of the Preamble, Content, and Explanation, but now the 1945 Constitution consists of the Preamble and Articles.[2] The one that must be examined is: how is the direction of the state and nation life structure in the country after the reform? Are the values of Pancasila as the state ideology and constitution reflected in the building of the rule of law in Indonesia?

Pancasila has been agreed as the way of life of the nation and state.[3] Pancasila is an "honorable deal" of "honorable men" (Founding Fathers) who respected each other despite the differences between them which were difficult to reconcile.[4] It was also confirmed in Act No. 12 of 2011 on the Establishment of Law that Pancasila materially is the source of all sources of law in Indonesia.

Therefore, there is no reason that the building of the rule of law in Indonesia made by the legislators of Indonesian law does not reflect the values of Pancasila as an ideology and constitution in Indonesia. However, after Pancasila went through all the challenges, Pancasila has been so far only interpreted as a political concept with the substance that has not been manifested in real terms. Indeed, since the new order was subverted by the reform movement, Pancasila as the ideology of the nation has lost its established place. There is a sort of phobia and allergy in the community of the nation/state to recognize Pancasila or even to try studying them. Although the country is still keeping a consensus to declare Pancasila as an ideology of the nation, in fact, it seems that we have to question it back. From the facts in the field, we can see in the statement of the Ministry of Domestic Affairs that there are 139 regulations which are contrary to Pacasila and the Constitution of the Republic of Indonesia, and they have to be canceled. In addition, there are also laws getting the resistance from the public due to their contradiction with the 1945 Constitution and Pancasila.

Main Problems

Is the setting consolidation of Pancasila as the state ideology and constitution in the 1945 Constitution urgent explicitly?

Discussion

Pancasila as *Gentlement Agreement*.

Genealogically, Pancasila was born as a *historico-political gentleman agreement*. It can be seen from the history of the birth of Pancasila which was an honorific deal of the gentlemen at the meeting of the Investigating Committee of Indonesian Independence Preparation Efforts (BPUPKI) which took place from 29 May 1945 to 1 June 1945. Pancasila was accepted as a foundation of *a State to be established*. Through a process that occurred in BPUPKI, a small committee chaired by Ir. Soekarno involving the representatives of Islamic and nationalist groups agreed on a national consensus, later known as *Jakarta Charter* which was called a *gentleman agreement* by Dr. Sukiman.

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[1] The paper was presented in the International Seminar of ICLEH on January 29 to 30 at Grasia Hotel Semarang.
[2] The 1945 Constitution of the Republic of Indonesia, the Secretariat General of the MPR (The House of Representative), the Additional Rules Article II, p. 171.
[3] Lih Bernard L.Tanya, "Pancasila as the Frame of Indonesian's Affairs", the discussion paper of UPT-MKU, Sebelas Maret University in Surakarta, May 21, 2015
[4] Ibid

The Jakarta Charter is not just a historical document. It is also a state document because it contains a national consensus and a gentlemen's agreement of the founding fathers on the foundation of the Republic of Indonesia between the "Islamic nationalists" who wanted a state based on Islam and the "secular nationalists" who wanted a national state with an absolute separation of religion from the state.

Pancasila as the nation's noble treaties and the state's philosophical foundation unite the two state ideals. It was initiated by Bung Karno's speech on June 1, 1945 on the five principles of state foundation, namely Indonesian nationality, internationalism or humanitarian, consensus or democracy, social welfare, and divinity.

Bung Karno's formulation of Pancasila was enhanced by *Panitia Sembilan* (the Committee Nine). The Divinity, placed by Bung Karno in fifth place, in the formulation of the Jakarta Charter, is used as the first principle. As said by Bung Hatta, *Panitia Sembilan* (the Committee Nine) changed the fundamental order of Pancasila by putting moral fundamentals higher than the political ones. With the new order and formula, the belief in God Almighty becomes the basic ideals of statehood led us to carry out all that is good for the people and society.

The Investigating Agency of Indonesian Independence Preparation Efforts (BPUPKI), in their meeting on June 22, 1945, accepted the formulation of *Panitia Sembilan* (the Committee Nine) as the Preamble of the 1945 Constitution known as the Jakarta Charter. The structure and order of Pancasila in the Jakarta Charter is the Deity with the obligation to enforce Sharia Law for its adherents, just and civilized humanity, the unity of Indonesia, democracy led by the wisdom of deliberations/representatives, and social justice for all Indonesian people.

One of the founders of the Republic of Indonesia and the National Hero of *Mahaputra*, Mr. Muhammad Yamin, in his *Proclamation and Constitution of the Republic of Indonesia* reveals an apriori fog on the Jakarta Charter. Muhammad Yamin asserts; the Jakarta Charter contains the lines of the revolt against imperialism, capitalism and fascism, as well as containing the foundation for the establishment of the Republic of Indonesia.

The Jakarta Charter, which is older than the San Francisco Peace Charter (June 26, 1945) and the Tokyo Capitulation (August 15, 1945), is the sovereign source that emits the Declaration of Independence and the Constitution of the Republic of Indonesia. The Jakarta Charter is the preamble and the Indonesian Constitution and the 1945 Constitution made by the philosophy and politics specified in the agreement charter. The Jakarta Charter contains a sentence of the Proclamation of Indonesian Independence declared on August 17, 1945, and the Jakarta Charter that gave birth to the proclamation and the constitution.

In the morning, on August 18, 1945, ahead of the the meeting of the Indonesian Independence Preparatory Committee (PPKI) which scheduled the ratification of the Constitution, Bung Hatta lobbied three Muslim leaders; Ki Bagus Hadikusumo, Kasman Singodimedjo and Teuku M Hasan. It is related to the events of the afternoon of August 17, 1945 when Bung Hatta received an officer of *Kaigun* (Japanese Navy) informing that the representatives of Protestant and Catholic in the areas controlled by the Japanese Navy were objected to the phrase concerning the obligation to enforce Sharia Law for the adherents in the preamble of the Constitution. If the part of the sentence is set, they preferred to stand out of the Republic of Indonesia.

Bung Hatta, in *Di Sekitar Proklamasi* (Around the Proclamation) said, "I would say that it is not discrimination, because the determination is only about the people who are Muslims. When formulating the preamble of the Constitution, Mr. Maramis who participated in *Panitia Sembilan* (the Committee Nine) has no objection and on June 22 he also put his signature".

Briefly, before the meeting of PPKI, Bung Hatta asked the Islamic leaders to willingly remove the sentence concerning Islamic law in the preamble of the Constitution. the whole psychological stress and final word at that time was in the hand of Ki Bagus Hadikusumo, the only exponent of the struggle of Islam who was the most senior and the Chairman of Muhammadiyah. Kasman Singodimedjo also tried to persuade Ki Bagus in order to receive the advice of Bung Hatta. According to Prawoto Mangkusasmito, HA Wahid Hasyim did not attend the meeting on 18 August 1945 because he was on his way to East Java.

Bung Hatta wrote, "At that time we can realize that the spirit of the Jakarta Charter did not disappear by removing the words of divinity with the obligations of Islamic law for the adherents and replacing it with a Supreme Deity." Prawoto Mangkusasmito, the former Deputy to Prime Minister and the (last) Chairman of *Masyumi*, had the opportunity to ask Ki Bagus Hadikusumo about the meaning of the term "Belief in God Almighty" is. Ki Bagus answered shortly, that is "*tauhid* (monotheism)". It was also asked to Teuku M Hasan who were present in the meeting of August 18, 1945. The figure from Aceh did not deny it.

In his biography *Hidup itu Berjuang* (Life is a Struggle), Kasman Singodimejo wrote, "the change in the seven words of the divinity formula was very important. The reason was that the Almighty determines the meaning of divinity. "Pancasila that is now *geruisloos* becomes the philosophy of our country and does not accept the random divinity. In addition, it is not the divinity of any divinity, but Pancasila accepts "Almighty God". Bung Hatta, in June and August 1945, described "God Almighty" is God, nothing but One God.

A Muslim leader and the former Minister of Religious Affairs, KH Saifuddin Zuhri, in the foreword to the book *Piagam Jakarta* by Endang Saifuddin Ansari stated that the Jakarta Charter does not lose its function or its role as a means of unifying the entire nation of Indonesia, as stated by President Sukarno in the meeting to commemorate the birth of the Jakarta Charter on 22 June 1965 in Istora Jakarta.

The Presidential Decree on July 5, 1959 on Returning to the 1945 Constitution confirms our belief that the Jakarta Charter, dated June 22, 1945 animates the 1945 Constitution and a set of unity with the constitution. The history records that Muslims had a lot to give to independence and national unity. In this case, I repeated what was stated by Lt. Gen. (ret) H. Alamsyah Ratu Perwiranegara during his service as the Minister of Religion; Pancasila is the greatest gift and sacrifice of Muslims to the unity and independence of Indonesia.[5]

1. Pancasila at the End of the New Order (1998)

As noted above, the formulation process of Pancasila as the state foundation involved a variety of national components who are the members of BPUPKI and PPKI. After the fall of Soeharto as the President, the position of Pancasila as the state foundation is claimed by various groups of people. It is a problem because the implementation of Pancasila in the new order through the program of the Pancasila Implementation Guidelines (P4) through TAP MPR NO.II / MPR / 1978 was revoked by TAP MPR NO.XVIII / MPR / 1998. In the reform era from 1998 to 2002, it was a transitional period in which the Amendment to the 1945 Constitution occurred. The amendment to the constitution is not concerned about Pancasila because Pancasila as the state foundation has been set in TAP MPR No.XVIII / MPR / 1998 as follows:

> Article 1. Pancasila as referred to in the Preamble to the 1945 Constitution is the foundation of the Unitary State of the Republic of Indonesia, and it must be implemented in the life of state affairs.
> Article 2. With the enactment of this Decree, the Decree of the People's Consultative Assembly of the Republic of Indonesia Number II / MPR / 1978 on the Guidelines of the Implementation of Pancasila (Ekaprasetia Pancakarsa) is revoked and declared invalid.
> Article 3. The Decree applies from the time it is stipulated (13 Nov 1998)

When we read the substance contained in the the Decree of the People's Consultative Assembly of the Republic of Indonesia (MPR-RI) No. XVIII / MPR / 1998, Pancasila as the state constitution and national ideology Pancasila is maintained. The question is: has Pancasila as the state foundation been implemented consistently? Can Pancasila be a framework or source of ethics of the Indonesian nation in law reform? As noted, Pancasila is the State Foundation, which means that it is the cornerstone of the nation and the state of Indonesia. Then, every move of the nation and state of Indonesia must always be guided by the precepts contained in Pancasila, namely: the belief in one God, just and civilized humanity, Indonesian unity, democracy under the wise guidance of representative consultations, and social justice for all the peoples of Indonesia. In the meantime, the meaning of national ideology means the ideals and objectives of the State.

2. Implementation of Pancasila Values in Indonesian Legal System

In the constitutional history of the Republic of Indonesia, since 2003, MPR (the People's Consultative Assembly) is no longer the highest state institution, but it is an equal state institution to the others and does not have the authority to issue the Decree of MPR as it was before the reform.

As stated above, Pancasila is the foundation for the State, which means that it is the foundation of the life of the nation and state of Indonesia. Therefore, every move of the nation and state of Indonesia must always be guided by the precepts contained in Pancasila; the belief in one God, just and civilized humanity, Indonesian unity, democracy under the wise guidance of representative consultations, and social justice for all the peoples of Indonesia. Pancasila as the state foundation should be well-structured and is also available in hierarchy of laws from the highest to the lowest ones.

The 1945 Constitution of the Republic of Indonesia contains the settings of three groups of the materials-content of the Constitution, i.e.: the presence of protection to human rights, the presence of fundamental constitutional structure, the division and restrictions on the fundamental constitutional duties. As we know, the 1945 Constitution never applies to the entire territory of Indonesia within three period: *first*, from August 17, 1945 to December 27, 1949; *second*, from 05 July 1959 to 1998; and *third*, from 1999 to present (reform order).

The Preamble of the 1945 Constitution, with the formulation of Pancasila in it, is a part of the 1945 Constitution or a part of positive law. In such a position, it contains two aspects; in terms of positive and negative terms. If Pancasila, in the preamble of the Constitution of the Republic of Indonesia, is considered to constitute an integral part of the articles, the positive aspects enforceability

[5] **S**aefudin M.Andrean, "PANCASILA Sebagai Konsensus Nasional dan Gentlemen's Agreement Founding Fathers Tentang Dasar Negara Republik Indonesia (PANCASILA as a national consensus and Gentlemen's Agreement of the Founding Fathers about the Constitution of the Republic of Indonesia)" http://www.wartalambar.com/2016/04/pancasila-sebagai-konsensus-nasional.html

can be forced (by the State). However, the negative aspect is that the substance in the preamble can be changed in accordance with article 37. If Pancasila, in the Preamble of the Constitution of the Republic of Indonesia, is not a unity, the positive aspects of Pancasila can not be changed by the Assembly as provided for in article 37, but the negative aspect of Pancasila can not be coerced. In 1998, the Assembly issued a decree of MPR-RI No. XVIII / MPR / 1998 on the Revocation of the Decree of MPR-RI No. II / MPR / 1978 on the Guidelines of Implementation and Appreciation of Pancasila *(Eka Prasetya Pancakarsa*) and the Decree on the Ratification of Pancasila as the Foundation of the State.

As consideration, it can be argued that Pancasila as referred to in the Preamble to the 1945 Constitution is necessary to emphasize its position and role in the life of the country. It should be mentioned that the Decree of the People's Consultative Assembly (MPR-RI) No.II / MPR / 1998 has the record of Treatise/ Explanation which is an integral part of the provision, as follows: that the foundation of the State referred to in this Decree contains the meaning of national ideology as the ideals and purposes of the State. Thus, other than as a foundation for the State, Pancasila is implied as the national ideology, and, as a national ideology, Pancasila is the ideals and objectives of the state. Thus, all noble values of Pancasila should be reflected in any legal reform in Indonesia.

3. The Urgency of the Explicit Setting of Pancasila as the Ideology and State Foundation in the 1945 Constitution of the Republic of Indonesia.

After the 1998 reform, there was a structural change of state administration in Indonesia. The reform was characterized by the changes in the 1945 Constitution in the years of 1999 (the first amendment), 2000 (the second amendment), 2001 (the third amendment), and 2002 (the fourth amendment). Along with the reform era, it was also marked by the issuance of the Decree of the People's Consultative Assembly (MPR) NO. XVIII / MPR / 1998 on the repeal of the provisions of the Decree of the People's Consultative Assembly (MPR) N0. II / MPR / 978 on the Guidelines of the Implementation and Appreciation of Pancasila (Eka Prasetia Pancakarsa) and the Determination of Pancasila as the state foundation. In 2003, the People's Consultative Assembly (MPR) issued the Decree of the People's Consultative Assembly (MPR) N0. I / MPR / 2003 on the Judicial Review and Status of the Decree of the Temporary People's Consultative Assembly (MPRS) of 1960 to 2002. According to the provisions of Article 6 of the Decree of the People's Consultative Assembly (MPR) No. 1 / MPR / 2003, it can be said that the assertion of Pancasila as the state foundation has already been final and does not require a follow-up anymore. The recognition of the Decree of the People's Consultative Assembly (MPR) as the legal product in the hierarchy of law ended in 2004 when it issued Act No.10 of 2004 on the Establishment of Legislation. The hierarchy arrangement is as follows:

a) The 1945 Constitution of the Republic of Indonesia.
b) Law / Government Regulation in Lieu of Law.
c) Government Regulation.
d) Presidential decree.
e) Regional Regulation.
    1) The Provincial Regulation made by the Provincial Parliament (DPRD) with Governor.
    2) The Regency/ City Regulation (DPRD) made by the regency/ city with the regent/ mayor.
    3) Village Regulations/ the Regulations equivalent made by the Village Consultative Body (BPD) or other names along with head of village

Pancasila as the state foundation which is set in the Decree of the People's Consultative Assembly (MPR) since 2004 has lost its footing as a legal basis. In 2011, Act No.10 of 2004 on the establishment of legislation was declared to be repealed and replaced by Act No. 12 of 2011 on the Establishment of Legislation, and the law puts the Decree of the People's Consultative Assembly (TAP MPR) back in the hierarchical order of laws as follows:

a) The 1945. Constitution of the Republic of Indonesia.
b) The Decree of the People's Consultative Assembly.
c) Law / Government Regulation in Lieu of Law (perpu).
d) Government regulations.
e) Presidential decree.
f) Provincial Regulation; and
g) Regency/ City Regulation.

When we see the dynamics of the amendments mentioned above, we can say that Pancasila as the state ideology and principles as stipulated in the Decree of the People's Consultative Assembly (TAP MPR) is very easy to be revoked and lost its footing. To provide legal certainty firmly on Pancasila as an the state ideology and foundation, in my opinion, it is necessary to explicitly mention in the articles. Besides, the term of Pancasila explicitly also has never existed in the Constitution. The inclusion of Pancasila in the fourth paragraph is only the precepts, while the term of Pancasila itself is not visible in the paragraph. In the body of

the 1945 Constitution of the Republic of Indonesia from the articles 1 to 37, it does not show the acknowledgment explicitly about the term of Pancasila as well as the recognition as a national ideology and principles explicitly. Therefore, it is not wrong if, in academia or the public, it is debatable.

Then, How is the juridical setting in the Decree of the People's Consultative Assembly (TAP MPR)? There had been a juridical setting in the Decree of the People's Consultative Assembly (TAP MPR); it was the the Decree of the People's Consultative Assembly (TAP MPR) No.XVIII / MPR / 1998. It was the Decree of the People's Consultative Assembly (TAP MPR) that revoked the Decree of the People's Consultative Assembly (TAP MPR) No.II/ MPR/ 1978 on the Guidelines of the Implementation of Appreciation of Pancasila and determined Pancasila as the state foundation.

However, the Decree of the People's Consultative Assembly (TAP MPR) No.XVIII / MPR / 1998 had ever been ambivalent because in the hierarchy of laws, the legal product of the Decree of the People's Consultative Assembly (TAP MPR) is not included in the hierarchy (Act No.10 of 2004). In the long period of 2004 – 2011, Pancasila was deemed not to be grounded and did not appear to strengthen the further regulations in the laws or to try to make the principles of Pancasila's noble values as the guidelines in national law reform. The legislators did not even meet the targets in legislation up to now because the atmosphere of the parliament, which was previously filled from the two parties and one *Golongan* Karya, later became a multi-party system that made the parliament more unstable. The weakness makes the tasks in the field of legislation more unfocused and more influence fights occurred in the parliament. The further impact on the legal reform in Indonesia is that the legislators are not directed in making the building the rule of law in Indonesia. The facts on the field can be seen in the statement of the Minister of Domestic Affairs that there are 139 regulations which are contrary to Pancasila and the 1945 Constitution of the Republic of Indonesia.[6]

Likewise, the legal products, a quarter of the laws made in 2008-2011, which were 102 out of 426 laws were problematic and contrary to the 1945 Constitution of the Republic of Indonesia and also contrary to Pancasila. They were filed for a judicial review to the Constitutional Court.[7] In my opinion, the formulations of the noble values of Pancasila as the guidance in Indonesian legal reform in Indonesia is necessary to be conducted again, and it is very urgent to avoid the wrong direction in achieving the state goals; social welfare.

Closing

Conclusion

The urgency of the setting consolidation of Pancasila as the state ideology and foundation explicitly needs to be conducted in the articles of the 1945 Constitution to provide the certainty of stability for the state foundation and ideology in constitutional life. By setting Pancasila explicitly in the articles, it would give forced strength in grounding the noble values of Pancasila through an organic law and at the same time facilitating the grounding of the noble values of Pancasila as the ideology and foundation in daily life. The formulation of the noble values of Pancasila as the guidance in positive law is very urgent. It will help legislators both at central and local level in performing legal reform in order not to deviate so that the integral human development in realizing social welfare through legal development can be realized soon.

Recommendation

a. To consolidate the setting of Pancasila as the State Ideology and Foundation, it is necessary to have the reconstruction of the setting consolidation of Pancasila in the 1945 Constitution of the Republic of Indonesia Year into its articles, namely the amendments of the 1945 Constitution.
b. The affirmation of Pancasila as an ideology and foundation of the Republic of Indonesia can be integrated in Chapter I on Form and Sovereignty into Chapter I on State Forms, Sovereignty, Ideology and Foundation.

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REGULATION SYSTEM ON LOADING/UNLOADING CARGO AT INDONESIA PORT CORPORATION BASED ON JUSTICE

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ABSTRACT

This paper analyses the role and performance of the Indonesia's seaports as a vital determinant to support Indonesia's vision to be a strong maritime country. Seaports play an important role to promote connectivity and improve competitiveness of the Indonesian economy. Their performance will affect efficiency in the production and distribution processes. By using descriptive analysis, it was found that despite playing an important role in the Indonesian economy, the performance of Indonesia's seaports still lag behind other countries in terms of their quantities and their qualities. Main policy challenge that need to be addressed is to reform the role and the position of the government in the development and management of the seaports. In this context, the government should ideally take several actions as follows. First, redesigning rules and regulations to promote private sector participation. Second, strengthening the implementation of Law No. 2 of 2012 on Land Procurement by involving Local Government in the execution of land acquisition as an effort to build the system of loading and unloading cargo at Indonesia Port Corporation based on Justice

Keywords : Seaports, Maritime Country, Private Sector, Policy Challenges

INTRODUCTION

Indonesia is the largest archipelagic country in the world that has 13,000 islands in a span of 3,500 miles. Indonesia also has the longest coastline in the world's fourth with more length and 95,181 kilometers. Indonesia is a maritime country, where the sea of Indonesia is wider than its land. The condition of Indonesian geography then resulted in a mindset reinforced by *Pancasila* as the ideology of the nation that is thinking about the insight of the archipelago in which the sea has a function as a unifying nation of Indonesia.

Thinking about the insight of this archipelago begins with the Archipelago concept.[1] The concept of the archipelago is a national conception of territory, while the archipelago is a national insight of the nation and state that originally developed on the basis of territorial conception. In 1957, this began with the Djoeanda Declaration issued on 13 December 1957. The text stated:

> "Any waters around, between and connecting the islands or parts of the islands belonging to the land of the Republic of Indonesia, regardless of their breadth or width are reasonable parts of the territory of the State of the Republic of Indonesia and thus constitute a part of the national waters which is under the absolute sovereignty of the Republic of Indonesia ..."[2]

It is clear that the function of the sea in the country of the archipelago, then and the conception of the archipelago developed into the insight of the archipelago which views Indonesia as a unity that includes land (land), water (sea) and air (air) above is clearly inseparable. With little effort, Indonesia is finally able to reinforce the principle of an internationally recognized archipelagic state on the legal principle of an archipelagic country as stated in the Third United Nations Convention on the Law of the Sea 1982 (United Nations Convention on the Law of the Sea) ratify with Law no. 17 of 1985.[3]

Based on the insight of the archipelago, the Indonesian nation should be able to take advantage of marine areas in order to maintain the survival and develop their lives. From Indonesia geographical point extends from 94^{o} East Longitude to 141^{o} East Longitude and 6^{o} North Latitude up to 11^{o} South Latitude reaches an area of 5.8 million km^{2}, Indonesia has a wealth of enormous resources contained in it.

Based on the geography condition it can be understood that the vastness of Indonesia's marine territory is also a potential power of marine business owned by Indonesia and must be managed by the government as well as possible in order to achieve its goal of prospering the people of Indonesia. From this ocean side, Indonesia can develop various industries and services, it covers fishery industry, marine mining to marine tourism. And to maximize the potential of the required infrastructure that can support the marine business activities of Indonesia. The most important infrastructure in the marine venture is "Harbor".

The ports in their activities have an important and strategic role for the growth of industry and trade as well as a business segment that can contribute to the national development. This brings consequences to the management of the port business segment so that its operations can be done effectively, efficiently and

[1] Christo Yosafat, "*Tinjauan Yuridis Dampak Penetapan Asas Cabotage Dalam UndangUndang Nomor 17 Tahun 2008 Tentang Pelayaran Terhadap Jasa Perhubungan Laut*" (Depok: Faculty of Law, University of Indonesia, 2010), pg. 1.

[2] *Ibid.*

[3] Djuanda Declaration, http://www.dephub.go.jd/jndex2.php?moduje=deklarasj juanda&actlist,, downloaded at March 1st, 2017

professionally so that the port service becomes smooth, safe, and fast at an affordable cost. Basically the services provided by the port are service to the ship and service to the cargo (goods and passengers).

Theoretically, as part of a sea transport link, the port function is the interface of two or more transport modes and interfaces of interrelated interests. Goods transported by ship will be dismantled and transferred to other modes such as land mode (truck or train). Conversely goods transported by truck or train to harbor unloading will be loaded again to the ship. Therefore, various interests meet in the port such as banking, shipping companies, customs, immigration, quarantine, *shahbandar* and other centers of activity.

But if we look at the facts that exist, we must admit that the ports in Indonesia are still not managed properly. As we all know, two-thirds of Indonesia is in the form of waters. Thousands of islands lined up from *Sabang* to *Merauke*. The position of this country is very strategic because it is in crossing the world trade routes. Ironically, Indonesia could not take advantage of the golden opportunity.

From 134 countries, according to Global Competitiveness Report in 2009-2010, port competitiveness in Indonesia is ranked 95th, slightly increased from the position of 2008 which is in the order of 104. However, Indonesia's position was lost to Singapore, Malaysia, and Thailand. The weakness of ports in Indonesia lies in the quality of infrastructure and superstructure.

Indonesia is also losing the productivity of loading and unloading, severe congestion conditions, and the maintenance of old customs documents. Global Competitiveness Report in 2010-2011 mentions, the quality of ports in Indonesia is only worth 3.6, well below Singapore which is worth 6.8 and 5.6 of Malaysia.

The entrepreneurs have long complained about poor port facilities in Indonesia. To lean and unload, a ship must stand in line for days to wait. Often, the waiting time for anchor is much longer than the time to sail. By seeing the poor condition of the port, no wonder if investors are reluctant to invest in the field of shipping. As a result, the distribution of inter-island goods was stagnant.

Further impact, soaring goods prices and economic development faltered. The high cost economy continues to haunt the country. It's hard to understand why Indonesia can 'calm down' witness the outdated port conditions. Many parties are surprised that Indonesia let this economic inefficiency last long. In the last 30 years, there has been almost no significant and significant port infrastructure development project. In fact, the Port of Tanjung Priok has been a flagship in Asia.

Due to delays in cargo handling, many ships avoid *Tanjung Priok*. For import export purposes, foreign ships choose to dock in Singapore and Malaysia. The World Bank also noted, the system and efficiency of ports in Indonesia is very bad. These conditions clearly worsen the competitiveness of Indonesian goods prices. As a result, the potential for foreign exchange also evaporates into neighboring countries.

The government must take appropriate steps to correct this serious problem, because from year to year there has been no significant improvement on port management. Therefore, the importance of building the system of loading and unloading cargo at Indonesia Port Corporation III based on justice.

Outline Of The Research

Based on the above description can be formulated some key issues that need to be studied and discussed as follows:

1. How the legal arrangement of loading and unloading cargo at Indonesia Port Corporation?
2. Why the loading and unloading cargo at Indonesia Port Corporation has not been effective yet?
3. How to build an arrangement of loading and unloading system at Indonesia Port Corporation based on justice?

Discussion

Understanding of loading and unloading at the Port

Loading and unloading is one of the activities undertaken in the process of forwarding (delivery) of goods in question with the loading activity is, the process of moving goods from the warehouse, raising and piled on the boat, while the unloading activity is the process of removing goods from the ship especially in the warehouse at the port or stock pile or container yard.[4]

In 1983, pursuant to Government Regulation No. 15 of 1983, Agricultural Training Center was changed to Public Corporation (*PERUM)* of Port I to IV which manages the public ports which are cultivated, while the management of the untreated port is carried out by the Technical Implementation Unit of the Directorate General of Sea Communications.

PERUM status lasted until 1992 when changed to Indonesia Port Corporation I, II, III and IV. Increase of company status from Public Corporation to Indonesia Port Corporation is an effort to improve business performance by providing greater independence for the taking and execution of commercial decisions of exploitation.

[4] Indonesia Port Corporation, Company Long Term Plan 2009-2013, pg. 2

Business Activities at Indonesia Port Corporation[5]

Field of business of Indonesia Port Corporation covers several business activities, namely:

1. Provision and/or service of harbor and aquatic pools for traffic and vessels;
2. Provision and/or services related to pilotage and ship delays;
3. Provision and/or services of the Wharf and other facilities for tethering, container loading, bulk liquid, dry bulk, multipurpose, general cargo and passenger and / or vehicle up and down facilities;
4. Provision of loading and unloading services, containers, bulk liquid, general cargo, and vehicles; - Provision and / or service of container terminal, bulk liquid, dry bulk, multipurpose, passenger, public service, and Ro-Ro;
5. Provision and / or service of warehouses and cultivation fields and tanks / stockpiles, freight forwarding, loading and unloading equipment, and port equipment;
6. Provision and / or service of land for various buildings and fields, industries and buildings / buildings connected with the interests of the smoothness of multi-modal transport; - Provision and / or service of electricity, drinking water and installation and waste and garbage disposal;
7. Provision and / or service of filling of fuel for vessels and vehicles in harbor environment;
8. Provision and / or service of consolidation and distribution of goods including animals;
9. Provision and management of Port-related Consultation, Education and Training;
10. The operation and operation of container depots and repairs, cleaning, fumigation, and logistics services;
11. Concession area business and temporary hoarding.

In addition to these main business activities in Indonesia Port Corporation also develops other business activities that can support the achievement of the Company's objectives and in order to optimize the utilization of resources owned by the Company, including: Transportation Services; Leasing and repair of facilities and equipment; Ship maintenance service and equipment in port area; Ship to ship transfer service including other follow-up services; Property outside the main port activities; Industrial area; Tourism and hospitality facilities; Port consultant and surveyor services; Communication and information services; Port construction services; Forwarding/expedition services; Health services; Supplies and catering; Waiting place for motor vehicle and shuttle bus; Diving services (salvage); Tally Services; Port fitting services; Service scales.

Regulation of Indonesian Port

1. Law Number 17 Year 2008 on Shipping

Law No. 17/2008 on Shipping was adopted on 9 April 2008 in a plenary session of the House of Representatives led by the Speaker of the DPR (Indonesia's House of Representatives), Agung Laksono. Law Number 17 of 2008 concerning Shipping is approved by 10 fractions in the DPR. This Act is a refinement of Law Number 21 of 1992 on Shipping.

The drafted seafaring bill is a refinement of a similar law that is no. 21/1992. Law No. 17 of 2008 on Shipping consists of 22 chapters and 355 articles or more than previous government proposals. The government previously proposed a Sailing Bill with 17 chapters and 164 articles.

The Government, in the end view, represented by the Minister of Transportation, Jusman Syafii Djamal, stressed that the new spirit in the new Shipping Bill has been well received by the faction fraction in the DPR, because the Shipping Bill brought a new change of ending the monopoly of Indonesia Port Corporation, so that Indonesia Port Corporation only as an operator, while the Government becomes a regulator. This will have an impact on the creation of fair business competition.6

Law No. 17 of 2008 on Shipping affirms three things. First, separate the regulator and operator. Second, ending the monopoly and the third opens up the competition. The main role of Law No. 17 of 2008 on Shipping is to distinguish regulators and operators; hence the former administrators are now affirmed that in accordance with international rules the regulator in one port is the port authority. So that things associated with the regulator automatically delegated to the Indonesia Port Corporation. Strategic Issues and Law Number 17 Year 2008 on Shipping about ports are set forth in general explanation where it is written

"The regulation for the port area contains provisions on the abolition of monopoly in the implementation of ports, the separation between the functions of the regulator and the operator and to give the participation of the local government and private sector proportionally in the implementation of the seaport."[7]

2. Government Regulation Number 61 Year 2009 About Port

Government Regulation is the Indonesian Legislation regulated by the President to implement the Act as it should. The content of Government Regulations is the material to enforce the Law.[8]

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[5] http://www.indonesiaport.coid/read/produk-and-layanan.html. accessed at May 30th, 2016

[6] http://analisis.vivanews.com/news/read12697-uupelavaran. accessed at June 11th, 2012.

[7] Republic of Indonesia, Law on Shipping, No.17 of 2008, LN No.64 of 2008, TLN No. 4849, General Explanation

Departure and the above definition to be able to carry out the articles related to ports in Law No. 17 of 2008 on the voyage required a Government Regulation governing the port. Of the 22 chapters and 355 articles in Law Number 17 of 2008 on Shipping, there are articles governing ports which require further regulation in the form of Government Regulation. Among them are article 78, 89, 95, 99, 108, 112 section (2), 113, and 210 section (2).

Due to the requirement of the aforementioned articles, it is necessary to stipulate a Government Regulation. It is as written in the consideration of Government Regulation Number 61 of 2009 on the Port.

That in order to implement the provisions of Article 78, Article 89, Article 95, Article 99, Article 108, Article 112 section (2), Article 113 and Article 210 section (2) Law Number 17 of 2008 concerning Shipping, about Ports.9

With the enactment of Law Number 17 of 2008 on Shipping, it is necessary to regulate in the field of port containing the provisions on the strategic issues contained in the law.

For the aforementioned purposes, in this Government Regulation shall be regulated on the National Port Master Plan, location determination, port master plan as well as Regional Work Environment and Regional Interests of port interests, port activities, development permits and operation of ports or terminals, special terminals and terminals for self-interest, wages, ports and special terminals open to foreign trade and port information systems.[10]

Competition Regulation in the Field of Ports as stated in Law Number 17 of 2008 on Shipping

1. Strategic Issue of Law Number 17 Year 2008 regarding Shipping

Indonesia is an archipelago country that two-thirds of its territory is waters with various islands and located in strategic location, because it is in crossing world trade routes.[11] Therefore, the role of port in supporting economic growth and social mobility and trade in Indonesia is very large, so the port becomes an important factor for the Government in running the economy of the country.[12]

The importance of the port sector in Indonesia makes Indonesia Port Corporation has special treatment by the Government. It is aimed to manage the port sector managed by Indonesia Port Corporation successfully executed the mandate of the 1945 Constitution. This then became one of consideration in the formation of Law No. 17 of 2008 on Shipping.[13]

There are 3 (three) strategic issues from Law Number 17 of 2008 regarding Sailing to the Indonesian seaport which has a direct impact on Indonesia Port Corporation. The strategic issues are (1) Elimination of Monopoly; (2) Separation of regulator and operator functions; and (3) the participation of local government and private sector proportionally in port activities. This strategic issue which will be later became the basis of change in the activities of seaports in Indonesia.

In Law Number 21 of 1992 it is stated that the implementation of public ports shall be carried out by the Government and their implementation may be delegated to State-Owned Enterprises established for such purposes under applicable laws and regulations.[14] It is also regulated how other business entities other than the operating entity may be included in the operation of the port on the basis of cooperation with the state-owned enterprise that carries out port operations.[15]

This provision is changed which essentially is the implementation of port is done by the organizer institution which is specially formed to carry out the function of arranging, controlling and supervising the activities of port.[16] This means that there is a special body that regulates the regulation of port in Indonesia. This particular agency is the Port Authority.

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[8] http://publikasi.kominfo.go.id/handle/54323613/11, accessed at May 30th, 2016.

[9] Republic of Indonesia, Government Regulation on Shipping No.61 of 2009, LN No.151 of 2009, TLN No. 5070, Considerance

[10] Republic of Indonesia, Government Regulation on Shipping No.61 of 2009, LN No.151 of 2009, TLN No. 5070, General Explanation

[11] Republic of Indonesia, Government Regulation on Shipping No.17 of 2008, LN No.64 of 2008, TLN No. 4849, General Explanation

[12] Administrator,"Operational area",www.inaport2.co.idJindex.php?mod=proffle&smod-sekilas, accessed at June 13th, 2012.

[13] that in the effort to achieve national goals based on *Pancasila* and the 1945 Constitution of the State of the Republic of Indonesia, to realize the Nusantara Insight as well as to strengthen national resilience required national transportation system to support economic growth, regional development, and strengthen the sovereignty of the state. Look at Republic of Indonesia, Shipping Law, Law No.17 of 2008, LN No.64 of 2008, TLN No. 4849, Considerances letter b.

[14] Republic of Indonesia, Government Regulation on Shipping, No.2 1 of 1992, LN No. 98 of 1992, TLN No. 3493, Article 26 section (1).

[15] Ibid. Article 26 section (2).

[16] Republic of Indonesia, Laws on Shipping, No.17 of 2008, LN No.64 of 2008, TLN No. 4849, article 81 section (1).

This is in contrast to the arrangements in the previous law on shipping (Law No. 21 of 1992) whereby the implementation of public ports shall be carried out by the Government and their implementation may be delegated to State-Owned Enterprises (in this case Indonesia Port Corporation) .

The implementation of the port on Law Number 17 Year 2008 concerning Shipping is conducted by the Port Authority of a commercially operated port [17](formerly ports under the control of Indonesia Port Corporation). The Port Authority then acts as a representative of the government to grant concessions or other forms to the port business entity to undertake port operations in ports as outlined in the agreement.[18]

Indonesia Port Corporation, formerly fully holding all port operations, on the new shipping law (Law No. 17 of 2008 on Shipping) is only acting as a Port Business Entity. Therefore, with the enactment of Law Number 17 Year 2008 on Shipping, Indonesia Port Corporation is no longer the port authority as applied to previous shipping laws.

Port Business Entity is a business entity whose business activities are specialized in terminal business and other port facilities.[19] If you look at the provisions of the implementation of the port above, any port business entity, not only Indonesia Port Corporation, which is licensed to carry out port operations from the Port Authority shall be entitled to conduct its activities at the port in accordance with its license. From this understanding, port operations can be undertaken by the private sector. Thus the arrangement of port operators in Law Number 17 Year 2008 on Shipping serves to run one of the strategic issues, namely to eliminate the monopoly in port operations.

The enactment of Law Number 17 Year 2008 on Shipping also gives effect to the status of Indonesia Port Corporation as the full authority of the port authority. Indonesia Port Corporation is no longer in full control as stipulated in the previous shipping law (Law Number 21 of 1992). In Law Number 21 of 1992, it is mentioned in Article 26 section (1) that the operation of a public port is conducted by the Government and its implementation may be delegated to a State-owned Enterprise established for such purpose in accordance with applicable laws and regulations.

While Law Number 17 Year 2008 on Shipping in Article 81, it states that port activities are carried out by the Port Authority. Definition and Authority the port itself is a government institution at the port as an authority that carries out the functions of regulating, controlling and supervising port activities commercially cultivated.[20] From this definition, the Port Authority has a function as a Regulator. This means a separation of the full power of Indonesia Port Corporation which previously concurrently as Regulator and Operator.

To perform its functions as a Regulator, the Port Authority has the powers set forth in Law No. 17 of 2008 on Shipping. Provision of concession[21] to the Port Business Entity to conduct port operations.[22] Provision of basic Infrastructure (previously provided by Indonesia Port Corporation is owned by the Government). Provision and/or port services not yet provided by the Port Enterprise Entity.[23] Regulates land use, water and port traffic. The Port Authority is also granted land management rights and water utilization. From the authority of the Port Authority granted by Law No. 17 of 2008 on Shipping, it is clear that the Port Authority is a government agency assigned as a Regulator.

The main innovation of Law No. 17 of 2008 on Shipping is the development of the Port Authority to oversee and manage trading operations within each port. Their primary responsibilities are to regulate, price and monitor access to basic port infrastructure and services including land and port waters, navigation tools, pilotage, breakwaters, harbor sites, sea lanes (dredging) and road networks port. In addition, the port authorities will also be responsible for developing and implementing port master plans (including determining land and sea control areas) while ensuring order, safety and harbor environmental sustainability.

It is a common way to share responsibilities across public and private sectors within a port/landlord port system. Although there is usually a discrepancy in such arrangements across ports and countries, the general rule is that if there is a consideration of public interest or natural monopoly, those functions should be run by the government. In this case, the Indonesian port authority has no exceptions and has the same role and function as the port authority anywhere. However, the issue that needs to be paid attention is whether the Indonesian port authority will have the technical and financial capacity necessary to carry out these functions effectively.

Technically, attention will be focused on the requirements set forth in the Act that only civil servants can serve as staff in the port authority (Article 86). This is a legacy of the recently adopted practice of establishing regulatory and regulatory agencies (as well as other government agencies providing key

[17] Ibid. Article 81 section (2)
[18] Ibid. Article 81 section (4)
[19] Ibid. Article 1 point 28
[20] Ibid Article 1 point 26
[21] The concession is the granting of rights by the port operator to the Port Enterprise to conduct certain port services and / or services within a certain period of time and certain compensation. See Republic of Indonesia, Government Regulation on Shipping, PP No.61 of 2009, LN No.151 Year 2009, TLN No. 5070, Article 1 point 30.
[22] Republic of Indonesia, Laws on Shipping, No.17 of 2008, No.64 of 2008, TLN No. 4849, article 82 section (4).
[23] Ibid. Pasal 83 ayat (1)

services), with a status known as the Public Service Board, a type of government legal entity with much greater flexibility to hire professional staff. Allowing port authorities to use Public Service Board

status will enable higher-wage hiring for staff with a wider range of expertise. such as retired transport service entrepreneurs. However, the Ministry of Transportation has made it clear that the port authorities are expected to have employees who are originally and jointly with department officials and the Directorate of Sea Transportation and Port Administration offices (Adpel).

The move to the landlord system model certainly means the development of a more complex interaction between the public and private sectors at the port level. A very important port authority task is to manage those interactions in such a way as to ensure competitive pricing and service provision. However, Indonesia is not experienced in managing ports in the context of business competition. The only current context is that public sector monopolies are characterized by the least or no competition in the provision of port services.

With the stipulation of the Port Authority as a regulator institution, the status of PT. Port of Indonesia (Persero) in the activities kepelabuhan be changed. PT. Pelabuhan Indonesia (Persero) lost its function as a regulator and its status changed to the Port Enterprise Agency (no longer the port operator). The Port Business Entity acts as the operator operating the terminal and other port facilities. Operation of port operations is carried out by the Port Business Entity by granting concessions by the Port Authority. Therefore the role of PT. Pelabuhan Indonesia (Persero) as the operator is limited to terminal business

Terminal business activities include:

a. Provision and or service of docks to be moored.
b. Provision and / or service of refueling and service of clean water.
c. Provision and / or service facilities up and down passengers and / or vehicles;
d. Provision and / or service of dock for the implementation of loading and unloading activities of goods and containers;
e. Provision and / or service of warehouses and stockpiling, loading and unloading equipment, and port equipment;
f. Provision and / or service of container terminal, bulk liquid, dry bulk, and Ro-Ro;
g. Provision and / or service of loading and unloading of goods;
h. Provision and / or service of distribution center and consolidation of goods; and / or
i. Provision and / or service of ship delays.

When viewed and authorized by the operator institutions conducted by the Port Business Entity, excluding the exploitation of land (land), waters (pond) and scouting. So that a Port Business Entity wishing to exercise control over land, water and scouting must first obtain the concession / assignment permit and the Port Authority (regulator). Such port supply and / or service activities shall be secured commercially by the Port Business Entity in accordance with the type of business it possesses and such operations may be carried out for more than one terminal. This means that the concession license granted to the Port Enterprise is done per business segment and can be done more than one terminal.

Based on the above, proving that private business actors can be considered as potential competitors in the field of port. The second possibility is that with the inclusion of private business actors, there will be price increases that harm the people, because the private objective is the pursuit of profit. Examples of business fields that have been opened for private are toll roads.

The port sector concerns the livelihood of the people, therefore in accordance with Article 33 Paragraph (3) of the 1945 Constitution, the interests of the livelihood of the people must take precedence. Monopoly in the field of port activities is considered no longer satisfactory because it has not been able to PT. Pelabuhan Indonesia (Persero) provide adequate services and protect the interests of consumers. The government should be through the Port Authority as the port operator, improving the quality of PT. Pelabuhan Indonesia (Persero), so that when the private sector into the competition, PT. Pelabuhan Indonesia (Persero) can compete.

Closing

Conclusion

Based on the research and analysis that I have done on the discussion, the author will describe some conclusions as follows:

1. In accordance with Law Number 17 of 2008 on Shipping, this Port Authority shall perform the functions of a regulator. Meanwhile, after the revocation of the regulator function by Law Number 17 Year 2008 on Shipping, PT. Pelabuhan Indonesia (Persero) only acts as an operator. Understanding the operators referred to Act No. 17 of 2008 on the same voyage with the Port Business Entity.

   The hierarchy of ports established by Law Number 17 Year 2008 regarding the voyage opens the private opportunity for port activities.

   Includes the separation of existing port assets so that they split into different and competing companies. The approach, commonly known as 'unbundling', is a preferred option in the privatization literature for the direct application of competition to the infrastructure sectors that until now have been dominated by state monopolies. However, in this case, the choice may be a politically difficult choice to take. As

noted in various media reports in the weeks prior to the enactment of the Act in April 2008, there was a great rejection of the law by port workers who threatened to protest. Finer rejection is voiced by PT. Pelabuhan Indonesia (PERSERO) and Ministry of State Owned Enterprises (Ray, 2008). In response, the government has made a clear commitment that no assets of PT. Any Indonesian Port (PERSERO) that will be sold to the private sector.

2. Implementation of Law Number 17 Year 2008 on Shipping has a positive influence to the Indonesian seaport sector. With the implementation of Law No. 17 of 2008 on Shipping which contains strategic issues concerning the implementation of ports, the Indonesian ports which have been stagnant have started to grow.

   The impact of the application of Law Number 17 Year 2008 on other Shipping is the separation of regulator and operator function in port sector. PT. The Indonesian Port (Persero) is no longer in full force as stipulated in the previous shipping law (Law Number 21 of 1992), This provides an important mechanism for capacity building and competition in the medium to long term. However, this will require an increase (or at least softening) the upper limit of private investment on port operations and basic infrastructure development by governments, as well as regulatory approvals, all of which take time. And most importantly, it will require sustainable development and capacity development of a number of port authorities who are civil servants who will oversee port planning and operations and manage access to port services and facilities. It will also take time and new investors will be cautious about how they will be treated by the new authority vis a vis PT. The authorized Port of Indonesia (PERSERO), which is their competitor.

3. And it may be an easily feasible option to instantly increase competition and PSPs in Indonesian ports allow for quick changes to special terminals and their own use to facilitate them to accommodate general cargo. Currently, Indonesia has a lot of container capacity and handling of unused bulk goods at the port of private port that can be used directly to compete with PT. Pelabuhan Indonesia (PERSERO). Allowing at least some ports for third party cargo holds will provide some short to medium term solutions to current Indonesian port logistics problems, while awaiting long-term solutions through investment in new capacities made possible by the 2008 Shipping Law.

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REGIONAL LEGAL RESPONSIBILITIES ON POLITICAL PROMISES IN THE REGIONAL GOVERNMENT REGION

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ABSTRACT

Good governance can only be realized in the State of Law. The concept of a state of law leads to the goal of creating a democratic life, and is protected by human rights, and equitable welfare. One of the principles of good governance is the principle of accountability that requires the Regional Government to account for all its actions in governance. Local government accountability consists of political, legal and economic accountability. Political accountability, The research method used is normative legal research with normative juridical approach, after the legal material is collected by documentation study and analyzed descriptively qualitative with qualitative method the researcher also observe the behavior of society There are two kinds of common accountability in the form of a report on the implementation of regional government which must be done once a year to the Central Government as a basis for evaluation and subsequent regional government guidance and accountability report of governance to DPRD and informs the administration of the government to the community as assessment material to receive or reject the accountability report that can resulting in the dismissal of the Regional Government. In democratic countries, the legislature is indeed designed as a representation of the majority of the people who elect it, the people can bill the promises of the regional head who are in disagreement in his nomination campaign.

Keywords: Accountability of local government, Head of Region, DPRD

Introduction

Article 1 paragraph (3) of the 1945 Constitution of the third amendment formulates "the State of Indonesia is a state of law". The inclusion of this article into the section of the 1945 Constitution shows the strengthening of the legal basis and the mandate of the state that the state of Indonesia is a state of law.

The concept of a state of law leads to the goal of creating a democratic life, and protected by human rights, and equitable welfare. Other evidence of the juridical basis for the existence of the legal state of Indonesia in a material sense.[1] Based on the above, all state and regional administrations should be based on laws aimed at the people's welfare

As a form of division of state power, autonomous regions are formed with forms and arrangements regulated in legislation. According to Joeniarto decentralization "is the transfer of authority from the state government to the local government to regulate and manage its own household which is usually called self-governance or autonomy".[2]

The government has at least three functions: allocation function, distribution function and stabilization function in the framework of government administration, community service and development. An opinion says that the distribution and stabilization function is generally more effectively implemented by the central government, while the allocation function is generally more aware of the needs and standards of community service. But in its implementation it is necessary to note the different conditions and situations of each region.[3]

In accordance with the mandate of the 1945 Constitution, that local government has the authority to regulate and manage its own government affairs. Where in the implementation of local government should be based on the principle of autonomy and duty of assistance. According to Article 1 number 11 of Law no. 23 of 2014 formulates "Co-Administration is an assignment from the Central Government to an autonomous region to implement a portion of the Governmental Affairs which is the authority of the Central Government or from the Provincial Government to the Regencies / Municipalities to implement part of the Governmental Affairs which is the authority of the province".

In Bagir Manan's opinion, the essence of legislation related to Regional Government is to build Local Government and improve the welfare of local people. In addition, the Regional Government Law in addition to regulating the units of autonomous regions also regulates administrative units. To implement the Government effectively and efficiently, each region is granted autonomy rights.[4]

Institutionalization Regional autonomy is not only articulated as a final destination, but rather as a mechanism to create democratization of self-administered governance by autonomous regions. Among the

[1] Max Boli Sabon,2011,*Law of Regional autonomy*,Jakarta:Atma Jaya Univercity,.page.35
[2] Abdul Samad,2008,*contruction of HTN indonesia Post Amandement of 1945 constitution* ,Jakarta,Pustaka Sinar Harapan,Page,16
[3] Sarundajang,1999,*Reversal of central to local Authority*,Jakarta.Pustaka Sinar Harapan,page.105
[4]Bagir Manan,*Charging Dawn of Regional Autonomy*,Yogyakarta:,Law Study Center (PSH)Faculty of Law UII.page.56

prerequisites that must be met to achieve these objectives is that regional governments must have a legal territorial of power; own local own income; has a representative body (local representative body) that is able to control local executives. [5]

Implementation of decentralization is a consequence of the implementation of Indonesia's reform which is a form of state ideals for the realization of a democratic state. The government of a previously centralized state, its authority is distributed to the regions in order to avoid an authoritarian system of government.

The study of the dismissal of the Regional Head is certainly inseparable from his main study which is the study of regional autonomy which in this case speaks also about the division of authority and territory within a country. The division of authority within a unitary state is certainly much different from the division of continued authority within a federation and union state.

The inherent sovereignty of the people does not come suddenly but because the people are the owners of the state. At the same time the people as the owner of all authority to carry out the functions of state power, both executive, legislative, and judicial. Because it is in the voice of the people that power has legitimacy that is lawful and governmental.

The right to vote and to be elected is a human right guaranteed by the Constitution. This recognition makes room for the people that the people are equal in their position in politics and government. On the other hand, this recognition affirms that the people as holders of the highest sovereignty in forming the government.

Article 1 paragraph (2) of the 1945 Constitution formulates that sovereignty is in the hands of the people and implemented according to the Constitution. Philosophically, the meaning of this article is the sovereign people of the state, and judicially the sovereignty is carried out in a representative manner through the representatives of the people, namely the DPR and Provincial DPRD, Regency / City.

In 2010 the Surabaya City Council deliberated the dismissal of the Mayor of Surabaya Tri Rismaharini, after the establishment of the right to question the issuance of Mayor Regulation (Perwali) Number 56 and 57/2010 on the calculation of advertisement rent value which according to DPRD there is something wrong with the issuing perwali mentioning tax increase billboards for large sizes reach 100 percent more. According to Vice Chairman of Rights of Perwali 56 and 57 of 2010 Parliament Surabaya Masduki Toha said, the dismissal could have occurred if the mayor did not revoke the perwali. The questionnaire has been supported by 34 proposers from 50 members of the DPRD Surabaya.[6] Risma policy is considered less profitable for some parties.

Conflict which then became a hot news in a number of mass media both local and national is fairly interesting because it happened when the government Tri Rismaharini still running less than 1 year. Many assumptions have grown that the background of Risma as a pure bureaucrat makes it difficult to accept political interests accustomed to using compromise or "equally good" ways. From here then came the issue that says that the conflict between Risma as the mayor with the legislature or the politicians if arguably, runs less harmonious because Risma less able to understand the language of political interests and then Parliament issued Decree of Surabaya City No. 02 of 2011 on the termination of the Mayor of Surabaya which was then sent to the Supreme Court. But then East Java Governor Soekarwo which is the extension of the central government then issued Decree No. 131/2059/011/2011 sent to the DPRD to cancel the dismissal of the Mayor of Surabaya. [7]

The dismissal of regional heads is closely related to the dynamics of political interests a position in local government. Arrangement of dismissal as the Law of Local Government precisely cause instability of local government which resulted in inhibition of government road. Democracy developed with the concept of decentralization for local government still has not touched the essence of democracy implemented by opening public participation for the welfare.

Formally the power of the Indonesian state political regime will soon end and be replaced by the next regime. On paper, the 2019 election will be a good historical record in the direct elections by the people in determining political leaders because the democratic process can survive in the midst of corrupt political turmoil.

Law No. 2 Year 2011 on Political Parties states that the party struggles and defends the political interests of members, society, nation and state is an inseparable part of their work embodied in public officials that they have been elected in the election.

Four previous elections after the 1999, 2004, 2009, and 2014 election reforms should have been able to mirror how the election results not only from the side of the process, but also the concrete results for the public. In the context of Indonesian constitutional law, the executive in this case the Regional Head is the

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[5] Boy Yendra Tamin,2011.Legislative Functions of Local Legislative Council and The Establishment of Local Regulations,downloaded from http://boyyendratamin.com,on, november 10,2017,

[6] "*DPRD of Surabaya Discourse Dismissal Mayor" in* www.republika.co.id download on.november,10. 2017 Pukul 19.30 WIB

[7] R.Bintang Permana Putra **"***Dinamics of Elite in Politics Surabaya ,Study conflict impeachment Mayor Surabaya***"** in a journal.unair.ac.id downloaded on November.10. 2017 .at 20.00

embodiment of the political representation system and the regional representative who should be held accountable for his political work so far.

In democracies, the legislature is designed as a representation of the majority of the people who elect it. According to theory, this body will represent the people to hold accountable to the government. democracy as a system of government that the majority members of a political community participate on the basis of a representative system and ensure that the government is accountable for its actions to the majority. In France and the United States the legislature has the authority to meg- Impeach (prosecute) and prosecute high officials including the president, but the judgment courts.[8]

In 2009, Boni Hargen and his friends filed a lawsuit citizen lawsuit to court. In the lawsuit, the plaintiffs declared SBY-JK default because unable to complete the campaign promise in the 2004 presidential election. When the SBY-JK campaign promised to increase economic growth and reached 7.6% in 2009. Poverty rate is predicted to fall from 17.14% 8.7% in 2009. The commitment was re-affirmed in the state speech when SBY-JK was appointed as president and vice president

According to the plaintiff the new economic growth reached 5.5%. That way SBY-JK has not fulfilled his campaign promise so categorized wanprestasi. SBY-JK's own attorney stated that the poverty rate reached 15.54% in 2008, while in 2005 it reached 17.7%. Economic growth alone has reached 6.4%. Based on hukumonline notes, the Government Performance Plan 2010-2014 has already lowered its economic growth target to 5.5%. This means down from what was previously targeted. [9]

As the campaign season of political promises becomes a heavenly breeze for the people. The leader sells all appointments when he or she later occupies the desired chair. Starting from the economic growth, infrastructure development and human resources improvement for the people. Becoming a habit of political promise has always been a lasting wind and never be part of accountability of regents, mayors or governors who should be given to the people.

Juxtaposing the right of the people to vote and be chosen with the people's accountability of his choice is equally important. But only some people understand this. Elections are only considered a routine five-year agenda and nothing more. In fact, the election as a means to channel the aspirations of the people and choose leaders in accordance with the will of the people.

The wrong impact of choosing this leader was not kidding. Mistakes in selecting public officials will have implications for the emergence of policies that are not in accordance with the will of the people who tend to neglect the promises and programs during the campaign. Not even a few public officials who practice corruption, and caught other legal cases

The elected public official must be aware that he / she can become an official because of the support of the people who imperatively must exercise their maximum power for the people. On the other hand, the people as supporters of public officials must also be accountable for their choice by constantly reminding and criticizing officials whom he has chosen as a form of oversight of his choice. If this supervision is not done then what will happen is the birth of a majority tyranny in which minority aspirations are ignored. Then there are some things that we can formulate the problem of how the accountability of political promises of regional heads that can not be realized? And How is the ideal concept of dismissal head of the future based on the wanprestasi of political promises?

Discussion

1. The Responsibility of Political Promises of Unreachable Regional Heads

The change of government administration from the centralized system to the decentralization system in Indonesia based on Article 18 of the 1945 Constitution of the Republic of Indonesia is an entry point for the Regional Government in regulating and managing its own government according to the principle of autonomy and assistance task. This means that the Regional Government in addition to organizing its own household affairs also organizes the affairs of the Central Government assigned to it.

In accordance with the principle of autonomy in the administration of the State, some of the powers of the President submitted to the Governor / Regent / Mayor as the manager of local finance. Some matters that have been able to and more properly managed by the regions themselves and are typical of the regions, are certainly more effective and provide better results if entrusted to each region to take care of it, than if the affairs are still handled by the central government.[10]

Each region is headed by the head of a local government called the regional head. The regional head for the province is called the governor, for the district called the regent and for the City is the mayor. The regional head is assisted by one deputy regional head, for the province called the deputy governor, for the district called the vice regent and for the City is called the deputy mayor. Heads and deputy heads of regions have duties, authorities and obligations as well as restrictions. Heads of regions also have an obligation to provide reports on the implementation of local government to the Government, and provide accountability

[8] Miriam Budiarjo,2005**,** *Fundamentals of Political Science*,Jakarta:Gramedia,page.183
[9] "*Political Pledge officials* at hukumline.com downloaded on november 12. 2017
[10] Faisol Akbar Nasution,2009, *Local Government and Local Original Revenue Source*,Jakarta:Sofmedia. Page.10

reports to the DPRD, and inform the report on the implementation of local government to the community. Concrete efforts to realize accountability and transparency within the government require every state financial manager to submit a wider and more timely financial accountability report.

Good governance can be realized in a governance system that reflects a responsive legal order in accordance with the will of the people. The assumption refers to Plato's concept known as "nomoi" which states that good state governance is based on good legal arrangements.[11] This assumption suggests that good governance can only be realized in the rule of law.

One of the principles of good governance is the accountability principle. Article 1 Paragraph (2) of the 1945 Constitution of the State of the Republic of Indonesia formulates that "sovereignty is in the hands of the people and carried out according to the Constitution" is the legal basis of government accountability in the sense that every power holder (government official) in the Indonesian state administration system must be able to account for the implementation of its power within the boundaries of the constitution to its people. Thus, accountability other than regulated in the state of law is also regulated in a democratic country.

During this time, government responsibility is directed to formalistic administrative accountability which puts its variables on documents and data presented statistically. Yet it is far more important to understand and implement that accountability has a very comprehensive aspect of meaning including the theoretical and philosophical arguments behind the birth of a policy requiring accountability from the Regional Government.

Philipus M. Hadjon argues that the 1945 Constitution of the Republic of Indonesia embraces two (2) patterns of state power sharing in governance, namely the distribution of state power horizontally and vertically.[12] The horizontal distribution of state power is the division of state power to the state organs called State institutions, such as the President, the House of Representatives, the Supreme Court, the Constitutional Court, the Supreme Audit Board and so on. While the division of state power vertically is the division of state power between the Central Government and Local Government.

Given the transfer of government affairs by the Government to the Regional Government under its authority or autonomy causes the powers and burdens of the Regional Government to be sufficiently broad, therefore it is necessary to be balanced with the administration of accountable government to prevent the detourement of pouvoir by the Regional Government .

Realizing a responsible government is certainly not easy. Therefore, Lord Acton in Miriam Budiardjo, has warned that the use of power or authority is potential to be abused,[13] as he reveals "Power trends to corrupt, but absolute power corrupts absolutely". The greater the power, the greater the tendency to be abused.

In the implementation of local government, accountability in the political field can be divided into 2 (two) kinds namely: obligatory accountability and voluntary accountability. Accountability must be differentiated into 2 (two) kinds namely the ordinary responsibility that must be done once a year as regulated in Article 71 paragraph (2) of Law no. 23 of 2014 jo Law No.9 of 2015 and the extraordinary responsibility required by the DPRD in the form of requesting a report on the accountability of local government in the administration of government within the period of local government as referred to in Article 71 paragraph (2) of Law no. 23 Year 2014 jo Act No.9 of 2015. While voluntary accountability arises on the basis of moral responsibility of local government to the people by informing report on the implementation of local government to its community as Article 72 Law no. 23 of 2014 jo Act No.9 of 2015.

In a legal state every act of office conducted by a representative (vertegenwoordiger) that is an officer (ambtsdrager) must be based on the principle of legality, meaning that any action of office must be based on the authority granted by the laws and regulations. And the use of authority to take legal action should be accountable.[14] Similarly, Sri Soemantri, argued that any grant of authority to government officials implied therein concerns the accountability of the officials concerned. In the concept of public law is known the principle of "geen bevoegdheid (macht) zonder veraantwoordelijkheid" (no authority or power without accountability).[15]

Based on the above, if the head of the region faced in his accountability report experienced a widespread confidence crisis, then in this case the DPRD uses the right of inquiry to respond. The exercise of the right to inquiry is carried out as a continuation of interpellation rights exercised after obtaining the approval of the DPRD Plenary Meeting attended by at least 3/4 (three quarters) of the total members of the DPRD and taken by agreement at least 2/3 (two thirds) DPRDs are present to conduct investigations on the regional head.

In using questionnaire, a questionnaire committee composed of all elements of the DPRD fraction will be held within 60 (twenty) days and will deliver its work to the DPRD, as a follow up to the DPRD to propose a temporary discharge with the decision of the Regional People's Legislative Assembly

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[11] Tahir Azhary,2007.*A study of its principles seen from the aspect of islamic law:its implementation in the medina period and the current period*,Jakarta,Kencana Prenada Media,page..88-89

[12] Philipus M.Hadjon,1992, *Rule by Law, Surabaya*, Universitas Air langga .page 1-2

[13] Meriam Budiardjo,page.52

[14] Ridwan,2009,*Administrative Law in Region* , Yogyakarta,UII Press,page.114

[15] Sri Soemantri,1987,*Procedure and System of Constitutional Change*,Bandung ,Alumni,page.7.

The authority of the Regional People's Legislative Assembly in proposing the dismissal of regional heads is also regulated in Article 317 paragraph (1) sub-paragraph d of Law No. 17 of 2014 on Arrangement and Position, Provincial DPRD has the duty and authority to propose the dismissal of the Head of Region and / or Deputy Head of Region to the President through Home Affairs.

That the proposal to dismiss the regional head was decided again in the plenary session. DPRD in Article 106 of Law No.23 of 2014 has been regulated on the right of DPRD, namely: (1). Provincial DPRD has the right: a. interpellation; b. questionnaire; and c. expressed an opinion.

DPRD can build an early warning system or an early warning system in case of any irregularities or irregularities in the governance process. Through the Oversight Instrument, members of the DPRD may use the right to ask the Regional Head.

Dismissal of Regional Head Based on the Proposed DPRD In Law Number 23 Year 2014 on Regional Government formulated Article 79 paragraph (1) "The dismissal of regional head and / or deputy head of region as referred to in Article 78 paragraph (1) a and b and paragraph (2) a and b shall be announced by the DPRD leadership in a plenary session and proposed by the DPRD leadership to the President through the Minister for the governor and / or vice governor and to the Minister through the governor as the representative of the Central Government for the regent and / or vice regent or mayor and / or the deputy mayor to obtain a termination.

According to Gabriel Almon explains that political promises are part of the political communication tool of political parties run by the available structures of elected candidates. Here Gabriel Almon explains that political promises must be made by elected candidates.[16]

Violation of any element of the oath / pledge of office may be viewed as a violation of the oath of office, and constitutes a violation of the constitutional law. Thus, a violation of the oath / pledge of office poses legal consequences. Therefore, the assessment of the head of a region violating the oath / pledge of office is a legal domain. And political promises should also be part of the DPRD's right to file for interpellation and the right to inquiry on the political promises of the regional head.

2. Ideal Concept of Dismissal of the Head of the Future Based on the Default of Unrealized Political Promises

The region is formed through a process called decentralization within a unitary state. In the study of State Science as well as State Constitutional Law distinguished understanding the form of state with the form of government. The state of the Federation, Confederation, and unitary state. According to C. Strong, any country of any kind comes from the integration process. The special process of integration may be due to war, where the winners of war annex a territory (eg in the case of England & France) or simultaneous wars of adjacent units that merge in anticipation of possible dangers (eg Serbia, Slovania) or a number of isolated units are finally aware of the need or unity to anticipate the dangers that have not yet occurred to them (such as the presence of Australia).[17]

The role of the Regional Head is enormous in the performance of Regional tasks, especially the tasks of autonomy. In this regard, a scientist states, the success or failure of the duties of the Region is dependent on the Regional Head as the Regional Manager concerned.[18]

The mechanism of dismissal of the regional head (and / or deputy regional head) on both the reasons, the processes and procedures, the related institutions and their implications in both juridical and political matters. The regulation concerning the dismissal of the Regional Head shall be regulated in Law Number 23 Year 2014 on Regional Government in Chapter VII of Third Section Paragraph 5, Article 78 to Article 89, while the investigation action against the Regional Head and Deputy Regional Head shall be stipulated in Paragraph 6 of Article 90.

Article 78 of Law Number 23 Year 2014 states that the regional head and / or deputy head of the region cease because of one of three things: dead, at his own request, or dismissed. Whereas in Article 78 paragraph (2) mentioned the reasons for the regional head and / or deputy head of region dismissed. Regarding the first reason that has expired his term of office and has been inaugurated a new official, presumably this need not be explained again, because with the expiry of the term of office of the regional head, then he must automatically be dismissed from his position.

Regarding the second reason is: unable to carry out the task continuously or continuously for six consecutive months, this formula is actually confusing, because it contains two possibilities. Firstly, this formula means that the regional head is dismissed for not being able to carry out his duties in a sustainable manner in the absence of continuing for six months. Second, this formula contains two criteria for dismissal of the head of region, that is unable to carry out the task in a sustainable manner and unable to remain consecutive for six months.

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[16] "*Collect The Promise of The Elected Regional Head*, "http://www.hukumpedia.com downloaded on November,12. 2017

[17] C.F.Strong, 1963, *Modern Political Constitutions, An Introduction to The Comparative Study Of Their History and Existing Form*,London:Sidwick&Jaksaon,page.113

[18] M.Manullang,1973,*Some Aspect of Administratio Region Government,Development*,Jakarta ,page.67.

The explanation of this article states: "What is meant by not being able to carry out the duties in a sustainable manner or unable to remain is suffering from physical and mental illnesses that are not functioning normally as evidenced by a certificate of competent and / or unknown doctor". If the explanation of this article is elaborated, the understanding of this article should be placed within the framework that there are two criteria to be used: (1) unable to carry out the task in a sustainable manner, and (2) continuing to remain in a row for six months.

The first criterion is based on two objective conditions and subjective conditions. Orientation of objective conditions is a reference to the ability to perform the task. In this case the assessment is done with a future orientation or is anticipatory and political. Subjective conditions refer more to the development of health. Based on the objective conditions it is possible that the political appraisal is still embraced by Law No. 23 of 2014 jo Law No. 9 of 2015 on Regional Government.

Legal certainty is a question that can only be answered normatively, not sociologically. Normative legal certainty is when a rule is created and enacted as it is clearly defined and logical. Clearly, in the sense that there is no doubt (multi-interpretation) and logical in the sense that it becomes a system of norms with other norms so as not to clash or cause a conflict of norms. The norm conflicts arising from the uncertainty of the rules may be normative contestation, norm reduction or norm distortion.[19]

Three (3) basic values proposed by Gustav Radbuch; justice, benefit and the certainty of its orientation is to create harmonization of law implementation, good justice for the ruler as the leader as well as the people as society which lead. As the purpose of law is to protect human beings both actively and passively. It is actively intended as an effort to create a humane human condition in a process that takes place naturally. While passively intended is to seek the prevention of arbitrary efforts and unfair misuse of rights. Efforts to realize this guidance include among others the realization of order and order, realizing true peace, realizing justice for all society, realizing the welfare of all people.

The dismissal of regional heads as described above for both political and juridical reasons involves other institutions, namely DPRD, Supreme Court and President. There is also a dismissal of regional heads who do not involve the DPRD, as mentioned in Article 81 of Law Number 23 Year 2014 on Regional Government. The Head of the Region shall be temporarily suspended by the President without the proposal of the Regional People's Legislative Assembly if declared a criminal offense punishable by imprisonment of at least 5 (five) years or more based on a court decision.

That anyone who becomes a public official, either through political mechanism or the appointment always has the responsibility of the office which is bound by the legislation that binds him. For, we must all recognize that no public office anywhere, especially the position of the regional head elected through direct election mechanisms, may be immune from dismissal. Thus, it is their responsibility as regional heads to always comply with all laws and regulations to avoid the object of dismissal.

In addition to the above there is also a political promise during a campaign that is often thrown, when it has been elected then the People have the right to bill legally on the basis of broken promises (wanprestasi), when his political promises are not implemented by the couple elected. that the people can collect political promises legally, the mechanism by reporting it to the DPRD as a representative of the people, later council members can question the broken promise to the elected spouse, breaking political promises can lead to disgraceful acts, which leads to impeachment or impeachment

Closing

Conclusion

a) The head of the region who reports the accountability of his political promises the people can legally bail when the elected spouse opts a promise and must be implemented, as a form of equality before the law so anyone is not arbitrarily in issuing opinions even political promises. become part of the DPRD's right to file for interpellation and the right of inquiry on the political promise of the regional head.
b) His political promises are not exercised by the elected spouse, the people can bill legally the political promise, the mechanism by reporting it to the DPRD as a representative of the people, later councilors can question the broken promise to the elected spouse, breaking the political promise may lead to disgraceful acts , which leads to impeachment or impeachment.

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TRADITIONAL MARKET PROTECTION AND MODERN MARKET CONTROL POLICY IN PATI REGENCY

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Introduction

As the world's fourth largest country, Indonesia has become a very attractive and promising market for retail business. The high market potential based on quantity and increasing consumer purchasing power, especially middle class society in Indonesia is utilized by big retailers both local and foreign to get big profit. This has resulted in the increasingly intense competition in the retail business sector in Indonesia.[1]

Initially, the retail sector was dominated by traditional markets which consisted of small capital traders who did business on a small scale and the process of buying and selling merchandise through bargaining with its main function was to serve the needs of the community both in the villages, sub-districts and others.[2] Until now, even though traditional markets provide a variety of community needs at low prices, traditional markets are still synonymous with inadequate environments and poor management systems.[3] Over the past few decades, modern stores have begun to take advantage of the advantages of traditional markets such as cleanliness, comfort, security, product quality and adequate facilities and infrastructure.

Until the early 1990s, the modern market in Indonesia was still dominated by domestic retailers. However, in 1998, Indonesia made an agreement with the IMF on the liberalization of the retail sector as outlined in the Presidential Decree No. 99 of 1998. The purpose of the regulation is to increase foreign investment so that foreign retailers can freely invest in Indonesia.[4]

Until the early 1990s, modern stores served only the upper middle class.[5] However, as the times progressed, modern stores began to mushroom into small towns in Indonesia by offering convenience in meeting the various needs of consumers with quality products and affordable prices.[6] This allows lower-middle-class consumers to access modern stores. Reardon and Hopkins explained that the issues of competition in the retail business between traditional markets and modern stores have occurred almost in all countries over the years in some respects such as price, convenience, product quality and security.[7] This also happens in developing countries, one of which is Indonesia. Competition of retail business between traditional market and modern store is a common phenomenon of globalization era. The rapid growth of modern stores such as supermarkets, hypermarkets and minimarkets contrasted with the growth of traditional markets which each year decreased. The development of modern stores during 2005 to 2011 in Indonesia by 21% for supermarkets, 36% for hypermarkets and 74% for minimarkets. The development of modern stores is not balanced with the traditional market development of only 15% and 8.5%.[8]

Urban society is now very spoiled by various shopping centers. Sometimes the location of shopping is close to each other, both traditional and modern. This condition is very beneficial to the community because they just choose which outlet to go.[9] On the one hand with the rampant retail business that enters the areas will make consumers pampered because it has many choices in shopping. But on the other hand, traditional markets that supply consumer needs are slowly squashed.[10]

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[1] Iin Zahratain dan Lukytawati Anggraeni, 2014, *Dampak Perkembangan Toko Modern Terhadap Kinerja Pedagang Produk Pertanian Pada Pasar Tradisional Di Kota Bekasi*, Departemen Ilmu Ekonomi, Fakultas Ekonomi dan Manajemen, Institut Pertanian Bogor, Jurnal Manajemen & Agribisnis, Vol. 11 No. 2, Juli 2014.

[2] Sinaga P. 2008. *Menuju Pasar Yang Berorientasi Perilaku Konsumen*. Jakarta: Kementerian Koperasi dan UKM.

[3] Malano H. 2011. *Selamatkan Pasar Tradisional*. Jakarta: PT Gramedia Pustaka Utama.

[4] Iin Zahratain dan Lukytawati Anggraeni, 2014, *Dampak Perkembangan Toko Modern Terhadap Kinerja Pedagang Produk Pertanian Pada Pasar Tradisional Di Kota Bekasi*, Departemen Ilmu Ekonomi, Fakultas Ekonomi dan Manajemen, Institut Pertanian Bogor, Jurnal Manajemen & Agribisnis, Vol. 11 No. 2, Juli 2014

[5] CPIS. 1994. *Perdagangan Eceran di Indonesia: Skala Kecil vs Skala Besar*. Jakarta: Center for Policy and Implementation Studies.

[6] Lembaga Penelitian SMERU. 2007. *Dampak Supermarket Terhadap Pasar dan Pedagang Ritel Tradisional di Daerah Perkotaan di Indonesia*. Jakarta: SMERU.

[7] Reardon T, Hopkins R. 2006. *The supermarket revolution in developing countries: policies to address emerging tensions among supermarkets, suppliers, and traditional retailers*. European Journal of Development Research 18(4): 522–545.

[8] Iin Zahratain dan Lukytawati Anggraeni, 2014, *Dampak Perkembangan Toko Modern Terhadap Kinerja Pedagang Produk Pertanian Pada Pasar Tradisional Di Kota Bekasi*, Departemen Ilmu Ekonomi, Fakultas Ekonomi dan Manajemen, Institut Pertanian Bogor, Jurnal Manajemen & Agribisnis, Vol. 11 No. 2, Juli 2014.

[9] Euis Soliha, 2008, *Analisis Industri Ritel Di Indonesia*, Fakultas Ekonomi Universitas Stikubank Semarang, Jurnal Bisnis dan Ekonomi (JBE), September 2008

[10] Mahmudah Masyhuri dan Supri Wahyudi Utomo, 2017, *Analisis Dampak Keberadaan Pasar Modern Terhadap Pasar Tradisional Sleko Di Kota Madiun*, ASSETS: Jurnal Akuntansi dan Pendidikan Vol. 6 No. 1, Universitas PGRI Madiun, Madiun.

The rise of retail business is also experienced in Indonesia. This business has not only stood in the districts and cities only, but now it is standing in various sub-districts and rural areas. Examples of well-known retail business among today's society are Alfamart and Indomaret. The rise of retail business that is happening nowadays is growing the interest of shopping in the society, because both Alfamart and Indomaret provide a variety of everyday products with prices that are clearly stated in the product, the availability of 24-hour service, more convenient place, cleaner, electoral system and the taking of own goods by consumers so as to facilitate the public to buy and get the needed goods immediately. In addition to the friendly service and often do discounts and product promo, Alfamart and Indomaret very appreciated its existence by the surrounding community because it is very satisfactory. Even by shopping at Alfamart or Indomaret and having a membership card, consumers will get points or get a discount.

The abundance of the modern market of Alfamart and Indomaret grown in society has an advantage and a disadvantage. The advantages obtained are very meet the needs of consumers and become a field of work for the surrounding community. The disadvantage of the rise of the modern market will affect the existence of traditional markets. Because the majority of products sold in the modern market Alfamart and Indomaret is the same as the products sold in traditional markets. Many people argue that one factor is the decline in activities in traditional markets due to the abundance of modern markets of Alfamart and Indomaret that grow and its location is very close to the traditional market that has an impact on the business of small traders in traditional markets. The emergence of the modern market led to a decrease in the number of consumers in traditional markets due to the presence of modern markets followed by changes in people's preferences in choosing shopping.

The market has a sense of place where sellers and buyers meet until the occurrence of a transaction. Currently, the market that occurs within the community is not just traditional markets. Nuraini and Merdekawati argue that traditional markets emphasize the physical market sense, so traditional markets are also often referred to as concrete markets.[11] Asribestari and Setyono explained that the traditional market is the market where the seller and the buyer bargain directly so that the price agreement between both parties.[12] Rahayu and Bahri argue that traditional markets are markets that are managed with more traditional and simpler management than modern markets.[13] Traditional markets are proprietary ownership. The existence of traditional markets is one of the most important indicators in economic activity.[14]

If observed further then the retail or retail business competition is increasingly unhealthy. The government tends to sell licenses to big players, even hypermarkets, even though the market is already saturated. As a result, in some cities, large retail outlets were closed, while in residential and grocery traders were threatened by mini market franchises.

In an unhealthy business climate applies the law of the jungle. Who is strong is he who came out as the winner. Maybe Indonesia has not been that bad, but if not immediately fixed then the potential for the law of the jungle to live one step further. Local government as the regional authorities should know the potential of the region. What is the purchasing power of the people and how many retail are operating. So far, there is a tendency of local government never to give permission to investors who want to open retail outlets. Therefore the problems that then arise is how the policy of people's market protection and restrictions on supermarkets in Pati regency.

Discussion

1. The Development of Modern Market & People's Market

The growth of modern market in Indonesia in recent years is quite high. In 2000-2010, there was an increase of supermarket market share to the total market share of the food industry which is quite sharp from 11% to 30%. Sales of supermarkets grew an average of 15% per year, while sales of traditional traders fell 2% per year.[15] Pricewaterhouse Coopers predicts that supermarket sales will increase by 50% from 2007 to 2010, while hypermarket sales will increase by 70% for the same period. One of the causes of the increasing number and sales of modern markets is urbanization that encourages the acceleration of urban population growth as well as rising per capita income.

[11] Nuraini, E. dan Merdekawati, D. 2013. Ekonomi: Untuk SMA/MA Kelas X. Sidoarjo: Masmedia Buana Pustaka

[12] Asribestari, R. dan Setyono, J. S. 2013. *Pengaruh Daya Tarik Pasar Tradisional Dan Pasar Modern Terhadap Preferensi Konsumen (Studi Komparasi Pasar Karangayu Dan Giant Superdome)*. Jurnal Teknik PWK, 2 (3).

[13] Rahayu, S. E dan Bahri, H. 2014. *Studi Komparatif Perubahan Pendapatan Usaha Warung Tradisional Sebelum Dan Sesudah Adanya Warung Retail Modern Di Kecamatan Medan Timur*. Jurnal Manajemen & Bisnis, 14 (2)

[14] Sukesi, Sugiyono. 2009. *Dampak Keberadaan Pasar Pasar Modern Terhadap Pedagang Pasar Tradisional (Studi Kasus di Kota Balikpapan)*. DIE – Jurnal Ilmu Ekonomi dan Manajemen, 5 (4).

[15] Natawidjaja, Ronnie. 2005. *Modern Market Growth and The Changing Map of The Retail Food Sector in Indonesia*. The Pacifik Food System Outlook 2005.

From 1998 to 2005, hypermarkets throughout Indonesia grew 27% annually, from eight to 49 outlets. Nevertheless, hypermarket growth is concentrated in Jabodetabek region with a proportion of 58% of all hypermarkets.[16]

Based on AC Nielsen study, modern market in Indonesia grows 31.4% per year, while traditional market shrinks 8% per year. If these conditions remain left, thousands and even millions of small traders will lose their livelihoods. Traditional markets may be drowned in line with the current development trend of the retail world dominated by modern markets.[17]

Traditional traders who are directly affected by the presence of supermarkets or hypermarkets are traders who sell the same products sold in both places. Nevertheless, traders who sell fresh food (meat, chicken, fish, vegetables, fruits, etc.) can still compete with supermarkets and hypermarkets as many buyers still choose to go to traditional markets to buy the product. The superiority of modern markets over traditional markets is that they can sell relatively similar products at cheaper prices, plus the convenience of shopping and a variety of payment options.

Supermarkets and hypermarkets also cooperate with large suppliers and usually for long periods of time. This is what causes them to make efficiency by utilizing large economies of scale. So the Influence of Modern Market to Traditional Market quite a lot of problem, meaning The presence of modern market, especially supermarket and hypermarket, is considered by various circles have cornered the existence of traditional market in urban.

2. Existing Policies & Regulations

Federation of Traditional Market Traders Organizations or Foppi assess Presidential Regulation No. 112 of 2007 signed by President Susilo Bambang Yudhoyono on the Arrangement and Development of Traditional Markets, Shopping Centers and Modern Stores, contains many weaknesses. Therefore, the government is asked to immediately revise the provisions in order to be aligned and lift the dignity and the dignity of traditional traders whose condition is now slumped. Reportedly, the number of traders who previously reached 13,450 people is now shrinking every year up to 8.5 percent nationally due to the implementation of the perpres.[18]

This was conveyed by Chairman Foppi Sujianto, who was accompanied by the Chief Advisor Foppi Salahuddin Wahid, in a press statement after meeting with Vice President Kalla at the Vice Presidential Palace, Jakarta, Tuesday (9/3) afternoon. "The key to the weakness is in Presidential Regulation 112 of 2007, which provides a very large mandate to regional governments through regional autonomy, therefore regions are boosting local revenue (PAD) to major retailers, by prioritizing large retailers rather than market traders" said Sujianto.

According Sujianto, Presidential Regulation 112 Year 2007 also does not set the distance or zonning between modern markets with traditional markets. "This is because the arrangement is left to the local government, because the distance arrangement between modern and traditional markets is no longer exists, consequently the social and spatial aspects are not considered anymore," Sujianto added.

Sujianto acknowledged, how to marginalize traditional traders is to burn the market location and then rejuvenated again. "At the time of rejuvenation, the price of kiosk became very unaffordable for us, as in Block A of Tanah Abang Market, the price of its kiosk after being rejuvenated to Rp 500 million. In Mayestik market, Kebayoran Baru, the price per square meter becomes Rp 50 million. Square, too, as per its kiosk to Rp 60 million per square meter, "said Sujianto. In contrast, Sujianto continued, the modern market grew by 31.4 percent annually. "Supermarkets grew 50 percent annually over the 2004-2007 period, with hypermarkets also growing by 70 percent over the same period," said Sujianto.

Salahuddin said, "In relation to this, we have reported to the KPPU and KPK related to the purchase of land by market developers and resold to traders very expensive, but there is no clarity, we came to the Vice President Kalla. " According to Salahuddin, he compares with the price of land in an apartment in the Kuningan area, which can be purchased at Rp 20 million per meter. However, by way of strata title so it can be owned and used as collateral. However, land for small traders can only be rented out and very expensive.

Asked about the attitude of Vice President Kalla regarding the fate of traditional traders, Salahuddin said Vice President Kalla affirmed the treatment to traditional traders should not be like that. "Market traders must be involved in every rejuvenation, it can not be left behind," Salahuddin said, quoting Vice President Kalla.

3. Expected Protection Policy

The phenomenon of rapid development of the trade sector is a logical consequence of the existing trade liberalization in Indonesia is not separated also in Pati District, trade liberalization allows the free competition among economic actors in the trade sector. The Development and Modern Market Phenomenon, especially

[16] R u s h a m, 2016, *Analisis Dampak Pertumbuhan Pasar Moderen Terhadap Eksistensi Pasar Tradisional Di Kabupaten Bekasi*, Jurnal Ilmiah Ekonomi Manajemen Dan Kewirausahaan, "OPTIMAL" •VOL.10, NO. 2•SEPTEMBER 2016 Dosen Fakultas Ekonomi Universitas Islam "45" Bekasi

[17] AC.Nielsen, 2010 . *"Laporan Pertumbuhan Ritel Modern dan Dampaknya Terhadap Ritel Tradisional"*. Jakarta

[18] http://ekonomi.kompas.com/read/2009/03/10/20582914/Pedagang.Tradisional.Menyusut..Revisi.Perpres.1122007 diakses pada 1 Januari 2018.

the modern store in Pati Regency, both small-scale and supermarket scale has brought a real impact for society both from the social and economic side, and in the future it is also very likely to grow towards Hypermarket growth which if not anticipated will bring negative impact and harm to the existence of Traditional Market and Micro, Small and Medium Enterprises. With the growth and development of Modern Market it needs to be arranged and controlled so that Traditional Market and Micro, Small and Medium Enterprises can grow and develop together with Modern Market in harmony, balanced and fair and far from monopolistic practices.

Central and local governments that have regulatory functions to the problems that develop in the community, should be immediately responsive to the phenomenon of the development of Modern Market as a result of trade liberalization. Authority granted by the Central Government to Regional Government as regulated in Presidential Regulation Number 112 Year 2007 regarding Traditional Market Setting and Development, Shopping Center and Modern Store is the foundation for Local Government in arranging and fostering for Traditional Market and Modern Market, while its technical guidance has been set forth in Regulation of the Minister of Trade No. 53 / M-DAG / PER / 12/2008.

In both regulations, it is stipulated that the location of the establishment of Traditional Markets and Shopping Centers and Modern Stores shall refer to the Spatial Plans of Regencies / Municipalities (RTRW) and the Spatial / City Detailed Spatial Plan (RDTR) including the zonation. However, in many cases it is often found that licensing of shopping centers and modern shops in various regions has a negative impact, especially for the sustainability of Traditional Market and Micro, Small and Medium Enterprises in the Region. In addition, it is often seen that the granting of permits to the establishment of modern stores seems very easy and ignores the analysis of environmental impacts, especially the socio-cultural aspects as well as the negative impacts of small traders and the surrounding traditional markets which ultimately threatens the existence of the small capitalist economic actors.

The growth and development of Modern Market needs to be arranged and controlled so that Traditional Market and MSME can grow and develop together with Modern Market in harmony, balanced and fair and far from monopolistic practices. Of the 1945 Constitution of the Republic of Indonesia Article 33 paragraph (1) states that "The economy is constituted as a joint effort based on the principle of kinship". In 'family' there can be no other 'turn off'. If "The economy is structured as a joint effort based on the principle of kinship" then inter-business activities should not be mutually 'kill'. Therefore, a policy of arranging for modern markets (especially supermarkets) can coexist with the people's market. The policy in question is expected to be a Regional Regulation. Based on the above considerations, it is necessary to prepare Local Regulations on the Protection and Empowerment of Traditional Markets, Structuring and Controlling Modern Market.

Regulations on the implementation of Traditional Market Protection and Modern Market Restrictions are implemented based on principles:

a. humanity; What is meant by the principle of "humanity" is the principle in providing protection and empowerment of Traditional Market as well as structuring and controlling Modern Market must treat the economic actors in it humanely.
b. justice; Referred to as the principle of "fairness" which is the principle of providing protection and empowerment of Traditional Market and the arrangement and control of Modern Market shall treat the economic actors in it fairly in accordance with its portion.
c. equality of position; What is meant by the principle of "equal status" is the principle in providing protection and empowerment of Traditional Market and the arrangement and control of Modern Market shall treat the economic actors in it in equal position.
d. partnership; What is meant by the principle of "partnership" is the principle in providing protection and empowerment of Traditional Market as well as structuring and controlling Modern Market should pay attention to aspects of partnership and mutual cooperation.
e. order and legal certainty; Referred to as the principle of "law and order of law" is the principle on which the regularity, harmony and balance in protection and empowerment of Traditional Market and the arrangement and control of Modern Market and the principle of the rule of law which emphasizes the basis of legislation, propriety and justice in any State Implementation policy.
f. environmental sustainability; What is meant by the principle of "environmental sustainability" is the principle in providing protection and empowerment of Traditional Market as well as arrangement and control of Modern Market must pay attention to the aspect of environmental sustainability.
g. business honesty; Referred to as the principle of "business honesty" which is the principle in providing protection and empowerment of Traditional Market as well as structuring and controlling Modern Market must pay attention to aspect of honesty and mutual trust.
h. fairness competition. The term "fairness" is defined as the principle of providing protection and empowerment of the Traditional Market and the arrangement and control of Modern Market must be directed to ensure fair business competition between economic actors in it.

Local Regulations on the Protection of Traditional Markets and Modern Market Restrictions are expected to have a purpose for:

a. To protect Traditional Market along with business actors in it to be able to grow, compete, advance, independent, and can improve society prosperity.
b. To control Modern Market so that its existence will not harm Traditional Market and can become business partner of Micro, Small and Medium Enterprises in the Region, in order to meet the needs of the community.

The Regional Government is obliged to provide protection to the Traditional Market and the business actors in it. In protecting the Traditional Market, and the business actors within it, the Regional Government shall be obliged to provide protection in the aspect:

a. strategic and profitable business location;
b. legal certainty and business guarantees of unfavorable evictions;
c. competition with business actors in Modern Stores in terms of location and other aspects; and
d. legal certainty in the status of lease rights, to ensure business continuity;
e. legal certainty about the status of land use rights of the market.

In an effort to empower the Traditional Market and the business actors in it, the Regional Government is obliged to do the following:

a. fostering the managers of Traditional Markets and business actors in it;
b. facilitating business actors in the Traditional Market to obtain business capital;
c. assisting in the improvement of facilities and infrastructure of Traditional Markets;
d. facilitate the formation of traders' containers or associations as a means of fighting for the rights and interests of traders;
e. directing sharing funds from the Central Government to the Regional Government in order to build the market.

Traditional Markets that have historical values, can not be changed or made Modern Market except revitalization efforts in order to become a clean, organized, comfortable, safe, unique Market Traditional Market, a regional icon, has value as part of the tourism industry. In order to provide protection and empowerment of Traditional Market, Local Government arranges and conducts guidance to informal economy actors so as not to disturb the continuity and order of Traditional Market.

In contrast to the modern market also needs to be restricted. Semosal location of the establishment of Modern Market shall refer to Regional Spatial Plan, and Detailed Spatial Plan of Area, including its Zoning Regulation. Networked minimarkets and minimally local / regional networked minimarts may be located on any road network system, including environmental road network systems in urban / municipal service areas, whereas minimarket national / international networks may only be located on road network systems artery or collector and local.

Supermarkets and Department Stores should not be located on an environmental road network system; and should not be located in an urban / urban service area. While Hypermarket and Shopping Center may only be located at or on access of artery road network system or collector; and should not be in a local service area or neighborhood within a city / city. Wholesalers may only be located on or on the access of the arterial road network system or the primary collector.

Sales systems and modern merchandise types also need to be arranged so that Minimarkets, Supermarkets and Hypermarkets sell in retail consumer goods, especially food products and other household products should not sell meat, wet fish and vegetables. Department Stores are only allowed to sell in retail consumer goods primarily clothing products and equipment with the arrangement of goods by sex and / or consumer age level. Restricted merchants may only be allowed to sell wholesale consumer goods. Minimarket located in District of Pati Regency beside Kota District opening time starting at 9 am until 23 pm.

Establishment of shopping centers, supermarkets, Hypermarkets, department stores and compulsory perks:

a. taking into account the socio-economic conditions of the community, the existence of Traditional Markets, Micro, Small and Medium Enterprises in the Region;
b. minimarkets at the sub-district level, except sub-district cities with at most three minimarts.
c. taking into account the distance between shopping centers, supermarkets, Hypermarkets, department stores and pre-existing Traditional Markets;
d. providing parking area of at least parking area of 1 (One) unit of four-wheeled vehicles for every 60 M2 (Sixty Meter square) sales floor area;
e. provides facilities that ensure shopping centers, supermarkets, Hypermarkets, department stores and clean, hygienic, safe, orderly and comfortable public spaces; and
f. providing business premises for Micro, Small and Medium Enterprises with a selling price or rental fee in accordance with the capabilities of Micro, Small and Medium Enterprises or which can be utilized by such business through other cooperation in the framework of partnership.

Analysis of socio-economic conditions of the community in the form of studies conducted by competent independent bodies / institutions. Analysis of socio-economic conditions of the community is expected to include:

a. population structure according to livelihood and education;
b. income level of household economy;
c. population density;
d. population growth;
e. partnership with MSME in the Region;
f. absorption of manpower in the Region;
g. the resilience and growth of Traditional Market as a means for MSME in the Region;
h. the existence of existing social facilities and public facilities;
i. the positive and negative impacts caused by the distance between shopping centers, supermarkets, Hypermarkets, department stores and pre-existing Traditional Markets; and
j. corporate social responsibility.

The establishment of networked Minimarket shall pay attention to the following matters:

a. population density;
b. the development of new settlements;
c. regional accessibility (traffic flow);
d. support / availability of infrastructure;
e. distance Minimarket networked with Traditional Markets and smaller stores in the area that has been around before; and
f. provide sufficient parking area and other public facilities.

Terms of distance as referred to in paragraph (1) letter e, are stipulated as follows:

a. distance Minimarket networked with Traditional Markets that have existed previously at least 500 M (Five hundred Meters);
b. distance of networked Minimarket located at Jalan Arteri with smaller pre-existing stores of at least 50 M (Fifty Meters);
c. distance of networked Minimarket located at Collector Street, Local Road and Neighborhood road with smaller pre-existing stores of at least 100 M (One Hundred Meters).

Every business actor of Shopping Center and Modern Store must perform partnership with MSME in Region. Partnership with general trading pattern is done in the form of marketing cooperation, provision of business location, or acceptance of supply from supplier to Modern Store which is done openly. The marketing cooperation can be done in the form:

a. marketing goods manufactured MSME which is packaged or repackaged with brand of goods owner, modern shop or other brands agreed in order to increase the selling point of goods; or
b. marketing products of MSME results through storefront or outlet from Modern Store.

Provision of business location is done by the manager of Modern Store to MSME by providing business space within the area of Shopping Center or Modern Store. MSME must utilize the business space in accordance with the agreed designation.

Business cooperation in the form of acceptance of supply of goods from Suppliers to Modern Stores is implemented in the principle of mutual benefit, clear, fair, fair and transparent. Modern Stores prioritize the supply of MSME products in the Region as long as they meet the requirements or standard set by Modern Stores. Suppliers of goods included in the criteria of Micro Enterprises, and Small Enterprises are exempted from listing fee fees. Partnership business partnership between MSME and Modern Store can be done in the form of commercial cooperation in the form of business space, coaching / education or capital or other cooperation form.

The cooperation is set forth in a written agreement in the Indonesian language pursuant to Indonesian law agreed upon by both parties without pressure, which at least contains the rights and obligations of each party and the manner and place of dispute settlement. Without prejudice to the principle of freedom of contract, the terms of trade between Supplier and Modern Store must be clear, fair, fair and mutually beneficial and agreed upon by both parties without pressure.

Shopping Centers and Modern Stores should be fair in providing services to business partners either as owners / tenants of the business or as a supplier. Modern stores are prohibited from selling promotions at lower prices compared to prices in nearby Traditional Markets for basic commodities.

Every Modern Market Manager must set aside a portion of its profits to support development activities in the vicinity of the place of business as a form of corporate social responsibility to the public. In addition to these obligations every Manager of Shopping Center and Modern Shop is obliged:

a. partnership with Micro, Small and Medium Enterprises;
b. comply with the provisions of licensing in the Region;
c. improve service quality and ensure consumer comfort;
d. maintaining security and order of place of business;
e. maintaining cleanliness, the beauty of the location and the preservation of the business environment;
f. to prevent any activities of gambling and other acts that violate morality and public order in the place of business;
g. prevent the use of business premises for the circulation and use of alcohol, drugs and other illicit goods;

h. providing health facilities, garbage and drainage facilities, showers and toilets and praying rooms for employees and consumers;
i. providing opportunities for employees and consumers to perform worship;
j. recruiting at least 50% (Fifty per cent) of the workforce in the Region;
k. establishing employee uniforms that meet the norms of decency;
l. adhere to employment agreements and ensure the safety, health and welfare of employees;
m. providing fire-fighting equipment and preventing possible fire hazards in the place of business;
n. publish and list prices written in Rupiah currency; and
o. submit a partnership business report to the local government for a period of 5 (five) years.

Every Modern Shopping Center and Store Manager should be prohibited:

a. conduct monopolistic practices in running their business;
b. stockpiling and / or storing the basic needs of the community in the warehouse in an amount exceeding the fairness for purposes of speculation that would harm the interests of the community;
c. stockpiling and / or storing goods of a nature and type of health hazard;
d. selling outdated items;
e. change or add to the means of business premises, merchandise types and alter their designation without the permission of the Bupati in accordance with applicable regulations;
f. employ underage labor and / or foreign workers without permission in accordance with applicable laws and regulations.

Closing

Conclusions and Recommendations

The growth and development of Modern Market needs to be organized and controlled so that the Traditional Market and MSME can grow and develop together with Modern Market in harmony, balanced and just and far from monopolistic practices. Of the 1945 Constitution of the Republic of Indonesia Article 33 paragraph (1) states that "The economy is constituted as a joint effort based on the principle of kinship". In 'family' there can be no other 'turn off'. If "The economy is structured as a joint effort based on the principle of kinship" then inter-business activities should not be mutually 'kill'. Therefore, a policy of arranging for modern markets (especially supermarkets) can coexist with the people's market. The policy in question is expected to be a Regional Regulation. In the absence of local regulations it will be difficult to enforce the law. Only with the local regulation also the Civil Service Police Unit can enforce the criminal law.

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ETHICAL BASE-MORAL LAW OF INDONESIA: PERSPECTIVE OF PANCASILA

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ABSTRACT

This paper is about to discuss the ethical base-moral law of Indonesian from the perspective of Pancasila. The main problem to be discussed is the basic values (what are) contained in Pancasila which should be the ethical base-moral law of Indonesia. Such issues have been the concern of Neo-Kantian thinkers, such as Stammler, Kelsen, and Radbruch. The main question that these three thinkers will answer, is "what is the normative basis of a legal system that has a compelling nature"? In the Indonesian context, the answer is Pancasila. Pancasila is the normative basic of Indonesian law. Hermeneutically, the Pancasila values are not confined to textual meaning in its precepts, but also the values attached to its birth process and which are attached to its position as Weltanschauung. In the context of Pancasila as the "source of all law sources", the values of Pancasila should be the basic guidelines that determine the direction, shape, and content of Indonesian law in serving the Indonesian people. Those values determine how Indonesian law should be, and should be in duty simultaneously. For that, this paper seeks to lift the noble ideas that exist in Pancasila to be the ethical base/ normative basic of Indonesian law.

Keywords : Ethical-Moral Base; Indonesian Law; Pancasila

Introduction

The doctrine of law that is morally neutral proves to be problematic. This doctrine opened the space for the emergence of instrumentation and legal manipulation, whether in the shades of Podgorecki's totalitarian law[1], or Nonet-Selznick's repressive law[2], even law as a tool of crime by Roni Nitibaskara.

Not only that, the closure of the law to morality raised by the adherents of legalism[3], legal positivism, or *reine rechtslehre*, not only led to various misconduct, but also gave birth to a very cruel humanitarian tragedy, such as Hitler's law that ordered the genocide of Jews and war crimes in the War World II. The incident in Indonesia in the form of a series of cases that hit the legal world, such as the Driver License Simulator case, the bribery case of the Chief Justice of the Constitutional Court, and tens or even hundreds of other cases involving law enforcers, are proof of the seriousness of the issue when moral absences in law. Bribes and corruption in the legal world are no longer a matter of every man's need, as Mahatma Gandhi says, but the problem of every man's greed because of the paralysis of self-restraint, because of the absence of morality.[4]

It is suspected that it is easy for people to make laws, even law enforcement officers are not shy about being corrupt, and one of them is the absence of ethical base in punishment. The current dominant punitive tradition in Indonesia has more to do with legal materials and how to use them technically. From the beginning of the law class, students were "forced" to know the articles of law, and were trained to construct juridical issues on the basis of those articles and the doctrinal logic that defended them.[5]

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[1] The law of totalitarianism is a legal system characterized by: First, the substance of the law contains unilaterally binding rules and the material varies according to the arbitrary wish of the ruler. Second, the rule of law is used as a mask in an "astute" way to mask excessive power intervention. Third, the "acceptance" of society against the law goes in a false consciousness. Fourth, legal sanctions, potential social disintegration (social disintegration), and social nihilism spread uncontrollably. Fifth, the ultimate goal of law is the institutional legitimacy that is out of the question of the acceptance of the totalitarian law, can be read in Adam Podgorecki, "Totalitarian Law: Basic Consepts and Issues", in Totalitarian and Post-Totalitarian Law, Pogorecki & Oligiati (eds.), 1996.

[2] Repressive law has ten characteristics, namely: (1). Order becomes the main purpose of law; (2). The legitimacy or basis of its binding force is the power of the state; (3). Its detailed regulations are harsh (repressive) binding to the people, but soft to the authorities; (4). The reason for the making is ad-hoc according to the wishes of the ruling arbiter; (5). The opportunity to act is pervasive as per chance; (6). Coercion of all-encompassing unlimited borders; (7). The morality demanded of society is self-control; (8). Power occupies a position above the law; (9). Public compliance must be unconditional, and non-compliance is punished as a crime; (10). Public participation is permitted by submission, while criticism is understood as insubordination (Philippe Nonet & Philip Selznick, Law and Society in Transition: Toward Feedback Law, London: Harper and Row Publisher, 1978, pp. 29-52).

[3] Legalism, according to Jurgen Habermas, does not give any moral motive to legal subjects. In the insight of legalism, modern law only protects personal tendencies within formally defined boundaries. Consequently, it is not a sanctioned evil disposition, but a deviant behavior of the norm (Jurgen Habermas, *Rasio dan Rasionalistas Masyarakat*, translation of *Theorie des Kommunikativen Handels* by Nurhadi, Bantul, Creation Discourse, 2012, p. 319).

[4] Yovita A. Mangesti dan Bernard L. Tanya, *Moralitas Hukum*, Yogyakarta: Genta Publishing, 2014.

[5] Quoting Gerry Spence, Professor Satjipto Rahardjo made a harsh critique of the technical education model. As is known, Gerry Spence through his book The Death of Justice, N.Y .: St. Martin's Press, 1997, criticized the legal education in

It has never been sharpened to ask, for what the chapters are, what is really at stake in those chapters, where the position of human value / destiny in those chapters, and what humans should do against the chapters the law?

Those questions may be considered too philosophical. But we must realize from the beginning, that although it does not have to turn into ethics, people still expect something of value from the law. Though not necessarily a religion, people still expect something noble from the law. Although not necessarily an ideology, people still expect something ideal from the law. That is what must be a foothold / critical attitude in carrying out the law.

This paper, departing from a creed, that law requires a moral-ethical basis[6] for two basic reasons. First, law is an instrument of justice. As an instrument of justice, the law (in all facets) must first adhere to the norms of justice. Without idealism about the norms of justice, the law will not be sensitive, even easily ignore the so-called equity, fairness, equality, *nobles oblige*, *honeste vivere*, *neminem non laedere*, *uniqum sum tribuere*, and so on. Yet these are the most basic norms of justice. Without all that, there will be the most obvious injustices.

Second, the highly technical nature of modern law is easily manipulated. The highly technical nature of laws (concepts, formulations, procedures, legal requirements, interpretation, etc.), is easily infiltrated by hidden agendas, both at law making process and at run (judicial and executions) . Not to mention we are talking about the habit of the punishment of who controls the implementation of law in this country.

Legal manipulation is wide open, because law is produced politically. Decision-making that relies on numbers and amount, it's easy to be the way to win everything-even beyond the common sense and the norms of justice. Habit bargain cow trade model in parliament, allowing all the bad things infiltrated in the law. This is particularly important, because the easiest and most effective channel for imposing interests, monopolizing rights, and suppressing others is through legal policy. With the infiltration of hidden agendas by law, it not only leads to injustice and covert oppression, but also shared goals will be distorted and will not be achieved.

On the basis of these considerations, this paper would like to raise a fairly basic issue, namely the moral-ethical basis of Indonesian law based on the values of *Pancasila*. By knowing these values, we can reflect proportionately on how Indonesian law should be and should be based on *Pancasila*.

Main Problems

The discussion in this paper will focus on two questions. First, the theory of moral as the normative basis of law. Second, the value priorities in *Pancasila* that can become the moral-ethical basis of Indonesian law.

Discussion

Theory About Morality As Normative Basis of Law

One of the main issues in legal theory is the "normative basis of a legal system". This issue is of concern to Neo-Kantian thinkers, such as Stammler, Kelsen, and Radbruch. The main question that these three thinkers will answer is "what is the normative basis of a legal system?[7]

The answers of the three thinkers are different. Stammler refers to "juridical will" as the normative basis of the legal system. The will is meant, the common will to live together regularly. The law obtains the obliging nature by the will to live a regular life in question.[8]

On the other hand, Kelsen chose Grundnorm as the normative basis of the legal system. According to Kelsen, Grundnorm is an "early premise".[9] Grundnorm is assumed to be the basis upon which everything begins. It is not derived from anywhere. Validity is also taken for granted. It is valid because it is presupposed to be valid, so says Kelsen.[10] It is the basis, without having to adapt to other norms.

His position as the "initial premise", led to Grundnorm not classified as part of the positive law. It goes beyond the positive legal order. It is transcedental-logic that is above positive law.[11] Nevertheless, it becomes the determinant of the validity of the whole positive legal order. Each legal norm obtains a gradual attestation

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the United States that has lost its zeal to educate potential legal professionals to have a humanitarian concern on professionalism. Already since the students have set foot in law schools, their feelings, their humanity have been seized and collected. Therefore, Spence says, lawyers must become evolved persons before becoming lawyers (see Satjipto Rahardjo, Law Education as Human Education, Yagyakarta, Genta Publishing, 2009, pp. 36-37).

[6] This terminology refers to the "idea of custom". Pojman interpreted the word moral as "... the principle of both ideal and actual". While Piaget interpret a moral as "view about good and bad, right and wrong, what ought to or ought not to do. This shows that morality is one of the important domains that are the measure of one's behavior or actions, including the way of punishment.

[7] Look at Bernard L. Tanya, (*etal*), *Teori Hukum: Strategi Tertib Manusia Lintas Ruang dan Generasi*, Yogyakarta, Genta Publishing, 2013.

[8] *Ibid.*

[9] Look Wolgang Friedmann, *Legal Theory*, London: Stevens & Sons, 1967.

[10] Hans Kelsen, *General Theory of Law and State*, New York: Russel & Russel, 1961, p. 116.

[11] The original is, Kelsen's *Grundnorm* is not an articulated or even written. It is a *a constitution in the transcedental-logical sense*, that different with *constitution in the positive legal sense* (*Ibid*).

of the above norm, and at the last level all legal norms obtain an endorsement of the basic norm or Grundnorm. The virtue of Grundnorm, according to Kelsen, lies not in the goodness of Grundnorm's values, but in its position as the initial premise for positive rule of law.[12]

In contrast to Kelsen and Stammler, Gustav Radbruch chose the value of justice as the normative basis of the legal system. As a prominent Neo-Kantian exponent of the school of Baden, Radbruch tends to pay attention to values, and reflections on the cultural sciences. E. Lask classified the law as *Kulturwissenschaft.* The essence of the law as *Kulturwissenschaft*, is the realization of values. Thus, if placed within the framework of Kant, then the law is not the territory of 'pure reason', but the realm of 'practical reason'.

For Radbruch, who follows Lask, culture is human values. Both knowledge, art, morality, and law, these are part of the culture.[13] Each one has human values. The law itself, according to Radbruch, carries the value of justice for the concrete life of man. This is intrinsic in law, because it is essentially one of the elements of culture. Other elements have their own duties. Science is in charge of presenting truth, art for beauty, moral behavior for morality. So each has its own mission and a task with the ultimate goal is the man with his real needs.

Law as the bearer of the value of justice, according to Radbruch becomes the measure for fair unjust law. Not only that, the value of justice is also the basis of law as law. Thus, justice has both normative and constitutive properties for law. It is normative, because it serves as a prerequisite of the underlying value of each positive and dignified law. It becomes the moral basis of the law as well as the benchmark of a positive legal system. To justice, positive law stems. While constitutive is because justice must be an absolute element for the law as a law.

Long before the Neo-Kantian thinkers above, Thomas Aquinas, has revealed the importance of law-lending to values.[14] That is, the law must have a foundation of ethics.[15] The foundation of that ethic must depart from the human nature[16], which is goodness! That is why, to the question, "what is the law of a law"? The answer given by Thomas is the Aristotelian answer, which is happiness and goodness.

According to Thomas, the realization of happiness and goodness will be the fulfillment and perfection of human nature itself.[17] This is the law of law. Implementing the natural law, means acting according to human nature: do good, and stay away from evil! The positive law must depart from this moral basis. That means, the law must help human beings develop according to their nature, uphold human dignity, be fair, guarantee equality and freedom, advance the interests and common prosperity.[18]

Thus the law's validity, according to Thomas, is not *ius quia iussum* (the enforceability of law because it is imposed), but *ius quia iustum* (lawfulness of justice). Thomas saw, the enactment of the law should have effect on two things: (1). Make human beings good, and (2). Giving direction to human action.[19] Laws are made and enforced not solely for the benefit of an individual person, but for the common good of all citizens. If law is a rule and a measure, then that means law is the principle of human action. The law directs people to get used to doing good things.

Indeed, there was a lawsuit against Thomas's theory. The objection is that the content of natural law is too abstract. But the objection is not substantial, because the concept of natural law that Thomas taught, more as a source of meaning for positive law, not the positive law itself that must be formulated clearly and in detail. Natural law, positioned as general principles.

Since they are general principles, the natural law language is the language of principles, or it can also be called the moral language or the moral text. Because natural law emphasizes moral content, reading it requires a separate way of reading. Borrowing the phrase Ronald Dworkin, how to read is referred to as moral reading.[20]

For Thomas, natural law is not a closed system of thought and static. The concept of natural law should not be given a rigid content. The human understanding of what is of value to his actualization, or for the fulfillment of his natural orientation,[21] is progressive and evolves in line with the development of human culture, which is (expected) increasingly sensitive to the dimensions of humanity.

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[12] Wolgang Friedmann, *Legal Theory*, London: Stevens & Sons, 1967, p. 24.
[13] *Ibid.*
[14] Thomas Aquinas' thought about Law, can be read well in Franz L. Neumann, *The Rule of Law*, Leamington Spa: Heidelberg, 1986, pp. 53-67.
[15] Look at M. Sastrapratedja on Preface for E. Sumaryono book, *Etika dan Hukum: Relevansi Hukum Kodrat Thomas Aquinas*, Yogyakarta, Published by Kanisius, 2002, p. 9.
[16] *Ibid*, p.10.
[17] *Ibid.*
[18] *Ibid*, p. 11
[19] *Ibid*, p. 18
[20] Ronald Dworkin *Taking Right Seriously*, London: Gerald Duckworth & Co. Ltd, 1977.
[21] There are three kinds of trends in the human person. 1). tendency toward the good, the tendency to seek the preservation of human existence according to his nature. 2). characteristic trends such as other living beings form. 3). natural inclinations to know "includes God. This tendency is a manifestation of natural law.

Natural law demands that human beings act-in law or other fields-in ways that are in harmony with the normative or *tao* humanity of humanity[22]. Natural law in its true sense, according to Thomas, is first and foremost intended to achieve the common good.[23] Therefore, the creation, formulation, and implementation of the law must be maintained in the corridor *bonum commune*.

The doctrine of natural law is an example that there is always value which is considered to be the beginning, the more mainstreaming and the basis of the validity of a positive law. Before there are legal norms, there is always the norm that precedes it, which is used as a basis in giving the form and content of the rules of positive law. The norm that precedes it is moral. So Earl Warren was right when he said, law floats in a sea of ethics. The law floats on the ocean of ethics!

The next view comes from H.L.A. Hart. Through his work: "Positivism and the Separation of Law and Morals," Hart revised John Austin's doctrine of the separation between law and morals.[24] For Hart, although law and morals are different, they are closely intertwined. Even according to him, morality is a legal minimum requirement[25], especially when facing complicated case.

Ordinary cases can easily be covered by technical rules. The juridical rules will easily solve routine cases. But not when facing hard cases, hard cases made bad law. Each case is difficult, always showing the limitations of the law. The law looks bad when it comes to complicated cases. According to Neil MacCormick, hard cases refer to cases where the law has a difficult impact on someone whose circumstances cause sympathy. In such cases, there is an inescapable necessity for interpreting beyond the rules to avoid excessive complexity.[26]

For example the application of the murder chapter, a person with a disease that is medically impossible to cure and who is suffering so badly that he cannot afford to survive, can the family stop the food intake, so that in the short time it will die to end its suffering? Or a patient who is already in a comatose state, which is medically almost impossible to regain consciousness, and now his life can only be maintained through the installation of artificial tools? Can it be just plucked out, so that the person can die naturally?

How about a patient who is in a coma, medically impossible to cure, and the installation of artificial devices is so expensive that it is beyond the ability of the family to pay for it, let alone sacrifice it means sacrificing the entire future of the family for the sake of a calculated medical is not possible to recover?

Hard case as above, need a constructive interpretation based on what Dworkin called moral reading.[27] The problems experienced by the people above are concrete facts, and only they perceive the system of the situation at hand. He could not have been casually debated behind the table. It can only be understood through the unique experiences, contexts, and situations that these people face. Here the murder chapter needs to be read morally (moral reading). Morally, the above event is necessary evil. When those people choose evil from evil, they choose the lesser and the smaller (the lesser evil).

Value of *Pancasila* as the Ethical Base of Indonesian Law

In the context of Indonesia, *Pancasila* according to Soekarno is *Weltanschauung*[28] Indonesia. Although Sukarno did not give a definition of Weltanschauung, but seeing the purpose and contents, *Weltanschauung* is meant Soekarno different from the versions of Karl Mannheim and Karl Jaspers.

Karl Mannheim's *Weltanschauung*, is *Weltanschauungeines Zeitalters*. Mannheim speaks of the worldview in a period of history (weltanschauungeines zeitalters). Similar to a spirit of the times or

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[22] A.C. Danto, "Human Nature and Natural Law", dalam Sydney Hook (ed), *Law and Philosophy, A Symposium*, New York, New York University Press, 1964, P. 199.

[23] The common good "as the highest good, not because of good is common, but because it is essentially" good ". The rationale is "self-realization". It is that all things, including humans, exist or are created by God complete with the purpose associated with that existence ... Man who is a rational being created with "free will" which always characterizes his attitude of action. With this free will, man strives for the ultimate goal, namely the good and the well-being of life. This is in line with Aristotle, who considers the "wealth" of man as a substance realized in his nature as a rational being. Activity will result in actuality. Since "perfection" is the ultimate goal, the axiom is that good must be done, evil must be avoided (E. Sumaryono, Ethics and Law ..., Op.Cit, p. 17).

[24] Lih Bernard L. Tanya, "Morality in Criminal Law Enforcement", Paper presented in Upgrading of National Penal Law, Mahupiki Cooperation and Ubhara Surya, Surabaya, November 29, 2017.

[25] Because Hart's thoughts are to some degree tolerant of morals, Brian Tamanaha classifies Hart as a soft positivist (Look at Brian Tamanaha, A General Jurisprudence of Law and Society, Oxford University Press, 2001)

[26] The monumental case of this is the case of R against Dudley & Sephens. Sailors in shipwreck are faced with a definite death due to running out of water and food. They agreed to draw a name, and the name that appeared could be killed to eat the flesh and drink its blood.

[27] Ronald Dworkin *Taking Right Seriously*, London: Gerald Duckworth & Co. Ltd, 1977.

[28] It is noteworthy that the world view, i.e world view or Weltanschauung is treated in the social sciences as the subject of study and research of the cultural sciences. Clifford Geertz, for example, sees the world view as the idea of people in a cultural group of the world they are facing and living, an overview of the complexity of the world in some simplified picture: whether the world is basically good or evil, real or virtual, eternal or temporary, is a place for a stopover or a place where people cultivate their destiny and build their future (Ignas Kleden, "Soekarno, Pancasila, and ..., Op. Cit.)

Zeitgeist.[29] In contrast, Soekarno-when talking about *Pancasila*-is not directed to the worldview according to the time or trend of the times. *Pancasila*, for Sukarno, is a worldview for a certain place called Indonesia. So *Pancasila* is a world view for the locus of Indonesia, not for a certain period of time.

It is different with Karl Jaspers. Jaspers speaks of *Weltanschauung* as a philosophy of the world. Soekarno did not talk about philosophy about the world, but the philosophy of coexistence in an Indonesian state.[30] *Pancasila* is the philosophy of life (*Lebensphilosophie*) about the common life in Indonesia. However, what kind of Indonesia does Sukarno mean to him-*Pancasila* should serve as a philosophy of coexistence in Indonesia? The answer is: Indonesia the Unity in Diversity. Against this kind of Indonesia, the philosophy of a common life called *Pancasila* must be born and present. For the law, the philosophy of the common life contained in *Pancasila*, serves as the basic norm that gives the foundation of moral-ethics. Below will be described the values of *Pancasila* which can be the foundation of moral-ethic law of Indonesia.

Pro-Nation-State

This value is regarded as the first value, because historically, *Pancasila* is present for it. *Pancasila* becomes meaningful for Indonesia, precisely because Indonesia is a plural nation-state. A nation-state,[31] not an ethnic state, not a city-state, not an empire, not an empire, nor a Caliphate. As a modern nation-state, Indonesia is formed of the national spirit of the tribes that exist to build a common future under a common state, even though its citizens differ ethnically, race, religion, historically, and culturally. Therefore, Indonesian unity is not ethnic, religious, or ethnic, but an ethical unity.[32] That ethical union is what we find in *Pancasila*.

Historical explanation and hermeunetik,[33] more clarify it. *Pancasilai-as* we know-raised Soekarno amid sharp contradictions in *Dokuritzu Zyunbi Tyoosakai* on what would (be) become the basis of the state of Indonesia Merdeka. Differences of opinion that occurs, not only about the subject of religion and secular, but also related to other matters related to diversity of Indonesia. As Soekarno said to Cindy Adams:

> ... the Javanese priyayi, Sumatran merchants, farmers outside Java; and then Islam and nationalists, federalists and unitarians-all groups have their own ideas that are difficult to reconcile.[34]

The three-day sharp contrast in Dokuritzu Zyunbi Tyoosakai's forum ended after Soekarno delivered a speech on June 1, 1945.[35] In the speech, Sukarno offered a solution: Indonesia Merdeka, a country based on Pancasila. Sukarno's speech received a warm welcome, and is considered as a way out of the impasse faced.[36] What is at stake in the warm welcome of Soekarno's offer, is no other than the desire for Indonesia to be a home for all who helped build it, and to live a peaceful life in it. That is the desire of Indonesia as a nation-state that *bhinneka tunggal ika*.

The dream of a calm "*Rumah Indonesia* (Indonesian house)" made the Founding Fathers beat their respective ego groups, and accepted Bung Karno's offer of *Pancasila*. *Pancasila* is accepted, not primarily because it is proposed by Sukarno, but because it is considered to be the best way of caring for "*Rumah Indonesia*" as a nation state. Home to all and a peaceful life, is a key word for Indonesia's legal mission. The mission, summarizes various questions about the existence of the Indonesian nation as a plural nation. Caring for Indonesia-an, means: recognizing and accepting diversity as an existential reality. Hundreds of ethnic groups (with all cultures, traditions, religions / beliefs it embraces), are legitimate residents with equal rights and duties in Indonesian homes.

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[29] *Ibid.*

[30] *Ibid.*

[31] To note, the nation state, is a modern format in which the authority of a recognized state regulates the whole nation / tribes that exist within its territory. The nation-state brings together different regions and communities into a new territory of government. They form a new political unity as well as a new national unity. The Spirit that binds them, is the spirit of nationalism (see Winarno, New Paradigm of Citizenship Education, (third edition), Jakarta: PT Bumi Aksara, 2013).

[32] Baca Franz Magnis Suseno, *Etika Politik, Prinsip-Prinsip Moral Dasar Kenegaraan Modern*, Jakarta: Gramedia, 1997.

[33] Hermeneutic, which, if translated freely, means "text history", better known in the German version as *Redaktionsgeschichte* or editorial history. This concept asserts that every text produced in culture, always has a kind of life history of composing, codifying, altering, or revising editors, and possibly also text authorization occurring from time to time. Therefore, knowing the history of the editorial, is an important prerequisite for listening to the meaning of the text in relation to the context of its creation or arrangement because of frequent turnover or semantic exchanges, the addition of annotations, the insertion of new parts in editing, syntactic refinements or stylistic modulation resulting in a shift in meaning or change of pressure on the various parts of the text.

[34] Cindy Adams, *Bung Karno Penyambung Lidah Rakyat Indonesia*, Jakarta: Gunung Agung, 1966, p. 299.

[35] That speech then is known as *Lahirnya Pencasila*.

[36] Eka Darmaputera, *Pancasila, Identitas dan Modernitas: Tinjauan Etis dan Budaya*, Jakarta : BPK Gunung Mulia, 1987, p. 105.

The mission requires equal protection for all elements of the nation from Sabang to Merauke without exception, the equal right of all tribes existing to inhabit Indonesian homes, and the same duty of the inhabitants to preserve the Indonesian house and keep the tranquility living together.

In other words, in this mission, it is not permissible for any form of discriminatory treatment of a primordial nature to any person or group. Restrictions let alone oppression to individuals or groups, because they are different, must be forbidden by the state and the law. Keeping the house of Indonesia as the home for all, and the guarantee for its inhabitants to live in peace, should not be left to the willingness and tolerance of persons per person or group, but must be the absolute responsibility of the state and the law. The reason is that everyone tends to make mistakes, and therefore my righteous conduct and no harm to others cannot be left to everyone's personal morality, but it needs to be governed by positive law.

Since the mission is crucial to Indonesia's unity, it must be a starting point in projecting the legal direction of the law. That is, the interest of maintaining the house of Indonesia as a home for all, and the guarantee for its inhabitants to live peacefully, must underlie legal politics on all facets.

Pro-Etos Gentlement

This value underlies acceptance of *Pancasila* as the basis of the state. As is known, behind the emergence of *Pancasila*, following changes in the composition and revision redaksinya happened that almost leads to deadlock debate. Although there are difficulties that are difficult to meet among the Founding Fathers, but with the spirit of tolerance to be maintained and for the common good of a pluralistic nation, they agree to accept *Pancasila*. That is why, *Pancasila* was born as a historico-political gentleman agreement.[37] *Pancasila* is an honorable agreement of respectable people (Founding Fathers) - though there are differences among those who are difficult to reconcile. The founders of the nation, knightly and elegantly dismissed the primordial path as a way of life (beneficial to themselves and their group), and voted to adopt a tolerant way of life through *Pancasila* (which benefits all Indonesians). The agreement must be made by the Founding Fathers in order to create a foundation for a national consensus on the way of life to be lived in the state of Indonesia.

Gentlement is a social ethos that promotes honesty, knighthood, courage, responsibility, abstinence, abstinence, righteousness, justice, obedience and faithful to common rules. From this angle, the *gentlement* attitude should underlie all policies in the field of law (legislation, judiciary, execution). Legislation products, for example, are no longer the product of cow trade bargaining, but the *gentlement* agreement product of honorable people. So it is with law enforcement, no longer the activities of cheap people, but the praiseworthy work of respectable people.

Pro-Kindness

In reformulating Soekarno's Pancasila (its radical and its composition), especially when placing the Divine Force into the first principle of *Pancasila*, the Little Committee has the following considerations:

> "The Godhead of the Almighty .... give soul to the effort to organize all that is right, just and good "....[38] . Belief in the Almighty is no longer just respect-respects their respective religions, but becomes the basis that leads to the path of truth, justice, goodness, honesty, brotherhood and others.[39]

Interesting what became the founding of the Little Committee in the above quotation, that "The Divine Principle of the Almighty.... give the soul to the effort to administer all that is righteous, just and good ...."This phrase is another word of a" praxis"[40] or "charity ". The Godhead is not associated with religious orthodoxy / certain religious beliefs, but with a more neutral moral expression of charity and moral conducts (holding everything right, just and good). In the format of the Godhead, all moral praxis is religious dimension. That means the necessity of organizing all that is righteous, just and good is a sacred command that must be executed as a form of religious charity. Running something as a religious-worthy charity will be different from the non-religious. In religious terms, there is always a sacred feeling that must be addressed with sincerity to appreciate it. That sense should inspire our attitudes and actions, including in managing the law both at the stage of law-making and at the stage of its implementation. Managing the law in that religious spirit requires us to treat the art of values.

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[37] Ignas Kleden, "*Soekarno, Pancasila, dan Sejarah Teks*", Article on daily newspaper "Kompas", June 23, 2007.
[38] Little Committee (*Panitia Kecil*), *Uraian Pancasila…, Op. Cit*, p. 42.
[39] *Ibid.*
[40] Praxis refers to ethical and political action, meaning values-based action in the pursuit of good. According to Jurgen Habermas, one of the weaknesses of modern science is that it tends to reduce all practices into techniques. Though the theory is actually closer to praxis because at first the theory meant a reflection on the order of the cosmos to gain the wisdom of life (see Jurgen Habermas, Knowledge and Human Interests, Boston: Beacon Press, 1971).

The art maintains its values[41] and / or principles. Law is a valuable and valuable guide. That means, the law is more than just a rule of pragmatism to master and control. It contains a normative nature in its form, because it involves also the rationality of values.[42] So the law-not just about rules and how to keep it-that can be handled solely by technicalities. Moreover, a rule of law must be justified by reason and morals, whether it is worth (true, good, and worth) for human beings (individuals or groups). In other words, in the context of God's value, a rule of law must be so valuable that no one should be disturbed, for in addition to being rational; it is also reasonable or appropriate for all. It's not even a problem, if it were applied to ourselves.

Pro-Humanity, Justice, and Civilization

This is the core of the Second Precept of *Pancasila*, a just and civilized humanity. This precept is the Indonesian doctrine of human quality. That is, humanity (Indonesia) is humane on the one hand, and human beings are able to be just and civilized on the other side.[43] Man is human, whatever his social-cultural affiliation, gender, race, color, even ideological orientation. Man has the right to humanity. The normality of each institution, including legal institutions, must be measured according to humanitarian values. All our actions, included in the punishment can only be accounted for morally, when the point of departure from the genuine and genuine appreciation of the values of humanity itself.

This capital, according to the writer's opinion, is our connection point (Indonesian man) with the commitment of other nations to establish a humane, just and civilized life order, crystallized through ideas, tracts and human rights charter (since Zeno / Stoicism Antique Greek era until the Universal Declaration of Human Rights 1948 and various Charter and Covenant which until now continues to grow from time to time).

The other side of the Second Precept of *Pancasila*, is as moral praxis to act justly and civilized. This has to do with the repositioning and reformulation of the *Pancasila* principles by the Little Committee.

> "... In the present order, a just and civilized basis of humanity must follow, in conjunction with the first (Godhead)... The just and civilized basis of humanity is a continuation in the deeds and practices of life from the lead.[44]

So, if the Godhead is the source of all that is right, just and good, then fair (*adil*) and civilized (*adab*) are its normative commands. Justice and *adab* became the normative command that underlies the entire Indonesian human order. A noble and noble value of *Alkhalik* gets a practical meaning in human moral activity. In the phrase of Second point, the moral activity referred to is: a just and civilized humanity!

There are many attributes of justice, but it is enough here to name some of the praxis of justice: not cheating, daring responsibility, faithful to duty, possessing something right, not arbitrary, respecting the rights of others, fair, equal, The just man is a man capable of doing all that.

Likewise the matter of civilized, many attributes about it, but is very commonly known is: able to live honorable, obedient principle, obedient rules of play, moderate, *ugahari*, not forward muscles / strength, dare to admit mistakes, one word with deeds, ways, respect for truth, and so on.

Read in the spirit of *Pancasila*, the necessity of acting in a civilized and fair manner is the virtues that must be institutionalized into a kind of moral human habit of Indonesia, including in punishment. Indonesian law must be based on civilized and just ways. Of course, the doctrine of the Second Precepts is relevant to the need for Indonesian law to be more dignified. The first thing to say, is: the importance of a moral (civilized and just) human presence in the management of the law. The legal bearers (on all facets), should be the elect (in terms of integrity), in addition to knowledge competence.

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[41] Values, is something that is upheld, something that gives meaning to life; which memeberi to life this point of departure, content, and purpose. According to Steeman, value is something that is considered noble enough to be noticed, and demands our loyalty and obedience (Theodore M. Steeman., "Religious Pluralism and National Integration", Dissertation, Harvard University, 1973).

[42] This rationality by Max Weber is placed as opposed to instrumental rationality. The latter rationality, oriented toward the reconstruction of objective systems (such as state bureaucracy) with the intent of mastery and the handling of certain social processes. This system operates according to a work-action logic called Habermas as an instrumental act. The rationality of this model will lead to the subduing of productive forces, social institutions, cultural meanings, and personality structures under the logic of rationality-aimed action. That is why, according to Habermas, the logic of this work of rationality has removed the traditional worldview, which in turn agrees with a new ideology called technocraticism. The spread of this rationality, then received an instrumental emphasis when the Frankfurter Schule exponent applying Marx's "functional epistemology" in social life. The logical consequence of Marx's epistemological claims has dragged the Frankfurter Schule exponent in what came to be known as an ideologist of science and technology. As a result, modernization becomes an emancipation with erosion of meaning. That is, the liberation of the myth, turned into a science and technology pemitosan through the dominance of instrumental ratios. That is why, with the disappearance of this aspect of meaning, the critical theory of the Frankfurter Schule exponent fails to become an emancipatory theory (See Habermas, Legitimacy Crisis, London: Deacon Press, 1973, FB Hardiman, "Overcoming the Paradox of Modernization", in Community and Humanitarian Discourse, London: Gramedia, 1993).

[43] Bernard L. Tanya, et al, *Pancasila: Bingkai Hukum Indonesia*, Yogyakarta: Genta, 2015.

[44] Look at footnote about *Panitia Kecil* before.

The legal world needs someone like Aristotle, who is able to say: *Amicus Plato sed magic amicus veritas o*r a person like Plato who dreams of a leader's moral virtue (the law of a laudable leader, is his own morality). Or even people like Socrates who are willing to sacrifice their souls for the sake of the authority of the law.

Pro-Equality

This is the heart of the Third Precept. The state is obliged to protect the entire nation of Indonesia and the entire country of Indonesia based on unity. This value gives the nation's foundation on Indonesian law to promote the interests of national unity over the narrow primordial loyalties of a group or group. Therefore, the law is required to function to ensure that equality and justice issues are the necessity of all elements of the nation to develop themselves as the people of a government, and develop themselves as citizens of a country.

It should be realized from the beginning, that the nation in the context of Indonesia-ness, is a nation in the political sense, not pre-political. It is not a collection of people or groups who can play freely according to their own interests. Nations in the political sense, is the public arena in which we develop ourselves as the people of a government, and develop ourselves as citizens of a country.

Space as a people and space as a citizen, is a space of equality and justice which is governed by the law and the constitution of the state. That means every person or group as people and citizens, controlled by the rules of the game together in the form of state law. Our behavior as citizens and citizens is bound by the laws and constitutions of the state. Here, unity can be pursued through law and constitutional enforcement.

That means, the equal rights of every citizen must be absolutely guaranteed and upheld by law and constitution. The guarantee cannot (again) be left to the willingness of the person per person or class, but is governed and guaranteed by positive law. It must be ensured that positive laws treat each person equally in rights and duties as citizens and as citizens.

Taking care of Indonesia that is comfortable and safe to live in together requires law and need a state that guarantees the rights of its citizens without discrimination of identity. On the other hand, our position as a citizen and as a citizen requires that law and constitution be prioritized rather than primordial fanaticism. The Constitution (UUD'45) has strictly regulated the rights of citizens and the people of Indonesia, including the right to be treated equally and non-discriminatively on the basis of origin, race, religion / creed, color, sex and others etc. That means, the law and the state must resist any agitation and provocative efforts that discredit one group by another on the basis of identity. Law and state must fight and crack down on demagogues that exploit the primordial hostility sentiment by anyone.

The people of Indonesia must be treated equally or equal, not only because we are human, but also because it is a citizen. State attends to it. This is also what is meant by the First Thoughts of our Constitutional Explanation: The State protects all Indonesians.

The job of protection must be real and real. The unity of Indonesia will be firmly established when state and law authorities are upheld, when the state and law provide a guidance to all peoples without exception, when there is real protection for the rights of all classes guaranteed by the law and the constitution, when the state carries out its service duties without favoritism, when the state is capable of cracking down on every perpetrator of the crime, when there is no rule of law permitting undiluted privileges of a group, including hidden privileges in any case, when there is legal action against any slanderous acts of violence, and so on. The end result is a sense of security. Each group enjoys a sense of security under the protection of the state. The people enjoy justice. Law and state stand above all people and factions.

Pro-People

The Fourth Precept of *Pancasila* gives the people's foundation on the law. The law must be pro-people. If we return to the basic principle of democracy that democracy is a political system based on the aspirations of the people and aims to realize the aspirations of the people, then the democratic character must also be reflected in the law. In a democratic system it can be assumed that the law must also be based on people's aspirations and aim to realize the interests of the people.

In a democracy-based democracy, it is not permissible to model "democracy figures" nor the presence of "fly democracy". "Democracy figures" are rejected, because the priority is the majority-minority, while Pancasila is concerned with the whole people. Likewise, the "flies' democracy" is rejected, because the emphasis is on the rotten things in which flies like to gather, whereas *Pancasila* wants wisdom and wisdom.

Democracy competes in numbers, the result is not the government of all the people, by all the people, and for all the people, but the government of a group of people one for another, and by a group of people over another. Government by one or two groups over all other Indonesian tribes. The dominance of the class, permitting the fertile ground in the democratic system of numbers, because in democracies the numbers, the majority is the determinant, it is easy to imagine the largest number (tribe, class, belief / religion), the chance to determine political power in the real sense.[45]

[45] The same has been reminded by Hasan Tiro (former leader of Aceh Merdeka) through his writings, Democracy For Indonesia, Jakarta: Teplok Press, 1999, p. 86-87.

People in the context of the Fourth Precepts, are citizens as citizens. The basic doctrine of citizens everywhere, is: equality and fairness. The space of citizens is a public space where justice and equality (everyone) are defended and defended. The virtue of the people's right as a citizen, reflected in the ideology of the modern constitution, namely Constitutionalism.[46] The philosophy of constitutionalism, the principle of the virtue of the people's right.[47] The philosophy was formulated solidly, for example, by Francois Hotman in Francogalia (1573), as quoted by Rocky Gerung: "A people can exist without a king ... whereas a king without a people cannot be imagined."[48] People can live without kings, but not vice versa.

Constitutionalism is not primarily a constitutional doctrine, but a final principle of the rights of the people / citizens. From there it was then accepted a universal credo of the inevitability of the relationship between democracy, the rule of law, and the constitution. Mutual suppose and need each other.[49]

Because this is so, the constitution is no longer just a term to refer to a legal document, but at the same time become an understanding of the basic principles of state administration based on the rights of the people / citizens (constitutionalism). Whoever he is, regardless of religious affiliation, ethnicity, class, race, and gender, shall be treated equally and equally by the state. That's a standard principle for every citizen. Therefore, the state (and the law) must be able to ensure that no single group of citizens may be privileged or neglected in the rights attached to him as a citizen. The rights of citizens to be treated equally and equally, as also provided for in the 1945 Constitution, constitute a constitutional right. Against the constitutional rights of citizens, it is an absolute obligation for the state and the positive law to protect it.

Thus, to say that against constitutional rights guaranteed in the constitution, the state and the law shall be legally obligated to protect, respect and promote those rights. On the contrary, by sacrificing the citizens' constitutional rights for procedural reasons and subjective feelings of people per person, then not only is the spirit of a democratic constitutional state sacrificed there, but also the constitution and constitutionalism of a cruel betrayal. We may say parodisly that correcting some articles of the Law will not cause the Act to feel betrayed, but sacrificing the interests of the people must make people feel betrayed.

Pro-Social Justice

The Fifth Precept of *Pancasila*, is the Indonesian doctrine of economic democracy. Namely, the necessity of realizing social justice for all people. This doctrine of economic democracy, the foundation of state politics and law in caring for the life of society. If social justice is regarded as an important precept, then we must make the big and abstract themes into concrete problems and experiences confronting the less fortunate people to pursue them from poverty, freedom from violence, freedom from backwardness, and so on. Living in society, must be based on the reality of social justice. This is a vision that must be realized. We say there is social justice, when the nation's economic resources are utilized for the welfare of all people; when there is no economic monopoly; when all the people have a decent livelihood; when there is no discrimination of welfare access; when empowered the weak and marginalized; and when there is a concession to the most disadvantaged.

In this context, the legal task is to ensure and ensure that all elements of social justice are realized in real life. The law must create a just normative procedure for all to achieve prosperity. Concerning the just procedure for prosperity, John Rawls proposes a layered procedure. First of all is the principle of fair equality of opportunity. That is, access to welfare opens equally wide for everyone. Every person without exception is entitled to prosperity.[50] But, if there are still marginalized because of the inevitable structural constraints, then the second procedure must be taken, namely the difference principle. This means that social and economic differences must be arranged in such a way as to provide the greatest benefit to the most disadvantaged.[51] The term socio-economic difference in the principle of difference refers to the inequality in the prospect of a person to attain the essential elements of welfare, income, and authority. These are the ones who should be given special protection, not to be left free to compete with the strong.[52]

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[46] As a doctrine, constitutionalism is a notion that limits state power on the one hand and guarantees the rights of the people on the other, through the rules of the constitution. In the logic of constitutionalism, a good constitution must therefore provide a mechanism of mutual control between and / or to the institution of state power available. Understandably, the modern development of democracy leads us to the importance of constitutionalism, as a regulatory principle that must ensure the institutionalization of democracy itself.

[47] The foundation of this philosophy and view is still traceable to the political proposition of David Hume (1711-1776) who opposes the future binding of the present-day binding contract (the prohibition against binding the future). The same view is shared by Thomas Jefferson in the Declaration of Independence. He said: "It is the right of the people to alter or abolish" which has become "destructive" to life, liberty and the pursuit of happiness ". The people cannot be bound by law, except for guaranteeing his freedom, life and happiness.

[48] Look at Rocky Gerung, " Etika dan Tugas Politik Oposisi ", in the *Panduan Parlemen Indonesia*, Jakarta: API Foundation, 2001, p. 18.

[49] *Ibid*, p. 18-19.

[50] Bernard L. Tanya, *etal, Teori Hukum…, Op. Cit*, p. 95.

[51] *Ibid.*

[52] *Ibid.*

Thus, the principle of difference demands the regulation of the basic structure of society in such a way that the prospect gap gets the main things of welfare, income, and authority destined for the benefit of the least benefited.[53]

Closing

The necessity for the law to have a foundation of ethics has a theoretical underpinnings in the science of law as seen in Thomas Aquinas's thought, Gustav Radbruch, and implicitly in Hart's idea of morals as the legal minimum requirement. For Indonesian law, the values contained in Pancasila can be a very strong moral-ethical foundation. The values are: Pro-Nation-State, Pro-Etos Gentlement, Pro-Kindness, Pro-Humanity-Justice-Civilization, Pro-Equality, Pro-People, and Pro-Social Justice. These values are the basic guidelines that determine the direction, shape, and content of Indonesian law in serving Indonesians. Those values determine how Indonesian law should be, and should be in duty simultaneously.

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[53] *Ibid.*

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PUBLIC POLICY IN THE USE OF FOREIGN WORKER:
THE LAW INTERPRETATION OF THE LAW ON THE CONSTITUTION

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ABSTRACT

Advance the public welfare is one of the aims of a state mentioned in the constitution by "the founding fathers." General welfare has a very broad meaning, because of the linkage between the rights of citizens and the obligation of the government to be able to carry out so that every citizen can get a job, so that by working can earn a decent income to fulfill the needs of his life. It should be noted, however, that citizens are made up of indigenous Indonesians and other peoples who are legalized by law as citizens who both have equal rights to work. In addition there are foreigners who work in Indonesia, or known as a foreign worker who works by bringing the science and technology needed for development. It should be emphasized that the use of foreign workers should not rule out Indonesian worker rights. The growing number of Indonesians entering working age with low levels of education and productivity, as well as unequal distribution, have made it difficult for development efforts undertaken by the Government, so that employment policies should be directed at solving existing employment problems to lead to the realization of common prosperity. The regulation of the employment field is not only related to the law, but also relates to economic matters, so that the public policy maker must really understand what is desired by the Constitution.

Keywords : Public Policy, Worker, Constitutition

Introduction

According to the Indonesian General Dictionary, Wisdom means:

1. It is wise; intelligence using his mind (experience and knowledge);
2. Leadership and ways of acting (regarding government, associations and so on);
3. Acting skills when faced with others (difficulties and so on).[1]

Every jurist has a different opinion about the meaning of wisdom. Hogwood and Gunn classify the opinion of jurists on the meaning of wisdom into 10 (ten) kinds of meanings as follows:

1. Policy as a label for a field of activity.
2. Policy as an expression of general purpose or desired affirmed of affairs
3. Policy as specific proposals.
4. Policy as decision of government
5. Policy as formal authorization.
6. Policy as a program.
7. Policy as output.
8. Policy as outcome.
9. Policy as a theory or model.
10. Policy as process. [2]

In order to realize the desired goal, the law is used as a means to operate a policy and to create order in society. Thus it means that public policy begins with the law. From this there appears to be a link between law and public policy or public policy. In reality, public policy can not be separated from the dominant influence of political power at a time when wisdom is chosen and established. In a broader sense, public policy is an action taken by the Government, both active and passive in accordance with the "Policy alternative" that has been set to be an option.

Basically the main function of the state is to create, execute and implement wisdom for all citizens, in other words the main purpose of a public policy is the public interest. Public policy can be understood as a conscious and systematic policy of the state by using the rule of law, with clear political objectives being targeted, which is then carried out step by step, which in its implementation there is the possibility of encountering obstacles until it is finally done. The Constitution of Indonesia, in particular Section IV of the Preamble of the 1945 Constitution of the State of the Republic of Indonesia (hereinafter to be referred to as the 1945 Constitution) states, among other things, that:

[1] W.J.S. Poerwadarminta, *Kamus Umum Bahasa Indonesia*, Balai Pustaka, Jakarta, 1995, p.138.
[2] Bambang Sunggono,S.H.,M.S., *Hukum Dan Kebijaksanaan Publik*, Sinar Grafika, Jakarta, 1994, p. 15.

"..... to establish a government of the State of Indonesia that protects the entire nation of Indonesia and the whole of the blood of Indonesia and to promote the general welfare ....." is a State goal which the Government should strive to achieve.

As the implementation of the objectives of the state to realize the general welfare, the founding fathers describe what Indonesians must understand about matters relating to the general welfare in their articles, including Article 27 section 2 and Article 28D section 2 of the 1945 Constitution. Toward the realization of general welfare can be done by through policy making in national development by emphasizing the development of economic field accompanied by the development of other fields. Development in all fields involves the need for the use of labor that can be met from within the country and from abroad or known as the Indonesian Workers and Foreign Workers.

With the advent of globalization that swept the world, open flows of people and people from and to an ever increasing country. A country cannot prohibit a person from entering and leaving and into his country, unless there is a particular reason, for example, for committing a crime or drug. Entry and exit from and to a country is one of the basic human rights that must be upheld. Human Rights guarantee that all human beings have equal rights, which include the right to education, the right to legal protection, the right to citizenship, the right to religion and the right to work. All citizens have the same rights and are entitled to exercise their rights, but in practice, of course, shall respect the rights of others.

Referring to the right to work, it makes no difference between indigenous Indonesians and those of other nations legalized by the Ordinance. With the presence of foreign workers who enter and work in Indonesia whose presence is necessary in order to transfer technology need more attention to Indonesian Citizen Workers, because they are the nation's assets that must be realized welfare, in accordance with the will of the founding fathers. The question is what should the Government do to make the use of Foreign Workers in carrying out development in Indonesia does not violate the right of Indonesian Workers?

Discussion

Article 27 section 2 of the 1945 Constitution states:

"Every citizen has the right to work and a decent living for humanity"

The meaning of the citizens is the people of indigenous Indonesians and other people of the nation who are ratified by law, as mentioned in Article 26 section 1 of the 1945 Constitution. Based on Article 26 section 1 of the 1945 Constitution, the foreigners who later became Indonesian citizens also have the same rights as those of indigenous Indonesians and those rights are protected by the State. The protection granted by the state is not only granted to Indonesian citizens, but also to every person who resides in the territory of Indonesia in accordance with the proportion, meaning in accordance with the purpose of its existence in Indonesia.

Based on Article 27 section 2 of the 1945 Constitution above, every citizen is entitled to work, so that by working can have income to meet the needs of his life. As is known, the articles contained in the 1945 Constitution cannot be implemented directly in practice, because the 1945 Constitution only regulates the essentials. Therefore, the articles contained in the 1945 Constitution are outlined in the form of the drafting of laws and regulations which are under the 1945 Constitution. Furthermore, Article 27 section 2 of the 1945 Constitution is described in Law Number 13 Year 2013 on Manpower (worker). In Article 1 section 2 of Law Number 13 of 2013 on Employment stated that:

"Employee is every person that has the ability to do work for the purpose of producing goods and/or services to fulfill individual needs as well as those of society"

It is not unfamiliar when we often hear the words "fair and prosperous society" which is nothing but the ultimate goal of the life of a country. With the background of the ultimate goal of the state, development is the only means most appropriate to be used by the Government to lead to the realization of the State with a just and prosperous society life. The purpose of development carried out by the Government is in order to realize a prosperous society, as desired by the founding fathers in the fourth section of the Preamble to the 1945 Constitution. In the development of one of the requirements for its success is the quality of Indonesian people. To improve the human quality of Indonesia there must be a guarantee that human quality will be achieved if people work, because by working will be earned income to meet the needs of life. Between improving the quality of Indonesian people, life guarantees and opportunities to work there is a close relationship that can not be separated from each other. Fulfillment of the necessities of life through employment opportunities will improve the quality of human life of Indonesia. Therefore, the problems in the implementation of employment are important issues to be solved.

It is the duty of the Government that every person who is willing and able to work can get a job in accordance with his wishes, and in order to work can be earned income to improve the quality of life. The task of the Government is not easy, because of the wide range of problems encompassing, which includes a large and growing population, low levels of education and productivity, uneven distribution of population and

an increasing number of working-age populations. Article 4 of Law Number 13 of 2013 on Labor describes the purposes of employment development as follows:

a. Resourcing and making use of employees optimally and humanely;
b. Realize the equalization of employment opportunities and the provision of employees that is appropriate to the needs of building of the nation and regions;
c. Protect employees in order to create welfare; and
d. Increase employee and familial welfare.

Labor/Worker as one of the main capital in the implementation of development should be developed skills and skills in order to respond to the demands of development and technology development. For this purpose, the Government creates training programs and labor skills whose purpose is to provide skills and skills for job seekers to easily find jobs or create jobs for others. This training and work skills program is outside the formal education system with a method of prioritizing practice rather than theory for those who already work can also improve professional skills, so it can work more productively and efficiently.

The content of the training and skills programs must be in accordance with real needs in the field, so that those who have followed these exercises can easily obtain or be accepted to work. To that end, the Government established a Training Center (BLK) in each City / District. The provision of training and work skills to suit the needs of the labor market will provide and improve skills and skills, thereby establishing work attitudes, work quality, and work productivity. The right to work is not only meant for normal people, meaning to have complete limbs, but also to persons with disabilities. For this group the Government also provides a vocational training center, which is at the Disabled People's Training Center (BLK Penca).

The existence of the Training Center shows the Government's seriousness to provide employment opportunities for its citizens who have entered the working age and need work. The right to work and a decent living for humanity is one of the basic rights guaranteed in Article 28D section 2 of the 1945 Constitution, which reads as follows:

"Everyone shall have the right to work and receive fair and reasonable remuneration and treatment in the employment relationship"

The link between Article 27 section 2 and Article 28D section 2 of the 1945 Constitution is that every Indonesian citizen has the right to get a job and a decent living for humanity, in the end will be realized the general welfare. With the globalization of free people in and out of a State with a variety of purposes. There are entering a country to travel, there are performing office tasks, to find work and others. The entry of foreigners is a part of human rights protected by the state. As for the number of foreigners who entered into Indonesia there are 2 (two), namely temporary residence and permanent residence. In Indonesia many companies with various business fields accept foreign workers, or known as Foreign Workers, with higher salary / wages than Indonesian Workers.

In accordance with applicable law, the foreigner may establish a limited liability company in Indonesia, may take over the majority of a company's shares. Even after a period of time in Indonesia, if the foreigner wishes he can apply to become an Indonesian Citizen by Naturalization. In essence, these foreigners can commit a civil law act in Indonesia. With the openness of world social intercourse without limit, open also international trade relation. In the field of investment, the Government opens opportunities for investors to invest in companies in Indonesia, whether established with all or part of foreign capital in existing companies or establishing new companies in Indonesia.

Companies that use foreign capital facilities are subject to the applicable legal rules in Indonesia, such as regulations on investment, immigration and employment. In connection with the influx of foreign capital with the employment problems faced by the Government, it is expected that foreign capital can play a role in opening opportunities or employment opportunities for the Indonesian nation, or in other words so that the available employment opportunities as much as possible can absorb the Indonesian workforce. Against this background, the use of foreign nationals must be arranged in such a way that their existence does not interfere with or diminish the opportunities that Indonesian Workers should have.

To promote economic development and growth, equitable distribution of development to all corners of the country, expansion of employment/employment opportunities, and expansion of employment in Indonesia, the Government allows firms to import or use foreign workers only if there is no Indonesian labor available for skill / skill certain. The use of Indonesian workers should take precedence over the use of foreign workers. Foreign workers are used only to do certain jobs that Indonesian workers have not been able to do and for a certain period of time as well.

Foreign workers who are allowed to work in Indonesia is only in the field of work that is not controlled by the people of Indonesia. As for the field of work that is able to run the people of Indonesia, do not need to be submitted to foreign workers. (www.ppfshop-spsi.blogspot.com). with foreign workers to work on a difficult job, Indonesian workers can gain knowledge and experience of foreign workers, so that later no longer need to bring in foreign workers.

The use of foreign workers requires legal arrangement by the Government in the form of legislation. The law is not only used to regulate behavior that already exists in society or to maintain custom patterns that already exist in people's lives. Moreover, the law is directed to be used as a means to a desired destination. Law is the norm that directs society to achieve goals or a certain circumstance by not ignoring the world of reality. Therefore, the law is primarily made with full awareness by the state and is used to achieve a certain goal. The use of foreign workers is regulated in Law Number 13 of 2003 on Labor, from Article 42 to Article 49. Any employer employing foreign workers shall have written permission from a designated minister or official.

In this description the employer is defined as those who provide employment to a person or employment, which includes natural persons, employers, legal entities or other entities employing labor by paying wages or other forms of remuneration. Under the Employment Act, the employer must submit a written permission to the Minister accompanied by a plan for the use of foreign workers. With the use of this plan is intended for the use of foreign workers can be done selectively in order to optimize the utilization of Indonesian labor, because the Indonesian workforce is the subject and object of development. Article 43 section 2 of the Labor Law provides that the plan for the use of foreign workers should at least contain the following information:

a. Reasons for the use of foreign workers;
b. Position and / or position of foreign worker in the organizational structure of the company concerned;
c. Duration of use of foreign workers; and
d. Appointment of Indonesian citizens as employers of foreign workers employed.

The provisions on the procedures for the use of foreign workers shall not apply to the use of foreign labor for government agencies, international agencies, and representatives of foreign States. As outlined above, the use of foreign workers is only in certain positions or positions within a company, and for a certain time also, in article 44 section 1 of the Labor Law states:

1. Foreign employers shall comply with the provisions concerning the applicant's position and standard of competence.
2. The provisions concerning the position and standard of competence referred to in section (1) shall be regulated by a ministerial decree.

In order to enter into any country and for any purpose, foreigners must comply with applicable requirements in that country. According to article 1 point 13 of Law Number 13 of 2003 on Employment:

> "Foreign workers are foreign citizens of visa holders with the intention of working in the territory of Indonesia"

Although the right to work is a basic human right, including the human rights of foreigners residing in Indonesia, the existence of this foreigner must remain limited in terms of existence and activities in Indonesia. Regarding restrictions on the space for foreigners to enter and work in Indonesia can be seen in Law Number 6 of 2011 on Immigration which regulates some types of permits for foreigners. To enter Indonesia, foreigners must meet many requirements, especially if you want to work in Indonesia more and more requirements that must be met. The number of requirements to be met by the foreigner makes more and more agencies involved in it and this requires active coordination among agencies that must be supported by strict and strict rules. Although the presence of foreigners in Indonesia only temporarily resides, they can earn a living.

Many types of work are open to foreigners. A closed job for foreigners is just a job as a civil servant. The majority of foreigners working in Indonesia come from Japan, Malaysia, China and South Korea, but some are from other countries, although not as many as coming from those four countries. By the end of 2008, the number of foreign workers worked in Indonesia and registered officially reached 83,453 people, up 11.4 percent compared to the year 2007 of 74.915 people. The amount does not include the unofficial. In the field of business, foreign workers can only be at the level of directors and managers who really have excellent human resources, and are not owned by Indonesian workers, as they concern the culture. To know the culture of an area, especially the country is very difficult. For that the Immigration should be really selective determining foreign workers work in Indonesia. (www.tempointeraktif.com 27 April 2010). In the modern legal state of duty, the authority of the government is not merely to maintain order and security (*rust en orde*), but also to seek the common good (*bestuurszorg*).

Although foreigners reside temporarily or permanently, they may even become residents of Indonesia when they meet the prescribed conditions, but they have rights and obligations that are different from the rights and obligations of Indonesian citizens. When it comes to rights, foreigners are subject to certain restrictions. In order to carry out its duties, the Government is empowered in the field of regulation by enacting legal regulations to regulate all aspects of life, from the highest form of regulation to the lowest regulation.

Regarding the rights and obligations depends on the qualification of the foreigner who came to Indonesia, meaning the purpose of his arrival to Indonesia was for what, whether to work or for other purposes. But usually that will be very intersecting with the status of citizenship when married in Indonesia with Indonesian citizens. According to the Immigration Act, strangers are limited by their space, whenever a violation of the Immigration Code of the foreigner may be deported. In Indonesia, foreigners may not engage in political activities. Foreigners residing in Indonesia do not have the right to vote in the General Elections; therefore they cannot hold political positions.

On the other hand, in the case of economy, foreigners who work or do business in Indonesia must have a work permit, known as a Work Permit for Foreign Workers and a valid business license from the relevant Minister. According to Syachran Basyah, 42 permits are legal acts of state-sized administrative law that apply the rules in concrete terms based on the requirements and procedures as stipulated by the provisions of legislation. In working or doing business in Indonesia, foreigners need to be limited to their motion in order not to endanger the national interest, especially concerning employment and the job market. It needs to be done by the Government to make employment opportunities for Indonesian citizens more widely open than employment opportunities for foreign workers.

Given the interrelationship of the regulation of human rights in working for Indonesian citizens and foreign citizens, and maintaining the sovereignty of the state indeed the Government must coordinate in making the rules not to collide with each other. For existing regulations, revisions should be made. Efforts towards revamping towards deregulation were also started. In 2016 the Government together with the Minister of Home Affairs evaluated 3,153 local regulations with the cancellation by the Constitutional Court. In my opinion, these rules should not be canceled, but immediately revoked. In order to accelerate development, regulation improvement by the Government needs to be done with coordination from the central level to the regional level, ie in order to avoid overlapping regulations. Coordination of the manufacture or improvement of regulations should be done, because the development of a field related to the development of other fields. For example economic development, because it will relate to the field of law, so and so on.

During this time there is often a lag in the development of a field because it stuck on the quality of regulations that are low. Formally the definition of legislation is contained in Law Number 12 of 1211 Concerning the Establishment of Legislation, namely "a written regulation containing general legal norms and established or stipulated by state institutions or authorized officials through established procedures in the Laws and Regulations." Legislation is intended as a code of conduct in the society, nation and state. In the administration of the state, the regulation is an instrument to realize the policies of the state in order to achieve the goals of the state. As an instrument to realize every state policy, the regulation must be established in the right way so as to produce good regulation and able to encourage the implementation of social dynamics orderly and able to encourage the performance of state administration. (Ministry of PPN / Bappenas, 2015)

In this era of reformation, it is not unusual for a new regulation to emerge in a diverse society reaction. The occurrence of community reactions can be understood because a rule is made by involving many factors and the actors behind that factor. Not to mention later in its implementation and law enforcement must be many reactions that appear in the community. As a big and growing nation, it is appropriate for the Indonesian people to reflect on the description in Considerance letter a on Law Number 12 Year 2011 which reads as follows:

> " in order to realize Indonesia as law base country, the state has obligation to carry out the development of a planned, integrated, and sustainable national law in the national legal system that guarantees protection of all rights and obligations of the people of Indonesia based on the 1945 Constitution of the Republic of Indonesia."

From the description of the drafting of legislation which in fact is a public policy, it appears that a law of at least is always made by administrative, academic and political considerations. In this reform era, state institutions always involve academics at the time of arranging or adjusting a regulation, namely in the form of holding Focus Group Discussion (FGD) forum with universities, with the intent and purpose for a draft of regulation can be accounted academically .

Closing

The wisdom of the use of foreign workers to date remains in the areas and types of work that the Indonesian labor force cannot yet fill and the use thereof is timed. To achieve this objective, the Government has issued various policies that limit the use of foreign workers, the main requirement is the existence of written permission from the minister and the existence of rules that the use of foreign workers must be accompanied by Indonesian workers as a companion in carrying out its work, so that after the workforce the foreigner returns to his country his work can be continued by the Indonesian workforce. Most importantly, there is a strong commitment from the Government to reorganize existing regulations to create protection for

its own citizens, in order to contribute to the enhancement of competitiveness towards the realization of common prosperity.

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Law and Regulation

1945 Constitution of Republic of Indonesia
Indonesian Law No. 13 of 2003 on Labor
Indonesian Law No. 12 of 2011 on Immigrations

NORMATIVITY OF ECONOMIC DEMOCRACY IN REGULATION FOR MICRO, SMALL, AND MEDIUM ENTERPRISES IN INDONESIA

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ABSTRACT

After the amendment of The 1945 Constitution of the Republic of Indonesia, the form of the Indonesian economic system is economic democracy. Nevertheless, the normativity of The 1945 Constitution of the Republic of Indonesia especially related to the meaning of economic democracy and its implementation still needs further assessment in accordance with the dynamics of the Indonesian economy in various sectors. This paper describes how the normativity of economic democracy in relation to the regulation of Micro, Small and Medium Enterprises (MSMEs) in Indonesia with the focus of the problem: What are the essence and basic principles of Indonesia's economic democracy? And how is the normativity of economic democracy in relation to the regulation of MSMEs in Indonesia? The conclusion is that the essence of economic democracy is an economic system that institutionalizes the sovereignty of the people by involving all levels of society in the development process, closely related to the aspect of justice and rests on fair market mechanisms with the aim of improving overall economic welfare or the majority of society. While the normative arrangement of MSMEs in Indonesia is based on the principle of welfare state in which the State must perform various interventions in the field of economy, realizing the equity of trying and protecting small businesses from various forms of unhealthy business competition practices.

Keywords : Economic democracy, MSMEs

Introduction

Economic democracy is a concept initiated by the founding fathers of Indonesiato find an appropriate form of economy and in accordance with the character of the Indonesian nation. Indonesia's economic reform needed is reform of the economic system, which updates the rules berekonomi be rules that better ensure economic justice through increased even distribution of development outcomes. Economic reform requires a normative foundation for the strategy, policy and program direction.

The implementation of the concept of economic democracy are being sought and developed its shape until now, because it is not easy to establish a system of distinctive Indonesian economy but still in accordance with the changing times. According to Arief Sritua, Juoro judge that contains the moral consequences of economic democracy, but it is specifically highlighted as the form of a blend of political, economic, moral and cultural. Political systems, economic, moral and cultural work dynamically, balanced, and not subordinate to each other so that each interact well.[1]

The cornerstone of the Indonesian economy is normative system in Article 33 of the Constitution of 1945. This article has been changed and developed in more detail after the amendment. Originally Article 33 of the Constitution of 1945contains 3 chapters:

1) The economy is structured as a joint venture based on family principles.
2) Production branches which are important for the country and dominate the life of the people controlled by the state.
3) The earth and water and natural resources contained in it are controlled by the state and used for the greatest prosperity of the people.

After the amendment on the article, there are two sections (4 and 5), namely:

1) The national economy shall be organized based on economic democracy with the principles of justice, solidarity, efficiency, sustainability and environmental insight, independence and by keeping a balance between progress and unity national economy.
2) Further provisions on the implementation of this article are regulated by law.

Related to amendment of Article 33 of the Constitution of 1945The Mubyarto notes that the retention of the old Article 33, section 3 is indeed in accordance with the will of the people, which is formulated Article nuanced founding fathers of socialism in the spirit of family, group, and collective rather than competition. However, with the addition of section 4 to be biased by the new section is technical matters concerning the management and implementation of policies and programs for economic development. The mind behind this new section is understood free market competition that requires the inclusion of explicit provisions in the Constitution of the free market system.

[1]www. Kompasiana.com, *DemokrasiEkonomi*, accessed on September 25th, 2017, at 08.00 WIB

The principle of efficiency of justice in the new section 4 is difficult to explain the intent and purpose as it combines two concepts are clearly very different and even contradictory.[2]Mubyarto above outlook is quite reasonable because confusion could give birth because of legal interpretation that *contradiction in* terms

Thus the normative already arranged that after the 1945 amendment, a manifestation of our economic system is economic democracy. However normativity Law of 1945, especially related to the meaning of economic democracy and its implementation still need further assessment in accordance with the dynamics of the Indonesian economy in various sectors.

Economic democracy as an ideal picture of the national economy will not escape from the strengthening of democratic government into regulating and steering the passage of the national economy. Without a strong government, in the sense able to distribute the rights and obligations of each economy in a fair economy, the economy truly democratic would be difficult to materialize. The government has a strategic role in realizing and prevent negative elements of economic democracy through regulation, policy, ethics, norms and principles of justice.

Edy Suandi Hamid stated that the process of national economic development that has been taking place is actually not the fruit of a process of democratization also equally take place, but only a "sweetener" policy made by the government and compromise legislative, solely for the sake of power and not for the sake of rakyat.Ini means, the process of democratization that is being built yet would give maximum impact to the economic life of the people during the actual mechanism is not practiced democracy and to the attention of the party and government[3]

In other words, the real economic democracy has not really implemented in the context of the current Indonesian politics. Only with economic democracy really done well, people are able to participate in the creation and execution of the decisions that affect him. Without this, the new economic democracy that occurred in the form of formal democracy and ceremonial in addition to costly, also does not guarantee the creation of an effective government.

One of the issues related to the meaning of economic democracy is the setting of Micro, Small and Medium Enterprises (SMEs). The number of industrial businesses, including most SMEs Indonesia among other countries, especially since 2014. The number of SMEs in Indonesia continues to experience growth from 2015, 2016 and 2017 the number of SMEs in Indonesia will continue to grow. (data MSMEs 2015, 2016, 2017) In recent years, the population of productive age population by more than the number of jobs available. This triggers especially the youth to create his own chances to open a business. Most of the businesses classified as an industrial sector for Micro, Small and Medium Enterprises (SMEs). Data from the Ministry of Cooperatives and Small and Medium Enterprises in 2014, there were approximately 57.8 million SMEs in Indonesia. In 2017 and the next few years is estimated the number of SMEs will continue to grow.

The era of globalization and economic liberalization a bad impact and make it difficult for SMEs to conduct business. Romli access Atmasasmita declared negative of capitalism is evident from the cases of unfair competition and monopoly businesses regardless of the local small and medium businesses, both in the domestic level as well as at the level of international business transactions. [4]In addition, SMEs difficult to get the same opportunities, especially in controlling the market and gained access to capital in financial institutions (banks). Conversely large enterprises can freely control of economic resources of public and consequently reduces the chance of small and medium-sized enterprises[5].

The government has sought to protect and develop SMEs from various sectors, including the regulation. This is because SMEs have an important role in the life of the Indonesian economy. SMEs can create jobs and provide equal opportunity to strive pretty big. In addition, SMEs as well as a contributor to the national economy through tax revenues, fees and other receipts form. SMEs are also rated as the spearhead of the national industry.

Law aims include providing protection for people who are in a weak position, both weak socially, politically and economically. Forms of legal protection in the economic field is required particularly with regard to the existence of small businesses in the face of free competition. From the aspect of legal philosophy purpose of protection to small businesses is in efforts to achieve economic justice through the equitable distribution of business opportunities.

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[3]Edy Suandi, *Memperkuat Basis Demokrasi Ekonomi Melalui Pengembangan Ekonomi Rakyat* http://edysuandi .staff.uii.ac.id, accessed on September 20, 2017 at 08.10 WIB.

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PROBLEMS

Based on the background description above problem issues in this paper are:

1. What is the essence and the basic principles of economic democracy in Indonesia?
2. How normativity of economic democracy in relation to the setting of SMEs in Indonesia?

Discussion

1. T

he essence and basic principles of economic democracy in Indonesia.

In accordance with the provisions of Article 33 of the Constitution of 1945before the amendment, the principle of our economic management should embrace "economic democracy".

The concept of economic democracy is not a new vocabulary in conversation Indonesia.Pada economic system in the 1930s, Bung Karno in-depth review of the concept of "social-democratic", that is a mix of political democracy and economic democracy. According to the Bung Karno, a true democracy is not limited to political democracy but also must contain economic democracy.

At almost the same time, Bung Hatta also review about this economic democracy. Economic democracy is a "populist-economy" or "economic disquiet and economic equilibrium. Bung Hatta,economic *laisses-faire* system,in the spirit of *free* enterprision,incompatible with the ideals of a just and prosperous society. Because, in the eyes of Bung Hatta, this system will lead to the rich getting richer and the poor grow destitute[6].

Bung Karno and Bung Hatta does not agree that capitalism is rampant. The formulation of the two main characters founder of the Republic of Indonesia, also the founding figures of other nations, span the 'hierarchy properly in Article 33 of the Constitution of 1945before the amendment. Furthermore, Article 33 of the Constitution of 1945Explanation of the democratic principles of economic parse it as follows:

> *"The economy is based on economic democracy, prosperity for everyone. Because the production branches which are important for the country and dominate the life must be controlled by the state. Otherwise, the supreme production will fall into the hands of those in power and the people are much opposed."*

"The term" economic democracy "appears in the elucidation of Article 33 of the Constitution of 1945whose meaning refers to the Indonesian economic system. However, the term "political democracy" and even the term "democracy" itself is not found in any part of 1945 before amandemen.Padanan said democracy is the sovereignty of the people. This corresponds to the notion of democracy put forward by US President Abraham Lincoln, that government of the people,by the people ,and for the people. Referring to the definition, the definition of economic democracy is the core of production by all, for all which implies participation and equity. In the language of ontology Raharjo Dawam Democratic Populist Economy Indonesia is based on people's social and economic justice that institutionalize sovereignty[7].

Meanwhile, according to A. Simarmata term economic democracy, which is expressly contained in the Company 1945, can be interpreted as the equivalent of social economy. Elucidation of Article 33 of the Constitution 45 declares that the people's economy economic system in which production is done by all, for all, as well as under the ownership of members of the public. Thus one of the pillars of economic democracy is the participation of everyone in the production[8].

According Mubyarto, democratic economy is a democratic economic prosperity of the people devoted to small[9].

Meanwhile, according to Zulkarnain, democratic economy is an economic system that must be adopted in accordance with the philosophy of our country concerning two aspects, namely justice and economic democracy, and economic alignments to the people[10].

An understanding of the people's economy can be viewed from two approaches: *first*, the approach of economic activities of small-scale economic actors, who are called the people's economy. Under this approach, the purpose is economic empowerment empowerment of small-scale economic actors. *Second*,the approach of the economic system, ie economic democracy or democratic development system, called participatory development. Based on this second approach, the economic empowerment of the people intended to apply the principles of democracy in development. This means that the people's economy is the economic system that involves all levels of society in the development process in which all the layers without exception as a driver of development.[11]

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[6]http://www.berdikarionline.com/kembali-ke-demokrasi-ekonomi/accessed on September 26, 2017, at 20.30

[7]Dawam Raharjo, *Nalar Ekonomi Politik Indonesia*, IPB Press, Bogor,2011, p. 16

[8]A. Simarmata, *Reformasi Ekonomi*, Jakarta , Lembaga Penerbit Fakultas Ekonomi UI, 1998, Cet. Ke-1, p. 117 .

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[11]Ibid

Meanwhile, according to Salim siagian, the people's economy is an economic activity the masses in a country or region that is generally lagging behind when compared with the economy of the country or region concerned, on average. And in another sense says that the people's economy is indigenous economy, not economic activity that comes from outside the community activities *(external economy).*

Thus, the meaning of the people's economy is the economy or economic development communities that developed relatively slowly, in accordance with the conditions attaching to the community[12].

Explanation of the 1945 Constitution says that build businesses or appropriate form of economic organization is a cooperative. Cooperative rated reflects the understanding "of all, for all, under the leadership or members of the public ownership" with a society in which prosperity is preferred, not prosperity by an individual.

Based on the description of some of the above definition, it can be concluded that the essence of economic democracy is the economic system that institutionalize sovereignty of the people by involving all levels of society in the development process, closely related to aspects of fair and based on market mechanism fair with the aim of improving the welfare of the overall economy or the majority of people.

Soeharto Prawiro Kusumo[13], suggests some traits and principles contained in the concept of democracy economy as follows:

a. Upholding the principle of justice with a concern for the weak.
b. Siding, empowerment, and protection of the weak by all the potential of the nation, particularly the government in accordance with its capabilities.
c. The creation of healthy competition and market-friendly.
d. Empowerment of people's economic activities closely related to efforts to move the rural economy.
e. Utilization and use of land and other natural resources, forests, sea, air, water, and minerals. Everything must be managed in a fair, transparent and productive by giving priority to local people's rights, including customary rights of indigenous peoples while preserving environmental functions life.

Having undergone four amendments finally determined that the explanation of 1945 is no longer a part of the content or the content of the 1945 Constitution Important things are still in use included in the torso (part-perpasal article). Economic democracy principles laid down in the Company Constitution 145 before the amendment was finally fixed accommodated in Article 33 section (4) the Constitution in 1946 after the amendment as follows:

> *"The national economy shall be organized based on economic democracy with the principles of justice, solidarity, efficiency, sustainability and environmental insight, independence , and balancing economic progress and national unity ".*

It appears here that the differences observed when the formulation of the sentence that would result in a fundamental difference of meaning. Before the amendment explicitly states the formulation of the sentence*"The economy is based on economic democracy, prosperity for* all".Meanwhile, following the amendment to the formulation is*"The national economy shall be organized based on economic democracy* .."

Thus the normative according to the author for this time in the Republic of Indonesia in 1945 after the amendment, economic democracy is no longer a basis (philosophy) national economy but "only" as a basis for organizing the national economy. However, the concept of economic democracy is still maintained.

Associated with the basic principles of economic democracy in Indonesia based on the provisions of Article 33 section (4) of the 1945 Constitution the principle of economic democracy in Indonesia today is justice, solidarity, efficiency, sustainability and environmental insight, independence and by keeping a balance between progress and national economic unity.

While the basic principles of economic democracy Indonesia 1945 before the amendment include:

a. The principle of kinship. in the explanation of 1945 stated that the economy is structured as a joint venture based on the principle of kinship.
b. The principle of fairness. Implementation of democratic economy should be able to realize justice in society.
c. The principle of equitable distribution of income.
d. The principle of balance between individual interests and the interests of society.

2. N

ormativity of economic democracy in relation to the setting of SMEs in Indonesia.

Philosopher John Rawls in his book *The Theory of Justice* is harshly critical of free market economic system. According to Rawls free market economic system raises even increase the economic inequality between the rich *"read big business"* with the poor *"small* business".

[12]MajalahUsahawan No. 02 Th XXX Februari 2001
[13]SoehartoPrawiroKusumo, *Ekonomi Rakyat : KonsepKebijakandanStrategi*, Yogyakarta : BPFE,tth, p. 4

The free market did not work according to Rawls ensure an equitable economic equality, therefore according to Rawls free market would lead to injustice. Free market system opens opportunities for the strong eat the weak *"(Monopoly)"*, the rich get richer *(conglomerates)"*[14] .

Based on the way the mind Rawls, Sidarta, expressed inability to compete for the opportunity (trying) lives better, may be caused by their *unfairness* in society. So there is always the possibility of someone poor (read small) not because he was lazy to work but are not given the chance ("chance") to improve the lot. Banking institutions shut down for them because they can not show sufficient collateral[15]. The opportunity to evolve towards better is what must be guaranteed by any legal system. The social system according to Rawls must be set so that in the end, based on equal opportunities and freedom for all. This social system works in such a way to benefit the group most lacking these basic beruntung.Atas Rawls put forward the principle of distinction *(Difference Principle).*Law that serves as a social engineer is expected to change the situation better against disadvantaged groups (read small businesses).

The principle of equality of treatment requires that some cases are treated equally and different cases are treated differently *(Treat like cases alike and different cases differently.*To achieve justice in the long term can only temporarily opened the possibility applied different treatment to individuals (affirmative action included in this context). the legal system it is possible to tolerate this, because of the difference in treatment (exemption) in law is also an inherent[16].

ccording to John Rawls in Sonny Keraf, social inequality and the economy should be regulated such that the inequality the benefits those who are most disadvantaged. John Rawls also wants to dilute the social and economic inequality as a result of free competition is bad for Small Business. for that Rawls states setting must be carried out within the framework of political institutions and legal governing economic events and maintain social justice.

Further Rawls asserts that the program populist dimension of justice must give attention to two principles of justice, namely; *The first* gives the same rights and opportunities on the most extensive basic liberty covering the same freedom for everyone, and *secondly*able to rearrange the socio-economic gap that occurs so that it can provide benefits are reciprocal *(reciprocal benefits)* for everyone, for those who belong lucky or unlucky.

In line with the thinking of John Rawls, the philosopher Jeremy Bentham homage to utilitarian emphasis on protecting the function of the law to realize equality, equal opportunities *in work* through the legislation, because the law can make changes to realize the equation.

In the view of Bentham States can prevent the accumulation of wealth by the few people who live in luxury at the expense of the many. With the wealth piled on a few people create injustice in view of Rawls. For that countries should take action to prevent this from happening it. Government is held to assure people that he can enjoy the natural rights and rights that is not written. The main function of the law which is to protect and maintain the balance of the various interests[17].

According to the theory of the Welfare State, the State take responsibility for the welfare of every citizen based on the values of equality and justice. The realization of the state's responsibility is to conduct interventions in the economy, especially in trying to ensure equitable and protect the small businesses of various forms of unfair business competition.State intervention can be done by issuing a variety of legislation in the economic field, especially with regard to SMEs.

Legally the Government of the Republic of Indonesia has enacted Law No. 20 Year 2008 on Micro, Small and Medium Enterprises and various implementing regulations such as PP 17 Year 2013 concerning the Implementing Regulations of Law No. 20 Year 2008. In addition to the regulatory aspects of the Indonesian government has also established a structure in the form of the duties and functions institutions nurture and develop SMEs, which the Ministry of Cooperatives and SMEs. While at the local level based on autonomy possessed authority may establish Department / Agency for Cooperatives and SMEs which carry out a work program in accordance with the duties and functions of each.

In the preamble to weigh Act No. 20 of 2008 on Micro, Small and Medium Enterprises stated:

a) that the just and prosperous society based on Pancasila and the Constitution of the Republic of Indonesia Year 1945 should be realized through the development of national economy based on economic democracy;
b) that the public in accordance with the mandate of MPR XVI / MPR / 1998 on Political economy in the context of economic Democracy, Small, micro and medium enterprises need to be empowered as an integral part of people's economy has the potential role and strategic position to realize the structure of the national economy are growing and justice;

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[14]Sonny Keraf, 1998, pp. 153-155.

[15]Sidarta, "*Konsep Di skriminasiDalam P erspektif F ilsafatHuku m*", d ala m B utir -ButirPemikiranDalamHukum; Memperingati 70 Tahun Prof. Dr. AriefSidharta, S.H., PeneribitRefikaAditama, Cet. II, Jakarta, 2011, p. 117

[16]*Ibid*

[17]W. Friedman, *TeoridanFilsafatHukum*, terjemahan Muhammad Arifin, Rajawali Press, Jakarta, 1990, pp. 115-118.

c) that the empowerment of Micro, Small and Medium Enterprises as referred to in point b, should be organized as a whole, optimal and sustainable through the development of a favorable climate, the provision of business opportunities, support, protection, and business development widest, so as to increase position, role and potential of Micro, Small and Medium Enterprises in realizing economic growth, equity and improvement of people's income, job creation, and poverty alleviation

Before the Law 20 of 2008 is in force, the previous government has issued Law No. 5 of 1995 regarding Small Business in considers also stressed the importance of economic empowerment philosophy as small as an integral part of the national economic development in realizing economic growth, equal opportunity to strive in order to create a just and prosperous society.

According to Article 6 of Law No.20 Year 2008 on the criteria of SMEs in the form of capital is as follows:

1) Criteria for Micro are as follows:
   a) has a lot of wealth net worth Rp50,000,000.00 (fifty million rupiahs), excluding land and buildings business; or
   b) have annual sales of at most Rp300,000,000.00 (three hundred million)
2) Small Business criteria are as follows:
   a) has a wealth net worth from 50,000,000 to at most 500,000,000.00 (five hundred million), excluding land and buildings; or
   b) have more than Rp300,000,000.00 annual sales results (three hundred million rupiah) up to at most Rp2.500.000.000,00 (two billion five hundred million rupiah).
3) Criteria Medium Enterprises are as follows:
   a) has a wealth net worth of 500,000,000.00 (five hundred million rupiah) up to at most 10,000,000,000.00 (ten billion rupiahs), excluding land and buildings; or
   b) has an annual sales turnover of more than Rp2.500.000.000,00 (two billion five hundred million rupiah) up to at most Rp50.000.000.000,00 (fifty billion rupiah).

Act MSMEs has set a goal of MSMEs as stated in Article 3 which reads: Micro, Small and Medium Enterprises aims to foster and develop their business in order to build a national economy based on economic democracy with justice.

While the empowerment of SMEs do to is to achieve balanced national economic structure, developing, and justice; With the ability to grow and berkembangkan Micro, Small and Medium Enterprises become a strong and independent businesses are expected to SMEs more involved in regional development, job creation, income generation, economic growth and the alleviation of people out of poverty.

One of the difficulties of small businesses in developing a business is the lack of business management and the difficulty of getting capital. Generally, SMEs also have difficulties in dealing with free markets and economic globalization.

To overcome the various problems concerning capital through Law No. 20 In 2008 the Government set a few steps and strategies is to diversify the funding sources and facilitate Micro, Small and Medium Enterprises to have access to bank credit and non-bank financial institutions. In addition it also made efforts to expand financing institutions and expanded its network so it can be accessed by Micro, Small and Medium Enterprises; Similarly, by making it easier to obtain funding fast, accurate, inexpensive, and does not discriminate in the provision of service in accordance with laws and regulations.

Closing

1. C

onclusion

a. The essence of economic democracy is the economic system that institutionalize sovereignty of the people by involving all levels of society in the development process, closely related to aspects of keadilandan based on fair market mechanism which improvement goal to increase overall economic welfare or the majority society.
b. Normativity setting SMEs in Indonesia is based on the principle of the welfare state in which the State is required to conduct interventions in the economy, ensure equitable to try and protect small businesses from various forms of unfair business competition.

2. S

uggestion

Indonesian economic ideology requires enactment understand that berasas familial togetherness, which is of course at odds with the ideology based on individualism and liberalism. Therefore, setting SMEs in Indonesia must be sterile from the concept of economic development liberal flow because it does not correspond to the values and ideology of the Republic of Indonesia.

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THE HUMAN RIGHTS IN THE LIFE ENVIRONMENTAL PERSPECTIVE

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ABSTRACT

The Human rights as natural rights is a necessity of a universal social reality. In the concept of the State of law there is an attachment of government power to the law and guarantee of the protection of human rights. The Environmental law is one of the public policy instruments of state law on environmental management. Environmental management is the power of the government, which is material meaning state power that does not include legislative and judicial power, and in formal terms is a form of government action. Since the birth of the rule of law, environmental law has the main function of protecting the human rights based on the principles of good administration.

Keywords : Human Rights, Environmental Law

Introduction

Natural resources are constitutionally controlled by the state, as embodied in the Constitution of the Republic of Indonesia Year 1945, which in Article 33 paragraph (3), that the earth, the water, and the riches contained in it are controlled by the State. The definition of controlled has been described in the BAL, which in Article 3 in essence says, that: 1) the State as an organization of power will set the designation and operation of natural resources in the public interest; 2) the government has the natural resources; and 3) the government held the utilization of natural resources for equity and improve welfare society.

Natural resources are environmental elements which consist of non-biological resources and biodiversity as a whole form a unified ecosystem. Law No. 5 1990 about Conservation of Biological Resources and Ecosystem, said that the definition of natural resources are the elements of biological in nature consisting of plant natural resources (plants) and animal natural resources (wildlife), which along with other elements non biological surrounding the overall shape of the ecosystem. While the conservation of natural resources is the management of natural resources which utilization is done wisely to ensure continuity of supply while maintaining and improving the quality of a multifaceted and value.

Environment as a whole space with all its components is a gift of Almighty God and the nation of Indonesia is also the space where the activity takes place at the same time is a natural resource that must be managed properly. As stipulated in Article 1 point 1 of Law No. 32 of 2009 on the Protection and Environmental Management, that is the environment hdup is unity with all things space, power, state, and living beings, including humans and their behavior, which affect nature itself, the continuity of livelihood and well-being of humans and creatures another life.

Thus, it can be said that in a state, which is considered as fundamental problems are not unique to defend and defend human rights, but also to defend and maintain the quality of the environment is good and healthy. Human rights issue and the environment be the subject of two equally important in the life of this modern country.

UU no. 32 of 2009 on the Protection and Management of the Environment has put every person is entitled to a good environment and healthy part of human rights, as stated by Masyhur Effendi that the "breaking of human rights associated with different political systems, system state and law from different countries is an interesting phenomenon as a further study of human rights law.[1]

Not pro-environmental development could threaten the sustainability of the development. Thus, the need to understand the universe in relation to man, where man is no longer the absolute determinant for natural life. Natural and man must live in balance. The presence of Almighty God is the human perspective that he was not the center of everything, then God's presence must be included for complete environmental damage caused by the pattern of relationships that are not balanced between man and nature.

Man is forced to do justice to their fellow creatures of God, namely the natural surroundings and the universe that are beyond the human self. Not only human rights but also of the universe, where nature has basic rights or fundamental rights myself for not undermined and disturbed balance. Because the natural carrying capacity to sustain human life from generation to generation are maintained continuity of all time in order to realize*"sustainable* development".

[1] H.M Hadin Muhjad, 2015, Hukum Lingkungan, Sebuah Pengantar Untuk Konteks Indonesia, Genta Publishing, Jogjakarta, page 165

Discussion

Human rights is believed to have universal value. Universal value signifies no bounds of space and time, which is the product of national law in some countries universal value is defined to be able to protect and uphold human values, by Miriam Budiardjo, said that the basis of all human rights is mansia should have the opportunity to thrive according to their talents and ideals.[2] According to Mahfud MD, human rights are defined as rights inherent in human dignity as God's creatures, and human rights to be brought from birth on earth so that those rights are pure (natural) and not a human being or state administration.[3]

Formulating of human rights in an international script begins after the world experienced two wars involving almost the entire world where human rights are trampled. By 1948 has been accepted by countries that are members of the United Nations (UN), which charter known as *"Declaration of Human* Rights"(Statement of globally on human rights).

Previously had been born a few manuscripts that gradually established that there are some rights that underlie human life, and because it is universal and human. Naskat texts are as follows:[4]

1. *Magna Carta* (the Great Charter, 1215), a document is that note some of the rights granted by *King John of England to some nobles of his subordinates for their demands. This text also limits the power of King John.*
2. *Bill of Rights (Rights Act, 1689) a law adopted by the Parliament of Great Britain after the success of the previous year make a resistance against King James II, in a bloodless resolution (The Glorious Revolution 0f 1688).*
3. *Declaration des Droits de l'homme et du citoyen (statement of the rights of man and citizen, 1789), a text which was initiated at the beginning of the French Revolution, as resistance to the tyranny of the old regime.*
4. *Bill of Rights (Rights Act), a text compiled by the American people in 1789 (so the same year with the French Declaration*), and that becomes part of the constitution in 1791.

The 20th century US President, Franklin D Roosesevelt spark *The four Freedoms* (four Freedom), namely:

1. freedom of speech and expression*;*
2. freedom of religion*;*
3. freedom from fear*;*
4. Freedom from poverty.

The fourth rights, especially reflect the changes in the minds of human beings who think that political rights in itself is not enough to create happiness for him. Considered that the political rights such as the right to express an opinion or the right to vote in elections held once in four or five years, there is no meaning if the most basic human needs: the need for food, clothing and housing can not be met. According to this notion of human rights also include the areas of economic, social, and cultural.

In line with this thinking, namely that established by the UN Commission on Human Rights rights(Commission on Human Rights)in 1946 which stipulates in detail some of the economic and social rights in addition to political rights. In 1948 managed to make the Declaration On Rights Human Rights, adopted unanimously by the countries who are members of the United Nations, except five countries including the Soviet Union. Eighteen years after receipt of the statement rights Human Rights, could finalize the Agreement and at the end of 1966 the UN General Assembly approved by acclamation Treaty on the Rights of the Economic, Social and Cultural Rights (Covenant on Economic, Social and Cultural Rights) and agreements on Rights Civil Rights and Politics(Covenant on Civil and Political Rights).

Ten years later, on January 1976 Treaty on the Rights of the Economic, Social and Cultural Rights entered into force and ratified by 35 countries, while the agreement on Civil and Political Rights of then. Countries that ratify Denmark, Equador, the Democratic Republic of Germany, the Federal Republic of Germany, the Philippines, Romania, the Soviet Union and Yugoslavia. Countries that have not ratified the United States, Britain, India, Indonesia, Malaysia, Thailand and so on.

Rights Civil and Political Rights include:

1. Article 6 : right to life
2. Article 9 : right to liberty and security of person
3. Article 14 : right to equality before the courts and tribunals
4. Article 18 : right to freedom of thought, conscience and religion
5. Article 19 : right to hold opinion without interference
6. Article 21 : right to peaceful assembly
7. Article 22 : right to freedom of association

[2] Miriam Budiardjo, 1989, Dasar Dasar Ilmu Politik, Gramedia, Jakarta, page 120
[3] Mahfud MD, 2001, Dasar Dan Struktur Ketatanegaraan Indonesia, Rineka Cipta, Jakarta, page 127
[4] *Ibid*, page 120-121

while the rights of economic, social and cultural include:

1. Article 6 : right to work
2. Article 8 : right to form trade unions
3. Article 9 : right to social security
4. Article 11 : right to an adequate standard of living for himself and his family, including adequate food, clothing and housing
5. Article 13 : right to education.

Receipt of the statement and the agreement by the majority of the United Nations also shows clearly that the idea of the need for human rights are guaranteed, completely supported by all of humanity, and not a mere liberal ideas. Constitution of the Republic of Indonesia Year 1945 has mandated implied about the increase environmental status is associated with human rights. This assertion is contained in Article 28 H paragraph (1), which states that: "everyone has the right physically and mentally prosperous life, reside and earn a good living environment and healthy and receive medical care".

The provision of Article 28 H paragraph (1), clearly mengamantkan that the right to obtain a good environment is a human right. Thus, it can be said that the 1945 Constitution of the Republic of Indonesia, as said by Jimly Asshidiqie "very pro environment, so it can be called a green constitution ".[5] The provision of human rights means that the State guarantees the fulfillment of the right to a healthy and healthy living environment, besides that the State also has the right to prosecute everyone to respect the rights of others and, where necessary, to force everyone not to destroy and reflect the environment for the common good . Moreover Article 25 A of the 1945 Constitution of the Republic of Indonesia stipulates that "Unitary State of the Republic of Indonesia is an archipelagic State characterized by archipelagic territory whose boundaries and rights are established by law"

In connection with Article 33 paragraph (3) the Constitution of the Republic of Indonesia Year 1945, which stipulates that "the earth, air and the natural resources therein shall be controlled by the state and used for the greatest prosperity of the people", and Article 33 paragraph (4) it, which stipulates that "the national economy is organized based on economic democracy with the principles of togetherness, efficiency-justice, sustainability and environmental friendliness, independence, and balancing economic progress and social unity". Both of these verses has connote "ecosystem" in which the national economy based on economic democracy based on the principle of sustainability and environmentally sound.

Provisions of the legislation in the environmental field should be set on ecosystem management for the benefit of sustainable development, Act No. 32 of 2009 on the Protection and Environmental Management has been set up on the principles of environmental protection and management of life based governance is good because in each formulation and application of the instrument prevention of pollution and / or damage to the environment as well as prevention and law enforcement requires the integration of aspects of transparency , participation, accountability, and fairness. Law on Environment Protection and Management serves as an "umbrella" for the preparation of other legislation.

Protection and management of the environment is essentially the application of ecological principles in human activity on or the environment, particularly human ecology, which essentially lies in human interaction with the environment, as stated by Munadjat Danusaputro, that "the protection and management of the environment in the modern sense is an "ecology-oriented", so that the nature and essence is to follow nature and the nature of the environment itself ". [6] It said further by Koesnadi Hardjosoemantri, that the goal is "achieving harmonious relation between man and the environment, both the physical environment and socio-cultural environment".[7]

UU no. 32 of 2009 regulate the environmental behavior has an influence on human life, the environment is defined as defined in Article 1 paragraph 1 of Law No. 32 of 2009 is the unity with all things space, power, state, and living beings, including humans and their behavior, which affect nature itself, the continuity of livelihoods and human well-being as well as, other living creatures. According to Siti Sundari said that the legal environment needed to protect the environment in all its aspects at the present time is not only seen in their function as protection and certainty for the community (social control) with the role of "agent of stability) but were more pronounced means of development (a tool of social engineering) with the role as "agents of development" or "agents of change".[8]

[5] Jimly Asshidiqie, 2009, Green Constitutin, Nuansa Hijau Undang Undang Dasar Negara Republik Indonesia Tahun 1945, PT Raja Gravindo Persada, Jakarta, page 179

[6] Mudanjat Danusaputro, 1981,Hukum Lingkungan Buku II: nasional, Bina Cipta, Bandung, page 87-90

[7] Koesnadi Hardjosoemantri, 1983, Aspek Aspek Peran Serta Masyarakat Dalam Pengelolaan Lingkungan Hidup, Gadjah Mada University Press, Jogjakarta, page 42

[8] Siti Sundasri Rangkuti, 2000, Hukum Lingkungan Dan Kebijaksanaan Lingkungan Dalam Proses Pembangunan Nasional Indonesia, Airlangga University Press, Surabaya, page 7

In connection with the rights and obligations of any person, Act No. 32 of 2009 on the Protection and Management of the Environment in Article 65 paragraph (1) stipulates that "everyone is entitled to a good environment and healthy living as part of human rights". Paragraph (2) it determines that "everyone is entitled to receive environmental education, access to information, access to participation and access to justice in environmental katas ha filled the good and healthy" .Disamping get right to the good living environment and healthy, everyone is also is obliged to preserve the function of the environment and control pollution and / or damage to the environment, as provided for in Article 67 of the Constitution of the Republic of Indonesia Year 1945.

Implementation of pro-environmental development is development that can maintain and preserve the function of the environment in the context of national stability with regard strategic environment both locally, nationally and globally. Sustainable development contained in the report entitled "Our Common Future", namely cohesion between environment and development, as stated by Oekan S Abdoellah, that the idea of sustainable development due respect to harmony and balance in the relationship between man and God, man and man, and man with environment.[9]

Human rights in the perspective of the environment when it comes to the principles of good governance is essentially the implementation of human rights based on the "principles of good administration". Principle of good administration when referring to the opinion of Atmosudirjo Prayudi there are 13 (thirteen) principles, namely: 1) certainty; 2) balance; 3) similarity; 4) act carefully; 5) motivation; 6) Do not confuse authority; 7) decent game; 8) justice and fairness; 9) trust and respond to award reasonable; 10) nullify the result of a decision that invalidated; 11) the protection of outlook on life; 12) wisdom; 13) implementation of general interest.[10]

General principles of good governance into the governance guidelines in the implementation of environmental protection and management, in addition to referring also to the principles as set out in Article 53 paragraph (2) b of Law no. 9 of 2004 in conjunction with Law No. 5 of 1986 concerning State Administrative Court the same formulation with PSAL 3 of Law No. 28 of 1999 on Anti-Corruption, Collusion and Nepotism (KKN), which includes:

a. The principle of legal certainty;
b. The principle of orderly organization of the State;
c. The principle of public interest;
d. The principle of openness;
e. Asa proportionality;
f. The principle of professionalism;
g. The principle of accountability.

The principles of environmental protection and management as set out in Article 2 of Law No. 32 of 2009 on the Protection and Management of the Environment carried out based on:

a. state responsibility;
b. preservation and sustainability;
c. harmony and balance;
d. alignment;
e. benefits;
f. prudence;
g. justice;
h. ecoregions;
i. biodiversity;
j. polluter pays;
k. participatory;
l. local wisdom;
m. good governance; and
n. local autonomy

Principles of environmental management in its implementation is not only limited to the principles relating to the implementation of tasks and responsibilities in the environmental field, but also based on the hope the general principles in the administration of the state and the general principles of good governance in order to achieving good governance and ensure human rights.

[9] Oekan S Abdoullah, 2016, Pembangunan Berkelanjutan Di Indonesia, Di Persimpangan Jalan, PT Gramedia Pustaka Utama, Jakarta, page 15

[10] Philipus M Hardjon, cs, 2002, Pengantar Hukum Administrasi Negara, Gadjah Mada University Press, Jogjakarta, page 279

UNDP to formulate the characteristics of good governance (good governance), include:[11]

a. Participation
b. Rule of Law
c. Transparency
d. Responsiveness
e. Consensus orientation
f. effectiveness and efficiency
g. accountability
h. Strategic vision

Principle of good governance be implemented to realize good governance.Munculnya good governance concept originated from the interest of donor agencies such as the UN, World Bank and IMF in providing assistance capital loans to developing countries. According Hafifah Sj. Sumarto said that "good governance is set as a condition for the State that requires a loan, so that good governance is used as the standard determinant for achieving sustainable and equitable development.[12]

The concept and program donors world institutions oriented towards poverty alleviation, for poverty to be one factor inhibiting growth of development in a negara.Pembangunan in a state carried out primarily oriented to economic, social, cultural, political and political factors than environment so the environment began to be concentrated on the concept of environmentally sustainable development.

The term sound development sustainable environment as popularized by Brundtland report, namely "our common future" in 1987. The peak in 1992 when the Summit (Summit) in Rio de Janeiro Earth, Brazil accepted the concept of sustainable development as a political agenda of development for all countries in the world.[13]thus all aspects of the organization of the State need to consider the problem of sustainable development and environmental issues seriously.

Environment including the State administration category. According to P. de Haan, there are three functions of administrative law, namely:

a. Normative function (normatieve functie): includes organizations and government instruments.
b. Instrumental function (instrumentele functie): active instrumental function in the form of authority. Instrumenta function passive form of a regulation.
c. Assurance function (waarborgfunction) includes three types of collateral, the collateral of government (bestuurlijk waarbogrgen) concerning aspects of doelamatig and democratie include openness (opeenbaarheid), inspraak and brbagai control mechanism; legal protection (rechtsbeschermimg) dang anti losses (de schadevergoeding). [14]Then it was said further, that there are three main approaches in administrative law, namely:[15]
    1) This approach to government power, is very popular with the British administration approach to ultra vires, while the Dutch administration places great emphasis on aspects rechtmatigheid which essentially pertains to rehtmatiheidcontrol. Both approaches illustrate the power (government) as the focus of administrative law.
    2) Rights approach, a new approach in the British administration. This approach focuses on two things:
        a) Protection of human rights (principle of fundamental rights).
        b) Principles of good governance (principles of good administration). Among other things legality, procedural Propriety, participation, openness, reasonableness, relevancy, Propriety of purpose, legal certainty and proportionality).
    3) Functionaries approach, which is an approach to complement the approach of power and human rights approach, which specifies that the authority is to carry out an official. Therefore, administrative law giving attention to the behavior of the apparatus. Thus the administrative legal norms not only include behavioral norms apparatus (overheidsgedrag), norms of behavior measured by the concept of the mall administration. In the Netherlands the behavioral norms of the excavated apparatus ombudsman aspect.

Mal administration can be used as a benchmark and measure of good governance in governance. The form of action mal administration, among other things: actions clumsy (Inappropriate), distorted (deviate), arbitrary (arbitrary), in violation of the provisions of (irregular / illegitimate), abuse of authority (abus 0f

[11] Sedarmayanti, 2003, Good Governance (Kepemerintahan Yang Baik) Dalam Rangka Otonomi Daerah, Mandar Maju, Bandung, page 5
[12] Hafifah Sj. Sumarto, 2003, Inovasi, Partisipasi Dan Godd Governance, Yayasan Obor Indonesia, Jakarta, page 5
[13] Jimly Asshidiqie, 2009, log cit, page 136
[14] H Muladi, Editor, 2007, Hak Asasi Manusia, Hakekat, Konsep Dan Implikasinya Dalam Perspektif Hukum Dan Masyarakat, PT Refika Aditama, Bandung, page 65
[15] *Ibid*, page 65-66

power) or unnecessary delays (other undue delay) and compliance violations (equity).[16] Measures mal administration has Kitan closely with the attitude and behavior of the organizers of the administration of the State as a subject of law, which in theory the government has a special status, as the only party that is entrusted with the duty to regulate and organize the public interest which in order to carry out this obligation to the government given the authority to make regulations legislation, use of government coercion or impose sanctions, so that the implementation of the State government has a very dominant influence.

Mal administration action is contrary to the principles of good governance, because the meaning of good governance as a rule of ethics or morality in governance for ensuring good governance, while obviously mal adminitration as administrative act contrary to ethical or moral and legal. According to SF Marbun said that "the attitude of the State administrative acts in carrying out its functions carry out public services, thirst still based on applicable law and general legal principles accepted".[17]

In connection with dependents legal action, it says further by Sjachran Wet, that "in carrying out tasks of servicing the public itself actively, it is for the administration ngara arise consequences special, which is required Freies Ermessen that allows the law to be able to act on their own initiative. However, the decisions taken to resolve the problems that have to be morally accountable to God Almighty (MPR Decree No. II / MPR / 1978 and the law (PSAL 27 paragraph (1) of the 1945 Constitution which is the benchmark important in determining the tolerance limits of the State administration actions, so that for those affected by the action was not harmed. "[18]

Good governance is closely related to human rights, namely the general principles of good governance, thereby asas- governance principle bik be a basis for organizing the basic tasks of government, namely:

1) Assure the safety of every person and of society (to gurantee the sevcurity of all prsons and society itself)
2) Managing an effective structure for the public sector, the private sector and the public (manange to an effective framework of for the public sector, the private sector and civilsociety);
3) Advancing economic targets and other areas in accordance with the will of the people(topromote economic, social and other aims-in accordance with the wishes of the population).

Closing

Everyone is entitled to a good environment and healthy part of human rights. Good environment and healthy and the human rights provisions of the Constitution have been adopted in the Republic of Indonesia Year 1945 which mandates that state and government policies must not conflict with the provisions on environmental insights and principles of sustainable development.

Environment in the category of State administration, where the function and approach in the administration of the state is to protect the rights that are pleasing to the use of power, rule and behavior of apparatus in performing service to society. The power of government rests on the principle of legality.

Compliance behavior of officials in implementing the service function basing on the norms of decency behavior of officials in order to realize good governance for inappropriate actions of the authorities is an act of maladministration

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[16] Anton Sujoto, et al, 2002, Ombudsman Indonesia Masa Lalu, sekarang, Dan Masa Mendatang, Komisi Ombudsman Nasional, Jakarta, page 35-36

[17] SF Marbun dkk, 2001, Dimensi Dimensi Hukum Administrasi Negara, UII Press, Cet 1, Yogyakarta, page 285

[18] Sjachran Basah, 1997, Eksistensi Dan Tolak Ukur Badan Peradilan Administrasi Di Indonesia, Alumni, Bandung, page 285

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BUILDING GOOD GOVERNANCE SYSTEM USING DISCRESSION TO MAKE PEOPLE WELLBEING

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ABSTRACT

Health is a human right that must be realized in accordance with the ideals of the Indonesian nation as referred to in Pancasila and the 1945 Constitution of the State of the Republic of Indonesia. One of the public health problems currently faced is the double burden of non-communicable diseases. Implementation of effective non-communicable disease control in public health services requires serious attention by all parties, both stakeholders and the community. Non-Communicable Disease Control (PTM) regulations due to lifestyle changes in the globalization era are indispensable as the current increase in non-communicable diseases in Indonesia is in epidemiological transition, requiring adequate and comprehensive control efforts through promotion, early detection, treatment and rehabilitation. Reconstruction of non-infectious disease control regulation due to lifestyle changes in the era of globalization related to policies to be oriented towards improving the welfare and health of the people needs to be regulated institutionally.

Keywords : Regulation, Non Communicable Disease, Lifestyle in Globalization Era

Introduction

The Republic of Indonesia as a constitutional state based on Pancasila and the 1945 Constitution aims at realizing the living order of a prosperous, secure, peaceful, and orderly state and nation that ensures equality of citizens in the law. The Government shall not take arbitrary actions that are not in accordance with applicable law. Various regulations are the legal basis for government officials to carry out their duties, but ironically the existing legislation is sometimes still not strong enough to protect the government apparatus.

Good governance is the foundation for the formulation and implementation of democratic state policies in the era of globalization. The phenomenon of democracy is marked by the strengthening of public control over governance, while the phenomenon of globalization is characterized by interdependence between nations, especially in the management of economic resources and business activities. The business world and the owners of capital, which previously attempted to reduce the state authority assessed as likely to hamper business activity, must begin to recognize the importance of regulations that protect the public interest. In contrast, communities previously placed as beneficiaries, are beginning to recognize their position as stakeholders who also serve as perpetrators.[1]

A clean government generally takes place in a country where people respect the law. This kind of government is also called good governance. The good governance can only be built through a clean government with its bureaucratic apparatus free from Collusion and Nepotism Corruption (KKN). In order to realize a clean government, the government must have a moral and proactive fiber *checks* and *balances*.[2] It is impossible to expect the government as a component of the political process to fulfill the principle of clean government if it has no moral, proactive and *check* and *balances*.

The conception of *good governance* refers to the notion that power is no longer solely owned or governmental, but emphasizes the implementation of government functions jointly by governments, civil society, and private parties. *Good governance* also means the implementation of socio-political policies for the benefit of the masses, not just for the prosperity of individual people or groups.[3] *Good governance* is more emphasis on the realization of democracy, therefore the implementation of democratic state becomes an absolute requirement for the realization of good govemance, which is based on the existence of responsibility, transparency, and community participation.

Guided by these principles, it is hoped that later every policy taken by public officials can proceed according to the existing legal corridor. In realizing the basic principles of good governance the most fundamental is the prohibition of abuse of authority and the prohibition of arbitrary acts. On the other hand, the regulation also empowers the government to act and create a rule of law that deviates from the principle of legality, which is then called discretion.

The use of discretion because of the purpose of life of the state to be achieved, the purpose of statehood of welfare state understanding is to create people's welfare. In realizing the welfare of a government official

[1] Lalolo Krina. 2003, *Indicators And Benchmarks Accountability, Transparency and Participation.* Jakarta, BAPPENAS, Secretariat of National Policy Development of Good Governance, p. 1.

[2] J.H. Paper, 2002, *Political Philosophy: Plato, Aristotle, Augustine, Machiaveli*, PT. Raja Grafindo Persada, Jakarta, p. 59.

[3] Agus Dwiyanto, 2006, *Achieving Good Governance Through Public Service*, UGM Press, Yogyakarta, p. 78.

decides on a course of action under the provisions of rules, laws or applicable laws but on the basis of wisdom, judgment or fairness. It is interesting for the author to examine further in this article under the heading "Building Good Governance System Using Discretion to Achieve People's Welfare".

Formulation of the problem

Based on the background mentioned above, it can be formulated the problem as follows :

1. How is the use of Discretion as an instrument in the decision of a good Government Official ?
2. How to build good Government system using Discretion to realize people's prosperity ?

Discussion

1. Governance of Good Governance

Governance is bestuurvoering or execution of government duties, while the government is an organ / tool or apparatus that runs the government. The Government in its broadest sense includes all the fittings of the state, which substantially consists of branches of executive, legislative, and judicial power or other state apparatus acting for and on behalf of the state. Government in the strict sense is the organ / state fittings that are entrusted with governmental duties or implementing the law, while in the broad sense includes all the bodies that organize all power within the state both the power of sex executive and legislative and judicial power.[4]

The Government in this case is the Board or the State Administration Officer (TUN Official) in performing his duty to issue a State Administrative Decision shall be based on the authority of each who is present to him or is assigned to him. According to S.F. MARBUN in his book R.Wiyono is a formalized power, either against a particular field of government derived from legislative powers or from governmental power. While the definition of authority (competence, bevoegdheid), is only about certain parts or specific fields only. In this case authority is the ability to act provided by law applicable to conduct a certain legal relationship.[5]

The Preamble of the Constitution which is the soul of the Constitution of the Unitary State of the Republic of Indonesia has stated briefly and concisely that the state of Indonesia has a purpose to promote the common prosperity, to educate the life of the nation, and to carry out the world order based on independence, eternal peace and social justice. Constitutionally the state is responsible for realizing welfare, intelligence, orderliness, freedom, peace and social justice for the whole society.

According to Plato in his book Nomoi suggests that the administration of a good state, which is based on a good (legal) arrangement. Plato's notion of a state of law was increasingly assertive when it was supported by his disciple Aristotle, who wrote it in Politica. According to Aristotle, a good state is a state governed by the constitution and the rule of law.

The idea of the law state is still vague and sinking for a very long time, and then comes the concept of rechstaat from Freidrich Hulius Stahl, inspired by Immanuel Kant's thought.[6] In its development, the conception of the State of the Law then undergoes a refinement, which in general can be seen elements as follows:

a. State Government System based on people's sovereignty;
b. That the government in performing its duties and obligations must be based on laws or laws and regulations;
c. The existence of a guarantee of human rights (citizens);
d. The existence of power sharing within the State;
e. The existence of supervision of judicial bodies (rechterlijke controle) which is free and independent, in the sense that the judicial institution is completely impartial and not under the influence of the executive;
f. The existence of a concrete role of members of society or citizens to participate in overseeing the actions and execution of policies undertaken by the government; and
g. The existence of an economic system that can guarantee an equitable distribution of resources necessary for the prosperity of citizens.

In the provisions of Article 1 paragraph (3) of the 1945 Constitution of the Republic of Indonesia states that "the State of Indonesia is a State of Law". The State embraces decentralization in governance, as mandated by Article 18 Paragraph (1) of the 1945 Constitution that "the Unitary State of the Republic of Indonesia is divided into provinces and provinces divided into districts and municipalities, where each province, district and city have local government regulated by law ". Theoretically, the authority derived from the legislation is obtained through 3 (three) ways: Attribution *(Attributie)*, Delegate *(Delegatie)*, and Mandate *(Mandaat)*.[7]

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[4] Ridwan HR, 2003, *Law of State Administration*, UII Press, Yogyakarta, p. 20-21.
[5] R. Wiyono, 2010, *Procedural Law of State Administration Court "Second Edition*, Sinar Grafika, Jakarta, p. 64.
[6] Ridwan HR, 2011, *State Administration Law Revised Edition*, Rajawali Press, Jakarta, pp. 2-3
[7] Ridwan HR, *Ibid*,hlm. 102

According to the author one of the efforts to provide protection to government officials, the government has issued Law Number 30 Year 2014 on Government Administration. The Act provides for :

1) Administrative action is the act of Government Officials or other State Organizer to perform or not to do concrete actions in the framework of governance.
2) Discretion is the decision and / or action determined and / or performed by the Government Officials to address the concrete problems faced in the administration of the government in the case of legislation which gives preference, does not regulate, incomplete or unclear and / or stagnation government.
3) Concession is the decision of the Authorized Government Authority as a form of approval of the agreement of the Agency and / or Government Officials other than the Agency and / or Government Officials in the management of public facilities and / or natural resources and other management in accordance with the provisions of legislation.
4) Dispensation is the decision of the Authorized Government Official as a form of approval of the request of a citizen who is an exception to a prohibition or order in accordance with the provisions of legislation.
5) Delegation shall be the delegation of authority from Badang and / or higher Government Officials to Badang and / or lower Government Officials with responsibility and accountability fully transfers to delegate recipients.
6) A mandate shall be the delegation of authority of a higher Governmental Body and / or Government Official to a lower Agency and / or Government Official with responsibility and accountability remaining with the creditor.

2. Government Legal Actions In Implementing Good Governance

The act of governmental law is an action performed by the Board or the State Administration Officer in order to carry out government affairs. Forms of government action or form of state administration actions that can be broadly divided into two kinds, namely :

a. Legal action / legal action *(rechtshandelingen);* and
b. Not a legal act / ordinary action *(feitelijkehandelingen)*.

In an important administrative law is a government action classified as legal action *(rechtshandelingen)*. The actions of the government are classified as legal action, namely :

a. Acts under private law; and
b. Actions under public law.[8]

Every act of government must be based on the law, because in the state there is the principle of wetmatigheid van bestuur or the principle of legality. This principle determines that in the absence of a basis of authority granted by a prevailing law and regulation, all kinds of government apparatus shall have no authority which may affect or alter the state or legal position of its citizens.

Actions of State Administrative Law are not as meaningful as official actions or acts of state administrative bodies. Any official action is an act of State Administrative Law. Definition of State Administration law action is included in a group of public legal actions that are one-sided and directed to individual goals. As a public law, it is necessary to correctly understand the difference between public legal action and private legal action.[9]

Good governance, in fact, is a signpost for the state organizers in performing their duties. Such signs are necessary for their actions to remain consistent with the true purpose of law. The purpose of the Good Governance Principles is to advocate legal protection against the use and exercise of the *discretionary* authority of the government in exercising its authority, for example the use of authority in making resolutions *(beschikking)*.[10]

The existence of these Good Governance Principles (AAUPB) in Indonesia has not yet been recognized in a formal juridical manner and therefore has no formal legal force. Discussion on the Draft Law Number 5 of 1986 in the House of Representatives (DPR), the ABRI faction proposed that the principles be included as one of the reasons for the lawsuit against the decision of the state administrative body, but this proposal was not accepted by government with the reasons proposed by Ismail Saleh, as then Minister of Justice who represents the government.

Along with the passage of time and political change of Indonesia, these principles later emerged and published in a law, namely Law Number 28 Year 1999 on the State Organizer is Clean and Free from Corruption, Collusion and Nepotism (KKN) and recognized and applied in the administration of the government in the judicial process in the State Administrative Court, after the existence of Law No. 9 of 2004

[8] T Quarter of the Quarter and Ismu Gunadi Widodo, 1998, *State Administration Law,* UII Press, Yogyakarta, p. 308.
[9] Ridwan HR,*ibid,* hlm. 583-584.
[10] A. Muin Fahmi, 2006, *Role of General Principles of Decent Governance in Achieving Clean Government*, UII Press, Yogyakarta, p. 56.

on the amendment to Law No. 5 of 1986 on PERATUN as one of the reasons that can be used in the lawsuit in the State Administrative Court, which are mentioned as follows :

a. Principle of Legal Certainty, which is the principle within a state of law that prioritizes the basis of legislation, propriety, and justice in every state administration policy.
b. The Orderly Principle of State Administration, which is the basis upon which order, harmony, and balance in the control of state officials.
c. Principle of Openness, the principle that opens up the right of the people to obtain correct, honest, and non-discriminatory information about the administration of the state while maintaining the protection of personal rights, class and state secrets.
d. Principle of Proposality, namely the principle of prioritizing the balance between the rights and obligations of state officials.
e. Principle of Professionalism, the principle that prioritizes the skills based on the code of ethics and the provisions of applicable legislation.
f. Principle of Accountability, the principle that determines that every activity and the final result of the activities of the state organizer must be accountable to the public or the people as the highest sovereign of the state in accordance with the provisions of applicable legislation.

The use of authority of the government in carrying out other common interests of the public interest which has been determined in its basic rules. In its development, it turns out the positive law in Indonesia has determined that *Detournement de Pouvoir* is the act of government *(bestuur)* in violation of law *(onrechtmatige overheids daad)*. The function of Freies Ermessen is that the administration of the state as a state apparatus can assess and determine what is *inconcreto*, which in fact must take place, in this way society.

3. Use of Discretion as an Instrument in the Decision Making of Government Officials

The discretion in the Black Law Dictionary is derived from the Dutch *"Discretionair"* which means wisdom in the case of deciding upon an act of rules, laws or laws but by virtue of wisdom, judgment or justice.[11]

Discretion in English is defined as a wisdom, discretion.[12] According to the legal dictionary composed by J.C.T Simorangkir discretion is defined as the freedom to make decisions in every situation faced in his own opinion.[13] Thomas J. Aaron defines the discretion that: "discretion is power authority conferred by law to action on the basis of judgment of conscience, and its use is more than idea of morals than law". This is defined as a power or authority made under the law of reason and belief and further emphasizes moral judgments rather than legal considerations.[14]

According to Wayne La Farve that discretion concerns decision-making that is not bound by law, where personal judgment also plays a role.[15] Based on the definition of discretion, it can be said that simply discretion is an authority concerning decision making on certain conditions on the basis of one's considerations and personal beliefs. This definition leads to the understanding that the wisdom factor and the attitude of one's responsibility have an important element in discretion.

According to Sjachran Wet,[16] that the elements to be met by a discretion are:

a. It is due to the existence of public service duties carried by state administrators;
b. In carrying out these tasks, state administrators are provided with discretion in determining policies;
c. These policies can be accounted for both morally and legally.

Based on several definitions mentioned above, that the discretion arises because of the purpose of life of the state to be achieved, the purpose of the state of welfare state is to create prosperity of the people. In releasing the discretion, the most important is not the problem of policy making, but the problem of benefits to be achieved, namely for the benefit of the general public.

The State of Indonesia is a form of modern welfare state reflected in the preamble of the 1945 Constitution. As a Welfare State it is still far from expectations, but the objective outlined in the constitution is that it is a country that wants to provide prosperity for its people. This is reflected in the substance contained in the 1945 Constitution as a constitution.

Freedom of movement, given to the state administration (government) a freedom of action which is often called *fries ermessen* (Germany) or *pouvoir discretionnaire* (France). This is the ultimate weapon for government officials to penetrate the legality of legal products that sometimes meet deadlock. Therefore, there is no reason for the government apparatus to refuse to take a policy. Although the law and other legal

[11] Yan Pramadya Puspa, 1977, *Law Dictionary*. Aneka Ilmu, Semarang, p. 91.
[12] M. John Echol & Hasan Shadilly. 2002, *English Dictionary Indonesia*, Gramedia Pustaka Utama, Jakarta, p. 185.
[13] J. C. T. Simorangkir, Erwin, T. Rudy and J. T. Prasetyo, 2002, *Legal Dictionary*. Sinar Grafika, Jakarta, p. 38.
[14] M. Faal, 1991, *Filtration of Criminal Cases by Police (Police Discretion)*, Pradnya Paramita, Jakarta, p. 16.
[15] Soerjono Soekanto, 2002, *Factors Affecting Law Enforcement*. Raja Grafindo Persada, Jakarta, p. 15.
[16] Sjachran Wet, 1986, *Reviewing the Draft Laws on PTUN*, Alumni, Bandung, p. 89.

products do not arrange it formally, it does not mean that the situation will close the space to give happiness to the people.

4. Basis of Discretionary Use by Government Officials to Achieve People's Welfare

Discretion is generally issued by the executive officer, this is based on the idea that the executive is very close to the function of public services. It can not be denied that outside the executive, discretion is also not closed issued by other officials, but the most vulnerable to the use of expressions is the executive, especially State Administration officials.

As is the case with legal products, discretion also has a clear footing ground which, although not formally formulated. In formal casting, then of course discretion is no longer needed. According to Muchsan, the basis of discretionary footing there are 2 (two), namely :

a. Legal / Juridical Basis, which concerns formal provisions; and
b. Basic Policy, which involves benefits.

In this case, the policy is divided into two categories, the first policy is absolute (absolute) the second is the policy that is not absolute (relative), this can happen because the law is not clear.

Use of Discretion aims to create people's welfare. In achieving the goals of the state, the government is concerned to pay attention and maximize social security efforts in the widest sense. This resulted in the government must actively play a role in interfere with the field of public socio-economic life *(public service)* which resulted in the administration of the state should not refuse to take a decision or act under the excuse of the absence of legislation *(rechtsvacuum)*. Therefore, for the freedom of movement, given to the state administration (government) a freedom of action which is often called discretion or *fries ermessen*.

According Bintan R. Saragih argues that discretion need not be regulated or restricted because there is already accountability itself both morally and law. Furthermore Bintan R. Saragih said that the regulation on official discretion is only commonly used in parliamentary systems, while presidential systems are more habitual.

Discretion as a freedom of action would certainly be vulnerable to the complexity of the problem because it diverts the principle of legality in the sense of the "exceptional" property. The fact is when the implementation of direction sarah, then this type of policy is not infrequently actually cause greater losses to the community. This indicates that many of the government apparatus who issue discretion are not in accordance with the rules of the game that has been determined.

Discretionary restrictions are absolutely necessary, because discretionary users are ordinary people who can at any time err or misdirection. Example: a traffic policeman who orders cyclists, rickshaws, motorcycles, cars and others, to pass when the traffic lights show red, signaling them to pass. This is done by the police, because it has the authority to use discretion, for reasons of public interest, public security, the smoothness of public services, the welfare of society and others, as mandated by Law Number 2 Year 2000 regarding Police of the Republic of Indonesia has the right to apply discretion in its duty.

Users of public services there, may mock the contents of the board earlier. They are entitled to demand the principle of customer service excellence, applicable elsewhere. They may protest to the public officials there, as they regard it as out of the ordinary. On the contrary, similar to the traffic police, doctors or nurses (in the capacity of public officials) serving there, have the right to express the intended authority as the application of discretion, which lies behind the task, as well as reflecting on the implementation of crisis management behind his professional responsibilities.

Closing

Conclusion

Based on the above discussion, the authors can draw the following conclusions :

1) Use of Discretion as an instrument in decision making Good Government Officials in making a prompt, appropriate, and useful decision on something not yet regulated by law. The policy of government officials using discretion is obliged to account for their decisions to their superior officers and the public, so that the application of discretionary principle can be one to create a good government in the life of the country to create the welfare state.
2) Developing good governance system using Discretion to realize people's prosperity to conduct a policy must be based on the spirit and determination to always account for its actions. Besides accountability, legal rules, standard values in society, human rights and others, etc., the use of discretion shall be eligible for public purposes, within the limits of its jurisdiction, and not in violation of the Good Governance Principles. In the realization of a good governance system, a policy of a government official is required in deciding on an act based on rules, laws or applicable laws but on the basis of wisdom, judgment and fairness.

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ADMINISTRATION AND SECTORAL ASSET MANAGEMENT IN OPTIMIZING LOCAL REVENUES BASED ON GOVERNMENT REGULATION NO. 6 2006

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ABSTRACT

In order to execute the Law mandate No. 32 year 2004 and Law No. 33 Regions of knowledge 2004. Local government sought to maximize the potential of its region so they can carry out the development well and accountable, one of the effort is running Administration and Management of Local Properties in order to Optimize Local Revenue based on the Government Regulation No. 6 Year 2006. Then to ensure the implementation of the administration and the management of goods local properties, it require a common perception and also integral and comprehensive steps.Department of Revenue and the Local Asset Management is an important element in the local government institutions to regulate and manage local properties, in order to empower and utilize it well. To carry out these tasks through Government Regulation No. 6 year 2004, the Local Revenue Department has done some efforts to organize and manage the local assets in order to encourage local revenue optimally.

Keywords: Administration and management of Local assets in encouraging local revenue.

Introduction

In carrying out the No. 32 Year 2004 Act mandate about the Local Government and Law No. 33 year 2004 about Financial Balance between Central and Local Government. Local properties as one of the important element in the governance framework in the public service must be managed properly. To realize the management asset of local properties optimally it should consider the principles of: the functional principle, the principle of legal certainty, the principle of transparency, efficient principle, the principle of accountability, and the principle of certainty of value. Management of local properties includes: the planning needs and provision management, provision, receipt, storage, and management and also its use, so it need to implement concrete steps so that the local properties can be used optimally.

Viewing these foundations and the field conditions that still plenty of local properties that does not store well, even the tendencies of upkeep and ignored. Then, in order to guarantee the implementation of good administration and good management of local properties, it would require a common perception and also integral steps of elements involved, in this case is the Department of Revenue and the Local Asset Management.

Department of Revenue and the Local Asset Management is a regional autonomy executive in the income and asset management field of the area under and responsible to the governor through the district secretary (Sekda). Department of Revenue and the Local Asset Management had main tasks to implement government affairs in income and local local asset management based on the principle of the Local autonomy as set in Article 36 of Governor Regulation No. 70 year 2008 about the translation of Main Duties, working procedure of Department of Revenue and Local Asset Management of Central Java.

To carry out these basic tasks, the Department of Revenue and Local Asset Management has a duty to formulate the technical policy of income and local asset management, conducting government affairs and public service areas of revenue and managing the local assets in the provincial and district/ city scope, carrying out tasks in the tax, retribution, and other income field. The data management in income revenue sharing, provision of funds, asset management area, monitoring, evaluation and reporting areas of income and local asset management, carrying out the secretarial services and carry out other tasks given by the governor in accordance with its duties and its functions.

Formulation of the Problems

Based on the above background, by seeing the complexity of the problems associated with the administration and management of local assets in order to optimize local revenues, so those problems can be identified as follows:

1. How does the administration and management of local assets in order to optimize local revenue based on the government regulation No. 6 year 2006?
2. What are the obstacle in the administration and local asset management?

Discussion

Administration and Local Asset Management to Optimize the Local Revenue Based on the Government Regulation No. 6 year 2006

As we discussed earlier, that the Department of Revenue and the Local Asset Management are important elements in implementing Local autonomy, particularly in the income and local asset management field. Local Autonomy is an effort from central government for, so the existing government intervened in the existing empowerment potency including the local assets.

The local asset management as stipulated in the Government Regulation No. 6 year 2006, that the management should be implemented with regard to the following principles[1]:

1. Functional, namely taking decisions and solving problems in the goods management of local belonging which are carried out by the authorized of users's goods. Management of goods in accordance with the functions, powers and responsibilities of each party.
2. Legal certainty, namely the management of local asset should be implemented based on the law and regulations.
3. Transparency, namely the ipmlementation of local assets, it should be transparent to the public's right to gain correct and accurate information.
4. Efficiency, namely the local asset management are directed so that the local asset that is used as acording to the standard needs that is required in order to support the implementation of government duties and functions optimally.
5. Accountability, namely every activity of local management asset should be accountable to the people.
6. The value certainty, namely management of local asset that should be supported by the accuracy of number and value of goods in order to optimize the utilization and alienation of local properties and to develop the government balance sheet.

Before discuss the administration and management of local assets deeper, we need to convey; the scope of property and local asset management, as stipulated in Government Regulation No. 6 year 2006 in conjunction with Article 1 number 10 and number 11 of Act No. 1 year 2004 about State Revenue, that the scope of the goods belonging to the country/ region beside came from the purchasing or acquisitioning of some Country/ Region Budget revenue expenditure it also come from the acquisition of legal costs. State/ Local goods come from acquisitions legal costs acquisition that furthermore in the scope of government regulations clarified its scope which includes goods acquired under the provisions of the law and obtained based on court decisions that have permanent legal power.

Then rule of state/ local properties in this government regulation is limited in terms of state/ local property that are tangible (), as referred to in Chapter VII, Article 42 through Article 49 of Law No. 1 year 2004 about state treasury (*). Furthermore, Government Regulation No. 6 year 2006 about Management of State/ Region Property, stated that the management of sectoral asset include the following: needs planning and budgeting, provision, maintenance, utilization, security and maintenance, removal, transfer, administration, coaching, supervision, and control. As for the scope of the management of the logistic cycle as a more detailed elaboration of the logistic cycle as mandated by the elucidation of Article 49 Paragraph (6) of Law No. 1 year 2004 which based on consideration of the need for adjustments to the revenue cycle.

As for the administration of local properties include accounting, inventory and reporting. Property is in the local properties under dawah surveillance by the authorities of goods's should be mentioned items through the process of recording in the list of authorized users by authorized users of goods. Inventory process in the form of data recording and reporting data collection local property is part of the administration. Both results of bookkeeping and inventory processes required to implement the reporting process on sectoral asset recorded by the direct power of goods and the management of goods. Results of local administration of property used in order to:

a. Central/ local government balance preparation every year.
b. Planning unity procurement and maintenance of local properties every year to be used as a material planning budget.
c. Administrative use of local property.

The administration custody that is supported by the physical surveillance and legal supervision is the most important part of the management and administration of local properties, because the management and administration without the surveillance, administration can lead to insecurity even missing. User authority or sectoral asset manager has the authority and responsibility in ensuring the security of local properties. As the government's power user basic task and function executor from those local properties can be used as a form of community service in implementing government tasks.

The utilization of local properties is not happen without the transition of government ownership to other party. Ie, land or buildings that are not used in accordance to its duties and functions of instance. goods user must be submitted to the finance minister as the goods management for goods that is belonging to the state. And to the governor/ mayor/ regent as the holder of power of management of local goods. As for the handover of government task implementation always pay attention of goods condition.

[1] Government Regulation No. 6 Year 2006 on the Management of BMN / BMD, the Interior Ministry, Jakarta 2006

For the next local properties that have been submitted can be utilized to and can be to government organization that include functions as follow:

1. The function of service
   This function is realized through the transfer of usage status, which transferred its property to the local government agencies to be use in order to meet the needs of the organization in accordance with their duties and functions.
2. The budgetary function
   This function is realized through the utilization that is made in the form of lease, joint use, lease. As for the authority of utilization of goods implementation of local properties *implementing* of local asset utilization in principle are done by the the manager that is governor, regent/mayor, as the local level of government.[2]

Department of Revenue and of local assets management which is a government agency under governors have a duty and responsibility to organize and manage the assets in accordance with its tupoksi, as stipulated in the Governor Regulation No. 70 Year 2008 about Translation of Basic Tasks, Function and Work Procedure of the Department of Revenue and Local Asset management of Central Java province.

The vision and the mission of those agencies is to become the official agency supporting the independence of local autonomy by optimizing the revenue backed up by excellent service to the community and professional asset management based technology. Then the mission is to strive for the achievement of local revenue target, realizing efficient and effective asset management, coordinating the organization's role in the income and local asset management field consultancy area, develop a quality management system to realizing the excellent service and enhance the professionalism of human resources.

Seeing those vision and mission of the Department of Revenue and management of local assets is an important element in implementing local autonomy, particularly in the simple income and local asset management field areas and accountable to the governor through the Secretary.

The department of revenue and management of local assets have the principal task of carrying out the affairs of local government in the income and local asset management field area based on the principle of local autonomy, to carry out those basic tasks. Department of revenue and the local asset management performs functions:[3]

a. Policy makers and the technical field of revenue management of local assets.
b. Implementation of government affairs and public service areas of income and asset of local asset management.
c. Foster and facilitate in income and local asset management field within a specific area of provincial and district/city.
d. Execution of tasks in the taxes, fees and other income field, the data management and the revenue development, procurement and asset local asset management.
e. Utilization, evaluation, and reporting of income areas with local asset management.
f. Implementation of secretarial services.
g. Other executors given by governors in accordance with its duties and functions.

Based on the functions mentioned above, the asset management sector as has been stipulated in Article 42 of Governor Regulation No. 70 year 2008, has the task of carrying out the preparation, formulate technical policy, development and implement the field of maintenance and the use of assets, acquisition and utilization of assets and establishing legal status.

From those assignments, the asset management sector is expected to formulate a variety of technical policies, development and implementation in the field of maintenance and security tasks aset. From those local assets management it can be used for the implementation of local government duties optimally.

In the local asset management it can not be separated from the management or administration of the essential elements that are part of asset management area, because the administration adjust the obligations and responsibilities of managers. SKPD head as users in the implementation of revenue, record keeping, bookkeeping, inventory by census region goods, how to manufacture inventory book and the inventory ledger, the development of room inventory, goods identification card of a reporting system.

In the administration of local property there are three (3) activities that includes accounting, inventory and reporting.

a. Bookkeeping, users or power users of goods is obligated to register and record the local property into list of goods or abbreviated DBP user or power user or a list of DBKP items. In doing so the bookkeeping users record in format:
   1. Goods Inventory Card (KIB) A Land.
   2. Inventory Item Card (KIB) B, and Machine Tools.
   3. Inventory Item Card (KIB) C, Building and Construction.
   4. Inventory Item Card (KIB) D, Roads, Irrigation, and Network.

[2] Ibid, hal, 32
[3] State Property Management module, Training Center State Assets and Fiscal Balance, Jakarta 2009

5. Inventory Item Card (KIB) E, other fixed assets.
6. Inventory Item Card (KIB) F, construction in progress.
7. Card room inventory

b. Inventory, is an activity or an action to perform calculations, maintenance, organization, arrangement, recording and reporting of data in a unit area of property usage. From the inventory compiled an inventory book that shows all the material wealth of the region that are either movable or immovable

Then the inventory book contains data includes location, type/ brand, type, quantity, size, price, year of purchase, the origin of the goods, the median of goods, and others. The existence of a complete inventory of books, regular and sustainability has a function and a very important role in order to:

1. Control, utilization, security, and surveillance on every item.\
2. The attempt to use the maximum utilization of each item to the purpose and function of each, as well as
3. Supporting the implementation of the tasks of the government.

The inventory in question here are all the goods owned by local governments who use more than one year and are recorded and listed in the book inventory. So that the book inventory can be used according to the function and role, the implementation must be orderly, regular and ongoing, based on data that is correct, complete, and accurate so as to provide appropriate information on:

1. One year planning and budgeting
2. Procurement
3. The reception, storage and distribution
4. The use
5. Administration
6. Utilization
7. Security and maintenance
8. Assessment
9. Elimination
10. Alienation
11. Development and mastery and control
12. Financing
13. A claim for compensation

Then the state belongings (central government) that is used by the local government, the user record it in the inventory book of its own and reported to the management. Local properties that is means here is goods that come from budget revenue and expenditure or donations in form of gift, donors, endowments, grants, non-governmental, third party liability and contributions of others. It also includes companies belonging to the area.

c. Reporting. Power users gives user report in each semester, the annual one (1) year and 5 (five) yearly to the user, gives reports to the head district. Created in each SKPD quantity and value of goods and make a recapitulation. Recapitulation made as local balance preparation, made in the form of books and submitted to the manager, then manager arrange the inventory book into inventory ledger.[4]

Then ledger inventory book is an initial balance at the list of mutations of goods next year, for the next years the user/ power users and managers simply make a list of goods mutations. Additional and consumer goods in each SKPD each semester recorded an orderly at:

1. Report mutation goods
2. List mutations goods

Goods mutation reports is a goods report which of increases or decreased of goods for 6 (six) months to be reported to the head of the region through the manager. Reports mutations goods of first semester and the second semester are merged into the list of goods mutations for 1 (one) year and each made a list of recapitulation, then stored in manager assistance.

Recapitulation of all goods, won by state/ local henceforth submitted to the interior minister/ governor, regent/ mayor, for inventory report items by type, brand, type, must also include the value of countries/ regions property.

a. Sectoral asset classified into six (6) categories:
   1) Land
      Land settlement, agricultural land, plantation land, mixed farms, forests, land the fish pond, lake/ marsh, river, badlands/ damaged, the land of reeds and grasslands, land use another. Building land and mining land, the land of the road and others like.
   2) Equipment and machinery
      a) Large tools
         Large landline. Buoyant great tools, aids and others like.

[4] Ibid, hal, 24.

b) The tools transport
Motorized land transport equipment, non-motorized means of land transport, conveyance motor floating, floating non-motorized conveyance air, and others like.
c) workshop tools and measuring tools
Motor workshop tools, workshop tools not motorized, and others like.
d) The tools farm/ ranch
Tillage tools and plants, plant maintenance tool/ storage post and others like.
e) office equipment and household
Office equipment, household appliances, and others like.
f) studio equipment and communication tools
Studio tools, communication tools and others like.
g) The tools of medicine
Medical devices such as general medical equipment, dental instruments, medical device family planning, medical equipment eye, ENT medical equipment, X-ray apparatus, pharmaceutical equipment, and others like.
h) Laboratory
Unit laboratory tools, props/ school practices and others like.
i) security tools
Firearm, non-firearm weapons, ammunition, weapons and other rays like.

3) Building and buildings
a) Building of buildings
Workplace building, building, building Installation, building places of worship, homes and similar buildings.
b) The building monument
c) Temple, a natural monument, historical monuments, memorials, and others like.

4) Roads, irrigation and network
a) Roads and bridges
Roads, bridges, tunnels, and others of its kind.
b) The building of water/ irrigation
Building irrigation water, the tide of the building, building water marsh and polder development, building solar and water safety dyke, building water, dirty water building, water and other similar buildings.
c) Installation
d) Installation of drinking water, dirty water installations, installation of waste management, installation management of building materials, installation of power plants, installation of electrical substations, and others like.
e) Network
Drinking water networks, electricity grids, and others

5) Other fixed assets
a) Books and libraries
Books such as general books of philosophy, religion, social sciences, linguistics, mathematics and natural science, applied science, architecture, performing arts, sports geography, biography, history, and others like.
b) Goods patterned arts/ culture
Goods patterned art, culture such as sculpture, painting art tools, sports equipment, a sign of appreciation, and others like.
c) Animals/ livestock and plants
Animals such as cattle, poultry animals, reptiles, fish animals, zoo animals, and others like. Herbs such as teak, mahogany, walnut trees, tamarind trees, and others like including trees braid/ protector.

6) Construction in progress
a) Implementation of the inventory
The implementation of the inventory divided into two activities namely:
1) Implementation of the listing
2) Implementation of reporting

In order administration sectoral asset management in an orderly and correct, all government property that can be grouped as follows:

1. Local properties (provincial and district/ city), including goods which are separated in the company area/ locally owned enterprises/ foundation belonging to the area.
2. Item property/ wealth of the country that is used by the local government.

To achieve these objectives in the implementation of the technical guidelines can be described things includes the stages of implementation, how to use item code and filling out the form correctly.

Constraints In the Administration and Management of Local Property

In the implementation of the orderly administration of the administration and management of local properties to get the data correct and accurate and accountable (up to date) have to go through the census goods area, to do this is certainly not an easy task so it will have obstacles or barriers. Barriers are:

a. Limited human resources. Administration orderly administration and sectoral asset management in optimizing local revenues depends on the existence of human resources as the executor of the task and a major factor in the achievement of the program.
b. The extent of the region, with the vast area of East Java Tengah can or affect the difficulty level of the administration and management of local properties. The area is far from the government, the number of goods belonging to areas that can not be organized and managed optimally.
c. The number of items belonging to the area, which hampered and constraints are not balanced with energy or human resources to conduct the administration, so the belongings of those areas can not be managed optimally.
d. Limited facilities and infrastructure or lack of facilities and infrastructure in the area will affect the implementation of structuring and asset management area.
e. The limited budget allocated to the management of local properties, can not be denied that many belongings areas that remain unfinished because of budget or the cost of the arrangement is inadequate so that goods are impressed ignored.
f. Government policies are not in sync with the enactment of Law No. 32 Year 2004 on Local Government a lot of national and local government policies are not synchronized, including the administration and management of goods belonging to the region. This is certainly very influential on the performance of the Department of Revenue and the Local Asset management reason belongings Local arrangement is inadequate.

The things mentioned above are obstacles in the administration on sectoral asset management in optimizing local revenue so that as the basis for consideration Dipenda to perform his duties, and is a basis for making changes or steps in optimizing their duties and functions.

Closing

Based on the analysis above and see a variety of issues related to administration and asset local asset management can be summarized:

1. The management and sectoral asset management in optimizing local revenue is a step or policies of local governments in an effort to optimize the local income. Local properties as an important element in governance and public service or as a means of public services should therefore be managed properly. Administration is an effort to curb the belongings of the area can be managed and organized properly with due regard to the principles of functional, legal certainty, transparency, efficient, accountability, certainty of value, things that must be considered to ensure that its management does not pose a problem and can be best utilized. The legal basis is something that must be taken to ensure there is no overlap in execution and always pay attention to technical guidelines. This is so that there is uniformity of measures and actions that are treated in the management of Local properties in accordance with the norm of law.
2. The barriers that exist in the local asset management are:
    a. Limited human resources
    b. Limited facilities and infrastructure
    c. Limited local budgets for managing and investing the belongings of the area
    d. The extent of the territory of the unitary Republic of Indonesia or areas that can complicate administration of the belongings of the area
    e. The number of items belonging to areas that are not detected properly
    f. Still the overlapping policies between central and local governments, so that could complicate the technical field
    g. Lack of human resources who understand about the administration of the region's assets.

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GOVERNMENT POLICY IN SETTLEMENT OF POST OUTSOURCING SYSTEM DECISION OF THE CONSTITUTIONAL COURT

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ABSTRACT

The position of manpower requires the development of employment to improve the quality of manpower and to increase the protection of manpower and his family in accordance with the dignity and human dignity. One of the issues in employment that many get the spotlight is outsourcing. The use of outsourced manpower is a dilemma, on the one hand implementation is considered to be very detrimental to the workers, and on the other hand this system is very beneficial to entrepreneurs to achieve efficiency in order to increase the productivity of the company. As for the government, this outsourcing system is one solution to overcome high unemployment rate and as a lure for investors to invest their capital in Indonesia. Various irregularities that occur in this outsourcing system makes the workers do not stop to continue fighting for the elimination of outsourcing, to file a lawsuit to the Constitutional Court. The result of the judicial review of the Constitutional Court does not declare outsourcing as a forbidden system in business relations and work relations between workers / laborers and employers. The role of the Government in anticipating the deviation of the outsourcing system after the decision of the Constitutional Court by making changes to Law Number 13 of 2003 on Manpower and adopting the whole norm contained in several decisions of the Constitutional Court into a positive law.

Keywords: Government, Outsourcing System, Constitutional Court

Introduction

The national development is carried out in the context of the development of the whole Indonesian people and the development of the whole Indonesian society in order to realize a prosperous, just, prosperous, equitable society both material and spiritual based on *Pancasila* and the 1945 Constitution of the Republic of Indonesia. In the implementation of national development, has a very important role and position as the agent and the purpose of development.

The position of manpower requires the development of employment to improve the quality of manpower and its participation in the development and improvement of the protection of labor and his family in accordance with human dignity and dignity. Employment is all legal regulations related to manpower both before or during employment, and after employment.[1] One of the many polemics in employment that gets the spotlight is *outsourcing* issues.

Outsourcing system into a system that is dilemmatic, because on the one hand implementation is considered very detrimental to the workers and on the other hand this system is very profitable to entrepreneurs to achieve efficiency in order to improve the productivity of the company. So far the outsourcing system has put the workers in unprotected positions and can be terminated without severance pay or compensation after the end of the contract period. Labor is only considered a commodity. Therefore many opinions say that this outsourcing system as a form of modern slavery.[2]

This outsourcing system for the government is one of the solutions to overcome high unemployment rate and as a lure for investors to invest in Indonesia. The amount of investment is often a measure of a country's economic performance as well as the absorption rate of labor in the formal sector. In addition, investment and employment have the same public aspect that if there is an imbalance of its impact to the public sphere and eventually become a social problem.[3]

Implementation of outsourcing system to date has been much reaping protests from the workers because of frequent deviations that are very far from the protection of law and justice for the workers. According to the 1945 Constitution Article 27 paragraph (2) that the government gives protection to every citizen to get a job and a decent living. This provision is inseparable from the philosophy contained in the Preamble of the 1945 Constitution which affirms that one of the national goals is to improve the welfare for the people of Indonesia.

[1]LaluHusni, 2003, *Introduction to Indonesian Labor Law (revised edition)*, PT. Raja Grafindo, Jakarta, p. 24.
[2]Wijayanti, Asri, Articles: *Outsourcing: Theory, Rules & Practice in Indonesia*, http://masyarakthubunganindustrial.wordpress.com/2012/01/11/outsource-teori-aturan-dan-praktinya-di-indonesia.
[3]Hilman, Anjaz, Article: Considering the Interests of Outsourcing Workers and Employers in Industrial Relations in Indonesia, http: //sites.google.com/site/anjazhilman/hukum-ketenagakerjaan.

Outsourcing arrangements in Law No. 13 of 2003 on Manpower in Article 64 refer to this as Working Agreement and Service Provision Agreement.[4] Under the provisions of Article 64, there are two forms of *Outsourcing* Working Agreement, namely Working Agreement of employment and employment service worker agreement. The less obvious concept of *outsourcing* arrangements creates uncertainty on the working relationship between the parties related to outsourced employment agreements i.e employers, contractors and / or service providers and outsourced workers which ultimately creates uncertainty in the protection of workers.

Unions and labor alliances demanded legal certainty by filing a lawsuit to the Constitutional Court (MK) requesting that testing of the provisions of Article 64 - 66 of Law Number 13 Year 2003 regarding outsourcing. In filing a lawsuit to the Constitutional Court, finally the Constitutional Court believes that there is no problem in the outsourcing arrangements so that the Constitutional Court's decision strengthens the outsourcing position in Law Number 13 Year 2003.

Main problem

Based on the background of the above problem, it can be formulated the problem as follows:

1. What is the role of the Government in anticipating the deviation of outsourcing system in accordance with Law Number 13 Year 2003?
2. What is the Government's policy in regulating the outsourcing system after the decision of the Constitutional Court ?

Discussion

1. Outsourcing System as per Law Number 13 Year 2003 regarding Manpower

The term *outsourcing* comes from English that is from word out and source. Out means out, while source means source. Seen from the term outsourcing is not derived from the Indonesian term but derived from a foreign language that is the term English. Outsourcing is made up of two syllables of out and source *(source)* translated into Indonesian with *outsourcing*. *Outsourcing* was originally a term in the business world to meet the needs of a company's workforce by bringing in from outside the company.[5]

Outsourcing is a system of work to produce goods or services performed by the employer by transferring some of his work to other employers. There is no limit on who and to whom *outsourcing* can be done. Limitations on what types of work can be transferred to others. As long as the work is completed it will provide benefits both in quality and quantity. In this case outsourcing should mean *"outsourcing jobs"* instead of *"outsourcing workers"*.[6]

This outsourced work system will enable a company to focus more on its core business that is in line with the demands of economic globalization, which wants efficiency, speed and reliability of the product. While supporting works that are not directly related to core business, submitted to third parties. Benefits employers use outsourced labor, no burden of administrative matters and job planning outside their core business, no need to engage in Termination of Employment (PHK), provide severance pay, Holiday allowance (THR), and other rights that must be accepted by workers.

Based on survey results conducted *Outsourcing* Institute to more than 1200 companies and studies conducted by management experts since 1991 states that the reason companies outsource their activities is because of the potential benefits. Profit potentials can increase the company's focus, resources alone can be used for other needs, enable the availability of capital funds, create fresh funds, reduce and control operational costs, and solve problems that are difficult to control or manage.[7]

The existence of *outsourcing* is more profitable to the employers than the workers. This *outsourcing* system harms many workers, is not guaranteed welfare and does not get the protection of his rights as a worker. While the government always sees that *outsourcing* is beneficial for workers because it reduces a bit of unemployment problems, where the government considers the statement better to work than unemployed as if it were a tamer spell amidst a ferocious economy and intimidating community culture.

Implementation of *outsourcing* system abroad applied for *skill labor* and not *unskill labor* this situation is different from in Indonesia. In addition overseas implementation has been better, that is regulated and implemented without any irregularities that tend to lead to violations of human rights in this case is the rights of workers.

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[4] According to Article 64 of Law Number 13 Year 2003 concerning Manpower, that: *"The Company may deliver part of the execution of work to other companies through employment contracts or the provision of written / written employment services"*.

[5] M. Fauzi, 2006, *Legal Aspects of Submission of Some Implementation of Work to Other Companies (Outsourcing)*, Legal Proceedings Faculty of Law Unmul, 021-969X. Vol.2,No.2: p. 89.

[6] AsriWijayanti, *Towards a Just Labor System of Indonesia Law*, Muhamadiyah University Surabaya.

[7] http://hukum.kompasiana.com.

2. Arrangement of Outsourcing System In Law Number 13 Year 2003

Outsourcing arrangements are provided in Articles 64 to 66 of Law Number 13 Year 2003. Under Article 64 of Law Number 13 Year 2003, there are two forms of *Outsourcing* Working Agreements, namely "Working Contract of Work" and "Working Agreement on the Provision of Workers or Workers Services". The first *outsourcing* of the work, the legal construction is that there is a *main contractor* who subordinates the work to the *sub contractor*. *Sub contractor* to do work sub-by the *main contractor* that requires workers.[8] That's where *sub contractors* recruit workers to do the work that is called by the *main contractor*.

Based on the provisions of Law Number 13 Year 2003, there is no definition of employment contracting agreement and labor service provider agreement so that the public is free to translate in daily practice into outsourcing which is then translated into Indonesian into *outsourcing*. The term used by the said legislation shall be "Working Agreement" or "Employment Agreement / Workers' Period" as intended in Article 64 of Law Number 13 Year 2003.

Volume Work Agreement is also used in the Decree of Minister of Manpower and Transmigration No. KEP-150 / MEN / 1999 on Implementation of Social Security Program of Labor for Daily Worker, Volunteer and Working Agreement of Certain Time. Although the term *outsourcing* is not found in labor legislation, it does not mean that the use of outsourced nomenclature is not legally valid. The term *outsourcing* has been officially used in Decision of the Constitutional Court Number 27 / PUU-IX/2011.

Working contracts and employment service provider agreements shall be made in writing and may be made by a fixed term employment agreement and an indefinite period of employment agreement as stipulated in Article 65 and Article 66 of Law Number 13 Year 2003. Meaning of Articles 65 to 66 of the Act Number 13 Year 2003 further in the Decree of the Minister of Industry and Trade No. KEP.100 / MEN / VI / 2004, concerning the Regulation of the Minister of Manpower and Transmigration No. KEP-101/MEN/VI/2004 concerning Procedure of Licensing of Workers/Workers Company joKepmenakertrans Number KEP-220/ MEN/X/2004 on Terms of Submission of Some Implementation of Work to Other Companies.

According to MuzniTambusai,[9] as the former Director General of Industrial Relations of the Ministry of Manpower and Transmigration defines outsourcing as "encouraging one or part of the activities of the company that had been self-managed to another company which then called the recipient of work".

According to ErmanRajagukguk outsourcing is "the working relationship in which workers are employed in a company under a contract system, but the contract is not provided by the employer, but by the employment agency.[10] In simple terms outsourcing can be illustrated by the existence of a service provider company that recruits prospective workers to be placed in the user's company but the worker has a working relationship only with the service company workers.

The legal relationship between a service provider company and a worker user company is based on an engagement. Employers' service providers commit themselves to placing workers in user companies and user companies binding themselves to employ the worker. Under the employment pledge, the employer's service provider will get some money from the users.

3. The Role of Government in Anticipating the Deviation of Outsourcing Working System

The outsourcing system started from the investment climate improvement policy. This is intended to improve the competitiveness of crisis-stricken companies by reducing labor-related costs. Outsourcing system policies will benefit the company, although outsourcing is also needed to protect workers by creating jobs. Positive impacts for firms are decreasing costs, increasing competitiveness, and increasing corporate profits.

According to the author of the implementation of outsourcing system is very dilemmatic in the middle of high open unemployment rate. This system is one way out for workers who can not enter the formal job market. Restrictions on the use of outsourcing work system conducted by the government through Permenakertrans No. 20 of 2012, not enough effective to reduce discrimination experienced by workers.

Outsourcing practices are related to three parties: Employers, Managers or Providers of Labor, and Workers themselves. The position of the three parties will be more clear by discussing the articles governing it, namely Article 64 to Article 66 of Law Number 13 Year 2003. Provision in Article 64, that the company may submit part of the implementation of work to other companies through employment contract or provision of supplies workers / written services. In the official explanation there are only two forms of agreement for the implementation of the delivery of part of the work, namely the contracting of workers and the provision of labor services.

Under the provisions of Article 64 can be interpreted the existence of two types of *outsourcing* is "outsourcing work based on employment contracting agreements and outsourcing workers based on the

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[8] Aloysius Uwiyono, 2011, *Legal Uncertainty of Outsourcing Arrangement in Law Number 13 Year 2003*, PT. Raja Grafindo, Jakarta, p. 392.

[9] MuzniTambusai, *Implementation of Outsourcing (Outsourcing) in terms of legal aspects of employment does not obscure industrial relations, through http: //www.nakertrans. go.id/arsip news / naker / outsourcing.php (26/04/2013).*

[10] Abdul Khakim, *Introduction to Indonesian Labor Laws Based on Law no. 13 Year 2003*, Revised Edition, Citra Aditya Position of *Outsourcing* Post Decision of the Constitutional Court Number 27 / PUU-IX / 2011.

existence of employment services agreement agreement. In the provisions of this article the existence of irregularities that formulation is contrary to the legal concept of employment relationship. The study of 3 (three) elements that must be met in the working relationship, namely work, orders, and wages. Basically the order given by the employer to the worker, who enjoys the outcome of the job is the employer, but the law formulates a legal relationship arising only between the employer and the employer.

The Giver of Command is responsible for the worker's self including all rights under Law Number 13 of 2003. The employment relationship in *outsourcing* is between employer and employee, not between the company of providing workers with workers. In this case the worker's status becomes blurred juridically, and the weakness of Law Number 13 Year 2003 is in formulating the legal relationship in this *outsourcing* system is used as a gap for employers to implement an *outsourcing* system loaded with deviations regardless of the fate of the workers.

The practice of *outsourcing* in the implementation of many entrepreneurs who deviate from what has been determined in the article that describes the rules of charter work. At this time many Entrepreneurs provide their core business or core business and some even submit all their work to other companies with *outsourcing* system. The formulation of job vacancies is a source of conflict where it always raises different interpretations between workers and employers.

The study in terms of legal object of *outsourcing*, the handover of some work or work can be referred to as the object of law. While the worker can not be called a legal object. Worker is the person who should be the subject of the law, but in article 65 the object of the law is a job not a person. In its implementation, the object of law in the agreement between the employer and the employer is the person. People here have been trafficked and this has violated the human rights. The weakness of Law Number 13 Year 2003 becomes part of the deviation in this outsourcing work system and is best utilized by the entrepreneur to benefit his company unilaterally.

Employers who do not meet the provisions of the articles governing the *outsourcing*. In Article 64 to Article 66 of Law Number 13 Year 2003 with all its weaknesses is always sought by its gaps by employer companies or Employers Service Companies to benefit the company regardless of the fate of workers who are regarded as objects as objects that do not need to be considered right.

The occurrence of these irregularities continuously, if the government does not act explicitly to review the articles that regulate the *outsourcing* of Law No. 13 of 2003 this. The government should immediately revise the weaknesses in the existing articles and close the gaps used by certain parties for its own benefit. The government should also act decisively to impose legal sanctions on employers or parties found to be committed irregularities in the implementation of this *outsourcing* system.

4. Government Policy In Regulating Outsourcing System Post-Constitutional Court Ruling

From the outset, *outsourcing* has not been formally identified as a business strategy. This happens because many companies are simply preparing themselves for parts that can't be done internally done outsourced. The high competition has demanded corporate management through *outsourcing* functions that are important to the company but not related to the core business of the company. In subsequent developments, *outsourcing* is no longer just dividing risks but becoming more complex. According to Micheal F. Corbett, founder of The *Outsourcing* Institute and President Director of Micheal F. Corbett & Associate Consulting Firm said *outsourcing* has become a management tool, not just to solve problems but also to support business goals and objectives.[11]

Implementation of *outsourcing* work system often creates problems triggering workers not to stop fighting for the elimination of *outsourcing* from Law Number 13 Year 2003. Trade unions and alliances refuse to *outsource* from demonstrations to filing a review of the Constitutional Court on regulatory articles about *outsourcing*. Unions and labor alliances hope that the articles are abolished or reviewed so as to be able to adopt the interests of workers to obtain justice, wage protection, welfare and the rights to be gained by workers.

The Constitutional Court (MK) as a product reform institution was formed based on the result of the third amendment of the 1945 Constitution, has authority based on Article 7 B and 24C, covering five matters, namely: (1) to examine the matter of the Act against the Constitution, (2) Trial of authority disputes among state institutions whose authority is granted by the Constitution, (3) Judging and dismissing the opinion of the People's Legislative Assembly that the President / Vice President has violated or no longer qualified as President / Vice President, (4) decides the dissolution of political parties and (5), Examines and disputes the election result .

[11] SehatDamanik, 2006, *Outsourcing & Employment Agreement*, DSS-Publishing, Jakarta, p. 8.

Based on the authority of the Constitutional Court,[12] namely to examine the matter against a law, then in relation to Law Number 13 Year 2003 has been several times filing a lawsuit to be subjected to a judicial review to the Constitutional Court by the public because it violates the constitutional rights of citizens and / or contrary to the constitutional norm. In relation to the material *outsourcing* has twice submitted his test to the Court. Application for testing of the first *outsourced* material, the Constitutional Court's decision rejects the applicant's claim on the grounds that the Articles 64-65 on *outsourcing*does not conflict with the 1945 Constitution.

Applications for testing of outsourced materials in 2011 re-submitted material test to the Constitutional Court. AP2MLI registered in the petition register No.27 / PUU-IX / 2011 has filed a *judicial review* against Article 59, Article 64, Article 65, and Article 66. The result of the Constitutional Court's decision can only accept material test for part of the submission namely Article 65 and Article 66 , while for Article 59 and 64 it is deemed to be in accordance with and not contradictory to the 1945 Constitution. The Constitutional Court declares Article 59, Article 64, Article 65 except paragraph (7) and Article 66 except paragraph (2) letter (b) of Law Number 13 Year 2003 is not contradictory to the 1945 Constitution. It means that the provisions other than paragraph (7) of Article 65 and paragraph (2) letter (b) of Article 66 shall remain valid as positive law.

In the employment agreement between the recipient of the employment enterprise or the worker / labor service provider company the worker / laborer contains a requirement for the transfer of the protection of the rights of the worker whose work object remains (same), to the recipient of the employment or the employer / other laborers, then the employment relationship between the recipient of the wholesale employment company or the provider of the services of the worker / laborer and his / her worker may be based on a Specific Time Working Agreement (PKWT).

Based on the decision of the Constitutional Court does not implicitly declare the labor agreement of worker / laborer in the environment of *outsourcing* company must be with certain time work agreement (PKWTT). In its legal considerations the Constitutional Court offers PKWTT as one of the *outsourcing* model. In accordance with the above description, the Constitutional Court does not require companies to implement PKWTT. PKWTT status within the company only occurs when: (a) the PKWT does not require the transfer of worker rights protection whose work object remains; or (b) the company from the beginning of implementing the PKWTT.

Entrepreneurs may still submit or put their work to other companies so that the outsourcing system can still be implemented. This is in accordance with the consideration of the Constitutional Court which states *"... the delivery of part of the work to other companies through written employment agreement or through an outsourcing company is a reasonable business policy of a company in the framework of business efficiency. "*

The interpretation result that the Constitutional Court does not declare *outsourcing* as a forbidden system in business relation and working relationship between worker / laborer and entrepreneur. In that position, Article 64 of Law Number 13 Year 2003 remains valid as a legal basis for companies to execute *outsourcing* and Article 65 except paragraphs (7) and Article 66 except paragraph (2) letter (b) as technical work relations in *outsourcing*companies .

In fact, the results of the material test of the two articles have not been able to satisfy all workers, but the test of this material may open up opportunities for review of the articles so as to minimize any deviations. In addition, this opportunity will help the workers to obtain legal certainty immediately, because this is a moment that can be used by the government and the House of Representatives to discuss the amendment of Law Number 13 Year 2003 and to adopt the whole norm contained in several decisions of the Constitutional Court becomes a positive law.

Closing

Based on the description of the above discussion, it can be concluded as follows:

1. The role of the Government in anticipating the deviation of the *outsourcing* work system is to act decisively to give legal sanction to the employers or parties found to have committed irregularities in the implementation of this *outsourcing* system. The government not only sees *outsourcing* as one of the solutions to overcome the unemployment rate as well as emphasize the development of the business world in Indonesia, but also protect the rights of outsourced workers whose welfare is very low and require policies that make them prosperous. The government should be able to minimize the existing deviations by providing protection to workers can immediately obtain legal certainty.
2. Government policy in regulating the *outsourcing* work system after the Constitutional Court decision by reviewing the articles regulating the *outsourcing* of Law Number 13 Year 2003, so that its application will not cause problems again. The regulation of a just system of *outsourcing* work becomes the obligation of the Government and the House of Representatives to discuss the amendment of Law Number 13 Year 2003 and to adopt the whole norm contained in several decisions of the Constitutional

[12] Dian AgungWicaksono and MochammadAdibZain, 2013, *Seeking Constitutional Justice Outsourcing Arrangement in Indonesia: Normal Discussion and Implementation of Norms*, Proceedings, National Conference on Employment and Industrial Relations, Center for Legal Development of the Faculty of Law UniversitasBrawijaya Malang, p. 12.

Court becomes a positive law. Workers expect to work quietly and entrepreneurs can run the business comfortably which will ultimately increase productivity and affect the course of the development process.

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DEATH PENALTY POLICY ANALYSIS FOR NARCOTICS CRIME ACTORS IN THE PERSPECTIVE OF LAW AND HUMAN RIGHTS

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ABSTRACT

Efforts to create a prosperous, just and prosperous society that is equally material and spiritual based on Pancasila and the 1945 Constitution, the President of the Republic of Indonesia Jokowi expressly declares and supports the giving of capital punishment to narcotics dealers, regularly taking narcotics is definitely damaging the physical condition of a person. Laws that can be referenced in relation to Drugs, Law Number 35 Year 2009 on Narcotics (abbreviated Narcotics Act). Criminal Sanctions in the Narcotics Act one of them is the Dead Criminal Sanction, namely in Article 114 paragraph (2). Cesare Beccaria in the decade of the 1780s has opposed this type of criminal because it is considered inhumane and ineffective. Capital punishment is considered counter-productive when comparing it with legal objectives as part of the concrete face of the concept of morality of citizens. The most important and interesting issue is the effectiveness of the imposition of capital punishment itself, whether the imposition of capital punishment can suppress the rate of development and the extension of crime that is classified as extraordinary crime and whether it is true the formulation of capital punishment in the provisions of the Act and the execution of the death row is against the Right Human Rights, especially to the fulfillment of the right to life. The method used in this research is normative juridical, secondary diamanadata more main than the primary data. This research is also called research by way of literature study. Moving from the discussion that the death penalty is a cruel and unfit criminal because the death penalty is reducing Human Rights, the execution of capital punishment is ideal because the death penalty is done by putting forward the humanistic side and in Indonesia own view on Human rights are not absolute, because the law as a barrier as well as a balancing or controlling the rights to the basic obligations, so that the exercise of such rights when imposing the means to move to take actions that are deemed necessary and commensurate including the provision of capital punishment itself with the aim for social order and security national.

Keywords : Policy, Narcotics Crime, Death Penalty

Introduction

Efforts to achieve a prosperous Indonesia, equitable, and prosperous equitable both materially and spiritually based on Pancasila and the Constitution of 1945, the President of the Republic of Indonesia Jokowi clearly stated and supported sanctions capital punishment against perpetrators of drug dealers, because the effects that caused when regularly consume narcotics certainly damage a person's physical condition. And it can be bad for the young generation of Indonesia. With the prevalence of narcotics in Indonesia, our country is experiencing an emergency against narcotics extremely rampant among his special people in the environment of young people today.[1]

Several heads of state and government of the country of origin, death row inmates are already asking the President Jokowi in order to grant a pardon, but the president remains adamant stance by not giving forgiveness. As the State of Law (Article 1, section 3 of the Constitution of the Republic of Indonesia Year 1945), it is appropriate that Indonesia must uphold the law.[2] The characteristics that should be inherent in a state of law are the recognition and protection of human rights, an independent judiciary, and the rule of law. The death penalty for convicted drug is basically the protection of human rights for the people because of narcotics cases is one extraordinary crime that has hurt the nation in large numbers in material or immaterial. Indonesian Justice was indeed supposed to be an Independent and Impartial, meaning there may be intervened by any party, including the intervention of other countries.

Laws that can be associated with drug references, Law Number 35 of 2009 on Narcotics (Narcotics Law abbreviated). Criminal Sanction in the Law on Narcotics one of which is a Criminal Sanction Dead, namely in Article 114 section (2) reads: "In the case of the act of offering for sale, sells, buys, mediates in sale and purchase, exchange, surrender, or receive Narcotics Group 1 referred to in section 1 which is in the form of plants weighing 1kg or exceed 5 exceeds the trunk or in the form of non-plant weighs 5g, the offender shall be punished by death ".

[1] http://www.hmihukumugm.org/2015/04/penegakan-hukum-dalam-pemberantasan.html 25 Januari 2018 at 14:45
[2] Syamsul Hidayat, 2010, Pidana Mati di Indonesia, Genta Press, Yogyakarta, page 1

Cesare Beccaria in the decade of the 1780s had opposed this kind of criminal because it is considered inhumane and ineffective.[3] The death penalty is considered counter-productive if comparing with the purposes of the law as part of the face concrete concept of morality of the community. The issue most important and interesting is the effectiveness of the imposition of the death penalty itself, whether the imposition of the death penalty is able to suppress the rate of growth and expansion of the crimes classified as extraordinary crime and whether indeed the formulation of the death penalty to the provisions of the Act as well as the execution of death row inmates were contrary to the Right Human, especially towards the fulfillment of the right to life.

The position of criminal law as *ultimum remedium* (last drug) in dealing with legal issues in society has gained an important place, especially with regard to efforts to defend the public interest. Van Bemmelen line with the opinion, that the criminal law which threatened the existence of human behavior means that the state has taken over the responsibility of maintaining the rules and social order has been determined.[4]

Based on these problems the authors interested in writing about "**Death Penalty Policy Analysis for Narcotics Crime Actors in the Perspective of Law and Human Rights**".

Main Problems

Based on the problems above the author in formulating some formulation of the problem that is:

1. How does the execution of criminal narcotics in Indonesia?
2. Is capital punishment policies for the criminal narcotics in Indonesia have fulfilled a sense of justice?

Literature Review

Overview

Public Policy

Public policy is derived from the policy and the public. According to M. Irfan Islamy, public policies (public policy) is a "series of actions defined and implemented or not implemented by the government which has the purpose or goal-oriented in the interest of the whole community".[5]

Policy making is an action defined and implemented by the government and oriented towards achieving the objectives of public interest. Implementation of policies is an important aspect of the overall policy process. Van Meter and Van Horn [6]formulate implementation process as: "Reviews those actions by public or private individuals (or groups) that are directed at the achievement of objectives set forth in the prior policy decisions" (acts done either by individuals, officials, or government or private groups directed at achieving the objectives outlined in policy decisions).[7]

In the process of policy implementation there are often problems that show the ineffectiveness of policies that have been taken. These symptoms are called implementation gaps, namely:

> "A situation where the policy process always opens the possibility of a gap between what is expected (planned) by policy makers with what is in fact achieved (as a result or achievement of the implementation of the policy)."

Implementation of policies can be analyzed using several models of policy implementation. One model of policy implementation is a model developed by Van Meter and Van Horn, who is referred to as a model of implementation of the policy process (policy implementation process model).[8]

This model tries to connect between policy and implementation issues and a conceptual model that imputes policy with job performance. Between policy and job performance are separated by a number of independent variables related copy. Among the independent variables are the size and purpose of the policy, policy resources, characteristics or properties of entities / implementing agencies, communication between relevant organizations and implementation activities, brush implementers and economic environment, political and social.[9] In the process of implementation of the policy, there are various factors that influence the success and failure of the implementation of a policy. These factors include:

1) Content or the content policies
2) Implementer and the target group
3) Environment

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[3] Eva Achjani Zulfa, Pergeseran Paradigma Pemidanaan, Bandung, Lubuk Agung, 2011, page 104

[4] Andi Hamzah, Asas-Asas Hukum Pidana, Jakarta, Rineka Cipta, 2008, page 7

[5] Islamy, M. Irfan, 1997, Prinsip-Prinsip Perumusan Kebijaksanaan Negara, Jakarta: Sinar Grafika, page 20

[6] Wahab, Solichin Abdul. 1997. Analisis Kebijaksanaan; Dari Formulasi ke Implementasi Kebijaksanaan Negara. Jakarta: PT Bumi Aksara, page 65

[7] Wahab, Solichin Abdul, 2001, Analisis Kebijaksanaan: dari Formulasi ke Implemetasi Kebijakansanaan Negara, Jakarta: Bumi Aksara, p. 65

[8] Kertya Witaradya, Implemetasi Kebijakan Publik Model Van Meter Van Horn : The Policy Implementation Process, 15 Januari 2018 http://kertyawitaradya.wordpress.com/2010/04/13 /implementasi-kebijakan-publik-model-an-meter-van-horn-teh-policy-implementation-process/, diakses pada tanggal 8 Juni 2016 pukul 14.21 WIB

[9] *Ibid*

Special review

Definition of Narcotics

In the legislation in force in Indonesia, the crime of Narcotics classified into particular criminal offense because it is not mentioned in the Criminal Code, its regulation is specific. Narcotics term is no longer a foreign term for the public to remember so much good news from print and electronic media is preaching about cases concerning narcotics and with sanctions the death penalty for the perpetrators.

Narcotics or commonly known by the name of lay people in the form of drugs is not always defined negatively, in medicine narcotics with the right dose is used as a drug for the patient. In addition to drugs, another term that was introduced in particular by the Ministry of Health of the Republic of Indonesia is a drug which is an abbreviation of narcotics, psychotropic and addictive substances. Narcotics Sudarto said that the word comes from the Greek word "*Narke*", which means anesthetized so do not feel anything.[10]

SmithKline and Clinical Staff Frech defines that:[11]

> "Narcotics are substances or drugs that may lead to unconsciousness or anesthesia because these substances work affects the central nervous system. In the definition of Narcotics has included opium, substances made from opium (morphine, codeine, and methadone)".

In his book, Ridha Ma" Roef say that Narcotics is Opium, Marijuana, Cocaine, and Substance which the raw material is taken of objects including the Morphine, Heroin, Codeine Hashisch, Cocaine. And including synthetic narcotic that produces substances, a drug belonging to the hallucinogen and stimulant.[12] Meanwhile, according to Article 1 section 1 of the Law on Narcotics understanding of Narcotics is:

> "substances or drugs derived from plant or not plant, either synthetic or semisynthetic, which can cause a reduction or alteration of consciousness, loss of taste, reduce to eliminate pain, and can lead to dependency".

Narcotics refers to a group of chemical compounds that are harmful when used not in the proper dosage. Hazard in the form of opium and addiction that can not be stopped. This is because in narcotics contain addictive compounds that are addictive to the wearer. The use of narcotics can cause loss of consciousness and the user can easily forget all the problems encountered. User created as being above the clouds and always feel happy. This then drives many people who are overwhelmed with problems switching to seek pleasure by taking these drugs.[13]

At first, Narcotic substance is intended for the use of humanity, especially in science and medicine, with the development of science and information technology, drugs such as Narcotics are also growing also way of processing and circulation.[14]

But later revealed that the substances contained in Narcotic have power addiction that can cause dependence. Thus, the required period of time a bit longer to do the treatment, monitoring, and control in order to cure people who are already tied to narcotics.

Theory of Punishment

A theory of punishment is essentially a basic formulation-justification and criminal purpose. Traditionally theories of punishment in general can be divided into three groups of theories, namely:

Absolute Theory or Theory of Judgment

Adherents of this theory are Immanuel Kant and Leo Polak. This theory says that crime alone contains the elements that justify prosecute criminal and penal dropped. Kant said that the consequence is a logical consequence that after each crime. According to the practical ratio, then each crime should be followed by a criminal. Therefore convict was something that practical ratio, by itself after a crime that first performed, and then the convict is something demanded by justice ethically. Convict was a condition of ethics, so that Kant's theory describes the offense as a mere subjective retaliation.

Relative Theory or Theory of Interest

According to this theory, the basic rules of criminal defense are society. Therefore, the purpose of sentencing is to avoid (prevention) does an offense. The nature of punishment is prevention of general and special prevention.

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[10] Taufik Makarao, 2005, Tindak Pidana Narkotika, Jakarta, page 17

[11] *Ibid*, page 18

[12] Ridha Ma'roef, 1987, Narkotika, Masalah dan Bahayanya, PT. Bina Aksara, Jakarta, page 15

[13] Mardani. Hukum Aktual. Bogor: Ghalia Indonesia. 2009, page 16-21

[14] Julianan Lisa dan Nengah Sutrisna,Loc. Cit., page 1-3

Combined Theory is divided into three categories, namely:

- The combined theory which emphasizes reprisal, but the reply can't exceed what is necessary and sufficient to maintain public order. Supporting this theory is the Pompe.
- The combined theory that focuses on the defense of public order, but no more weight than a suffering that weighed according to the severity of acts committed by the convict. According to proponents of this theory, Thomas Aquinas, which became the basis of the criminal is the general welfare.
- The combined theory that considers both these principles should be focused equally.

Adherents are De Pinto. Furthermore, by Vos explained, because it is generally a criminal should be satisfactory for the community then the criminal law shall be such as a fair criminal law, with the idea of revenge that is impossible to ignore both negatively and positively.

Methods

This study uses approach, *normative juridical* meaning that the data obtained by referring to the juridical aspects, also based on the empirical aspects that are used as a tool. According to this flow of knowledge to be gained from experiences in the field and this stream also found irregularities in science is because humans are based on the provisions of thinking and ignores the real nature experience can provide the correct knowledge.[15]

Juridical empirical approach is an approach that examines secondary data first, followed by conducting research in the field of primary data. Juridical aspects used in this study are regulations and legislation.

Discussion

Implementation of Death Penalty For Narcotics Crime Actors In Indonesia

Criminal drug dealers die a death sentence which is still imposed in Indonesia. The Constitutional Court (MK) confirmed, the death penalty does not conflict with the Constitution of 1945. The imposition of the death penalty in Act No. 22 of 1997 on narcotics has been formulated carefully and observe. Article petition for the death penalty in the Narcotics Act filed by two citizens of Indonesia. Edith Yunita Sian and Rani Andriani aka Melisa Aprilia, and three citizens Australia, Myuran Sukumaran, Andrew Chan and Scott Anthony Rush. An Australian citizen that belong to the Bali Nine, was caught and sentenced to death for drug dealers.

The death penalty is not carried out to the children and pregnant or giving birth or the mentally ill person is suspended until the woman giving birth and that his case had a magnitude Act. Head of Correctional Division Office of the Department of Law and Human Rights in Central Java Bambang Winahyo welcomed the decision of the Constitutional Court who approved the death penalty. In reclaiming the Correctional Institution, Cilacap, Central Java, now there are 54 pending death sentences carried out.

The Indonesian government in dealing with the number of cases of drug users are increasingly prevalent of each period requires a statute Law Act which is the book capital punishment law (Penal Code) contained in Article 10 in addition to any other Act is also applied by the Indonesian government, namely Law number 22 of 1997 narcotics and psychotropic Law to establish a policy in executing the perpetrators of drug dealers. This means that Indonesia is a democratic country in Southeast Asia which apply the death penalty.

In connection with this, a criminal sentenced to death in reality many cause a negative reaction from human rights activists for policy executing drug traffickers in violation of human rights. On the other hand the Indonesian government through the president Jokowi declared that the death penalty for drug dealers is a fixed price for the policy is assessed in accordance with Law 1945 Constitution article 28 A, section 2 stating that the death penalty given to the inmates of drug court judged to be in violation of Human Rights.

On one hand, the Indonesian government also refers to Act narcotics threatens death penalty for drug traffickers to create a social life that actually appreciate the existence of human rights. The policy of executing drug dealers known to have been considered carefully by the Indonesian government for the narcotics Act stated that a drug dealer that the criteria amount or quantity of drug substance in a certain weight must be given the death penalty. This means that the narcotics law suggests that one can't do anything freely circulate drug considered it violates human rights because such actions violate moral values, security, and order in a democratic Indonesian society

The death penalty drug dealers in Indonesia under the Act of 1945, particularly Article 28A which states that everyone has the right to life, survival and livelihood. The right to life, freedom from torture, freedom of thought and conscience, freedom of religion, the right not to be enslaved, the right to recognition as a person before the law, and the right not to be prosecuted under the Act retroactive rights human beings can't be reduced under any circumstances.

[15] Ronny Hanitijo Soemitro, *Metodologi Penelitian Hukum dan Jurimetri*, Ghalia Indonesia, Jakarta, 1994, page 36

Thus, no one big criminals (including drug dealers and corruption) are left to roam rampant in society by spreading evil and trying to save his own life only with reference to the Human Rights. If this happens, then the principle of 'right to life' will be transformed into inhuman principle defenders criminals, and this principle has become a sort of 'enemy of humanity'. The right to life does not apply unconditionally to all people under all conditions there are exceptions to the rules and principles.

Exercise their rights and freedoms, everyone shall be subject to the limitations set by law for the purpose of securing due recognition and respect for the rights of freedom of busy people to meet the fair demands in accordance with considerations of morality, religious values, security and public order in a democratic society. Based on the 1945 view of the above, the death penalty for drug traffickers in Indonesia is a government effort in respecting human rights based on moral values, religious values, in creating public order. Implementation of the death penalty against drug dealers in Indonesia also received positive reactions from social activists who mostly come from scholars, jurists, moralists, theologians, sociologists, psychiatrists and criminologists.

Based on the provisions in the Law on narcotics, it is clear that one can't act arbitrarily or freely on behalf of human rights for all the deeds of each person are limited by the per-Law Invite. If someone has violated human rights or interfere with another person is obliged to account for his actions to achieve fair demands in accordance with moral considerations, security, and public order in a democratic society.

On the other hand, the Indonesian government's policy of executing drug dealers assessed by human rights activists violates human rights values of life. This is in accordance with the Human Rights Act section 69 subsections (1): "Every person shall respect the human rights of others, morals, ethics, and discipline of the society, nation, and state. Article (2): "Every human rights somebody raises a fundamental obligation and responsibility to respect the human rights of others on a reciprocal basis as well as being the government's duty to respect, protect, enforce, and moving it forward" so that the Indonesian government should be able to apply enforcement fair to apply the laws and legislation in accordance with applicable regulations.

Death Penalty Policy For Narcotics Crime Actors In Indonesia,

The death penalty is applied by the Government of the Republic of Indonesia is a breakthrough new government in order to reduce the number of hazard narcotics in Indonesia. This policy is actually good if executed in accordance with the legislation in force, but there are several views related to the Rights in persons seized by law, therefore the following views of the expulsion of the death penalty policy:

a. The views on Human Rights on the Human Right to Life.

Today thoughts on the death penalty can't be separated from the issue of Human Rights. In the context of Human Rights in which the right to life is a right that can't be ruled out. The right to life is a right that is highly protected. Article 3 of the Declaration of Human Rights of December 10, 1948 formulated the "everyone is entitled to a livelihood, freedom and safety of individuals". This formula outlined some key principles in human rights, namely that no one may be deprived of his life (his life) is arbitrary. The statement raises a number of questions and arguments whether the death penalty is a violation of the provisions of Article 3 of the Universal Declaration of the Human Rights?

The provisions in Article 6 of the International Covenant of Civil Rights and Political formulate that:[16]

- Every human being has the inherent right to life on him. This right shall be protected by law. No one shall be deprived of his life arbitrarily.
- In countries which have not abolished the death penalty, the death sentence can only be imposed on some of the most serious crimes in accordance with the law applicable at the time of the crime and not contrary to the provisions of the provisions of the Covenant and Convention genocide crime prevention and law. This penalty can only be carried out on the basis of a final decision rendered by a competent court.
- When a deprivation of life constitutes a crime of genocide, it should be understood that nothing in this Article shall authorize states are parties to the Covenant, in order to reduce any obligations that have been imposed by the provisions of the Convention on the Prevention and punishment of the crime of genocide.
- Every person who has been sentenced to death has the right to beg for forgiveness or punishment replacement. Amnesty, pardon or replacement can be given the death penalty in all cases.
- The death penalty shall not be imposed for crimes committed by someone under the age of eighteen years old and should not be carried out on pregnant women.
- No one else in this Article shall be used to delay or prevent the abolition of capital punishment by the state that is a party to these covenants.

From this provision, the position of the death penalty in view of human rights law can't be imposed on children, and can only be imposed for crimes are very serious including genocide. Based on the 2857 Resolution 1971 and Resolution 32/61 of 1977 and the UN took steps to announce the abolition of the death

[16] Eva Achjani Zulfa, Op.Cit, page 105

penalty as a universal goal to be achieved, albeit on a limited basis applied for some crimes. Several regional conventions are also pushing for the elimination of capital punishment, among others:[17]

- The European Convention on the Protection of Human Rights and Fundamental Freedoms, Article 2: Everyone's right to life shall be protected by Law. No one shall be deprived of his life except in execution of the sentence by the court after he was tried for a crime punishable by penalties according to Law.
- American Convention on Human Rights Article 4:
  a) Everyone has the right to life respected. This right is protected by the Act and, in general, of a murder. No one shall be deprived of life arbitrarily.
  b) In countries that have not been able to abolish the death penalty, this penalty can only be imposed for crimes of the most serious and in accordance with the final decision delivered by a competent court and pursuant to an Act which determines the punishment, enacted prior to the crime , Its application should not be expanded in the crimes against the sentence is not applicable now.
- The death penalty will not be imposed again in countries that have elimination.
- In any case the death penalty must not be imposed need for political offenses or related common crimes.
  The death penalty should not be imposed on a person who at the time the crime was committed under the age of 18 (eighteen) years or over seventy years and also may not apply to women who are pregnant.
  Every person sentenced to death has the right to apply for amnesty, pardon or penalties that may be given in all cases. The death penalty should not be imposed for such a petition is awaiting decision by the competent authority.

In the Safeguards Guaranteeing Protection of the Rights of Those Facing the death penalty (Resolution PBB.1984 / 50) formulated the following matters:[18]

1) In countries which have not abolished the death penalty, the death penalty should only threaten to crime- the most serious crimes, where it is understood that these crimes are crimes with firearms or crime that poses severe damage.
2) The death penalty has been threatened before it was committed. When there is a change after the deed is done should the perpetrator benefit from these changes.
3) A person who was under 18 at the time the act was committed can't be sentenced to death, not also be imposed for a pregnant woman or a new birth or those who suffer from mental disorders.
4) The death penalty may be threatened, to the person who was convicted by the evidence is clear and there is no possible explanation other than on facts.
5) The death penalty can only be imposed by verdict issued by a competent court after going through a fair trial process and impartially in accordance with the provisions of article 14 of the Covenant rights, civil and political rights, including the right of suspects to get assistance legal counsel at all levels of the judiciary.
6) A person who has been sentenced to capital punishment has the right to take legal actions to the level of a higher court, and in any legal action that passed should be reassured that have been examined adequately and by regulatory authorities.
7) Anyone sentenced to death are entitled to ask pardon or punishment, utilization or changes in collateral punishment in all cases where capital punishment is imposed.
8) The death penalty can't be executed when an appeal or other remedies as a means to obtain forgiveness or reduction of sentence being carried out.
9) The execution of the death penalty should be done in a way that can reduce the suffering inflicted.

The concept of human rights protection in Indonesia itself can be seen in Pancasila and the Constitution of 1945, it was also enshrined in the preamble of the 1945 Constitution also section of the fourth, as follows:

> "later on in order to form a government of Indonesia which protect the entire Indonesian nation and the entire homeland of Indonesia and to promote the entire homeland of Indonesia and to promote the general welfare, educating the nation and participate in the establishment of world order ".

From the opening quote of the 1945 Constitution can be understood that the principles of human rights in Indonesia have guaranteed its survival. The guarantee can be categorized in defense of social order and social welfare to be realized by the state, but it can be seen that the concept of implementation of human rights in Indonesia it certainly has a characteristic that is different from other countries. The difference of course lies in the Indonesian national wisdom reflected in the Pancasila and destination countries. The right to life itself is guaranteed for its sustainability in 1945, where the practices were not contrary to public order and the laws, so it is not necessarily the right to life can straddling the rights of others, especially in large-scale rights of the

[17] Eva Achjani Zulfa, Ibid, page 106
[18] Eva Achjani Zulfa, Ibid, page 106-107

community. This is the basic reason that the restriction of the right to life is situated on the obligation to respect the right to life which is owned by someone else. Based on one side of them that where the death penalty is still maintained even though reap opinions for and against execution.

The need for imposition of Criminal Dead view of the perpetrator Crime Narcotics.

To prevent and combat illicit trafficking more effectively, distributed, and embodied by the people's representatives in Parliament to change the law No. 22 of 1997 by Law No. 35 of 2009 on narcotics, the threat of the death penalty to this Law shows the seriousness of the government and Parliament To combat illicit trafficking. Chosen or prescribed the death penalty as a means to tackle crime essentially a policy choice. In establishing a policy may be people who argue pro or con against capital punishment.

As for the reason for the importance of the imposition of capital punishment to be applied against the convict narcotics are as follows:

a. If the death penalty is not applied to the convicted narcotics it is feared the development of the network (syndicate) drug dealers can't be restricted because of illicit trafficking can undermine public order, impair the younger generation, so it is natural that criminal sentenced to death.[19]
b. Capital punishment is needed in the era of development against those who hinder the development process, distribute narcotics can mean hindering development because of its detrimental and is a very great danger to human life, society, nation and state and national defense Indonesia.[20]
c. The death penalty is an important tool for good implementation of criminal law because of its usefulness as a tool of the authorities so that legal norms are adhered to.

Giving the death penalty, if the terms of the orientation of the purpose of criminal law itself, namely:[21]

a. Strengthen networks and build moral character or social responsibility.
b. Protect public order and constitutional order of interference or malicious acts.
c. Educating the public legal awareness.
d. To build a worthy attitude toward living together or societal rules.

According to Bambang Purnomo criminal Dead is still needed for the following reasons:[22]

a. Both in the implementation of capital punishment or imprisonment, in case of errors the judge's ruling, according to a reality was not easy to fix.
b. Based on the foundation of Pancasila which is associated with the development of the science of law must be drawn that line of thinking their emergence in the public interest for the community would take precedence over then for the benefit of the individual. Whenever there is a conflict of two patterns of interest, then put on the way of thinking that the operation of the rule of law that is efficient better start to the starting point to the interests of the community that became the basis of the above other interests, in the sense that there is no rule of law, then the interests of others can't be implemented. And besides that justification for the prevention of injustice caused by crime is the reason *subsociale* is a general interest to the public that have a higher nature.
c. In terms of talking about the culture and civilization of the nation of Indonesia is not possible slogan soar beyond the reality of the civilizations of other nations, especially against neighboring civilization which in reality does not become low because they threaten and impose the death penalty.
d. Knowledge of the purpose law of criminal and criminal prosecution can't release at all the attitude of alternative criminal elements in the form of retaliation, goals, objectives, education, frightening and destroy for certain crimes, in which each purpose it is used selectively and effectively according to the needs in accordance with the event.

Thus, the administration of the death penalty itself is not intrinsically be faced with diametrically (totally opposed) with the right to life (Article 28 A j.o. Article 28 I of the 1945 Constitution and Article 9 section (1) j.o. Article 4 of Law No. 39 of 1999 on Human rights) and the right to be free from the removal of the life (Article 33 of law of the No. 39 of 1999 on Human rights). The statement in the 1945 Constitution and Law No. 39 of 1999 on Human Rights that "everyone has the right to life" is synonymous with Article 6 Section (1) of the ICCPR (International Covenant on Civil and Political Rights) which states that "every human being has the right to life" but in Article 6 section (1) of the ICCPR (International Covenant on Civil and Political Rights), that statement is followed by a firm sentence "no one shall be arbitrarily deprived of his life". So although Article 6 Section (1) of the ICCPR states that "every human being has the right to life" but does not

[19] SR. Sianturi dan Mompang Panggabean, Hukum Penitensier di Indonesia, Bandung, Alumni, 1999, page 62
[20] *Ibid*,page 64
[21] Barda Nawawi Arief, Tujuan dan Pedoman pemidanaan Perspektif Pembaharuan Huum Pidana dan Kajian Perbandingan Beberapa Negara, Semarang, Universitas Diponegoro, 2009, page 19
[22] Syaiful Bakhri, Perkembangan Stelsel Pidana Indonesia, yogyakarta, Total Media, 2009, page 29-30

mean the right to life can't be taken away, that should not be is "deprivation of life arbitrarily, even under Article 6 Section (2) otherwise, the death penalty can still be possible for "the most serious crime."

Regarding the procedure of capital punishment itself with regard to the clauses of Article 10 (a) jo. Article 11 of the Criminal Code jo. Act No. 2 / PNPS / 1964 on procedures for the implementation of capital punishment in the neighborhood drop by the Court in general and Military Justice jo. Police Regulation No. 12/2010 regarding the procedure of implementation of the death penalty. Decisions regarding capital punishment who already have permanent legal force, must be declared by Presidential Decree (fiat execution), even though the convicted person refuses to beg for forgiveness (pardon) from the President, he remains authorized to grant clemency to overcome the possibility of errors the judge. In this case the intervention of the President, may mean that the death penalty is not arbitrary because it took a series of processes of thought and consideration deep enough either at the level of decision by the judiciary as well as in the implementation of the first through the approval of the President as the Executive.

The death penalty is viewed from the idea of the monodualistic[23] equilibrium and individualization of the criminal itself[24], it can't be classed as a form of stelsel that is cruel, because of the death penalty that is exceptional has the following conditions:

1)Implementation of the execution of death row inmate using way minimum may not cause prolonged pain (dying), within the meaning of the execution with regard to the humanitarian side against the convict.
2)Implementation of the death penalty should not be carried out in public, it is human nature to remember the convict in this case still regarded his position as a recognized individual rights are limited.
3)Criminal die never threatened individually never even threatened by alternative only to imprisonment for life.
4)Criminal die should not be administered concurrently with other basic criminal (jail, cover, imprisonment, fines).
5)Criminal die only given for crimes that were classified as serious crimes (Rare crime) and an extraordinary crime (extraordinary crime).
6)Article 56 of the Criminal Procedure Code states among other things that in the case of a suspect or threatened with the death penalty the officials concerned to examine the case required to appoint counsel for them free of charge.

Based on the above it is not wise if there is an argument that says the death penalty is punishment cruel and not feasible because of the provision of capital punishment the reduction of Human Rights, executions are ideal due to the provision of capital punishment is carried out by continue to promote the humanistic and Indonesia's own views on human rights are not absolute, because of the law as a barrier once balancer or regulator of the rights to the obligations of rights, so that the implementation of these rights when imposing the ingredients to move perform actions that may be necessary and worth including the provision of capital punishment itself with the aim of social order and national security.

Closing

Conclusion

Based on the writer already explained above, it can be made a conclusion:

a. The execution of criminal narcotics in Indonesia gets a variety of responses from all elements of society. This raises the pros and cons that exist in the community, where aspects of Rights against someone who is still used as a weapon in the fight against narcotics in Indonesia. This is according to some of the unethical performed on humans because there are other more humane way, name from one side that narcotics crime itself was also a crime that can undermine the future generation.
b. The measures taken by the government in terms of combating narcotics seems appropriate, given that narcotics is one extraordinary crime (extra ordinary crime). This policy is actually there are risks associated with human rights for the doers, but it is not wise if there is an argument that says the death penalty is punishment cruel and not feasible because of the provision of capital punishment the reduction of Human Rights, executions are is ideal because of the provision of capital punishment is carried out by promoting the humanistic and Indonesia's own views on human rights are not absolute, because of the law as a barrier once balancer or regulator of the rights to the obligations of rights, so that the implementation of these rights when imposing the ingredients for moving action as may be necessary and commensurate including the provision of capital punishment itself with the aim of social order and national security.

[23] Ide keseimbangan monodualistik diterapkan dalam syarat pemidanaan dalam konsep yang bertolak dari pemikiran keseimbangan antara kepentingan masyarakat dengan kepentingan individu, antara faktor objektif dan faktor subjektif. Lihat : Barda Nawawi Arief , Bunga rampai Hukum Pidana Indonesia, Semarang, Universitas Diponegoro, 2009, page 17

[24] *Ibid, page 20*

Recommendations

a. The execution of the doers should be more careful, because it may cause a difference of opinion among the public. There needs to be more intense socialization to the community so that people can understand the whole perpetually in this regard.
b. Policy on the death penalty for the perpetrators of criminal acts narcotics issued by the government is right, because it actually has considered the human rights element in it. However, in practice should be more careful in determining who and why somebody to be in charge as a death row inmate narcotics.

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LEGAL PROTECTION FOR CONSUMERS IN E-COMMERCE BUSINESS TRANSACTIONS

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ABSTRAK

The development of information technology, media and communication has changed both the behavior of society and human civilization globally. One of the changes that occur in the community is to use communication for transactions/e-commerce activities. Electronic transaction is basically an engagement or legal relationship that is electronically synthesized by a network of communication systems which is further facilitated by the existence of a global computer network or the internet. The agreement is always a legal act with a double or plural law, for which an agreement is required the parties. In the e-commerce transaction, the agreement of the parties must still meet the requirements of the validity of the agreement in accordance with the provisions of Article 1320 of the Civil Code and the principle of the good in the agreement. In Law Number 11 of 2008 concerning Information and Electronic Transactions, the principle of good is containing in the provisions of Article 9. In Article 9 there is an obligation for business actors who transacted through the internet should provide complete information about the supplied object. It is necessary because in electronic transactions the parties did not meet directly and the object of the transaction was not seen significantly. A good faith principle is needed to protect consumers from sellers cheating through the detailed information that is given at the time of bidding.

Keywords: Law Protection, Consumer, Transaction, E-commerce business.

Introduction

The development of information technology, media and communication has changed both the behavior of society and human civilization globally. The development of information and communication technology has caused the world's relationships to be boundless and causing significant social, economic, and cultural change to take place so quickly.

The presence of information society is believed to be one of the important agenda of the third millennium world community, among others, marked by the utilization of information technology including the management of information systems, communication systems, and electronic transactions systems that are increasingly widespread in various activities of human life, not only in developed countries but also in developing countries including Indonesia. This phenomenon in turn has placed information as a very important and profitable economic commodity. To address this development in some countries as a pioneer in the utilization of the internet has changed the paradigm of its economy from a manufacturing-based economy to a service-based economy.[1]

The existence of the Internet as one of the institutions in the mainstream of world culture is further underscored by the rampant electronic commerce (e-commerce) as the big business of the future. This e-commerce has not only become mainstream culture of developed countries but also has become transaction model including Indonesia. This fact shows that convergence in the field of information technology, media, and informatics continues unabated, along with the introduction of new developments in information technology, media and communications.

Literally electronic commerce terminology or commonly called E-commerce is a relatively new in the know. However, in practice E-commerce has actually been running in Indonesia in various variants. This is demonstrated by the large number of Electronic Data Interchange (EDI) and Electronic Funds Transfer (EFT) users, followed by the increasingly popular use of Credit Cards, Automated Teller Machines (ATMs) and Telephone banking in various businesses in Indonesia.[2]

Transactions electronically are basically an engagement or legal relationship that is electronically synthesized by a network of communications systems further facilitated by the existence of a global computer network or the Internet. In the sphere of civilianity, in particular the engagement aspect, the meaning of such transactions shall refer to all types and mechanisms in their own electronic legal relationships, which shall include sale and purchase, licenses, insurance, auctions and other engagements born in accordance with the development of trading mechanisms in the community.

[1] Abdul Halim Barakatullah dan Teguh Prasetyo, *Bisnis E-Commerce Studi Sistem Keamanan dan Hukum Di Indonesia,* Pustaka Pelajar, Yogyakarta, p. 250
[2] Ibid, p. 251

The e commerce agreement which is now a modern trend on the one hand provides benefits while on the other hand does not promise assurance and guarantee and rights protection for consumers.

Based on the above description, the authors want to conduct research entitled Legal Protection for Consumers in E-Commerce Business Transactions.

Main Problem

Based on the background description of the above problem, it can be formulated research problems how the concept of legal protection arrangements for consumers in business transactions E-Commerce?

Discussion

Legal Protection for Consumers in E-commerce transactions

Definition of Agreement

Agreement comes from the word "agree" which means consent between two parties (each expressing the willingness and ability to do something). Definition of agreement under Article 1313 of the Civil Code:

"A covenant is an action which one or more persons commit themselves to one or more persons".

Scholars of civil law generally argue that the definition of the agreement contained in the provisions of Article 1313 of the Civil Code is incomplete and too broad.

Subekti gives the understanding of the agreement is as follows:

"An event when a person promises to another or where the two men promise to do something".

R Setiawan gives understanding of agreement that is:

"Legal acts in which one or more persons commit themselves or bind themselves to one or more persons."

The Agreement is always a legal act with a double or plural, where it is necessary to agree on the part of the parties. However, not all multilateral legal acts are covenants, such as general elections. The promised thing to do is known as "achievement". Achievements may include:

- Gives something;
- Do something; or
- Do nothing.

In the relationship between the seller and the consumer, the treaty law serves to provide the certainty, stability, and security necessary to ensure the smoothness and execution of various transactions.

Principle of Agreement

Book III of the Civil Code recognizes three basic principles in making and executing agreements. The three principles are:

1. The principle of freedom of contract or open system.
   One principle in the treaty law is the principle of freedom of contract (freedom of contract). This means that the parties freely make an agreement and self-regulate the contents of the agreement, as long as meet the provisions as follows:
   a. Eligible as a treaty;
   b. Not prohibited by law;
   c. In accordance with the prevailing habits;
   d. Throughout the agreement is executed in good faith.

   The principle of freedom of contract is a reflection of the open system of the treaty law. The principle of an open system in the treaty contains a principle of freedom of contract, in the Civil Code normally summarized in Article 1338 section 1 which reads:
   "All legally-made agreements act as laws for those who make".
   From the meaning of the passage it can be interpreted that the public is allowed to make agreements in the form and contain anything (or about anything) and the treaty binds those who make it like a law.
2. The principle of consensualism.
   The principle of consensualism is essentially the covenants and engagements that are born from the moment the agreement is reached. The principle of consensualism is usually inferred from Article 1320 of the Civil Code which reads:
   A legally created agreement is required four conditions:
   a. Agree those who bind themselves
   b. The ability to make an agreement.
   c. A certain thing.
   d. A lawful cause.
3. The principle of good faith.
   The principle of good faith dictates that a covenant be carried out honestly, that is, by heeding the norms of decency and decency. This principle is one of the most important joints of the covenant law.

The terms of the Agreement

In Article 1320 of the Civil Code is a provision regulating the terms of the validity of the agreement, namely:

a. Agree they bind themselves;
b. the ability to make an engagement;
c. a certain right;
d. a lawful cause.

Of these four conditions, it is a common criterion for the birth of an agreement and covers the subject and object of the agreement. The first and second terms concern the subject, while the third and fourth terms concern the object of the agreement. A covenant containing the defect on the subject, then the treaty may be canceled, while a covenant containing the defect on the object, then the agreement is null and void.

In view of the terms of the validity of the agreement, Asser distinguishes the part of the covenant, the core part (*weezenlijk oordeel*) called *essensialia*, and the non-core (non *weezenlijk oordeel*) part of the *naturalia* and accidental.[3] First, *essensalia* is an absolute element that must exist, so that the agreement is valid is a condition of validity of the agreement. Second, *naturalia* is an element typically attached to a covenant that is an element which, without special agreement in the covenant, is naturally assumed to exist in the covenant, guarantees the existence of hidden cache. Third, accidentals are elements that must be agreed upon, contained in the agreement on the chosen place of residence. These three elements are generally present in every agreement made.

Electronic Commerce

a. Definition of E-commerce

Electronic commerce or e-commerce is business activities involving consumers, manufactures, services providers, and intermediary traders (intermediaries) using computer networks i.e the internet. Understanding e-commerce is the purchase and sale of goods and services by use online consumer services on the internet. This transaction model is known as electronic transaction.

b. Scope of E-commerce

The scope of E-commerce includes 3 (three) sides, namely e-commerce business to business, e-commerce business to consumer, and e-commerce consumer business to consumers.

(1) Ecommerce Business to business

E-commerce business to business is a business communication system between business actors or in other words electronic transactions between companies conducted routinely and in the capacity or volume of large products. The activities of e-commerce in this scope are shown to support the activities of the business actors themselves.

(2) Ecommerce Business to the consumer

E-commerce business to the consumer is an electronic business transactions conducted by business actors and the consumer to meet a particular need. The development of e-commerce segmentation in business to consumer brings profit, not only on the business actor; the consumer also gets the same benefits.

(3) E-commerce Consumers to consumers

E-commerce consumers to consumers is an electronic business transactions conducted between consumers to meet a particular need and at a certain moment the consumer segmentation to the consumer is more specific because the transaction is done by consumers to consumers who require transactions.

(4) E-commerce Law Settings

a) Law Number 11 of 2008 regarding Information and Electronic Transactions

In the Information and Electronic Transactions Law, the definition of electronic transactions can be seen in Article 1 number 4 are:

> "Legal acts committed by using computers, computer networks, and/or other electronic media.

In the provisions of Article 9 of the Information and Electronic Transactions Law contains the notion that:

> "Business actors offering products through electronic systems must provide complete information and are fully relevant to the terms of the contract, the manufacturer, and the products offered.

The parties conducting electronic transactions shall have good faith in conducting transactions and/or electronic information and/or electronic documents during the transactions. Electronic transactions set forth in electronic contracts bind the parties. Thus the Information and

[3] Mariam Darus Badrulzaman, *Perlindungan Hukum Terhadap Konsumen Dilihat dari Sudut Perjanjian Baku (Standar*), (BPPN, Bina Cipta Bandung, 1983), p. 99.

Electronic Transactions Law has been set about the protection for consumers who transact electronically.

b) Law Number 7 of 2014 on Trade.

Law No. 7 of 2014 on Trade applies to the international scale as the legal basis for the conduct of trading through electronic systems and consumers in trading activities through electronic systems. Law No. 7 of 2014 on Trade defines trading through electronic systems as a trade in which transactions are carried out with a series of electronic devices or procedures. Included in the trading through electronic systems are:

a. Traders / merchant.
b. Electronic Trade Provider, such as electronic communication organizers, electronic advertisements, application system providers, electronic payment systems, as well as service providers and delivery system applications.

In the Law of Commerce, the trade through electronic systems is regulated in Article 65 which regulates among others for business actors who trade goods and/or services using electronic systems shall provide complete and correct data or information, including: identity and legality of perpetrators business as producer or distributor, technical requirements of goods offered, technical requirements or qualifications of services offered, prices and means of payment of goods and/or services, and the manner of delivery of goods. The above provisions are intended to protect the rights of consumers in electronic transactions.

Consumer's Protection

1. Definition of Consumers

   In Article 1 section 2 of Law No. 8 of 1999 on Consumer Protection defines consumer understanding that is:

   > "Any person wearing goods and/or services available in the community, whether for self-interest, family, other people, or other living beings and not for trading."

   From this understanding that the consumer is the last user, without the consumer is the buyer of goods and/or services.

2. Consumer rights and obligations

   a) Consumer rights

      Article 4 of the Consumer Protection Law regulates the rights of consumers among others as follows:

      - Right to comfort, safety and safety in consuming goods and or services;
      - The right to choose goods and or services and obtain the goods and or services in accordance with the exchange rate and the conditions and promised warranties;
      - The right to correct, clear and honest information about the condition and guarantee of goods and or services;
      - The right to be heard by the complainant and his or her complaint over the goods and or services used;
      - The right to appropriate advocacy, protection, and dispute resolution efforts of consumer protection;
      - The right to education and consumer education;
      - The right to be treated or served properly and honestly and not discriminatively;
      - Right to compensation, indemnity and/or reimbursement, if the goods and or services received are not in accordance with the agreement or not as they should be.

   b) Consumer liability.

      Article 5 of Consumer Protection Law states that consumer liability is:

      - Read and follow instructions on information and procedures on the use or use of goods and or services, for security and safety;
      - Good faith in making purchases of goods and / or services;
      - Paying in accordance with the agreed exchange rate;
      - Following the legal settlement efforts of consumer protection disputes.

      In consumer e-commerce transactions the rights of consumers to obtain information about goods and or services remain protected

Closing

Conclusion

From our description above that the sale and purchase agreement through e-commerce will refer to the principle of validity of the agreement that is Article 1320 of the Civil Code in addition also refers to Article 1338 section 1 Civil Code. Law of Consumers Protection on e-commerce transactions in accordance with applicable legislation that is Information and Electronic Transactions Law and Trade Law namely Article 9 of

the Law on Information and Electronic Transactions Law and Article 65 of Law no. 7 of 2014 on Trade that is obliged to provide complete data and information.

Suggestion

In e commerce business transactions, business actors should obey the principles of civil law, one of which is the principle of good faith, which is reflected in Article 65 of Law Number 7 of 2014 on Trade that is for business actors must provide complete data and information, which is one of the consumer rights protected by Law No. 8 of 1999 on Consumer Protection is contained in Article 4 of Law Number 8 Year 1999 namely the right to true, clear and honest information about the condition and guarantee of goods and or services.

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GOVERNMENT POLICY IN SCHEDULE OF NON GOVERNMENT ORGANIZATION (NGO) IN INDONESIA

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ABSTRACT

The term "NGO" for the first time comes from a seminar held by the Secretariat of Bina Desa in Ungaran, Central Java, 1978. Each country has its own name to call NGOs, among others, in India is called Voluntary Agency (Volag), United Kingdom and some African countries used the term Non-Provit Organization, in the Philippines used the term Non-Community Organization, in the United States used the term Non-Governmental Organization. The use of various designations is based on the character of the desired role emphasis, and is also influenced by the state system adopted. Problems arise when NGOs are more subject to provisions made by donors than to the state, whereas the state has properties that one of them is the nature of coercion. Of the nature possessed by the state, bring consequences on its authority to regulate including NGOs. Issues of legality, accountability, facilities, up to law enforcement, sometimes become part of organizational problems formed by society in Indonesi. Based on a normative juridical approach that descriptive analysis, it can be seen that NGOs in Indonesia arrangements are still ubiquitous, in addition to the Foundation's foundation law for NGOs in the form of foundations, there are also in regulations related to associations, but some are without form or sporadic means to be set for a momentary purpose. Thus the government policy in the arrangement of NGOs in Indonesia is not the same as the government policy in regulating social organization, although same as organization formed by society but different form and legal basis.

Keywords: Government Policy, NGOs.

Introduction

The use of the term NGO for the first time comes from a seminar held by the Secretariat of Bina Desa in Ungaran, Central Java, 1978. According to Bambang Ismawan,[1] each country has its own name to call NGOs, among others, in India used Voluntary Agency (Volag), United Kingdom and some African countries used the term Non-Provit Organization, in the Philippines used the term Non-Community Organization, in the United States used the term Non-Governmental Organization. The use of various designations is based on the character of the desired role emphasis, and is also influenced by the state system adopted.

The role of NGOs as an organization that has a flexible freedom of movement, in its development has led to various opinions among officials of Indonesia. The first opinion considers that NGOs in Indonesia are an organization that likes to make a fuss by supporting activities that are demanding the government to be more democratic, to recognize human rights, and to pay more attention to the preservation of the environment in building. This opinion is still a large part of the opinion of government officials both at the national level and at the regional level. The second opinion is that the NGO is an organization that can be "used" to achieve the planned development goals. In this context emerges a "partnership" between the government and the NGO. Since the reforms have been initiated by the students, the presence of NGOs is like "mushrooms growing in rainy season", because every development project implemented by the government should involve NGOs.

Sharp criticism then emerged in 2012 when in the last week of August 2012 there were two events that were quite "intriguing" to reopen the old record of the role and existence of Non-Governmental Organizations (NGOs) in Indonesia. First, Hotma Paris Hutapea burst in Indonesia Lawyer Club on TV-One on August 28, 2012 "NGO Pokrol Bamboo, which is critical and wear flip flops when poor, and silent when given the position and wear expensive batik".

Second, reporting Alleged Corruption Jokowi to KPK dated August 30, 2012 by a group calling themselves TS3 NGOs, referred to as Nasi Bungkus NGO formed just 1 month ago[2]. This criticism plus many institutions have not been open and accountable for the conditions and developments achieved through public reports periodically and openly. In the matter of financial auditing by an independent auditor, the form of accountability is only given to donor agencies working together as administrative requirements rather than on the basis of political moral awareness in establishing accountability in managing credible organizations. The problem of NGOs lacking commitment to the implementation of "good governance" in the internal institutions is not separated from the role of donor agencies.

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[1] Bambang Ismawan , terpetik lewat Abdullah Syarwani dan Meutia Gani Rochman, (ed.),**Pengembangan Swadaya Nasional - Tinjauan Ke Arah Persepsi yang Utuh, LP3ES,** Jakarta, 1992, p. 79
[2] Diah Rahardjo, 2012 Politik Akuntabilitas Lembaga Swadaya Masyarakat (LSM) p. 1

Good governance practices, often not a measure of funding or others working together. In the perspective of donor agencies, it appears that feasibility (objectives, methods and outputs) of the proposed program are more important than the transparency and accountability of institutions[3]. At this point the NGO is more subject to the provisions made by the donor than to the state, whereas the state has a characteristic one of which is the nature of coercion.[4] Of the nature possessed by the state, bring consequences on its authority to regulate including NGOs. Issues of legality, accountability, facilities, up to law enforcement, sometimes become part of organizational problems formed by the community in Indonesia.[5]

Moving from the above background, until now the NGO "seems to be" the only institution established by the community free of government regulation and when it is associated with the authority of the government, it becomes highly relevant to be reviewed under the title "Government Policy In Arrangement Non Governmental Organization in Indonesia.

Problems

Basing on the description of the above background, it can be formulated problem formulation that is "How Government Policy In Setting NGOs in Indonesia."

Theoretical Basis

Public Policy Theory

James Anderson declares " *A purposive course of action followed by an actors or set of actors in dealing with a problem on matter of consern* .[6] This opinion implies that in public policy contains elements:

1. The existence of a series of actions
2. There is a certain goal to be achieved
3. There are executors
4. There are results to be achieved.

While David Easton states "Public policy is the authoritative allocation of values for the whole society"[7]. Compared to James Anderson's opinion, this view emphasizes the existence of a legitimate allocation of values to society, meaning that formal legal aspects are put forward by David Easton, which is of little importance to James Anderson.

The formulation of valid values in Indonesia is the formula that became the ideological recap of the Indonesian nation by concluding it from the points of thought in the Preamble of the 1945 Constitution and the values contained in all the principles of Pancasila in harmony and as a unified whole. In general, the basic values of the ideals of the Indonesian nation can be formulated as follows:

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[3] ***Lock.Cit.***

[4] **Prof Miriam Budiardjo.** Dalam bukunya "Dasar-dasar Ilmu Politik " berpendapat bahwa **sifat Negara** sebagai berikut:

a) **Sifat Memaksa Negara**
Sifat memaksa dimaksudkan agar peraturan perundang-undangan ditaati. Dengan cara memaksa maka penertiban dalam masyarakat tercapai serta timbulnya anarkhi dicegah. Termasuk disini adalah memiliki kekuasaan untuk memakai kekerasan fisik secara legal. Perangkat-perangkat yang dipakai adalah; polisi, tentara, dan badan peradilan. Dalam masyarakat yang bersifat homogen dan terdapat consensus nasional yang kuat mengenai tujuan-tujuan bersama, sifat memaksa menjadi tidak begitu menonjol. Sebaliknya dalam Negara yang baru berdiri, sementara rakyatnya heterogen dan ikatan konsensus nasionalnya tidak begitu kuat, sifat paksaan sangat menonjol.

b) **Sifat Monopoli Negara**
Negara memiliki sifat monopoli dalam menetapkan tujuan bersama dari masyarakat. Semua hal yang menyangkut kehidupan orang banyak dimonopoli oleh Negara. **Contoh sifat monopoli Negara;** Negara bisa melarang aliran kepercayaan atau kelompok politik tertentu yang dianggap bertentangan dengan paham Negara.

c) Sifat Mencakup Semua atau Menyeluruh *(all-encompasing, all-embracing)*
Negara memiliki sifat menyeluruh yang berarti mencakup semua. Semua peraturan perundang-undangan, misalnya kewajiban membayar pajak, berlaku untuk semua orang tanpa terkecuali. Hal ini dikarenakan menjadi warga negara bukan atas kemauan sendiri (involuntary membership), yang berbeda dengan asosiasi dan organisasi lain yang keanggotaannya bersifat sukarela

[5] https://news.detik.com/berita/3621869/mendagri-ada-344-ribu-ormas-yang-terdaftar-tapi-tak-berbadan-hukum, diunduh, tanggal 17 Januari 2018, yang menyatakan "Menteri Dalam Negeri (Mendagri) Tjahjo Kumolo menyebut ada 344.039 ormas yang terdaftar di Kemendagri dalam bentuk surat keterangan terdaftar namun tidak berbadan hukum per 6 Juli 2017. Hal tersebut disampaikan oleh Tjahjo dalam persidangan gugatan Perppu 2/2017 tentang Ormas di Mahkamah Konstitusi (MK). "Jumlah ormas besar dan cakupan aktivitasnya dalam berbagai sektor sampai tanggal 6 Juli 2017 ada 344.039 yang terdata di Kemendagri," kata Tjahjo di gedung MK, Jalan Medan Merdeka Barat, Jakarta Pusat, Rabu (30/8/2017). Di Kemendagri sendiri, ada 370 ormas yang terdaftar dengan surat keterangan tanpa berbadan hukum. Di Kementerian Luar Negeri, ada 71 ormas yang semuanya didirikan oleh warga negara asing. Pemerintah daerah ada 7.226 ormas tidak berbadan hukum tapi terdaftar. Pemerintah kabupaten/kota ada 14.890 ormas tidak berbadan hukum tapi terdaftar. Di Kemenhum HAM ini paling banyak ada 321.482, banyak yang berupa yayasan dan perkumpulan," paparnya.

[6] Wijaya, materi kuliah Hukum dan Kebijakan Publik, PDIH UNTAG Semarang, Semester Gasal TA. 2017-2018

[7] Yos Johan Utama, materi kuliah Hukum dan Kebijakan Publik, PDIH UNTAG Semarang, Semester Gasal TA. 2017-2018

1. The national law is built on the rational criteria, and upholds the spiritual, ethical and moral values to nourish the noble humanitarian character and uphold the moral ideals of the people. Concluded from the Godhead of Godhead and the fourth subject of the Preamble of the 1945 Constitution.
2. National law is built on the principle of respecting human dignity and prestige by providing citizens with equal, harmonious and balanced human rights and social rights. In addition, national law must be able to prevent the emergence of injustice in society. Inferred from the just and civilized principle of humanity and second thought in society.
3. The national law protects all the independent Indonesian nation, the whole blood of Indonesia and the independent, united, sovereign, just and prosperous Indonesia, strengthen the unity and unity of the nation in which there is only one national law that serves the national interest. Inferred from the precepts of Unity of Indonesia and the principal thoughts of the Preamble of the 1945 Constitution.
4. The national law is established in accordance with the principle of the sovereign state of the people, which means that with the people's consent through deliberations of representatives, so that the national law in accordance with the aspirations of the people so as to be a means to develop awareness, responsibility and pass participation in development and foster the dynamics of nation's life in an orderly and orderly Concluded from the precepts of Preciousness led by the wisdom of wisdom in deliberation. Representation and third idea of the Preamble of the 1945 Constitution.
5. The National Law explores the value of social justice in the sense of national law opening the way for the realization of equitable distribution of justice for all Indonesians.

Concluded from the precepts of Social Justice for all Indonesian people and the second idea of Preamble to the 1945 Constitution. The general formulation of the broad ideals of the summary summarizes the basic idea of the will and at the same time provides direction on the objectives to be achieved by the order of national law. In other words, the ideals of law serve as guiding guides, directing the national law to be a true embodiment of the noble values of Pancasila dynamically to meet the demands of the ever-evolving era.

In the development of the national legal system, it should refer to:[8]

a. Pancasila.
   Pancasila prelude to the political politics of laws and regulations per-UU this is intended for policy and strategy (politics) law and regulations per-law in line with the values prevailing in Indonesian society by still opening themselves to various good things that is a result of changes that occur in various areas of life in society, nation, and state both in the environment of national and international relations.
b. UUD 1945.
   The 1945 Constitution constitutes the formal basis and constitutional material in the politics of laws and regulations of the law so that every policy and strategy in the field of law and regulation per-UU get constitutional legitimacy as one of the formation of law-based state (rechtsstaat) and the principle of constitutionalism.
c. Regulation or implementing policy of the legislation regulatory policy.
   Referred herein is the rule or prerogative containing the rules relating to the politics of laws and regulations of the implementing law of the philosophical, constitutional, operational, formal and procedural grounds.

In implementing the politics of legislation law by law, it should also be concerned about the mindset of the formation of law by law (law) which must be adjusted to the principles:[9]

a. All types of legislation formed constitute a unity of legal system which sprang to Pancasila and UUD1945. Therefore, the order in which compliance between the various laws and regulations can't be ignored in the formulation of the law.
b. Not all aspects of public life and the state must be regulated by legislation. The various orders that live in a society that is not contrary to the ideals of law, the general legal principles contained in Pancasila and the 1945 Constitution can be allowed and recognized as the subsystem of national law and therefore have the force of law such as legislation.
c. The establishment of legislation, in addition to having juridical grounds, must carefully consider the philosophical and social grounds in which the rules will apply.
d. The establishment of legislation in addition to regulating the existing circumstances should have future reach.
e. The establishment of legislation is not only to create a legal certainty instrument but also an instrument of justice and truth.
f. The establishment of legislation should be based on community participation, either directly or indirectly (community participation).

[8] Materi Kulish Pembaharuan Hukum Indonesia oleh Prof. Dr. Joni Emireson, SH.,M.Hum, PDIH UNTAG Semarang
[9] **Ibid**. p. 15

g. The establishment of legislation should be based on the principle and content of legislation.

Thus in the process of public policy making in Indonesia should not be separated from the values contained in Pancasila as the philosophy of life of nation and state, including in governing NGOs.

The arrangement of NGOs in Indonesia

Definition of Authority Theory

The term authority theory is derived from the English translation, the authority of theory, the term used in Dutch, theorie van het gezag, while in the German language, theorie der autoritat. Theory of authority comes from two syllables, namely theory and authority. Before the definition of power theory is explained, the following presents the theoretical concepts of authority. H.D.Stoud, as quoted by Ridwan HB, presents an understanding of authority. Authority is: "All rules that are concerned with the acquisition and use of governmental authority by the subject of public law in public law relations".

There are two elements contained in the sense of the concept of authority presented by H.D.Stoud, namely:

a. The existence of legal rules; and
b. The nature of the legal relationship.

Before the authority is overrun to the institutions that implement it, it must first be specified in the legislation, whether in the form of laws, government regulations or lower-level rules. The nature of the legal relationship is the nature of the relating and has links or links or links or related to the law. Legal relationships are public and private.

Meanwhile, the sense of authority is found in the Black's Law Dictionary. Authority or authority is:"Right to exercise powers; to implementation and enforce laws; to exact obedience; to judge. Control over; jurisdiction. Often synonymous with power ". In essence, authority is the power that is given to the tools of state to run the wheels of government.

In the above definition, does not seem to sense the theory of authority. According to the author's opinion, authority theory (authority theory) is a theory that examines and analyzes about: "The power of the organs of government to exercise its authority, both in the field of public law and private law". The elements listed in the authority theory, include:

a. The existence of power;
b. The existence of government organs; and
c. The nature of the legal relationship.

Of the three elements, then that is explained only the meaning of government organs and the nature of legal relationships. Government organs are government tools that have the task to run the wheels of government. Legal relationships are relationships that have legal consequences. The consequences of law are the emergence of rights and obligations.

Terms and Understanding of NGOs.

NGOs emerged and became popular since the New Order era. However, if viewed from the historical facts, the presence and gait of NGOs in Indonesia have been seen long before Indonesia became independent. The struggle of R.A Kartini breaking down The shackles of the feudal order which subordinate women, later popularly known as the Emancipation movement, actually contain the values of NGO's struggle and struggle.

Non-governmental organizations began to emerge permanently in the early 1970s. This organization was originally given the term "Non-Government Organization" abbreviated as NGO.[10] As a translation of the "Non Goverment Organization" (abbreviated NGO) as used by the United Nations defined as follows: Non-governmental organizations (NGOs) are designations for organizations initiated, developed and developed by private parties committed to a social change process that is more beneficial to the common people at the bottom, where the organization has a "development ideology" of participation.[11]

The above definition implies that NGOs are all non-governmental organizations for the needs of the community itself, covering a wide range of organizations (as long as they are not government organizations), whether business organizations, the press, the arts, sports, and so on other.

Later also in the history of Indonesian independence movement is known as "Non" and "Co". The term "non" as a group refuses to cooperate with the Dutch government (colonizers) and "Co" on the contrary. If returned to the use of the term NGO, it will create an impression that can be interpreted or accused as a community group that does not cooperate with the government.

NGOs are often called Secondary Groups, ie organizations that move at the level between the Primary group (grass roots) and government agencies. Its founders are usually educated people who have a humanitarian goal to improve the lives of those who are in trouble or those who are poor.

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[10] Istilah Ornop dimunculkan pertama kali dalam suatu konperensi (1976) Wahana Lingkungan Hidup (WALHI).

[11] Peter K. Hannam, *Promoting grassroots development : Some Insigt From Indonesia NGO's,* Thesis BA pada Harvard University, hal.2 dan 24. lihat juga laporan Hasil Studi Lembaga Pengembangan Swadaya Masyarakat di Indonesia, oleh Komite Pengarah Study LPSM Indonesia, Jakarta, 1985

These organizations are usually involved in development activities that are often not done by the government or the government has difficulty in doing so. They usually limit activities to a small and limited scope with a non-profit motive. This group is usually well organized and more formal in nature than the primary group. LPSM accompanies NGO development.[12]

In addition, also known as the term Self-Help Group (KSM) which is often referred to as the Primary Group is those who work together because of the similarity of aspirations and activities. The relationship between its members is very close and intimate. They work and connect daily and help each other based on common interests that usually address basic needs. This group is known as "self help groups", which are usually small, not well organized and usually "informal".[13] In this case the NGO has the duty to assist the development of SHGs. Accompanying this means developing a relationship of parallel, friendship or friendship, and that relationship is the relationship between two dialogical subjects; while the object is complaints, needs, and other problems that arise in the group assisted.

Other definitions of NGOs, as mentioned in the Instruction of the Minister of Internal Affairs Number 8 year 1990 Attachment II are: "Organizations or institutions formed by members of the citizens of the Republic of Indonesia voluntarily on their own will and are interested and engaged in certain activities determined by the organization / institution as a form of community participation in efforts to improve the standard of living and welfare of the community, which emphasizes the devotion in a self-help " In the practice of organizational life the terms KSM and LPSM and NGOs are often not distinguished. All of them are called by the same term as NGOs, thus the meaning of NGOs includes two categories, namely KSM and LPSM.

Characteristics of NGOs

According to Emil Salim[14], the special characteristics of NGOs as a community organization are:

a. Free to seek members, choose and determine the leadership and administrators
b. Not a mass organization
c. Membership is limited, can be based on interests, hobbies, professions, or the same orientation
d. Development organizations
e. Nonprofit motives
f. Not part or extension of the arms of the government or apparatus, independent of the guidance of the apparatus
g. Willing to work on the prevailing government system and free to move within the existing government constraints space
h. Can be associated with development programs and or regional development
i. It is possible to cooperate and have a forum of cooperation
j. Accept the principle of Pancasila

Based on the characteristics of the NGOs described above, it can be argued that NGOs have the freedom to seek members, elect and determine their leaders and managers. Then the membership is limited and is not a mass organization that shows the number of its members and there is no provision on the minimum and maximum number, it is very possible there is an NGO whose members are administrators. So it can also be said that the NGO as a social organization that does not emphasize on the number of its members and is independent in determining the leadership or administrators without any interference from other parties outside the group.

According to Sebastian Saragih[15], member terms do not exist in NGOs, with participation, partners or assistants. It further said that: "To be sure the NGO is an organization, has a board, but does not have members, there are partners. The position of KSM assisted groups is equivalent to NGO assistance. This will distinguish it from the social organization ".

Discussion.

The government regulation policy on non-governmental organizations is based on Pancasila and the 1945 Constitution, which in one of the chapters is regulated on human rights including the right to associate and assemble. Etymologically the word association and assembly has a different meaning.

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[12] Lihat Amir Effendi Siregar, Pertumbuhan dan Pola Komunikasi (LSM/LPSM), terpetik lewat Percikan Pemikiran FISIPOL UGM tentang Pembangunan, FSIP UGM, Yogyakarta,1990, p. 495.

[13] Amir Effendi, **Loc.Cit.**

[14] Emil Salim, **Tanpa Pamrih Dalam Rangka Pembinaan Pedesaan,** LP3ES, Jakarta, 1989**,** p. 69.

[15] Sebastian Saragih, Membedah, **Op.Cit.,** p. 5

The union is derived from the word "union"[16] which means together to do something (trade), allied (with), friends (with). Gathered can be equivalent to a "meeting"[17], which is a meeting of two or more persons deliberately done for a certain period of time in a specified place and intends to discuss, declare, decide, or demand something. Therefore, meetings and assemblies must meet several elements, namely:

a. More than one meeting
b. Meetings are deliberate (organized, planned)
c. For a specific purpose (talking, declaring, deciding, or demanding)
d. Held at specified places[18]

The right to assemble and express opinions is closely related to democratic ideology, because basically the political right departs from the empire to create a democratic world. Commenting Sebastian Saragih's opinion on member terms does not exist in NGOs, where there is participation, partners or assistants. It further said that, certainly the NGO is an organization, has a board, but does not have members, who are partners. The position of KSM assisted groups is equivalent to NGO assistance. This will distinguish it from community organizations.

This opinion when associated with other Understanding of the NGO, as mentioned in the Instruction of the Minister of Internal Affairs Number 8 year 1990 Attachment II is an organization / institution formed by members of the community of Citizens of the Republic of Indonesia voluntarily on their own and interested and engaged in certain activities determined by organizations / institutions as a form of community participation in efforts to improve the standard of living and welfare of the community, which focuses on devotion self-help. An important element of NGOs according to the Instruction of the Minister of Internal Affairs Number 8 year 1990 is the presence of elements of community participation to improve the standard of living and welfare that focuses on self-help devotion.

In reality the formation of an NGO is based on the form of its institution, whether it is permanent or sporadic. The sporadic ones are usually only to reach the goal for a moment for the assistance of a particular affair, so when the goal is achieved by itself the NGO will disband. While the permanent NGOs in Indonesia are usually in the form of foundations or associations, each of which has been regulated by the government in the process of its formation.

1. Foundation.

The definition of the Foundation is referred to in Article 1 paragraph 1 of the Act of the Republic of Indonesia Number 28 Year 2004 The Foundation is a legal entity consisting of wealth separated and intended to achieve certain objectives in the social, religious and humanitarian fields, which have no members. Utrecht says that the foundation is any property (vormogen) that is not a wealth of people or wealth of bodies and that given a particular purpose. In the association of foundation law acts as a supporter of rights and obligations.[19]

There are four elements found in the foundation based on the above understanding, namely:[20]

a. Foundation is a legal entity (rechtspersoon) which in daily legal traffic the foundation is treated as legal entity. Foundation obtains status as a legal entity upon approval by the Minister of Law and Human Rights.
b. Foundation consists of separated wealth. Foundation consists of separated wealth is a logical consequence of the legal form of the foundation as a legal entity. In the provision of Article 5 jo Article 26 paragraph (1) jo Article 26 paragraph (2) of the Foundation Law can be seen that, the wealth of the foundation is separated wealth can be in the form of money, goods, or other property obtained by foundation under the Foundation Law.
c. Allow the foundation's wealth to achieve certain goals in the social, religious and humanitarian fields. This is in line with the opinion that the foundation is a philanthropic legal entity, has an ideal purpose, so that its activities are not intended solely for profit.
d. Foundation has no members. The Foundation does not consist of members. The people who are the founders and organs of the foundation, ie supervisors, supervisors and administrators are not members of the foundation.

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[16] Tim Penyusun Kamus Pusat Pembinaan Bahasa Departemen Pendidikan dan Kebudayaan, **Kamus Besar Bahasa Indonesia,** Balai Pustaka, Jakarta, p. 826

[17] Bagir Manan, **Ketentuan-ketentuan Mengenai pengaturan Penyelenggaraan Kemerdekaan Berkumpul Ditinjau dari Perpekstif UUD 1945**, Makalah yang disampaikan dalam Seminar "Lembaga Perizinan Dalam Perspektif Hukum dan Kajian Empiris Menghadapi Tantangan dan Persiapan Masa Depan" Oleh Media Komunikasi Fakultas Hukum Universitas Psundan, Bandung 4 November 1995, p. 7

[18] *Ibid*, p. 10

[19] Abdul Muis, *Yayasan Sebagai Wadah Kegiatan Masyarakat*, (Medan:Fakultas Hukum Universitas Sumatera,1991), p. 37

[20] Arie Kusumastuti Maria Suhardiadi, Hukum Yayasan di Indonesia Berdasarkan Undang-Undang Republik Indonesia Nomor 16 Tahun 2001 tentang Yayasan(Jakarta : Abadi, 2002), p. 16-24

2. Society.

The legal basis for the establishment of associations in Indonesia is regulated in Staatsblad 1870 Number 64 (Rechtspersoonlijkheid van Vereenigingen) Decree of the King March 28, 1870, S-1870-64. In the 1870 Staatsblad it is stated that it has been determined: The rights and obligations for the Indonesians, arising from entering as members or participating in the formation of an association shall obtain the permission of the appointed official.

Acknowledgment is made by agreeing to the statutes or the assemblies of the association. The statute or regulation contains the objectives, fundamentals, work environment and other provisions of the association. While the application for establishment of associations can be denied Recognition is only done based on public interest. Decisions are accompanied by reasons. Approved Statutes, amendments or changes are announced in official newspapers.

Associations established for a specified period of time, whose statutes or regulations are approved, also after the expiration of time stipulated in the statutes and the regulation without further approval shall be deemed to be a legal entity, provided that as far as the actions and behavior of its members or officers indicate that the association it, after the prescribed time, remains.

In transitional rules are set for associations, which at the time of entry into force of this ordinance because of the passage of time specified in the statute or the regulation no longer incorporated, but still exist as associations. While the Association as referred to in the previous paragraph is considered never to lose the nature of its legal entity with the provision that in the meantime obtained third parties.

The provisions concerning the opening of a branch of the Association are not stipulated in the Laws and Regulations. In the establishment of the Association, it is fitting that one of the provisions of the articles of association regulates the opening of a branch of the Society, in each establishment of the Association, in its act usually accompanied by a clause "The association may open a branch office or representative office elsewhere in the territory of the Republic of ... ". Although there is no legal basis governing it, but as a permitted act because the founders have agreed and arranged in the constitution of the association. Prior to the opening of the branch of the Association, the board must first meet the meeting by determining the reasons, intent and purpose of opening the branch, and then submitting it to other association organs for approval. Upon approval, the management comes to the Notary to make the deed of opening the branch of the Association. For the appointment of administrators and supervisors of branches become the authority of meetings of members of the association.

Broadly speaking, it can be conveyed Foundation Differences and Associations are as follows:

Foundation.	**Society.**
1. The existence of wealth in the founders of the founders for the initial wealth of the foundation	1. There is no need for initial wealth, the wealth of associations in the can of membership dues
2. The organs consist of; builders, administrators and supervisors	2. The organs consist of; General meeting of members, administrators, supervisors.
3. Have no members	3. Having members
4. Mandatory legal entities	4. Not compulsory legal entity

Source: Kyutri Class, Friday, January 11, 2013

In view of the substance of the Law on the Foundation and also the peratura used for the establishment of associations in Indonesia, it is clear that NGOs are not Community Organizations as referred to in the Ordinance Act, but NGOs are organizations formed by the community, in the form of foundations and associations.

Thus, a separate policy is needed in the arrangement of NGOs in Indonesia.

Closing.

Based on the above description, it can be concluded that government policy in the arrangement of NGOs in Indosia is not the same with the government policy in regulating social organization, although same as organization formed by society but different form and legal basis.

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ILLEGAL FISHING AS A FORM OF CRIMINAL ACT IN THE FIELD OF ECONOMICS

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ABSTRACT

Since its inception, the Djoeanda Declaration (1957) has conformed to the conception of Indonesia as a large, sovereign and prosperous maritime state. The sea is not only seen as a media fight for the state, but also serves as a space for the livelihood of the Indonesian people. But the utilization of marine resources is still weak, exacerbated by the weakness of the marine security system so that many cases of fish theft by large ships with more sophisticated equipment. Illegal fishing can be interpreted as illegal fishing or fishing. This term is contained in the explanation of Act No. 45 Year 2009 on Fisheries. The Article 1 of Act No. 31 Year 2004 jo Act No. 45 Year 2009 affirms that fisheries are all activities related to the management and utilization of fish resources and the environment ranging from preproduction, production, processing to marketing conducted with the fishery business system. Thus bringing the consequences that all forms of deed are prohibited in Articles 84 - 102 of Act No. 31 Year 2004 jo Act No. 45 Year 2009 on Fisheries is a criminal act of illegal fishing. Illegal fishing is qualified as an economic crime more on the basic consideration of the consequences / losses incurred for the state economy.

Keywords: illegal fishing - crime - economic field

Introduction.

Indonesia is often called a maritime state, this is because most of its territory consists of the sea. According to WALHI records, Indonesia is the largest archipelagic country in the world, which has 17,480 islands with 95,181 km of coastline. Under the 1982 Convention on the Law of the Sea (UNCLOS), Indonesia has sovereignty over 3.2 million km² of territorial waters comprising 2.9 million km of archipelagic waters and 0.3 million km² of territorial sea.

In addition, Indonesia also has the exclusive right to utilize marine resources of 2.7 km² in the waters of the Exclusive Economic Zone (ZEE). Coastal areas inhabited no less than 140 million people or 60% of the Indonesian population residing within a radius of 50 km from the coastline. Administratively, approximately 42 cities and 181 districts are located on the coast, and there are 47 coastal cities ranging from Sabang to Jayapura as centers for services of socio-economic activities.[1]

Economically, the results of marine resources have contributed to the formation of national GDP by 22% in 2014. Whereas the Indonesian territory reaches 5,193,253 km² of land and 3,302,498 km ² is the sea (Seminar Indonesia 2014-2019, Maritime Shaft for Prosperity and Justice , RokhimDahuri, Batavia Tower, Thursday, August 14, 2014). Biophysically, the coastal area in Indonesia is the center of the world's tropical marine biodiversity because almost 30% of the world's mangroves and coral reefs are found in Indonesia. However, with our coastal and marine riches, there are more than 5,254,400 people in coastal areas living in very poor conditions.[2]

Since its inception the Declaration Djoeanda (1957) has conveyed the conception of Indonesia as a great, sovereign, and prosperous maritime state. The sea is not only seen as a media fight for the state, but also serves as a space for the livelihood of the Indonesian people. However, the conditions to this day do not provide anything significant to those who depend on the management of Indonesian coastal and marine resources, such as traditional fishermen and farmers, to become economically fragile communities of education, health, and other basic matters.[3] The above conditions indicate the lack of maximum utilization of marine resources exacerbated by the weakness of the marine security system. The rise of fish theft cases by large vessels with more sophisticated equipment suggests that oversight and protection of Indonesian waters is under-scrutiny. These cases often occur without any serious efforts by the government to disclose them.

The lack of supervision and law enforcement against the perpetrators of illegal fishing has caused the perpetrators never deterrent. The existing legal process has only touched the ship's crew alone without trying to uncover the real perpetrator's brain, the corporate that backs up the activity. This has caused great losses to the state, the traditional fishermen, and coastal communities.

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[1] Peographic of Ecological Advocacy : Vis a Vis Corporate Crime ¨ in Nunung Mahmudah, Illegal Fishing, Sinar Grafika, 2015.

[2] *Ibid*

[3] Hans, "Years of SBY-JK Government Performance in Marine and Fisheries Sector, Common View of NGOs and CBOs.", June 25, 2009, http: // nttonline news.com.

State losses due to illegal fishing by foreign fishing vessels are feared increasingly in line with the increasing number of cases of violations in the field of fisheries. According to Supervision and Control data of Marine and Fisheries Resources in 2005 the number of violations handled by DKP 174 cases, in 2006 rose to 216 cases, as of September 2007 there were already 160 illegal processed fishing boats.[4] During 2010-2014, the Fisheries Supervisory Boat has successfully inspected 14,951 fishing vessels, and captured 492 fishing vessels suspected of illegal fishing.[5] The case continues to increase from year to year because the handling has not touched on the root of the problem.

From the evidence of illegal fishing cases obtained by DKP, the average potential loss of the state reaches between 1-4 billion rupiah per ship. If until September 2007 there are 160 ships captured, meaning minimal state losses due to illegal fishing in 2007 alone ranged from Rp 160 billion to Rp 640 billion. From DKP research in 2003, the total could reach US $ 1.9 billion (about Rp 18 trillion),[6] even in the government of President Joko Widodo, according to the Minister of Marine Affairs and Fisheries Susi Pudjiastuti, the value of losses due to illegal fishing could reach US $ 20 billion, or Rp 240 trillion per year.[7]

There are many legislative products issued by the government to regulate fisheries issues, ranging from law to ministerial instruction. It is therefore expected to minimize crime in the field of fisheries and can minimize the utilization and protection of marine resources. However, the resulting legislation product can not minimize illegal fishing, because it has not touched the corporation as the real perpetrator.

The sovereignty of the territorial waters of the Republic of Indonesia is regulated in Act Number 5 Year 1983 on Exclusive Economic Zone (ZEE). The law states that: "The Indonesian Exclusive Economic Zone is the outer and adjacent lane of the Indonesian territorial sea as stipulated under applicable law on Indonesian waters covering the seabed, underwater and above-water waters with the outer limit of 200 (two hundred) nautical miles measured from the basin of the Indonesian territory."[8]

Within this territory the Government of the Republic of Indonesia has sovereign rights, other rights, jurisdiction and obligations. Furthermore, the territorial waters of the Republic of Indonesia shall also be governed by Act No. 17/1985 on the Ratification of the United Nations Convention on The Law of the Sea (UNCLOS). This Convention has an important meaning because for the first time the principle of the archipelago Country for twenty-five years continuously championed by Indonesia, has succeeded in gaining official recognition of the international community.

The official recognition of the principle of this archipelagic state is essential in order to create a unity of territory in accordance with the Declaration of Djuanda of 13 December 1957, and the insight of the archipelago and as set forth in the Decree of the People's Consultative Assembly on the Guidelines of State Policy (GBHN), which became the basis of the embodiment for the Indonesian archipelago as a single political, economic, socio-cultural, and defense and security unit.[9]

In addition, Act Number 6 Year 1996 on Waters of Indonesia. This act regulates the sovereignty of the Republic of Indonesia in waters of Indonesia. In Article 2 paragraph (2) stated that: "The territorial waters of Indonesia are all the waters around, between, and connecting the islands or parts of islands belonging to the land of the Republic of Indonesia under the sovereignty of the Republic of Indonesia.

Then Article 4 states that: "The sovereignty of the Republic of Indonesia in waters of Indonesia encompasses territorial sea, archipelagic waters, and inland waters and airspace over territorial sea, archipelagic waters, and inland waters."

Then the first regulatory products in the form of laws that specifically regulate fisheries are Act No. 9 Year 1985 on Fisheries. This law is established in the framework of the implementation of national development with the insight of the archipelago, the management of fish resources should be done as well as possible based on justice and equity in its utilization by prioritizing the expansion of employment opportunities and improving living standards for fishermen and small fish farmers and the sustainability of fish resources and the environment that will improve national resilience.

In response to technological developments which have not been accommodated in Act No. 9 Year 1985, a new act was adopted, namely Act Number 31 Year 2004 regarding Fisheries. This act abolished the old act.

Over time, Act No. 31 Year 2004 on Fisheries has not been fully able to anticipate technological developments and legal needs in order to manage and utilize the potential of fish resources. For this purpose, the Act of the Republic of Indonesia Number 45 Year 2009 on the Amendment of Act Number 31 Year 2004 regarding Fisheries was established.

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[4]Retical Consequences Of Illegal Fishing Countries Continue Rising ¨4 October 2007, Http://www.Kapanlagi.Com/H/0000 13871.Html

[5]Add Three Fishery Courts For Eastern Indonesia¨, March 5, 2015 Http://Djpsdkp.Kkp.Go.Id/Index.Php/Arsipc/136/ Addition-Three-Our Course-Mitting-Ofwinding-Indonesia-Timur/?Category_Id= 21.

[6] Ibid.

[7]Minister Susi: Illegal Fishing Loss Costs Rp 240 Trillion", December 1, 2014, Http: //Finance.Detik.Com/Read/2014/12/ 01/152125 /2764211/4/Menteri-Susi-Retical-Cpnsequences-Illegal -Fishing-Rp-240-Trillion.

[8] Republic Of Indonesia, Law On Exclusive Economic Zone Of Indonesia, Law No. 5 Of 1983, Article 2.

[9] Insight Nusantara As Geopolitics Indonesia ", August 6, 2009, Http://Id.Wikipedia.Org/Wiki/Wawasan_Nusantara

Indonesia as a nation known as an archipelago has also just ratified the convention by stipulating Act Number 21 Year 2009 concerning the Agreement on Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the conservation and management of straddling fish stocks limited and highly migratory fish stocks. This Agreement applies to the conservation and management of straddling fish stocks and highly migratory fish stocks outside the territory of national jurisdiction.

Based on the description as mentioned above the author is interested to discuss whether illegal fishing is an economic crime and how to restore the loss caused by the illegal fishing.

Law Enforcement

Law enforcement is an attempt to realize the ideas of justice, legal certainty and social benefit become a reality. So law enforcement is essentially a process of materializing ideas. Law enforcement is the process of the enforcement of real or legal functioning of legal norms as the guidance of actors in traffic or legal relations in the life of society and the state. Law enforcement is an attempt to realize the ideas and legal concepts people expect to become reality. Law enforcement is a process that involves many things.[10]

According to Soerjono Soekanto, law enforcement is an activity of harmonizing the relationships of values that are outlined in the principles / values of steady values and manifestations and attitudes of action as a series of end-stage value translation to create, maintain and maintain peace of life.

Concrete law enforcement is the enactment of positive law in practice as it ought to be obeyed. Therefore, to provide justice in a case means to decide in concreto law in maintaining and ensuring the obedience of the law of matter by using procedural means established by formal law.

As a policy process, law enforcement is essentially a policy that can be done through several stages. The stage includes: first, the stage of the formulation of law enforcement stage in abstrakto namely the stage of legal formation undertaken by the legislature. In the criminal law this stage is done through the criminalization of the determination of an act that originally ordinary deeds then become a criminal act. Secondly, the application stage is the stage of application of criminal law by law enforcement officers starting from the examination at the police level up to the court level. This stage is called the judicial stage. Third, the execution stage is a concrete implementation stage of criminal law by law enforcement officers or also called the stage of executive or administrative policy.[11]

Criminal law enforcement is a part of criminal politics (criminal policy) is the rational efforts of the community in tackling criminal acts. Policies in tackling crime are implemented through the institutional level through a system called the criminal justice system. In its work, law enforcement is influenced by factors that may indicate the success or failure of law enforcement. According SoerjonoSoekanto the factors that influence law enforcement are:

1. The legal factor itself (regulation of Laws);
2. Law enforcement factors that are parties that form and apply the law;
3. Facilities or facilities that support law enforcement;
4. Community factor, ie the environment in which the law is applicable or applied; and
5. Cultural factors, namely as a result of work, inventiveness and sense that is based on human initiative in the association of life.[12]

Illegal Fishing Crime

Etymologically Illegal Fishing comes from the word illegal which means illegal and the word fishing which means catching or taking fish. Thus illegal fishing can be interpreted as illegal fishing or fishing. In the positive law of Indonesia to date there has been no definition of illegal fishing. However, this term is contained in the explanation of Act No. 45 Year 2009 on Fisheries.[13] Referring to the definition issued by the International Plan of Action (IPOA) initiated by FAO, the definition of illegal fishing includes:

1. Illegal fishing is illegal fishing activity in exclusive territorial waters or ZEE of a country, does not have permission from that State;
2. Unregulated fishing is a fishing activity in an exclusive territory or ZEE of a country which does not comply with the rules applicable in that State.

[10] Dellyana, Shanti, 1988. Konsep Penegakan Hukum, Yogyakarta: Liberty p. 32

[11] Teguh Prasetyo and Abdul Halim Barkatullah, Politik Hukum Pidana Kajian Kebijakan Kriminalisasi dan Dekriminalisasi, Yogyakarta: Student Literature, 2005 p. 111

[12] Edi Setiadi and Kristian, Sistem Peradilan Pidana dan Sistem Penegakan Hukum di Indonesia, Jakarta: PranadaMedia, 2017, p. 143

[13] Nunung Mahmudah, Illegal Fishing Pertanggungjawaban Pidana Korporasi Di Wilayah Perairan Indonesia, Jakarta: Sinar Grafika, 2015, p 79

3. Unreported fishing is a fishing activity in the exclusive territory or ZEE of an unreported country, both operational and vessel data and its catch.[14]

Considering that illegal fishing is always associated with criminal acts in the field of fishery, it should be emphasized that in Article 1 of Act No. 31 Year 2004 jo Act No. 45 Year 2009 on Fisheries has been mentioned that the definition of fishery is all activities related to the management and utilization of fish resources and the environment ranging from preproduction, production, processing to marketing implemented in the fishery business system. Thus it can be said that the definition of fisheries is not limited to fishing activities but very broad. This of course leads to the consequence that all forms of acts prohibited in Article 84- Article 102 of Act No. 31 Year 2004 jo Act No. 45 Year 2009 on Fisheries is a criminal act of illegal fishing.

Based on the review of Act No. 31 Year 2004 jo Act No. 45 Year 2009 on Fishery forms of illegal fishing in the fiel of fisheries include

1. Fishing and / or cultivation of fish with materials and / or tools that are harmful to the preservation of fish resources and / or its environment (Article 84)
2. Own, control, carry, and / or use fishing gear and / or fishing equipment that interfere with and undermine the sustainability of fish resources (Article 85)
3. Operating Indonesian-flagged fishing vessels fishing without SIUP (Article 92) does not have SIPI (Article 93); and does not have SIKPI (Article 94)
4. Falsifying and using fake SIUP, SIPI and SIKPI (Article 94 A).

Economic Crime

Economic crime can be interpreted narrowly and broadly. Narrowly economic crime is always associated with the provisions of Act no. 7 / Drt / 1955 on Investigation, Prosecution and Economic Crime Justice (hereinafter referred to as the TPE Law). While in the broadest sense of economic crime includes an entire criminal act outside the economic or patterned economic economic crime that can have a negative impact on the economy and finances of a healthy State.

Given the very wide scope according to Muladi and Barda Nawawi Arief in Yanti Amelia,[15] economic crime can be grouped into 3 forms, namely:

1. Property crimes, ie acts that threaten the safety of property or wealth of a person or State.
2. Regulary crimes, ie acts that violate the rules of government, and
3. Tax crimes, namely violations of liability or violation of terms related to the making of reports under the tax law.

According to Moch. Anwar economic crime or criminal acts in the economic field are grouped into two, namely economic crime in the narrow sense and in a broad sense. In a narrow sense all economic crimes are sourced from the Ps 1 of the TPE Law. Whereas in the broadest sense of criminal acts in the economic field consists of the first, the violation of the provisions of the regulations in the field of economics that are threatened with criminal other than those provided in the TPE Law. Second, unlawful acts which concern the economic field and enforceable Criminal Code rules.[16]

Discussion

1. Illegal Fishing as Economic Crime

The sea has a very important meaning for human life. Until now the sea has provided life for humans through the natural resources contained in it. Fishing activities conducted either by using simple or sophisticated equipment have proven that the sea can be a source of livelihood for citizens and even the State. In addition to being rich with various types of fish, the sea is also rich in other marine biota and various minerals such as cobalt and nickel copper that can be consumed for thousands of years.[17]

Given the enormous potential of the sea for human life, Indonesia as an archipelagic country whose territory consists of 2/3 of the sea and the rest of the land must be able to manage the sea as well as possible for the welfare of the people of Indonesia. Thus the rampant cases of illegal fishing that occur require an extra response from the government. The response here is intended to minimize the impact of illegal fishing as defined in the Decree of the Minister of Marine and Fisheries of the Republic of Indonesia no. KEP.50 / MEN / 2012 on the National Action Plan for Prevention and Illegal Response Unreperted And Unregulated Fishing Year 2014-2016 namely:

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[14] Moch. Iqbal, Illegal Fishing Sebagai Kejahatan Korporasi Suatu Terobosan Hukum Pidana dalam Mengadili Kejahatan Illegal Fishing, Jurnal Hukum dan Peradilan Vol. I No. 3 Nopember 2012, p. 420

[15] Yanti Amelia Lawerissa, *Praktek Illegal Fishing Di Perairan Maluku Sebagai Bentuk Kejahatan Ekonomi*, Jurnal Sasi Vol 16, July-September 2010, p. 64

[16] Moch. Anwar, Hukum Pidana Di Bidang Ekonomi, Bandung : Alumni, 1986, p. 7-20

[17] Supar dan Mansyur, Hukum Laut Internasional dan Perkembangannya, Paper accessed from supar dan mansyur. blogspot.co.id on October 24, 2017

a. threat to the sustainability of fish resources;
b. the livelihoods of the local fishing communities with small-scale fishing fleets and simple fishing gear for losing competition with illegal fishing actors
c. loss of a portion of fish production and foreign exchange earning opportunities of the State;
d. reduced non-tax state revenue (PNBP);
e. hampering Indonesia's efforts to strengthen the domestic fish processing industry, including increasing competitiveness;
f. damaging the image of Indonesia on the international scene, because foreign ships using Indonesian flags and Indonesian vessels conduct illegal fishing activities that are contrary to international conventions and agreements. It can also impact the threat of embargo on Indonesian fishery products marketed abroad.

With regard to the impacts mentioned in letter c (loss of foreign exchange earning opportunities) and letter d (reduced non-tax state revenues) indicates that illegal fishing is a form of unlawful act that may affect the State's economy. Therefore, according to the authors of illegal fishing can be qualified as an economic crime. Why is that ? This refers to one of the opinions of Muladi and BardaNawawi who classify economic crimes in three forms namely property crimes, regulary crimes and tax crimes. Illegal fishing can be classified in the form of property crimes because its existence clearly threatens the safety of property or State property.

According to the authors if it is related to the limits of economic crime narrowly then an act must meet the elements as mentioned in the TPE Law. Article 1 of the TPE Law stipulates that there are two categories of economic crimes:

1. offenses originating from outside the Drug Act no. 7 of 1955 namely Act or staablad as mentioned in Article 1 sub 1e and Article 1 sub 3e;
2. the offenses defined in Articles 26, 32 and 33 as defined in Article 1 sub 2e.

Taking the example of Article 33 of the TPE Law, the elements include: intentional, attracting the share of wealth to be avoided from billing or the imposition of a criminal, regulatory or temporary conduct. Meanwhile, if associated with illegal fishing then the elements that must be proven is fixed as stated in Act No. 31 Year 2004 jo Act No. 45 Year 2009 on Fisheries. Thus the qualifier as an economic crime is more on the basic consideration of the consequences / losses incurred for the state economy. The losses incurred can be:

a. illegal and unreported fish transportation will reduce Indonesia's ability to record the actual number of fish production in Indonesian waters
b. illegal and unreported fish transportation resulted in fishery processing industry in mainland Indonesia experiencing shortage of raw material supplay.
c. illegal and unreported fish transportation makes Indonesian fishery production export strength weakening, production development is very limited and export value does not increase significantly. At the same time fish available to domestic consumers is very limited.[18]

2. Efforts to restore losses due to Illegal Fishing

The policy of combating criminal offenses in theory is often referred to as the Criminal Policy or Criminal Politics, which is the rational effort of the community in tackling criminal acts. Penanggulangan criminal acts can be done by using two means of penal facilities and non penal means. The means of penal is intended as a countermeasure of criminal acts by using criminal law that is addressed to criminal acts that have occurred by bringing the perpetrators to the criminal justice process (criminal law enforcement) so as to be repressive. While non-penal means implemented by using other than the criminal law that is more on the prevention or preventive.

Considering the enormous losses of the State (reaching Rp 240 trillion per year) as conveyed by the Minister of Marine Affairs and Fisheries Susi Pudjiastuti, serious efforts are required to be able to return it. Government through Act No. 31 Year 2004 jo Act No. 45 Year 2009 concerning Fisheries has firmly stipulated that the perpetrators of illegal fishing are threatened with criminal sanctions whose formulation is done in cumulative form. Perpetrators are not only threatened with the crime of deprivation of liberty (prison) but also with a fine high enough to reach 20 billion. The threat of a fine high enough if it can be applied consistently and consistently against the perpetrators of illegal fishing then it will be one way to restore the losses that have been inflicted.

To be able to restore the losses that have been inflicted according to the opinion of the author required seriousness of the law enforcement officers in enforcing the rules that have been made. According to Lawrence Freidman there are three components of the interrelated legal system in law enforcement, namely: legal substance, legal structure and legal culture. As good as any rule that has been made (legal substance) if other components do not support it can not run properly law enforcement.

[18] Yanti Amelia Lawerissa, Ibid.,p. 67

Based on the review of literature study conducted there are obstacles associated with law enforcement officers viewed from the aspect of quality and quantity. Quality aspect is related to ability and skill or professionalism of law enforcement officer in handling illegal fishing case. While the quantity aspect relates to the number or completeness of the existing law enforcement apparatus. From the aspect of legal culture is indicated by the level of awareness or legal compliance of the community against the provisions of the law and its participation in law enforcement. Limited public legal awareness of the territorial sea, archipelagic sea and the inland sea is due to the public's vices to various aspects.[19]

In practice, the constraints of illegal fishing law enforcement can also be seen in legal proceedings that run both on the level of investigation and prosecution. At the investigation stage, it is possible that there are obstacles in the lack of awareness of the public and the authorities in understanding the nature of illegal fishing. Difficulties in obtaining accurate data and relevant facts with limited evidence, infrastructure and facilities including technical and personnel costs and capabilities, the existence of third party interventions conducted using influence and power.

In the stage of prosecution of the constraints faced may be the difference in perceptions between judges and prosecutors regarding the punishment and construction, lack of strong and relevant evidence, limited ability of laboratory technology and expert witnesses with expertise in the field, lack of ability of judges and prosecutors who master the law of waters in Indonesia as well as a lack of coordination and cooperation between investigators, prosecutors and expert witnesses so that the cooperation is inefficient and effective.[20]

Law enforcement of illegal fishing as part of marine safety management activities cites the opinion of TNI Laksda Dr Surya Wiranto SH., MH must be done in an integrated cross-sectoral way to produce optimal results. This is conveyed because there is still often a sectoral ego among each institution that has the authority.[21]

Closing

Based on the above description can be concluded that:

1. Illegal fishing as a criminal act of fishery is essentially also one form of economic crime in the form of property crimes. This is based on the consequences of losses incurred which may affect the economy of the State.
2. Efforts to restore the losses incurred by illegal fishing can be done by enforcing the law seriously by synergizing the motion of all law enforcement officials who have the authority to obtain maximum results with the imposition of criminal penalties as regulated in the Fisheries Law.

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[19] Nunung Mahmudah, ibid, p. 120-121

[20] Op.cit.

[21] Anonymous, Mengulas Penegakan Hukum pada Illegal Fishing di Perairan Indonesia, accessed from maritimnews.com on October 30, 2017.

RECONSTRUCTION OF LEGAL AGREEMENT POLICIES OF E-COMMERCE UNDERITE NO.11 OF 2008 AS THE PROTECTION OF LAW FOR SELLERS AND BUYERSIN E-COMMERCE

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ABSTRACT

This research aims to generate baseline of ideal decision regarding legal policy of e-commercewhich aims to enable the legal protection for the buyer and the seller. Basically, online transaction and legal protection for the seller or the buyer is already regulated by the Act - No. 11 of 2008 on Information and Electronic Transactions and Law No. 8 of 1999 on Consumer Protection, but the Law No. 8, 1999 has not optimally protect the buyer and the seller yet in e-commerce. The legal policies of online dealings are conducted in accordance with the intended rules as safeguards for sellers and online consignments in Indonesia, but on the application of Law no. 11 of 2008 has not been implemented optimally when transacting online, where people prefer the advertising or promotion and more based on the buyer's testimony who have purchased the product, which is not clarified yet by buyers, but for the seller online buying and selling process is based on trust and than many law problem in e-commerce not yet solve until today. This research is a legal research which usesconstructivism and has specifications of Non-Doctrinal legal research, empirical data, socio legal research, andpractical. Data collection instruments in this dissertation research is a structured interview that strengthened also by the study of literature and field research in the form of interviews with respondents consisting of buyers, sellers, developer of web e-commerce and government(Diskominfo) of Banyumas. After that, Forum Group Discussion (FGD) is conducted on the results of this dissertation research. The result of data analysis is done qualitatively using interactive model. This research discusses the results of research related to policy in central and regional related to legal policy settings online transaction agreement as a safeguard in the district of Banyumas, then the produced model as an online transaction in the form of policy will be compared with the legal system that is already implemented in the current online transactions, by the citizens of Banyumas, which refers to the ITE Law No. 11 Year 2008. Comparison is used as a reference in reconstructing the legal system of e-commerce.

Keywords: e-commerce, empirical, The Internet, FGD, non-doctrinal, Reconstruction

Introduction

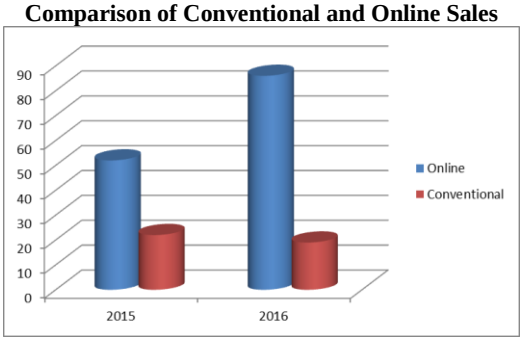
Globalization and free trade creates countries becomemore developing and more developed nations.One form of technological progress that can be seen from the increasingly widespread is trade transactions with online media via the Internet[1]. License Arrangement as a form of agreement or contract, not specifically notedin the Indonesian civil law system.Procedure of general agreement or contract within the system of civil law in Indonesia arrays in the Civil Code Book III of the article 1233 until article 1864. But, in progress, the patent license enters into a contractual group of business transaction. The main legal principles relating to commercial transactions are based on "*freedom of the contracting parties to agree as they wish*". This principle consists of the freedom to determine the contents of the contract as well as the choice of applicable law, which plays an important role in development. Information and communication technology has changed the behavior of society and human civilization globally. The development of information technology has caused the world to become borderless and cause rapid significant social change[1].

It can be seen from the rapid development of the Internet media.The Internet as a medium of information and electronic communication has been widely used for various activities, such as browsing, searching data and news, sending email, and trading. Almost all goods can be the object of commerce through the Internet, it is because the Internet is the most effective media today. However, it is necessary to notice that only movable objects that can be traded through the Internet media today, due to the sale and purchase of immovable objects such as land, must be done in front of the Land Deed Authority, and it cannot be done on theInternet.Today, on the Internet, there are communities that specialize in trading certain goods. They are incorporatedin sites that embrace their community. Some sites require users to become members first, but some are not. As an online shop that offers its goods viathe Internet.

[1] Lia Catur Muliastuti, "Perlindungan Hukum Bagi Para Pihak Dalam Perjanjian Jual Beli Melalui Media Internet," Tesis Program Studi Magister Kenotariatan Program Pascasarjana Universitas Diponogoro, pp. 1–133, 2010.

In general, trade is the most powerful transaction in commerce,and the most important part of business activity. Humans are social creatures that require interaction, and with their unlimited needs,it demands to meet the growing needs of each day. Various ways are done to fulfill the needs of life. One way of fulfilling the needs is by buying and selling activities. Withthe Internet buyers can see firsthand goods traded in cyberspace, pay it with bank transfer and just wait a while until the goods arrive.

Table 1
Comparison of Conventional and Online Sales

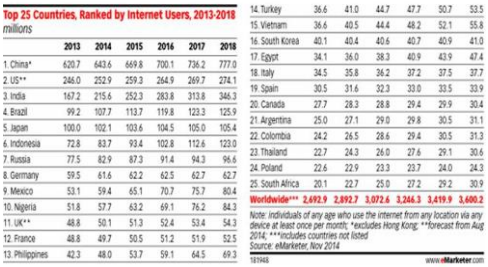


Source: Bisnisbali.com, 2016

E-Commerce is a process of buying and selling goods and services through the Internet, online buying and selling can streamline the time so that a person can make transactions with every person wherever and whenever. All sale and purchase transactions through the Internet is done without any face to face between the parties, they base the sale and purchase transactions on the trust of each other, so that the sale and purchase agreement that occurs between the parties was done electronically.Article 1 point 6 of Law no. 11 of 2008 on Information and Electronic Transactions (UU-ITE) stipulates that the administration of electronic systems is the utilization of electronic systems by the organizers of state, persons, business entities, and / or the public. In this case the organizers of electronic systems are Kaskus and Rekber. Furthermore, Article 15 paragraph (1) UUITE stipulates that every operator must organize the electronic system electronic system reliably and safely and is responsible for the operation of the electronic system as it should be. The Government has accommodated technological progress, by issuing Law number 11 of 2008 on information and electronic transactions, enactment of the law is expected to ensure the achievement of technological progress and improve the effectiveness and efficiency in public services.

This cellular subscriber growth rate is quite significant because with the presence of mobile Internet device technology on mobile phones, its users are able to access information via the Internet wherever and whenever they want to accelerate *the Internet penetration*. *Penetration* of mobile devices (mobile phones, personal digital assistants, laptop[2], etc) in Indonesia is quite high at 39%, while mobile broadband the Internet users by the end of 2007 are 315,000 people, the highest in ASEAN. Buyer's trust has been recognized in marketing as an important factor for success in business. In buying and selling conducted in the forum will certainly cause a problem between the seller and the buyer, because it is virtual. In practice, transactions that occur in the forum requires mutual agreement between the seller and the buyer or a joint agreement by the forum users about the transaction that will happen.

Tabel 2
Development of the Internet Users in The World 2013-2017



Top 25 Countries, Ranked by Internet Users, 2013-2018
millions

	2013	2014	2015	2016	2017	2018
1. China*	620.7	643.6	669.8	700.1	736.2	777.0
2. US**	246.0	252.9	259.3	264.9	269.7	274.1
3. India	167.2	215.6	252.3	283.8	313.8	346.3
4. Brazil	99.2	107.7	113.7	119.8	123.3	125.9
5. Japan	100.0	102.1	103.6	104.5	105.0	105.4
6. Indonesia	72.8	83.7	93.4	102.8	112.6	123.0
7. Russia	77.5	82.9	87.3	91.4	94.3	96.6
8. Germany	59.5	61.6	62.2	62.5	62.7	62.7
9. Mexico	53.1	59.4	65.1	70.7	75.7	80.4
10. Nigeria	51.8	57.7	63.2	69.1	76.2	84.3
11. UK**	48.8	50.1	51.3	52.4	53.4	54.3
12. France	48.8	49.7	50.5	51.2	51.9	52.5
13. Philippines	42.3	48.0	53.7	59.1	64.5	69.3
14. Turkey	36.6	41.0	44.7	47.7	50.7	53.5
15. Vietnam	36.6	40.5	44.4	48.2	52.1	55.8
16. South Korea	40.1	40.4	40.6	40.7	40.9	41.0
17. Egypt	34.1	36.0	38.3	40.9	43.9	47.4
18. Italy	34.5	35.8	36.2	37.2	37.5	37.7
19. Spain	30.5	31.6	32.3	33.0	33.5	33.9
20. Canada	27.7	28.3	28.8	29.4	29.9	30.4
21. Argentina	25.0	27.1	29.0	29.8	30.5	31.1
22. Colombia	24.2	26.5	28.6	29.4	30.5	31.3
23. Thailand	22.7	24.3	26.0	27.6	29.1	30.6
24. Poland	22.6	22.9	23.3	23.7	24.0	24.3
25. South Africa	20.1	22.7	25.0	27.2	29.2	30.9
Worldwide***	2,692.9	2,892.7	3,072.6	3,246.3	3,419.9	3,600.2

Note: individuals of any age who use the internet from any location via any device at least once per month; *excludes Hong Kong; **forecast from Aug 2014; ***includes countries not listed
Source: eMarketer, Nov 2014

Source*: Kominfo : 2017*

[2] Y. S. Pudji utomo, Edang Lestariningsih, "Kepercayaan Terhadap Internet Serta Pengaruhnya Pada Pencarian Informasi dan Keinginan Membeli Secara Online," Jurnal Ilmu Hukum, pp. 1–7, 2004.

We can see on table 2 above that Indonesia is in the position 6 among 25 developed and developing countries.We can know that the growth of the Internet users in Indonesia from 2013 to 2017 with an increase about 5% per year and the largest increase of The Internet users in Indonesia is in 2016.

Validity of Sale and Purchase Agreement through electronic transaction (online shop) between buyer with trading forum: Article 1320 on Civil Code regulates the four conditions that determine the validity of an agreement, such as: 1. Agree those who commit themselves. 2. The ability to create an engagement. 3. A certain thing. 4. A lawful cause[3]. Law number 11 of 2008 on information and electronic transactions or abbreviated as the ITE Law. The electronic contract shall also have the same legal force as the conventional contract, which binds the parties as Article 18 paragraph 1 of the ITE Law which states that "electronic transactions which implemented into electronic contracts bind the parties"[4]. Technological development has positive and negative effect for buyers, especially in online advertisement.Legal issues that often encountered are when related to the delivery of information, communications and or electronic transactions, especially in the case of proof and matters that relating to legal acts committed through electronic systems. Indonesia has been set a legislation that related to relations between advertisement and consumers; Law no. 8 of 1999 on Buyer Protection (UUPK) in which there are rules on consumer rights. The rights of the buyer which is formulated in Article 4 UUPK is an inseparable unity. That is, in every transaction or use of a certain product and service, the entrepreneur must ensure that all consumers rights are fulfilled. It is mentioned in Article 9 of the ITE Law that entrepreneurs who offer products through Electronic Systems shall provide complete and correct information relating to the terms of the contract, the manufacturer and the products offered. In this case the information made by businesspersons to attract buyers must be completely in accordance with the goods or services they offer, so the consumers do not have different expectations.

Tabel 3
E-Commerce Growth in the World (B2C), 2013 - 2016

Source *: Kominfo, 2017*

Table 3 above shows the growth of E-commerce with Business to Customer system in the world, and Indonesia is in 4thwith annual revenue growth from 2013 to 2016 by 80% per year. According to Volmar as quoted by Suryodiningrat argues that trading is a party of one seller (verkopen) bind himself to another party buyer (loper) to move an object in *eigendom* by obtaining payment from customer, a certain amount of money[5]. E-commerce becomes an attractive alternative for buyers to shop because it allows buyers to make transactions with everyone, anywhere and anytime. Generally online shopping is done through social media, such as Twitter, Instagram or mobile phone as a marketing tool. The sales object is just a picture and the specification of the product. The juridical issues that is caused by e-commerce agreements because e-commerce agreements different from conventional trade. In conventional trading buyers and sellers meet in person while in e-commerce does not. Based on these differences, the agreement through e-commerce has its own form either the form of B to B (Business to Business) or B to C (Business to Consumers). Especially for B to C in general, the buyer's position is not as strong as the company so it can cause some problems, such as: the businesperson's responsibility to the buyer's loss in the e-commerce sale agreement, buyer protection to get compensation, and also e-commerce agreement as an evidence[6].

[3] Presiden Republik Indonesia, "Undang - Undang Republik Indonesia Nomor 8 Tahun 1999 Tentang Pelindungan Konsumen," Pemerintahan Indonesia, pp. 1–46, 1999.
[4] Daniel Alfredo Sitorus, "Pernjanjian Jual Beli Melalui Internet (E-Commerce) Ditinjau dari Aspek Hukum Perdata," Skripsi Universitas Atma Jaya Yogyakarta Fakultas Hukum, pp. 1–16, 2015.
[5] A. Made Indah Puspita, "Hak dan kewajiban para pihak dalam transaksi jual beli," Skripsi Bagian Hukum Perdata Fakultas Hukum Universitas Udayana, pp. 1–5, 2013.
[6] Elina Rudiastari, "Perlindungan Hukum Terhadap PembeliDalam Perjanjian Jual Beli Melalui e-Commerce di Indonesia," J. Sos. dan Hum., vol. 5, no. Hukum Bisnis, pp. 71–81, 2015.

Figure1
Business to Customer (B2C) E-Commerce scheme

The Agreement shall be deemed as a valid agreement if it meets the subjective and objective requirements. Agreement in e-commerce is not very different from conventional agreement; the only things that differentiate them are form and the period of validity.Media that is used in conventional agreement are ink and paper and made based on the agreement of the parties. Once made and agreed, the agreement is binding upon signing, whereas e-commerce agreement uses electronic media which is only form of agreement made by one party written and displayed onweb page, then the other parties simply press the button provided to bind themselves to the agreement. This, of course, raises various problems about the validity of the agreement. The broader problem occurs in the civil area because electronic transactions for trading activities through electronic systems (electronic commerce) has become part of the national and international trade[7]. Electronic transactions that is implemented into these electronic contracts have the power of binding on the parties whocreated them. In accordance with the principle of freedom of contract as mentioned in Article 1338 BW jo 1320 BW jo Article Law of ITE, this brings the consequences of growing various new agreements, for example a sale and purchase agreement conducted by using the Internet services. The use of electronic transactions makes some people doubt regarding security and legal certainty. The question arises as to whether the sale and purchase transactions through the Internet are clearly legitimate under Indonesian laws, particularly Indonesian Legislation Information Act, especially the Information and Electronic Transactions Act. Law No. 8 of 1999 on Buyer Protection (hereinafter referred to as UUPK) should guarantee a Buyer Protection in a legal product. This is important because only the law has the power to force entrepreneur to obey it, and also the law has strict sanction[8].

Description above interpreted as a process of vigilance due to easy implications of transactions through the Internet. In fact, buyers and sellers have been distrustful of local government and central governments to carry out their duties. So,it is good to implement the idea of system constructivism that encourages legal renewal of the online sale and purchase agreement by promoting the principles of good governance. So in the future, it is necessary to reconstruct the existing online trade agreement law by reinforce and prepare all aspects of the resources that support the existence of the system, by taking the perspective side of the seller's relationship with the buyers in socio legal basis, as well as space for community participation in supervising e-commerce. Trading activities in the community have grown very rapidly. It is influenced bythe development of the Internet-based technology known as e-commerce. E-commerce is a form of trade that has its own characteristics of trade which is cross national borders, sellers and buyers do not meet face-to-face, and the Internet usage. There are at least two major components in fiscal policy such as the components of revenue comprising taxes and non-taxes, and components of governmentspending[9]. The phenomenon of online sales in Indonesia increase rapidly and unwittingly increase the economy in Indonesia.[10]

Furthermore, in the viewpoint of online sales, there are many fears and anxieties about the number of frauds made by e-commerce systems, due to the ignorance of a sellers and buyers who sell or buy their products.[11]

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[7] Sri Anggraeini Kusuma Dewi, "Perjanjian Jual Beli Barang Melalui Elektronik e-Commerce," J. Ilm. Teknol. dan Informasia ASIA, vol. 9, no. Hukum Bisnis, pp. 1–5, 2015.

[8]Singgih Utomo, "Perlindungan Hukum Bagi Konsumen Dalam Jual-Beli Online Melalui Facebook," Skripsi Ilmu Sosial dan Ilmu Politik, pp. 1–11, 2016.

[9] Ferry Prasetyia, "Rekonstruksi Sistem Fiskal Nasional dalam Bingkai Konstitusi," *J. Indones. Appl. Econ.*, vol. 5, no. Sistem Fiskal Naional, pp. 141–156, 2011

[10] Syahril, "Bimbingan dan Konseling Berbasis Gender : Rekonstruksi Pendidikan Seks dalam menanggulangi Seks Bebas di Kalangan Remaja Putri," *J. Stud. Gend. dam Islam PSW Stain Watampone*, vol. VII, no. Seks Bebas dikalangan Remaja, pp. 228–239, 2014

[11] N. A. T. Arief Widyatama, "Rekonstruksi Kepingan - Kepingan Akuntansi dari Perspektif Sejarah : Sebuah Redefinisi Akuntansi," *Skripsi STIE Panca Bhakti Palu*, pp. 1–18, 2012

Research Question

Based on the introduction that has been described, then the researchers formulate the problem to be studied:

a. How is the policy of government supervision system on the implementation of Law no. 11 of 2008 on information and electronic transactions in protecting sellers and buyers in e-commerce?
b. How to reconstruct the ideal policy of online transaction laws under Law no. 11 of 2008 on information and electronic transactions in protecting the sellers and buyers in online transactions (e-commerce)?

Proposition

The propositions used in this dissertation research are the theoretical proposition types, such as:

a. The supervision of the ideal online transaction law policy that affected the buyers' and sellers' confidence in using the e-commerce systembased on compliance with the application of Law no. 11 of 2008 on information and electronic transactions in legal protection for sellers and buyers in online transactions (e-commerce).
b. Idealize the legal form of online trading agreements to be accepted by the public based on Law no. 11 of 2008 on information and electronic transactions in legal protection for sellers and buyers in online transactions (e-commerce)

Purpose

Research should have a clear purpose, so that it has definite direction and guidance.Basically, purpose of the research reveals what the researchers want to achieve as a solution to the problems encountered. The objectives to be achieved by researchers in this study are:

a. Analyzing and reviewing the existence of government oversight on the online buying and selling law policy (electronic transactions), as well as discovering the ideal construction concept of online buying and selling policy system based on Law no. 11 of 2008 on information and electronic transactions in legal protection for sellers and buyers in online transactions (e-commerce).
b. Describe, analyze and criticize the forms and dynamics of government's oversight of the online buying and selling law policy (electronic transactions) in the implementation of Law no. 11 of 2008 on information and electronic transactions in legal protection for sellers and buyers in online transactions (e-commerce).

Research Method

As a legal research, this research uses constructivism paradigm and has non-doctrinal specification, empirical data, socio legal research, and practical. The instrument of data collection in this dissertation research is structured interview which is supported also by literature study, and field research.The interviewees in this research are buyers, sellers, e-commerce web developers, and government (Diskominfo) of Banyumas. Forum Group Discussion (FGD) also conducted on the results of this dissertation research. The result of data analysis isdone qualitatively using interactive model. With this approach, the object of law is positioned in a broad societal context, not putting it as an inseparable material isolated from the culture (thought systems knowledge systems) and power relations among law makers, law enforcers, stakeholders and the community.

By this approach, the assessment was conducted by describing the substance of legal norms and social reality, as well as the relationship between the two objects of the study. The use of this approach is intended for avoiding inequality in reviewing the law, because on the one hand the law cannot be removed from its normative features, but in terms of this research approach is not forever purely juridical as well as sociological, historical and philosophical approaches. The data required in this dissertation are grouped into two parts, primary data and secondary data. Secondary data in the form of primary and secondary legal material is collected through literature study process and documentation study either go to the field directly or through the Internet access, then processed by examination of completeness and equilibrium of legal materials, classification and systematization of legal materials. Primary data was collected through field study by interview. The analytical method used is prescriptive-analytical, that is by exposure and analysis of the content and structure of applicable law, systematization of legal phenomena described and analyzed, interpretation, and valid legal assessment used as an argument to answer the problem. This technique is used in the following ways: (1) Comparing the data obtained from the observation with the data obtained from the indepth interviews with interviewees; (2) Comparing perceptions, views and general opinions with perceptions, views, and opinions of researchers. (3) Conducting comparison between data of interview with documents of library research.

1. Theoretical Framework

This research uses several theories to analyze the problems. For the first problem, it is used several theories, such as: **First**, **Deal Theory** from **Mieke Komar Kantaatmadja**. This theory explains about when the deal took place embraces the theory of acceptance in which an agreement has been established when the bidder receives an answer letter in the form of acceptance of the offer. **Second**theoryis **Force Agreement Theory** from **Pitlo**.This theory explains that the standard agreement does not comply with the provisions of the law and by some jurists it is denied, but in fact the needs of the community go in the opposite direction of the law, which is used to analyze forced agreements. **Third**,**Stein Theory**tries to solve this problem by arguing that the standard agreement may be accepted as a treaty, based on the *fictie van will en verthouwen* which evokes the belief that the parties bind themselves to the treaty. If the debtor accepts the agreement, it means he voluntarily agrees on the contents of the agreement. Sutan Remy Sjahdeini revealed that the validity of the standard agreement is not necessary questioned again for the existence of the standard agreement has been widespread in the business world since more than 80 years. This fact is formed because the standard agreement was born from the needs of the community. The world of business cannot take place without a standard agreement. Standard agreements are required by and therefore accepted by the public.

Hypothesis

Based on the literature, the results of literature research, and observations, it is obtained some opinions that can answer some of the questions in this dissertation research:

First Question: How is the policy of government supervision system on the implementation of Law no. 11 of 2008 on information and electronic transactions in protecting sellers and buyers in e-commerce?

Government's policies that have not optimal yet to support the achievement of national interests in accordance with the mandate of the 1945 Constitutionthat aims to prosper the life of the people and the life of the nation, which makesslow economic growth; the lack of prosperity in utilizing and managing the natural resources of mining, marine wealth and agricultural crops of Indonesia, so that the quality of Indonesian human resources cannot compete in the global.

The rapid progress of information technology especially theInternet, which plays an important role for human life, makespeople in Indonesia use this technology. Nowadays Indonesian cannot be separatedfromthe Internet facilities to support communication, banking and e-commerce.With that in mind, it is necessary to formulate policies that can support and protect the use of the Internet technology facilities in Indonesia.The enactment of Law Number 11 of 2008 About Information and Transactions Electronics is expected to provide security for use information and communication technology. On the contrary,cybercrime and the Internet fraud at Indonesia are still high both from within and outside country.

Norton Report in 2013 claims that the potential and risk level of cyber crime in Indonesia has entered emergency status. The report states that there are about 400 million victims of cyber crime in Indonesia each year with a financial loss of USD 113 billion. While, according to the research by Indonesia Security Response Team, in 2011it was recorded approximately 1 million cyber attacks aimedthe Internet users in Indonesia each day. Technological crimes such as fraud, extortion and phishing. Therefore the government should strengthen the supervision and protection for The Internet users especially in handling fraud cases and disguised online sales, which is now rife.

Second Question: How to reconstruct the ideal policy of online transaction laws under Law no. 11 of 2008 on information and electronic transactions in protecting the sellers and buyers in online transactions (e-commerce)?

Discussion on this question is divided into two (2) sub-topic, **firstly**, the idealism of legal policy in e-commerce are ideal to protect buyers and sellers in online transaction on the elements of the legal aspects. The government's ideal oversight system to the seller and buyer, certainly based on the findings on the field about the weakness of reconstruction that will result from this research. It is about the number of miscommunications between stakeholders and the policy holders, and the supervision and coordination that result in the difficulty of tracing allegations of illegal acts. This weakness correlated with unimplemented procedural coordination.The reconstruction of electronic buying and selling law policies should be able to accommodate the values of Social , Information Technology, Law and Systems due to these are the main values of government's assessment and supervision in the success of the electronic transactional trading system. **Secondly,** the ideal online legal system of e-commerce should protect sellers and buyers in online transaction from the elements of Information and Technology.Based on findings in the field, information technology that is built only guided byprinciples that suit to the desire of programmers who build the system of selling and selling online, and does not refer to the Act no. 11 of 2008 about electronic transactions. (incomprehensible IT program in ITE law).Basically, every legalized rule of law is made to give certainty, justice and benefit of law for human being, because talking about legal problem at the level of life of society in which the law is located, then actually talking about human behavior when using law in reaching their purpose, people in this Earth hope when enforcing the law there must be a guarantee of legal certainty.[19].

Conclusion

1. Inference

   If we review the literature and results on field research, then the findings and ideal construction that can be put forward, are:

   a. The monitoring system of the sale and purchase of legal policy - conducted online in protecting the buyers and sellers to transact online, can be evaluated as follows:
      1) From the aspect of IT (Information Technology), the need to build layered security factors in the making of online system, the need of IT programmers who can develop high-security software and understandabout ITE Law, so they can provide insight to sellers and buyers about the law.
      2) From the social aspect, the need to create a factor to cultivate a culture of trust and spirit to conduct a clean and dignified online transactions and courage in building cooperation in protecting sellers and buyers in online transaction.
      3) From the aspect of Law, the need of information disclosure and legal awareness either in sellers, buyers or 3rd party (in this case programmers) application developer, where the written law or sanction is included in the application, and the existence of legal rule implied or explicitly integrated as information to sellers and buyers in online transactions.
      4) From the aspect of the system, the need of special institutions that continuously monitor all electronic transactions conducted in the community, in order to evaluate and reduce the number of illegal actions.
   b. The establishment of an integrated system of online trading applications that can view and evaluate the transaction from one door with the strengthening of legal system covering: IT Aspect, System Aspect, Legal Aspect, and Social Aspect. To actualize the e-commerce law Policy in legal protection for sellers and buyers in online transactions.
   c. Basically, the supervision system of government is not optimal yet in the process of online trading, especially in these factors:
      1) Lack of public understanding on the dynamics of the development of e-commerce system
      2) Lack of public understanding on the dynamics of the development of Information and Technology, in this case the procedure of e-commerce.

2. Suggestion

   In the e-commerce dispute procedures, government as policy maker should do:

   a. Socialize the important points in online transaction including the rights and obligations for sellers, buyers, and 3rd party (website developer)
   b. Socialize about the system that provides reportsor evidences of trading.So that, mutual trust between sellers and buyers exists.
   c. For sellers and buyers who have made transactions, should be responsible in accordance with the sale and purchase agreements that have been mutually agreed.
   d. Governments should socialize about registered trading activities, and carry out more rigorous evaluation and monitoring, so thatappropriate for the communities.

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THE THREE ENDS STRATEGY AS THE EFFECTIVE SOLUTION TO ERADICATE HUMAN TRAFFICKING IN ASEAN

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ABSTRACT

Trafficking in Persons has been the concern of the Association of Southeast Asian Nations (hereinafter referred to as "ASEAN"), where of which resulted in the 2015 ASEAN Convention Against Trafficking in Persons, Especially Women and Children. Having tendency to adhere closely to internationally accepted standard of emphasising the prosecution, protection, and prevention, has led ASEAN to conclude such agreement. Notwithstanding the progress on combating the said crime, human trafficking never seems to cease its presence within the land of the parties thereto. Should ASEAN desire the aforementioned crime to be rendered obsolete, the human trafficking has to be considered as one out of three problems that must be eradicated. Indonesia perceives human trafficking as a part of an integrated crime, especially directed towards women and children, whereupon emerged the *Three Ends* strategy, which comprises of an end of violence against women and children, an end of human trafficking, and an end of barriers to economic justice.This research analyses whether the above-mentioned strategy, in alleviating human trafficking, has been accommodated by scrutinising legislations related to the case at hand. In addition, the role of ASEAN Intergovernmental Commission on Human Rights will be examined and studied as a primary medium of diplomacy in eliminating human trafficking. This is a multi-disciplinary research, which uses the method of normative legal research (the literature study) and a descriptive qualitative research to better provide solution to the problem faced. The Result of this research shows that the *Three Ends* strategy is not a novel measure of prevention of human trafficking, as the prevention thereof has been embedded within the provisions of the related conventions on Trafficking in Persons. However, it provides a fresher perspective on seeing such problem. Additionally, with regard to the foreign cooperation, the role of ASEAN Intergovernmental Commission on Human Rights would suffice should the scope of its operation be broadened, in which this strategy is proposed to enrich and armed this regional commission.

Keywords: Human Trafficking, Eradication, Three Ends

Introduction

The trafficking in human is considered to be a highly profitable crime that inflicts a serious and gross violation of human rights. Victims are treated as if they have no dignity and exploited in their land and/or abroad for the benefit of the perpetrators. This worldwide phenomenon has become a concern to global security, not only to the Association of South-East Asian Nation (hereinafter referred to as, "ASEAN"), but also to the Nations and Continents across the globe. The prior statement is in pursuance to the assessment made by European Union, the United Nations, and the United States of America that reflects the said crime as a threat to global security.[4]

According to the 2016 Global Report on Human Trafficking, between the year of 2012 and 2014, it was identified, in 106 countries, that there was a total of 63,251 victims of human trafficking.[5]Whereas, the ASEAN Briefs of the Habibie Centre pointed out that, in 2016 alone, there are around 45.8 million people trapped in this modern slavery, where 30 million of which were from Asia-Pacific.[6]Amongst all of the numbers, the reports indicated that the majority (70%) of the victims comprises of females, in their adulthood as well as early age.[7]Further, it is concluded that there are no countries immune from trafficking in persons.[8]

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[4] Bettina Jakobsen *et. al.*, 2017, "EU Support to Fight Human Trafficking in South/South-East Asia", Special Report of the European Court of Auditors Number 09, Luxembourg, p. 8, para. 1.
[5] UNODC, Global Report on Trafficking in Persons 2016 (United Nations publication, Sales No. E.16.IV.6), p. 23.
[6] ASEAN Briefs, 2017, "Fighting for Freedom: Combatting Human Trafficking in ASEAN", vol. 4/issue 4, the Habibie Center-ASEAN Studies Program ASEAN Briefs, p. 3.
[7] UNODC, *loc. cit*.
[8] UNODC II, 2006, "Virtually No Country Immune from human trafficking, UNODC Report Shows", United Nations Office on Drugs and Crime, URL: https://www.unodc.org/unodc/en/press/releases/press_release_2006_04_2 4. html accessed on 19 January 2018.

On other studies, it was assumed that the trafficking happened was caused by poverty, lack of education and health access, gender discrimination and minority injustices.[9]Of all the issues mentioned, the issue of gender discrimination and poverty have been the main concern or a rather point of view of Indonesia in respect to this problem, as scholars have affirmed and attempted to find solutions.[10]The underlying reason, to the extent of the authors' knowledge, is because of the numbers and the percentage and the vulnerability of women and children to become victims.[11]

With regard to the percentage of human trafficking, women and children victims are detected to be at 79%, whilst men only at 21%.[12] If we look thoroughly at the trends of the Global Reports, it is evident that trafficking in woman has a falling chart from where it had initially been at 74% in 2004, became at 51% in the following decade.[13] Men, in the other hand, has an increase, to wit in 2014 it was at 21%, hereinbefore it had been at 13% in a prior decade.[14] Notwithstanding the increase in trafficking in men, women and children still have an overall greater percentage. Though it has to be noted, unlike the Global Reports, Indonesia categorises children as to cover both genders.

Indonesia, in order to eradicate the above-mentioned crime, enacted the Law Number 21 of 2007 on the Elimination of the Crime of Trafficking in Persons (hereinafter "Law on TIP"). The main objective of this Law is to protect the victims of human trafficking, whereupon the chain of crime will the be able to be cut. Thus, the victims would not be victims again and/or become perpetrators in the future. Moreover, this Law reflects United Nations Convention against TransnationalOrganized Crime and the Protocol to Prevent,Suppress and Punish Trafficking in Persons,Especially Women and Children, where it covers the needs to be internationally cooperated inhandling this complex crime with 5 steps, among others: (1) education;[15] (2) Prevention;[16] (3) Social Rehabilitation;[17] (4) Victims Protection;[18] and (5) People's involvement.[19]

ASEAN shares Indonesia's view on this matter, in which as a regional organisation, ASEAN has made efforts to put an end to human trafficking, one of which is the establishment of ASEAN Inter-Governmental Commission on Human Rights (AICHR). This commission was formed following the 1993 United Nations Conference on Human Rights in Vienna, wherein ASEAN foreign Minister, through a *joint communiqué*of the 26th ASEAN Ministerial Meeting of 1993, stated the needs to have coordination in the quest for common approach on human rights and actively participate in the application, promotion, and protection thereof.[20] Furthermore, the Article 14 of the ASEAN Charter stipulates in essence that in order to promote and protect human rights, a designated body needs to be established.[21] Therefore, the High Level Panel then made a draft of Term of References (TOR) of AICHR adopted by the Foreign Minister of ASEAN in July 2009, whereupon the commission was made official in the 15th ASEAN Summit on 23 October 2009 in Thailand.[22]

AICHR has accomplished one of its main mandates, which is development of ASEAN Human Rights Declaration, whereofwhich was adopted by the ASEAN Leaders at the 21st ASEAN Summit in Cambodia on 18 November 2012.[23]

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[9] Bettina Jakobsen *et. al., op. cit.,* p.8, para. 4.

[10]Herlina P. Sari, 2005, "AnalisisInterseksionalitasTerhadapRancanganAksi Nasional PenghapusanPerdagangan (Traffic king) Perempuan dan Anak", Indonesian Journal of Criminology Vol. 4 No. 1: 7 -13. Jakarta, p. 10. (Cari minimal lagi 2 jurnal)

[11]*See supra* note 2; *see also* Bibit Santoso, 2017, "MenyikapiPerdaganganManusia", Kompas, URL: http://nasional.kompas.com/read/2017/03/29/19382151/menyikapi.perdagangan.manusia accessed on 19 January 2018; Putri Utami, 2017, "UpayaPemerintah Indonesia dalamMengatasi *Human Trafficking* di Batam", University of Mulawarman, Samarinda; MutayaSaroh, 2016, "Perempuan dan Anak RentanTeribat Human Trafficking", trito.id, URL: https://tirto.id/perempuan-dan-anak-rentan-terlibat-human-trafficking-bGMb accessed on 19 January 2018.

[12] UNODC, *loc. Cit.*

[13]*Ibid.*

[14]*Ibid*.

[15] Art. 6 para. 4, Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nation Convention against Transnational Organised Crime (hereinafter "UN Protocol on TIP")

[16] Art. 2 point (a), UN Protocol on TIP.

[17] Art. 6 para. 3, UN Protocol on TIP.

[18] Art. 6, UN Protocol on TIP.

[19] Art. 6 para. 3, UN Protocol on TIP.

[20]YuyunWahyuningrum, 2014, "The ASEAN Intergovernmental Commission on Human Rights: Origins, Evolution and the Way Forward", International Institute for Democracy and Electoral Assistance, Stockholm, p. 13.

[21] Art. 14, Charter of the Association of South-East Asian Nations, "*In conformity with the purposes and principles of the ASEAN Charter relating to the promotion and protection of human rights and fundamental freedoms, ASEAN shall establish an ASEAN human rights body*".

[22]YuyunWahyuningrum, *loc.cit.*; *see also:* AICHR, "A Brief History of the ASEAN Intergovernmental Commission on Human Rights, URL: http://aichr.org/about/?doing_wp_cron=1516341198.3626220226287841796875 accessed on 19 January 2018.

[23] AICHR, 2012, "The Adoption of the ASEAN Human Rights Declaration (AHRD) at the 21st ASEAN Summit and the Special Meeting of the ASEAN Intergovernmental Commission on Human Rights (AICHR)", Press Release,

Thereafter, on 21 November 2015, ASEAN Member States concluded the 2015 ASEAN Convention Against Trafficking in Persons, Especially Women and Children (hereinafter "ACTIP"), which has taken into force since 8 March 2017.[24]This convention has adhered to international standard of combatting human trafficking, to wit: (1) prevention of trafficking in person; (2) Protection of victims; (3) law enforcement and prosecution of crimes of trafficking in persons; and (4) regional and international cooperation and coordination.[25]

Regardless the efforts made, referring to the paragraphs*supra*, the data on human trafficking still shows a considerably high rate. Even if the report says that the number of women and children are decreasing from 2004 to 2014, it should be noted that the percentage of women trafficking in 2013 is 2% lower than in 2014.[26]One of the reasons might as well be the omission by society (including but not limited to family), society, and even government.[27]This fact led Indonesia to think of another means of remedy to human trafficking, whereof initiated the non-penal strategy of *Three Ends*. This strategy, which was introduced in March 2016 by the Ministry of Women Empowerment and Chill Protection of Indonesia, encourages public participation to jointly alleviate the human trafficking, in which this strategy comprises of an end of violence against women and children, an end of human trafficking, and an end of barriers to economic justice.[28]

Therefore, according to the background above, the research on the said matter was initiated and entitled, "**The Three Ends Strategy as the Effective Solution to Eradicate Human Trafficking in ASEAN**", with the questions presented as to: (1) whether the *Three Ends* strategy is in conformity with and/or complementary to the pre-existing laws and regulations; and (2) whether ASEAN Intergovernmental Commission on Human Rights play a role in combatting the crime of Trafficking in Persons.

Research Method

This is a multi-disciplinary research, which for the first research question it uses a normative legal research method. The said method is identified as a literacy legal research, which comprises of studies on legal principles, systematics, synchronisations (either vertically or horizontally), comparisons, as well as history.[29] The sources used in a research with a normative character shall be based on primary and secondary legal materials.[30] As for the primary materials, the authors used materials that have binding forces (legally), to wit: international convention and related Indonesia's laws and regulations. The secondary materials are the materials that have supplementary purposes to the primary materials,[31] as well as giving guidelines to the authors to finalise the research.[32]The secondary materials used in this research are books and digests, papers, as well as internet sources related to the issue at hand.[33] As for the second research question, it uses a descriptive qualitative research. According to Creswell, qualitative research is a process for collecting, analysing, interpreting, and writing results from research.[34] Descriptive method is a method used to find the elements, characteristics, properties of a phenomenon.[35] Sources of data used are secondary data derived from literature review.

Phnom Penh. URL: http://aichr.org/press-release/the-adoption-of-the-asean-human-rights-declaration-ahrd-at-the-21st-asean-summit-and-the-special-meeting-of-the-asean-intergovernmental-commission-on-human-rights-aichr/ accessed on 19 January 2018.

[24] AICHR, 2017, "Press Release: AICHR Cross-Sectoral Consultation on the Human Rights based Instruments related to the Implementation of the ASEAN Convention Against Trafficking in Person, especially Women and Children", Press Release, Yogyakarta. URL: http://aichr.org/press-release/press-release-aichr-cross-sectoral-consultation-on-the-human-rights-based-instruments-related-to-theimplement ation-of-the-asean-convention-against-trafficking-in-person-especially-women-and-childre/ accessed on 19 January 2018.

[25] ASEAN Plan of Action against Trafficking in Persons Especially Women and Children, URL: http://asean.org/asean-convention-against-trafficking-in-persons-especially-women-and-children/ accessed on 19 January 2018.

[26] UNODC, *loc. cit.*

[27] Tini Rusmini Gorda, 2017, *HukumPerlindungan Anak Korban Pedofilia*, Setara Press, Malang, p. 155.

[28] The Ministry of the Republic of Indonesia Press Release Number: 27/HumasKPP-PA/3/2016.

[29]Soerjono Soekanto and Sri Mamudji, 2007, *Penelitian Hukum Normatif, Suatu Tinjauan Singkat*, Raja Grafindo Persada, Jakarta, p. 12; Lihat juga: Ida Bagus Wyasa Putra, 2015, *FilsafatIlmuHukum*, Udayana University Press, Denpasar, p. 151.

[30]Hadin Muhjad, 2012, *Penelitian Hukum Indonesia Kontemporer*, Genta Publishing, Jogjakarta, p. 51

[31]Peter Mahmud Marzuki, 2008, *Penelitian Hukum*, Prenada Media Group, Jakarta, p. 144

[32]Zainuddin Ali, 2016, *MetodePenelitianHukum*, SinarGrafika, Jakarta, p. 54.

[33]Bahder Johan Nasution, 2016, *MetodePenelitianIlmuHukum*, MandarMaju, Bandung, p. 97.

[34]Carrie Williams, 2007,*Research Methods. Journal of Business & Economic Research*, Volume 5, Number 3 URL: https://www.cluteinstitute.com/ojs/index.php/JBER/article/download/2532/2578accessed on 20 January 2018.

[35]Suryana, 2010,"MetodologiPenelitian: Model PraktisPenelitianKuantitatif dan Kualitatif. Buku Ajar Perkuliahan",Universitas Pendidikan Indonesia. URL: https://simdos.unud.ac.id/uploads/ file_penelitian_1_dir/ 23731890cdc8189968cf15105c651573.pdf) Diaksespada 20 Januari 2018

Discussions

Three Ends Strategy in Eradicating Trafficking in Persons and its conformity to the Existing Laws and Regulations

Laws and Regulations against trafficking in persons in ASEAN

As mentioned in the background, the ASEAN Convention against Trafficking in Persons Especially Women and Children (ACTIP) has been in force since last year.[36] This convention is the primary source on combatting human trafficking in ASEAN. The materials comprised in ACTIP, *inter alia*, criminalisation of the perpetrators and the accomplishes thereof,[37] prevention of crimes,[38] victims' protection,[39] and law enforcement.[40]

Criminalisation

This convention covers a criminalisation to the extent of the perpetrators, the accomplishes, and the organiser/director of human trafficking.[41]Thereby, each party is directed to take legislative action or other measure to held the criminals liable, which includes higher penalties should specific circumstances present.[42] The ruling also include the laundering of objects used for the purposes of the crime until the regulation to the obstruction of justice, which covers giving false testimony or pressuring witness into giving false testimony.[43]

Prevention

On the prevention section, ASEAN through this convention is heading towards the empowerment of the people especially potential victims. This shows by the provisions that stipulates a suggestion to each country within the region to strengthen the policies to prevent and combat such crime either domestically or involving cross-border cooperation.

Protection

This section provided the regulation to establish national guidelines or procedures.One of the most notable is that each party shall provide, to the victims:[44] (a) appropriate housing; (b) counselling and information, in particular as regards their legal rights in a language the victims can understands; (c) medical, psychological and material assistance; and (d) employment, educational and training opportunities.

Law Enforcement

Nothing in the provision of the Articles of this Convention's chapter provide a mechanism or procedure to settle or to enforce the law on regional level. That is due to the spirit of the organisation that upholds the principle of state sovereignty. Notwithstanding the lack of regional level enforcement, the convention does provide obligations to parties to ensure that each of their legal system is efficient and sufficient to punish and prosecute the crime of human trafficking.[45]

The *Three Ends* Strategy in the Existing Laws and Regulations

Three Ends strategy is a strategy that focusing on the non-penal action toward the human trafficking. However, instead of seeing the human trafficking as a single type of problem, this strategy sees it as one out of three major issues that are related to one another. This highlighted correlation is affirmed by the Report on the study of the underlying reason of the crime of trafficking in persons, which stated that most the said crime happening in the world were triggered by the lack of economical justice, gender discrimination and poverty.[46] Having that said, it is evident that this strategy is in a prevention aspect.

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[36] AICHR, 2017, "Press Release: AICHR Cross-Sectoral Consultation on the Human Rights based Instruments related to the Implementation of the ASEAN Convention Against Trafficking in Person, especially Women and Children", Press Release, Yogyakarta. URL: http://aichr.org/press-release/press-release-aichr-cross-sectoral-consultation-on-the-human-rights-based-instruments-related-to-the-implementation-of-the-asean-convention-against-trafficking-in-person-especially-women-and-childre/ accessed on 19 January 2018.

[37] Ch. II, ASEAN Convention against Trafficking in Person Especially Women and Children (ACTIP).

[38] Ch. III, ACTIP

[39] Ch. IV, ACTIP

[40] Ch. V, ACTIP

[41] Art. 5, para. 2, ACTIP.

[42] Art. 5, para. 3, ACTIP, which stipulates in essence that "penalties shall be higher if the offenders: (a) inflict serious injuries or cause death; (b) involve particularly vulnerable victims such as children or disabled, (c) expose victims to live-threatening illnesses; (d) involve more than one victim; (e) commit crime as a part of organised group activity; (f) have committed such crime in the past; (g) committed their crime in their capacity as a public official".

[43] Art 7 – 9, ACTIP

[44] Art. 14, para. 10, ACTIP.

[45] Art. 16, ACTIP.

[46] Global report

In pursuance to Article 11 paragraph 1 ACTIP, parties shall establish comprehensive policies, programmes and other measures to prevent trafficking in persons. Further, it also asserts that parties must protect victims to becoming victims again.[47] ASEAN, as well, realise that this measure cannot be done individually as a single country, in which the follong provision of Article 12 provide areas of cooperation as to include preventive measures and policy transcend national borders. That particular provision includes an establishment of maintained direct channels of communication as well as intelligence exchange.

Having said that, it is clear that the non-penal strategy of Three Ends is standing amongst those provisions. As Indonesia have, on 29 May 2016, invited various components of society as to include: (1) academics; (2) religious organisations; (3) Society's organisations; (4) entrepreneurs; and (5) media; to spread, educate, and support this policy of *Three Ends* in accordance with each of their capacity, function, and area of expertise.[48]In relation to its legal status in ASEAN, as to extend beyond Indonesian national border, is the cooperation provision. It is regulated that parties needs to take measures cross-domestic border, in which this is the justification of this strategy to be included in ASEAN Plan of Action. It should be noted that coordination cross-border is not an easy task. However, the existence of ASEAN Inter-Governmental Commission on Human Rights might be the answer to the insertion and an actual application to the strategy at hand. This notion will be substantiated in sub-section *infra*.

The Role of ASEAN Inter-Governmental Commission on Human Rights in Eradication Human Trafficking

As the organisation which purpose to secure a regional vicinity, ASEAN is making an effort to actively play a role in putting an end to human rights issues, including human trafficking. ASEAN established the ASEAN Inter-Governmental Commission on Human Rights (AICHR) as a regional body designated to accommodate the issues of human rights, which role is most notably limited. This can be seen in the mandate thereof, which only is a consultative body. AICHR's mandate does not contain explicit provision for receiving and investigating complaints of human rights violations.[49] By definition this commission cannot make any coercive mechanism because its authority is not equivalent or higher than states. Moreover, the decision make mechanism of AICHR is by consultation and consensus. If we look at the character of AICHR as a human rights body, certainly it is not apart from the nature of ASEAN itself as a regional organisation that emphasises the principle of ASEAN Way. The main principles in the ASEAN Way are to prioritise the sovereignty of each member country, non-interference, consensus, and avoid confrontation. Although many parties criticise the ASEAN Way, it is evident that ASEAN continues to grow from five members in its initial standing to 10 members today. During 50 years of standing ASEAN still shows its existence, even ASEAN is heading the process of regional integration through the establishment of ASEAN Community. AICHR as an agency under ASEAN certainly does not have the authority to interfere with human rights issues in each member country because it is based on the principle of non-interference.

There are several criticisms directed at ASEAN related to the settlement of human trafficking problems. There is criticism that AICHR is toothless and incapable of resolving human rights issues in ASEAN. Another criticism is in the writings ofRujiAuethavornpipat (2017), which states that although ASEAN already has a legally binding convention, namely ACTIP, there are still some weaknesses. ASEAN said it would commit to reducing the number of human trafficking with an international framework based on the idea of "3P" i.e. prosecution, protection, and prevention. However, in reality, ACTIP focuses more on prosecution and criminalization. Of 30 articles in ACTIP, six articles on criminalization and prosecution, two on victim protection, and only one that focuses on prevention or prevention.[50]Should AICHR cannot solve all human rights issues in ASEAN including human trafficking, it does not mean that AICHR has no role at all. AICHR is instrumental in the process of drafting the ASEAN Human Rights Declaration. Although in the form of declaration, this is the first step to increase awareness and make set of norms / standard in ASEAN.

Awareness of the importance of human rights issues was even followed up by ASEAN member countries. Evidently, all member states have legislative regulations at the national level relating to human trafficking. On December 2002, through Presidential Decree Number 88, 2002, Indonesia announced a National Plan of Action (NPA) to end human trafficking. In 2003, the Philippines passed the Anti-Trafficking in Persons Law of the Philippines. In 2004, the Government of Brunei announced the passage of the Trafficking and

[47] Art. 11, para. 1(b), ACTIP.

[48] Ministry of Women Emporement and Child Protection, "Festival PUSPA 2016, KomitmentPemerintah dan Masyarakat terhadp Perempuan dan Anak", URL: https://www.kemenpppa.go.id/index.php/pa ge/read/29/1278/festival-puspa-2016-komitmen-pemerintah-dan-masyarakat-terhadap-perempuan-dan-anak accessed on 18 January 2018.

[49] Human Rights Info, "ASEAN Intergovernmental Commission on Human Rights", Online Platform, URL: https://humanrightsinasean.info/asean-intergovernmental-comission-human-rights/about.html accessed on 19 January 2018.

[50]RujiAuethavornpipat, 2017, "Tackling Human Trafficking in ASEAN", Deparment of International Relations, Australian Nationa University, URL: http://ir.bellschool.anu.edu.au/news-events/stories/5149/tackling-human-trafficking-asean accessed on 17 January 2018.

Smuggling Persons Order. In the year of 2005, Myanmar decreed Anti-Trafficking in Persons Law. In 2007, Malaysia House of Representatives passed the Anti-Trafficking in Persons Act. In June 2008, Thailand introduced the Anti-Trafficking in Persons Act. In the same year, Cambodia passed Law on the Suppression of Human Trafficking and Commercial Sexual Exploitation. In 2011, Vietnam's National Assembly passed the Anti-Human Trafficking and introduced a five-year anti-trafficking plan. In 2014, Singapore's Parliament passed the Prevention of the Human Trafficking Act. Lao PDR has National Assembly's adoption of the Law on Preventing Human Trafficking in December 2015.[51]This shows that there has been a commitment from ASEAN member countries to realise the enforcement of human rights nationally and regionally. Regional cooperation is important and one of the prevention strategies that is increasing the collaboration between law enforcement agencies on a regional and international level, because human trafficking involves the movement of people between a point of origin and a point of destination, thus involving numerous jurisdictions and requiring the cooperation of multiple police agencies.[52]

One form of ASEAN's commitment is through the ASEAN Plan of Action Against Trafficking in Persons, Especially Women and Children which includes the IV section of Action Plans with several points related to the prevention of human trafficking such as: (a) Increase awareness and campaign to educate all levels of society on trafficking in persons and its linkage to violation of human rights, targeting those most at risk with effective involvement of the mass media, relevant NGOs, private sectors, and community leaders; (b) continue capacity building of law enforcement, immigration, education, social welfare and other relevant in the prevention of trafficking in persons; and (f) the adoption and implementation of national action plans, where applicable, to identify and prioritize key policies and programs aimed at preventing trafficking in persons.

Indonesia as a country that actively supports AICHR and ACTIP can propose the flagship strategic program of the Ministry of Women and Child Protection to become an excellent strategic program at ASEAN level. This program is a Three Ends which consists of end of violence against women and children, end of human trafficking, and end of barriers to economic justice. Point (a) in terms of increasing awareness and campaign to educate all levels of society in accordance with the implementation of the Three Ends in Indonesia which involves many components of stakeholders in it, such as academics, public institutions, community organizations, business and media. The Guidelines on the Operations of AICHR emphasizes the importance of interaction between different stakeholders for the promotion of human rights

Three Ends is also very suitable to be a strategy in capacity building which is one of AICHR program especially on point (b). In addition, based on AICHR Cross-sectoral Consultation on the Human Rights Based Instuments Related to the Implementation of the ACTIP, Especially Women and Children, held in Jogjakarta on 29 and 30 August 2017, government representatives, NGOs and other stakeholders discussed the development ACTIP implementation strategy must be based on human rights approach. The human rights approach is in line with some of the commitments previously issued by ASEAN, such as ASEAN Charter and ASEAN Human Rights Declaration. Human Rights became one of the key points in the ASEAN Political-Security Community (APSC), which is one of the three pillars of ASEAN Community. This approach means that the need to pay attention to the root causes of trafficking by considering the perspective or perspective of victims and vulnerable people.[53]This is in accordance with the three main elements of the *Three Ends* which is also a strategy derived from the human rights approach. In addition, the *Three Ends* also support the development that involves the role of women and children is done holistically, integrated and integrated. Point (f) above states that AICHR can adopt strategic programs undertaken by member countries, one of which is the programme owned by Indonesia. Member States that have positive programmes that have been implemented and have the potential to be developed on a regional scale may be considered for adoption by ASEAN in the future.

ASEAN should recognise that there is a difference in the global conception of trafficking issues contained in the UN Trafficking Protocol with human trafficking issues occurring in ASEAN, as for that the handling measures taken may be different. One example is the Trafficking Protocol emphasizing the presence of coercion as one element that distinguishes trafficked persons with migrants or participants in people-smuggling schemes. But in the ASEAN region, the poverty conditions affect the human movement that makes these people vulnerable to being moved unnoticed (trafficked).

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[51]Catherine Renshaw, 2016,"Human Trafficking in Southeast Asia: Uncovering the Dynamics of State Commitment and Compliance", Michigan Journal of International Law. Volume 37 Issue 4,P. 632.

[52]Portland State University, 2011,"Criminology and Criminal Justice Senuor Capstone. Prevention of Human Trafficking: A Review of the Literature", Criminology and Criminal Justice Senior Capstone, Paper 9,p. 7. URL: http://pdxscholar.library.pdx.edu/cgi/viewcontent.cgi?article=1009&context=ccj_capstone accessed on 18 January 2018.

[53]ASEAN Countries toward Human Rights based Approach to Prevent Trafficking in Persons. 2017. Articles Law and Human Rights. Center for Southeast Asian Social Studies Universitas Gadjah Mada. (http://pssat.ugm.ac.id/en/2017/11/16/asean-countries-toward-human-rights-based-approach-to-prevent-trafficking-in-persons/) accessed on 18 January 2018.

Here is a significant body of research demonstrating that in many cases, at least initially, the 'victim' of trafficking in Southeast Asia is a willing participant in a scheme that promises benefits, which might be economic (work, food, housing) or social (in the form of "taste for modern life").[54]ASEAN has made efforts to adopt the Declaration against Trafficking as part of the Vientiane Action Programme in 2004 which emphasises the urgent need for comprehensive regional approach in addressing human trafficking issues. The declaration also states that "social, economic, and other factors that cause people to migrate also make them vulnerable to trafficking in persons".[55]This suggests that poor economic conditions and social factors such as lack of awareness and information are responsible for the high number of human trafficking. One part of the *Three Ends* strategy is the ends of barriers to economic justice. This means that the Three Ends strategy supports the protection of vulnerable groups, including women, who must be given equal access to education and employment. If this is successful, the cause of human trafficking in terms of poverty can be reduced, let alone see the high number of victims who are women and children.

AICHR also conducts research, training, and workshops related to human rights issues. In the field of education, one of AICHR's recent efforts is to conduct an AICHR Regional Dialogue on the Mainstreaming of the Right to Education in the ASEAN Community, one of its objectives is to create a platform to strengthen regional cooperation on education and human rights. The *Three Ends* will support ASEAN's 4P approach, one of them for education. The *Three Ends* also have several programs that directly blend with the community through socialisation aimed at raising public awareness on these issues. These programmes have been conducted in Indonesia and can make a positive contribution to awaken the public the importance of active participation to prevent human trafficking. It is hoped that in the future, if the *Three Ends* can be adopted as one of the AICHR programmes, the scope of socialisation is not only limited in Indonesia but can be done in other ASEAN member countries according to the condition of the local community.

With limited enforcement mechanisms, AICHR should focus on prevention efforts, because if prevention efforts are successful, in the long run, ASEAN will be able to significantly reduce the number of human trafficking cases and human rights cases. One of the effective strategies that ASEAN can adopt in supporting preventive measures is through the *Three Ends* that can be proposed by Indonesia. Three Ends will be applicable in other ASEAN member countries as part of human rights promotion, education, and capacity building involving various stakeholders. The Strategy will also support the ASEAN Plan of Action to Combat Transnational Crimes which is one of the key points in the 2025: Forging Ahead Together vision of ASEAN in terms of enhancing ASEAN's capacity to address non-traditional security issues effectively and on time.[56]

Closing

ASEAN's existing law and regulation against human trafficking has cover all the aspects needed to putting the said crime to an end. It comprises of criminalising and preventing the trafficking, protecting victims should there be any, and enforcing laws to the perpetrators and the accomplishes. In addition, the regulation also provides provisions to cooperate with the states amongst the region. The *Three Ends* strategy has its spirit embedded within the core of the said regulation, in the prevention part and the cooperation. However, the *three Ends* has a distinctive character, that is the perspective of seeing Human Trafficking as one out of three major integrated problems.

Regarding the role of ASEAN Intergovernmental Commission on Human Rights, its existence is the very reason of the realisation of the ASEAN Convention against Trafficking in Persons Especially Women and Children (ACTIP). Therefore, it plays major role in combatting ASEAN's human trafficking problem. However, it should be noted that its limited capacity hinders its true potential of becoming the body to render the trafficking in person obsolete. Having that said, the strategy of *Three Ends* should it be utilised by the Commission would be better in a long run. Considering a limited enforcement capacity thereof, the Commission would be having a better chance of preventing the crime of human traffickin

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[54] Catherine Renshaw, *op.cit.*, p. 629.

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RECONSTRUCTION OF LEGAL CULTURE OF POLITICAL PARTY IN RECRUITMEN OF LEGISLATIVE MEMBERS WITH GENDER EQUALITY

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ABSTRACT

Legal culture of political parties in the recruitment of legislative candidates with gender justice in Bandar Lampung City based on "Legal culture" to reveal the legal culture of political parties in the recruitment of legislative candidates with gender equality. The Problem: How is the legal culture of political parties in the recruitment of legislative candidates related to gender justice, why the legal culture of political parties in the recruitment of legislative candidates has not been gender equitable.how to construct the ideal legal culture of political parties in the recruitment of legislative candidates with gender equality. The framework of thought used: The theory of law system of LM Friedman,theory of law work by Robert B Seidman and gender theory of Ulpianus and Aristotles and the responsive legal theory of Nonet and Selznik. The paradigm used in this research is constructivisme, approach of socio legal research, law as norm and law as social reality. Data analysis used the technique of Struss and Corbin model analysis, analyzing data since in the field in the form of open coding, axial coding and selectif coding. And using an interactive data model in which the researcher moves in 3 reduction cycles of data presentation and conclusion. Conclusion 1. The legal culture of political parties in the recruitment of legislative candidates related to gender equality, it turns out that political parties participating in the elections in recruiting and establishing legislative candidates have not yet been based on legal culture, have not yet gender perspective, still differentiate women's rights. 2. Legal culture of political parties in the recruitment of candidates for legislative members do not have gender justice, caused by the political party factors of electoral participants which still recruit and establishcandidates based on the ideology of patriarchy, 3. The construction of an ideal legal culture of political party in the recruitment of legislative candidates with gender equality, namely to recruit legislative candidates must be fair, do not distinguish women's political rights to be nominated or appointed as candidates for legislative members in general elections, meet the requirements of the law, not only fulfill 30% women representation, must be prepared through cadre, education and training, has been a member of political parties at least 6 months up to 1 year, noble, loyal, dedicating, and loyal to Pancasila and the 1945 Constitution of the Republic of Indonesia. This study has theoretical implications in the sense of contributing to the development, utilization of legal theory as a means of democracy in recruiting and appointing legislative candidates whichare gender equitable and practically can be a material for the preparation of the full application of law in an effort to nurture the nuances of democracy with gender equality.

Keywords : Legal Culture Of Political Party, Recruitment Of Legislative Candidates With Gender Equality.

Introduction

Democracy has relevance to the theory of popular sovereignty, even if it is traced that the meaning of democracy itself comes from the word *demos* meaning *people* and *kratein* which means *power*. This means that the people become the most authoritative parties to direct the implementation of state power. Democracy has now become a large current that swept the world, so it is considered as the most popular system and considered the best system in regulating the relationship between the people and the authorities[1] One of the instruments in a democratic country is the election.[2]

Elections are a must to uphold the democratic order to elect the House of Representatives, the Regional House of Representatives, the President and the Vice President, as well as the Regional Representative Council. The election is stipulated in the 1945 Constitution, Article 22E Paragraph (1) which states that Elections shall be held in a direct, public, free, secret, honest and fair manner every five years. Paragrapjadi nh (2) Elections shall be held to elect members of the People's Legislative Assembly, the Regional Representatives Council, the President and the Vice-President and the Regional People's Legislative Assembly. Paragraph (3) The election participants to elect members of the People's Legislative Assembly and members of the Regional People's Legislative Assembly shall be political parties. As for the function of Political Parties as regulated in Amendment of the Law of the Republic of Indonsia no. 2 of 2008 on Political Parties, is contained in Article 11 paragraph (e) which states:

[1]Fitra Arsil dalam : *Mencegah Pemilihan Umum Menjadi Alat Penguasa "Jurnal Legislasi Indonesia* Vol 9 nomor 4 Desember 2012, hlm 563.

[2]A. Mukhthie Fajar dalam "*pemilu yang Demokratis dan Berkualitas, Penyelesaian hukum Pelanggaran Pemilu dan PHPU, Jurnal Konstitusi.* Volume 6, Nomor 1, April 2009, hlm 4.

"Political recruitment in the process of filling political office through the mechanism of democracy by taking into account gender equality and justice".

The election to elect legislative candidates (DPR), DPRD and DPD, is further stipulated in Law Number 8 Year 2012 regarding General Election, in which each political party has the authority to recruit legislative candidates either at the central or regional levels. Furthermore, the procedure for recruitment of candidates for legislative members, by political parties both at the central and regional levels, is regulated in Law no. 8 of 2012 Article 52-56 stating that: that the candidate selection of prospective legislative members is a political party at each level of its territory. be democratic, and open in accordance with the articles of association, bylaws, and / or internal regulations of participating political parties. The list of prospective candidates as referred to in Article 53 shall contain at least 30% (thirty percent) of women's representation. Election results in 2014, more male members of the House of Representatives, few women DPR members. Further the facts can be seen in table 1.1, and table 1.2 below:

Table 1.1
Composition of Legislative Council Members in 2009

No	Name	Male / %	Female / %	Amount
1	House of Representatives	456 / 81,45%	104 / 18,6%	560
2	DPRD Lampung Province	79 / 8%	20 / 21%	90
3	DPRD Kota Bandar Lampung	39 / 80,7%	6 / 13.3%	45

Data Source: Election; Central,Province, and City Election Commission.[3]

Table 1.2
Composition of DPR, Provincial DPRD and Bandar Lampung DPRD Members in 2014

No	Name	Male / %	Female / %	Amount
1	House of Representatives	4003 / 81,45%	97 / 17,32%	560
2	DPRD Lampung Province	63 / 79%	17 / 21%	80
3	DPRD Kota Bandar Lampung	45 / 90%	5 / 10%	50

Data Source: Election Commissionof Kota Bandar Lampung[4]

The facts of election results in 2014 above male legislative members are more than female legislators. This is due to the recruitment pattern of legislative candidates by each political party participating in the election, not yet gender perspective. The gender perspective in the recruitment of legislative candidates means that it does not give priority to men rather than women. In addition, due to the recruitment patterns of legislative candidates have not been gender equitable. According to Agnes Widanti the law of gender justice is the law (both state law and society law or community norms) which allows dynamic balance between men and women in power structures in society and State. These structures are found in political economy, law and ideology.[5]

Elections are a real form of procedural democracy, although democracy is not the same as elections, but elections are one of the most important aspects of democracy that must also be democratically organized. Therefore, it is usual in countries calling themselves democracies to choose the elections to elect representatives of the people who will sit legislatively in both the central and regional levels. Democratic democracy and elections are "qonditio sine qua non", the one can not exist without the others. (one can not exist without anyone else). government requires the consent of the governed can be associated. In fact, in most democracies, elections are regarded as symbols, as well as the benchmarks of democracy itself. In other words, elections are a logical consequence of the adoption of democratic principles in the life of the nation and state. The basic principle of democratic state life is that every citizen has the right to participate actively in the political process.

According to Hamdan Zoelva that in order to ensure the realization of elections that are in accordance with the principles of democracy, the implementation must be done with a good system, namely the existence of very important parts, such as electoral regulation, electoral process, and electoral law enforcement.[6]

[3] Data diunduh Tanggal 10 Juli, 2015.
[44]Data diunduh tanggal 7 Juli 2015..
[5] Agnes Midanti, *Hukum Berkeadilan Gender,* Penerbit, Buku Kompas, Jakarta, 2005,hlm 62.
[6]Hamdan Zoelva, dalam *Problematika Penyelesaian Sengketa Hasil Pemilu kada oleh Mahkamah konstitusi" Jurnal Konstitusi,* volume 10, Nomor 3, September 2013,hlm 381.

Electoral regulation is any applicable provisions or rules regarding General Election, binding and a guide for organizers, candidates and voters in fulfilling their respective roles and functions. Electoral process is all activities directly related to the implementation of elections refer to legal provisions both legal and technical. Electoral law enforcement is a law enforcement of political, administrative, or criminal election rules. Fulfillment of the three parts of the election strongly determines the extent to which the capacity of the system can bridge the achievement of goals and election processes, each section can not be separated because it is a unified whole.[7].

Political parties participating in the election in recruiting legislative candidates in the 2014 election in Bandar Lampung city, in fact still rule out women legislative candidates, in terms of election laws and legislation of political parties have regulated the political rights of women. This is due to the behavior of political party officials in the process of recruiting, selecting and appointing legislative candidates not to be carried out in a democratic and open manner in accordance with Articles of Incorporation, Bylaws, and / or internal regulations of participating political parties.

The governance of political parties that are not gender-based is due to the dynamic imbalance the relationship between men and women is a social injustice. It means injustice caused by power structures in society. These structures are in the legal and political fields.[8] the existence of social construction concerning male discrimination against women's participation in economy and politics. So it implies on the level of practical political life, the law and the rights of citizens. According to Ratna Megawangi, gender role difference in Indonesia is due to social construction process. In many ways gender role differences are conditioned by the patriarchal Indonesian society. According to[9] Ratna Megawangi the mopinion of Ratna Megawangi mentioned above, the difference of gender position and role in Indonesia due to social construction, and still dominated by the patriarchal society order, this can change through mutual agreement, even the role and position of women, gender equality and feminist are placed in the context empowering each gender's potential to function properly, functioning complementarily.

The above conditions, in terms of the legal culture of Political Parties in the recruitment of legislative candidates with gender equality, will objectively be beneficial to women. If the recruitment of legislative candidates is not with a gender equitable legal culture, it will be detrimental for women in following the nomination process of legislative members.

According to Susi Dwi Harijanti, a woman's rights often get obstacles in politics, including election matters, decision making, and state administration and governance. When moral rules are no longer effectively used to prevent human rights violations, then law must play a role to define boundaries and obligations that must be obeyed against others.[10] Furthermore, he said that according to Law Number 2 Year 2012 on Political Parties, that there should be the 30% quota of women representation in legislative candidacy, but in practice, it shows the form of patriarchal ideology is always repeated in law.[11]

Based on the above background, the legal culture of political parties in the recruitment of legislative candidates with gender justice needs to be constructed the new (ideal) one through, values, and attitudes related to the law, which determine when, why, and how the community obeys legal or otherwise denying the law, determiniing what legal structure is used and what is the reason, and what legal rules are chosen to apply or be ruled out.[12] This resulted in the tendency to ignore, disrespect and disbelief of the people against the law.[13] The indication of the legal culture of political parties in the recruitment of legislative candidates with gender equality must apply the legal culture of political parties that is to apply attitudes, values and behaviors, not merely put forward the aspect of legal certainty, regardless of the aspect of justice, and benefit.

Main Problems

Based on the background of the above problem, it can be drawn some problems in this study, namely:

a. What is the legal culture of political parties in the recruitment of legislative candidates relating to gender justice.
b. Why is the legal culture of political parties in the recruitment of legislative candidates not yet gender equitable.
c. How to construct an ideal legal culture of political parties in the recruitment of legislative members who are gender equitable.

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[7] Bisariyadi, ,dalam *"Koparasi Mekanisme Penyelesaian Sengketa Pemilu di beberapa negara Penganut Paham Demokrasi Konstitusional, Jurnal Konstitusi* Volume 9, Nomor 3, September 2 hlm 536.

[8] Agnes Widanti, *Op Cit.*

[9] Ratna Megawangi, *Membiarkan berbeda, Sudut Pandang Baru Tentang Relasi Gender*, Bandung, Nizan Pustaka, 1999, hlm 103.

[10] Hhtp//galeri, psi.id/koran-solidaritas/item/95-mendobrak-tabu-gender.

[11] *Ibid.*

[12] Lawrence M. Friedman, *Legal Culture, and Social Devlopment, dalam Lawrwnce dan Stewart Maucauay, (eds) Law the Bihovioral Science*,Indianan Polis, The Bobbs Merril Company, h 1000-17.

[13] Sultan Hamengkubuwono ke X, *Merahut Kembali Keberhasilan Kita*, PT Gramedia Pustaka Utama, Jakarta, 2007, hlm 275.

Discussion

Political Culture of Political Parties in Recruitment of Legislative Cabdidates Related to Gender Justice.

The political parties participating in the 2014 election are as follows: 1. Golkar Party, 2. PDI Perjuangan,3. Democrat Party, 4. Hanura Party, 5. PKB, 6. PPP, 7. PAN, 8. Nasdem Party 9. PKS, 10. Gerindra Party 11. PKPI, and 12. Bulan Bintang Party. The political parties participating in the 2014 election have recruited and enacted women legislative candidates, fulfilling the provisions of the law, which has fulfilled the representation of 30% women, this is all done in the framework of affirmative action, encouraging women to be legislative members. However, political parties participating in the election, in recruiting and appointing legislative candidates have not been through party cadreisarial mechanisms, education and training of party cadres, ie small parties such as the PPP and PKPI, this is due to the weakness of the budget to conduct these activities.

In addition, the recruitment of candidates for legislative members is not through good stages, recruitment of candidates is only instantaneous, they arrange some activities to prepare and recruit cadres for candidates for legislative members just before the general elections. Political parties should prepare their party cadres, through the stages, which are swayed through party cadre, so that each party participating in the election has qualified cadres to be nominated, including female cadres. If the regeneration is not done this will cause the shortage of qualified women cadres to be nominated, and the party will eventually nominate female cadres just to fufill the 30% quota of women representation. This is also what can result in the election of small number of women when compared to male legislative candidates. In Bandar Lampung women who become members of the legislature are only 5 people, from the number of legislative members proposed 50 legislative candidates set in general elections in 2014. Male elected legislative members amounted to 45 people.

Construction of the Legal Culture of an Ideal Political Party in the Recruitment of Candidates for Members of the Legislative with Gender Justice.

Suprastructure of a political party is a party official at the city level of Bandar Lampung which is stipulated in the management bord of the party officials of the city, sub-district branches, to the vilage level. All party management boards are established legally, set in a letter signed by the party chairman and secretary based on management board level. Suprastructure of political parties in each field have the duty and authority in implementing party programs, to succeed the ideals of the party, for the benefit of the people and the state.

For the superstructure of political parties, it is necessary to develop its legal culture, that is, the political attitudes which have the attitude, the values which are considered good by the people, do not impose their will (authoritarian), should be responsive in all actions and decisions. Political infrastructure is a state institution, which has neutral functions and duties, such as media, public opinion, social institutions, customary institutions (traditional leaders and religious leaders). Political infrastruture serves to provide good input, criticism and suggestions so that suprapolitical party structure can carry out its duties and functions well when the process of recruiting legislative candidates with gender justice.

Legal Culture of Political Parties in the Recruitment Process of Legislative Candidates Based on Gender Justice

This research is intended to find a new paradigm in applying the legal culture of political parties, which means there will be an ideal legal cultural construction of political parties in the recruitment of legislative candidates with gender equality. The basic idea underlying the new construction of the application of ideal political party legal culture in the recruitment of legislative candidates for gender equality is based on Law No. 8 of 2012 on elections, namely in accordance with articles 51 to 56, how to recruit legislative candidates to meet the requirements and completeness, and correctness of the designated administration.

The substance of the above-mentioned Constitutional Law is good, which is related to the terms of recruitment of legislative candidates, but in practice the recruitment pattern of political parties participating in the 2014 election is not yet all of a gender perspective. The gender perspective here is meant not to distinguish women's political rights, equal positions and roles between men and women in law (equality before the law). Legal culture should be applied in the recruitment of legislative candidates with gender equality but the reality shows that the law is changedand is not in accordance with the rules. The law only reinforces patriarchal social relationships. The relationship is based on the behavior of values, the moral power of men and disregarding the position of the women's experience, because women themselves have souls, or the sense that their practical application is just or unfair.

This is caused by legal culture factor of patriarchal party structure in recruiting legislative candidate, resulting in unfair recruitment pattern. Facts of interview result with informant of political party participant of election, public figure, woman figure, adat or traditional informal leader thatpolitical parties participating in the election, recruiting women legislative candidates have fulfilled 30% representation of women with the real purpose is affirmative action, encouraging women to succeed sitting in legislative body, not just political parties pass the election.

Besides the legal culture of political parties in the recruitment of legislative candidates, no gender perspective is influenced by indigenous culture of Lampung, which only supports the leadership of the patrinial kinship line, male lineage, not for women. The legal culture of political stereotypes in the recruitment of legislative candidates with gender equality should be constructed, using responsive legal theory of Philipe Nonet and Philipe Selznik, explaining there are three types of legal character, namely repressive, autonomous and responsive. Repressive law is a tool of power that aims to impose (repressive) desire of the authorities (power). The repressive law aims to uphold justice through a power approach, when it is associated with a political party that is the holder of the political power of electoral participants in recruiting legislative candidates, only with patriarchal power for the benefit of men, forgetting the position and role of women. Autonomous law is an attempt to uphold justice independently or independently without intervention and intervention by anyone and from anyone. While responsive law is a means of responding to the reality of the needs and phenomenon of the aspirations of society, so the law develops in accordance with the wishes of the community. Thus, the legal process develops gradually which will definitely bring about evolutionary change. Evolutive in responsive law starts from an ideal type (repressive), less ideal (autonomous) to the most ideal (responsive) type.

Thus, the legal culture of political parties in recruiting candidates for legislative members should be responsive on the basis of democracy and openness and aspiration, based on the wishfulness of the conscience of women, not discriminating the political rights of women to vote and be elected in the general election, the role of women, has the same rights as men in the rule of law. Electoral political parties make careful planning, in the recruitment of candidates for legislative members, must apply a gender responsive legal culture, based on the attitude, the behavior of political parties, the values and the views of a good society. Political parties participating in general elections, recruiting legislative candidates, must be in accordance with the provisions of the 1945 Constitution, article 27 guarantees rights between men and women. Indonesia has ratified the Convention on the Elimination of All Forms of Discrimination Against Women through Law Number 7, 1984. Women's political rights set forth in Article 7 include:

a. The right to elect and to be elected
b. The right of participation in decision making
c. The right to hold office in government and execute every functions of government at all levels.
d. Participate in organizations and associations;
e. Participate in relevant non-governmental associations with public life and state politics.

Political parties in recruiting and appointing legislative candidates with gender justice need to set rules in their internal regulation or AD/RT, such as the stipulation that the candidate has been a member of the party participating in the election at least 6 months and maximum 1 year. This rule is intended, so as not to discriminate in recruiting and appointing legislative candidates. The reconstruction of legal culture in the recruitment of legislative candidates with gender justice, using Aristotle's theory of justice, the legal culture of the behavior of the Political Party structure in accordance with the ethical social feelings, does not harming others arbitrarily, gives to all its own part, namely how to recruit and assign legislative candidates to the same position, in the distribution of powers of political power, in terms of recruiting and providing fair treatment to men and women.

According to Aristotle,[14] without any good ethical social inclination to the citizen, there is no hope for the highest justice in the state, even if a wise one rules with any law. Since the law binds all people, legal justice must be understood in the sense of equality. But he shares the numerical equality and proportional equality. Numerical equality generates the principle of "all men equal before the law". While proportional equality generates the principle of "giving each person what is his right". Aristotle put forward another model of justice, namely distributive justice and corrective justice. Distributive justice is identical to justice on the basis of proportional equality. While corrective justice (remedial), focusing on the wrong correction. If an agreement is violated or an error is committed, then corrective justice seeks to provide adequate compensation to the injured party. Corrective Justice is in charge of rebuilding equality.

Nasaruddin Umar defines gender as a concept used to define male and female differences in terms of socio-cultural; gender in this sense defining men and women from non-biological angles.[15] According to Ratna Megawangi, gender role difference in Indonesia is due to social construction process. In many ways gender role differences are conditioned by the patriarchal Indonesian society. According to her, are these natural? I do not think so. They can be changed by mutual agreement.[16]

Based on the above facts, if a woman is willing, serious in her struggle, will bring results also, achievedher goals. Allah SWT is fair to his servants, Allah says in the Qur'an (Q.S: 13: 11) God will not change the state of a people, so that the people will change their own circumstances.

[14] Bernard L. Tanya, Yoan N. Simanjuntak, Markus Y Hage, *Teori Hukum Strategi Tertib Manusia Lintas Ruang dan Generasi*, Yogyakarta, Genta Publishing, 2010,hlm. 45.
[15] Nazarudin Umar,*Argumen Kesetaraan gender perspektif Al-Quran* Jakarta, Dianan Rakyat,2010, hlm 31.
[16] Ratna Megawangi, *Op Cit.*,

Since the passing of the provisions of the "30% women's quota in Law No. 8, 2012 on general elections, marks the significant achievement of many years of women's affirmative action movement to sit as legislators at various levels, such as central, provincial and regency/city levels. The presence of women in the political world is a prerequisite for the realization of a society that has gender equality and justice. In short, the need to increase women's representation in political institutions in Indonesia, thus raising an awareness that all political priorities and agendas must be overhauled and they can not be achieved with traditional political systems. If women want to come forward and hold various public positions, undoubtedly they will be able to build and establish new social and economic values that suit their interests.

The increasing representation of women in political institutions means at the same time also political decisions that will ensure the rights of their groups and the wider community and allocate the resources necessary to improve the quality of human life. Recruitment of legislative candidates with gender equality is recruitment that does not distinguish gender.Gender justice means it does not distinguish gender,whether the candidate is male or female is equal before the law. Gender equity is a fair process and treatment of women and men. Gender equity means that there is no role standardisation, double burden, subordination, marginalization of women and men.[17] The realization of gender justice is characterized by the absence of discrimination between women and men in obtaining the position to become a legislative member as a representative of the people.

Justice in Islam, as told Ibn Jubayr, is that justice that will be realized is justice which is in line with the words of God, fulfill the priciples of propriety, do not harm others, able to save themselves and must be born of good faith.[18] Islamic justice bases itself on moral ethical principles and always seeks to realize group justice. Thus, justice in Islam bases itself on moral-ethical principles and always seeks to realize substantial justice by realizing individual and group happiness, outward and inner happiness of life, and happiness both in the world and the hereafter. The development of national law will not work properly, if seen from the substance of the law is not good. The process of determining legislative candidates which prioritizes procedural justice is what makes most women will experience disappointment and disadvantaged and will ruin democracy. This will make the party power holders tend to be authoritarian, and in determining the legislative candidates they will be elitist or orthodox, not democratic / responsive.

According to Esmi Warassih[19] the issue of justice is a complicated and complex problem, because it concerns the relationship between people from all aspects of life. Understanding justice becomes clear, if we first understand the law. In essence the law always contains abstract values. The basis for the law is to regulate human behavior; which unes are allowed and which should not be. What are the criteria here ? In this case the law used is not sufficient because it isthe juridical basis only It needs to be equipped with philosophical foundations and sociological foundations because justice is not something that is obtained only through the process of reasoning or logic but also something that can be obtained completely[20]. The law has dimensions of moral ethical values embodied in the principles of law and set forth in the norms and formulated in the rules. Therefore, a political party leader in determining prospective legislative candidates, is not sufficiently implemented with democratic and statutory rules legislation, but with a legal culture containing the values, morals, behaviors, attitudes and expectations of the community.

Furthermore, Esmi Warassih explained that the face of justice is multidimensional. In the rule of law, it depends on the law enforcers, which side they approaches the law. In the legal state of Pancasila, for the concept of legal justice, they want to cover by the term "that is Justice by virtue of the One Supreme God".[21] Justice here should have a perfect meaning because justice is not only about the distribution of resources but must refer to morality issues. The application and implementation of justice should be seen from all aspects as the execution of a religious worldly life. This is related to the ideal political party legal culture in recruiting legislative candidates in addition to paying attention to gender equity, it is necessary to pay attention to the education qualification of legislative candidatesi.e. in terms of education the candidates should be at least bachelor / strata one graduates. Political parties need to consider the environment aspect of the legislative candidates, both internally and externally. Internally, political parties establish women legislative candidates from party cadres who have been proven to be devoted, faithful, disciplined and non-disable by law, and political parties must establish candidates on condition that they have become party cadres for at least the last 5 years.

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[17] Satya Arinanto, *Op Cit*,

[18] MahmuTarom, *Rekonstruksi, Konsep Keadilan (studi tentang perlindungan Korban tindak pidana terhadap nyawa menurut Hukum Islam, konstruksi masyarakat dan instrumen Internasional,* Semarang Universitas Diponegoro, 2010, hlm 90.

[19] Esmi Warassih, *Pemberdayaan Masyarakat Dalam Mewujudkan tujuan hukum Islam (proses penegakana hukum dan persoalan keadilan "Pidato Pengukuhan Guru besar dalam Ilmu hukum pada Fakultas Hukum (universitas Diponegoro,* 14 pril 2001, hlm 34.

[20] Esmi Warassih, *Op Cit,*.

[21] *Ibid*, 34.

In determining women candidates, political parties alsoprioritize the candidates who have shown seriousness even though women have a dual function. Political parties in appointing women legislative candidates are not affected by patriarchicalLampung culture or custom, and not only concerned with male legislative candidates rather than female legislative candidates. In addition, political parties recruits and determines women legislative candidates who have won public confidence in each electoral district where she is placed, so she will get a good response from the community.

Closing

1. The legal culture of political parties participating in general elections in the recruitment of legislative candidates has not been gendered justice. Since the practice of recruitment of legislative candidates has not been gender perspective, political parties in recruiting and appointing legislative candidates are still discriminatory, not based on fair women's political rights, not take into account the wishes and experiences of women.
2. Legal culture of political parties in the recruitment of legislative members has not been gender-based. It is caused by several factors, such as the legal culture of political parties at the level of the Branch Executive Board (DPC) or at the level of the Regional Executive Board (DPD II), in the process and implementation of recruitment and determining candidates for legislative members, are not yet based on gender-equitable decisions, undemocratic and not open and not based on good behavior, values and community views.
3. Idealreconstruction of legal culture of political parties in recruitment and determining candidates of legislative members with gender equality is applying legal culture of political party in recruitment of legislative member candidates by applying fair recruitment process, integrity, transparency and accountability, and are based on alignment to women and do not distinguish the political rights of women legislative candidates in the election.

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THE PHENOMENON OF CORRUPTION IN BUREAUCRATIC APPARATUS

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ABSTRACT

Corruption is a "social parasite" that destroys government structures, and is a major obstacle to the course of government and development in general. Corruption is the product of the attitude of the lives of one group of people who use money as the standard of truth and as absolute power. As a result, wealthy corruptors and corrupt, corrupt politicians can enter into the ruling and highly respected elite. Corruption occurs due to abuse of authority and positions owned by officials or employees for the sake of personal interest in the name of personal or family, relatives and friends. Corruption can stem from the weaknesses of the political system and the state administration system with the bureaucracy as its essentials. The ugliness of the law is another cause of widespread corruption. Efforts to overcome the problem of corruption can be viewed from the structure or social system, in terms of juridical, as well as terms of ethics or morals of human beings.

Keywords: corruption, system, apparatus

Introduction

Lately the problem of corruption is hangt - warmly discussed public, especially in the mass media both local and national. Many experts expressed their opinion on this corruption issue. Basically, there is a counter pros. However, although this corruption harms the state and can destroy the joints of togetherness of the nation.

In essence, corruption is a "social parasite" that destroys government structures, and is a major obstacle to the course of government and development in general. In practice, corruption is so difficult that it is almost impossible to eradicate, because it is very difficult to provide the exact proofs.

However, because the disease is an epidemic and continues to increase from year to year like mushrooms in the rainy season, so many people think that this problem can undermine the smooth tasks of the government and harm the state economy. The problem of corruption in the State of Indonesia is chronic, not just culture but has cultivated.

Besides, it is very difficult to detect it with definite legal basis. However, access to corruption is a latent danger that must be monitored by both the government and the community itself. Corruption is the product of the attitude of the lives of one group of people who use money as the standard of truth and as absolute power. As a result, wealthy corruptors and corrupt, corrupt politicians can enter into the ruling and highly respected elite. They will also occupy high social status in the eyes of society.

This practice will continue as long as there is no control from the government and the community, resulting in a group of employees including new rich people who enrich themselves (material ambition).

Main Problem

1. What is Corruption?
2. What are the factors driving corruption?
3. What are the kinds of corruption?
4. What are the effects of Corruption?
5. What are some ways to eradicate corruption in Indonesia?

Discussion

Definition of Corruption

Corruption originates (from Latin: corupption = corruptore = corrupt), corruption is a symptom in which officials, state bodies misuse authority with the occurrence of bribery of counterfeiting and other irregularities. The literal meaning of corruption can be crime, corruption, bribery, immorality, depravity, and dishonesty. Bad deeds like embezzlement, receipt of the figure and so on.

1. Corrupt (rotten, like taking bribes, bribes, using power for self-interest and so on.
2. Corruption (rotten deeds such as embezzlement, receipt of bribes and so on.
3. Corruptors (people who do corruption).

Many scholars try to formulate corruption, which is seen from the structure of language and the different means of delivery, but in essence has the same meaning. Kartono (1983) imposes limits on corruption as the behavior of individuals who use authority and office to gain personal gain, harming public and state interests. Thus corruption is a symptom of misconduct and mismanagement of power, for personal gain, mismanagement of state resources by using formal powers and powers (eg, legal reasons and the power of weapons) to enrich themselves.

Corruption occurs due to abuse of authority and positions owned by officials or employees for the sake of personal interest in the name of personal or family, relatives and friends. Wertheim (in Lubis, 1970) states that an official is said to commit acts of corruption if he receives a gift from someone who aims to influence him in order to make a decision in favor of the gift-giver's interests. Sometimes people who offer rewards in the form of remuneration are also included in the corruption. Furthermore, Wertheim adds that the remuneration of third parties received or requested by an official to be forwarded to his family or his party or person with whom he/she has a personal relationship may also be regarded as corrupt. Under such circumstances, it is clear that the most prominent feature of corruption is the behavior of officials who violate the principle of separation between personal interests and the interests of the community, personal finance with the community.

Causes of Corruption.

The causes of corrupt acts actually vary and are diverse. However, in general can be formulated, in accordance with the above definition of corruption that aims to gain personal advantage / group / family / group itself.

General factors that cause a person to commit acts of corruption include:

1. Absence or weakness of leadership in key positions capable of inspiring and influencing behavior that tame corruption.
2. Weaknesses of religious and ethical teachings.
3. Colonialism, a foreign government does not arouse the loyalty and obedience necessary to contain corruption.
4. Lack of education.
5. There is a lot of poverty.
6. The absence of strict legal action.
7. The scarcity of a fertile environment for anti-corruption behavior.
8. Government structure.
9. Radical change, a value system that undergoes radical change, corruption emerges as a transitional disease
10. Compound society.

In the theory put forward by Jack Bologne or often called GONE Theory, the factors that cause corruption include:

1. Greeds (: related to the existence of greedy behavior that potentially exists within each person.
2. Opportunities: related to the state of the organization or agency or society in such a way, so open the opportunity for someone to commit fraud.
3. Needs: relates to factors needed by individuals to support their normal lives.
4. disclosure: relating to the actions or consequences faced by the perpetrators of fraud if the perpetrator found fraudulent.

That the factors of Greeds and Needs relate to the individual actors of corruption, ie individuals or groups both within organizations and outside organizations that commit corruption that harms the victim. While the factors - factors Opportunities and Exposures associated with victims of corruption, namely organizations, agencies, communities whose interests are harmed.

According to Dr. Sarlito W. Sarwono, the factor causing a person to commit acts of corruption is a factor of encouragement from within oneself (desire, will, etc.) and external stimuli factors (eg encouragement from friends, opportunity, lack of control and so on).

Kinds of Corruption

The criminal acts of corruption are done quite diverse forms and types. However, when classified there are three types or kinds, namely shape, nature, and purpose.

1. Based on Forms of Corruption

Based on form, corruption consists of two kinds, namely: Materiil and immaterialil. So corruption is not always related to the misuse of state money. Money-related corruption is a type of material corruption. Example An officer trusted by the boss to carry out a development project, tempted to get a big profit project whose value is Rp. 4.000.000,00 in mark-up (increased) to Rp. 6.000.000,00 the form is clear the markup of project value associated with the profit of money. While the immaterial is corruption related to the betrayal of beliefs, duties, and responsibilities. Undisciplined work is one form of immaterial corruption. Indeed the country is not directly harmed in this practice. However, due to the act, the services that the state should have finally stalled. This service delay is the immaterial loss that must be borne by the state or private institution. So also with those who deliberately take advantage of the position or the responsibility that is owned to dredge personal gain.

2. Based on its nature

a) Public Corruption.

From the public side of nepotism, fraus, bribery, and bureaucracy. Nepotism is related to the closest relatives. All opportunities and opportunities are as much as possible used for the victory of close relatives. Close relatives can be nephews, siblings, grandparents or cronies. Fraus, that is, seeks to defend its position from outside influences. Various ways are done for this purpose.

Bribery, meaning the provision of tribute to people who are expected to provide protection or help for ease of business. Bribery also has a significant impact for business progress. However, the goal, more terpujupada out put (the work). Bureaucracy is also an integral part of corrupt practices. Bureaucracy that should serve to facilitate the service to the community, it turned into a service constraints. People who come to ask for service to a bureaucrat should get a clear map of which door to begin. But, on the contrary, one immediately sees the vagueness of what is expected. Bureaucracy is not created for the benefit of society, but the interests of bureaucrats.

b) Private corruption.

Corruption is viewed from the private sector, which is meant by private there are two, namely private and public legal entities. The practice of corruption occurs in the public and private entities because of the interaction between private legal entities and the bureaucracy, between the people and the bureaucracy. Thus, the nature of the interaction that occurs is reciprocity. These interactions result in certain mutually beneficial deals. Thus, corruption is not only in the institutions of state institutions, but with the private sector rolling, because there is interaction. Without any interaction between the private sector and the government will not happen.

Corruption has been clearly defined by Law No. 31 of 1999 in conjunction with Law No. 20 of 2001 in the articles. Based on those articles, there are 33 types of actions that can be categorized as corruption. 33 actions are categorized into 7 groups:

1. Corruption associated with harming the State's finances;
2. Corruption associated with bribery;
3. Corruption associated with embezzlement in office;
4. Corruption associated with extortion;
5. Corruption associated with cheating;
6. Corruption related to conflicts of interest in procurement;
7. Corruption associated with gratification.'

Impact of Corruption

1. The sluggishness of the economy.

   The sluggishness of the economy Corruption weakens investment and economic growth Corruption hinders society's access to quality education and health Corruption weakens economic activity, generates inefficiency and nepotism Corruption causes the financial or economic collapse of a country

2. Increased Poverty.

   Increased Poverty Great destructive effects on the poor: Direct impact felt by the poor Indirect impact on the poor Two categories of poor people in Indonesia: Chronic poverty Transient poverty Four high risks of corruption: Financial costs financial costs Human capital Moral destruction of social capital (loss of capital social).

3. High Crime Rate.

   The high number of criminals Corruption fosters various other types of crime in society. The higher level of corruption, the greater the crime. According to Transparency International, there is a close connection between the amount of corruption and the number of crimes. Rationally, when the number of corruption increases, the crime rate also increases.

4. Demoralization.

   Demoralization The widespread corruption within the government in the eyes of the general public will degrade the credibility of the ruling government. If the government actually prospers the practice of corruption, then also disappear elements of respect and trust (trust) of society to the government.

5. Bureaucratic Destruction.

   Destruction of bureaucracy Government bureaucracy is the vanguard of public service to the public. Corruption weakens the bureaucracy as the backbone of the state. Corruption fosters the overall inefficiency of de bureaucracy.

6. Disruption of Political System and Governmental Function

   Disruption of Political Systems and Government Functions Negative impacts on a political system: Corruption Disrupts the performance of the prevailing political system. The public tends to doubt the image and credibility of an institution allegedly linked to corruption. For example: the high-ranking House of Representatives that has begun to lose the trust of the Society of Political Institutions is used to sustain the realization of various personal and group interests.

7. The dispersed of the Future of Democracy

The dispersed of The Future of Democracy The Supporting Factor of Corruption Amidst Democracy Countries The spread of power in the hands of many people has paved the way for rampant bribery. Neoliberal reforms have involved the opening of a number of economic loci for bribery, particularly those involving public brokerage firms. The addition of a number of neopopulist leaders who won the election based on personal charisma through media, especially television, which many practice corruption in raising funds.

How to Eradicate Corruption

There are several efforts that can be taken in combating corruption in Indonesia, among others as follows:

I. Preventive Efforts.

The current efforts of the Government have led to prevention efforts in the eradication of corrupt acts with the issuance of Presidential Instruction of the Republic of Indonesia No. 1 of 2016 on the Acceleration of the Implementation of National Strategic Projects and followed up by the Attorney General by establishing a Guard and Security Team of Government and Development both at the Central Level TP4P) to the Attorney General's Office and the District Attorney General's Office based on the Attorney General Regulation No. PER-014/A/JA/11/2016 on the technical and administrative mechanisms of the government guard and safety team and the development of the Republic's prosecutor's office Indonesia.

In addition, it is also necessary for the Government to undertake reform efforts in mechanisms and systems in the Government by focusing on the following matters:

1. Inculcating a positive national spirit by prioritizing service to the nation and state through formal, informal and religious education.
2. Conduct recruitment based on technical skills principles.
3. Officials are urged to adhere to simple lifestyles and have high responsibilities.
4. Employees are always cultivated adequate welfare and there is a guarantee of old age.
5. Creating honest government apparatus and high work discipline.
6. The financial system is managed by officials who have high ethical responsibilities and are accompanied by an efficient control system.
7. Record the striking wealth of officials.
8. Trying to reorganize and rationalize government organizations through the simplification of the number of departments and their subordinates.

II. Attempts of Repression (Repression).

The prosecution effort, which is committed to those who are proven to be in violation with warnings, is dismissed and criminal punishable. Some examples of action:

1. Corruption in the Busway Procurement Program Project to the DKI Jakarta Regional Government.
2. The Deposition Case of Chairman of DPD RI Iman Gusman.
3. Bribery case of Chief Justice of the Constitutional Court Akil Mochtar.
4. Case of Tax Officer Gayus Tambunan.
5. The bribery case of the Supreme Court Justice in the Probosutedjo case.

III. Education Efforts Society / Student.

1. Have responsibility for political participation and social control related to the public interest.
2. Not being apathetic and nonchalant.
3. Conducting social control on every policy from village government to central / national level.
4. Open the broadest understanding of state governance and its legal aspects.
5. Able to position itself as the subject of development and play an active role in any decision-making for the benefit of the wider community.

IV. Education efforts of NGOs (Non-Governmental Organizations).

1. Indonesia Corruption Watch (ICW) is a non-governmental organization that monitors and reports to the public about corruption in Indonesia and comprises a group of people committed to combating corruption through the empowerment of the people to engage in the fight against corrupt practices. ICW was born in Jakarta on June 21, 1998 in the midst of a reform movement that wants a post-Soeharto government free of corruption.
2. Transparency International (TI) is an international organization aimed at combating political corruption and established in Germany as a non-profit organization now a non-governmental organization moving towards democratic organizations. The well-known annual publication by TI is the Global Corruption Report. The Indonesian IT Survey that established Indonesia's Corruption Perception Index 2004 stated that Jakarta is the most corrupt city in Indonesia, followed by Surabaya, Medan, Semarang and Batam. While the IT survey in 2005, Indonesia is in the sixth most corrupt country in the world. Indonesia's GPA is 2.2 parallel to Azerbaijan, Cameroon, Ethiopia, Iraq, Libya

and Uzbekistan, and only better than Congo, Kenya, Pakistan, Paraguay, Somalia, Sudan, Angola, Nigeria, Haiti & Myanmar. While Iceland is a country free from corruption.

Closing

Conclusion

The description of the phenomenon of corruption and its various impacts has confirmed that corruption is a bad action perpetrated by the bureaucratic apparatus and the people who are competent with the bureaucracy. Corruption can stem from the weaknesses of the political system and the state administration system with the bureaucracy as its essentials. The ugliness of the law is another cause of widespread corruption. As with other legal offenses, legal offenses relating to corruption in Indonesia are still vulnerable to the efforts of certain officials to divert laws to their interests. In reality or facts in the field, many cases to handle corruption crimes that have been prosecuted even defendant has been convicted by the judge, but always free from punishment. That is why if the punishment applied is not drastic, efforts to eradicate corruption can certainly fail. However, the eradication of corruption should not be the endless path, but the path should be closer to the end of the goal. Efforts to overcome the problem of corruption can be viewed from the structure or social system, in terms of juridical, as well as terms of ethics or morals of human beings.

Suggestion

The author realizes that in writing this paper there are still many errors and deficiencies. Therefore the author apologizes as much - magnitude, presumably criticism and suggestions that build very author need for the perfection of this paper in the future. Hopefully this paper is useful for readers, especially for writers. Amen.

THE PROTECTION OF PHARMACIST LAW IN THE COOPERATION AGREEMENT OF A PHARMACY ESTABLISHMENT

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ABSTRACT

Article 3 paragraph (1) Regulation of the Minister of Health No. 9 of 2017 on pharmacies determines that pharmacists can establish pharmacies in cooperation with the owners of capital, both individuals and companies. The establishment of pharmacies is expressed in a notary certificate a cooperation agreement, which includes the rights and obligations of the parties, including pharmaceutical work must still be done entirely by pharmacists concerned and the Owner of a Pharmacy Facility prepare pharmacy fittings. But in reality, business advice a pharmacist feel as the owner of the pharmacy and get involved in the work of pharmacy, and even business advice a pharmacist regulate and intervene in the authority and the work of pharmacists, such conduct laboratory examination, blood sugar checks, cholesterol, uric acid, triglycerides, blood pressure and make a concoction of drugs without a prescription. Empirical Study , the Owner of a Pharmacy Facility who feels as the owner of a pharmacy reports that the pharmacist has committed the theft or embezzlement of the pharmaceutical preparation which is his responsibility of misuse of authority from the owner of of a Pharmacy Facility, as a criminal case Number 233/Pid.B/2012/ PN.Smg jo Number 312 /Pid/2012/Pt.Smg. So that problems arise related to the arrangement of the Pharmacist's position and the legal protection of the Pharmacist in the agreement of establishing the pharmacy . Based on the socio-juridical approach to primary data a pharmacist and secondary data on court rulings, the data collected with the participants observer have obtained a result of the study, *first*, that pharmacist is the owner and manager of the pharmacy legally, with consideration of (a) a pharmacy is a means pharmaceutical services performed by pharmacists (Article 1 point 13) ;(b) Pharmacists who established and applied for permission to establish pharmacies and who were given a license of pharmacies, so that the pharmacist's owner is a pharmacist [Article 25 paragraph (1) and (2)] of Government Regulation No.51 of 2009 on Pharmaceutical Works , and Article 3 paragraph (2) on pharmaceutical and Article 13 on licensing in Regulation of the Minister of Health No. 9 of 2017 on pharmacies ; (c) Pharmacist as the leader of pharmacies as regulated in Article 1 paragraph (1) letter b Staatblad No.419 dated December 22, 1949 on Hard Drugs. *Kedua* legal protection Pharmacists formulated in Government Regulation No.51 Year 2009 on Pharmaceutical Works, Regulation of the Minister of Health No. 9 of 2017 on Pharmacies , andLaw Number 36 of 2009 on Health stated that the work of pharmacy must still be done entirely by Pharmacists covers pharmaceutical work**,** the materials field, the field of administration and finance, and other fields related to the duties and functions of pharmacy, and must done by health workers who have the expertise and authority in accordance with the provisions of laws and regulations , as well as authority over the supply of supplies, bids for the sale of hard drugs , as Article 3, 4 and 5 of Staatblad No.419 of 22 December 1949 on Hard Drugs . Finally it can be concluded, that the Pharmacist is the owner and manager of the pharmacy, which must be protected by law (criminal) in exercising its authority from the Owner of a Pharmacist Facility.

Keywords : Legal Protection and Pharmacist

Introduction

Health affairs is a mandatory government affair that should be organized by the Government and Regional Government systematically in the form of policies, infrastructure, programs and activities, and health services. The implementation is in accordance with the 1945 Constitution of the State of the Republic of Indonesia which has mandated, that:

Article 28H Section (1)

Every person has the right to live a prosperous and spiritual life, to live and get a good and healthy living environment and is entitled to receive health services

Article 34 section (3)

The State is responsible for the provision of appropriate health service facilities and public service facilities

Law Number 36 Year 2009 on Health, in its consideration dictum also states, that:

> Health is a human right and one of the elements of welfare that must be realized in accordance with the ideals of the Indonesian nation as referred to in Pancasila and the Constitution of the Republic of Indonesia.

Every activity in the effort to maintain and improve the highest level of public health is implemented based on the principle of non-discriminative, participatory and sustainable in the framework of the formation of human resources of Indonesia, as well as increasing the resilience and competitiveness of the nation for the development of Indonesia. Participatory principles in health development become a guideline for the community to participate in health development, one of them in the form of health services, in the form of supply and compounding pharmaceutical preparations through pharmacies. The Ministry of Health of the Republic of Indonesia stated that in 2017 there are 25,339 pharmacies in Indonesia (twenty five thousand three hundred and thirty nine).[1] This amount contributes greatly to health development in Indonesia, although casuistically in a study, the number of Apothecaries is still lacking, as happened at RSJ Prof.dr.VL Ratumbuysang Manado "that according to the Narkotka Law No.35 of 2009 entitled giving narcotics drug is a pharmacist or pharmacist assistant who was accompanied by a pharmacist, but then another informant said that who distributed drug substitute substitute drug substitute 542 is not due to the lack of pharmacists at RSJ Prof.dr.VLRatumbuysang."[2]

Pharmacists are still quantitatively still deficiency, and qualitative aspects (quality) Pharmacists tend not to understand in non-pharmaceutical activities (agreement law), especially in carrying out duties and authority in a pharmacy established under a cooperation agreement. Therefore it is necessary to understand about the position and protection of law Pharmacists in the management of pharmacies based on the agreement of establishing a pharmacy, so that the realization of justice. Pharmacies as a means of pharmaceutical services, one of which is the procurement and compounding of pharmaceutical preparations established by either an Apothecary or on cooperation between Pharmacist and the Capital Owner (investor), which can be referred to as a borrower of capital and or as an Investor/Owner of a Pharmacy Facility. The establishment of a pharmacy is a participatory effort of the community in health services, including providing health information to patients in pharmacies. Sudibyo Supardi, et.al. states "Pharmacists must provide true, clear and understandable, accurate, unbiased, ethical, wise and up to date information to patients at pharmacies."[3]

The inability of a Pharmacist's finances as a major factor to cooperate with the Capital Owner, as set forth in a notarial agreement deed. The covenant agreement contained in notarial deed is a binding of a person (Pharmacist) with another party (Capital Owner) and notarial agreement deed as a law for the parties to comply with their rights and obligations in a pharmacy, as Article 1313 and Article 1338 Civil Code. Pharmacists' lack of understanding of a cooperation agreement can have an impact on the weakness and legal standing of pharmacists in pharmacy management. One of the disadvantages, the Apothecary earns a salary from the Capital Owner, as the result of research from Rendy Ricky Kwando stating that "the most important obstacle complained by Pharmacists, namely the lack of wages/salaries of Pharmacists."[4] The opinion shows that the position of the Pharmacist under the Owner Capital, which tends to act outside of authority by performing pharmacy management practices and pharmaceutical practices. The act is very disturbing and or contrary to the position and authority of the Pharmacist. Example of a criminal case Number 223/Pid.B/2012/PN.Smg jo Number 312/Pid/2012/Pt.Smg jo Number 539K/Pid/2013.

In the case of such crime, the Capital Owner as the Owner of the Pharmacy Facility carries out the management of the pharmacy and undertakes pharmaceutical activities by arranging and intervening the authority and work of the Pharmacist, such as performing laboratory tests, blood sugar, cholesterol, uric acid, triglyceride, blood pressure and concoction of over-the-counter medicines, even misuse of drugs for personal gain. In relation to the actions of the Capital Owner as the Owner of the Pharmacist Facility, the Pharmacist resigns and secures and delivers the medicines to the Health Office as a supervisor and supervisor. Owner of Capital as Owner of a Pharmacy Facility who feels as the owner of a pharmacy does not accept the actions of the Pharmacist and reports to the police that the pharmacist has committed theft and/or embezzlement of pharmaceutical preparations. In the case of securing pharmaceutical preparations is the responsibility of the Pharmacist from abuse of authority from the Capital Owner. The Capital Owner's Actions reporting the Pharmacist to the police is a Capital Owner's misunderstanding of pharmacy management and pharmaceutical practices. Uncomprehension also occurs to the Investigator, Public Prosecutor and District Court Judges and High Court who do not understand and understand the position and authority of the Pharmacist in a pharmacy, thus convicting the Pharmacist with imprisonment of 4 (four) months.

The criminal justice process interferes with the work and performance of the Pharmacist profession, who are concerned about the conduct of the Capital Owner's intervention. Legal protection, both civil law and criminal law is the expectation of the pharmacist profession in carrying out management and pharmacy

[1] Binfar.Kemenkes.go.id

[2] Reinne G. Wowiling, J. Posangi, and Ch. R. Tilaar, *Analisis Pengelolaan Obat Substitusi Narkotika Subuxone Di Rumah Sakit Jiwa Prof.dr.V.L.Ratumbuysang Manado*, JIKMU, Suplemen Vol. 5, No, 2 April 2015, pp. 541-542

[3] Sudibyo Supardi, et.al., *Kajian Peraturan Perundang-undangan tentang Pemberian Informasi Obat dan Obat Tradisional di Indonesia*, Jurnal Kefarmasian Indonesia, Vol 2.1.2012:20-27

[4] Rendy Ricky Kwando, *Pemetaan Peran Apoteker Dalam Pelayanan Kefarmasian Terkait Frekuensi Kehadiran Apoteker Di Apotek* in Surabaya Timur, Jurnal Ilmiah Mahasiswa Universitas Surabaya, Volume 3 No.1 of 2014

activities in a pharmacy established in cooperation with the Capital Owners. In this paper does not discuss the criminal case, but only to emphasize that in the formulation and implementation of cooperation agreement of the establishment of pharmacies there has been disharmony relationship between pharmacist and the owner of Capital. The disharmony occurs because either party or both parties do not understand and understand the position and legal protection of each other.

Main Problems

The problem of pharmacists is very complex, can be studied from various aspects of the law, and pragmatically can be studied from the aspect of cooperation agreement on the establishment of pharmacies, formal education, professionalism, roles and responsibilities, and protection of pharmacists in cooperation with other parties. The limitation of the study material relating to the Pharmacist is an attempt at focusing the study, which in this paper limits on two issues:

1. How is the pharmacist's legal position in the establishment of a pharmacy?
2. How is the Pharmacist's legal protection in the pharmacy establishment agreement?

Methods And Purposes

The Pharmacist study in this article is based on a juridical-sociological approach that describes the position and role of the Pharmacist in the establishment of a pharmacy established by juridical by means of cooperation with the Capital Owner, synchronized with the reality in pharmacy management as stated in the agreement of establishment agreement of pharmacy. Primary data used is data obtained from a Pharmacist who had been a defendant and victim of the arbitrary of Capital Owner, and secondary data in the form of a court decision that has permanent legal force in the criminal case Number 223/Pid.B/2012/PN.Smg jo Number 312/Pid/2012/Pt.Smg jo Number 539K/Pid/2013. There are also participant observer data collection techniques, which in the criminal justice process is the author as a lawyer, and library studies that will be analyzed qualitatively by describing the juridical and sociological conditions of the legal standing and protection of pharmacists. The purpose of this paper is to describe the position and protection of law Pharmacists in a pharmacy management based on cooperation agreements with the Capital Owners, so as to realize the consciousness of the parties and fairness are proportional.

Discussion

Pharmacists Discussion in this writing includes 2 (two) problems, namely the position and protection of law Pharmacist in the agreement of establishment of a pharmacy, with consideration of the limits of the authority of the Pharmacist with the Owner of Capital is quite confusing, because in the agreement agreement the establishment of a pharmacy there is a vague arrangement or not it is clear who the founders, owners and managers of pharmacies, even Pharmacists tend to be under the authority and control of the Capital Owners. Juridically, licensing of pharmacy establishment is filed on behalf of Pharmacist, but on the other hand the Capital Owner assumes that he is the owner and has the authority to manage the pharmacy. Therefore, the position and legal protection of pharmacists in the pharmacy establishment agreement should be discussed to find the best solution formula based on justice.

Legal Status of Pharmacist in Pharmacy Establishment Cooperation

Pharmacists are in a strategic position to minimize medication errors, whether viewed from interrelationship with other health workers or in the treatment process.[5] This means that the pharmacist has a strategic position in health services in order to reduce the risk of loss of patients, so the participation of Pharmacists in establishing a pharmacy into the carrying capacity of health services that evenly and minimize medication errors. Pharmacists may establish their own pharmacies or cooperate with others as owners of capital, as Article 25 section (1) of Government Regulation No. 51 of 2009 on Pharmaceutical Works, and Article 3 section (1) Regulation of the Minister of Health No. 9 of 2017 on Apothecaries, that Pharmacists can establish pharmacies with their own capital and/or capital from individual and corporate capital owners.

The establishment of pharmacies by pharmacists with their own capital, whether pharmacy management and pharmaceutical practice is not a problem, because Pharmacists other than as the founder of pharmacies, as Pharmacist Pharmacy Manager, as well as Pharmacy Facility Owners and pharmaceutical practice organizers. The problem will arise, if the pharmacist is founded by the Pharmacist, but the capital of the other party (investor), also called the Capital Owner, either as Capital Borrower and or as Capital/Owner of Pharmacy Facility. Problems that arise in a pharmacy established jointly, namely the problem of different views of legal position of Pharmacists and Capital Owners in the management of pharmacies. Each party feels a legal force in establishing a pharmacy based on a cooperation agreement.

[5] *Direktorat Bina Farmasi Komunitas dan Klinik Ditjen Bina Kefarmasian dan Alat Kesehatan Departemen Kesehatan, Tanggung jawab Apoteker Terhadap Keselamatan Pasien (Jakarta: Ditjen Bina Kefarmasian dan Alat kesehatan*, 2008), p. 4

Pharmacists may argue that they themselves are the founders, owners and managers of pharmacies, while the Capital Owner may consider himself the owner and chairman of the pharmacy, for lending capital and or investing capital. Juridically, there are several laws and regulations governing the legal status of Pharmacists in the establishment of pharmacies based on cooperation, namely:

Pharmacist as Founder of Pharmacy;

Terminologically, the Pharmacist is a person who performs duties and authority in pharmacy activities, as a place of preparation and concoction of medicines, information delivery and consultations related to pharmacies. Pharmacists as professionals who possess competence and professional ethics, obtained under a formal pharmaceutical education. Pharmacists are a key requirement for the establishment of a pharmacy. Based on juridical analysis, Apothecary is the founder of pharmacy formulated legislation, namely:

1) Government Regulation Number 51 of 2009 on Pharmaceutical Works
   Article 25 section (1)
   Pharmacists may establish Pharmacies with their own capital and / or capital from the owners of capital, both individuals and companies.
2) Regulation of the Minister of Health No. 9 of 2017 on Apothecaries
   a) Article 1 point 7
      Pharmacy Permit is written proof given by regency/city government to pharmacist as permission to organize pharmacy;
   b) Article 3 section (1)
      Pharmacists can establish pharmacies with their own capital and/or capital from the owners of capital, both individuals and companies.
   c) Article 11 section (1)
      Pharmacist holder of Pharmacy License;
   d) Article 13 section (1) and (2)
      To obtain a Pharmacy Permit, the Pharmacist must submit a written application to the Regency/City Government accompanied by complete administrative documents including photocopy of Registration Letter of Pharmacist, Identity Card, Taxpayer Identification Number, location map and facilities and equipment and equipment;

The aforementioned laws and regulations have clearly proved that Pharmacists who established pharmacies and holders of Pharmacy Licenses, either the establishment of pharmacies on their own capital or on the basis of cooperation agreements. The formulation of other parties in the establishment of a pharmacy based on the cooperation agreement is limited to the Owner of Capital. This means that the Owner of Capital, whether as a Borrower of Capital or as a Capital Owner/Owner of Pharmacy Facilities has no legal standing as the founder, owner and manager of pharmacies.

The Capital Owner as the Borrower has a civilian position as a lender to the Pharmacist, so that the agreement on the debt repayment and the method of settlement can be arranged in the debt agreement agreement, either by guarantee or not by guarantee. The Capital Owner provides loan money to the Pharmacist in the establishment of the pharmacy, the Pharmacist as the founder and owner and manager of the pharmacist has an obligation to the Capital Owner to return the loaned capital in accordance with the cooperation agreement, as Article 1382 of the Civil Code that "any engagement can be fulfilled by anyone concerned, it looks like a debtor. " Capital Owners as Investors who invest in pharmacies, they are called Pharmacy Facility Owners, and Capital Owners as Capital Marketers/Pharmacy Facility Owners will get a share of profits from pharmacy operations according to the cooperation agreement.

Pharmacist as the lead pharmacist;

Pharmacists as managers of pharmacies as stipulated in Article 1 section (1) letter b Staatblad No. 419 dated December 22, 1949 on Hard Drugs, stating that the pharmacists are those in accordance with applicable regulations have the authority to run the practice of drug compounding in Indonesia as a Pharmacist while leading a Pharmacy.

Law Number 36 of 2009 on Health states that the pharmacist not only performs the task of secrets, but also performs administrative and financial duties, so that all tasks and activities in pharmacies are the responsibility of the Pharmacist as the manager and the leader of pharmacies. It is very dangerous if the manager and the head of the pharmacy are the Capital Owners, because they will place the Pharmacist as an employee, and will intervene the authority of the Pharmacist, as the case of criminal acts Number 223/Pid.B/2012/PN.Smg jo Number 312/Pid/2012/Pt.Smg jo Number 539K/Pid/2013. While in the job of pharmaceutical required competence and understanding of the practice of pharmacy that use health service standard. M Shofwan Harris said, that:

> Every activity or activity of service requires understanding and understanding in togetherness of assumption or interest to something related to service. Service will run smoothly and qualified if each party with an interest in service has a sense empathy in completing or maintaining or having the same commitment to the service.[6]

Based on the opinion of M Shofwan Harris, then those who understand, understand, and have commitment to the service are health workers, one of them is the Pharmacist, not the Capital Owner or Owner of the Pharmacy Facility. Pharmacists as leaders and managers of pharmacies have the authority to employ pharmaceutical and non-pharmaceutical personnel. However, it would be dangerous, if in pharmacy management there are only non pharmaceutical workers, such as Wendi Muh Fadhli and Siti Aminah, stated that:

> Reality in the field that there are still pharmacies that employ non-pharmaceutical workers based on experience gained. No competence and authority possessed. Non-pharmaceutical recipes service makes prescription services that do not comply with the standard of pharmac ...[7]

Standardization of health services in a pharmacy is located in Pharmacists, Pharmacist Assistant Assistants and Pharmaceutical Technical Workers, not lies in the capital of the Capital Owners.

Pharmacist as the executor of pharmaceutical activities

Pharmaceutical activities are the authority of Pharmacists and Pharmaceutical Engineering Personnel, who have fulfilled the requirements as pharmaceutical workers according to the laws and regulations:

1) Law Number 36 of 2009 on Health
   Article 108 section (1) states that:
   > Pharmaceutical practices which include the manufacture including pharmaceutical quality control, safeguards, procurement, storage and distribution of medicines, prescription drug services, drug information services, and drug development, medicinal and traditional ingredients shall be undertaken by health workers with expertise and authority in accordance with the provisions of the legislation.

   Article 1 point 6 states that:
   > A health worker is any person who devotes himself / herself to health and has knowledge and / or skills through education in the field of health which for certain types requires authority to undertake health efforts.
2) Law Number 36 of 2014 on Health Personnel states:
   Article 1
   > Health Worker is any person who devotes himself in the field of health and has knowledge and/or skills through education in the field of health which for certain types require authority to make health efforts.

   Article 11 section (1) letter e
   > Pharmaceutical Personnel is a Health Manpower.
3) Government Regulation Number 51 Year 2009 on Pharmaceutical, states:
   Article 51
   > Pharmacy services in pharmacies, health centers or hospital pharmacies may only be performed by Pharmacists, who have Pharmacist Registration Certificates, and Pharmacists may be assisted by Pharmaceutical Workers who have Pharmaceutical License Registration Letters;

   Article 52
   a) Any Pharmaceutical Worker performing Pharmaceutical Works in Indonesia shall have a license in accordance with the place of Pharmaceutical Workers.
   b) The license as meant in section (1) may be:
      a. SIPA for Pharmacists conducting Pharmaceutical Works at Pharmacies, puskesmas or hospital pharmacy installations;
      b. SIPA for Pharmacists who undertake Pharmaceutical Works as Pharmacists;
      c. SIK for Pharmacists performing Pharmaceutical Works in pharmaceutical facilities outside of pharmacies and hospital pharmacy installations; or
      d. SIK for Pharmaceutical Workers who perform Pharmaceutical Works on Pharmaceutical Facilities.

[6] M. Shofwan Haris, *Pengaruh Apoteker Pengelola Apotek (APA) Terhadap Kualitas Pelayanan Kefarmasian Di Apotek Kabupaten Bangkalan*, Jurnal Administrasi Publik ISSN: 0216-6496 Juni 2014, Vol. 12, No. 1, pp. 19 - 26 19

[7] Wendi Muh Fadhli dan Siri Anisah, *Tanggungjawab Hukum Dokter dan Apoteker Dalam Pelayanan Resep* (Media farmasi Vo.13 No.1, Maret 2016: 61-87), p. 84

4) Regulation of the Minister of Health No. 889/Menkes/Per/V/2011 concerning Registration, Practice License, and Pharmaceutical Work Permit juncto Regulation of the Minister of Health of the Republic of Indonesia Number 31 of 2016 on Amendment to Regulation of the Minister of Health No. 889/Menkes/Per/V/2011 concerning Registration, Practice License, and Work Permit for Pharmaceutical Workers

Article 1 point 1 states that:

Pharmaceutical work is the manufacture including the quality control of pharmaceutical preparations, security, procurement, storage and distribution or distribution of drugs, drug management, prescription drug services, drug information services, and the development of drugs, medicinal and traditional medicines.

Article 1 point 2 states that:

Pharmaceutical personnel shall be personnel undertaking pharmaceutical work, consisting of Pharmacists and Pharmaceutical Technical Personnel.

Article 2

a) Any pharmaceutical worker who undertakes pharmaceutical work shall have a registration certificate.
b) The registration certificate as referred to in section (1) shall be in the form of:
    a. Pharmacist Registration Certificate for Pharmacists; and
    b. Letter of Registration of Pharmaceutical Technical Workers for Pharmaceutical Engineering Personnel.

Article 17

a) Any pharmaceutical worker who will undertake pharmaceutical work shall have a license in accordance with the place of the pharmaceutical workforce.
b) The license as meant in section (1) shall be in the form of:
    a. Pharmacist Practice License for Pharmacists; or
    b. Pharmaceutical Engineer Licensed Practice License for Pharmaceutical Engineering Personnel.

Based on the above legislation proves that the Pharmacist is a health worker who has legal status as the founder of pharmacies, owners, leaders and managers of pharmacies, and as implementers of pharmaceutical practices. The legal status shall be set forth in the cooperation agreement on the establishment of a pharmacy in a notarial deed. The laws and regulations governing the health of the above do not regulate the legal standing of the Capital Owner, either as a Borrower of Capital or an Investor/Owner of a Pharmacy Facility. Arrangement of legal status of Capital Owner, either as Capital Borrower or Capital Owner/Owner of Pharmacy Facility formulated in deed of establishment agreement of pharmacy, based on Civil Code, that is:

Article 1313

An agreement is an action by which one or more persons commit themselves to one or more persons.

Article 1320

For the validity of the agreements four conditions are required:

1. agree those who commit themselves;
2. the ability to make an engagement;
3. a certain thing;
4. a lawful cause

Article 1338

All ssah agreements are valid as laws for those who create them. Such agreements can not be recalled other than by mutual agreement, or for reasons which the law provides sufficient. Approvals should be carried out in good faith.

The legal position of the Capital Owner as a Borrower to the Pharmacist is set forth and is bound by the agreements formulated in the notarial deed of the debt agreement, which regulates the rights and obligations of the parties. In order to maintain the integrity of the duties and authority of Pharmacists, both as the founders, owners, managers and leaders of pharmacies as well as pharmaceutical practices, the provisions stipulated in legislation concerning health, pharmacies and pharmaceuticals shall be set forth in the deed of debt agreements.

The position of Capital Owner as an Investor in the form of pharmacy facilities shall be set forth in the deed of establishment agreement of the pharmacy, and the position of the Capital Owner as the Owner of the Pharmacy Facility. Right of Owner of Pharmacy Facility is sharing of net profit of pharmacy operation based on the agreement contained in notarial deed. In this case clearly and firmly, the Pharmacist is not the Owner

of the Pharmacy Facility, but as a user of the pharmacy, so the Pharmacist has the obligation to maintain and maintain the pharmacy facilities responsibly.

The Capital Owner's position, whether as a Capital Borrower or an Investor/Owner of a Pharmacy Facility is a proportional and fair position, and the Capital Owner will not be able to intervene in pharmacy management and pharmaceutical activities. The notarial agreement deed must contain the rights and obligations of the parties by clarifying the legal standing of the parties, namely the Pharmacist as the founder, owner, manager and implementer of pharmaceutical activities at the pharmacy. Others who provide capital as Capital Borrowers or Capital Owners/Pharmacy Facility Owners, have the right to hold accountable for non-pharmaceutical management related to management of pharmacy management and profits. The legal status is in accordance with the laws and regulations.

The aforementioned legal standing will clarify and affirm the accountability of pharmacy management and the implementation of pharmaceutical activities before the law, ie the Pharmacist who is fully responsible for the pharmacy, while the Capital Owner as the party who holds the Pharmacist accountable to the management of non pharmaceutical pharmacy management related to finance pharmacy.

Legal Protection of Pharmacists in Pharmacy Establishment Cooperation Agreement

Juridically it is known that the legal status of the Pharmacist in the establishment agreement of pharmacists as the founders, owners, managers and managers of pharmacies and implementers of pharmaceutical activities. The legal status will be in vain if in a cooperation agreement in a deed is formulated, that the Capital Owner shall be declared as Owner of the Pharmacy with authority that exceeds the authority of the Pharmacist or makes the Pharmacist as an employee of the Capital Owner/Owner of the Pharmacy. It occurs in the case Number 233/Pid.B/2012/PN.Smg jo Number 312/Pid/2012/Pt.Smg jo Number 539K/Pid/2013. The owner of the pharmacy Facility feels as the owner of the pharmacy and has committed an act that exceeds its authority as an investor, which carries out pharmacy management actions, even pharmaceutical actions which should have pharmacist authority and responsibility available to the pharmacist, and even the owner of pharmacy facilities has violated the law that is:

a. perform laboratory tests, such as blood sugar, cholesterol, uric acid, triglyceride and blood pressure checks;
b. Psychotropic compounding of Valisanbe and diazepam;
c. Make a concoction of a drug without a prescription;

Where it is known in the legislation regarding health, pharmacies and pharmaceuticals, that pharmacists have authority in pharmacy management and pharmaceutical practices, ie manufacture including pharmaceutical quality control, safeguards, procurement, storage and distribution or distribution of drugs, drug management, prescription drugs, drug information services, and drug development, medicinal and traditional medicine. Pharmaceutical activities must be performed by health personnel with expertise and authority in accordance with the laws and regulations, as defined in Article 108 of Law Number 36 of 2009 on Health, Article 1 number 1 and 3 Government Regulation Number 51 of 2009 on Pharmaceutical Works . Similarly formulated in Article 1 Section (1) Sub-Section b of Staatblad No. 419 dated December 22, 1949 on Hard Drugs, regulates the authority of Pharmacists to practice drug compounding in Indonesia as a pharmacist while leading a pharmacy, and in Article 3, Article 4, and Article 5 The pharmacist has authority over the supply of supplies, bids for the sale of hard drugs.

Based on the consideration of the above legal analysis, the pharmacist has the authority, both in the non pharmaceutical and pharmaceutical fields such as security and storage. Case analysis of the criminal case Number 223/Pid.B/2012/PN.Smg jo Number 539K/Pid/2013, Pharmacist in accordance with their authority in the field of pharmacy, there is no will and not proven in trials against rights, transfer, transfer, benefit, from holding back, refusing to return and concealing drugs and psychotropic drugs. Pharmacists by safeguarding narcotics and psychotropic drugs in the Department of Health, with the first juridical consideration The pharmacist is responsible for pharmaceutical work based on scientific, fairness, humanitarian, equilibrium and protection and safety of patients or peoples concerned with pharmaceutical preparations that meet safety standards and requirements , quality and utility (vide Article 3 of Government Regulation Number 51 of 2009 on Pharmaceutical Works); second the occurrence of repeated pharmaceutical violations committed by the Capital Owner as an Investor/Owner of a Pharmacy Facility. The delivery of narcotics and psychotropic drugs to the Health Office is in accordance with Article 27 and Article 28 of Regulation of the Minister of Health No. 9 of 2017 on Pharmacies, which states that the guidance and supervision on the implementation of this Ministerial Regulation shall be conducted by the Minister, Head of Provincial Health Office and Head District/Municipality Health Office in accordance with the duties and functions of each. In 2012-2013 when the case occurs, the pharmacist's actions to deliver drugs narcotics and psychotropic to the Health Office of Semarang City is in accordance with Article 29 of the Minister of Health Decree no. 1332/Menkes/SK/X/2002 (currently the regulation is no longer applicable), namely the safeguard procedure:

a. inventory of all narcotics, psychotropic, certain hard drugs and other drugs and all prescriptions available at pharmacies;

b. narcotics, psychotropic substances and prescriptions should be placed in a closed and locked place. Pharmacists Pharmacies Manager must report in writing to the Head of District Health Office, regarding the cessation of activities along with the inventory report referred to in letter (a).

Pharmacists have never committed an act against the law, the acts committed by the Pharmacist are appropriate and run the legislation. If the Pharmacist is declared to be committing an act that violates the cooperation agreement and causing harm, then applicable Civil Code, namely:

Article 1238 Civil Code (wanprestasi)

The debtor is negligent, if he by warrant or by a similar deed has been alaliened, or for his own engagement, is if it establishes that the debtor shall be deemed negligent by the passage of the prescribed time.

Article 1365 (unlawful act)

Any unlawful act, which carries harm to another person, requires a person who, for whose fault, issues the loss, liabilities.

Article 1367 (responsibility represented)

A person is not only responsible for the loss caused by his / her own actions but also for the loss caused by the actions of the persons who become his dependents or caused by the goods which are under his control.

Legal protection The pharmacist in the establishment agreement of pharmacies is clearly and firmly stipulated in legislation and must be set forth in the deed of agreement of establishment of pharmacy, with different authority, that is Pharmacist as founder, owner, manager and leader of pharmacy and implementer of pharmacy, while the other party only as Owner of Capital. Such arrangements will have an impact on the accountability of pharmacy management and pharmaceutical activities on Pharmacists.

Closing

Based on the above discussion, it can be concluded that juridically, the legal position of the Pharmacist as the founder, owner, manager and leader of the pharmacy as well as the executor of pharmaceutical activities in the pharmacy. While the legal position of the other party in the agreement of establishment of a pharmacy as a Capital Owner, either as a Borrower of Capital or as a Capital Owner/Owner of Pharmacy Advice. Second, the legal protection of pharmacists has been regulated in legislation and shall be guidance in the deed of cooperation agreement in the establishment of pharmacies.

On this occasion, the authors advise that the first legislation regulating the position and protection of the law of the Pharmacist in the cooperation agreement on the establishment of a pharmacy shall be guidance in the Deed of Pharmacy Establishment Cooperation Agreement. Second, the formulation of Deed of Agreement on Establishment of Pharmacies should regulate the authority of Pharmacist as the founder, owner, manager and manager of pharmacy and executor of pharmaceutical activities, while the other party is only limited to the Capital Owners who will gain financial benefit in accordance with the agreement of pharmacy establishment.

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Regulation of Health Minister No. 9 of 2017 on Pharmacy

Regulation of Health Minister No. 889/Menkes/Per/V/2011 concerning the Registration, Practice License and Work License of Pharmaceutical Officer jo Regulation of Health Minister No. 31 of 2016 on Amendments to

THE RECONSTRUCTION OF PUBLIC POLICY IN OVERCOMING PROBLEMS IN INVESTMENT-BASED SOCIAL JUSTICE

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ABSTRACT

This paper discusses the reconstruction of public policy to overcome problems in investing based on social justice using normative approach, the materials are taken from bibliography, using descriptive qualitative. Law construction finds solutions to legal problems by exploring the meaning it faces Law construction finds solutions to overcome various legal issues to avoid legal vacuum. Reconstruction of the law is a legal reform is a drastic change for improvement in the field of law in the community or country. Discover the weaknesses of the rule of law for renewal. Some people do not give permission to investors who will invest even if all the permits have been fulfilled. The government must reconstruct Law Number 25 of 2007 regarding Capital Investment namely (a). Adding the rules in Article 34 section (1) which states, "Business entities or individual businesses as referred to in Article 5 which do not fulfil the obligations as stipulated in Article 15 may be subject to administrative sanctions," amended to "Business entities or individual businesses as referred to in Article 5 which does not comply with the regulations as specified in Article 16, which damage the environment and harm the state or society is subject to criminal and administrative sanctions" (b). "Business entities or individual businesses that caused the fatalities may be penalized and administrative sanctions" (c)."Create and enact new regulations on administrative sanctions for those who make it difficult for investors to invest, providing solutions to any investment activity.

Keywords: Public Policy, Investment, Industry

Introduction

The industrial sector is a sector that plays an important role for the economy in Indonesia has several advantages compared with other sectors because it is able to absorb a lot of labor, in order to realize the Fifth Precept of *Pancasila*, which reads Social justice for the whole of the people of Indonesia. The industrial sector is the largest contributor to GDP, is expected to drive economic development. Remote infrastructure limitations led to the construction industry in the region difficult to develop, because it raises the development gap between regions. Dropping mastery of technology makes competitiveness of domestic industrial production is weak in the face of fierce competition in the free market. The competitiveness of domestic products is increasingly under threat as a result has not been widespread adoption of the national standardization. The government must try to invest in the country can grow and stay ahead of the competition.

Legally investment set in the Law of the Republic of Indonesia Number 25 of 2007 on the Capital Investment. The law aims to regulate the investors in making investments that do not have an impact on environmental pollution and the things that could harm the state. In this case there are some weaknesses in the Law of the Republic of Indonesia Number 25 of 2007 on the Capital Investment therefore necessary reconstruction of the law so that investment running well.

Sociologically, in part of society. NGOs, the Regional Council Community Institutions, village officials do not want investors to invest, despite all the permission of the government, consent of a notary public, including the EIA has been met by investors. They have their own rules that deliberately contrived to complicate the investor to invest. They deliberately look for reasons that make no sense. Community up land prices are very high on their region's market price of land purchased by investors which resulted in investor can't invest. Villagers want the very high income from the sale of land, tax very high commission money from investors in the request for permission to make an investment.

Philosophically, many rural communities had different ideas with the people of the city caused by the background of the customs, culture, education, norms or ethics, a way of life that is still underdeveloped which results can inhibit the development of investment to be made by the investor. This study aims to examine public policy to overcome the problems in the investment using normative juridical approach Therefore this paper entitled, *"The Reconstruction of Public Policy in Overcoming Problems in Investment-Based Social* Justice."

Method of Research

According Wahyu, Sapto budoyo and Maryanto in this journal that title Understanding the Concept of Naturalism, Using Comparative Law A Better Indonesians Immigration System in Handling the Illegal immigrant said :

"The method of this research is by the way of data collecting which is done by documentation study, questionnaires, and interview document study is done by tracing through research library, to primary and secondary data sources. The instrumens used in this study are questionnaires, interview guidelines and observations notes. The used of qustionnaire as means of collecting data based on the reference and goodness of references resourced from the literature (law or the resources of law) as well as on the basic consideration of couscience and honesty. The qustionnaire used in this study are mixed (semi-closed), a combination of Closed Questionnaires and open qustionnaires, qualitative research method and grounded theory study approach, which is bassed on primary data comperative law and secondary data from the relevant life rature."[1]

This study uses normative approach, the data obtained from ingredients from the literature by using qualitative descriptive approach that describes something that seems inconsistent with the practice field. The formulation of the problem formulated in this paper as follows:

1. How can public policy efforts to encourage interested investors to hold investments in Indonesia?
2. How is the reconstruction of public policy in Indonesia to overcome the problems in the investment in the industrial sector?

Result of Research

1. Definition of Investment and Public Policy Efforts in Achieving the goal for Investors Interested to Invest Holding in Indonesia
   a. Definitions Investments

   Investments have meaning use of capital to create money, either by means of generating revenue or through venture-oriented risk designed to raise the capital.[2] While capital investment are all forms of investing activity by both domestic investors and foreign investors to do business in the territory of the Republic of Indonesia. (Article 1 Paragraph (1) of the Law of the Republic of Indonesia Number 25 Year 2007 on Investment). Domestic Investments is investing activity to do business in the territory of the Republic of Indonesia by a domestic investor using domestic capital. (Article 1 Paragraph (2) of the Constitution of the Republic of Indonesia Number 25 Year 2007 on Investment). Foreign investment is investing activity to do business in the territory of the Republic of Indonesia, made by a foreign investor, whether using foreign capital and joint venture with a domestic capital investment. (Article 1 Paragraph (3) of the Constitution of the Republic of Indonesia Number 25 year 2007 on Investment).

   In carrying out their daily activities or for the development of future company needs funds in cash. There are several funding alternatives of choice for companies seeking loans / additional loans, for a merger partner, sell the company / close the company, seek additional capital by looking for others who want to come to invest in the company.[3] Investments aimed at seeking greater profits and provide jobs for the unemployed in accordance with *Pancasila* which symbolizes rice and cotton, which reads, "social justice for all Indonesian people."

   As for in Article 3 of the Law of the Republic of Indonesia Number 25 Year 2007 on Investment , formulate, "Investment organized based on the principle of a. Legal certainty; b. Openness; c. Accountability; d. The same treatment and does not distinguish between countries of origin; e. Togetherness; f. Efficiency of justice; g. Continual; h. Environmental; i. self-reliance; j. Balance between progress and unity of the national economy. While the purpose of the organization of the investment, listed in Article 3 of Law No. 25 of 2007 on Investment, among others: a. Improving national economic growth; b. Create jobs; c. Promote sustainable economic development; d. Improving competitiveness of national business; e. Increasing the capacity and capability of national technology; f. Encouraging the development of community economy; g. Processing economic potential into real economic strength by using funds from both domestic and foreign; h. Improve social welfare.

   Article 1 of Law of the Republic of Indonesia Number 5 of 1984 on the industry is an economic activity that processes raw materials, raw materials, semi-finished goods, and / or finished goods into goods with a higher value to the user, including the activities of design and engineering industry , Many Japanese multinational companies to open branches and building industry in Indonesia, there are approximately one thousand Japanese companies operating in Indonesia. It is giving out the contribution to the reduction of unemployment in Indonesia and provides vast employment opportunities like human

[1]Wahyu, Sapto budoyo and Maryanto in this journal that titke Understanding the Concept of Naturalism, Using Comparative Law A Better Indonesians Immigration System in Handling the Illegal immigrant, Using Comparative Law for A Better IndonesianImmigrationsystem in Handling the illegal Immigrant, International Journal of Humanities and Social Sciences, ISSN 2250-3226, Volume 7, Number 1, Research India Publoication (2017), pp.23-33. Downloaded at January 5th at 01.00 W.I.B.

[2] Hendrik Budi Untung, Hukum Investasi, Cetakan Pertama, P.T. Sinar Garfika, Jakarta, 2010, page 1

[3] Tavinayati, Yulia Qamariyanti, Hukum Pasar Modal Di Indonesia, Catakan Pertama, P.T. Sinar Grafika, Jakarta, 2009, page 3

resources in the country.[4] The development of the domestic market, construction of the plant is expected to be a driving force for industrial businesses to continue to develop the industry in order to strengthen the national economy.

As for Chapter IV, Article 5 of the Law of the Republic of Indonesia Number 25 of 2007 regarding investment regulates the form of business entity and the position of investment, formulated as follows: (1) Domestic investment can be done in the form of business entity that is a legal entity, not a legal entity or individual businesses in accordance with the provisions of the legislation; (2) foreign investment shall be in the form of a limited liability company under the laws of Indonesia and domiciled in the territory of the Republic of Indonesia, unless otherwise stipulated by law;

Obligations that must be met by investors defined in Article 15 of the Law of the Republic of Indonesia Number 25 of 2007 regarding Investment, as follows: "Every investor is obliged to: a. Applying the principles of good corporate governance; b. Implement corporate social responsibility; c. A report on the investment activities and submit it to the Coordinating Board Investors; d. Respect the cultural traditions of communities around the location of investment business activities; e. Comply with all the provisions of the legislation.

While Article 16 of the Law of the Republic of Indonesia Number 25 of 2007 on capital investment reads," Every investor responsible for: (a). Ensuring availability of capital from sources that are contrary to the provisions of the legislation; (b). Bear and settle all liabilities and losses if investors stop or unilaterally abandon its business activities in accordance with the provisions of the legislation; (c). Create a business climate of fair competition, prevent monopoly, and other things that hurt the country; (d). Preserving the environment; (e). Promotion of safety, health, comfort and welfare; and (f). Comply with all the provisions of the legislation.

Matters concerning licensing in capital investment set out in Chapter XI, of Endorsement and Licensing of Article 25 of Law of the Republic of Indonesia Number 25 of 2007 on Investment, include: (1) investors making investment in Indonesia should be appropriate with the provisions of Article 5 of this Act; (2) Approval of the establishment of enterprises, domestic investment which is a legal entity or not incorporated performed pursuant to the legislation; (3) Approval of Establishment of foreign investment enterprises Limited Liability Company (PT) carried out in accordance with the provisions of the legislation; (4) The right investment companies conduct business activities must obtain a permit in accordance with the provisions of the legislation of the agencies that have the authority, unless otherwise specified in the legislation; (4) The license referred to in Paragraph (4) is obtained through one door integrated services, aims to assist investment in obtaining service convenience, fiscal facilities, and information on the investment.

Settlement of disputes in capital investment set out in Chapter XV, Article 32 of the Law of the Republic of Indonesia Number 25 of 2007 regarding Investment, through: (1) In the case of a dispute in the field of investment between the government and investors, the parties first complete disputes through consultation and consensus; (2) In the event of dispute settlement referred to in paragraph (1) is not reached, the dispute settlement can be made through arbitration or alternative dispute resolution or court in accordance with the provisions of the legislation; (3) In case of a dispute between the government in the field of capital investment by domestic investors, the parties can resolve the dispute through arbitration is not approved, the dispute settlement conducted in court; (4) In case of a dispute in the field of foreign investment, the parties will resolve the dispute through international arbitration agreed by the parties.

Suyud Margono said dispute resolution method can be done in several ways:

1) *Adjudicative Processes,* which includes litigation and mediation;
2) *Consessus Processes,* which includes the Ombudsman, *Netral Fact Findin, negotiation, mediation, and conciliation*;
3) *Quasi Ajudicative Processe,* include mediation-arbitration (Med-Arb), *Mini Trial) , Sumarry Jury Trial), and Early Neutral Evaluation).*[5]

The legal efforts Pati citizens who reject the establishment of a cement factory PT. Sahabat Mulia Sakti in the area of Mount Kendeng aground cassation level. They are concerned that the establishment of cement factory is established will have an impact of environmental pollution on the environment and the ecosystem at large. The verdict of the Supreme Court published official dilaman chaired by Yosrean members and Julius Sudaryono Is with Registration Number 4K / TUN / 2017 rejected the appeal filed decide Pati citizens. The verdict handed down on March 6, 2017.[6]

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[4] Aminuddin Ilmar, Hukum Penanaman Modal di Indonesia, P.T. Kencana Prenada Madia Group, Jakarta, 2006, page 16

[5]Suyud Margono, *Alternative Dispute dan Resolution dan Arbitrse Proses Pelembagaan dan Aspek Hukum,* P.T. Ghalia Indonesia, Jakarta, 2004.

[6]Puji Utami,, *Mahkamah Agung Tolak Kasasi Warga, Indocemet Siap Berdiri di Pati*, Surat Khabar Kompas, 15 Maret 2017, 10;15, https://m.merdeka.com/jateng/industri/ma-tolak-kasasi-warga-indocement-siap-berdiri-di-Pati-1703152.html

As is known, a number of citizens reject the establishment of a cement factory Starch Kendeng region by suing through the State Administrative Court Semarang to cancel the license of the establishment of a cement plant by PT. Sahabat Mulia Sakti Pati citizen lawsuit was granted by the State Administrative Court Judge (Administrative Court) Semarang. Permission to PT. Sahabat Mulia Sakti which is a subsidiary of PT. Indocement was issued by Pati Regent on December 8, 2014.[7] Based on the decision of the State Administrative Court Judge (Administrative Court) Semarang, PT. Friends of Noble Way and Regent appeal. Surabaya High Court later overturned the verdict of the trial court. With that decision, the people who reject the establishment of the factory then filed a cassation to the Supreme Court against the decision of the State Administrative High Court Surabaya. Delivery of cassation carried out on September 5, 2016 urging the establishment of a cement plant environmental permits issued enumerated by the Regent to PT. Sahabat Mulia Sakti cancelled through an appeal, but was rejected by the Supreme Court.[8]

Pursuant to Article 33 Paragraph (3) of the Constitution of the Republic of Indonesia in 1945 to formulate, "Earth, water and natural resources contained in it are controlled by the state and used for the greatest prosperity of the people". While Article 33 Paragraph (4) of the Constitution of the Republic of Indonesia in 1945 declare, 'The national economy shall be organized based on economic democracy with the principles of togetherness, efficiency, justice, sustainability and environmental friendliness, death of a soul going on in the province of East Kalimantan, which seemed to leave one by one children die from falls at mines hole in the districts since 2012.[9] There is no rule of law that targeted to companies who should be responsible. Data and mining advocacy network said only one case, companies are required to pay administrative Rp.1000, - and the confinement of 2 (two) weeks for the company's security officer. Fears and concerns of the people will lose their management area as a living community broke out in many areas.

Cement is one the core industries which plays a vital role in the growth and expansion of nation. Its basically e mixture of compounds, consisting mainly of silicates an aluminates of calcium, formed out of calcium oxide, silica, alumunium oxide and iron oxide. The mand for cement depends primally on the pace activities in the business, financial, real estate and infrastructure sectors of the economy cement is considered prefered building material and is used worldwide for all construction works such as housing and industrial construction, as well as for creation of infrastructures like ports, roads, power plants, extra.[10]

The cement industries constitute a mature, capital and energy intensive sector with normally predictable demand and relatively high barrier for market entry. There ere many enterprises with along standing tradition and the sector is known to be rather conservative in terms of how business in done. Therefore, a basic assumption that information and communication technologies (ITC) usage and e-business activity is not deployed than other many facturing industries and service sector such us tourism banking and ITC services, where new developments in ITC tent to have much more direct and significant impacts on the hand, the constraints could be a driver for companies to turn their attention to ITC, as They seek opportunities to increase their process efficiency in order to cut costs. In this skenario, the crisis drivers companies to exploit a possibly untaped potensial to become more competetive.[11]

Considering the co effisients and signifinance level, it can be concluded that incement industry, the nature of working capital capital policy, financing of working capital policy, financing of working capital, inventory holding period. Accounts receivable collection periode . Acount payable period, and cash conversion cycle indays play an important role in determining cement industries overall profitability return on total aset. From the corelation is negative, from the profitability ratios it is clear that correlation between working capital efficiency and profitability ratios of the selected sement companies with some exceptions where the correlation is negative. From the profitability ratios it is clear that the performance of the selected cement companies under study period is not statisfactory according to industry avarage. From the regression and correlation analysis it can be concluded that poor management of working. Capital is one of the important causes for poor performance or poor profitability position if the selected coment industry under the study period. It is found from the study that the working capital management

[7] *Ibid.*
[8] *Ibid.*
[9] Brigitta Isworo Laksmi dan Wawan II Prabowo, *Amicus Curiae, Suara untuk Berkelanjutan*, Kompas, 2017.
[10] Avinash Pareek, Indian Cement Industry, A Road A Head, International Journal in Management and Social Science (Impact Factor-4.358), Vol.o3, Issue-08, August, 2015, Page 2, ISSN : 2321-1784, Department of Management, IASE Deemed Universitas, GVM, Sardarshahr, Dist.Churu 331401 (Rajasthan), Email : id-irjmss@gmail.com, http ://www.ijmr.net.in, diunduh tanggal 6 Januari 2008, Jam 01.25. W.I.B.
[11] Arrijit Maity, Study of Future Prospects of online cement Retailing international Journal of Research –Granthaalayah, Vol.3, Issue 3, March, 2015, Page 4, ISSN-2350-0530, University of Calcuta, India, Correspondence Author : arijit.maity1979 @gmail.com, granthaalayah.com>02_IJRG15_AO3_47, diunduh Tanggal 7 Januari 2018, Jam 21.00 W.I.B.

of cement industry is inefficient. This is evident from the study that working capital plays in important role in the overal performance of the industry.[12]

Major objective of development should be to ensure the satisfaction of human needs and aspiration of material kind. Emphasized the fact that over exploitation of resources compel human societies to compromise their ability to meet the essential needs of their people in future. Settled agriculture, the diversion of watercourses the extraction of mineral, the emissions of heat and noxious gases into the atmosphere, commercial forest, and genetic manipulation, were all mentioned in the report a examples of human intervention in natural system during the course of development as the overriding goal and test of national policy and international cooperation.[13]

The burning of various types of wastes requires the detailed control and adoption of the technological processes to each type of waste. For this reason, alternative fuel are derived from wastes having and similiar composition and properties. Should be exmined before the burning alternative fuel is undertaken :

1) Physical State of The Fuel (solid, liquid, gaseous);
2) Conten of Circulating Elements;
3) Toxicity (organic, compound, heavymetals);
4) Composition and Content of Ash;
5) Volatile Content;
6) Calorivic Value;
7) Physical Properties (scrap size, density, homogeneity).[14]

Definition and solve to conflict according M. Afzalur Rahim that tittle Managing Conflict in Organization is like this :

> "Conflict is defined as an interactive process manifested in incompatibility disagreement or dissonance within or between social entities (i.e., individual, group, organization, extra). Calling conflict an interactive state does not preclude the possibilities of intra individual conflict, for it is known that a person often interacts with himself on herself. Obviously, one also interacts with others. Conflict occur when one or two social entity (ies) : (1). Is required to engage in en activity that is in-congruent with his or her needs or interest; (2). Hold behavioural preferences, the satisfaction of which is incompatible with another person's implementation of his or her preferences; (3). Want some mutually desirable resources that is in short supply, such that the wants of every one may not be satisfied fully; (4). Pesseses attitudes, values, skills, and goals that are salient in directing one's behaviour but that are perceived to be exclusive of the attitudes, values, skills, and goals held by the other (s); (5). Has partially exclusive behavioural preferences regarding joint actions; (6).It interdependent in the performance of function or activities."[15]

Solution for solving the problem about wastes of industry according F.N. Stafford in his journal at undertaken :

> "Uncontrolled wastes disposal still is the cheapest way to run out the wastes, but it is not safe for environment our human health. The alternative of co processing brings environmental and social benefits, avoiding the consumption at fossil fuels and giving a properly destination for maniacal or

[12]ManjurulAlam Mazumder, Working Capital Management and Profitability : Evidence from The Cement Industry in Bangladesh, International Journal of Business and Management Review, Vol.3, No.8. PP.53-73, September 2015, Department of Business Administration, International Islamic University Chittagong, 154/A, College Road, chwkbazar, Chittagong-4203, Bangladesh, Published by eiropean Centre Research Training and Development UK.,www.eajournals.org, ISSN 2052-6407, diunduh Tanggal 7 Januari 2018, Jam 21.15 W.I.B.

[13]Abdul Ghafoorawan, Relationship Between Environment and Sustuinable Economic Devbelopment, A Theoretical Aproach to Environmental Problem, International Journal of Asian Social Science, 2013, 3(3): 741-761, Page 4, Dean of Faculty, Instite of Southern Punjab, Multan Pakistan, http//www.recentscientific.com, Email : http ://www.aessweb.com, diunduh Tanggal 7 Januari 2018, Jam 22.00 W.I.B.

[14]Nicholaos Chat Ziaras and Constantinos S. Psomopoulos, Nicholas J. Themelis, use of Waste Derived Fuelsin Cement Industry, A Review, Department of electrical Engineering, Technological Edicational Institution of Piraes, Agaleo, Greece and Earth Engineering Conter, Columbia, University, New York, USA, 2016, Management of Environmental Quality, An International Journal, Vol.27, Issue 2, pp. 178-193, Page 91, www.seas.columbia.edu.wtert.sofos, www.emeraldinsight.com/1477-7835.htm, diunduh Tanggal 7 Januari 2018, Jam 22.30 W.I.B.

[15]M. Afzalur Rahim, Managing Conflict in Organizations, Third Editions, London, 2001, Page 32-33. Includes Bibliographical Reference and Indexm ISBN 1-56720-262-4, Title HD 42. R34 2001, 658.4053-dc21, 00-037271, Library of Congress Catalog Card Number 00-037271, Quorum Books, 88 Post Road West, Westport, CT 06881, An Imprint of Greenwood Publishing Group, Inc., Email : www. Quorumbooks.com, Printed in the United States of Anerica, Permanent Paper Standart Issued by The National Information Standards Organization (239.48-1984), diunduh Tanggal 7 Januari 2018, Jam 23.00 W.I.B.

hazardous wastes. For this reason, co-processing is a win-win relation and must be encouraged and enhanced."[16]

In current business environmental, different organizations including those that are operating in the SACCO sub-sector are striving for ways and means attaining and sustaining a competitive advantage over their competitors through the uniqueness competitive strategies and operational system, The competitive that are adopted by an organisation can effective performance, with can be manifested in terms of shares growth rate, market share, productivity and profitability attained by organization. The competitive strategy that an organization adopted by an organization adopt can provide directions to organization 's effort. These may take the form of cost leadership, differentiation or focus strategy to compete i the market that operates in. The focus on alignment necessary involves possibilities for complementary can be positive, where the " whole is greater than the sum of the part ," or negative, where elements of the system conflict (internally or externally) and actually contribute to destruction rather than creation of value. The more subtle the alignment requirements and more idiosyncrasy to particular organization, the more the competitive strategies can provide an inimitable strategic asset.[17]

Basic Physical infrastructure required for economic development , such as good roads, ample power supply, and good rail and river transportation facilities, are in very poor shape in most African Countries. As result, deplorable roads, deteriorating rail lines, where rail transportation still exist, inadequate power supply, and unusable waterways have combined to make small business operations difficult. For examples, damage to equipment because of power surges and down time due to unavailability of Electric power during production hours are major problems for small manufactures in some African countries (Akwani, 2007). According Ekeledo, et all., said, to overcome this problem, entrepreneurs who can afford it own private generators to power their manufacturing operations, thus increasing production costs and making their products less competitive. Futhermore, poor transportation facilities and bad roads result in higher costs of moving goods from one section of the country to another.[18]

Can Exist and can be Monitor properly. Thus on whom the responsibility is given must be effective enough and must have equal and high degree of concern for people and production who are working under him. Very often the special compliance department means a kind of welfare approach. i.e. establishing good relation with the employer /owner employee through a systematic introduction of welfare benefits and a kind of sympathetic treatment. The assumption is that an approach that would, make the employee and employer more contended, disciplined and productive. This is generally followed in India industry in the past, however the special Compliancedepartment with head and reporting, to owner has acquired a different meaning in during the pas twi decades.[19]

According to Hendrik Budi Untung in his book Investment Law classifies its investments into 2 (two) parts, namely:

1) Direct investment

Investors who want to invest directly, physically have to be present in the operations, the agency must comply with the provisions of existing law in Indonesia;

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[16]F.N. Stanfford, M.D. Viques, J. Labrinca, D. Hotza, Advances and Challenges for the Co-processing in Latin Americant Cement, International Conggress of Sience and Technology of Metaallurgy and Materials, SAM-CONAMET, 2014, Procedia Materials Science 9 (2015), pp.571-577, Page 4-6, E-mail Adress : dhotza@gmail,com, Published by Elsevier, CCBY-NC-ND Licence, licences/by nc-nd/4.01, www.sciencedirsct.com, http ://creative comons.org, Federal University of Snta Catarinam Campus Universitario Joao David Ferreira de Lima, Floriano Polis, 88040-9001, Brazil, diunduh Tanggal 7 Januari 2018, Jam 23.15 W.I.B.

[17]Evans Vidija Sagwa and Appolonius Shitiabai Kembun, Effects of Competitive Strategy on the Performance Of Deposit Taking SACCOs in Nairobi County, Kenya, International Journal Business Research, European Journal of Business and Management, ISSN 2222-1905 (Paper) ISSN 2222-2839 (Online), Vol.8, No.8, 2016, School Business and Management Studies, Technical University Kenya, Po. Box.52428-0020 Nairobi, Kenya and School of Business and Economic, Mount Kenya University, Po.Box.342-01000 Thika Kenya, The Research was Conducted Under Research Permit NACOSTI/P/15/3402/7631 that wsh issued by th National Council of Science, Technology and Innovation (NACOSTI) Nairobi, Kenya, and Available for this in Email : www.freepatentsonline.com/araticle/International-Jurnal-Business-Research/208535102.html, diunduh Tanggal 7 Januari 2018, Jam 23.30 W.I.B.

[18]Ekeledo, Ikechi Bewayo, Edward D., Challenges and Opportunities Facing African Entrepreneurs and Theirs Small Firms, International Bussiness Research, Publisher : International Academic of Business and Economics, Audience :academic, Format : Magazine/Journal, Subject : Business, International, 2009, ISSN : 1555-1296, www.freepatentsoline.com/article/International, Quoting Akwani, Obi A., " Manufacturing in Nigeria : The Many Huddless Facing the Small Manufacturer,' http : www.imdiversity.com/Villages/Global/Business_finance/ ManufacturingNigeria.asp, August 2007, Accessed January 17, 2018. at 3.135 W.I.B.

[19]Yogesh Maheswary (CONSELOR IGNOU IIP-KOLKATA), Industrial Dispute in Jute Mills, International Journal of Marketing, Financial Services and Management Research Vol.2, No.7, July 2013, ISSN : 2277-3622, www.indianresearchjournals.com.

2) Indirect investment

Investors who want to invest their money need not be physically present, in order to obtain maximum results with the time span is not too long are able to enjoy the benefits. [20]

Deliarnov divide Types of Investments into 2 (two) categories which can be seen as follows:

1) Induced Investment

Induced Investment is investment that is held as a result of growing demand, which increase the demand is due to the increase in revenue. If income increases then the additional revenue will be used for additional consumption. While additional consumption is intrinsically growing demand;

2) Autonomous Investment

Autonomous Investment is an investment carried out freely, meaning that investments are made not because of the increased effective demand is precisely to create or increase effective demand. Autonomous investment is not affected capital formation of national income. So the level of national income does not specify the amount of investment made by the companies.[21]

Goods that can be invested by viper that investment products available in the market:

1) Savings Bank

By saving money in the bank will get a certain amount of interest rate following the policy of the concerned bank. Savings products usually allow us to take the money that we want in the bank;

2) Deposits at the Bank

By saving money and can be taken within a certain time period with a higher interest rate than savings and is not affected rise or fall in interest rates in the bank;

3) Share

Ownership of of the company, by buying shares means buying a portion of the company. If the company is experiencing a profit, then the shareholders will usually get part of the profits (dividends). Shares may also be sold to other parties both at the higher prices that the price difference is called capital gains as well as lower than we bought it that the price difference is called a capital loss. Gains could be obtained from there two stock dividends and capital gains;

4) Property

Investment in property means investing in land or house. The advantage to be had in the form of property, namely:

a) The property rents another parties so get rents;
b) The property sells at a higher price.

5) Collection items

Sample are collectible items stamps, paintings, and antiques,etc; The benefits of collectibles is to sell the collection to another party

6) Gold

price of gold will follow the increase in value of the currency of the country. The higher increase in value of the currency of the country the higher the value the increase of the foreign currency exchange rate, the higher the price of gold. The higher inflation is usually higher the rise in gold prices, gold often exceeded the rise in inflation itself;

7) Foreign Currency

Currency All sorts of investments in foreign currencies are generally riskier than investing in stocks due to foreign currency exchange rate in Indonesia is adopting a free float (free float) is totally dependent on supply and demand in the market. In Indonesia the free floating system makes the value of the currency is very volatile. [22]

Sadono Sukirno said investment activity allows the public to continuously improve national income and improve the welfare of society.[23] In an occupation where there is a limited labour supply but demand is very large, wages tend to reach higher levels. [24] he investment increases will be followed by employment in the industrial sector. The increasing investment of the new companies that require more labour in the industrial sector. Development of investment in Indonesia tend to fluctuate. Based on Article 13 of the Law of the Republic of Indonesia Number 25 Year 2007 on Investment that one of its goals is to create jobs.

[20]Hendrik Budi Untumg, *Loc. Cit.,* page.13.
[21]Deliarnov, TeoriEkonomiMikro, P.T. Raja Grafindo, Jakarta, 1994, page.85, www.landasanteori.com/2015/07/pengertian-investasi-jenis-dan-definisi.html, diunduh 11 September 2017, jam 19.30 W.I.B.
[22]Safir Senduk, Seri Perencanaan Keuangan Keluarga, Mencari Penghasilan Tambahan, P.T. Alex Media Komputoindo, Jakarta, 2004, page. 24.
[23]SadonoSukirno, PengantarTeoriMakroEkonomi, P.T. Raja GrafindoPersada, Jakarta, 2000.
[24]SadonoSukirno, Pengantar Teori Ekonomi Makro, P.T. Raja GrafindoPersada, Jakarta, 2003, page.369.

Wili Semer examined in 36 countries with different income levels, concluded among other things a general model of fiscal policy and growth in an economic with a government that taxes optimally and undertakes public expenditure on by :

a) Education and health facilities
b) Public infrastructure
c) Public Administration
d) Transfer and public consumption facilities
e) Debt Service.[25]

b. Public Policy Efforts in Achieving the goal for Investors Interested to Invest Holding in Indonesia

Rizal Affandi Lukman found ways to improve the industry's growth in Indonesia to attract investors is improving the investment climate with legal rigor, the efficiency of logistics which is in line with the transport system, increasing competitiveness of local government that is the competition between local governments, and coupled with handling the problem of disparity..[26]

There are several ways the Financial Services Authority (FSA) and the Stock Exchange as the operator has no way to realize an increase in the number of investors increased, namely:

1) Increase *supply*, to increase supply Financial Services Authority will continue to make the capital market as a source of funding that is accessible, efficient and competitive;
2) Improving *demand* market by establishing institutions *investor protection fund* that guarantee the investment potential investors from *fraud* (embezzlement);
3) Law enforcement, fair and transparent;
4) Sets standards of good corporate governance (GCG) of preventing violations;
5) Drafting new rules and revised regulations are adjusted to the prevailing international practice.[27]

The factors which affect investment and Terms Invest is as follows, Internal conditions and external conditions. The factors that have influenced the investment by Rizky P. Lubis, Muhammad Firdaus, and Hendro Saso, can be seen as follows below:

1) Internal conditions, either:
   a) Political and economic system of the country concerned;
   b) The attitude of the people and the government towards foreigners foreign capital;
   c) Political stability, economic and financial;
   d) The number and the population's purchasing funds as prospective customers;
   e) Their raw materials and auxiliary materials;
   f) Their cheap labour force;
   g) Their land for a place of business;
   h) The structure of taxation, customs and excise;
   i) Legislation and legal support of business assurance.[28]
2) External factors, such as:
   a) Political;
   b) Economy;
   c) Social;
   d) Technology;
   e) Environment;
   f) Law.[29]

[25]Wili Semer and Greiner, Alfred Dialo, Bobo and Rezai, Armond and Rajaram Anand, Fiscal Policy Public, Expenditure Composition, and GrowthTheory and Empirics, " *Policy Research Working Paper Series 4405, The World Bank* dikutip Wiwik Priyantoro,Analisis Pengaruh Pengeluaran Publik Infrastruktur dan Otonomi daerah terhadp PDRB/ Studi Kasus pada Enam Kabupaten di Provinsi Nusa Tenggara Barat Periode 1990-2008, Tesis, Universitas Indonesia, Jakarta, 2012, page.2,3. lib.ui.ac.id/file?file=digital/20290281-T26408-Analisis%20pengaruh.pdf, diunduh 13 September 2017, Jam 19.45 W.I.B.

[26]Rizal Affandi Lukman, Rabu 29/9/2010, Jakarta, Kompas.com Ekonomi.kompas.com/read/2010/09/29/1329426/ Bagaimana.Menarik.Investor.ke.Indonesia, diunduh 14 September 2017, Jam 19.55 W.I.B.

[27]Harry Andrian Simbolon, Lisa Lawrentiis, Joevan Yudha, Adam Zulfikar, Agus Triana Putra, Meningkatkan Jumlah Investor, Akuntansi Terapan for Better Business Practise,https://akuntansiterapan.com.2013/12/09/meningkatkan-jumlah-investor-di-indonesia/diunduh 12 September 2017, Jam 19.50 W.I.B.

[28]SoedjonoDirdjosisworo, Hukum Perusahaan mengenaiKegiatanMenanamModal di Indonesia, Mandar Maju, Bandung, 1999, page.226, dikutip Ikartini Dani Widiyanti, Tinjauan Yuridis terhadap Penanaman Modal Asing di Indonesia, library.unej.ac.id/client/search/asset/649, diunduh 12 September 2017, 20.55.

[29]Rizky P. Lubis, Muhammad Firdaus, HendroSasongko, JurnalBisnisdanManajemen, 2015, Vol.XVI, NO.2, page.80-89, Program PascaSarjana Manajemen dan Binis, Institut Pertanian Bogor, Bogor, Indonesia, Email Korespondensi : 1bsriszky@gmail.com, firdaus femipb@yahoo.com, jounal.feb.unpad.ac.id/index.php/jbm/article/downloadSupp File/11/2, 12 September 2017, 20.00 W.I.B.

3) Factors affecting private investment in Indonesia

According to Didier Herlianto his book entitled *Inside Investment in Capital Markets in Indonesia* explains the factors that affect the investment capital markets, among others:

a) Shares
   One of the instruments of financial markets is one option the company wants to raise capital company. Stocks as a sign of ownership of an individual or party (entity) within a corporation or limited liability company.
b) Bond
   A reversible medium term letter that contains the promise of the issuing party to pay the interest in the form of interest at a specified period and repay the principal of the debt at a predetermined time to the buyer of the bonds.
c) Derivative
   contract or agreement that the value or opportunity profits associated with the performance of other assets *(underlying asset)*, a derivative is a financial contract between two (2) or more parties in order to fulfil a promise to buy and sell *assests / commodities* that serve as objects that are traded on time and price a collective agreement between the seller and the buyer.
d) Mutual Funds are
   containers used to collect funds from the public per modal to be invested in portfolio securities by the investment manager.[30]

2. Reconstruction of Public Policy may Indonesia to Solve Problems in the Investment:

The definition of the legal construction of which was to find solutions to the legal problems faced by exploring the meaning that it faces.[31] Construction aims to find solutions to overcome the many problems in the law. Construction law is quite clear about something, quite simply, does not create new problems intended that the Court decision in the event of concrete can satisfy the demands of justice and benefit the justice seekers.[32]

Construction law to avoid a *vacuum of power*(vacancy law) alone. Reconstruction means that "re" means the renewal of a system or form.[33] Renewal of a system or form in a legislation to improve the legislation. Reconstruction of the reform law is a law, according to Indonesian Dictionary of Law reform is a drastic change for improvement in the field of law in a society or country.[34] Finding the incompleteness and weaknesses in the rule of law or the articles in a rule legislation to be renewed again by legislators.

According Sudikno Mertokusumo, laws are incomplete and unclear, then it must be sought and found."[35] This is called discovery of the law.

The discovery of weaknesses Act No. 25 of 2007 on Capital Investment, namely:

a. Adding the rule in Article 34 Paragraph (1) of Law Number 25 Year 2007 on Capital Investment, which reads, "enterprises or individual businesses as referred to in Article 5, which does not meet the obligations as specified in Article 15 may be subject to administrative sanctions, "can be changed to" Any companies or individuals referred to in Article 5, which does not meet the obligations as specified in Article 15, Article 16, Article 25 Paragraph (4) may be subject to administrative sanctions"
b. Adding rules in Article 34 of Law No. 25 of 2007 on capital investment, ie" enterprises or individuals who cause fatalities can be subject to criminal sanctions and administrative."
c. "Creating and establishing new rules on administrative sanctions for whoever complicate or hinder investors in making investment , As well as providing the most effective solutions to the problems which influenced the investment activities."

Discussion

In investment, the investors must be able to manage waste disposal plant that does not have an impact on environmental pollution, as well as industrial waste can leak polluting the sea or river water, groundwater, agriculture, erosion. Before investing investors must obtain permission from the residents, village officials to not get into trouble later in life, as well as demonstrations by the local residents, the factory was occupied by

[30]Didit Herlianto, *Seluk Beluk Investasi di Pasar Modal di Indonesia*, Edisi Pertama, Penerbit Gosyen Publishing, Yogyakarta, 2010, page.11, 13,19, 27.
[31]MuhNashirudin, KonstruksiHukum, https://sofiana. wordpress.com/tag/konstruksi-hukum/diunduhtanggal 9 Nopember 2017, Jam 01.00 W.I.B.
[32]Ahcmad Ali, *Menguak Tabir Hukum*, P.T. Ghalia, Bogor, 1998, page.191-192.
[33]Jerio Hallean, *Rekonstruksi dalam Hukum Acara Pidana*,www.academia.edu/27297698/*Rekonstruksi_dalam_hukum_acara_pidana*,diunduhtanggal 12 Nopember 2017, Jam 02.00 W.I.B.
[34]Kamus Besar Bahsa Indonesia, https://www.kamusbesar.com/reformasi-hukum
[35]Sudikno Mertokusumo, *Penemuan Hukum Sebuah Pengantar*, P.T. Liberty, Yogyakarta, 2007, page.37.

the locals so it can't operate. And when this happens, then there should be solving problems by consensus for approval or compensation because investors have a lot to pay for capital in setting up the investment.
This study contributes to the government should consider to address the constraints faced by investors in making investment in Indonesia, and the impacts of investing that will do the investors in order not to damage the environment and harm the state.

Conclusion

Definition of legal construction that is finding solutions to legal problems faced by digging meaning that it faces. [36] Construction aims to find solutions to overcome the many problems in the law. Construction law to avoid a *vacuum of power* (vacancy law) alone. While the law Reconstruction is a rearrangement of effort to re-examine the actual occurrence of an offense which is done by repeating back show as the actual incident.[37] Finding the lack of accessories and weaknesses in the provisions in a rule legislation to be renewed again by lawmakers tersebut.Pemerintah must reconstruct Act No. 25 of 2007 on the Capital Investment by adding the legislation, adding the rules in Article 34 is the first of administrative sanctions to anyone who complicate or hinder investors in making investments, as well as providing the most effective solutions to the problems which influenced the investment activities, both adding provide criminal sanctions and administrative for investors in doing disruptive effect on the investment, the third gives the criminal and administrative sanctions for those investors in making investment can be detrimental to the country of Indonesia.

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[36]MuhNashirudin, KonstruksiHukum, https://sofiana. wordpress.com/tag/konstruksi-hukum/diunduhtanggal 9 Nopember 2017, Jam 01.00 W.I.B.

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POLLUTER PAYS PRINCIPLE IN THE ENVIRONMENTAL DAMAGE CAUSED BY INDUSTRIAL ACTIVITIES A CASE STUDY OF SEVERAL COURT VERDICTS IN INDONESIA

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ABSTRACT

Industrial activities both mining and non-mining should pay attention to the carrying capacity of the environment because it affects the life of human beings and other living things. Industrial activityis one of the causes of environmental damage and/or resulting in pollution of water and air environments that exceed the threshold and even lead to the damage to natural and social environments. This paper discussed why the application of polluter pays principle in the destruction of the environment was not applied consistently, and industries were evasive from their responsibility for their activities that caused environmental damage. From some of the Indonesian Court Verdicts in the case of environmental pollution that should use the system of reversed evidentiary burden with the principle of absolute responsibility, it still implements the responsibility based on the mistake so that the affected people still have to prove through a lawsuit, such as the cases against PT. Inti Indorayon in North Sumatra, PT. Newmont Minahasa Raya in North Sulawesi and the Lawsuit against PT. Lapindo Brantas in Sidoarjo. The Court's verdicts in the case of environmental pollution have not fully applied the polluter pays principle and did not pay attention to the carrying capacity and the increasingly damaged environment for future generations.
Keywords: polluter pays, environment, industry.

Introduction

The state of Indonesia, which in the 1970s was known as an agrarian country, has now experienced a shift, not as an agrarian country anymore. With the enactment of Act no. 1 of 1967 on Foreign Investment in Indonesia, it accelerates the reduction of agricultural and forest lands due to the conversion to industrial landsfor both mining industry and manufacturing industrial areas. Based on the results of a study led by Matt Hansen from the University of Maryland, they found that Indonesia lost 15.8 million hectares of agricultural land in 2000 - 2012 (http // damage- agriculture and forest.blogspot.com/ was uploaded on 10th August 2014 at 22:39). Furthermore, the condition of the forests in Indonesia from 1950 to 1970 showed that the forest areas in Indonesia were estimated to be 162 Ha.However, after 1970, loggingswere done commercially, and the forest area was reduced every year to 2.83 million hectares. From the data of FAO (Food and Agricultural Organization), in the book of state of the World's forest in the period of 2000-2005, Indonesia's forest land was reduced by 1.87 million hectares (WirendroSumargo Forest Watch Indonesia, 2011: 5).

With such reduced conditions of agricultural lands and forests, it has become one of the causes of the natural environment damage. It even becomes one of the triggers of environmental pollution because the decrease of agricultural land and forest and the growth rate of industrial activity are not accompanied by a good planning,utilization, maintenance, supervision and law enforcement. It will result in environmental degradation, reduced flora and fauna, and even the impact on social conflicts.

The state of Indonesia, through the Ministry of the Environment, in March 1979, has established a working group on legal development and apparatus in the management of natural resources and environment, and then the draft of Act was passed into Act No. 4 of 1982 on Basic Provisions of the Environment that regulates the resolution of environmental disputes. Act No. 4 of 1982 that regulates the Basic Provisions of the Environment, is as a legal umbrella in the resolution of environmental disputes, through the legal instruments of State administration, civil law, or criminal law. The provision of Article 20 paragraph (3) of Act no. 4 of 1982 describes the "polluter pays principle" which mentions: Anyone who damages or pollutes the environment bears responsibility with the obligation to pay compensation to the sufferer whose right violated into a good and healthy environment. The provision of Article 20 Paragraph (3) of the Law clearly indicates that every polluter shall pay compensation to the affected communities, In other hand, based on the case example, 9 (Nine) Asahan residents of North Sumatra filed a lawsuit for a compensation respectively IDR 2,880,000on the activity of the paper mill industry of PT. Inti Indorayon in Medan which was considered to be polluting. The Medan District Court with its verdict dated July 11, 1989. No. 154/ Pdt.G/ 1989/ PN.Mdn, did not accept the lawsuit (Paul Effendi Lotulung, 1993: 70).

Furthermore, Act No. 4 of 1982 is considered incomplete, and, to adjust the development of the global environment, then the law was amended by Act no. 23 of 1907,It was then amended again with Law Act no. 32 of

2009. With the amendments of Act no. 4 of 1982, the polluter pays principle remains as one of the instruments to maintain the preservation of sustainable environmental functions.

After the enactment of the amendment of the laws, the expectation is surely that the pollution principle can be applied properly and consistently. Like the case of PT. Newmont Minahasa Raya through the government in it, the State Minister of Environment solved this problem through a non-litigation path to PT. NMR by requesting compensation for the loss of environmental quality and life of Buyat residents who were victims of Newmont's mining operations. In addition, the Government through the Public Prosecutor charged criminally the owner of the Newmont Mine named Richard Bruce Ness. However, the verdict statedthat he is free and not proven to be polluting. Subsequently, the case of Lapindo Brantas Mudflow in Sidoarjo which sacrificed the Village community of Siring Sidoarjo which was sued by the Indonesian Legal Aid Foundation as a Non Governmental Organization in the Central Jakarta Court against the Government of the Republic of Indonesia Cq. The President of the Republic of Indonesia and Lapindo Brantas Incorporated as the Defendant and, from the result of the lawsuit, the decision declared that it was rejected. From the description above, by viewing some results of the court decisions, the above title is interesting to discuss.

Main Problems

Based on the description of the introduction above, this paper raised the problems as follows:

1. Why is the application of pollutant pays principle in environmental damages not applied consistently?
2. Why did the Court in deciding the case of environmental pollution still use the element of mistake, not absolute responsibility?

Discussion

Environmental-Based Industrial Activities

The growth of industry, especially in the cities in Indonesia, is still seen and only oriented towards the efforts to achieve. economic growth targets, so the need for the development of industrial estate can not be avoided. Such an orientation does not adequately consider the purpose of structuring and the use of space in accordance with its designation. Conceptually, the industrial development plan should be conceptualized as a comprehensive and integrated plan by analyzing the aspects of capacity and environmental carrying capacity.

Industrial activities within a particular area should be based on the insight of the archipelago and national resilience, and it is expected to be achieved through the embodiment of: (a) the harmony between natural and artificial environment, (b) the integration in the use of human resources, and (c) the protection to spatial functions and prevention of negative impacts on the environment due to space utilization. As an anticipation to every industrial activity in order to maintain environmental conditions, the Environmental Impact Analysis (AMDAL) is an attempt to reduce negative impacts and risks at particular level that occur and to manage the risks through environmental law mechanisms and systems (M. Daud Silalahi, 2010: 2). AMDAL is an important instrument in any industrial activity that has an impact, so there is a mandatory responsibility for the activities to monitor their business activities carefully and periodically. The condition of the facility, its operation, and the requirements must be fulfilled in accordance with the business activity permit and report the results of their monitoring to the authorized institution; in this case, the Environment Agency (BLH) in each Regency/ City. Employers are required to maintain the environment to support sustainable development, to prevent and control pollution and damage (Article 6 of UULH of 1997), and to evaluate the activities in the vicinity of the business and/ or activities (Article 25 of Act 32/2009). Therefore, the increasingly complex and constantly evolving industrial activities have a high risk to the threat of environmental pollution, so it is necessary for the government to monitor every activity of the companies for their industrial activities to continue to integrate the environmental, social, and economic aspects in the development strategies to ensure the integrity of the environment and the safety, abilities, welfare, and quality of life of present and future generations.

Pollution Pays Principle in Environmental Damage

The polluter pays principle, according to the description of Simons (SitiSundariRangkuti, 1986: 142), was originally proposed by the economist E.J. Mishan in The Cost of Economic Growth in the sixties: het principle de vervuilerbetaalt is door de econoom E.J. Mishan in The Costs of economic growth gelanceerd .in de zestiger jaren en is sindsdien kortetijd voor de wereld die zich gehelennheu met het een en bezig Houdtelegemenactnvaardeslazingeworden.

The polluter pays principle is derived from economics based on the notion that po9lluters are merely the ones that commit the pollution so that they should be able to avoid it. Similarly, the legal norms in the form of prohibitions and licensing requirements have the purpose to prevent contamination that may be evitable.

In the polluter pays principle for the perpetrators of environmental pollution, it is also encouraged by the international organization engaged in the environment; the Organization of Economic Cooperation and Development (OECD). The organization internationally, from June 15 to 16 in 1971, had a meeting with the OECD member countries to apply the polluter pays principle. The pollution pays principle has been followed by Indonesia under the provisions of Act No. 4 of 1982 as regulated in Article 20 paragraph (3); anyone damages or pollutes the environment is assumed to have the responsibility to pay the cost of restoring the environment to the state. The provision of the Article is not clear on how the mechanism of the cost recovery procedure to every environmental destructor (polluter) because it must be regulated by law and until finally act no. 4 of 1982 was amended by Act no. 23 of 1997.

The provisions of Act No. 23/1997 in article 35 paragraph (1) stipulate that the person in charge of businesses and/ or activities whose businesses and activities have significant and important impacts on the environment, which use hazardous and toxic materials, and/ or produce hazardous and toxic waste, has absolute responsibility for the damages incurred by the obligation to pay compensation directly and immediately at the time of the occurrence of pollution and/ or damage to the environment. The provisions of article 35 paragraph (1) with Article 20 paragraph (3) of Act no. 4 of 1982 have fundamental difference. According to the writer, the obligation to pay compensation is not only to the State, but it is also to the sufferer (the affected one), and the error is not necessary to be proven by the Plaintiff. Therefore, based on the provisions of the article, judge should open the opportunity to use the concept of responsibility under the provisions of Article 35 of Act No.32 / 2009 (EkoPujiono, 2007: 212).

From the first and second environmental laws (Act No. 23/1997), and the third environmental law change (Act No. 32/2009), it is found that when a society files a lawsuit to the Court regarding the action conducted by industries, such as the lawsuit filed by 9 (nine) Asahan people against PT. IntiIndorayon in Sumatra, the government's lawsuit against PT. Newmont Minahasa Raya and community lawsuit of Siring Village of Sidoarjo Regency against PT. LapindoBrantas, in the legal considerations of the verdict, the judges did not consider the principle of polluter pays principle and in practice there were many difficulties for the application of the principle.

Actually the polluter pays principle is a provision that is not negotiable and judges must make a legal breakthrough because it is stated explicitly in the provisions of the third article of the Environmental Law; but the value to pay is not set exactly. In relation to the polluter pays principle in the case of the environmental pollution is the Netherland which expressly creates the polluter pays principle (SitiSundariRangkuti, 1986: 149).

Nederland is met de uitvoering van het principekoploper en heft alsenig land ditprincipesystematisch in vin weigevingingehracht in de vorm van mogelikheden tot .specifiekeheffingenvoorlederdeel (tie) van de millieuveronireining.

The principle that the polluters should pay for environmental pollution countermeasures and the prevention of new pollution in the Netherlands is applied strictly to the formulation of environmental legislation, primarily through financial means.

Several Decisions of Courts That Are Not Base On Absolute Responsibility

In the environmental provisions no. 4 of 1982, there is no difference with Act no. 23 of 1997 and Act no. 32 of 2009 on the resolution of environmental disputes within Act no. 4 of 1982, when polluters damage or pollute the environment, they bear the responsibility by paying compensation to the sufferers. Therefore, it is held without going through mediation process. In other hand, in the provisions of Act no. 23 of 1997 and Act no. 32 of 2009, in the event of an environmental dispute, the resolution may be taken by the court or out of court on the basis of voluntary choice from the parties to the dispute but not applicable to environmental crime.

In the case of environmental pollution, the party responsible for the business and / or activities with great and significant environmental impacts, which use hazardous and toxic materials, and / or produce hazardous and toxic wastes, are ultimately responsible for the loss with the obligation to pay compensation directly and immediately in the case of environmental pollution and/ or damage (Article 35 paragraph 1 of Act No. 23/1997). Likewise, in the provisions of Act no. 32, 2009, any person whose actions, activities and/ or activities uses B3 (hazardous substances), produce and/ or manage B3 waste, or which poses a serious threat to the environment is ultimately responsible for the losses incurred without the proof of error element.

Of the three laws, there are differences on the settlement of environmental disputes; in Act no. 4 of 1982, it is not initiated by mediation but directly resolved in court. In Act no. 23 of 1997 and Act no. 32 of 2009, there are two options that can be done out of the court and resolved in the Court when the out-of-court resolution is not reached. The provisions of the articles clearly explain who causes environmental pollution, so the principle of absolute responsibility without the need to prove the guilt of the perpetrators applies (Article 88 paragraph 1 of Act No. 32/2009).

Some environmental disputes resulted from mining or non-mining industrial activities, in the Court's decision, are still based on the element of error. On the juridical point, the matter of responsibility has been regulated so that there is no hope for the people affected by pollution and it is difficult to get justice, as well as ecological justice that is part of human rights and the environment (Aaron Sachs, 1997 44).

As an example of environmental disputes, when Act no. 4 of 1982 had been enacted, the Asahan community of North Sumatra has represented 9 (nine) people to file a lawsuit to the Medan District Court against the Pulp and Paper Company of PT. Inti Indorayon to claim the compensation of IDR 2,880,000 due to an environmental pollution as registered in the case no. 4 / Pdt.G / 1989 / PN.MDN.

As the basic reason why the Asahan community filed a lawsuit, it was the activities of PT. IntiIndorayon as a Pulp company, in their factory operations, which were suspected to have environmental pollutions in the form of deforestation, decreasing the water level of Lake Toba, crop failure, pet death and disturbing odor so that the community had suffered due to continuous waste disposal.

By the Medan District Court with its verdict dated July 11, 1989 of the case, the lawsuit filed by the Asahan community was declared unacceptable because it had not been taken through the examination by the Team as mentioned in Article 20 paragraph (2) of Act no. 4 of 1982.Therefore, the lawsuit was still considered premature although, when examined, the provisions of Article 20 of Law. 4 of 1982 does not govern mediation.

In another case, the people living around the blue jeans washing affected by the air pollution caused by the factory activities established around 1988.It is also a confectionary using electrically powered machinesand kettle. It also made artesian wells and used chemicals for the entire production mechanism (P. Joko Subagyo, 1992: 94).

The basis of the lawsuit filed by the Plaintiff was the operations of the company. The defendants every day caused air impurities which are felt to smell of chemicals as well as flying dust from the company's location. As a result, 15 birds and 20 birds belonging to one of the Plaintiffs died. In addition, it also caused noisy from the sound of machines with vibrations on the walls of the plaintiffs; wastewater steaming smelly chemicals through sewers, and the fear of environmental damage.

According to the Plaintiff's Explanation, there was repeated deliberations that resulted in the ability to stop the pollution even if it was only verbally expressed. However, the defendant always repeated the same actions against what had been agreed upon. Even, it was structurally tried to be resolved through the Regional Government and the Central Government on the issue of industrial waste.

The Panel of Judges in their decision decided:

- Refusing the plaintiff's claim
- Refusing the plaintiff's claim to the fullest;
- Imposing the plaintiff to pay a court fee of IDR 50,000 (fifty thousand rupiah).

PT. Newmont Minahasa Raya is a mining company that cooperates with the Government of the Republic of Indonesia in the framework of Foreign Investment. The types of excavated materials that are allowed to be processed are gold and other minerals, except oil and gas, coal, uranium and nickel with an area of 527,448 hectares for a processing period of 30 years starting from December 2, 1986. In the exploration phase, PT. NMR discovered the gold deposit in 1988. Then, the mining operations will be planned with an area of 26,805.30 hectares to be conducted in Messel, RatatotokSub-District, Minahasa District, 65 miles southwest of Manado or 1,500 miles northeast of Jakarta.

The pollution and impact due to the mining activities of PT. NMR occurred from 1996 to 1997 with 2000-5000 cubic tons of waste every day disposed by PT. NMR to the waters of Buyat Bay which started in March 1996. According to PT. NMR, the waste disposalwas encased in a thermocline layer at a depth of 82 meters. Local fishermen strongly protested the waste disposal due to many dead fish.

The government, in this case the State Minister of Environment, solvedthe problem through non litigation against PT. NMR by asking for the compensation of 124 million dollars in compensation as a result of the decline of environmental and citizen life. Buyat is the victim of Newmont mining activities. PT. NMR was only able to pay 30 million US dollars, and the completion of the litigation path was also considered as an appropriate solution. However, in 2005, this case went to a criminal lane. However, on April 24, 2007, the Panel of Judges of the Manado District Court freed Defendant I - PT. Newmont Minahasa Raya and Defendant II - Richard Bruce Ness from the lawsuit of environmental pollution. In their verdict, the Panel of Judges stated that Defendant I - PT Newmont Minahasa and defendant II - Richard Brune Ness were not legally and convincingly proven guilty of committing a crime in the primary indictment,subsidiary indictment, more subsidiary indictment, and much more subsidiary indictment (http // www.google.co.id// q = case+pollution+pt+newmont+minahasarayadownloaded on 12-8-2014 at 9.44).

From the two cases above, in reality, there has been environmental pollution by industries, and the legal instrument used as the basis of the lawsuit was Act no. 4 of 1982, so that the Panel of Judges in making the legal considerations in the decision should not be based on the evidence presented by the plaintiff and not the element of error that has to be proven by the Plaintiff.

Furthermore, there are two examples of environmental dispute cases which are very interesting after the enactment Act no. 23 of 1997 which was then amended by Act no. 32 of 2009 for the amendment of Act No. 4 of 1982.

Furthermore, the case that was just miserable the community in the village of Siring, Sidoarjo, East Java due to the drilling of PT. Lapindo Brantas which spewed hot mud to drown the houses of the people, the location of the company, and the paddy fields around Porong sub-district. As a result of this massive mud eruption, it caused a huge impact so that the people suffered material and immaterial losses, including the destruction of rice fields and environmental damage. Then, YLBHI filed a lawsuit to the Government of the Republic of Indonesia Cq President of the Republic of Indonesia Cq Minister of EMR Cq. The State Minister of Environment et al, PT. Lapindo Brantas Incorporated as the defendants as registered in the case No. 384/ Pdt G/ 2006/ PN.JKT.PST at the Central Jakarta District Court.

From the result of the decision, it was stated that the Defendants did not act against the law, there was no evidence of pollution or environmental destruction, but it was a natural disaster so that the lawsuit was declared to be rejected (the Data of the Verdict was taken from the Central Jakarta District Court on January 15, 2008).

From the above cases, it shows that the lawsuit filed by the public affected by pollution as a plaintiff, the judges did not apply the reserved burden of proof for the verification system. It means that the burden of proof was still charged to the Plaintiff, and the panel of judges did not apply a system of strict liabilitybut still applied the element of error meaning that the plaintiff must prove the guilt of the defendant. The court (the judges) should have the courage to make a breakthrough to apply the concept of liability (strict liability charged to the perpetrators of pollution) as stipulated in Article 35 of Act no. 23/1997 which is now with Act No.32 of 2009 in Article 88. In order to balance the justice of the community, the judges in deciding cases should not be influenced by the social class between the poor people with the industries with the capability of capital (John Rawls, 2006: 86).

Conclusion

Based on the description above, it can be concluded as follows:

a. The application of the polluter pays principle in environmental damage was not consistently applied by the judges in some environmental cases because there was a difference of interpretation in understanding the polluter pays principle and the interpretation of compensation to the sufferer and the panel of judges as if they did not consider the community in a weak position. Likewise, the judges should pay attention to the capacity of the environment that is increasingly damaged for the sake of future generations.
b. The court, in deciding the cases of environmental pollution based on cases that have been decided, still used the element of mistake, not an absolute responsibility. The judges should have the courage to decide on the basis of the principle of absolute responsibility because firmly the absolute responsibility has been regulated in the Environmental Law, and the burden of proof is not emphasized to the plaintiff (the sufferer), it is the defendant (the perpetrator of pollution) who must prove his guilt.

BASIC DYNAMICS OF PUBLIC POLICY TESTING BETWEEN THE LEGAL AND THE BENEFIT APPROACH

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ABSTRACT

Government Administration according to Law Number 30 of 2014 concerning Government Administration shall include the management of decision-making and/or actions by government bodies and/or officials, which, if harmful to the interests of the public may be sued in the Administrative Court of the State. In government administration, a decision is a written provision which is issued while the action includes the concrete act or not done in the framework of the administration. Government administrative action included as an object of lawsuit is to improve the quality of government administration, legal protection for both society and government officials and realize good governance. Some opinions state that government administration is qualified as a public policy that only concerning the actions of government administration. The characteristics of public policy, among others, provide the government with choice in acting, aimed and binding the whole society and oriented to the public interest so that the basis of testing is the benefit (doelmatigheid toetsing). The basis for examining the lawsuit object in the Administrative Court according to the explanation of Article 48 of Law Number 5 Year 1986 concerning the State Administrative Court is a legal test (rechtmatigheid toetsing). If public policy is sued in the Administrative Court, a proper concept of testing grounds and parameters is required so that public policy objectives are not neglected and do not deviate from testing legally as a basis for testing in the Administrative Court.

Keywords: Basic Testing, Administrative Court, Public Policy

Introduction

Act Number 30 of 2014 about Government Administration (hereinafter referred to as the UUAP) defines the administration of government as the governance in decision-making and/or actions by the agency and/or government officials. This definition when parsed, which meant government administration can be either a decision or acts or actions that are preceded by a decision. Subjects who perform government administration may be bodies or officials. Government administration decisions can be defined as written provisions issued by the body and / or Government Officials, whereas the action of administration government include done and/ or not done a concrete action. The decisions and the administrative actions in the framework of the administration if harming the interests of the public can be sued in the Administrative Court. Government administrative action included as an object of lawsuit is to improve the quality of government administration, legal protection for both society and government officials and realize good governance.

James E. Anderson gives the understanding of public policy as *a purposive course of action followed by an actors or set of actors in dealing with a problem on matter of consern*[1]. Other opinions expressed by Thomas R. Dye that public policy is *whatever governments choose to do or not to do*. Similarly David Easton Defines *public policy* sebagai *the authoritative allocation of value for the whole society, but it turns out that only theg overnment can authoritatively act on the 'whole' society, and everything the government choosed do or not to do result in the allocation of values*[2].

Based on these various opinions, the point-to-point public policy is any action taken or not done with the objectives followed and implemented by the community to solve a particular problem. When referring to a government administration that is qualified as a public policy only concerning the actions of government administration, whereas administrative government decisions are not included. James E. Anderson further states that public policy is a policy developed by agencies and government officials. This understanding is implied by [3]:

1. Policies always have a specific goal or goal-oriented action,
2. The policy contains actions or patterns of action of government officials,
3. Policy is what the government actually does,
4. Policies can be positive in the sense that they are some form of government action on a particular issue or are negative in the sense that it is a government official's decision not to do something,
5. The policy, in a positive sense, is based on legislation and is coercive (authoritative).

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[1] James E. Anderson, *Public Policy Making*, Holt, Rinehart and Winston, New York, 1984, third printing, Page 12.
[2] Afrizal WS Zaini, *Definisi Kebijakan Publik Menurut Pakar*, https://afrizalwszaini.wordpress.com /2012/01/13/defenisi-kebijakan-publik-menurut-pakar/ accessed on January 8, 2018, at 19:15 pm
[3] James E. Anderson, *op.cit*, Pages 12-13.

The characteristics of public policy are, among other things, the government's choice of action, the act has a purpose, and is allocated to the whole society so that it is binding and public-oriented[4]. In the administrative realm of government as stipulated in Article 22 paragraph (2) of Law Number 30 of 2014 on Government Administration (UUAP), Government Officials can conduct discretion aimed at conducting government administration, filling legal vacuum, providing legal certainty and overcoming government stagnation in certain circumstances for the benefit and the public interest. Discretion includes decision-making and / or action in the event of a provision of legislation providing choice or decision-making and / or action in the case of statutory regulations not regulating, incomplete or unclear or decision-making and / or actions due to government stagnation in the interests of the wider.

If the objective of the discretion as stipulated in Article 22 paragraph (2) of UUAP is related to the characteristics of public policy, then there is the similarity between public policy and discretion, that is, actions in which the government is enabled to make choices in acting and the action has a purpose. It's just that public policy is broader because it includes the choice of inaction as long as it has a purpose for society. The Indonesian legal state contains the consequences that if a party or community (read: a civilian person or legal entity) feels aggrieved of its interests as public policy may file a lawsuit to Administrative Court (PTUN).

The basis of decision testing or government administration action including public policy and discretion according to the explanation of Article 48 of Law Number 5 of 1986 concerning State Administration Court (PTUN) is a legal test (*rechtmatigheid toetsing*). While the characteristics and implications of public policy and discretion based on the opinion of James E. Anderson also the provisions of Article 23 UUAP, among others, contain elements or goal-oriented so that in line with the goals of discretion that is usefulness and public interest. Therefore the relevant basis of public policy testing is a test of expediency (*doelmatigheid toetsing*).

On the one hand, the examination of the disputed object in the Administrative Court is a legal test (rechtmatigheid toetsing), on the other hand the relevant public policy test is the *doelmatigheid toetsing* but in the procedural law of the state administrative court, the test of doelmatigheid toetsing constitutum is unaccommodated, so that this paper discusses and analyzes how the basis of testing the right public policy as well as having formal legality in the procedural law of the administrative court.

The Act Government Administration and authority PTUN before UUAP

The Act of government administration includes the deeds of the law (*recht handelingen*) and perform factual actions (*feitelijke handelingen*). The act of law consists of the act of issuing a decision (*bechikking*) and make rules (*regeling*). Government law act in the form of making rules (*regeling*) is a regulating activity with a rule (*regels*) the general nature of which is addressed to the plural *addressat* and can not be determined with certainty and abstract is not real about the actions governed. Simply regulation is a legal instrument of a general nature, contains arrangements, apply and binding to the public[5].

If the public feels that errors or errors in the formulation procedure will have implications for the legality of the regulation and therefore may be required for judicial review to authorized institutions. Judicial review includes testing of the formation process (formal test) and its cargo material (material test). In particular the formal test of the law against the 1945 Constitution is associated with the law in a formal sense (*wet in formele zin*) whereas the material test is associated with the law in a material sense (*wet in materialile zin*) in which both forms of testing are by the Law Law Number 24 of 2003 regarding the Constitutional Court is distinguished by the terms of the formulation of laws and content of the law[6]. Judicial review of laws and regulations against the law through the Supreme Court.

The act of government in the form of factual legal action (*feitelijke handeling*) which is contrary to law is called an act against the law by the government (*onrechtmatige overheidsdaad-OOD*). The test is conducted by the General Courts based on the provisions of Article 1365 of the Indonesian Civil Code which is interpreted as a government action against written law (legislation) or unwritten law (legal principles, rules, values) or violates its own legal obligations, violates the subjective rights other parties (read: the public), violate decency or propriety[7].

Basically every act of government can be tested, only by different court environment. Before the promulgation of UUAP, the three administrative acts only issue a decisions (*beschikking*) which is the authority of the Administrative Court to examine, decide and resolve the state administrative dispute between civil persons or legal entities resulting from the issuance of state administrative decisions. It is based on the

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[4] Wijaya, *Slide Hukum dan Kebijakan Publik*, Program Doktor Ilmu Hukum - PDIH Universitas 17 Agustus, Semarang, 2017, Page 9.

[5] Jimly Asshiddqie, *Hukum Acara Pengujian Undang-Undang*, Sinar Grafika, Jakarta, 2010, Page 2.

[6] *Ibid*., Pages 57-58.

[7] Enrico Simanjuntak, *Beberapa Anotasi Terhadap Pergeseran Kompetensi Absolut Peradilan Umum Kepada Peradilan Administrasi Pasca Pengesahan UU No. 30 Tahun 2014*, Genta Press, Yogyakarta, 2014, Pages 64, 68.

object that can be sued in the Administrative Court is a written stipulation issued by the Board or the State Administration Officer containing the state administrative law acts based on the applicable, concrete, individual, and final applicable laws and regulations, law for a person or a civil legal entity (*vide* Article 1 point 9 of Law Number 51 Year 2009 regarding the Second Amendment to Law Number 5 Year 1986 regarding State Administrative Court).

The authority of the Administrative Court which only examines, decides and resolves the dispute over the issuance of a decree as a legal act of the government has been declared since the draft of the PTUN Bill on December 20, 1986, submitted by Ismail Saleh, then Minister of Justice at the same time by Paulus Effendi Lotulung, in the whole process of drafting and deliberation of the Bill of State Administrative Court[8]. The limited authority of the Administrative Court of Justice shall only examine the legal act of the government issuing the decision (beschikking) valid until the enactment of UUAP.

The authority of PTUN after UUAP

The Government Administration Law enacted on October 17, 2014 has an impact on the competence of the Administrative Court. Article 1 Sub-Article 1 of the Act clearly states the extent to which the so-called government administration covers the management of decision-making and / or action. Competencies since the establishment of the Administrative Court even since the enactment of the Administrative Court Law have only the authority to test the (*beschikking*) decision supplemented and expanded by the inclusion of the act (*feitelijke handelingen*) as part of the government administration. Even in Article 1 number 7 of UUAP, the definition of the decision also contains only elements of written provision, issued by the Agency and / or Government Officials, in the administration of the government. Less than the element of decision according to Article 1 number 9 of the Administrative Court Law, however, juridically it extends the authority of PTUN.

In addition to the body of the UUAP also extending the competence of the Administrative Court, including Article 21 on the authority of the abuse of authority test, Article 22-32 on the authority of discretionary testing, Article 53 on the authority of positive fictitious decision testing, Article 87 on the authority of the test against the expansion of what called the decision. When Article 53 Paragraph (2) of Law Number 5 Year 1986 concerning State Administrative Court has not been amended by Law Number 9 Year 2004, the abuse of authority is one of the basic testing of a decision (*beschikking*) with parameters, whether the subject issuing the disputed objects using the objective other than the purpose of granting authority or not. Next Article 53 paragraph (2) is amended by Law Number 9 Year 2004, the abuses are no longer the basis of testing in the Administrative Court. Thus, with the authority to examine the abuse of authority provided for in Article 21 of the UUAP, basically restores the authority of the PTUN. Only according to the provisions of Article 17 paragraph (2) UUAP parameters whether or not there is misuse of authority is a prohibition beyond Authority, Mixed Authority, and / or arbitrary.

The authority of the PTUN to examine discretion is the examination of a decision and / or action in the event of a provision of a legislation providing an option or not regulating or incomplete / obscure or because of government stagnation for the wider interests. UUAP does not govern whether the basis of discretion testing. However, referring to Article 24 letters a, b and c UUAP, can at least be used as a guideline that the discretion must be in accordance with its objectives, not contrary to the laws and regulations, in accordance with the Good Governance Principles (AUPB). UUAP does not distinguish the basis of the test using legislation or AUPB. The basis for the examination of disputed objects in the PTUN before UUAP is differentiated between the decisions derived from the bound authority (*gebonden beschikking*) which is tested by legislation and the decision derived from free authority (*vrij berstuur / discretioner*) which is tested with AUPB.

One of the extensions of the authority of the Administrative Court according to UUAP is as stipulated in Article 53 paragraph (4) namely to decide upon the request to obtain the decision and / or the action of the body or government official. The authority was born because the public who submitted a request and has been received by the body or government official, but the request was not responded, not answered, but also not granted. The silence of the body or government official is counter-productive with the public service, so UUAP considers legally the body/ or government official to issue a decision in the form of granting the request of the community (*positive fictitious*). The assumption that the petition has been granted, UUAP authorizes the Administrative Court to examine it and decide whether the request is to obtain a decision and/ or action of a legal body or agency or government official or not to be corroborated by a decision.

The object of dispute in the Administrative Court which has been based on the provision of Article 1 point 9 of Law Number 51 Year 2009 by Article 87 UUAP is meant to extend into a. written determination which also includes factual acts; b. Decisions of the Board and / or State Administration Officials in the

[8] See the minutes of discussion of the bill of the State Administrative Court in May 1986 until it was ratified by the Law at the end of December 1986, Sekretariat Jenderal Dewan Perwakilan Rakyat RI, Jakarta, 1996, Pages 1610-1611, at Enrico Simanjuntak, *Ibid.*

executive, legislative, judicial and other state administrations; c. under the terms of legislation and AUPB; d. final in a broader sense; e. Decisions that have the potential to cause legal consequences; and/ or f. Decisions applicable to citizens. This means that there is an extension of the meaning of the TUN decision into a government administration decision according to UUAP.

Basic Public Policy Testing at PTUN

The state administrative dispute (TUN) occurs due to differences of opinion concerning the application of law between a civil person or legal entity who feels aggrieved by a TUN decision with the TUN body or officials who administer government affairs[9].

The implementation of government in the state of law and welfare is carried out with the development for the benefit of the society which aims to achieve prosperity (*welfare*). Perspective welfare in the form of public policy benchmark is the purpose and benefits of development then the basis of testing is the usefulness (*doelmatigheid toetsing*). On the other hand, public policy aimed at the public has the potential to cause harm to society, so the right of lawsuit through PTUN. Juridical oversight / control is the law, so the basis of testing in the Administrative Court as a judicial institution is legally (*rechtmatigheid toetsing*).

The basis of judicial testing has been introduced in the explanation of Article 48 of the Administrative Court Law, which states: "In contrast to the procedures in the State Administrative Court, the administrative appeals procedure or objection procedure shall be subject to a full assessment, both in the application of law and in terms of discretion by the disconnecting agency". In a contrario, the basis of testing in the Administrative Court is only about the application of the law (*rechtmatigheid*).

The procedure of appeal and administrative appeals is called administrative effort(*administratieve beroep*), or quasi-administrative judiciary (*quasi recht praak*), or improper administrative proceedings (*eigenlijke administratieve recht praak*) *and administratieve tribunal*[10] namely a procedure that can be taken and carried out in the environment of self-government for civil persons or legal entities if not satisfied with a decision TUN. In an administrative effort an assessment is performed or a test basis is used(*toetsing gronden*) in the form of legal application(*rechtmatigheid*) and his wisdom (*doelmatigheid*). This is the basic difference of testing between administrative measures that may test the legal side (juridical) as well as issues that are still within the level of beleid or wisdom, but administrative courts only examine the legal (juridical) it alone, should not be cut off things which concerns beleid or wisdom[11].

J.H Van Kreveld mentioned the wisdom of many issued in the administration of state administrative tasks in various forms *beleidslijnen* (lines of wisdom), *het beleid* (wisdom), *voorschriften* (regulations), *richtlijnen* (guidelines), *regelingen* (clues), *circulaires* (circular letter), *resoluties* (resolutions), *aanschrijvingen* (instructions)), *beleidsnota's* (note of wisdom), *reglemen ministriele* (ministerial regulations), *beschikkingen* (decisions), *en bekenmakingen* (announcements)[12]. Bagir Manan mentions the following characteristics of the policy rules[13]:

a. The policy rules are not legislation
b. The principles of restriction and testing of statutory regulations can not be enforced under the rules of discretion.
c. The rules of wisdom can not be tested in a wetmatigeheid manner, as there is no basis of legislation to make such policy regulatory decisions
d. Policy rules are made on the basis of *freies ermessen* and in the absence of the administrative authority concerned to enact legislation.
e. Testing of the rules of wisdom is left to the *doelmatigheid* so that the test stone is the general principles of decent governance.
f. In practice it is given a format in various forms and types of rules, namely decisions, instructions, circulars, murmurs, etc., can even be found in the form of rules.

Wisdom is a waiver of a provision in the form of or not done an act with certain considerations and conditions. Policy is the implementation of an authority to solve problems or circumstances to achieve certain goals. Some experts like James E. Anderson, Thomas R. Dye and David Easton define public policy at its core is any action taken or not done with the objectives that are followed and implemented by the community to solve a particular problem[14].

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[9] Muchsan, *Pengantar Hukum Administrasi Negara Indonesia*, Liberty, Yogyakarta, 1982, Pages 47, 58.
[10] Paulus Effendie Lotulung, *Beberapa Sistem Tentang Kontrol Segi Hukum Terhadap Pemerintah*, Buana Ilmu Populer, Jakarta, 1986, Pages 21-23.
[11] S.F. Marbun, *Peradilan Administrasi dan Upaya Administratif di Indonesia*, UII Press, Yogyakarta, 2003, Page 13.
[12] Ridwan HR, *Hukum Administrasi Negara*, PT. Raja Grafindo Persada, Jakarta, 2010, Pages 182-183.
[13] Bagir Manan, Peraturan Kebijaksanaan, Makalah, Jakarta, 1994, Pages 16-17.
[14] Afrizal WS Zaini, *loc. cit*.,

Neither policy nor policy involves whether or not an action is carried out with a specific purpose which may be either formalized or formalized in the form of a decision. The difference is that wisdom is only intended for certain qualified parties with certain considerations, such as the policy of motor becak is prohibited except for pedicabs. while the policy is aimed more generally (public) as the implementation of policy-making authority, such as the 12-year compulsory education policy.

Referring to the gravity of the objectives to be achieved in order to respond to a particular situation and the formal form of a policy or policy sometimes in the form of decision (*beschikkingen*), then there are times when wisdom is considered equal to the public policy so that one character is a test based on the principle of benefit and purpose (*doelmatigheid*) as part of the general principles of good governance (AUPB). In addition, the public policy only covers the actions of the government administration in the form of factual action (*feitelijke handeling*), while the administrative decisions are not included. The authority of the PTUN granted by UUAP includes testing both of decisions and actions. Public policy that contains elements of action can be sourced from bound authority (*gebonden bestuur*) or sourced from free authority (*vrij bestuur / discretionare*). Actions derived from free authority, in essence, policy makers have the authority but how to use that authority legislation does not regulate, or provide choice or regulated but not clear and / or action due to stagnation of government for the wider interests. The exercise of this kind of authority is called the discretion authority.

Using comparative interpretation method that is by comparing between one law with other law with the intention to seek clarity of a provision of the Act and use method of argument analogy that is invention of law by giving equal to an event which have similarity of problem and event with regulated by Law[15], then public policy testing may use discretion testing.

How to test the discretion is not regulated, Article 22 paragraph (2) UUAP only determines Government officials can do discretion which aims to: launch government administration, fill the legal void, provide legal certainty and overcome the stagnation of government in certain circumstances for the benefit and the public interest. Further Article 24 UUAP governing government officials who use discretion must meet the following requirements: a. in accordance with the objectives of discretion as referred to in Article 22 paragraph (2); b. not contrary to the provisions of laws and regulations; c. in accordance with AUPB; d. based on objective reasons; e. does not constitute Conflict of Interest; and f. done with good faith.

From these provisions it can be concluded that the discretion derived from the bound authority is still tested legally (*rechtmatigeheid*) even based on legislation (*wetmatigheid toetsing*), while the discretion derived from the free authority of the benchmark is the purpose and usefulness of the discers and the basis of testing is *doelmatigheid toetsing*.Legal testing (*rechtmatigheid toetsing*) on discretion sourced from the bound authority, reference and benchmarks are legislation in a formal sense whereas the test against discretion sourced from the free authority is tested in the benefit and purpose (*doelmatigheid toetsing*), reference and benchmark is AUPB.

If the PTUN examines a public policy based on a legal (*rechtmatigheid toetsing*) authority, it may well be concise and quick to decide that a public policy is in conflict with legislation in a formal sense, because as previously outlined, public policy which in certain respects the same with the discretion can be issued as long as there is authority but without the basis of legislation that determines the manner in which authority is used. That is, in the case of legislation not regulating, regulating but incomplete or unclear or to overcome the stagnation of government for the wider interests. Conversely, if the PTUN examines a public policy derived from the authority directly bound by benefit and purpose (*doelmatigheid toetsing*) then the PTUN does not follow the basis of judicial review according to the procedural law as stipulated in the Elucidation of Article 48 of the Administrative Court Law.

The Principles of Good Governance (AUPB) under Article 10 paragraph (1) include the following principles: a. legal certainty; b. expediency principle; c. impartiality; d. precision; e. not abuse the authority; f. openness; g. public interest; and h. good service. The principle of expediency refers to the explanation of the article can be summed up as a balance between the various related interests. The head of each court decision is "*Demi Keadilan berdasarkan Ketuhanan Yang Maha Esa*". Therefore the purpose of justice should be placed on top of other goals. Justice can be achieved if there is harmony and harmony between legal certainty and legal expediency. The association with the basis of public policy testing is to integrate the basis of legal testing (*rechtmatigheid toetsing*) and the basis of expediency testing (*doelmatigheid toetsing*) because the purpose of public policy is public benefit while the Administrative Court as a judicial institution refers to the legal and juridical basis. A fairness when the PTUN uses a dynamic testing basis between *rechtmatigheid* and *doelmatigheid*.

[15] Mufliha, *Penemuan Dan Penafsiran Hukum*, http://mufliha-oke.blogspot.co.id/2008/02/02-penemuan-dan-penafsiran-hukum.html, accessed Wednesday 10th January 2018 at 19:05 pm

As a juridical foundation it would be urgent to revise the explanation of Article 48 of the State Administrative Court Law to accommodate the basis of expediency testing (*doelmatigheid toetsing*) for public policy derived from free authority. As well as rectifying, with reference to the theory of legal drafting and the provisions of Article 10 paragraph (1) a and e of Law Number 12 Year 2011 on the Establishment of Legislation, the authority of the judiciary must be regulated explicitly with the Act and not placed in the elucidation of the Act but in the body of the Act. The purpose of expediency testing and objectives of public policy derived from free authority by doelmatigheid toetsing is testing using the AUPB especially principles of expediency, testing the accuracy of the implementation of public policy with the objectives when the policy is made, and whether public policy is made to provide benefits or not to society in general. The end result, if the implementation of public policy is not in accordance with the purpose it becomes the responsibility of the implementer of the policy (delegation theory), whereas if public policy does not provide benefits to the community is the responsibility of the policy maker (mandate theory). Public policies that are inconsistent with the objectives of policy making and/ or no benefits, may be declared void by the Administrative Court.

Presumably, public policy testing is sourced from the free authority of using AUPB especially the principle of expediency (*doelmatigheid toetsing*) basically does not violate the basic constitutum theory and rules of testing in the PTUN that is *rechtmatigheid toetsing*, because with the UUAP, the principle of expediency as part of the AUPB that is not the norm has been formalized in Article 10 UUAP. It is clear that public policy can be tested dynamically between legally testing (*rechtmatigheid toetsing*) as well as purpose and expediency testing (*doelmatigeheid toetsing*) which in this paper is conceptualized as law testing wich tend to legal usefullness whose ultimate goal is justice. As a reference to the implementation of the expediency testing (*doelmatigheid toetsing*) although not yet been formal legally (*constitutum*) but has been used in legal considerations of several the Supreme Court ruling of the Republic of Indonesia namely Verdict of Judicial Review Number : 99 PK/TUN/2016, verdict of cassation : 576 K/TUN/2015 and verdict of cassation : 501 K/TUN/2013, and also Constitutional Court Verdict number : 181/PHPU. D-VIII/2010

Closing

On the basis of such studies and analyzes as described above, public policy can be sourced from bound and free authority. Public policy testing based on free authority is tested by expediency and objective (*doelmatigheid toetsing*) that is testing using the AUPB especially principles of expediency, testing the accuracy of the implementation of public policy with the objectives when the policy is made, and whether public policy is made to give benefits or not to society in general.

This test is basically a *doelmatigheid toetsing*, but because the expediency principle has been formalized by UUAP, then the test is still in the framework of dynamic legal testing (rechtmatigheid toetsing) which in this paper is conceptualized as legal law testing which tend to legal usefullness whose ultimate goal is justice.

This concept is expected to provide guidance for public policy making as well as solve concrete problems in the case of laws and regulations are not regulate, or regulated but not clear / incomplete, or regulated by giving options or to overcome the stagnation of government, so it is expected to be a solution in providing protection law and justice for both citizens and government officials. The basic authority of the testing of the Administrative Court shall be strictly regulated in the body of the Act and shall not be placed in the elucidation of the Act, including when incorporate authority of the basic of expediency testing.

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CONFLICT RESOLUTION IN FOREIGN COURTS IN CRIMINAL JUSTICE SYSTEM OF CHILDREN IN INDONESIA

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ABSTRACT

During this time, most people only know the judicial process is a way to resolve conflicts / disputes. While the resolution of conflicts / disputes outside the judicial process, not widely known. Therefore it is necessary to find out about the existence of conflict resolution process / disputes outside the process of peradian. Initially, the process of resolving disputes / disputes outside the court was only conducted on conflicts / disputes in civil law alone, but in its development, violations of public law, both in the field of state administrative law and in the field of criminal law can also be settled outside the judicial process . Although non-court settlement of conflicts in the field of criminal law can be done, but not for all conflicts in the field of criminal law can be resolved through an out-of-court process. In Indonesia, in the field of criminal law, the resolution of out-of-court conflicts can take place. However, it is still integrated in the criminal justice process and not all conflicts in the field of criminal law can be resolved through out-of-court processes. As regulated in the Law of the Republic of Indonesia Number 11 Year 2012 on the Criminal Justice System of the Child, the resolution of out-of-court conflicts can take place. However, what kind of conflict? This is the problem discussed in this paper.

Keywords : Completion Of Conflict Outside, Criminal Justice System, Indonesia

Introduction

In public life, history shows that the relationship between community members and the relationship between society and state institutions there is always a clash of problems with one another, giving rise to conflicts / disputes need to be resolved. Until recently, most people only know the judicial process is a way of resolving conflicts / disputes. While the resolution of conflicts / disputes outside the judicial process, has not been known. Therefore, it is necessary to find out about the existence of the conflict resolution process / disputes outside justice process.

In Indonesia, the presence of a conflict resolution process / dispute out of court is the embodiment of the values of the Republic of Indonesian state philosophy of Pancasila. As the speech after-service professor Romli Atmasasmita entitled "Character and Direction of Political Law in National Development", said that:

> For the legal community in Indonesia, the philosophy of Pancasila is the basis of life and determines the direction of policy and program development of the national legal system, in line with the character Indonesian public law as reflected in the five principles of the Pancasila, we need not doubt or question again, reinforced by religious and belief communities that have grown and evolved over the centuries, the archipelago on earth.[1]

This opinion gives an understanding that the philosophy of Pancasila that it contains five principles, reflect the values derived from the character of Indonesian law. Legal development that is not rooted in the values that are reflected in the precepts contained in the Pancasila, is a denial of the spirit and kejuangan the founders of the Republic of Indonesia.[2] Therefore, in a variety of legal development in Indonesia should reflect the precepts of Pancasila. One of the legal development that reflects the principles of Pancasila, is the legislation governing the settlement of the conflict / dispute out of court

Of the five precepts contained in the Pancasila. Sila all four are populist, led by the inner wisdom consultative / representative. Fourthly, there is a reflection of the presence of the settlement of the conflict / dispute out of court, so the presence of the settlement of the conflict / dispute out of court is unquestionable. In the fourth principle is reflected in the legal character of Indonesian society in resolving conflicts / disputes, that uses deliberation to reach consensus .. As posted by Nur Aini Solihat at 7:42,

> "Democracy Led by Wisdom Wisdom In Deliberative Representation." Every human being Indonesia should feel and high uphold any decision result of deliberation, therefore all parties concerned should get and implement it in good faith and a sense of responsibility. Here bersamalah preferred interests above personal or group interests. Talks in the meeting is done sensibly and in accordance with noble

[1] Romli Atmasasmita, *Retirement Speech: Character and Politics of Law in Development*, Faculty of Law, University of Padjadjaran, Bandung, 2014, page 3
[2] Ibid, page 6

conscience. The decisions taken must be morally accountable to God Almighty, upholding human dignity and the values of truth and justice.[3]

Nur Aini's opinion to clarify the basis of the presence Solihat resolving conflicts / disputes out of court which is currently being developed in Indonesia. The values embodied in the principles of Pancasila is the basis for the inadmissibility of resolving conflicts / disputes out of court philosophically. Communities can accept the presence of the settlement of the conflict / dispute out of court, because the starting point used for settlement of the conflict / dispute out of court is the deliberation that the results are not for personal or group interests, but for the common interests between those in conflict / dispute. It was also said by Nur Aini Solihat, that the consensus decision should be morally accountable to God Almighty, and should also uphold human dignity and the values of truth and justice.

At first, the process of settlement of the conflict / dispute out of court is applied only to conflicts / disputes in the field of civil law, but also in its development, the violation of public law, both in the field of administrative law as well as in the field of criminal law can also be completed outside the judicial process , Although the conflict out of court settlement in the field of criminal law to do, but not for all the conflicts in the field of criminal law can be resolved through a process outside the court.

In the field of civil law, to resolve conflicts / disputes that occur in the community, can be done through the judicial process and can also be completed outside the judicial process, the use of alternative dispute resolution (APS) or *alternative dispute resolution* (ADR), which is known by most society as a dispute resolution outside the court. Dispute resolution outside the court in the field of civil law, there is integrated in the court and some are not integrated in the court, there is even a condition for the completion of conflicts / disputes in the judicial process.

In Indonesia, in the area of criminal law, conflict resolution outside the court to do. But integrated within the criminal justice process and not to all the conflicts in the field of criminal law can be resolved through a process outside the court. As stipulated in the Law of the Republic of Indonesia Number 11 of 2012 on the Criminal Justice System Child, conflict resolution outside the court to do. However, a conflict that how that can be resolved out of court in accordance with Act No. 11 of 2012 on the Criminal Justice System Children? This will be discussed in this conceptual writing. Law of the Republic of Indonesia Number 11 Year 2012 on Child Criminal Justice System, commonly referred to as laws Child Criminal Justice System, which is often abbreviated Act SPPA

Main Problem

Conflicts how that can be settled out of court pursuant to Law Criminal Justice System Children in Indonesia?

Discussion

Existence Of Conflict Resolution Outside The Law Courts In The Criminal Justice System Children

Constitutionally, Article 5 (1), Article 20, Article 28B paragraph (2), Article 28G, and Article 281 of the Constitution of the Republic of Indonesia in 1945[4] a judicial reason the issuance of Law of the Republic of Indonesia Number 11 Year 2012 Kids on the Criminal Justice System. This Act into force on June 30, 2014, or apply two years after publication. Thus, if the count of the validity period, to date the entry into force of this law can be said to be relatively new. Therefore, the necessary understanding of the substance, especially as related to the presence of conflict resolution outside the court. This law replaces the law of the Republic of

[3] http://laporannurainisolihat.blogspot.co.id/2015/02/makalah-pancasila-nilai-pancasila-sila.html Downloaded Wednesday, January 17, 2018 19:10 pm

[4] Article 5 (1) 1945: President is entitled submit a bill to the House of Representatives. Article 20 UUD 1945: paragraph (1) House of Representatives holds the power to make laws; paragraph (2). Each bill is discussed by the House of Representatives and the President for approval together; paragraph (3). If the bill was not approved together, the draft should not be raised again during the trial period the House of Representatives; Paragraph (4). The President endorsed a draft law that has been approved together to become law, 28G undang.Pasal 1945 paragraph (1) Everyone has the right to protection of self, family, honor, dignity, and property are under his control, and are entitled to taste security and protection from threats to do or not do something that is a human right; paragraph (2). Everyone has the right to freedom from torture and degrading treatment of human dignity and the right to obtain political asylum from another country: .Pasal 281 UUD 1945 paragraph (1). The right to life, freedom from torture, freedom of thought and conscience, freedom of religion, the right not to be enslaved, the right to be recognized as a person before the law, and the right not to be prosecuted on the basis of law has applied retroactively are human rights that can not be reduced under any circumstances; Paragraph (2) .Each person entitled to be free from discriminatory treatment on any basis and the right to protection against discriminatory treatment itu.ayat (3) .Identitas cultural and traditional rights be respected in line with the times and civilizations; Paragraph (4). The protection, promotion, enforcement and human pemenuhan hak negara terutama is the responsibility of the government; (5). To uphold and protect human rights in accordance with the principles of a democratic constitutional state, the exercise of rights manusiadijamin, regulated and set forth in the legislation

Indonesia Number 3 of 1997 on Juvenile Justice, which is considered not provide special protection for children in conflict with the law.

One new thing that is regulated in Law Criminal Justice System Son is, the provisions on the obligations of law enforcement officers (Investigator, Prosecutor General, and the District Court judge) to seek diversion by using restorative justice approach in dealing with children in conflict with the law , The terms of diversion and restorative justice in juridical sense given in Article 1 point 6 and 7 of Law SPPA.[5]

Versioned as stipulated in Law SPPA, a process for settling disputes Children in conflict with the law originated from the criminal justice process are then removed from the criminal justice process. This definition is also to be understood that the settlement of the conflict with the law child out of court, an out of court settlement of the conflict in which interegation with the judicial process. It is said that, due to the completion of the children in conflict with the law first made in the juvenile criminal justice process. If fulfilled the conditions prescribed by the Law of the Child Criminal Justice System, then the Completion of the children in conflict with the law who are in the juvenile criminal justice process can be transferred to a child outside of the criminal justice process.

Thus, not all children in conflict with the completion of the law can be dialihan of the criminal justice process to a child outside the juvenile justice process. The transfer of the settlement children in conflict with the law of the criminal justice process to a child outside the juvenile criminal justice process, only the conflict that meets the requirements prescribed by the Act Child Criminal Justice System, and should also embody restorative justice.

Restorative justice that are referred to by the Act shrimp Criminal Justice System Child, implies the completion of the criminal case involving the perpetrator, the victim, the perpetrator's family / families of the victims, and other relevant parties to work together to find a fair settlement with the emphasis on recovery their relationship to the original condition, and not with vengeance. From this sense, restorative justice is defined as a product, that is the product of justice accepted by both parties. so there is a balance between the two sides.

Natangsa Surbakti distinguish between restorative justice as a product and as a restorative justice process. Restorative Justice a kind of quality of justice is generated through the implementation of restorative justice, the state has been the resumption of material or immaterial damages caused by the criminal acts through the direct responsibility of the offender or his family.[6]

Restorative justice, a process to involve, as far as possible, all parties have a role in the occurrence of a crime to jointly identify and understand the damages caused, the wishes of the victim, and obligations of the parties criminal offenders, with the aim to restore and put everything in place as possible. [7]

Regulates the obligation for investigators, prosecutors and judges to seek diversion by using restorative justice approach in the Law of the Child Criminal Justice System, a consequence of the presence of conflict resolution outside the court. It is explicitly mentioned in the diversion destination specified in the Law of the Child Criminal Justice System. One purpose is to solve cases of diversion of children outside the judicial process.[8] Besides these objectives, the diversion has tujun another purpose, namely to achieve peace between the victim and children, avoiding Children of deprivation of liberty; encouraging the public to participate; and instill a sense of responsibility towards the Child. Thus, formally, conflict resolution outside the courts in the field of criminal law has been regulated in the Law of the Republic of Indonesia Number 11 Year 2012 on Child Criminal Justice System. Therefore, the existence of conflict settlement out of court in the juvenile justice system is acceptable legally.

Use Of Terms Conflict

The term conflict legally used in the Law of the Child Criminal Justice System, which is to distinguish between "children in conflict with hukun" with "children in conflict with the law", as stipulated in Article 1 paragraph 2 of Law Child Criminal Justice System. [9] Thus, the notion of children in conflict with the law covers children in conflict with the law, in addition to the child who witnessed a crime and children who are victims of crime. Therefore, understanding children in conflict with the law, including in children in conflict with the law, in particular, children in conflict with the law has its own definition.

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[5] Article 1 item 6 of the Law SPPA: restorative justice, is the completion of the criminal case involving the perpetrator, the victim, the perpetrator's family / victim, and other relevant parties to work together to find a fair settlement with the emphasis on restoring back to the original condition and not vengeance; Article 1 point 7 UUSPPA: Diversion is a transfer of settlement Son of the criminal justice process to outside the criminal justice process.

[6] Natangsa Surbakti, *Restorative Justice in the frame Empiri, Theory and* Policy,Genta Publising, Bantul, Yogyakarta, 2015, page 4.

[7] Ibid, page 17.

[8] Article 6 of the Law SPPA: The purpose of diversion is to achieve peace between the victim and the Son; settlement to the case of children outside the court process; avoiding Children of deprivation of liberty; encouraging the public to participate; and instill a sense of responsibility towards the Child.

[9] Article 1 paragraph 2 of Law SPPA: Children in conflict with the law are children in conflict with the law, children who become victims of crime and children who witness a crime.

The notion of children in conflict wiith laws specified in Article 1 paragraph 3 of Law Criminal Justice System Child[10] In these conditions, in particular children in conflict with the law were given special sense that children suspected of committing a crime, and is restricted by age children, ie children aged twelve (12) years, but not yet 18 (eighteen) years. In addition to the notion of children in conflict with the law, determined also mention of children in conflict with the law in this legislation, which is referred to as the "Son".

Conflicts To Be Settled In Court Affairs According To Law Child Criminal Justice System In Indonesia

In **Indonesia,** the judicial power is done by a Supreme Court and judicial bodies underneath, which consists of general courts, religious courts, military courts and administrative courts and the Constitutional Court. Thus, juvenile justice is not a judicial one held exclusively by independent judicial body. However, juvenile justice is part of the general courts.

Although the juvenile criminal justice is part of the general courts, but there are differences in the implementation process. In juvenile justice, the implementation process can be done out of court settlement of the conflict. Based on a proportional basis, the handling of children in conflict with the law can be removed from the criminal justice process, if the conditions are met the age limit of children and criminal offenses allegedly committed by children.

Legislation Criminal Justice System Child regulates the treatment of children in conflict with the law who was not yet twelve (12) years and has not reached the age of 18 (eighteen) years old and also governs the handling of children in conflict with the law who was not yet 12 (two twelve) years. Against children in conflict with the law with the age limit can be raised to the juvenile criminal justice process. However, if the actions criminalized less than 7 (seven) years and not a repetition, the process can diverted out of the juvenile justice process. In terms of the age requirement and the actions undertaken are fulfilled, then both the investigator, nor the prosecutor's and judges, shall seek diversion using restorative justice approach.

Thus, not all the conflicts faced by Children should be pursued diversion. Only against children in conflict with the law that restricted age has reached 12 (twelve) years and has not reached the age of 18 (eighteen) years and acts allegedly committed punishable less than 7 (seven) years and not repetitions are allowed attempted diversion. Therefore, not all juvenile criminal justice process can be diverted from the criminal justice process to a child outside the juvenile criminal justice process, it can be said that: the conflict out of court settlement in the juvenile justice system in Indonesia is limited. Still limited by the child's age and criminal sanctions threatened against the actions undertaken, as well as his actions is not a repetition. Apart from having to fulfill these requirements, the diversion must consider the interests of the victim, and the responsibility of child welfare, avoidance of negative stigma, avoidance of retaliation, and must also pay attention to propriety, decency and public order.

Furthermore, the question that must be answered: how is the handling of children suspected of committing a crime, but he was not yet twelve (12) years. In this case, according to the Law of the Child Criminal Justice System, if the matter reported to law enforcement officials in the police, the investigator must take action. The action is conflict resolution outside the court process. Investigators should choose alternative actions that will be selected. The choice is, the child is returned to the parent / guardian, or the child will be enrolled in education or training program.

In theory, how to resolve conflicts / disputes out of court is a way of resolving conflicts / disputes in accordance with the legal theory put forward Responsive *Nonet-Selznick* and progressive legal theory put forward Satjipto Rahardjo.

As by Bernard L Tanya and comrades, as follows:

> a responsive law theory of law required profile in transition. Because it must be sensitive to the transitional situation around, then the law is responsive not only required to be a system that is open, but also have to rely on the primacy yujuan *(the souveri egnity of* purpose),namely social objective intending to accomplish as well as the consequences that arise from the operation of that law.[11]
>
> According Rahardjo need legal thinking on basic philosophy, ie the philosophy of law to manusia.Dengan, the man set the tone and orientation point of law. Legal duty to serve people, not vice versa. Therefore the law is not an institution that is separated from the human interest.[12]

Both theories are strengthening the rationale for acceptance of the presence of the way out of court settlement of the conflict in the Criminal Justice System Child. Legally sense Criminal Justice System Children defined in Article 1 paragraph 1 of the Act of the Republic of Indonesia Number 11 of 2012 on the

[10] Article 1 paragraph 3 of Law SPPA: Children in conflict with the law, hereinafter referred to a child is a child over the age of 12 (twelve) years, but not yet the age of 18 (eighteen) years who allegedly committed crimes.

[11] Bernard L. Tanya, Yoan N Simanjuntak, *Legal Theory of Human Conduct Cross-Space Strategy and* generasi,Genta Publising, Bantul, Yogyakarta, Molds IV, Revised Edition, 2013, page 185.

[12] Ibid, page 191.

Criminal Justice System Child, as the whole process of settlement Children in conflict with the law, from the stage of the investigation to the extent of supervision after serving a criminal. The principle which is used as a basis for the implementation of the juvenile justice system is a principle of protection, justice, non-discrimination, best interests of the child, respect for the views of the child, survival and child development, coaching and mentoring children, proportionately, deprivation of liberty and criminal prosecution as an attempt Last, and avoidance of retaliation[13]

Closing

From the above discussion, it can be concluded, as follows:

1. The presence of the way of conflict resolution outside the court in the Criminal Justice System Children in Indonesia are acceptable existence, both philosophically and legally. However, not all conflicts can be settled out of court juvenile. Thus, are limited. That is, only that meets the requirements specified in the Law of the Child Criminal Justice System. And the achievement of restorative justice.
2. Conflicts can be resolved outside the juvenile criminal justice process, is integrated in the juvenile criminal justice process. Said to be integrated, because the settlement process against children in conflict with the law began filing into the criminal justice process, and then be moved outside of criminal justice, if fulfilled the conditions prescribed by the Law of the Child Criminal Justice System.

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Regulation

Constitution of the Republic of Indonesia 1945

Law of the Republic of Indonesia Number 11 Year 2012 on Child Criminal Justice System

[13] Law of the Republic of Indonesia Number 11 of 2012 on the Criminal Justice System of the Child, Article 2: Juvenile Justice System is implemented based on the principle: a..perlindungan, b. Justice c. non-discrimination, d. best interests of the child, respect for the child's opinion, f. survival and development of the child, g. coaching and mentoring children, h. proportionally, i. deprivation of liberty and criminal prosecution as a last resort, and j. avoidance of retaliation.

LAW ENFORCEMENT IN BUSINESS DISPOSAL IN INDONESIA[1]

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ABSTRACT

Law Enforcement Business Dispute, rapidly growing economic growth in Indonesia is prone to abuse of authority and ignores the principle of prudence and ignores the rule of law in force. Economic activity today many legal problems that occur because there are many entrepreneurs and economic actors who want to quickly achieve profits quickly. Proximity to rulers and using unfavorable means and great profit-seeking motives underlie current business conduct. Indonesia as a law country should entrepreneurs hold fast to the principle of law-abiding. Foreign investors to invest their capital in Indonesia are still the best for the Indonesian government to run the development wheel. Legal certainty must be implemented so that investors do not hesitate to invest in Indonesia. Equally in the eyes of law must be enforced either the Indonesian entrepreneurs or foreign businessmen. Business in principle should seek profit so that business ethics should be put forward, so that if there are legal issues to be resolved by law, resolved through court or out of court. Law No. 40 of 2007 on limited liability company and Law No. 25 Year 2007 on investment must be considered by the businessmen.

Key Words: Law Enforcement Business Disputes

Introduction

The company must essentially seek profit for the sustainability of the company. Business competition can not be avoided at this time, the rules embodied by the law can not be sure can make the company obey the law in running its business. Seeking profits by way of doing business lawfully or doing business in a way that is not lawful is an option to be made. Running a business with a lot of unlawfulness will certainly generate enormous profits for the company or doing business by running an unhealthy competition will also benefit greatly, but it all violates the law and business ethics. The existence of regulations and laws that regulate made for the benefit of society, so that the public will be comfortable in carrying out its business activities. Law is directed entirely as a means to support development. Whereas that should be development is just a means to improve human dignity. So it is clear that by law we will create or make prosperity for society.[3]

With fair certainty, justice is certain, and the use of that law can guarantee regular freedom in the dynamics of the economy, so that in turn can bring together prosperity in the life of society. Without certainty, the economy can not develop regularly; without justice, the economy will not foster fair and just freedom; and without utility, the economy will not bring prosperity and peace. Because ultimately, the law itself must bring life together to the well-being and peace of life together.[4] Entrepreneurs running a business having a purpose to realize a just and prosperous Indonesia are also stated implicitly and expressly in Article 33 paragraphs (1), (2), (3) and (4) of the 1945 Constitution, that:

1. The economy is structured as a joint effort based on the principle of kinship.
2. Production branches that are important to the State and which affect the livelihood of the public are controlled by the State.
3. Earth, water and natural resources contained therein are controlled by the State and used for the greatest prosperity of the people.
4. The national economy is organized on the basis of economic democracy with the principles of togetherness, fair efficiency, sustainability, insight, environment, independence, and by maintaining a balance of progress and national economic unity.

If we see from article 33 paragraphs (1) and (4) it is clear that business activities in Indonesia must be run with awareness to prosper the people of Indonesia by promoting the principle of submission and obedience to the law is not run based on unhealthy business competition. Maintaining a sustainable national business climate is a common goal towards a prosperous society. Obedient and obedient to the law really must be executed the business.

Main Problems

There are still many companies in running their business do not obey the law and do not run business by using ethics, and disturb public order and injure society in general still happening. It is often called corporate crime that all crimes committed by employers and corporations, therefore, can be charged to a corporation because the activities carried out by employees and employees are often known as white-collar crimes.

[1] International Confrence on Law, Economy and Health, ICLEH 2018 di UNTAG Semarang, 29-30 Januari 2018.
[2] Faculty of Law Universitas Borobudur, Jakarta, Indonesia
[3] Faisal Santiago, *Pengantar Hukum Bisnis*, Jakarta; Mitra Wacana Media, 2012, hal. 2.
[4] Ibid, hal, 21.

Research Methods

1. Method approach: The formulation of the problem shows that the research is done by approach of normative juridical approach. Where the normative jurisdiction is to examine a legal problem and make the settlement through the applicable legislation.
2. Research specifications: The specification of this study is descriptive analysis to provide an overview of the real facts along with an accurate analysis of laws and regulations that can be used as material analysis or analysis related to law enforcement in business disposal in Indonesia.

Literature Review

Running a business must be submissive and obedient to the law, the law is made by the entrepreneur to be run by the public for the welfare of the community. In principle, the business operated in a law-based country must promote principles of obedience to the rules. Indonesia is being vigorous in carrying out development in all fields, it must require foreign investors in its implementation, investment or investment today become such a contention for the countries or regions to be partners in carrying out development in all fields. We need to know that the name of the investor must have advantages both in terms of financial and other things owned by these investors. The problem is, parties who want to invest in a country or region can not be separated from the business side. Law is directed entirely as a means to support development, development should be just a means to enhance human dignity. So it is clear that by law we will create or make prosperity for society. The issuance of Law No. 25 Year 2007 on Capital Investment in Indonesia, is one proof that legal certainty is highly regarded by the Government of Indonesia.

Field of business is a field of activity that is allowed or allowed to invest. Procedures and requirements are the ordinances that must be met by investors in investing. The state is the country where the investment is invested. Usually the countries that receive investment are the developing countries. So it can be said that in the investment law there are several elements that must be considered:

1. There is a rule of law;
2. The existence of the subject, where the subject in the investment law is the investor and the recipient country of investment;
3. The existence of a business field permitted for investment;
4. Procedures and conditions for investing;
5. Country.[5]

In Article 3 paragraph (1) of Law no. 25 of 2007 on investment there are ten principles that must be considered:

1. Principle of legal certainty, namely the principle in a legal state that places laws and statutory regulations as the basis for any policies and actions in the field of investment.
2. The principle of openness, the principle that is open to rights and the public to obtain correct, honest, and non-discriminatory information about investment activities.
3. Principle of accountability, the principle that determines that every activity and the end result of the implementation of investment accounted to the public or the people as the holder of state sovereignty in accordance with the provisions of legislation.
4. The principle of equal treatment and does not distinguish the origin of the country is the principle of treatment of non-discriminatory services under the provisions of legislation, whether between domestic investors and investors from other countries.
5. The principle of togetherness, a principle that encourages the role of all investors together in their business activities to realize the welfare of the people.
6. Fairness efficiency principle, is the underlying principle of the implementation of capital investment by promoting fair efficiency in the business of creating a fair business climate, conducive and foreign power.
7. The principle of sustainability, is the principle that is planned to work through the development process through investment to ensure welfare and progress in all aspects of life, both for the present and future.
8. The principle of environmental insight is the principle of investment that is carried out by keeping in mind and prioritizing the protection and maintenance of the environment.
9. Principle of independence is the principle of capital investment that is done by maintaining the potential of the nation and the state by not closing themselves to the entry of foreign capital for the realization of economic growth.
10. The principle of the balance of progress and national economic unity is the principle that seeks to maintain the balance of regional economic progress in the national economic unity.

These ten principles need to be considered well in terms of optimizing investment, especially in Indonesia. So the authors say there must be a linkage between the association of the legal principle with the investment law:

1. The economic principle of the company, namely the principle where in the investment investment can be cultivated and done optimally, and according to the principle of efficiency.
2. The principle of international law is a principle in the dispute settlement between the government and the investor, if the government does an overall nationalization / dispossession and the settlement must be based on international legal principles.
3. The principle of economic democracy, which is the principle in which investment is based on the principles of democracy.

[5] Ibid hal 11

The principle of benefit, which is a principle where in the investment investment can provide the greatest benefit for the prosperity of the people of Indonesia[6]. In Law No. 40 Year 2007 regarding Limited Liability Company, Article 2, it is said that the Company must have a purpose and purpose and business activity which is not contradictory to the provisions of law, orderliness and / or morality. This Article clearly states that the business carried on must comply with applicable legal rules.

Business nuance is very thick for investors in doing an investment activity, it is legitimate for an economic activity. As we know that investors both domestic and foreign capital that brought it can not be interpreted something free (free of charge) but there are calculations in the implementation, because they do not want to be regarded as a sinterklas whose job is to divide the funds to a country or region. The principle of take and willing must exist for both parties in the implementation of investment. Asia is still the right choice in this decade to invest, almost all of Asia region has been invested by investors for business continuity or business expansion

Discussion

Dispute Settlement, dispute resolution is one of the important clauses in bilateral investment agreements. Especially in the context of Indonesia, the provisions on dispute settlement become a central issue in any investment agreement negotiations due to a negative perception of the legal and judicial system in Indonesia. Therefore, they will generally request that any disputes arising as a result of capital investments be settled through arbitration abroad. Dispute settlement is the main thing in the conduct of business conducted by foreign investors. Disbelief in local law is a major obstacle. The legal system in Indonesia that is often the spotlight of the public to seek justice has not been done well, so in the end many in the business agreement, in one of the articles if there is legal problems then resolved by using international arbitration.This is a form of foreign investor distrust in enforcement law in Indonesia. Business Dispute in the case of proven growth of foreign investors continues to increase Investment Coordinating Board (BKPM) released of investment realization Domestic Investment (PMDN) and Foreign Investment (PMA) in the first quarter (period January-March) in 2017 reached Rp 165, 8 trillion, an increase of 13.2% from the same period in 2016 amounting to Rp 146.5 trillion. The realization of these investments absorbed 194 thousand workers.

Head of BKPM Thomas Lembong said that the achievement of the first quarter investment realization gives hope to achieve the target of realization of investment in 2017 which is set at Rp 678.8 trillion. "Looking at the realization data of Foreign Direct Investment (PMA) and Domestic Investment (PMDN) TW I in 2017, illustrates that investment interest in Indonesia remains high and we are increasingly optimistic that the target of 2017 of Rp 678.8 trillion will be achieved , "He said in a press conference at the BKPM office in Jakarta.[7] The increase of foreign businessmen in Indonesia is not accompanied by the level of confidence in dispute settlement in Indonesian courts, they prefer the settlement of disputes outside the court with the arbitration path.

Closing

The settlement of business disputes in Indonesia by using out of court by the businessperson is legitimate to do, seeing from effectiveness and efficiency is a natural thing. The dispute that must be resolved to achieve legal certainty is a major factor for the sustainability of its business. The choice of law is done with a very careful consideration that must be decided. The government should be responsive to this matter in order to immediately reform the judicial system in Indonesia, so that public trust and business people especially foreign investors can use the existing judicial system in Indonesia. The choice of dispute settlement in Indonesia must be realized immediately so that it is not contradictory to the principle of the rule of law and the businessperson must submit to and obey Law No. 40 of 2007 on limited financing in which said that if there is a legal dispute it can be solved by the legal system in Indonesia.

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[6] Faisal Santiago, Jurnal Lex Publica Op Cit, hal 310.
[7] https://kominfo.go.id/2017

Regulation
https://kominfo.go.id/2017

Undang-undang No. 25 Tahun 2007 tentang Penanaman Modal.

Undang-undang No. 40 Tahun 2007 tentang Perseroan Terbatas

SEXUAL DEVIATION MANAGEMENT TO COPE WITH DYNAMIC MORAL DEGRADATION DUE TO INFORMATION TECHNOLOGY DEVELOPMENT

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ABSTRACT

National development is an ongoing process that must constantly respond to the various dynamics going on in the community. Utilization of information technology, media, and communications have changed the behavior of both human society and civilization globally. The development of information and communication technologies also have an impact on the relationship becomes borderless world and spread social change. Technology known as the double-faced, on the one hand of great benefit to humans and as a sign of the progress of society, but on the other hand also can provide convenience and even extend global crime. Abuse or negative impact of advances in information technology through computerization and networking system known as "Cyber Crime. As the development of Cyber Crime flourished and the term Cyber crime Cyber Sex or Porn. Information and communication technology has been used as a facilitator for the trafficking and sexual exploitation of women and children in various ways.
Keywords: Poverty, sexual deviation, information technology

Introduction

Properly tsunami that threw all the barrier, the wave of globalization also have the same effect for countries that do not prepare for his arrival.[1] The development of information technology in Indonesia, one of which is marked by the increasing number ofserviceusers, *interconnected networking* or better known as the internet.[2] The presence of a sophisticated media such as the Internet can give a tremendous positive impact for our lives, such as getting or spreading the word very quickly. Progress internet in addition to providing a positive impact there is also a negative impact. *Computers start to play a role in crime in situations where the capabilities ofthe computers allow a person to commit that crime or store information related to the*crime.[3]

Cyber Porn is an act of using *cyberspace* to create, display, distribute, publish pornography and obscene material. *Cyberspace* with technology that carries pornography, so that pornography provides more feature-rich form of pornography, pornografipun experienced media translation and making pornography dikreasikan with multi features.[4]

To further improve the control and monitoring in an effort to prevent and combat *cyber-porn* it would require a joint effort between the government, law enforcement officials with the public, because without coordination jointly between the parties concerned will be difficult to eradicate the spread of *cyber porn* as one of the negative impact misuse of technology. Society began to feel the effects and consequences of poor significantly, even within the level of malicious threats and crimes against the interests of society and lead to moral degradation.

According SatjiptoRahardjo speak of social change[5] danmodernisasiis not surprising that the social changes coupled with the social crisis.[6] One is access-aksesyang[7]pornography.Pornography through the

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[1]*Adi Sulistiyono,* Reformasi Hukum Ekonomi Dalam Era Globalisasi, *Sebelas Maret University Press,Surakarta. 2005, P. 9.*

[2]*Moch. Basarah*,Prosedur Alternatif Penyelesaian Sengketa Arbitrase Traditionaldan Modern (Online), *Genta Publising, Bandung, 2011, P.98*

[3]*Anthony Reyes,* Cyber Crime Investigation Bridging The Gaps, Between Security Professionals, Law Enforcement, And Procecutors, *Syngress Publishing, United States of America, 2007, p. 194.*

[4] Feri Sulianta, Cyber Porn Bisnis atau Kriminal, Elex Media Komputindo, Jakarta, 2010, p. 3 - 4

[5]According Selosoemardjan understanding social change include changes in the various institutions of society that affect the social system, Polak interpret social change as a change that occurred in this structure according to polak always aligned with cultural change. Mahmud Kusuma, Menyelami semangat hukum Progresif, LSHP Indonesia, Yogyakarta, 2009, p. 101

[6]Satjipto Rahardjo, Sosiologi Hukum, Genta Publishing, Yogyakarta, 2010, p 25.

[7]History of pornography: pornography is defined as a work that exploits the vulgar and immoral scenes in the form of images, film and writing. Apart from pornography ratings as a work of art, pornography itself actually does not appear suddenly. But through a process that all started around the year 1907 to 1912. According tobook Patrick Robertson's(Film Facts), "porn earliest known date of manufacture is A L'Ecu d'Or ou la bonne auberge", made in France.This film tells the story of a soldier fatigue and a relationship with a waitress disebuah specialty stores. More Robertson mentions pornographic films oldest surviving stored in the Kinsey Collection in America. At first pornographic films made in a very short duration. Like the German film Am Abend (circa 1910), a ten-minute short film which begins with a woman who satisfy himself in his room and then switched by showing him having sex with a man, fellatio and anal penetration. In those days except a short duration, the distribution of the blue movies are also still carried the hidden. This is done to avoid social pressure for the cast. Therefore, screening is usually done traditionally with a tool that is very simple and is rotated by hand. Yet already there are several men

Internet used to only display the pornographic images, but it's been growing prostitution via the Internet. Tersebutpara internet through free commercial sex workers selling themselves to men who want to satisfy his lust. Ironically, the girls were classified as very young who actually still has a bright future.[8]

The development of ICT *(Informationand Communication*Technology),the increasingly sophisticated and complex. Society has found a new space, living in the community network*(thenetwork*society).Internet access has become a necessity of life of all walks of life. The number of bloggers, faceboker, and twitter continue to rise, they go into the world of surfing the internet with various motifs and business purposes, mass mobilization, spreading political ideology, chatting, browsing the literature, searching for jobs, looking for a date and so forth.[9]

Technology known as the double-faced, on the one hand of great benefit to humans and as a sign of the progress of society, but on the other hand also can provide convenience and even extend global crime. Abuse or negative impact of advances in information technology through computerization and networking system known as*"cybercrime".*Along with the growing cybercrime andcrime, the term *cybersex* or *cyberporn.*

Discussion

Negative Impact ofAddiction *Cyber Porn*

Cyberporn is an act of using cyberspace to create, display, distribute, publish pornography and obscene material. *Cyberspace* with technology that carries pornography, provide more feature-rich form of pornography, pornography experienced media and can dikreasikan translation with multi features.[10]

Cutting-edge technology of the Internet has created a new world called *cyberspace.* According to Howard Rheingold, *Cyberspace* is an imaginary space or virtual space that is artificial. Everyone is doing what is usually done in everyday social life in new ways.[11]

Cyberporn or *cybersex* is one of the negative sides of their information technology. This is due to sex is a commodity that can carry a large enough profit in the business, especially through *e-commerce services.* Pornography which extended to the virtual world can be easily accessed by anyone, regardless of age, sex, education level, and social stratification. In addition, the ease and convenience in transacting *sex,* online childbirth and keprivatan satisfaction of its own, which is often argued to no much harm, due to anxiety and negative effects are not directly felt.

There are two views about the impact of porn sites by expert psychologists and social sciences. First, encourage crime and deviant sexual behavior, and secondly as a super fast information media about sexual matters.[12] Two views at the top are basically related to the purpose / motivation of consumers in accessing pornography on the internet. The first view is more directed at the negative side of pornography, while the second view is more aimed at finding a solution with regard to the problem of sexual intercourse or sexual health. This second view should only be done by people who are married or have a family alone. Most of the internet users who open a porn site or a site of sexual consultation instead of the children or adolescents.

Based on the theory of imitation, the media can make the audience do the impersonation like what was being served, the children or adolescents who have not been able to analyze the good and bad through his mind, will tend to imitate and try what you have seen. The result was a sexual deviation because there is no place or even possible distribution of sexual relations outside of marriage.

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and women who want to become an actress and pornographic film actor. At that time maybe they just think will get a big payday without thinking of its negative effects. And really, at that time the actress paid a sizable about hundreds of millions of dollars worldwide. It is more convincing them to remain in this blue film.

Developments pornography: the blue film. The more demand, the more produced the massive and ultimately become an undeniable pornography industry perkembangannya.Pertengahan speed until the end of the 1980s called "The Golden Age of Porn", when many porn actors and actresses such as JohnHolmes, Ginger Lynn Allen, TraciLords, VeronicaHart, NinaHartley, Seka,and Amber Lynn became famous. With the onset of erathe DVD in the late 1990s, there are names like JennaJameson,Juli Ashton, Ashlyn Gere, AsiaCarrera, TeraPatrick, BrianaBanks, StacyValentine, Jill Kellyand SilviaSaint.

DVD era is growing, enabling them to create and distribute pornographic films. Parallel to that, the industry in this field even more heightened and unstoppable even today. Where the internet connection as make things easier. To the extent that access blue movies was no longer a difficult case and should be done secretly. Initially, the makers of porn films Indonesia used a female model who acted as a commercial sex worker. Allegedly, that the cast of the film also a commercial sex worker, which is of course more easily persuaded to star in porn movies. 2 porn film titled "Children Runny nose" and "Gadis Baliku" using the same pattern. And judging from the scene created, scenes that do commercial sex workers more free 'expression', pattern of this scene is very imitate the pattern of US-made porn film that uses a standard grip story: Money can Buy Anything, Included Sex! And this is a strong evidence that the phenomenon of filming sex refers to the pattern of the industry has been run porn film company in the United States. Read: http://jangkrik-jangkrik.blogspot.co.id/2010/05/dibaik-fantasi-pornografi.htmld

[8] http://yobel.byethost31.com/2008/l1/prostitusi-via-internet/

[9]Abdul Kholek, in http://blog.unsri.ac.id/revolusi street / 6

[10]*Feri Sulianta,* Cyber Porn Bisnis atau Kriminal, Elex Media Komputindo, *Jakarta, 2010, p. 3-4.*

[11] http://www.bogor.net/idkf/idkf-2/public-space-dan-publicyberspaceruang-in-era.infthe public

[12]*Nanan Sari Atmatalita , http://www.kompas.com/kesehatan/news/0602/24/104258.htm)*

Many people argue that the law is always behind in following the development of technology that is currently manifested in the internet media. The opinion may be true if we see it only in terms of technology alone. Whereas in addressing the phenomenon should be seen in perspective. This impression has implications on the behavior of users (providers and users) the internet these days tend to "irregularities" and not "adhere to the" norms prevailing in society.

Indonesia has some of the rules relating to *cyberporn.* For example, the Code of Penal (Penal Code), the Telecommunications Act, the Law on Information and Electronic Transactions (ITE).

a) The Code of Penal (Penal Code)
   of the Criminal Code that is used in Indonesa today is a translation of the Wetboek van Strafrecht (WvS) *imposed by Act No. 1 of 1946 on the Criminal Code for the whole territory of the Republic of Indonesia. Based on the provisions stipulated in the Criminal Code related to prostitution are listed in the following terms:*

   The forms of the crime of pornography in the Criminal Code are grouped into three:
   1) a criminal offense in the form of sexually explicit,
   2) criminal acts in the form of pornography,
   3) the crime of pornography as livelihood

   Cyber pornography perhaps can be defined as the spread of pornographic content via the internet. Dissemination of pornographic content over the Internet is not specifically regulated in the Criminal Code. The Criminal Code is not known term / evils of pornography. However, there is the Criminal Code that can be worn for this act, namely Article 282 of the Criminal Code on crimes against decency.

   "Whoever distributes, or puts up a writing, images or objects that have known it is in violation of decency, or whoever with the intention to broadcast, shown or pasted in public, make writing, picture or the object, put it in the country, forward , take it out of the country, or have inventory, or whoever openly or by circulating a letter without being asked, offered or show as can be obtained, punishable by a maximum imprisonment of one year and six months, or a fine of four thousand five hundred rupiah

b) Act oF No. 36 of 1999 on Telecommunications
   on 8 September 1999 passed Act No. 36 of 1999 on Telecommunications. Background or sociological foundation of this law is that the impact of globalization and the development of telecommunications technology has resulted in a very rapid fundamental changes in the organization and the perspective of telecommunications; Article 21, which reads*"Telecommunicationsoperator is prohibited from conducting business telecommunications operation contrary to the public interest, ethics, security and publi*corder".

c) Law Number 19 Year 2016 on the Amendment of Act No. 11 of 2008 on Information and Electronic Transactions
   Article 27 paragraph 1 of Law ITE "Any person intentionally and without right to distribute and / or transmitting and / or make the inaccessibility of Electronic Information and / or electronic documents that have a charge of violating decency
   "Elucidationof the article:
   Paragraph (1)
   the definition of" distributing "is sending and / or disseminate electronic information and / or electronic documents to many people or various parties through the Electronic System.
   What is meant by "transmit" is to send the Electronic Information and / or electronic document, addressed to the other party through the Electronic System. What is meant by "making accessible" is all the other acts in addition to distributing and transmitting via the Electronic System which causes the Electronic Information and / or Electronic Documents can know the other party or the public.

d) Law Number 44 Year 2008 on Pornography
   Act which expressly regulate the pornography is Law No. 44 Year 2008 on Pornography (Pornography Act). Understanding pornography in accordance with article 1 paragraph 1 of the Law on Pornography is:

   "*... drawings, sketches, illustrations, photographs, text, voice, sound, moving pictures, animation, cartoons, conversation, gestures, or forms other messages through various forms of communication media and / or show in public, which contains obscenity or sexual exploitation that violate the moral norms of*society."

   The prohibition of the dissemination of pornographic content, including via the internet, set out in article 4 paragraph (1) pornography Act, namely;

   "Every person is prohibited to produce, produce, reproduce, copy, distribute, broadcast, importing, exporting, offering, reselling, renting or providing explicit pornography that includes:
   a. persenggamaan, including aberrant mating;
   b. sexual violence;

c. *masturbation;*
d. *nudity or nudity an impressive display;*
e. *genitals; or*
f. *child pornography. "*

Violation of Article 4 paragraph (1) of the Law on Pornography threatened with imprisonment of minimum six months and maximum of 12 years and / or fined at least Rp250 million and at most 6 billion (article 29 of the Law on Pornography). Article 10 of Law Number 44 Year 2008 on Pornography "Every person is prohibited from exposing themselves or others in the show or in public that depicts nudity, sexual exploitation, mating, or other pornographic contents".

Pornography Law Article 44 states that when the Act comes into force, all laws and regulations governing or relating to the crime of pornography shall remain valid to the contrary in this Act. The process of addiction of pornography addiction similar to the process that occurs when taking drugs. In other words, is tantamount to letting the brain is exposed to chemicals such as dopamine, serotonin, oxytocin, or epinephrine excessively. Brain also will make the activity that makes him capable of accepting additional chemical substances. In such conditions, it will terbangunlah tolerance and dependence on these substances. From initially just "want", became a source of pleasure requires the (pornography or drugs).[13]

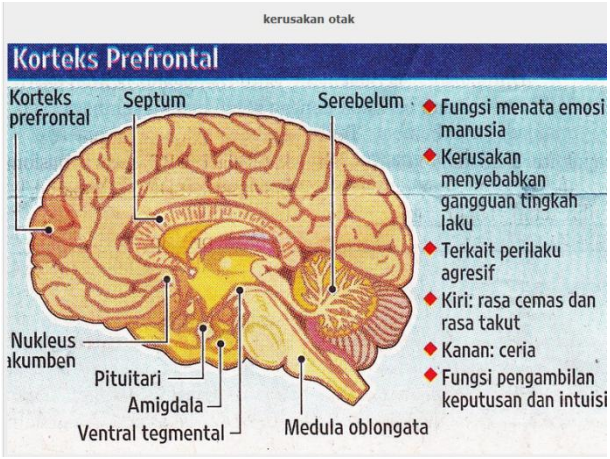

Image 1. Brain Damage[14]

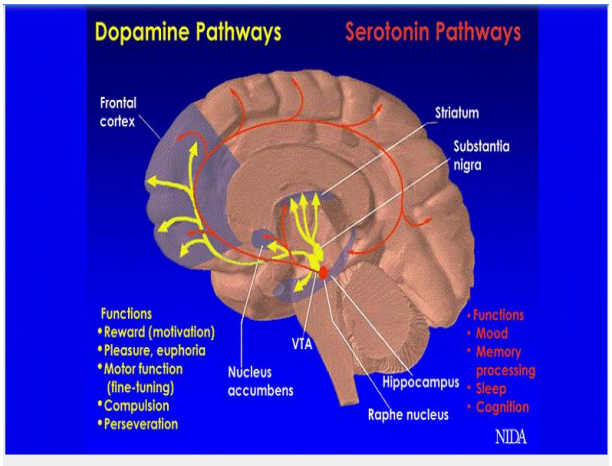

Image 2. Brain Damage Due to pornography is difficult Healed[15]

[13] http://www.gulalives.co/2016/02/20/dampak-negatif-pornografi-pada-anak-yang-wajib-diketahui-ortu/,
[14] https://www.kaskus.co.id/thread/53575bd5f7ca17fb088b47a5/ini-gan-gambar-kerusakan-otak-akibat-kecanduan-pornografi/,
[15] *Ibid*

By dr. Donald Hilton Jr. neurosurgeon Methodist specialty and Transplant Hospital in San Antonio, said that brain damage from pornography addiction is more difficult to cure than food addiction (obesity) and drugs. In general, the brains of the pornographer would produce dopamine and endorphins that are brain chemicals that create a sense of fun and feeling better. When a pornography habit is excessive, then the brain will experience hyper-stimulating (excessive stimulation). Thus affecting the performance neutransmitter or brain chemicals that send messages. Allowing too old to enjoy this habit would be fatal that the shrinkage of brain tissue causes continuous work and eventually the brain will undergo downsizing and permanently damaged. If someone is addicted to pornography, then it would seem a decline in social interaction with the environment and difficulty concentrating. Pornography is a poison that cause addiction similar to drugs, pleasure obtained will be stoked to do the same thing until finally bound and difficult to remove. Therefore, as early as possible should be realized that pornography is harmful to health.[16]

Rehabilitation Model For *Sex Addict* Efforts In *Cyber Porn* Indonesiain

The complexitiesthe telematics crime is not enough when anticipated with normative juridical approach, such as producing new rules and apply them as was common in the practice of law. Telematics crime prevention strategy requires a fuller, ranging from understanding the social reality, interpretation sharpen up on the direction of philosophy, understand and consider the context of global transformation, breakthrough creative to do a reconceptualization of the criminal law.

> *All collective human life is directly or indirectly shaped by law. law is like knowledge, an essential and all pervasive fact of the social condition.[17] Many scholars contend that a principal function of law in modern society is social engineering. Its Refers to purposive, planned and directed social change initiated, guided, and supported by the law.[18]*

According to Lawrence M. Friedman, there are three elements that affect the working of the law is:

1) The legal structure*(legal*structure)
   is a framework that remained part, the part that gives a kind of overall shape and limits to law enforcement agencies. In Indonesia, which is the structure of the legal system such as institutions or law enforcement authorities such as lawyers, police, prosecutors, and judges.
2) Legal substances*(legal*substance)
   Represents the rules, norms and actual behavior of human being in the system, including including products produced by people who are in the legal system that includes a decision that they incur or new rules that they set.
3) Kultur law*(legalculture)*[19]
   is a system of mind and social forces that determine how the law was used, is avoided, and abused by the public.

With the Regulation of the Minister of Communication and Information (Kemenkominfo) No. 19 of 2014 the government can block the sites filled with content considered negative. The Ministerial Regulation is intended to fill a legal vacuum regarding the procedures for blocking Internet content that is considered negative. The regulation also as a derivative of setting the content listed in Law No. 19 Year 2016 on the Amendment of Act No. 11 of 2008 on Information and Electronic Transactions. Related blocking pornographic content in the Minister was explained that the Communications and Information Technology can directly block because it fits well with Articles 17 and 18 of Law-UndangNomor 44 Year 2008 on Pornography as follows:

Article 17:

> "The government and regional governments are required to prevent the manufacture, distribution and use pornography.

Article18:

in order to make prevention as referred to in Article 17, the Government is authorized to:

a. terminating network product manufacture and distribution of pornography or pornographic services, including the blocking of pornography via the internet;
b. to supervise the manufacture, distribution and use of pornography; and
c. cooperation and coordination with the various parties, both from within and from abroad, in the prevention of the manufacture, distribution and use of pornography.

"Before the birth of Candy No. 19 of 2014 blocking can only be done by *an Internet Service Provider* [20](ISP).

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[16] *Ibid*

[17] Niklas Luhman, A sociological Theory Of Law, International Library Of law, 1985, p. 1 (All living with humans directly or indirectly shaped by the law. The law is an essential fact and penetrate all areas of social conditions)

[18] Steven Vago, Law and Society, Sanit Louis University, , 1997, p.18 (Many scholars argue that the primary function of law in modern society is a social engineering. It refers to the social changes intended, planned, initiated and directed, guided and supported by law).

[19]*Achmad Ali*, "Kepurukan Hukum di Indonesia, Penyebab dan Solusinya", *Ghalia Indonesia, Jakarta, 2002, p. 2*

As a comparative study formedcounseling services *Quit Porn Addiction* for those who want to treat addiction to porn sites as in the UK.[21] Humans do have a tendency to engage in sex and love sex in a certain extent, but pornography was able to bring that desire is so strong. Those who view pornography must be thinking about sex, something thought surely produce an action, this action is embodied in a sexual activity.[22] Excessive addictive against pornographic content impact on people's behavior as a consumer to try those who peddle themselves through porn sites. So that those who have become addicted to porn sites need to get out of the addiction rehabilitation. Just as morphine and similar drugs that will be difficult to break the addiction and even dependence will*tincrease with frequencyERUs accessing pornographic content and become a cyber-porn-consuming.*

Mc. Connell and Keith Campbell lays out in five stages of addiction, among others:

1. ***Early exposure*/ see the first**time.People who are addicted to pornography begin by looking at pornographic content.
2. ***Addictio*** /addiction.Activities accessing pornographic content to a habit difficult to stop because they allow themselves captivated by it.
3. ***Escalatio*/ addiction**increased.People who are addicted to not feel pretty and satisfied just by looking at the content that's it, they look for the unusual pornographic content becomes fantasy experience.
4. ***Desensitizatio*/**numb.They experienced a period where pornography is no longer giving any influence as they had done before. They are no longer stimulated and feel the vibrations despite seeing various other pornographic contents.
5. ***Action* / sexual**acts.At this point, people began to realize the obsessions and fantasies, they would make the realization in the real world.[23]

fifth harmful impact for fans of pornographic content but be a desirable destination for the makers of pornography sites which ultimately affects their well being hawked itself through these sites obtain consumers with their online transactions. The impact of various studies on the Government needs to provide places forrehabilitation *sex addict* as a means to treat offenders who access the *cyber-porn.*

Closing

a) negative impact *Cyber Porn*addiction. *Cyberporn* is an act of using cyberspace to create, display, distribute, publish pornography and obscene material. *Cyberspace* with technology that carries pornography, provide more feature-rich form of pornography, pornography experienced media and can dikreasikan translation with multi features, if someone is addicted to pornography, then it would seem a decline in social interaction with the environment and difficulty concentrating. Pornography is a poison that cause addiction similar to drugs, pleasure obtained will be stoked to do the same thing until finally bound and difficult to remove. Therefore, as early as possible should be realized that pornography is harmful to health. Besides cyber porn is a violation of Article 281-283 the Code of Penal (Penal Code), prohibiting pornography in any form; Law No. 36 of 2009 on telecommunications, Article 5, paragraph 1 and article 13 paragraph 1 letter a; Article 27 paragraph 1 of Law ITE and Act No. 44 of 2008 concerning pornography

b) addictive excessive against pornographic content impact on people's behavior as a consumer to try those who peddle themselves through porn sites. So that those who have become addicted to porn sites need to get out of the addiction rehabilitation. Just as morphine and similar drugs that will be difficult to break even addiction dependence will continue to increase with the frequency of accessing pornographic content and become a *cyber-porn-consuming.*

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[20]ISP (*Internet Service Provider*) adalah perusahaan yang menawarkan akses ke internet pelanggan, atau terkdang disebut juga sebagai ISP atau bahkan sebagai IAP, penyedia akses internet. ISP penyedia layanan internet menjaga dan mempertahankan layanan jaringan untuk mentransfer dan memberikan konten web bagi mereka membayar biaya langganan (lihat: http://pacarita.com/pengertian-isp-dan-manfaat-internet-service-provider.html,

[21] http://indonews.org/wah-semakin-banyak-wanita-kecanduan-konten-porno/

[22]*Feri Sulianta*, Cyperporn Bisnis Atau Kriminal, Elex Media Komputindo, *Jakarta, 2010, p. 47*

[23] Ibid, p. 51

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RECONSTRUCTION OF THE LAW OF THE RESTORATIVE JUSTICE AND DIVERSION APPROACH TO THE CHILD IN CONFLICT WITH THE CRIMINAL LAW BASED ON THE JUSTICE AND HUMAN VALUES

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ABSTRACT

This research used a normative approach, the materials are taken from the literature (qualitative descriptive approach), discusses the Law Construction of Restorative Justice Approach, find restorative justice as the goal of criminalization not yet regulated in law, Construction Law of Diversion, finds the absence of special event regulation legislation containing the version . Reconstruction of Restorative Justice, reconstructing a restorative justice system approach to children in conflict with the law with restorative justice is a process aimed at granting rights to victim of crime. In order to achieve the objective, a meeting was held between the victim and the perpetrator. Reconstruction Diversion, reconstructing diversion law protection equal to all children of perpetrators of crime irrespective of legal sanction. Reconstruction means renewing, in this case the updating of the Law of the Republic of Indonesia Number 11 Year 2012 on the Criminal Justice System of the Child, Article 3 letter states, "Every child in the criminal justice process is entitled to social advocacy," changed to "Every child in criminal proceedings shall be entitled to a free social advocacy from the time of investigation to the stage of the child completing the crime. "Article 81 article (2) reads, "The imprisonment which can be imposed on the Child shall be no more than one term of maximum imprisonment for the adult," Changed to"imprisonment that can be imposed on the Child within one-third of maximum adult punishment penalty." Physical and mental children are not strong if they are serving a long sentence, the Government shall make sanctions using non-penal means for children in conflict with the law punishable by imprisonment under seven years.

Keywords: Crime, Restorative, Diversion

Introduction

Teenage crime is a very disturbing issue due to the increasing number of children involved in criminal acts. The term child in conflict with the criminal law is any child who is 12 (twelve) years old and under 18 (eighteen) years who commits a crime, so the child has to deal with the law is called criminal (juvenile) delinquency offender as well as theft, persecution , and others. While the child who committed the offense. Norms in society but not a crime called delinquency offender status as well as smoking, dating, and others.

Juridically, the child molestation is inconsistent with Article 28 D (1), Article 28 G section (1), and 28 H section (2) of the Constitution of the Republic of Indonesia 1945 and Law of the Republic of Indonesia Number 36 of 2009 regarding The health that governs everyone is entitled to the right to life, the right to liberty, prosperity, equality before the law, and justice. Because the Criminal Justice System was established to overcome the crimes committed by children, namely Law of the Republic of Indonesia Number 11 Year 2012 on Child Criminal Justice System.

Sociologically, humans live in a community, in preventing children's crime need to involve the participation of government, government officials, community, clergy, and both parents / guardians and families effectively and continuously in educating and controlling children so that children do not commit crime.

Philosophically, Prisons are just right for adults who commit crimes, children do not go to prison right from the physical look of the child will not be able to live it, and many children are depressed because of it. Criminalization can destroy the future of children, it is necessary to develop a paradigm of decriminalization of children that is to prevent children from criminal sanctions. Prevention appropriate for child delinquency is to use non-penal means without the use of penalties or criminal sanctions. In reality, however, if restorative and deviant justice fails, the process of inquiry remains to be done. Therefore, the government must perform a reconstruction of things that have not been found in Law Number 11 Year 2012 on the Criminal Justice System for Children by using non-penal means.

In this study examined the case of several children who beat and kick the victim which resulted in the victim suffered swollen and bruised wounds. The victim conducted a visum et repertoire and reported it to the Police. This paper aims to research the course of the implementation of the process of restorative justice and the conversion of children in conflict with the criminal law under the title, "Reconstruction of the Law of Diversion Approach and Restorative Justice to Children in Conflict with Criminal Law Based on Values of Justice and Humanity."

Method of Research

According Wahyu, Sapto budoyo and Maryanto in this journal that title Understanding the Concept of Naturalism, Using Comparative Law A Better Indonesians Immigration System in Handling the Illegal immigrant said :

> " The method of the research is by the way of data collecting which is done by documentation study, questionnaires, and interview document raton study is done by tracing through research library, to primary and secondary data sources. The instruments used in this study are questionnaires, interview guidelines and observations notes. The used of questionnaire as means of collecting data based on the reference and goodness of references resourced from the literature (law or the resources of law) as well as on the basic consideration of conscience and honesty. The questionnaire used in this study are mixed (semi-closed), a combination of Closed Questionnaires and open questionnaires, qualitative research method and grounded theory study approach, which is based on primary data comperative law and secondary data from the relevant life rature."[1]

This study uses a normative approach, data obtained from the materials of the literature using a qualitative descriptive approach that describes something in accordance with the practice of the field or the actual situation.

Based on the background described above, can be formulated into several problems as follows:

1. What is the legal construction of a restorative justice approach to children in conflict with criminal law based on justice and humanitarian values?
2. How is the legal construction of a diversion approach to children in conflict with criminal law based on justice and humanitarian values?
3. How do legal reconstruction of a restorative justice and adversarial approach to children in conflict with criminal law based on justice and humanitarian values?

Result of Research

Definition of Children, Children Against Criminal Law, Children in Conflict with the Law, and Law Construction of Restorative Justice Approach to Children in Conflict with Criminal Law

In the Convention on the Right of the Child governing the principle of legal protection of children, Indonesia consented to and signed the convention and is obliged to provide special protection for children in conflict with criminal law.

a. Understanding Children, Children faced with criminal law, Children in conflict with the law

A child is a person not yet 18 (eighteen) years of age, including a child still in the womb, defined in Article 1 Item (1) of the Republic of Indonesia Act No. 23 of 2002 as amended by Law Number 35 Year 2014 concerning Protection Child). Children as the mandate of God Almighty as the successor of the older generation that must be protected and uphold the dignity and dignity, for it needs attention, upbringing, supervision and protection from parents and society with affection to adulthood.

The Criminal Justice System of the Child is the settlement of a child's case against the criminal law from the investigation stage to the guidance stage following the crime (Article 1 Item (1) of the Law of the Republic of Indonesia Number 11 of 2012 on the Criminal Justice System of the Child). The problem of children in conflict with criminal law so far has not responded to many parties to defend it, because the view of society that is still normative, they always want appropriate retaliation for the bad deeds committed by the child when the child does not know whether the actions that are done violate the law , and have not been able to judge between wrong or right, good or bad, and do not understand the consequences of what will happen to the child for the deeds he did.

Article 1 section (3) of the Law of the Republic of Indonesia Number 11 of 2012 on the Criminal Justice System of the Child formulates that a child who is in conflict with the law hereinafter referred to as a child is a child who is 12 (twelve) years old but not yet 18 years. who allegedly committed a crime.

Persecution by a child is inconsistent with Article 28 D (1) of the 1945 Constitution of the Republic of Indonesia, Article 28 G section (1) of the 1945 Constitution of the Republic of Indonesia, and 28 section H (2) of the Constitution of the Republic of Indonesia 1945 and the Law of the Republic of

[1]Wahyu, Sapto budoyo and Maryanto in this journal that titke Understanding the Concept of Naturalism, Using Comparative Law A Better IndonesiansImmigration System in Handling the Illegal immigrant, Using Comparative Law for A Better IndonesianImmigrationsystem in Handling the illegal Immigrant, International Journal of Humanities and Social Sciences, ISSN 2250-3226, Volume 7, Number 1, Research India Publoication (2017), pp.23-33 in the Fajar Ari Sadewo, Gunarto, Hamida, Abdurahman, Reconstruction of Restorative Justice System Approach to Children Who Have Problem With The Laws Based On Justice Values, Volume2, Issue 4, Page 254, July 2017, the International Journal of Academic Research and Development, ISSN : 2455-4197, Impact Factor : RJIF5.22 www.academicsjournal.com, Doctorate Degree Of Faculty of Law, University Of Islamic Sultan Agung Semarang, Indonesia, diunduh tanggal 13 Januari, Jam 01.00 W.I.B.

Indonesia Number 36 of 2009 on Health which regulates every person shall be entitled to the right to life, the right to freedom, welfare, equality before the law, and justice.

Definition of Article 28D section (1) of the 1945 Constitution of the Republic of Indonesia formulates, "Everyone shall have the right to equitable recognition, guarantee, protection and legal certainty and equal treatment before the law." Everyone regardless of race, religion or status including those who are unable to gain access to justice and their rights to the recognition, guarantee, and protection of fair legal certainty. While Article 28 G section (1) of the 1945 Constitution of the Republic of Indonesia reads, "Everyone shall have the right to personal, family, honor, dignity and property protection under his control and entitled to a sense of security and protection from the threat of fear to do something that is a human right. "Article 28 H section (2) of the 1945 Constitution of the Republic of Indonesia states," Everyone is entitled to the convenience and special treatment of equal opportunities and benefits to achieve equality and justice. " guarantees everyone to legal aid as the embodiment of a just and civilized Humanity Principle, and the Precepts of Social Justice for All Indonesians from Pancasila. The provision of legal assistance to children in conflict with the criminal law is provided for in Article 3 letter k, "Every child in the criminal justice process is entitled to social advocacy."

The approach of restorative justice and the conversion of children in conflict with criminal law can not be resolved if it fails or there is no agreement between the victim and the perpetrator and the perpetrator / victim's family. Therefore, it is recommended to the government to reconstruct the Law of the Republic of Indonesia no. 11 of 2012 on Child Criminal Justice System to add add to the article to complete the shortcomings or weaknesses in the Law of the Republic of Indonesia no. 11 of 2012 on Child Criminal Justice System. In Article 1 section (6) on Restorative Justice. Restorative Justice is the settlement of criminal cases involving perpetrators, victims, families, perpetrators / victims, and other related parties to jointly seek a just settlement by emphasizing restoration back to the original state, rather than retaliation (Article 1 section (6) on Restorative Justice Law of the Republic of Indonesia No. 11 of 2012 on the Criminal Justice System of Children).

John Braithwite in his theory that according Restorative Justice, Assessing an Immodest theory and a Pessimistic Theory Draft to be Submitted to Crime and Justice, said :

> ” The distinguishing feature of restorative models with order models lies in the way he looked at the behaviour at the juvenile delinquency. According to model of restorative, delinquency behaviour is behaviour that is detrimental to the child victim and the community. Restorative justice response to delinquency directed at society. Restorative justice is not punitive, not mild nature. Its main objective is provement of the wounds caused his actions, and conciliation among victims, offender, and communities restorative justice also intends to restora the well-being of society through means confronts the child’s behaviour on the responsibility for his behaviour. Victims are given the opportunity to perticipate in the proccess.[2]

Muladi and Diah Sulistyani R.S. in his book entitled The Complexity of Crime Progress and Criminal Policy says:

> "In restorative justice, evil is seen as a violation of a person against another person in a criminal society having both individual and social duties. Violations create responsibilities and focus on problem solving. Responsibility is defined as accepting responsibility and being willing to fix / recoup, prioritize dialogue and negotiation. "

Justice is the right of every human being, the child also needs to be given justice that is given freedom in giving opinion, get education in school, freedom in playing and be creative in developing their talent and get the protection of things that can endanger her and its future.

The definition of legal construction is to find a solution to the legal problems it faces by exploring the meaning it faces. Finding a problem solving to resolve problems within the law.

The construction of the law provides a clear picture of something, simple enough, does not cause new problems aimed at the judge's decision in concrete events to meet the demands of justice and beneficial to the seeker of justice. Construction law to fill legal void. In the construction of law, the principle of justice must take precedence over the principle of utility and the principle of legal certainty.

According to Sudikno Mertokusumo, the law is not incomplete and unclear, it must be sought and found. "This is called legal discovery.

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[2]John Braithwite, Restorative Justice, Assessing an Immodest theory and a Pessimistik Theory Draft to be Summited to Crime and Justice, Review of Research, University of Chicago Press, Page 5 dalam Jurnal hukum Nur Rochaeti, Restorative Justice in Act Number 11 of 2012 On The Juvenille Criminal Justice System in Indonesia, Semarang, Central Java, Indonesia, Email:iyenk283@yahoo.co.id., Proceeding Kuala Lumpur International Business, Economics and Law Conference 6, Vol.4., April 18-19.2015, Hotel Putra, Kuala Lumpur, Malaysia, ISBN 978-967-11350-4-4, yang sudah diterjemahkan ke dalam bahasa Indonesia, diunduh 10 September 2017, Jam 03.45 W.I.B.

Mawissen was quoted by B. Arief Sidharta in his book "Legal Development", explaining:
"The discovery of law with the development of law is a human activity with respect to the existence and enactment of law in the community which includes forming, applying, finding, interpreting systematically, studying, teaching the law.

The Law Construction of Restorative Justice Approach is to find the Arrangement in restorative justice as the purpose of criminal prosecution in court decision is incomplete and not yet regulated in legislation. Restorative justice in the Criminal Justice System is only a matter of understanding. Therefore, the legal values must be extracted in the community, regulate the compensation, and the treatment of the victims of the crime, the perpetrator should not repeat his actions again or commit other crimes that could harm others, so that the perpetrator is really deterrent and does not repeat his actions again or commit other criminal acts.

Promovendus in Sukardi said, the construction of the principle of restorative justice must absolutely define the concept of substantive justice and procedural justice. Justice fairly rule of law is justice given in accordance with the rules of substantive law regardless of procedural errors that have no effect on the plaintiff's substantive rights. According to Plato quoted Fikri Prasetyo states, Procedural Justice is when a person performs deeds in accordance with the expected procedure. This means that what is formally, procedurally correct can be blamed materially and substantially or otherwise.

Definition of Diversity and Construction of Law of Diversi to Children in Conflict with Criminal Law

According to Kevin Haines, Stephen Case, Ketie Davies, Anthony Charles, in his book that tittle The Swansea Bureau, A Model of Diversity from The Youth Justice System aiming as this folow:

"The Swansea Burreau an innovative design to divert young people out of the formal processing of the youth justice system. The Swansea Burreau extends beyond simple diversion grounded in at least or non-intervention and into tackling the underlying causes of youth crime through mechanisms that normalize youth powers and promotes prosocial behavior, carrer and the local community inter-agency working is pursued in a political, strategic and operational context of viewing young people as "children first, offenders second."

a. Definition of Diversion

Diversion is the transfer of the settlement of cases from the process of criminal justice outside the criminal justice (Article 1 section (7) of Law of the Republic of Indonesia No. 11 of 2012 Article 1 section (7) on Diversion). In addition to the defendant's son wherever possible sentenced to criminal as well as using other non penal means as prevention of criminal acts (preventive).

The right judicature for child delinquent offenders is restorative justice and Diversion. Restorative justice is an attempt to prevent children from the criminal justice system children only become victims of the environment that affect children's behavior so that children become evil, economic downturn, do not get the attention and affection from parents.

b. Construction of the Law of Diversion in the Child Criminal Justice System

The definition of the Law of Diversion Construction is to find out that there is no regulation that contains special procedural law in the Criminal Justice System of Children. Understanding Diversion in Article 1 section (7) in the Law of the Republic of Indonesia Number 11 of 2012 on the Criminal Justice System of Children, has not touched on negotiations, damages of goods, treatment of victims, administrative sanctions or criminal sanctions for child offenders when repeating a crime. Therefore, the Government shall add or create and enact new regulations concerning the diversion containing negotiations, damages, treatment of victims, administrative sanctions or criminal sanctions for child offenders if they repeat offenses and all forms related to diversion.

Article 5 section (1) of the Law of the Republic of Indonesia Number 11 of 2012 on the Child Criminal Court System formulates, "The Criminal Justice System of the Child shall prioritize the approach of Restorative Justice." Article 5 section (2) Republic Law Indonesia Number 11 of 2012 on the Child Criminal Justice System reads, "The Child Criminal Justice System as referred to in section (1) covers: a. Child investigation and prosecution conducted in accordance with laws and regulations except as otherwise provided in this law; b. Court proceedings conducted by courts within the general court; and c. Coaching, guidance, supervision, and / or mentoring during the criminal or action process and after undergoing crime or action. Article 5 section (3) of the Law of the Republic of Indonesia Number 11 of 2012 on the Criminal Justice System of the Child states, "In the Child Criminal Justice System as intended in section (2) a and b shall be strived Diversion."

Article 6 Diversity of Law of the Republic of Indonesia Number 11 of 2012 on the Criminal Justice System of children reads as follows, "Diversion aims: (1) Achieve peace between victims and children; (2) completion of a child case outside the judicial process; (3) Avoidance of children from deprivation of liberty; (4) Encouraging children to participate; (5) Impart a sense of responsibility to the child.

According to Article 7 of the Law of the Republic of Indonesia Number 11 of 2012 on the Criminal Justice System of the Child states, "(1) At the level of investigation, prosecution and examination of the case of a child in a state court shall be strived for Diversity; (2) Diversion referred to in sub-article (1) shall be conducted in the case of a criminal act committed a. Threatened with imprisonment under 7 (seven) years; b. It is not a repeat of a crime;

Article 7 letter a and letter b of the Law of the Republic of Indonesia Number 11 Year 2012 on the Criminal Justice System of the Child constitute a constraint for the implementation of diversion, this is contrary to Article 6 section (3) which is to prevent children from deprivation of independence.

Based on Article 29 section (1) of the Law of the Republic of Indonesia Number 11 of 2012 formulates, "Investigators shall seek diversion within a maximum period of 7 (seven) days. Whereas, "The Public Prosecutor shall seek the conversion within a maximum period of 7 (seven) days, formulated in Article 42 section (1) of the Law of the Republic of Indonesia Number 11 of 2012. For that investigator and prosecutor in handling cases of children in conflict with criminal law shall seek diversion.

Matters that need to be constructed in Law Number 11 of 2012 on Child Criminal Justice System as follows:

Article 3 Sub-Article k of the Law of the Republic of Indonesia Number 11 of 2012 on the Criminal Justice System of the Child, which reads, "Every child in the criminal justice process is entitled to social advocacy." However, in reality the child in conflict with criminal law is not accompanied by advisor the law from the investigation stage of the police to the stage of the criminal process, advising the legal counsel aims for children to obtain optimal legal assistance in settling the case, If the child is not accompanied by the Legal Counsel then the child can be convicted which can cause the child's future will be destroyed. Therefore it is expected that Judge, Prosecutor, Police make every effort possible so that child is not punished. Article 3 Sub-Article k of the Law of the Republic of Indonesia Number 11 of 2012 on the Criminal Justice System of the Child shall be amended to, "Every child in the criminal justice process shall be entitled to free social advocacy at the stage of investigation to the stage of criminal proceedings, and prosecution is null and void. "

Article 81 section (2) of the Law of the Republic of Indonesia Number 11 of 2012 on Child Criminal Justice System is important to be changed, because physical and mental children are not strong, the child will experience depression when undergoing a long prison sentence process that is imposed a maximum imprisonment of 1/2 (one parcel) of the maximum adult criminal penalty. Article 81 section (2) of the Law of the Republic of Indonesia Number 11 of 2011 concerning the Criminal Justice System of the Child which formulates, "The imprisonment which can be imposed on the Child shall be no more than 1/2 (one percent) of the maximum prison sentence for adults" shall be changed to "a jail sentence that may be imposed on a Child at least 1/3 (one third) of the maximum imprisonment penalty for an adult."

The appropriate crime prevention for children is to use non-penal means, by providing skills, education, channeling children's talents, so that children can be independent and can compete positively with the outside community. Therefore, the government is obliged to make regulations of non penal means for children in conflict with criminal law.

Persecution is normally regulated under Article 351 of the Indonesian Penal Code (KUHP), minor maltreatment set out in Article 352, and severe maltreatment is provided in Article 353 to Article 356 of the Criminal Code (Penal Code). In this paper, it is discussed in Article 351 section (1) of the Indonesian Penal Code (Criminal Code) of ordinary maltreatment, formulated, "Persecution is punishable by imprisonment for a maximum of two years and eight months." If this severe maltreatment is committed an adult shall be subject to a maximum of five years of imprisonment, but if the child has been subjected to severe maltreatment, the criminal penalty is ½ (one parent) of an adult criminal under Article 81 section (2), Republic of Indonesia Act No. 11 of 2012 on the Judicial System Child Crime. The legislation in Article 81 section (2) of the Law of the Republic of Indonesia Number 11 of 2012 on the Criminal Justice System of the Child is still very severe when applied to the child about the threat of criminal, should the child criminal threat is 1/3 (one third) the criminal penalty against an adult (a person who is 18 years of age or older), because the ½ (one parent) imprisonment is too long to be lived for minors physically or mentally, can result in depression in children.

Prevention appropriate for child delinquency is to use non-penal means without the use of penalties or criminal sanctions. in the form of giving various skills, education is mandatory for her. The Government should in addition to stipulate the Law of the Republic of Indonesia Number 11 of 2012 on the Juvenile Justice System also establish and enact non-penal facilities law in handling the settlement of cases against children in conflict with the criminal law in the case of a criminal offense punishable by imprisonment under 7 years.

The Supreme Court Regulation of the Republic of Indonesia Number 4 of 2014 on Guidelines for Implementation of Diversity in the Criminal Justice System of the Child provides that Judges, Prosecutors and Policemen are obliged to undertake Diversity in handling cases of children in conflict with the law.

According to Soedarmadji in his opinion on measures to strengthen the implementation of the restorative justice approach in the Criminal Justice System of Children is:

"The court as an institution that creates justice in a concrete form should always be able to make law and justice a related sequence. The law is deliberately created by the legislator so that the Judge may be stuck in a pattern thinking that is designed by law and ultimately only capable of creating legal justice rather than substantive justice. "

The legal justice that is owned by the Indonesian people is the justice that humanize the human being called dignified justice that is although someone is guilty legally but must still be treated as human. Every human being is entitled to the same protection before the law without distinction of social status, position, ethnicity, religion, color, and so on. for the sake of the realization, "The Fifth Precept of Pancasila which reads," Social Justice for All Indonesian People, "and the Second of Pancasila which reads," Just and civilized humanity. "

As an example of the implementation of Diversi against children who perform ordinary maltreatment based on Article 351 section (1) of the Indonesian Criminal Code by the Decision of the Makassar District Court by Case Number 20 / Pid.Sus-Anak / 2014 / PN. Mks., The defendant named Bendoro name (pseudonym). 17 ofs old with the defendant Sikri and Dedi on August 14, 2014 at around 21:00 WITA carried out the mistreatment of victim named Andi Najamuddin alias Andi in the environment of Makedes Negeri Makassar was injured with bruises and bruises with Letter of Visum Et Repertum dated August 26, 2014. Based on the Supreme Court Regulation (PERMA) of the Republic of Indonesia Number 4 of 2014 concerning Guidelines for Implementation of Diversity in the Criminal Justice System of the Child, the Public Prosecutor as a law enforcement performs a diversion effort. Then there was a diversion agreement between the defendants and the victim, as follows:

1) The defendant promised not to repeat the deeds done;
2) The defendant's parents and the defendant reimburse the entire cost of the victim's treatment.

With the agreement of the Diversi, the judge who examined the case as well as the divergent facilitator issued the following stipulation:

1) Declare termination of case examination Number 20/Pid-Sus-Anak/2014/PN.Mks. on behalf of Sultan Bendoro alias sultan;
2) To charge state fees.

Reconstruction of the Law of Restorative Justice Approach and Diversity Against Children in Conflict with the Criminal Law

Reconstruction means that "re" means the reformer of a system or form. The reconstruction of the law is a legal reform, according to Big Indonesian Dictionary Law reform is a drastic change for legal reform in a society or country. Reconstruction is synonymous with legal reform. Barda Nawawi Arief in his book titled Bunga Rampai Penal Law Policy said:

"Criminal law reform is essentially an effort to review and re-assess (reorientation and reform) the values of the socio-political, socio-philosophical and socio-cultural aspects of Indonesian society that underlie criminal policies and the rule of law in Indonesia."

The renewal of the law is to renew a system or form within a science, law, written rule, that is finding weaknesses in the articles of the law to be renewed by lawmakers. Juyanto argues in his work entitled Reconstruction Restorative Justice System in Criminal Justice-Based Persecution Progressive Lawsuit:

"The weakness of restorative justice in solving cases of children involved in crime is considered unsatisfactory, perpetrators and victims are not given the opportunity to deliver justice, so that a crime that should be settled by the parties, always must be brought by the court.

The Reconstruction value is the concept a diversion on the inequality law protection for all children who commit criminal acts, they should be given the same law protection regardless the threat of punishment they did and repetition of criminal acts.[3]

Fajar Ari Sadewo, Gunarto, Hamidah, Abdurahman in his international journal said that Description about reconstruct the restorative justice system aproach to children in law conflict with justice based law is :

1. Law Number 11 of 2012 on the child criminal justice system in corporates restorative justice as a concept of thinking that respond to development of the judicial system by focusing on the needs of the involment of the community and the victims percieved as marginalized by the mechanism employed in the existing criminal justice system. Restorative justice is a process aimed at granting

[3]Ulina Marbun and Darwinsyah Minin, Reconstruction of Diversion Concet in Child Protection of Conflict With The Laws Based On the Value of Justice, Page 14, "Comparative Law System of Procurement of Goods and Service Arround Countries in Asia , Autralia and Europe, in the 2nd Proceeding Indonesia Clean of Corruption in 2020,"Doctoral Program Faculty of Law Sultan Agung Islamic University, Jalam Raya Kaligawe, KM.4 Semarang Indonesia, Email : ulinamarbun1@yahoo.com atau jurnal_mizan@yahoo.co.id, https://jurnal.unissula.ac.id/index .php/the2ndproceeding/article/view/1139 , diunduh tanggal 13 Januari 2018, Jam 03.00 W.I.B.

rights to victims of crime. In order to achieve the objective, a meeting was held between the victim and the perpetator. [4]

2. The handling undertaken taking into account the wider influence on victims, perpetrator and communities is carried out trough a diversion mechenism. The purpose of this article is to establish an ethical pathway based on the principles and rules an violations.[5]

Widodo said in his international journal about Based on the previsions of the act of child criminal justice system, it can be briefly explained that the characteristic of diversion based on the rhetoricaljustice of Indonesia version can be spelled out in aspects, the term, objective, process, the outcome of the agrrement, and the indicator of justice to be achieved :

a. The aspect of the requirement of the case that can be diversified, namely the perpetrator have been twelve years old but have not reached eighteen years of the first time of committing a crime is threatened with imprisonment of fewer than seven years;
b. The aspect of diversion purpose, namely : (a). Achieving peace between the victim and the child; (b). The settlement of the child's case outside the judicial process; (c). Preventingthe child deprivationof liberty; (d). Encouraging society to participate; (Building a sense of responsibility to the child;
c. The aspect of the diversion process, namely : (a).The diversion may only be conducted chronologically by the investigator, the prosecutor, and the jugde by involving the parties concerned; (b). It is done by direct face to-facemeeting a room for deliberation, with the obligation to pay attention to the to gthe interes of the victim, the welfare and resposibility of the child, the avoidance of negative stigma, avoidance retaliation, comunity harmony, and propeaty, decency, and public order; (c). The child of the perpetrators of a crime must be determinated to become a suspect first by the investigator; (d). The diversion is done in two phases, namely the diversion process and the implementation of diversion agreement; (e). If the diversion process does not reach an agreement (f). Fail then the process of settlement of the case will be commited to the criminal justice system; (g). The evidence of success of the diversion shall be a legal document in the form of a decision of court of justice ; (h). If the diversion agreement has already been executed than the case will be closed;
d. The aspects pf the result of the diversion agreement, namely : (a). Peace with or without compesation; (b). Resignation to parents or a guardian ; (c). Participation in educational institutions or social welfare provider for a maximum period if three months; or (d). Community service;
e. The aspects of indicator of restorative justice elements to be achieved, namely :
(a). Indicator element " Settlement of criminal case involving perpetrator, victim, and other related parties"; (c). The element of indicator, to jointly seek a fair settlement by emphasizing on : (1). The Restoration of the original condition, and (2) not retaliation.[6]

The combination of two concept, special responses to children and young people an equal rights under the law create intention in practice on how best to reconcile the competing claim of the law, judicial process and punishment with the need consider the best interest and the rights of the child or young person, while at the same time responding affectively at the needs of victims and communities and to reducing affending system

[4]Fajar Ari Sadewo, Gunarto, Hamida, Abdurahman, Reconstruction of Restorative Justice System Approach to Children Who Have Problem With The Laws Based On Justice Values, Volume2, Issue 4, Page 254, July 2017, the International Journal of Academic Research and Development, ISSN : 2455-4197, Impact Factor : RJIF5.22 www.academicsjournal.com, Doctorate Degree Of Faculty of Law, University Of Islamic Sultan Agung Semarang, Indonesia. quoting marlina, Peradilan Pidana Anak di Indonesia, Pengembangan Konsep Diversi dan Restorative Juetice, P.T. Refika Aditama, Bandung, 2007, P.95., diunduh tanggal 13 Januari 2018, Jam 03.25 W.I.B.

[5]Fajar Ari Sadewo, Gunarto, Hamidah, Abdurahman , Reconstruction of Restorative Justice System Approach to Children Who Have Problem With The Laws Based On Justice Values, Volume2, Issue 4, Page 254, July 2017, the International Journal of Academic Research and Development, ISSN : 2455-4197, Impact Factor : RJIF5.22 www.academicsjournal.com, Doctorate Degree Of Faculty of Law, University Of Islamic Sultan Agung Semarang, Indonesia. quoting Setyo Trisnadi, The Legal Protection of Indonesian Physician : The Medical Dispute Settlement Based On Principles, Standards, Norms and Rules of Physicianprofession in Doctor-Patien Relationship, International Journal of Humanities Social Science and Education (IJHSSE) Volume 3, Issue 1, PP 146-155, ISSN 2349-0373 (Print) dan ISSN 2250-3226, Volume 7, Number 1, Research India Publications (2017), PP 23-33, diunduh tanggal 13 Januari 2018, Jam 03.35 W.I.B.

[6]Widodo (Professor in Post Graduate Program of Wisnuwardhana University of Malang, East Java , Indonesia), The Diversion Based on Phiolosophy of Restorative Justice Indonesia Version : Between Ideality and Reality in Settlement of Child's Casses by An Investigator, Wisnu Wardhana, University of Malang, East Java, Indonesia, Journal of Philosophy, Culture and Religion, ISSN 2422-8443, am International Peer-Reviewed Journal, Vol.30, 2017, Page 5, www.iiste.org, iiste.org/Journals/index.php/JPCR/article/download/38088/39166, di unduh tanggal 14 Januari 2018, Jam 03.45 W.I.B.

dealing with young people who offend are often different along the broad dimension of justice and welfare. As with all ideal types, models are seldom found in a pure form.[7]

John Munci Said in his international journal about Two quite different global narratives tend to characterise analytical communities analytical commentaries of international trends in juvenile justice :

> " The first an most dominant, is essentialy dystopisn and pessimistic . It conceives a process where by, negemonic neo-liberalism has all but eradicated welfare protectionism and is steadily giving rise ti diversify and intensifying 'cultures of control' with in which the special status of childhood is diminishing; children'shuman rights are systemically violated, and the global population of child prisoners continues to grow. The second, but significantly less developed narrative , is in herently utopian and optimistic it emphasises the unifying potential of international human right standard treaties, rules and conventions and the promise of progressive juvenile justice reform based on 'best interest' principles child friendly imperative and 'last resort' rationales.''[8]

Dolares E. Smith said in his journal about Corporal Punishment of Children in Jamican Context :

> " Additionally, many care givers may be un informed about the child development process and what behavior are appropriate and normal at each developmental stage. Thus, it is conceivable that children are punished for what should be seen as routino developed and conduct. There for, basic child development information coupled with elements of non-violent disipline should be emphasized in parent education programs. Taken together, parents and prospective parents shoul be dedicate on the investment of time and effort required for optimal child outcomes, made aware of the advantages of non violent dicipline, instructured on basic child development processes, and coached on alternative models to corporal punishment."[9]

According Olayinka Silas Akinwumi and Definition about children and young person : The children and young person, enacted in Eastern,Western and Northern regions, a "child" means a person under fourteen years, while "young person" means a person who has attained the age of fourteen years and is under the age of seventeen years."[10]

Florenda S. Frivaldo said in her book that tittle Children in Conflict with the Law , tha Case of Street Children in The Philipines in this follow :

> " In the poorer of society, families sometime abandon their role of providing direction and guidance t their children because the burden of sheer survivs outweigghs all other concerns. The children are forced to find work and in turn become economically self-reliant, thereby finding it necessary to heed any direction their families may attempt of to provide for them. Instead of gaining moral values from their families, such misguided youth instead turn to movies on televisionand the cinema, which are saturated eith crime, violence, drugs, and sex and exhibit a total disregard for any and all social and familial values and responsibilities.

From the description of the legal reconstruction of the restorative justice approach and the diversion approach finds the following:

a. Making Amendments to Article 3 Sub-Article k of the Law of the Republic of Indonesia Number 11 of 2011 on the Criminal Justice System of the Child formulates, "Every child in the criminal justice process is entitled to social advocacy," changed to "Every child in the criminal justice process is entitled to social advocacy free of charge from the stage of investigation to the stage of the child's completion of a criminal, if it does not receive social advocacy, the investigation and prosecution are null and void. "

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[7]Bill Whyte, Young People in Conflict with the Law in Scotland-50 years after the Kilbrandon Report, What does Contemporary Policy and Practice Tekk Us about Progress Since and About The Legacy of Kilbrndon?Scottish Journal of Residential Child Care, December 2014, Volume 13, Nomor 3, Page 7, Sutherland Trust LectureSpring, May 2014, B.Whyte@ed.ac.uk , Diunduh tanggal 14 Januari 2018, Jam 12.00 W.I.B.

[8]John Muncie, International Juvenile (in) Justice Penal Severity and Rights Compliance, International Jurnal for Crime, Justice an Social Democracy, 2 (2), PP.43-63, 2013, Page 44, Open Univerdity, U.K., Queensland University of Technology, Australia, www.crimejusticejournal.com, IJCJ 2013 2(2) : 43-62, diunduh tanggal 14 Januari 2018, Jam 01.00 W.I.B.

[9]Delores E. Smith, Corporal Punishment of children in The Jamaican Context, Internationl Journal of Child, Youth and Family Stidies, 2016, 7(1), Page 38. Delores E. Smith, P.H.D., is an Asociate Professor in the Department Family Studies, Collage of Eduction, Health, and Human Sciences, 1215 W.Cumberland Ave., Knoxvile, TN 37996. E-mail : delsmith@utk.edu, https://journal.Uvic.ca/index.php/ijcyfs/article/download/15415/6124, diunduh tanggal 14 Januari 2018, Jam 01.20 W.I.B.

[10]Oleyinka Silas Akinwumi, Legal Impediments on the Practical Implementation of the Child Right Act 2003, Taslim Elias Library, Nigerian Law School, Page 387, The International Journal of Legal Information, Volume 37, Issue 3, article 10, Winter 2009, http://scholarship.law.cornel.edu/ijli/vol37/, diunduh tanggal 14 Januari 2014, Jam 23.38 W.I.B.

b. Changing Article 81 section (2) of the Law of the Republic of Indonesia Number 11 Year 2012 on Child Criminal Justice System is important to be changed, because physical and mental children are not strong, children will experience depression when undergoing long prison sentence process, long 1/2 (one parent) from the maximum the threat of imprisonment for adults. Article 81 section (2) of the Law of the Republic of Indonesia Number 11 Year 2011 concerning the Criminal Justice System of the Child which formulates, "The imprisonment which can be imposed on the Child shall be no more than 1/2 (one percent) of the maximum prison sentence for adults" shall be changed to "a jail sentence that may be imposed on a Child at least 1/3 (one third) of the maximum imprisonment penalty for an adult."
c. The Government shall create and enforce sanctions by using non-penal means for children in conflict with criminal law in the event of a criminal offense punishable by imprisonment under 7 (seven) years

In addition to the government's stipulation of the Law of the Republic of Indonesia Number 11 Year 2012 on the Criminal Justice System of the Child as a penal instrument, the Government shall make and establish the use of non-penal means against the child who committed the crime as follows:

a. Moralistic, Abolitionistic, Prefentive
   According to A. Qirom Syamsudin Meilala quoted Maidin Gultom that in general to cope with juvenile crime can be done in three ways, namely:
   1) Moralistic, ie propagating the teachings of religion and norms, good legislation and other means that can curb the desire to do evil, this system should receive special attention, both by the parents themselves, especially for the experts concerned , as well as the government;
   2) Abolitionistic, ie eradicating the causes of the crime, for example, it has been investigated that the economic factor (poverty and welfare) is the cause of the effort to achieve prosperity and prosperity is to reduce crime;
   3) Preventative, ie the effort to avoid crime before the crime plan occurs and is done. This preventive action can also be a meaningful giving of the children, as in addition to incorporating into skills courses such as culinary, dress, art, sports, music, laudering, interior and exterior design, and as a way to channel talents which is owned by a compulsory education for him, religious education, so that after completing the crime the child is able to compete with the outside community, Patrol conducted by law enforcement officers in the street are prone to crime, and others.
b. The Power of Judges in Determining the Prevention of Legal Offenses
   According to Jeremi Benthan in his book on the theories of legislation The Principles of Legislation, Civil Law and Criminal Law explain:
   "The power of judges in preventing the occurrence of violations of the law ..... has the power of the Law."
c. Raising Awareness of Law Society
   Legal awareness is other social activities.

Discussion

Of the many studies and experience in the field in solving the cases of children involved in crime based on the paradigm of the juvenile justice system in Indonesia can not be tolerated any more because it will only destroy the future of the child and is a character assassination for the child, then it is the right child delinquent actors are restorative and diversionary justice. Convicting children through penalty means will only make them more evil than ever. Prison is an environmental factor that can affect children's behavior to make children more intelligent, more intelligent, more experienced in doing criminal for hanging out with prisoners of child prisoners.

Imprisonment adversely affects the physical, psychological, future and even survival of the child. Once a child gets out of prison, he or she will usually get a negative stigma from the community, and exclusion from the community will be difficult to get a job, the child becomes unemployed, will feel cornered, low self-esteem, frustrated and able to return to crime such as stealing, robbing, etc.

This research gives contradictions to the Police, General Officers and Judges to seek the diversion of children who commit a criminal offense if they are not enforced may result in investigations, prosecutions, court decisions null and void, and shall endeavor to provide advocates / in conflict with the law at the police investigation stage until the stage of child completion of criminal proceedings.

Closing

The legal construction of finding solutions to the legal problems it faces by exploring the meaning it faces. The Law Construction of Restorative Justice Approach is to find the Restorative Justice Arrangement as the objective of punishment in the incomplete and not yet regulated in the legislation. Restorative justice in the Criminal Justice System is only a matter of understanding.

For that reason, it should be explored the values of the living law in society, regulating compensation and rehabilitation or treatment of victims of crime. While the Law of Diversi Construction concerns finding something related to the rules that have not yet been contained in the Law on Versioning. Therefore, the government is obliged to create and enact new regulations containing special regulations on diversion.

Reconstruction means that "re" means the renewal of a system or form. Find articles that are incompatible or incomplete in the law to be updated by lawmakers. Legal Reconstruction of the Restorative Justice Approach seeks weakness of the restorative justice system and Diversity in children in conflict with criminal law as well as the application of a restorative justice system and a fairness-based Diversity. It can therefore be advisable to the government to add suggestions in chapters or chapters of the lesson to supplement the deficiencies or weaknesses in those Articles.

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DETERMINING INJURY DEGREE ON LIGHT AND INTERMEDIATE INJURY IN CLINICAL FORENSIC CASE

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ABSTRACT

Conclussion in Visum et Repertum report should always include wound qualification. Injury degree determination should have a scientific base that could be accounted. Determination of light and intermediate injury still causes problems towards the examiner, therefore it often cause problems for the authorities in processing the case. In this paper, we tried to explain methods in determining injury degree on light and intermediate injury. We explain two case reports of a victim with history of battery and assault. First case was a woman who had been beaten and strangled by her friend, and second case was a woman who had been assaulted using knife and been poked in the eye using a finger by her friend. In first case, we found few abrasion wounds at the front of victim's neck. On second case we found abrasion wound on the nose bridge, incissed wound on lower left arm and the result of consultation with the eye department revealed an erotion on cornea with bleeding on the sclera. Impact of the blunt injury to the neck depends on the anatomy location, pressure duration, intensity of pressure and the area of pressure. In this patient we did not found any signs of disturbance in airway system nor vascular system. The result of consultation with the ear-nose-throat departement revealed a normal result. Therefore we could conclude that the injury on the first victim had been a light injury. On second case, the incission wound on the lower left arm must be stitched because it had damaged the muscle tissue. The result of consultation with the eye department revealed cornea erotion and sub-conjunctival bleeding without complication. It can be concluded that the second case was an intermediate degree wound. Determination of wound degree by an examiner should have scientific base. The examiner has the authority to determine whether a consultation / supporting examination is needed or not.

Keyword : Visum Et Repertum, Clinical Forensic, Injury Degree.

Introduction

In Indonesian law, *Visum et Repertum* was stated in *Staatsblad* No. 350 year 1937 that stated *"Visum et repertum is a written report, for the sake of justice acording to the authority's request, that is made by doctor about all that the doctor's seen and discover in an evidence investigation. Based on the oath when the doctor's accepted his position and the doctor's best knowledge.".* Visum et repertum was also stated in article 187 Law of Criminal Procedure that said, "*written testomony of an expert which contains an opinion based on his expertise conderning a fact or a circumnstance which is provided as evidence of a fact or a circumstance.*[1-2]"

When an offence affecting the human body happens, the victim would report the offence to the authorities and the authorities will accompany the victim to a healthcare for further examination and medical intervention needed. The victim will be handled according to the standard operating procedure in the healthcare. After the written request from the investigator involved was accepted, the doctor will write the *Visum et Repertum.* The *Visum et Repertum* then sent to the investigator with official report. However if the victim is in need for urgent medical intervention, they can seek medical care first before reporting to the authorites [3-4]

Refering to Law of Criminal Procedure article 133 that stated, "*In matters of an investigator for the sake of justice in dealing with a victim, whether it's an injured, poisoned, or dead that was suspected to be a criminal event, they had the authority to ask for an expert statement from a justice expert doctor, or a doctor or another expert* [5,6] In daily practice, a doctor doesn't do examination for the sake of diagnostic and treatment of a disease only, but also to make a medical statement letters including visum et repertum.

Visum et repertum is a subtitute of an evidence in court, if the evidence is not be able to be brought on a court in its original form. Evidence that is orginated from a human body could change, for example an injury

[1] Staatsblad no 350 year 1937.
[2] Law of Criminal Procedure
[3] Aflanie I *et al.* 2017. *Forensic and Medicolegal Science.* Jakarta : Rajawali Press.
[4] Indonesian Head of Police Regulation no 10 year 2010 chapter 12.
[5] 2012 Indonesian Doctor Competentency Standard
[6] Law of Criminal Procedure

can be healed[7,8]. In forensic medical science, injury qualification divided according to Indonesian Penal Code, that is a light injury, intermediate injury and severe injury. However, there is no perception standarization of an injury qualification regarding wound qualification related to law aspect of an injury. Result of a research in Pekanbaru, there isn't any doctor that had done visum et repertum examination including wound qualification according to KUHP, whereas from the law point of view, determination of injury degree causes different penalty for the perpetrator. Therefore, the mistake in concluding the injury qualification properly can cause injustice for the victim as well as the perpetrator. That causes a decrease of *visum et repertum* function as an instrument to help judicary progress.

Severe wound injury had stated clearly in Indonesian penal code article 90 that stated : (1) illness or injury, which does not leave any prospect for a complete recovery or through which danger of life exists (2) continuous incopetence for performing official and professional activities; (3) loss of the use of a sense organ; (3) mutilation; (4) paralysis; (5) disturbance of the intelectual capabilities, which lasted for more than four weeks; (6) removal or death of the womb of a woman.

Differentating the light and intermediate injury degree often causes problem with the doctor as the examiner. This could cause variation in clinical decission during determination of injury degree that will harm the law decision in juridical process. Determination of injury degree must have a responsible scientific base. Anatomical regio, wound type, wound care and prognosis were aspects that have to be considered in determining injury degree. In this case report, we explain the method of determining mild and intermediate injury degree using two case reports as examples.

Method

In this article we will explain two cases of living victims with history of battery and assault. First case was a woman with history of beating and manual strangulation by her friend on 3rd of June 2017 around 06.00 PM. The second victim was a girl, with history of attack using a knife and being poked in the eye using a finger by her friend on 19th of June 2017.

Result

First Case

On the first victim examination we found :

a. Multiple abrasion wound on the front neck. The largest abrasion wound was three centimeters in length and zero point seven centimeters in width. The smallest abrasion wound was zero pint five centimeters in length and zero point three centimeters in width. Both wounds' borders were unclear and the colours were brownish red.
b. Consultation result with ear nose and throat department revealed no abnormalities.

Second case

On the second victim examination we found :

a. An abrasion wound on the nose bridge, zero point seven centimeters in length and zero point two centimeters in width. The wound border was unclear and the colour was red.
b. An open wound on the front of lower right arm. The wound was two centiemter length and zero point three centimeters width. The wound border was clear, flattened margins, both corners were sharp, wound wall was flattened and consists of skin, connective tissue, fat tissue and muscle. The base of the wound was muscle.
c. Consultation with the eye departement revealed :
    1) Normal intraocular pressure on both right and left eye.
    2) Front chamber of right eye was calm, pupil was round, central, regular, zero point three centimeters in diameter, pupil reflex was normal, lens was clear with bright fundus reflex.
    3) On left eye there was a bleeding on nasal part of eyeball mucous membrane, reddish color, no laceration. On left cornea (clear membrane of the eye) there were minimum swell and damage at the center with zero point four centimeter length and zero point two centimeter width, no infiltration, flourescent test was positive. Front chamber of left eye was on third eye in van Herick classification (open edge), pupil was round, central, regular, zero point three centimeter in diameter, pupil reflex was normal. Lens was clear with bright fundus reflex.
d. Conclussion : according to the examination, on third eye there was erotion of conea and bleeding of bleeding of eyeball mucous membrane (sclera).

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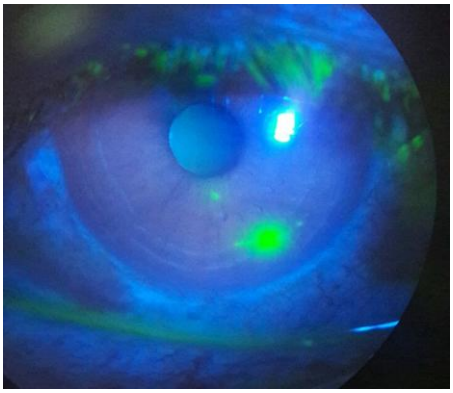
Picture 1. Abrasion wound on the front neck of the first victim

Picture 2. open wound on the front of lower right arm of second victim

Picture 3. abrasion wound on the nose bridge of second victim



Picture 4. Positive fluorescence test reveals erotion of conea

Discussion

In determining injury degree on living victim, a doctor must have strong scientific base. On first victim, the injury that had been found was concluded as mild injury. The reason for this conclussion is the injury that had been found on the victim examination that were abrasion on the skin of the neck, was wound that will not result in an illness or obstacles in the performance of official or professional activities. Examples of mild injuries were abrasion wound or bruise[9].

Anterior part of the neck has the collection of important organs including blood vessels, windpipe, oesophagus and nerves. On the neck, there were a lot of vital organs that were close to the skin and could easily injured. Compared to a penetrating injury to the neck that could directly cause injury on blood vessels such as ruptures or haematoma as well as non-direct impact like air embolism, blunt force injury to the neck could not be detected at first[10].

Laryngeal injury that caused by direct blunt force injury on the front part of the neck, that compressed the thyroid gland and crycoid cartilago towards cervical vertebra can be detected by stridor during inspiration. If there were ruputre on carotid artery, there will be a rapid increasing haematoma that cause the pressure on the airway. Damage on the nervous system can be detected by contralateral paralysis from the impact area[6].

Impact from the blunt force injury to the neck depends on the anatomical position of the blunt force injury, duration of the pressure, the severity of the pressure and the surface area of the pressure. Fatal manual strangulation could cause cardiac arrhytmia (irregular beating of the heart) due to the pressure on carotid arterial ganglion, pressure on carotid artery that causes obstruction of the blood flow to the brain, pressure on the jugular vein that prevent return flow from the brain and pressure to the larynx that causes obstruction of the airway that leads to asphyxia[11].

On physical examination, the signs that should be considered as a warning on a victim with history of a blunt force trauma to the neck were anatomical disturbance of the airway such as tracheal laceratorn, fracture on the larynx and increasing haematoma. Examination must evaluate whether there were stridor or tracheal deviation. Physical examination must included palpation to the neck to evaluate increasing haematoma, pulsative mass and subcutan emphysema. On this victim there weren't any of the signs. The victim complained of sore throat and to make sure whether there were any abnormality on the airway the patient had been consulted to the ear nose and throat department. The consultation result did not reveal any abnormality. From the analysis it could be concluded that the injury on the first victim was a light injury, because it did not result in an illness or obstacles in the performance of official or professional activities[12].

On second case there was an incissed wound on the front side of lower right arm. The injury needed a wound hecting (wound stitches) because the damage had reached the muscle. According to Mayo Clinic, wound with more than ¼ inches depth (0.635 cm) or exposed the fat tissues / muscle needed wound stitches[13]. Result of the examination form the eye department on the second victim revealed erotion of the cornea and bleeding on the sclera. Erotion of the cornea could also be followed by intra-ocular structure prolapse. Prognosis of corenal erotion depends on whether there is any intra-ocular structure prolapse or not. If the injury on the cornea was severe and there is any loss of intra-ocular structure then the prognosis for the retrieval of normal eye function was terrible, this condition is an indication for enucleation (urgical procedure that involves removal of the entire globe and its contents, with preservation of all other periorbital and orbital structures) or evisceration (surgical technique by which all intraocular contents are removed while preserving the remaining scleral shell, extraocular muscle attachments, and surrounding orbital appendages)[14].

In this victim the laceration of the cornea did not followed by intra-ocular tissue prolapse and also free from contamination. In this victim laceration on the cornea was treated by antibiotic eye ointment and eye patch. Laceration on the cornea in this situation could be healed within 24-48 hours. Sub-conjunctival bleeding could be a sign of eyeball damages, if there is any decreasing intra ocular pressure also deepening of front eye chamber. On second victim the intra ocular pressure was normal. Sub conjungtival bleeding without complication could be healed within five to six days. From that analysis, could be concluded that the injury from the second victim was an intermediate injury because it caused illness or obstacles in the performance of official or professional activities temporarily[15].

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Conclussion

In determining injury degree, a doctor must have a strong scientific base. Injury on each body part has a warning signs that had to be recognized in order to detect deterioration. The healing time of an injury or the disturbance of certain body part function during healing time should be considered in order to determine injury degree.

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IMPLEMENTATION OF DISASTER MANAGEMENT PARADIGM ACCORDING TO LAW NO. 24 OF 2007 OF STAKEHOLDER SYNERGY IN DISASTER HANDLING

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ABSTRACT

Indonesia is a country that vulnerable to various catastrophic events. According to Law no. 24 of 2007 on Disaster Management, the disaster management paradigm in Indonesia has changed, from the fatalistic-reactive approach and emergency response, to proactive and disaster risk reduction, integrated through development planning. This paper examines how the implementation of disaster management paradigm in accordance with Law No. 24 of 2007 in thestakeholders' synergy of disaster management as well as the factors that influences it. The conclusions obtained in this study is that changing the paradigm of disaster management provides a new view of disaster management and its implementation to demand shared responsibility, both among society in general, government, private parties, and international institutions. The factors that influencing stakeholders' synergy of disaster management are regulation, institutional, funding, and capacity building aspects.

Keywords: Disaster Management, Stakeholders' Synergy

Introduction

Fourth Aleniaof The Preamble of the 1945 Constitution of the Republic of Indonesia mandates that the Government of the Unitary State of the Republic of Indonesia to protect the entire nation and the entire blood of Indonesia, to promote the general welfare, to educate the nation and to implement the world order based on independence, eternal peace and social justice.

As the implementation of the mandate, a national development aimed at bringing about a just and prosperous society that always considers the right to livelihood and protection for every citizen within the framework of the Unitary State of the Republic of Indonesia.

The Unitary State of the Republic of Indonesia has a large area and is located on the equator in a cross position between two continents and two oceans with natural conditions that have various advantages, but on the other hand its position is in an area with geographical, geological, hydrological and demographic conditions that are vulnerable against the occurrence of disasters with a high enough frequency, so that requires a systematic, integrated, and coordinated.

Indonesia is the largest archipelago in the world. The region is also located between the Asian and Australian continents and the Indian Ocean and Pacific Ocean has 17.508 islands. Despite the richness of nature and the beauty of the extraordinary islands, the Indonesian Nation needs to realize that the archipelago has 129 active volcanoes known as the "ring of fire" region, and lies in the meeting of three active tectonic plates: the Indo-Australian Plate, Eurasia and the Pacific. Being in the "ring of fire" region and meeting three tectonic plates put the Indonesian archipelago country potentially against the threat of natural disasters.

In addition, Indonesia's position in the tropics and hydrological conditions triggered the occurrence of other natural disasters, such as tornadoes, extreme rain, floods, landslides, and drought. Not only natural disasters as threats, but also non-natural disasters often hit homelands, such as forest and land fires, social conflicts, and technological failures.

Facing the threat of disaster, the Government of Indonesia plays an important role in building disaster management system in the country. Establishment of institutions is one part of the system that has been processed from time to time.

The tragedy of the earthquake and tsunami that struck Aceh and surrounding areas in 2004 has prompted the Government of Indonesia and internationally serious attention in disaster management. Following up the situation at that time the Government of Indonesia issued Presidential Regulation no. 83 of 2005 on National Coordinating Agency for Disaster Reduction. This agency has a coordination function that is supported by the daily executive as the element of disaster management. In parallel, the approach of disaster risk reduction paradigm is a major concern. In response to the current disaster management system, the Government of Indonesia is very serious in establishing legalization, institutions, and budgeting.

After the issuance of Law Number 24 Year 2007 on Disaster Management, the government then issued Presidential Regulation No. 8 of 2008 regarding the National Disaster Management Agency. National Disaster Management Agency consists of heads, elements of disaster mitigation, and elements of disaster management. National Disaster Management Agency has the function of coordinating disaster management activities in a planned, integrated and comprehensive manner.

Disaster management is any effort or activity undertaken in the context of prevention, mitigation, preparedness, emergency response and disaster-related recovery undertaken before, during and after the disaster.

Disaster management is a series of preventive, rescue and rehabilitative activities that must be held in a coordinated, comprehensive, simultaneous, fast, precise and accurate manner involving cross-border areas, requiring coordination of various agencies concerned with an emphasis on public awareness and community mobilization.

Under the provisions of Article 5 of Law Number 24 Year 2007 on Disaster Management, the Government and Local Government are responsible for the implementation of disaster management. The establishment of National Disaster Management Agency is the realization of Article 10 paragraph (1) of Law of the Republic of Indonesia Number 24 of 2007 on Disaster Management. Article 10 paragraph (2) of the same Law states that this institution is a ministerial non-ministerial government institution.

Article 18 in Law Number 24 of 2007 mandates the establishment of National Disaster Management Agency) at the provincial and district / municipal levels.

Establishment of Regional Disaster Management Agency based on the Regulation of the Minister of Home Affairs Number 46 of 2008 on Guidelines of Organization and Working Procedures of Regional Disaster Management Agency and Regulation of the Head of National Disaster Management Agency Number 3 of 2008 About Guidelines for the Establishment of Regional Disaster Management Agency.

Furthermore, based on the provisions of Article 25 of Law Number 24 Year 2007 stipulated that further provisions on the formation, function, task, organizational structure and working procedures of the Regional Disaster Management Agency shall be regulated by a Regional Regulation.

Grobogan District has geographical, geological, hydrological and demographic conditions that enable disaster, so Grobogan District is known as disaster prone area. The disaster that occurred in Grobogan Regency is very diverse both types and scale. Potential causes of disasters in the District Grobogan can be grouped in 3 (three) types of disasters, namely natural disasters, non-natural disasters, and social disaster.

Natural disasters are disasters caused by events or series of events caused by nature such as earthquakes, tsunamis, volcanoes, floods, droughts, hurricanes, landslides, droughts, wildfires/land due to natural factors, plant pests, epidemics, epidemics, extraordinary events, and space events / celestial bodies.

Non-natural disaster is a disaster caused by an event or series of non-event events that include failing technology, failing modernization, epidemics, and disease outbreaks. Non-natural disasters include human-caused forest/land fires, transport accidents, construction / technology failures, industrial impacts, nuclear explosions, environmental pollution and outdoor activities.

Social disaster is a disaster caused by events or series of human-caused events that include social conflicts between groups or between communities, and terror. Social disaster, among others, in the form of social unrest and social conflict in society that often occur.

Disasters cause impacts on the loss of human life, property, and damage to infrastructure and facilities. The loss of property and infrastructure can reach an enormous amount so that a competent institution is needed to carry out disaster management.

Based on the Letter of the Minister of Home Affairs of the Republic of Indonesia Number: 061/352/SJ Dated February 7, 2011 Regarding Recommendation Formation of Regional Disaster Management Agency of Grobogan District is temporarily stipulated in the Regent Regulation, so that at the first opportunity the institution is stipulated in the Regional Regulation. Finally on March 27, 2012 officially ratified by Local Regulation no. 6 of 2012 on Organization and Administration of Regional Disaster Management Agency of Grobogan Regency.

Research Method

This research is a type of normative juridical research. The research was conducted by doing library research, that is research on secondary data. [Ronny HamityoSoemitro, Legal Research Methodology, Semarang: Ghalia Indonesia, 1982, p. 44] Thus in this study more emphasis on reviewing the rules of applicable law, especially those relating to the issues to be discussed in this study.

The research specification used in this research is analytical descriptive, that is doing an analysis as an effort to illustrate the principal of the problem studied, that is arrangement of alcoholic trafficking in Grobogan Regency, and obstacle faced in law enforcement of liquor circulation in Grobogan Regency.

According to the source, the data in this study can be divided into two types, namely: Primary data, the data obtained directly from the source directly through the interview. Secondary data, ie data obtained from literature, archival data, statistical data, and statutory provisions relating to this research.

Discussion

Implementation of Disaster Management Principles conducted by BPBD in Grobogan District

Based on Law no. 24 Year 2007 on Disaster Management, stated that the meaning of disaster is "event or series of events that threaten and disrupt the life and livelihood of the community". The causes of the disaster

include natural and / or non-natural factors and human factors, resulting in human casualties, environmental damage, property losses, and psychological impacts.

One interesting thing is when there has been a shift in approach and perspective regarding disaster management action. This approach starts from the use of natural science, then increased to applied science, followed by social science. In fact, the approach should be to use a holistic approach, comprehensive without any insulation of knowledge.

As for the shift of perspective there are four fundamental things / principles that change from the initial perspective in disaster management. Some of them are as follows:

a. From emergency response to preparedness. Emergency responses to this day are important and needed by disaster-affected communities. However, it is not enough to just stop here. There was a catastrophic event, followed by a rescue process, then completed. But more important is how to prepare people to be smarter in the face of disaster, reduce the impact of risks that will be faced, and manage knowledge into collective awareness in society so resilient / resilient in the face of disaster that befall.
b. From centralistic to regional autonomy. The government realizes that the disaster event must be responded quickly and accurately. Seeing the handling so far which is all managed by the central government, so there are many delays in providing relief and assistance. Here comes a new paradigm, that disaster management can be implemented through autonomous regional government.
c. From the government centric to participatory. The ability of the government is not large enough to pour its budget to help so many victims of disasters that occur almost simultaneously and continuously. Therefore, the participation of local, national and international communities is needed to help restore the disaster victims. This is called the paradigm shift from government centric to participatory.
d. From generosity to basic rights. Initially, the government thought that helping disaster victims was a mere generosity. This is a wrong assumption, while the truth is that helping the disaster victims is indeed because it is the basic right of every Indonesian citizen. Thus, it is not wrong to mention that protection is a part of basic rights, and risk reduction is part of development

From changing the principle of disaster management, the government acts as commander in relation to emergency / evacuation, to post disaster process, but the main executor in the field is not enough from the government alone. If we look at one of the four fundamental things that are shifting over the disasters, we have all realized that government alone is not enough, and should be assisted by various stakeholders to provide comprehensive and targeted help.

Disaster management is our common responsibility, both among the public in general, government, private parties, and international institutions. The issue of disaster management is a global humanitarian issue. It is not surprising, then, that the response of his aid moves anyone, regardless of race, geographical area, and/or religion.

The general public or the affected communities need to take more responsibility for them by practicing preparedness that has been taught by both government and private institutions. The government is also expected to become more active in taking care of its people, while increasing the budget for disaster victims from disaster management, evacuation and post-disaster services. The private sector can also play a role both from the corporate/business sector,groups/community, political parties, non-governmental organizations at local and international levels. All sectors should strive to integrate visions and perspectives in disaster mitigation efforts.

Changing the perspective of disasters provides a new view of disaster management in Indonesia, from responsive to risk management. Disaster is something inseparable from the existing system on earth. In its development, the science of disaster is much studied.

Activities Disaster prevention is a series of activities undertaken as an effort to eliminate and/or reduce the threat of disaster (Law No. 24 of 2007 Article 1 number 6. Prevention is a preventive effort in managing the threats and vulnerabilities of disaster risks contained in programs in communities at the local and district levels at the district level to completely eliminate the threats and vulnerabilities that cause disaster risks.

Disaster mitigation is a series of efforts to reduce disaster risk, both through physical development and awareness and capacity building in the face of disaster (Law No. 24 of 2007 Article 1 point 9). Mitigation activities aim to minimize the impact of threats in the stages of mitigation activities are carried out when we have identified threats with priority programs for managing threats.

Preparedness is a series of activities undertaken to anticipate disasters through organizing as well as through appropriate and effective measures (Law No. 24 of 2007 Article 1 point7).

Early warning is a series of warning activities as soon as possible to the community about the possibility of a disaster at a place by an authorized institution (Law No. 24 of 2007 Article 1 number 8).

Disaster emergency response is a series of immediate activities in the event of a disaster to deal with adverse impacts, including the rescue and evacuation of victims, property, basic needs, protection, refugee care, rescue, and restoration of infrastructure and facilities No. 24 of 2007 Article 1 Number 10)

Rehabilitation is the restoration and restoration of all aspects of public or community service to a sufficient level in post-disaster areas with the primary objective of normalization or fair progress of all aspects of governance and community life in post-disaster areas (Law No. 24 of 2007 Article 1 point 11).

Reconstruction is the reconstruction of all infrastructure and facilities, institutions in post-disaster areas, both at government and community levels with the main target of growth and development of economic, social and cultural activities, the establishment of law and order, and the rise of community participation in all aspects of community life in the region post-disaster (Act No. 24 of 2007 Article 1 point 12).

Based on Presidential Regulation No. 8 of 2008, the National Disaster Management Agency was established as a government institution in the case of disaster management. In order for disaster management can be accommodated well then in each region formed Regional Disaster Management Agency.

Through the Letter of the Minister of Home Affairs of the Republic of Indonesia Number: 061/352 / SJ Dated February 7, 2011 Concerning Recommendations Forming the Regional Disaster Management Agency of Grobogan District is temporarily stipulated in the Regent Regulation, so that at the first occasion the institution shall be arranged in a Regional Regulation. Finally on March 27, 2012 officially ratified by Local Regulation no. 6 of 2012 on Organization and Administration of Regional Disaster Management Agency of Grobogan Regency.

In the local regulation, it is mentioned that the BPBD of Grobogan Regency is a district apparatus established to carry out the tasks and functions to carry out disaster management.

Disaster management can be done well if the implementation is accompanied by the principle of work or obligation that must be owned by an institution in carrying out its duties and functions. Thus the duties and functions of the Regional Disaster Management Agency Grobogan District can be known whether in accordance with the desired law or not.

In the implementation of disaster management and handling in Grobogan District is implemented through 3 (three) stages better known as Disaster Cycle, namely:

a. Pra Disaster
   Implementation of disaster management in the pre-disaster stage includes the situation of no disaster and the situation there is the potential for disaster.
b. Saat Disaster / Emergency Response Stage
c. Pasca Disaster
   The implementation of disaster management in the post-disaster stage includes rehabilitation and reconstruction efforts.

Constraints Faced In Implementing The Principle Of Disaster Management In Disaster Management In Grobogan District

Disasters can certainly cripple the people's economy, and in the end will increase the number of new poor people. For example, the Merapi disaster, for example, has devastated thousands of hectares of farmland in Sleman, Magelang, Klaten, Boyolali, even in Yogyakarta also affected by the declining number of tourists.

How many hundred family heads lost their homes, possessions, and business opportunities. Data collected by agencies in Central Java and Yogyakarta related to disaster management indicate that thousands of hectares of agricultural land can not be cultivated for some time and hundreds of livestock die, and thousands of unemployed for long periods of time. If calculated materially, there is approximately 6 trillion rupiah loss due to the disaster. This is not to mention the psychological impact that will affect their future.

Disasters will generally eliminate assets and business opportunities, undermine education and health facilities, and undermine people's savings. This means that disaster risk reduction strategies must be integrated with poverty reduction strategies.

The strategy must be comprehensive and able to recognize in detail, for example what factors contribute to vulnerability (occupation type, home location, access to credit and social safety net, etc.). Vulnerability is not the same among ethnic, *antargeografis, antararknis* social, and so on.

The right strategies should be made because after the disaster, there must be a recovery effort and this takes a long time, because there are changes such as: changes in food production, asset sales to meet the needs during displacement and as long as production resources have not recovered, schools for their children, cutting credit access, and so on. Mainstreaming disaster risk reduction should be a key element in development planning, whether at the national or regional level. In this way, there must be allocation of funds for disaster risk management, including financial planning for potential disaster areas.

Institutional strengthening by incorporating disaster risk management into short-term and long-term targets, especially capturing the impact of programs relating to the poor as well as on reducing vulnerability beyond mitigating losses.

A social safety net financed by public funds, strongly supports poor and post-disaster poor families for the restoration of their livelihoods. The social safeguard program is capable of providing basic food, helping to divert efforts and strategies for survival, such as to prevent the sale of productive assets to survive. With social safety nets can also be directed to a variety of income-generating activities that can help build assets and increase revenue.

Provision of a Disaster Insecurity Map supplemented with a Village Disaster Risk Map for each village to make it easier to identify vulnerability levels and predict future disaster possibilities. This Disaster Hazard Map should be continually updated along with land use maps. A general or qualitative land potential inventory aimed at identifying the possibility of developing an environmentally sound area is a first step that needs to be designed and established procedures and formats.

It is almost certain that disaster will continue to exist if the lust of development is not controlled in harmony with the laws of nature. Indeed many rules have been made, but often the rules are only interpreted as administrative completeness or just as a paper tiger.

Because of the existence of regional regulations on disaster management as a precaution in the event of a disaster, also need to be evaluated its effectiveness. This disaster management regulation is needed because it is prone to disaster. With this regulation it is hoped that after a disaster there is a move and responsible.

From these arrangements it appears that the disaster management regulation is more likely to be an emergency response phase. Whereas the presence of a local regulation that can hamper environmental damage during pre-disaster is even more important.

The rapid growth of industry causes a lot of environmental damage. Natural disasters such as floods, and landslides, indicate that there is an imbalance in development. The increasing number of buildings that are almost out of control are exacerbated by human activities by deforestation has caused environmental damage.

Thus a disaster management regulation is necessary but as the saying "prevention is better than cure", more disaster prevention is needed. A clear, short- and long-term action plan is needed for the short-term, medium and long term, such as: rehabilitating critical lands, formulating the direction of watershed utilization for protected areas, buffer functions, and cultivation functions. Even more important is the continuous extension to the community, and law enforcement for those who dare to violate.

Disaster management can be done well if the implementation is accompanied by the principle of work or obligation that must be owned by an institution in carrying out its duties and functions. Thus the duties and functions of the Regional Disaster Management Agency Grobogan District can be known whether in accordance with the desired law or not.

From previous disaster management experiences some important records in disaster management that must be observed include:

a. Disaster management needs good coordination
b. Good management is required
c. Need to involve society not as object, but as subject
d. Mainstreaming gender

Regional Disaster Management Agency as the main actors in disaster management in Grobogan District in implementing its duties and functions would be influenced by two factors: inhibiting factors and supporting factors. These factors must be faced by the Regional Disaster Management Agency as the party that plays a role in disaster management.

Factors supporting Regional Disaster Management Agency ofGrobogan District in implementing the principle of disaster management in disaster management through the implementation of its duties and functions are:

a. Government Support Grobogan District.
   Government support is mainly policy support and budget is very supportive of disaster management process
b. Participation of communities and organizations participating in disaster management.
   The existence of community participation and the presence of organizations that participate in disaster management is a very helpful BPBD Grobogan District in implementing the principle of disaster management in disaster relief.

While the obstacles faced by Regional Disaster Management Agency of Grobogan District in implementing the principle of disaster management in disaster management include:

a. the presence of Regional Disaster Management Agency as the main actors in disaster management but its existence has not been widely known by the community.
b. koordinasi built by Regional Disaster Management Agency as the Agency that commanded other organizations but the new coordination was built when the disaster occurred Inadequate facilities and infrastructure.

Closing

Conclusion

a. Implementation of the principle of disaster management undertaken by the Regional Disaster Management Agency in disaster management in Grobogan Regency is normatively regulated in the Regional Regulation. Implementation of disaster management is done through mechanism of disaster management cycle which consists of Pre Disaster, Disaster / Emergency Response and Post Disaster.

b. Emplementation of the principle of disaster management conducted by the Regional Disaster Management Agency in disaster management in Grobogan District in the implementation of tasks and functions of BPBD there are several obstacles, namely:
   1) The existence of Regional Disaster Management Agency as the main actors in disaster management but its existence has not been widely known to the public.
   2) coordination that was built by BPBD as the Agency that commanded other organizations but the new coordination was built when disaster happened.
   3) Inadequate facilities and infrastructure.

Suggestion

a. Make a clear action plan of disaster management for short, medium and long term.
b. Need to made environmental management regulation, which can prevent environmental damage at the time of pre-disaster.

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Surat Menteri Dalam Negeri Republik Indonesia Nomor: 061/352/SJ Tanggal 7 Pebruari 2011 Perihal Rekomendasi Pembentukan Badan Penanggulangan Bencana Daerah Kabupaten Grobogan.

Peraturan Daerah No. 6 Tahun 2012 tentang Organisasi dan Tata Kerja Badan Penanggulangan Bencana Daerah Kabupaten Grobogan.

STEP FOOTPRINT INDONESIA ASYLUM SEEKER 1965 UNDER INTERNATIONAL LAW IN PERSPECTIVE CRITICAL THEORY

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ABSTRACT

Crossing the border and entering other countries illegally many people from various countries. Even the issue of migration from one place to another for several reasons or underlying factors. see that migration has been categorized in four sections : 1) Factors associated with the area of the origin (push factors), 2) Factors associated with the area of the destination (pull factors), 3) Intervening obstacles, and 4) Personal factors (and biases). In the context of migration of Indonesians in 1965, more dominated by push factors, is political factors. This factor is due to the political situation in the non-conducive country of origin, whether it is state policy, unfair legal system, discrimination, persecution, massacre and murder. Migration is a way out of getting issues for the protection of international law, to get the right to freedom of choice, security and freedom from life-threatening actions. That is what experienced by the Indonesian people in 1965-1966, after the tragedy of 30 September 1965 known as G30S / PKI or the September 30th Movement. The rowdy situation of September 30, 1965, according to Caldwell & Ernest was due to the frustration of the deterioration of economic conditions and the consequent failure of confrontation resulting in poverty within the lower armed forces, corruption and land grabs and escalating conflict between the right wing a more powerful army with a leftist political organization that exploded in October 1965. However, the events of the September 30, 1965 as a failed social revolution

Introduction

Crossing the border and entering other countries illegally many people from various countries. Even the issue of migration from one place to another for several reasons or underlying factors. Lee (Op.Cit : 49-50), see that migration has been categorized in four sections : *1) Factors associated with the area of the origin (push factors), 2) Factors associated with the area of the destination (pull factors), 3) Intervening obstacles, and 4) Personal factors (and biases).* In the context of migration of Indonesians in 1965, more dominated by push factors, ie political factors. This factor is due to the political situation in the non-conducive country of origin, whether it is state policy, unfair legal system, discrimination, persecution, massacre and murder. Migration is a way out of getting issues for the protection of international law, to get the right to freedom of choice, security and freedom from life-threatening actions.

The United Nations Refugee Convention 1951 describes an asylum seeker as a person with a well founded fear of persecution on grounds of their race, religion, political opinion, nationality or membership of a particular social group, is outside their country of nationality and is unable or unwilling to avail her/himself of state protection because of such fear. More about asylum seekers is a condition where a person or a lot of people who feel they are threatened inside their country because of political issues, religion, sense of social group because of conflict between the two groups, where they then seek protection to another country. In World English Dictionary, *asylum seekers*, cause *"....a person who, from fear of persecution for reasons of race, religion, social group, or political opinion, has crossed an international frontier into a country in which he or she hopes to be granted refugee status*.

The definition of political asylum was also adopted by *Droit International* at its Bath Conference in 1950, where asylum has meaning: *[1] la protection [2] qu' un Etat accorde [3] Introduction sur son territoire ou dans un autre endroit relevant de certains de ses organes à [4] un individu qui est venu la chercher. [1] the protection [2] offered by a State [3] on itsterritory or elsewhere to [4] an individual who came to seek it.*

In this case Battjes (2006), then explains the four components, such as; term in the first point, "protection" implies some threats or dangers from which individuals need shelter. In specification "*sur son territoire* (…) *à un individu qui est venu la chercher*" (its territory --- to someone who came to take--) it shows, asylum because of the concerns of some foreign dangers. Therefore, the protection of asylum is a matter of concern by the state from the dangers that threaten foreigners outside the jurisdiction of the state. Asylum protection as the first point, by battjes offered by the State. This does not include protection by churches or other non-state actors. Then the scope of the territory, as the third point, encompasses both the protection offered in the region and the protection offered at embassies and consulates. While the fourth point of "individual" should be understood as a person having no citizenship who then asks for protection from the state. Therefore, there needs to be a legal framework effort in bringing about political asylum as the above points, as Nuala Mole and Catherine Meredith (2010) point out, that:

> *"...the Geneva Convention was primarily an instrument devised to meet a humanitarian need by providing a proper legal frame-work for asylum, it was also an instrument which was intended to serve the aims of Cold War politics."*

Mole further explained that the emphasis is on providing protection for those who fled from countries behind the Iron Curtain. In 1967 the New York Protocol to the Geneva Conventions abolished the January 1, 1951 referendum, so that virtually all the member states of the Council of Europe subsequently abolished geographical boundaries, so that those who came from every part of the world were protected, it was not just asylum seekers in Europe.

Mole also explains about the recognition of the refugee question that is not just the phenomenon of European isolation. Even according to him during the year of the rapid economic expansion of the 1960s, the Cold War meant that very few refugees or asylum seekers were able to reach western countries and arrivals which, in any case, were welcomed by feeding, economic demand by expanding employment. Since then people have sought international protection coming in Europe both from former communist countries, from sub-Saharan Africa and from various other regions of the world that were devastated by civil wars, natural disasters or severe poverty or where they lived under the regime which is oppressive.

Even Mole has pointed out that most asylum seekers arrived in Europe since the end of the Cold War have left the country where serious and endemic human rights violations have been committed - tortured in the country by civil war or where the state machine has been broken so that it can no longer offer protection to its citizens.

On the other hand, Asylum seekers are also referred to as someone who filed into another country then they get official protection. And for that they must reach a territory of the State or Embassy of a State which has ratified the Refugee Convention in which they may apply for asylum.

This can be seen in the Universal Declaration of Human Rights 1948, in Article 13, paragraphs 1 & 2, as follows :

1. *Everyone has the right to freedom of movement and residence within the borders of each State.*
2. *Everyone has the right to leave any country, including his own, and to return to his country.*

As well as the explanation of political asylum in the universal declaration of human rights, i.e.:

1. *Everyone has the right to seek and to enjoy in other countries asylum from persecution.*
2. *This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.*

That is what experienced by the Indonesian people in 1965-1966, after the tragedy of 30 September 1965 known as G30S / PKI or the September 30th Movement. The rowdy situation of September 30, 1965, according to Caldwell & Ernest (2011: 253) was due to the frustration of the deterioration of economic conditions and the consequent failure of confrontation resulting in poverty within the lower armed forces, corruption and land grabs and escalating conflict between the right wing a more powerful army with a leftist political organization that exploded in October 1965. However, the events of the September 30, 1965 movement by Iwan G Sujatmiko (1999: 5), as a failed social revolution.

The problem of the failure of the revolution caused tremendous implications for the PKI as a supporter of Soekarno (Mardiyono.2014: 54). The incident according to Taufik Abdullah (1999: 3) as a national catastrophe. Because it became the starting point of the political legitimacy of the new order to destroy the Indonesian Communist Party from the Indonesian political scene. Besides, there was also a shift of national leadership from Soekarno to Soeharto, which also happened to transform the old order into the new order. As a result, the new order of political movement to clean up the State of Indonesia from the elements of communism PKI. According to Cribb & Kahin, the army suspected the PKI was responsible in the Gestapu, so despite Soekarno's attempts to prevent bloodshed during 1965-1966, but the army together with several Muslim organizations and others launched the massacre of communists and supporters of their mass organizations, the dead range between 300,000 and 1 million.

Not only that, Indonesians who are abroad to attend seminars, working visits, or those who get scholarship bonds to the government of Soekarno in 1965 also experienced actions in the form of deprivation of citizenship and their passports no longer valid. Almost they became a person who had no citizenship in Asian and European countries. Therefore, they seek political asylum in many countries especially in Asia and Europe. An asylum seeker is someone who has applied for refugee status, but who has not yet received a decision on whether they have been recognized as a refugee. However, political asylum if viewed from the perspective of sociology is a matter of international mobility, namely the movement of people from a place (country of origin) to another (destination country).

Asylum is one way to save yourself from persecution, the slaughter of torture. Therefore, political asylum is a common problem of the international community, it is related to crossing the territorial boundaries of a country. Does not everyone have the right to be anywhere in the world, which at one point found formulations in the universal declaration of human rights as a right to be in any country territory. (Pajo, Erin, 2008 : 3).

An asylum seeker is someone who claims to be a refugee but whose claim hasn't been evaluated. This person would have applied for asylum on the grounds that returning to his or her country would lead to persecution on account of race, religion, nationality or political beliefs. That, someone is an asylum seeker for so long as their application is pending. So not every asylum seeker will be recognised as a refugee, but every refugee is initially an asylum seeker.

Those asylum seekers who are found to be refugees are entitled to international protection and assistance. Those who are found not to be refugees, nor to be in need of any other form of international protection, can be sent back to their country of origin. There are several problems that arise if then the political asylum seekers are not covered internationally, namely: 1) the asylum seekers will be returned to their home country or deportation, so that they are in danger from the threat of murder, torture; 2) asylum seekers will remain in the destination country, but there is no international protection, so they will become stateless people.

It is actually experienced by Indonesians who are considered to be involved in the activities of the Indonesia Communist Party (PKI) in 1965. Where they are to avoid returning to the country of origin (Indonesia), then they secretly go from one country to another as a stateless person. The issue of asylum seekers who must then be evaluated first, for this writer is very dangerous because the existence of political asylum seekers is very vulnerable to be returned to the country of origin, which is very dangerous to their safety. Why? Because in humanitarian affairs, we should not be trapped by the rule of law that is full of political interests. Including international law is inseparable from the interests of countries in playing its foreign policy. Therefore, the authors propose the idea that if a refugee later found out that they are political asylum seekers, it should automatically receive international protection, as in this research entitled, "Step Footprint Indonesia Aslum Seeker 1965 under International Law, in perspective critical theory".

Main Problem

In the this research question and two sub-questions flow directly from the stated aim of this research. The main research question is:

1. How do footprints of Indonesian asylum seekers in 1965 under international law?
2. Does the protection of political asylum under international law have the maximum to protect humanity?

Discussion

Political Asylum seekers is a condition in which a person or a lot of people feel threatened in their country because of political, religious, and social issues because of the conflict between the groups, where they seek refuge in another country. Lau they cross the line by ignoring the rules of international law as well as the law of the destination country. Migration is the best way to save yourself from persecution and persecution.

Crossing the border and entering other countries illegally many people from various countries. Even the issue of migration from one place to another (migration) has been known and done since antiquity. Later the migration to other countries is increasing from year to year. The picture of migration is influenced by two things, namely: first Pull factors is a factor that attracts a person to migrate. Often Pull Factors are associated with economic factors, because there is a desire or hope to get a better job, earn money and food, a better place to live, or expect each family to have a higher standard of living. Both push factors, the factors that drive people to migration leave the country. Push factors, usually between political factors and social factors are more dominant. Political Factors, which is due to the existence of an unfair legal system, the revocation of rights, especially political rights, and issues related to the safety of his soul.

As is the case with exiled Indonesians who are exiles. Exiles are a bad connotation, because they are expelled from their country because they are no longer needed or considered unproductive. Then they stayed abroad to seek political asylum in 1965. They were divided into two, namely; first they went from their country to avoid cruel arrest and torture, and secondly: they were prevented from going home and revoked their passports because they were considered to be Sukarno's followers who were supposedly aware of the political issue of the September 30th 1965 Coup.

The events of September 30, 1965, provide a diverse interpretation of the socio-political migration of Indonesians. In the first case, the PKI people knew after the arrest and torture and even mass killings then fled abroad ---- China, Cuba, Vietnam and Europe-region ---. However, the second case, they became exile because at that time they were delegation delegates on the anniversary of the People's Republic of China October 1, 1965, Students who received scholarship including the bonds of government from Sukarno.

In the case of the deprivation of citizenship of the Indonesian citizens conducted in China post-October 1, 1965 by the security controller at that time, which then made them unable to go home, including the category of people deprived of passport and citizenship. As experienced by Mr. Mintardjo (Romania), Sarmaji and his friends (China), initially was among those who were prevented from returning because of their citizenship revoked. But after five years of living in China, then have to migrate to Europe. The person then migrates according to theory because it is caused by several things, namely full factor and push factor.

While the second case as experienced by the mother Sisca F Patipilohy, who made the transfer from Indonesia to the Netherlands in 1968 and to choose to live in the Netherlands. Sisca feels it is not safe to stay in Indonesia because the local government considers that she is part of PKI sympathizers and close to Sukarno, where the PKI was considered to have committed a September 30, 1965 Coup.

What Sisca did was a form of migration according to the above theory. Migration according to Advanced Leaner's Dictionary, that migration is intended as a move from one place to another (to live there). The Indonesians who were stymied back home indeed various problems that happened. The movement of people from one country to another because of political factors, therefore they then --- the Indonesians seek refuge in the destination country. In the case of the Indonesian delegation who attended the anniversary of the People's Republic of China on October 1, 1965, of course they sought protection against the Chinese government, which in turn also provided political protection, according to Hill (2009: 6) the New Order officially freezes diplomatic relations with China on October 9, 1967. The demand for political protection, known as political asylum, as the Indonesians did in China in 1965, was actually regulated in international law.

Is it true, the Indonesians who were abroad in 1965, afraid to return? The choice of options offered by the military at the Indonesian Embassy in China between Sukarno and Suharto was a dilemma for them. Moreover, the delegates who attended the majority of the PKI and those close to Sukarno, so that even if pretending to choose Suharto, it is difficult for the Indonesian government (New Order) to believe. As a result, the Indonesian Ambassador to China, Jarwoto at that time, chose to remain in China. The reason is none other than fear of persecution as they hear from the news of the PKI's massive arrests. Especially at that time the political situation in the country (Indonesia) is uncertain, so anything can happen to him. So, they seek asylum (protection) to the Chinese government.

In this case the Indonesian delegation as well as college students in China, the demand for protection was then granted by the Chinese state even though it was only until 1970. The political and humanitarian reasons under which the jurisdiction of the Chinese government had not ratified the 1951 Convention and the 1967 Protocol, on refugees. In 1984, a group of government representatives, academics and distinguished lawyers from Latin America met in Cartagena, Colombia, and adopted what became known as the Cartagena Declaration. Among other things, the Declaration recommended that the definition of a refugee used in the region should include, in addition to those fitting the 1951 Convention definition, persons who flee their country :

> "because their lives, safety or freedom have been threatened by generalised violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order."

Although the 1951 Convention there is little mention of political asylum, but the Indonesians are also refugees as internationally, refugees as:

> *"Caused by genuine anxiety based on persecution for reasons of race, religion, nationality, membership of a* particular *social group or political opinion, is outside the country of his nationality and can not or, because of the anxiety, refuses to exploit the state's protection ; or a person who is not citizenship and is outside the country in which he previously resided, as a result of such events, can not or, because of the anxiety, refuses to return to the country "*

In contrast to that done by the Government of the Netherlands against the Indonesian people who are in the country. However, the Dutch Government did not deport or repatriate them, even when the Police knew that the Indonesians did not have complete documents or even when their passports were not applicable, the Police checking them only reminded them not to make noise and to work. And the most important is both the State of China and the Netherlands, never questioned the existence of Indonesian people who were deprived of their citizenship, even the Dutch government specially assume Indonesian passports owned by Indonesian people are considered valid and still valid. While the affairs revoked its citizenship is considered an internal affair between Indonesia with the people concerned.

> *"The Dutch government, it does not matter our existence here. Although our passports are not valid in Indonesia, but still in Holland, there is no problem ". Sarmaji said, one of the political asylum seekers.*

Protection is also done by international organizations, as conducted by the Netherland communist Party (NCP) against the Indonesian people who fled China because of new policies, as well as those Indonesians who happened to get a bond scholarship in Europe. The NCP considers Indonesians deprived of their rights under threat and need international protection. Because of the political communications that had been made by the Indonesian Communist Party (PKI) with the Dutch NCP at that time, it has generated political solidarity among the two. Even NCP also provide advocates to accompany the request of protection to the Queen of the Netherlands. *[3] on its territory or elsewhere to*. That is the protection of political asylum can also be done in areas such as embassies and consulates. *[4] an individual who came to seek it.* Individuals who come to seek refuge should be understood as people who do not have citizenship who then seek protection from the state.

In the case of Indonesians deprived of citizenship, in fact, has fulfilled the element of Droit International at its Bath Conference in 1950, at point 4 (four) as a person who has no citizenship. Therefore they then ask for protection from the State of China, as well as the State in the European region.

Similarly, UN General Assembly Resolution December 14, 1967 2312 on territorial asylum, article 1 which states:

> *All States shall respect asylum granted by other States, in order to exercise their sovereignty to everyone entitled to vote for the entry into force of article 14 of the Universal Declaration of Human Rights, including those who are fighting against the colonial.*

Even at the 1951 Convention, about refugees, which is one of the most important components of an asylum institution, according to Lucy Gerungan, is the principle of non-refoulement. In principle, article 33, paragraph 1, Convention 1951, is:

> *"..No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion".*

The most important right detailed in the Convention is the right to be protected against forcible return, or refoulement, to the territory from which the refugee had fled. Based on the meaning of the 1951 Convention article 33 paragraph (1), that the prohibition of the principle of non-refoulement, according to Abu Al-Wafa, Ahmad (2011: 43-44), actually has been regulated by five basic rules in International Law contemporary, ie :

a. there shall be no reservation or exemption in one or more of the text of the legislation which recognizes it, in terms of the impact of the harm it may cause.
b. Under no circumstances shall the principle of non-refoulement restriction be excluded.
c. The principle of a non-refoulement restriction is considered partly as part of customary international law, and therefore every State must be bound, by this principle, regardless of its attachment to any text of covenant.
d. Since the principle of non-refoulement is "jus cogens", there can be no agreement to put it aside and such an agreement becomes null and void.
e. This principle serves as one of the fundamental reasons for refusing extradition.

With respect to "*Jus Cogens,*1" in the point (d), is a part of customary international law binding on all States whether members of the 1951 Convention or non-members . Yuliatiningsih, Aryuni (2013 : 161-162). Therefore the attitude of the Chinese government (China) and the European countries in 1965, which seeks to protect and not to do non-refoulement of the Indonesian citizens who have been deprived of their citizenship reflects the spirit of the International Law embodied through the 1951 Convention. Despite the consequences, the Indonesian government then severed diplomatic ties with China.

The problem is that all products of international legal instruments are political products, so that the protection of political asylum depends on the inner atmosphere and political atmosphere in the country of destination. This also happened to Indonesian asylum seekers in 1965 in China. In the previous year the country was easy to provide political protection, even on strict conditions. However, after 1970 - 1977, the Chinese government adopted an unpopular policy towards asylum seekers, asking Indonesian asylum seekers to leave China. If it will not be deported or repatriated to the country of origin. The policy was then addressed by Indonesian asylum seekers to move secretly to other countries, such as Cuba, Vietnam, the Netherlands, Belgium, Germany.

Therefore, in international law there are already international habits, such as : Convention 1954 relating to the status of stateless person, Konvention 1951 relating Refugees, 1967 Declaration of Territorial Ayslum Seekers. Conventions are rules of state behavior based not on laws but on constitutional habits and precedents. In another sense, the convention is an unwritten rule, repeatedly done, and accepted as a law. The habits referred to as such conventions arise and are properly preserved in the practice of constitutional administration, upheld by a sense of constitutional compliance or by practical consideration (a feasible possibility). The Convention may provide guidance on procedures, powers, and obligations in no written law. Thus, the convention fills a void in law.

Maka seharusnya sudah cukup ketika seseorang datang ke negara tujuan karena konflik politik atau dalam keadaan bahaya, secara otomatis mereka menjadi pencari suaka dan harus dilindungi. Understanding as below, An asylum seeker is a person who has sought protection as a refugee, but whose claim for refugee status has not yet been assessed. Many refugees have at some point been asylum seekers, that is, they have lodged an individual claim for protection and have had that claim assessed by a government or UNHCR. It is important to note that refugee status exists regardless of whether it has been formally recognised. And then it must be changed to the right of everyone seeking protection for self-salvation. People do not "become" refugees at the point when their claims for protection are upheld – they were already refugees, and the assessment process has simply recognised their pre-existing status.

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1 According to article 53 of the Vienna Convention of 1969, Jus Cogens is a norm accepted and recognized by the international community as a whole as a norm which should not be excluded and which can only be altered by the later general rules of international law which have the same character or character.

People become refugees (and are entitled to international protection and assistance) from the moment they flee their country due to a well-founded fear of persecution, as stipulated in the Refugee Convention.

Closing

Seeking political asylum and then having to leave the country of origin is not a will of its own. Political problems in a country are sometimes very cruel, so that a person may be subjected to torture, massacres and political detention. Therefore, what the Indonesians experienced in 1965 was a valuable lesson. That it is hard to get political protection from a country. They must be exiles or homeless in the country, before entering into international protection.

However protection does not fall from the sky, but must continue to be fought. The Declaration of Human Rights Article 13 paragraphs (1) and (2) may serve as a reference to accelerate the protection although it must conflict with customs in international legal instruments. Regardless of law, habit is just a rule, and most importantly human values are themselves.

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DEVELOPMENT STRATEGY OF CREATIVE INDUSTRY WITH KNOWLEDGE CREATIVE AS A DRIVER FOR TOURIST DESTINATIONS IN SEMARANG REGENCY

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ABSTRACT

Creative Industries and tourist destinations are synergic and mutually influential, therefore a creative knowledge is needed to manage them both. This research is aimed at formulating the Creative Industry Development Strategy as A Driver for Tourist Destination in Semarang Regency. With this development strategy, the Creative Industries are expected to have linkage with tourism sectors in Seamrang Regency. This development strategy is also expected as an advance tool to optimally develop creative industries and tourism sectors. Type of data used in this research are primary and secondary ones. The research uses descriptive analysis, both qualitative and quantiative. The research took place in Semarang Regency, using documentation and snowball-in-depth interview with practitioners of creative industries as the method of collecting data. For data analysis, this research uses SWOT analysis. The result of this research shows that Semarang Regency has a great potent in creative industry and tourist destination, even in craft sub-sector the creative industry had given a biggest contribution in form of foreign exchange and employment in Semarang Regency. The potential development of the creative industry as a driver for tourism in Indonesia has not yet optimally implemented and tends to developed partially. Poor linkage between creative industries and tourism is quite obvious from the fact that despite a lot of tour package already available to many tourist destinations, many of these destinations has not yet provide themselves with souvenir shops that sell unique souvenirs of the area. The existing shops, if any, are just the regular ones that sell common items easily found in other areas. These items are also poorly designed and easily copied. Unavailable unique products and poor promotions are among the reasons for failure in inviting more tourists to the destinations. A development strategy, using knowledge creative, which builds a linkage between creative industries and tourist destinations to boost tourist visit by focusing on the meanagement of something to see, something to do and something to buy is needed.

Keywords: Creative Industries, Tourism Destinations, Knowledge Creative

Introduction

Global competition forces regions to efficiently produce outputs in order to survive. Efficiency can trigger creative thinking that eventually lead to creative ideas. Creative Economy, which is identical to creative industries, is recently considered to be the one that can give a significant contribution to regional economy. Its existence is inseparable. According to UNCTAD (2008), creative industries have given real contributions to State economy in form of export value improvement, increased employement, and higher gross domestic product. This is in line with data from Department of Trade (2008), noted the average of 6.3% - similar to about 152.5 billion rupiahs - contribution from creative industries to GDP from 2002 to 2006. Creative industries are capable of absorbing 5.4 million labors with 5.8% participation level. In terms of exports, the creative industry recorded total exports of 10.6% between 2002 and 2006.

One of the reasons for developing potential creative industries is the positive effects on social life, business climate, economic improvement, as well as the image of the region. Novelty, either in relation to goods or services, would always encourage people to come, see, know, feel, or even want to have when it is available on sale. This also applies to the creative industries. Something entirely new, innovation of the existing itmes or copying from elsewhere, will always encourage people to see and experience the new things. Therefore, the existing of creative industries is both directly and indirectly an appeal for tourism (tourist destination), an attraction for people to come and see these creative industries.Semarang Regency, as any other regencies in Indonesia, also has creative industry potent that can drive tourism to Semarang Regency if it is well managed. This research is aimed at formulating development strategy using knowledge creative for creative industry development as a driver for tourism in Semarang Regency.

Creative Industry

According to DCMS *(CreativeDigital Industries National Mapping ProjectARC Centre of Excellentfor CreativeIndustries and Innovation*, 2007) creative industry is "derived from the utilization of industrial creativity, skills and individual talents to create wealth and jobs through the creation and utilization of creative ability and creative power of the individual" *(BPEN/WRT/0011I12009* Januari edition).MohammadAdamJerusalem(2009) stated that creative industry is an industry that has authenticity in individual creativity, skill and talent that has the potential to bring in revenue and job creation through the exploitation of intellectual property". Meanwhile, *United NationsConference on Trade and Development* UNCTAD (2008)in MohammadAdamJerusalem(2009),creative industry is:

1. Cycle of creation, production, and distribution of goods and services that use creativity and intellectual capital as primary inputs;
2. Part of a series of knowledge-based activities, focusing on art, which could potentially generate revenue from trade and intellectual property rights;
3. Consisting of physical products and intellectual (non-physical) products, or services contiaining creative-content arts, economic value and market objectives;
4. Multisectoral between art, services, and industry; and
5. Part of a dynamic sectors in world trade.

Based on above opinions, the creative industry can be defined as an industry which rely on innovation and new ideas from creative human resources.

Classification of Creative Industry

According to the Ministry of Trade Industry in the book of *Pengembangan Industri Kreatif Menuju Visi Ekonomi Kreatif 2025* (Development of Creative Industry Creative Towards Economy Vision 2025), the creative industries can be grouped into 14 sub-sectors, which later one other sub-sector were added:

a. Advertising
b. Architecture
c. Art Goods Markets
d. Craft
e. Design
f. Fashion
g. Videos,FilmsdanPhotography
h. InteractiveGames
i. Music
j. Showbiz
k. Publishing and Printing
l. Computer Services and Software
m. Television &Radio*(broadcasting)*
n. Researchand Developmen t (R&D)
o. Culinary

There are wide range of developing creative products in Indonesia such as crafts, advertising, publishing and printing, television and radio, architecture, music, design and fashion. Creative economy would only potential in implementation when three things are supporting: Knowledge Creative, Skilled Worker, and Labor Intensive. (BettiAlisjahbana (2009).

Tourist Destination

Daryanto (1997: 167) in *kamusBahasa Indonesia Lengkap* (Indonesian Complete Dictionary), defines destination as a "point of interest or areas of interest". A tourist destination is the geographic regions that are within one or more administrative regions in which tourist attraction, public facilities, tourism facilities, accessibility, and interrelated and complementary community exist in the realization of tourism. (Law No. 10 Year 2009 on Tourism).

Cooper et al (1993), stated "tourist destination is one of the most important elements since it is the reason for people to travel and the tourist attraction in it will attract tourists". While Gunn (1993), states that the tourist destinations is a place that provides not only sights visible for travelers, but also activities performed on the site, which attract people to visit the place. Based on these opinions, a tourist destination should be an area that has a characteristic or uniqueness that attract or appeal a visitor during his visit and may give a longer impression that lure him back to the destinations later on.

Tourist Destination Components

Four components of any tourist destination should be addressed, are:

1) Attraction :tourist attraction is any interesting things and worth visiting and seeing (Pendit,1999:20). Edward Inskeepdevided tourist attraction into 3 (three):

a. *Natural attraction.* This includes *Site Attraction,*(such as climate, panorama, flora and fauna, or historical sites), and *Event Attraction (*can be in form of MICE *(Meeting, Incentive,Conference,Exhibition),*or other sports events such as Olympic, world cup, etc..
b. *Culturalattraction,* This includes activities that involve person, such as *karapansapi* (cow race), *ngaben* (a kind of cremation ceremony), sekaten, megeretpandan, burial ceremony in Trunyan (Bali), etc.
c. *Special type soft attraction.* This is a man-made artificial attraction such as themepark,*circus, shopping,* (this one does not have to with the previous two)

2) *Accessibility,*is a convenience for tourists to access a destination.
3) *Ancillary Service*, Services provided by the destination to tourists and industry, in form of marketing, development and coordination among the components of destinations, such as organizations / government agencies, private agencies or a combination of government and private agencies.
4) *Community Involvement*, is a community involvement in providing services and the relationship created between tourists and local communities of a destination. This kind of involvement will also determine whether that destination is good or not to be visited by tourists.

Creative Industry and Tourist Destination

"Creative economy and tourism sector are mutually influential and potentially synergic when properly managed" (Ooi, 2006). The concept of tourism activities are defined by three factors, i.e. "*something to see, something to do,* and *something to buy*" (Yoeti,1985).

a) *Somethingtosee*, related to attraction of the tourist destination,
b) *somethingtodo* , related to tourists' activities at the destination,
c) *somethingtobuy*, related to local souvenirs, bought as personal memorabilia for the tourists. Creative economy can enter through *somethingtobuy* by creatinginnovative products typical of the region.

Research Method

Type, Source and Method of Collecting Data

Data type and source for this research were from primary and secondary ones. Primary data were collected through in-depth interview with the informen using questioner, and through FGD with the government, creative industries as well as tourist detinations. And the secondary data were obtained from literature and reports relevant to this research.

Research Subject and Location

The research took place in Semarang Regency with focusing on 2 (two) tourist destinations developed byDepartment of Youth, Sport and Tourism of Semarang District : *Gedungsongo* (the bigges contribution to local revenue), *Kawasan Rowo Pening (Bukit Cinta), Desa Wisata Keseneng* (categorized as a potential tourist destination village), and a private tourist destination. Subjects of this research are craftmen in Creative Industries, traders in Creative Industries, Managements of tourist destination including Department of Youth, Sport and Tourism of Semarang District. Managements of Creative Industry including Department of Industry, Cooperatives and SMEs of Semarang Regency and Intellectuals of Semarang Regency.

Technique of Data Analysis

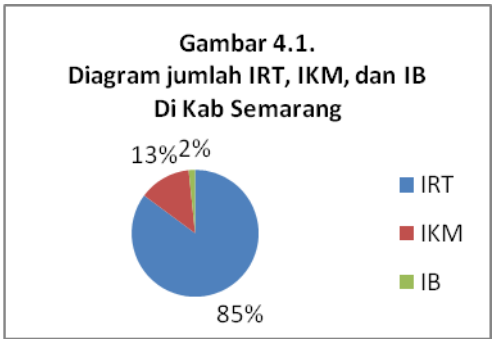
Data analysis is the processing of collected data which then presented in appropriate report forms as needed. This research uses descriptive analysis, both qualitative and quantitative. This analysis provides a variety of information or explanations on data about aspects of who, when, how, size, shape, distribution, as well as the state of a variable that can be presented in tabular form supported by various theories (Cooper & Emory, 1996) Model of data analysis being used is an interactive analysis with four components: data reduction, data presentation, data collection and research verification. The analytical tool used is the SWOT analysis

Discussion

In Semarang regency, creative industries and tourism destinations are managed by two different departments; the industry is managed by Department of Cooperatives, SMEs, Industry, and Trade while Tourist Destination is managed by the Department of Youth, Sports and Tourism of Semarang Regency.

Potential and Development of Creative Industry in Semarang Regency

Based on data from the Department of Cooperatives, SMEs, Industry, and Trade, Semarang Regency has a huge potential role in industry, either Industry Household (SME), Small and Medium Industries (SMI), and Large Industry (LI) spread over 19 Kecamatans. These industries are 85% dominated by home industries. Most of home industries in Semarang Regency are food processing ones, such as food and beverages. Details are presented in Figure 4.1. as follows:



Source :Bureau of Cooperatives , SMEs, Department of Industry and Trade Semarang Regency

The creative industry is an industry that was created for the unique. This industry is not an industry that requires large scale production in quantities, more reliant on the quality of human resources, and mostly appearing in the Small and Medium Industries (SMI). Based on the classification, Figure 4.1 shows that Semarang Regency has a huge potential of creative industries (98%). However, identification and mapping of these creative industries are not yet available. The researcher attempts to make a grouping based on KBLI of Department of Trade (2008) that classify creative industries into 14 sub sectors and later on onether one sub sector is added, i.e. culinary.

Based on data from Bureau of Cooperatives, SMEs, Industry and Trade of Semarang Regency, Creative Industry Checklist from 19 Kecamatans of Semarang Regency, and observation on tourist destinations, among 15 sub sectors of creative industry based on KBLI, sub sectors of creative industries mostly found are craft, culinary and fashion.

1. Craft,

   Semarang Regency has 18 types of craft categorized as superior products. Some of them are handycraft made of *encenggondok* (Eichhorniacrassipes) such as bag, tissue box, etc., bamboo crafts, handycraft made of stick, wood, and any other kind of handycrafts. The market of these kinds of handycrafts covers Central Java, DIY, Jakarta, and outside Java, even some of these are exported to other countries.

   Wood handycraft is the biggest contributor for foreign exchange, and Australia is one of the regular customers. Aboriginal wooden crafts(such as boomerang, aborigin mask, and digiridu – kind of blown music instruments) made in Desa Pakis of KecamatanBringin of Semarang Regency is the biggest contributor for foreign exchange.

   The export value is 30 thousand USD per year and increasing every year. Next to Wooden handycraft is crafts made of *encenggondok* such as furniture and bag, which also the big contributor for export value in Semarang Regency. Chairman of Bureau of Cooperatives, MohNatsir, confirmed this by saying that : crafts, especially the wooden ones, is the top contributor for the export value of creative industries in Semarang Regency. This statement is supported by data from Bureau of Cooperatives, SMEs and Trade of Semarang, where in 2015 the gross income from craft industry in global and domestic market records total of IDR 93 billion. Market for these exports cover Saudi Arabia, Abu Dhabi, USA and Japan.

2. Culinary

   The second creative industry is culinary. Semarang Regency has big potential in creative industry, culinary sub sector. Among 56 items categorized as superior products, 43 of them are superior culinary products such as *tahubakso, sate sapi, torakur, geplakwaluh, kopi kelir*, and others. Markets for these commodity are Semarang, Solo, and outside Java.

3. Fashion

   Creative industry sub sector fashion as listed in Bureau of Cooperatives, SMEs and Trade of Semarang Regency is still small in number. There are only 4 (four) items and all are without specific characteristic which means they can easily be found in any other places. Fashion products includes garment, bordering, footwear, outfits, bags, and wallets.

In addition to the creative industry sub-sectors of crafts, culinary, and shirts, in fact there are also other sub-sectors of creative industry, like photography, but only in certain tourist destinations and only few in numbers, while for the performing arts and music, only in certain moments. Semarang Government, through the Bureau of Cooperatives, SMEs, Trade and Industry, has made efforts to develop the SME "creative industries" through packages - packages of policies, cluster approach, coaching, training, and facilities of

joint marketing and promotion. Common problems that arise among others are: the mindset of HR creative industries such as lack of motivation and innovation in the management, sectoralego, lack of community sense for business development, and perceive the environment as a rival. In terms of local government, sometimes the policy is still a piece of cut, less synchronization, and unfinished coaching

Potential and Development of Tourist Destination in Semarang Regency

In addition to having the potential of creative industries, Semarang regency also has a lot of potential tourist destinations that can be developed. The uniqueness that Semarang regency has is actually mutually supported by the favorable location of Semarang Regency, as a buffer zone (hinterland) of Capital Central Java. Based on data from the Department of Youth, Sports, and Tourism Semarang district, there are more than 59 tourist resorts. These resorts can be grouped into natural resorts (10), cultural (18), artificial tourism (20) and industrial (11). In addition to tourist resorts, Semarang regency also has 35 villages that are classified into tourist village mainstay (4), leading tourist villages (5), and a potential tourist villages (26). Village tourism is a potential for the economic empowerment of local communities.

Some tourist villages in the Semarang Regency are: Kopeng, Sidomukti, and Tegalan, which became models of tourist village for other villages. Other tourist villagesareGenting, Gemawan, Kebondowo, Mirogomo, Guci, Nyatnyono, Keseneng, Rowopening, and Tlogo. Each tourist village has a uniqueness that can be offered to visitors, such as woven banana leaf, *encenggondok*and other crafts. These tourist villages provide additional incometo people who live in the surroundings. The surrounding community can offer services and sell around the tourist sites. Kesenengtourist village, for example,people can get revenue of Rp40 million within 2 months. For the time being, the money is currently prioritized for development of tourism facilities. Problems come especially from the HR in managing tourist destinations

Government of Semarang Regency have established policies that support the development of tourist destinations, such as the decree No. 111, of 2011, about RIPPARDA, Semarang regency, in 2010-2030, and the establishment of programs and tourism activities in 2015, including the development program of tourism marketing, tourist destination development program, and program development partnerships, as well as their optimization potential based destination development, which prioritizing: *Gedungsongo* region, *PemandianMuncul*, *Senjoyo*, and *RowoPening (Bukit Cinta)*. In this development includes efforts for the construction of souvenirs and culinary center and the place for photography (Selfie).

Real action made by the Government of Semarang Regency in an effort to attract tourists, both in industrial tourism, cultural tourism, natural tourism, and tourist village, such as the creation of leaflets, tourist maps, in the form of tourist packages, such as *IndahnyaDesaku*, *Desa Wisata Kabupaten Semarang*: *DesaWisataMenariTanon* tour package, *Genting* tour package, *Sidomukti Village* tour package, *Salam Ambarawa* tour package, *Gemawang* tour package,*Gedung Songo and Klenting KuningKemowi* package, *SekarKanthilKemetul*(*SusukanSubdistrict*) tour package, JembrakUjung-Ujung tour package.In addition, there is also tourist destination in program, live-in the tourist village of Semarang regency, as well as organizing tourist village festivals. Even in the promotion, tourism office has planned the development of tourism with the indefinitely promotion system (borderless marketing system). This means the employees working in the Department of Tourism and other employees are required to be ready for giving eksplanation related to tourism in Semarang Regency should they are asked for. Increase local awareness about tourism.

The main problemcomes especially from HR in managing tourist destinations, motivation and innovation for development as well as the readiness of infrastructure supports, such as roads, availability of parking, community readiness (for a tourist village), etc.

Creative Industries in Supporting Tourist Destination Based on Knowledge Creatif of Semarang Regency

Ooi, (2006), states that creative industries and tourism sector are two synergic things when appropritely managed. This is proofed by several creative cities such as Bali, Bandung and Yogyakarta. The results showed that the creative industries in Semarang District has not fully support the tourist destinations. This can be explained as follows:

1. Semarang Regency has creative industries that have unique experiences that can be used as alternative tourist destinations, such as :
   a) The creative industry sub-sectors of the arts that has a unique local culture, such as:
      a. *Acaan*, inTawang village, KecamatanSusukan.It is locally termed as *prosesibersihdesa* (procession of village cleansing ritual) as a form of gratitude to God Almighty.
      b. SedekahRowo, a parade of *tumpengrobyong*and *air suci*(holy water) from 7 watersprings. This parade is followed by locals in their Javanese traditional costums, starting from *CandiDukuhBulitBrawijaya* heading to *RawaPening*, ended with the lighting of *oborsewu* (thousand torch) as a symbol of enlightment, taken place in Kebondowo village, KecamatanBanyubiru.
      c. TariKendalen,is a kind of dance imitating horse riding, located in Ngrawan village, KecamatanGetasan, and *taritopengAyu* (mask dance) from Tanon.

b)Creative Industri - culinary sub sector, which has local food uniquenss such as*Torakur*, a kind of food made of tomato that processed so that the form and taste similar to date, and*Tahuserasi*and *Tahu Bu Puji* fromBandungan.

c)Creative Industri - handycraft sub sector, which has local uniqueness such as handycraft made of *encenggondok*, in form of bags, footwears, wall decoration, etc. It is located inKebondowo village, KecamatanBanyubiru.

These unique items and products, however, are not yet found in tourist destination in Semarang Regency, although the government of Semarang Regency via Department of Youth, Sports and Tourism has made efforts by creating tourist villages. One of the reasons is that creative industries and tourist destinations are managed by different Departments.

2. Featured creative industries (Fashion, Handycraft, and Culinary) in Semarang Regency that are listed in Bureau of Cooperatives, SMEs, Industrial and Trade are are hardly found in every tourist destinations. For example:
   1)In tourist destination that gives biggest contribution to local revenue of Semarang Regency, that is Gedungsonggal at Gedongsonggo, items sold by the sellers are mostly imported from other regions: fashion items are from Yogyakarta and Borobudur, and the handycrafts – accessories, necklace, bags made of coconut shell, and keyholder, etc. - are from Yogyakarta.
   2)At Bukit Cinta tourist destination, we can find local unique culinary such as locally processed fish products typical Rawapening and handycrafts made of *encenggondok* typical Semarang. Other creative industry products are imported from other regions such as Semarang, Yogyakarta, and Bandung.
   3)At UmbulSidomukti and KesenengTourist Village, we can found only culinary products of creative industry, not typical, and can be found elsewhere.

When associated with the respondent's answer, the reasons tharespondents did not buy at a tourist spot is because the design or model is not attractive, mostly less typical and easily found elsewhere, Thereisa different handycraftmade of flannel by MrFadil from a village of Bandungan.Although considered as interesting and creative, but this item is not a typical souvenir of Semarang regency.

3. the manufacture and shops of creative industries are located in different places apart from tourist destinations, such as the Craft Market in Tuntang and Glodogan. There is also a tourist destination, but there is no market that sells their local souvenirs. Even when the souvenirs are available, they are just "ordinary" ones, and can easily be found in other areas.
4. Lack of networking and cooperation between the creative industries manager with tourist destinations.
5. The existingsectoral Ego in the development of creative industries and tourism destinations make the fundamental problem everlasting.

Creative Industries Development Strategy For Driving Travel Destinations

1. SWOT analysis with internal- external matrix

   The SWOTanalysis with internal daneksternalmatrix, resulted as follows:

Table 1.
Weighingand Rating of Internal –Eksternal Factors

No	Internal Strategic Factors	Weigh	Rating	Score
	Strengths			
1.	Potential Natural Resources that support the development of creative industries	0,20	4	0.80
2.	The potential of creativity and innovation (ideas, innovation, etc.) that the HR have	0,15	3	0,60
3	Their guidance from the Department for the development of creative knowledge of HR	0,15	2	0,30
4.	Potential of Tourist Destination (object and attractiveness) that supports the developmment of creative industry	0,15	2	0,30
	Weaknesses			
5.	The absence of a distinctive creative industries in tourism destinations	0,10	3	0,30
6.	Lack of capital to develop the creative industries	0,05	1	0,05

7.	Lack of promotion to that support creative industries in the tourist village, in the form of travel packages and information technologies	0,05	3	0,15
8.	Sectoral Ego and the absence of fundamentally Troubleshooting	0,05	3	0,15
9.	Accessibility to the tourist destination	0,05	2	0,10
No	**External Strategic Factor**	**Weigh**	**Rating**	**Score**
Opportunities				
1.	Potential of Semarang regency in bringing investors in the creative industry and tourist destinationsls	0,20	3	0,60
2.	Increased travel Destinations in Semarang Regency provide marketing opportunities for the creative industry	0,20	4	0,80
3.	Increased tourist visit to Semarang Regency provide marketing opportunities for the creative industry	0,15	4	0,60
4.	Job creation from the creative industry events and tourist destinations	0,15	3	0,45
Threats				
5	The shift in consumer behavior in the demand for creative industries in tourist destinations	0,10	3	0,30
6.	Increasing number of hijacking somebody's creative products – IPR	0,05	2	0,10
7.	Excessive use of the resources	0,05	2	0,10
8	Unfair competition among creative industries businesses	0,05	1	0,05
Total		1,00		3,00

Processed Primary Data Source

Based on the above calculation, the analysis would be as follows:

Table 2
Matrik Of Internal – External Strategic Factors

Eksternal Internal	High (3,1 – 4)	Medium (2,1 – 3)	Low (1 - 2)
High (3,1 – 4)	Growth through Vertical Integration	Growth through Horizontal Integration	Turn Around Strategy
Medium (2,1 – 3)	Stability	Profit Stability Strategy	Diversivication strategy
Low (1 - 2)	Growth through Concentration Diversification	Growth through Conglomerate Diversification	Liquidity

Source: Processed Data

Results of internal and external analysis matrix: the internal score is 2.75 (within medium quadrant), and the external score is 3.00 (within medium quadrant), this means it supports the development of potential creative industries without changing the direction of the strategy adopted. In other words, the creative industries will remain profit stable when it is developed with pre-existing conditions. Thus, it needs the creativity knowledge of human Resources.

2. SWOT analysis with space analysis matrik
   SWOT analysis with *space analysis* matrix, resulted as follows:

Strengths (S) = 2,75 thus :
Weaknesses (W) = -2,40
Opportunity (O) = 3,50 S + T= 2 , 75 + (-2) = 0,75
Threats (T) = -2 W - O = -2,40 + 3,50 = 1,10

Based on the results, development strategy should be applied is the one that support the development of creative industry potential, such as:

1. HR Development :to exploit the potential of existing natural resources, through:
   a) Changes in mindset,
   b) Business motivation,
   c) Enterpreneurship development,
   d) Improvement in the development of HR through *knowledge creative.*
   This development is possibly carried out through education and training, comparative study, seminar, and other options that can improve innovation, creative ideas from the HR in creating and managing the creative industry and tourist destination.
2. The development of innovative, unique and distinguish creative industries (Crafts, Culinary, and Fashion), using local potentials.
3. Improvement in accessibility by providing Workshops and other location for creating creative industry within the tourist destination.
4. Provide facilities that shorten the distance between creative industries and the tourist destination abundantly visited by tourists.
   Provide creative industries within famous tourst destinations. This is an important step, thus, the management must take into account *something to do*, *sonetbing to* and *something to buy*, as shown in the following examples:

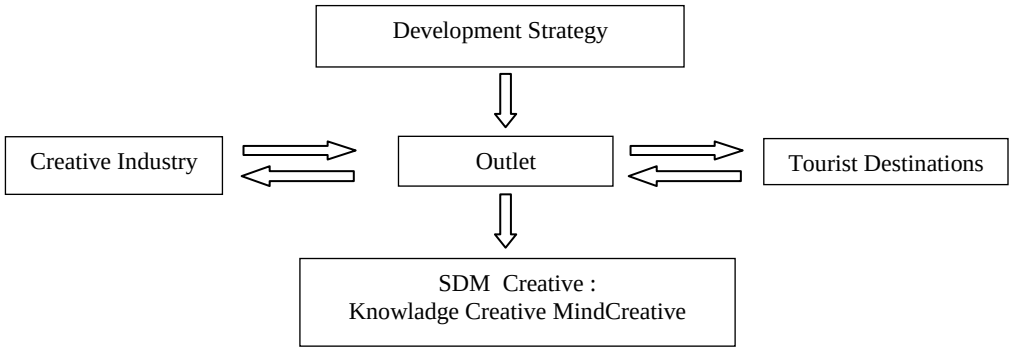
Table 3
The creative industries development pattern to drive Tourist Destination
in Semarang Regency

Tourism Activity	Development Form
something to do (Related to Abstraction)	Cultural process :Acaan, Sedekah Rowo. Batik making Festival
something to see (Related to Activation)	Batik making in Gemawang, handicrafts making: kuda lumping, masks, and creating culinary dishes in some of the tourist villages.
something to buy (Related to typical souvenirs)	Kinds of specific culinary : Tahubakso, Sate kelinci Crafts made of *encenggondok*, sticks, banana midrib.

Source :Yoetty, 1985, processed for research

5. Implementation of environmental-oriented marketing strategy and adapting to trends and changes in consumer behavior.
6. Building a synergy between the main actors in creative industries and tourism destinations in Semarang regency.
7. Eliminating sectoralegotosolve the fundamental problems. The main actors in this case are scholars, government, and businesses. Whith this synergy it is expected to create the linkage between the creative industries and tourism destinations.

Picture 2.
Models Development Strategy Of Creative Industry With Knowledge Creative
As A Driver For Tourist Destinations In Semarang Regency



Source : processed for research

Closing

Conclusion

Semarang regency has huge potential of creative industries. However, these creative industries has not yet optimally drive tourists to tourist destinations in Semarang regency. One of the reasons is the lack of linkage between the creative industries and the tourism sector as a tourist destination. Each sector is separately managed by different department so they run on their own ways. This can be seen from the fact that eventhough there are many tourist destinations, typical souvenir sales areas are not appropriately available. The available souvenirs are just "ordinary" ones, and can easily be found in other areas. Some souvenir shops are even located too far from the tourist destinations. less promoted, and sell only these "ordinary" items. As a result, not many visitors are driven to the areas.

Based on SWOT analysis, the appropriate development strategy should be applied is the one that support the development of industry potential that focusing on the development of creative knowledge of the HR, especially on the mindset. This can be done by improving the motivation to manage the business through training, comparative study and other activities related to the improvement of creativity and entrepreneurship. There should be improvements and innovations in packaging creative industries in every tourist destinations, using 3 basic concepts: *something to do, something to see, dan something to buy.*

Recommendation

The development of creative industries to drive tourists to tourist destination needs a strategy that improves connectivity between the two. This is possible by by providing product outlets close to or within the tourist destination, in form of craft center that can be packaged in a tour package. Integrate creative industries and creative tourism activities into one package, by involving tourists, where visitors not only buy souvenirs, but also look at the manufacturing process and even participate in the creation process.

In terms of creative knowledge, the need for the role of local government in meningatkan aspects of Human Resources skills through training and character formation, revamping management, good marketing management, product quality, and promotion, as well as financial management, access to technology and capital.

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THE NETWORK GROWTH OF MINIMARKET FRANCHISE TOWARDS THE PRINCIPLE OF JUSTICE TO THE INCOME TAX

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ABSTRACT

The liability of income tax on the net profit of an enterprise in Indonesia is distinguished by the amount of sales per year in 3 (three) categories. First, sales of up to Rp 4.8 billion per year are categorized as Micro, Small and Medium Enterprises (MSMEs) liable to Final Income Tax of 1% of sales results. Second, one year sales above Rp 4.8 billion up to Rp 50 billion are liable to income tax of 12.5% of net profit, for sales up to Rp 4.8 billion and 25% of net profit from above Rp 4.8 billion sales. Third, a year sales above Rp 50 billion are liable to income tax of 25% of net profit. Minimarket franchise outlets are very fast spread all over Indonesia. Minimarket franchise outlets in Indonesia are liable to income tax in accordance with current tax regulation, so minimarket franchise outlets with sales up to Rp 4.8 billion per year are categorized as Micro, Small and Medium Enterprises. The conclusion of this research is that minimarket franchise outlets is a large trading distribution network of society daily needs that is managed and controlled by the Franchisor. Minimarket franchise outlets should be liable to income tax with the highest rate (25%) of net profit of each outlet (except loss), so that taxes can also work to create justice for traditional stalls to stay in doing their activities.

Keywords : Income Tax, Minimarket Franchise Outlets, Trading Distribution Network, Traditional Stalls

Introduction

The increased development in all areas, especially in the economic field affect the trade sector. One of the manifestations is the is a minimarket business that has sprung up. Even now the business is no longer centralized in urban areas but has penetrated in the rural environment. This condition is also triggered due to the shifting lifestyle of society as a result of globalization. People, especially the younger generation are no longer happy to shop for their needs in traditional stalls or traditional markets but are more interested in shopping for their needs in the modern market, one of which is in the mini market.

The basic difference between a mini market and a traditional market or shop is located on the services provided, time of shopping, price, cleanliness and other facilities provided. Apart from all that shopping in the mini market provides a sense of comfort because it is equipped with air conditioning facilities, thus making the shopping space is not hot. Structuring of goods in modern markets such as mini market is also a factor that it is easier for buyers to find their needed goods because it is placed in accordance with the type and the function respectively. Mini market also provides facilities that the community needs such as electricity bill, water, telephone and others.

Mini market in Indonesia such as *Indomaret*, *Alfamart*, *K-Circle* and the others is a form of mini market that uses franchise system in the field of management and use of brand together. This can be seen starting from the model of place of business, paint outlets and model arrangement even types of goods sold even between one store to another is also almost the same. Mini market market with franchise system has utilized the progress of science and technology in the form of information technology with electronic network so that all transactions are recorded on real time. Real time is a data processing system that should not be delayed, recorded when a transaction occurs, in the case of transactions in mini market real time recording process is when the cashier inputs goods purchased by the buyer and the arrival of merchandise processed by the warehouse. The real time transaction process provides real-time information to the management of the state of the amount of sales in quantity and amount of money, changes in inventory balance, even the calculation of cost of goods sold can be known in real time.

The business world is a well-established field in utilizing technology. This establishment is due to the ability of the business world to re-create the needs that can always be utilized every result of science and technology into goods for the present and future[1]. Maximum utilization of science and technology by mini market franchise network gives signal transactions made transparent in terms of management and financial reports. Transparency in financial statements facilitates the mini market franchise management calculates tax obligations, including facilitating the fiscal party to analyze and explore the potential of taxation mini market franchise.

[1] Sri Redjeki Hartono, 2000, *Kapita Selekta Hukum Ekonomi*, Published by Mandar Maju, Bandung, p. 34.

Taxes in terms of microeconomics, is a transition of money (wealth) from the private sector or individual to the public sector or government, without any rewards that can be directly appointed. Tax money received by the government is issued back to the public to finance the public interest, thus giving a huge impact on the economy of the community. Taxes may affect prices, may affect the market, may affect the wage system, may affect unemployment, may affect the welfare of the community, and so on. Government spending to the public has a huge economic impact, especially with the multiplier effect in society. For this it is necessary just knowledge of the economy.[2]

Tax is actually debt, that is, the debt of the community members to the public through the state and the debt in the sense of law is the engagement. Therefore, the state through the government is mandated by the Act to compel the members of the public to pay taxes according to the applicable tax laws. Fair taxation will provide a balance of effort for both business entrepreneurs mini market in the form of franchises or stalls of the entrepeneurs or traditional shops.

Main Problem

Is the imposition of Income Tax on mini market franchise network operating in Indonesia has fulfilled the principle of justice against traditional stalls?

Discussion

This research is based on normative juridical basis. The normative juridical research base uses data from the applied tax laws in Indonesia. Empirical data obtained are used to sharpen the analysis. Indonesian tax laws on the trade in domestic goods either retail or wholesales are subject to Value Added Tax and Income Tax. Entrepreneurs who are required to collect 10% Value Added Tax are entrepreneurs whose sales value is more than Rp 4.8 billion a year. Entrepreneurs who are required to collect Value Added Tax on every rupiah of sale are referred to as Taxable Entrepreneurs. Employers with annual sales up to the limit of Rp 4.8 billion are not required to collect 10% Value Added Tax because it is categorized as Micro Small and Medium Enterprises (MSMEs).

The imposition of income tax on the net income of a business entity in Indonesia also differentiates its tariff based on a year's sales value. There are 3 (three) types of income tax rate for company in the form of a business entity of 1% final of sales, 12.5% and 25% of net income. First, sales of up to Rp 4.8 billion a year are subject to a 1% Final Income Tax on sales proceeds. Second, sales of above Rp 4.8 billion up to Rp 50 billion are subject to income tax as follows: 12.5% of net profit for sales up to Rp 4.8 billion and 25% of net income from sales of above Rp 4.8 billion to 50 billion Third, a year's sales of above Rp 50 billion are subject to income tax of 25% of net income.

Empirical data obtained based on tax reports of several mini market franchise outlets in Indonesia with an area of 200 m^2 - 300 m^2 of business space, with annual sales of around Rp 5 Billion - Rp 10 Billion per mini market outlet, in accordance with current income tax rules mini market outlets obtain tax rate facility. Mini market franchise networks (such as *Indomart, Alfamart, Seven Eleven, K-Circle*, and the others) are a retail trade distribution network using trademarks, management, information technology, employee recruitment, supply of goods and joint promotion systems. The Franchisee provides a place of business, or leases a place of business and provides sufficient working capital, then the Franchisor will arrange and administer all licenses, purchase inventory, recruit employees, training, etc. until the mini market outlets are ready to operate.

The Franchisor is as "the parent company" governing the purchase of merchandise and supplying the merchandise to the Franchisee's outlets. The selling price is also tied to the benchmark that has been determined by the Franchisor. Management fee of a percent must be paid to the Franchisor each month according to the amount of gross sales every mini market outlets. Franchisor is a network of intregation, into one entity from the structure of the Franchisee's business activities, because all mini market franchise activities controlled by Franchisor and Franchisee have no power to interfere with their own mini market activities. Distribution networks established and controlled by Franchisors contribute to lower cost of goods sold structures due to various discounts obtained from manufactur or supplier industries.

Relationship between Franchisor and Franchisee is a special relationship and according to Law Number 36 of 2008 on Income Tax. Article 18 section (4) of the Income Tax Law stipulates that the related relationship is independent of the amount of inter-company capital participation, but the special relationship among Taxpayers may occur due to dependence or attachment to each other due to the mastery through management or use of technology. Mini market franchises can be likened to part of a large trading network with the management and brand together so that the tax aspects of each mini market franchise outlets should not get facilities as Micro Small and Medium Enterprises (MSMEs). Total sales a year from one brand of mini market franchise network throughout Indonesia can reach more than Rp 50 Billion, or at least above Rp 4.8 Billion up to Rp 50 Billion.

[2] Rochmat Soemitro, 1990, *Asas dan Dasar Perpajakan 1*, Published by Ereco, Bandung, p. 2.

Total sales a year for all of Indonesia from one brand of mini market franchise network do not meet criteria as Micro Small and Medium Enterprises, so every mini market franchise outlet must be specified as Taxable Entrepreneur to collect Value Added Tax 10% from every sale even though the sales of one year does not exceed Rp 4,8 Billion. On the net income of each mini market franchise outlets should be taxed income with the highest rate of 25%. Mini market outlets that suffered losses would not be subject to income tax. By classifying mini market franchise outlets as a network of large trading companies will meet the principle of fairness to the tax treatment for traditional stalls entrepreneurs are increasingly evicted by the growth of mini market franchises. The principle of fairness in paying taxes is to levy taxes in proportion to the taxpayer's capability in terms of capital, management, human resources, technological mastery and total sales amount per year.

Closing

Mini market franchise that penetrated from big city to rural environment is a large distribution network of basic needs of society conducted by Franchisor through mini market outlets. Mini market franchise is a network of intregation, into one unity of the structure of business activities, because all the activities of mini market franchise controlled by Franchisor. Distribution networks established and controlled by Franchisors contribute to lower cost of goods sold structures due to various discounts obtained from manufactur or supplier industries.

The result of the research concludes that mini market franchise outlets are an integral part of large trading activity network, so that the imposition of Income Tax should be calculated from taxable income with the rate of Income Tax of 25%, and should not get the lower tariff facility as the shops traditional. Including any total sales a year then every mini market franchise outlets must be confirmed as Taxable Entrepreneurs to collect 10% Value Added Tax from buyers.

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LEGAL STATUS OF THE COMPANY LIMITED BY FOUNDER OF LAW NUMBER 40 OF 2007 ON THE COMPANY LIMITED

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ABSTRACT

Founder has an important role in the establishment of a limited liability company. The important role of the founders of a limited liability company, among others in terms of contributing, especially the conditions of establishment until the procurement field of good material in the form of money or goods to the establishment of a limited liability company. The position of the founder in the establishment of a limited liability company has several stages, starting at the preparation stage, the stage before the establishment of the company as a legal entity and the stage after the company approved as a legal entity. Each stage, the founders have different responsibilities. During the preparation stage, all activities undertaken by the prospective founders of the company plays an important role. These activities constitute a legal act to prepare all the needs regarding the establishment of a limited liability company, and the legal actions will have legal consequences for the company after the company's stand. Limited liability company that already obtain legal status by the Government, puts the founders at different positions, especially in case of separation and division of the capital. Article 7 (2) of Law Company Limited confirms that position before the company's founder passed as a legal entity is a shareholder for the first time, for their part in the form of an initial capital stock for the establishment of the company. Treasures as the capital of the company from founder is separate from the assets of the founder. Legal act performed by the founder on behalf of the Company that has not earning a legal status, legal action is the responsibility of the respective founders and does not bind the Company. Article 12 paragraph (1), (2), (3) and (4) confirmed that the founder of the legal act is twofold made by authentic act and not an authentic deed. Legal act is not authentic act there is a necessity that the deed of a legal act of the founders were attached together on founding act. Dereliction of necessity it will result in the company not tied to the rights and obligations arising from legal actions carried out by the founders.

Keywords: Establishment, Limited Liability Company, The Founders Of Legal Acts, Legal Entities

Introduction

Existence of a limited liability company existing and organized since the Dutch colonial era in the Book of the Law of Commercial Law and until now its presence is increasingly important in the sphere of trade and industry. Limited liability company is one form of business entity that has the characteristics, properties and different arrangements with entities other businesses. Forms of business entities previously arranged entirely in the Book of the Law of Commercial Law and the draft Civil Code, but some already in the form of laws, such as Act regulating About Company Limited.

The setting in the Book of the Law of Commercial Law of a specific nature, with the draft Civil Code as the general law. Relationship Book of the Law of Commercial Law with the draft Civil Code affirmed in Article 1 in the Book of the Law of Commercial Law, namely:

> The draft Civil Code also applies to Haal matters provided for in the present law, just in in the book of this law is not specifically distorted.

The principle contained in Article 1 of these is the principle of *Lex Specialis,* so far as not stipulated in the Civil Code Commercial code remains valid.

Indonesian law has set forms of business entity are: partnership, association, firm, cooperatives and limited partnership. Guild divided into two legal entities communion and fellowship which is not a legal entity. The difference between the others concerning the provisions on capital contributions as a founder of the fellowship, stewardship and responsibility and segregation of assets communion with personal possessions. A limited liability partnership incorporated in, separating the assets of the company with personal wealth.

The establishment of a limited liability company can't be separated from the founders who have an important role to be able to establish a limited liability company. The important role of the founders of a limited liability company, among others in terms of contributing establishment of a limited liability company, especially in the field of good material in the form of money or goods to the establishment of a limited liability company.

The legal position and the responsibility of the prospective founders of the company may limited regarding two important points, namely the legal position which means position legally accountable prospective founders to the establishment of limited liability and responsibility that have the intent is responsible for everything that happens with the establishment of a limited liability company.

The legal position and the responsibility this involves legal acts candidate founder relating to the establishment of a limited liability company, as stipulated in Article 12 paragraph (1) of Law Number 40 Year 2007 regarding Limited Liability Company (hereinafter referred to Law Company Limited) which stresses that:

> Legal actions relating to the ownership and remittance made by candidates before the Company's founders established, should be included in the deed.

Article 12 paragraph (1) is related to Article 13 paragraph (1) of the Corporate Law which states that:

> Legal actions conducted prospective founders for the benefit of the company that has not been established, binding the company after the company became a legal entity if the General Meeting of Shareholders of the first expressly states that accept or take over all rights and obligations arising from legal actions undertaken by prospective founders or their proxies.

Establishment of a Limited Liability Company

Article 1 paragraph 1 of Law Company Limited confirms that:

> Limited liability company, hereinafter referred to the company, is a legal entity which is a capital alliance, founded on the agreement, engage in business with a capital base that is entirely divided into shares and meet the requirements set in this law and its implementing regulations.

The elements in the provisions of Article 1 paragraph 1 for the birth of a legal entity is:

1. A legal entity
2. Capital alliance
3. Founded on an agreement
4. To conduct business
5. The birth of the Company through the legal process in the form of endorsement the government[1]

Legal Entity

Legal entity is an entity or entities which may have rights and obligations and can perform actions such as receiving and has a wealth of its own, and can be sued and sued in the face of the judge.[2] Legal entities like humans is the subject of the law is as bearer of rights and obligations.[3] Law Dictionary legal entity termed artificial person, the body (such as company) the which is the person in the eye of the law.[4] The legal entity means other than as a bearer of rights and obligations, also attached to it legal responsibility and be able to take legal actions included therein is to act as a party in the agreement.

Alliance Capital

Alliance is a coalition or association of two or more people to own and carry a business, or in conjunction with the purpose of profits. Another meaning of communion is unity of the people the same importance to a particular company. Allied meaning that the participants in a company.[5]

Guild of capital means of cooperation with a combined capital do between two or more people who have a common interest to make a profit or at a particular company. The capital can be in the form of cash, goods or personnel included in the alliance.

One of the principal element of the limited liability company is the authorized capital is capital that is mentioned or stated in the deed of the company. The authorized capital divided into shares or holdings. Consisting of capital divided into shares and shareholders were put in their status as members of the company by way of paying the share to the company.

Article 31 paragraph (1) of the Corporate Law states that:

> "Companies authorized capital shall Consist of the total nominal value of Reviews their shares."

Article 31 paragraph (1) is related to Article 32 paragraph (1) of the magnitude of the nominal value its authorized capital is at least Rp. 50,000,000 and the authorized capital shall be prepared by the founders to establish a limited liability company.

According to Article 1 of Government Regulation No. 29 Year 2016 on Amendment Authorized Capital Company Limited

(1) Limited Company shall have its authorized capital.
(2) The authorized capital of Limited Liability Company should be enshrined in the statutes contained in the deed of Limited Liability Company.
(3) The amount of the authorized capital of the Limited Liability Company as referred to in paragraph (1) is determined by mutual agreement of the founders of limited liability companies.

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[1] M. Yahya Harahap, 2009, **The Limited Liability Company Law**, Sinar Grafika, Jakarta, p. 34-36.
[2] R. Soebekti, 1987, **Principles of Civil Law**, Intermasa, Jakarta, p. 182.
[3] Sigit Irianto, 2014, **The Civil Law**,Faculty of Law Firm publisher UNTAG Semarang, p. 13.
[4] Collin, PH, 1992, **Law Dictionary**, Universal Book Stall, New Delhi, India, p. 17.
[5] Elandaharviyata.wordpress.com/2013/02/17/*sense-and-term-fellowship,* downloaded date January 15, 2018

Elucidation of Article 1 (1) confirms that it is a "must have authorized capital of the company" is that every company Limited must have a capital base sufficient to initiate business activities. The provisions regarding the authorized capital is fixed berasaskan freedom of contract which was confirmed on the verse (3) are the determination of the amount of the authorized capital of the company limited by agreement, the founders of the company Limited is an effort to respect the principle of freedom of contract that gives freedom to the people to have an agreement on establishing the company Limited under the provisions of civil law. the amount of the minimum amount of basic capital paid up is as affirmed Article 2 (1):

(1) The authorized capital of the Company limited as referred to in Article 1 shall be issued and fully paid at least 25% (twenty five percent) as evidenced by the proof of depositing valid.

In addition to capital alliance, the establishment of a limited liability company jug a partnership composed of the founders of the company as the initial shareholders. But lelbih stand out is the communion of the capital alliance disbanding or members, as contained in the partnership set out in Article 1618 of the Civil Code.[6]

Established by Treaty

Article 1 paragraph 1 confirms that the company is established based on an agreement, means the establishment of the company at least two people as the founder. Based on the principle of lex specialis derogate legi generali, then Article 1313 of the Civil Code as the basis for the establishment of a company.

Contractual nature inherent in the establishment of a limited liability company, for the birth of the company based on the agreement of the founders. Based on the law of treaties, the establishment of a limited liability company established by a minimum of two people. This relates to Article 7 (1) of the Law Company Limited in the second paragraph is saying that

The company was founded by two (2) or more persons under deed made in Indonesian.

The establishment of a limited liability company under the agreement involves several things:

a. Founded by two or more
b. Made with a notary deed and in indonesian
c. Every founder is obliged to take part of the stock at the time of the establishment of the company's
d. Legal status was obtained on the date of issuance of the Decree of the Minister of Justice and Human Rights regarding ratification liability company

Doing Business Activity

Article 2 of Law Company Limited confirms that a company must have a purpose and business activities, and then affirmed in Article 18 which says that the purpose and objectives and business activities that should be included in the articles of association in accordance with the provisions of the legislation.

Business activity had the purpose as human activities in the economic field in order to achieve the goals that have been set, either individually or together. The business activities of the limited liability company means that all economic activities which aim to make a profit, and followed by other activities specified in the regulations. The business activities of the bias is limited or unlimited time

Birth of the Company Through the Legal Process in Government Endorsement Form

A limited liability company is declared valid as if it had been through the legal process and has been approved by the government, namely through a ministerial decree. Article 7, paragraph (2) of the Corporate Law states:

> The company obtained the status of legal entity at the date of issuance of the ministerial decree endorsement liability company.

Ratification by the minister makes official the company as a legal entity and is attached therein rights and obligations as legal subjects. The Company as a legal subject artificial creature or authorized by the State to be incorporated is not biased views and unbiased palpable (Invincible and intangible). However, no real existence as a separate legal subject and (separate) and free (independent) of the owners or shareholders and of the board in this case the Board of Directors of the Company.[7]

Legal Status Limited Liability Company Founder

Founder position in the establishment of a limited liability company has several stages, starting at the preparation stage, the stage before the establishment of the company as a legal entity and the stage after the company approved as a legal entity. Each stage, the founders have different responsibilities. In the preparation phase of the establishment, all legal actions is the founder of personal responsibility, except those related to capital investments.

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[6] *Op* cit, p. 34.
[7] Yahya Harahap, *Op* cit, p. 37.

During the preparation stage, all activities undertaken by the prospective founders of the company plays an important role. These activities constitute a legal act to prepare all the needs regarding the establishment of a limited liability company, and the legal actions will have legal consequences for the company after the company's stand.

Article 7 (2) Limited Liability Company Act which states: Each of the founders of the company shall take shares when the company was founded.

This article asserts that the position of the company's founder before it was passed as a legal entity is a shareholder for the first time, for their part in the form of an initial capital stock for the establishment of the company. Treasures as the capital of the company from founder is separate from the assets of the founder.

Legal act performed by the founder on behalf of the Company that has not rnemperoleh legal status, legal action is the responsibility of the respective founders and does not bind the Company.

Article 12 of the Limited Liability Company Act subsection (1) states:

(1) Legal actions relating to ownership and remittance made by candidates before the Company's founders established, should be included in the deed.

Further provisions regulating the legal acts of the founder, Article 12 paragraph (2), (3) and (4) states:

(2) In the case of a legal act referred to in paragraph (1), is expressed by deed that is not authentic act, the deed attached to the certificate of incorporation.

(3) In the case of a legal act referred to in paragraph (I), is expressed by authentic act, number, date and the name and domicile of the notary who made the authentic act mentioned in the Articles of Association.

(4) In the case of the provisions referred to in paragraph (1)) (2) and (3) are not fulfilled, the legal act did not cause the rights and obligations and does not bind the Company.

Article 12 paragraph (1), (2), (3) and (4) confirmed that the founder of the legal act is twofold made by authentic act and not an authentic deed. Legal act is not authentic act there is a necessity that the deed of a legal act of the founders were attached together on founding act. Dereliction of necessity it will result in the company not tied to the rights and obligations arising from legal actions carried out by the founders. Furthermore, Article 13 (1) stipulates that:

(1) Legal actions performed nominee founder for the benefit of the Company that has not been established, binding the Company after the Company became a legal entity if the first GMS Company expressly stated accept or take over all rights and obligations arising of a legal act performed by prospective founders or their proxies.

Legal acts in question is a legal act relating to the initial capital, either in cash or in other forms, such as land, buildings, plant, machinery, or purchases of goods for the purposes of the company. The initial capital apart with a personal wealth.

According Herlien, as quoted Agus Budiarto.[8] deposit such shares in the form of property, plant and equipment will rise to a right which the doctrine in the Netherlands called economic property rights (Economische eigendom) of the founders of the limited liability company.

In principle, the prospective founder legal acts done for the sake of the establishment of the company after the company's binding obtain legal status, if it met the following requirements:

a. The first General Meeting of Shareholders explicitly states accept or take over legal actions prospective founders;
b. Implementation of the General Shareholders Meeting a maximum period of 60 days
c. General Meeting of Shareholders is considered valid if approved unanimously.

General Meeting of Shareholders accept the legal act binding means, if the GMS does not accept the Company's non-binding means. Acceptance by the GMS has a consequence that the rights and obligations arising from a legal act prospective founders are the sole responsibility of the company. Such acceptance must be recorded in written form (schriftelijk, in writing), and must be made before the company was set up.[9]

Dereliction must to attach certificates were not authentic act on the company's certificate of incorporation will result not tied to the rights and obligations arising from legal actions carried out by the founders. In principle, the prospective founder legal acts done for the sake of the establishment of the company after the company's binding obtain legal status, Article 13 paragraph (1) of the Law Company Limited affirmed the following conditions:

1. The first General Meeting of Shareholders The Company expressly say accept or take over all the rights and obligations arising from legal actions undertaken by prospective founders or their proxies;
2. Affirmation and declaration it is not permitted to be confirmed and decided at a general meeting of Shareholders of the second and so on.

[8] Agus Budiarto 2009, **Legal Status and Responsibilities of Founder Company,** Limited,Ghalia Indonesia, Jakarta, p. 104.

[9] Yahya Harahap, *Op* cit, p. 189.

Instead, the legal act prospective founders to personal responsibility when the General Meeting of Shareholders not been implemented within the period of 60 days since the company obtain the status of legal entities and / or the General Meeting of Shareholders held in that time period did not result in a unanimous vote (Article 13 paragraph (4) of Law Company Limited). Approval of the General Meeting of Shareholders as referred to in paragraph (2) is not required in cases where the legal act performed or approved by all candidates before the establishment of the Company's founder (Article 13 (5) of the Limited Liability Company Law).

According to Metzger et al, as quoted by Yahya Harahap.[10] The founder prospective legal actions primarily related to capital, is a legal act is limited to paid-in capital. Corporate law to allow people to embed their money (invest Reviews their money) in the company without the burden of responsibility is not unlimited (without imposing unlimited liability), and also without the burden of responsibility upon management company investors.

In this phase, the founders can make a deposit of shares *(inbreng)* in other forms that are not in the form of cash, such as building and land, factory machinery, as well as the purchase of goods made by the founders, such as plant and equipment, solely conducted with the aim to provide capital (wealth) in the company and separate from the personal assets of each of the founders.

Capitals deposited by the founders can be included in the joint ownership that is poured in the form of a preliminary agreement, and at that time the founders are personally liable.

Limited liability company that already obtain legal status by the Government, puts the founders at different positions, especially in case of separation and division of the capital.

In the state of the Company Limited has been established with the establishment made by a notary, but not yet approved as a legal entity, joint ownership are binding, in which the state of co-ownership is as a result of the establishment of PT her and is comparable position with a firm , Thus, the founders are not free to conduct the separation and division.[11]

The position of the founder before the company is authorized as a legal entity as a shareholder for the first time, as a party to provide capital to the company, and the capital that is separate from the personal possessions (Article 7 (2) of the Law Company Limited). Furthermore, in paragraph (2) it confirms that every founder must take stock at the time the company was founded.

Thus, the founders are also shareholders in a limited liability company, but the founders still have to take personal responsibility personally for all legal actions that have been done, when the company has not been authorized as a legal entity. Founder have a position as a shareholder both before and after the company becomes a legal entity, the difference is before approved by the founders to take personal responsibility, but after obtaining the endorsement as a legal entity, the act of the law is the responsibility of the company if approved by the General Meeting of Shareholders of the first ,

Another possibility as stipulated in the Company Law is the principle of breakthrough limited liability (piercing the corporate veil or lifting the corporate veil *or* going behind the corporate *veil.).* This principle also isa doctrine or theory that is defined as a process of burdensome responsibility on the shoulders of another person or company on a legal act which is done by a company principal (legal entity), without looking at the fact that the act was in fact carried out by the company these actors , Article 3, paragraph 1 of Law No. 40 of 2007 on Limited Liability Company (Company Law) namely:

> The shareholders are not liable personally for the engagement made on behalf of the Company and is not responsible for any damages beyond the Company's shares *held.*

Elucidation of Article 3, paragraph 1 of Law PT express provisions of this paragraph affirm that the shareholders of the Company characteristic only liable for payment of all shares owned and do not include personal *possessions.* The doctrine of separation of property and responsibility of the company and the founder / owner was not absolute, because in certain cases the owner can be held accountable as individuals or together with the company to indemnify third parties even if they are carried out on behalf of the company.

The shareholders still need to take personal responsibility even though the company has already obtained legal status, as defined in Article 3 (2) b, c, and d if:

a. The shareholders are concerned, either directly or indirectly by utilizing the company's bad faith solely for personal use. This occurs when using the company's shareholders as a means to fulfill its ambitions so inseparable again between his personal interests and the interests of the company;
b. The shareholders in question involved a legal act carried out by the Company.
c. The shareholders are concerned, either directly or indirectly, unlawfully using the company's wealth of riches lead the company become insufficient to pay off its debts.

[10] *Ibid*, p. 71.
[11] *Op cit*, p. 105.

Closing

In principle, the position of the founders of the limited liability company based on the phases before and after the limited liability company established by obtaining validation and status as a legal entity by the government. Before the company obtained legal status, the founder is responsible for all legal actions personally. After the company obtained legal status, it can be transferred to the company by the general meeting of shareholders to receive it.

Based on the principle (piercing the corporate veil, the founder still be accountable for his actions personally, together with the company to a third party, even though the legal act is carried out on behalf of the company.

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STRENGTHENING OF FOOD PRODUCT SUPERVISORY THROUGH STANDARIZATION AS A PROTECTION TO CONSUMER

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ABSTRACT

The distribution of processed food products in the market is very diverse and varied in shape. Food products offered and marketed in the market are produced by both industry and home. Food products are circulated in an attractive packaging, so that consumers are interested to buy regardless of the standardization of products that should be listed in the product packaging. Food standardization is important for consumers to protect consumers from products that will endanger them. Standardization is the process of formulating, defining, implementing and revising standards that are carried out in an orderly and cooperative manner with all parties. Application of standardization is done through certification and accreditation activities. Product standardization aims to enhance the protection of consumers, business actors, workers and other communities for safety, security, health, and environmental conservation; help facilitate trade; and realizing fair business competition in trading. Standardization of this product is important as an effort to control for food products circulating in the market. Control of standardization is carried out by the leader of the agency in accordance with the authority or the Regional Government; the certification body of the product issuing the certificate; community and consumer self-help institutions oversee the goods circulating in the community. This control aims to provide protection to consumers in accordance with the consumer rights set forth in Law No. 8 of 1999 concerning Consumer Protection (Statute Book of the Republic of Indonesia No. 42 of 1999, Supplement to Statute Book No. 3821).

Keywords: Strengthening Control, Food Products, Standardization, Consumer Protection.

Introduction

Food is the most basic human need, and its fulfillment is a part of human rights guaranteed in the Constitution of the Unitary State of the Republic of Indonesia 1945, as a basic component in order to realize qualified human resources. The state is obliged to realize the availability, affordability, and fulfillment of food consumption. The availability of adequate, safe, quality, and nutritious food fulfillment.[1]

The definition of food according to Article 1 number 1 of Law Number 18 of 2012 on Food shall be anything derived from biological resources of agricultural products, plantations, forestry, fisheries, livestock, water, and water either processed or not processed as food and beverage for human consumption, including food additives, other raw materials used in the process of preparing, processing, and/or the making of food or drink.

Type of food that circulating in the market in the form of fresh food and processed food. Fresh food is food that has not undergone processing that can be consumed directly and /or that can be raw food processing. While processed foods are processed foods or beverages in a certain way or method with or without additional ingredients.

This processed food product is produced by a company engaged in the food section called food production. Food production is a condition of activity or process of producing, preparing, making, preparing, preserving, packing, repackaging, and/or changing the form of food. The results of this food product have to fulfil the food production standards. This food safety standard complies with the security principle of Law No. 18 of 2012 on Food.

According to the provisions of Article 67 section (2) of the Food Law, Food safety is intended to prevent the possibility of biological, chemical, other objects that may interfere with, harm and harm human health/consumers. Consumers as people who use the product must be careful in buying processed food that is distributed in the market. Given the circulation of processed food products in the market is very diverse and varied in shape. Food products are circulated in an attractive packaging so that consumers are interested to buy regardless of the standardization of products that should be listed in the product packaging. The marketing of food products in circulation needs control as an effort to protect the consumer.

[1] Consideration of Law No. 18 of 2012 on Food.

Discussion

Food Standardization

The implementation of food is based on the principles of sovereignty, independence, resilience, security, benefits, equity, sustainability and justice. The implementation of food aims to: improve the ability to produce food independently; providing diversified food and meeting the requirements of security, quality and nutrition for public consumption; realizing the level of food sufficiency, especially basic food with reasonable and affordable price in accordance with the needs of the community; facilitate and improve food access for the community, especially food insecurity and nutrition; increase the added value and competitiveness of food commodities in domestic and foreign markets; increase knowledge and awareness of the community about safe, quality, and nutritious food for public consumption; improve welfare for farmers, fishermen, fish farmers and food business actors; protect and develop the wealth of national food resources. In order to realize these objectives for food industry results need a standard.

Standard of food product must according to the principle of food law that is the principle of security. Food safety is the condition and effort required to prevent food from possible biological, chemical and other contaminants that may interfere with, harm and harm human health and not conflict with religion, beliefs and culture of the community so it is safe for consumption. The government sets norms, standards, procedures, and food safety criteria. Application of norms, standards, procedures, and food safety criteria is carried out gradually based on the type of food and food business scale. The Government is obliged to nurture and supervise the implementation of the norms, standards, procedures and criteria of food safety.

The food law requires that every food product be required to use food-based packaging that does not endanger consumers. Inside the package shall include a label containing at least the following information: product name, list of materials used, net weight or net content, name and address of the party producing or importing, halal to the required, date and production code, date, month and year expired, authorized distribution number for processed food, and the origin of certain ingredients. This obligation serves for the safety and security of consumers in consuming an industrialized food.

According to the provisions of Article 86 of Law No. 18 of 2012 on Food, every business actor producing and trading food shall meet food safety and food quality standards. The fulfillment of the standard is done through the application of food safety and quality assurance system. The certificate of food and quality assurance is provided by the government and / or an accredited certification body by the government.

Control

The marketing of food products on the market needs control. Control is required for the implementation of a plan/program can be achieved according to goals and objectives that have been determined. According to Duncan, control is the act that determines whether a plan is achieved or not. Control is an activity that is carried out seamlessly without deviation so that operational objectives are achieved seamlessly without any significant deviations. While Harold Koontz defines oversight is the measurement and improvement of the work performance of subordinates so that the plans that have been made to achieve corporate objectives can be held. Henri Fayol argues that oversight is to include checking whether everything happens according to the established plan, the issued order, and the principle adopted. It is also intended to know the weaknesses and errors in order to avoid the occurrence in the future.[2]

Understanding control according to the experts mentioned above, it can be concluded that control is an activity carried out to measure, and if necessary make improvements made to ensure manager results in accordance with the planned and no deviations occur.[3]

Control Purposes

The purposes of control according to Soewarno Handayaningrat are:[4]

a. Objectives to prevent or correct errors, irregularities, non-conformities, misconduct, and others that are inconsistent with specified duties and authorities.
b. Aims to make the work execution efficient and effective in accordance with predetermined plans.

So the purpose of control is to know whether an activity is in accordance with the command, running in accordance with the plan so run efficiently, effective and efficient, no errors, deviations, non-conformities, diversions, and others that are not in accordance with the task and authority that has been determined.
Implementation of control shall be conducted with the following aims and objectives:[5]

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[2] Riska Suariesti, 2014, *Pengaruh Pengawasan inas, Terhadap Motivasi Pegawai Di Dinas Tenaga Kerja dan Transmigrasi Kabupaten Cirebon*, Universitas Pendidikan Idonesia/repositor.upi.edu/perpustakaan.upi.edu, pp. 12-13, accessed on August 25, 2017.

[3] Siti Mariyam, *Kebijakan Pengawasan Terhadap Produk UMKM Sebagai Upaya Perlindungan Pada Konsumen*, Jurnal Ilmiah: Hukum dan Dinamika Masyarakat, Volume 15 No. 1, October 2017 p. 47.

[4] Ibid p. 47

[5] www.sumbarprov.go.id. *Program dan Kegiatan Bidang Pengendalian dan Pengwasan Mutu Produk Dinas Perindustrian dan Perdagangan Propinsi Sumatera Barat*, accessed on August 27, 2017.

The purpose of control is

1. Monitoring the circulation of goods / products circulating in the market.
2. Conducting guidance and coaching on business actors that produce or sell to be guided and carry out their business in accordance with applicable rules.

The objectives of the control are:

1. The decreasing of goods/food products circulating in the market that is not in accordance with the provisions and rules that applied.
2. Consumers are protected from possible risks of health, safety, and safety problems in consuming goods/food products in circulation.
3. Increased competitiveness and a conducive business climate.

While the essences from control are:

1. Ensure the fulfillment of consumer rights to consume goods/food products that meet the aspects of Safety, Security, consumer health and the environment and as promised.
2. Encouraging business actors to try honestly and responsibly.
3. Improve the competitiveness of domestic industries.

The scope of supervisory includes:

1. Goods and or services circulating in the market, including: standards, labels, raw clauses, after sales service and advertising.
2. Prohibited goods and/or services circulating in the market, may only be distributed in accordance with the provisions of laws and regulations.
3. Goods and/or services regulated by its rules, shall comply with applicable laws and regulations.
4. Distribution shall comply with applicable laws and regulations.

Control is very important to implement. Control aims to oversee food products marketed in the market already meet food safety standards or have not met the standards. It is important that consumers can enjoy food products safely, comfortably and safely. Food product monitoring is conducted by The National Agency of Drug and Food Control. The National Agency of Drug and Food Control is a non-ministerial body responsible for overseeing the circulation of drugs, traditional medicine, health supplements, cosmetics and food. The National Agency of Drug and Food Control's duties, functions and authorities are regulated in Presidential Decree No. 103/2001 on Positions, Duties, Functions, Authorities, Organizational Structures and Working Procedures Non-Departmental Government Institution which has been reviewed the last time by Presidential Regulation No. 3 of 2013 on the Seventh Amendment to Presidential Decree No. 103 of 2001. Control of food products on the market is done by The National Agency of Drug and Food Control together with the Industry and Trade Office. The community is also expected to supervise food products that do not meet the standards by not buying the product.

Consumer Rights and Obligations

The consumer is any user and/or user of the goods or services either for his or her own benefit or for the benefit of others. Az. Nasution provides several consumer restrictions:[6]

1. Customer is any person who obtains goods and/or services used for a particular purpose.
2. In-between Consumer is any person who obtains goods and/or services for use with the aim of making other goods and/or services for trading (commercial purposes), for the intermediate consumer, goods and/or services are goods or services of capital in the form of materials raw materials, auxiliary materials or components of other products to be produced (producers). Consumers between this get the goods or services in industrial markets or producer markets.
3. The ultimate consumer is any person who obtains and uses goods and/or services for the purpose of fulfilling his/her personal, family, and/or household needs and is not for trading (non-commercial).

Because of many understanding of consumers, consumers referred to in the protection of food products are consumers in the sense of end users. Consumers who obtain and use goods and/or services for the purpose of meeting their personal, family, and/or household needs and not to be re-traded. Consumer rights and obligations are stipulated in Law Number 8 of 1999 concerning Consumer Protection. The consumer's rights and obligations are stipulated in Article 4 and Article 5. The consumer's rights are, among others, the right to comfort, safety, safety in consuming food.

[6] Az. Nasution dalam Bukunya Firman Tumantara Endipradja, 2016, *Hukum Perlindungan Konsumen Filosofi Perlindungan Konsumen Dalam Perspektif Politik Hukum Negara Kesejahteraan*, Setara Press, Malang, p. ix

Consumer rights are as follows:

1. Right to comfort, safety, and safety in consuming food product.
2. The right to choose the goods/food products and obtain the food products in accordance with the exchange rate and the conditions and promised guarantees.
3. Right to correct, clear and honest information about food product condition and guarantee.
4. The right to be heard of opinions and complaints on food products they buy.
5. The right to appropriate advocacy, protection, and dispute resolution efforts for consumer protection.
6. Right to get coaching and consumer education.
7. Right to be treated or served properly and honestly and not discriminatively.
8. The right to compensation, compensation, and/or reimbursement if the food product received is not in accordance with the agreement or not as it should be.

Consumer liabilities include:

1. Read and follow instructions on information and procedures on the use or use of goods and/or services (food products), for security and safety.
2. Pay in accordance with the agreed exchange rate.
3. Following legal remedies to resolve consumer protection disputes.

Consumer as the buyer must understand the rights and obligations. Consumer rights and obligations are aimed at ensuring that consumers are protected from consuming food products that do not meet the standards. Food standards are important to protect consumers from consuming food products that are harmful to health.

Closing

Control of food product standardization by The National Agency of Drug and Food Control and the Office of Industry and Trade is important to prevent consumers from consuming food products that are harmful to health due to the possibility of contamination of chemicals and other objects causing damage, decay and the occurrence of pathogenic bodies on food products.

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POLICY OF WAREHOUSE RECEIPT IN A COLLATERAL PERSPECTIVE: ECONOMIC ANALYSIS OF THE LAW

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ABSTRACT

Agriculture is the basis of the national economy, therefore the position of the agricultural sector becomes very strategic in the structure of the national economy. The result of abundant agriculture, causing a fall in market prices at each harvest season. On the one hand farmers with crops can not be stored longer, on the other hand farmers also do not have warehouses to store their crops, while farmers need capital. Warehouse receipt as securities in futures trading provides an opportunity to be used as collateral for bank credit as stipulated in Law Number 9 Year 2011 regarding the Amendment of Law Number 9 of 2006 concerning Warehouse Receipt System arranging credit with Warehouse Receipt guarantee object, but the existence of challenges in its implementation . Economic analysis of the law gives thought contribution in solving legal problem related to Warehouse Receipt can be collateral, that is from value aspect, utility and efficiency.

Keywords: Warehouse Receipt, Collateral

Introduction

Law as a means of supporting the development of modernization and comprehensive development covering all areas of development, so to perform its functions efficiently and productively, need legal coaching is linked directly with various policies in all areas of development. [1] Development in agriculture becomes very strategic, agriculture becomes the base of the national economy, therefore the importance of infrastructure in supporting the legislation related to agriculture. Law Number 9 Year 2011 on Amendment to Law Number 9 of 2006 concerning Warehouse Receipt System is a legal product that provides infrastructure-related arrangements for farmers who will sell their agricultural crops by storing them at the SRG Warehouse (System of Warehouse Receipt) provided by the government. Abundant agricultural products, it is expected that the welfare of farmers to be good, with the existence of SRG Warehouse in the district, but sometimes just the middlemen who enjoy the farmers' efforts.

The results show, [2] various problems arise, the result of abundant agriculture, causing the fall in market prices at each harvest season. On the one hand farmers with crops can not be stored longer, on the other hand farmers also do not have warehouses to store their crops, while farmers need capital. Warehouse receipt as securities in futures trading provides an opportunity to be used as collateral for bank credit as stipulated in Law Number 9 Year 2011 regarding the Amendment of Law Number 9 of 2006 concerning Warehouse Receipt System arranging credit with Warehouse Receipt guarantee object, but the existence of challenges in its implementation . Warehouse Receipt Policy has not been effective, local government has little role in encouraging the implementation of Warehouse Receipt system. The absence of synergy between related institutions, local government and private sector and warehouse receipt actor also not maximal yet, and not yet the formation of deposit guarantor institution (LPS) in case of execution guarantee of warehouse receipt. Warehouse Receipt is a document of ownership of goods stored in a warehouse that can be used as collateral completely without any other collateral required, so that farmers and SMEs can pledge and get the cost to continue its business activities.

The policy of using warehouse receipt as credit guarantee has not touched farmer and banking community in distributing credit, because credit requirement with interest subsidy with guarantee of warehouse receipt stipulated in Regulation of Minister of Finance Number 171 / PMK.05 / 2009 concerning Warehouse Receipt Subsidy Scheme still limited the highest credit ceiling amounting to 70% of the value of Warehouse Receipt; The amount of ceiling set by the Bank or financing institution with a maximum ceiling of Rp. 75.000.000,00 (seventy five million rupiah) per farmer; Maximum ceiling is based on the number of Farmers in Farmers Group, Cooperative, and Combined Farmer Groups; The maximum ceiling can be reviewed at any time based on the feasibility analysis of the proposed farming business. [3]

Similarly, constraints faced in the provision of credit through Warehouse Receipt is first, the cost to be incurred by owners of commodities is relatively larger. This is because the number of institutions involved in the warehouse receipt system makes the cost swelling. Second, the quantity of commodities is relatively smaller, so if the warehouse receipt is not worth the cost. Third, the absence of a party that serves as a

[1] Mochtar Kusumatmaja, *Konsep-konsep Hukum Dalam Pembangunan,* Alumni, Bandung, p 113.
[2] Sri Mulyani, Eny Patria, Setiyowati, hasil penelitian, Membangun Sistem Pengaturan Resi Gudang Sebagai Jaminan Kredit Perbankan, 2015
[3] ibid

supervisor. Fourth, the quantity of independence and professionalism of the conformity assessment body also needs to be improved. In addition to the constraints from the banking side, the financing pattern through the warehouse receipt system has not been optimally enforced because of the lack of understanding of the community and business actors (banking). To reduce the risk of loss, fire, flood and others, the goods stored in the warehouse are insured. Likewise to minimize the risk of failure of the debtor in making payments, then the insured is the credit. With the transfer of risk to the insurance company, then there is the additional cost of insurance costs to be borne by farmers. [4]

Based on the results of the research as mentioned above, the authors will review and analyze by basing on the economic analysis of the law which is expected to contribute thoughts in solving legal problems related to Warehouse Receipt can be collateral, ie from the aspect value (value), utility (utility) and efficiency (efficiency).

Discussion

Substance Warehouse Receipt Regulation can be used as Credit Guarantee Banking SRG arrangements are contained in various regulations, namely in Law no. 9 of 2006 on Warehouse Receipt System as amended by Law no. 9 Year 2011; PP no. 36 of 2007 on the Implementation of Law no. 9 of 2006 on SRG as amended by Government Regulation no. 70 Year 2013; Permendag no. 08 / M-DAG / PER / 02/2013 on Amendment of Minister of Trade Regulation no. 37 / M-DAG / PER / 11/2011 concerning Goods That Can Be Stored at Warehouse in SRG Implementation; Head of Bappebti Regulation (15 pieces) governing the technical implementation of SRG; Bank Indonesia Regulation Number 9/6 / PBI / 2007 concerning Second Amendment to Bank Indonesia Regulation Number 7/2 / PBI / 2005 concerning Asset Quality Rating for Commercial Banks.

Aspects of law substance regulation of Warehouse Receipt as the right of guarantee in Law Number 9 Year 2011 about Amendment of Law Number 6 Year 2006 about Warehouse Receipt System can be seen in table below: [5]

Tabel 1
Substansi UU Resi Gudang

Material principle	Article 4 (point1)	Warehouse receipts can be transferred, used as debt collateral, or used as goods delivery documents.
Acessoir Principle	Article 12 (point1)	The warehouse receipt agreement is a subsequent agreement of a loan agreement.
	Article 12 (point 2)	Each Warehouse Receipt issued can only be encumbered with a debt guarantee.
The principle of preference	Article 15 (point b)	In certain respects, the relationship between the Warehouse Receipt Holders and creditors is based on trust, creditors feel no longer have the right to guarantee and release the guarantee rights. In this case, the creditor no longer holds, guaranteed warranty and warehouse receipt are handed back to the Warehouse Receipt Holder
Understanding Goods	Article 1 (point 5)	any movable object that can be stored for a certain period of time and traded in general
Load binding	Article 14 (point 1)	The imposition of Warranty Rights to Warehouse Receipt shall be made by the Deed of Warranty Agreement
Registration of Warehouse Receipts Warehousing publicity	Article 13	Recipient The warehouse receipt must notify the warehouse acceptance agreement as a guarantee right to the Registration Center and Warehouse Manager
Transfer of Warehouse Receipt Guarantee	Article 8 (point 1)	Transfer of Warehouse Receipt on behalf is done by authentic deed.

[4] ibid

[5] Sri Mulyani, *Konsep Resi Gudang sebagai Surat Berharga dalam Perspektif Jaminan Kredit Perbankan: Perlindungan dan Kepastian Hukum*, Jurnal Supremasi Hukum, FH Universitas Bengkulu, Vol. 22 Nomor 2, 2013, hal.214

	Article 11	Warehouse Receipt redirects can occur because: inheritance; grant; sale and purchase and / or other reasons justified by law.
Right of Execution	Article 16 (point 1)	In the event that the pledgeor of the Warranty's injury rights, the assignee has the right to sell the security object on its own behalf through a public auction or direct sale.
	Article 16 (point 2)	The recipient of a security right shall have the right to take his receivable upon the proceeds as referred to in paragraph (1) after deducting the cost of sales and management fees.
	Article 16 (point 3)	The sale of the guarantee object as referred to in paragraph (1) may only be made on the knowledge of the grantor of the guarantee rights

Source: Extracted from Law No.11 Number 9 Year 20011 on Amendment to Law Number 6 Year 2006 regarding Warehouse Receipt System

Economic Analysis of Law in the study of Warehouse Receipt as an object of Credit Guarantee Banking

According to Richard A. Posner, the economic analysis of law is the application of economic principles as rational choices to analyze legal issues. The theory is derived from the flow of utilitarianism which prioritizes the principle of benefit, developed by philosopher Jeremy Benthem (1748-1832) and philosopher John Stuart Mill (1806-1873). Economic analysis of the law, emphasizing the cost-benefit ratio.[6] With economic analysis of law, it gives thought contribution to two basic problems concerning the rule of law, that is positive or descriptive and normative analysis, concerning the question of what is the effect of the rule of law on the behavior of the person concerned the identification of the effects of legal rule and normative analyzes concerning the question of whether the influence of the rule of law is in accordance with the social desirability of a legal rule. [7] The approach adopted in the economic analysis of the law on these two basic issues is the common approach used in general economic analysis, which explains the behavior of individuals as well as forward-looking and rational firms, and adopts an economic welfare framework to test the wishes of the people. By descriptive analysis it can be said rational, when people act to maximize expected goals or benefits, whereas with normative analysis it can be explained that one particular rule of law is better than other rule of law, when giving the highest level for social welfare measure.

With economic analysis of law, it gives thought contribution to two basic problems concerning the rule of law, that is positive or descriptive and normative analysis, concerning the question of what is the effect of the rule of law on the behavior of the person concerned the identification of the effects of legal rule and normative analyzes concerning the question of whether the influence of the rule of law is in accordance with the social desirability of a legal rule. Agriculture is the basis of the national economy, therefore the position of the agricultural sector becomes very strategic in the structure of the national economy. [8] The abundant agricultural products of each crop, underlying the idea of the birth of Law Number 9 Year 20011 on the Amendment of Law Number 6 Year 2006 on Warehouse Receipt System, but in its implementation is hampered by obstacles and obstacles, so that the effort to realize the welfare for farmers is delayed. Warehouse Receipt as a document is a proof of ownership of the results of storage stored in SRG Warehouse for a certain time, can be used as collateral for bank credit.

According to Posner, the role of Warehouse Receipt law as credit collateral is seen from efficiency point of view, in addition to the value and benefit aspect as mentioned above, that Warehouse Receipt is more efficient than other guarantee objects. Posner defines the efficiency as: "to denote the allocation of recources in which value is maximized", but in the context of economic analysis, he adds that efficiency in this case is limited to ethical criteria in the framework of the preparation of social decisions concerning the regulation of

[6] *The Economic Analysis of Law, which lies in a direct line of descent fromutilitarism, substitutes the more easilt measurable criterion of economic efficiency for the felicific calculus's criteria of pleasure and pain,* Ian Mc Leod.Palgrave *"Legal Theory",* (New York:Macmilan, 2005), p.164, dalam Darminto Hartono, *Economic Analysis of Law atas Putusan PKPU Tetap,* Univeritas Indonesia Fakultas Hukum, Lembaga Studi Hukum dan Ekonomi, 2009, p.17-18

[7] Louis Kaplow dan Steven Shavell, *Economic Analysis of Law,*National Bureau of Economic Research, Cambridge, 1999, Chapter 1,hal.1, http://www.hls.edu/ dalam saifudiendjsh.blogspot.com/2007, diakses tanggl 30 Maret 2011.

[8] Mohammad Jafar Hafsah, *Kedaulatan Pangan Sebagai Perwujudan Pasal 33 UUD NRI Tahun 1945 dalam* http://www.mpr.go.id/berita/read/2013/12/11/12966, akses tanggal 6 Februari 2014.

the welfare of society. [9] The essence of the value of efficiency, if associated with the Warehouse Receipt as collateral in the bank is the legal protection for the parties as a result of a legal relationship that creates the rights and obligations in which the existence of the Warehouse Receipt as collateral is rare in banking practice, resulting in the absence of legal certainty over regulations that have been enacted (Act of Warehouse Receipt System) as a positive law.

The prospect of using Warehouse receipts as collateral for bank credit is also more open when it is associated with the economic analysis of law of Richard A. Posner. [10] Economic analysis of the law-supporting the rule of law in terms of value-will increasingly open the prospect of brand use as an object of collateral, particularly banking credit guarantees. At this point, the economic value of a Warehouse Receipt document will be an economically justifiable collateral. In an economic perspective, using the Appraisal Institute for warehouse receipt values can be measured using a market approach to know the fair price of agricultural produce (grain) in the market. Benefits of Warehouse Receipt shall be used as collateral for credit, since the Receipt of Warehouse as collateral shall be surrendered or in the possession of the creditor as the recipient of the guarantee, therefore, if it has been in the hands of the creditor of the guaranteeee, the Warehouse Receipt is no longer possible to be guaranteed. In contrast to other warranties, where the object of a guaranteed item may be burdened with more than one debt. This is a distinct advantage for the recipient of the warehouse receipt (creditor) receives Warehouse Receipt as collateral for bank credit. [11]

The recipient of the warehouse receipt has a privileged position, for every warehouse receipt can only be encumbered with a debt guarantee. On the right of execution there is a weakness in this warehouse receipt arrangement that there is no executorial title to the warehouse receipt certificate, although the position of the warehouse receipt holder assumes the position of a privileged creditor who can conduct public auction or sell the guarantee himself by having to notify the guarantor. [12]

Closing

Conclusion

Warehouse receipt is a document / certificate that has economic value is a proof of ownership of agricultural products (grain) stored in accredited warehouse known as SRG Warehouse (Warehouse Receipt System). Economic analysis of the law gives thought contribution to the problems that arise with the issuance of Warehouse Receipt document can be used as bank credit guarantee, in terms of efficiency, value, and expediency. Based on the economic analysis of the law, the regulations made in this regard the Warehouse Receipt arrangement as collateral for bank credit will be targeted to reach the farmers, the Joint Farmer Group (Gapoktan), as well as the banking community, so that the ideal expected by the government to improve public welfare is achieved

Recomendation

Warehouse Receipt Arrangement, should be reconstructed again, because in practice there are many obstacles faced by farmers and the combination of farmer groups (Gapoktan). Financing the process of storing the crops (grain) in SRG Warehouse needs to be revisited, considering that the farmers have spent a lot of money during the process of planting rice to harvest rice.

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[9] Richard A.Posner, .*Economic Analysis of Law*, fourth edition, Little Brown and Company Boston Toronto, London, 1992, p.13

[10] Richard A.Posner, *Economic Analysis* Ibid p.12

[11] Op.cit, Sri Mulyani, *Konsep Resi Gudang*.

[12] Jamin Ginting, *Aspek Hukum Resi Gudang sebagai Jaminan Hutang,* Jurnal Mimbar Ilmiah Hukum Universitas Islam Jakarta, 2008, dalam http://isjd.pdii.lipi.go.id, akses 20 Januari 2014

LEGAL RESPONSIBILITY OF MEDICAL COMITTEE ON PROFESSIONALISM DOCTORS IN PATIENT SAFETY

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ABSTRACT

The existence of doctors as medical staff in the hospital is a necessity because the quality of hospital services is largely determined by the performance of medical staff that will affect patient safety.One of the risks that can threaten the patient's safety is the competence and attitude of the doctor in performing medical actions. Medical committees perform a function to uphold professionalism by controlling medical staff who perform medical services in hospitals. These controls include credentials, improving the quality of the profession, and enforcing professional discipline. Currently, an understanding of the nature and purpose of professionalism among the medical profession itself is lacking so that the medical committee is inadequate in maintaining patient safety. Common mistakes that occur, all doctors who work in the hospital are considered competent because the doctor is a professional group, so there is no need for verification mechanism by the medical committee. Though the current understanding of medical professionalism is quite the opposite, a doctor is considered professional when it has proven competent through a mechanism of credential by the medical committee. This understanding focuses on patient safety.

Keywords : Legal Responsibility, Medical Committe, Patient Safety.

Introduction

Public awareness of patient safety assurance began to increase with increasing cases of lawsuits against alleged malpractice. The profession of doctors is one of the professions that many highlighted by various circles in health services. The existence of doctors as medical staff in the hospital is a necessity because the quality of hospital services is largely determined by the performance of the medical staff at the hospital. One of the risks that can threaten the patient's safety is the competence and attitude of the doctor in performing medical actions.

The provisions of a physician in obtaining a license for practice in a health care facility include only a doctor's diploma, registration certificate, a letter of recommendation from the Indonesian Doctors Association, and a physical and spiritual health certificate. Doctors considered after having a license of practice can practice freely without being verified again competence.It is a common mistake that all doctors who work in the hospital and have a license to practice are considered competent because the doctor is a professional group, so there is no need for any more verification mechanism by the medical committee.

To apply the clinical governance so that the medical staff at the hospital is maintained professionalism, the hospital director establishes a medical committee which is a non-structural organization in the hospital.Regulation of the Minister of Health Number 755 / Menkes / Per / IV / 2011 concerning the Implementation of Medical Committee at the Hospital aims to regulate good clinical governance so that the quality of patient's medical and patient services in the hospital is more secure and protected and regulate the implementation medical committee in every hospital in order to increase the professionalism of medical staff.

The medical committee has a major role in upholding the professionalism of medical staff working in hospitals, including recommendations for licensing of clinical appointments including delineation of clinical previlege, maintaining professional competence and ethics, and enforcing professional discipline.The medical committee is a hospital tool for implementing clinical practice(clinical governance) so that medical staff at the hospital is maintained by professionalism through credential mechanisms, maintenance of medical professional quality, and maintenance of the ethics and discipline of the medical profession.

The control of the competence and behavior of medical staff by the medical committee at the hospital has not been fully operational as it should be. This situation causes the doctor does not know the limits of what they can do and what they should not do, so it can affect the patient's safety.

Main Problems

1. What role does the medical committee charge for patient safety?
2. What is the responsibility of the medical committee to the physician's professionalism in patient safety?

Discussion

Patient safety has become a hot topic in recent years One of the causes of accidents in hospitals is a medical act performed by an incompetent physician.By law, hospitals have an obligation to ensure patient safety from an incompetent physician.In the absence of a good patient safety assurance system, the patient's right to obtain a security guarantee can only be met through a lawsuit to the hospital and doctor.

In Indonesia, an understanding of the nature and purpose of professionalism among the medical profession itself seems to be lacking, so the medical committee is inadequate in maintaining patient safety.A common mistake that occurs, all doctors who work in the hospital are considered competent, because the doctor is a professional group, so there is no need for verification mechanism again by the medical committee. The current understanding of medical professionalism that a physician is considered professional when it has been proven competent through a mechanism of credentials by the medical committee. This understanding focuses on patient centredness.

Hospitals should empower medical committees as one means to ensure patient safety.The hospital is very concerned with the medical committee because it determines the good of the clinical governance in the hospital. The medical committee plays a leading role in upholding the professionalism of medical staff working in hospitals.

The duties of the medical committee are as follows:Enforcing professionalism by controlling medical staff who perform services at the hospital; Recommendation of licensing to perform medical services (entering to the profession); Maintaining the competence and behavior of licensed medical staff (maintaining professionalism through medical audits and continuing professional development).

Members of the medical committee are divided into 3 subcommittees : Credentials subcommittee in charge of medical staff professionalism; professional quality subcommittee in charge of maintaining competence and professionalism of medical staff; ethics and professional disciplinesubcommitteein charge of maintaining discipline, ethics, and professional behavior of medical staff.

Credentials are the screening of clinical competence of medical practitioners which is a process to determine carefully what a physician can do or should not do in a hospital.The subcommittee of credentials in the medical committee is the main instrument for determining clinical privileges. The role of the subcommittee of credentials is to convince and state that a doctor is competent to perform services in the hospital.The task of the credential subcommittee is as follows:compile and compile the list of clinical privilege; conducting examination and assessment of competence, physical and mental health, behavior, and professional ethics.; evaluation of professional education data; interview; assessment and determination of clinical privilege; re credentials.

In carrying out the task of maintaining the quality of the medical staff medical committee profession has function as follows:conducting medical audits;recommendations of internal scientific meetings in the context of continuing education for medical staff;recommendations of external activities in the context of continuing education for staff medical hospitals; recommendation of the mentoring process (proctoring) for the medical staff need.

In carrying out the task of maintaining the discipline, ethics, and behavior of the medical staff profession the medical committee has the following functions:coaching ethics and the discipline of the medical profession;examination of medical staff suspected of committing disciplinary offenses;recommendations of disciplining professional actors in hospitals; giving advice/ consideration in ethical decision-making on care medical patients.

The law is always attached to human life as an individual or society and functions to discipline and organize societies in society and solve problems that arise in social life.In the health sector, the government has the responsibility to organize, organize, nurture, and oversee the implementation of equitable and affordable health efforts by the community. One of them is the provision and quality control of health personnel.Health workers in hospitals, especially doctors determine the safety of patients who are one of the patient's rights

The medical committee has an important role in providing qualified professionals to ensure patient safety. Here it is demanded the legal responsibility of the medical committee in the provision of doctors who have verified professionalism, so as to ensure patient safety. The legal responsibility of the medical committee in this case is a legal function.The function of Law Joseph Raz (1979):

1. Direct Function of LAW (Primay Function and Secondary Function};
   The direct function of the law is the fulfillment of all that is required to be obeyed and carried out according to the law.
   - Primary function : visible from the outside, affecting the general public
   - Secondary function : Maintenance of legal system
2. Indirect Function of LAW (The knowledge of the existence of laws and The compliance with and application of laws}.
   The indirect function of law is the legitimate results regardless of the necessity to comply with the provisions of the law.

Law is one of the main instruments of society to perpetuate freedom as well as arbitrary order and disturbance, whether by individuals, community groups or governments. The main element needed by man is order, the second element is justice, the third element is the certainty.

According to Satjipto Rahardjo, the law is not only used to reinforce the patterns of behavior and behavior that exist in society, but also to direct the desired goal, eliminating habits that are seen no longer appropriate to create patterns of new behavior. Thus law is used as a source. The main purpose of law is to create an orderly order of society, to create order and balance. With the achievement of order in the society expected the interests of the community will be protected.

In the health sector, the government has the responsibility to organize, organize, supervise and supervise the implementation of equitable and affordable health efforts by the community. One of them is the provision and quality control of health personnel.Competence of health personnel in hospitals, especially doctors determine the assurance of patient safety which is one of the patient's rights. Patients are consumers of service users in hospitals. Consumer rights include the right to comfort, safety, protection and patient safety.One form of patient safety in the health service is performed by the physician in accordance with its competence. The competencies referred to here are the clinical privilege. The clinical privilege of every doctor working in a hospital is different from one another.

According to the Regulation of the Minister of Health of the Republic of Indonesia Number 755 / Menkes / Per / IV / 2011 on the Implementation of Medical Committee at the Hospital, the medical committee has the duty to improve the professionalism of medical staff working in the hospital by performing credentials for all medical staff who will perform medical services in the hospital; maintaining professional quality of medical staff, and safeguarding the discipline, ethics, and professional behavior of medical staff. Implementation of credentials by regulating clinical privilege to perform medical services, only medical staff who meet certain competency and behavioral requirements are allowed to perform medical services.

The regulation of clinical privilege is done by licensing mechanism to entering to the profession, obligation to fulfill certain competence and behavioral requirements to maintaining professionalism, and expelling from the profession.

The medical committee functions to uphold professionalism by controlling medical staff who perform medical services in hospitals. This control is carried out jointly by the director of the hospital and the medical committee. The medical committee performs credentials, improves the quality of the profession, and enforces professional discipline and recommends its follow-up to the director of the hospital. Only credible medical staff are allowed to perform services to the community, this is done through a licensing mechanism. Unqualified medical staff can undergo the process of coaching (proctoring) in order to have the necessary competencies so that it can be allowed to perform services to the community after going through the credentials.

Closing

The medical committee has a major role in upholding the professionalism of medical staff who works in the hospital, including recommendation for licensing clinical appointment, including delineation of clinical privilege, maintaining professional competence and ethics, and enforcing professional discipline. The legal responsibility of the medical committee in this case is a legal function (the primary function of the law)

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LEGAL POLITICS OF PANCASILA DEMOCRACY CONDITIONS DURING NEW ORDER PERIOD

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ABSTRACT

Democracy is a long process passing through habit, learning, and comprehension. For this goal, social supportand democratic surroundings are needed. Democracy success is shown through how far the democracy as theprincipal and life reference inter citizens is done and obeyed. Democracy is a political and ethic set whichdevelop dynamically. In reality, democracy is a group of people who are able to manage the country. It meansthe people who hold and manage the country must be those who have statesmen soul. It means they really revere the democracy highly used as the principle in pertaining to form government in Indonesia. Democracy whichis really for people is not like the democracy applied in Indonesia today where the state holders and the organizers are busy with their own business. They take a decision by relying on their own interest without any sensitiveness to see the condition of people today. One of kind the government that adheres the system is New Order, I'ts time for President Soeharto's leadership. Democration which use from rezim of New Order is Democration of Pancasila that democration which based on the Pancasila's values. But in the fact many deviation that held by Orde Baru's government. That make disaffection in the people and effected many rebellion in he Indonesia.

Keywords: Democration, New Order, Democration of Pancasila, Corruption,

Introduction.

The implementation of Pancasila democracy began in the era of Suharto's reign, beginning the government with the determination to implement Pancasila and the 1945 Constitution in a purely and consistent manner. Based on experience in old order period, the new order government seeks to create political stability and security to operating its government. The New Order assumed that the irrelevancy of Pancasila and the 1945 Constitution of the Republic of Indonesia was the main failure cause of the previous government, the New Order was the tone of human life system, the nation and state of Indonesia based on Pancasila implementation and the 1945 Constitution in a purely and consistent manner. Applied Democracy is called Pancasila Democracy. Pancasila democracy is a democracy based on the values contained in Pancasila.

But in practice, the noble ideals of the Indonesian nation to become a democratic country that actually collapsed due to abuse of government power, especially by president Soeharto. In the New Order era, the Indonesian nation seemed to fall into a totalitarian state, the condition could occur due to several things, among others the people can not voice their aspirations, if they want to hold a meeting must ask permission from the authorities, scholars who have a conscience and criticism of the government is not heard at all what is its aspiration but rather detained and ostracized, which is very detrimental to society that is the implementation of elections that are not democratic because it has been designed for the winning of one party that is the work class, because it aims to perpetuate the power of government and to realize national stability, slowly the concept of national stability expanded into anti-criticism and anti-concept logic. As an anti-criticism logic, national stability is linked to security issues and serves a lot to help organize state power mechanisms. As an anti-concept logic, national stability is associated with legitimacy issues and many functions to support the art of managing the authority of state power, which subsequently is centralized the role of the state personified through Suharto, People's Consultative Assembly, People's Legislative Assembly, Press, Political Parties, community organization and almost all social and political institutions "statehood" systematically under the control of the state and armpit of Suharto, the situation like this is a fake democracy. This democratic paradox eventually collapsed also with the various crises felt by the entire nation of Indonesia.

Suharto's very high confidence was shown shortly after President Suharto appointed his daughter Siti Hardiyanti Rukmana to become Minister of Social Service and his close friend Bob Hasan became Minister of Industry and Trading in the Development Cabinet VII. And it turns out that Soeharto's election and the formation of the Development Cabinet VII did not bring significant improvement of the condition but instead caused various crises in all fields.

That the multidimensional crisis that hit Indonesia in the mid-1990s led to Suharto's resignation from the presidency. After Suharto resigned it was replaced by Bacharuddin Jusuf Habibie (B. J Habibie) as Vice President to continue his leadership as President. The appointment of B. J. Habibie at that time caused a controversy that did not subside the Special People's Consultative Assembly held on 10-13 November 1998

was no less controversial with the appointment of B.J. Habibie as President of Republic of Indonesia. The controversy in the implementation of the Special Session of the People's Consultative Assembly lies in the Special Session of the People's Consultative Assembly (MPR) which is the result of the 1997 general election which in fact is not undertaken democratically.

In the Special Session of the People's Consultative Assembly, there are 4 provisions, among others, the First Decree of the People's Consultative Assembly of the Republic of Indonesia Number VIII / MPR / 1998 on the Revocation of the Decree of the People's Consultative Assembly of the Republic of Indonesia Number IV / MPR / 1983 about Referendum. Second, the Decree of MPR RI Number X / MPR / 1998 on the Principles of Development Reform in the Framework of National Security and Normalization of Life as the State Policy. Thirdly, the Decree of MPR RI Number XIV / MPR / 1998 on Amendment and Supplement to the Decree of the People's Consultative Assembly of the Republic of Indonesia Number III / MPR / 1988 about General Election. Fourth, Decree of MPR RI Number XIV / MPR / 1998 about Human Rights.

In addition to the four provisions, Special Session of the People's Consultative Assembly also stipulates eight Provisions, so as a whole the 1998 Special Session of the People's Consultative Assembly has set twelve Provisions.

General Election as mandate of People's Consultative Assembly Republic of Indonesia Decree Number XIV / MPR / 1998 can be implemented in June 1999. General Election is democratic and fair. Despite being democratic and fair, various shortcomings are still encountered. This deficiency lies in the legislation. One of the indisputable facts is that the arrangements concerning the Election Commission and the Indonesian Electoral Committee are confusing and seem overlapping. The culmination of the weakness of this arrangement is the inability of the General Election Comission to determine the results of the general election which is then passed to the President.

Main Problem

What is the condition of Legal Politics during Pancasila Democracy Period?

Discussion

Legal Political Typology

There are many definitions of legal politics. Padmo Wahjono said that legal politics is the basic policy that determines the direction, form, and content of the law to be formed. Teuku Mohammad Radhie defines that legal politics as a purpose declaration of the state authorities regarding the laws prevailing in their territory and the direction of established law progress.

At the same time Satjipto Raharjo defines the politics of law as the activity of choosing and plans to achieve a social objective with certain laws whose scope includes answers to some basic questions, i.e. 1) what goals are to be achieved through the existing system?; 2) which ways and which are best perceived to be used for achieving that goal?; 3) when and how the law should be changed?; 4) can a standardized and established pattern be formulated to assist in deciding the process of choosing the goals and the way to achieve those goals as well?.

As for Moh. Mahfud Md formulates that the legal politics is the choice of the laws to be applied as well as the choice of laws to be revoked or not applied, with a view to reach the nation goal as stated in the preamble of the 1945 Constitution.

Democracy

Democracy was adapted from the word demokratie in French in the 16th century. But the origin of the word actually comes from the Greek demokratia, which is derived from the word demos (people) and kratos (ruled). Democracy means a form of government which compared to monarchy or aristocracy, is implemented by the people. As a consequence democracy produces a political community where all people are perceived as having political equality. 'Governance by the people' probably seen as an ambiguous concept, but that view may be deceptive. The history of democracy concept is very complex and much characterized by conception conflicts. There are so many limitations that cause disagreement.

Democracy is a very old political system. The notion of the state, political power, justice, and especially intellectual genealogical democracy can be traced from the political tradition of the classical Greek city states called polices or city states.

Pancasila Democracy.

Characteristics of Pancasila Democracy:

a. Sovereignty is ruled by people
b. Always based on kinship and mutual cooperation
c. The way to make a decisions through deliberation to reach consensus
d. Not following the monopoly system
e. Recognized the existence of harmony between rights and obligations
f. Respect for Human Rights

g. Elections are conducted in an open manner
h. Contains floating system
i. Put the interests of the people first or the public interest.

The implementation of Pancasila democracy in Indonesia is marked by the release of the Letter of Commemoration of March 11, 1966, whereby the new order was determined to implement Pancasila and the 1945 Constitution purely and consequent manner. The beginning of the New Order gave hope to the people, development in all fields through Pelita I, II, III, IV, V, and during the New Order era successfully managed to held elections in 1971, 1977, 1982, 1987, 1992, and 1997.

The new order is a term for the reign of President Soeharto in Indonesia to replace the old order referring to the Soekarno government. The new order came with the spirit of "total correction" of deviations made by Soekarno during the old order, the New Order lasted from 1966 to 1998. In that time period, the economy grew rapidly although this happened along with the rampant corruption practices in this country . In addition, the gap between rich and poor is also widening. President Soeharto's term of office began in 1966, People's Consultative Assembly formally inaugurated Suharto for a 5-year term as President and then reinstated in succession in 1973, 1978, 1988, 1993 and 1998 respectively.

In the early days of Suharto's New Order the government drew a very firm line, among others, the political isolation carried out on people associated with the Indonesian Communist Party. Criminal sanctions are conducted by holding an Extraordinary Military Tribunal to try the parties constructed by Suharto as a Rebel. The trial was held and some of those involved were "dumped" to Buru Island.

Non-criminal sanctions are conducted with political isolation through the creation of administrative rules. Special Research Instruments were applied to select the old forces and participate in the carriages of the new order, KTP (Identity Card) marked ET (Ex Tapol).

Condition of Pancasila Democracy in the New Order Period.

In Pancasila Democracy until today the distribution of various demands that live in society shows a balance. At the beginning of the implementation of this system is done simplification of party system then emerged a dominant power namely Golongan Karya (Golkar) and ABRI. Elections run periodically in accordance with the mechanism, although here and there are still many shortcomings and still colored the existence of certain political intrigues.

During the new order, the pillars of democracy such as political parties, representatives of the people, and the mass media were in a state of weakness and always overshadowed by reccalation mechanisms, while political parties lacked internal autonomy. The mass media has always been overshadowed by the revocation of a press release business license (SIUPP). While the people are not allowed to organize social political activities without permission from the government. There is practically no civil society force capable of control and a balancing force for the dominant power of government. Practical democracy Pancasila at this time does not go according to the ideals, even tend towards otoriatianisme or dictatorship.

The failure of the three major parties in their role as the controlling institution for the government and the non-functioning of checks and balances, due to managed of compromise politics from political elite, finally the real Pancasila democracy is not working. Pancasila democracy becomes pseudo. The People's Legeslative Assembly does not reflecting the real people's representatives. There is collusion, corruption, and nepotism in all spheres of life, as power tends toward the oligarchy.

This resulted in a crisis of trust, destroying the values of honesty, justice, political ethics, morals, the basic laws of democracy and religious joints. Particularly in the political sphere responded by the public through pressure groups that held various protests pioneered by students, colleger, lecturers and practitioners, NGOs and politicians. A wave of demonstrations that voiced reforms is becoming stronger and widespread.

Conditions that occurred during the New Order government with the real Pancasila democracy as follows:

a. The political rights of the people are severely restricted

   Since 1973, the number of political parties in Indonesia is limited to only three. Government officials and ABRI are required to support the ruling party. Political meetings must get permission from the authorities. Critics of the government are politically excluded, some even forcibly removed. Although the press is declared free, in fact the government can suppress / muzzle press publications that are considered opposed to the government. In addition, there is discriminatory treatment offspring of persons who are considered to be involved in G30S / PKI.

b. Centralization of power in the hands of the president

   Although in the new order era, state power was divided into formal state institutions (People's Consultative Assembly, People's Legeslative Assembly, Supreme Consultative Council, Supreme Court, etc.), in practice the state's high institutions were controlled by the president.

c. An undemocratic election

   In the new order era, elections truly held every five years. However, in the implementation of the elections did not take place democratically. The ruling party did various ways in order to win the election.

d. Establishment of extraconstitutional institutions

The government established the Kopkamtib (Security and Order Control Command), which served to secure potential rulers opposition parties with all deceit to preserve their power.

e. Discriminatory against certain ethnicities

In the new order era also happened discriminative against certain ethnic. For example, people of Chinese descent are prohibited from expression. Since 1967, the citizens of descent are considered as foreign nationals in Indonesia and their positions are under indigenous people, which indirectly also abolish their human rights. The New Order government argued that Chinese citizens whose population at that time reached approximately five million of the entire people of Indonesia, feared to spread the influence of communism in the country. In fact, most of the Chinese descendants work as traders, which is contrary to what communism teaches, which forbids commerce.

f. Corruption, Collusion, and Nepotism are reign

Implementation of state government that is too centralistic during the New Order era resulted in the rampant practices of corruption in all fields. This resulted in the people getting miserable, until a term emerged that the rich getting richer and the poor getting poorer.

Condition of political life during the New Order:

1. Establishment of Development Cabinet

   After the 1968 MPRS (People's Consultative Assembly (Temporary)) Session adopted Suharto as president for a five-year term, a new cabinet was formed under the name of the Development Cabinet with its duties called Pancakrida (Five Activity), i.e.:

   a. Creating political and economic stability.
   b. Preparation and implementation of the First Five Year Development Plan.
   c. Implementation of the General Election.
   d. The erosion remains of the 30 September 1965 of PKI Movement.
   e. Cleaning of the state apparatus in the central government and the region from the influence of the PKI.

2. Dissolution of the PKI and its mass organizations.

   The dissolution of the PKI on 12 March 1966 reinforced by the inauguration of MPRS decree No. IX 1966, also issued a decree stating that PKI as a banned organization in Indonesia.

3. Simplification and grouping of political / Fusion parties

   Fusion in a number of parties after the 1971 election, the simplification of the number of parties, but not the elimination of certain parties so that the implementation of party is no longer based on ideology, but on the equation of the program. The merger resulted in three socio-political powers, as follows:

   a. Partai Persatuan Pembangunan (PPP) was a fusion of NU, Parmusi, PSII, and Partai Islam Perti which was held on January 5, 1973 (group of Islamic political parties).
   b. Partai Demokrasi Indonesia (PDI), was a fusion of PNI, Catholic Party, Murba Party, IPKI, and Parkindo (a group of nationalist political parties).
   c. Golongan Karya (Golkar).

4. General Election

   During the New Order period, it has successfully conducted six elections held every five years, i.e. 1971, 1977, 1982, 1987, 1992, and 1997. The holding of elections organized during the New Order led to the impression that democracy in Indonesia was created. Moreover, the election took place in an orderly and imbued by the principle of Luber (Direct, Public, Free, and Confidential). In reality, however, the election during the New Order period was directed at the victory of certain participants, that is Golongan Karya (Golkar) which has always been conspicuous since the 1971-1997 election. Victory of Golkar which always dominate the government very favorable because of the majority of votes in the People's Consultative Assembly and Parliament. This balance allowed Soeharto to become President of the Republic of Indonesia for six election periods. Every any liability, Draft Act, and other proposals from the government are always subject to the approval of the People's Consultative Assembly and Parliament without a record.

5. ABRI's dual role

   In order to create political stability, the government placed a double role for ABRI as a role of hamkan (defense and security) and social. The role ABRI is known as the army of warriors and army soldiers. Position of the TNI and Polri (Republic of Indonesia Police) in the government is with People's Consultative Assembly / Parliament and Regional House of Representatives bodies they are allotted seats with appointments. Consideration of their appointment is broadcast on the stabilizer and dynamicator functions.

6. Correctional P4

   In order to support the New Order program, implementation of Pancasila and 1945 Constitution is purely and consequently, since 1978 there has been a full P4 Upgrading in all levels of society. The implementation of P4 Upgrading shows that Pancasila has been utilized by the New Order government. This is apparent with the Government's appeal in 1985 to all organizations to make Pancasila a single principle. Upgrading P4 is a form of ideological indoctrination so that Pancasila can becoming part of the personality system, cultural system, and social system of Indonesian society.

By looking at the above conditions then the condition of Pancasila Democracy and living conditions Political law in the New Order era raises the nation and state atmosphere in conditions:

- The splendor of Corruption, Colussion adn Nepotism.
- Indonesia's uneven development and the emergence of development gaps between the center and the region, partly due to the wealth of the region largely aspirated to the center.
- The emergence of a sense of dissatisfaction in some areas due to the development gap, especially in Aceh and Papua.
- Jealousy between locals and transmigrants who received substantial government benefits in their first years.
- Increased social inequality (unequal income difference for rich and poor)
- Human Rights Violations to non-indigenous communities (especially Chinese)
- Criticism is silenced and opposition is forbidden
- Freedom of the press is very limited, colored by many newspapers and magazines have banned.
- Application of violence to create security, among other things with the program "Mysterious Shootings"
- There is no succession plan (decrease of power to the next government / president)
- The decline in the quality of Indonesia's bureaucracy that infected the disease "Up to You", this is the fatal mistake of the new order because without the effective bureaucracy the country must be destroyed.

Closing

Conclussion.

Experts have defined legal politics differently, but essentially legal politics as legal policy or legal policy line that will be applied either by the creation of a new law or with the replacement of the old law, in order to achieve the state's objectives.

Legal politics in the New Order period is very unique and interesting to observe, is called unique and interesting because there are two kinds of policies in legal politics that are usually not in line. The first legal policy was to create a law to defend and concentrate power in the hands of Suharto, by weakening the legislative function with Golkar as a tool for the creation of stability in the executive without any disturbance from the opposition. And the second is to create law as a foundation in liberal economic policy. It is rarely used in an autoritical system, which is often used as a monopoly system by the government, and lacks a place for the capitalists. This is the unique of the New Order, although finally the liberal economic system has a negative impact that makes the national economy in the hands of a handful of people (entrepreneurs), creating the rise of KKN (Corruption, Collusion, Nepotism).

At the beginning of his journey, the New Order government displayed a liberative style that was actually a transitional style while seeking a new format for political configuration. Development programs that focus on the economic field should be secured with "national stability" which is considered a prerequisite whose realization proves to be an authoritarian style. Since the discovery of Indonesia's new political format in 1969/1971, Indonesia has begun to show the bureaucratic authoritarian political configuration necessary to secure the course of development. And so legal product of the New Order era became conservative / orthodox.

Recommendation.

Legal Political of Pancasila democracy condition during the New Order period in Indonesia which actually aims to implement Pancasila purely and consequently can be maintained. By using Pancasila democracy then the system of government will be held as well, consistently and primarily can create the life of nation and state in accordance with the aspired of the society of just and prosperous.

That all the state apparatus should understand Pancasila democracy by implementing it in daily life, either as an official who can give role to the society he leads.

That if you will choose the leader should be those who fear Allah SWT so that there is no desire to do KKN (Corruption, Collusion, and Nepotism) and realize that his presence in the world does not bring anything and if called by the divine did not bring anything.

That Pancasila Democracy has always been an efficient political tool in perpetuating power. Even during the New Order period, civil and military bureaucracies openly supported the government in support and financial mobilization. The same thing is still happen in Reforms period, but in several areas only. Some cases in the elections that had been recorded by the media became one of the real evidence of the use of bureaucracy for succession. Actually, the strengthening or "conquest" of bureaucracy can be done with the notion that the conquest is based on good faith to realize the programs that have been established by the government. But unfortunately, this conquest only understood political actors is to fulfill the ambition in fostering power.

Perhaps in this case, we as the nation's successor must be able and continue to compete in realizing a better Indonesia than before, the Indonesian nation's self-esteem is to love and keep the State assets to be made a savings for future generations. In the process of development of this nation must be able to unify opinion for the welfare of society in general.

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EXECUTIVE POLICY ON THE REHABILITATION FOR DOMESTIC VIOLENCE VICTIMS

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ABSTRACT

All violence is a violation of human rights and crimes against human dignity and a form of discrimination, there fore we need a form of legal protection for the victims, for those who have experienced to violence and / or threats of violence. The factors that cause domestic violence are very complex issues of values in society, public policy through wrong interpretation of religion. These conditions underlying the enactment of Law No.23 of 2004 on the Elimination of Domestic Violence (family violence).With the aim of preventing all forms of violence, protect victims and prosecute perpetrators. Cases of domestic violence are generally made by people who close to the victim. The reluctance of victims to make a complaint are not influenced by internal / external. The forms of domestic violence such as physical violence, psychological, sexual and economic. The existence of a legal system are no partial to the victim based on gender. Indonesia Penal Code (KHUP) has only limited control of physical violence, there fore, it needs government role in the recovery for family victim (PP. No.4 / 2006) and legal renewable for society.

Keywords : Family Violence And The Victim.

Introduction

Everyone has the right to get a sense of security free from all forms of violence, because it is a violation of human rights and crimes against human dignity and discriminatory. To guarantee the rights of every person, in 1948 the United Nations issued an important document called *the Universal Declaration of Human Rights* (Universal Declaration of Human Rights). In harmony with the state government that Indonesia always puts, upholding and protection of the fundamental rights of human life, as mandated in the 1945 Constitution of the State and society shall implement the prevention, protection and prosecution perpetrators of violence. The view of the country is based on Article 28 and its amendment of Article 28 G paragraph (1), which explains that:

> "Everyone has the right to protection of self, family, honor, dignity and property under his control and has the right to personal safety and protection of the threat of fear to do or not to do something is a human right"

Discrimination against women prevalent in Indonesia, which creates the female victims new in considerable amounts, either physically (eg, rape, lewd acts), psychological (abuse, terror) or economically. The violent phenomenon often occurs within the family (domestic violence).

For the prevention of domestic violence needed legal reforms considering the development of a crime of domestic violence is very alarming, necessitating special arrangements regarding the crime of domestic violence although in general in the Criminal Code has been set regarding the persecution and decency as well as neglect of people who need to be given subsistence.

Attendance Law 23 of 2004 About PKDRT expected to be a means and prevention, protection and restoration of the rights of victims of domestic violence. And obligations of law enforcement officers, health workers, social workers and support volunteers are protecting the victim to be more sensitive and responsive. In general, domestic violence committed by someone who has the closest relationship to the victim's family and the majority of victims are women and children. Victims are people who have experienced violence and / or threats of violence, so it needs an effort to provide security to the victim's family, the state and the public interest in prosecuting accordance with the law.

Prevention and protection of victims of domestic violence needs to be done in a coordinated and integrated inter-thematic, as mandated in Article 43 of Law No. 23 of 2004, with the following objectives:

1. Ensuring the implementation of the ease of service victims of domestic violence,
2. Ensuring the effectiveness and efficiency of the recovery process of victims of domestic violence,
3. Cooperation and coordination in the recovery of victims of domestic violence among agencies, the executive officer and the relevant institutions.

Therefore, the recovery service condition of the victim must be done immediately as possible after the complaint and / or reporting of the victim, so it is necessary to establish a Government Regulation on the Implementation of the Domestic Violence Victim Recovery and Cooperation of the PP # 4 of 2006, in this regulation is the recovery the victim is every effort to strengthen victims of domestic violence to be more empowered, both physically and psychologically.

Implementation of the recovery of victims held by the government and local governments and social institutions in accordance with the duties and functions of each including providing the necessary facilities for the victims

Discussion

The concept of domestic violence

Domestic violence (domestic violence) has become a global issue and receive enough attention. According Muladi problem of violence against women is not only a matter of individual or national problems but in certain things as a transnational problem.[1] Starting from the ignorance of the public, social and cultural structures and values of society that always wants to look harmony in the family. In fact much of the violence against women is not limited to physical violence but also on psychological violence, sexual and economic.[2]

In criminal law enforcement in Indonesia has been an injustice to the victims of violence within the family circle. There is a concept of thought that it is a family disgrace that must be covered and patriarchal mindset of the people who cause domestic violence cases do not rise to the surface / not reported[3]; resulting in many people make demands and efforts to formulate gender-based violence in a bill PKDRT because the Criminal Code (the Code Penal) Indonesia has not set the formulation of gender-based violence.

The involvement of the state and society to address the suffering of victims of domestic violence with not enough public service facilities, need to be accompanied with the premise that the state is obliged to maintain the safety and improve the welfare of its citizens. Therefore, we need a protection from law enforcement as defined in Article 16 of Law No. 23 Year 2004.

Then in Article 10 explained that victims of domestic violence are entitled to receive:

1. Protection of the family, the police, prosecutors, courts, lawyers, social agencies, or other parties on a temporary or by fixing a protective order from the court,
2. health services in accordance with medical needs,
3. Treatment specifically relating to the confidentiality of the victim,
4. assistance by social workers and legal assistance at every level of the inspection process in accordance with the weight, legislation, and
5. the ministry of spiritual direction.

Forms of Crime of Domestic Violence

Definition of domestic violence (domestic violence) defined in Article 1 of Law No. 23 of 2004, as follows:

> "Any action against someone, especially women, misery or suffering physical, sexual, psychological and or negligence of household including threat to commit acts, coercion, or deprivation of liberty unlawfully within the scope of home stairs".

The scope of household in Article 2 of Law No. 23 of 2004, mentioned include:

a. Husband, wife, and children.
b. People who have a family relationship with the person referred to in paragraph a by blood, marriage, dairy, care, and guardianship, were living in the household, or
c. People who are working to assist the household and living in the household.

The forms of domestic violence, are:

1. Physical violence (Article 6 of Law No. 23 of 2004)
   is any act that results in pain, injury, or disability in a person's body, the death of the womb, fainting or cause death,
2. Psychic violence (Article 7 of Law No. 23 of 2004)
   is an action that resulted in fear, loss of confidence, loss of ability to act, a sense of helplessness, and or psychic suffering on someone,
3. Sexual violence (Article 8 of Law No. 23 of 2004)
   is any action in the form of sexual harassment, forced sexual relations by way of unnatural or undesirable, forcing sexual intercourse with another person for commercial purposes and or specific purposes,
4. Neglect Household (Article 9 of Law No. 23 of 2004)
   is any act that results in economic loss and terlantarnya family members and or create Keter hanger economy by limiting or prohibiting to work inside or outside the home, do not give a living, remove

[1] Mohammad Azzam Manan, "Domestic Violence in Sociological Perspective", *Journal of Legislation* Indonesia,Vol.5, No.3, September 2008, Jakarta, Indonesia Kumham DG, p.13.

[2] A. Reni Widyaastuti, "The Law and Domestic*Violence",justisia Law*Journal,Vol. 25, No. 3, July 2007, Surakarta, FH USM, p. 257-269.

[3] Ruby Hadiarti Johnny, "Crime of violence against Women (Criminal etiologic study in Banyumas Police jurisdiction), *Journal of Legal*Dynamics,Vol.11 No.2, May 2011, Purwokerto, FH Unsoed, p. 219.

Based on the results of research Institute of Legal Resource Center, gender equality and human rights every year the number of crimes of domestic violence the greater the number, the victims are not only women but also childrens[4]. As a result of the violence will have an impact both psychologically traumatic, physically, sexually, economically and socially. Domestic violence is a criminal offense, which according to Prof. Mulyatno, defines the term as a state criminal offense created person or property deed has been done and pointed to the consequences and the consequences. Meanwhile, according to Prodjodikoro Wiryono, a criminal offense means an act which the perpetrator is liable to punishment.

Van Hammel argue, elements of a criminal offense are :[5]

- Human acts are defined in the legislation,
- The act unlawfully
- Done with errors, and
- It should be convicted

In any criminal elements required by the result, which means a change from the outside. The issue causes of a given itself is a very difficult problem, thus this Causalitas theories seek an objective relationship between human actions with a result which is prohibited by law.[6]

The concept of victim

Victims of crime are those who either individually or collectively, suffered losses due to the act or not in violation of criminal law, including the prohibited acts / abuse of power. According to Andi Hamzah, victims of crime is basically being worst affected in a crime and it does not get as much legal protection granted by law to the perpetrator.[7] In addition, the victim itself is defined as someone who has suffered a loss as a result of a criminal offense and / or the direct sense of justice has been interrupted as a result of his experience as a target (target) crime

Assessment of the issues victims of crime can not be separated from issues concerning human rights. This is reflected by a conception of crime victims are those who suffer physically and mentally as a result of the actions of others who seek the fulfillment of our own or others contrary to the interests and human rights.

The victim in a crime can be divided into two general categories:[8]

a) Victims Direct

   Defined as the direct victims are the victims of and feel the suffering of the offenses, which is characterized as

   - Physical injuries,
   - emotional suffering,
   - Loss of income,
   - Suppression of basic human rights,

   Caused by an act or omission that is formulated in criminal law or caused by the abuse of power.

b) Victims of Non-Direct

   Referred to as indirect victims are casualties as a result of the interference someone to help victims directly or participating in the prevention of the onset of the victim, but he himself became a victim of crime, or their dependents to the victim, such as a wife or husband, child and family nearby.

   Victims of domestic violence is an act of sacrilege against human nature, but there are among men who still think that it is a logical consequence of a life, that women are considered worthy to be sacrificed or treated as objects of gratification of the interests of men in any way, including allowed violence. This fact indicates that a woman has long treated as human beings should be guarded dignity of humanity. One party to blame for the violence are the law enforcement perceived lack of attention to the aspirations of victims or perpetrators of justice seekers.

   The correlation between victims of domestic violence and the responsibility of his actions when seen from the typology of the victims were known to victimologi [9] included in the *biologically Weak* Victims,ie victims biologically in weak condition both in terms of physical and mental health. In these conditions will easily affect someone for committing a crime against the victim. In this typology to be responsible were the perpetrators of the crime and the community is also responsible for not providing protection to victims.

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[4] Dwi Habsari Retnaningrum, "Incest as a Form Manifestations of Violence Against**Women",** *Journal of Legal Dynamics*,Vol.9, 2009, Purwokerto, FH UNSOED, p. 24

[5] Sudarto, 1987, the *Criminal Law* I, Diponegoro University, Semarang , p. 25

[6] Ibid, p. 67

[7] Andi Hamzah, 1986,*"Protection Human Rights in the Code of Criminal Procedure*", Bandung: Bina Cipta, p. 33

[8] Sudarto, op.cit, p. 51

[9] Sudarto, Ibid. p. 27

The Executive Policy in the Implementation of Recovery of Victims of Domestic Violence

Domestic violence (domestic violence) as a form of behavior that causes physical and psychological suffering on someone who is in the domestic sphere. The impact of domestic violence crime is extraordinary can cause effects in psychiatric and physical suffering because of it, domestic violence is a subject of the cruelty that is not fair in a household so we need a preventive effort. The government is responsible for the prevention / protection of domestic violence, carried out by:

- Formulate policies on PKDRT,
- To provide communication, information and education about domestic violence,
- carrying out advocacy and dissemination of domestic violence,
- Conduct training and gender-sensitive education and domestic violence issues.

Such policies have been and are being kept by the government together with all elements relevant to the community and social institutions with the aim to increase effectiveness in the implementation of prevention and recovery of victims of domestic violence. Even the need for distributing comprehensive information about the comprehension and understanding of domestic violence in order to be aware of the rise of domestic violence in their environment.

Society also has a duty of domestic violence according to his ability, in terms of:

1. Preventing the continuation of crime,
2. Provide protection to victims,
3. Provide emergency assistance,
4. Assist the application process determination of protection.

The community participation is expected in constant and continuous in order to create high social responsibility and harmony built up both within households and communities in the neighboring. Translation of the implementation of the protection of domestic violence (domestic violence) contained in the various forms of policy, for example the adoption of Act No. 13 of 2006 on the Protection of Witnesses and Victims, PP 4 of 2006 on the Implementation and Co-operation Recovery victims of domestic violence. In terms of implementation of the policy administration services to victims of domestic violence, the government and local governments in accordance with the duties and functions of each make an effort:

1. Provision of special services office in the police,
2. Provision officials, health personnel, social workers and counselors religion,
3. Creation and development of the system and cooperation mechanisms care program involving the party easily accessible victim,

in principle criminal offense of domestic violence according to the Act - Act No. 23 of 2004 is an ordinary crime, meaning that the obligation to law enforcement authorities (Police) to immediately conduct investigations and examinations immediately after learning / receive reports on the occurrence of domestic violence without having to wait first complaint of the victim / family. But in general, domestic violence is a criminal offense to a complaint so that a new follow up after complaints from victims / families. Law enforcement domestic violence stems from police, prosecutors and court procedures done based on Law No. 8 Year 1981 About the Code of Criminal Procedure unless otherwise stipulated in Law No. 23 of 2004, concerning the legal protection of women from domestic violence acts are more fully detailed settings.

Regulation on prevention, protection and recovery of victims of domestic violence in the Act PKDRT more specific than the elements of the incidents of torture contained in the Criminal Code. Changes in legal improvement began to appear with the courage of victims / families to report cases of domestic violence and the establishment of various centers of victims of domestic violence services. However, there are still many obstacles in the process of handling his case, due to:

1. Lack of understanding of what domestic violence,
2. Facilities and infrastructure are inadequate services,
3. The problem of *dark number* (dark crime figures that are not covered in the law enforcement process).

So that needs to be addressed immediately in order to find solutions to solve the root problems associated with things that are repressive, legal reform as the driving motivation of the handling of domestic violence cases and legal awareness of the protection of their human rights. One of the government's efforts in providing legal protection for victims of domestic violence is by socializing Act No. 23 2004 control every aspect of society. But not without obstacles often socialization is actually not up on the right target because of limited facilities and infrastructure, the lack of public outreach provided socialization and limited provision of material or understanding of the laws PKDRT.

The lack of public understanding of the mechanisms to resolve cases of domestic violence into the causes of divorce. People understand if there KRDT they should report to the police and perpetrators will be prosecuted so as not thought about him that law enforcement is done through a mechanism of the Criminal Justice System *(ultimum remedium).*With the enactment of Law No. 23 of 2004 is expected to have a

paradigm shift in looking at the problem of domestic violence community. While steps to resolve domestic violence, are:

1. Through the mentoring mechanism,
2. Availability of special institutions handling domestic violence cases.

So we need a regulation on the implementation of the recovery of victims of domestic violence, as stipulated in Government Regulation No. 4 of 2006, Chapter I General Provisions Article 1, as follows:

Paragraph (1) recovery of victims is any attempt to revamp the victims of domestic violence to be more empowered, both physically and psychologically.

Paragraph (2) the implementation of the recovery are all actions that include services and support victims of domestic violence

Implementation of the recovery of the victim carried out by the government and local governments and social institutions according to the task and their respective functions, including providing the necessary facilities. Services as in can be given to the offender and his family members. Social workers in providing services to the victims can be done in a safe house, the service center or an alternative dwelling owned by the government, local government or the public with the consent of the victim in order to protect the victim from any threat.

Procurement of safe houses, service center or shelter alternatives that do community can be facilitated by the government and / or local government in accordance with the legislation. Further provisions on the procedure for the provision of services in a safe house or an alternative dwelling owned, governed by the regulations of the Minister of Social Affairs. To implement the cooperation in the framework of the recovery of victims, local governments can perform inter-agency coordination related to people concerned about the elimination of domestic violence (PKDRT).

Handling and application of criminal sanctions to perpetrators of domestic violence is a form of attention (protection) by law to victims of domestic violence, not only limited to the prosecution of offenders but also the consequences that befall him. Victims of domestic violence also have rights that must be upheld, as provided for in Article 10 of Law No. 23 of 2004.

In fact, efforts to achieve justice and redress as a result of domestic violence has not been getting the most and most victims of domestic violence tend to remain silent, resigned to the fate of the suffering that is endured rather than denouncing the violence that afflicts him. Many factors influence why domestic violence victims do not report, namely:[10]

1. The fear of his life is threatened,
2. Fear of loss of financial support from her husband,
3. Fear of defamation and disgrace,
4. Undecided,
5. Do not know their rights, which are part of human rights,
6. Lack of legal protection and the lack of response of law enforcement agencies for victims of domestic violence,
7. The victims feel embarrassed and depressed when the case is known by the public.

Law PKDRT has a strategic value for the elimination of violence against women, but in the implementation of law enforcement there are various obstacles ranging from the introduction of the offense of domestic violence, the scope of domestic violence as a private space, tend to view domestic violence as physical violence, lack of perception in the application of the law to the lack of attention to the position of the victim so that the victim's rights ignored[11]

Harkristuti, a number of obstacles in the process of criminal justice for acts of domestic violence against women, as there are a number of issues such as:[12]

a. Difficulty in obtaining information from witnesses,
b. Lack of understanding / law enforcement expertise in handling domestic violence cases,
c. The paradigm of proof based on the principle *Umus testis nullus testis* (one witness no witness),
d. Less involvement of social workers intensively in the handling of domestic violence.

So we need a breakthrough effort against the legal protection of victims of domestic violence as set out in the Draft Bill of 2008, namely: [13]

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[10] Yeni Huriyani, "Violence in the home (domestic violence) Issues Private Becomes Public Issues", *Journal of Legislation*Indonesia,Vol.5.No.3 in September. 2008, Jakarta, Director General of Government Regulation RI Depkumham. P.81-83

[11] Hamidah Abdurrahman, "Legal Protection to Victims of Domestic Violence in the District Court For Implementation of Rights - Rights of Victims",*Journal of Law Ius Quia*Iustum,vol.17, No.3, July 2010, Yogjakarta, FH. UII, p. 477.

[12] Harkristuti Harkrisnowo, "Violence Against Women in Socio-Juridical Perspective", *Journal of Law Ius Quia*Iustum,Vol. 7, 14, 2000, Yogjakarta, FH.UII, p. 165-166.

1. Formulation of physical violence, taken as a whole of the Law on Elimination of Domestic Violence (Article 587 of the Criminal Code bill),
2. Definition of violence (Article bill 178 of the criminal Code),
3. Include specific minimum threat if physical violence that resulted in the victim fell ill, severely injured or dies,
4. psychic violence crime (Article 588 of the criminal Code bill),
5. sexual violence (Article 589 - Article 590 bill penal Code),
6. economic violence included in the crime of neglect of persons (Article 524 bill KHP).

Furthermore, in a concrete definition of victim protection, formulated in Article 135 of the Criminal Code Bill, namely:

a. If the defendant was sentenced and there are victims who suffered material damages, the judge requires the defendant to pay compensation to the victim,
b. If the convicted person does not pay compensation then their property will be confiscated and auctioned to pay compensation to the victims,
c. If convicted evade its obligations then the convicted person is not entitled to a reduction in the sentence and parole period,
d. Criminal punishment specified in the conditional special conditions convict pay rugian obligation to the victim,
e. Foreclosure and auction procedures for further stipulated in Government Regulation (PP)[14]

Closing

Generally, victims of domestic violence are women and children - children, the impact of domestic violence crime is very unusual for a victim that needs to be prevention by governments and their social institutions on an ongoing basis with the involvement of the community to create social awareness in various forms of policy formulated in PP No. 4 of 2006 on the Implementation of the Domestic Violence Victim Recovery Cooperation and Law 23 of 2004 as a guarantee of the country to prevent domestic violence, crack down on the perpetrators and protect the victims. Many victims of domestic violence do not report / denounce cases of violence to law enforcement resulted in the difficulty of handling legal cases. There are various constraints faced by the government related to domestic violence cases, namely:

- The public perception of domestic violence-related matters,
- The paradigm of the legality of law enforcement officers, and
- Weakness Act - Act PKDRT.

So that needs to be done as a legal breakthrough in efforts to protect victims of domestic violence as defined in the Draft Bill 2008

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[13] Hamidah Abdurrahman, op.cit, p. 486-487
[14] Ibid, p. 488.

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ECONOMIC ANALYSIS OF THE PROCES ILLEGAL FISHING

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ABSTRACT

Indonesian a state of law, most of its territory is the ocean, whichc contains vacariuos potential natural recources such as fishery commodities. In its management includes. The use, protection, supervision and law enforcement, the government passed the law no 45 of 2009 amendment of law 31 of 2004 concerning frisheries. Thelaw guideline for all communities in utilizing the frisheri sector in the hope of realizing legal order and preserved nature, but in reality there arestill many people who are not obedient and a ware of the importance of the regulation. In the midst of a difficult economic crush, the number of illegal fishing perpetrators increased, including, illegal, unreported and regulated on the pretext of meeting the daily need. The condition is reguired solute legal handlin, able to analyze and find the source of the cause, so that the regulations is really able to realize the legal order but does not hurt the public's heart. This normative approach which only puts forth right and wrong, with the aim of defanation a lone not wis law enforcement, because it only prioritiez legal certainty ignores justice, so gradually will cause a prolonged social and economic crisis.

Keywords: Economic Analysis, Process, Illegal Fishing

Introduction

The United Nations Convention on the Law of the Sea increases the size of Indonesia's territory so that the length of the Indonesian coast reaches 95,181 KM with 5.8 million KM2 or 70% of the total territorial area of Indonesia of 7.7 million KM2 with a total of about 17,000 islands, the condition places Indonesia as a State the largest archipelago in the world because it has vast sea and the number of islands very much.[1]

The management of coastal and marine resources basically has the objective of continuously improving social welfare, especially local communities living in public waters, therefore in the utilization of public water resources, ecological aspects in terms of sustainability the power and functions of its ecosystem must be maintained as the main basis for achieving that welfare. Utilization of aquatic resources is expected not to cause damage to fishing ground, spawing ground, or nursery ground fish. It also does not damage the function of forest ecosystems and public waters that have ecological linkages with resource sustainability in the region.[2]

The existence of Law RI Number 45 Year 2009 amendment of Law RI Number 31 Year 2004 concerning fishery contain philosophical value that waters which are in sovereignty and jurisdiction of unitary state of Republic of Indonesia contain fish resources and is a blessing of the omnipotent god mandated at Indonesian people who have the philosophy of life of Pancasila and the 1945 Constitution to be utilized as much as possible for the welfare and prosperity of the people of Indonesia, in the management of fish resources is done with the best based on justice and equity in the utilization of prioritizing the improvement of living standards for fishermen and environmental sustainability

The utilization of fish resources has not provided a sustainable and fair living standard through fisheries management, supervision and optimal law enforcement system, while according to Article 33 paragraph 3 of the 1945 Constitution "Earth and water and natural resources contained therein are controlled by the state and used for the greatest prosperity of the people "this has not been fully realized, it is evident that there are still many coastal communities who live far below the poverty line, whereas the Indonesian state is a maritime country that most of the territory is the ocean

This condition, according to the authors, triggered many criminal actors in the field of fisheries (illegal, unreported, unregulated) and increasingly day-to-day considering that the existing regulations by most people are generally considered not able to answer all existing problems related to management and utilization for support the people's economy.

The jurists have known and understood what is the purpose of law, order is the nearest destination and justice is the furthest destination, and in the midst of both goals is certainty and usefulness. But in achieving the objectives of the law, but the jurists have not much thought about whether the law enforced has worked well in achieving the aims of the law.

[1] Mimit Primyastanto, 2017, *Marine Science and fisheries*, Jatim, Intrans Publishing, hlm v
[2] Ibid, hlm vii

Whether the dispute solution or criminal prosecution which leads to a court decision determining who "the winner and the losser or peace between the parties, can be stated with certainty that the objectives of the law have been achieved or reflect the purpose of the law.[3]

The presence of economic analysis of criminal offenses can help analyze current legal events and can predict with certainty and measurable in the future. related description above about economic analysis and illegal fishing authors are interested in making the title Economic Analysis Against Handling Illegal Fishing Crime.

Main Problem

Based on the above description then the authors formulate the problem as follows:

1. What is IUU (Illegal, Unreported & Unregulated)?
2. How is the economic analysis of the handling of illegal fishing crime?

Discussion

IUU (Illegal, Unreported & Unregulated).

IUU (Illegal, Unreported & Unregulated) is literally defined as illegal fishing activities, fishery activities not regulated by existing regulations, or activities not reported to an available fishery institution or Institution. IUU can occur in all fishing activities used and intensity of exploitation, and can occur either small scale or industrial, fishery in national and international jurisdiction zone.[4]

Illegal is a fishery activity undertaken by a person or kapa lasing in waters becoming the jurisdiction of a country, without the consent of that country or contrary to the laws and regulations. [5] It can also be said that Illegal is a fishing activity by ship or other fishing gear in the legal area of a country, without requesting permission from the person in charge of the territorial sovereignty.[6]

Unreported is a fishery activity that is not reported or reported incorrectly, to the competent national authority, which is contrary to laws and regulations.[7] Is a fishing activity carried out in a management area that is not reported or reported incorrectly, contrary to existing reporting procedures.[8]

Unregulated is a fishery activity undertaken in the territorial waters or for fish stocks where there is no applicable conservation and management arrangement, conducted in a manner contrary to the State's responsibility to conserve and manage marine natural resources, in accordance with the provisions of international law.[9]

Fishing activities in an area of fishing or fish stocks in frishery management territory of the republic of indonesia that have not been applied in accordance with preservation and management provisions or activities carried out in a manner that is inconsistent with the State's responsibility for the preservation and management of fish resources in accordance with international law.[10]

Economic Analysis of Illegal Fishing Crime

The real science of law lies in whether the provisions of law or law, obeyed or violated by humans, then whether its usefulness is felt real either by the victim, the community, the perpetrator or the State.[11] determining whether or not there is a violation of the law and determining who is responsible for a violation of the law is a criminal law task, to determine whether a person suspected of committing a violation of the law is liable for his conduct, the law uses a right or wrong judgment or assessment that is ex ante. Unlike the economic point of view that is focused on the cost and benefits achieved.[12]

The development of law in Indonesia on economic analysis of criminal law is a new force that can improve the moral of criminal law in order to be used efficiently and meaningfully for the improvement of people's welfare. This can happen if criminal lawyers seriously pay attention to the usefulness and disadvantage of the use of criminal law which has been viewed as an instrument capable of causing deterrent effect and stop the evil that occurred in society. The new view of the economic analysis approach to the criminal law has instead changed the paradigm of classical (right and wrong) criminal law to economic-based criminal law, that is how much social and economic impact the people have from the use of criminal law.

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[3] Romli Atmasasmita & Kodrat Wibowo, 2016, *Microeconomic Analysis abaout Indonesian Criminal Law*, Jakarta, Prenadamedia Group, hlm 18

[4] Mukhtar-api.blogspot.com accessed on Januari 8 2018

[5] Mas Ahmad Santosa, 2016, *Nature Also Need Law & Justice*, Jakarta, asa@-Prima Pustaka, hlm 30

[6] www.ajarekonomi.com,2016,07 accessed on Januari 8 2018

[7] Op cit, hlm 30

[8] https://jefrihutagalung.wordpress.com accessed on Januari 9 2018

[9] Op cit, hlm 30

[10] Kajian perikanan.blogspot.com accessed on Januari 9 2018

[11] Romli Atmasasmita & Kodrat Wibowo, 2016, *Microeconomic Analysis abaout Indonesian Criminal Law*, Jakarta, Prenadamedia Group, hlm 3

[12] Ibid, hlm 4

The purpose of law is also usefulness besides certainty and justice. Law has many aspects of human life such as economic, social, cultural and political aspects,[13] so according to the authors the relationship between law and economy is very closely, complement each other in order to maintain the efficiency able to support the principle of expediency

A criminal act is an act that is prohibited by a rule of law, a prohibition of which is accompanied by a threat in the form of a specific penalty, for whoever violates the prohibition. It may also be said that a criminal act is an act which by a rule of law is prohibited and punishable by criminal, provided in the criminal, that the prohibition is indicated to an act (a circumstance or incident caused by a person's conduct), while his criminal penalty is shown to the person raising the incident. Between the prohibition and the criminal penalty there is a close relationship, because between the event and the person who caused the incident there is a close relationship too, one can not be separated from the other.[14]

Genesis can not be prohibited, if that raises not a person, and the person can not be threatened with criminal, if not for the incident caused by it. And it is precisely to assert that close relationship, the action of an abstract notion that refers to the two concrete states: first, the existence of a certain event, and second, the existence of the one who does, causing the incident.[15] There is another term used in criminal law, which is "criminal offense", the term grows from the Ministry of Justice, often used in legislation, although the word acts is shorter than the action but the word acts, does not lead to abstract things such as deeds , but merely states concrete circumstances, as is the case with the difference that acts are behavior, behavior, gestures or physical attitudes of a person, which is better known in acts, actions and acts and later often used to be dealt with. Therefore, acts as a word are not so well known, then in legislation using the term of criminal acts both in its own articles, as well as in its explanation almost always used also the word deed.[16]

While the meaning of the word deed in the phrase of criminal acts by Noyon and Langemeijer that the deeds can be positive and negative. Positive action means doing something, while a negative act implies not doing something. Not doing their duty or not doing something that should be done is known as omissions.[17] According to Satjipto Rahardjo, a criminal offense calls it a legal event, where the law event is an event in a society that moves a certain legal rule, so that the provisions contained therein are manifested.[18]

In the criminal law I written by Sudarto, relating to criminal acts or strafbaar feit is classified as monistic and dualistic. The monistically flow is as follows: [19]

a. D. Simons.
   The elements of the crime / strafbaar feit are
   1) Human actions;
   2) Threatened with criminal law;
   3) Against the law;
   4) Done by error;
   5) By a responsible person.

   Simons calls the existence of the objective element and the subjective element of a criminal act or strafbaar feit, which is an objective element
   1) Acts of persons;
   2) The visible effect of the act;
   3) There may be certain circumstances that accompany the act.

   While the subjective element is as follows:
   1) Responsible person;
   2) An error (dolus or culpa).

b. Van Hamel.
   Van Hamel argued that it can be categorized as a crime must meet the following elements:
   1) Human actions formulated in the law;
   2) Against the law;
   3) Done by error;
   4) It is compulsory to be convicted.

[13] Romli Atmasasmita & Kodrat Wibowo, 2016, *Microeconomic Analysis abaout Indonesian Criminal Law*, Jakarta, Prenadamedia Group, hlm 6
[14] Moeljatno, 2015, *Criminal Law Principles*, Jakarta, Rineka Cipta, hlm 59
[15] Ibid, hlm 60
[16] Ibid, hlm 61
[17] Eddy O.S Hiariej, 2014, *Principles of Criminal Law*, Yogyakarta, Cahaya Atma Pustaka, hlm 94
[18] Satjipto Rahardjo, 2014, *Legal Studies*, Bandung, PT. Citra Aditya Bakti, hlm 35
[19] Sudarto, 2009, *Criminal Law I*, Semarang, Yayasan Sudarto, hlm 66

c. E. Mezger.
   The definition of a criminal offense according to E. Mezger is the entire requirement for the existence of a criminal. Terms or elements of a criminal offense are as follows:
   1) Actions in the broadest sense of the human (active or letting);
   2) The unlawful nature (both subjective and objective);
   3) Responsible to someone;
   4) Threatened with criminal law.
d. J. Baumann.
   Criminal acts or strafbaar feit is an act that satisfies the formulation of offense, is unlawful and done with mistakes.
e. Karni.
   The offense or criminal act contains the right of wrongdoing, committed with wrongdoing, by the perfect person of his mind and to whom the action is worthy of.
f. Wirjono Prodjodikoro.
   A criminal offense means an act whose perpetrator may be subject to a criminal offense

While that is a dualistic flow is as follows:
a. H. B. Vos.
   Criminal Acts are an act that is unlawful:
   1) Human behavior;
   2) Threatened criminally in legislation.
b. W. P. J. Pompe
   Criminal acts are unlawful acts committed by mistakes and criminal penalties. It is very clear between the criminal and the criminal.
   1) Elements of a criminal act Moeljatno argues that the elements of a criminal act are as follows:
      a) Actions consist of behavioral consequences;
      b) The matter or circumstances that accompany the deed;
      c) Additional incriminating circumstances;
      d) Elements against the objective law;
      e) Elements against subjective laws.[20]
   2) Criminal Accountability

The definition of criminal responsibility presented by Simons as a psychic state, so that the application of a criminal provision viewed from a public and personal point of view is considered appropriate.[21] While Vos declares a deed that can be accounted for the perpetrator is a disgraceful behavior to him. The reproach here is not necessarily an ethical reproach, but it is sufficiently reprehensible by law, as well as ethically permissible conduct, according to the legal norm as a compulsive for our personal ethics.[22]

According to our law there is no error without breaking the law, this theory is then formulated as "no crime without error without breaking the law, this theory is then formulated as no crime without error or geen starf zonder schuld.asas is the basis of criminal liability and not in find in the law. There are also other postulates that read nemo punitur sine injuria, facto, seu defalfa which means no one is punished unless he has done wrong.[23] The principle of geen starf zonder schuld has a history that begins in the classical school of criminal law that the criminal law only looks at deeds and consequences only or what is called tatstrafrecht. In its development, modern criminal law began to focus on the person or the actors known as taterstrafrecht but did not leave tatstrafrecht. Today or the classical neo-flow, criminal law is oriented towards deeds, consequences and persons or perpetrators, known as tat-taterstrafrech or daad-daderstrafrecht.[24]

The principle of legality is contained in the Criminal Code Article 1 "there is no act of being punished, but on the penal provisions of the law, which preceded the deed". That the criminal provisions in the law can not be imposed on acts that have been committed before the criminal provisions in the law are held which means that the law is not likely to be retroactive or retreat, "nullum delictum sine praevia lege poenali" will exist, if the criminal provisions in the law do not exist first. With this provision, in punishing persons, judges are bound by law so as to guarantee the right of personal independence of persons.[25] According to the authors that the society is always experiencing progress and should the law always follow these developments in a sense not rigid, so the use of the principle of legality is not fully able to give a sense of justice to the development of society today.

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[20] Eddy O.S Hiariej, 2014, *Principles of Criminal Law*, Yogyakarta, Cahaya Atma Pustaka, hlm 94
[21] Sudarto, 2009, *Criminal Law I*, Semarang, Yayasan Sudarto, hlm 121
[22] Ibid, hlm 122
[23] Op Cit, hlm 119
[24] Ibid, hlm 119
[25] R. Soesilo, 1980, *The Criminal Code (KUHP) and The Full Commentaries Chapter by Chapter*, Bandung, PT. Karya Nusantara, hlm 23

According to the authors of the reconstruction of no criminal principle without error, no error without expediency (Romli, 2017) in accordance with the development of the global economic community. In the drafting of the 1945 Constitution has affirmed that Indonesia is a State of law that must strengthen the economy to achieve the ideals of social welfare of the Indonesian nation, the provisions of Chapter I Article 1 Paragraph (3) The State of Indonesia is a State of law, connected with the provisions of Chapter XIV Article 33 on national economy and social welfare. Based on these two important chapters, it is a milestone and the main pillar of the Unitary State of the Republic of Indonesia in accordance with the present national development in Indonesia and the future.[26]

The founder of the Unitary State of the Republic of Indonesia is not without the intention of forming the 1945 Constitution, in addition to forming a framework of thought on the basis of the State of law, has also thought deeply about the leitmotive and vision of the Indonesian legal State that can create the welfare of the Indonesian nation. Then was born the question has leitmotive and vision is achieved until now, of course the answer is not, why? There are two main considerations, namely lack of understanding of former criminal law makers, who are still guided by ex ante events, but have not considered the impact of the criminal event by using the maximation, efficiency and equilibrium. second consideration is empirical, that is law enforcement so far still use only parameter of success, (output), not yet use parameter of expediency of working of criminal law (outcome). The formula of success of criminal law is still I (input) + P (process) = output, I should (input) + P (process) + output = outcome or expected impact of income. The old formula focuses on discovering material truth through the process of punishment rather than benefit, both from social and individual aspects.[27]

The new formula of the concept of criminal law should focus on material truths that can prosper society and benefit the perpetrators, not just deterrent, regardless of the impact of the harassment itself on the perpetrators of crime and their families, victims and society. The principle of classical criminal law (retributive) in practice can not create a comfortable, just and beneficial community life climate for people and suspects, defendants or convicts. In contrast, there has been a density of prisoners who exceed the limits of their capacity and have resulted in sexual, social and security demoralization in prisons, and there has been an increase in the quality of criminal acts, so often called prison is a crime high school. The negative excesses from retribution are not expected, and even the recidivists are increasing, the significant and unpredictable impact of retributionists is the waste of state costs for law enforcement, both in the institutional and financial aspects of criminal cases. Basically against any threat of punishment there must be objections, but this does not mean that we may ignore the determination of where a person is punishable, but it is true that there should make judgments about his advantages and disadvantages and should keep the punishment true to be a healing effort and not to make the disease worse.[28]

The principle of no crime without error, no fault without expediency in relation with the handling of illegal fishing crime is very significant, given that according to the author always put forward premium remedium with the intent and the main goal is retributiv, so the effect detterent for others. the handling of illegal fishing related to the illegal fishing vessel illegal fishing by fishery supervisors during this time that many reap the pros and cons, although the law is protected, in accordance with Article 69 Paragraph (4) of Law No. 45 of 2009 amendment of Law 31 Year 2004 on fisheries which reads "in carrying out the functions referred to in sub-article (1) the fishery investigator and / or supervisor may take special action in the form of burning and / or pengenggalaman a foreign-flaged fishing vessel based on sufficient initial evidence. This is normatively true, but if analyzed by economic analysis, that the act is not effective or even does not provide maximum benefit as expected. Evidently there are still many illegal fishing actors, so the retributive pattern to give effect detterent has not succeeded.

Since 2014 until now, 317 illegal vessels have been sunk after incrach van dewisge.[29] So if analyzed economically to the execution action of vessel shiping is very unfortunate, because if auctioned in accordance with existing procedures then the State will get income from the auction results. Then if granted to indigenous communities, it will provide kemahfatan in the form of reduction of unemployment and as a concrete form of government attention in realizing the welfare community. The point is that every human behavior both law-abiding and legal behavior will always consider the calculations to reap as much as possible with the burden of the slightest loss.[30] and in the economic model of criminal behavior states that a person will commit a crime if the benefits of committing a crime outweigh the risks (costs),[31] so to reduce the crime should be reduced profits or increased risk. It is the duty of the government to provide deterrent effect to the

[26] Romli Atmasasmita, 2017, *Recontruction of No Criminal Principle Without Error*, Jakarta, Gramedia Pustaka Utama, hlm 13
[27] Ibid, hlm 14
[28] Ibid, hlm 16
[29] Suryamalang.tribunews.com accessed on Januari 10 2018
[30] Romli Atmasasmita & Kodrat Wibowo, 2016, *Microeconomic Analysis abaout Indonesian Criminal Law*, Jakarta, Prenadamedia Group, hlm 2
[31] Ibid, hlm 28

perpetrators of illegal fishing but still provide benefits and education so that cost and benefit both now and the future can be measured properly.

Closing

IUU (Illegal, Unreported & Unregulated). Understanding IUU (Illegal, Unreported & Unregulated) means IUU (Illegal, Unreported & Unregulated) is literally defined as illegal fishing activities, fishery activities not regulated by existing regulations, or activities not reported to an institution or management agency available fisheries. IUU can occur in all fishing activities used and intensity of exploitation, and can occur either small scale or industrial, fishery in national and international jurisdiction zone.

Economic Analysis of Illegal Fishing Crime Economic analysis of illegal fishing crime, have the intent and purpose of handling criminal acts illegal fishing should using the principle of no criminal without error, no error without benefit, this means that in the handling of illegal fishing does not have to always put forward retributive under the pretext causing a deterrent effect, but in fact it is not able to produce maximally, so the need for renewal by emphasizing the principle of ultimum remedium and expediency, will result in measurable predictions related to cost and benefit, able to reduce the cost of State expenditure and provide the maximum income, contribute in the field of national economic development to as soon as possible to realize an orderly, prosperous and just society.

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TAPPING AUTHORITY BY THE CORRUPTION ERADICATION COMMISSION (KPK) IN THE INDONESIAN CRIMINAL JUSTICE SYSTEM

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ABSTRACT

The Commission for the Eradication of Corruption (KPK) of an independent State institution established under Law No. 30 of 2002 in conducting its duties in the field of investigation, investigation and prosecution is authorized to intercept and record the discourse under Article 12 paragraph (1) a. Article 26 a Corruption Eradication Commission Law. This authority reaps some opinions that either support or refuse because it is considered the authority of this tapping is too broadly owned KPK. Therefore, the authors will try to investigate with the restriction of problem formulation (1) How is the difference between the wiretapping authority of KPK compared to the authority of wiretapping owned by other law enforcers ?, (2) How ideally gives this tapping authority to KPK and other law enforcement officers in the framework of accelerating the eradication of corruption in the Indonesian Criminal Justice System ?. This research is descriptive, using normative approach in the form of, approach of law and approach of law hermeunetika, using legal material of primary, secondary and tertiary legal material through literature study, using qualitative analysis. Research findings (1). The authority to intercept and record the conversation held by the KPK in carrying out the task of investigation, investigation and prosecution as referred to in Article 6 letter c, in applying the TPK perpetrator is wider than the wiretapping authority possessed by the police and prosecutor who need the permission of the Chairman of the District Court to be able to do (2) The tapping authority shall be maintained to deter the perpetrators and to assist the disclosure of corruption cases, by making the Implementing Regulation (PP) on the Implementation of Tapping as defined in the Telecommunication Law and the ITE Law which regulates the specific mechanism , the process and the implementation of intercepts conducted by each law enforcement apparatus, both the police, the prosecutor and the KPK, to avoid violations of human rights and realize the provisions of Article 28 F and G of the 1945 Constitution. And fulfill the three components of authority namely influence, legal basis and conformity law. without reducing the existing KPK's authority

Keywords: Tapping, KPK, Corruption, Indonesia

Introduction

The change of society and technology has had a profound effect on legal changes including in the criminal law system, both material criminal law implemented in the Criminal Code (KUHP), as well as in the formal criminal law listed in Law No. 8 Year 1981 on the Criminal Procedure Code (KUHAP). Proving means to give certainty to the judge about the existence of certain events, whether in civil law or criminal procedure, the proof has a very central role. In essence the proof began since the existence of a legal event. If there are criminal elements (initial evidence of crime), then the process begins by conducting an investigation, then an investigation is conducted (Edmon Makarim: 2004 ;419).

In connection with the increasingly musical modus operandi would require more effort to be able to prove it in order to seek material truth. Likewise with corruption (TPK). Therefore, the evidence contained in Article 184 KUHAP alone is no longer sufficient to prove a TPK, so it is necessary to find other alternative evidences to help reveal cases related to the use of information technology. This is in accordance with the stipulation of Electronic Information (IE) and Electronic Document (DE) as additional evidence of evidence of witness testimonies, expert information, letters, guidance and explanation of defendant that has been established as evidence in KUHAP Law No. 11 Year 2008 on Information and Electronic Transactions (ITE). It is also followed in Article 26 A of Law No. 20 of 2001 which amends and supposes Law No. 31 Year 1999 on Corruption Act (UU TPK), where the recording is included as evidence of guidance.

To obtain the above mentioned IE and DE evidence by lawmakers authorizes law enforcement officials to intercept and record the conversation of a suspected TPK actor. Tapping is a very effective tool in dismantling a crime. At least the belief is emanating from the expression of the proponents of the use of tapping methods. But on the other hand wiretaps also have a tendency to violate human rights.

According to Indonesian criminal procedure law, investigators in certain cases can wiretap with permission from the Chairman of the District Court. While interception as one of the authority given to the KPK in order to carry out the task of investigation, investigation and prosecution, menurt Article 12 paragraph (1) letter a KPK Law does not require permission from the Chief Justice, this difference in authority gives rise to problems in practice so as to bring the desire from the police, the attorney and the House of Representatives Commission III to review the wiretapping authority given to the KPK widely.

Tapping results conducted by the KPK can be seen by the number of cases of hand-catch operation (OTT) conducted by the KPK against the dominant corruptors are the Head of Region and other public officials. Wiretaps used to obtain guidance for law enforcement officers in proving a criminal offense. The granting of authority to wiretap to the KPK is in a dilemmatic position, on the one hand it is necessary to reveal corruption cases that occur because the law must be able to keep up with the times and technologies that can no longer rely on conventional evidence, on the other hand there are human rights respected in law enforcement. Therefore, it is necessary to review the granting of this tapping authority in the examination of general criminal cases and TPK in particular.

Main Problem

Many problems that arise in connection with the granting of authority to tapping this KPK, In this study will be limited to the formulation of the problem as follows:

1. What is the difference between the wiretapping authority that KPK has in comparison with the wiretap authority possessed by other law enforcers?
2. What is the ideal of granting this tapping authority to the KPK and other law enforcement agencies in order to accelerate the eradication of corruption within the Indonesian Criminal Justice System?

Research Methods

This research is a descriptive research, by explaining the issue of granting tapping authority to KPK investigators by KPK Law in performing their duties in the field of investigation, investigation and prosecution. This study uses a normative approach in the form of the Act approach and the legal hermeunetics approach by interpreting the legal provisions relating to such intercepts. The legal substance used by primary, secondary, and tertiary legal materials through literature study, which is analyzed by qualitative analysis by restoring the existing problems to the applicable Indonesia legislation

Discussion

Differences of Tapping Authorities Owned By KPK Compared to Tapping Authorities Owned By Other Law Enforcement

Tapping means listening (recording) the information (secret, conversation) of others intentionally without the knowledge of the person. While tapping the process, how to tap. Tapping is the activity of installing tools or enhancements to the telecommunications network for the purpose of obtaining information by unauthorized means. Basically information owned by a person is a private right that must be protected so that tapping should be prohibited. While the recording of information, among others, the recording of conversations between the parties bertelekomunikasi. (https://www.kamusbesar.com)

According to chapter explanation Article 42 of Law Number 36 Year 1999 concerning Telecommunication (Telecommunication Law) that:

> "The telecommunication service provider shall keep confidential information transmitted and / or received by telecommunication service subscribers through its telecommunication network and / or telecommunication services, except for the purposes of the criminal justice process, telecommunication service providers may record information sent and / or received by telecommunications service providers and may provide the necessary information on:
>
> a. written request of the Attorney General and / or the Chief of Police of the Republic of Indonesia for certain offenses;
> b. the investigator's request for a specific offense in accordance with applicable Law. "

The provisions concerning the procedure for requesting and giving the recording of information as intended are regulated by Government Regulation (PP). This PP which has not existed since its enactment in 1999 until now, causing problems and multi-interpretation in its implementation. The criminal justice process in this provision covers investigation, prosecution and investigation of criminal acts threatened with imprisonment for 5 (five) years and above, life or death, certain criminal acts in in accordance with the Law on Psychotropic.

Furthermore, in chapter explanation Article 40 of the Telecommunication Law it is explained that

> "Everyone is prohibited from intercepting information transmitted through telecommunication networks in the form. If done under Article 56, a criminal shall be punished with a maximum imprisonment of 15 (fifteen) years ".

In addition to the above provisions, in Article 42 paragraph (2) Sub-Paragraph b of Law Number 11 Year 2008 concerning Electronic Information and Transactions (UU ITE), states that "tapping is an activity to listen, record, deflect, alter, inhibit, and / or record the transmission of electronic information and / or electronic documents that are not public, either using a communication cable network or a wireless network such as electromagnetic or radio frequency ".

Tapping is an activity for eavesdropping with or without installing any equipment or enhancements on a telecommunication network that are carried out to obtain information either discreetly or explicitly. Wiretapping has been around since the first world war to protect the nation's defense and security. In the field of law the use of eavesdropping in the disclosure of a case, especially corruption cases by the KPK is a new color that invites many opinions among lawyers themselves.

According to Audy Murfi (Ricca Anggraeni :2010 ;186)

> "Tapping is one of the audit techniques to obtain information in an effort to uncover the case or as a basis for establishing the next audit / investigation step. Recordings of tapping results are not necessarily a separate evidence in criminal law, but information obtained from tapping results in the form of a tape can be used as evidence of evidence in the Criminal Procedure Code, because of the results of this interception, the judge obtains clarity on the occurrence of corruption ".

Based on the above description looks the importance of tapping in uncovering a case in the investigation and investigation. Investigation is one of the components of the integrated criminal justice system in our country. The criminal justice system (criminal justice system) is a system within a society to cope with the problem of crime. Tackling means, efforts to control crime to be within the limits of community tolerance. This system is considered successful, if most of the reports or complaints of people who become crime koban can be resolved (Romli Atmasasmita : 1996 ;16)

The investigation under Article 1 Sub-Article 2 of Law No. 8 of 1981 on the Criminal Procedure Code (KUHAP) and Law No. 2 of 2002 on Police "is a series of investigative actions in respect of and in accordance with the manner laid down in this law for seek and collect evidence which with such evidence makes light of the offense and to find the suspect. "

To investigate the above, the investigator in Article 7 paragraph (1) the police investigator of the Republic of Indonesia shall be authorized, receive a report or complaint from a person of a criminal offense, perform the first action at the time of the incident, order to stop a suspect and examine the ID suspects, arrests, detentions, searches and seizures for inspection and confiscation of letters, and other powers.

The authority of the prosecutor to conduct a specific criminal investigation according to the general elucidation of number 3 of Law No. 16 of 2004 on the Attorney General's Office is intended to accommodate several provisions of law which authorize the prosecutor to conduct an investigation, Law Number 31 Year 1999 on Eradication Corruption as already amended by Law Number 20 Year 2001, and Law Number 30 Year 2002 regarding Corruption Eradication Commission (Pathorang Halim :2016 ; 433).

Based on the provisions of Article 7 paragraph (1) of the Criminal Procedure Code (KUHAP) on the authority of the investigator above, it is seen that the investigator is authorized to carry out a forced effort against the suspect in the form of arrest, detention, seizure, and others. All that is provided by KUHAP to facilitate investigators in uncovering a criminal case so that it can obtain evidence and find the suspect. One of his strategies in this technological era to obtain such evidence is that law enforcement officers are given the opportunity to wiretap, with the permission of the Chief Justice.

The same authority to conduct interception is also given to KPK to conduct investigations as regulated in Article 26 a of the Corruption Eradication Commission Law, affirmed in Article 12 paragraph (1) a. Which states "In conducting the investigation, investigation and prosecution task as referred to in Article 6 letter c, the Corruption Eradication Commission has the authority to: a) intercept and record the conversation ". especially in recruiting TPK perpetrators, because in some cases wiretap is done to someone after KPK get a report of alleged misuse of state finance and state economy from society.

KPK in wiretapping is subject to the Standard Operational Procedure (SOP) based on the KPK Decision. Chandra M. Hamzah stated that the wiretapping process in the KPK is quite strict, there is a form, the period of time, consideration and expected results. Every year the KPK intercepting is also audited by a special team established under Permenkominfo No: 11 / PER / M.KOMINFO / 020/2006. The decision to wiretap by the KPK was based on the need to strengthen the evidence in investigative activities. The investigation itself was conducted after data collection and explanation activities were conducted after TPK indication was found. This means that another consideration of tapping is the existence of strong allegations obtained from the report results of supervision (indication) and sufficient initial evidence. Although the KPK has a formal legal authority to wiretap, it does not mean the KPK can be arbitrary in its use. There must be a procedure that can be accounted for before tapping. Tapping is not the first step to get evidence and is not an easy decision (Ricca Anggraeni : 2010 ; 186)

Hary Budiarto, Deputy of KPK Information and Data Division, explained that there were three deputies in KPK involved in wiretapping action, namely Deputy Penindakan, Deputy of Information and Data (Inda), and Deputy of Internal Control and Complaint of Society (PIPM). Enforcement as a user who sends the number and receives the result later, Inda who tapped, then PIPM who do the audit. So, even though Kemenkominfo does not audit, we audit every three months. Deputy Inda will not intercept if the investigator does not issue a wiretap order signed by the five KPK leaders. He also mentions the sprindap is valid for one number only. The tapping is called restricted for 30 days.

If it has been 30 days the machine will automatically stop tapping, other numbers enter, so like the queue, from there made summary to be given to Deputy action Based on the above description it is seen that the interception of KPK already existed its SOP, unlike some allegations that assume KPK to tamper away with the authority given by KPK Law, although it does not require permission from the Chairman of the local District Court.

Giving Authorization of Tapping Against KPK And Other Law Enforcement Apparatus In Order Of Accelerating Eradication Of Corruption In Indonesian Criminal Justice System

Speaking of the tapping authority to the KPK in the future means talking about criminal justice policy. According to A Mulder, criminal justice policy is a policy to determine how far the applicable criminal law provisions need to be changed or renewed, what can be done to prevent the occurrence of criminal acts, and the way in which investigations, prosecutions, justice and criminal proceedings must be carried out, which including formulative, applicative and executive policies.

Previously reviewed on the SPP as a system that is directly related to the disclosure of a corruption in Indonesia. Citing the opinion of Lawrence Friedman, Mardjono Reksodiputro, describes the elements of the legal system as follows (Barda Nawawi Arief :2003 ; 26)

a. Legal Substance is about norms, rules and laws
b. The legal structure (Legal Structure) includes the executive, legislative and judiciary bodies and related institutions, such as Police, Attorney, Court, Corruption Eradication Commission, Judicial Commission, and others
c. Legal Culture, including views, habits and behavior of the community regarding the thoughts of values and expectations of the prevailing legal system. In other words, the legal culture is the climate of social thinking about how the law is applied, violated or implemented.

While Nanda Syahputra Umara, quoted Romli Atmasasmita opinion that SPP is a system in a society to combat crime. Tackling is defined as controlling crime to be within the limits of community tolerance. The components working in this system include Police, Attorney, Court and Correctional Institutions. Currently in its development KPK and advocate become part of sub system in SPP. This component is expected to cooperate to produce an integrated known as integrated criminal justice system (Nanda Syahputra Umara : 2017 ;53). One of the problems that need to be reviewed here is about tapping as one of the authority given by the Corruption Eradication Commission Law to the KPK in performing its duties in the field of investigation, investigation and prosecution as part of SPP, so that in the future it is expected not to cause further problems in law enforcement, with first look at and review some of the opinions that are developing today.

The wiretapping arrangement in Article 6 Sub-Article c of the new KPK Law stipulates the absence of wiretapping authority, but has not set the boundaries of the authority itself, causing problems in practice. However, the KPK can not be blamed for the absence of the arrangement itself. One of the makers of KPK Law is why KPK Law does not clearly regulate the limits of the usage of wiretapping authority. It is not the KPK's authority to create a wiretapping law, but the Government and the House of Representatives. If any DPR member blames the KPK because the absence of a wiretapping law means that the DPR member does not understand its own duties and functions. Not only does it matter whether or not the permission of the Chief Justice is necessary. This arrangement is intended to provide guarantees for the use of such authority not to be misused, by providing clear parameters of when the wiretapping authority can be exercised, whether the objective is in the context of law enforcement, who can be intercepted, what if in tapping is found other indications of crime , how the protection of the parties involved in communication with the intercepted parties unrelated to a crime.

This above is associated with the overall authority of KPK according to (Sukmareni : 2016 ; 895)

> "Authority of the Commission so large as described above constitute a risk to the existence of the Commission itself, it is seen with the emergence of the desire of some in the House of Representatives (DPR) RI to the weakening of the duties and authority of the Commission by the parties who feel threatened by the performance of the current KPK this. Some of the authority of the Commission to be reduced by the House of Representatives (hereinafter referred to as the House of Representatives), through the revision of the KPK Law"

According to Fahri Hamzah, Vice Chairman of the House of Representatives argued that "illegal KPK wiretapping is all and this tapping is selective. Because the operational standard (SOP) we do not know. KPK never wants to be open about SOPs they use, "whereas the Constitutional Court's decision some time ago stated that there needs to be a law regulating wiretapping (http://nasio om/read/2017/08/25/ 11462951 /fahri-hamzah-semua-penyadapan-kpk-ilegal,)

Meanwhile, according to ICW researchers, "in the Act, the Commission has the right to tap without the need for licensing from the judiciary. The law is general or lex generalis. If it wants to regulate KPK's wiretapping, then the DPR should change the KPK Law which regulates wiretapping (https://tirto.id/peneliti-icw-uu-penyadapan-tak-bisa-berlaku-pada-kpk-cwx1).

In relation to the above opinion, the Commission III of the House of Representatives of the Republic of Indonesia at a meeting on 13-9-2017 urged the KPK to improve the wiretapping procedure conducted by the House of Representatives Commission III chairman Bambang Soesatyo, there is still content in the tapping that is not related to the subject matter, but goes to court , and then broadcast into the public space. Related wiretapping, Chairman of KPK Agus Rahardjo said wiretap conducted KPK can not be done carelessly because there is a mechanism that governs it. He explained that the wiretapping started from the proposal of the Directorate of Investigation of KPK after collecting material (pulbaket) submitted to the KPK leadership. If five leaders agree and sign a wiretap order (sprindap), new activities can be done. "But, the tap is not the Directorate of Inquiry, but the Directorate of Monitoring under the Deputy Information and Data (Inda) KPK (http://www.dpr.go .id/ berita/detail/id/17636/t/DPR+Minta+KPK+Perbaiki+Prosedur+Penyadapan).

In relation to the extent of wiretapping authority granted by the Corruption Eradication Commission Law to the KPK, the desire of some parties, especially the House of Representatives Commission III to revise KPK Law. This was responded by the KPK leadership, stating that "the existing KPK Law is adequate. If the revisions are to be done, do not include the four points of revision that have recently been discussed. "The four points are the establishment of the Supervisory Board, the addition of the authority to issue a warrant for suspension of inquiry (SP3), the regulation of interception, and the possibility of the KPK to appoint investigators, investigators and prosecutors themselves. "Furthermore, the Commission's reasoning in its rejection of the wiretapping authority is that:

a. Based on the Decision of the Constitutional Court, namely in Case Number 006 / PUU-I / 2003 and Number 012-016-019 / PUU-IV / 2006, the Constitutional Court states that the KPK's tapping authority does not violate the Constitution so it needs to be maintained and so far the tapping authority is very supportive the success of KPK in eradicating corruption. If this authority is revoked then it is equal to the desire to weaken the KPK and eradicate corruption.
b. The KPK has the authority to conduct a legal by regulated tapping based on the evaluation / audit of the interception process, so that when the KPK does wiretapping there is no need for a legal by court order (https://www.kpk.go.id/id/ component/content/article/79-berita/berita-media/3209-kpk-tolak-empat-poin).

Another opinion about this was raised by former KPK advisor Abdullah Hehamahua, once the coordinator of standard operating procedure (SOP) and secretary of KPK audit tapping. Tapping at that time involved many parties, including from Kemenkominfo and providers. The result, no abuse found. does not agree if the tapping by the KPK is complicated. According to him, wiretapping by other law enforcers such as Police, prosecutors, and State Intelligence Agency (BIN). That should be monitored, such as when the case of lizard versus crocodile volume I, revealed the existence of tapping by law enforcement. He agrees there is a Wiretapping Act to regulate in general, but, there is a lex specialis clause for the KPK (https://www.kpk.go.id/id/component/ content/article/79-berita/berita-media/3232-yang-harus-diawas i-tapping).

Meanwhile, Director of Legal Aid Institute YLBHI Julius Hebrew said, in the KPK is clear there is a tapping mechanism that is difficult dikongkalikongkan. For example, wiretapping and wiretapping applicants are different people. Tapping is proposed to the leadership. Furthermore, the KPK leadership appoints the person assigned to tap without informing the proposer. Julius agrees with Abdullah's opinion above which encourages the House of Representatives to set up tapping rules for other law enforcers. never been told how the mechanism. The revised intention of the Corruption Eradication Commission Law, including interception, is suspected to arise due to concerns of corruptors. Because, during this wiretapping became the main weapon KPK in conducting investigations and investigations. Almost all cases of hand-catching operations begin with tapping. Article 12 A paragraph 1 point b proposed for the revision regulates wiretapping shall be with the written permission of the supervisory board, it is feared the leaking of intercepts that do not necessarily have clear integrity.

According to the observer of constitutional law, Refly Harun, the limiting point of tapping is potentially counter productive. KPK, which has been successfully revealed even capture corruptors thanks to the authority. , many cases were revealed because of tapping, KPK arrested PDI-P politician Damayanti Wisnu Putranti, in the case of bribery of budget preparation of the Ministry of Public Works and People's Housing (https://www.kpk.go.id/id/component/content/article/79-berita/berita-media/3201)

The KPK (Sukmareni :2017 ; 81) is still urgently needed to accelerate the eradication of TPK in the Indonesian criminal justice system, as an independent body regardless of the influence of anyone, seeing that there are still so many reported cases of TPK that have not been examined by the KPK and TPK currently happening in the community, juridical will not be able to be resolved by the police and prosecutors, in addition to the prevention and monitoring tasks as part of the eradication of TPK in Indonesia. KPK needs to get support from all parties who want to accelerate the eradication of TPK. But it should also be considered in the future about the system of supervision over the implementation of authority and performance of KPK which is very broad compared to the police and prosecutor's office

When examined from the aspect of authority, the authority of the legal power (rechtsmacht), as the concept of public law, the authority consists of at least three components, namely influence, legal basis, and legal conformity. The influence component means the use of authority to control legal behavior. While the basic components of the law is always meant to be able to be appointed legal basis. The conformity component of the law contains the meaning of the standard of authority or the general standard and its particular standard (Philipus M Hadjon : 2012 ;11).

Based on some of the above opinions and analysis of the granting authority of wiretapping to the KPK, the writer is of the opinion that the authority of this tapping should be maintained to deter the perpetrators and to help the disclosure of corruption cases that have been entrenched in this beloved earth. Then in accordance with the decision of the Court Number 012-016-019 / PUU-IV / 2006 and to meet the three components of authority as mentioned above, and for more legal certainty in the implementation of this interception, ideally the lawmakers immediately make the Regulation Pelaksanaa (PP) on the Implementation of Tapping as referred to in the Telecommunication Law and the ITE Law which regulates the specific mechanisms, processes and execution of intercepts carried out by each law enforcement apparatus, whether police, prosecutors or KPK.

This is necessary to avoid violations of human rights and to realize the provisions of Article 28 F and G of the 1945 Constitution. Article 28 F on "protection to the right of everyone to communicate and obtain information to develop their personal and social environment, and have the right to seek, obtain, possess, , process and convey information by using all kinds of existing channels ". Article 28 G, on the other hand, "guarantees everyone's right to self-protection, family, honor, dignity and property under his control, and is entitled to a sense of security and protection from the threat of fear of doing or not doing what constitutes a human right " (Ronni Rachman Nitibaskara : 2017;14).

But it is hoped that PP will be made is expected to reduce the abuse of authority that law enforcement is very possible, because in essence nobia profession of any kind will be a bad image when littered its own culprit. Then it is also expected that the PP does not reduce the existing authority, because for now tapping is still needed to accelerate the eradication of corruption in Indonesia. So the goal of establishing KPK as an independent institution in an effort to accelerate the eradication of corruption is achieved.

Closing

1. The authority to intercept and record the conversation held by the KPK in carrying out the task of investigation, investigation and prosecution as referred to in Article 6 letter c, in recruiting the TPK perpetrator is broader than the wiretapping authority possessed by the police and prosecutor who require the permission of the Chairman of the District Court for can wiretap, while KPK does not require the permit, in accordance with Article 12 paragraph (1) letter a. Article 26 (a) of the Corruption Eradication Commission Law, which states "This wide granting of authority creates a debate in law enforcement
2. This tapping authority does need to be maintained to deter the perpetrators and to assist the disclosure of corruption cases that have been entrenched in this beloved earth. This has been confirmed in the Decision of the Constitutional Court 006 / PUU-I / 2003 and Number 012-016-019 / PUU-IV / 2006. In the future, a Regulation of Implementation (PP) on Enforcement of Wiretaps as intended in the Telecommunication Law and the Law on EIT shall be set up specifically for the mechanisms, processes and enforcement of intercepts carried out by each law enforcement apparatus, police, prosecutors and KPK to avoid human rights violations and realize the provisions of Article 28 F and G of the 1945 Constitution. And fulfill the three components of authority namely influence, legal basis and legal conformity. With the hope that PP will be made does not reduce the existing KPK authority, because for now tapping is still needed to accelerate the eradication of corruption in Indonesia.

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RELATIONSHIP BETWEEN CORRUPT BEHAVIOR THE POWERS ABATEMENT CULTURAL PERSPECTIVE

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ABSTRACT

Corruption and power, like two sides of the same coin. Corruption always accompany the journey of power and reverse power is a "gateway" for corruption. There are others who say corruption postulate follows the nature of power. If the power of the centralized character, then followed her character centralized corruption. The more centralized the power, the greater is also corruption in the power center. This species is found in the New Order. Conversely, when that happens is autonomy, such as regional autonomy, corruption had followed parallel with the autonomy. Therefore, power moved from one center of power to the many autonomous centers of power, corruption had followed him to move from one center of power to many centers of power. This type experienced now, in the post-New Order era. Autonomy and decentralization has led to the corruption spread to the regions. In fact, if the previous era were generally corrupt is the executive and the legislature has now struck. Both fights quickly engulfed the state money and suck people's money. Corruption as a vicious virus apparently gain medium through effective deployment of autonomy and decentralization.
Reform of the House of Representatives does produce more power than the president, while the yield autonomy of Parliament is no less than the reign of Regional Head. In fact, even the accountability report (LPJ) heads of regions and local elections be used as a means of corruption in mutual cooperation. It was clearly threaten the future of this country. Study of *Political and Economic Risk Consultancy* (October 2001) suggests the existence of the most dangerous factor for the future development of the Indonesian nation that exceeds military movements or chaotic political transition. That factor is corruption!

Keywords: Corrupt Behavior, Power

Introduction

Corruption and power, like two sides of the same coin. Corruption always accompany the journey of power and reverse power is a "gateway" for corruption. This is the essence of the statement of Lord Action,professor of modern history at the University of Cambridge, England, who lived in the 19th century with its famous adage he stated: *Power tends to corrupt, and absolute power corrupt absolutely* (that power tends to corrupt, and power absolute corrupts absolutely).[1]

There are others who say corruption postulates follow nature of power. If the power of the centralized character, then followed her character centralized corruption. The more centralized the power, the greater is also corruption in the power center. This species is found in the New Order. Conversely, when that happens is autonomy, such as regional autonomy, corruption had followed parallel with the autonomy. Therefore, power moved from one center of power to the many autonomous centers of power, corruption had followed him to move from one center of power to many centers of power. This type experienced now, in the post-New Order era.[2] Can you imagine if that happened the widest possible autonomy. According to this postulate, corruption will follow, and will explore the widest in many centers of power are autonomous.

Decentralization would lead to many problems which could jeopardize the program itself. In addition to reducing efficiency, decentralization was also fosters corruption. So as between the center and regions vying for corruption. In such a tight race happened so that now it is not clear yet, which is more severe and "achievement" in corruption.

Autonomy and decentralization has led to the corruption spread to the regions. In fact, if the previous era were generally corrupt is the executive and the legislature has now struck. Both fights quickly engulfed the state money and suck people's money. Corruption as a vicious virus apparently gain medium through effective deployment of autonomy and decentralization.

Reform of the House of Representatives does produce more power than the president, while the yield autonomy of Parliament is no less than the reign of Regional Head. In fact, even the accountability report (LPJ) heads of regions and local elections be used as a means of corruption in mutual cooperation. It was clearly threaten the future of this country.

[1] Miriam Budiardjo, *Fundamentals of Political*Science,(Jakarta: Gramedia, 1995).

[2] In this paper intentionally did not use the term reform era. Reform is actually associated with every effort toward a better change from an earlier era. In line with the meaning of this definition should better should reform era of the New Order era. In fact, in the case concerning the behavior of political, economic, legal and so on, the present era is no better than the New Order era. So it is too risky to naming the post-New Order era called by the terms of the reform era.

Study of *Political and Economic Risk Consultancy* (October 2001) suggests the existence of the most dangerous factor for the future development of the Indonesian nation that exceeds military movements or chaotic political transition. That factor is corruption!

Meaning and Corruption Type

A wide variety of definitions of corruption. The various definitions of corruption is defined as behavior that deviates from the formal ethical rules concerning the actions of someone in a position of public authority caused by motives of personal considerations, such as wealth, power and status.[3] Corruption is also often understood as an abuse of power and trust for personal gain. But corruption can also be understood as the behavior does not comply with the principle of "maintaining the distance". This means that in policy making in the economic field, whether it is done by individuals in the private sector or by a public authority, personal or family relationship played no role. Once the principle of "maintaining a distance" was violated and the decision was made based on personal or family relationship then corruption will arise. For example, conflict of interest and nepotism. The principle of maintaining this distance is the foundation for any organization to achieve efficiency.[4]

While the manifold, corruption as stated by Yves Meny,[5] there are four (4) types. First, corruption shortcut. Widely practiced in the case of embezzlement of state funds, intermediary economic and political, economic sector to pay for political gain. When you fall into this category of cases employers will want to be certain of Labor Law enacted; or regulations that favor certain businesses to not revised. Then the majority of the political parties get money in return.

Second, corruption-tribute. Forms of corruption which is possible because of strategic positions. Thanks to the post of someone getting a percentage of the various activities, both in the economic, political, cultural, and even tribute from subordinates, other activities or services in a case, including theefforts. mark-upThe first type of corruption that is distinguished from the latter as more prominent political institutional nature. Money politics included in the first category even though the exchange rather than directly from the economic sector.

Third, corruption-contract. Corruption can not be separated from efforts to get the project or market; fall into this category is the effort to get a government facility. Fourth,corruption-extortion. Corruption is closely related to security and internal affairs and external shocks; recruitment of middle-ranking officers Indonesian Armed Forces (TNI) and police intomanager human recources department or the inclusion of the name of high-ranking officer on the board of the company. The use of security services such as Exxon Mobil in Aceh or Freeport in Papua is a striking example. Included in this category also is an opportunity to share ownership of the "strong man" certain.

With the mention of a similar variety, Amien Rais,[6] divides the types of corruption that should be watched and judged to have been rampant in Indonesia into four types. First, corruption ekstortif. This corruption refers to a situation where a person had to bribe in order to get something or get the protection of the rights and needs. For example, a businessman was forced to give bribes on certain officials in order to obtain a business license, the business penyogok protection, which can move from thousands to billions of rupiah.

Second, corruption manipulative. These types of corruption refers to gross operating person to influence government policy or decision making in order to gain maximum profit. For example, a person or a group of conglomerates give money to the regents, governors, ministers and so forth so that the rules are made to benefit them. That then rules out will hurt many people, certainly not the business of the corruptors. Third,corruption nepotistic. Corruption of this type refers to the preferential treatment given to children, nephew, or a close relative in every echelon officials. With the preferential treatment that the son, daughter, niece and wife of the officials were able to take profit as much as possible. Nepotistic corruption is generally run by breaking the existing rules. However, these abuses can not be stopped because nepotistic corruption behind it stood an official who is usually felt above the law. Fourth, corruption subversive. This corruption of the country's wealth in the form of theft committed by state officials. By abusing the authority and power, they can break into the wealth of the country that should be saved. This corruption is subversive or destructive to the state because the state lost a large scale and in the long term may endanger the existence of the state.

[3] Nye, JS, "Corruption and political development: a cost-benefit analysis", in *American Political Science*Review,Vol LXI, No. 2, 1967.
[4] Vito Tanzi, "Corruption, Governmental Activities and Markets", in *IMF Working*Paper,August 1994.
[5] As quoted in Haryatmoko, *Political Ethics and* Powers,(Jakarta: Kompas, 2003), p. 124-125.
[6] Amien Rais, "Succession as a necessity," *paper*,delivered in the Assembly Tanwir Muhammadiyah, Yogyakarta, 1993.

According to Indonesian Corruption Watch (ICW), corruption in Indonesia can be seen from four aspects, namely corruption among officials, corruption within the department, corruption among state-owned enterprises and foreign aid corruption.[7]

Stages of Corruption in Indonesia

As mentioned in the novel Corruption works of Pramoedya AnantaToer,[8] a matter of law violations in connection with state officials, already began to grow well since the beginning of the presence of this republic. Even Hamid Basyaib states that if you like diruntut back, VOC which collapsed at the end of 1799 was not caused by an earthquake or hurricane winds, but by miss management or corruption.[9] As a result, the colonial state inherited none other republics always suffered from the same disease. In the end the people that fall into disrepute, poor and stupid and need to be helped in the early twentieth century with a politicaletische.

This fact means that the question of abuse of power in violation of the rules made by the organizers of power is something that should be accepted in the modern state system. Problem fence eating plants instead of character today, but already inherent in the nature of modern country that always replace the absolute power in the hands transferred to an entity, group or gang called bureaucracy. For if the power is in one hand, corruption called tributes dibelandakan with hernsdienst.When the bureaucrats were also aristocrats, is not overly concerned about corruption, because that sort of thing in the sense of justice is not too intrusive. Corruption as happened in the early republic only became a problem of political elite itself, in the sense of what might happen equally involved in power, how revenue could be different? This means that corruption is a matter of law, breaking the law, and political fatsoen. This fact by Emanuel Subangun,[10] he called the early stages of corruption in Indonesia.

The next stage is when the state authorities to combat corruption with the "mismanagement". After successfully subvert the power of the Old Order, New Order regime under Soeharto was initially also tried to eradicating corruption by forming TOR (Anti-Corruption Committee) and all the knick-perniknya, including laws and appeals. In shorta matter of tribute and herndienst it'sfuss again, and because at that time the ruling class likes to berkongkalikong with about 200 Chinese conglomerate, then corruption is replaced with the name of "extortion" is none other than the usual acronym of "extortion". In legal language, by itself is referred to as abusing power to gain financial benefit unnaturally, as mentioned in the oath of office as political leaders, including the head of our country.

In the appeal, because the law is not efficient enough to combat corruption, but instead allows corruption to walk safely and peacefully in damp places such as the state treasurer's office or elsewhere, then advised that officials are not doing commercialization of office. So extortion is ihwalnya, and commercialization of office is the process. As in any appeal of a political nature, now and throughout the New Order, corruption grows in its natural rhythm. Not shrinkage but thrives equivalent to the rate of growth of our wonderful it was. Because no other appeal is the affirmation of an existence, corruption is no longer solely and primarily legal and political problems, but the problem of buying and selling positions in the bureaucracy. Positions that means close to scarce resources and ultimately financially. Then the commercialization of office is none other than the circuit resign commercial procedures in force.

The most typical of that era is the presence of all the different officials as a commissioner on the company conglomerates! Herein lies the difference corruption during the New Order with the Old Order. In the Old Order, corruption is a matter of difference in the income ladder, meaning that the issue of justice among actors who incidentally is the ruling elite. Entering the New Order era, the problems that arise is no longer associated with the issue of justice, law, and politics, but it is a natural thing for the market expansion that occurs, position the country is one of the important link for smooth business whose name is security in business!

The third stage, when the Reformation arrived and regimes come and go, the face of increasingly kaleidoscopic corruption. BJ Habibie genius preoccupied with advanced technology, and the affairs of the money handed over to his men as they are now appearing in court, Rahardi Ramelan or Akbar Tandjung. The same thing is done Abdurrahman Wahid that it should fall under the pretext of corruption as well, simply because Abdurrahman Wahid was also not too concerned with his own cash flow.

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[7] This reality has also been expressed by Kwik Kian Gie, Minister of National Development Planning / Head of Bappenas. Kwik suspect-but not making any-will be leakage in the utilization of loan funds from the Consultative Group on Indonesia (CGI). The government even officially recognize billions of dollars, which is manifested in various infrastructure projects, each year the leak up to 20%. Kwik added that during this CGI funds channeled tens of billions of dollars. However, the fund was leaked, because the project was done in accordance with the plan or even distorted so that there is no project at all. Check in *Kompas*,January 24, 2003.

[8] See further Pramoedya Ananta Toer, *Corruption*,(Jakarta: Hasta Mitra, 2002).

[9] See Hamid Basyaib, "Extraordinary Spreading Corruption", in the *Journal of*Resonance,Special Issue 2003 Year-End and the Beginning of 2004, p. 67-72.

[10] Emanuel Subangun, "Three Phase History of Corruption in *Indonesia",* in *Kompas,* July 8th, 2002.

Age BJ Habibie and Abdurrahman Wahid is a transitional period in the history of abuse of official authority in exchange for money. New age began to spread when Megawati was sworn in as president and simultaneously collect all her family members for not practicing corruption. Acts of symbolic as real actions, so practically many unnerved. However, it is not how long the president, soon the culture of corruption that took shape that can be achieved civilization. Not again today about the unauthorized inclusion in the bag (Old Order), nor mere commercialization of office (New Order), but more beautiful and more wonderful happened. The subtleties of problem called corruption was framed in terms of corruption (similar community work), but the real fact is the political servants in all layers, ranks, and positions increasingly know and understand the financial value of that position. Now, the office is no longer a chain of commercial systems is growing, but it is becoming one of the strategic commodities for other commodities are not worth selling, production systems are not roads, and buildings monetary / financial continue to falter. In all circumstances erratic, the only salable commodity is in political office! Whether it's in the people's representative, in government, in the military service, prosecutors, judges, and so on.

Corruption Ridden

Corruption country,seems to have been entrenched and not merely belong to the upper strata within the ranks of government. In connection with this issue, in the hierarchy, corruption is perceived to have become a phenomenon inherent ranging from the level of village-level agencies, the district / municipality to the provincial level. Educational institutions, health and religious even did not escape accusations of corruption practices.

Some research shows how the decline of the nation's image. Ranked the image of "countries (ter) corrupt" almost always attached throughout the year. The assessment results Political and Economic Risk Consultancy Ltd (PERC) in 1996 and then, for example, puts the country in third place among the most corrupt countries in Asia, after China and Vietnam.

In the same year, Transparency International a global anti-corruption coalition-issued annual index of the business and academic community perceptions about corruption in more than 50 countries. Of the index, Indonesia is among the 10 countries with the highest degree of corruption. In fact, the worse condition back indicated by the agency Transparency International (TI) in 1999. Indonesia placed as the third most corrupt country in the world, and the position was not changed when the next year of this institution announced the corruption perceptions index (CPI) to 99 countries. New in 2001, ranking unchanged despite not mean much considering the stamp as the fourth most corrupt country in the world restated by IT. In fact, China and Vietnam which in recent years to compete in the matter of corruption in Indonesia, is now outpacing Indonesia towards better after campaigning for the anti-corruption movement by executing their patio officials involved in corruption.

While in terms ofcorporate good governance over the last three years of the ten countries in Asia (Singapore, Hong Kong, Taiwan, India, Korea, Malaysia, China, Thailand, Philippines, and Indonesia) were studied by the Asian Development Bank, Indonesia is in the distended position , Earlier in the early 1990s, Indonesia's economic guru, Sumitro Djojohadikusomo repeatedly claimed to have leakages by 30 percent of the state budget every year. There are many reasons that lead to "achievement" in Indonesia in terms of corruption is so great. In addition to some already mentioned above, corporatism (precisely statecorporatisme)also become a factor that is determined. The realm of the political-economic literature, corporatism is often akin to political practice in which the government (regimes) interacts closely with a large private sector. In the closure, political mapun economic transactions occur only in the interests of a handful of interest groups (interest groups) involved in it. Politics and economics of the transaction usually like this happens informally in vague legal order or legal order that favor the interests of small groups.

Applicability of corporatism is not just a symptom of not working of participatory politics and economics, but also an evidence of distortion of the economic system and democratic politics. Wherever corporatism system will lead to instability that would eventually collapse on itself because of the power of the people (who have been harmed) forced and must get rid of such systems.

In practice, corporatism usually "affair" with the practice of "illegitimate" others called rent seeking (hunt rents) conducted by the ruling elite or elite families in scope. Rent seeking in the practice of trafficking in public office is held by a public official in order to obtain economic kekuntungan, who practice character "corrupt". Corporatism andpractice rent seeking it looks so during the reign of the New Order regime. Accumulation and distribution of capital is only enjoyed by a few people (about 10%) with relatively abundant capital coverage (about 90%). While most people (90% more) are very difficult to access the capital gain only a little (only about 90%).

This bitter reality coupled with the paradigm shift from the previous national development oriented politics become more oriented economy. Most countries that prioritize economic aspects, consequently, the direction of development is more focused on aspects of growth rather than equity. State growth-oriented macroeconomic usually will make as a measuring tool. The parameters of economic growth, income per capita, exchange rate, stock price index (CSPI) is always going to be a measuring tool. In fact, these parameters do not always depict actuality in field.

The per capita income for example, during the New Order our country's per capita income is quite well-though still less when compared to other neighboring countries. However, if the per capita income depicts the true reality? The answer of course not! Most of our society (about 30 million at the time) lives below the poverty line. So how much of our society who live in poverty?

The current government has always argued that the model of growth is embracing the concept of absorption down (tricledown-effect).This means that future growth is expected, capital does not just spin in the scope of large employers, but resapannya also will be enjoyed by many people. Development with a model like this all have seen the results. Building macroeconomic pretty good, but not by economic fundamentals-and of course the political fundamentals are strong. Countries experiencing severe economic crisis. While the "growth" being offered do not produce anything, but most people's economic woes.

Every new government has always promised to eradicate corruption. However, after the power is running, corruption is also reduced, there is even a tendency to increase. Bung Hatta once mengkonstatir that in the New Order era, corruption in Indonesia has reached the stage entrenched. The statement despite obtaining a mixed response in the community, but the truth is undeniable. Following the development of anti-corruption efforts "normative force" from time to time.

Power trustful as a Way Out of Recently

Frosted description about power because we often refer to the exercise of power is gripped by bad politicians. However, the adage "power corrupts" can actually be ignored when the present power trustful, fair and democratic and has a vision and a clear commitment on clean government and goodgovernance.Trustful leadership is leadership that emphasizes exemplary, transparency and accountability in power. Fair leadership is leadership that emphasizes the rule of law and enforce the law for all parties based on a sense of justice without discrimination. Democratic leadership is participative leadership and in the constellation of checks and balances between units of political superstructure and political infrastructure.

This is where the urgency we produce a new leadership that meets the criteria. Without a new leadership that is credible, capable and acceptable, corruption will be difficult to eradicate. How could we wipe the floor with a dirty broom. The powerlessness of law in the presence of strong, plus the lack of commitment of the government elite, they cause why corruption still thrives in Indonesia.

The leadership change, now has rediscovered its momentum through direct presidential election phase of 2014. In the perspective of democracy, elections have two main functions. First,as a means of updating and strengthening the political legitimacy of the authorities that are running. If the government and the ruling party's aspirations for the people, implement the reform agenda, justice and the welfare of the people, then the election function is updating the political legitimacy. The voters came to the polls for mengamanahkan back political sovereignty in her hand. Government and party it deserves the trust back to manage the country and represent the interests of the people. The existence of other parties in the election intended to bear the power of checks and balances so that the government not their toabusepower in defiance of the reform agenda.

Second,as a means mendelegilitimasi old government and form a new government. If the government and the ruling party is not aspirational, ignoring the mandate of reform, driven by bad politicians and is not capable of running the government, the election becomes a momentum for national leadership succession, both at the executive and legislative branches, from the center to the regions. Elections are supposed to be a nightmare for the regime is corrupt, rotten politicians, who like to partyadvocates promise closeout grassroots and anyone who supports them. Voters will "execute" them at the polling booths and divert its legitimacy on the new leader and the party that is aspirational alternative to their interests.

The question is whether voters have a high level of political culture that understands the meaning of the vote and being able to evaluate critically the regime? Or do they just do not have the collective memory of a rather long and can remember the behavior of rulers or ineffective, unfair and corrupt as long as they are in power? If the people's political awareness is low and short political memory, so they are easily entertained and given the "candy politics" by the authorities so that the elections will only serve as contracts renew political momentum and fortitude, power, despite their disappointing performance.

Finally, this paper will conclude by quoting the Greek philosopher Socrates in court:

> "Gentlemen,power gentlemen can make laws at will. But the power of these gentlemen will eventually be defeated feeling of justice of the people who can not turned off or suppressed. Long after I die, gentlemen judges will be known as examples, where the law is not the same as justice. The law comes from the human brain, while justice comes from the hearts of the people ...."And Allaah a 'lam bi Al-Shawaab.

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COOPERATIVE SOCIAL RESPONSIBILITY/CoSR)[1]

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ABSTRACT

The term "Cooperative Social Responsibility (CoSR)" has not commonly been discussed by experts in Indonesia or even abroad. It is probably because the cooperative is a people's economic movement, so its establishment prioritizes the benefit for the people (members of the cooperative). It can be proved by looking at the goal of the cooperative and in the sharing of the remaining results of operations. However, to make sure whether the cooperative is really for the benefit of its members and also the community in general, then it needs data to be able to indicate whether or not the goal of the cooperative is appropriate. Another problem that needs to get the solution is whether the cooperative has carried out the social responsibility. Cooperatives are legal business entities such as privately-owned enterprises and state-owned enterprises (BUMN), which definitely need relationships with other stakeholders. The rrelationships with other stakeholders are also the things that should get a lot of attention fom the cooperative in order that its goal is trully realized. If we consider the goal of cooperatives and the sharing of the remaining results of operations, cooperative business entities can be said to have a principle of great social responsibility. However, the reality in field has shown that some cooperatives, in doing their business, aim only to pursue profit, although the goal shows the pretext for the welfare of the people (members of the cooperative). The conclusion to put forward is that the cooperative has the soul and the value of social responsibility so it can be stated that Cooperative Social Responsibility (CoSR), as that in corporations, has principles or values of Corporate Social Responsibility (CSR). However, the implementation of CoSR in Indonesia has not been as expected from the goal of the cooperative.

Keywords: Social Responsibility, Cosr, CSR.

Introduction

The 1945 Constitution of the Republic of Indonesia, particularly Article 33, verse (1) explains that the economy shall be organized as a common endeavour based upon the principles of the family system. The elucidation of the Article 33, verse (1) suggests that the model of a company which is mostly recommended is a cooperative. It is the prosperity of society which is put in the first priority, not the prosperity of individuals. By paying attention to the words "mutual prosperity" it suggests that the cooperative prioritizes mutual prosperity, not the prosperity of individuals.

The cooperative is a business entity (enterprise) which consists of a person or a cooperative legal entity whose activities are based on the cooperative principle which is an economic movement referring to the principle of kinship. A cooperative in Indonesia can be established by at least 20 (twenty) persons called the primary cooperative or 3 (three) cooperative legal entities called the secondary cooperative.

The cooperative is established to promote the welfare of its members in particular and the society in general as well as to build the order of the national economy in the frame of realizing a developed, just and prosperous society based on *Pancasila* and the 1945 Constitution.

The cooperative is established by a deed of incorporation containing the statutes, which covers a list of founders' names; name and place of position; intent and purpose as well as the business field; provisions on membership; provisions concerning Member Meetings; provisions on management; provisions on capital; provisions concerning the period of its establishment; provisions concerning the sharing of the remaining results of operations; and provisions on sanctions.

In the statute of the cooperative, there is a stipulation on the sharing of the remaining results of operations, which suggests that the earned revenues in one accounting period shall be reduced by the depreciation cost and other liabilities including taxes in the relevant fiscal year. The remaining results of the business consists of 2 (two) parts, those are the remaining results of operations obtained from business with members and the remaining results of operations obtained from businesses with non-members.

The remaining results of operations obtained from business with members are usually shared for cooperative reserve funds, for meritorious members and depositors, for board fund, and for welfare fund of the employees of the cooperative. The remaining results of operations obtained from businesses with non-members are usually shared for cooperative reserve funds, for the management's fund, for the welfare funds of employees of the cooperative, for education funds, and for Regional Development fund.

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With regard to the purpose of the cooperative and also the sharing of the remaining results of operations then the problems arise is " does the cooperative practice the values of social responsibility? Additionally, it also needs to get the solution for the second problem, "Do the cooperative performs cooperative social responsibility (CoSR)?"

Corporate Social Responsibility (CSR)

A company and a society are inseparable entities, because companies exist in the midst of a society and products of a company is for the benefit of members of the society. The existence of companies in a society has experienced a paradigm change, in which at first a company only aims to get profit (responsibility to investors) then it turns into a company that wants to be sustainable. In the new paradigm, a company not only aims to gain profit as much as possible, but the company must try and have a commitment that the company must exist and be sustainable. The company will exist and can be sustainable if the company pays attention to the society. Therefore, a company is not only responsible for the owners of capital but also must be responsible to the public. Responsibility to the society is commonly called as corporate social responsibility.

Corporate social responsibility (CSR) is in a narrow sense defined as the company's moral responsibility to the society. However, in a broad sense, corporate social responsibility also includes a legal liability, i.e. a responsibility arising either by law or by agreement. The company's moral responsibility can certainly be directed to many things, such as to the company itself, to employees, to other companies, suppliers, consumers, distributors, to media, to the surrounding community, to the government and others (K. Bertens, 2000).

A corporate social responsibility is in general the acceptance or the commitment of a company management towards its duties of considering the customers' satisfaction and the society's welfare as a value which is in line with the effort of the company to gain profit. (Suparnyo, 2010). Meanwhile, World Bank defines a corporate social responsibility as *"the commitment of business to contribute to sustainable economic development working with employees and their representatives, the local community and society at large to improve quality of life, in ways that are both good for business and good for development* (Suparnyo, 2010)". From the above definitions, it can be simply perceived that a company should be committed to contribute to sustainable economic development and to develop the quality of life of workers and their families, local communities and the public in general.

Corporate social responsibility began to be discussed in Indonesia around the 1980s and became familiar to the public in the 1990s. Corporate social responsibility is initially a generous activity of a company, in the form of donation to the surrounding community such as giving groceries, *Idul Fitri* allowances, environmental security assistance, environmental hygiene, charity on national holidays, and so on. In a further development, corporate social responsibility is not only to provide voluntary assistance but in Indonesia its implementation has become an obligation for companies, especially companies in the form of Limited Liability Company (PT), as regulated in Act No.40 of 2007 on Limited Liability Company.

In Indonesia, the soul or value of corporate social responsibility was known when the government obliged the State-Owned Enterprises (BUMN) to implement Partnership Programs and Community Development (PKBL). The role of BUMN in PKBL had been realized since the issuance of Government Regulation no. 3 of 1983 on Procedures for the Development and Supervision of Bureau of Companies (Perjan), Public Enterprises (Perum) and Limited Liability Company (Persero). The underlying consideration of the implementation of the program is the existence of the BUMN strategic position in relation to the small (micro) business that has strong point in the field of production/processing, technology, distribution network and human resources utilized to foster and develop the micro business so that it becomes a sustainable and independent business.

The obligation was then followed up with the issuance of Decree of the Minister of Finance of the Republic of Indonesia no. 316 / KMK.016 / 1994, dated June 27, 1994, concerning Guidance for Small-Scale Business Development and Cooperatives through the Utilization of Funds from the State-Owned Enterprises Profit Sharing. The Partnership and Community Development Program was also based on a Decree from the General Director of BUMN Development of the Ministry of Finance and the General Director of Small Entrepreneur Development of the Ministry of Cooperatives and PPK. KEP.155 / BU / 1994, dated October 4, 1994, concerning Guidelines for the Implementation of Small Scale Business Development and Cooperatives through the Utilization of Funds from the Profit Sharing of State-Owned Enterprises. The other legal basis is the Decree of the Minister of Finance of the Republic of Indonesia No. 60/KMK.016 /1996 dated February 9, 1996 on the amendment of Article 3 of the Decree of the Minister of Finance of the Republic of Indonesia No. 316 / KMK-016/1994.The Partnership and Community Development Program was just effective in 1999. This is the government's efforts in giving a coach through partnership programs and providing working capital loans in the form of capital loans to micro, small and medium enterprises and cooperatives with relatively small interest.

The government's policy to reform the BUMN has implications for the tug of social policy of this state-owned enterprise and has found its stable formulation through The government's efforts to promote the public prosperity have always been developed so that the government through the Act Number 19 of 2003 on State-

Owned Enterprises (BUMN) has made policies for the BUMN to coach micro, small and medium enterprises (UMKM) and cooperatives. The Minister of State-Owned Enterprise Decree no. Kep-236/MBU/2003 on Partnership Program of State-Owned Enterprises with Small Business and Community Development Program (Tanri Abeng, 2006).

The government policy in promoting public welfare was then continued, i.e. by the issuance of Act Number 19 of 2003 regarding the State-Owned Enterprises, stipulated on 19 June 2003. The Article 2 verse (1)e states that the establishment of State-Owned Enterprises shall intend to provide guidance and assistance to economically weak entrepreneurs, the cooperative and society.

This Act reinforces the government's efforts in strengthening the partnership program of State-Owned Enterprises with small businesses and environmental development as set forth in the Decree of the Minister of State-Owned Enterprises no. KEP-236/BMU/2003 dated June 17, 2003 on Partnership Program of State-Owned Enterprises with Small Business and Community Development Program.

In the Decree of the Minister of State-Owned Enterprises, it is stated that BUMN are obliged to implement a Partnership and Community Development Program and for the open companies (PERSERO) they can implement the Partnership and Community Development Program based on the Decision determined based on General Meeting of Shareholders (RUPS). The Partnership Program Fund is provided in the form of: (a) Loans to finance working capital and /or purchase of fixed assets in order to increase production and sales; (b) Special loans. The special loan shall be used: (1) to finance the funding requirement of the short-term business activities of the Trainee Enterpreneurs in order to fulfill the orders and the business partnership of the Trainee Enterpreneurs; (2) Grants, which are used to finance education, training, apprenticeships, marketing, promotions, and other activities related to productivity improvement of the Trainee Enterpreneur and for evaluation/research project.

The Community Development Program Fund is used for the purposes that benefit the community in the business area of State-Owned Enterprises in the form of donation for: (a) Natural disaster victims; (b) Education and or training; (c) improvement of health; (d) Development of public infrastructure and facilities; and (e) facilities of worship.

The Partnership and Community Development Program was for example, ever conducted by Pertamina in 2004 and had onated funds amounting to Rp. 500,000,000,000.00 (five hundred billion rupiah) (Pertamina Cybernews, 2005). Funds from the Partnership Program are disbursed in the form of loans to finance working capital of small entrepreneurs. The Partnership Program also allocates funds to finance education, evaluation, research, apprenticeship training, marketing, promotion, and other matters related to productivity improvement of the targeted enterpreneur partners. Meanwhile, concerning the Community Development Program conducted Pertamina donates the fund for providing benefits to the community in the business area of the State-Owned Enterprise. Its allocation is for the victims of natural disasters, health improvement, the development of public infrastructure and facilities, as well as worship facilities.

Based on the Regulation of the Minister of State Owned Enterprises (BUMN)No.Per-05/MBU/2007, the Partnership and Community Development Program (PKBL) are implemented by saving some partial amount of the company's net income. This PKBL is a social task and not a core business of the BUMN. The State Owned Enterprises (BUMN) are obliged to conduct separate accounting management (separated from the company's financial report) on partnership programs and community development programs and submit the periodic, quarterly and annual reports audited by independent auditors to the Minister/shareholder to be approved by the Minister/the General Meeting of Shareholders (RUPS).

The implementation of the PKBL is a corporate action, in which any party, except the BUMN organs is prohibited from interfering in the management of the state-owned enterprises (BUMN). The Partnership program is a forum for the development of UMKM and cooperatives because this program can answer and overcome the weaknesses that have been experienced by the UMKM and cooperatives in Indonesia. The objective of the partnership program is to increase the capability of small-scale enterprises to become strong and independent entrepreneurs through the utilization of the partial amount of state-owned enterprises' profit; to expand access to financing and guarantee to the UMKM for investment and working capital, and to enhance the image of BUMN through partnership programs.

The target of the partnership program to be achieved is to direct the ability of small businesses to become big and growing business by improving managerial skills in entrepreneurship and marketing by providing guidance, working capital loans and investment so that the less healthy small businesses will be healthier, the healthy ones will be more tough, independent and growing to be very healthy. The BUMNs are committed and strive to improve the welfare of the societies in which the companies operate. In order the company can always grow and develop together with the community, the company should develop the economy of the surrounding community and provide business opportunities for the UMKMs.

In order to achieve the objective of the partnership program, the partnership program unit shall at least perform the function of coaching, evaluation, distribution, billing, training, monitoring, promotion, administration and finance. Fulfilling the mandate of the Act on BUMN and as a manifestation of the concern for the economic growth of society and the social environment of the surrounding community, the BUMNs implement PKBL as part of the corporate actions.

By considering the importance and roles of PKBL towards the welfare of the community, the government had affirmed the obligation of the implementation of corporate social responsibility, therefore in 2007 the government issued the Act Number 25 of 2007 on Investment and Act No. 40 of 2007 on Limited Liability Company (UUPT). Article 15 b of the Act on Investment (UUPM) regulates the obligation of investors to carry out corporate social responsibility. The Act on Limited Liability Company (UUPT) also requires companies to implement social and environmental responsibility as stipulated in Article 74.

The obligation for carrying out the social responsibility in the UUPM is addressed to all investors, both individuals and bodies. Meanwhile in the UUPT the obligation for carrying out the social and environmental responsibility is only required for companies incorporated in the form of Limited Liability Company (PT), whereas companies in other forms have no obligation normatively to carry out the corporate social responsibility.

Companies that have to carry out social and environmental responsibility are those in the form of PT and which conduct their business activities in the field and / or related to natural resources. The implementation of social and environmental responsibility is budgeted and calculated as the cost of the company whose implementation is carried out with regard to decency and fairness. Companies that do not fulfill their social and environmental responsibilities are subject to sanctions in accordance with the provisions of laws and regulations.

Based on these provisions, the obligation to carry out Social and Environmental Responsibility is only for the Company or Limited Liability Company (excluding other forms of business such as CV, Firm, Cooperatives, and individual business form), since the mentioned company referred to in the UUPT is Limited Liability Company. However, due to the objective of the regulation on this social and environmental responsibility, which is to realize the sustainable economic development in order to improve the quality of life and environment that benefit the company itself, local community, and society in general, so companies need to do the corporate social responsibility in any forms. The provision is also intended to support the establishment of a harmonious, balanced, and appropriate relationship of the Company with the values, norms and culture of the local community.

In implementing the obligations of the company, the activities of Social and Environmental Responsibility should be budgeted and calculated as the company's expenses carried out with due observance to its properness and reasonableness. These activities are recorded in the Company's annual report. In the event that the company does not carry out its social and environmental responsibilities, the company shall be subject to sanctions in accordance with the provisions of laws and regulations.

Corporate social responsibility is an approach where companies integrate social concerns into their business activities and into their relationships with stakeholders based on the principles of volunteerism and partnership. Some other names that have similarities or are even often considered identical with corporate social responsibility (CSR) include Corporate Giving/Charity, Corporate Philanthrophy, Corporate Community Relations (Public Relations), and Community Development. The four names can also be seen as a dimension or approach of Corporate Social Responsibility in the context of Social Investment which is lit by a spectrum of motives ranging from charity to empowerment motives. Corporate social responsibility is one of the principles (Mas Ahmad Damiri, 2005) of good corporate governance (GCG) besides transparency, accountability, independence, and reasonableness.

The Cooperative Social Responsibility (CoSR)

Values of the Cooperative Social

In the Indonesian legal system, parties who may own or have rights and obligations are legal subjects, consisting of persons and legal bodies. The cooperative as a legal entity definitely has rights and obligations. The rights and obligations of the cooperative may be born due to law or derived from an agreement. Right is everything that can be maintained or owned, while the obligation is everything that must be done, so that it raises the responsibility for the party who has obligations.

The sense of the responsibility in General Dictionary is a condition where it is obliged to bear everything, so it is obliged to bear responsibility, bear everything or give answer and bear the consequences. Cooperative business entity in running its business activities must also be responsible for all actions taken. The Indonesian Cooperative is based on the provisions of Article 33 of the 1945 Constitution of the Republic of Indonesia, particularly verse (1) which states that the economy is constituted as a joint effort based on the principle of kinship (family system). The model of a company in accordance with this provision is the Cooperative.

In the provisions of the Cooperative Act, cooperatives have a function of building and developing the potential and economic capacity of the members in particular and the society in general to improve their economic and social welfare. Cooperatives are also expected to participate actively in the efforts to enhance the quality of human life and society. Cooperatives also play a role to strengthen people's economy as the basis of strength and national economic resilience with the cooperative as the pillar. Cooperatives should also seek to realize and develop the national economy that is a joint effort based on the principle of kinship and economic democracy.

The Implementation and Management of the Cooperatives should be in line with the following principles: (1) membership is voluntary and open; (2) management is carried out democratically; (3) the sharing of the remaining results of operations is done fairly in proportion to the load of the business services of each member; (4) giving of limited remuneration to capital; and (5) independence. Additionally, cooperatives also implement the principles of the cooperatives, such as cooperative education; and cooperation between cooperatives.

In the perspective of the field of business, the cooperative business is directly related to the interests of its members to improve the business and welfare of the members. If there is an overload of service capacity, the cooperatives can be used to meet the needs of people who do not belong to the members of the Cooperative. Cooperatives run business activities and play a major role in all areas of the economic life of the people.

Referring to the provisions in the Cooperative Act, it can be stated that the conducted activities contain principles or values of social responsibility. The social principles or values of the cooperative can be inferred from the provisions of the Cooperative Act, as follows:

(1) The undertaken business is based on the principle of kinship;
(2) It has the function of building and developing the potential and economic capacity of its members in particular and the society in general to improve their economic and social welfare;
(3) It should actively participate in the efforts to enhance the quality of human and community life;
(4) It is also established to meet the needs of the non-cooperative members of the community;
(5) It seeks to realize and develop the national economy;
(6) It plays a major role in all areas of people's economic life.

The Implementation of the Cooperative Social Responsibility

The cooperative conducts its business activities based on the prevailing laws and regulations, Statutes, Bylaws and Annual Work Program. Business activities undertaken can be directed to members and non members. Service to non members is done if the service to members has been fulfilled or done. Technically, the implementation of business activities is based on Statutes and Bylaws and Annual Work Program. Business activities undertaken by the cooperative are basically in order to meet the needs of its members. In meeting the needs of members, cooperative management always strives to be able to provide good service. Cooperative business activities in each annual accounting period shall be accounted by the Cooperative Board to the members. Members' accountability to members is done through the Annual Members Meeting (RAT), in which there will also be the sharing of the remaining results of the business (SHU). The percentage of SHU shares is based on the provisions set forth in the Statutes.

The sharing of SHU in the cooperative, especially the Village Unit Cooperative (KUD) in Demak Regency is done by the following percentage:

1) 50% for the holders/owners of capital;
2) 25% for the reserve;
3) Cooperative Social Development, among others:
   a) 10% for organizational donation within the cooperative environment;
   b) 10% for environmental cooperative religious activities;
   c) 2.5% for social donation of the cooperative environment;
   d) 2.5% for natural disaster response donation.

From the sharing of SHU it can be seen that the social responsibility of cooperatives is done through social and environmental development with a total of 25% of SHU. This is somewhat different from the implementation of corporate social responsibility, in which the budget for the implementation of corporate social responsibility must be budgeted in advance at the time of preparation of the budget, not taken from the profit.

The implementation of the cooperative social responsibility is in practice not the same as the implementation of the corporate social responsibility. The implementation of the cooperative social responsibility has not been as expected as well as the corporate social responsibility.

In terms of the principles or values of social responsibility in the cooperative, many of the cooperatives have not implemented the values. Though not yet ideally done, there have been efforts to apply the values of cooperative social responsibility. In fact, some cooperatives, such as the Village Unit Cooperative (KUD) in Demak Regency are still to fulfill their responsibilities internally or to internal stakeholders.

Therefore, the social responsibility of the cooperative is still limited to the internal stakeholders, that is the responsibility to the members. The social responsibility of the cooperative towards external stakeholders is still limited to the effort of establishing its relationship with the local government, i.e. the government at the sub-district level. The relationship between KUD and the local government is seen during the Annual Member Meeting (RAT).

The social responsibility of cooperatives (KUD) in Demak Regency as written in the Statutes/Bylaws, in the form of a cooperative environmental development, has not been realized in practice, because the SHU allocation for the environment is still very small.

Closing

From the discussion above, it can be concluded that:

(1) The Cooperatives, especially the Village Unit Cooperatives (KUD) have the values or principles related to the social responsibility in conducting their business as written in their Statutes and Bylaws.

(2) The implementation of the Cooperative Social Responsibility, especially by KUD is still limited to the social responsibility for internal stakeholders, while for the external ones, it is still limited due to the limited fund taken from the remaining results of business (SHU).

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DEMOCRACY "CHARACTER" LOCAL WISDOM BUILDING DEMOCRATIC POLITICAL AWARENESS OF CHARACTER "AKAL BUDI" AUTENTIK INDONESIA: A STUDY FROM EXPERIENCE OF GOVERNANCE SYSTEM OF REPUBLIC OF NAGARI IN WEST SUMATERA

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ABSTRACT

Although democracy has become the icon of the world, democracy still has the potential to accommodate in itself the values that are of national locality. The values then make democracy different from one country to another. There is a tendency to strengthen the role of the state by reducing the role of popular sovereignty, the development of democracy in the end tends to face the interests of the people themselves. Democracy is no longer a symbol of power politics in favor of the people. In order to maintain the consistency and content of morality or character in democracy, the values of indigenous peoples, such as Nagari which develops musyawarah, togetherness, control, supervision, togetherness, etc., have the potential to encourage the realization of an authentic and authentic Indonesian democratic system. Although institutionally, the development of institutional model of democracy has been good enough, but the institution or organization can not be separated from the substantial values that will lead and at the same time keep it running in the corridor of democracy. Because, the strong tendency of power tends to corrupt and abuse of power, then the values of morality that became the character of Indonesia should be affirmed in the democratic system adopted by the Indonesian nation today. Thus, the goal of realizing a politically just social life for all Indonesian people can be realized.

Keyworld: Democracy, Local Wisdom, and the Republic of Nagari

Introduction

Our Democracy Problems

The main problem of the implementation of Indonesian democracy today is the direction of development that tends to the good of the state, b eliminating people's cause. Democracy is no longer working for the sake of the people as souvereignity sovereign owners, which is the strengthening of the government (state) so as to place it more autonomously with full and constitutional power to do good actions according to the government, not the good according to the people. The ideologicalization of power as a result of the application of democracy without value and idealism has resulted in:

a) The whole life of the people is fully determined by the central government, while the position of local government and its people is no more as a legitimator for the establishment of absolute power in the central government.
b) State tools, in the name of the interests of the people, work in addition to strengthening their institutional identity, while at the same time strengthening the power network of its political parties within the state. So the interests of the sovereign people are merely complementary.
c) The loss of people's democratic rights as the owner of full sovereignty over the state, ranging from legalization efforts to all actions of the people to the formalization of community life by ignoring the rights of participation, independence, and self-reliance.
d) The sovereign is no longer a development orientation, development is top down, the government claims directly what and how the will of the people, the nrimo people, if not considered as an act against the will of the government.
e) The intimidating political style should not ask what the state has given you, but ask what you have given to the state. Unlike the democratic political style, do not ask what the people have given to the state, but ask what the state (government) has given to the sovereign. Therefore, the government (state) on behalf of the people with absolute power has full authority to take actions and policies related to the interests of social justice for all the people of Indonesia.

Some of the implications of the conception of democratic conception above, would be dangerous for the growth of democracy and the conception of the nation state of Indonesia that is civilized. Because, with the potential power of power tends to corrupt, power can act arbitrarily abuse of power, and power can issue policies and regulations to defend its interests, the potential power will act otherwise, better protect its own interests, than the people, always declaring himself working for the benefit of the people.

Understanding

The concept of democracy is the only social concept has globalized that is not restricted by the bounds of the locality of a nation. Democracy becomes a world icon adopted by almost all nation states that declare themselves as a sovereign state. Despite the "unlimited" nature of democracy, it can not be denied that the influence of the culture and culture of a country remains a color of democracy. Therefore, the application of democratic systems between America and Britain is different, as is the implementation of democracy between Brazil and Indonesia, respectively, attaching their cultural authenticity to democracy, which Soekarno calls the character (welstanchaung)[1]. And that character is then as the basis of differentiation between countries sesame adherents of democracy.

In a general sense, the term or concept of Democracy has been understood by almost all countries as a "government based on the interests of the people". The people are therefore seen as the highest sovereigns in a country. In spite of the fact, concrete or practice is done in different patterns and models, whether through state, federal and united forms, as well as forms of republican and parliamentary government, as well as in the form of people's legitimacy through direct election or representation systems. Democracy remains the icon of these countries, although later, the diversity of practices often leads to an anomaly situation with the principle of democracy itself.

Democracy according to Dahl is a political system that originally developed in Greece. Derived from the word demos which means people and cratia means government, then democracy is meant as "government by or from the people". Within the framework of sovereignty, democracy is meant by "the government is completely independent of the influence of the king's power or the power of the nobles." [2] Democracy thus, firmly rejects monarchism and aristocracy because these two forms of government both annul the people's sovereignty in their government.

Therefore, the power of government is exercised in the perspective of "the sovereignty of the people", then the sovereign people equally affirm the role of values that live in society itself. Local wisdom is not only related to the social structure of a society, but rather it leads to a conception of liberalism, pluralism, and egalitarianism. Where the sovereign people, not only in terms of body or physical human, in it also contained human values consisting of mind, soul, and humanitarian rights to be declared as a whole human (sovereign) sovereign. Therefore, democracy then requires no distinction between social strata and social titles attached to a person, all the same.

Democracy will not be meaningless without the values that bind it. For, with the principle of the sovereign people embedded in its true identity, democracy must be exercised over a corridor that can prevent it from anarchism tendencies, since, the majority tend to impose its will on minority groups. [3] The rational, utopian and idealistic definitions affect much of medieval theoretical, yet lose much of their influence when implemented in state practice.

The narrowness of the meaning of democracy by Anders Uhlin is called the minimalist definition[4] contained in the concept of ancient Greek democracy resulted in the limited meaning of the concept of ancient Greek democracy on aspects of government and abstract power. In fact, democracy has a broad aspect that is concerned with the life of the people themselves. [5]

Looking at the weaknesses of the maximalist democracy definition, experts especially post-1950s, try to reconstruct the definition into a more maximalist definition[6]. The maximalist definition or procedural definition places democracy as an empirical, descriptive, and institutional concept. Schumpeter explains:

> An institutional plan to achieve political decisions in which individuals gain power to decide politics, in which individuals gain power to decide by means of a competitive struggle over the voice of the people"[7]

The people referred to are government of the people, by the people, for the people. [8] Who has absolute power with strong representation to give political role to its representatives, both in government and

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[1] Safroeddin Bahar dan Nannie Hudawati (ed), *Risalah Sidang Badang Penyelidik Usaha-Usaha Kemerdekaan Indonesia (BPUPKI) dan Panitia Persiapan Kemerdekaan Indonesia (PPKI) 28 Mei 1945-22 Agustus 1945*, 1998, Jakarta, Sekretaria Negara Republik Indonesia, hlm.92

[2] Robert A. Dahl, *Analisa Sistem Politik Modern,* terjemahan, Sahat Simamora, dari judul, Modern Political System, Bumi Aksara, Jakarta, 1985, hlm. 16

[3] Robert A. Dahl, *Demokrasi dan Para Pengkritiknya,* terjemahan, Yayasan Obor Indonesia, dari judul, Democracy and Its Critics, Yayasan Obor Indonesia, Jakarta, 1992, hlm. 43

[4] Anders Uhlin, *Oposisi Berserak: Arus Deras Demokratisasi Gelombang Ketiga di Indonesia,* terjemahan, Rofik Suhud, dari judul, Indonesian and The Third Wave of Democratization The Indonesia Pro Democracy Movement in Changing Word, Mizan, Bandung, 1998, cet, ke-2, hlm. 9

[5] Samuel P. Huntington, *Partisipasi Politik di Negara Berkembang,* terjemahan, Sahat Simamora, dari judul, No Easy Choice : Political Participation In Developing Countries, Rineka Cipta, Jakarta, 1990, hlm. 39

[6] Anders Uhlin, *loc.cit*.

[7] *Ibid*., hlm. 269

[8] Wiliam D. Halsey and Bernard Johnston (eds), *Collie's Encyclopedia,* New York : Macmilan Educational Company, 1988, hlm. 75

legislative. According to Dahl, the ideal process of implementation of democracy will be seen on five criteria that can not be avoided if the government are:

a) equality of suffrage in making binding collective decisions, the privileges of every citizen should be considered in a balanced manner in determining the final decision,
b) active participation. The whole process of collective decision-making, including the stage of collective decision-making, including the determination of the agenda of work, every citizen should have equal and adequate opportunity in declaring his privileges in order to realize the final conclusion,
c) The exposure of the truth. In the time possible, because of the need for a decision, every citizen must have equal opportunity to carry out a logical assessment in order to achieve the most desirable outcomes,
d) final control of the agenda. The community must have the exclusive power to decide which issues should and should not, and
e) coverage. Society must cover all adults in relation to law.[9]

Based on Dahl's formulation above, the modern conception of democracy is no longer letting the government (state) act without involving the people. The occurrence of misconceptions that take place today, where with the system of representation, people's power asasiah taken over by the House of Representatives / DPD to the area, the will, aspiration, control and transparency of government (state) to the people become erased and lost. This situation is increasingly in perparah when the President with DPR / DPD / DPRD have the same political interests, then what happens then is merely Democracy Political Party Daulat, which further strengthens the state of democratic deficit. According to Daniel Sparingga:

Among political analysts, the five-year transition of democracy in Indonesia is characterized by what they are conceptualized with the term "deficit democracy". One of the most important parts of the analysis of this issue highlights the role of political parties that are perceived as less seriously implementing the reform agenda for the purpose of democracy. In general, political parties in Indonesia have lost their true ideological orientation to a meaningful change. Party elites are often involved in debates characterized by the uncertain ideological battlefield and power struggle. Both are mixed, often very manipulative for using ideological themes for a very political purpose, namely power for power.[10]

Values of Local Wisdom in the Democracy of Indonesia: Learn from the Experience of the Republic of Nagari in Minangkabau

Indonesia in the context of modern governance, has not reached the age of a century. Meanwhile, in the context of the nation under the great and small kingdoms have begun since the year 306 AD, ranging from sabang to merauke. The life of the nation in the monarchi political tradition, as it is experienced by other nations in the world, provides the experience of resources for Indonesia to live in a sophisticated political order. Because, the traditions of Unity of Indigenous People (KMHA) which reach 250 zelbesturendelanschappen and volkgemeenschappen. [11] Local life is small, as Van Vollenhoven has argued[12] :

> that when the first Dutch trade fleet entered (and anchored) in the archipelago (Banten 1596), the Indonesian state was not a wild and empty area (woest en ledig). In Indonesia at that time there has been the structure of society and government in the composition of tribe, village, republic and kingdom.

The structure of the governed society as stated by Van Vollenhoven shows how the Indonesian archipelago (later became Indonesia) has organized its social, political and governmental life in a modern way, even though it is not in written form. Glen Wright, sees the customary law contained in Indonesia with the various prerequisites of value contained in it is very modern.

Indonesian law is based on a civil law system incorporating elements of customary law and Dutch law. Prior to colonisation by the Dutch in the sixteenth century, Indonesia was ruled by numerous independent indigenous kingdoms, each with their own customary laws. Following independence in 1945, Indonesia started to develop its present legal system, infusing new laws with the precepts and concepts of existing laws. As such, customary law known as adat law remains a part of the modern Indonesian legal system.[13]

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[9]Robert A. Dahl, *Dilema Demokrasi Pluralis*, *Antara Otonom dan Kontrol*, terjemahan, Sahat Simamora, dari judul, "Dilemmas of Pluralist Democracy" Rajawali, Jakarta, 1985, hlm. 10-11

[10]Daniel Sparringga, " Partai Politik dan Transisi Demokrasi", *Pengantar*, dalam, Thomas Meyer, *Peran Partai Politik dalam Sebuah Demokrasi*, 2012, Jakarta, Friedrich-Ebert-Stiftung (FES), hlm. 18-19

[11]Penjelasan Pasal 18 UUD Tahun 1945

[12]Dikutip dalam Bagir Manan, *Beberapa Masalah Hukum Tata Negara Indonesia*, 1997, Bandung, Alumni, hlm. 206

[13]Glen Wright, "Indegenous People and Customary Land Ownership Under Domestic Redd Framework : A Case Study of Indonesia", *LEAD Journal (Law, Environment and Development Journal)*, 2011, Vo. 7/2, hlm. 125

Even then, customary law is categorized modern in its day, because society has been arranged in legal relations in various aspects of life. Unlike other indigenous peoples in various countries. Where, their lives take place in a custom process not regulated by normative agreements. [14]

Thomas E. Davitt's understanding and conclusions on several examples of the countries he put forward in his book. A distinctive difference when compared with the Minangkabau Traditional Law concept, the place where Nagari was born. These agreed values become law even if not written, but in the maxim and mamangan, which develops orally from generation to generation, the legal counseling process continues over a considerable period of generations.

Nagari as a symbol of power of Minangkabau indigenous people, can be called as a republican power. Soekarno is referred to as the "desir d'etre ensemble",[15] which is a large family that has an integrated value structure in a Minangkabau culture. Therefore, the reason strong enough to confirm this view is that Nagari was first born of the Pagaruyung Kingdom. His relationship to the power of the Pagaruyung Empire was not hierarchical and the imperial power rushed to the small areas. Nagari is autonomous, because it is more concerned about the tribe and the people who are under his control. And the number of people who are genealogical in the Nagari region is a minimum of 8000 to 18.000 population. As stated by Imran Manan[16] "the traditional authority of the king of Minangkabau seems to be only a symbol of unity of the Minangkabau Minangkabau republics and the maintenance of relations with people outside the Minangkabau realm". Further stated Wendra Yunaldi, "The kingdom of Minangkabau therefore not also as a symbol of power center that nourish Nagari. Nagari and the Pagaruyung Kingdom are like two sides in one coint, each standing alone bunch by Minangkabau custom ". Therefore, Nagari in West Sumatra never experienced life in a feudalistic power system.

Living in a society that has never experienced a feudalistic culture, is able to foster philosophical values such as deliberation, consensus, mutual cooperation, communalism and unity. This conception is then adopted by Article 18 of the 1945 Constitution that is the traditional root of Nagari customary law community in Minangkabau. Some of the characteristics of the democratic social system of the Nagari community in Minangkabau, according to Wendra Yunaldi[17] taking into account several traditions that have taken place in Nagari society since the beginning, are:

a) have a philosophy of life
b) have a clear identity
c) sovereign
d) the nature of togetherness (communal)
e) religious
f) authority
g) decency
h) tepa slira
i) harmony
j) gotong royong
k) the objective and accepted objective legal order
l) clear and legitimate leadership
m) supervised, controlled and responsible leaders
n) representative and representative representation bodies
o) Deliberation in decision making.[18]

According to G. Kartasapoetra[19], history has proven that all the traditional legal or community associations of our ancestors have always shown the will to:

[14]Thomas E. Davitt dalam penelitiannya di berbagai negara terkait dengan hukum primitive (hukum kebiasaan), menunjukkan bahwa hukum kebiasaan yang berlaku di tengah-tengah masyarakat tradisional hanyalah nilai-nilai yang berkaitan dengan kepentingan individu-individu dalam kelompok tersebut. Nilai-nilai tersebut tidak bersifat universal, sehingga ia tidak diberlakukan universal untuk seluruh kelompok masyarakat. Thomas E. Davitt, *Nilai-Nilai Dasar di Dalam Hukum, Menganalisa Implikasi-Implikasi Legal-Etik Psikologi & Antropologi Bahi Lahirnya Hukum,* 2012, Yogyakarta, Pallmal Yogyakarta, hlm. 41

[15]Safroeddin Bahar dan Nannie Hudawati (ed), *Loc.Cit*

[16] Imran Manan, Birokrasi Modern dan Otoritas Tradisional di Minangkabau (Nagari dan Desa di Minangkabau, 1995, Padang, MRC FPTK IKIP Padang, hlm. 43

[17]Wendra Yunaldi, "Rekonstruksi Regulasi Kesatuan Masyarakat Hukum Adat Nagari yang Berbasis Keadilan Dalam Bingkai Negara Kesatuan Republik Indonesia, *Disertasi,* 2017, Semarang, Universitas Islam Sultan Agung, hlm. 158

[18]*Ibid*., hlm. 152-153

[19]G. Kartasapoetra, *Desa dan Daerah dengan Tata Pemerintahannya*, 1986, Jakarta, Bina Aksara, hlm. 119-120

a. Always tolerate
b. Always participate
c. Always help out and in an atmosphere of unity
d. Always actively combining unity and unity in the form of mutual cooperation, and
e. And others that show a principle that has a universal value, where one characteristic of it is "not justify the split

Koentjoro Poerbopranoto[20] states: Regarding the original elements of democracy still in the indigenous communities throughout Indonesia, BJ Haga in his book "Indonesische en Indische democratic" has meticulously collected and examined the materials in each of the indigenous peoples he learned and came to a conclusion that in Indonesia there really is a kind of "eastern democracy.

The term eastern democracy certainly affirms the differences of democracy that exist in Indonesia with the democratic ideas that are in the Netherlands, so that B.J. Haga came to that conclusion. Soetardjo by looking at deliberations and meetings held by villagers as the embodiment of democracy based on the One Godhead, according to the philosophy of "Manunggalnya Kawulo Gusti".[21] Three things can be understood from Soetardjo's opinion, that is, first, put the human (meeting participants) in the same position, parallel and not caste, and secondly, the absence of authoritarian decision-making and without involving the interested community, and third, and involvement of all stakeholders in the village to make an agreement for the common good.

Nagari in West Sumatra, better known as the nagari republic, [22] has regional and adat powers as well as integrated. I.H.DT.R. Penghulu[23] states:

> Indigenous democracy in Minangkabau is not according to Western mathematics, Minangkabau democracy is sovereign to the people, its roots deeply into the hearts of society. Therefore, he is souveran, native and has its own personality, Minangkabau democracy united with the fairy of people's life, the philosophy of the people's life studied by nature ... This is Minangkabau democracy whose wadjahnya imagine in the composition of society, pendjel maan from the customs and laws that from the beginning become fixed in a long pole, anchored to a simmering sea, as rising with smoke, as with the dew.

Making Authentic And Independent Democratic Politics Indonesia

Hatta[24] stated that "the Indonesian political joints consist of two forms, namely the sovereignty of the people and the deliberation of the people". People's sovereignty necessitates a building system in which the sovereignty of the people really manifests substantially and formally. Substantially, the values contained in it can elaborate the whole way of thinking of the elements of the nation, such as legislative, executive, judiciary and civil society to strengthen the constitutional building, especially in the application of democracy in accordance with the will of the sovereign people. The will of the sovereign people is then carried out with a model of "deliberation" as a system that eliminates differences and barriers, be they political or natural. That principle is called the political morality of the nation. Where value is more important than the way or system is formed. The political morality of the nation should be built with a family model, as Sukarno, Hatta, Soepomo and M. Yamin and almost all the founding fathers in the sessions of BPUPKI and PPKI 1945.

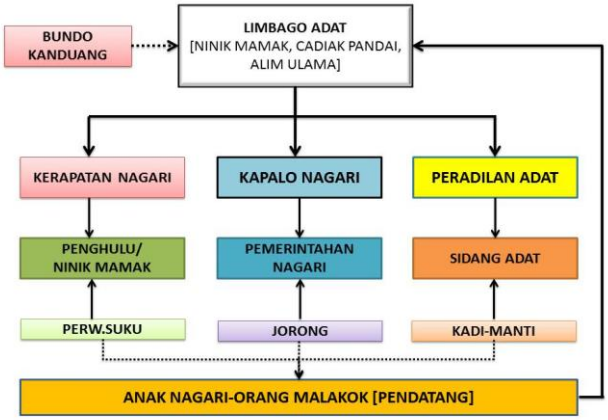
Excessive democracy, democratic deficit, or other terms that indicate a decline in subsistence democratic meaning today, so that democracy as a tool to realize the ideals of Indonesian nation life becomes obstructed, the structural approaches that have tended to be used by the state, both in the era of guided democracy, then in the era of Pancasila democracy and to this day when democracy lives merely the political jargon of the regime. There needs to be a new approach and awareness that started from strengthening the values of the character of local wisdom owned by indigenous peoples of Indonesia.

The model of the Nagari republic is able to provide solutions for the implementation of alternative democracy in order to reinforce the articulation of democracy in the life of the nation and the state at this time. Nagari as stated by Hazairin basically has exemplified the model of representation through the House of Representatives (DPR) [25]. In the concept of political representation which at the same time embodies the people's representatives, the essence of the function of the political party from which the birth of political representatives is expected to be the leader of the people in managing and solving the problems faced by society. although, it can not be denied, the interests of political parties are more precedent than the interests of

[20]Koentjoro Poerbopranoto, *Sistim Pemerintahan Demokrasi*, 1987, Bandung, PT. Eresco, hlm. 82
[21]Soetardjo Kartohadikoesoemo, *Desa,* 1984, cet, ke-1, Jakarta, PN. Balai Pustaka, hlm. 221
[22]Ungkapan Republik Nagari ini dipopulerkan oleh Tsuyohi Kato, dalam, Aidul Fitriciada Azhari, *Rekonstruksi Tradisi Bernegara Dalam UUD 1945,* 2014, Bantul-Yogyakarta, Genta Publishing, hlm. 35
[23]I . H. DT. R. Penghulu (pen), *Adat Minangkabau,* 1968, t.p, t.tp, hlm. 121
[24]Mohammad Hatta, *Demokrasi Kita, Pikiran-Pikiran tentang Demokrasi dan Kedaulatan Rakyat,* 2009, cet, ke-2, Bandung, Sega Arsy, hlm. 60
[25]Hazairin, *Demokrasi Pancasila*, 1985, Jakarta, Bumi Aksara, hlm.55

the people, so what is the wishes and expectations of the people, not necessarily the wishes and expectations of political parties.

In Nagari, the leader or pengujulu incorporated in Limbago Adat as the supreme institution in power to straighten the executive, legislative and judicial policy. As the structure of Nagari put forward Wendra Yunaldi[26]:



Ninik mamak meetings in Lembaga Adat, in addition to resolving tangles (problems) among the three elements, they are also a place of complaint for the community for the actions and policies taken by the elements of the nagari. Thus, with their position of direct representation of their people (tribes), elements such as the legislature, the judiciary, and the executive, because of the legitimetious disconnect on them, the three institutions are very cautious and pay attention to the decisions they make.

This condition is somewhat different from the position of the People's Consultative Assembly (MPR), with members consisting of members of DPR and DPD, inevitably the political intervention in its policy is inevitable. The people are difficult, if it is not possible to directly complain to the MPR. The authority of the MPR as regulated in Article 2 and 3 of the 1945 Constitution of the Republic of Indonesia, the MPR is only authorized to amend the Constitution and then to inaugurate and dismiss the President. The People's Consultative Assembly (MPR) does not have the authority of the people to remedy the mistake, whether it be the President, the DPR, the DPD or the judiciary. These state institutions are independent and the MPR has no authority to voice the aspirations of the people, when these state institutions fail to carry out their duties to realize the expectations of the people. Simple cases are seen in the absence of accountability when planned programs fail to be implemented by the President, Governor, or Regent / Mayor in his tenure, or they are unable to satisfy the public. The President or the regional head, when it failed to materialize the expectations of the people, was solely linked to political sanctions. Which because of the failure they can not be considered to have committed unlawful acts.

When using Robert A. Dahl's perspective on democracy, in the model adopted by Nagari, equality, active participation, truth-proclaiming, final control of the agenda and coverage, have not been implemented. The absence of these basic principles is due to the current model of representation, more to the effort of co-opting legitimacy by political institutions.

For the three aspects of Dahl's perspective above, namely participation, transparency and control by the people against the government (state), tend to be weak. People's aspirations and participation have been represented to the DPR and DPD. In the modern political system, this representative institution works in the interests of the people who empower them to follow the aspirations and wishes of the people. In the third thesis, Meyer,: Political Parties translate the value and importance of a society in a bottom-up process * so that the values and interests of that society become the draft state laws, binding regulations, and programs for the people. [27] However, seeing the current political dynamics, the relationships between the representatives (political parties) and the people, are only limited to five years of political contestation, after which the representatives (political parties) are busy with their internal political interests in relation to power. Although, the activities of members of the People's Legislative Assembly in the form of a recess to their electoral districts, such activities are no more merely ceremonial.

Unlike the democratic model developed by the leaders in Nagari, they are always present in the pulse of aspirations and the problems faced by the people (tribes). It is they who sometimes ask for a high meeting in Limbago Adat to resolve the kusuik (dispute) that occurs within the tribe and the people. According to

[26]Wendra Yunalid, *Op.Cit*., hlm. 454
[27]Thomas Meyer, *Op.Cit*, hlm.30

Emeraldi Chatra: in his position as a community leader, a penghulu is no longer a free individual in behaving ... it may even be said to be silent on his own behalf or exhibit anarchist attitudes." [28] B.J Haga as Koentjoro pointed out, the element of traditional democracy in Indonesian custom is partly a "democratie directe", in which customary chiefs together with elected representatives, constitute a council of adat officials. .[29]

In terms of expressing aspirations and control over power. The principle of democracy in Nagari establishes its authority based on the principles of kinship and mutual cooperation. Even though, the public has the right to voice aspirations and evaluate the performance of their leaders, all done in polite and civilized ways, bajanjang ride batanggo down. That is, open participation for all communities and individuals open opportunities to voice things that are perceived to be detrimental to their interests. However, everything is done in ways that are customary, that is using the principle alua jo patuit (propriety). Because, on the basis of the principle of chaos, any evaluation and criticism given is not to destroy, but in order to maintain straightness and responsible attitude. Because, from wrongful deeds that are fatal will harm the common interest. As M. Nasroen puts it: the happiness of a person with and within it is achieved on the basis of the form and composition of society based on the principle of, by and for cohesion also ... [30]

Based on the above description, Indonesian democratic character of local wisdom is basically very likely to be developed in this democratic political tradition in modern times. The purpose of democracy is not solely on the realization of representative political institutions, but also, to fulfill the will of political behaviour living in society. this perspective is what the founders of the country call the political morality of the Indonesian nation. And that morality, very rich is contained in the value structure and cultural system that lives in Indonesia, one of them, like Nagari. Branded clothes can be made in america, but kerpibadian must be made in Indonesia.

Closing

The democracy of local wisdom as embodied in Nagari in Minangkabau teaches about the meaning of democracy as a model of political life that synergizes the institutional interests of the state with the values of morality. State institutions that are void of value, and disregard the role of value in their systems, tend to be a tool of power that negatively affects democracy itself. And on the other hand, will increasingly marginalize the sovereign people in the political order.

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PERSPECTIVE OF FAMILY PSYCHOEDUCATION THERAPY FOR TREATMENT SANCTIONS AGAINST MENTAL DISORDERS CRIMINAL ACTORS

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ABSTRACT

Law 44 of Criminal Code determines the sanction of the caring action in the psychiatric hospital for disorder criminal actors. The formulation of Criminal Code Law No. 44 is based on the disorder concept on 1880; while in fact, in its improvement, both the mental disorder concept in the psychology and the aim of criminalization has paradigm change. Perspective family psychoeducational therapy as the helper/support for the activity of sanction on the maintenance action in the psychiatric hospital, it needs to be considered to be applied in the criminal law of Indonesia. This issue emerges as long as the progress of the mental disorder concepts in the psychology and its punishment aim. The decision to put the criminal actors to the psychiatric hospital is one of the *treatment* that the aim is not to hurt the criminal actors, but this decision is regarded as the best solution for the criminal actors who suffer from mental disorder. However, the family psychoeducational therapy contrasts with the existence of the family as a whole system and it cannot be separated each other. Family also can participate actively in supporting the psychotherapy treatment for the criminal actors who suffer from mental disorder that get maintenance action in psychiatric hospital.

Keyword : Family Psychoeducational Therapy; Treatment Sanction; Mental Disorder Criminal Actors

Introduction

Since Rome monarchy, law stated that people who are regarded as *non compos mentis – without mastery of mind-* (does not have ability to control his mind) cannot be regarded guilty of their criminal act.[1] The main logic is it immoral to decide that mental disorder people are guilty and punish them for their acts. From opinions above, it indicates that asking responsibility to mental disorder people for their acts is immoral, because their lack ability in controlling their mind.

Article 44 of Criminal Code formulates that people who are included into *non compos mentis* condition are having mental disorder and lack of controlling their mind because of some diseases. If people who suffer from mental disorder *non compos mentis condition do crime*, the sanction sentencing is sending them to psychiatric hospital with the longest time is a year. There are principal differences between the punishment and the treatment. According to Sudarto,[2] "dogmatically, criminal is regarded as the punishment of the mistakes of the doer, while the treatment is decided to protect society from the crime that is done by the doer".

Consider the opinion of Sudarto, that the basic treatment sanction is to protect society from the crime of the doer. The society protection in the treatment sanction context must be understood extensively. This opinion must be understood by the whole society, especially the family of the perpetrator have lived together as one family. In the case of mental disorder offender, family has important role to be involved in supporting the successful of the treatment sanction into psychiatric hospital.

According to Barda Nawawi Arief, "guilt principle is fundamental principle as a pair with the legality principle which those are the idea realization of mono-dualistic balance". Guilt principle "not shall be punished without fault" or geen straf zonder schuld, is basic of not sentencing the mental disorder offender, although his act opposes the law which as the legality principle. However, the perpetrator can be punished by sending them to psychiatric hospital.

Sending the mental disorder offender to psychiatric hospital is not as the form of criminal responsibility, this decision is based on reaching the necessity of mono-dualistic balance idea. Those are between interests of the community (general) and individual interests. In other side society feels safe from the possibility of dangerous offender act. Moreover, the offender gets the health treatment for his health care. The decision to send the mental disorder offender to psychiatric hospital is *treatment* that cannot be supposed to punishment but it is for goodness the offender. The imposition in sending the mental disorder offender to psychiatric hospital is one of modern criminal law characters that that prioritizes of the human person as the perpetrator, than the act has done.

[1] Mark Constanzo (Penerjemah: Helly Prajitno Soetjipto dan Sri Mulyani Soetjipto), 2008, *Aplikasi Psikologi Dalam Sistem Hukum,* Yogyakarta: Pustaka Pelajar, p.170.
[2] Sudarto, 2010, *Kapita Selekta Hukum Pidana,* Bandung: Alumni, p. 110.

According to Roeslan Saleh,[3] "the boundary between punishment and treatment are difficult to be determined theoretically, because punishment itself contains of thought to protect and to improve". Thus, sentencing the mental disorder offender to be cared in psychiatric hospital can create the idea aim of monodualistic balance. Those are the community (general) and individual interests, the balance idea between *social welfare* with *social defense*, and the balance idea between sanction that is oriented to the *offender* (criminal individualization) and *victim.*

Based on idea of monodualistic balance that the sanction sentencing is not only merely for the society protection of dangerous act of the mental disorder offender, but it is also oriented to the necessity of the offender (criminal individualization). Therefore, the aims of sentencing of sending him to psychiatric hospital are to protect the society from dangerous act and also to give psychology treatment for the offender. Based on of the Article 44 of the Criminal Code, the treatment in psychiatric hospital has certain period. The longest time is a year that needs the support of *family psychoeducation therapy* as the effectiveness support of the sanction.

According to Barda Nawawi Arief,[4] "the relation between determination of a criminal sanction and the purpose of punishment is important point in determining the designing strategy of criminal politic. Determining of the purpose of punishment can be the foundation to decide the way method, means or measures will be taken". The option of measures decision for mental disorder offender is based on purpose of punishment. If oriented to the purpose of punishment, those are oriented as the protection facilities for society, rehabilitation, and resocialization. The purpose of prevention in sanction sentencing is to protect society. It is done by keep the offender in different place with society, or in literary it is called as *incapacitation.* Sending the mental disorder offender in psychiatric hospital for certain period separately from society can be included into prevention effort in preventing repetition of the criminal act. Therefore, society can be protected from dangerous act of the offender.

By considering the base value of criminal law and also the aim of criminal law, so the mental disorder offender can still be sentenced by give them an act. The value of criminal law and also the aim of criminal law are to prevent the crime and give guardianship to society. Although the crime of mental disorder offender cannot be responsible for his crime and cannot be sentenced by the punishment, but by considering those both aspects a treatment still can be done. This decision is also based on the purpose nature of a treatment which is taken from the aim to protect society and to give therapy for the offender. By sending the offender to psychiatric hospital, it does not only give the offender therapy but it also gives protection to society. The therapy which is given to the offender aims to heal the offender from his lack ability in controlling his mind.

The aim of prevention in sentencing the criminal is to protect society. In this case the prevention is done by sending offender to separate place with society. The aim of deterrence in sentencing the criminal is to fear someone else to do the crime. There are three purposes of deterrence. Firstly, it is individual purpose. Next, it is public purpose. The last is long term purpose. The individual purpose means that deterrence is made to make the offender being afraid to repeat his crime. The long term deterrence is made to keep the discipline of society to the current criminal. This theory is often called as educative *theory* or *denunciation theory.*

According to the theory of condemnation tendency which is based on the idea of *long-term deterrence* is to keep the discipline of society to the current criminal law. While according to *denunciation theory*, the law sanction must be the expression of society condemnation. *Denunciation theory* is the combination of utilitarian view and also retribution view. This sanction gives an advantage to give direct denouncing to the crime that has been done by offender, sanction also acts as a prevention to society to do other crimes. *Denunciation theory* also contains of retributive character. This theory agrees that the offender is advisable to be punished for his crime. The sentencing can be explained by the positive prevention theory using the system of criminal justice. It aims to teach society about the right social norms and also it functions as the moral strengthener.

According to *educative theory or denunciation theory,* sending the mental disorder offender to psychiatric hospital can be the facility of rehabilitation and also resocialization for the offender. While from the social aspect, this decision is to express the punishment for the crime that has been done by the mental disorder offender. Giving treatment to the offender in psychiatric hospital gives two advantages. The first is offender gets rehabilitation because of his lack in controlling his mind and get resocialization. Furthermore, it educates society to not being despotic in punishing offender because of their fury to the crime.

The sentencing decision of mental disorder offender is oriented to the condemnation tendency which is based on educative *theory* or *denunciation theory*. It is hoped that it will not only give treatment to mental disorder offender but also as the support of sanction function. Therefore family therapy is also needed. Family therapy is a family psychoeducation which is given by the government institution. This government institution has responsibility in doing the treatment sanction implementation of sending the mental disorder offender to psychiatric hospital.

[3] Roeslan Saleh, 1978, *Suatu Reorientasi Dalam Hukum Pidana*, Jakarta: Aksara Baru, p. 27.
[4] Muladi dan Barda Nawawi Arief, 1992, *Teori-teori dan Kebijakan Pidana Edisi Revisi*, Bandung: Alumni, p. 95.

According to Goldenberg,[5] **"**family psychoeducation is an education which is given to someone who supports a treatment and rehabilitation, those activities can improve the cognitive ability because the therapy consists of knowledge that can develop the family' knowledge about the disease. It gives some techniques to recognize the deviation symptoms to the family and it also acts as support for the family itself". The aim of family psychoeducation program is to develop the family knowledge about that disease, teach the techniques to help the offender, protect the family by knowing the behavior symptom and support the family power.

Family psychoeducation therapy is one of psychosocial managing,[6] it is one of family health treatment program element to giving the information and education through therapeutic communication. The characters of this approach are educational and pragmatically.[7] The main purpose of family psychoeducation therapy is to share the information of mental health treatment,[8] moreover, this therapy is given to support the family members in decreasing the physics and mental burden in caring the mental disorder offender in a long term. *Family psychoeducation therapy* is also given to family that needs the education of mental disorder, family that one of the family members suffers from mental disorder, or family that wants to keep their health. This therapy is given by the skill training.

From the criminal law aspect, family psychoeducation therapy can be analyzed from the criminal policy view or the criminal politics. Based on G. Peter Hoefnagels,[9] "*criminal policy is the rational organization of the social reactions to crime".* Criminal policy as the rational society reaction in handling the crime that is in boundaries of policy which is unlimited and it is connected to many aspects that cover the social policy in large and designed scale.

Family psychoeducation therapy is the part of criminal policy. It is included in non-penal effort, it is related to the prevention effort in handling the mental disorder offender. The implementation of family psychoeducation therapy is included into non penal policy, it means that the policy is not connected directly with the criminal law. However, it focuses on efforts outside the criminal law. Family psychoeducation therapy which is given to family of mental disorder offender is one of non-penal effort, where family is as important basic in the process of healing the mental disorder offender.The implementation of family psychoeducation therapy is included into non penal policy, it means that the policy is not connected directly with the criminal law. However, it focuses on efforts outside the criminal law. Family psychoeducation therapy which is given to family of mental disorder offender is one of *non-penal* effort, where family is as important basic in the process of healing the mental disorder offender. The terapeutic family and family that support the mental disorder offender is very helping for the healing and they can prevent the recurrence.[10] The terapeutic family can be reached through the psychoeducation therapy to help the process of the healing of the mental disorder offender and postpone the recurrence. Those efforts are included into efforts that are done outside the criminal law. Family psychoeducation therapy is one of the strategy effort as non-penal effort in criminal law policy.

Family psychoeducation therapy is to recognize and state the hidden pattern in defending the balance in family and to help family in understanding the meaning and the purpose pattern.[11]Family psychoeducation therapy which is based on Harold I. Kaplan[12] aims:

a) "solving the problems or decreasing the issues and the pathogenic anxiety in the matrix of *interpersonal relationship*;
b) Decreasing the perception and the fulfill of other family's need that is done by the family;
c) Decreasing the role relation which is compatible between the genre and inter-generation;
d) Strengthening the ability of individual family member and family as the whole in overcoming the destruction inside and also outside its surround environment; and
e) Affecting the identity and family values, so the family members will be oriented to the health and growing".

Based on the psychology as stated by Kaplan, family psychoeducation therapy that is done to the family of the mental disorder offender has important role and also gives important contribution in supporting the healing and the health of the offender. Family psychoeducation therapy for the offender's family considers: in

[5] Ruti Wiyati, Dyah Wahyuningsih, dan Esti Dwi Widayanti, "Pengaruh Psikoedukasi Keluarga Terhadap Kemampuan Keluarga Dalam Merawat Klien Isolasi Sosial", *Jurnal Keperawatan Soedirman (The Soedirman Journal of Nursing)*, Vol. 5, No.2, Juli 2010, p. 91.

[6] Benhard Rudyanto Sinaga, 2007, *Skizofrenia & Diagnosis Banding*, Jakarta: Balai Penerbit Fakultas Kedokteran Universitas Indonesia, p. 71.

[7] Gail W. Stuart, Alih Bahasa Ramona P. Kapoh dan Egi Komara Yudha, 2002, *Buku Saku Keperawatan Jiwa Edisi 5*, Jakarta: Penerbit Buku Kedokteran ECG, p 102.

[8] *Ibid.*

[9] G. Peter Hoefnagels, 1969, *The Other Side of Criminology (An Inversion of the concept of Crime)*, Holland: Kluwer – Deventer, p. 57.

[10] Ruti Wiyati, Dyah Wahyuningsih, Esti Dwi Widayanti, *op.cit.*, p. 88,

[11] Harold I. Kaplan, Benjamin J. Sadock, Jack A. Grebb, (Alih Bahasa Widjaja Kusuma), 2010, *Kaplan dan Sadock Sinopsis Psikiatri Ilmu Pengetahuan Perilaku Psikiatri Klinis Jilid Dua*, Tangerang: Binarupa Aksara,p. 428.

[12] *Ibid*, hlm. 434.

Indonesia, family is a whole system, it is the main place where the offender starts interpersonal relationship with environment, family also can acts in solving or decreasing the conflict and the pathogenic anxiety. It is because family can understand well the past of the offender and maybe they can understand the main cause of his mental disorder. Moreover, family can strengthener the family members' ability and solve the destructive thing that comes from outside and inside environment around them. Therefore, family psychoeducation therapy considers the idea that family is the whole system and it cannot be separated, thus family can actively support in giving the psychotherapy for the mental disorder offender both directly or indirectly. This efort is done to defend the health degree of their health.

The existence of spiritual bond between the mental disorder offender and his family cannot be separated emotionally and easily. It is because family has ability to act freely and tolerantly, so they can judge the offender's weakness and strengths well. Family therapy is very useful. By involving family to the implementation of psychoeducation therapy, so family also has responsibility of the mental disorder offender in doing the psychology treatment that is related to the action sanction of sending the offender to psychiatric hospital.

Implementation of family psychoeducation therapy in the system of sanction sentencing for the crime that has been done by the mental disorder criminal offender has been formulated in Criminal Code in China Article 18. It stated that mental disorder people who are dangerous, they cannot understand and they cannot control their actions so their actions cannot be responsible after the law investigation, but the offender's family has responsibility to monitor and take care of the offender medically. In this case, the tight monitoring and caring medically that is done by family to the mental disorder offender based on Criminal Code China, thus the monitoring and the caring process by family can be combined by family psychoeducation therapy indicates the important role of the family in the process of the treatment. The active participation of the family in getting the medical and psychological guidance from the psychologist. It aims to accept the education in supporting the treatment and rehabilitation, hopefully it can develop the maximum result of the family's knowledge related to the disease or the mental disorder of the offender. It is also done to support the family of the mental disorder offender.

Family psychoeducation therapy can be analyzed from the theory of condemnation tendency according to J. Bentham. He stated that the condemnation tendency that is reformative is the condemnation system that emphasizes the offender establishing. This establishing is to build the offender becomes good social.[13] The involvement of family in the process of psychoeducation therapy can support the offender establishing in changing them to be god social. Bentham[14] used approach of criminal utility. It is based on *the great happiness of the great numbers* stated that do not use the criminal law if it is *groundless, needless, unprofitable or inefficacious*. Sending the mental disorder offender into psychiatric hospital is in order to get psychology therapy. This action emphasizes the offender establishment to be better individual and to be good social. Moreover, the using of family psychoeducation therapy that is given to offender's family can be done by approach of criminal utility. The action is based on *the great happiness of the great numbers* that is in the implementation and the managing is based on *diagnosis* and *prognosis* which will be given by psychologist.

The sentencing of sending the mental disorder offender into psychiatric hospital must be categorized first based on the kinds of mental disorder of the offenders. Thus, if the therapy process is combined by the responsibility of family educational therapy, so it can be deferred into the sanction sentencing that the purpose is reformative. The advantages of this decision are not only to fulfill the society's satisfaction of the safety feeling but also to give protection to society from the dangerous act of the mental disorder offender.

Family that involves actively in the process of psychoeducation therapy is one form of the responsibility of the family in the action implementation. Those aspects are the whole pack that cannot be separated, between the offender and the family. In this case, hopefully family involves and supports the process in order to reach the goals. The goals are to defend the health degree of the offender's mental.

The reformation aims to give the sanction in the criminal law. It means that it aims to rectify or to rehabilitate the offenders. It aims to change the offender to be better person and be helpful individual for society. The treatment sanction to mental disorder offender which is accompanied by family psychoeducation therapy hopefully it can build the health mental, so the offender can be better and useful individual for society. In conclusion, in small scale the family will get advantage and in the big scale the society will not be annoyed because the mental disorder offender get his ability in control his action and his mind and becomes normal individual. Mental disorder people often get more negative stigma and more discrimination from society around him than other medical sufferer. [15] Mental disorder people still often gets negative stigma and more discrimination from society and family.

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[13] Y.A. Triana Ohoiwutun, *Kesaksian Ahli Jiwa Dalam Pertanggungjawaban Pidana Penganiayaan Berat (Kajian Putusan Nomor 210/Pid.B/2005/PN.RKB,* Jurnal Yudisial, Vol. 8 No. 1 April 2015, p.6.

[14] Yesmil Anwar dan Adang, 2008, *Pembaharuan Hukum Pidana Reformasi Hukum Pidana*, Jakarta: Gramedia, p. 12.

[15] Benhard Rudyanto Sinaga, *op.cit.*,hlm. 1.

According to *Mental Health Foundation*, [16] "mental disorder people get strong social stigma and strong discrimination from the whole aspects of their life as the sufferer of mental disorder, therefore this condition makes worse the mental health of the sufferer and it complicates the healing of mental disorder sufferer". The negative stigma and discrimination give negative impact to mental disorder sufferer. While the healing of mental disorder sufferer can be cured together with support condition of family and environment surround the sufferer. [17] There are many forms of negative stigma and discrimination from society. For instance, inhuman treatment like physical violence, being isolated, being separated and even place the mental disorder sufferer in stocks.

The negative stigma and the discrimination that is done by society to the mental disorder sufferer can be concluded into "punishment" that has to be accepted by the mental disorder sufferer (even the negative stigma and discrimination from their own family).

Article 183 Criminal Procedure Code (KUHAP), stated the condition in imposing the criminal sanction. The conditions are at least there have to be two legal evidences and the sureness of the judge on offender's guilt. The legal evidences based on article 184 The Drift of Criminal Procedure Code are: 1) witness assertion, 2) expert explanation, 3) letter, 4) clues, and 5) accused's assertion. The Drift of Criminal Procedure Code professes the authentication system based on laws negatively *(negatief wettelijk bewijs)*. Therefore, it can be concluded that the judge's sameness in the authentication is included into subjective judge discretion. [18] The consequence of juridical system *negatief wettelijke bewijs*, related to the investigation of mental disorder offender. The judge reduces the psychologist explanation, but based on his subjective discretion has full authority to accept or disregard the explanation of the psychologist depending on his sameness in deciding the case.

Subjective discretion of the judge in the investigation of criminal case represents the power of the judge which is absolute. While the absolute authority of the judge is limited by Criminal Procedure Code Article 183 and Article 184. If the case is related to mental disorder offender, so the psychology investigation will be done diagnostically. This is done to investigate the existance of mental disorder deviation. Besides, it is also done to decide the imposing sanction prognostically by the judge. On the prognosis scope, the forensic psychiatrist investigation related to an idea that stated the possibility of relation between immediate journey with future journey, the level and impact of mental disorder. The implementation of prognosis in forensic psychiatrist investigation is advantageous in deciding the imposing sanction by the judge. Thus, diagnostically, the role of psychologist is to determine the ability of the offender in doing responsibility, while prognostically it is used to decide the sanction of sending the offender to the psychiatric hospital with the longest time is a year based on article 44 Criminal Code.

The psychology investigation in the scope of prognosis aims not only in deciding the kinds of psychology therapy that will be done to mental disorder offender, but also in deciding the importance of family psychoeducation therapy as the effectiveness support the successfulness the psychology therapy. Thus, the existence of subjective discretion of the judge and the judge's absolute authority in the case investigation of mental disorder offender, the judge is having authority to decide the imposing sanction of sending the offender into psychiatric hospital in a year as the longest time by accompanied by family psychoeducation therapy.

The implementation of family psychoeducation therapy will be more effective if it is decided in the same time by the sending of the offender into psychiatric hospital. According to Paul Scholten, "people should remember that the material, the given materials that is processed by yurisprudence does not only consist of law as and regulations, but also judge decision and the more important thing in this situation is people who obey the law (law behaviour)". [19]

According to Scholten, the concrete situation that is related to the changing of mental disorder concept in psychology, both related to mental disorder or the kinds of its therapy, those must be considered by the judge in imposing the sanction based on Article 44 Criminal Code. It is because only the judge that has authority in deciding to put the mental disorder offender to psychiatric hospital in a year as the longest time. Referring to the development of the concept in psychiatry regarding mental disorders as a concrete phenomenon and the benefits of family psychoeducation therapy, thus the judge may order the actions to send into psychiatric hospital, accompanied by family psychoeducation therapy.

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[16] http://translate.google.com/translate?hl=id&langpair=en|id&u=http://www.mentalhealth.org.uk/help-information/ mental-health-a-z/S/stigma-discrimination/ diakses 25 September 2013.

[17] Sri Idaiani, *Dampak Program Kesehatan Jiwa Berbasis Masyarakat Dibandingkan Program Kesehatan Jiwa Berbasis Rumah Sakit Jiwa Terhadap Pemulihan Pasien Psikosis*, http://health.kompas.com/read/ 2013/07/16/ 1047559/Pasien.Gangguan.Jiwa.Bisa.Dirawat.di.Lingkungan.Masyarakat. diakses 25 September 2013.

[18] Luhut M.P. Pangaribuan, 2009, *Lay Judges & Hakim Ad Hoc Suatu Studi Teoritis Mengenai Sistem Peradilan Pidana Indonesia*, Jakarta: Diterbitkan atas Kerja Sama Fakultas Hukum Pascasarjana Universitas Indonesia dengan Penerbit Papas Sinar Sinanti, p. 104.

[19] Paul Scholten, (diterjemahkan B. Arief Sidharta), 2003, *Struktur Ilmu Hukum*, Bandung: Alumni, p. 14.

By the existence of judge' decision, it is expected to give any impacts on the behavior of those who should obey the law, because only state that is law subject which has authority to impose criminal sanctions (ius puniendi) with all its juridical consequences. The judiciary is a representation of the state in resolving lawsuits. Justice criminal case against mental disorderl offenders and treatment sanction in psychiatric hospital, occupy an important position in the effort against crime. The function of criminal law accompanied by criminal sanctions is as facility to control the society (society controlling). [20] Related to this case, van Apeldoorn[21] stated "to maintain the regulation, the law must be balanced. The aims is to protect the interests that exist in society. The balance between these interests is regarded as something that is fair".

The implementation of family psychoeducation therapy together with the treatment of sending the mental disorder criminal offender into psychiatric hospitals can be assessed from retributive theory-teleological. The aim of the theory of retributive-teleological punishment is retributive patterned lies in the punishment which is seen as wrong reaction to criticism of moral, and its teleological character lies in the idea that the moral criticism goal is to reform or change the behavior of the accused in the future. Based on its theories aim of retributive-teleological punishment which integrates several functions at the same time, it is the retribution which is utilitarian. It means prevention and rehabilitation at the same time are seen as targets to be achieved in a sentencing plan. According to Muladi, [22] because the goal is integrative, thus the purposes of punishment are: 1) general and specific deterrence; 2) protection of society; 3) maintaining community solidarity and 4) balancing / offsetting. Muladi notes, that the purpose which purpose that is the main point of its casuistry. Then Muladi[23] created the purpose of condemnation concept which is pointed as the integrative condemnation purpose (humanity and system of Pancasila). The concept of integrative condemnation was started from the basic assumption that crime is the disruption of balance, harmony and suitability in society that cause destruction to individuals and society, the purpose of punishment is to fix those destructions which are caused by criminal act.

If referring to the concept of integrative condemnation purpose, according to Muladi, the mental disorder offender is one of disturbance form of balance, harmony and suitability in the society. This situation causes some disadvantageous both morally and materially. The decision goal of sending the mental disorder offender to psychiatric hospital is merely to fix the destruction and disadvantages that happened. Those decisions is only the form of the implementation of humanity values and Pancasila values. According to Muladi, purpose of integrative punishment is both a humanitarian and a system of Pancasila. Thus, the decision that is given to mental disorder offender is the sanction form that emphasizes the values of Deity, humanity (humanistic), democratic, nationalistic and social justice.

The imposition treatment sanction of sending the mental disorder offender into psychiatric hospital is formulated in Article 44 of Criminal Code, can not be categorized as prevention effort that is economical (economic deterrence), if such treatment is not the implementation of punishment which is contrary to the purpose of the utilitarian theory. It includes the crime that can be prevented as early as possible (preventive), to prevent others from committing the crimes (deterrence) and the perpetrators should be transformed / constructed (reform). According to Ted Honderich, [24] a criminal sanction can be referred to as a prevention tool that is economical (economic deterrence), if it consists of: the criminal sanction really prevents and it does not cause more dangerous situation or harm situation. If the criminal sanction was not charged, and there is no other crime that could prevent effectively.

Based on the opinion of Ted Honderich, that the imposition sanction of sending the mental disorder offender into psychiatric hospital, must be a sanction that can prevent, so that a dangerous state of the criminal offender can be cured or treated as a function of the curative health care and rehabilitative health care which is based on Act Number 36 of 2009 on Health. Thus, the imposition sanction of sending the mental disorder offender into psychiatric hospital is appropriate and effective for the benefit of psychotherapy of perpetrators and the protection of the interests of the community to the action that might be dangerous which commit by mental disorder people. Therefore, family psychoeducation therapy is required to get the effectiveness of the imposition sanctions of sending the offender into psychiatric hospital.

Family psychoeducation therapy is helpful in giving the understanding to the families regarding mental disorders, so that the mental disorder offenders who have been healthy after undergoing treatment in psychiatric hospitals can be prevented in committing the same crime. The family's understanding through family psychoeducation therapy may develop in a positive direction, both for families and the mental disorder people, so it will be also positive to society. The family support (and communities) for mental disorder people, is expected to increase the desire to heal and minimize the recurrence of the crime. Family's harmony

[20] Sudarto, 2007, *Hukum dan Hukum Pidana*, Bandung: Alumni, p. 150.
[21] P. Vandijk, 1985, *van Apeldoorn's Inleiding tot de Studie van het Nederlandse Recht*, Tjeenk – Willijk, p. 10-12.
[22] Muladi, 1985, *Lembaga Pidana Bersyarat,* Bandung: Alumni, p. 61.
[23] Sholehuddin, 2003, *Sistem Sanksi dalam Hukum Pidana, Ide Dasar Double Track System dan Implementasinya,* Jakarta, Raja Grafindo Persada, p. 51.
[24] Yesmil Anwar dan Adang, *op.cit.* p. 12.

and the close relationship between the family, will be able to rejuvenate the mental health of mental disorder people.

Closing

Conclusion

Family psychoeducational therapy is very useful as a support of the operation in imposing sanction in sending the mental disorder into psychiatric hospital to get treatment that is given for mental disorder criminal offender. Family psychoeducational therapy in line with the development of the concept of mental disorder in psychiatry and a paradigm shift in the purpose of sentencing in criminal law. Family psychoeducational therapy is not specified in the legislation, it is the *non-penal* criminal policy, which is indirectly related to preventive effort in dealing with mental disorder offenders;

Recomendation

Family psychoeducational based on the presence of the family as a whole system and inseparable, and families can participate actively to support the efforts in providing psychotherapy for mental disorder offenders for the purpose of maintaining the health of the soul, therefore, family psychoeducational therapy should be given by institutions / agencies which are responsible for the implementation of the treatment sanction in a psychiatric hospital;

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POLICY RECONSTRUCTION OF TERRORISM CRIMINAL TRIAL THROUGH DEATH PENALTY

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ABSTRACT

Terrorism is extra ordinary crime that caused teror ambience, wide afraid, massive victims to people. Government had policy to counter terrorism by used The Law No. 15 year 2003 about Terrorism Criminal Trial Counter. But obviously, terror action in Indonesia is still happen until now and even increase than before. The problems to discuss in the research are how the implementation of death penal to terrorism criminal trial and what are defiances dan the solutions. The legal research is study that is normative. Tipe of data used include primary and secondary data. Data collection techniques using the documentary as a study of secondary data that supported by primer data with interview method. The analysis used qualitative analysis of normative data. Based on this study showed that terrorism is a crime that has political motive. It had been done by groups that usually as political victims such as not fair, discrepancy, destitution, discrimination. The purpose is against the bigger power that imposible to against by conventional. Implementation of death penal to terrorism criminal trial not gave wary effect to terrorists. It was caused by misunderstood about terrorist criminal trial characters and hard action to terrorist result the harder new action. The solutions are trying to change law policy by sociologist, persuasive and deradical approach.

Keywords : implementation, death penal, terrorism criminal trial.

Introduction

Indonesia in the last ten years is often shaken by the existence of a form of large-scale communal violence, one of which is the violence of terrorism. This terrorism violence attracted worldwide attention after September 11, 2001, and the violence has also occurred in Indonesia. Nevertheless, the violence was perpetrated by small groups acting in a very secret, so it can not be regarded as collective violence. Compared to other types of violence, this violence also requires smaller deaths, although the impact of shocks from the dead is certainly not worth the numbers. The emergence of the term terrorism is the most popular discourse discussed by the public since the collapse of the WTC (World Trade Center) and the Pentagon in America have implications for the world political order. Almost all countries around the world are busy increasing their security and preventing similar events. Indonesia also did not escape from the impact that became the consequence of the incident with the Bali bombing I at Kuta Legian Bali on October 12, 2002. With the Bali bomb blast I have encouraged the government to issue Government Regulation in Lieu of Law (Perpu) to fill the legal void (Rechtsvacuum) on the crime of terrorism. The government through President Megawati even directly issued two Perpu, namely Perpu. 1 of 2002 on the Eradication of Criminal Acts of Terrorism and Perpu. 2 of 2002 on Investigation, Investigation and Prosecution of Bali bombing case. A year later Perpu no. 1 of 2002 was passed into Law no. 15 Year 2003 on Combating Terrorism Crime. The other laws that give the threat of capital punishment, namely; UU no. 4 of 1976 on Aviation Crime and Aviation Facilities, Law no. 5 of 1997 on Psychotropic, Law no. 22 of 1997 on Narcotics, Law no. 31 of 1999 on Corruption Eradication, Law no. 39 of 1999 on Human Rights and Law no. 26 of 2000 on Human Rights Courts. UU no. 15 of 2003 on the Eradication of Criminal Acts of Terrorism is what ultimately ensnared terrorism acts committed Amrozi and his friends until finally on November 9, 2008 executed dead.

The interesting thing after the execution of the three perpetrators of Bali bombing is a lot of people who actually debate and criticize the Law. 15 of 2003 on the Eradication of Criminal Acts of Terrorism, in particular the provisions relating to the threat of capital punishment. Some circles both inside and outside of the country have a bad view of the imposition of the death penalty for varying reasons. Among them the policy of applying the death penalty is considered as an inhumane policy. The opposition to capital punishment is at least a basis for argumentation such as the possibility of the execution of an innocent person, the lack of deterrence of violent crime and they also base on moral and religious arguments (based on moral or religious basis). From the historical and theoretical approach of capital punishment is the development of an eye for an eye, which some considered to be outdated in the science of criminal law.

Formulation Of The Problem

Based on the background of the problems described above, then the problem is formulated as follows:

1. How is the implementation of capital punishment on the crime of terrorism?
2. What are the obstacles and solutions of the implementation of capital punishment on the crime of terrorism?

C. DISCUSSION

1. Government Policy in Handling Criminal Acts of Terrorism

The terror acts at the WTC and the Pentagon of America on September 11, 2001 are a new chapter for countries around the world to build security systems. The Government of the Republic of Indonesia also experienced and did the same thing after the Bali Bombing on October 12, 2002, despite actually taking steps since early 1999 by drafting a Law on the Eradication of Terrorism as an anticipatory step to prevent and overcome .

In Indonesia itself, initially the problem of terrorism is still a political debate. Some people assume that terrorism does not exist, while others assume that terrorism has existed in Indonesia and become a serious threat. Since 1999 there have been bomb blasts in various regions, even the 2000 Christmas bombing that took place in various cities, is still only politically debated and does not raise awareness of the importance of paying attention to terrorism. In 2001, the concern was precisely in the House of Representatives, where two members of the Indonesian House of Representatives refused to form a Special Committee to discuss the magnitude of the threats of various forms of terror that have taken place in Indonesia. Perhaps even some of the political elite gain political advantage to strengthen the position of the importance of political power at the time.

The Bali Bombing event has finally denied all political debates about whether or not terrorism exists in Indonesia. The deaths of hundreds of foreign nationals put Indonesia in a situation to take immediate and serious steps to combat terrorism. The Government of the Republic of Indonesia is burdened with a mandate as contained in the Preamble to the 1945 Constitution that is, in order that the State protect all Indonesian Nations and the entire Indonesian blood spill. The State is obliged to protect every citizen from any threat of crime whether national, trans-national, or international in nature. Therefore, a policy that relies on the provisions of the Constitution of the Republic of Indonesia which is formulated in a law which can be used as the basis for overcoming terrorism crime.

Terrorism is an extraordinary crime or extra ordinary crime that requires a pattern of handling by utilizing extraordinary ways (extra ordinary measure). Given such a category

then its eradication can not use the usual means of handling criminal offenses in general. Victims of terrorism are not limited to casualties, but also the destruction and even destruction and destruction of property, the environment, economic resources, as well as social shocks in the political, social and economic fields. Human victims of terrorist crimes whose targets are random and indiscriminate and often sacrifice innocent people including women, children, parents and possible use of weapons of mass destruction.

On the one hand the human rights analysis on the part of the victim will convince anyone, that what is called terrorism is an extraordinary crime that should be condemned for any reason or motive. From the side of the victims of terrorism, human rights are related, among others, individual things such as things to live (freely from fear), freedom from fear, and fundamental freedom. Besides, it also relates to collective rights such as fear of a wide range, danger to democratic life, territorial integrity, national security, legitimate government stability, socio-economic development, pluralistic pluralistic peace, harmony in interational peace and so on. On the other hand, human rights review from the side of the perpetrator will provide the basis for how far the character of terrorism as extra ordinary crime must be faced with extraordinary measures or actions (extra ordinary measure) that are often considered to violate human rights. Based on the facts occurring within the community as mentioned above, the Government of the Republic of Indonesia as the party responsible for the safety of the nation and state, considers it necessary to as soon as possible have a strong and comprehensive legal basis to combat the crime of terrorism. The Government recognizes that current legal norms as set forth in Law Number 12 of the Year 1951 on Firearms containing ordinary crimes are not sufficient to combat terrorism which is an extraordinary crime (extra ordinary crime). The provisions of Law No. 8 of 1981 on the Criminal Procedure Code are also felt to be inadequate. The process of investigation, investigation and prosecution of terrorist acts requires special provisions which are regulated separately, in addition to the general provisions applicable in the Criminal Procedure Code. To anticipate all possibilities with terrorist activities, the Government of Indonesia is of the opinion that there is a requirement of "matters relating to the urgency of force" as stipulated in Article 22 Paragraph (1) of the 1945 Constitution has been fulfilled. The government is determined to act immediately to unravel the bombing incident in Bali and to anticipate all the possibilities that will happen. To that end, the Government issued a policy by stipulating Government Regulation in Lieu of Law No. 1 of 2002 on Combating Terrorism Crime and Number 2 of 2002 on the Implementation of Government Regulation Number 1 of 2002 on Combating Terrorism Crime at the Bombing Bomb Event in Bali on 12 October 2002, by giving a death sentence. The threat of capital punishment is intended to create a deterrent effect for terrorist actors so that the terror acts in Indonesia do not happen again.

Concerns are also true, because it is not impossible in the fight against terrorism is actually done also by the way of terror on people's lives. But it must be admitted that terrorism is a real threat and has occurred in Indonesia, and no longer must be debated whether or not there is terrorism in Indonesia. For this reason the government issued and established a policy of countering terrorism through Government Regulation in Lieu of Law (Perpu).

The government and the nation of Indonesia should be able to demonstrate and take steps that are proactive, decisive and reasonable to face terrorism activities both international and domestic. The Government of Indonesia must seriously deal with terrorism in the territory of Indonesia in particular and also its neighbors in Southeast Asia in general.

International cooperation is also deemed necessary as the United Nations sees that acts of terrorism are still continuing and increasing both in terms of quantity and quality and increasingly becoming a serious threat to the principles of world peace as enshrined in the Charter UN. At this time the country of Indonesia already has a legal tool on the eradication of terrorism in the form of law namely Law Number 15 Year 2003 on Stipulation of Government Regulation in Lieu of Law No. 1 of 2002 on Combating Terrorism Crime into Law. Attempts to combat terrorism require the hard work of the Indonesian Government through its law enforcement agencies and the participation of the community to prevent and combat terrorism. According to Sudarto a criminal offense is a basic definition in criminal law and is also a juridical notion. The term "criminal offense" is used as a substitute for "strafbaar feit" and to this day the legislator has always used the term "criminal offense" in legislation.

Definition of Criminal Acts of Terrorism Article 1 paragraph 1 of Law Number 15 Year 2003 is: Criminal Acts of Terrorism is an act that meets the elements of criminal acts in accordance with the provisions of the law. Article 5 of Law Number 15 Year 2003 provides for interesting and special matters, namely: Criminal Acts of Terrorism are exempted from political crimes, offenses related to political crimes, criminal acts with political motives, and criminal offenses with political objectives , which inhibits the extradition process.

The provisions contained in Article 5 are intended to prevent the crime of terrorism from taking refuge behind the background, motivation, and political objectives of avoidance of investigation, prosecution, examination in court and punishment of the perpetrators. This provision is also to improve the efficiency and effectiveness of extradition treaties and mutual legal assistance in criminal matters between the Government of the Republic of Indonesia and other governments. The exclusion of criminal acts of terrorism from existing political crimes in Indonesia is different from that in other countries.

2. Implementation of Law no. 15 Year 2003 on Combating Terrorism Crime

In Indonesia, the government's 'serious' reaction to terrorism came after the Bali Bombing on October 12, 2002 that killed 202 lives and injured 209 lives. On October 18, 2002, the government immediately issued Government Regulation in Lieu of Law (Perpu) No 1 of 2002 on Combating Terrorism Criminal Act and Perpu No. 2 of 2002 on the Implementation of Government Regulation No. 1 of 2002 on Combating Terrorism Crime in Bomb Bombing Event at Bali On October 12, 2002. One year later the Perpu was stipulated as Law no. 15 Year 2003 on Eradication of Terrorism Crime. This determination is based on the view that the existing legal umbrella is inadequate and fails to overcome similar problems that have occurred before and Bali bombing tragedy is the worst terrorist acts in the history of Indonesia, can not be overcome with the existing legal umbrella.

Perpu No. 1 of 2002 is reaping criticism of various parties because it is considered to give excessive power to the state that tends to threaten civil society and does not provide a corrective effect on the weakness of the device and legal institutions so far. The government is seen as overreacting to avoid political impact at the international level because the majority of victims in the tragedy are foreign citizens. Perpu No. 1 of 2002 was finally established into Law No. 15 of 2003 on Stipulation of Government Regulation No. 1 of 2002 on Combating Terrorism Crime into Law. As in Perpu No. 1, the government also made Law No.16 of 2003 on the Stipulation of Perpu No. 2 of 2002 on the Implementation of Government Regulation Number 1 Year 2002 on Combating Terrorism Crime in the Bombing Bomb Event in Bali on October 12, 2002 into Law. The two illustrations above show that the policy towards the fight against terrorism that currently stands out is subjective-reactionary and partial-repressive.

As a subjective reactionary act, this effort biases national and international political motives rather than the goal of solving the real problem. By attacking and capturing several members of the Jama'ah Islamiyah (JI) network armed with the Perpu No. 1 of 2002 which later became Law No. 15 of 2003 on the Stipulation of Perpu No. 1 of 2002 on Combating Terrorism Crime into Law, the Government of Indonesia views has sufficiently responded to public demands to deal with such acts of terror. In fact, in Indonesia, terrorism continues with the explosion of bombs at JW Marriott Hotel, ahead of the Australian and Bali Embassy. Meanwhile, as a partial-repressive reaction, the effort actually gives

excessive authority to certain institutions, tolerates the use of violence methods and ignores international laws and human rights principles. The Indonesian government itself prefers to justify the active role of the State Intelligence Agency (BIN) which in fact is a non-judicial strategic intelligence. The Indonesian government has also given wide authority to the Police in this case Densus 88 to exhibit repressive acts in the arrest of Islamic activists and to target pesantren who are suspected of being part and pockets of terrorist networks. Efforts to combat terrorism have justified all means, including taking non-derogable rights, torture and legalizing arrest and arbitrary detention. So in fact, many terrorist actors died outside or before the judicial process at the time of arrest and detention.

The above facts show that the war on terrorism contains a dilemma in itself, between the interests of overcoming the problem of terrorism and the crush of new issues of human security, both arising from acts of terrorism and the fight against terrorism. Based on the experience of effectively managing repressive authority and the means of violence, the state chooses a pro-interest policy development of state stability rather than seeking solutions to the breakthrough in the context of a democratic state. The above dilemma is solved by building a problematic strategy and generating the next dilemma for the public; supporting the country while they are potential to be victimized by the policy or reject the meaning which will directly deal with the state. Furthermore, such government efforts will threaten reforms in law enforcement, clean and authoritative government, strengthening of civilian authority, and the fulfillment, protection and promotion of human rights.

In the United Nations report entitled Protection of Human Rights and Fundamental Freedoms While Countering Terrorism; The study of the United Nations High Commissioner for Human Rights states that the efforts of various countries to overcome the problem of terrorism has caused human rights conditions in various parts of the world threatened, including in Indonesia. The threat is mainly related to fundamental rights and freedoms (fundamental rights and freedoms). The basic rights that are threatened include the right to life; the right to be free from torture and punishment or other cruel, inhuman or degrading treatment; the right to be free from arbitrary detention; as well as the right to a fair trial and lawyer assistance. While threatened freedoms are, among other things, freedom of thought; freedom of belief; freedom of religion; freedom of expression and association; and free from any form of discrimination. Including in Indonesia, cases of arrest, detention in the fight against terrorism have also disregarded fairness principles as set out in national criminal law procedures that adheres to the principle of free and fair trial.

Perpu No. 1 of 2002 on Combating Terrorism and Perpu Act No. 2 of 2002 on the Implementation of Government Regulation No. 1 of 2002 on Combating Terrorism Crime in the Bombing Bomb Event in Bali on October 12, 2002 was issued on the grounds of emergency and impossible to overcome by Law takes a long time to form. Perpu No. 1 Year 2003 and then became Law No. 15 of 2003. The House of Representatives changed the law into a law without any correction and change of substance, but since the form of the Perpu and the bill has been criticized against the substance of the Perpu and its implementation. The law regulates more subjective-reactionary and partial-repressive measures as acts of terrorism and acts that support acts of terrorism. The State chooses to organize things that are logically easier, because once the state establishes a person as an actor of terrorism, the government simply searches the network and its supporters, the facilities used and the neglect that provides an opportunity for terrorism or an event similar to that of terrorism.

In the case of definitions of terrorism, let alone ignoring political motives, most of them are criminal acts which are clearly also contained in the Criminal Code. Including arranging parties involved in arrest, investigation and examination.

Article 1 paragraph 1 of the Criminal Code states the principle of legality of our national criminal law that "an act can not be criminal unless it is based on the force of existing criminal legislation". Again, if regulated are subjectively-subjective and partial-repressive subjects called terrorism is the use of violence and the threat of violence (murder, blasting, destruction), negligence, use of dangerous goods and financing for acts of terrorism, and acts support for acts of terrorism (inclusion). If the principle of determining the criminal law is to regulate the above three things, and it is almost certain that the Criminal Code is sufficient, then it is necessary to strengthen it with little amendment.

Secondly, the Government has difficulty in making a comprehensive definition of a criminal act of terrorism as seen in the Act. The definition of a crime charged under this Act almost all contain acts that fulfill the elements of ordinary crimes set forth in the Criminal Code, such as: crimes against state security, crimes against friendly countries and against the heads of friendly countries and their representatives, crimes that endanger public safety for persons or goods, crimes against life, torture, death or injury caused by negligence, extortion and threats, destruction or destruction of goods, crime of voyages, aviation crimes and crimes against aviation facilities / infrastructure. With the existence of two laws which in principle regulate the same form of crime, it is not impossible that the probability of errors in determining the offense becomes large, and that may conflict with the objectives law enforcement principles of justice and accountability. In the Act it is seen that the definition of terrorism formulated is also very wide. Articles 6 through 19 provide for all forms that

can be included as categories of acts of terrorism. While articles 20 through 24 provide other crimes related to terrorism. Article 6 is a criminal offense so that the element that must be proven is the result of the act of the emergence of an atmosphere of terror or fear that extends or cause a mass casualty. while Article 7 is an unfinished crime (trial) so that should be proven is the intention to create an atmosphere of terror or fear that extends or cause mass casualties. Then what is the atmosphere of terror? If the meaning is fear and mass casualties, then the words atmosphere of terror should not be listed because it invites unilateral interpretation of the state. With such a broad definition and categorization of crime, this law may be paradigmatically misguided, when it is unable to make clear boundaries of crime in the category of criminal terrorism by relying on two important matters, namely the use of violence and the threat of violence, not merely emphasizing on the motive of action to cause an atmosphere of terror or widespread fear or mass casualties. Article 8 of the Law includes 18 kinds of acts as a criminal act of terrorism, which is the labeling of terrorism offenses on ordinary crimes. This can not be justified because in this article there is no element of consequence that is generated as a characteristic of terror crime. For example, the point e of this article states 'intentionally or unlawfully, destroying or disabling an aircraft wholly or partly belonging to another'. Based on this formula, any person who damages an aircraft can be sentenced to death for committing a criminal act of terror without necessarily resulting from the arising of an atmosphere of terror or a pervasive fear or causing mass casualties. The maker of this Act assumes that any form of aircraft destruction may lead to an atmosphere of terror or a pervasive fear of mass casualties.

Thirdly, with the uncertainty of the motives and urgency, this law would potentially be a tool of new repression, given the vastness of crime and violations that are categorized as criminal acts of terrorism and rubber article formulation. The formulation of this law does not meet the principle of predictability and legal certainty, because it is difficult for one to suppose whether an act or omission it is a criminal act of terrorism or not. What this Act looks like is the impression of having an interest in expanding the authority of the state in controlling and limiting the things that are unilaterally perceived as a criminal act of terrorism. Especially with the government's lack of seriousness to formulate a comprehensive agenda to overcome the problem of terrorism in Indonesia, the issuance of this law is merely an answer to international pressure for the sake of power politics in the domestic sphere. So far there have been many interpretations of what constitutes acts of terrorism. The number of such definitions is closely related to the motives and interests behind the mention of 'who' and 'what' is meant by terrorism by either government, society and resistance groups (armed opposition or independence resistance). The late 19th century, early 20th century and before World War II, 'terrorism' became a technique of revolutionary struggle, for example the regime of Stalin's government (1930s) called 'the reign of terror'. In the era of cold war 'terror' is associated with the threat of nuclear weapons. In the 1970s terrorism styles were attributed to various phenomena; ranging from bombs that erupted in public places to poverty and hunger. Some governments stigmatize their enemies as

'Terrorists' and their actions as 'terrorism'.

Some Indonesian politicians themselves have included Free Aceh Movement (GAM) in the category of terrorist groups with no clear arguments. The US government in the Patterns Of Global Terrorism 2000 report mentions 43 major international terrorist groups, which are closely related to the 'threat' posed or potentially caused by these groups to their interests. Based on the area of ??operation, the international terrorist groups are divided into 6 regions, 13 groups operating in the Middle East, 11 in Western Europe, 8 in Asia, 5 in Latin America, 4 in Africa and 1 in Euroasia, and none one group based in North America. Based on the basic character of the movement, the terrorist groups can be broken down into 3 sub-groups, namely 1). The religious fanatical subgroup consists of 27 groups, 18 of which are Islamic, 8 Christian / Catholic groups, and one group holds the Aum sect; 2). Sub-based ideology (12 groups). The ideological base found for this subgroup is only one of the ideologies of Marxism with its variations; and 3). Subgroup ethno-nationalism (4 groups). These subgroups are found in Sri Lanka, Rwanda, and Columbia.

Beyond the direct mention and stigma of certain groups, in general acts of terrorism are understood as well-planned, politically motivated acts, attacking civilian targets, carried out by organized groups or underground agents (clendestine) with the aim of influencing the public or creating terror. Terror action is done to create a state of terror (atmosphere of terror / fear) in the community. The Propatriat Working Group defines terrorism as an offense that satisfies all of the following elements: 1). Intentionally use violence and / or threats of violence; 2). Addressed to civilians and / or civilian objects indiscriminate; 3). Conducted in an organized manner; 4). Delivers widespread fear; and 5). Can have political motives and goals or not. These two meanings try to explicitly emphasize the existence of clear and limitative definitions of terrorism, so that they can be distinguished from other crimes and at the same time prevent the use of articles to ensnare actions that are not within the scope of the definition of terrorism.

Both definitions above emphasize the meaning of the quality of actors (terrorists) and actor actions (terrorism). Given a clear and limitative definition, it is easy to ascertain whether the existing legal instruments are adequate or not and the need for new instruments. But as a note, that definition of the above has not been able to provide certainty of the definition of terrorism intact, including criminal acts. So far there has not been a recognized definition of universal terrorist crime. Even the United Nations does not issue a specific understanding of what constitutes terrorism or criminal acts of terrorism. The notion of 'terror' is a subjective experience, depending on the 'threshold of fear' that is in each person. Some people can survive despite long persecuted and there is a direct panic against the 'terror'. The existence of this subjective dimension leads to the possibility of stigmatization of a person as a 'terrorist' by the state. The interpretation of a criminal offense can not be a political commentary containing political dissent, but must also be an interpretation that is bound to facts or material evidence of crime so that an indictment and offense can be established. If the interpretation of a criminal offense is political, then criminal law enforcement becomes a mere sanction law, not to enforce norms, rules and order (prevention / aspect directing policy). As a political action, the US for example, could name 43 international terrorist groups. However, to carry out the legal process, it is still necessary to verify whether a person is right to commit a crime or not, or whether the action is a crime or not.

Especially to refer to as a crime of terrorism, if the definition used is very political (unclear and limitative in accordance with the meaning of law) then the Act on Criminal Acts of Terrorism is only a symbol attributive the success of the state formalil over terrorism, not an effective and concrete implementation of law enforcement.

3. Deadly Criminal Controversy

Contrast at various occasions always declare the rejection of the death penalty as the expression of the most cruel and inhuman punishment. Death penalty is the most important type of human rights violation, the right to life. This fundamental right (non-derogable rights) is a right that can not be violated, reduced or restricted under any circumstances, whether in an emergency, a war, including when a person becomes a prisoner. Indonesia itself has signed the Universal Declaration of Human Rights and President SBY has ratified the International Covenant on Civil and Political Rights, both expressly stated that the right to life is the right of every human being under any circumstances and is a state obligation to guarantee it. Unfortunately, the ratification of the Covenant on Civil Politics is not followed by the Second Supplementary Ratification of the International Covenant on Civil Political Rights on the Elimination of Death Penalty. The death penalty has other serious violations of human rights violations, namely violations in the form of acts of torture (psychological), cruel and inhuman. This can happen because generally the range between the death penalty and the execution lasts long enough. Tragically Indonesia itself has ratified the Convention against Torture and adopted it into the Anti-Torture Act No.5 of 1998. The abolition of the death penalty through legal or political mechanisms in Indonesia must have upheld the dignity of Indonesia in the eyes of the international community.

Even for the crime of terrorism the death penalty is generally a factor that reinforces the recurrence of future action. The death penalty becomes an ideological ammunition to increase the radicalism and militancy of the perpetrators. Until now even terrorism crime is still a scourge and the country has absolutely no effective answer to this problem. On September 9, 2004, there was a case of a bomb blast in front of the Australian Embassy.

As with other death-row inmates, the process of executing death executions is often hampered by the many opportunities for death row inmates to make legal remedies to avoid, alter or waiver punishment. These legal efforts are in the form of review (PK), amnesty and pardon. As happened in the Bali bombing case I, Amrozi cs actor has been sentenced to death by the Denpasar District Court judge on August 7, 2003 and made the PK effort three times. Although the legal effort was rejected by the Supreme Court in 2007, the convicted person decided not to use any other legal remedy, therefore the right to Amrozi cs's legal remedy could be declared fulfilled and only be executed on November 9, 2008 .

In addition, technically, the defendant's legal efforts are often constrained by the overload of cases at the Supreme Court level. So with the limited number of personnel then forced Agung. So with the limitations of the number of personnel then forced priority to the settlement of certain cases. The defendant or convicted terrorist can still be questioned or may be a witness to other acts of terror. Because almost all terrorist groups in Indonesia have links or linkages.

So the government needs to make a new policy on the prevention of terrorism by changing the paradigm of death sentence with a more soft and persuasive punishment. That is, the Government can apply a life sentence. As Satjipto Raharjo expressed on the sociology of law and progressive law. So it can be concluded that the death penalty not only in physical terms, but also can be social and the impact of a lighter but continuous penalty will have a greater deterrent effect than severe punishment but only for

a moment. In the sense that a life sentence can actually be regarded as a death sentence in a sociological sense, because it can not perform its social activities but still remain in its physical condition. Terrorism terrorists may prefer to be executed for entering heaven immediately in their thoughts and wishes, but will cry if sentenced for life, because the death of jihad is not fulfilled and will even suffer longer in prison.

The perpetrators of terrorism do indeed have symptoms of mental deterioration, due to past experiences, which are linked as victims of discrimination, inequalities, poverty, injustice and the environment of violence. It is also a result of strong doctrine. Thus human beings need psychological healing and liberation from the false radical doctrine. Penitentiary (LP) is not only a place to physically punish it. But according to the purpose of punishment in addition to causing a deterrent effect also provides an opportunity for the defendant to correct himself from mistakes. And if possible can return to live in the community well.

D. CLOSURE

1. Conclusion

Government policy in overcoming terrorism crime, related to the application of death penalty in Law no. 15 of 2003 on Combating Terrorism Terrorism has not reached its goal of providing a deterrent effect for the perpetrators of terrorism crimes. This happens because of lack of understanding of the characteristics of terrorism crimes that are different from other crimes. Terrorism crime has political, religious or ideological motives that must be proven first. Motives are things that do not seem like a crime. Terrorism crime is always associated with other crimes. The perpetrator is deeply emotionally attached to the group. Terrorism groups always have widespread and closed networks, with a new recruiting system. Fight against terrorism will not be exhausted, like a dead one grows a thousand. Dealing with terrorism aloud, whether it be with the threat of capital punishment, or being shot dead during an ambush is a trigger for more vengeance.

Terrorist criminals tend to have psychological problems resulting from past experiences or doctrinal results that generate militant souls. The belief in the truth of a crime committed creates a loss of fear of death. Even death is made as a goal to achieve the reward and heaven. Then of course the threat of capital punishment is useless, let alone the deterrent effect.

In the implementation of capital punishment on criminal acts of terrorism is still a lot of obstacles, especially related to the law and Human Resources law enforcement. The absence of a legal device at the time of the Bali Bombing I in 2002 forced the government to impose a retroactive terrorism Act that reap the controversy. The readiness of Human Resources of the police and other law enforcement agencies is also insufficient to deal with terrorism cases so that it can hamper the legal process of settling terrorism cases. The creation of a hasty act of terrorism and the influence of political impulse resulted in many substantial weaknesses that have an impact on its application. The lack of understanding of the characteristics of terrorism crime and the obstacles in its legal process cause the expected deterrent effect is not achieved.

2. Suggestion

Suggestions that can be given in the discussion of this paper are:

1. To tackle criminal acts of terrorism the government needs to change policies with a more sociological and deradicalisation legal approach. Replacing death sentences with life sentences to avoid polemics about the death penalty itself and counterattack. That lighter but continuous punishment is more influential than heavy but momentary.
2. Avoid giving death sentences against terrorists to be able to provide opportunities to improve themselves through guidance in Penitentiary. So the goal of punishment can be achieved.
3. In order to change the definition of terrorism in Terrorism Act by incorporating elements of political motives, religion and ideology.
4. Accelerate the legal process of convicted terrorism terrorist so that it does not result in long waiting period of execution.

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THE SETTINGS POLITICAL PARTIES IN DEMOCRACY INDONESIA SYSTEM
(Critical Review of Decision of the Constitutional Court Number 5 / PUU-V / 2007 concerning Renewed Individual Candidate In Pilkada)

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ABSTRACT

Election of Regional Head in Indonesia is only followed by candidates submitted from political parties or a combination of political parties. However, in its development, individual candidates can also register themselves as candidates for regional head. It is in accordance with the Decision of the Constitutional Court Number 5 / PUU-V / 2007 granting the petition for the examination of Article 56 paragraph (2), Article 59 paragraph (1), paragraph (2) and paragraph (3) of Law Number 32 Year 2004 regarding Regional Government. Therefore, the candidates in the Regional Head Election are then not only from political parties or coalitions of political parties but also permitted from peseoroangan. Individual candidates only apply in the election of regional head. But not in the presidential election (Presidential election). Because the Constitutional Court rejected the application of independent candidate or individual in the presidential election as the Constitutional Court Decision Number 56 / PUU-VI / 2008 namely the Constitutional Court of the Republic of Indonesia rejected the material test of Law Number 42 Year 2008 regarding General Election of President and Vice President of Law Basis of the Republic of Indonesia Year 1945. But with the allowance of individual candidates in the election of regional head to make political parties can't perform its function maximally. Because in the democratic system, political party is one of the "pillars of democracy" which performs the function of political aggregation in preparing presidential candidates, governors, regents and mayors. Especially in the democracies is not found "individual candidate". Even in its journey, in the elections very few candidates are submitted through the individual path. And when the candidate for office as head of the region, easily dropped as the case happened to the Garut Regent who has been deposed because it has no power in parliament. This paper aims to analyze political parties in the democratic system in Indonesia and the regulation of political parties in the Regional Head Election in conjunction with the decision of the Constitutional Court. 5 / PUU-V / 2007 on individual candidates. The type of research used in this paper is Juridical Normative (Legal Research). Understanding this normative juridical research is research conducted by reviewing and analyzing the substance of legislation on the subject matter or legal issues in consistency with the existing legal principles.

Keywords: Political Parties, Democracy, Election of Regional Head.

Introduction

The election of the Governor, Regent and Mayor often referred to as the election of regional head (Pilkada) as regulated in Law Number 10 of 2016 concerning the Second Amendment to Law Number 1 Year 2015 On Stipulation of Government Regulation in Lieu of Law Number 1 Year 2014 The election of the Governor, Regent and Mayor into Law, has stipulated that the filling of the office of the regional head shall use two channels, namely through the channels of political parties or coalitions of political parties, and individual channels.[1]

The path through independent candidate or commonly referred to as independent candidate, formally appear in the local political arena after the issuance of Amar Decision of the Constitutional Court Number 5 / PUU-V / 2007 granting the petition for review of Article 56 paragraph (2), Article 59 paragraph (1) , paragraph (2) and paragraph (3) of Law Number 32 Year 2004 regarding Regional Government. In essence, the verdict states that not only political parties or coalitions of political parties can nominate candidates for heads / vice-heads, but also open opportunities for individuals to volunteer without going through political parties or coalitions of political parties.

The presence of independent or independent candidates is one manifestation of the disappointment of candidacy through the political party line.[2] With the presence of independent or independent candidates in the election certainly has broad political influence at least to political parties. The influence is the birth of a challenge for the political party, especially making the competition more complex and tight. Competition not only happens

[1] Law Number 10 Year 2016, Article 40 paragraph (1) and Article 41 paragraph (1).
[2] Pratikno, "Independent Candidate, Election Quality, and Institutionalization of Political Parties", Journal of Social and Political Sciences, Volume 10, Number 3, March, 2007

between political parties that carry their respective candidates, but also occurs between political parties with independent candidates.

Of course, the increasingly tight competition, at least become a criticism and awareness for political parties to fix itself, especially the issue of the process of political cadre and difficult to register to become regional heads through political parties because of the many requirements that must be fulfilled, especially concerning "political dowry" or cost of winning.

Indeed, after the reforms marked by the collapse of the New Order regime in 1998 have sprung up political parties. Previously, since 1973 there were only 2 (two) political parties namely the United Development Party (PPP) and the Indonesian Democratic Party (PDI) and added one (1) political power of interest of the "ruler" named "GolonganKarya" (Golkar). Of course, political parties born after reform still have flaws and weaknesses.

However, despite the shortcomings and weaknesses, since political parties are one of the pillars of democracy, the Law which emerges after the reforms mandates that political parties perform the function of political aggregation. Therefore, the right to nominate the president and head of the region is only a political party or a coalition of political parties. This is as regulated in the Law of the Republic of Indonesia. Number 23 of 2003 on Presidential Election and Vice President of Article 5 paragraph (1):

Participants in the General Election of the President and Vice President shall be the Pair of Candidates nominated in pairs by a political party or a coalition of political parties"[3]. and the Law of the Republic of Indonesia. Number 32 Year 2004 regarding Regional Government in Article 56 aya (1) and paragraph (2) which reads as follows:

(1) The regional head and deputy regional head shall be elected in candidate pairs carried out democratically on the basis of direct, public, free and secret, honest and fair.
(2) The prospective pair as referred to in paragraph (1) shall be submitted by a political party or a coalition of political parties.[4]

In Indonesia, political parties still have shortcomings and weaknesses. But that does not mean that the shortcomings and weaknesses are actually allowed the path of individual candidates in the election of regional head (Pilkada). Because, in addition to not found individual candidates in various countries that understand democracy, can also reduce the function of political parties. Because, previously, political parties in various parts of the world have functions such as political socialization facilities, political recruitment facilities, political communication, political participation and other functions including political aggregation either as presidential candidate, governor, regent to mayor, then how after allowing a candidate through a personal path? Of course many questions arise such as: why individual channels are allowed to nominate candidates in local elections, while presidential and vice presidential candidates are not allowed from individual candidates and only political parties or joint political parties are eligible to nominate candidates.

In the implementation, the development of local election from year to year followed by candidates from individual channels is very small percentage. especially individual candidates who follow the election of governor[5]. Individual paths tend to nominate candidates for district head or city elections. And since elections are held simultaneously from 2015 to 2017, candidates from individual channels[6], very few can win. . When the individual path can win as regional head, will have problems in running the wheels of government.Because it does not have the support of the Regional House of Representatives (DPRD). The result is easily dimakzulkan (dilengserkan) as happened in the case of Garut Regent named Aceng HM Fikri.

Realizing the reality, where the participation of candidates from individual paths in its development has many problems (madlorot) than the aspects of maslahah, the authors consider it necessary to conduct study on the participation of candidates from the individual path in the election of regional head, as well as reconstruct, how the party arrangement politics in the democratic system in Indonesia, especially in welcoming the election of regional head (Pilkada), nationally, which will be implemented in 2024.

In this paper, the problem of limiting authors can be formulated as follows:

1. What is the position and function of political parties (Political Parties) in the democratic system in Indonesia?
2. What is the arrangement of political parties (political parties) in the election of regional head (Pilkada) in relation to the decision of the Constitutional Court. 5 / PUU-V / 2007 on individual candidates?

[3]Law of the Republic of Indonesia. Number 42 of 2003 on Presidential Election Article 5 paragraph (1).
[4] Law of the Republic of Indonesia Number 32 Year 2004 Concerning Regional Government Article 56 paragraph (1) and (2).
[5] In the direct elections held on 27 June 2018 held in 27 Provinces in Indonesia, only 7 candidates for governor and deputy governor registered in the KPUD from individual channels.
[6] The individual winning line data that can win the elections of 2015 amounts to ....From….Region.And in the year 2017 amounts to ... ..of ....Area.

Theory Review

1. Democratic Theory

The term democracy comes from the Greek word "democrat", the basic meaning: demos = people; kratos = strength; so the power of the people[7], or a form of state government, where the people are influential above him, in short the people's government. Democracy is a social idea that places the people as the holder of sovereignty (power). Robert Dahl states "... there is no democratic theory ... there are only democratic theories[8]." Democracy is an integration of ideas, procedures and practices that are in synergy with one another.

Democracy is also a method or means to regulate the order of society and also to make a change of society, to determine its own cultural style, to determine freedom of movement, to express opinions and writings, to determine freedom of the press, to gather, to adhere to religion or beliefs and beliefs, etc. . There is equality in a democratic state of independence for each person, and in a dictatorial state there is an independent equality for each person. Independence or freedom of every human being is the soul of democracy.[9]

Democracy has significance for the people who use it because with the democracy of the people's right to decide for themselves the way the state organization is guaranteed. Therefore, almost all the understanding given to the term democracy always provides an important position for the people, although operationally implications in different countries are not always the same.[10]

Robert Dahl in Miriam Budiardjo put forward five criteria of democracy as a political idea and how a government is called democratic. First, the running of state sustu government is based on law enforced, such as constitution, human rights, law, and free and impartial court. Second, the running of governance is under the real control of society. Here high political participation of society is needed. Third, the free, regular elections (elections), and allowing the majority of the population to vote and be elected. Fourth, the existence of majority principle, namely the adoption of consensus decision, if in the election is not achieved with the most votes. Fifth, the existence of guarantees for the democratic rights of civil society in the fields of politics, economy, social, and culture. From several points expressed by Dahl, the important points that can be taken related to procedural democracy in the election is on the first and second statements. Procedural democracy here has a close connection to elections.[11]

Regional Head Election

The filling of representative institutions in the constitutional practice is usually carried out through the General Election. After amendment of the amendment of the 1945 Constitution of the State of the Republic of Indonesia, all members of representative institutions and even presidents and regional heads are elected by the mechanism of the General Election. General Election became the agenda held periodically in Indonesia.IbnuTricahyo defines General Elections as follows: "The General Elections are instruments of realizing the sovereignty of the people who intend to form a legitimate government and the means of articulating the aspirations and interests of the people"[12]. The above definition makes it clear that elections are an instrument of realizing popular sovereignty, establishing legitimate government and as a means of articulating the aspirations and interests of the people. The State of Indonesia includes its people in the framework of state administration. People's sovereignty is run by representatives of the people who sit in parliament with a representative system (representative democracy) or indirect democracy. People's representatives are self-determined by the people through general election periodically in order to fight for the aspirations of the people.

Soedarsono pointed out that what is meant by the general election is as follows: "Elections are a minimum requirement for the existence of democracy and held with the aim of electing representatives of the people, regional representatives, presidents to form a democratic government"[13]

The above explanation states that the general election is a minimum requirement of democracy which aims to elect the representatives of the people, regional representatives, the president to form a democratic government. People's sovereignty is run by representatives of the people who sit in the representative institutions. People's sovereignty over the administration run by the president and the Regional Head who are also elected directly. Members of the legislative as well as the President and the Regional Head having been directly elected are all

[7] C.S.T Kansil& Christine S.T. Kansil, "Constitutional Law of the Republic of Indonesia" (Jakarta: RinekaCipta, 2008), p. 90
[8] RobiNurhadi, Procedural Democratization in the Election of Jakarta. Political Journal Vol. I. 2008, p. 2
[9] C.S.T Kansil& Christine S.T. Kansil, Opcit, p. 92
[10] Moh.Mahfud MD, "Democracy and the Constitution in Indonesia", (Jakarta: RinekaCipta, 2000), p. 19
[11] Miriam Budiardjo, Fundamentals of Political Science, (Jakarta: GramediaPustaka, 2008), p. 109
[12] IbnuTricahyo, "Electoral Reform, Toward the Separation of National & Local Elections". (Malang: PT In-Trans Publishing, 2009), p. 95.
[13]Soedarsono, "Constitutional Court of Democracy Guards", (Jakarta: Secretariat General and Registrar, Constitutional Court of the Republic of Indonesia, 2004), p. 19

representatives of the people who exercise their respective functions of power. The position and function of the people's representatives in the constitutional cycles is so important and that the people's representatives actually act on behalf of the people, the people's representatives must be determined by the people themselves, that is through the general election. According to JimlyAsshidiqqie the importance of organizing the General Election on a regular basis is due to several reasons including the following:

1) People's opinions or aspirations tend to change over time;
2) The living conditions of society that can also change;
3) Population and adult population who can exercise their suffrage;
4) To ensure good leadership regulation in the executive and legislative branches.[14]

Based on the above statement that some of the reasons for the importance of elections include the people's aspirations tend to change, changing people's living conditions, population growth and leadership regulations.

Elections become a means to channel the aspirations of the people. People's changing life conditions require a mechanism that accommodates and regulates it through the election process. Every adult Indonesian citizen and citizen has the right to exercise his or her right to vote in elections. The leadership regulation of both the executive and legislative branches will be implemented periodically with the election.

Based on Law Number 10 Year 2016, the election participants of the Regional Head and Deputy Regional Head are couples proposed in pairs by a political party or a coalition of political parties or individuals who register or be registered in the Provincial or Regency / City General Election Commission. A political party or a coalition of political parties may register a candidate pair if they meet the requirements for the acquisition of at least 20% (twenty percent) of the seats of the DPRD or 25% (twenty-five percent) of the accumulation of valid votes in the parliamentary elections of the relevant members of the DPRD.

Therefore, the participants of Pilkada are candidates paired in pairs by a political party or a coalition of political parties. The election of regional heads entered a new era when the Constitutional Court ruled that individual candidates could participate. The existence of the provisions of election participants can only be nominated by a political party or a coalition of political parties is considered contradictory to the 1945 Constitution. However, after Ranggalawe, a member of the Regional People's Legislative Assembly of Central Lombok District, filed a judicial review of Law number 32 Year 2004 on July 23, 2007, the Constitutional Court with Decision Number 5 / PUU-V / 2007 states that in Article 32 of Law Number 32 Year 2004 regarding Regional Government which only gives opportunity to political parties or coalitions of political parties and closed the constitutional rights of independent candidates in Pilkada is contradictory to the 1945 Constitution. It is the verdict that opens the opportunity for independent candidates to advance in the Pilkada contest.

Research Methods

The type of research used in this paper is Juridical Normative (Legal Research). Understanding this normative juridical research is research conducted by reviewing and analyzing the substance of legislation on the subject matter or legal issues in consistency with the existing legal principles.[15]

Analysis

Political parties in the democratic system in Indonesia

As an individual or precisely as a person, man can not live and develop on his own. He needs social institutions, he needs society and state[16], in this perspective humans are referred to as political beings. Man as a political being is a perpetrator of the life of society and his country, he also has rights and duties as a citizen or citizen of a country. Therefore, the relationship between man and politics is very closely in the life of society, nation and state.

Etymologically, the word politics comes from the Greek word "polis" which means city or community as a whole. The concept of "polis" is the idealistic project of Plato and Aristotle.[17] Along with the development of science, began many scientists who provide the definition of politics, among others are as follows. Budiardjo said that politics is an attempt to set rules that are acceptable to most citizens, to bring people to a harmonious common

[14]JimlyAsshiddiqie, "Constitution & Constitutionalism of Indonesia", (Jakarta: SinarGrafika, 2011), p. 169
[15]Marzuki Peter Mahmud, "Legal Research", (Jakarta: PT KencanaPrenada Media Group, 2010), p. 35
[16]Maran, R., Introduction to Political Sociology. (Jakarta: RinekaCipta, 2007) pp. 7.
[17] Firmansyah. Managing Political Parties - Communications and Positioning of Political Ideology in the Era of Democracy. (Jakarta: YayasanObor Indonesia. 2008), p. 8.

life[18]. To reach the good life is related to various activities, among others, concerning the process of determining the objectives of the system, as well as ways to implement that goal.

Politics is closely related to political parties. the organization of political parties is an important component as evidence of a democratic state. Political parties in a democratic country serve as one of the vessels of the people's aspirations. Without political parties, the mechanisms of a democratic country can not function effectively. The existence of political parties is also inseparable from the support of the community.

Max Weber defines a political party as a public organization aimed at bringing its ruling leader and allowing his supporters (politicians) to benefit from that support[19]. Furthermore, many other scientists who provide the definition of political parties, as proposed by experts in Hamid[20], as follows:

Sigmund Neuman defines a political party as an articulate organization comprised of active political actors in society, those who focus on the control of governmental power and who compete for popular support, with some other groups having different views. Thus the political party is a great intermediary that links social forces and ideologies with the official governmental institutions that link it to political action within a broader political society.

For Joseph La Palombara and Myron Weiner, political parties are political organizations that have limited and temporal relationships with their supporters in the region. According to Roy C. Macridi, a political party is an association that activates, mobilizes people, and represents a particular interest, provides a compromise way for competing opinions, and raises political leadership, and is used as a tool to gain power and to govern. Peter Schroder, argues that political parties are groups of people of equal standing, seeking power and influence at the government level, in order to influence the formation of will / goals and bring about a shared political view.

La Palombara and Weiner identified four basic characteristics that characterize organizations categorized as political parties, as follows.

1. Long-term organization. Political organizations must be long-term, expected to continue to be present even if the founders are no longer present. ... and there is a succession mechanism that can guarantee the long-term sustainability of political parties.
2. Organizational Structure. Political parties will only be able to carry out their political functions if supported by an organizational structure, from the local to the national level, and there is a regular pattern of interaction between the two. ... thus improving the efficiency and effectiveness of control and coordination functions.
3. The purpose of power. Political parties are established to gain and retain power, both locally and nationally. ... it also distinguishes political parties from other groups and groups in society such as unions, associations and ties.
4. Broad public support is a way to gain power. Political parties need to gain widespread support from society. ... the greater the public support a party gets, the greater its legitimacy.[21]

Law Number 2 Year 2008 on Political Parties, which has been amended by Law Number 2 Year 2011 in Article 1 paragraph 1 states that a political Party is a national organization and is formed by a group of Indonesian citizens voluntarily on the basis of equality of will and the ideals to fight for and defend the political interests of members, society, nation and state, and to maintain the unity of the Unitary State of the Republic of Indonesia based on Pancasila and the 1945 Constitution of the State of the Republic of Indonesia.

Budiardjo said that political parties are an organized group whose members have the same orientation, values, and ideals. The aim of this group is to gain political power and seize the political position (usually) in a constitutional way to carry out its program.[22]EapSaefulloh Fatah describes the meaning of political parties as follows.[23]

1. is a collection of individuals;
2. constitutes organized associations with definitions of clear, standardized positions, functions, and hierarchies;
3. there is a common identity bond between its members, both ideologies and interests;
4. having the aim of acquiring political power in government; and participate in elections to achieve its objectives.

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[18] Miriam Budiardjo, Fundamentals of Political Science, Opcit, p. 15

[19]Firmansyah. Managing Political Parties - Communications and Positioning of Political Ideology in the Era of Democracy.Opcit, p. 66.

[20] Hamid, Ahmad. F. Local Political Party in Aceh - Political Decentralization in Nationality Country. (Jakarta: Kemirtaan, 2008), p. 6.

[21]Firmansyah. Managing Political Parties - Communications and Positioning of Political Ideology in the Era of Democracy.Opcit, p. 67

[22] Miriam Budiardjo, Fundamentals of Political Science, Opcit, p. 404

[23] Hamid, Ahmad. F. Local Political Party in Aceh - Political Decentralization in Nationality Country. Opcit, p. 9.

So the so-called political party is an organized organization and has the same ideals, ideals, views and goals, namely to gain power by filling the positions in government in order to hold control of the government.

The presence of political parties as a reflection that human rights have a place of honor, especially the right to express an opinion, as well as the right to assemble and associate. Therefore, the presence of political parties in political activities gives its own color, it is based on the function and purpose inherent in political parties. The objectives and functions of political parties in Indonesia are regulated in legislation, namely the Law of the Republic of Indonesia Number 2 Year 2008 on Political Parties. As mentioned in article 10, paragraph 1 and 2, political parties have general goals and special purposes.

The general objectives of the political parties mentioned in article 10, paragraph 1 are as follows.

1. To realize the national ideals of the Indonesian nation as referred to in the Preamble of the 1945 Constitution of the State of the Republic of Indonesia;
2. Maintain and maintain the integrity of the Unitary State of the Republic of Indonesia;
3. Developing a democratic life based on Pancasila by upholding the sovereignty of the people within the Unitary State of the Republic of Indonesia; and
4. Achieve prosperity for all Indonesian people.

Similarly, the specific objectives of the political parties mentioned in article 10, paragraph 1 are as follows.

1. Increasing the political participation of members and communities in the context of organizing political and governmental activities;
2. Fighting the ideals of Political Parties in the life of society, nation, and state; and
3. Building ethics and political culture in the life of society, nation, and state.

In addition to general objectives and special purposes, political parties are also authorized to set up their party goals, which can be set forth in the Statutes and Bylaws of each political party. It is also regulated on the function of political parties listed in article 11, that political parties function as the following means.

1. Political education for members and the wider community to become citizens of Indonesia who are aware of their rights and obligations in the life of society, nation, and state.
2. Creation of a conducive climate for the unity and unity of the Indonesian nation for the welfare of the people.
3. Absorbers, collectors, and distributors of the political aspirations of the people in formulating and defining state policies.
4. Political participation of Indonesian citizens.
5. Political recruitment in the process of filling political office through democracy mechanism by taking into account gender equality and justice.

Budiardjo in his book Fundamentals of Political Science mentions there are 4 functions of political parties in democracies, as follows.[24]

1. As a means of political communication

The political party holds an interest aggregation in the form of opinions and aspirations, then processed and formulated in a more organized form or called interest articulation. If there is no aggregation and articulation, then these opinions or aspirations will be confused and conflicting. Therefore, with aggregation and articulation the interests of confusion and impact are reduced. After that the political party formulates a policy proposal that is included in the program or platform of the party (goal formulation) to be fought or submitted through parliament to the government to be made public policy (public policy). Thus the demands and interests of the community are presented to the government through political parties.

2. As a means of socialization or political education

Political socialization is a process through which a person obtains an attitude and orientation towards a political phenomenon, which is generally applicable in the society in which he resides. It is part of the process that determines a person's political attitude, such as nationalism, social class, ethnicity, ideology, rights and duties.

3. As a means of political recruitment

This function is concerned with issues of leadership selection, both internal party leadership and wider national leadership. For its internal interest, every parati needs qualified cadres, because only with such cadres can it be a party that has a greater chance of self-development. By having a good cadre, parati will not have difficulty determining its own leaders and have the opportunity to nominate candidates for entry into the national leadership exchanges.

[24] Miriam Budiardjo, Fundamentals of Political Science, Opcit, p. 405

4. As a means of regulating conflict

Conflict will always exist in every society, especially in heterogeneous communities. Whether in terms of ethnic, social and economic, as well as religion. Each difference saves potential conflicts. Here the role of political parties is needed to help resolve conflicts, or at least can be arranged in such a way that the negative consequences can be reduced as much as possible. Party elites can foster understanding between them and at the same time convince their supporters.

Suprihatini mentions several functions of political parties, including political parties as:[25]

1. Means of political participation;

That is, this political party seeks to mobilize or direct the masses (citizens) into life and political activities. This function is a function peculiar to political parati. The success of the function of political parties is marked by the increasing level of citizen participation in fighting for a government post.

2. Means of articulation of interests;

The functioning of political parties as a means of articulation of their intended interests, political parties are charged with declaring the interests of citizens to the government and higher political bodies.

3. Aggregation of interests;

In this function, the task of a political party is to formulate a political program that reflects the combined demands of the political parties present in the government and submit it to the legislature. In addition, political parathy also bargains with candidates for government officials proposed in the offering of support to candidates for government officials in return for the fulfillment of party political interests.

4. Means of policy makers;

The function of political parties as policy makers can not be separated from the background of the formation of political parati, namely to seize power within the government in accordance with existing rules. ... in other words, the policy of government is a follow-up of the policies of the existing political parties.

In the opinion of Sigmund Neumann in Hamid[26], political parties in a democratic country have four functions: First, the party regulates a chaotic public will; Second, educate citizens to be politically responsible; Third, being the liaison between government and public opinion; and fourth, choosing leaders.

The existence of political parties in a democratic system is very important. Because after all Political Parties, is the main instrument in the democratic system itself. If then in the implementation of a democratic system in a political party state is still not able to perform its functions, it is almost certain that the current democracy has a flaw, and this is happening in Indonesia. Political parties are not yet fully capable of performing their functions so that the public wants other candidates apart from the Political Parties.

Since 2005 when the regional head election was first performed, the existence of political parties became increasingly important. Political party with its own network, is expected to give birth to various regional heads capable of building their respective regions. But the high disappointment on the performance of political parties then raises the idea of alternatives, namely carrying candidates for regional heads who are not from political parties or known as independent candidates.

The existence of independent candidates within the framework of elections is actually a form of inconsistency over the democratic system that the Indonesian nation has agreed upon. Agreement to make democracy as a political system, basically requires a strong political party institution. Therefore, when the political party institutions are not yet capable of performing their basic functions, the only way that suits the democratic system is to improve and strengthen the political party itself.

The number of candidates for regional heads supported by political parties in the election of regional head elections, ultimately demanding the sustainable reform of institutions of political parties. The existence of political parties in the electoral process as exemplified in the study, is needed as an instrument of communication and political socialization as a function of the political party itself. But in reality not all political parties can give full support to the candidates as described in the study. On the contrary, the existence of political parties is often assessed as part of the problem Pilkada itself. The cost of political dowry that reaches hundreds of millions for example, is one of the main problems why then the cost of elections become greater. Political parties then provide a variety of reasons why it takes a large dowry. One of the reasons is for the cost of surveying candidate candidates

Without neglecting the process of reforming the existing political party institutions, at the same time must also revamping the current regional head electoral system. The election system of the regional heads by giving the

[25]Suprihatini, Amin. Political Parties in Indonesia. (Klaten: CempakaPutih, 2008), p. 19.

[26] Hamid, Ahmad. F. Local Political Party in Aceh - Political Decentralization in Nationality Country. Opcit, p. 12.

option of submitting individual candidates should be terminated. Political parties with all its weaknesses should be addressed and given a complete space in democracy in Indonesia. The provision of space to individual candidates in Pilkada is actually a weakening of the existence of political parties.

Arrangements of political parties in the election of regional heads in relation to the decision of the Constitutional Court. 5 / PUU-V / 2007 on individual candidates

Democracy Indonesia is currently being hit by problems, political party is not fully able to carry out its functions so that there is dissatisfaction with various policies of Political Parties such as Pilkada. Election as a democratic mechanism followed by political parties to market their best cadres in the political market, it still often resulted in regional heads and representatives of the people who have problems in various legal cases. Various cases of corruption committed by officials and members of Parliament, is one proof of the failure of political parties in performing its function, namely recruitment. political parties as the main instruments of democracy, especially in Indonesia, still seem unable to select and invite people who are considered capable to be involved further in every political process that is taking place.

The stuttering of this political party which later became a gap and successfully exploited by various layers of the elite to enter in politics. They also try to mobilize instantly various groups in society to engage in the political process. This is one of the sources of political instability. Political instability in the case of Indonesia can easily be encountered from various cases of political processes. Especially seen in the case of Pemiilihan head area. In many regions, there are not many election pilkada that preceded or followed by the occurrence of social conflict.

Political instability can in fact be said to be part of the ongoing failure of democratization. The ongoing democratization does not necessarily make political parties the only means of channeling the various interests that exist in society in political issues. One of them is the problem of the emergence of individual candidates in the regional head elections.

The emergence of individual candidates in the regional head election shall be based on the Decision of the Constitutional Court Number 5 / PUU-V / 2007 granting the petition for review of Article 56 paragraph (2), Article 59 paragraph (1), paragraph (2) and paragraph (3) of Law Number 32 Year 2004 on Local Government. The authority of the Constitutional Court according to Article 24C paragraph (1) of the 1945 Constitution, Article 10 paragraph (1) sub-paragraph a of Law Number 24 Year 2003 regarding the Constitutional Court as amended by Law Number 8 Year 2011 on Amendment to Law Number 24 2003 concerning the Constitutional Court (State Gazette of the Republic of Indonesia Year 2011 Number 70, Supplement to State Gazette of the Republic of Indonesia Number 5226, hereinafter referred to as the Constitutional Court Law) and Article 29 paragraph (1) sub-paragraph a of Law Number 48 Year 2009 concerning Judicial Authority (State Gazette Republic of Indonesia Year 2009 Number 157, Supplement to the State Gazette of the Republic of Indonesia Number 5076), one of the constitutional authorities of the Court is to hear at the first and final level the decision of which is final to examine the Law against the 1945 Constitution of the State of the Republic of Indonesia.

The Constitutional Court in its ruling. 5 / PUU-V / 2007 which reads: "The Court is not a legislator who can supplement the provisions of the law by adding word formulas to the laws being tested. However, the Court may eliminate the words contained in a provision of the law so that the norms contained in the articles, clauses and / or sections of the law are not contradictory to the 1945 Constitution. As for the entirely new material that must added in the legislation is the duty of legislators to formulate it "

In order for individual candidates without going through a political party or a coalition of political parties is possible in the election of the regional head and deputy head of the region, according to the Constitutional Court, several articles of the Regional Government Law petitioned for review must be granted partially by eliminating all paragraph or paragraphs as follows:

Article 56 paragraph (2) reads, "The prospective pair as referred to in paragraph (1) shall be submitted by a political party or a coalition of political parties" shall be deleted entirely, as a barrier for individual candidates without passing political parties or coalitions of political parties. Thus, with the abolition of Article 56 Paragraph (2), Article 56 becomes without a clause and reads, "The regional head and deputy head of region shall be elected in one candidate pairs carried out democratically on the basis of direct, public, free, secret, honest and fair" ;

Article 59 paragraph (1) is deleted on the phrase which "is proposed in pairs by a political party or a coalition of political parties", as it would be a barrier for individual candidates without passing political parties or coalitions of political parties. Thus, Article 59 paragraph (1) shall read, "Participant of the election of regional head and deputy regional head shall be the candidate pair";

Article 59 paragraph (2) is deleted on the phrase which reads "as referred to in paragraph (1)", as a consequence of the change of Article 59 paragraph (1), so that Article 59 paragraph (2) shall read, "Political party or joint political parties may register candidate pairs if they meet the requirements for the acquisition of at least 15% (fifteen percent) of the seats of the DPRD or 15% (fifteen percent) of the accumulation of valid votes in the

parliamentary elections in the respective regions ". Therefore, Article 59 paragraph (2) is a provision containing the authority of a political party or a coalition of political parties and at the same time the requirement to nominate candidates for regional head and deputy regional head in the regional head election;

Article 59 paragraph (3) is abolished on the phrase which reads, "a political party or compound of a mandatory political party", a phrase that reads, "the widest", and a phrase that reads, "and further processes the intended candidate", so that Article 59 paragraph (3) shall read, "Opening the opportunity for prospective candidates who meet the requirements as referred to in Article 58 through a democratic and transparent mechanism." Thus, there is an opportunity for individual candidates without passing political parties or coalitions of political parties.

Decision of Constitutional Court No. 5 / PUU-V / 2007 which provides an opportunity for independent candidates to advance in the Pilkada contest leaving some very important legal issues to be resolved soon. This is considering the legal consequences directly related to the filling of the position of regional head in Indonesia. Failure to resolve legal issues after the Constitutional Court's verdict on independent candidates will also directly affect the future of democracy and the creation of good local governance.

To see more about the legal aspects of Decision of the Constitutional Court. 5 / PUU-V / 2007 and the legal consequences, which we shall refer to are the Constitutional Court Decision No. 7 / PUU-V / 2007. 5 / PUU-V / 2007 itself. The authors argue that the Court's decision in this case resulted in the existence of new legal norms. If we look closely at the contents of the Constitutional Court Decision, it appears that new legal norms are formed by the removal of phrases that may prevent independent candidates from being nominated by a political party or a coalition of political parties. The formation of this new legal norm is due to changes in legal norms in the Law on Regional Government, for example in Article 59 paragraph (1) which originally meant that the nomination of candidate pair of regional head can only be proposed by political party or combination of political party become the norm of law candidates for regional heads can not only be proposed by a political party or a coalition of political parties.

When considered carefully, it is clear that on the one hand the Constitutional Court creates a new norm by opening up opportunities for individual candidate pairs other than those proposed by political parties or coalitions of political parties, while on the other hand there has been a legal vacuum (rechtsvacuum) due to the limited authority of the Constitutional Court which can not form new legal rules.

Thus it can be interpreted that the new legal norms have been formed from legal norms that are contradictory to the 1945 Constitution becomes a legal norm that is no longer contradictory to the 1945 Constitution. The Constitutional Court can not establish new legal rules because they do not have legislative authority but can create norms the new law by its verdict. With the characteristic of the final and binding decision of the Constitutional Court, the establishment of this new legal norm should be used as the basis for the General Elections Commission and the Regional General Election Commission to not close the opportunity for candidate pairs that are not derived from the nomination of a political party or a coalition of political parties.

As the author has conveyed that to solve the legal problem after the Constitutional Court decision about independent candidates, then that should be a starting point is the decision of the Court itself. By looking closely at the Constitutional Court's decision regarding independent candidates, it can be seen that the legal vacuum (rechtsvacuum) does occur as long as the rules are more complete about the minimal amount of support for individual candidate pairs.

Verdict MK No. 5 / PUU-V / 2007 stating: "Whereas the determination of minimum support requirements for individual candidates is entirely the authority of the legislator, whether to use the provisions as mentioned in Article 68 of the Aceh Governance Law or under different conditions. To avoid the legal vacuum (rechtsvacuum), before the legislator regulates the terms of support for individual candidates, the Court is of the opinion that the General Election Commission pursuant to Article 8 Paragraph (3) a and f of Law Number 22 Year 2007 concerning the General Election Organizer is authorized to make arrangements or regulation on the matter referred to in the framework of preparing and stipulating the procedures for the holding of regional head elections. In this case, the General Elections Commission may use the provision of Article 68 Paragraph (1) of the Aceh Government Law as a reference ". To overcome this legal void, the role of the General Elections Commission or the Regional Election Commission is so vital.

Thus it can be stated that for the moment the candidate for Elections comes from Political Parties, Joint Political Parties and Individual Candidates. This is according to the author is against the democracy itself. This is because in democracy, the participant of the General Election is a Political Party. All the aspirations of the people are channeled into the Political Party so that if any aspirations of the people should be channeled in the Political Party policy not on the other. The internal matter of Political Party about the lack of recruitment capacity is an internal Party problem and must get support to carry out various reforms. This is done so that the Party is able to function optimally and able to support people's aspirations for a better state life.

Closing

Conclusion

1. Law Number 2 Year 2008 regarding Political Parties, which has been amended by Law Number 2 Year 2011 in Article 1 paragraph (1) states that a political Party is a national organization and is formed by a group of Indonesian citizens voluntarily the basis of equality of will and ideals to fight for and defend the political interests of members, society, nation and state, and maintain the unity of the Unitary State of the Republic of Indonesia based on Pancasila and the 1945 Constitution of the State of the Republic of Indonesia. Political parties are participants of the General Elections and Regional Head Election in Indonesia.
2. The existence of political parties in Indonesian democracy is very important, because Political Parties are the main instruments in the democratic system in Indonesia. If then in the implementation of a democratic system in a political party state is still not able to perform its functions, it is almost certain that the current democracy has a flaw, and this is happening in Indonesia. Political parties are not yet fully capable of performing their functions so that the Election Candidates in Indonesia should come from Political Parties or Combined Political Parties, now undergoing changes to Political Parties, Combined Political Parties and Individual Candidates. With the Decision of the Constitutional Court. 5 / PUU-V / 2007 concerning Individual Candidates then the Political Party can not function optimally in democracy in Indonesia. This threatens the existence of democracy in Indonesia.

Suggestion

1. It is necessary to review the participation of political parties in the elections in Indonesia so that they can function optimally.
2. For lawmakers should review the problem of individual candidates in Pilkada and give space to political parties as instruments of democracy to improve themselves, so that they can function well in democracy.

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structures and settlement systems in order to achieve environmental, social, and global environmental benefits derived from concentration urban functions. However, the law of spatial planning in Indonesia has not pushed the concept of *compact city*. Thus it is important to hold a revision of Law Number 26 Year 2007.

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Regulation

Undang-Undang Dasar Negara Republik Indonesia Tahun 1945

Undang-Undang Nomor 26 Tahun 2007 tentang Penataan Ruang

Undang-Undang Nomor 32 Tahun 2004 tentang Otonomi Daerah

Peraturan Pemerintah Nomor 26 Tahun 2008 tentang Rencana Tata Ruang Wilayah Nasional.

Can be described that within the system there are sub-human resources with a wide range of activities utilization of natural resources by man-made resources, with t i incidence of utilization of space is different. Activity development of course requires land and space as a place to accommodate the development activities referred. Land use by development will at least change the initial environmental tone into a new environmental tone, resulting in a change of environmental sustainability, which if not done carefully and wisely, will deteriorate the quality of the environment, destroy and even destroy the life of certain habitats in the ecosystem concerned.

The law of spatial arrangement with the concept of compact city the effectiveness and effectiveness in Indonesia should pay attention to the phenomenon urban sprawl and the liberalization of the land market has caused a number of urban problems, among them: first congestion. As the urban population increases and the widespread urban reach, the need for transport to serve the movement of goods and services from the periphery towards the center of the city increases. *Second,* reduced urban comfort. The level of urban comfort felt perceived less. Increasing the number of motor vehicle use, the growth of housing - new housing due to population growth, and a reduction in the supply of green open space in urban areas has contributed to the declining quality of life in urban areas.

The emergence of noise and pollution, reduced public space, and marginalization of pedestrians are also indicators of the declining quality of urban environments. Third, inefficient energy use. With the increasing use of motor vehicles to facilitate the movement from the periphery to the city center, the level of fuel use will also increase. In addition, the zone - the zone of urban activities fragmentary also lead to increased mileage to perform the movement from one zone to another zone. Reduced green fields at urban areas also result in rising air temperatures in urban areas that can lead to increased use of cooling. Fourth, injustice access to housing. Unbridled land market in urban areas has also led to inadequate access to housing. Looking at the phenomenon of urban development in Indonesia and the problems that arise, the concept of *compact city* can be seen as a solution.

Through the application of the concept of *compact city,* urban lands will be utilized as efficient might be the settlement high density with a wide range of urban functions accommodated in several activity centers. The center of the city will be divided into self-contained small pockets that can accommodate the functions of the adjacent *homes, works, likes* and clans, thus shortening the travel distance from one function to another. Meanwhile, the city - satellite towns around the city will be integrated with the vertices of transit movement are such as the possibility of developing *rail based* development. The same applies to the determination of new activity centers with mixed land use around the urban transport node.

After going through a long process, finally Indonesia drafted Act No. 24 of 1992 on Spatial Planning, which eventually passed the law and apply. However, in line with the changes to the paradigm of regional autonomy through the provisions of Law Number 32 Year 2004 regarding Regional Government, the provisions on spatial arrangement have changed which is marked by the replacement of Law Number 24 of 1992 on Spatial Planning into Law Number 26 Year 2007 on Spatial Planning. Some of the weaknesses of Law Number 26 Year 2007 on Spatial Planning are:

First, the national spatial plan has been mentioned in Law Number 26 Year 2007 on Spatial Planning, but the government has also issued a regulation on the national spatial plan in the Government Regulations Number 26 of 2008 on plan documentation National Spatial. Secondly, the review, the National Spatial Plan as referred to in Law Number 26 Year 2007 is reviewed once (1) in 5 (five) years. However, the review may occur more than once if there are emergencies such as natural disasters occurring in the region. Third, the legal product of the National Spatial Plan is a government regulation, one of which is the issuance of Government Regulation No. 26/2008 on National Spatial Planning as the implementation of Article 20 paragraph (6) of Law Number 26 Year 2007 on Spatial Planning.

Nevertheless, it has not yet applied the concept of *compact city* especially to urban spatial planning, which has not yet specified about improving the built up and population density, intensifying the economic, social and cultural activities of urban areas, and manipulating the size cities, urban forms and structures and settlement systems in order to achieve the benefits of environmental, social, and global sustainability derived from the centralization of urban functions. Contents of the City Spatial Plan according to Law Number 26 Year 2007 on mutandis equal to district RTRW, provided that in addition to the details in Article 26 paragraph (1) the *compact city* concept is added with: a. plans for the provision and utilization of green open spaces; b. plan for the provision and utilization of non-green open spaces; and c. plans for the provision and use of pedestrian infrastructure and facilities, public transport, informal sector activities, and disaster evacuation rooms, which are required to carry out the functioning of urban areas as centers for socio-economic services and regional growth centers .

Closing

Based on the analysis and discussion above can be concluded that the concept of efficient and efficient spatial arrangement can be done through *compact city*. Definition emphasizes the dimension *compact city* 'high density'. The *compact city* approach is to increase the area of efective and efficient awake and density of settlements, intensify the economic, social and urban budgets , and manipulate urban size, form and urban

illnesses are present due to a clean environment, (9) poor electrical installation in the area, (10)) the number of fires occurring in densely populated settlements due to short-circuit power, (11) the number of rivers or drainage contaminated by household waste (Jaroslav Burian., 2012) .

From the foregoing it can be understood that there would be adverse effects as a result inflicted their land-use planning in a residential area, especially in crowded areas with dense population as well. In this case the need for intervention from the government to carry out the implementation of Compact City in the development setting in its territory. Although in general the city has been equipped with Spatial Planning (RTRW), even with more detailed planning in the form of Detail Spatial Plan (RDTR) and its planning that has reached the depth of the Building and Environment Building Plan and Zoning Regulaton. However, experience proves that the plans that have been enacted not used as a reference in the utilization of space in the form of construction of buildings, housing and construction of facilities and infrastructures other cities.

According to Budiardjo (2004), *compact city* should also be able to maintain environmental sustainability, then the main policy that can be adopted is with the way as follows: First, develop the institutional through the establishment of a steady management organization, with details of tasks, authority and responsebility clear. Second, improving the ability of the apparatus that can support the activities of spatial planning and the arrangement of land in order to maintain environmental sustainability. Third, socializing the spatial arrangement and the arrangement of land in order to protect the environment to the society and business world and other elements. Fourth, to strengthen the utilization of spatial plan as a reference for regional development with special interest in fast developing area and mainstay area, and strategic area. Fifth, strengthen its control, including safeguards against regional space which has assets important for local governments. Sixth, improving information system, monitoring and evaluation in spatial arrangement and arrangement of land in order to preserve the environment.

In accordance with the mandate of Chapter II of Article 2 of Law Number 26 Year 2007, Compact City arrangement is implemented jointly and integrated in the effort to achieve development objectives, spatial arrangement is organized based on the principle of (1) alignment, (2) harmony, and (4) sustainability, (4) empowerment and effectiveness, (5) openness, (6) togetherness and partnership, (7) general interests protection, (8) law enforcement , (9) accountability. Given these conditions, development in Indonesia, especially in some urban areas, is required to have a spatial planning concept, called the Master Plan based on the concept of compact city, where the concept is guidance and guidance in carrying out the development, so that the problems that will happen resulting from the development will be minimized.

Importance of Spatial arrangement with the concept of *compact city* , among others,[4] first, to improve the spatial planning system, to strengthen the management of space utilization and to strengthen the control of space utilization, especially to maintain the utilization of technical irrigation land and protected areas; improve the institutional capacity and spatial planning organization in the regions, both local government apparatus, legislative institutions, and judiciary as well as institutions in society so that the spatial plan is consistently followed by all parties.

Second, increasing the principle of the benefits of various resources in the environment such as improving the function of protection of land, forests, water, flora, industrial functions, agricultural functions, residential functions and other functions. Environmental spatial errors can have an impact on air and climate, waters, land and others that will be fatal to the survival of humans and other living things. Third, in accordance with Law Number 26 Year 2007 on Spatial Planning, among others is to strengthen the National Resilience based on the Archipelagic Insight and in line with the policy of regional autonomy which gives greater authority to local governments in the implementation of spatial arrangement, then the authority needs to be regulated in order to maintain harmony and integrity between regions and between the central and regional so as not to cause inter-gap area.

When implemented comprehensively and consequently, spatial arrangement with the concept of *compact city* can be an effective tool to prevent environmental damage and environmental disasters such as floods and landslides. Space utilization in accordance with the spatial plan and heed the environmental conditions can avoid future environmental problems .

Compact City position in Space Spatial Law

Indonesia is the largest archipelago in the world that consists of 13 466 islands, 21 alternatif name commonly used is the archipelago. With a population of over 263,846.946 million people by 2016 (Badan Pusat Statistik, 2013), Indonesia ranks fourth most populous after China, India and the United States. The concept of spatial planning juridically that spatial planning is classified based on the system, the main function of the region, administrative area, activities area, and the strategic value of the region (Law Number 26 Year 2007). The territory of the State of Indonesia consists of national territory as a unity of provincial and regency / municipal territory, each of which is a sub-system space according to administrative constraints.

[4] Compare with Vanessa Watson, *Change and Continuity in Spatial planning Metropolitan Planning in Cape Town Under Political Transition* (London: Routledge, 2002).

Protocol targets. Fifth Korea. In 2011, the concept of Compact City was explicitly incorporated into the urban strateti of the National Comprehensive Development Plan.

Study results on the application of Compact City in Indonesia

Associated with the possibility of early implementers Compact City in urban Indonesia, some of the results of a study from the Department of Urban and Regional and Planning, Gadjah Mada University, pointed right evidence of opportunities to apply these concepts in the context of the Compact City urban areas in Indonesia. For example, the study results Roychansyah (2010) showed that the structure of the urban space Yogyakarta settlement faith tangible in the village can be regarded as a representation of Compact City. Village character that has a high population density and land use mix come into one's vision that right starting point to development of compact city buildings.

Al Karim (2012) also conducted a study showing the possibility of applying the concept of Compact City in Yogyakarta. The existence of infill housing development trend on the outskirts of urban Yogyakarta. The construction of infill housing will encourage urban land-use efficiency and the efficiency of the delivery of urban infrastructure. If further encouraged, the construction of this infill housing can be one of the strategies for the realization of Compact City.

Furthermore, the compact urban space structure has also been proven by Atianta (2014) to reduce the number of people traveling outside the districts. By boasts dingkan region with an index of *urban compactness* the highest and lows, the study showed that area with structure more space compact to reduction of 10, 25% of trips out districts, will reduce the emission of exhaust from vehicle .

Several proposed proposals and simulations of the Compact City concept have also been developed. For example, the proposed Virdyana (2014) to assume the right TOD around East Bekasi Monorail Station. Absari (2014) also proposed the development of Seturan area to become a compact urban settlement area integrated with the provision of public service facilities, green open space and foot circulation .

Some of the results of this study and proposed development show that the concept of Compact City has the potential to be penetrated into the Indonesian context . This concept is certainly Seed to be supported by implementation strategy effectively in order to adapt to urban settings in Indonesia drain. In Indonesia, the Government has launched a comprehensive, integrated, directed, gradual, and sustainable development of national development by developing spatial arrangements in a dynamic environmental order while maintaining environmental sustainability.

In an economic perspective, the city as the center of the economy has a huge role for development.[1] His contribution to the fulfillment of the needs of his citizens gave birth to various problems. Avery large population with uneven distribution, as well as high urbanization flows are increasingly a burden for large metropolitan cities.[2] Development new cities which are prevalent in the era of regional autonomy, thus speeding up the change of land use from wetland, fields and shrubs into commercial land, residential and industrial.

In developing countries,[3] the condition of the city - the city getting worse. Although there's the city's economic rise, but behind it t i incidence of stressresidents is high, the number of sick continues to grow, the number of residents with high quality continued to decline, and in the end, the city that he is progressing economists was in decline in various things (Jaroan Burian., 2012), with the application of the State Compact, is expected to boost the region woke up and the population density of settlements, intensify economic activities, social and urban culture, and manipulate the size of the city, in order to achieve sustainability benefits environmental, social, and global, derived from the centralization of urban functions.

In addition there will be the density and irregularities building, will have a negative impact also on the other side, among others, (1) the density of the building with a layout that not regularly, (2) not their green open space as catchment areas of rain and decrease air pollution, (3) access roads that are difficult to pass by large vehicles (cars) in densely populated settlements, (4) small access roads to certain areas due to large number of settlements, (5) access to clean water and drinking water is hard to obtain, no good drainage can cause flooding during the rainy season, (7) population density makes households trash accumulate, (8) many

[1] The economists in the world to understand the potential of Indonesia with all his wealth to become one of the world's economic powers, in addition to the BRIC countries (Brazil, Russia, India and China), as well as other countries such as South Korea and South Africa. The combination of natural resources, the availability of land and a massive number of people making Indonesia one of the candidates in the category of BRIC. It reminded of the theory to Adam Smith, in his book The Wealth of Nations, which says that the number of human and natural resources ultimately determine the wealth of a country in terms of groos domestik product and stock market its size.

[2] Since 2008, the urban population in Indonesia for the first time as large as the number of the rural population and the future, the urban population will continue to increase. Statistical records show in 1970, the urban population of Indonesia is only about 17.4%, and it became 22.3% in 1980, increased to 30.9% (1990), 43.90% (2002) and, finally, 50.5 % (2008). Thus within 40 years, the phenomenon of urbanization has led to the percentage of the urban population tripled. With urbanization scenario moderately by 1.5%, the percentage of urban population will reach 56% (2015), up to 65% (2025). By contrast the number of the rural population will continue to decline

[3] Check out Robert B. Potter. *Urbanisation and Planning in the 3rd World*, London: Routledge, 1985.

Major cities in the world have a lot of problems with spatial planning, not just because the city has been built since the beginning and grow naturally, but the city is experiencing more rapid growth, which is usually always faster than the spatial concept is enacted because of the rapid pace of development in urban area. The number of people who increase in their years will result in the density of the population in an area that will affect the need for shelter (John R.Logan and Todd Swanstrom, 1990).

Fenomen that arises due to a physical growth trend uncontrolled population is not under control land market, especially d i hotspots region with high appeal. Land sales in the region grew be right be released to the market mechanism. The price of land in region soared. Moreover, the trend of development will also be not to ecological interests, but the interests of economical. Lands with ecological functions that have power must be willing to be released to the self -sufficiency for later is converted into a high-rise land with high economic value , while the private sector is not paying attention to the provision of public spaces with no economic value.

On the other hand, the private sector also seeks to maximize economic advantage by purchasing land that is slightly apart from the existing construction site (leap frog development), leaving space in the peerless. The concept of Compact City can be seen as an alternative of urban area development management solution in Indonesia to anticipate the challenges and problems .

Research methods

These early researchers will use normative juridical approach so data source kind used in this early research is secondary data and primary data. Secondary data in the form of books and other library materials such as scientific papers such as journals, theses, theses and dissertations, while the primary data in the form of the 1945 Constitution, Law Number 26 Year 2007 on Spatial Planning and other legislative regulations. The nature of this early research was descriptive analysis aimed to uncover a ma one or circumstances or event as such so as to reveal the fact that such data in fact. Presentation in the form of description, qualitative analyzed to anwer for the problem of researchers which eventually resulted in conclusions and suggestions (Hadari Nawawi, 1993)

Analysis and Discussion

Compact City in Effective and Efficient City Spatial Planning

The definition of Compact City according to Jenk s , Burton and William (Mike Jenks, E. Burton and K.William, 2004) in his writing emphasizes the dimension of 'high density '. Compact City approach is increasing the area woke up and the density of the pen sitting settlement, intensify inactive activity of economic, social and urban culture, and manipulate the size of the city, the shape and structure of urban and settlement system in order to achieve the benefits of environmental sustainability, social, and global, which is obtained from the pe the functioning of urban functions (Jenks and Rod Burgess, 2004).

Although the concept is very diverse operations, te compact city strategy was seen as a major an idea implementers sustainable development in a city. As a result, this idea was adopted by many cities in the world, mainly in developed countries. The tendency to adopt this idea, in addition to bringing a positive effect on the discourse of sustainable development, but many are made as it is without considering the existing city problems and the peculiarities of a city (Roychansyah, M.Sani, 2006) .

Definition of Spatial Planning by the Law of the Republic of Indonesia Number 26 Year 2007, is a form of space structure and spatial pattern. While the understanding of city, reviewed in terms of geography s according to Bintarto (1989) , the city can interpreted a system of human life network, characterized by the density of the high population and colored with heterogeneous socio-economic strata and materialistic style. Or can be interpreted s cultural landscape that arise by elements of natural and non-natural with symptoms of a fairly large concentration of population with heterogeneous life style and materialistic than the area beneath. Urban area is a region that has main non-agricultural activities with the composition of the function of the area as a place of urban settlement, centralization and distribution of government services, social service and economic activities .

Some countries have implemented Compact City policy in the development of the city, including: *First* , Australia, the Australian government has made an urban national policy , Our Future-A National Urban Policy for a Productive, Sustainable, and Liveable Future . This policy establishes 14 targets for major cities in Australia, including integrating land and infrastructure, maintaining natural balance and built environment, and increasing accessibility and reducing dependence on private vehicles. Secondly, the Czech Republic. In 2010, the Government of the Czech Republic issued a national urban policy, the National Principles of Urban Policy, to encourage compact settlements with mixed land uses. Thirdly, France has renewed its town planning approach to include the Compact City concept by releasing the Grenelle de l'Environnement in 2007. This policy allows the municipality to establish minimum density in urban areas, and provides incentives and disincentives to address the desired density. Fourth of Japan. The Japanese government has incorporated the concept of Compact City as a top priority in its urban policy. The Compact City concept is also encouraged as a tool to create cities and regions with low carbon gas levels in order to achieve the Kyoto

JURIDICAL REVIEW ON COMPACT CITY CONCEPTION TO SPATIAL CITY SUPPORT PLANNING

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ABSTRACT

Spatial arrangement is a stage of development of the region which consists of the planning, utilization and control of space. Spatial planning is aimed at realizing a prosperous society that is housed in a comfortable and sustainable space. Currently, the compact city approach becomes the main alternative for spatial planning in Indonesia. This research uses normative juridical method, to discuss how the concept of compact city in the city spatial planning effective and efficient and status within applicable laws this time. The type of data used in this research is secondary data and primary data. The results of the research show that the concept of efficient and efficient spatial planning can be done through compact cities that emphasize on the 'high density'. However , the law of spatial planning in Indonesia has not pushed the concept of compact city . Thus critically important to the Digitized held on Law Number 26 of 2007.

Keywords: Spatial Arrangement, Compact City, Law

Introduction

Spatial arrangement is a stage of regional development process consisting of planning, utilization and control of space. The goal is to create a prosperous society that is housed in a comfortable and sustainable space. Therefore, the application of the principles of spatial planning in urban development is relevant in order to realize systematic urban development and integrated. Spatial planning in support of urban development will be effective and efficient if the process is done in an integrated manner with all development actors (stakeholders) in the local area, and the need for spatial planning to harmonize the environment a lam and artificial environment, so as to realize integration in the use of natural resources d an artificial resources, as well as to provide protection against function space and prevention of the negative effects on the environment due to space utilization.

According to data from United Nations (2014), currently around 54% of the total population of the earth resides in the urban areas. This amount dip forecast to continue to increase to around 66% on 2050. Of that amount, Asia state will be home to approximately 53% of the urban population in the world. Despite the fact that the level of urbanization in Asian countries is still relatively lower than in other parts of the world , eg. Africa , a number of major cities in Asian countries will emerge as giant cities (mega cities) . Several cities in Asian countries, such as Tokyo, New Delhi, Shanghai, and Mumbai have a population of over ten million. Other cities , such as Manila and Jakarta, are also in the process of growing into a gigantic city.

With the increase of population urban area, because the world will face a number of challenges in the provision of its population needs, including the need for housing, infrastructure, transportation, energy, health services and education, and employment. The Seed for space heal & condition of urban space will of course also be experienced enhancement. In developed countries, this fact has encouraged the emergence of a number of concepts of urban development that emphasizes the efficient use of space and energy actually encouraged land use ‘mixed – use’ in the urban area supported by system transport that is reliable. In between concepts growing and has discussed a multitude of fish, even implement as fish is the concept of Compact City.

Indonesia, as a developing country in Asia and the country with a population of fourth in the world, also facing the same challenges as a result of urban growth in the number of urban. In 201 0, the urban population of Indonesia has branded the around 49% of the total population as a whole. Total Project will soon beyond number of the rural population. The proportion of Indonesia's urban population has exceeded the average proportion of urban population in Southeast Asia and even the Asian continent. Moreover, that small towns in Indonesia well growing fast . This will early warning for the down-town city in Indonesia to anticipate the challenges and problems due to the growing number of population in urban areas.

According to Law Number 26 Year 2007, spatial arrangement is based on system approach, main function a region, administrative area, activities n and strategic value of area, and main activity of area consist of spatial arrangement of urban area and spatial arrangement of rural area. Urban areas, by size, can be small urban areas, medium urban areas, large urban areas, metropolitan area, and megapolitan areas. Spatial arrangement of metropolitan area and megapolitan area, especially metropolitan area in the form of core urban area with the surrounding urban area which has functional interconnection and connected with integrated regional infrastructure network, is a guideline for integrating spatial planning of administrative area in the region, and is tools to coordinate the implementation of development across the administrative region concerned.

The need for a form of an ideal system of the regulation of management of water resource which can provide protection and legal certainty to the people's right of water and sustainable environment, and also can provide opportunities or economic benefits to society based on Pancasila.

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system setting of water resource management that provide economic opportunities while protecting people's rights and a sustainable environment.

Lawrence M.Friedman (Friedman, 2009) called it "the subject of social science," because the legal system has three elements, one of them is based on the substance of law. Viewing from the aspect of legal substance of the Law No. 7 of 2004 on Water Resources, is the provision relate to the management of water resources that provide opportunities for the private company which switched ownership because the acquisition agreement to be foreign owned, can be seen in the table below:

Table 1:
Substance Law No. 7 of 2004 on Existing Water Resources

Substance	Article	Description
Water privatization	**Article 9 (1)**	Right to cultivate water may be granted to an individual or business entity with the permission of the Government or Local Government in accordance with its authority.
	Article 9 (2)	Holder of the right to cultivate water can stream the water on other people's land by consent of the holders of land rights.
	Article 9 (3)	Approval referred in paragraph (2) may include indemnity or compensation agreements

Looking at the substance of the Law of Water Resources as shown in Table 1 above, indicates, that one of the reasons the government has allowed the privatization of water resources by the private sector is due to economic factors which expected by local governments whose territory has springs can be managed by private company to be able to increase PAD (locally-generated revenue) (Steni, 2009), but in fact it impacts the future of society shortage of water (water discharge decreases). In addition, the people around the springs are not progressing, as well as local governments do not get the revenue significantly.

The concept of water privatization (Article 9 on law of Water Resources), as mentioned above, its meaning is too broad, can lead to a variety of interpretations which are likely to lead the water resource managers who have held the license to be more freely to take advantage of the rule beyond the limits of its powers. It has proven that the water resources manager (AMDK) secretly take advantage of this situation by drilling water without the permission of the government.

Based on the substance of the Law of Water Resources as mentioned above, the ideal system to be built is the birth of a policy about the management of water resources that provide economic opportunities while protecting people's rights and sustainable environment based on Pancasila, by including the following elements (a). Water resources will have economic value, if the management is done well, means there is a balance on protecting people's rights and sustainable environment which are outlined in a policy, so that the impact of the loss can be anticipated, the people is prosperous, and the environment is protected. (b). Legal basis (Article 9 of the Law on Water Resources) legalizing the privatization to discuss further if the national companies (AMDK) acquired by foreign companies.

Conclusion

The right of water is a right which existence is guaranteed by the Constitution of the Republic of Indonesia 1945 but the people's right to water on water resources become threatened when management is done by multinational company that has acquired a national company that produces AMDK (bottled drinking water products) does not give economic opportunities to the society, and does not pay attention to environmental sustainability.

These circumstances reflect injustice in one generation (intergenerational equity) which should find a solution that provides economic opportunities to the right of people and environment sustainability. The discrepancy between the regulations on acquisition of foreign company to national company with Constitution of the Republic of Indonesia 1945, where in each acquisition regulation there is no provision that prohibit the acquisition by foreign companies to national companies that using raw water, similarly, the discrepancies between the Laws on Water Resources with the 1945 Constitution Article 33. In the Law on Water Resources, the private sector was given the opportunity to manage water. This gives opportunities for privatization of water, which gives the gap in the private sector to exploit / commercialize water for doubled profit without regard to people's right of water. This is very contrary to the spirit of Article 33 of the 1945 Constitution.

is connotes juridical, in the sense, it generates numerous regulations which arranged in hierarchical and derived from it, while the Pancasila as an ideology can be interpreted as a social and political program where the law become one of the tools and therefore must also be sourced from the Pancasila. (Mahfudz MD, 2006).

This is consistent with what was raised by Barda Nawawi Arief (2009) with the concept of the values of balance that reflect the values of Pancasila into legislation in Indonesia is the substance of the establishment of the National Legal System (SHN), because SHN is essentially a legal system of Pancasila which is based on three Pancasila balance values, namely "God" values (moral religious); humanistic values and "Community" values. Thus, the legal system in Indonesia, which is not oriented to the three values, cannot be said as SHN, although made by the Indonesian legislature.

When we look at the signs from Barda Nawawi Arief then we reflect to the substance of the rules governing the management of water resources, namely Act No. 7 Year 2004 or Act No. 40 Year 2007 on Limited Liability Company, we can see that the Act No. 7 Year 2004 give high regard that the Water Resources is the gift of God Almighty, and therefore water resources are managed for the greatest prosperity of the people. But, on the other hand, in several chapters of this Act are expressing privatizations with opening the role of domestic and foreign private sector for the management of water resources.

This shows that the law has not been oriented toward the balance values of Pancasila, therefore, not surprising that the spirit of this law is for individualism prosperity more than collectivism prosperity. In this case the law is not sensitive to the people around the area of water resources that should be benefited from the availability of water resources around them.

According to Satjipto Rahardjo with Progressive Legal Theory, when looking at the substance of the Act No. 5 Year 1990 and implications of conflict which had occurred, that the law should prosper the society, the progressive law departs from the idea that "the law is an institution that aims to deliver human to a fair and prosperous life also make people happy". The statement is firmly that the law is for human, in a legal sense only as a "tool" to achieve a fair and prosperous life also makes people happy. Therefore, according to the progressive law, the law is not the purpose of human, but the law is just a tool. The presence of law is not for themselves but for something bigger and greater.

Wolfgang Friedman (1999) argued that one of the roles or functions of the state is as a regulator, Indonesia as a legal country regulates the management of water resources in the national legal system. A legal system Bruggink (1996), (translated by Sidhartha) occurs by forming the entire system interrelated. Between laws should be harmony in the unity of the system. The task of legal system is to organize the legal system and the applicable legal decision (Bruggink,1996).

The legal system of environment is an integral part of the Indonesian legal system, so that the legal system of environment cannot be separated from the larger framework of national legal systems which are derived from Pancasila and the 1945 Constitution. Article 44 of Law No. 32 of 2009 determines that any drafting of legislation at the national and regional level shall take into account the protection of environmental functions and principles of environmental protection and management in accordance with the provisions set in Law No. 32 of 2009. Here it appears that the national legal system directed and required to be oriented on environment (green law or eco-law law system). The principles and norms of environmental law must animate the law substances of other fields and should be the guide in drafting legislation. Even the preparation of the state budget (central and local) is also based on environment (Article 45 and 46).

The provision is in line with Decree No. IX / MPR / 2001 on Agrarian Reform and Natural Resources Management which in Article 4 establishes the principle: "carry out a social function, preservation, and ecological functions according to the local socio-cultural conditions" and "recognize, respect, and protect the rights of indigenous people and the cultural diversity of the nation's on agrarian resources / natural resources. "The basic principle of recognition of indigenous is determined by Article 28 I paragraph (3) of the 1945 Constitution that specifies," The cultural identity and the rights of traditional society is respected in line with development of times and civilizations. "(Silalahi, 2007).

Reality cannot be separated from the sense of environmental justice held by our constitution, the environmental justice referred is the Ecology justice which is the issue of justice closer to Capra teachings of deep ecology. Justice should examine the meaning of environment deeper which is the significance of the moral of human relations with non-humans. Stockholm Declaration in 1972 towards Rio de Janeiro in 1992, up to Rio + 10 in Johannesburg in 2002, introduced the three pillars in development and expected to be used as a model of development in countries around the world of the three pillars, emphasizing the need for coordination and integration of natural resources, human resources, and man-made resources (economic) in any national development. The three pillars are known as the Three Dimentional, namely pillar of environment, economic and social.

The three pillars mentioned above should be the pillar of water resources management in Indonesia, which has the dimension of integration and coordination between society, economy and environment. The base that will be used to construct is ecological justice. New construction is formed based on dialectical process between the existing condition of legal regulation of water resources, and the consistency against the constitution and Pancasila, the state ideology. These three pillars are the foundation in building an ideal

company. The problem is further complicated when a private company later acquired by a foreign company, so the company's need for raw materials (water resources) is more and more necessary to pursue the highest possible profit. In conditions like this, people's right to water for the present and the future will be easily overlooked.

One of the many springs which are exploited and sucked at the very low price by national company that has been acquired by a foreign company to this day is a spring in Mangli, Wonosobo, Central Java. The drinking water company buys clean water to PDAM for Rp.6, - per cubic liter (Samekto et al, 2014). This is not yet added from the permission granted by the Government in the form of drilling water independently. The intake of water resources at a very low price is very profitable for the company.

Another impact of water privatization is opening the opportunities to foreign company joining the ownership of bottled drinking water company by acquisition. The major share ownership by foreign company has the consequence, that the benefit of water resources is enjoyed by foreign private companies. This raises ecological injustice to the people and environment of Indonesia. Based on this, the regulatory system to manage water resources is currently inconsistent with Pancasila as the source of all sources of national law, inconsistent with the constitution, and with the Act No. 32 of 2009 which is the law umbrella (Umbrella Act) that states there should be no legislation which is in contrary to the protection and preservation of the environment in Indonesia.

The substance of Privatization Rules and Acquisitions of Water Resources.

In understanding the acquisition, Felix Oentoeng Subagjo (Subagjo, 2006) distinguishes between acquisition, merger and consolidation. According to his opinion if the acquisition of the company is done then either parties the acquiring or the acquired both will remain exist. Acquisition regulation legislation in Indonesia are: (1). Act No. 40 Year 2007 about Limited Liability Company; (2). Government Regulation No. 27 Year 1998 about Merger, Consolidation and Takeover of the Limited Liability Company; (3). Decision of the Chairman of the Capital Market Supervisory Agency and Financial Institution No.Kep-259 / BL / 2008 dated June 30, 2008 about Takeover of a Public Company (Bapepam IX.H.1); (4). Government Regulation No. 8 Year 1999 about Merger, Consolidation and Acquisition of Bank.

Based on expert opinion and some of the regulations which govern the acquisition in Indonesia can be seen that the acquisition is one way of expanding the company externally. One of the purposes of the acquisition is to raise the stock price, as well as improving the efficiency and productivity of the business activity (Darlis, 2011). The problem is that the existing rules on the acquisition in the regulatory system of acquisition in Indonesia substantially have no specific set about acquisition of the company relating to water resources, so that the acquisition of the bottled water companies are treated the same as a company in the other fields, which have the same goal, that is to increase the stock value, by raising the productivity and efficiency.

Fact on the field shows the existence of the case of bottled drinking water company which has been acquired by the multinational company. The French owned company to increase its power began to enter the Asian market and took over two bottled drinking water company in China and the largest bottled water company in Indonesia. On September 4, 1998, the national bottled drinking water company officially announced the "unification" of the two companies through the acquisition, and coincides with the turn of the millennium, in 2000 the bottled drinking water company launched a national drinking water products labeled as the multinational company. In 2001, the foreign company that acquired the largest national bottled drinking water company increase the share ownership from 40% to 74%, so that the foreign company (owned by the French) later become the major shareholder of bottled drinking water company group in Indonesia.

Act No. 7 Year 2004 on Water Resources which opened up privatization opportunities and also Act No. 40 Year 2007 on Limited Liability Companies which regulates the acquisition does not mention the purpose of the acquisition for benefit of society and the environment. Values or ideas contained in these regulations have the spirit of a capital injection, according to the characteristics of capitalism. Acquisition in the model of capitalism is needed to raise capital in the pursuit of the good quality. In addition, even the acquisition in the capitalism model raises the efficiency in the use of factors of production by consolidation of several companies, because the economic measures performed is based on the profit motive profusely.

Constructing Management Control System of Water Resources Based on Ecological Justice

From the finding of the legal facts above, the issues related to water resources management is more rooted in the problems of the legal substance from the legislation which gives the frame or foundation for the operation of the law. In principle, the existing laws in a country must be in accordance with the idea or ideal of the law and the reality of the society in which the law to provide service. Pancasila is the idea or ideal of the law of Indonesia, so the positive law in Indonesia must be in accordance with the values of Pancasila.

Laws in Indonesia must ensure and uphold the values contained in the preamble of the Constitution of 1945 which is a reflection of Pancasila (Sidhartha, 2000). According to Hamid S.Attamimi, in its capacity as the basis and the state ideology, Pancasila should be the paradigm (frame of mind, the source of value, and the orientation of direction) in constructing law, including all attempts at renewal. Pancasila as the state basis

CONSTRUCTING WATER RESOURCES MANAGEMENT BASED ON *ECO SOCIAL JUSTICE* (STUDIES IN AMDK COMPANY THROUGH MULTINATIONAL COMPANY INVESTMENT)*

Adji Samekto[1], Nita Triana[2], Sri Mulyani[3], and Nanik Trihastuti[4]

ABSTRACT

This study is a non-doctrinal legal research with socio - legal approach. The types of data used include primary data which obtained through interviews and observation and secondary data which obtained through the study of documents. Results illustrate that the right to water is a right guaranteed by the existence of Pancasila and the 1945 Constitution. Embodiment of people's right to water is difficult to realize, when multinational companies acquired nationwide companies water resources, which produces bottled water products (Bottled Drinking Water). Motivation of accumulated profits of multinational companies has the potential to cause negative impacts to communities whose territory is affected by the activities (projects) to make clean water. Society becomes shortage of clean water because the other side of the water management company was legally entitled and has the right to exploit water resources. Under these conditions, reformulated the system and performed synchronization of acquisition regulation of multinational companies to national companies in the field of water resources based on eco- social justice.

Keywords: Water Resources, Acquisitions, Multinational companies

Introduction

In Indonesia, the management of water resources has been regulated by the state and set out in Article 33, paragraph 3 of the Constitution of 1945 which states that the land, the water and the natural wealth contained in them is controlled by the state and to be used for the maximum prosperity of the people by justly and equally. To clarify the meaning of Article 33, paragraph 3 of the Constitution of 1945, the government explained again in Act No. 7 of 2004 on Water Resources, which explains that the Water Resources is the gift of God Almighty that provide multipurpose benefits for the welfare of all people in all areas of social, economic, cultural, political and national security fields. But the fact shows that the right of water for most of the world's population, including Indonesia, has not been achieved.

Global capitalism (Falkenmark, 2000) has shown that the public demand for water is increasing; it encourages strengthening the water economic value than its social value and function. On the other hand, the management of water resources which is leaner on economic value tends to favor the shareholders and may also ignore the social function of water resources. As privatization that occurred in the Bottled Drinking Water Companies that have the negative impact on the surrounding society, in the form of loss of access to clean water resources as happened in Klaten district, Cianjur, Sukabumi, Wonosobo, Bekasi and Serang.

The privatization of water resources became more dangerous due to the Company's acquisition of the National Bottled Drinking Water Company by the Multinational Company, the intake of water resources on a large scale from Indonesia by foreign parties become very open. The provisions in the Act No. 7 of 2004 concerning Water Resources which provides room for the implementation of the agenda of water privatization and commercialization of water in Indonesia, actually cause the strengthening impact of the bias against the owner of capital rather than the bias against the people and the environment. Efforts toward privatization of water have been expressed in Article 7, Article 8, Article 9, Article 26, Article 38, Article 40, Article 45, Article 46, Article 47 and Article 49. These articles could be individual entrances and private legal entities for both domestic national companies and multinational companies. Under the law conditions of water resources management like this, the law of the acquisition was not specifically regulate the acquisition of companies that manage water resources. The condition of the legal arrangements like this make the people's right to water is threatened.

People's right to the Clean Water and the Neglected Environment

In the context of people's right to water, people should enjoy clean water for their survival both for the present and future. The reality is, in the management of water resources, the government opened up opportunities of water resources management by involving private capital by giving permission to the owners of private capital to take advantage of water that exists in the region of Indonesia for bottled drinking water

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adoption of evidence-based practices among professionals and organizations, and as a core skill for public sector managers and social entrepreneurs. It is being viewed as an approach to design more effective, efficient, equitable and sustainable approaches to International Journal of Scientific and Research Publications, Volume 4, Issue 4, April 2014 6 ISSN 2250-3153 www.ijsrp.org enhance social well-being that extends beyond individual behavior change to include creating positive shifts in social networks and social norms, businesses, markets and public policy.

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3. Kenya

Through mass media in Kenya, social marketing emphasized the quality image of Kinga condom, reflected in product design, package, and moderate cost. Commercial shopkeepers and a mobile sales team were used as condom distribution channels and proved effective in extending accessibility to rural areas. The promotional campaign had a significant impact on contraceptive practice. Current method users among survey 35% in one year, whereas the control group showed little change. In addition to promoting sales, the campaign created a high level of brand awareness. After six months of marketing, 85% of male survey respondents were aware of Kinga condoms. Of those who had heard of Kinga, 80% were able to describe its purpose as a contraceptive, rather than as a venereal disease prophylactic, a function that was deliberately included in the campaign messages. Before being educated about Kinga, only 23% of survey respondents spontaneously mentioned condoms when discussing contraceptive methods. Six months into the campaign, this figure had risen to 57% (Black & Harvey, 1976).

4. Indonesia

The Weaning Project in Indonesia (Proyek Pola Makanan Pendamping ASI or PMPA) was a pilot effort to examine the role that enhanced communication could play in strengthening the impact of the national nutrition program (UPGK) to improve child feeding practices at home. The purpose of the project was to help reduce infant mortality through improvements in the nutritional status of infants and young children by assisting in the development of an infant feeding policy. The project utilized existing programs to promote low-cost, sustainable solutions to problems faced in feeding the weaning-age child in different ecological and socio-economic situations, thus showing the importance of a marketing approach, rather than a media-based advertising campaign (htt2)

Why Marketing?

If social change means influencing individual behaviors, then there is clearly a role marketing to play. Over the past 30 years, Andreasen and some social marketers have argued in books, articles, and assemblies that social marketing is an extremely powerful set of concepts and tools for bringing about changes in individual behavior (Andreasen, 1995).

The challenge of these tactics and initiatives todo attest to the power of marketing. The challenge here is to find ways to use that power for social good beyond the marketplace for influences that clearly improve individual lives, communities, and entire countries or regions of the world. All marketers are successful when they influence individuals. Private sector management and stockholders are ecstatic when more people choose their company's brands or shop at their stores, patronize their fast food chains, fly their airlines, stay in their hotels, and spend more money in their gift shops. However, marketing power can also be used to influence men in Bangladesh to daughters attend high school. It can induce teens to wear seatbelts and mothers to put their babies to rest on their backs to prevent sudden in death syndrome (SIDs). Marketing promotions and distribution strategies have achieved remarkable effects with high blood pressure in the United States and accelerated family planning successes all around the world (Harvey, 1999).

In one sense, social marketing has a major advantage over private sector marketing in achieving public support. In the private sector, marketing's ulti-mate goal is to make a corporation bigger and more profitable and stockholders happier. In the social sector, although an indirect goal sometimes makes an organization or program grow, the ultimate goal is to improve the lives of individuals or the society of which they are a part. Social marketing is about making the world a better place for everyone-not just for investors or foundation executives. Also, as Andersen argue throughout his book, the same basic principles that can induce a 12-year-old in Bangkok or Leningrad to get a Big Mac and a care-giver in Indonesia to start using oral rehydration solutions for diarrhea can also be used to influence politicians, media figures, community activists, law officers and judges, foundation officials, and other individuals whose actions are needed to bring about widespread, long lasting,positive social change. (Andreasen, 1995).

Conclusion

Social marketing seeks to develop and integrate marketing concepts with other approaches to influence behaviors that benefit individuals and publics to pursue greater social good. Social marketing also great tools to gain better result in public health or social aspects way. Social marketing are seek integrate research, best practice, theory, audience and partnership insight, to inform the delivery of competition sensitive and segmented social change programs that are effective, efficient, equitable and sustainable. For social marketing to become more widely accepted by public health professionals and carefully applied, several developments are necessary. Program administrators, health educators, and other program planners need to be trained in social marketing to enable them to imbue public health organizations with a marketing mindset . Although social marketing is sometimes seen only as using standard commercial marketing practices to achieve non-commercial goals social marketing use when marketing techniques are used to improve social well-being. It is also being explored as a method for social innovation, a good framework to increase the

to different needs, facilitate capture and sharing of transferable learning between interventions, and assist monitoring and evaluation of interventions. Other criteria, critical to successful interventions, might have been included, e.g., strategic planning, partnership and stakeholder engagement, monitoring and evaluation, etc. However, those that the National Social Marketing Center promotes are unique to social marketing (Serrat, 2010). The criteria are:

- Orientation. This implies a strong client orientation, with importance attached to understanding where the customer is starting from, e.g., their values, experiences, knowledge, beliefs, attitudes, and needs, and the social context in which they live and work.
- Behavior. This refers to a clear focus on understanding existing behavior and key influences upon it, alongside developing clear behavioral goals. These can be divided into actionable and measurable stages, phased over time.
- Theory. This connotes the use of behavioral theories to understand human behavior and to build programs around this understanding.
- Insight. This calls for gaining a deep understanding and insight into what moves and motivates people.
- Exchange. This rests on the use of the "exchange" concept— understanding what is being expected of people, and the real cost to them.
- Competition. This hinges on the use of the "competition" concept. This means understanding factors that impact on people and compete for their time.
- Segmentation. This demands that the audience be clarified using segmentation to target people effectively.
- Methods Mix. This requires the use of a mix of different interventions or methods to achieve a behavioral goal. When used at the strategic level this is referred to as the intervention mix. When used operationally, it is described as the marketing mix.

Social Marketing in Developing Country

1. India

Social marketing programmers by government In late 1960's, National Family Welfare Programme of India has introduced condoms as one of the prevalent family planning methods and promoted it through social marketing. It is promoted as a dual method of protection against unintended pregnancies as well as sexually transmitted infections (STI's). In 1992, National AIDS Control Organization (NACO) set up to manage and oversee policy and programme related to prevention and treatment of HIV/AIDS and introduced National AIDS Control Programme (NACP). The prevention services of the programme included condom promotion and increased condom use which is also done through targeted intervention projects (peer-lead projects) (Akanksha & Jyoti, 2016).

2. Dominican Republic

In the Dominican Republic, contraceptive social marketing implemented by Profamilia, a local family planning association, achieved its objectives: increased availability of Microgynon birth control pills, increased use among lower socioeconomic women, increased contraceptive prevalence, and increased involvement from the private sector with consequent expanded market outlets. In collaboration with a private sector orals manufacturer, Profamilia reduced the price of Microgynon by 50% and sold the oral under a new logo. In a five-year period, Profamilia generated enough sales revenue to recover all operating costs and become self-sufficient. Microgynon purchasers represented an expanded market (34% new acceptors), as well as brand switchers already in the commercial market (66%). Some 89% of the clients surveyed planned to continue using Microgynon (Green, 1987) (Stover, 1987). Equally impressive, however, is the overall trend in the total orals market. During the five-year period, the contraceptive social marketing program contributed to a 30% increase in the total orals market, without eroding the market shares of other leading orals manufacturers (Ling, Franklin, Lindsteadt, Gearon, 1992).

Bangladesh Acclaimed as having one of the most successful contraceptive social marketing projects. In one decade, the program sold over 130 million condoms and over 2.2 million cycles of oral contraception. In 1984, the project served 40% of all contraceptive acceptors (many being rural) by selling low-cost products through retail and wholesale outlets. Qualitative research techniques, such as focus group discussions and in-depth interviews, were used to identify the major resistance points to using contraception. Investigators concluded that men should be the primary target audience of the media program, because they were the most resistant, ignorant, and unwilling to consider family planning. Research concerning current users confirmed that husbands were an important source of instruction. Fourteen months after the radio portion of the campaign began, the number of persons who believed that modem family planning methods are unsafe decreased and interpersonal discussions about family planning and recognition of the personal economic benefits of family planning increased. Contraceptive social marketing efforts in Bangladesh drew attention to both the private and public sectors, expanded the market, and used indigenous institutions in program planning, operation, and evaluation (Laing & Walker, 1987) (Luthra, 1991) (Series, 1985).

core of this practice have been use to help reduce tobacco use, decrease infant mortality, stop the spread of HIV/AIDS, prevent malaria, etc. (Deshpandee & Lee, 2013).

In several countries, social marketing programs have proven effective at making affordable public health campaign. For example in contraceptive way, contraceptives widely available and at encouraging use through extensive mass media advertising, and Information, Education, and Communications (IEC) campaigns. Although most social marketing programs target a wide audience, they do not emphasize the specific needs of adolescents and young adults. This study examines whether a youth-targeted social marketing intervention can successfully promote sexual and reproductive health among adolescents and young adults.

Review Methods

Timeline Literature

Social marketing is not a science, but rather a professional craft which relies on multiple scientific disciplines to create programs designed to influence human behavior on a large scale. Commercial marketing targets purchase behaviors, product choice behaviors, and product promotion behaviors. Social marketing typically targets complex, often socially controversial behaviors, with delayed and distant benefits to audiences who often do not recognize they have a problem, much less are looking for a solution (Smith, 2006).

Social marketing has been in the marketing literature since the 1960s. Variations of social marketing have been applied to promote traffic safety, tobacco control, drug prevention, childhood immunizations, improved nutrition and diet, and environmental behavior, as well as to reduce infant mortality. (Smith, 2006)

The first documented evidence of the deliberate use of marketing to address a social issue comes from a 1963 reproductive health program led by K. T. Chandy at the Indian Institute of Management in Calcutta, India. Chandy and colleagues proposed, and subsequently implemented, a national family planning program with high quality, government brand condoms distributed and sold throughout the country at low cost. The program included an integrated consumer marketing campaign run with active point of sale promotion. Retailers were trained to sell the product aggressively, and a new organization was created to implement the program (Chandy, Balakrishman, Kantawalla, & et al, 1965). In developing countries, the use of social marketing expanded to HIV prevention, control of childhood diarrhea (through the use of oral re-hydration therapies), malaria control and treatment, point-of-use water treatment, on-site sanitation methods and the provision of basic health services (Lefebvre, 2011).

Health promotion campaigns began applying social marketing in practice in the 1980s. In the United States, The National High Blood Pressure Education Program (Roccella & Ward, 1984) and the community heart disease prevention studies in Pawtucket, Rhode Island and at Stanford University (Lefebvre & lora, 1988) demonstrated the effectiveness of the approach to address population-based risk factor behavior change. Notable early developments also took place in Australia. These included the Victoria Cancer Council developing its anti-tobacco campaign "Quit" (1988) and "SunSmart" (1988), its campaign against skin cancer which had the slogan "Slip! Slop! Slap!" (Milestones")

Since the 1980s, the field has rapidly expanded around the world to include active living communities, disaster preparedness and response, ecosystem and species conservation, environmental issues, development of volunteer or indigenous workforces, financial literacy, global threats of antibiotic resistance, government corruption, improving the quality of health care, injury prevention, landowner education, marine conservation and ocean sustainability, patient-centered health care, reducing health disparities, sanitation demand, sustainable consumption, transportation demand management, water treatment systems and youth gambling problems, among other social needs (Lefebvre R. , 2013).

Social marketing theory and practice has been progressed in several countries such as the US, Canada, Australia, New Zealand and the UK, and in the latter a number of key government policy papers have adopted a strategic social marketing approach. Publications such as "Choosing Health" in 2004, (UK Department of Health, 2004)"It's our health!" in 2006 and "Health Challenge England" in 2006, represent steps to achieve a strategic and operational use of social marketing. In India, AIDS controlling programs are largely using social marketing and social workers are largely working for it. Most of the social workers are professionally trained for this task.

On a wider front, by 2007, government in the United Kingdom announced the development of its first social marketing strategy for all aspects of health (UK Department of Health, 2004). In 2010, the US national health objectives (Services, n.d.) included increasing the number of state health departments that report using social marketing in health promotion and disease prevention programs and increasing the number of schools of public health that offer courses and workforce development activities in social marketing.

Dimensions of Social Marketing

In the United Kingdom, the National Social Marketing Center has worked to clarify the salient features of social marketing. Building on work by Alan Andreasen in the United States, it has drawn social marketing benchmark criteria. They aim to ease understanding of the principles and techniques of social marketing, encourage consistency of approach leading to impact, uphold flexibility and creativity to tailor interventions

GOOD IMPRESSION OF SOCIAL MARKETING IN PUBLIC HEALTH

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ABSTRACT

The unique feature of social marketing is that it takes learning from the commercial sector and applies it to the resolution of social and health problems. In 1971, marketing professor Philip Kotler and his collaborator, Gerald Zaltman, called the application of marketing practices to nonprofit and social purposes "social marketing. " They described it as "a promising framework for planning and implementing social change".In several countries, social marketing programs have proven effective at making affordable public health campaign. For example in contraceptive way, contraceptives widely available and at encouraging use through extensive mass media advertising. Social marketing are seek integrate research, best practice, theory, audience and partnership insight, to inform the delivery of competition sensitive and segmented social change programs that are effective, efficient, equitable and sustainable. For social marketing to become more widely accepted by public health professionals and carefully applied, several developments are necessary. Program administrators, health educators, and other program planners need to be trained in social marketing to enable them to imbue public health organizations with a marketing mindset.

Introduction

Social marketing is not a theory it is like generic marketing in itself. Rather, it is a framework or structure that draws from many other bodies of knowledge such as psychology, sociology, anthropology and communications theory to understand how to influence people's behavior (Kotler & Zaltman, 1971) Several definitions of social marketing exist, but one of the most useful (Andreasen, 1995) describes social marketing as follows social marketing is the application of commercial marketing technologies to the analysis, planning, execution and evalution of programs designed to influence the voluantary behavior of target audiences in order to improve their personal welfare and that of society (Houston & Gassenheimer, 1987) The unique feature of social marketing is that it takes learning from the commercial sector land applies it to the resolution of social and health problems.

Four key features are illustrated in this definition. The first is a focus on voluntary behavior change: social marketing is not about coercion or enforcement. The second is that social marketers try to induce change by applying the principle of exchange—the recognition that there must be a clear benefit for the customer if change is to occur (Houston & Gassenheimer, 1987). Thirdly, marketing techniques such as consumer oriented market research, segmentation and targeting, and the marketing mix should be used. Finally, the end goal of social marketing is to improve individual welfare and society, not to benefit the organization doing the social marketing; this is what distinguishes social marketing from other forms of marketing (MacFadyen, Stead, & Hastings, 2002).

In 1971, marketing professor Philip Kotler and his collaborator, Gerald Zaltman, called the application of marketing practices to nonprofit and social purposes "social marketing. " They described it as "a promising framework for planning and implementing social change" (Kotler & Zaltman, 1971). Social marketing attempts to persuade a specific audience, mainly through various media, to adopt an idea, a practice, a product, or all three. It is a social change management strategy that translates scientific findings into action programs. It combines elements of traditional approaches and modem communication and education technologies in an integrated, planned framework. Social marketing uses marketing's conceptual framework of the 4 Ps: Product, Price, Place, and Promotion. Social marketers adopted several methods of commercial marketing: audience analysis and segmentation; consumer research; product conceptualization and development; message development and testing; directed communication; facilitation; exchange theory; and the use of paid agents, volunteers, and incentives (Ling, Franklin, Lindsteadt, & Gearon, 1992).

Social marketing and public health

Social marketing is often perceived as a contradiction in terms and an odd fit for the public health professional. For if marketing, the business of selling goods and services, is pursued single mindedly-exclusive of all other considerations but profit-it will eventually clash with the social purpose of public health. Yet, in less than 20 years, social marketing for health has emerged as a recognized practice. (Ling, Franklin, Lindsteadt, & Gearon, 1992).

Social marketing, as a discipline, has made enormous strides since its distinction in the early 1970s and has had a profound positive impact on social issues in the area of public health, injury prevention, the environment, community involvement, and more recently, financial well-being. Fundamental principles at the

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Brand Experience
This part explained with currently features that have by the app, forced the user by gaining good experience while using the app. Mostly all participants said it was good experience to use the app even one participant declared health apps same with her mother to do some daily activites such as eat hygiene food.
“Sometimes I feel this app like my mom, eat hygiene’s food, exercise. “
P3

“Yeah I think so, because it makes me aware what I do, what I eat for my healthiness.”
P2

“Feelings to made my life more healthy almost every night I was watch the summary how my work out was done for a day”
P1

Brand Loyalty
This part explained how user will keep use the app in every situation. Because the app offer to use third parties mostly people argue to keep use the app as long as got support from the third parties. For example:
“It depends, if the features are very awesome than competitor , should have not any problem”
P1

Also one participant complained about his battery problem, but still he wanted to use the app if he can solved his battery problem.
“Yes, but I hope it will have development for battery problem”
P2

Even if the developer decide to made some upgrade with paying some money there is one participant who willing to pay for getting the benefits.
“As long fulfill my expectations I will consider to buy the app”
P3

Suggestion for Improvement
Suggestions for improvement were identified, its included:
“Together using with third party it boost a lot of its features.”
“Yes, although too simple because to gain more benefit we should combine with other third apps”
P3

“Yes, not just only with this app. Because I am combing with other apps who have different features so that I do had solved for my problems.”
P2

“I heard recently this app had many support for third apps, if it really like this I should be to use it again this time”
P3

Conclusion

In this study the insight was to know with a positive experience while using the app will give significant impact on brand trust and brand satisfaction, also with brand loyalty. So in other meaning, the user will keep use the app to made sure their healthiness life’s are fine and no symptoms. All variables have positive reviews from user so based on the interviewed record they wanted to keep use the app. But with one remarks. In order to keep use the app, the users want guarantee from the developer to insist using the third parties. Only the app didn’t made the users satisfied. They found to use this app more efficiently and benefit they should use as many third party support so the result will be also help them to improve their healthiness life.

Limitations and Further Research

In this study, future research may focus on how dependable the third party on the health app. increasing the total of the participants with variant user will be support the research.

other participant use for 6 months, and the last as beginner currently from 2-3 months longs. Two of them had theirs latest education as high school student, one among them had graduated from bachelor program. All of them declared healthily life is very important for living with no doubt. One participant convince health is most important, whenever the participant got sick his life balancing will go in a trouble. While participants resources, 2 of them knew health app from online site. And the rest knew from friends.

Engagement
The health app towards engagement among the user, for example one participants always to check their notification from health app.
"Because it made me always to look my notification, and made me more aware"
P1

Even other participant state every night before going to bed he always check the apps make sure there is no problem or bad sector in his healthy display
"Well, if you mean for keeping me to see the display, yes it is. Before sleep, I am always see my notifications because it makes me aware what I do, what I eat for my healthiness."
P2

Ease of Use
It's explained with the TAM, and includes concepts such as automation, convenience, fun and healthy literacy suitable to cater a range of consumers (Kevin, Oksana, & Lynne, 2016). Some features are appreciated by the user. For example:
"Actually, it was very easy to use, the fonts were well read."
P1

It also has positive comment for early user.
"I am beginner in this app, still using this for 2/3 months. What I am like for this app it shows me my work out activity such as how many steps I got, how many calories do I need and vice versa, actually before using health app, I am using others app but it had not many features than health app so I decided to changed"
P2

The display of the app gained a positive comment.
"The display is very simple like others apple apps, the font number is very highlighted so it made me aware about that"
P2

"It helps me to know about my healthily style in its display. Starting from my daily activities, nutrition, and my sleep activities. It's a worth try to recommend to my friends."
P3

Brand Satisfaction
In this section, declared about how the health app satisfied the user. While have many good review on it. For example:
"It was great apps to monitor your workout"
P1

"It's like I am having my own private doctor for free"
P2

"Is it very useful and just in times, nowadays peoples are too busy even for workout so those notifications from the apps can be used as reminder."
P3

But this satisfaction didn't made until the users addicted.
"No. It's for reminder only"
P3

Brand Trust
In this part, how health app can be trust by the user. How the result from this app can be verified by the owner. It turns out most participants are not sure about the result by the app.
"I think so, but I am not sure about the validity which in display is it really accurate or not"
P2

Literature Review

Brand Experience

Experiences are private events that occur in responses to stimulation and often result from direct observation and/or participation in events, whether real, virtual, or in dreams (Schmitt, 1999). Previous studies proposed numerous patterns of experiential classification (Schmitt, 1999), in which brand experiences are divided into two categories: individual and shared experiences. Sense, feel, and think experiences are considered as individual experiences. In contrast, act and relate experiences are regarded as shared experiences. (Holbrook & and Hirschman, 1982) proposed the experiential aspects of consumption: fantasies, feelings, and fun According to (Brakus et al, 2009), Brand experience is conceptualized as sensations, feeling, cognitions, and behavioral response evoked by brand-related stimuli that are part of a brand's design and identity, packaging, communications, and environments. Brand experience can be defined as the perception of the consumers, at every moment of contact they have with the brand, whether it is in the brand images projected in advertising, during the first personal contact, or the level of quality concerning the personal treatment they receive (Alloza, 2008). Based on (Brakus et al, 2009), brand experiences vary in strength and intensity; that is, some brand experiences are stronger or more intense than others.

Brand Satisfaction

Satisfaction has been found to lead to the long-term combination of relationships (Anderson C & Narus, 1990). According to (Algesheimer et al, 2005) brand relationship quality can be defined as the degree to which the consumer views the brand as satisfactory partner in an ongoing relationship; it is the consumer's overall assessment of the strength of his or her relationship with the brand.

Brand Trust

Brand trust leads to brand loyalty or commitment because trust creates exchange relationships that are highly valued (Robert M & Hunt, 1994). Thus loyalty or commitment underlies the ongoing process of continuing and maintaining a valued and important relationship that has been created by trust (Arjun & Holbrook, 2001). Following (Amine, 1998), the importance of the trust construct has already been demonstrated in sustaining buyer and seller relations. Brand trust is defined as the willingness of the average consumer to rely on the ability of the brand to perform its stated function (Arjun & Holbrook, 2001). The domain of trust, the brand experience in its entirety (encompassing both product and service aspects offered by the brand's provider) but not focusing on specific attributes (Sahin, Cemal, & Kitapçı., 2011)

Brand Loyalty

Loyalty has been referred to in a variety of market-specific contexts, for example, service, store, and vendor loyalty, an context that reflect the unit of measurement; customer and brand loyalty (Algesheimer et al, 2005). According to (Jacob & Kyner, 1973), brand loyalty expressed by set of six necessary and collectively sufficient conditions. These are that brand loyalty is (1) the biased (i.e., nonrandom), (2) behavioral response (i.e., purchase), (3) expressed over time, (4) by same decision-making unit, (5) with respect to one or more alternative brands out of a set of such brands, and (6) is a function of psychological (decision-making, evaluative) processes.

Methodology and Framework

'Health app' was defined as any commercially-available health or fitness app with capacity for self-monitoring. The semi-structured interview guide questions based on the Technology Acceptance Model These models also facilitated deductive thematic analysis of interview transcripts. Implicit and explicit responses not aligned to these models were analyzed inductively. Also adapting with (Sahin, Cemal, & Kitapçı., 2011) research model can be showed on figure 4, so in shortly explanation the brand experience from health app has positive impact on satisfaction, brand trust, and brand loyalty. Using the loyalty users for health app from Apple will triggered the awareness of healthy life. Criteria of the respondents were minimum 17 years old without any maximum age, have iOS device and use the Health app by Apple.

As (Davis, 1989) and his previous study proposed the Technology Acceptance Model (TAM) to investigate the impact of technology on user behavior, which the model focuses on "Perceived Usefulness" and "Perceived Ease of Use" as the key factor. Indeed in this study, the questions are based from TAM theory by (Davis, 1989). From Table 1 are the questions list for the participants. These table based on model by (Kevin, Oksana, & Lynne, 2016)

Result

Description about the participants

In this study, conduct with 3 participants who have a currently use or to be used health app. With 2 males and 1 male. Their range ages are 20-26 years old. All participants use iPhone as the platform and currently having iOS 11 as theirs operating system. Two from three participants are students as their main job, and the rest is employee working in a multinational company. The longest time who had use the apps are 2 years,

Apps for Health

Apps have also entered the medical field. In a recent review of articles discussing the development and evaluation of smartphone applications for health, (Mosa, Yoo, & Sheets, 2012) make a distinction between apps for healthcare professionals (including disease diagnosis apps, drug reference apps, and medical calculator apps), apps for medical and nursing students (including anatomy tools and electronic versions of medical books), and apps for patients (including chronic disease management Apps for health Apps have also entered the medical field. In a recent review of articles discussing the development and evaluation of smartphone applications for health, (Mosa, Yoo, & Sheets, 2012) make a distinction between apps for healthcare professionals (including disease diagnosis apps, drug reference apps, and medical calculator apps), apps for medical and nursing students (including anatomy tools and electronic versions of medical books), and apps for patients (including chronic disease management (van Velsen, Desirée, & van Gemert-Pijnen, 2013).

Apple's App Store classified the applications into twenty categories: Books, Entertainment, Games, Music, Business, Finance, Healthcare & Fitness, Lifestyle, Medical, Navigation, News, Photography, Productivity, Reference, Social Networking, Sports, Travel, Utilities and Weather. m-Health applications were distributed in the categories of Medical or Healthcare & Fitness. There were 1056 applications in the Medical category as of January 14, 2011, and 1004 applications in the Healthcare & Fitness category as of January 18, 2011. These numbers increased every day. Apps in these two categories were chosen for detailed analysis based on three criteria (Chang et al, 2011):

- Popularity. Applications were sorted by "Most Popular" instead of "Release Data." The top 100 most popular ones in both categories were selected.
- Rating. Applications with higher customer ratings (three or more stars out of five) were selected.
- Relevance. The goal was to identify the current status of the m-health applications.

So only those applications relevant to healthcare were selected. In the Medical category, out of the top 100 apps by popularity, eighteen had two or fewer stars in customer ratings. Two were not relevant. (One was in numerology; the other was a vet tool.) The 80 apps left were classified into seven classes (Chang et al, 2011)

1. Drug/medical information database that provides information about drug's shape, function, color, code, etc.
2. Medical information reference that refers to medical articles, websites, or journals.
3. Decision support for medical practitioners, including physicians, surgeons and nurses.
4. Educational tools for students or people who are learning medical science.
5. Tracking tools that track diabetes factors, blood pressures, and so on, and then visualize the tracking data.
6. Medical calculators.
7. Others, include eye charts, medical images, color test tools and timers remaindering users to take medicine.

Relation Health Mobile App and Brand Loyalty

m-Health applications or "apps" as they are more commonly knows, offer the opportunity to improve healthcare delivery and clinical outcomes (McCurdie et al, 2012). In this study, used only m-Health apps who provided by iOS and usually had already installed at the iPhone or iPad devices. Further details of the apps can be showed on figure 3. The Health app from apple has consistently developing their features and functions. As the previously version, there were lack of abilities or it can be said useless because at least we need additional third party sensors. But for those with a new iPhone, the Health app can be useful right now, because it has the ability to track your steps like a pedometer, as well as flights of stairs climbed and walking/running distance, indeed it support with a whole bunch of additional third party sensors. With those experiential value using the Health apps from Apple would have significant positive effect on brand satisfaction, brand trust, and brand loyalty. With a positive brand experience from Health app by Apple, users will be more aware about theirs healthiness in such a simple way by using only theirs smartphone.

Figure 3
Source http://cdn.osxdaily.com/wp-content/uploads/2014/10/track-steps-movement-iphone.jpg

QUALITATIVE STUDY OF HEALTH APP ON LOYALTY: STUDY OF HEALTH APPLICATIONS ON APPLE

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ABSTRACT

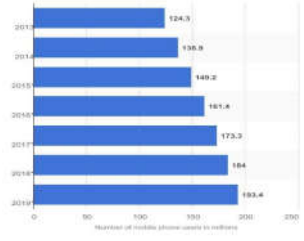
Nowadays, peoples do not really care about their healthy life because they are busy with work, study and other activities. People now also busy with their life on smartphone. All theirs friends coming from the smartphone even if they are looking for information they always looking on theirs smartphone. In order to keep healthy life through smartphone, Apple answered the problem with launched their health application. Health application provide the user how they should life with healthy during their busy life. It displayed about how long they workout, how they should eat, blood pressure, sleep life cycle and so on. So people do not to worry about theirs medical record because its all provided in his/her smartphone. The challenging part is how user experience with the app will impact on brand trust of the app, satisfaction, and also loyalty, if users are loyal with the apps, then automatically users are aware about they healthy life. In this study, will conduct a qualitative study in order to analyze how the variables (experience, trust, satisfaction, loyalty) impact on each other. Supporting also with TAM theory for improvement about this study,

Introduction

The Rise of Mobile Technology

In this millennium era user of smartphone are madly increase. In Figure 1 the statistic shows the total number of mobile phone users in Indonesia from 2013 to 2019. For 2017 the number of mobile phone users is expected to rise to around 173 million. In the last couple of years, there are witnessed a skyrocketing in the sales and use of smartphones and tablet computers. Apple, for example, has sold 46, 68 million iPhones and 11.4 million iPads in the third quarter of 2017 from last year in the same quarter 40.4 million. These numbers are part of a trend that shows an increase of sales since the introduction of these devices. The increasing pervasiveness of mobile technology and the speed with which this growth has taken place, has affected the way in which we live our lives: we are online everywhere and anytime (Agger, 2011). In the end, this development has ensured that mobile technology is now an integral part of daily life, and here to stay. One of the key features of these mobile technologies is the possibility of installing apps. Mobile applications are one of the fastest growing segments of downloadable software applications markets (Gunwoong & and Raghu, 2014). Apps are software applications that run on smartphones or tablet computers and are distributed via services like the iTunes store (for iPhone and iPad apps) or Google Play (for Android apps). These apps can be authored by the developers of the mobile technology, or by other individuals or organizations, the so-called 'third-party apps'. Examples of popular third-party apps are the game Angry birds, or the CNN app which provides the latest news (van Velsen, Desirée, & van Gemert-Pijnen, 2013). Based on Figure 2 the amount of App Store increased continuously from 2008 until 2017. Which means markets or App developer were aware the potential download from user. In other hand, it can produce a financial benefit. Mobile App Store markets exhibit key characteristics of long tail market such as a large selection of digital products and relatively low user search costs (Gunwoong & and Raghu, 2014). Launched in 2008, the iOS App Store now lists over 2.000.000 apps for iPhone and iPad devices. The App Store contains both free and paid apps, with Apple taking 30% of revenue from app purchases, application developers have access to a large audience of potential customer, and Indeed, a popular app such as "Angry Birds," can generate millions of dollars (Rishi & and Gu, 2012).

Number of mobile phone users in Indonesia from 2013 to 2019 (in millions)



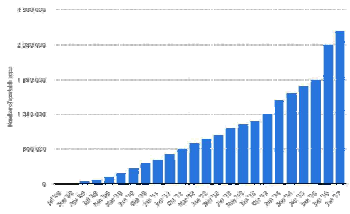


Figure 1
Source https://www.statista.com/statistics/274659/forecast-of-mobile-phone-users-in-indonesia/
Figure 2
Source https://www.statista.com/statistics/263795/number-of-available-apps-in-the-apple-app-store/

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Undang-Undang Nomor 28 Tahun 2014 tentang Hak Cipta

Undang-Undang Nomor 42 Tahun 1999 tentang Jaminan Fidusia

Undang-Undang Nomor 4 Tahun 1996 tentang Hak Tanggungan

Undang-Undang Nomor 10 Tahun 1998 tentang Perbankan

Peraturan Menteri Keuangan Republik Indonesia Nomor 101/PMK.01/2014 tentang Penilai Publik

a) Copyright must be registered with the Directorate General of Intellectual Property Rights Ministry of Law and Human Rights.
b) Copyright the own estimate of the economic value that can be accounted for, can be seen from the value of contracts with companies that use / distribute / distribute / display the copyrighted work.
c) Copyright has been managed by the Collective Management Institute, so that the royalty rate is already known.
d) Lending given in the precautionary principle, in terms of the amount of the credit score, the designation and the time period to be in accordance with Bank Indonesia and or Financial Services Authority.
e) Certificate of Intellectual Property Rights is included in the types of collateral that allowed the bank credit financing.
f) If required then given another guarantee in the form of personal guarantee or borgtocht of the company managing a copyright work (eg a personal guarantee from the owner of the music label company that houses a composer).[22]

Then, to do economic assessment*(economic valuation),*the Copyright shall be eligible include:[23]

1. A copyright work should be identified specifically and can be identified;
2. There must be clear evidence or manifestation of the existence of a copyright work (eg, contracts, licenses, registration documents, computer disks, a set of procedural documentation, customer lists, recorded on a set of financial statements, etc.);
3. The copyrighted work that should have been made / have been there;;
4. The copyrighted work must have legal protection and can be transferred legally
5. The copyrighted work must have a sale value

Although there are criteria or reference in the assessment / valuation of the Copyright, but based on the results of research by the author in Bank Mandiri, Bank BCA, Bank BRI and Bank BNI Tegal, barriers in applying Article 16 (3) of the Copyright Act, among others:

a) there are no government regulation that governs more about the mechanism of assessing or estimating the economic value of a copyright and how the binding ordinances Copyright as the object of fiduciary;
b) the Bank has not received any official notification from the government; and
c) People do not understand that the copyright certificate can be used as collateral fiduciary.

Closing

efforts can be done to overcome barriers to the use of copyright license certificate as collateral object fiduisa is government should immediately issue a government regulation that specifically regulates the procedures for binding of Copyrights as objects fiduciary and the need for dissemination to the public on Copyright that Copyright can be pledged as collateral to obtain credit facilities at financial institutions

Conclusion

Based on the discussion in the description above, can the authors conclude: (1) that the use of copyright license certificates as objects fiduciary can not be implemented. This is due to the lack of readiness of facilities and infrastructure for financial institutions especially the Bank to facilitate the provision of Article 16 (3) of Law Number 28 Year 2014 concerning Copyrights, 2) Barriers to the use of the license certificate of copyright as fiduciary among others:) there are no government regulation that governs more about the mechanism of assessing or estimating the economic value of a copyright and how the binding ordinances Copyright as an object of fiduciary, b) the Bank has not received any official notification from the government; and c) People do not understand that the copyright certificate can be used as collateral fiduciary.

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[22] *Ibid.*p.235
[23] Module 11, Intellectual Property Valuation, World Intellectual Property Organization.p.8

of the loan / debt should not exceed the value of the objects / items as collateral. Generally, the loan amount that can be given is 85% to 89% of the estimated value of goods pledged. This is done with the purpose when the debtor defaults, the objects / items that will be auctioned pledged that the results will be given to creditors as repayment of debt, and the remainder is returned to the debtor. If the value of collateral object is lower than the value of the loan / credit application debtor, the creditors will suffer losses as a result of the auction objects such guarantees can not cover the debt of the debtor.

Determining the economic value of an invention can be seen from several approaches.approach *The first* is a market approach*(marketapproach).*Market approach provides a systematic framework for estimating the value of intangible assets is based on the analysis of actual sales or licensing transactions with intangible comparable objects. *Second,* the income approach*(incomeapproach).*Income approach provides a systematic framework for estimating the value of intangible assets is based on the capitalization of economic income or the value of current or future value. The value of economic revenue will be derived from the use, license or lease on the intangible objects. *Third,*the cost approach*(costapproach).*The cost approach provides a systematic framework for estimating the value of intangible assets based on economic principles subtituti commensurate with the costs to be incurred as a substitute for comparable as unilitas function.[20]

An expert appraiser / assessor public / appraisal are people who have competence in the field of estimated or able to provide an objective assessment of the value of a good to move / no move that became collateral. Appraisal profession is regulated by Ministry of Finance of the Republic of Indonesia No. 101 / PMK.01 / 2014 on Appraisal. Under this rule, the Valuer is someone who has the competence in conducting assessment, which at least have passed the initial education Assessment and Appraisal is a Appraisers who have obtained permission from the Minister to provide services as set out in the Ministerial Regulation. Appraisal authority covering the services sector Ratings as follows

a) Appraiser Simple;
b) Appraiser; and
c) Business Valuation.

Assessment of a copyright, including from the Business Valuation service area which includes:

a) a business entity;
b) investments;
c) securities including derivatives;
d) the rights and obligations of the company;
e) intangible assets;
f) the economic losses caused by an activity or event to support various corporate actions or transactions are material;
g) the fairness opinion; and
h) financial instruments.

In conducting the assessment, using Standard Assessment Appraisal Indonesia hereinafter referred to as SPI. SPI is the basic guidelines that must be obeyed by the Valuer in conducting the Assessment. The assessment procedures and mechanisms implemented by the Appraisal in accordance with Article 4 of the Regulation of the Minister of Finance of the Republic of Indonesia Number 101 / PMK.01 / 2014 on Appraisal is as follows

1. identify and understand the scope of the assignment;
2. collecting, selecting and analyzing data;
3. Assessment approach; and
4. preparing the Valuation Report.[21]

The assessment process the price / value of an object or goods to be pledged starts from the estimator / expert appraiser determines the estimated top of the collateral submitted by the customer. Good estimates will generate good loan money anyway. Loan money that will produce the optimal capital leases. Conversely a bad estimate (estimated high / low) will generate money troubled loans. High assay will impede the working capital turnover and *cost of capital* the highdue to need further handling of the case the high estimate. Estimates are low will lead to lower borrowing money and capital lease income is low; in addition to the trust in the guarantor of the debt will be lower because the objects / items they lower estimated by the appraiser.

For that there are several criteria that can be used as the basis of evaluation of the economic value of a copyright to be used as collateral for credit, among other things:

[20] Sri Mulyani, 2012. *Pengembangan Hak Kekayaan Intelektual sebagai Collateral (Agunan) untuk mendapatkan kredit Perbankan di Indonesia*. Jurnal Fakultas Hukum Universitas 17 Agustus 1945 Semarang.p.573

[21] Reni Budi Setianingrum, *Mekanisme Penentuan Nilai Ekonomis dan Pengikatan Hak Cipta Sebagai Objek Jaminan Fidusia,* Jurnal Media Hukum Vol.23 No.2 Desember 2016. Universitas Muhamadiyah Yogyakarta. p.233

According to Article 1 (20) of Law No. 28 of 2014 on Copyright, Licenses are granted written permission by the copyright holder or related rights owner to another party to carry out the economic rights over the creation or product rights associated with certain conditions. In the field of intellectual property rights including copyright terddapat compulsory license is a license that is required and set explicitly in the Act included in the ordinance and its implementation requirements.[13] In a specific term with a particular purpose or use a person can enjoy property rights of others. The trick with a license agreement*(license)*between the licensor*(licensor)*and the licensee*(licensee).*On that basis, the licensee has the right to enjoy the economic benefits of a property of another which has been licensed licensor him. Sehubung with it by Act No. 12 of 1997 held the addition of a new chapter on perlisensian an invention in the field of science, art and literature. The addition of a new chapter is intended to provide a basis for setting perlisensian practices that took place in the field of copyright.[14]

Further, within the provisions of Article 16 (3) of Law Number 28 Year 2014 concerning Copyrights Copyrights states that an object can be used as a fiduciary. This is another step in the government's economic advance where the copyrighted work can be used as an object of fiduciary and has had a clear legal framework. Law No. 42 of 1999 on Fiduciary, states that fiduciary is a transfer of ownership of an object on the basis of trust with the provision that the object ownership rights transferred are still in the control of the owner of the object, while the Fiduciary is the right collateral to the moving objects both tangible and intangible and immovable in particular building can not be burdened with security rights as stipulated in Law No. 4 of 1996 on mortgage which remain in control of the Giver Fiduciary, as collateral for the repayment of certain debt, which gives the position preferred to Beneficiaries of Fiduciary towards other creditors.

Speaking of guarantees, generally always associated with the granting of loans or financing. Antonio M. Shafi explained that financing is one of the bank's main task is the provision of funding facilities to meet the needs of those who are deficit units.[15] According to the Law of banking No. 10 of 1998 is the provision of cash or the equivalent, based on agreements between the bank and other parties who require the financed party to return the money or the charges after a certain period of time in exchange or for the results.[16] A good financial institutions and non-banks, including financial institutions, in providing credit or financing generally require a guarantee to the debtor. The guarantee referred to here can guarantee material and individual guarantees.

Fiduciary guarantee a specific guarantees that arise because of a special agreement between the debtor by creditors and can be executed without a court ruling (parate execution) because the head of the Deed of Fiduciary already written executorial title in the form of irahirah, the phrase "By Justice Based on God ". In Indonesia, fiduciary regulated by Law No. 42 of 1999 on Fiduciary (UUJF).[17] In fiduciary, security object is not controlled by the creditor and the debtor remains in control of, and not accompanied by physical delivery. Fiduciary agreement be in writing in the form of a notarial deed and must also be registered in Fiduciary Registration Office. After the new registration will be born fiduciary.

Characteristics of an object that is used as debt collateral object is an object that has economic value in terms of a time when the debtor's breach of these objects is expected to replace the debt. In relation to copyright serve as the object of course Copyright collateral must be registered in advance to the Directorate General of Intellectual Property, and are still in a period of protection.[18] So that in the event of default, that is the fiduciary giver Copyright holders and execution can be done without having to go through the judgment

Based on the results of research by the author in several financial institutions in the City of Tegal such as Bank Mandiri, Bank BCA, Bank BRI and Bank BNI Tegal not been able to facilitate the provision of loans with collateral Letter Creation Records / Certificate of Copyright. It is caused by several factors such as the lack of readiness of facilities and infrastructure of financial institutions to facilitate the provision of Article 16 (3) of Law No. 28 of 2014 on Copyright. It is also delivered by Reni Budi Setianingrum were found up to now there is no party that provides credit with collateral in the form of copyright because there is no assessment mechanisms and the binding fiduciary collateral Certificate of Copyright.[19]

2. Barriers and Efforts to Use License Certificate of Copyright As Fiduciary

In determining the amount of loans / credits that can be granted by a creditor, it is necessary to estimate the economic value of an item / items to be guarantees of credit / debt. It is necessary to remember the value

[13]Janed Rahmi, 2014. *Hukum Hak Cipta (Copyright's Law),* Bandung: Citra Aditya Bakti, Cet. Ke-1. p 180.

[14]Rachmadi Usman, 2003. *Hukum Atas Kekayaan Intelektual : Perlindungan dan dimensi hukumnya di Indonesia* , Bandung : Alumni, Cet. Ke-1. p147.

[15] Muhammad Syafi I Antonio, 2001. *Bank Syariah dari Teori ke Praktik*, Jakarta: Gema Insani Press, p. 160

[16] Kasmir, 2002. *Manajemen Perbankan*, Jakarta: Raja Grafindo Persada, p.73

[17] Reni Budi Setianingrum, *Mekanisme Penentuan Nilai Ekonomis dan Pengikatan Hak Cipta Sebagai Objek Jaminan Fidusia,* Jurnal Media Hukum Vol.23 No.2 Desember 2016. Universitas Muhamadiyah Yogyakarta. p.232

[18] Subagio Gigih Wijaya, 2010. *Tesis : Hak Cipta Sebagai Objek Jaminan Utang Dalam Perspektif Hukum Jaminan Indonesia,* Universitas Sebelas Maret, Solo.

[19] Reni Budi Setianingrum. *Op.cit.* p.229

Methods

This study is a normative law that legal research done by researching library materials or secondary data emphasis on norms.[6] This study uses the approach of law*(statuteapproach)* because that will be examined are various laws that are the focus of research is *a comprehensive, all-inclusif and systematic*[7] and to examine all laws and regulations that have to do with legal issues being handled ".[8] he technique used in data collection techniques documentary study of secondary data and presented in descriptive and qualitative analysis with decomposition descriptive and prescriptive analytics, combined with juridical and conceptual analysis[9]

Results and Discussion

1. Use License Certificate of Copyright As Object Fiduciary

Copyright is a legal term for the call or call creations or works of human creativity in the fields of science, literature and art. Definition of copyright according to the provisions of Article 1 (1) of Law No. 28 of 2014 on Copyright is the exclusive right of the creator that arise automatically based on the principle of declarative after an invention is embodied in a tangible form without reducing restrictions in accordance with the provisions of the legislation. Berasarkan Article 4 of Law No. 28 of 2014 on Copyrights, Copyright consists of economic rights*(economicrights)*and moral rights*(moralrights).*Moral rights inherent right of self perennially on the Creator to continue to say or not to include his name on the copy with respect to the use of his work to the public, using the alias name or pseudonym, changing her work in accordance with decency in society, changing the title and subtitle of the work; and defend their rights in the event of a work distortion, mutilation Creation, modification of a work, or things that are detrimental to the self-respect or reputation.

Moral rights are also attached to the performers that can not be removed or can not be removed for any reason despite the economic rights have been transferred. Moral rights are rights that are united between creation and self-creator, or it can also be said the integrity of the creator. A copyright moral rights can include the right to include the name of the creator in his creation, and the right to change the title and / or content creation. Moral rights are rights that can not be transferred, so that the moral right is always integrated with the creator.[10] Then, what is meant by economic rights are exclusive rights creator or copyright holder to obtain economic benefits on her work. The creator or copyright holder has the economic rights to the issuance of a work, Multiplication creation in all its forms, creation of translation, adaptation, pengaransemenan, or transforming the Creation, Distribution of the work or a copy, show Creation, Special Creation, Communication Creation, and leasing of Creation. According to Abdulkadir Mohammed, one of the special rights attached to intellectual property rights including copyright, is the Economic Rights, namely the right to gain an economic advantage over intellectual property. It said Economic Rights for Intellectual Property Rights is an object that can be valued in money.[11]

Since the object is a personal right of the copyright is always attached to the author / copyright holder. Copyright always follows the existence of a creator / copyright holder where the person concerned was somewhere. Copyright Law in the newly particularly Article 16 paragraph (1), has set up a provision that adds economic value of a copyright, ie where a movable Copyright intangible (intangible) can be made the object of Fiduciary. This is in accordance with the opinion Sudjana that guarantee institutions most likely be charged to the Copyrights as debt collateral object is given the fiduciary institution Copyrights are moving objects.[12]

Then, because the copyright is an intangible object moves, the rights can be transferred even this material. The transfer can be done either whole or in part to others. This provision is contained in Article 16 paragraph (2) of Law Number 28 Year 2014 concerning Copyrights are Copyright can be transferred by way of inheritance, grants, wills, written agreements, and other reasons that justified in accordance with the provisions of legislation. However, before the Copyright is transferred then the Creator must register first creation to the Minister of Justice and Human Rights of the Republic of Indonnesia through the Directorate General of Intellectual Property to obtain a Certificate of Registration of Works / Certificate of Copyright. After that, the Creator may assign their rights as way above or through the License

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[6] Soerjono Soekanto dan Sri Mamudji, 2001. *Penelitian hukum normatif* "Suatu Tinjauan Singkat" Rajawali Pers, Jakarta. p. 13

[7] Bagir Manan.1999. *Penelitian di Bidang Hukum*, Jurnal Hukum Puslitbangkum Nomor 1-1999. Lembaga Penelitian Univ. Padjadjaran, Bandung. P.3-6

[8]Peter Mahmud Marzuki, 2010. *Penelitian Hukum*, Jakarta : Kencana. p 93.

[9] Barda Nawawi. 1986. *Penetapan Pidana Penjara Dalam Perundang-undangan Dalam Rangka Usaha Menanggulangi Kajahatan,* Bandung : Universitas Padjadjaran. P.123

[10] Ferol Mailangkay, *Kajian Hukum Tentang Hak Moral Pencipta Dan Pengguna Menurut Undang-Undang Nomor 28 Tahun 2014 Tentang Hak Cipta*, Jurnal Lex Privatum Vol. V/No. 4/Jun/2017 Universitas Sam Ratulangi Manado, p.138

[11] Abdulkadir Muhammad, 2007. *Kajian Hukum Ekonomi Hak Kekayaan Intelektual* Bandung: Citra Aditya Bakti. P.23

[12] Sudjana, *Hak Cipta Sebagai Jaminan Kebendaan Bergerak Dikaitkan Dengan Obyek pengembangan Fidusia*, Mimbar Hukum Volume 24, Nomor 3, Oktober 2012.p.407

COPYRIGHT LICENSE OF USE CERTIFICATE AS OBJECT FIDUCIARY INSURANCE

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ABSTRACT

Article 16 paragraph (3) of Law Number 28 In 2014 regarding Copyright, explained that the copyright can be object of fiduciary insurance. But, practice in the community, this provision does not understood by Financial Institutions. From the basic of such a situation, the writer interested to study it deeper, so that the problem issues in this paper, such as how the use of a copyright certificate license as object of fiduciary insurance in Indonesia with the effort and the problems. This paper is a juridical normative research with statute approach. The conclutions of this study such as : 1) copyright certificate license as object of fiduciary insurance in Indonesia cannot be implemented. This is due to several factors, such as lack of facilities and infrastructure of Financial Institutions, and 2) Bank has not received notification from the government and society has not understood that copyright certificate license can be object of fiduciary insurance.

Keywords : Copyright Certificate, Fiduciary Insurance.

Introduction

Intellectual Property Rights (IPR) can be interpreted as the right to ownership of the works that arise or born because of the ability of the human intellect in the field of science and technology. These works constitute intangible material that is the result of one's intellect or human capability in the field of science and technology through creativity, taste, intention and his work, which has moral values, practical and economical. Basically, within the scope of IPRs is segalakarya in the field of science and technology generated through the mind or the intellect of a person or a human before, and it is this that distinguishes IPR and other proprietary rights derived from nature.[1] The one area that includes Intellectual Property Rights is Copyrighted.

Article 1 (1) of Law No. 28 of 2014 on Copyright, states that the meaning of the Copyright is the exclusive right of the creator that arise automatically based on the principle of declarative after an invention is embodied in a tangible form without reducing restrictions in accordance with the provisions of the law - invitation. Then, in Article 16 (3) of Law Number 28 Year 2014 concerning Copyrights Copyrights states that an object can be used as a fiduciary. Fiduciary is a transfer of ownership of an object on the basis of trust with the provision that the object of the professionalised ownership rights remain in the control of the owner of the object. So, fiduciary arise on the basis of community need credit to guarantee moving objects, but the objects that are still needed for their own use. While the fiduciary is the right collateral to the moving objects both tangible and intangible and immovable in particular building can not be burdened with mortgage referred to in Act No. 4 of 1996 on Mortgage which remains in the possession of the giver fiduciary, as collateral for certain debt repayment that gives precedence to the receiver position fiduciary to the other creditors.[2]

According to Kartini Mulyadi and Gunawan Wijaya,,[3] that the fiduciary is a guarantee of material known in the positive law. Sri Rejeki Hartono[4] revealed that the rules on fiduciary included in the economic law because according to her customary fiduciary utilized in economic activity for several reasons, among others, practical and safe. The guarantee is collateral for the repayment of debt, which provide the main position to the holders of fiduciary against another Creditor regulated in Law Number 42 Year 1999 regarding Fiduciary. Fiduciary has significance in meeting the credit needs of the community, particularly small and medium-sized companies because it helps the debtor's business. The debtor can still master the collateral for the purposes of daily business and the banks are more practical. This is because the Bank does not need to provide a special place in the institution collateral such as pawn *(pand)*".[5]

Based on the description above, the writer interested to study it more deeply so that the problem in this research is how to use a copyright license certificates as objects fiduciary in Indonesia and barriers and efforts.

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[1]Rachmadi Usman, 2003. *Hukum Atas Kekayaan Intelektual : Perlindungan dan Dimensi Hukumnya di Indonesia*, Bandung : Alumni, Cet. Ke-1, p 2.
[2] Purwahid Patrik, 2009. *Hukum Jaminan*, Semarang: Universitas Diponegoro. p. 178.
[3] Kartini Mulyadi dan Gunawan Wijaya, 2005, *Hak Istimewa Gadai dan Hipotik*, Prenada Media, Jakarta, p. 203.
[4] Sri Rejeki Hartino, 2007, *Hukum Indonesia,* Banyumedia Indonesia Publishing, Malang p. 167-168.
[5] Sri Soedewi Mascjhoen Sofwan, 1977, *Beberapa Masalah Pelaksanaan Lembaga Jaminan Khususnya Fidusia di Dalam Praktek dan Pelaksanaannya di Indonesia*, Fakultas Hukum Universitas Gajah Mada, Yogyakarta, p. 75.

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make laws. Another stipulation regulates that the a draft of a laws are jointly discussed between the Parliament and the President to get a joint approval (article 20, verse 2). In the article 20 (verse 5) it is stated that "If the jointly approved draft of a law has not been legalized by the President in 30 days since it is approved, the draft legally becomes a law and is obliged to be legislated." The two stipulations are confusing and result in a controversy since it places the President's and the Parliaments' authorities together in legalizing a law in the one hand, and on the other hand, the stipulations cause an abuse of power to the Parliament's authorities to propose a draft of a law and also to compel the President to legalize the proposed draft of a law. At last, the President has no right to approve or to refuse a draft of a law that has been approved with the Parliament.

If the presidential government system in the 1945 Constitution of the State of Republic of Indonesia contains all characteristics of a pure presidential government system, the presidential system based on the 1945 Constitution of the State of Republic of Indonesia is a presidential government system copied from the doctrine of the Trias Politica. At present in Indonesia, the presidential government system has not shown an effective government since the 1945 Constitution of the State of Republic of Indonesia has not regulated the presidential government system purely.

Closing

Conclusion

From the research results made dealing with the Reconstruction of the Presidential System based on the 1945 Constitution of the State of Republic of Indonesia, as described above, the following conclusions are made and formulated:

1. The implementation of the presidential system based on the 1945 Constitution from the early independence era up to this transition era has shown its inconsistency. As a result the stipulations in the 1945 Constitution are interpreted in accordance with the interests of the Presidents in the ears;
2. It is necessary to reconstruct the presidential government system in the 1945 Constitution of the State of Republic of Indonesia;
3. Some reinforcements of the presidential system on the basis of 1945 Constitution of the State of Republic of Indonesia have occurred;
4. The President and vice President are directly elected by the people;
5. The Parliament hold powers to make laws, but he President as the executive body still has rights to propose drafts of laws;
6. The mechanism of the dismissal of the President is made through three stages, first the political stage through the parliaments' opinions. The second stage is through the examination made by the Constitution Court, and the third is through the Peoples' Consultative Council Meeting.
7. The administration period of the president is 5 years and he can be reelected twice.
8. The position of the Parliament cannot be liquidated by the President, but Kedudukan DPR tidak dapat dibubarkan oleh Presiden, but not stipulation exists to liquidated the Local Representation Members and/or People's Consultative Council .
9. Viewed from the attainment of the presidential government system as stated in the 1945 Constitution of the State of Republic of Indonesia, it has not fully contained any characteristics of a pure presidential government system.

Recommendation

1. In order to make the characteristics of a pure presidential government system appear in the Constitution of the State of Republic of Indonesia, it is necessary to sonly make some amendment of the Constitution of the State of Republic of Indonesia towards a pure presidential government system.
2. The results of the amendment of the Constitution of the State of Republic of Indonesia made by the amendment team of the Constitution should be consolidated with the People's Consultative Council as an institution possessing authorities to make amendments of the Constitution.

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Jazim Hamidi, 2005, *Hermenetika Hukum*, Yogyakarta, UII Press

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_____, 2007, *Perdebatan Hukum Tata Negara*, *Pasca Amandemen Konstitusi*, Jakarta, LP3ES

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system happens. The reinforcement to the Parliament may also be seen in the Parliament when it makes its supervision function. It has rights as stated in the 1945 Constitution of Republic of Indonesia, namely: rights for interpellation, rights for inquiries, and rights for stating ideas.

The Position of People's Consultative Council in the 1945 Constitution of the State of Republic of Indonesia

After the Changes in the 1945 Constitution, concerning the existence of the Parliament and the People's Consultative Council, the position of People's Consultative Council becomes a joint-session body, where People's Consultative Council does not hold the highest sovereignty. The elimination of the highest body system is a logic effort to go out from a trap from a confused state structure design in order to have a check and balance mechanism among state institutions.

b. Executive Institution

President' s Power

In line with the principle in the changes of the 1945 Constitution intended to affirm the presidential system[13], one of the effort is to change the President election, where at first the president was elected by MPR, then the President is directly elected by the people. The direct election of the President and vice President may make some balances among various forces in coordinating the state, especially in creating *checks and balances*, between President and the parliament which are elected by the people.

1. The Mechanism of the Dismissal of the President and Vice President

After the changes of the 1945 Constitution, the mechamism of the dismissal of the President and Vice President involve another state institution, besides Parliament and People's Consultative Council, namely Constitution Court through an open, just and fair court session process.

The mechamism of the dismissal of the President and Vice President above according to Mahfud MD[14] shows that the dismissal adopts a mix between *impeachment* and *previlegiatun forum system. Impeachment* shows that it is prevailed over by a political institution representing the whole people. Meanwhile *previlegiatun* is prevailed over the president through a specific justice which is principally is a heavy law breaking as stipulated in the constitution and it is decided by the judge.

The last decision in such a dismissal is in the hand of the People's Consultative Council meeting, where the decision making is politically made, namely at least the meeting is attended by ¾ members of the People's Consultative Council and it is approved by at least 2/3 members attending the meeting. This kind of dismissal may meet principles of legal certainty and checks and balances, an also show a meretriciously presidential system since in this system no political motif is allowed in dismissing the President and/or Vice President.[15]

2. Judicative Institution

After the amendment, the 1945 Constitution of the State of Republic of Indonesia requires an autonomous justice power. Before the amendment, the justice power was undergone by the Supreme Court, and all justice bodies under its territories in the public justice, religion justice, military justice, and state administration justice, and by a Constitution Court.

3. The Attainment of the Pure Presidential System

The results of the amendment of the 1945 Constitution come new state institutions into being based on the 1945 Constitution of the State of Republic of Indonesia and the election, appointment and the dismissal of the President and vice President. The amendment of the 1945 Constitution does not affirm the government system and the separation of power system. The amendment also results in the reinforcement of the presidential system, but the aspect of the parliamentary system still exists. If what is intended is a presidential system, the President and the Parliament should be given authorities in accordance with the presidential system.

4. The Construction of the Pure Presidential Government System

On the basis of the doctrine Tiras Politica by Montesquieu that the government system is implemented based on the separation of power known as a presidential government system, the presidential government system as stipulated in the 1945 Constitution of the State of Republic of Indonesia, has not shown a separation of power that should exist in the principle of a presidential government system as shown in the characteristics of a pure presidential government system. It is because the laws in Indonesia may be proposed by the President in Article 5, verse (1) of the 1945 Constitution of the State of Republic of Indonesia, while in article 20 it is stated that (1) the Parliament has a power to

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[13] Moekhtie Fadjar, *Hukum Konstitusi dan Mahkamah Konstitusi,* KonPress, Jakarta, KOnPress Citra Media, 2006,p. 54

[14] Mahfud MD, *Perdebatan Hukum Tata Negara, Pasca Amandemen Konstitusi,* Jakarta, LP3ES, 2007 p. 18

[15] Agus Harayadi, *Bikaneral Setengah Hati,*dalam Mochtar Pobotingi dan Abdul Mukhtie Fadjar, *Konstitusi Baru Melalui Komisi Konstitusi Independen*, Jakarta, Sinar Harapan, 2002, p. 114

Research Results and Discussion

1. The Presidential Government System Based on the 1945 Constitution

a. Agustus 18, 1945–Desember 27, 1949 Periods

During the early independence period, the state Indonesia did not have complete infrapolitics namely state institutions such as People's Consultative Council**,** Parliament**,** Supreme Court, Financial Examination Board and Supreme Advisory Board as required in the 1945 Constitution. There were just the President and the Vice President that were established. Therefore, on the basis on the Rule of Transfer in Article IV of the Constitution, the power of the state institutions are implemented by the President. It is stated as follows: "Before the eople's Consultative Council**,** Parliament**,** and Supreme Advisory Board are established based on the Constitution, all powers are implemented by the President with the hel of a National Committee".

b. July 5, 1959 - March 11, 1966 Periods

On the basis of the Presidents' decree July 5, 1959, it is stated that the 1945 is reprevailed. Since the time, the 1945 Constitution was prevailed as the basic law. What is interesting is the legal aspect, instead of the content of the decree. The President's decree dated on July 5, 1959 is a revolutionary legal product, a legal product which is without a legal basis.

Theoretically, it is difficult to explain the position of the Decree. From its positivistic point of view, it is clear that it is even in contradiction with the 1950 Temporary Constitution, mandating the President to obey the 1950 Constitution. From progressive legal perspective, the Decree does not have any characteristics for the interest of the whole Indonesian people. It is a legal product that ignores the 1945 Constitution itself, therefore it can be stated that a deteriorating condition happens since this legal product is merely for the interest for some people. Because after that, the desires of the Indonesian people to become a country which is democratically governed should go towards an authoritarian country.

c. March 11,1966 – 1998 Periods

During the administration of the New Order, the 1945 Constitution is thought to be sacred. In this ear, the concentration in managing the government system and the life of democracy was focusing on the aspect of political stability in order to support the national development. The President's power in the 1945 Constitution is very strong, but viewed from the state structure on the basis of the 1945 Constitution, it is the characteristics of a parliamentary system which are clearly seen, namely:

1. The first President is elected by People's Consultative Council with voting.
2. The elected President is appointed by People's Consultative Council and People's Consultative Council may ask for responsibility to the President any time.
3. Each law made should be approved by the Parliament.\

d. The Presidential Government System during the Transition Period from the 1945 Constitution into 1945 Constitution of the Republic of Indonesia

After the New Order was removed, the system of the state structure of Indonesia entered into a transition era, where in this period, the process of changing the 1945 Constitution was being made to promote the administration of a democratic state structure system.

A President election in this ear was felt to be more democratic than in the previous time, since the members of People's Consultative Council used their votes to determine the President they liked. During the Abdurrahman Wahid administration, there was some effort to divide power between the President and the vice President through the 2000 President's decision No.121. Politically, it can be stated that the President transferred his power based on his own power and he was not forced by People's Consultative Council. The action may be constitutionally justified, since what is done by the President Abdurrahman Wahid is not to separate or to disengage the government power from the President but to assign the task to the vice president but the responsibility is still on the president himself.[12]

2. The Construction of the Presidential Government System in the 1945 Constitution of the State of Republic of Indonesia

a. Legislative Institution

From the results of the changes of the 1945 Constitution, the Parliament has obtained some reinforcement. The mostly felt reinforcement is the changes in making laws. It is stipulated in the Article 5 verse (1) of the 1945 Constitution that "President has powers to make laws, then in article 5 verse 1) of the 1945 Constitution of the State of Republic of Indonesia, it becomes, "President has a right to propose draft a draft of a law*"*.

Actually, in order to give stronger reinforcement to the presidential government system, it is necessary for the President to have a veto right in making the a draft of a laws to balance the strength in the legislation process. It is in this stage the attainment of one of the characteristics of the presidential

[12] Ni'matul Huda, *Politik Ketatanegaraan Indonesia,* Yogyakarta, FH-UII Press, 2003, p. 76

of Jurists as cited by Mahfud MD[7] namely : 1) Constitutional Protection, 2) Free Justice Agency, 3) Freedom to give opinion, 4) Freedom to make unions, 5) Citizenship Education.

In Indonesia the implementation of government is based on the Constitution. From the independence day on August 17, 1945 up to now, four Constitutions have been prevailed UUD, the 1945 Consitution, the Constitution of United Republic of Indonesia, and Temporary 1950 Constitution. Special for the 1945 Consttution, it has been prevailed in two periods, fist on August 17, 1945 to Deceber 27, 1949 (early period of independence). Then it was prevailed in 1959 through the President' decree on July 5, 1959. At normative level, above the Constitution, there was once a state basis prevailed namely *Pancasila* (the Five Basic Principles).

When the various Constitutions were being prevailed in Indonesia, there appeared many variants of the political systems. According to Mahfud MD[8] when the 1945 Constitution was prevalied, it resulted in an authoritative political system where power centralization and political agenda were in the hand of the president.

There some amendments in the 1945 Constitution during 1999-2002. One of the purpose of the amendment is to reinforce a presidential government system. This will become a basis for operating a good, effective, and efficient presidential government system. If fact, the results of such amendments have not shown characteristics of a presidential government system, therefore, it is necessary to reconstruct a pure presidential government system. The concept of such a pure system contains twelve characteritics namely:

a. President is as the Head State and also the Government State;
b. President is directly elected by the people;
c. The time period of the Presidents' administration should be clearly determined ;
d. The Cabinet or the ministry board is formed by the President;
e. The President is not responsible for the legislative body;
f. The President cannot liquidate the legislative body;
g. Ministers are not allowed to be members of legislative board;
h. Ministers are responsible for the President;
i. The time period of the minister position is dependent on the President's credence;
j. The roles of the executive and legislative boards are made in balance with a c*hecks and balances* system*;*
k. Laws are legislated by the legislative board without involving the executive board;
l. The President has rights to veto the laws made by the legislative board.

So, a government system is called a pure presidential government system if it contains all above-mentioned characteristics.

Research Method

This study may be categorized into a qualitative research domain using a constructivism paradigm.[9] The constructivism paradigm is chosen in order to enable the writer to know and to understand the operation of the presidential government system compreesively in terms of the legal materials contained in the 1945 Constitution before and after the amendments. It is a non-doctrinal legal research[10] with a s*ocio-legal approach*. The object to study is the law conceptualized as a full meaning symbols as results of human mental construction (the creators of the Constitution) manifested in the forms of articles in the Constitution. To catch the object of realities, a hermeneutic theory is made use of.[11] The hermeneutic approach is used to interpret texts in the form of articles in the 1945 Constitution and the 1945 Constitution of the State of the Republic of Indonesia dealing with realities in operating the state. This present research may be specified into a descriptive analytic one in order to describe or to make a whole picture of the existence of the presidential government system in Indonesia, either as thought, or as norms as stated in the Constitution. From the results of his study, an understanding of the realities of the implementation of the presidential government in Indonesia may be obtained. Therefore, a prescriptive thought of the characteristics of a pure presidential government system may be made, where it can be recommended to be included in the 1945 Constitution of the State of Republic of Indonesia.

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[7] Mahfud MD, *Demokrasi Konstitusi Indonesia,* Yogyakarta, Liberty 1993, p 30

[8] *Ibid,* p 24

[9] Norman K Denzil and Lincoln Yvanna S, *Handbook of Qualitative Reseach ,* Secon Edition (Ed), London, Sage Publication, p. 165

[10] Soetandyo Wignjosoebroto, *Hukum Paradigma, Metode dan Dinamika Masalahnya*, Huma, Jakarta, 2002, p. 148

[11] Jazim Hamidi, *Hermenetika Hukum,* Yogyakarta, UII Press, 2005, p. 29

Review of Literature

In order to build an intact 1945 Constitution-based presidential government system, this work applies an approach to the theory of democracy supported by the theory of separation and division of power and the theory of the government system and its application. According to Arend Lypahard as cited in Juanda a state may be called a democracy, if it at least meets the following elements:

1. Freedom to establish and become members of an association;
2. Freedom to give opinions;
3. Rights for vote in an election;
4. Opportunities to be elected or to occupy various positions in the government or state;
5. Rights for political activists to campaign in order to obtain supports or votes;
6. The existence of sources of information;
7. Free and just election;
8. Dependence of all institutions with duties to formulate government policies on the government's desires. The eight elements show that people are an important factor in a state adopting democracy.

The doctrine *volonte general* proposed by J.J. Rousseau as the highest power in a state, according to Soehino[2] has two consequences, namely:

1. The existence of the people's rights to replace or to to remove rulers. It deals with whether the people are allowed or not to make a revolution to the rulers;
2. The existence of a concept whether it is the people who have sovereignty. The people are not the sum of individuals, but as an abstract *emeinschaft*.

People's sovereignty in *volonte* general is then realized with the medium of law with four characteristics:

1. United: the people's spirit to have a right to govern and no willingness to be governed is a unit. The unity may be seen in making laws, declaring a war, asking for justice and respecting a state or people;
2. Inseparable; sovereignty cannot be smashed;
3. Not transferable; sovereignty cannot be sold, pawned or donated.
4. Unchangeable; sovereignty is still under the people's hands, is not shrunk and is not less in quantity.[3]

In line with the focus of the problem above, the government system adopted in various countries actually is dependent upon the power organization existing in the country in organizing the power. A presidential system is a government system based on the theory of *Trias polica,* a theory of separation of power developed by John Locke[4] to limit the ruler' power in order to protect the citizents' human rights. John Locke's idea was then developed by Montesquieu where the teaching of *Trias politica* requires separate executive, legislative and judicative powers.[5] It is the tecahing which at last is applied in US which is in known as a presidential government system.

Besides the presidential system, there is also a system of separation of power but the division is among institutions given the power, where relationship between the executive and legislative institutions is reciprocal and may influence one another, and this system is called a parliamentary system.

A government system based on the relationship between legislative and judicative institutions is a working committee system. This system is adopted in Sweden. The House of Representative in Sweden is called *Bundesversamlung* consisting of two chambers namely National Council and State Council, meanwhile its executive council is called Federation Council, consisting of seven persons chosen by *Bundesversamlun*g. The task of this federation council is to implement any decisions made by *Bundesversamlung,* since it is merely administrative in nature.

Besides the three government systems, there is also a semi-presidential government system. Sartori in Saldi Isra calls it a mix government system on the basis of a flexible dual authority structure, that is to say, a bicephalous executuve whose 'first head' change as the majority combinations change.[6]

The operation of state power is mainly influenced by the concept of a law state, where the state power is limited by the law. The formulation of the law state had been renewed since 1964 by *International Comission*

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[2] Soehino, *Ilmu Negara,*Yogyakarta Liberty, 1993, pp. 120-121

[3] Muhammad Yamin, *Ploklamasi dan Konstitusi Republik Indonesia,*Jakarta, Djambatan, 1951

[4] Mukthie Fadjar, *Tipe Negara Hukum*, Malang, Buyumedia,2004, p. 17

[5] Suwoto, Mulyosudarmo, *Peralihan Kekuasaan Metode dan Dinamika Masalahnya,* Huma, Jakarta, 1997, p 26

[6] Saldi Isra, *Pergeseran Fungsi Legislasi, Menguatnya Model Legislasi Parlementer dalam Sistem Presidensil Indonesia,* Jakarta, Raja Grafindo Persada, 2010,p. 44

THE CONSTRUCTION OF PRESIDENTIAL GOVERNMENT BASED ON THE 1945 CONSTITUTION TOWARDS A PURE PRESIDENTIAL GOVERNMENT SYSTEM

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ABSTRACT

The Indonesia government system is based on the 1945 Constitution. If some constitutions were implemented in Indonesia in the past, varied political systems were resulted in. During 1999-2002, the 1945 Constitution was amended, and one of the objectives of the amendment is to reinforce the presidential government system. It is expected that the amended 1945 Constitution would be a good and effective basis and an efficient presidential government system would be made. Therefore, some awareness of reconstructing towards a presidential government system may be promoted. From the 1945 independence to the transition eras, the 1945 Constitution-based presidential government system was implemented in contradiction with the presidential government system principles since the substance of the 1945 Constitution was interpreted according to their own interpretation. Theoretically, a new concept in the presidential government system appears, namely a pure presidential system. Just like in the principles of the presidential government system in the 1945 Constitution, the consequence is to possess a relatively the same position among the state institutions as stated in the Constitution. Then, the presidential government system may be implemented optimally and efficiently, since each state institution, especially President and the parliament may focus their attention to their tasks and functions.

Keywords : Reconstruction, Government system

Introduction

The *Trias Politica* doctrine requires an equal position among executive, legislative and judicative institutions. If a state applies the doctrine in its constitution, its government system is called a presidential government system. In the system, the relationship between the president and the parliament may control one another and may make checks and ballances.

Dealing with the government system, experts in constitution law have different opinions in mentioning the government system in Indonesia, especially the government system that is based on the 1945 Constitution. Some calls it a presidential government system, some others, quasi presidential government system. According to Mahfud MD[1] because the 1945 Constitution contains parliamentary and presidential elements.

Some problems inherent in the presidential government system in Indonesia may be seen from the relationship pattern between the President and the Parliament. The pattern may be traced from the prevailing periods of the 1945 Constitution from the beginning of the independence to the reformation era. In the shift rule, article IV of the 1945 Constitution, it is stated that "Before the People's Consultative Council, the Parliament, and the Supreme Advisory Board are established in accordance with this Constitution, all powers are implemented by the President with the help of a National Committee". From this article, it is shown that in the early formation of the government, state institutions are performed by the president. The president has a very strong position, because on the basis of the shift rule, article IV of the 1945 Constitution, president performs powers possessed by the Consultative Council, the Parliament, and the Supreme Advisory Board with the help of a National Committee.

The roles of the Parliament before the president are very weak, even the government system in Indonesia cannot be grouped either into a parliamentary government system or presidential government system. The presidential system during the Old Order was not carried out in line with the characteristics of a presidential government system.

From the background, it is shown that the relationship between the President and the Parliament has not shown an institutionl relationship as assumed in a presidential government system. Whereas, the presidential government system is the realization of the *Trias Politic* doctrines placing an equal position between executive and legislative institutions.

The research problems are formulated as follows: 1. Why has the presidential government system become a basis for the operation of government in Indonesia based on the 1945 Constitution? 2. How is the construction of the presidential government system in the 1945 Constitution of the State of Republic of Indonesia? 3. How is the construction of a pure presidential government system?

[1] Moh Mahfud, MD, *Politik Hukum di Indonesia,* LP3ES, Jakarta, 1998 p. 32

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Must prioritize objectives unite and protect the people who obviously have different ethnic backgrounds, religions, different races, promoting deliberation and consensus, as well as profuse aimed at realizing social justice.

Conclusions

1) The law is a product of a more powerful political force to a political force that is weaker. Written law is a political tool and is universal. The law, which made the main guidelines to achieve state goals embodiment. PAW mechanism has not been fully put members in the position of the presumption of innocence. Not yet fully their recognition, security, protection and legal certainty, and equal treatment before the law*(equalitybefore the law* in the Interim Replacement. During this time a political party like the king that are absolute to be a party policy so that there is no legal control in mewujudakn PAW democratic and dignified.
2) Changes in the fundamental system of legislation on topics Interim Replacement (Recall) is required to satisfy the justice and legal certainty as well as meet the expectations and demands of society. Rights of party members should be given in the portion to be appreciated as this part of democracy. Absolute decision that the party can not be contested as a feature of authoritarian state law so it hurt democracy in the state again hukum.apa own legislation based on Pancasila

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Political and legal reform is the law that is affected by the provisions of the law that have been there before, and the dominance of the political system that covered.[26] Indonesia is a country of law, legal politics its legislation based on thethe 1945 Constitution

proximity ofin the legal system with the social reality occurs when the political system established a democratic political system, while if the political system is built is non-democratic, then the system existing law it would alienate the public by the law itself. A democratic political system is determined by the existing political configuration in the countries concerned and the hallmark of the political system itself that is commonly referred to as a political format.[27]

In the implementation of the law states that everything has to based / based on the law. Thus, everything that does not obtain legal legality viewed as an act which can not be justified under the law.[28] Legalization of the law against power means set the validity (validity) of power from the juridical aspect. Each authority has a formal legal basis, it means having the legality. The problem is if the powers that be legalized by the law is arbitrary or unfair. It is sociology, is closely related to what is called the legitimacy of power, namely the public recognition of the validity of the law.[29]

Replacement is basically the time between replacement of the representatives of the people in the middle of his term. Same with any other public office, dismissal of members of people's representative body in the middle of his tenure should be arranged specifically as recruitment. The dismissal must also be associated with the recruitment process. Mechanical was made in such a way that his successor had the same political legitimacy least formal legal because it is determined by the constitution with which it replaces. Reasons for switching and substitute members who cease to be associated with the system that led to his election.

PAW caused controversy. This is due to two conflicting streams. The first flow found that people's representatives should only be *delegates* or *messenger boy* (channeling sound), only transmits messages constituents. The second flow states that the representatives of the people should be the *trustee* (the messenger who is trusted), namely representatives of the people who express their opinions in the legislature according to its own considerations and thoughts in the interest of all people. Theorists*Representative"* "as *Trustee*(Theory of Full Mandate) found people's representatives, after public office, both executive and legislative, are no longer acting in the interests of his party, but must act for the benefit of the whole nation.[30]

The assumption of PAW in Indonesia, it is done or at least decided by the two institutions, political parties and constituencies. PAW proposal of the party at all there should be no verification. This is in contrast with the proposal PAW of constituents must be filed through the Ethics Council, there must be verification, defense, and so on. But the authority of PAW in political parties and at all absolute, if the parties told us he had enough PAW approved by Decree of the President of the House of Representatives Center.[31] It should be understood that the political decision not a legal decision.[32]

PAW by their political parties, members of the Board more indebted to the constituents being chosen by a majority vote. But when he function as a legislator, he would have thought to be threatened by the existence of this institution, especially later when it comes to fractions, no sound of institutionalized political interests, contrary to the opinion that he would be threatened with political party in the recall.

Recall by political parties to punish members who strayed from the party line, in the absence of a clear basis for the violations. In fact, about the dismissal of members of Parliament can not be done without clear criteria and procedures in view of the assumption that it was selected strictly in elections and have a political responsibility to a specific constituent groups.[33] In addition, PAW institution owned by any political party as a weapon to attract members of the House of Representatives seat in consideration of unilateral, must be removed.[34]

Pancasila is always associated with the values. The values of Pancasila assert that the law applicable in Indonesia should be based on belief in almighty God, shall have a great concern to humanity, which means one of them is to give high appreciation for human rights, respect for human dignity as a whole in contemporary developments

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[26] Andi Mattalatta, 2009, *Politik Hukum Perundang-Undangan*, Jurnal Legislasi Indonesia, Vol. 6 No. 4-Desember, Jakarta: Direktorat Jendral Peraturan Perundang-undangan Departemen Hukum Dan HAM RI, p. 576.

[27] Bintan Regen Saragih, *Op.Cit.*, p. 30.

[28] Sirajuddin & Zulkarnain, 2006*, Komisi Yudisial & Eksaminasi Publik Menuju Peradilan Yang Bersih Dan Berwibawa*, Bandung :Citra Aditya Bakti, p. 21.

[29] HM. Wahyudin Husein & H. Hufron, 2008, Hukum, Politik & Kepentingan, Yogyakarta: Laksbang Pressindo, p. 20.

[30] RM Ananda B. Kusuma, 2006, Tentang "Recall", *Jurnal Konstitusi*, Volume 3, Nomor 4, Desember, Jakarta: Sekretariat Jendral Dan Kepaniteraan Mahkamah Konstitusi, p, 156-157.

[31] *Ibid,* p. 67.

[32] Denny Indrayana, 2011, *Cerita Di Balik Berita: Jihad Melawan Mafia*, Jakarta: Bhuana Ilmu Populer, p. 158

[33] Bivitri Susanti, 2009, "Menata Ulang Kedudukan Wakil Rakyat (Pembahasan Kritis Atas RUU Susduk MPR, DPR, DPD dan DPRD)", dalam Andy Ramses M., Dkk, Editor, *Politik Dan Pemerintahan Indonesia*, Masyarakat Ilmu Pemerintahan Indonesia, Jakarta, p. 433.

[34] Eddy Purnama, *Op.Cit.*, p. 247.

Justice refers to an equality of rights before the law, the value of the benefit refers to the purpose of justice is to promote the good in human life, and the value of certainty point out that the law provides justice and norms aimed at justice really should serves as the rules that must be obeyed.

2. The ideal concept Interim Replacement Member of Parliament in the future

participation of the people is one of the most important characteristics of democracy. These characteristics indicate the presence of active citizenship principle with the shape and pattern of participation vary. Public participation in influencing policy in the country is part of a certain level of political participation.[15] Public participation (political participation) in public policy-making process is community involvement in decision-making forum, instead of merely hearing or consultation alone.[16]

The concept of a democratic constitutional state governed democracy of meaning contained and constrained by the rule of law, while the substance of the law itself is determined by means of a democratic constitution.[17] Based on the constitution, form of government can be democratically streets with the people's best interest, to protect the principles of democracy, creating supreme sovereignty in the hands of the people, carry out the basic state, and determine the law with justice.[18]

As is known, pursuant to Article 1 (2) and (3) of the 1945 Constitution, RI adopts state sovereignty of the people and understand the state of law.[19] The principles of a constitutional state*(nomocratie)*and principles of popular sovereignty*(democratie)*run in parallel as two sides of the same coin. Understand the state of law thus known to be called as a democratic constitutional state*(democratischerechtsstaat)*or in the form of constitutional called *constitutional*democracy.[20]

The law as a rule in it is a set of norms which state laws of Indonesia based on Pancasila and the 1945 Constitution, taking the concept of prismatic or integrative of two such conceptions that the principle of "legal certainty" in *Rechtsstaat* combined with the principle of "fairness" in *The Rule of*law.Indonesia did not choose one of them but include elements of both of them. And a choice of prismatic like this become necessary because at present already difficult to attract a substantive difference between *Rechtsstaat* and *The Rule Of*Law.Legal certainty must be enforced to ensure that justice in society as well upright.[21] This means that the rule of law, the existence of legal norms that regulate social order to achieve an order, the general character of the country held by the law.[22] Is the law that must be lifted and referenced only by the state in managing the lives of its citizens.

The existence of a conflict of interest laws no longer be solved according to who is the most powerful, but based on the rules oriented to the interests and values of the objective with no distinction between strong and weak. Orientation is called justice.[23] Talking about the law means talking about the system. Realizing the means to enforce a rule of law system, and established a good legal system means enforcing a rule in the life of the nation.

The legal system is a means for the authorities to conduct discipline in society. The legal system can also to maintain and increase his power even though the use of the law for that purpose there are also limits. The legal system creates and formulates rights and obligations and their implementation. Through the legal system, the rights and obligations established for citizens who occupy certain positions or to the entire community. The rights and obligations have the nature of a reciprocal, meaning that the right of a person causing liability on the other side and vice versa.[24]

Law (positive) that is an *output* of a prevailing political system, to convert *the input* into or available through the political process. *Input* in the form of demands and aspirations of the community in the form of support.[25] Law is essentially a rule or regulation is the result of the interrelation of socio-political system involved in the chain of history, values in the society, behavioral elite of power and influence values from outside the territory.

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[15] Anis Ibrahim, 2008, Legislasi Dan Demokrasi: Interaksi Dan Konfigurasi Politik Hukum Dalam Pembentukan Hukum Di Daerah, Malang:Intrans Publising, p. 83.

[16] *Ibid*., p. 86.

[17] Janedjri M. Gaffar, 2012, Demokrasi Konstitusional: Praktik Ketatanegaran Indonesia Setelah Perubahan UUD 1945, Konstitusi Press (Konpress), Jakarta, p. 7.

[18] Zukarnaen & Beni Ahmad Saebani, 2012, Hukum Konstitusi, Bandung: Pustaka Setia, p. 41.

[19] Susilo Suharto, 2006, *Kekuasaan Presiden Republik Indonesia Dalam Periode Berlakunya UUD 1945,* Yogyakarta: Graha Ilmu, p. 30

[20] Jimly Asshiddiqie, *Hukum, Op. Cit.*, p. 132

[21] Mahfud MD, 2010, *Membangun Politik Hukum, Menegakkan Konstitusi*, Jakarta: Rajagrafindo Persada, p. 26.

[22] Lukman Hakim, 2010, *Kedudukan Hukum Komisi Negara Di Indonesia Eksistensi Komisi-Komisi Negara (State Auxiliary Agency) Sebagai Organ Negara Yang Mandiri Dalam Sistem Ketatanegaraan,* Program Pascasarjana Universitas Brawijaya, Pusat Kajian Konstitusi (Pukasi) Universitas Widyagama, Malang: Setara Press, p, 105.

[23] Franz Magnis Suseno, 2001, *Etika Politik: Prinsip-Prinsip Moral Dasar Kenegaraan Modern*, Jakarta: Gramedia Pustaka Utama, p. 77.

[24] Soerjono Soekanto, 2010, *Pokok-Pokok Sosiologi Hukum*, Jakarta: Rajagrafindo Persada, , p. 93.

[25] Bintan Regen Saragih, 2006, *Politik Hukum, Bandung*:Utomo, p. 29

party's decision contained in the political party law so that judges have no other choice but to cut off because of lack of space in the political party law.

The principle of accountability should be strengthened, the institutional bond is also provided with a mechanism dismissal of members of Parliament at the proposal of the people. Through the mechanism of PAW, voters who are dissatisfied with their representatives be given the right to propose that his deputy was dismissed and replaced by another representative of the will of the people. Interim Replacement is a political mechanism provided for voters to punish legislators who are ignorant and inattentive towards them.

Indonesia as a democratic state, but democratic systems do not provide such a mechanism in the relevant legislation. Proposal dismissal of members of the House entirely on political parties. The right to apply for PAW is still dominated by political parties. When referring to the provisions of Article above, it is evident that the people had room to propose the dismissal of a member of Parliament. Because not found any of the provisions in the article which provides a space for voters to propose the dismissal of members of Parliament. Proposal dismissal of members of Parliament belongs only to political parties. It became one of the reasons oligarchy political party can not be penetrated. These issues ultimately affect the weak accountability of legislators to voters.

In addition to the elected representatives accountable reason, the need for a mechanism proposed by the people PAW also in order to maintain consistency in the application of the principle of popular sovereignty. When the people as the sovereign right to choose who their representatives, then the voters should also have the right to terminate or at least propose the dismissal of a member of Parliament when they are no longer satisfied with its performance.

Semestisnya a member of the House may be proposed to be dismissed by the people who are in an area constituents. The nomination of the petition can be done through people or other forms. The petition was submitted to the House leadership. Parliament member in question must be processed through the Court of Honor of the Board to be examined on the issue raised in the petition of the people and further the process of dismissal against members of the House concerned.

In addition to providing a mechanism Interim Replacement by the people, should also be a mechanism to ensure that a member of the House was not dismissed arbitrarily by the political party nominating them. During this time a political party like a king who must be obeyed by members of the board, although not always defend the interests of the people.

Interim Replacement clauses often used by political parties to punish members who strayed from the party line, in the absence of a clear basis for the violations. In fact, about the dismissal of members of Parliament can not be done without clear criteria and procedures in view of the assumption that it was selected strictly in elections and have a political responsibility to a specific constituent groups.[11] In addition, PAW institution owned by any political party as a weapon to attract members of the House of Representatives seat in consideration of unilateral, must be removed.[12]

Moh. Hatta also once said: Interim Replacement Rights (PAW) is incompatible with democracy especially with Pancasila democracy. The party leaders are not entitled to cancel its members as a result of the election. Apparently in fact feel more powerful party leaders from constituencies. If so he suggested that the elections be eliminated only.

In a democratic state, the ideal format representation of the people in a country to be something very important. The existence of representative institutions of the people is a logical consequence of the democratic system. Constitution as the basic law should be able to answer those needs. Any institution that the representation in state administration must be set and published in the constitution.[13] However, of course, a better constitutional guarantee was not enough. Many of the challenges and barriers to implement the constitutional guarantees into action as citizens.[14]

The law, which made the main guidelines to achieve state goals embodiment. Each enforceability of written rules have applicability philosophical foundation, juridical, and sociological. Legal regulations set by the state agency.

Protection of citizens is located in the country, if it recognizes the concept of a state of law. In this concept, a country considered to be the principle of a constitutional state, if the state administration was done according to the law, as outlined in the constitution.

Legislation that good is a rule able to give justice and to ensure legal certainty as well as meet the expectations and demands of society. That is, these rules must satisfy the justice of the individual and a sense of social justice, as well as legal certainty. As the theory proposed by Gustav Radbruch that the value of

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[11] Bivitri Susanti, 2009, "Menata Ulang Kedudukan Wakil Rakyat (Pembahasan Kritis Atas RUU Susduk MPR, DPR, DPD dan DPRD)", dalam Andy Ramses M., Dkk, Editor, *Politik Dan Pemerintahan Indonesia*, Masyarakat Ilmu Pemerintahan Indonesia, Jakarta, p. 433.

[12] Eddy Purnama, *Op.Cit.*, P. 247.

[13] Charles Simabura, 2011, *Parlemen Indonesia: Lintasan Sejarah Dan Sistemnya*, Jakarta: Rajagrafindo Persada, p. 1.

[14] Denny Indrayana, 2004, Negara Hukum Indonesia Pasca Soeharto: Transisi Menuju Demokrasi Vs. Korupsi, *Jurnal Konstitusi*, Volume 1, Nomor 1, Juli, Mahkamah Jakarta: Konstitusi Republik Indonesia, p. 107.

Pancasila is the source of all sources of state law. Thus confirmed in Law No. 12 Year 2011 on the Establishment Regulation Legislation. This means that all product legislation, ranging from the Constitution NRI 1945 to local regulations, must be derived from the values of Pancasila which is on God, Humanity Just and Civilized, Indonesian Unity, Democracy Led by Wisdom Wisdom in the Consultative representatives, and social justice for all Indonesian people.

This is the starting point of the problem, where the rights of PAW The political parties tend to be based on political considerations alone, when a political party whose members carry considers the membership of Parliament / DPR outside the party line politics, the political parties will do PAW from the membership of the House. Paratai act politically to do PAW against party members who are critical and fulfills the aspirations of the people considered to be in line with party policy. Political parties can not see the whole meaning of Pancasila that political interests become precedence over promoting Pancasila as the views of national life.

PAW is one part of the elite political interests of due sejalannya party members in Parliament for the policies of his party, although freedom of opinion is the right but when confronted with the party's policy was to one should be subject to the policy even if contrary to the aspirations of the people.

Interim Replacement phenomenon often lead to legal disputes since then, especially by one party (usually those who were subject to dismissal and / or replacement) who feel the injustice of what happened to their positions. The parties who feel aggrieved in the fight for 'injustice' that happened, generally take legal action through a lawsuit in court.

PAW is not only a political dimension but also the social and legal dimensions. Based on the description that are exposed at the top, then there are two (2) basic questions which also is a problem that we discussed, namely: What form of legal equality *(equality before the law)* Recall to members of Parliament and political parties with the mandate of the Act in 1945? How ideal concept Interim Replacement mechanism by Political Party member of Parliament in the perspective of democracy for the future?

Discussion

1. Equality before the law *(equality before the law)* Recall to members of Parliament and political parties with the mandate of the 1945

political dynamics evolving in political institutions in Indonesia is a natural process that always appear in the reform era. Similarly, the time between replacement (PAW), especially in the legislature is something that naturally happened in a democracy. Nevertheless, the issue of inter-time replacement (PAW), a member of the House is absolutely a matter for each political party. The process still starts from the political party as a candidate for the legislature, it can not be denied even if the replacement over time (PAW) The pressure from the public and may not be replaced directly without going through the process and the rules that have been set.

Parliament formed by the people through a political party is an institution that is essential to democracy, because those who occupy the seats in these institutions are representatives of the people. Their main job is to think about the interests and needs of the people they represent, to identify the problems faced by the people, and so preparing a law that guarantees the realization of the interests in question. Aware that Parliament as an institution of the lawmakers in it loaded with the interests of the institution should not be able to escape from the control activities.[9]

Dismissal mechanism between the time legislators stipulated in Law No. 17 of 2014 of the People's Consultative Assembly, House of Representatives, Regional Representatives Council, and Regional House of Representatives can be done through two doors, which was proposed by the leader of his political party or by the Court of Honor Council

mechanism dismissal time between members of Parliament and then by the Interim Replacement proposed by the leadership of their political parties regulated by Article 240 of Law No. 17 of 2014 of the People's Consultative Assembly, House of Representatives, Regional Representatives Council, and Regional House of Representatives formulation of Article 240 paragraph (1) 'proposed by the political party leaders to the leadership of the House of Representatives with a copy to the President', can be interpreted PAW decision against the members of the House then 'real' and the decision is up to the leadership of Parliament and the President. Thus if it is seen to the tasks of coordinating and protocol House leadership that the House leadership is not the 'boss' of the members of Parliament. Execution time replacement among members of the House must first be discussed to leadership of the House and the opening made by the President.

Council members objected to the dismissal of a member of a political party, can appeal to the court, and the dismissal invalid if has obtained permanent legal force as defined in Article 241 paragraph (1).

In the period 2009-2014, PAW occurred on two members of the National Awakening Party, Lily Wahid and Effendi Chadidjah Choiri, as opposed to the policy of his party in the use of the right of inquiry 'Bank Century' and 'Mafia Taxes'.[10] In fact the party's decision will be won by the courts, it is proving absolute

[9] Eddy Purnama, 2007, Negara Kedaulatan Rakyat Analisis Terhadap Sistem Pemerintahan Indonesia Dan Perbandingannya Dengan Negara-Negara Lain, Bandung: Nusamedia, p. 248-249

[10] *Ibid,* p. 168

violation of the laws and regulations which can be proven material in general court, board members face the challenge politically contested by both the parent and the constituent political parties and society in general.[3]

At this time the authority of PAW stipulated in Article 239 paragraph (1) and (2) and Article 355 paragraph (1) and (2) of Law No. 17 of 2014 about the position of the MPR, DPR, DPD and DPRD (Act MD3) determines that members DPR and DPRD besides selected, be removed from office (Dismissal Inter time) which is one of the reasons is, if nominated by their political parties to be dismissed as a member of the Parliament / Council in accordance with the provisions of the legislation.

Sovereignty is the right of absolute power, supreme, unlimited, unstoppable and without exception.[4] The system of government that embraces popular sovereignty, the power of the government-held and run by state institutions formed from the people, by the people and for the people (democracy). The embodiment of popular sovereignty carried out through direct general election as a means for the people to choose their representatives. System adopted will affect, either in respect of the electoral system and the party system, greatly affect the essence of the representation of the people.[5]

The existence of representative institutions of the people in central theme, namely representatives who can act on behalf of the aspirations of the people it represents. The principle of popular sovereignty requires legislative branches that the filling is based on the general election. The elections are a means to mendudukan the representatives who will represent their interests. With the general election of that, the people have the right to choose their representatives based on the rule of law underlying it.

Interim Replacement (PAW) or *Recall is* generally understood as the recall of members of Parliament to be dismissed and therefore replaced with other members before ending the tenure of the members of Parliament are drawn.[6] PAW implementation of board members can be performed between the time when the implementation of the dismissal of the board members for violating the oath of office and code of conduct of Parliament, not obeying the plenary session or completeness another meeting, in violation of the provisions of law and dismissed by political parties supporting him. In empower political parties in the democratic era is to provide the right or authority to impose disciplinary action to enforce any of its members, for the members to behave and do not deviate. Moreover, contrary to the AD / ART political parties. To improve work efficiency parliamentarians in carrying out their duties as elected representatives of the House of Representatives members joined in a fraction.[7]

PAW political party against its members can result in the Parliament for not voicing people's votes in total and there is no freedom of members of the House to carry out the people's mandate. PAW rights of political parties is widely used as a reason for the termination of the membership of Parliament who are not subject to the discretion of political parties, resulting in rights PAW political party into a shadow of the threat of bullying (although not directly) membership of the House of Representatives to express the aspirations of their constituents. PAW rights of political parties as if a chain that shackles the freedom of expression and the membership of the House of Representatives to act according to his conscience. PAW rights political parties show the will of the people and the tendency to ignore complicate people's political participation.

The strength of the political representation lies in the implementation norms of collective representation. By this criterion, the representative has the potential to reflect the aspirations and interests of a plurality of constituents. PAW has become a political instrument to enforce compliance and control of the House. In the national scope such as the public reaction to the case of the century bank later in the House of Representatives discusses the bank's right of inquiry century that led to PAW against Chadidjah Lily Wahid by the leader of the National Awakening Party (PKB) because they are already beyond the tolerance limit and violate party policy. Political considerations which tend to support government policy that indicated problems are often the cause of his in-PAW a member of the House who are themselves vocal and critical of the people who do not take sides.

Interim Replacement (PAW) is also conducted to Fahri Hamzah from the membership of the House of Representatives by the Prosperous Justice Party (PKS), according to the dismissal of MCC MCC has appropriate legal basis. But Fahri Hamzah refused and sued to court for PAW himself.[8] At once people have done PAW then it politic he could no longer represent konstiuenya to re-represent the area to move forward as a board member of the same party days of the next election unless he changed the party as a political vehicle to participate again in elections

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[3] Sebastian Salang, 2009, *Menghindari Jeratan Hukum Bagi Anggota Dewan*, Jakarta: PT. Penebar Swadaya, p. 269.
[4] Padmo Wahjono, 1961, Ilmu Negara, Jakarta: Indo Hill Co, p. 153.
[5] Jimly Asshiddiqie, 2005, *Format Kelembagaan Negara dan Pergeseran Kekuasaan dalam UUD 1945,* Yogyakarta: FH UII Press, p.44.
[6] M. Hadi Shubhan, 2006, "Recall": Antara Hak Partai Politik Dan Hak Berpolitik Anggota Parpol, Jurnal Konstitusi, Volume 3, Nomor 4, Desember, Jakarta: Sekretariat Jendral Dan Kepaniteraan Mahkamah Konstitusi, p. 46.
[7] BN Marbun, 1993, *DPRD: Pertumbuhan, Masalah dan Masa Depannya*, Jakarta: Erlangga.p. 97
[8] "PKS Yakin Pemecatan Fahri Hamzah Sesuai Landasan Hukum" dalam nasional.sindonews.com. diunduh tanggal 27 oktober 2017 Pukul 23.00 WIB

BUILDING CONCEPT OF IDEAL REPLACEMENT MECHANISM BETWEEN MEMBER PARLIAMENT TIME BY POLITICAL PARTIES IN THE PERSPECTIVE OF DEMOCRACY

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ABSTRACT

The general election to elect members of the House of Representatives is one part of a democratic step. Parliament is an institution which is the political representative of the aspirations of a container dealer throughout Indonesia so that the authority is run and the rights that are used by the Parliament is a reflection of the will of the people area. Shape control of the public against members of the House elected as the constituency is through Interim Replacement (PAW). However, the mechanisms that occur during this time is more dominant paw carried out by political parties, while the rights and aspirations of the voters as the constituents as defined in the Act No. 17 Year 2014 About the MPR, DPR, DPD and DPRD accompanied by a fairly complicated procedure. The method used is a normative legal research with normative juridical approach, after legal materials collected by documentation study, and analyzed by qualitative descriptive qualitative method. Mechanism Interim Replacement Board members by Parties through the recall begins with the termination member of Parliament nominated by the political parties to the leadership of the House of Representatives with a copy to the President, but if members of Parliament mind it can take legal actions to the Court, and the dismissal invalid if has obtained permanent legal force. Mechanism Interim Replacement Member of Parliament by political parties on the basis of a violation of the Articles of Association / and Bylaws of the political party which can be proved by law, in accordance with the principles of fairness and legal certainty can not be possible that the subjective nature of the political parties.

Keywords: PAW, Member of Parliament and political parties

Introduction

System Indonesian constitution, ideals State of Law's become an integral part of the development of the idea of statehood Indonesia since independence. Although the articles of the 1945 Constitution before the change, the idea of rule of law was not formulated explicitly, but the explanation stated that Indonesia adheres to the idea of *'rechtsstaat',*not 'machtsstaat'. As, in 2001 the Third Amendment of the Constitution of the Republic of Indonesia Year 1945, was re-listed provisions concerning expressly in Article 1 (3), which reads: "Indonesia is a State of Law".

The idea of a State of Law was built by developing legal devices as a system that is functional and fair, developed by managing super-structure and infra structure of political institutions, economic and social orderly, and nurtured by building cultural and legal awareness of rational and impersonal in public life and nation. To that end, the legal system needs to be built *(law making)* and enforced *(enforcing the law)* as it should be, starting with the constitution as the highest legal position. To ensure the enforcement of the constitution as the basic law of the highest position *(the supreme law of the land),* also formed a Constitutional Court, which acts as a *'guardian'* and it is *'the ultimate interpreter of the*constitution'.[1]

In carrying out the people's sovereignty on the basis of democracy led by the inner wisdom of deliberations / representatives, need to realize the people's consultative institution, legislative branches, representative danlembaga daerahyang able to embody the democratic values and to absorb and memeperjuangkan aspirations of the people and the area in accordance with the demands of the life of the nation.

Charging representative institutions is implemented through general elections (elections). Elections are one of the instruments to realize the sovereignty of the people who intend to form a legitimate government as well as a means of articulating the aspirations and interests of the people.[2] Membership recruitment legislative branches (DPR / DPRD) based political parties, so that no single member of the people's representatives are not tied to a political party. As the formulation in Article 22E paragraph (3) of the 1945 Constitution which states that "participants of the elections to elect members of the House of Representatives and members of the Regional Representatives Council is a political party."

The general election is one way to determine the representatives who will sit in the representative body of the people. Being political representation within the framework of a democratic system brings burdens and responsibilities as well as a relatively large political consequences. Therefore, despite the shackles of law as a

[1] Jimly Asshiddiqie, "Gagasan Negara Hukum", di akses dari perpustakaan.bphn.go.id pada tanggal 17 oktober 2017 Pukul. 23.20 WIB

[2] Ibnu Tricahyo, 2009, *Reformasi Pemilu Menuju Pemisahan Pemilu Nasional dan Lokal,* Malang: In-Trans Publishing, p. 6.

Undang-Undang Republik Indonesia Nomor 36 Tahun 2009 Tentang Kesehatan.

Peraturan Menteri Kesehatan No. 755/Menkes/Per/Iv/2011 Tentang Penyelenggaraan Komite Medik Di Rumah Sakit.

Peraturan Menteri Kesehatan Republik Indonesia Nomor 69 Tahun 2014 Tentang Kewajiban Rumah Sakit Dan Kewajiban Pasien

Peraturan Menteri Kesehatan Republik Indonesia Nomor 1691/Menkes/Per/Viii/2011 Tentang Keselamatan Pasien Rumah Sakit

context of health services which bermutu.14 Violation of the policy or administrative law provisions may result in sanctions administration may include revocation of business license or revocation of legal status to the hospital, while the doctors and other health professionals can be either oral or written reprimand, revocation of his license to practice, delay or advancement regular salary level higher.

2. Accountability Hospital in Civil Law;;
   In civil legal liability, on the responsibilities set forth in Article 1367 Book of the Law of Civil Law as a further explanation of who and what is under his responsibility. The civil legal liability consequences that breaches (ie, that cause harm to others) should pay compensation. In civil, patients who feel aggrieved to seek redress under Section 1365 in 1367 in conjunction with the Book of the Law of Civil Law.
3. Accountability Hospital In Criminal Law
   In criminal law adhered to the principle of "no punishment without guilt" .15 Furthermore, in Article 2 of the Code of Law Criminal Law says, "The penal provisions under Indonesian law applicable to anyone who commits an offense in Indonesia". The formulation of this article determines that every person residing in the territory of Indonesia, can be held criminal liability for the mistakes he made

Based on that provision, professional health workers who work in the hospital can not be separated from the provisions of that article. Compensation is an attempt to provide protection for every person on a result arising from fault or negligence of health workers.

Closing

1. The setting operation of the Hospital in improving health services as regulated in the Law on the actual Hospital is one means of preventive supervision. Resulting in the delivery of public services, especially health services through the hospital can really realize the achievement of the optimum degree of public health that the ultimate objective is the of health.
2. Responbility form a hospital, for acts of negligence of health workers in hospitals, which causes harm to a person / patients, on the basis of Article 46 of Law of the Republic of Indonesia Hospital. The first hospital is responsible for the losses, to the extent a result of the negligence of medical personnel at the hospital; secondly, the hospital is not responsible for all the damages a person, if it proved to be no acts of omission of health personnel at the hospital; Third, the hospital is not responsible for the deliberate actions which cause loss of health workers throughout the not the responsibility of the hospital; and fourth, the hospital is responsible for the actions kelalain health workers, if negligence is done and happens in the hospital

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Regulation

Undang-Undang Republik Indonesia Nomor 44 Tahun 2009 tentang Rumah Sakit

Undang-Undang Republik Indonesia Nomor 29 Tahun 2004 Tentang Praktik Kedokteran

To ensure that the medical committee to function properly, the organization and administration of the medical committee stated in the internal regulations of the medical staff (medical staff bylaws) were prepared by referring to the Ministry of Health's Internal regulations hospital (hospital bylaws) are the basic rules that govern the procedures operation of hospitals include corporate internal regulations and internal regulations of the medical staff. Regulation of corporate internal (corporate bylaws) are the rules governing the order of corporate governance (corporate governance) held well by setting the relationship between owners, managers, and the medical committee at the hospital. While the internal regulation of medical staff (medical staff bylaws) are the rules governing clinical governance (clinical governance) to maintain the professionalism of the medical staff at the hospital.

In principle, the internal regulation of medical staff is a normative basis for any medical staff in order to create a good cultural and accountable profession. The medical committee function to uphold professionalism by controlling the medical staff who perform medical services at the hospital. Control is done with the authority to regulate in detail the medical services (delitenation of clinical privileges). Control conducted jointly by the head / director of the hospital and the medical committee.

The medical committee did credentials, improving the quality of the profession, and to discipline the profession and recommend follow-up to the head / director of the hospital; while the head / director of the hospital medical committee to implement the recommendations by mobilizing all resources to the professionalism of the medical staff can be applied in the hospital. Therefore, it is necessary supervision and control so that the application of science and medical technology in hospitals actually in accordance with the requirements of the profession.

Similarly, the implementation of medical audit as an evaluation of all medical personnel. It has also been regulated in Law Number 44 Year 2009 on Hospitals, Article 39 which states that in the administration of the hospital to do an audit, in the form of performance audit and medical audit. The medical committee was formed so that the hospital can administer good clinical governance (Good Clinical Governance) so that the quality of medical care and patient safety in hospitals is guaranteed and protected and provide legal protection for patients, health professionals and hospitals.

Law of the Republic of Indonesia Number 44 Year 2009 on Hospital Article 33 paragraph (1) of each hospital must have an organization that is effective, efficient and accountable, the elucidation refers hospital organization are intended to achieve the vision and mission of the hospital with run good corporate governance (GCG) and good clinical governance (good clinical Governance). Pasa 33 paragraph (2) of the Organization of the hospital at least consist of the head of the hospital / director of the hospital, medical service element, the element of nursing, medical support element, a medical committee, the internal investigation unit, as well as public administration and finance.

Indonesian Health Ministry Decree No. 755 / Menkes / Per / IV / 2011 on the Implementation of Hospital Medical Committee. Article 19, which states are required to adjust the organization hospital medical committee in accordance with the provisions of the Ministry of Health is in a maximum period of 6 (six) months after the enactment of this Regulation of the Minister of Health.

As the center of public service delivery, the hospital as an organization is required to conduct quality medical services for the community. Under these provisions basically there are four sections relating to the responsibilities of hospitals as medical services, namely:[11]

a. The responsibility of the personnel;;
b. Professional responsibility for the quality;
c. The responsibility for the facilities / equipment; and
d. The responsibility for the security of buildings and maintenance.

The legal basis for hospital accountability in the implementation of health care to patients that their legal relationship between hospitals as health care providers and patients as users of health services. The legal relationship born from a commitment or agreement on health care, which is commonly called therapeutic agreement.

According to Article 46 of the Law of the Republic of Indonesia Number 44 Year 2009 regarding Hospital, the hospital is legally responsible for all losses incurred on omissions by health workers in hospitals. The responsibility of the hospital in the implementation of health care to patients can be seen from several aspects: the ethical aspects of the profession, the administrative law aspects, aspects of civil law and legal aspects of legal responsibility [12] ype given by the hospital against medical errors committed actions by doctors is as follows:[13]

1. The overall responsibility for the Hospital In Administrative Law;

   Implications of administrative law in the legal relationship-patient hospital is related policies (policy) or the provisions of health care administration is a requirement that must be met in the

[11] Titik Triwulan Tuti, *Perlindungan Hukum Bagi Pasien,* Prestasi Pustaka, Jakarta, 2010, P.51
[12] H. Syahrul Machmud, *op.cit*., p 182
[13] *Ibid*., p 199.

1. Reliability : delivery of service promised to promptly and satisfactorily
2. Responsiveness : assist and provide services to response without distinguishing elements of SARA (Tribe, Religion, Race, Class) patients
3. Assurance : security, safety, comfort
4. Emphaty : good communication and understanding the needs of

Patients,while the obligations of health facilities among others:

1. Providing services to patients regardless of race, ethnicity, religion, sex, and social status of the patient
2. Merawat pasien sebaik-baiknya, menjaga mutu perawatan dengan tidak membedakan kelas perawatan
3. Caring for patients as well as possible, maintain the quality of care by not distinguishingtreatment classaid. Provide treatment in the emergency room without asking for collateral material in advance
4. Refer the patient to another hospital if not have facilities, infrastructure, equipment, and personnel inneed
5. Backingmedical outpatient and inpatient.

Currently, the public is increasingly aware of their rights as healthcare consumers. So often they critically question about disease, examination, treatment, and actions to be taken in respect of the disease, they often do not even get a second opinion (second opinion), It is a right which should be respected by health care providers.

The Legal Responsibility For All Losses Incurred On Omissions By Health Workers In Hospitals

In the dictionary of law, the responsibility is explained that a must for someone to carry out what has been required for him.[7] According Soekidjo Notoatmojo that the legal responsibility is a result of the consequences of his actions a freedom with regard to ethics or morals in doing.[8] Furthermore, according to the Quarterly point, must have a basic responsibility, which is the cause for a legal right to sue others as well be something that bore a legal obligation others to give a accountability.[9]

Hospital is a public service organization that has responsibility for every public health services are convening. These responsibilities, namely, conducting quality health services affordable based on the principle of a safe, comprehensive, non-discriminatory, participatory and provide protection for the public as users of health services (health receivers), also for the organizers of health services in order to realize the health status of the highest.[10]

Law of the Republic of Indonesia Number 44 Year 2009 regarding Hospital. Article 46 says: Hospitals are legally responsible for all losses incurred on omissions by health workers in hospitals.

Based on the formulation of Article 46, it can be interpreted in several ways. First, the hospital is responsible for the losses, to the extent a result of the late kelalai health workers in hospitals; secondly, the hospital is not responsible for all the damages a person, if it proved to be no acts of omission of health personnel at the hospital; Third, the hospital is not responsible for the deliberate actions which cause loss of health workers throughout the not the responsibility of the hospital; and fourth, the hospital is responsible for the actions kelalain health workers, if negligence is done and occurs in hospitals

For example, what if a patient falls out of bed because bednya broken leg fracture, resulting in the impairment is the responsibility of the hospital. Therefore, hospitals must conduct strict controls on all equipment, particularly medical equipment. Against losses caused by faulty medical treatment, of course, highly dependent on the status of the concerned doctor. If his capacity as physician attending the hospital are not accountable for mistakes doctor. However, if the status of a doctor at the hospital as an employee, then by doctrin of vicarious liability, liability gugatnya can be transferred to hospital.

However, the independence of health workers in performing their duties in hospitals need to be controlled in accordance with applicable regulations, therefore the hospital should have standard or operating procedures and organized through a group that can direct and coordinate the activities of all medical personnel (health workers) this group accounts called the medical committee. Government regulations governing the medical committee that the Minister of Health of the Republic of Indonesia No. 631 / Menkes / SK / IV / 2005, which amended the Decree of the Minister of Health. No. 755 / Menkes / Per / IV / 2011 on the Implementation of Hospital Medical Committee. According to this Permenkes medical committee hospital is a device for implementing clinical governance (clinical governance) so that the medical staff at the hospital maintained its professionalism through the mechanism of credentials, secure the quality of the medical profession, and the maintenance of ethics and discipline of the medical profession.

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[7] Andi Hamzah*, Kamus Hukum*, Ghalia Indonesia, 2005, p 7

[8] Soekidjo Notoatmojo, *Etika dan Hukum Kesehatan*, Rineka Cipta, Jakarta, 2010, p. 4

[9] Titik Triwulan dan Shinta Febrian, *Perlindungan Hukum bagi Pasien*, Prestasi Pustaka, Jakarta, 2010, p 48

[10] H. Syahrul Machmud, *Penegakan Hukum dan Perlindungan Bagi Dokter yang diduga Melakukan Medikal Malpraktek,* CV. Karya Putra Darwati, Bandung.2012, p. 161.

profession, for each medical action undertaken have legal relationships between hospitals, physicians, and patients

Legal Protection Against Doctor In Medical Care Providing

Legal protection against the doctor if the alleged medical malpractice ang consisting of: basic foundations of the law that provides legal protection against doctors in carrying out medical profession, things to do doctor to avoid lawsuits, and the reason for elimination of penalties against doctors who allegedly committed medical malpractice.

Fundamentals of law providing legal protection for doctors in carrying out medical profession. The legal provisions that protect doctors in case of alleged malpractice contained in Article 50, Law of the Republic of Indonesia Number 29 Year 2004 on Medical Practice, Article 24 Paragraph (1), in conjunction with Article 27 Paragraph (1) and Article 29 of the Law of the Republic of Indonesia Number 36 Year 2009 on Health. Article 50 :

The doctor or dentist in performing medical practice has the right:

a. Obtain legal protection throughout the duties in accordance with professional standards and standard operating procedures;
b. Provide medical services in accordance with professional standards and standard operating procedures;
c. Obtaining a complete and honest information from patients or their families; and
d. Receive payment for services.

Article 24 paragraph (1) The health worker as defined in Article 23 mentioned (1) The health worker is authorized to organize health services. (2) Authority to organize health services as referred to in paragraph (1) shall be conducted in accordance with their expertise. (3) In the health service delivery, health workers should have a license from the government. (4) During the health service as referred to in paragraph (1) shall not put the interests of the valuable material. (5) Provisions on licensing referred to in paragraph (3) shall be stipulated in the Ministerial Regulation. In accordance with Article 23 terbut must comply with a code of ethics, professional standards, the right to health service users, service standards, and standard operating procedures. Article 27 (1) Health workers are entitled to remuneration and legal protection in carrying out tasks according to profession. Article 29, in the case of health workers suspected of negligence in carrying out his profession, such omission must be resolved first through mediation. Things to do doctor to avoid lawsuits.

1. Informed Consent

   Informed Consent In run the profession is an obligation that must be met by a doctor. Informed Consent consists of two words, "informed" that implies an explanation or description (information), and the word "consent" meaningful consent or consent. Thus Informed Consent implies a consent given by the patient or his family after being informed of the medical action to be carried out against him and all risk.[4]
2. Medical Record

   Informed Consent addition, doctors are also obliged to make the medical record "in every activity of health care to patients. Settings medical records contained in Article 46 paragraph (1) of the Medical Practice Act. Medical record is a file that contains records and documents on his identity, examination, treatment, measures and services provided to patients. Medical records are made with a variety of benefits, namely for the treatment of patients, improving the quality of service, education and research, financing, health statistics as well as verification of legal problems, discipline and ethic.[5]

Health services have characteristics that are different services / products, namely consumer ignorance / unknowing consumers, supply induced demand / influence health care providers to consumers (consumers do not have the bargaining power and select power), health care products is not a homogeneous concept, restrictions on competition, the uncertainty about the illness, as well as healthy as a human right.

In this case, the patient is actually LiveWare factor. Patients should be viewed as subjects who had a major influence on the end result is not just an object of service. Rights of patients must be met considering patient satisfaction become one barometer of the quality of care while a patient dissatisfaction can be the base of the lawsuits.

Expectations of patients to health care providers and the obligations of health-care facilities in meeting these expectations, the expectations of patients are:[6]

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[4] Veronika Komalasari, *Black Law Dictionary*, dalam Syahrul Machmud, *Penegakan Hukum dan Perlindungan Hukum Bagi Dokter Yang Diduga Melakukan Medikal Malpraktek*, KDP, Bandung, 2012. p. 85

[5] Syahrul Machmud, *Op cit*. p.219

[6] http://luk.staff.ugm.ac.id/atur/sehat/Perlindungan-Konsumen-Kesehatan1.pdf, di akses pada tanggal 10 Mei 2016

society that both of these norms are different, both in its formation, as well as in the implementation of the consequences when banned.[2]

Act of the Republic of Indonesia Number 44 Year 2009 on Hospitals, Article 1 (1) Hospital is a health care institution that organizes personal health services in the plenary, which provides inpatient, outpatient and emergency department. Whereas Article 2 states that the Hospital was organized based on Pancasila and based on human values, ethics and professionalism, benefit, justice, equality and anti-discrimination, equality, protection and patient safety, as well as having a social function ".

Objective of the Hospital can not be separated from the provision that the public is entitled to health as defined in various provisions of the Law of the Republic of Indonesia Number 36 of 2009 concerning health. Meanwhile, the government has a responsibility to achieve the highest degree of health-in height, such as by providing health facilities as needed, and one of the HCF is the hospital.[3]

Hospital has the task to provide personal health services in the plenary. Individual health care is any activity health services provided by health personnel to maintain and promote health, prevent and cure the disease and restore health. While the plenary health care is health care that includes promotive, preventive, curative, and rehabilitative services. To perform tasks Hospital health service has the function:

a. Service delivery and health recovery treatment in accordance with the standard of hospital services.
b. Maintenance and improvement of the health of individuals through healthcare plenary second and third level appropriate medical needs.
c. Providing education and training of human resources in order to increase capacity in the provision of health services, and
d. Implementation of research and development and technology screening health sector in order to improve health services with attention to ethics in health sciences.

The setting of tasks and functions of hospital associated with the many requirements that must be fulfilled in the establishment of the Hospital is one form of preventive supervision of the hospital, in addition to very severe sanctions a form of repressive supervision. Such arrangements when he in fact motivated by aspects of health care as a matter concerning lives is very important for the community. The setting of the role and functions of the Hospital include the following:

1. To provide and organize:
   a) Medical
   b) The medical support services
   c) Nurse service
   d) Rehabilitation service
   e) Prevention and health promotion
2. As a place of education and or exercise medical personnel or paramedics
3. As a place of research and pengembngan LMU and technology in health

Inview of the establishment of the hospital, Article 7 of the Law of the Republic of Indonesia N0mor 44 2009 About hospital mentioned:

1. Hospitals must meet the requirements of the location , building, infrastructure, human resources, pharmaceutical, and equipment
2. Hospitals may be established by the Government, local government, or private.
3. Hospital which was established by the Government and the Local Government referred to in paragraph (2) shall take the form of Technical Implementation Unit of the agency in charge of health, certain institutions, or the Regional Technical Institute with the management of the Public Service or Public Service Board in accordance with the provisions of the legislation.
4. Hospital which was established by the private sector as referred to in paragraph (2) shall be a legal entity whose operations only engaged in hospitalization.

When examined in depth, the setting operation of the Hospital with various requirements as set in the Act are in fact the hospital is one means of preventive supervision. Resulting in the delivery of public services, especially health services through the hospital can really realize the achievement of the optimum degree of public health that the end goal is health.

Liability Hospitals In The Implementation Of Health Care Citizens

The development of the medical world affect hospitals function as providers of health care. Hospitals often have the health care crisis, because the function of the hospital is not a place for treatment but services include activities that are curative, rehabilitative, promotive and preventive, limits of authority and responsibility of ethics, health workers in hospitals must be in accordance with the standards of the

[2] Hermein hadiati koeswadji, *Hukum Untuk Perumahsakitan*, citra aditya bakti, Bandung, 2002, p 188-189
[3] Endang Wahyati Yustina,*Mengenal Hukum Rumah Sakit*, keni media, bandung, 2012, p 8

LEGAL STATUS OF THE HOSPITAL IN IMPROVING PUBLIC HEALTH SERVICES

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ABSTRACT

Hospital as one of the health care facilities are part of the health resources that are necessary in supporting the implementation of health measures Health is a state of well being of body, soul and social that allow everyone to live socially and economically productive. Thus in addition to health as a human right, health is also an investment that needs to be supported by the facility / hospital facilities were good. In order for health care facilities to function in providing health services to the community, must be supported by infrastructure, health personnel, as well as financing memada, thus requiring any health laws dynamic that can provide certainty and legal protection to boost, direct, and provide basic for community health services. As for as the legal instruments Law of the Republic of Indonesia Number 44 Year 2009 on Hospitals, Law of the Republic of Indonesia Number 29 Year 2004 on Medical Practice, Law of the Republic of Indonesia Number 36 Year 2009 on Health.

Keywords: Improving Services, Public Health

Introduction

Act of 1945 mandates that health is a human right. In Article 28 H states that every person has the right to live physical and spiritual prosperity, reside and earn a good living environment and healthy and receive medical care. Furthermore, in Article 34, paragraph 3 states that the state is responsible for the provision of health care facilities and public service facilities were feasible.[1]

It shows that the government is obliged to nourish the sick and trying to maintain a healthy to stay healthy. Based on the Law of the Republic of Indonesia Number 36 of 2009 on Health states that health is a state of being of body, soul and social that allow everyone to live socially and economically productive. Thus in addition to health as a human right, health is also an investment that needs to be supported by the facility / hospital facilities were good.

In order for health care facilities to function in providing health services to the community, must be supported by infrastructure, health personnel, as well as adequate financing. Health personnel must be available and distributed uniformly in the number and kind, and quality in accordance with the health care needs of the community.

Hospital as one of the health care facilities are part of the health resources that are indispensable in supporting health efforts. Providing health care in hospital characteristics and have a very complex organization. Various types of health professionals with scientific devices each interact with one another. Science and medical technology is growing very rapidly be followed by health workers in the framework of the provision of quality services, making more complex problems in the hospital.

Through the provisions of the Law of the Republic of Indonesia Number 36 of 2009 on Health and the Law of the Republic of Indonesia Number 44 Year 2009 on Hospitals, in this case the government and institutional providers of health services that the hospital has the responsibility for the objectives of development in the health sector reached optimal results, through the utilization of health personnel, facilities and infrastructure, both in quantity and quality, either through the mechanism of accreditation and standard setting, should be oriented to the legal provisions that protect patients, thus requiring any health laws dynamic that can provide certainty and protection law to boost, direct, and provide the basis for health care. Based on the foregoing the need for the legal status of hospitals in improving public health services

Discussion

The setting operation of the Hospital in improving public health services.

Hospital as organ which was originally established based on social, humanitarian or religious significance in the history of its growth has been progressing, so that the hospital serves to bring two (2) principal task of differentiating with other organs that produce services. The hospital is the organ that brings tasks based on the argument medical ethics because it is the place of work of professionals with the pronunciation of medical oath bound by Hippocrates' argument is oath traditionally done by doctor about ethics they should do in the practice of his profession. in performing its duties. Besides, from a legal perspective as the basis for a container hospital as organ engaged in legal relations in a society bound by legal norms and ethical norms of

[1] *Rencana Pengembangan Tenaga Kesehatan Tahun 2011 – 2025, Jakarta, 2011, p 1.*

In principle, in spite of economic crime in general and corporate crime in khususnyan nonviolent (non-violent crimes), but always accompanied by fraud (deceit), deception (misreprentation), concealment of reality (concealment of fact), manipulation, breach of trust (breach of trust), subterfuge (subterfuge), and circumvention illegal circumvention legislation), to distinguish them from civil and administrative cases. Corporate crime in the form of white collar crime (white collar crime), is generally performed by a company or legal entity engaged in business with a variety of acts contrary to criminal law002E[31]

Although in terms of .. crime environment and the application of administrative sanctions (ultimum remedium) precedence, does not mean that the administrative law can not be a criminal sanction environment. Because, not only about kewenanangan, but involves abuse of authority.

Indriyanto Seno Aji argued that, the issue of misuse of authority and corruption are not on the understanding of "policy" but rather the question of the relationship between the authority with bribery (bribery).[32]

In Indonesia, law enforcement against the corporation as a criminal in the field of environment and natural resources is not easy because it is a highly organized crime, so it is often not easy terungkap.Di outside things .. the evil field of environment and natural resources involving corporation as perpetrators of criminal acts is also often associated with public officials who wield political authority to protect the perpetrators of such crime. Ensnare and impose accountability to the corporation for the crimes committed by the corporation in the field of environment and natural resources will certainly be the case .. that is impossible if it is not fully supported by the governments of both the policy aspects of the law enforcement aspect mapun law itself.[33]

PT. Jom which imported 3,800 tonnes of copper in the form of B3 waste sludge had an indication a white-collar crime in the process of environmental law for importing B3 waste from the State of South Kores is a crime and should be taken into primum remedium because it is a crime.

B3 result, residents in around where ditimbunnya B3 waste that resulted in 70 households in housing Putri Hijau, Batu Aji suffer from itching and other skin diseases. Now the citizens affected by health problems due B3 PT. Jom has been moved to another place far away from the B3 waste landfilling.[34]

It is expected that with the issuance of the Supreme Court Rules (Perma) Number 13 Year 2016 on Procedures for Crime Case Management by the Corporation. Accountability Criminal Corporate and Management Article 3 The offenses by the Corporation constitute a criminal offense committed by the person based on the employment relationship, or based on other relationships, either individually or jointly, acting for and on behalf of the Corporation on the inside and outside of Corporate Environmental

Article 4 (1) Corporations can be held criminal liability in accordance with the provisions of the Corporations criminal laws governing the Corporation. (2) In deciding against the Corporation, the judge can assess the fault Corporation referred to in paragraph (1) include: a. Corporations can benefit or the benefit of a criminal offense or criminal act was committed for the benefit of the corporation; b. The corporation fail to prevent crime; or c. The corporation does not undertake the necessary measures for the prevention, preventing a greater impact and ensure compliance with applicable laws and regulations in order to avoid.

Sustainable development (sustainable development) according to Law No. 32 of 2009 on the Protection and Environmental Management is conscious and planned effort that combines aspects of environmental, social and economic development strategies to ensure the environmental integrity and safety, capability, welfare, and quality of life of the present generation and the future.[35]

Development aimed at the welfare of the people, the reality is only enjoyed by a few people close to fasting. The concept of Sustainable Development contains two things .. principal, namely:[36]

1. The concept of needs, in particular the basic needs of the poor of the world;
2. That the lack of technology and social organization in improving the environment's ability to meet community needs in the present and future (Our Common World Commission on Environment and Development.1987

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[31] *ibid.* p...115.

[32] Prof.Dr.H.Abdul Latif, S.H.,M.H., Hukum Adminstrasi Dalam Praktik Tindak Pidana Korupsi, Penerbit :Jakarta : Prenada Media Group, 2014. p...41

[33] Masrudi Muchtar, S.H.,M.H., *Op.cit*.p... 116-117

[34]Wawancara dengan Uban Ingan Sigalingging, Koordinator Lembaga Swadaya Gerakan Anti Korupsi (Gebrak) yang mengadvokasi warga waktu itu

[35] Dr.Marhaeni Ria Siombodo, S.H.,M.Si. *Op.cit.* p...57

[36] *Ibid.* p...59

Berkaitsn administrative law enforcement with environmental laws, especially for importing B3 waste does not correspond applied for has done and the consequences. In UUPPLH described B3 waste import an act of importing B3 waste to wilayan the Republic of Indonesia. This means that already meet the elements of tort and categorized *primum remedium* because incoming material offense.

ne of the most important functions of the law is as a regulator of public order. In carrying out these functions, the law passed through an important process and is divided into several stages with various activities and different qualities. Broadly speaking, the law can be classified into two stages, namely the law-making process and the process of law enforcement. It is clear that law enforcement is an inseparable part of the law-making process .Tanpa good law enforcement, the law is only the records meaningless. Enforcement of the law is an attempt to ensure public order, because law enforcement is an effort that the law be obeyed by the people.[24]

In English literature, law enforcement known as *"law enforcement"*and Dutch*"rechtshandhawing"*.Although the two terms are not exactly understanding, but an outline both point in an attempt to force compliance with the public adherence to the law. Differences were only related to spacelingkupya *lawenfocement* mean repressive law enforcement, and while the*"rechtshandhawing* also includes preventive law enforcement.[25]

The position of environmental law as a functional law, an effect also against the legal process that refers to the three areas of the law is civil law, law, criminal law and administrative law. It .. This is similar to what is proposed by Bizeveld as follows:[26]

The application of administrative sanctions as acts of government(Bestuurshandelingan).The application of administrative sanctions in cases of environmental pollution is one of the forms of government acts committed in the context of law enforcement lingkungsn. Therefore, studies on the application of the administrative sanctions teorits not biased apart from the discussion about the acts of government. Adminstasi sanctions is an action that is based on public authority and is unilaterally by the Government. As argued by Van de Wel, as quoted by E. Etecht that legal action is an act of public cornered the government on the basis of a special power which is owned by the government. This action is called "beschikking*"*[27]

Potential Corruption In Case of Environmental Law

PT. Jom been importing B3 waste which is clearly prohibited in accordance UUPPLH. Meaning forbidden menur ut Kamus Besar Bahasa Indonesia over,[28] states that "banned" as meaning ordered him not to do something; do not allow to do something.

Environmental crime can be categorized as a crime in the economic field in the broad sense, because the coverage of crime and violations of the wider environment than other conventional crime, the impact resulting in economic losses of State outstanding, as well as have an impact on environmental degradation. The criminal justice system as one of the ways the State to prevent and solve crimes in the community certainly has a very big role to prevent and control environmental crime which can be categorized as an extraordinary crime (extra ordinary crimes).[29]

Crime in the environmental field can not be separated from the role of corporations. Because the waste and / or vandal and environmental pollutants are massive and relatively large mostly carried out by companies. Pollution, destruction and environmental damage as a result of business activities of these companies. Understanding corporation according to Black's Law provides a broader spectrum, considering the corporation is defined as an entity that legally have the authority to act as the subject of legal persons, which is different from the owner, and so on. It shows a strict separation between the owner and who run the corporation[30]

The scope of corporate crime, Steven Box mentions include:

1. Crimes for corporation, is a violation of law committed by the corporation in an effort to achieve our corporate goals to earn a profit;
2. Criminal corporation, the corporation that aims solely to commit crime;
3. Crime againt corporation, namely crimes against corporations such as theft, or embezzlement owned corporation. Which in this case the victims are corporations.

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[24]Dr.H.Bachrul Amiq, S.H.,M.H., *Penerapan Sanksi Administrasi dalam Hukum Lingkungan*, Penerbit : Yogyakarta: Laksbang Mediatama, 2013. p...11

[25] *ibid*

[26] *ibid*

[27] *ibid*.p...16

[28] http://kbbi.web.id/larang

[29] Masrudi Muchtar, S.H.,M.H., Sistem Peradilan Pidana di Bidang Prlindungan & Pengelolaan Lingkugan Hidup, Penerbit : Jakarta : Prestasi Pustakaraya, 2015. p...157

[30] *Ibid.* p...112

that must have the Environmental Impact Assessment, and Minister of State No. 17 Year 2012 on Guidelines for Community involvement In Environmental Impact Analysis process and Environmental permit.

Sociological research / empirical put more emphasis on the effectiveness of the law in society, so it is not solely written law, it is necessary to conduct a field study as primary data that is interview, observation and look for other data related agencies such as the Environmental Impact Management Agency (BAPEDALDA) Batam and communities directly affected due to environmental pollution, especially B3.

Empirical research is a qualitative research. Qualitative research is a research method that is more focused on understanding social phenomena from the perspective of participants with more emphasis on the complete picture rather than detailing become interrelated variables. Qualitative research aims to gain an understanding of the meaning of *Verstehen,*developed the theory and describes a complex reality. In qualitative research can not be obtained or measured using statistical procedures. Qualitative research is often used as research on the life of a community. The data generated in qualitative research is descriptive data in the form of written words or speech principals being observed.[21]

Results And Discussion

Principles *Ultimium Remedium* And Potential Corruption In The Perspective Of The Environmental Law

Understanding Principles *ultimium Remedium* for Environment

Principles *Remediumultimium* in perspectiveAct No. 32 of 2009 on the Protection and Environmental management is an administrative sanction environmental law. Act No. 23 of 1997 on Environmental Management, hereinafter referred to UUPLH known principle of subsidiarity.

In penjelesan general UUPLH "As penujang administrative law, application of criminal law while maintaining the principle of *subsidiarity,*ie that the criminal law should be used if sanctions in other areas such as administrative sanctions and civil sanctions and alternative environmental dispute settlement ineffective and / or level of blameworthiness relatively heavy and / or due to the relatively large actions, and / or actions cause public unrest.[22]

Blameworthiness is not too heavy, and / or as a result of his actions is relatively not too large, and / or act the perpetrator does not cause public unrest, this indicates that the action is a formal offense. Formal offense is the offense that has not been completed, usually defined by the word "may". Basically formal offense not pollute or damage the environment, the new administration is unlawful, that violate the prohibition B3 waste into the wild at the top of the quality specified. Against the perpetrator error is relatively heavy and / or due to the relatively large actions and / or actions cause public unrest, the criminal law is no longer *ultimum remediaum* but already *primum remedium.*

Prohibition of Imports B3

Importing limbh B3 including prohibited acts, and the category of crime. This means that elements of material offense has been fulfilled. Case PT. Jom which imports weighing 3,800 tonnes of waste B3 of South Korea in the form of *copper sludge* should be the legal process quickly, because it does not need to go through the principle of *ultimum*remedium,but in reality the legal process is slow, since the known supplier / importer of B3 waste in 2009, until 2013 there is no clarity even seem "like face of the earth"

Regarding inter-country imports B3 waste contained in the fullBasel Convention *Convetionon the Control of Transboundry Movement on Hazardous Waste and their* Disposal.The Convention regulates the movement of traffic control boundaries B3 waste and disposal / storage. Konvensi ini melarang ekspor limbah beracun ke Negara yang tidak mampu mengelola secara berwawasan lingkungan . Indonesia telah meratifikasi konvensi Basel melalui Keputusan Presiden Nomor 61 tahun 1993 Tentang *Pengesahan Convention on the Control of Transboundry Movements of Hazardoaus Wastes and Their Disposal*.

The Indonesian archipelago in the world cruise lines are very susceptible to the arrival of sewage and other pollution sources. Apart from the difficulties for supervision of illegal goods, the presence of around 17,000 islands will invite countries to throw waste in Indonesia. Necessary efforts to reduce the negative impact of trade and the movement of chemicals which, if not regulated, has risks detrimental to health and the environment. Particularly to prevent Indonesia used as a "dumping" hazardous chemical compounds and toxic prohibited use of the developed countries.[23]

[21]http://www.informasi-pendidikan.com/2013/02/*perbedaan-penelitian-kualitatif*-dan.html-diunduh : Hari Minggu, 20 Nopember 2016

[22] Dr.Syahrul Machmud, S.H.,M.H, *Op.cit*.p...4

[23]http://www.menlh.go.id/*indonesia-berperan-dalam-pertemuan-internasional-tentang-pengaturan-pergerakan-limbah-b3-dan-b3-konvensi-basel-konvensi-rotterdam-dan-konvensi-stockholm*/-diakses: Hari : Minguu, 12 Februari 2017

"The imposition of administrative sanctions such as suspension or revocation of the environmental permits as referred to in Article 76 paragraph (2) c and d do if penangungjawab business and / or activities do not carry government coercion."

In Article 80 reads as follows:

Paragraph (1) Force the government referred to in Article 76 paragraph (2) b in the form of:

a. Temporary suspension of production activities;
b. The transfer of production facilities;
c. Closure sewerage or emissions;
d. Demolition;
e. Seizure of goods or equipment that could potentially cause offense;
f. Temporary suspension of all activities; or
g. Other actions that aim to stop infringement and actions to restore environmental functions.

This involves application of administrative sanctions on permissions. And environmental permits issued by the central government, and local governments. The central government in question is the Minister. While local government is the Regent / Mayor. General Provisions Article 1 of Law No. 32 of 2009 on the Protection and Environmental Management, paragraph (37) states: Central Government, hereinafter referred to as the Government, the President of the Republic of Indonesia who holds the power of government of the Republic of Indonesia as stipulated in the Constitution

1945.Article 1 (38) reads: local government is the governor, regent or mayor, and the area as the organizer elements of local government, whereas in paragraph (39) states: the Minister is the minister who held government affairs in the field of protection and management living environment. These administrative sanctions shall take precedence before other environmental legal sanctions. Although it has fulfilled the material offense.

Formal offense in UUPPLH regulated in Article 98 paragraph (1), Article 99 paragraph (1), and Article 100 to Article 109. In this formal offense, the role of administrative law should take precedence or precedence and pushed solve environmental problems. Once these efforts are not effective, then the criminal law empowered or optimized. Thus, the function of criminal law against formal offense is ultimum remedium. Criminal law as a supplement or complement of administrative or civil law or mediation. Against blameworthiness of relatively heavy and / or as a result of his actions is relatively large and / or actions cause public unrest, the criminal law is no longer *ultimum remedium* but already *primum*remedium.[19]

Judging from the functions of the administrative sanctions in environmental law, then the licensor holds important role to prevent environmental damage such as pollution of air, soil, and water. For every applicant / entrepreneur to establish a place of business must obtain permission, let alone assessed company has the potential to produce dangerous waste B3, and because of all the environmental permits are still administratively. Once a company starts doing activities, and it turns B3 waste, and then discharged to any place, and if the B3 waste fluid, and discharged into the sea or into the ditch on the housing of citizens, it is still legal sanction administrative sanctions, whereas violation "intentionally", and this makes criminal shutter, because it meets the elements of material offense.

Research Methodology

In this study, researchers used a type of empirical legal studies, the basic assumptions of the optical sociological discrepancy between the written law*(dassollen)*with laws that live in the community *(das*sein)or that is a fact. The fact is then assessed based on the framework of causation. This is a descriptive study.[20]

The data collected is qualitative data, the technique used in data analysis qualitative analysis controlling interactive models. In the data analysis after the data collected can then be presented in the presentation of data or by step process data (data reduction) obtained from a source of literature (literature, literature, law, letter khabar or sources other literary), or from the data obtained in the field of informants who are competent in providing data on Environment particularly B3 based Undandang Act No. 32 of 2009 on the Protection and Environmental Management. and legislation related to the environment such as Government Regulation No. 27 Year 2012 on Environmental Permit, Regulation of the Minister of Environment No. 1 Year 2012 About Program Towards Indonesia Hiaju, Minister of State Kingkungan Life No. 05 of 2012 on Type Recana Enterprises and / or activities

[19]Dr.Syahrul Machmud, S.H.,M.H., *Problematika Penerapan Delik Formil DalamDalam Perspektif Penegakan Hukum Pidana Lingkungan Hidup di Indonesia,* Penerbit : Bandung :Mandar Maju, 2012. p.5

[20] Prof.Dr.H.Syahruddin Nawi, S.H.,M.H., *Penelitian Hukum Normatif Versus Penelitian Hukum Empiris*, Penerbit Makassar: Umitoha Ukhwah Grafika, 2014. p.22

In connection with the documents that are pertinent information B3, then Article 113 stated:

"Every person who gives false information, misleading, omit information, damaging information, or give false information required in relation to the supervision and enforcement of the law relating to the protection and management of the environment as referred to in Article 69 paragraph (1) letter j shall be punished with imprisonment for a period of 1 (one) year and a maximum fine Rp.1.000.000.000,00 (one billion rupiah). "

Definition of Pollution, Destruction and Damage Environment

Definition of pollution and environmental damage stipulated in Law No. 32 of 2009 on the Protection of the Environment and Management. In General Provisions Article 1 (14), said environmental pollution is the entry or introduction of living beings, matter, energy, and / or other components into the environment by human activities that exceed the environmental quality standards have been set. In addition, regarding the destruction of the environment in paragraph (16) reads: environmental destruction are actions that cause changes directly or indirectly to the physical, chemical and / or biological environment that exceeds the standard criteria of environmental damage, while in verse (17) reads: environmental damage are the changes directly and / or indirectly to the physical, chemical and / or biological environment that goes beyond the standard criteria of environmental damage.

Characteristics of B3

B3 is characterized by several parameters such as total solids residue (TSR) content of *fixed residue* (FR), the content of *volatile solids residue* (VSR) water content*(moisturecontent*sludge)volume solids, and the character or nature of B3 (toxicity, corrosion properties, flammability, explosive properties, toxic and chemical properties as well as chemical compounds), under PP 101 2014 Chemical materials have characteristics bererdasarkan B3 B3 classification Article 5 PP 101 2014 About the management of hazardous and toxic, chemical materials have characteristics bererdasarkan B3 B3 classification of Article 5 as follows:

Paragraph (1) In the case .. there is waste in your list of B3 as listed in Annex I, which is an integral part of this regulation has the characteristics indicated by B3, the Minister is required to conduct tests to identify the characteristics of the waste as:

a. B3 category 1;
b. B3 category 2; or
c. Waste non B3.

Article (2) The characteristics of B3 as described in paragraph (1) shall include:

a. explosive;
b. combustible;
c. reactive;
d. infectious ;
d. corrosive; and / or;
e. toxic.

Sanctions Environmental Law

Legal sanctions environmental field, there are three (3) types namely legal sanction administrative, civil and penal law. In the environmental dispute settlement, then put forward the administrative sanctions. Administrative sanctions contained in Law No. 32 of 2009 on Control and Environmental Management hdup in Article 76 to Article 83. Article 76 states:[18]

Paragraph (1) "The minister, governor or regent / mayor applying administrative sanctions to managers business and / or activities if the surveillance is found infringement against the environmental permit. "

Paragraph (2) The administrative sanctions consisting of:

a. written warning;
b. government coercion;
c. revocation of environmental permits.

In Article 79 reads:

[18]Undang-Undang Nomor 32 Tahun 2009 Tentang Perlindungan dan Pengeloaan Lingkungan Hidup,

b. Benefits

Research'shoped this research be useful for the general public, researchers, students, lawyers and professors as a reference in future research. For community groups, can know that his role in preserving the environment. If it is known there are illegal acts related to the destruction or pollution of the environment by industrial activities that result in the disruption of public health, it may file a *class*action.action *class* Thelisted in Article 2 letter k which is "participatory principle" which states: "every member of the community is encouraged to actively participate in the decision making process and the implementation of environmental protection and management, either directly or indirectly. In addition Article 70 paragraph (1), (2) and (3) .In Article 70 paragraph (1) states: "People have rights and equal opportunities as possible to play an active role in the protection and management of the environment ".

Community involvement in environmental monitoring is supported by the Supreme Court of the Republic of Indonesia Regulation No. 1 Year 2002 on Class Action event called *class*action.Article 1 In the Regulations of the Supreme Court referred to as:

1) Class Action is a procedure for filing a lawsuit, in which one or more persons who represent the group filed a suit for himself or herself-themselves and simultaneously represent a group of people who are numerous, which have in common the fact or legal basis between representatives of the group and members the group in question;
2) Deputy group is one or more persons who suffered losses are filed and simultaneously represents a group of people who are more numerous.

In UUPPLH was no provision concerning environmental dispute resolution. In paragraph 5 of Article 91 paragraph (1), (2) and (3).

Literature Review

Understanding the Environment

In etomologi, the word "Environment" comes from the Greek*"oikos"*(household) and*"logos"*(science), which was first introduced in biology by a German biologist, Ernst Hackckel. Environmental literally means the science of households living creatures. Which is a living thing is the environment. Ecologists De Bel mengemukkan, that the environment is *a "Study of the total impact of man and other anilmals on the balace of nature"*[15]

Emil Salim generally formulate the environment is defined as any objects, conditions, circumstances and influences contained in the rooms we live in and affect living things, including humans .. in it. Limit environmental chamber according to this definition can be quite extensive, but for practical purposes we limit the environmental space by factors that can be reached by humans as natural factors, political factors, economic factors, social factors, and others.[16] The dominance of the environment is a human destroyer with modern technology environmental damage quickly and massively.

PT. Jom and PT. APEL are importing B3 waste and unlawful entry and material offense. In Article 69 paragraph (1)[17] about the ban, mentioned the ban on importing B3 waste in point b mentioned, enter B3 that is prohibited by the legislation to the territory of the Republic of Indonesia, in the letter d is prohibited from importing B3 waste into Unitary Republic of Indonesia, as well as in the letter f prohibited from disposing of B3 and B3 to environmental media. Therefore, the act responsible for PT. Jom This is a category of crime and criminal sanctions*(primumremedium)*is no longer the principle of *ultimum*remdium.Formal offense about importing B3 waste to Indonesia stipulated in Article 105 reads:

> "Any person who imports the waste into the territory of the Republic of Indonesia as referred to in Article 69 paragraph (1) letter c shall be punished with imprisonment for a minimum of 4 (four) years and a maximum of twelve (12) years and a fine of at least Rp.4.000.000.000,00 (four billion rupiah) and at most Rp.12.000.000.000,00 (twelve billion.) "

In Article 106 also explained that:

> "Every person who imports the waste into the territory of the Republic of Indonesia as referred to in Article 69 paragraph (1) letter d, shall be punished with imprisonment of at least five (5) years and a maximum of 15 (fifteen) years and a fine of at least Rp .5.000.000.000,00 (five billion rupiah) and at most Rp.15.000.000.000,00 (fifteen billion.) "

[15] Azis Budianto, S.H., MS., *Hukum Lingkungan*, Penerbit : Jakarta, Cintya Press, 2012. p...9
[16]*Ibid*.p...11
[17]Undang-Undang Nomor 32 Tahun 2009 Tentang Perlindungan dan Pengelolaan Lingkungan Hidup

Korea, the notary deed PT. Jom mention that the imported waste comes from a smelting company / production of copper, jad B3 waste or residue leftover copper smelting*(copper),*and a B3 with scientific code D211.[8]

Results of laboratory tests had confirmed that the imported goods were classified as B3 waste the crust agencies*(copper sludge)*that are harmful to the environment. While Indonesia has laws strictly prohibit the import of all types of B3 waste. Minister of Environment, Prof. Rachmat Witoelar (then) had come alone to Batam for a close look B3 is entered by the importer PT Joice Octavia Mandiri.[9]

B3 waste in Batam is very worrying. In addition to receiving the B3 waste from other negari like to do PT. APPLE and PT. Jom, also Batam itself -as-industrial area of the B3 waste, because the shipbuilding industry activities, and a variety of companies in the industrial zones is B3 waste, household waste in addition of the 1.2 million residents of Batam.

PT Panbatam Island Shipyard known to commit an offense. Violations atprocess *sanblasting* that does not fit the rules beraku .[10] *Sandblasting* is a process of cleaning corrosion (rust) that is attached to the steel that will be used as the vessel wall. Sandblasting material is usually a special sand, and after use to dust hal..us and B3.

Temua hundreds of tons of waste *sandblasting.* disposed of forestry in Tembesi Waste allegedly belonging to PT Batam Expresindo Shipyard (PT BES), Tanjung Uncang known after there are people who are affected..[11] Every year, at least 100 companies in Batam B3 waste without treatment processes. The total volume of waste generated is estimated at 2,000 tons per year. Based on data BAPEDAL Batam City, there are 776 industrial enterprises in Batam. A total of 375 companies of which could potentially produce B3.[12]

Of the 375 potential industries, 275 companies, or 73 percent already manage B3 by B3 waste manifest. While 100 other companies, or 27 percent not manage B3. Modus covers dumped in the ground in the area of the company, was burned in the area of the company, thrown into the sea, and mixed with trash. During 2010, BAPEDAL Batam has issued warning letters to 10 firms first, second warning letter to one company, as well as the process of investigation against 13 companies and investigations against one company.[13]

Of the 776 targeted surveillance industry BAPEDAL Batam City during the last 5 years, this type of shipbuilding and electronics industry is the largest producer of B3). In terms of volume, shipbuilding industry is the largest supplier. In terms of the number of companies producing B3, the electronics industry is the largest. In 2010, the shipbuilding industry in Batam amounted to 120 companies. Potential B3 include sandblasting, *sludge*oil,paint, and contaminated waste. While the company B3 potential of the electronics industry including *the printed circuit board* (PCB) and components are damaged.[14]

Main Problem

1. Does the principle of *ultimum Remedum* potential corruption in the perspective of environmental law ?
2. How Criminal sanctions*(PrimumMeredium)*for destroying the environment Life ?

Objectives and Benefits Research

a. Research purposes

This study aims to determine whether the principle *of ultimum Remedium* in the perspective of the environment can prevent damage to the environment, because in the Law No. 32 of 2009 on the Protection and Environmental Management 3 (three) penalties for wrecking the environment that legal sanctions Administration (principle) *ultimium*Remedium,sanctions Criminal Law and Civil Law sanctions include Alternative Dispute Resolution*(AlternativeDispute*Resolution).But in terms of environmental damage of forest fires, B3 of Industry and / or activities isdustri, marine pollution due to reclamation, which put forward is the administrative law (principle of ultimum remedium). As a result of massive environmental damage, because such sanctions do not make businesses become wary.

Environmental legal sanctions process is also protracted. Prolonged resolution of cases of environmental pollution open opportunities for corruption among law enforcement agencies with the environmental law violators strong position financially field under the pretext of the principle of *ultimum remedium* it.

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[8]Irma Anshari, *Pengelolaan Limbah dan Penanganan Limbah B3*, Diambil pada 29 Agustus 2014 dari http://limbahb3-limbahb3.blogspot.com/

[9]http://www.menlh.go.id/soal-limbah-b3-di-batam-segera-kembalikan-ke-negara-asalnya/ Diakses Hari Jum'at, 10 Februari 2017

[10]*http://batamtoday.com/berita53722-Dugaan-Pembuangan-Limbah-B3-PT-Panbatam-Belum-Bisa--Dibawa-ke-Ranah-Hukum*.html-diakses Hari: Jum'at, 10 Februari 2017

[11]http://www.p..uankepri.com/fokus/41-fokus/8526-limbah-b3-tiada-henti-cemari-batam.html-diakses Hari: Jum, 10 Februari 2017

[12] http://tekno.kompas.com/read/2011/01/23/14500927/batam.hadapi.masalah.2.000.ton.limbah.b3

[13] http://tekno.kompas.com, *loc.it*

[14] http://nasional.kompas.com/read/2011/03/21/03385587/about.html - diakses Hari : Jum'at, 11 Februari 2017

Concerns of the world community to the environmental damage is not without reason. The reason that makes sense if linked to global warming*(globalwarming).*The adverse effects of global warming is man himself, as well as other living creatures on earth. Therefore, the world community considers global warming is .. scary, because the State which are adjacent to the sea will be the main target due luat level rise caused by global warming.

Global climate change, as the implications of global warming has led to instability in the bottom layer of the atmosphere, especially near the Earth's surface. Global warming is caused by greenhouse gas meningkatmya dominant generated by these industries. Observations of global temperature, from the 19th century shows the change in average temperature to be indicators of climate change. This temperature change is shown by the increase in average temperatures of up to 0.74^0 C in the present century, and even according to other studies IPCC*(IntergovermentalPanel on Climate* Change)is projected to range between 1.1 to 6.4° C.[4]

The World Meteorological Organization (WMO) reported that 2016 was the warmest year in history. The average global temperature in the last year of 0.07 degrees Celsius higher than in 2015. The industrial sector, agriculture and animal husbandry contribute the largest greenhouse gas emissions that affect global warming. This result is obtained based on data from the UK Met Office Hadley Center, *Climatic Research Unit of the University of East Anglia, National Oceanic and Atmospheric Administration* (NOAA) and the *Goddard Institute for Space Studies* of NASA.[5] In addition to rising global temperatures could not be separated from the rising / increasing human population. The concentration of carbon dioxide and methane touched a new record in 2016. Warming of the climate caused coral bleaching reached dangerous levels and also cause glaciers to melt.[6]

Countries in the world who are members of the United Nations (UN) was concerned about damage to the environment. Therefore, the world body hosted the United Nations conference on Environment in 1972 in Stockholm, known as Konferansi Stockholm in 1972, and resulted in several respects, as follows:[7]

a. Declaration on the Human Environment, which consists of a preamble and 26 principles of the so-called *"Stockholm* Declaration";
b. Human Environment Action Plan (action plan) consisting of 109 recommendations 18 recommendations, including lectures on Planning and Management of Human Settlements;
c. Recommendations on institutional and financial support the implementation of the action plan mentioned above.

Since then, Indonesia ratified the Stockholm Conference and has issued a total of three (3) times the legislation related to the environment, namely; Law No. 4 of 1982 On Main Principles of Environmental Management (KPPLH), Act No. 23 of 1997 on Environmental Management (UUPLH), and Act No. 32 of 2009 on the Protection and Environmental Management hereinafter abbreviated as (UUPPLH).

All laws above only contains the principles and main principles for the management of the environment, then the law serves as an "umbrella" for the regulation of other legislation, the views of all three laws that have been published environmental concerns so-called *"umbrella act* or *umbrella*provision".Therefore, in the implementation of environmental legislation of living is not maximized, even the destruction of the environment such as forest fires, supplies to be hazardous waste hereinafter abbreviated to B3 from industry to rivers and / or into the sea, B3 waste landfilling, even imported waste B3 from various countries to Indonesia.

Regarding the import of waste B3 is happening in Batam done by. Asia Pacific Eco Lestari hereinafter abbreviated PT.APEL importing B3 waste from Singapore weighing 1,700 tons, and the PT. Jace Octavia Mandiri hereinafter called PT. Jom importing B3 wastetypes *sludge cooper* of South Korea weighing 3,800 tons. B3 waste is imported from South Korea on February 4, 2009. The case was sticking to the national level, and PT. APEL penalized B3 waste is obligated to returntype of *copper sludge* theto Singapore. *Re-export* (sending back) B3 was witnessed by the Minister of the Environment at the time, Wismar Witoelar. But B3 which is imported by PT. Jom not *re-export* if asked by the Ministry of Environment.

Laboratory Test Results of the Ministry of Environment said B3 which is imported by PT. Jom from South Korea have Harmoninasi code System (HS) 2505.90.000, so the goods come from LS-Niko Copper Inc., South

[4] Deni Bram, *Hukum Perubahan Iklim Perspektif Gobal dan Nasional*, Penerbit : Malang : Setara Press, 2016, p.32
[5] Lutfi Fauziah-http://nationalgeographic.co.id/berita/2017/01/tahun-2016-*catat-rekor-terpanas-sepanjang-sejarah*-diunduh hari: Jum'at, 03 Februari 2017
[6] Lutfi Fauziah-http://nationalgeographic.co.id/berita/2017/01/tahun-2016-catat-rekor-terpanas-sepanjang-sejarah-diunduh Hari : Kamis, 02 Februari 2017
[7] Dr.Marhaeni Ria Siombo,S.H.,M.Si, Hukum Lingkungan & Pelaksanaan Pembangunan Berkelanjutan di Indonesia, Jakarta : PT.Gramedia Putaka Utama, 2012.p. 17

PRINCIPLE ULTIMIUM REMEDIUM AND POTENTIAL CORRUPTION IN THE PERSPECTIVE OF THE ENVIRONMENT ACT

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ABSTRACT

The environmental disaster will adversely affect the lives of humans being and other creatures on earth. Forest fires, industrial activities have a large share of environmental pollution. Batam as an industrial area is a producer of such waste. There are also companies that import B3 waste althogh it is prohibited. The import hazardouz waste is a criminal offense as mentioned in article 69 paragraph (1), meaning that its material and formally offense is being fulfilled, and the application of the criminal law (primum remedium), no longer administrative law (ultimum remedium). Researchers conduct research concerning the application of administrative sanctions in the field of the environment, and empirical research method, which is a legal research that lives in the community (das sein). In the UUPPLH are being mentioned the sanction of the environmental law does not necessarily criminal law, but must first administrative sanctions, but in practice should be polluted, and criminal sanction catagory , because of the entrance into material offense as well as imports of hazardouz waste. As a result the implementation of administrative sanctions in advance, by implementing administrative sanction there are opportunities for doing corruption in the case of environmental pollution by companies producing B3 waste, and called white collar crimes.UUPP LH has not been able to reach this white collar crimes crime because it is integrated between law enforcers (police, Prosecutors and judges) are exposed to bribery. Therefore, UUPPLH needs to be revised and divide proportional administrative sanctions, and this can be done if there is government involvement.

Keywords: Environmental disaster , Administrative Law, hazardous waste

Introduction

Environment and parcel of human life and other creatures on earth. Therefore, the preservation of nature and the environment is an attempt to rescue the man himself in the present, children and grandchildren, and future generations. The impact of the pollution of soil, water, and air are not necessarily, there is a chemical process that for many years, but it will happen. Which is perceived by the public as a result of environmental damage is usually small scale such as shortness of breath, itchy skin, or others who require medical treatment.

For communities resulting in loss of opportunity to save both for their children to continue their education and / or other purposes, then the achievement prosperous life far from the fire and the meaning of sustainable development *(sustainable*development)were heralded only *"lip service"* mere.

Tragedy pollution and mercury poisoning of the world famous 60 years ago in Minamata, Japan caused by industrial pollution. More than 60,000 victims of Minamata disease in Japan is still fighting for justice and recognition. Meanwhile in Indonesia, the last 15 years is found 'strange disease' and babies birth defects have sprung up in remote areas, allegedly due to mercury poisoning which is used by parents and their neighbors to extract gold. [1]

Referring to Law Number 36 Year 2009 on Health states, national development in Indonesia should pay attention to health and the environment is the responsibility of all parties, both government and the public. Every thing that cause environmental health problems also affect the health of Indonesian society which can result in huge economic losses for the country, and every effort to improve the health status also means investment environment for the development of the State itself.[2]

Article 3 of Law No. 36 Year 2009 on Health also mentioned that the development of health (environmental) aims to raise awareness, willingness and ability of healthy life for everyone in order to materialize the health of society as high, as an investment for the development of human resources the socially and economically, but it is mentioned that: Everyone deserves a healthy environment for the achievement of health status.[3]

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[1] http://www.balifokus.asia/single-post/2016/12/12/*Keracunan-merkuri-Minamata-setelah-60-tahun-dan-15-tahun-di-Indonesia-*

[2] Masrudi Muchtar, Abdul Khair, *Noraida, Hukum Kesehatan Lingkungan*, *Kajian Teoritis dan Perkembangan Pemikiran*, Yogyakarta : PT.Pustaka Baru, 2016. p. 23

[3] *ibid*

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Regulation

Republik Indonesia, Undang-undang Nomor 23 Tahun 2002 tentang Perlindungan Anak sebagaimana telah diubah oleh Undang-undang Nomor 35 tahun 2014 tentang perubahan Undang-undang Nomor 23 Tahun 2002 tentang Perlindungan Anak.

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Qanun Aceh Nomor 5 Tahun 2003 tentang Pemerintahan Gampong

Qanun Aceh Nomor 9 Tahun 2008 tentang Lembaga Adat

Qanun Aceh Nomor 10 Tentang Pembinaan Kehidupan Adat-Istiadat

Qanun Aceh Nomor 11 Tahun 2008 tentang Perlindungan Anak

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United States Department of State, *Trafficking in Persons Report 2010 - Indonesia*, 14 June 2010, <available at: http://www.unhcr.org/refworld/docid/4c1883ecc.html> [accessed September, 12, 2013] bandingkan Deputi Bidang Perlindungan.

<http://www.waspada.co.id/index.php?option=com_content&view=article&id=60912:- facebook-modus-baru-dunia-traficcking, html/> ;<http://cop1past3.wordpress.com/2011/02/19/ facebook-mulai-jadi-alat-jual-diri, html> <http://www.eocommunity.com/showthread. html/>.

or by anyone else). If someone is not able to control all three "cappa", it is considered dead before death. The expression shows the value of culture if implemented properly can prevent trafficking in persons.

West Java

Kesundaan character concept called *"cageur"* means healthy, *"bageur"* means good, and *"right"*meaning true, and *"Sieger"* means introspective and *"smart"*(smart). The fifth concept of the local culture if understood deeply the prevention of trafficking in persons and each of these elements are mutually reinforcing prevention of trafficking in persons. Healthy life will be realized in a way of life that is good and right, life is good and right can be realized if it is always introspective and intelligent in the face and find solutions to problems.

Indonesia is rich in local moral values that can actually be a deterrent power of society in preventing crime of trafficking in persons, and their major role is given to the Institute of Traditional especially in the province of Aceh, still happened practice of child trafficking in Indonesia. This is supposed to be realized for Indonesia early on when a number of positive effects that appear MEA, Indonesia is also already Preparing strategies to suppress the threat posed akaibat enforcement of MEAs in Indonesia.

Closing

1. Conclusion

a. Intervention Institute of Traditional and community roles have space actively involved both local moral values as well as through regulation in each area based on regional autonomy. Child trafficking prevention strategies by indigenous institutions and communities in addition to the frontline in preventing child trafficking, most understand the context of these crimes actually stems from the people themselves, and use policies in the prevention and control of trafficking in children through local knowledge in their respective areas.

b. Local knowledge is still there but the majority of the basic values that a lot of shifting and displaced due to globalization. Values and social relations, including decision-making due to the patriarchal culture system that causes female subordinate to the impact of, among others, limited education, structural poverty, and culture marry a young age with the risk of divorce, vulnerable to domestic violence in all its forms, discrimination.

2. Suggestion

a. The necessity of the role of traditional institutions and the communities become agents of reform and change by empowering the values of local wisdom in order to prevent perdagang people.

b. It took the role of academia through research, teaching and various forms of socialization to perform mapping and inventorying the forms and values of wisdom Locally every region in Indonesia that are not gender biased and can be used as a medium for the prevention of trafficking in persons, so as it can be used by policy makers for policy formulation and The following regulations budget trafficking in persons and child protection in Indonesia.

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Wagley, R, *Human Trafficking – (2007), An Overview*, Washington, DC 2002: Center for Advanced Defense Studies.

In the urban environment, beggars and street children also become the most widely used mode for exploiting children for economic purposes. Ironically, it was found that the perpetrators in the case of coercion of a child to beg along the highways instead of adults and are even their own parents.

Entrapment mode teenage children victims of trafficking women through sites such as *facebook,*twitter, *whatsapp,* line, WeChat, and other offerings through various forms of social mdia in cyberspace really disturbing. Performers communicate, deceit with victims through various social networking applications finally made sexual exploitation.[22] Other modes of victims of child trafficking as couriers "drug" because it promised a number of prizes in the form of money, courted or will be married by the perpetrator. Other mode, mail-order brides in West Kalimantan to multiple destinations such as Hong Kong and Taiwan, the mode of marriage contract lasts for a few days or weeks mediated tour guide *(guide),* occurs between the Middle Eastern tourists with their teens Indonesian women in the area of Cisarua, Bogor Regency.[23]

One of the strategies that need to be taken to prevent and deal with the crime of trafficking in persons is a relationship and build a network with institutions and traditional leaders. Another strategy is local knowledge can support the prevention of child trafficking. Nevertheless, policy-laden local wisdom and philosophy of life barely been implemented due to a shift in values. It is feared that in the era of MEA instead of local wisdom values are positive pent-lived history or misused for certain interests which position the child becomes vulnerable to a variety of violence and crime, including trafficking in persons. Strategy Institute of Traditional and Local Wisdom Values in the prevention of child trafficking several areas as follows:

Aceh Province

An Garda potential Indigenous Institute Leading intervention in the prevention of trafficking. Indigenous Institute not only serves as the preservation of customs as one manifestation of the implementation of the specificity and Aceh specialty in the field of customs, but also as an institution that can intervene in various forms of prevention against this crime.[24]

Local moral values lull the child *"hi kutimang Jak jak kutimang aneuk lon, jak kutimang Bungong Keumang aneuk boh ha hai theme. (Let kutimang my dear, you are like a flower blooming, you are the baby's mother). "The* context of other local moral values that protect children from child *trafficking"defender fooled Ngoen haba Mangat, Geu tanyoe meukeumat like saboh period, menyoe Geu tanyoe na ta remember tentei seulamat deceit tub .... (do not be fooled by the sweet promises because someday we will have a problem. But if we can be aware of it will survive the trickery) ".*

Positive values about child protection. "Children are a surrogate of God in terms *Acehnya"promise meubah defender, the defender meutukan mandate.* "Thismeans that if there were to entrust means he trusts." This means that the child must be maintained by the parent who is believed to bring loan from Allah.

For the fulfillment of children's rights, such as the right of children to education, below. *"Meunyo tatuoh peulaku, boh pumpkin jeut keu aso rich, meunyo hana tatuoh peulaku aneuk tengku jeut keu beulaga(*Althoughchildren born to a poor family but educated properly then he will grow up to be good. Otherwise though the child was born out of kelauarga rich , social status is respected as scholars but if not trained properly then he will grow into a child misbehaves,*evil)".*

West Sumatera [25]

Minangkabau known pattern *"ka barajo kamanakan mamak mamak ka barajo panghulu panghulu barajo kakabanaran, kabanaran barajo kapatutan ka".* This means that in order Minang community association in each generation or strata no oversight function of the much respected both in the family and in life berkaum (tribe).

South Sulawesi [26]

South Sulawesi, known as*"Siri",* which means shame. Shame for Boogies mentioned on the three ends, the first*"Lilahcappa tip of the tongue"* should not be significant in speechless and dikata-dwarf with obscenities and vile. Secondly,*"cappakawalitip of the dagger"* means abstinence avoid let alone run away from physical attacks and other forms of other threats, the three*"cappalasoend male genitalia"* is interpreted to abstain from sexual relations outside of marriage (fornicate or dizinahi family members and close relatives

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[22] <http://www.waspada.co.id/index.php?option=com_content&view=article&id=60912:- facebook-modus-baru-dunia-traficcking, html/> ;<http://cop1past3.wordpress.com/2011/02/19/ facebook-mulai-jadi-alat-jual-diri, html> <http:// www.eocommunity.com/showthread. html/>.

[23] Noer Indriati, *Op.cit*., p. 7.

[24] Aceh telah memiliki Qanun Aceh No. 11 Tahun 2008 Tentang Perlindungan Anak, pada BAB VIII mengatur isu tentang Kekerasan, Perdagangan dan Eksploitasi Anak. Lembaga Adat di Aceh dapat berperan dalam melakukan intervensi pencegahan perdagangan orang dalam isu ini berkaitan dengan anak melalui regulasi yang diatur lebih lanjut dalam Qanun Perlindungan Anak Tahun 2008 pada Pasal 29, Pasal 31 dan Pasal 33.

[25] Deputi Bidang Perlindungan Perempuan Kementerian Pemberdayaan Perempuan dan Perlindungan Anak, *Op. cit.,*

[26] *Loc.cit.*

Indonesia's ratification of the Trafficking in Persons Protocol, followed the establishment of Indonesia also established Law No. 21 of 2007 on the Eradication of Trafficking in Persons (hereinafter the Act PTPPO 2007) Gazette of the Republic of Indonesia Year 2007 Number 58.

Therefore the protection of children is an activity that creating a condition where every child has access to their rights. Therefore, to protect children is to protect human beings.[16]

Limits the definition of "child protection" provided for by Article 1 paragraph 2 of the Child Protection Act, namely, "any activity to ensure and protect the Child and rights in order to live, grow, develop, and participate optimally in accordance with human dignity, and to receive protection from violence and discrimination "Furthermore, Article 76F Child protection Act states" Every person is prohibited to place, let, do, told to do, or was involved in the abduction, sale, and / or trade Son ".

In this regard Article 1 of Law PTPPO 2007 mentioned what is meant by trafficking as follows:

> "Trafficking in persons *(human trafficking)* is the act of recruitment, transportation, storage, transportation, transfer or receipt of a person with a threat of violence, use of force, abduction, confinement, forgery, fraud, penyelahgunaan power or vulnerability, debt bondage or giving payments or benefits, to achieve the consent of a person having control over another person, whether done in the State, for the purpose of exploitation or which causes the exploited"

Traffickingin persons is a new form of slavery, in modern times with the goal of a low cost of living but can benefit a large*(bigprofits and cheap*lives).[17] Basically, almost all countries in the world experience problems with trafficking though with difficulty levels are different. No country has become the destination country of trafficking in persons, transit or source countries trafficking in people, like that of Indonesia.

Methodology

This type of research in this paper is a normative juridical focused on secondary data as the main data, through the comparative approach inter alia, by comparing the potential legal customs and value local knowledge possessed in several regions in Indonesia. Specifications analytical descriptive study then analyzed by juridical qualitative, are presented in the form of descriptions.

Results Discussion

Indonesia is a source, transit and destination of trafficking of women, children and men, especially for the purpose of prostitution and forced labor. Based on data from *the International Organization For Migration (IOM),* there are at least 76% of the women and children were recruited by traffickers with the mode of offering work abroad as Tenaga Kerja Indonesia (TKI)[18]. There are currently an estimated 6.5 million to 9.0 million migrant workers work outside Indonesia, including 2.6 million in Malaysia and 1.8 million in the Middle East.[19]

In 2010 the Criminal Investigation Police recorded some 105 cases of adult victims of trafficking with a number of child victims 86 people and 57 people. From the results of the placement data summary 2008 to July 2010, the Ministry of Manpower and Transmigration reported that more than 70% of migrant workers are women working in the informal sector as domestic workers.[20] Women and children become the target of human trafficking for exploitation either sexual or power *(forced labor),* at home and abroad. The phenomenon of trafficking in persons in the country are also increasingly diverse forms and mood.

Prostitution well in the area of localization as well as in places such as in a cafe disguised prostitution, massage parlors, beauty salons plus-plus, hotels and others began to mushroom, both in large cities and in rural areas. IOM database (March 2005-2011) female child victims 749 people while 150 boys.[21]

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atau orang lain, untuk tunjuan eksploitasi. Pasal 4 Protokol Perdagangan Orang menyebutkan bahwa "Protokol ini mempunyai ruang lingkup berlakunya pada tindak pidana perdagangan orang yang bersifat transnasional dan melibatkan kelompok penjahat transnasional, serta perlindungan korban tindak kejahatan tersebut. Protokol tersebut mengatur pula kewajiban Negara-negara pihak dalam melaksanakan isi protokol yaitu dengan mengeluarkan peraturan perundang-undangan dan mengambil langkah-langkah guna memberikan perlindungan".

[16] Arif Gosita, *Masalah Korban Kejahatan (kumpulan karangan)*, Jakarta: Bhuana Ilmu Populer Kelompok Gramedia-Edisi Ketiga, 2002, p. 246.

[17] Kevin Bales, *Disposable People: New Slavery in the Global Economy*, Calif: University of California Press, Berkely, 1999, pg. 34. (Pendapat yang menyebutkan bahwa perdagangan orang dewasa ini identik dengan perbudakan dalam era modern.Lihat dalam John R. Wagley, *Human Trafficking – An Overview*, Washington, DC 2002: Center for Advanced Defense Studies, 2007, pg. 2).

[18] International Organization for Migration, *Counter-Trafficking Database Maret 2004-Desember 2010.*

[19] United States Department of State, *Trafficking in Persons Report 2010 -Indonesia*, op.cit.

[20] Kementerian Tenaga Kerja dan Transmigrasi, Data Penempatan Tenaga Kerja Indonesi di Luar Negeri, Rekapitulasi data penempatan Tahun 2009 s/d juli 2010: Dilaporkan bahwa jumlah keseluruhan TKI yang ditempatkan adalah 1,459,621 dengan komposisi TKI formal (yang mayoritas adalah laki-laki) sebanyak 315.180 dan TKI bekerja sebagai pembantu rumah tangga (yang mayoritas adalah perempuan) sebanyak 1.44.441.

[21] International Organization for Migration, *Database, Op.cit.*

expensive, (5) the cultural context of a multicultural, which weaken the position of women and children. For example, for poor children to get married to diminish the responsibility of the parents economically.[7]

The effects of globalization offer pragmatic and consumptive lifestyles so that their tendency to erode attitude patterns towards *lifestyle* apathetic, skeptical, individualist and *selfish.* It is also a child protection issues continue to occur despite the various regulations has been owned by Indonesia.

Actually, Indonesia has a lot of values of local wisdom*(local*wisdom - *local*genus),in the form of values that grow and develop in society. [8] This value should be the hallmark of national character that is influential in our daily lives in the form of thought patterns and behaviors, so the *style* apathetic, skeptical, individualist and *selfish* do not become part of the national*identity.* The involvement of public awareness through local moral values and customs-based institute is an effective resistance of each crime prevention including child trafficking crime.

Aceh province with its privileges and specificity settings Indigenous Organization in carrying out its role close to the value of local wisdom philosophy is governed by Article 98 of Law No. 11 of 2006 (Law on Governing Aceh) follows Qanun-Qanun provincial and regency / city.[9]

Therefore, traditional leaders contained in traditional institutions in Aceh and the role of scholars has a central position as child trafficking prevention interventions. Indigenous potential contained in the Institute of Traditional Aceh and elsewhere in Indonesia should be able to be used as the frontline in the prevention indication of crime of trafficking in persons and other crimes related to child protection.[10]

Based on the facts stated above, this short article examines how to maximize the potential of indigenous loaded with the value of local wisdom as a preventive intervention strategy Child trafficking in Indonesia

Literature Review

The UN Convention on transnational organized criminal act, 2000*(ConventionAgainst Transnational Organized Crime 2000),*[11] mentioned by ratifying this Convention any Contracting State included Indonesia is obliged to take action or measures are required, such as harmonizing legislation and administrative procedures relating to the Convention without undermining the principles of sovereignty, territorial integrity and non-intervention.[12]

Indonesia has had the Law on Child Protection No. 23 of 2002 (Law PA 2002). PA Act of 2002 amended by Act No. 35 of 2014 on the Amendment of the Law PA No. 23 of 2002 on Protection of Children (hereinafter the Child Protection Act), effective force, October 18, 2014.[13]

Furthermore, the Protocol to Prevent, Crack and Punish Trafficking in Persons, especially Women and Children [14], adopted by General Assembly resolution 55/25, entered into force on 25 December 2003. The protocol was set on an agreed definition of trafficking State agreement.[15]

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[7] Sri Walny Rahayu, *Op. cit*., p.3.

[8] Kamaruzzaman Bustamam-Ahmad, *Kearifan Lokal dalam Perspektif Epistemologi Irfani, dalam Adli Abdullah, M (eds), "Kearifan lokal di Laut Aceh",* Banda Aceh: Syiah Kuala University Press, 2010.

[9] Qanun Nomor 9 Tahun 2008 tentang Pembinaaan Kehidupan Adat-Istiadat dan Qanun Nomor 10 Tahun 2008 tentang Lembaga Adat. Qanun Aceh Nomor 4 Tahun 2003 tentang Pemerintahan Mukim Dalam Provinsi Nanggroe Aceh Darussalam**.** Qanun Aceh Nomor 5 Tahun 2003 tentang Pemerintahan Gampong,

[10] Sri Walny Rahayu, "Strategi Intervensi Lembaga Adat dan Kearifan Lokal sebagai Bentuk Pencegahan Perdagangan Anak di Indonesia", Makalah, pada The 4th International Law confrence "Kejahatan Terorganisasi Transnasional" Fakultas Hukum Universitas Syiah Kuala, Banda Aceh kerjasama dengan Universitas Indonesia, AAC Dayan Dawoood, Darussalam – Banda Aceh, 28 - 29 Oktober 2013. Makalah dengan pengembangannya disampaikan juga pada International Seminar: The Strategy in Building the Competitiveness in the Asean Economic Era (SBC MEA), dengan judul "Indigenous Institutions and the Local Wisdom Values in Indonesia as one of the Prevention Strategies of the Child Trafficking in the AEC Gedung Nyak Syech 3rd floor, Abulyatama University, Aceh Besar-Aceh, Tanggal 31 Maret 2016.

[11] Noer Indriati, *Op.cit.* p. 7.

[12] *Ibid*. p. 5. Konsekuensinya Negara harus membuat perundang-undangan sesuai dengan prinsip-prinsip dasar hukum nasionalnya (*fundamental principles of its domestic law*), dan setiap negara peserta diperbolehkan membuat peraturan yang lebih ketat dibandingkan konvensi (Pasal 34 Konvensi Tindak Pidana Transnasional Terorganisasi 2000). Pasal 36 ayat (3) dan (4) Konvensi menegaskan bahwa Konvensi ini tunduk pada cara-cara pengikatan diri suatu Negara terhadap suatu perjanjian internasional dengan ratifikasi, penerimaan atau kesepakatan yang ditentukan dalam perjanjian, dan selanjutnya instrumen tersebut harus didepositkan pada Sekretaris Jenderal PBB.

[13] Perubahan yang terdapat dalam Undang-Undang Nomor 35 Tahun 2014 di antaranya memberikan tanggung jawab dan kewajiban kepada negara, pemerintah, pemerintah daerah, masyarakat, keluarga dan orang tua atau wali dalam hal penyelenggaran perlindungan anak, serta dinaikannya ketentuan pidana minimal bagi pelaku kejahatan seksual terhadap anak, serta diperkenalkannya sistem hukum baru yakni adanya hak restitusi.

[14] Protokol untuk Mencegah, Menindak dan Menghukum Pelaku Perdagangan Orang, khususnya Terhadap Perempuan dan Anak selanjutnya ditulis dengan sebutan Protokol Perdagangan Orang.

[15] Pengertian Trafiking, Pasal 3 Protokol PBB tentang Perdagangan Orang sebagai kejahatan terorganisir *(organized crime*), "rekrument, transportasi, pengiriman, persinggahan atau penerimaan orang-orang dengan ancaman atau penggunaan kekuasaaan atau bentuk pemaksaan lainya, penculikan, penipuan,penyalahgunaan kekuasaan atau posisi rentan, atau memberikan atau menerima pembayaran atau keuntungan untuk mendapat izin dari seseorang yang memiliki kendali

POTENTIAL INTERVENTIONS LOCAL WISDOM IN INDIGENOUS FOR CHILD TRAFFICKING PREVENTION[1]

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ABSTRACT

The purpose of this paper is to examine how to maximize the potential of custom which is full of local wisdom as one of prevention strategy of child trafficking in Indonesia. This is because Indonesia's geographical location and other factors such as poverty, weak individual and family vulnerability, an expensive education system, and a multicultural culture that weakens the position of women and children make women and children the target of trafficking for exploitation sexually or otherwise (forced labour). Potential customs and local wisdom or local genis, in Indonesia could be used as alternative to prevent child trafficking. The type of research in this paper is the normative juridical emphasis on secondary data as the main data, through the comparative approach degan way of comparing the potential of customs and the value of local wisdom owned in several regions in Indonesia. The research specification is analytical descriptive and then analyzed based on qualitative juridical, presented in the form of description.

Keywords: Customs and Local Wisdom, Prevention, Child Trafficking

Introduction

Children and women are in the position of the weak and vulnerable as victims of human trafficking *(traffickingin persons / human* trafficking). The offense is one of transnational crime*(transnationalcrime)* are organized, berjaring from big cities to remote areas and systematic.[3]

Transnational crime is a felony or misdemeanor that crosses a border with the modus operandi of modern and sophisticated. The offender comes from two (2) or more countries. In Southeast Asia there are eight (8) types of transnational crime within the scope regulated ASEAN *ASEAN Plan of Action to Combat Transnational Crimes* (ASEAN-PACTC) in 2002. All of the eight types of crimes, namely, illicit drug trafficking, human trafficking, *sea*-piracy,arms smuggling, money laundering, terrorism, *international economic crime*and *cyber*crime. [4]

Other data cited by the *United Nations International Labor Organization (ILO)* reported there were 215 million children trapped in hazardous work which puts them at risk of injury, illness or death, and are vulnerable to trafficking.[5] Therefore, child trafficking is a serious crime for victims, their families, communities and countries.[6]

The crime, a crime extraordinary *(extraordinary crime), which* violate human rights. Trafficking cases such as the theory of the iceberg, since many cases have not been getting the attention of the government and thus the perpetrators of these crimes have not been touched by the law.

Regulation perlindungaan child has been owned by Indonesia, but not discourage or deterrent for the perpetrators. In fact the rampant found various crimes against children as victims in Indonesia. This happens because of several factors that can be mapped, namely, (1) poverty. Indonesia as the origin (sender) is also a destination country of trafficking; (2) weak deterrent power of individuals and families; (3) to the lack of a birth certificate; (4) The government's concern is not optimal improve education systems tend to be

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b. supervision

To avoid peyelewenganin the use of space or land that is no need for a business or preventive measures in the form of direct supervision by the government in this case the Regent as Regional Head. Surveillance measures are by no means an instrument of control for certain parties who want to take advantage of people who are outside of a predetermined plan or outlined in the general plan of urban spatial or outside the permit has been granted by the competent authority.

Supervision and guidance of the local government to conduct counseling to the public about legal products related to spatial and programs of government development programs Grobogan that community activities they will do to conform with regulations that have been established in this regard in accordance with RUTRK Grobogan

4. Control and Law Enforcement.

Their high mobility in the research area often encountered resulted in a violation of applicable laws. To overcome these problems required enforcement action organized in the form of the imposition of sanctions in accordance with the legislation in force. Enforcement action undertaken regulatory authority, which in this case is a civil servant investigators (investigators) in the local government, whose appointments are determined by the legislation in force. It was appropriate and we tihat in article 40 paragraph (1) of Regional Regulation No. 16 of 1995. In the article 40 paragraph (1) states that in addition to the general investigators, the investigation of the offenses referred to in article 39 of these regulations can also be done by investigator of civil servants in local government administrations, which are appointed in accordance with the applicable legislation.

Article 40 paragraph (2) reads: in carrying out the duties of civil servants investigator referred to in paragraph (1) of this article is authorized to:

a. receive reports or complaints from anyone about the crime.
b. The first criminal offense when it may be in the incident and inspection;
c. Says stop someone suspected of perbuataanya and checking personal identification of suspects,
d. the seizure of objects and options or letters;
e. Fingerprinting and photographing of a person;
f. Calling a person to be heard and questioned as a suspect or a witness.
g. Bring in the necessary expertise in relation to the case investigation,
h. Stops investigation after receiving instructions from a general investigator that there is not enough evidence on these events is not a crime and subsequently through public investigator told this to the public prosecutor, the suspect or his family;
i. Hold another action according to the law that can be accountable.

This enforcement action in the form of enforcement of sanction is a warning or a reprimand at most three times within a period of three months from the issuance of the first warning or reprimand. The activities can be done in the form of:

1. Direct Control.
   This action is done through legal mechanisms in accordance with the legislation in force.
2. Control indirectly.

This action dilakulan in the form of administrative sanction, namely the imposition of a progressive levy appropriate regulations applicable law or through pembatatan provision of basic facilities and infrastructure.

Conclusion

1. Grobogan that this population continues to experience growth, not in accordance with the provision of land in urban areas in particular, so the need for regulations governing land use.
2. In the region received less research attention regarding the arrangement of space in terms of the arrangement of street vendors, the need for penyempunaan local regulations in order to provide legal certainty

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b. Coaching aspect, namely, preventive action if there is a violation.
c. Enforcement aspect is controlling the activities of legal sanctions.

Local government in this case has given reprimands or warnings to vendors who mainly reside and selling in the garden / sidewalk so as not to continue activities in these locations that sell for violating Regional Regulation No. 16, 1995. This strike can be performed three times and if the strike is not adhered to by traders forced the government will dismantle the stalls belonging to street vendors in the park / the roadside.

2. Licensing.

Licensing deals with spatial Grobogan City based on Bylaw No. 16 of 1995 that the building control mempertinibangkan Planning Advice always refers to the layout. Planning Advice issued by the Department of City Planning And Landscape City Grobogan. If violated spatial utilization may be subject to sanction in accordance with Article 39 paragraph (1) and (2) Regulation No. 16, 1995 as follows:

1. Whoever violates the utilization location stipulated in the Regulation on the threatened imprisonment of at maximum 3 (three months or a maximum fine of Rp 50,000 (fifty thousand rupiah)
2. In addition to the criminal act sebagainiana terset paragraph (1) of this article, actions that resulted in the destruction and pollution of the environment shall be liable in accordance with applicable legislation.

In granting permission made by the applicant to submit the terms as follows:

a. submit certificate of land
b. submit pictures of the building.
c. Photocopy of taxes on land and buildings.

Furthermore, the City Planning Office Grobogan form a tini to verify whether the slice and conditions are in accordance with the land ownership then later issued a permit.

3. control and Supervision

a. control.

In order to control and space utilization town, both for the sake of private / individual or institution or department estab ering themselves to go through the licensing procedure. Broadly speaking, in Grobogan construction permits can be grouped into: permission to use the town plan, building permits, permits the use of the building.

1). *Planning Permit* (Permit Planning)

The license is granted in order to create the suitability of the building / buildings to be constructed with the overall plan of the city. This compliance includes:

a. Type of Use.
b. The action plan of the building.
c. Road network plan.

Implementing / co-ordination, consultation and licensing can be done by the City Planning Office Grobogan who has authority in the use of urban development plans and supervision of its implementation on the recommendation of the governor.

2) *Permission* to erect the building.

New building permit can be granted after the applicant gets *planning permit* for the proposed building to obtain a building permit. The application should be accompanied by a plan drawing buildings. Completeness and requirements that must be met in image building plan in kaitaanya with building permits, among others:

a. *Advice* Planning.
b. Data completeness facilities.
c. Data landfills.

3) *Permit* the use of the building.

This permission is used as a handle in taking legal action for the building users who deviate from the proposed plan. This permission is required for building the user control to match what was previously planned. This is so that land use can be arranged with regular all right, Indari and well, so that it will reflect the city and the public good.

Some agencies authorized to provide consent, among others:

1. Bappeda Grobogan bediak is the agency issuing land use permits.
2. The Department of City Planning Grobogan is the agency issuing building permits berwennang acting on behalf of the Regent.
3. Grobogan Land Agency is the agency that issued the certificate of land and bediak check the status of land and a certificate, which is against its validity in order to avoid double certificate.

c. The widespread influence in the rural areas of the city in terms of economic, social, cultural and psychological. (JW. Schoorl: 1997, p.26)

While Jakobson, as stated Dadjoeni said: urbanization is a phenomenon that shows a process shelter population growth driven by social conditions in the broad sense, in general urbanization in view as part of the process economic development and as a result of rapid population growth that can not be prevented. (Daldjoeni. N: 1996, hal.137)

Urbanization and development Grobogan can be seen along with the increasing urbanization will arise severe problems, with the rapid growth of population and economy of the city and the spatial issues in the urban environment will be more complex Grobogan also the need for land, space. and various urban facilities and others will continue to increase and unfortunately it was not accompanied by an increase in the financial sector of the district government. The demand for space utilization and more efficient land will grow, while the problems of the urban environment will be more and more. The issue of water supply, sanitation, and environmental boards decent and affordable housing will continue to grow accompanied by the issue of the municipal waste (solid waste, liquid, air pollution) will also increase. (Setiawan B.: 1999, p.31)

Excessive migration.

Migration to urban areas is a complex process in which many fakor related conditions such as destination, place of origin, and the barriers between individual factors. Migration can be regarded as an ongoing process. Migration in general is selective, meaning that moving and occupy a new place or leave the place of origin has the characteristics of a typical residence, education, social status, and cultural characteristics.

Migration is actually a process of social change regarding the decision to migrate, the displacement itself and the adjustment in the destination. Up to now there is no real way to measure the adjustment of immigrants.(Setiawan B.: 1999, p.31)

The rapid development in Grobogan create social and economic changes, both to individuals and to the goal area, but nevertheless large migration flows can create pressure on various social facilities, causing an imbalance with the carrying capacity tangible urban environment such as contamination of the environment, housing shortage, untidiness and cause an overload other facilities. Population distribution in Grobogan demanding guidance of the local government settlement because if it is not taken seriously and the absolute will affect the quality of the environment in Grobogan.

Efforts Achieve Local Government Land Use Efficiency in Grobogan

With the rapid development in this clutter timbulah can see where the vendors using the city land, to a place of education, street stalls, food stalls, selling CDs, as well as commercial and other activities.

Case in point: the stalls are Wildly used by illegal traders in the area for landscaping and greening as well as illegal stalls along the main streets.

Based on the results of interviews conducted by the Researchers to the ten respondents roomates include building owners, entrepreneurs who in this case are street vendors can be seen that the location of research is a very strategic and very profitable for trading activities. Financial crisis the caused the cost of subsistence is increasing faster than income derived Also a cause of growing menjamunya business activities of hawkers, the which mainly can be found on roadsides and use land that is landscaping the city in response to the lack of agricultural land they have.

The growing number of street vendors that are not supported by the capacity of existing land resulted in congestion along the study site, especially at rush hour like clockwork school, go to work, shopping and of course damage to the environment.

The Efforts undertaken by the Government Grobogan to Overcome the problems of land use is as follows:

1. Policy of Urban Spatial / Land Use Grobogan

   Patterns urban spatial / land-use Grobogan based Spatial Plan Provides that the trade area consisting of activities locally and regionally are located on the city center adjacent to the means of transportation. To Anticipate the development of Cities and the atrocities committed by the illegal traders / street, the local government will develop regional and local trade area.

   In an effort to Overcome the chaos of street vendors Grobogan District Government cope with the various Efforts both preventive and repressive. preventive measures taken is to meet the licensing process, the which is any person who will carry out activities in the area of Grobogan must have permission from the local government. In addition to permitting the government Grobogan also perform activities of outreach to groups such as employer groups and other communities on development programs in cities Grobogan that their activities will they do to conform with regulations that have been established in accordance with the General Spatial Plan Kota (RUTRK) Grobogan. It refers to three aspects of coaching are:

   a. Namely the socialization aspect, a new program of extension activities of the local government.

5. Elements of Demography and Health.
   City residents health level is closely linked to the live birth rate. So the city are eligible hygiene and health will have a special attraction for both residents of the city to stay as well as for visitors from outside the city to come and settle in the city.
6. Elements Kehudayaan and Education
   towns have places quality of education or the school will be a place for immigrants studying in hopes of getting a good education. Moreover, the location or the location of the city in strategic areas will to urbanization every year that influence the development of the city.
7. Elements of Technology and Electrification.
   The continued development of electronic technology and will encourage the development of the town citizens can easily overcome the problem of whether it was about the distance, the problem of information, transportation issues and so on. So the selection of the location of settlements no longer bound to the city center, next due to be widened urban areas and growing.
8. Elements Transporttraffic in
   Network the street in the city network or connecting road between the city with surrounding areas or other cities is very important for traffic flow of goods and people is thus very possible developments town in different directions. With the increasingly extensive network of roads then the city becomes more productive especially the city has a road network traffic by land, air and sea. (Marbun BN: 1990, hal.7-8)

Problems of the city

Problems of the city is a result of developments the city itself, the circumstances of the original town is both simple and traditional turn out to be more complicated, difficult and modern. The problems that arise can be the settlement issue, the problem of waste, transportation problems, problems of land use in the city, administration and sebagianya that it is inseparable from the interests of social, economic.

The limited capacity of the city resulted in social problems as well as physical and non-physical environment such as high rates of unemployment in terms of quality and quantity, the occurrence of all forms of pollution due to human activity in particular economic activities. For some city residents are economically less profitable will emerge of its own problems, such as slum in certain areas within the city, the emergence of any kind of business or trade that keeping wild urban space and so forth.

Sharp competition in the city life "led to the attitudes or private individuals are individualistic and aggressive attitudes could lead to legal issues and security. Lingkunganpun pollution problems not only result in problems that are physical, but also social like, psychological, legal culture, and economy. Thus, the source of the pollution and the use of space causes a massive city that does not comply with the environmental capacity of the city, causing the environmental quality of the city.(Bintarto: 1994, p. 53)

The decline of city life optimal environment with the term *"Urban Environmental Degradation* "atthis time showed symptoms of widespread, especially in big cities in Indonesia. Setbacks or city environmental damage can be seen from two sides, namely:

1. From the Physical Aspects, the disruption caused by natural elements such as water, air or contaminated voice any kind of pollution can cause health problems that could ultimately affect human lifespan. These kinds of environmental degradation classed environmental degradation that is physical or*"Environmentaldegradation of the physical*nature".
2. From the aspect of society or social, the disruption caused by the man himself and result in disruption of tranquility, enjoyment and peace of life. Degradation types are subsumed environmental degradation are social or*"Environmentaldegradation of social*nature".(Bintarto: 1994, p. 53)

Results

Factors Affecting the Efficient Use of Land In Grobogan

Urbanization

Urbanization is a process that carries most population lived in urban centers. In other words, urbanization is a process of transfer of population from rural to urban areas. Urbanization can be viewed as a process in terms of:

a. The increasing number and density of population of the city. More cities become more bloated. As a result of population growth from both natural increase and the city's population due to the addition of people from villages who bemukim and thrive in the city.
b. Increasing the number of cities in a country or region as a result of economic development, culture and new technologies.
c. The changing village life into town life atmosphere.

Schoorl said, urbanization can be described as:

a. The outflow of residents to the city.
b. Increasing the size of the workforce in the industrial sector nonagraria.

c. Having more buildings socio-economic facilities (schools, clinics, markets, shops, government offices and other-other than disekitanya region.

2. Socioeconomic characteristics:
   a. Has the population is larger than that in the region disekitanya one- building unity, amounting to at least 20,000 in the island of Java, Madura, Bali, or 10,000 people outside the islands.
   b. Having a population density is relatively larger than the surrounding area.
   c. Has the proportion of the working population at-sector nonagricultural sectors such as government, commerce, industry, services and others are higher than the surrounding area. It is the center of economic activities linking agricultural activities and the surrounding area where marketing or processing raw materials for economic activity.

3. City Environment
   a. development of Cities .

   Urban life has always been inseparable and activities of the city that can ultimately mendoro ng on the growth and development of the city. Development of the city was always faced with two aspects:

   1. Aspects regarding the desired changes and experienced by citizens.
   2. Aspects related to the expansion or urban expansion.

   To be able to do proper planning of urban development with note signs of urban development, which include the following:

   l. Conurbation symptoms, the symptoms of the cities of the region joint due to the expanding reach of the city. In the phenomena of conurbations, the regions which are called membrane urban core extends outwardly cities with expanding area of the membrane core another city so that the city limits will be in contact and possible merger between the two regions urbanity with two core cities, conurbations can also be formed from some of the urban areas. This is due to the structure polinukleus conurbations. In other circumstances can also occur conurbations with winukleus structure.
   2. The twin towns or twin towns, win Cities can also be used as a guide or a symptom of regional development and urban. In general, these twin cities are industrial cities, towns or groups of settlements recreation merge into one focus.
   3. Symptoms of urban development, can also be shown by changes in the existing structure, such as a change from an agrarian structure into non-agricultural structures or activities sifanya shift from primary to secondary and activities that are ongoing that are tertiary. Similarly, a shift in the function of residence of a single function into a dual function of change of just a place to stay just a place to live and a place of business, either for trade in goods and services. (Marbun BN: 1990, hal.3-4)

Besides the above influences there are also influences that are fundamental and the main character, the effect of which is fundamental is the form of state and state physiographic sosiogeografi around urban areas, while the influence The main properties in the form of a historical background and natural resources. Although there are influences that are fundamental and primary, still not independent of human influence as citizens of the city that will cause the personality of the city or *urban*personality,elements such influence can be described as follows:

1. The element oflocation of

   The strategicthe city layout will be a positive influence the development of the city itself as it is located in the traffic area of trade, lies in a fertile valley and many impassable rivers.
2. Elements Relief climate and

   Temperate Cities too wet or too dry hard to develop. as well as the cities that were padadaerah altitude in mountainous areas or hilly progress will be limited by natural obstacles or*"naturalbarriers"*but with the advances in building techniques and technologies, natural obstacles is not impossible can be attenuated effect, contrary to the city which has a flat relief and cool climate will have a fairly dense transportation network.
3. Natural Elements.

   Areas that have ingredients for potential mining in the mine will encourage the growth of centers and settlements which can then bring their new cities. The emergence of new growth centers will be attracted to enter the area to encourage more rapid development of the city.
4. Earth Element.

   The change concerning ways of processing and utilization of agricultural land in epektif and efficiency are supported by a reliable transport can encourage the growth of small towns in areas of fertile farmland.

4. The Government Office Regions.
   Grobogan District Government Office Region administrative area areas of the city / county.
5. Industrial Zone
   Industrial Zone for domestic industry and nonpolutif not specified in a particular region, but can be located spread in the region.
6. Tourism Regions
   as a tourist area in the complement component serves as a living environment that is equipped with travel. The tourist area can be a grouping of entertainment venues, sports fields, open spaces, and natural attractions and man-made. Within the scope of its service scale, this tourist area can be used to scale services or for services the city and regional scale.

Urban

Definition of the City

In a general sense the city is a group of residential quarters in which there are facilities, among others for a place to stay, a place of economic activity, traffic lanes are organized, as well as places of entertainment and recreation.

Article 1 Regulation No. 2 of 1987 states that the definition of the city is the center of settlement and activity of the population that has boundaries set out in the legislation and settlements that have shown the character and characteristics of urban ways of life.

According to Article 1 paragraph 1 of Law No. 22 1999 Urban Area is, areas with major non-agricultural activities, with the arrangement as a function of the area of urban settlements, centralization and distribution services, administration, social services and economic activities.

Judging from the notions mentioned above, the Grobogan can be referred to as a city based on population characteristics of urban, boundary region, a unity among them, as well as other requirements that must be met as a city.

According to Article 7 paragraph (3) of the Law on Spatial Planning, there are three types of regions, namely:

1. The Urban Area
   is the main activity areas with no agricultural composition as a function of the area of urban settlements, centralization and distribution of government services, social services and economic activity.
2. Rural Region.
   Is a region that has a major agricultural activities including the management of natural resources with the composition as a function of the rural area, government services, social services and economic activities.
3. Specific areas.
   Is a national defined area has a strategic value priority spatial arrangement.

City development today is a demand that can not be postponed again. This is due to the role of the city which is quite extensive and complex, in addition to functioning as the settlements function as a government center and activity center of social, economic, cultural, danpolitik as well as a center of growth for the region around the city(hinterland).

One thing that is important and needs to be discussed is the influence of urban development on the environment, according to Emil Salim should be drawn up based on priorities, on the basis of:

1. Lack of land (land fixed), the land use planning and space charge.
2. Security and development of water.
3. Plans on human development.

One factor that menentuhan in structuring the city is the population, because a city is essentially functioning as settlements. The increasing population of the city, mean additional housing needs and facility service activities on the population. As well as cities in Indonesia. population problems that arise are:

1. The number of population is still relatively high.
2. The distribution and population density is irregular.
3. Urbanization continuous population.

As a result of the above factors, causing urban areas increasingly dense population and densely populated city with a very likely cause damage to the environment.

The area of town has the characteristics that can be grouped into two:

1. Physical characteristics:
   a. Points of settlements is one unit with an area, the number of buildings, relatively high building density of the surrounding area.
   b. The proportion of permanent buildings is greater than in the surrounding region

Grobogan spatial plan is based on the principle set out in Article 2 of Regional Regulation 16 of 1995, namely:

a. Benefits are optimal space utilization are tercermnin in determining the level of service functions and activities of the network system.
b. Balance and harmony that creates harmony and insensitas function in a region of space utilization.
c. Sustainability yaiutu create harmonious relations between humans and the environment are reflected in the pattern of the intensity of the use of space.

Land Stewardship in Grobogan

Grobogan which has a relief area of limestone mountains and hills and plains in the middle, as the topography is divided into 3 groups:

1. Region lowlands at an altitude of 50 meters above sea level with slopes between 0-8% includes 6 sub-districts Gubug, Tegowanu, Godong, Purwodadi, Grobogan south and Wirosasi south.
2. The hills at an altitude of between 50-100 meters above sea level with a gradient of 8-15% includes the 5 Districts namely Klambu, Brati, Grobogan north and Wirosari north.
3. Regional plateau at an altitude of 100-500 meters above sea level with a slope of more than 15% covers the districts in the south of the region Grobogan. A geographic and reliefs, Grobogan a district which buffer the economy are in the agricultural sector and is an area that tends to be quite difficult to get clean water.

The use of land in Grobogan is diverse, according to data available on the Office of Tata cities Grobogan 2016 can be seen in the table below

Tabel : Land Use Grobogan 2016

No	Allotment of land	Luas (ha)	%
1	settlements or housing.	1.175,01	1,25
2	Education.	162,52	0,57
3	Industry.	8.025,00	8,54
4	Trading.	28,58	0,02
5	Administration (office)	42,00	0,04
6	Agriculture Plantation	20,000	21,28
7	regional and freight	5,00	0,01
8	terminals.	5,250,00	2,55
9	Limited production forest.	298,750	31,64
10	Protected forests and	7,11	0,01
11	protected areas.	503,83	0,54
12	A place of recreation and sightseeing. Sports facilities. Highway	399,94	0,42
	Jumlah	94,000,00	100%

Source: Department of city Planning Grobogan 2016

as detailed directives for each activity of the city in connection with the arrangement of the land is as follows:

l. City center.

The city center as the concentration of trade activity, government offices and services with the scope of services throughout the district.

2. Center for environmental services.

Neighborhood service centers are developed with an emphasis on the primary function of settlement services and are equipped with service centers lingkunuan forming services are:

a. public service center (meeting hall)
b. Health Facilities (Medical Clinic)
c. trading facilities (market, environment, retail, and kiosk).
d. Education facilities (kindergarten, elementary, junior, senior and PT)

3. Housing area

Housing area includes land-use housing and infrastructure and social service facilities regulated economy tiered Sesua with parts of the city that has been set.

4. Ensure optimal utilization of space through the allocation of space and place nationally in order to improve the living standards of the community with the aim of implementation arrangements functioning spatial use of protection and cultivation area.
5. Intensify efforts linkages between interests so as to avoid differences in the allocation and utilization of space.
6. Determination of the spatial allocation and confirmation functions in an optimal space to realize the protection function space and to prevent and cope with negative impacts on the environment.
7. Determination of specifications and space allocation,
8. Creation of strategy allocation and optimal space utilization and matching among various interests.

Based on the spatial development policy Grobogan set as follows:

l. Respond and take advantage of economic opportunities open for their comparative advantages region / city rooted in the strategic value because of geography and its resource potential.
2. Taking into account the development challenges of the area of influence (Hinterland) cities to take advantage of mutual interaction in order to develop the region as a whole.

Grobogan city spatial planning, geared to improve the welfare of the people equitably and to lay a solid foundation in order to promote the speed and kesinamlrungan development according to the characteristics of Grobogan, with the principles of environmentally sustainable development. To that end Grobogan government divided the territory into 6 parts of the city (BW) in accordance with the explanation in Article 10 of Regional Regulation No. 16 of 1995 which is a continuation of the general plan of the city spatial structure is still general.

Parts of the city (BW) in Grobogan consists of:

1. BWK A, serves as the center of development provide a very large part of the external and internal aspects of government. In addition there is the town recreation area supporting facilities, housing and trade. Thus it can be said that this role and functions of internal to external to the residents of the city and the wider region.
2. BWK B, its activity is similar to BWK A but there is a difference in scale services. BWK B more emphasis on local service scale, so it is more geared to the future as a sub downtown more emphasis to provide resident services.
3. BWK C, the dominance of activity in parts of the city C (BWK C) are seen at this time as the area of education, and housing. Was when viewed from the domination of land use is to korversi nature. Tutorial non-agricultural development will be done in this BWK is as educational and residential area. educational activities will be strengthened in this BWK not only to provide local services (urban dwellers) but also to regional services.
4. D. BWK prepared for the development of residential areas and directed as a sub-center of the new city. BWK is a response to the needs of the deployment of existing activities in the town center which has an increasingly crowded insentitas activity thus in BWK development aims to reduce the intensity of activity and use of space in the city center, so it can take advantage of vacant land in the area of urban sprawl.
5. BWK E, in its development aims to meet the demand of the population will need food. The development of the agricultural sector more emphasis on the sub-sector and food crops. For the sub-sector, aimed at guidance on improving results through the capture and marketing management, looking for food crops sub-sector is to utilize as much as possible of existing agricultural land.
6. BWK F, which serves as a nature conservation is mountainous and hilly areas that are useful for the preservation of water resources.

Article 14 paragraph (1) by considering the provisions of article 2, paragraph (2) and (3), Article 9, paragraph (2) and Article 10, paragraph (1) and (2) government in the framework of socialism Indonesia to make a plan umun about inventory, allocation and use of land, water and airspace as well as natural resources, contained in them with the aim of:

1. Purposes of the country.
2. Purposes of worship and other sacred purposes in accordance with the basis of Almighty God.
3. Purposes centers of community life, social, cultural and others.
4. Purposes develop agricultural production, livestock and fisheries and in line with it.
5. For the purposes of industry develop, and mining.

Article 4 (2) of Law Number. 26 of 2007, states that every person has the right to:

1. Determine the spatial plan
2. Participating in spatial planning, space utilization, space utilization control.
3. Obtain a decent replacement of the conditions experienced as a result of the implementation of pembagunan activities in accordance with the spatial plan.

the earth such as natural resources and others because it needed more rights. In addition to the land rights of authority there are certain obligations such as inherited in Article 6 BAL. bahwanya all land rights have social function. This means any land rights that exist in a person should not be used solely for their personal use rights especially if it causes damage to society. This means also that the use of land and changes can be made, but must be adapted to the circumstances and the nature of the beneficial rights to the welfare of the owners and the community.

BAL ketentuaan that explicitly regulates land use changes is Article 14 of the BAL, this article provides that the government create a general plan of the inventory, allocation and use of land, water and airspace as well as the natural riches contained therein to:

1. Purposes of the country.
2. Purposes of worship and other sacred purposes in accordance with the basis of Almighty God.
3. Purposes centers of community life, social, cultural and others.
4. Purposes develop agricultural production, livestock and fisheries and in line with it.
5. For the purposes of industry develop, transmigration and mining.

In addition to article 14 of the BAL, there is another chapter in the Law relating to land use change, namely Article 15 on the obligation of every person, legal entity or agency that has a legal relationship with the land to preserve land, including the increase fertility and prevent damage.

Law No. 26 of 2007 on spatial planning (UUPR) is legislation that was issued to implement the provisions of Article 14 BAL.

General Situation of Land Use.

Definition of Spatial

Article 13 paragraph (2) UHPR states that "Spatial planning is done through the process and procedures of the legislation in force. Spatial planning is based on Article 14 UUPR done by considering the following:

a. Harmony and balance function and the function of protected cultivation, social and cultural dimensions of time technology and security and defense functions.
b. Aspects of integrated management of various resources, the function of environmental aesthetics and environmental quality.

As is the general plan based spatial Minister Regulation No. 2 of 1987 on guidelines for the City Plan is a plan of allocation, use, supply and maintenance of earth, water, and space so that optimal utilization, sustainable. balanced and harmonious for the greatest prosperity of the people.

Article 4 of Regulation No. 16 Year 1995 concerning General Spatial Plan Grobogan stated General Spatial Plan are:

l. Formulate a basic policy in the area of space utilization;
2. Achieve linkage and inter-regional balance regional development;
3. Establish an investment location of the government and society in the region.
4. Provide guidance and detailed preparation of a detailed plan for land-use and implementation of development in utilizing the space to develop their activities and is the basis for issuing permits construction site.

Goals General Plan City Spatial Grobogan, Article 5 Regional Regulation No. 16 of 1995 are:

1. The well-organized functioning of protected areas;
2. The level of well-organized service centers;
3. The well-organized transportation system is well-organized infrastructure and facilities
4. social services, economic and other:
5. The well-organized central region of production;
6. well-organized urban settlement area.

The elucidation of Article 22 paragraph (3) of Law Number 26 Year 2007 on Spatial Planning stated that: spatial planning districts / cities serve as guidelines for local authorities to establish the location of the development activities in the use of space as well as in formulating development programs related to the utilization space in the area and were essential in giving guidance on the use of space, so that the use of space in the implementation of development always in accordance with the spatial planning districts / cities that have been defined.

Wisdom spatial directions Grobogan which will provide basic guidelines for the development of the region with regard to government policy as follows:

1. Maintain and create harmony use of space among the various sectors of interest.
2. Support the creation of a well balanced development between regions and between sectors.
3. Ensuring a sustainable development.

e. Ensuring surveying, from village to village in order certification of land rights.

Conduct Land Use.

Used in accordance with the ability of the land, so that land use dangan contradict the principles of land use and social function of land rights. With the increasing number of population resulting in increased demand for land. It just is not balanced soil conditions which are relatively limited so frequent conflicts of interest between one another. Thus a program to regulate land use aimed at business:

a. Growing understanding about the importance of land use planning and in accordance with the ability of soil in order to achieve optimal use of the land;
b. Develop plans to use land, rising national and regional level.
c. Develop technical guidelines on the allocation and use of land in rural and urban areas, including the procedures of land use plans.
d. Conducting the survey as an ingredient to make maps of land use, land capability map, and maps of the area kritia.

Conduct Maintenance of Soil and Environment

existence of the phenomenon Indonesian population density is high and socio-economic circumstances of most Indonesian people are low, mengakibattan the exploitation of natural resources, especially land and kesusilaannya exceed the carrying capacity, the indicator is a change in use of land does not fit anymore the allocation and pricing of land that has been difficult to control and can damage existing natural potential. As more and the expansion of productive land-consuming higher.

a. Therefore the program to curb the use of land. People aware that the maintenance of the land, including adding fertility is the duty of all land-rights holders.
b. Giving consideration in land use in any application for land rights, land and the environment should be directed to operations of land use change, this is to prevent the use of land which is not in accordance with the ability of the soil and cause waste in the use of land.
c. Carry out an environmental impact assessment (EIA) prior to an established industrial businesses or factories. This EIA will be able to give you an idea the impact caused by an industrial activity environment.
d. Monitoring the use of land.

From this land chess program orderly berkadian directly with the problems of land and the environment is orderly orderly use of land and land maintenance, while the other two orderly land is seen as a supporter.

Changes to non-agriculture Agricultural Land Use.

a. Understanding Urban

Change is change, transition, exchange, use of the process works, use, wear something so that the change is defined as a process to change or transition, the exchange, in terms of using and discharging (Muliono, Anton M., et al.: 1990 , p.405)

Land in the BAL by definition, is a space context, namely as a factor of production as well as the (container) for humans to organize or establish a life and livelihood (Soni Harsono: 1992 p.3)

Changes in the use on a plot of land can occur because the act or acts of man or occur due to natural events such as natural disasters themselves and others that need to be known beforehand which land use changes are intended in this discussion.

The process of land use change is always associated with the subject modifier that is, the population. High growing population will follow the increasing number of activities. It is always followed by increasing the frequency of changes in land uses, especially agricultural land into non-agricultural besides that investment in the form of land into the motivations that implicated. This is reasonable because the ownership of land may serve as a financial safety valve in times of economic instability.

b. Legal Basis

If the view hierarchy in law, then the legal basis of land use change regulation is Article 33 paragraph (3), Article 14, Article 15 BAL.

Article 33 paragraph (3) is the legal basis the legal relationship between the ground and the subject matter, the state acts as the subject. The state's role as the subject, of course, have a purpose, and the purpose of which is elaborated in Article 2 (1) of the BAL, which states the earth, water and air space including the natural resources contained therein controlled by the state as the power of the people.

Article 4 (2) it gives the authority, there are three types of authority to use the land in question as well as the land and water as well as space on it than is necessary for the sake of which directly relates to the use of land within the boundaries according to the BAL and regulations a higher law. Means in the aforementioned article required the authority of a general nature, this authority does not cover what is contained in the body of

3. Current
   a. Fluent in service
   b. Fluent berlalulintas
   d. communicate fluently in
4. Healthy
   a. Healthy physical terms.
   b. Healthy spiritual terms.

In order to achieve the ATLAS situation indeed requires setting up a space on the ground as the ingredients. According to Article 2 of Law Number. 26 In 2007, the principles of spatial planning as follows:

1. The use of land for the benefit of an integrated all efficient and effective, harmoniously balanced and sustainable (sustainable).
2. Order, equality, justice and legal protection
   Because according to Law Number. 26 of 2007 (Article 1 and Article 14 paragraph 12. The land use is part of spatial planning together with the air use planning, water use planning, and planning for other natural resources. And thus the use of accounting principles tanahpun included in the principles of spatial planning as mentioned above.

Chess tongue Land Affairs.

Land is the most important requirement in the implementation of the development. Land to be processed or often referred to as the land is intended to support a wide range of human activities such as, for agriculture, settlement, place of business, industry and others. the position of the land is important is often not matched by uasah-effort to overcome various problems arising in the land sector, then, was issued discretion of the area of land which is famous Chess Conduct field of the land, contained in the Presidential Decree (Decree) No. 7 of 1978. Chess Land of Conduct regulates:

1. Conduct Land Law
2. and Order AdministrationLand
3. Land UseConduct.
4. Conduct Maintenance of Soil and Environment

As for the content and purpose of each order of land can be described as follows:

Conduct Land Law.

In the practice of everyday life, many problems occur mastery, possession, use of land contrary to the provisions of the national agrarian law. Included in these violations were:: ownership or control of land that is not characterized by a specific right and be regarded as illegal possession, including land ownership exceeds maximum land ownership has been determined.

Their violations of agrarian law in force due to the provisions of the land law has not been understood by the citizens, and this lead to consequences for the level of public awareness that inasih low, also the sanctions that have been defined never held against peyanggaraan occurring such as enacting land purchase by the village head in clear violation of the provisions of land law.

On the basis of the above facts, orderly land law is directed at the program:

a. Increasing the level of public awareness through counseling / agrarian law enforcement, especially the rights and obligations relating to land ownership, the importance of proof on the ground (certificate), ground persertifikatan procedures, the importance of the preservation of soil maintenance.
b. Completing the rules and regulations the land sector, for example, laws on land use, as the executor of Article 14 and Article 15 BAL.
c. Sanctions firmly against violations teljadi.
d. Improving supervision and coordination of the implementation of the agrarian law.

Conduct Land Administration

land affairs procedure is too cumbersome cause people unwilling to take care of their land rights and let the circumstances in accordance with the applicable provisions of the agrarian law. On the basis of the above facts orderly land administration program focused on efforts to:

a. Accelerate the process of service concerning the affairs of Land to improve the implementing organs, increasing the number of executive officers, eliminating unauthorized charges.
b. Provide maps and land use data, as well as socio-economic situation of society as an ingredient in planning the use of land for development activities. Map and such data should be provided at all levels of the institution closely connected with agrarian tasks.
c. Preparation and list of land owners, land excess of the prescribed maximum limit, absente lands and state lands.
d. Enhance the lists of activities, both in the offices of the land or in the office PPAT, such as a list of book-making PPAT deed.

At a seminar on land use natural resources in 1989 in Jakarta stated that agrarian land planning must be based on principles:

1. The principle use of Arts *(principle of multiple use)*
   This principle requires that the agrarian structure plan (ground) must be meet some aspects of the specific ground rules. This principle has an important role to overcome the limitations of the area, especially in the area whose population is already very solid.
2. The principle of maximum use *(principle of maximum production)*
   This principle is intended to use an agrarian including land aimed to obtain physical results as high as to meet people's needs are urgent, is the physical result is the product of the soil, for example paddy produce rice or other food ingredients.
3. The principle of optimal use *(principle of optimum use)*
   The principle is intended to make use of an agrarian including land can provide economic benefits as much as possible to the people who use or exploit natural resources without destroying itself.

In the legal literature agrarian principles in land use are usually divided into two groups, namely land use for rural areas *(rural land use planning)* and urban areas *(urban land use planning).* Land use of rural areas based on the principles of Sustainable, Optimal, Dressage and Balanced (LOSS):

1. Lestari
   According to this principle, the soil should be harnessed and used for long periods of time, while maintaining the physical structure such as maintaining soil fertility levels. With regard to the principle of this sustainable, positive impact obtained are:
   a. There will be saving in the use of land, this can be achieved by ensuring that the lands that are not yet used to the direct interest of human life both for agriculture and for settlement, maintained continuity. Where expansion territory for agriculture or settlement had to be done was about his expansion of the region in trying slowly as possible. This is to prevent the area of land is limited not all be used to meet the interests of human life, regardless of the resources of the land itself.
   b. In order that the current generation can meet its obligations to bequeath the land resources for generations to come. Land does not belong to the public now, but the land belongs to the community first. people now and people will come.
2. Optimal
   According to this principle, the use of the land should bring results or economic gains as high. An important factor in this is the principle of optimal match between the physical ability of land to the type of activities to be implemented. To determine the suitability of soil data required physical abilities. With this data and the needs of the people in the area concerned, it can be determined that a ground which can provide economic results as high when used for a particular activity or not. For example, a suitable soil built reservoirs and communities in the region need to irrigate rice fields, the construction of reservoirs that are considered to provide economic benefits. If there are two activities or business requires the same location the business or activities that can provide higher economic gains to be won.
3. Compatible and Balanced
   According to this principle, a room on the ground should be able to accommodate a wide range of interests of both individuals, communities and countries so as to avoid any conflict or conflicts in the use of land. Contradiction in the use of land is sometimes unavoidable, especially two or more activities require the same locality for this need to create a list of priorities. With reference to the scale of these priorities can be determined which activities should take precedence. Setting priorities should be based on the "urgency" of these activities. The point of these activities should be included in the category of public interest.

While the principle of land use for urban areas based on the, principles of ATLAS, the Safe, Orderly, Current and healthy.

1. Safe, secure is defined as:
   a. Safe from fire hazards
   b. Safe from crime
   c. Safe from the danger of flooding
   d. Safe from the dangers of traffic accidents.
   e. Safe of unemployment
2. Conduct
   a. Conduct in service
   b. Conduct in the structuring of urban areas
   c. Conduct in traffic.
   d. Conduct in law

3. The land use planning is an attempt to layout the growing of non-governmental initiatives in accordance with the scale of the priority list, so that on the one hand can be achieved in an orderly use of land, while on the other hand still respected the prevailing regulations.

Interest Land Use

Land must be able to support the implementation of national development. This means that the purpose of land use must be in accordance with national development objectives. Implementation of Article 33 paragraph (3) of the 1945 can be found in chapter 14 BAL and article 2, paragraph (3) BAL stating that the stewardship of land by the government is aiming for:

1. Brought orderly and orderly land use and environmental preservation.
2. terarahnya land use designation and certainty for individuals and legal entities who have a legal relationship with the land.
3. terarahnya provision of land for various needs of development activities, organized by the government and the public in accordance with the spatial.

So that land use can actually improve the welfare and prosperity of the people, then the actions you can take are:

1. Ensuring that does not happen misplaced land use, meaning every activity that memerluhan soil must be considered on the ground with the data prosperity will kegiatanan held. Furthermore it should be noted also that there are social awareness around the location of the land. This is intended to prevent the unrest-unrest caused by construction activities. Another thing to consider in order to prevent the use of land that one place is the economic factor, this last factor is important to determine the economic benefits to be gained from such activities so that it can improve the welfare of society.
2. Attempt to avoid the use of land mismanagement. That is all parties, both individuals, communities and legal and government agencies must implement their obligations preserve land under their control. This prevents kalitas declining land resources will eventually arise damage to the soil decreased levels of soil quality, in case of destruction of land, obviously reduces efforts to improve the welfare and prosperity of landowners, communities and countries. Even the destruction of land requires no small cost to rehabilitate them, also take time to restore the level of the soil quality in its original state.
3. Ensuring their control over land development community needs. This control is important to avoid conflicts of interest in the use of land. If this land use plan of activities associated with the construction activities to avoid conflicts or contradictions in the use of land needed priorities. Thus, if there are two activities that require the same ground location, the activities included in the scale of priorities should take precedence.
4. Ensuring that there is a legal guarantee for the rights of citizens on the ground. Legal guarantee is important to protect people whose land was taken for the sake of development projects. For this implementation of land acquisition should be in accordance with the legislation in force. The aim is to avoid the perception that the development carried out at the expense of the public interest.

In order to achieve land stewardship is the welfare and prosperity of the people, the land stewardship plan development should be based on the principles of good land use plans and land use designation inventory. The principles of land use according to the literature of the agrarian law into two groups, namely the principles of land use in rural areas and urban areas. This difference is caused by the difference in emphasis between the two land use.

Principles of Land Use

Conceptually land use prior to the issuance of Law Number. 26 In 2007, distinguished on land use urban and rural land use. This division is based on the difference between the two regional land use that is urban and rural areas. The use of land in rural areas focused on agriculture, while the more urban areas on non-agricultural activities such as housing, offices, shops and so on. The use of these consequences also on the difference principle is used in each of these regions.

Another factor that determines the difference principle is a characteristic of life of rural communities and urban communities. Rural community life that is still characterized by traditional, this means that the dynamics of village life is lower than the life of an urban community. Indeed, if in view the composition or the number of people it is more of Indonesia's population live in rural areas, but if in view of the overcrowding, the urban area has a high population density, the number of densely populated and the opening of the influences of outside cultures that may cause various problems either in social, economic, security, health, and politics.

In order to achieve the land use right, which is the people's welfare and prosperity of the people effectively, the manufacture of land-use planning should be based on principles or specific principles. These principles are often referred to the principle of land use.

Indonesia's ownership of urban land must remain a social function (Article 6 BAL). Although property rights are rights that the strongest, fullest, and hereditary. But if it really proved to the public interest, then it could be deprived of the rights owner. The problem is the lack of regulations that limit the authority of a subject of the right to own property. Indeed DI No. 59 / DDA / 70 states that ownership of land for building limited to no more than five fields, with the exception of a permit.

In relation to the environment, it is clear there has been a lack of clarity led to the management of this case can not fulfill the basic needs of both townspeople and villagers, as a result of the lack of infrastructure and lack of environmental facilities because of delays in the provision of infrastructure by the government, so it is not surprising that people take initiative organize themselves at the expense of facilities and general prasarara regardless of environmental interest or the wider region.

Article 3 of Law No. 23 of 1997 on Environmental Management, abbreviated UUPLH. states that the environmental management organized by the principle of national responsibility, a principle of sustainability and utility aims to achieve sustainable development environment in order to complete Indonesian human development and the development of Indonesian society that is faithful and devoted to God Almighty. Definition of sustainable means to achieve such capabilities. Term preservation of the environment's ability to bring harmony and balance to the harmony between development and the environment, so the notion that, that development and environment are not opposed to one another. (Harjosoemantri Koesnadi, 1994, p.114-115)
While the formulation of the problem of this research is the *factors that influence the efficiency of land use in Grobogan? How attempts are made to realize the efficiency of land use in Grobogan?*

Literature
Definition Land

In juridical sense of the term of land contained in article 4, paragraph (2) of Law No. 5 of 1960 on Basic Regulation of Agrarian, hereinafter referred to as BAL. As is the land according to Article 4 paragraph (1) BAL namely: "The sorts of rights to the surface of the earth." Article 4 (2) states that "the rights to land as defined in Article 1 of this confers authority to use land is concerned as well, the land and water and the room above it necessary for the benefit of the direct use of land within the boundaries according to this law and other applicable laws higher

"Fromthe above description can take an understanding that the land is one of the elements of the land. Due in the literature there is the term used a lot of ground, so if in many ways researchers use the term ground, it is still in a sense that is the soil in this study is the land.

In accordance with the activities of rated efficiency if certain input obtained results *(output)* maximum, or a particular outcome minimal input required. Efficiency will improve the ability to grow and develop, while "efficiency" will encourage activities that experienced a negative development towards the damaging process will be faster.

Land Use
Definition

In the current development increases the need for land, materiai development activities both in cities and in villages requires a lot of land as a form of realization. Urban expansion effort either change its expansion by opening both to the settlements in the suburbs as well as the expansion of business-USANA according to the system environment is constantly require land for that purpose.

In short almost all businesses require a land development as the ingredients, so it is not impossible conflicts of interest. Abdurrahman explained the relationship of land and development that there are places that seem conflicting with each other with regard to land issues in development. (Abdurrahman: 1990, p.3)

Tata implies directives, guidelines and provisions setting and implementation of an action thus conceptually, is a land-use are the order of the allocation, use, inventory, and maintenance of land, which is in the form of directives, guidelines and provisions. (Soni Harsono: 1992, p.23)

According to Article 1 point 2 UUPR., Is a form of structural layout and space utilization patterns whether planned or unplanned, then Article I point 3 determines that spatial planning is the process of spatial planning, utilization of space, and control the utilization of space. Due to land use and spatial forms part, together with the air use planning, water use planning, and planning for other natural resources, it is thus covered tanahpun use planning sense in terms of layout as described above. Thus the notion of limited land use in the form of structural and land use patterns, whether planned or unplanned.

So the notion of land stewardship is a series of activities to plan, implement and control the use of land. There are three definitions that will be put forward, namely:

1. The land use planning is a series of activities to regulate the allocation, use and inventory of land in a planned and organized in order to obtain the benefits of a sustainable, optimal, balanced and harmonious for the greatest prosperity of the people and the state. (taken from the book "The implementation of agrarian tasks")
2. Sustainable land use is structuring, supply, allocation and land use planning in order to implement the national development.

EFFICIENCY IMPROVEMENT EFFORTS IN THE AREA OF URBAN LAND USE (STUDY IN THE DISTRICT GROBOGAN)

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ABSTRACT

The problems caused as a result of the division the city is the housing problem, the problem in the field of traffic, the problem of shortage of school buildings, pressed rice fields in the border areas outside the city and public administration issues. Weak areas are places where the process of urban sprawl can not walk or virtually stopped. The regions have a better economic potential to be an area that has a strong appeal to urban sprawl. Such areas can be said to be a strong area. Problems in this study: Factors that influence the efficiency of land use in Grobogan? How attempts are made to realize the efficiency of land use in Grobogan ? This type of research is normative juridical, specification of this research is descriptive analytical. Data were obtained through library research, and interviews. The research result can be concluded that: (1). Grobogan continues to experience population growth, not in accordance with the provision of land in urban areas, so the need for regulations governing land use; (2) In Grobogan less get special attention as in the case of spatial structuring of hawkers, so it needs improvement local regulations in order to provide legal certainty.

Keywords: Efficiency of Urban Land Use

INTRODUCTION

Most cities in the world are experiencing very rapid growth. Every year millions of people move from rural to urban areas even though the big city in fact is already unable to provide sanitation services, health, housing and transportation to its citizens.

Cities not only extends horizontally but also vertically, as a reaction to the phenomenon municipalities will have the expansion, which is of course followed by some of the consequences arising problems, problems caused as a result of urban sprawl is a problem Housing. problems in the field of traffic, the problem of shortage of school buildings, terdesaknya rice fields in the border areas outside the city and public administration issues. The issues that would require all parties, especially the role of planners and regulators urged the city to immediately be able to handle it.

The consequences of an increasing number of city dwellers in Indonesia requires extra thought the government to provide land in order to be a viable settlement areas in the future. Moreover, the historical development of the cities in Indonesia so far has shown a lot of areas of the city that grew out of planning.

Research and Development Research Center and the Land Development Department of the Interior in cooperation with the architectural part of the Faculty of Engineering Research Center for Design and Development Issues Gadjah Mada University in 1977, summarizes the problem of urban land that occurs in various countries. The results of the research revolves around the following matters:*(ResearchLand:*Ministry of Home Affairs, 1977, p.6-11)

1. Supply (Supply) Soil increasingly limited.
   Limitations that arise due to various circumstances below:
   a. Physical geographical situation the city or state is limited in extent, so that the city can be developed is limited.
   b. Although there are limitations in the city land supply in stock the city, most of the land area of the city that is not used optimally by the owner or deliberately used for the purpose of speculation.
   c. The city required amount is far beyond the existing land supply, mainly because of urbanization exceeded the carrying capacity of the land inventory in major cities.
2. The increase in land prices is not entirely due to the efforts of development or improvements made to the land owner, or in general, but mostly because of lack of infrastructure investment by the government. The value of the price increase due to development investments need to be achieved by the government so that the results can be reused in land prices that are not controlled.
3. This is a consequence of the very limited land supply in the face of the enormous need. The increase in the price of land is generally also due to investments in land is a great opportunity for a lot of circumstances for the benefit of society.
4. It is difficult to acquire land for construction in urban areas either by elements of private and government construction. Governments generally have very limited sources of financing for land acquisition for the construction of the city.
5. Despite the limited land supply, but in reality for some cities, according to a study to be found that there is still land in the city is not used (vacant land). Most of the land in the city is less, used as appropriate.

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