

# PROSIDING

SEMINAR INTERNASIONAL  
FAKULTAS HUKUM UNIVERSITAS LAMPUNG

## International Conference on Fundamental Rights (I-COFFEES)

Bandar Lampung, 7 September 2018



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**FAKULTAS HUKUM UNIVERSITAS LAMPUNG**

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**PROSIDING**  
**SEMINAR INTERNASIONAL**  
**FAKULTAS HUKUM - UNIVERSITAS LAMPUNG**

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**SEMINAR INTERNASIONAL**  
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**Welcoming Address**  
**The First International Conference on Fundamental Rights**

I heartily welcome you for the prestigious occasion of our Faculty. The idea of putting the researchers, academics and practitioners of an educational institution is so inspiring: what was once planted as a sapling is now all grown into a large tree. Here I can see a blend of extraordinary and educated people who have made this day arrive; they have come to us from each and every corner of the city.

This year, I find it to be my pleasure to address you people who are the minds of today and the responsible citizens of tomorrow. I and whole of our dedicated Committee team appreciate the efforts put in by researchers, academics and practitioners to come and presented each of paper that will be published. So, here I feel privileged to extend my warm welcome to all who are constantly extending their support and love to fulfil I-COFFEES.

The committee have received 146 paper proposals and we accepted 128 papers, but unfortunately only 63 papers will be presented during the conference, encompassing 12 themes relating with fundamental rights.

Taking further, I on the behalf of everyone present here, heartily welcome all the presenter and participant, the guest of honour, and all the keynote speaker. I am especially thankful to Prof. Yushiro Kusano, Dr. Kyaw Nyi Nyi, Ph. D., MHRD, MSc., Prof. Dr. M. Idriss Fassasi, LL.M., Prof. Hikmahanto Juwana, S.H., LL.M., Ph.D., and Prof. Muhammad Akib for accepted our request and readily agreed when he looked at today's event and its program. So, I hope for everyone to have an endeavors and life experiences from I-COFFEES.

Bandar Lampung, 7 September 2018  
Chef Committee,

  
Dr. Rudi Natamiharja, S.H., DEA.

## TABLE OF CONTENTS

### Business & Economic Rights

|  |    |
|--|----|
| Building a Non-Bank Islamic Business Based on Sharia Economic Law .....  | 1  |
| <i>Lina Maulidiana</i>   |    |
| Management of Sharia Mutual Fund in Islamic Economic Law of Indonesia<br>(Study Collective Investment Contract (CIC) Mutual Fund)..... | 16 |
| <i>Nunung Rodliyah and Ade Oktariatas K</i>  |    |
| Implementation of the Rights of Businesses and Economic<br>in the Globalization.....   | 30 |
| <i>Suyatno</i>   |    |

### Constitutional Democracy & Election

|  |    |
|--|----|
| Threshold the Presidential Nomination in 2019 Elections .....  | 45 |
| <i>Eka Mandayanti</i>  |    |
| The Election Organizers Ethics Council of Republic of Indonesia (DKPP RI):<br>New Chapter of Ethical Court and Democracy.....                                | 58 |
| <i>Ferry Fathurokhman</i>  |    |
| Critiquing the Problem of Threshold Against the Constitutional Rights<br>of Political Parties in Proposing a Candidate For President and Vice President..... | 67 |
| <i>Ricca Anggraeni, Cipta Indralestari Rachman and Muhammad Ihsan Maulana</i>  |    |
| A Model Political Education to The Society to Create Democratic Election .....   | 81 |
| <i>Muhammad .Iwan Satriawan and Evie Faridaturohmah</i>  |    |
| Redesign of Constitutional Ethics for Constitutional Court Judges Based<br>on Pancasila Law in Realizing the Goal of the 16th SDGs .....                     | 90 |
| <i>Muhtadi and Indra Perwira</i>   |    |

### Criminal Law Development

|   |     |
|---|-----|
| International Cooperation againt Transnational Corruption .....   | 100 |
| <i>Ahmad Baharuddin Naim</i>  |     |
| Local Wisdom Existence in Indonesia's The Sentencing System .....   | 110 |
| <i>Erna Dewi and Damanhuri Warganegara</i>  |     |
| Optimizationof Criminal Law Enforcement Model Based on Integral<br>and Scientific Approachesagainst Crime Spoliation (Begal) in Lampung ..... | 136 |
| <i>Heni Siswanto and Aisyah Muda Cemerlang</i>  |     |

|  |     |
|--|-----|
| Penal Mediation as an Alternative Model of Restorative Justice<br>in The Criminal Justice System of Children.....            | 150 |
| <i>Henny Saida Flora</i>   |     |
| Death Sentence in Hindu Perspective .....  | 162 |
| <i>I Ketut Seregig</i>   |     |
| The Implementation of Human Rights Instruments in Criminal Victims Protection .....  | 182 |
| <i>Ino Susanti, Waty Suwarty H. and Petrus Irawan Panjaitan</i>  |     |
| Restructuring the Corruption Law Enforcement Model<br>that Optimizes Corporation as Corruption Subject of Criminal Act ..... | 196 |
| <i>Sunarto D.M. and Heni Siswanto</i>  |     |

### **Environmental & Natural Resource**

|   |     |
|---|-----|
| Considering Affected People Rights as a Human Rights in the Land Acquisition<br>for Public Interests..... | 210 |
| <i>Ade Arif Firmansyah, HS. Tisnanta, and Malicia Evendia</i>   |     |
| Land Law Position in Indonesia: the Persfective of Government Regulation No.<br>47/2015 .....             | 220 |
| <i>Adhimaz Kondang Pribadi</i>  |     |
| In Making of a Responsive and Sustainable Environmental Budgeting in Province of<br>Lampung.....          | 239 |
| <i>Marlia Eka Putri A.T and Fathoni</i>   |     |

### **Good Governance & Public Service**

|   |     |
|---|-----|
| Authority of Civil State Apparatus (ASN) Doctor Post Revoking<br>The Registration Certificate .....   | 246 |
| <i>Apriyanto</i>  |     |
| The Effectiveness of the Regulation of Minister of Health Number 33 in 2015<br>Concerning the Planning of Health Human Resources Need ..... | 256 |
| <i>Defi Fitri Agustiani</i>   |     |
| The Provincial Government Authority in Conducting Programmed Immunization.....  | 268 |
| <i>Miravianti</i>   |     |
| The Regional Government Authority in Provisioning Regional Regulation<br>of Non-Smoking Area .....  | 283 |
| <i>Rika Tri Okviyanti</i>   |     |
| Analysis of Public Service Survey in West Lampung .....   | 292 |
| <i>Robi Cahyadi K, Rudy, Rudi Wijaya and Chaidir Ali</i>  |     |

## Human Security

|   |     |
|---|-----|
| Legal Protection of Nurse in Providing Health Services.....   | 305 |
| <i>Ambar Widiyanto</i>  |     |
| The Legal Analysis of Vehicle Reposseossion Finance Companies.....  | 314 |
| <i>Bani Muhammad Alif</i>   |     |
| Legal Aspects of The Informed Consent Completeness, Related with Patient's Rights and Duties And Responsibilities of The Hospital .....                                   | 324 |
| <i>Diah Harsowati</i>   |     |
| The Role of Government in Traditional Health Services.....  | 336 |
| <i>Henita</i>   |     |
| The Effectiveness of Regulation of Minister of Health Number 97 in 2014 to Delivery by Midwives in Primary Health Care Facilities to Reduce Maternal Mortality Rate ..... | 348 |
| <i>Rina Apriyanti</i>   |     |
| Implementation of Health Social Security in Human Rights Perspectives in Indonesia .  | 356 |
| <i>Sri Zanariyah, M. Najib Imanullah, Arief Suryono, and Adi Sulistiyono</i>  |     |
| The Rights of HIV/AIDS Patients' Care: Medical Secrecy and Medical Record .....   | 370 |
| <i>Suci Hawa</i>  |     |
| Rights to Personal Data Base Warranty as Rights of Privacy.....   | 384 |
| <i>Sulistino and Muhammad Syaiful Dahlan</i>  |     |

## Indigenous Rights

|  |     |
|--|-----|
| Why Indigenous Community Matter ? : The Persistence of Boti Tribal Community to Survive Their People, Lands, Norms And Values .....  | 392 |
| <i>Budiyanto Dwi Prasetyo and Handoyo</i>  |     |
| The Role of Indigenous Rights in the Management of Natural Resources Conservation Biodeversity Area and Ecosystems: Perspective Study Based on Politic of Law Paradigm ..... | 407 |
| <i>Danggur Konradus</i>  |     |
| Why Do Belief of Followers Rebel ? The Indigenous Religion and Citizenship.....  | 425 |
| <i>Dewi Nurhalimah</i>   |     |
| The Paradox of National Development Indigenous Peoples under Human Rights Perspectives.....  | 436 |
| <i>Mas Nana Jumena and Afandi Sitamala</i>   |     |



## Individual Justice

|  |     |
|--|-----|
| The Protection of the Right of Foreign Workers Based on the International Convention on the Protection of All Migrant Workers and Members of Their Families 1990 and the Implementation in Indonesia ..... | 448 |
| <i>Desy Churul Aini and Desia Rakhma Banjarani</i>   |     |
| Warning Violations under International Humanitarian Law .....  | 469 |
| <i>Dian Mahardikha</i>   |     |
| Cooperation Agreement between Pharmacist and Apothecary Owner .....  | 480 |
| <i>Refmidawati</i>   |     |
| Pancasila's Freedom of Speech .....  | 488 |
| <i>Rudi Natamiharja, Heryandi and Stefany Mindoria</i>   |     |

## Law & Development

|  |     |
|--|-----|
| The Notary's Role in the Implementation of Tax Amnesty in Batam City .....   | 499 |
| <i>Agus Riyanto, Lenny Husna, Padrisan Jamba, and Frangky Silitonga</i>  |     |
| Prohibition of Land Ownership for Citizens of Non Indigenous in the Special Region of Yogyakarta .....                       | 511 |
| <i>Shandi Patria Airlangga, F.X. Sumarja and Sri Sulastuti</i>   |     |
| Juridical Review on Human Rights Protection of Indonesian Overseas Workers Based On National Law and International Law ..... | 519 |
| <i>Siti Azizah and Desia Rakhma Bajarani</i>   |     |

## Legislation Development

|  |     |
|--|-----|
| Building and Empowering Rural Society through Village Fund .....   | 532 |
| <i>Ahmad Taufik</i>  |     |
| Reconstruction of Protection the Right of Land Within Tradition Law Society in The Perspectif of Human Right ..... | 546 |
| <i>Candra Perbawati</i>  |     |
| The Construction of Village Regulation Formulation .....   | 559 |
| <i>Rudy, Yusnani Hasyimzum, Roro Rukmi W P, and Siti Khoiriah</i>  |     |
| Urgent Construction of Indigenous Village Regulation in Indonesia .....  | 574 |
| <i>Yulia Neta, Rudi Wijaya, Tia Nurhawa</i>  |     |

## **Transportation**

- The Influence of Mass Media on Traffic Awareness Consciousness and Transportation in The City of Bandar Lampung..... 583  
*Eddy Rifai, Husna Purnama, Nila Sari Dewi and Akbar Prima Rifai*
- Effectiveness of the Fine of Traffic Compliance Based on Law Number 22 of 2009 on Highway Traffic and Transportation In Baturaja City ..... 603  
*Nora Soraya Sinabutar*
- Freight Forwarding Through Air Cargo: (Study on Garuda Indonesia Airline Company) ..... 615  
*Ratna Syamsiar*
- Disability Rights Protection on Public Transportation Facilities In Bandar Lampung ... 633  
*Rizky Pradana Putra Laksana Panjaitan and Ria Wierma Putri*

## **Women & Children**

- Rule of Law Marriage in Indonesia on Sanctions Prohibition of Criminal Practice Unregistered Marriages ..... 646  
*Achmad Yustian Jaya Sesunan*
- Models of Policy Making: Juvenile Detention Center and Self-Reliance Program..... 657  
*Bayu Sujadmiko and Intan Fitri Meutia*
- Legal Protection to Support the Implementation of Breastfeeding Counseling ..... 663  
*Lenny Syahnimar*
- Legal Protection of Children: Child Soldier Recruitment in Somalia ..... 679  
*Bahjah Ayu Bakta and Misbahul Ilham*
- Implementation of Children Rights in the Field of the Law..... 688  
*Nikmah Rosidah dan Chaidir Ali*
- The Violation of the International Code of Marketing of Breast-Milksubstitutes ..... 700  
in Sumatera Island Indonesia  
*Ritma Fathi Khalida, Upi Fitriyanti and Helen Emdaniar Kawulusan*
- Strengthening Children Education in the Environment Based on Law No. 35 of 2014 on the Amendment to Law No. 23 of 2002 on Child Protection ..... 704  
*Siti Khoiriah and Yeti Yuniarsih*
- Children Rights on Public Sphere ..... 715  
*Thania Christy Corne and Rehulina*
- Violence against Woman and Children ..... 724  
*Yunita Maya Putri*

# PROCEEDING

## THE FIRST INTERNATIONAL CONFERENCE ON FUNDAMENTAL RIGHTS FACULTY OF LAW UNIVERSITY OF LAMPUNG



September 7<sup>th</sup>, 2018  
LAMPUNG - INDONESIA

## **Building a Non-Bank Islamic Business Based on Sharia Economic Law**

Lina Maulidiana

### **Abstract**

Economic activities especially in the field of trade outside of the bank are rapidly developing in Indonesia. One of them is Islamic business such as Kitamart, 212Mart, UMMAR, Sodaqoh Mart, etc. This is proven by the increasingly widespread business people based on sharia economic law, however there is no specific regulation that safeguards that business. Problem formulation: 1. What is the model of Islamic business in Indonesia? 2. What is the role of government in building Islamic business in Indonesia based on sharia economic law? The result of the study concluded: Islamic business practitioners use sharia business in the form of *syirkah*, namely business contract which are not contain *riba*. (*Al-'Aini in 'Umdah al-Qari'*) *gharar*, in- doubt transaction deception or action that aims to harm the other party or in other sense that a contract contains an element of fraud, because there is no certainty, whether regarding the existence or not of a large, small contract object regarding or submitting the object of the contract and does not contain *maisir*, business of luck like gambling. This has not yet developed because it's difficult to trace. Government's involvement in building the islamic business outside the banking system is still limited to the fatwa of the National Sharia Board and the Compilation of Islamic Laws. There is no specific regulation currently in place to protect Islamic business in general. The Government in performing its role, accordance with regulations, it is only limited to the bureaucracy of licensing, guidance and supervision carried out by the Supervisory Team established by the Director General of Domestic Trade. Suggestions: 1. The government needs to conduct socialization to the community especially for the business of Islam, so that they are interested in doing Islamic business based on sharia economic law. 2. There needs to be an implementation of the government in conducting guidance and supervision of Islamic business people, so that the sharia business can be on a par with conventional business equivalent to conventional business.

**Keywords:** *Islamic Business, Sharia Economic Law*

## A. Introduction

Humans in acquiring their necessities of life in the association of society conduct legal relations and agreements based on the will of agreement. The agreement arises due to a law that bind both parties, in this connection an agreement is required. Book III article 1313 of the Civil Code provides an understanding of the agreement, namely: "An act by which one person or more ties himself to another person or more"<sup>1</sup>.

The relationship between these two people is a legal relationship where the rights and obligations of the parties are guaranteed by law. An agreement can lead to an engagement, in the form of a series of words that contain a promise or ability that is spoken or written. This is confirmed by the provisions of article 1338 paragraph (1) of the Civil Code, namely: "An agreement made legally applies as a law for the author"<sup>2</sup>.

An agreement occurs legitimately if each party is free to bind it, if there is a lack of will in the agreement, then it can be canceled. An agreement is deemed to have no freedom of will if it occurs because of coercion, error, and fraud. Business practices can be found in a variety of agreements (contracts) used by business people likewise, the terms used are quite varied, some use agreements, contracts and consents, so the contract is something very important in the course of business activities. The contract will link businessmen with other businessmen or the relationship between businessmen and consumers. This relationship will facilitate business activities because this relationship will clearly realize the rights and obligations of the parties.

Sharia business is different from conventional businesses that use the interest system as an instrument of profit which is based on the human mind to survive in a temporal economic law. Sharia business uses profit sharing, the process has a strong basis based on the Quran and Hadith that cannot be compared to human thought.

Sharia business based on Islamic principles against *riba*. Sharia business is bound to moral and ethics in accordance with what is taught by the Prophet Muhammad. In addition to having a business purpose, sharia business also carries out the shari'a and commands of Allah SWT as taught by the Prophet Muhammad in doing business and interacting with fellow human beings, in contrast to a more individual capitalist, socialist that gives almost all responsibilities to its citizens and extreme communists . Islamic business establishes

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<sup>1</sup>Code of Civil Law

<sup>2</sup>*Ibid.*, Article 1338 verse (1).

forms of trade and services that are allowed and forbidden to be traded. Business in Islam must be able to provide welfare for the society, provide a sense of fairness, togetherness and kinship and be able to provide the widest possible opportunity to every businessmen.

The mechanism of Islamic financial institutions using a profit sharing system is an alternative choice for the business community<sup>3</sup>. The essence of the mechanism of profit sharing basically lies in good cooperation between *Shahibul Maal* and *Mudharib*. Cooperation or partnership is a characteristic in the Islamic economic society. Economic cooperation must be carried out in all core economic activities such as production, consumption, distribution of goods and services. One of the form of cooperation in islamic business is *mudharabah*. Through *mudharabah* both parties who are partnering will not get interest but get profit sharing from the economic projects agreed upon together.

The union in Islam known as *asy-syirkah* or *al-musyawah*, is one of the transactions or ways to obtain assets to meet the needs of life. The association according to Islam belongs to the *muamalah* group, which is the part of sharia law which regulates human relations with other humans beings related to property. Another part of sharia is worship, which is a law that regulates vertical relations with Allah and the amaliyah in the context of the belief in human relations with God regulated in the aqeedah section<sup>4</sup>. One of the example of a Non-Bank Sharia business that is growing rapidly in Indonesia is UMMAR (Ummah Market), a place to shop for Muslims to fulfill their needs.

Based on the description in the background, the study in this paper is:

- a. Why is Sharia business not yet developed in Indonesia?
- b. What is the role of the government in building sharia business in Indonesia?

The benefits of this research are theoretically expected to add insight into the knowledge of sharia business in particular, for the development of legal science, especially business law and as further research material. Practical Benefitst is expected that the results of this study provide additional knowledge for entrepreneurs and can be used as a material consideration in taking policy for the government related to sharia business issues.

## **B. Literature Review**

### **1. Social Welfare Theory**

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<sup>3</sup> Muhammad. *Tehnik Perhitungan bagi hasidi Bank Syariah*. Yogyakarta :UII Press,2001, p. 13

<sup>4</sup>Akmad Mujahidin, *Hukum Perbankan Syariah*, Jakarta : RajaGrafindo Persada, 2016, p. 81.

The life coveted by all people in this world is welfare. Both those who live in the city and those in the village all crave a prosperous life.

Social welfare in Islam is the belief that humans were created by Allah SWT. Humans do not submit to anyone except Allah SWT. (Q.S. *Ar-Ra'du*: 36) and (Q.S. *Luqman*: 32). This is the basis for the charter of Islamic social freedom from all forms of slavery. Regarding this matter, the Qur'an expressly states that the main purpose of Muhammad's prophetic mission is to release man from the burden and the chain that binds him (Q.S. *Al-A'raaf*: 157)<sup>5</sup>. The concept of social welfare in Islam is that humans are born independent. Therefore, no one even any country has the right to revoke this independence and make human life bound. In this concept, every individual has the right to use his independence as long as it remains within the framework of Islamic norms. In other words, as long as that freedom can be accounted for both socially and spiritually before Allah SWT.

## 2. Theory of Law and Economics

The encounter between economics and law is not a new thing, the economic approach to law can be found in the work of followers of utilitarianism such as Cesare Bonesara (1764), and Jeremy Bentham (1789); the work of political economy Adam Smith (1776) and Karl Marx (1861); and the flow of the American Institutional School which is associated with the work of John R. Commons (1929)<sup>6</sup>. Law and Economics was originally an idea of economics (non-law) which saw the potential to utilize legal instruments to achieve optimal results in implementing public policy, especially in the economic field<sup>7</sup>. Legal experts welcome the idea in an effort to overcome the problems that occur in the community.

Broadly speaking, Law and Economic applies its approach to contributing thoughts on two basic issues regarding legal rules, namely a positive or descriptive analysis, regarding the question of the influence of legal rules on the behavior of the person concerned (the identification of the effects of a legal rule); and normative analysis, regarding the question of whether the influence of legal rules is in accordance with the wishes of the community (the social desirability of a legal rule)<sup>8</sup>.

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<sup>5</sup>Ikhwan Abidin Basri, *Islam dan Pembangunan Ekonomi*, Jakarta: Gema Insani Press 2005, p. 89.

<sup>6</sup>Cento Veljanovski, *The Economics of Law*, Ed. 2, London : The Institute of Economic Affairs, 2006, p. 27

<sup>7</sup>Jhonny Ibrahim, *Pendekatan Ekonomi Terhadap Hukum: Teori dan Implikasi Penerapannya Dalam Penegakan Hukum*, Surabaya : Putra Media Nusantara & ITS Press, 2009, p. 43.

<sup>8</sup>Karl E. Case dan Ray C. Fair, *Prinsip-prinsip Ekonomi Mikro (Principles of Economic)*, Ed 5, diterjemahkan oleh Benyamin Molan, Jakarta : Prenhallindo, 2001, p. 12.

The approach used by Law and Economics on these two basic issues is an approach commonly used in general economic analysis, which describes the behavior of both individuals and companies, which are forward looking and rational, and also adopt an economic welfare framework for testing people's will<sup>9</sup>.

### 3. Sharia Business (*Al-Tijarah*)

In the Al-Qur'an the word 'business' is *al-tijarah* which means trading . *At-tijaratun walmutjar* namely trade, commerce (according to *Al-Munawwir's* dictionary). According to *Ar-Raghib, Al-Asfahani* in *Al-Mufradat* fit the *Gharib* Al-Qur'an, *at-tijarah* means managing property for profit. According to Ibn Farabi, who was quoted by *Ar-Raghib*, *fulanun tajirun bi kadza* means someone who is skilled and capable who knows the direction and goals pursued in his efforts<sup>10</sup>.

In the sharia business it must be bound to the Shari'ah, that: "Then we make you above the Shari'a (rules) of the affairs (religion), then follow the Shari'a and do not follow the passions of those who do not know" (Surat *al-Jaatsiyah*: 18)<sup>11</sup>. Allah SWT forbids His servants who might eat their neighbor's wealth in an evil manner and how to seek illegitimate profits and violate the Shari'ah such as *riba*, gambling and the same from various tricks that appear to be in accordance with the Shari'ah law but Allah knows that what is done is only a trick of the perpetrator to avoid the legal provisions outlined by the Shari'ah of Allah

### 1. Sharia Contract Concept

Terms related to the agreement, in the Al-Qur'an, there are at least 2 (two), namely the contract (*al-'aqdu*) and the word *'ahd* (*al-'ahdu*). The first word etymologically means agreement, engagement, and *al-ittifaq*. Al-Qur'an uses this word in terms of engagement and agreement. This can be seen in surah *Al-Maidah* verse 1<sup>12</sup>. While the word *al-'Adhu* etymologically means time, message, perfection and promise or agreement. This can be seen in the Al-Qur'an of *Al-Nahl* verse 91 and *Al-Isra* verse 34, common word used in *mu'amalah* (business transactions) is the word contract (*al-'Aqd*). According to Islamic jurists, the word contract is defined as follows: "The relationship between *ijab* and *qabul* in

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<sup>9</sup>Steven Shavell, *Foundation of Economic Analysis of Law*, Cambridge : Harvard University Press, 2004, p. 1-3.

<sup>10</sup>Jeni Susyanti, *Pengelolaan Lembaga Keuangan Syariah*, Malang : Empat Dua, 2006, p. 5.

<sup>11</sup>H. Dwi Condro Triono, *Pengantar Bisnis Syariah*, Islamic Business Bootcamp, p. 9.

<sup>12</sup>Wahbah Zuhaili, *Al-Fiqih Al-Islamiy wa Adillatuh*, Mesir : Dar al-Fikr, 1989, p. 80-81.



accordance with the will of the conditions that determine the effect of law on the object of engagement"<sup>13</sup>.

*Akad* comes from Arabic which means bond, conclusion, or agreement. *Akad* in Indonesian language is also called an agreement, whereas in sharia economic law is called *akad*. The word contract is derived from the word *al'aqd*, which means to tie, connect or connect (*ar'rabht*)<sup>14</sup> ". *Akad (al-'Aqd)*, in the sense of Indonesian is called contract, is a logical consequence of social relations in human life. This relationship is destined by God when creating creatures called humans. Therefore the intended contract is a social need that is comprehensive and universal give the clear enough rules in the contract to be implemented in social life at all times.

### **C. Researched Method**

The research method used in this study is normative-empirical (applied) legal research. The type of research is descriptive explanatory. The case studies regarding the Non Bank Islamic business using sharia economic law. Using secondary data and primary data, collecting data through searches and interviews supported by documents and analyzed qualitatively.

### **D. Research Results and Discussion**

#### **1. Sharia Business Analysis Not yet developed in Indonesia**

Al-Qur'an is *altijarah* which means trading, managing property for profit. Allah SWTforbidding His faithful servants to eat the property of others in an evil manner and how to seek illegitimate profits and violate sharia such as usury, gambling and the like from various tricks that appear to be in accordance with shari'a law but Allah knows that what is done is only a trick of my people to avoid the legal provisions outlined by the Sharia of Allah. God excludes from this prohibition the pursuit of property by means of trade (commerce) carried out on the basis of mutual liking by the two parties concerned.

Allah swt said in Sura Nisa: 29:

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<sup>13</sup>Mariam Darus Badarulzaman, *Kompilasi Hukum Perikatan*, Bandung : Citra Aditya Bakti, 2016, p. 247.

<sup>14</sup>amsul Anwar, *Hukum Perjanjian Syariah Studi Tentang Teori Akad Dalam Fikih Muamalat*, Jakarta : Raja Grafindo Persada, 2007, p. 96

"O you who believe! Do not complement each other's wealth with the way that you bathe except in the trade that applies above like you among you. And do not kill yourself. Really, Allah is Merciful"<sup>15</sup>.

In sharia business, which is more of a role as a trigger: Islamic way of choosing sharia business or is it a sharia business that will encourage to Islam? It is a fact that Islam is a sharia business. However, it is also true that the sharia business (sharia economic way) will have implications for Islamic protection. So, the relationship between dialectics, despite the initial Islam being the initial trigger, because it separates the Islamic business can also be used as an entry point for the improvement of Islam and morals<sup>16</sup>. In his seminar, it was conveyed that "A Muslim must be active in the economy without being able to be separated from Islamic values"<sup>17</sup>.

*Ijtihad* as a source of Islamic law provides opportunities for the development of Islamic thought in dealing with all problems in the era of globalization. Various types of transactions begin to emerge to fulfill the needs of daily life. Many new types of transactions that promise multiple benefits in an easy and simple way. In addition, there are also statutory regulations governing the modern-day economic transactions issued by government authorities as an effort to control the existing and developing economic transactions in Indonesian society, the majority of which are Muslim, because the majority of people in Indonesia are Muslim, then the positive law (*ius constitutum*) which regulates this matter must also be examined in clarity according to Islamic law.

One of Islamic business in Indonesia is classified as a type of *musharaka* business (*syirkah / syarakah*), which is between two people in managing a product, where the owner is between two people in managing a product, this sharia business is a concept of beneficial cooperation between two parties in developing their respective businesses.

This is in accordance with the word of God which said: "*And help you in (doing) virtue and piety and do not help help in committing sins and transgressions. And believe in Allah, verily Allah is severe in His punishment*" (Surat *al-Maidah*: 2). Likewise in QS. *Shaad*: 24, "And indeed most of those who are in association some of them do wrong to

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<sup>15</sup>Jenis Sustanti, *Op.cit.*, p. 6.

<sup>16</sup>Agus Triyanta, *Hukum Ekonomi Islam Di Indonesia: Aspek Filosofis Dan Praktis* Penataran Dosen Hukum Ekonomi Islam Indonesia ke-1", Seminar, Asosiasi Pengajar dan Peneliti Hukum Ekonomi Islam (APPHEISI) dan Prodi Hukum serta Pascasarjana Fakultas Hukum Universitas Islam Indonesia Yogyakarta, 19-21 April, 2018.

<sup>17</sup>*Loc.cit.*

some others, except those who believe and do righteous deeds, and very few of them." Furthermore the Rasullullah explained the positive side of association this is in the *Qudsi* hadith of Abu Hurairah Ra, said to the Messenger of Allah "truly Allah said:" *I am the third (helper) of two people who associate, as long as one does not betray his friend, if he betrays then I come out of the union of two people that* "(HR. Abu Dawud No. 3383).

Based on the results of research by conducting a survey to the location of sharia business and conducting interviews by sharia businessmen, using *syirkah* (cooperation, work partners or profit partners), such as on: UMMAR (Ummah Market)/Working Partners (*Syirkah*). Based on the results of an interview by Mr. Emil Edhie Dharma as a businessman in UMMAR (Ummah Market) as Director and Mr. Lio Hudyawan, Putra Fajar, Rizalman, as the manager of UMMAR's business activities said in essence that:

UMMAR (Ummah Market) / Working Partner (*Syirkah*), in capturing its business to do business strategies that do not deviate from Islamic teachings. UMMAR is a sharia business with a strategy in capturing Muslim businesses to join in a single container, namely the Ummah Market (UMMAR). These businessmen invest and UMMAR as managers by collaborating with other parties such as PT. Pos Indonesia as the procurement of facilities or Karang Taruna in West Java about the utilization of youth potential and village potential in West Java within the scope of sharia business.

The management of UMMAR assigns expert personnel called Expert Partners in the management of UMMAR in their business activities. As for the system offered by UMMAR with a profit sharing system in accordance with the agreements made by the parties in the agreement, the absence of coercion, no *riba* and maintaining the principles of sharia and capital they do not use Banking. UMMAR entrepreneurs from members of the Islamic congregation who gathered with the same vision and mission that is to improve the economic level of the Muslim community<sup>18</sup>.

This is in accordance with the Segel and Bruzy social welfare theory that: Social welfare is a prosperous condition of a society. Social welfare includes health, economic conditions, happiness, and the quality of life of the people. Social welfare in Islam, being the most important pillar in a Muslim's belief is the belief that humans were created by Allah SWT. He does not submit to anyone except Allah SWT. (Q.S. *Ar-Ra'du*: 36) and (Q.S.

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<sup>18</sup>Interview, Emil Edhie Dharma and Rian, as businessmen UMMAR (Ummah Market), in 6 Januari 2018.

*Luqman*: 32). This is the basis for the charter of Islamic social freedom from all forms of slavery. Regarding this matter, the Qur'an expressly states that the main purpose of Muhammad's prophetic mission is to release the human being from the burden and the chain that binds him (Q.S. *Al-A'raaf*: 157)<sup>19</sup>.

The concept of social welfare in Islam is that humans are born independent. Therefore, no one even any country has the right to revoke this independence and make human life bound. In this concept, every individual has the right to use his independence as long as it remains within the framework of Islamic norms. In other words, as long as that freedom can be accounted for both socially and spiritually before Allah swt.

One example of the Ummar Minimarket Sharing Production Sharing Agreement Between Ummah Market (Ummar) and Ummar Partners Number: 01 / PKS-MITRA / UMMAR / XI / 2017 that:

Profit Sharing Cooperation Agreement (hereinafter referred to as "Agreement") is made and signed in Jakarta, on Friday, October 6, 2017, the undersigned:

- a. PT. Global Media Perkasa, a Sharia Business development company formed and established with the Notarial Deed of Isadora, S.H., MKn, Number 01 dated 11 January 2011 domiciled at Jl. Taman Empu Sendok, Number 21, Kebayoran Baru, South Jakarta, legally represented by Emil Edhie Dharma as President Director, acting for and on behalf of PT. Global Media Perkasasel is the owner of the trademark Ummah Market (UMMAR) hereinafter referred to as the First Party.
- b. Herdi Yustiadi, Indonesian Citizen, with the address Puri Sriwedari Blok J No.34, Cimanggis, Cibubur, West Java, with the Population Identity Card (NIK) 317-504-161171-0003 which is legally acting for his own behalf or representing the UMMAR Partner community which is subsequently in the Agreement called Second Party .

In the contents of this agreement the parties namely PT. Global Media Perkasa is legitimately represented by Emil Edhie Dharma as Managing Director as Manager and Herdi Yustiadi as Financier.

**Article 1**, General Provisions contain the obligations of the parties, the rights of the parties, expert partners as professionals in the field of UMMAR minimarket management and Force Majeure.

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<sup>19</sup>Ikhwan Abidin Basri, *Islam dan Pembangunan Ekonomi*, Jakarta: Gema Insani Press 2005, p. 89.

**Article 2, Purpose,** The intention is to establish a UMMAR minimarket business partnership and aims to synergize and obtain business blessings and benefits that are mutually beneficial for the Parties.

**Article 3, Object of Agreement and Scope of Agreement**

1. The Object of the Agreement which is cooperated between the Parties is a Minimarket business with the UMMAR Brand (Ummah Market)
2. The Scope of the Agreement which is cooperated between the Parties is a joint business activity of UMMAR minimarket at the location in the Fatmawati Post Office, South Jakarta.

**Article 4, Obligations & Rights of First Parties**

**Article 5, Obligations & Rights of Second Parties**

**Article 6, Equity Participation,** The Parties agree that the total paid up capital is Rp.271,100,000, - (Two Hundred Seventy One Million Hundred Thousand Rupiah) with the details of the capital of the Parties as follows:

- a. First Party amounting to Rp. 135,550,000, - (One Hundred Thirty Five Million and Fifty Thousand Rupiah) equivalent to 50% of the total capital;
- b. Second Party amounting to Rp. 135,050,000, - (One Hundred Thirty Five Million Fifty Thousand Rupiah) equivalent to 50% of the total capital.

**Article 7, Profit Sharing,** The Parties agree to implement a Profit Sharing System in this collaboration provided that it has agreed that the distribution of business profits is as follows:

- a. First Party gets a percentage of profit sharing of 75% of all net proceeds from the shares which will be distributed by 35% to PT. Pos Indonesia as the owner of the location, 15% for the management of UMMAR and 25% for the proportion of capital deposited by the First Party;
- b. The percentage of profit sharing for the First Party will be divided again if there are UMMAR Partners in 1 community in accordance with the proportion of investment of each UMMAR Partner;
- c. The Second Party gets a percentage of the profit sharing of all net profits from the Minimarket business profit of 25%.

**Article 8, Division of Losses**

- a. Loss of business capital without negligence from the First Party as manager, the loss will be borne by the Second Party.
- b. The loss of business capital due to negligence of the First Party as the manager and evidenced by the intentional or managerial element violating the specified requirements, the loss will be borne by the First Party as the manager.

**Article 9, Failure and Sanctions**

- a. Negligence is a deliberate action which can be proven where the First Party does not carry out the obligations that should be carried out.
- b. The form of sanctions given in the form of:
  - 1) Verbal warning
  - 2) Written warning
  - 3) Termination of agreement by the Second Party with obligations for the First Party to return all business capital that has been received.

**Article 10, Term and End of Agreement**

1. The term of this Agreement is for 4 (four) years from the date of signing this Agreement;
2. The term of this Agreement can be extended based on the agreement of the Parties, before the term of the agreement expires;

UMMAR Sharia business introduces Muslims spread throughout Indonesia who have a lot of business lines that emphasize Islamic law. But unfortunately the business network seems to be unknown because of the difficulty of tracking locations, to try to solve this problem, the UMMAR application is present. Islamic business managed by UMMAR is in the form of syirkah (cooperation) which is carried out between UMMAR as the Manager and businessmen as Financiers.

**2. Government participation in building sharia business in Indonesia**

Economic development is one of the aspect of a series of development activities carried out by each component in the community according to its capacity. Economic development can be defined as a process that causes per capita income to increase in a relatively long period of time which is reflected by the improvement or improvement of welfare.

Following this we will try to describe the intended impact in detail in order to be taken into consideration for the government as a policy maker. This description is also useful for employers as decision makers in choosing the type of business that will be carried out in order to provide benefits that are in line with the targets of the business itself. The government is responsible for the empowerment of the people's economy in each of its policies always provides facilities and motivation for the community to increase their income through various efforts to produce goods and services to meet their needs. Sharia business contributes greatly to the empowerment of the people's economy since this business has the advantage of generating enthusiasm for the people's economy. Therefore, the government must always strive to encourage people to take part in the franchise business so that they can be more empowered, which in turn are expected to develop themselves sustainably. In line with that, how to build and develop an original franchise system that is the result of domestic technological innovation so that the multiplier of income and labor can be enjoyed by the public at large.

Sharia business has business prospects for small to medium-scale entrepreneurs who are dominated by the public in general. This is because the franchise business has been proven to be able to increase market access, synergize the development of big entrepreneurs through partnerships, and accelerate the problem of business opportunity gap between the strong economic groups who already have networks with the weak economic class. This system also accelerates the use of products and services to be distributed to regions, because this system allows the participation of regional resources involved to the sub-district level, even to the countryside.

The Directorate General of Domestic Trade in carrying out its duties and functions, organizes:

- a. Policy formulation in the field of controlling distribution and availability of essential goods and / supervision of domestic trade distribution, fostering actors and distribution business, creation and development of business climate, development of trade distribution facilities, trade between islands and borders, trade transactions through the system electronics, increased use of domestic products, increased access to micro, small and medium business markets;
- b. Implementation of policies in the field of controlling distribution and availability of essential goods and / or essential goods, supervision of domestic trade

distribution, fostering actors and business distribution, income and business climate development, development of trade distribution facilities, development of trade distribution facilities, trade between islands and borders, trade transactions through electronic systems, increased use of domestic products, increased access to micro, small and medium-sized businesses markets;

- c. Formulation of norms, standards, procedures and criteria in the field of controlling distribution and availability of essential goods and / or essential goods, supervision of distribution, creation and business climate development, the development of trade distribution facilities, trade between islands and borders, trade transactions through electronic systems, improvement use of domestic products, increasing access to micro, small and medium-sized business markets;
- d. Providing technical guidance and supervision in distribution control and availability of essential goods and / or essential goods, monitoring distribution of domestic trade, creating and fostering business climate, developing trade distribution facilities, trading between islands and borders, trading transactions through electronic systems, increased use of domestic products, increased access to micro, small and medium-sized businesses market;
- e. Evaluation and reporting in distribution control and availability of essential goods and / or essential goods, supervision of important goods, supervision of domestic trade distribution, coaching of actors and distribution business, creation and fostering of business climate, development of distribution facilities, inter-island and border trade, trade transactions through electronic systems, increasing use of domestic products, increasing market access for micro, small and medium-sized businesses market;
- f. Administration of the Directorate General of Domestic Trade; and
- g. Implementation of other functions provided by the Minister<sup>20</sup>.

## **E. Conclusions**

Based on the results of the study, it can be concluded that the sharia business must uphold the basic principles of sharia namely *tauhid* (unity), balance or equality (*equilibrium*), free will (responsibility) and integrity of the parties in conducting sharia business that. Based on the results of the study, one of the sharia businesses namely the

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<sup>20</sup>Directorate General of Domestic Trade, *Job and Function of Directorate General of Domestic Trade*, Kementerian Perdagangan Republik Indonesia.



Ummar Market business in the form of *syirkah*. Islamic business is difficult to develop in Indonesia because it is unable to compete with foreign brands and the existence of Islamic business is difficult to trace.

The government's involvement in building the sharia business is not a different with conventional business, the government uses the local One-Stop Service. The role of the government in developing Sharia business in Indonesia refers to the Regulation of the Minister of Trade No. 57 / M-Dag / Per / 9/2014.

The government based on its role in accordance with the rule of law governing Sharia business meets the provisions stipulated by government regulations, trade minister regulations: bureaucracy of licensing, guidance and supervision carried out by the Supervisory Team established by the Director General of Domestic Trade. The Director General of Domestic Trade can coordinate with relevant agencies at the center and in the regions.

- a. The Governor of DKI Jakarta delegates the authority to supervise the implementation of the Franchise in his working area to the Head of the Office in charge of trade.
- b. The Regent / Mayor delegates the authority to supervise the implementation of the Franchise in his working area to the Head of the Board who is responsible for trade.

But the implementation of both the guidance and supervision of the government and local government has never been implemented at all, even at the local government level there is almost no coaching effort carried out, except to the extent of registering business licenses. This has been proven from the data obtained from interviews at the Directorate General of Domestic Trade, the Ministry of Trade that the sharia franchise business is not listed but in reality the results of this study is the existence of sharia businesses such as the Ummar Market in the form of *shirkah* if there is guidance from the government.

Suggestions in this dissertation research are as follows: a) The government needs to conduct socialization to the community, especially for businessmen, so that they are interested in doing sharia business. B) There needs to be an implementation of the government in conducting guidance and supervision, especially the sharia business, so that the sharia business can be equivalent to conventional business.

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**Management of Sharia Mutual Fund in Islamic Economic Law of Indonesia (Study  
Collective Investment Contract (CIC) Mutual Fund)**

Nunung Rodliyah and Ade Oktariatas K

**Abstract**

Investment activity is an activity of placing funds in an instrument aimed at obtaining profits in the future. Investment can be categorized in two parts, namely, investment in real assets and investment in the form of financial assets. One alternative investment included in capital market products is sharia mutual funds that place funds in debtors that do not out from sharia regulations, in the fundamentals and operations of the company in accordance with the guidelines of the Indonesian Ulema Council fatwa. Mutual fund management can take the form of an open and closed company, and can also be in the form of Collective Investment Contract. The problem in research is how is the legal position of Islamic mutual funds in Indonesia and how is CIC-based management in accordance with the principles of Islamic economic law in Indonesia. This research is normative with descriptive research types. Data collection was carried out by literature study and document study especially legal document. The collected data is then analyzed qualitatively into structured and logical sentences. The results of this study explain the regulations that guarantee the legal position of sharia mutual funds in Indonesia realize the guarantee of legal certainty. The regulations that apply are varied among state institutions that issue but still pay attention to the harmonization of rules so as to minimize overlap between the rules that apply. Secondly, the elaboration of the legal position regarding what important matters must be in place to support the smoothness of the transaction. The management is based on the principles of Islamic economics that are applied in Indonesia. The exposure is related to the suitability of the national written rules, sharia rules and practices, and also describes the elements of the settlement of disputes in this transaction viewed from the risk of the transaction.

**Keywords :***Capital Market, Sharia Mutual Funds, Regulation, Management*

## A. Introduction

Islam as a religion that Rahmatan lil alamin regulates aspects of the life of all humanity without error. Economic aspects which are of course very important in the order of community life are also regulated in Islamic law. Islamic economics in these three decades has progressed quite rapidly, both in academic studies in universities and in operational practices. In the form of teaching, Islamic economics has been developed in several universities in Muslim countries, as well as in western countries, such as the USA, Britain, Australia, and others<sup>21</sup> in terms of general academic studies and explicit studies such as the scope of investment activities. This development also has an impact on experts in the field of investment have different views on the theoretical concept of investment. Fitzgerald, defines investment as "activities related to efforts to withdraw resources (funds) that are used to hold capital goods at the present time, and with these capital goods will produce new product flows in the future"<sup>22</sup>. planting money or capital in a company or project for the purpose of obtaining profits.<sup>23</sup> According to Hendry Faisal Noor, investment is to sacrifice current consumption opportunities, to obtain benefits in the future.<sup>24</sup> As for the sharia perspective, investment can be interpreted as the placement of a number of funds / capital in an investment instrument for the purpose of obtaining profits and benefits by using sharia principles.

Various kinds of statements related to the investment, it can be concluded that investment is an activity of placing funds / capital in an investment instrument with the hope of obtaining profits in the future. In general, investment can be categorized in two parts, namely, investment in real assets (real assets) and investment in the form of financial assets. The form of real asset investment is opening a business, investing directly in a business, investing in commodities, land, gold and property. While investment in financial assets can be divided into two parts, namely investment in money markets / banking institutions in the form of demand deposits, savings and time deposits, as well as investments in capital markets in the form of stocks, bonds, sukuk, and mutual funds.

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<sup>21</sup>Tira Nur Fitria, Kontribusi Ekonomi Islam Dalam Pembangunan Ekonomi Nasional, STIE – AAS Surakarta, Jurnal Ilmiah Ekonomi Islam Vol. 02, No. 03, November 2016

<sup>22</sup>Abdul Manan, *Aspek Hukum dalam Penyelenggaraan Investasi di Pasar Modal Syariah Indonesia*, (Jakarta: Kencana, 2009), p.183.

<sup>23</sup>Nurul Huda dan Mustafa Edwin Nasution, *Investasi pada Pasar Modal Syariah Syariah*, (Jakarta: Prenada Media Group, 2008), p. 7.

<sup>24</sup>Hendry Faisal Noor, *Investasi Pengelolaan keuangan bisnis dan Pengembangan Ekonomi Masyarakat*, (Jakarta: PT. Indeks, 2009), p. 4.

The role of the Capital Market is a market for various financial instruments or long-term securities that can be traded, both in the form of debt or own capital. The capital market is an effective means of obtaining funds and is used as investment financing through a mechanism for collecting funds from the public and channeling funds to productive sectors. By buying shares, investors hope to receive dividends every year and capital gains when their shares are resold. However, by investing, investors are also expected to risk losses that are directly proportional to the profits earned.<sup>25</sup>

Alternative investments through sharia mutual funds that place funds on debtors that do not violate sharia boundaries and based on Islamic sharia principles, in the fundamentals and operations of the company in accordance with the guidelines of the Indonesian Ulema Council fatwa. Islamic mutual funds are an investment vehicle that combines Islamic stocks and bonds in one product managed by an investment manager.

Mutual Funds are a container that is used to raise funds from the public to be invested in the securities portfolio. Mutual fund management can take the form of an open and closed company, and can also take the form of a Collective Investment Contract (CIC). Until now the Financial Services Authority (OJK) as a government agency has granted business licenses to hundreds of mutual fund products using both conventional and sharia.<sup>26</sup> Malaysia as a neighboring country Indonesia also develops its investment activities mainly in Islamic mutual funds, the significant growth of the mutual fund industry has been supported by the strong commitment of the local government.<sup>27</sup>

Sharia mutual fund regulations are prepared, among others, by the form of the Financial Services Authority Regulation (POJK), POJK Number 15 / POJK.04 / 2015 concerning Application of Sharia Principles in the Capital Market, POJK Number 19 / POJK.04 / 2015 concerning Issuance of Sharia Mutual Fund Requirements, POJK Number 23 / POJK.04 / 2016 concerning Mutual Funds in the Form of Collective Investment Contracts, POJK Number 53 / POJK.04 / 2015 concerning Contracts Used in Sharia Securities Issuance in the Capital Market. In addition to several regulations from the Financial Services Authority (OJK), there is a fatwa that also regulates Islamic mutual funds,

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<sup>25</sup><http://repository.wima.ac.id/2385/2/Bab%201.pdf> pg. 1 access in March 13th 2017 14.12 WIB.

<sup>26</sup>Depri Liber Sonata, Hubungan Hukum Kontraktual Pada Pengelolaan Reksa Dana Kontrak Investasi Kolektif Di Indonesia, Bagian keempat Hukum Perdata Dalam Berbagai Perspektif.(Bandar Lampung, Harakindo Publishing,2015) p.186.

<sup>27</sup>Nurasyikin Jamaludin, Malcolm Smith, Paul Gerrans, *Mutual Fund Investment Choice Criteria: A Study In Malaysia*, International Journal of Education and Research, Vol. 1 No. 4 April 2013

namely the Fatwa of the Indonesian Ulema Council (MUI), namely the DSN MUI Fatwa Number 20 / DSN-MUI / IV / 2001 concerning Implementation Guidelines for Sharia Mutual Funds. Sharia Mutual Funds are Mutual Funds that allocate all funds or portfolios into Sharia instruments, such as shares that are incorporated in the Jakarta Islamic Index (JII), Sharia bonds, and various other Islamic financial instruments.<sup>28</sup> In managing Sharia Mutual Funds using the wakalah contract. There are reductions and additions related to the rules of the system in Islamic mutual funds. In Sharia Mutual Funds there are additions, namely the screening and cleansing process, the existence of the Sharia Supervisory Board as a supervisor, and in the case of binding to a contract. This was not there before in conventional mutual funds. And the reduction is in terms of investment objectives if in conventional mutual funds seek high profits, Islamic mutual funds prioritize SRI or Socially Responsible Investment, and in sharia mutual fund transactions must be free of interest (*riba*).

Islamic mutual funds comply with sharia principles in the capital market if their contracts, management methods and portfolios do not conflict with sharia principles in the capital market as stipulated in the Financial Services Authority Regulation Number 15 / POJK.04 / 2015 concerning the application of sharia principles in the capital market. From this definition, there are three important elements in Mutual Funds, namely: the existence of pool of funds, investments in securities portfolios, and Investment Managers as fund managers (Limited Offerings).<sup>29</sup> The wakalah contract whereby the party giving the power of attorney (*muwakkil*) gives power to the party that receives the power (representative) to take certain actions or actions.<sup>30</sup> The contract of wakalah in Sharia Mutual Funds, the statement of Ijab and Qabul must be stated by the parties to show their intention to enter into a contract (*akad*). Wakalah with binding rewards and may not be canceled unilaterally. The Financial Services Authority (OJK) as a regulator continues to be committed to encouraging the Sharia Mutual Fund industry to continue to grow, this is evident from the Financial Services Authority Regulation (POJK) Number 19 / POJK.04 / 2015 concerning Issuance and Requirements of Sharia Mutual Funds.

Sharia mutual funds and conventional mutual funds have different philosophical and management methods. The main difference about conventional Mutual Funds with Sharia

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<sup>28</sup> Andrian Sutedi, *Pasar Modal Syariah: Sarana Investasi Keuangan Berdasarkan Prinsip Syariah*, (Jakarta: Sinar Grafika, 2011) p. 8.

<sup>29</sup> Ni Putu Fanindya Pertiwi, *Pengelolaan Reksadana Kontrak Investasi Kolektif (KIK) Syariah Di Indonesia* (Skripsi), Fakultas Hukum Universitas Lampung, 2017, p. 30

<sup>30</sup> Jeni Susyanti, *Pengelolaan Lembaga Keuangan Syariah*, (Malang: Empat Dua, 2016) p.202.

Mutual Funds is at the screening process. In the management of Sharia Mutual Funds there is a screening process as part of the asset allocation process. Sharia mutual funds are only allowed to place shares and other instruments in accordance with Islamic law. This difference in Sharia Mutual Funds affects the allocation and composition of assets in its portfolio. Sharia Mutual Funds perform a cleaning process that intends to clear non-halal income and not in accordance with Islamic law. The thing that causes people to be interested in the Shariah Mutual Fund is that in Indonesia, the majority of cultures and religions are Islam. So that the Sharia Mutual Funds are more developed than Conventional Funds. However, enthusiasts of the Syari'ah Fund are not only limited to the Muslim community, but many non-Muslim communities are also interested in joining the Shariah Funds based on Trust.

Looking at the types of mutual funds that have been arranged, Sharia Mutual Funds that are currently in great demand are open Mutual Funds in the form of Collective Investment Contracts (CIC). The term is the same as the term Mutual Funds invested in the real sector categorized as Limited Participation Funds.<sup>31</sup> So the most widely issued Mutual Funds are CIC Mutual Funds. Mutual funds owned by the Investment Manager and Custodian Bank rely on the contract according to Law Number 8 of 1995 concerning the capital market which is referred to as "Collective Investment Contract" (CIC)".<sup>32</sup>In the KIK agreement, the Investment Manager and the Custodian Bank bind the unit holder where the investment manager is authorized to manage the collective investment portfolio and the custodian bank is authorized to carry out collective safekeeping as regulated in the Financial Services Authority Regulation (POJK) Number. 23 / POJK.04 / 2016 concerning Mutual Funds in the Form of Collective Investment Contracts. In Mutual Fund operations, the Custodian Bank will receive instructions from the Investment Manager to complete the investment activities decided by the Investment Manager.<sup>33</sup>

Based on this background, the rapid development of Sharia Mutual Funds, and other explanations, the authors are interested in conducting research as outlined by the title

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<sup>31</sup>Yulizar D. Sanrego, University of Darussalam Gontor (UNIDA), *The Role Of Islamic Capital Market For Micro, Small, and Medium Enterprises (MSMES) Through Synergy of Mutual Fund And Venture Capital Institution*. Journal of Islamic Monetary Economics and Finance, Vol. 3 No. 1 (2017) e-ISSN : 2460-6618

<sup>32</sup>Jeni Susyanti, *Op.cit*, p. 222.

<sup>33</sup>*Ibid*.

"Management Of Sharia Mutual Fund In Islamic Economic Law Of Indonesia (Study Collective Investment Contract (Cic) Mutual Fund)".

## **B. Problems**

This paper try to answer two question :

1. Whats the regulation set the Sharia Mutual Fund in Indonesia?
2. How to manage CIC Sharia Mutual Fund in Indonesia?

## **C. Discussion**

### **1. The Regulation**

#### **a. Sharia Capital Market**

Sharia capital markets can be interpreted as activities in the capital market as stipulated in the Capital Market Law No. 8 of 1995 concerning Capital Market which does not conflict with Sharia principles. Therefore, the Sharia capital market is not a system that is separate from the overall capital market system. In general, Sharia Capital Market activities do not have differences with conventional capital markets, but there are some special characteristics of the Sharia Capital Market, namely that the products and transaction mechanisms do not conflict with Sharia principles. Sharia Mutual Funds is one example of a form of financial transactions in the Islamic capital market in Indonesia.

Sharia mutual funds are mutual funds that operate according to the provisions and principles of Islamic sharia, both in the form of a contract between the Custodian Bank as the owner of the property (shalib al-mal / rabb al-mal) and the Investment Manager, as well as the management of investment funds as the al-mal vice shalib, as well as between the Investment Manager as the vice al-mal and the unit holders.

#### **1) About Sharia Mutual Fund**

According to Fatwa National Sharia Board (DSN) Number 20 / DSN-MUI / IX / 2000, Islamic mutual funds are mutual funds that operate according to Islamic sharia principles and principles, both in the form of a contract between investors as property owners (Sahib al-mal / rabb al- mall) with investment managers as representatives of sahib al-mal, as well as between investment managers as representatives of investment users. Sharia mutual funds will not invest their funds in bonds from companies whose management or



products are contrary to Islamic law, for example: liquor factories, pig industries, financial services that involve usury in its operations and businesses that contain immorality.<sup>34</sup>

## 2) Legal Construction Mutual Fund

Based on its legal form (Article 18 paragraph 1 of Law No. 8 of 1995 concerning the Capital Market), Mutual Funds are divided into two:

First, Corporate-shaped Mutual Funds (Types of Companies) In this form of Mutual Funds, the activities of an Investment Fund issuing company are fund raising activities and stock sales. Then, the funds are invested in securities.

Second, Mutual Funds in the form of Mutual Fund Collective Investment Contracts are instruments of fund raising with participation units (UP) to investors and subsequent funds used for various types of money, both in the capital market and money market.<sup>35</sup>

Other arrangements in the Fatwa of the National Sharia Council Number: 20 / DSN-MUI / IV / 2001 concerning Guidelines for the Implementation of Investment for Syari'ah Mutual Funds The financial instruments in question include: <sup>36</sup>

- a. Stock instruments that have been through a public offering and dividend distribution are based on the level of operating profit;
- b. Placements in deposits with Sharia Commercial Banks;
- c. Long-term debt that is in accordance with Sharia principles;

Collective Investment Contract (CIC) is a contract made between the Investment Manager and the Custodian Bank which also binds the unit holder as an investor. Through this contract, the Investment Manager is authorized to manage collective portfolios and the Custodian Bank is authorized to carry out safekeeping and collective investment administration.<sup>37</sup>

The Collective Investment Contract regulates the duties and responsibilities of each party, the purpose and type of investment to be carried out, the procedures for transactions,

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<sup>34</sup> Nur Aini Kandarisa, *Perkembangan Dan Hambatan Reksadana Syariah Di Indonesia: Suatu Kajian Teori*, Universitas Negeri Surabaya, p. 4-5

<sup>35</sup>*Ibid*, p.4

<sup>36</sup>Pasal 7 angka 2 Fatwa Dewan Syari'ah Nasional Nomor: 20/DSN-MUI/IV/2001 tentang Pedoman Pelaksanaan Investasi Untuk Reksa Dana Syari'ah

<sup>37</sup>Pratomo Eko Priyo dan Ubaidillah Nugraha, *Solusi Perencanaan Investasi di Era Modern* (Jakarta : PT. Gramedia Pustaka Utama, 2009), p. 48

costs, the rights of the unit holder as investor and other rules and provisions concerning the management of the CIC Mutual Fund.

The purpose of the establishment of sharia CIC mutual funds is the agreement to carry out a business activity in the established financial sector based on the contract. Sharia CIC mutual funds are established between investment managers and custodian banks based on CIC which also bind the unit holders. Sharia Mutual Fund formation process is not much different from conventional CIC Mutual Funds, Investment Managers (Representin) will take the initiative to issue Mutual Funds through a process of registration statement to the Financial Services Authority in order to sell investment units to public investors, without the need to form a company. Before carrying out the registration statement process, the Investment Manager (w Representin) must first determine the Custodian Bank to be able to determine or make a Collective Investment Contract. Agreement between CIC Mutual Funds and participation unit holders (third parties) was born since the investor as a third party stated his intention to purchase a CIC Mutual Fund participation unit, since then the investment manager and custodian bank have the responsibility to fulfill the rights and interests of third parties .

The name of a Mutual Fund in the form of a Sharia Collective Investment Contract (CIC) must describe the name of the Investment Manager, a name that reflects the type of Mutual Fund, add the word "sharia" to the name of the Collective Investment Contract issued,<sup>38</sup> and the denomination of foreign currency used when using a currency other than the rupiah.<sup>39</sup> For example, the name of a Sharia Mutual Fund in the form of a Collective Investment Contract managed by the ABC Sharia Investment Manager with an investment policy in accordance with the provisions of the type of Fixed Income Mutual Fund can be named "Independent ABC Sharia Mutual Income Mutual Fund<sup>40</sup>".

Mutual Fund names in the form of sharia Collective Investment Contracts (CIC) are prohibited from the same as other Mutual Fund names, containing the expression that Mutual Funds have certain benefits which are not necessarily true, contain the expression Investment Managers have certain advantages which are not necessarily true and inconsistent with

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<sup>38</sup>Republik Indonesia, *Peraturan Otoritas Jasa Keuangan Nomor 19/POJK.04/2015 tentang Penerbitan dan Persyaratan Reksadana Syariah*, Bab III Pasal 15 Ayat 3 huruf f

<sup>39</sup>Republik Indonesia, *Peraturan Otoritas Jasa Keuangan Nomor 23/POJK.04/2016 tentang Reksadana Berbentuk Kontrak Investasi Kolektif*, Bab II Pasal 3 Ayat 1

<sup>40</sup>Reksadana ABC Syariah Fixed Income Merdeka

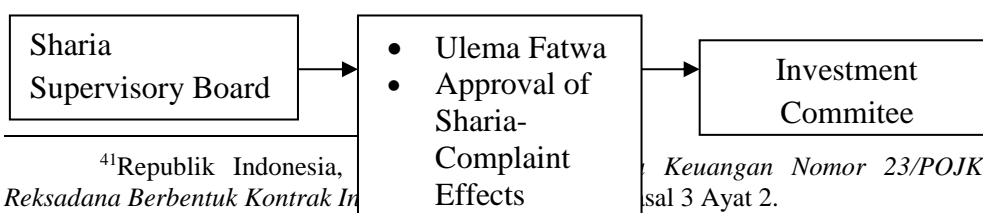
Mutual Fund policies.<sup>41</sup> Sharia Mutual Funds (CIC) Mutual Funds in the form of Collective Investment Contracts must include the Investment Manager and the Custodian Bank as representatives (w Representin) who act for the benefit of the unit holders as the represented party (muwakil) where the Investment Manager is authorized to manage collective investment portfolios and The Custodian Bank is authorized to carry out collective safekeeping. Contracts, management methods, and portfolio of Sharia Mutual Funds in the form of Collective Investment Contracts do not conflict with sharia principles in the capital market.<sup>42</sup>

Sharia mutual funds in the form of Collective Investment Contracts can invest in sharia securities and / or sharia money market instruments issued by one party no more than 20% (twenty percent) of Net Asset Value Sharia Mutual Funds form a Collective Investment Contract at any time. However, it does not apply to sharia securities in the form of Bank Indonesia Syariah certificates, sharia securities issued by the Government of the Republic of Indonesia and sharia securities issued by international financial institutions where the Government of the Republic of Indonesia is a member.

In terms of sharia mutual fund mutual fund formation process is simpler than PT. Islamic mutual funds. That is why all Sharia Mutual Funds and Mutual Funds in Indonesia are CIC mutual funds. Unlike PT. Sharia Mutual Funds that issue Shares, Sharia CIC Mutual Funds are not a company so they do not issue shares, but issue participation units so that evidence of investor ownership is collectively the owner of sharia mutual funds. The management of CIC mutual funds is based on an agreement / contract between two parties that bind a third party.<sup>43</sup> In managing Islamic CIC mutual funds it is not much different only in CIC Sharia Mutual Funds using the Contract between two parties that bind a third party.

#### **b. Managing CIC Sharia Mutual Fund in Indonesia**

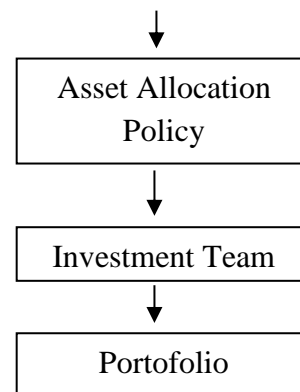
Sharia mutual funds are based on sharia principles, simply the investment management process for Islamic mutual funds can be described as follows:



<sup>41</sup>Republik Indonesia, *Reksadana Berbentuk Kontrak Investasi Syariah*, Peraturan Otoritas Jasa Keuangan Nomor 23/POJK.04/2016 tentang Reksadana Syariah, Pasal 3 Ayat 2.

<sup>42</sup>Republik Indonesia, *Peraturan Otoritas Jasa Keuangan Nomor 19/POJK.04/2015 tentang Penerbitan dan Persyaratan Reksadana Syariah*, Bab III Pasal 15 Ayat 3 huruf a

<sup>43</sup>Depri Liber Sonata, Op.Cit. pg. 190



The above chart explains the process of managing Islamic mutual funds, sharia supervisors are the institutions authorized to review, explore and formulate the values and principles of sharia law in the form of fatwas to be used as guidelines in transaction activities that occur in sharia financial institutions and approve the appropriate effects with sharia principles. The guidelines are used by the investment committee to develop investment objectives, policies and strategies which are then carried out by the investment team in the form of securities portfolios in accordance with sharia principles.<sup>44</sup>

In a mutual fund fund contract involves two parties, each of whom has certain rights and obligations. The relationship between the parties in mutual funds is not the relationship between the creditor and the debtor, but the partnership between the investors / investors and the investment manager who acts as the fund manager (mudharib).<sup>45</sup>

In general, operational mechanisms in Islamic mutual funds can be divided into two, namely between investors and investment managers and between investment managers and investment users. The operational mechanism between investors and investment managers is carried out with the wakalah system. While the operational mechanism between investment managers and investment users is carried out with the mudarabah system<sup>46</sup>.

Asset owners in the Sharia Mutual Fund portfolio are carried out through a rigorous screening process based on sharia principles. If a mutual fund buys shares, the shares purchased must be company shares that have been declared in accordance with sharia. Sharia mutual funds are mutual funds that allocate all of their funds or portfolios into sharia

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<sup>44</sup> Nur Aini Kandarisa, *Op.Cit*, p.7

<sup>45</sup> M. Rasyid Ridha, *Peranan Reksadana Syariah Dalam Peningkatkan Investasi Di Indonesia*, Transparency, Jurnal Hukum Ekonomi, Juni 2013, Volume II Nomor 2, p.4

<sup>46</sup>Hanif, *Reksa Dana Syariah*, Fakultas Syari'ah IAIN Raden Intan Lampung, Vol.2, No.1, Januari 2010 p. 27

instruments, such as stocks that are incorporated in the Jakarta Islamic Index (JII), Islamic bonds, and other sharia financial instruments.

Financial activities, Sharia Mutual Funds will be bound in the *mudharabah aqad* as *Mudharib* which manages jointly owned funds from investors. As proof of participation, investors will receive an investment unit (share) from Islamic mutual funds. Sharia mutual fund group funds will be placed back into the activities of the Issuer (other companies) through the purchase of sharia securities. In this case the Sharia Mutual Fund acts as *Mudharib* and the Issuer acts as *Mudharib*. Therefore, this kind of relationship can be called a Tier *Mudharabah* bond.<sup>47</sup> There is a relationship between rights and obligations between Investors, Investment Managers, and Custodian Banks. The most important party in the Mutual Fund system is the Investment Manager. However, if the Mutual Funds that are operated are Sharia Mutual Funds, then the important parties are the Investment Manager and the sharia supervisory board. If one party does not fulfill its obligations or if there is a dispute between the parties, then the settlement is done through the Shariah Arbitration Board after an agreement is not reached through deliberation.<sup>48</sup>

#### **D. Conclusion**

Based on the legal form (Article 18 paragraph 1 of Law No. 8 of 1995 concerning the Capital Market), Mutual Funds are divided into two:

First, Corporate-shaped Mutual Funds (Corporate Type) In this form of Mutual Funds, the activities of the Investment Fund issuing company are fund raising activities and stock sales. Then, the share sale fund is invested in the form of various types of shares traded on the stock exchange.

Secondly, Mutual Funds in the form of Mutual Funds Collective Investment Contracts are instruments for collecting funds by issuing unit investments (UP) to investors and then the funds are invested in various types of investments, both in the capital market and money market.

In addition to the regulation of the National Sharia Council Fatwa Number: 20 / DSN-MUI / IV / 2001 concerning Guidelines for the Implementation of Investment for Syari'ah Mutual Funds, determining the investments imposed on Sharia Mutual Funds in

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<sup>47</sup>Ali Amin Isfandiar, *Akad Muamalah Di Pasar Modal Syariah*, Juni, 2009, p.102

<sup>48</sup>Pasal 12 angka 2 Fatwa Dewan Syari'ah Nasional Nomor: 20/DSN-MUI/IV/2001 tentang Pedoman Pelaksanaan Investasi Untuk Reksa Dana Syari'ah

Indonesia can currently run as long as they do not conflict with the principles Sharia is fundamentally as well as *ijtihad* of the scholars.

Mutual fund funding contracts involve two parties who each have certain rights and obligations. The relationship between the parties in mutual funds is not the relationship between the creditor and the debtor, but the partnership between the investors / investors and the investment manager who acts as the fund manager (*mudharib*).

In general, operational mechanisms in Islamic mutual funds can be divided into two, namely between investors and investment managers and between investment managers and investment users. The operational mechanism between investors and investment managers is carried out with the *wakalah* system. While the operational mechanism between investment managers and investment users is carried out with the *mudarabah* system.

Asset owners in the Sharia Mutual Fund portfolio are carried out through a rigorous screening process based on sharia principles. If a mutual fund buys shares, the shares purchased must be company shares that have been declared in accordance with sharia. Sharia mutual funds are mutual funds that allocate all of their funds or portfolios into sharia instruments, such as stocks that are incorporated in the Jakarta Islamic Index (JII), Islamic bonds, and other sharia financial instruments.

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## **Implementation of Business and Economic Rights in the Globalization**

Suyatno

### **Abstract**

This research is the implementation of every human being who has ownership rights, both alone and together with other humans for the development of himself, family, nation and society in a way that does not violate the law. Some people still think a lot about economics is the study of inflation, unemployment, the business cycle and other mysterious macroeconomic phenomena that are far from the attention and legal system. Actually the strength of the economy is much broader because in essence all humans seek and find for their purpose in achieving satisfaction of everyone. The International Covenant on economic rights and business rights has not paid attention to the organization and administrative procedures as much as the attention given to substantive provisions. In this case article 2 stipulated in the International Covenant, all rights must be carried out without any discrimination and the obligation to take steps towards full realization to be carried out immediately. In Indonesia, article 33 of the 1945 Constitution paragraph 1, that the economy is structured as a joint venture based over family. Problems, business and economic rights that are openly and competitively healthy and supported by everyone and mutually beneficial to human life based on law. In the current and future global era, economic activities are increasingly developing and full of competition and openness. unlimited technology. Purpose of business and economic rights, so that everyone in carrying out and developing a business can benefit themselves, their families, communities and nations that are just and prosperous and compete with each other in accordance with applicable laws. As for the underlying elements business and economic rights are, ket uhanan, intelligence and skills, human relations, and honesty and openness. The method of research is normative juridical with deductive method approach techniques. Conclusion of the study, that the implementation that must be carried out by all people in carrying out business and economic rights must be based on the awareness of God, beneficial for themselves, their families, the nation and state with openness, honesty and intelligence and skills that interact and communicate with each other in fair competition does not violate the law. This is the basis and strength for all people to increase their business rights and the economy in a fair and prosperous manner.

**Keywords: Implication, global, benefit everyone.**

## **A. Introduction**

Humans are beings who have been given reason, thoughts, feelings as social and cultured beings. This is inseparable from mutual interdependence between each other. Besides a number of criteria that are inherent in human beings and are fundamental rights, namely the right to do business and economic rights that must be fought for. Without economic basis, humans will not live according to a decent life and welfare program. Business competition is getting tougher among humans with each other. The flow of globalization in all sectors of life has been global and cannot be dammed again. Moreover, the development of increasingly sophisticated technology, both the internet and communication. The consequences of reality in life will affect humans to how to work with business rights and economic rights to sustain life and welfare improvement in general.

The impact of global competition is not only on individuals but also on each group even among nations. In this case there is a need for legal protection from fostering rights in the development of economy and business for each individual and group and nation to compete in a healthy manner without breaking the law. . We understand that the crisis that happened and the various adverse effects directly. However, we cannot and cannot prevent it because the dehumanization process seems to be driven by machines that are very sturdy and deliberately created by political, economic and cultural interests. Every human being has the right to determine and achieve welfare for a decent living for humanity, both individually and in groups from economic rights and business rights. Besides that everyone has the right to welfare, it is stated in human rights.

The economy of a nation will develop its economy if all citizens can improve business movements in a healthy manner and have skills that can compete globally so that justice and people's welfare will be achieved.

## **B. Research Methods**

The research writing method that I use is normative jurisdiction, which is supported by the inductive approach method. This research was carried out with the concept of a new regulation specifically to more general rules of character. By using data sources, primary data and secondary data, namely in the form of primary, and secondary legal materials. The analysis technique used is the technique of qualitative normative analysis.

## **C. Discussion**

## 1. Human Resources

Economic and business rights can be owned by anyone, either individuals or groups. Modern organizational theory explains that human resource factors are a source of uniqueness or excellence of an organization because these factors are of high value, rare and difficult to imitate. The relationship between the company and employees is mutually giving and mutually beneficial. This shows that between individuals and groups is integration in terms of economic and business movements.

In general, human resources that can improve economic and business rights include:

- a. Humans who fear God the Almighty.
- b. Humans who are physically and mentally healthy.
- c. Human educated.
- d. Humans are moral and skilled.
- e. Productive humans
- f. Humans innovate and have high imagination.
- g. Humans who have high competitiveness.
- h. Humans who are business ethics
- i. Humans who regulate discipline time.
- j. Humans who are smart at work, smart to communicate, intelligent social.
- k. Humans are honest and always uphold the rules that apply.
- l. Human being resilient, diligent and hardworking.
- m. Humans who try to develop technology.
- n. Smart man
- o. Humans are loyalty

## 2. The expected norms and human attitudes

For the development of human resources there are eight norms of human behavior, among them: a. Loyalty; b. Work performance; c. Responsible; d. Tense; e. Honesty; f. Cooperation; g. Initiative; dan h. Leadership

To prepare human resources in the movement of economic and business rights between the two components of character elements and elements of attitudinal norms developed combined into one reliable force and finally the hope that human resources will form human resources capable of competing in the global era and digital era. Global human resources are also needed professionally to support economic rights and business rights.

### 3. Professionalism

In general, the profession can be described as work that provides and provides services that require special expertise through previous training. In the development of economic rights and business rights it is always necessary to have reliable professional human resources. As for the characteristics of a profession there is three main, namely:

- a. A profession requires extensive training before entering a profession.
- b. The training includes significant intellectual components,
- c. Trained personnel are able to provide important services to the community.

And three additional features of the profession, plus the existence of a license or certificate process, the existence of an organization, and autonomy in its work.

There are three professional work characteristics, namely:

- a. The work of a professional is determined to realize the virtues for the sake of upholding the honor of the profession in which he is involved. Therefore, not too concerned with or expect material rewards.
- b. The work of a professional must be based on high-quality technical skills achieved through a long, exclusive and heavy education and / or training process.
- c. The work of a professional, measured by technical quality and moral quality, must subject himself to a control mechanism in the form of a code of ethics developed and agreed upon in a professional organization.

From the professional characteristics and work characteristics of the profession is also a capital to develop economic rights and business rights in good and accurate business ethics according to the demands of the times.

### 4. The basis of professional legitimacy

Professionals exercise authority if their actions develop a special human good that the client really wants. In front of him and for the benefit of the client, a professional has stated and promised to serve and seek that special kindness. According to Daryl Koehn, so that professionals get their moral authority, they must be honestly trusted before the public as the foundation. For this reason, you must have the following conditions:

1. In order to be trusted, professionals must make the interests of the client their interests. The demand comes out of the essence of trust.

2. Willingness to act, also needs to gain trust. The best evidence that is professional is done for the good of the client is action for the good of the client.
3. Willingness must be open and continuous. Willingness must be maintained because the client hopes that the good will of the professional will continue, not only in a limited period of time, but as long as needed, whether assistance is given or a decision must be made.
4. Professionals must be competent. For example, a doctor does not have to be able to cure all kinds of brain tumors, but they must be able to carry out well procedures that are considered to help the profession, or based on knowledge about health and past experience, they are able to cure patients.
5. Professionals must also be able to sue from the client the level of accountability and self discipline.
6. Professionals who can be trusted must have the freedom to pay attention to the goodness of each client with policy, ability, time and energy management if the client's efforts are better.
7. Professionals must have a conscious sense of responsibility. Although most clients can work with professionals to handle their needs, they must not forget that not all clients can do it.

#### **D. Economic Law**

Economic law arises because of the rapid flow of existing problems and functions to regulate and limit economic activities in the hope that development in the economic field does not neglect the rights and interests of the community. Sunaryati Hartono said that social economic law, so the economic law of development and social law, so that the economy has two aspects, as follows:

1. The aspect of regulating economic development efforts, in the sense of increasing overall economic life.
2. The aspect of regulating efforts to share the results of economic development equally among all levels of society, so that every citizen of Indonesia can enjoy the results of economic development in accordance with his contribution to the economic development effort. Thus business rights and economic rights are in line with the regulation of economic development law and social economic law. Economic rights and business rights are national and international legal capital that is always expected for everyone to be more just and prosperous.

Economic law can be used to protect individuals or legal entities or groups. The law of the economy can always be the main factor leading to the business model and the development of economic rights for everyone who will improve welfare in the economic field.

### **E. Principles Developed in Economic Rights and Business Rights**

The principles in question are as follows:

1. The principle of faith and piety of God Almighty.
2. Benefits principle.
3. Principles of Pancasila democracy
4. The principle is fair and equitable
5. Principle of balance, harmony and harmony in life.
6. Law principle
7. Principle of independence
8. The principle of science
9. Financial principles
10. Asasebersamaan, kinship, balance, and continuity in the prosperity of the people.
11. The principle of economic development that is environmentally sound and sustainable, and
12. The principle of independence which is responsible for the state.

By relying on the principles that underlie economic rights and business rights, it can always be used as a guideline for economic movements that increasingly compete fairly and sustainably in a fair and prosperous manner.

Elsi Kartika Sari, Advendi Simangungsong, *Law in Economics*, Grasindo, PT. Gramedia Widiasarana Indonesia, Jakarta, 2007, p.4.

Ibid, h. 5-6

### **F. Globalization**

Globalization is defined as a process that produces a single world, communities throughout the world become interdependent on all fronts of life, politics, economics and culture. Ohmae called it a world without limits. Today's society has shown a completely different reality. In the political field, there are supernational entities with various coverage of political and military blocks, dominant power coalitions, regional unitary organizations, international scale organizations. The economic sector is seen to increase the role of

multinational cooperation, etc. Globalization can be defined as the spread of global habits, expansion relationships across continents, organizations of social life on a global scale, and the growth of a shared global awareness. The idea of globalization includes a number of transactional processes that are separated from each other even though they can be seen as a globalizing thing in their achievements. Globalization has become a big concern for business people, especially with the emergence of global markets and various accompanying technologies. The expansion of this relationship has led to various adjustments and uniformity of the values adopted by people throughout the world. Globalization produces two contradictory phenomena, standardization and diversification. Globalization is not just a matter of what happens in the world, separate and far from individuals, but globalization also affects aspects of intimate and personal life. Globalization does not develop fairly, and does not mean all the consequences are beneficial. For most countries in Europe and North America, globalization seems unpleasant, such as westernization or even Americanization, because the United States of America is now the only superpower with a dominant economic position. , culture, military, and global order. Western countries and industry in general still have a large influence on world issues compared to poor countries and globalization is increasingly spreading rather than the monopoly of certain groups of countries, the impact of globalization increasingly spreads not monopoly of certain groups of countries, the impact of globalization is also felt in western countries. big, Ohmae called it the term 4i, namely Investment (capital investment), Industry (industrial development), Information technology, and Individual consumers. The four actors helped enliven the course of globalization in various worlds. Expansion of capital from developed countries to developing countries, has accelerated the development of the third world so that the uniformity of the world occurs faster.

These four aspects will influence economic policy in each country, so business rights and development rights in the economic field must be protected and developed in line with current globalization.

## **G. Human Rights**

Humans who behave according to the provisions of legislation will definitely have a positive impact on each other, but vice versa if there is a deviant behavior will certainly have a negative effect on other people or other parties. If the violation is referred to directly in positive law regarding the threat of punishment for a type of violation and crime, for the

violator, if he is not sanctioned with a fine, he will certainly be sentenced to prison. Violations and crimes are forms of juridical counter-normative actions that result in the destruction of the social order and the peace of life in the community. Likewise with justice, if justice is blocked so that it is not successfully enforced, the consequences will be borne by the community and the state. The ideals of justice that are hindered and not realized will be felt to torture justice seekers, especially if it is related to fundamental interests. Justice is the ultimate goal of a juridical process.

Meanwhile, regulations or legislation will be able to become a preventive force and binding power in a repressive manner and even show the imperative dimension when the administrators of the legal profession participate in deceiving themselves, carrying out their duties and based on disrespectful, immorality, keeping up with the rules will lower the light of justice. Human rights continue. The term human rights is often equated with the term natural rights, basic human rights. According to Philipus M. Hadjon, in rights (rights), contained a claim (claim). The definition of human rights based on the provisions of Article 1, number 1 of Law No. 39 of 1999 concerning Human Rights and Law No.26 of 2000 concerning the Human Rights Court is a set of rights attached to the nature and existence of human beings as the creatures of Almighty God and His gift must be respected, upheld, and protected by the State, law, government and everyone for the sake of honor and protection of human dignity. The prominent rights of this century are socio-economic rights and the right to get something (rights to receive). The idea of the concept of human rights, in general according to Philipus M. Hamjon, is divided into three groups, based on the idea of 9 ideas), namely political and ideological thought, namely the West, Socialists, and the third world.

Human rights in Indonesia have been partially formulated in the 1945 Constitution, the formulation of which has not been inspired by The Universal Declaration of Human Rights which was formed earlier. Thus the formulation of human rights in the 1945 Constitution is thoughts that are based on the background of the cultural traditions of the life of the Indonesian people themselves.

Nanang Martono, *Sociology of Social Change, Classical, Modern, Posmodern, and Post-Colonial Perspectives*, Revised edition, PT. RajGrafindo Persada, Jakarta, 2016, p.191

Philipus M. Hadjon, *Legal Protection for the Indonesian People (A Study of its Principles, Handling by Courts in the Environment of General Courts and Establishing Administrative Courts)*, Civilization, 2007, p.33.34

The development of the concept of human rights in the international world is generally distinguished in three generations, namely the first generation with emphasis on



civil and political rights, the second generation with emphasis on social and cultural rights, and the third generation that gives birth to development rights. In detail, it can be described as follows:

1. Conception of Civil and Political Rights (First Generation).

Civil rights include, among others:

- a. The right to self-determination,
- b. Right to live
- c. The right not to be put to death
- d. The right not to be tortured
- e. The right not to be arbitrarily detained
- f. The right to a fair trial.

Political rights include:

- a. Right to express opinions.
- b. The right to gather and organize
- c. The right to get equality of treatment before the law,
- d. The right to choose and be elected.

2. Social, Economic and Cultural Rights (second generation).

Social and economic rights, including:

- a. The right to work
- b. The right to get the same salary
- c. The right not to be forced to work
- d. Right to food
- e. Right to housing
- f. Right to health
- g. The right to education.

Cultural rights, among others.

- a. The right to participate in cultural activities
- b. The right to enjoy the advancement of science
- c. The right to obtain protection for the work of copyright (copyright).

3. Development Rights (Third Generation).

Development rights include:

- a. The right to obtain a healthy environment
- b. The right to obtain decent housing
- c. The right to obtain adequate religious services.

The implementation of the concept of rights based on the second generation is social and economic rights underlie the human ability to develop business rights and economic rights of a person including working in a professional manner, the right to receive wages according to eligibility in accordance with applicable labor rules.

As a basis for economic rights and business rights, from the Right to Welfare, it is strengthened again from the basis of article 36 of Law No. 39 of 1999 paragraph 1,2 and 3 as follows:

1. Everyone has the right to own property, both alone and together with others for the sake of developing themselves, their families, their nation and society in a way that does not violate the law.
2. No person may be deprived of his property arbitrarily and in an unlawful manner.
3. Property rights have social functions.

When associated with national economic governance and social welfare, from article 33 of the 1945 Constitution, specifically paragraph 1 and 4 as follows:

Paragraph 1, The economy is structured as a joint effort based on the principle of family.

Paragraph 4, The national economy is held based on economic democracy with the principle of togetherness, efficiency with justice, sustainability, environmental insight, independence, and by maintaining a balance of progress and unity of the national economy.

This means economic rights and business rights must be beneficial and organized for national welfare in addition to individuals.

Except economic rights and business rights that must be regulated for family, community, social and state interests. In order for economic rights and business rights of both individuals and groups to grow and develop in line with the existing competition and form of protection, the anti-monopoly law and unfair competition will also underlie it. As for the law which is the basis of the 5-year UUNo 1999 concerning anti-monopoly and unfair business competition.

Law No.5 of 1999 has the following objectives:

1. Maintaining the public interest and increasing the efficiency of the national economy as one of the efforts to improve people's welfare.

2. Realizing a conducive business climate through sound business competition arrangements, so as to ensure the certainty of the same business opportunities for large business actors, medium business actors, and small business actors.
3. Prevent monopolistic practices and or unfair business competition caused by business actors.
4. Effective creation and efficiency in business activities.

The activities that are prohibited in business practice are as follows:

1. Monopoly

The situation of the procurement of certain merchandise is at least one third controlled by one person or one group, so the price can be controlled.

2. Monopsony

Is an unbalanced market situation that is controlled by a buyer.

3. Market share

Is the process, method, or action of dominating the market.

4. Conspiracy

Is to conspire or agree to commit a crime.

5. Dominant position

It is a position where a business actor does not have a meaningful competitor in the relevant market in relation to financial capacity, ability to access supply, sales, and the ability to adjust the supply and demand for certain goods or services.

6. Multiple positions

It is said that a person who occupies the position of director or commissioner in another company, if the companies are in the same relevant market, have a close relationship in the field / type of business, can jointly control the market share of certain goods / services that can lead to practice monopoly and or unfair business competition.

7. Share ownership

Business actors are prohibited from holding majority shares in several similar companies, conducting business activities in the same field in the same relevant market or establishing the same companies if the ownership results in, among other things, one business actor / group of business actors controlling more than 50% share of one certain types of goods / services, two or three business actors, business groups, business groups that control more than 75% of the market share of certain types of goods / services.

8. Mergers, smelters and takeovers

In carrying out the company the act of merging, consolidation and takeover will result in monopolistic practices and unfair competition and are expressly prohibited.

## **H. Conclusion**

In conclusion that economic rights and business rights can be carried out individually and in legal entities or groups that function for the benefit of the family, society and nation and are carried out without breaking the law. As success can be achieved by increasing professional human resources in anticipation of global competition.

Based on the basic human rights of all people, either individually or a legal entity / group, this is a force for the development of economic rights and business rights.

It is also inseparable from the economic law that regulates it so that business and economic rights development are worth fighting for so that everyone has the hope of living a more just and more prosperous life.

Government and stakeholders related to the movement of economic and business rights need to be strict in the context of supervision and implementation of law enforcement must be fair so that small economic actors, middle-level are not pressured by larger business actors.

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Legislation:

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1945 Constitution of the Republic of Indonesia.

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## **Threshold The Presidential Nomination in 2019 Elections**

Eka Mandayanti

### **Abstract**

The general election is a mean of popular sovereignty in the Unitary State of the Republic of Indonesia based on Pancasila and the 1945 Constitution of the Republic of Indonesia. The purpose of the election is to elect representatives of the people and regional representatives and to form a democratic government. Since independence the Republic of Indonesia has held electoral elections 11 times, and the next election will be held on April 17, 2019. The 2019 elections will be held simultaneously to elect the legislative members of the Indonesian House of Representatives, the Regional Representative Council and the Regional House of Representatives and will elect the President and vice-president. For the 2019 presidential and vice presidential election, a system of threshold conditions is required to nominate candidates for president and vice president or known as Presidential Treshold. In Law Number 7 of 2017 concerning Election article 222, it is stated that political parties or joint political parties must have 20 percent of the votes in the House of Representatives or 25 percent of national legitimate votes in the 2014 general election to be able to carry the presidential and vice presidential candidates. The problem of this research is that the implementation of elections will be carried out simultaneously, this is close the access of new political parties and old political parties that did not get 20 percent of the votes in the House of Representatives or 25 percent of the valid votes of election results 5 years ago. Even though the political party can get more than the threshold of 20 percent. Article 6 paragraph (2) of the 1945 Constitution states that presidential candidates and vice presidential candidates are proposed by political parties or joint political parties. This means that political parties can nominate candidates for president and vice presidential candidates without having to join other political parties. Article 222 was not in line with the principle of justice contained in the 1945 Constitution article 22 E paragraph (1) and (2) because it treated political parties participating in the election differently in proposing presidential and vice presidential candidates. The method used in this study was normative juridical.

**Keywords: Election, Presidential Treshold**



## **A. Introduction**

General elections (elections) are one of the ways in a democratic system to elect representatives of the people who will sit in the representative institutions of the people, and one of the forms of fulfillment of the human rights of citizens in the political field. Elections are held to realize people's sovereignty. Because the people cannot order directly. For this reason, a way is needed to elect representatives to run the government of a country for a certain period of time.

Almost no country wants to be said to be an undemocratic country, so there are almost no government systems that do not carry out elections. Election is essentially a system to capture public officials that are widely used by countries in the world with democratic governance systems. For some countries that adhere to or climax as a democratic state (sovereignty of the people), elections are indeed regarded as an institution as well as being the main benchmark of democracy. It can be interpreted that, in the implementation and results of the election is a reflection of the atmosphere of openness and application of the basic values of democracy, in addition to the existence of freedom of opinion and association as a reflection of citizens' opinions.

Election is a representative of people's aspirations that are closely related to the legitimacy of the government. Through democratic elections as a system that can guarantee the freedom of citizens which is realized through sound absorption as a form of public participation widely. Thus the election is a symbol of people's sovereignty. General elections are a means of sovereignty of the people in the Republic of Indonesia based on Pancasila and the 1945 Constitution.

The purpose of holding an election is to elect representatives of the people and regional representatives, and to form a democratic, to reinforce government and gain popular support in realizing national goals that are part of the 1945 Constitution of the Republic of Indonesia.

The Republic of Indonesia implements elections in the context of realizing people's sovereignty and at the same time implementing democratic principles or values, as well as increasing the political awareness of the people to actively participate in general elections in order to realize the ideals of a democratic Indonesian society. If the election is associated with democracy, it can actually be seen in relationships and simple formulations, that elections are one of the most tangible forms and ways to implement democracy.

Democracy is defined as government by and for the people, then the way the people determine the government is done through elections. General elections, hereinafter referred to as general elections, are means of sovereignty of the people to elect members of the People's Legislative Assembly, members of the Regional Representative Council, President and vice president and to elect members of the Regional Representative Council, which are carried out directly, publicly, freely, confidentially, honestly and fairly in The Unitary State of the Republic of Indonesia based on Pancasila and the 1945 Constitution of the Republic of Indonesia.<sup>49</sup>

Since the State of Indonesia became independent in 1945, it had carried out eleven elections. Starting from 1955 to the 2014 elections. In other words, the 2019 election will be the twelfth election to be held in Indonesia. However, Indonesia for the first time carried out the presidential election directly in the 2004 elections. The election which was then followed by 24 political parties, was carried out in three stages, the first on 5 April 2004 was carried out the election of members of the People's Legislative Assembly, the Provincial Regional Representative Council, the House of Representatives District / City Region and Regional Representative Council. Second, carried out on July 5, 2004 the first stage of the president and vice president election was held. Third, on September 20, 2004 the second stage of the presidential and vice presidential election. From the results of the election set the pair Susilo Bambang Yudhoyono and Jusuf Kalla as president and vice president of the Republic of Indonesia period 2004-2009.

During the election from the first elections in 1955 to the 2014 elections, it was carried out at different times of power, from the old order to the reform period. The election system used in every election was almost the same as the election that had been held. In the implementation of the election then regulated by the Election Law, along with political changes also then the Election Law changed. In the 2019 general election the new electoral law has been ratified, namely Law Number 7 of 2017 concerning General Elections. This is where the author wants to write related to the implementation of the 2019 election which will be carried out simultaneously and the implications of political parties that do not reach 20% of the votes in the House of Representatives or 25% of national legitimate votes.

## **B. Problem Sheet:**

1. How will the implementation of 2019 elections be implemented simultaneously?

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<sup>49</sup> Pasal 1 ayat (1) Undang-Undang Nomor 7 Tahun 2017 tentang Pemilihan Umum

2. How is its implication when not reaching 20 percent of the vote in the House of Representatives or 25 percent of the national legal vote?

### **C. Purpose and Usability**

#### **1. Purpose**

The purposes of writing this paper briefly are as follows:

1. To find out how the 2019 elections will be held simultaneously?
2. To find out what the implications are if it does not reach 20 percent of the votes in the House of Representatives or 25 percent of the national valid votes?

#### **2. Usability**

1. This paper can provide an understanding of how the implementation of the 2019 elections will be carried out simultaneously and what are the implications if it does not reach 20 percent of the votes in the House of Representatives or 25 percent of the national valid votes?
2. Providing knowledge of information and this paper is expected to be a source of information for legal science, especially the electoral system
3. Useful as reference material for the next paper.

### **B. Discussion**

#### **1. Concurrent General Elections in 2019**

For the first time the Republic of Indonesia will hold general elections simultaneously to elect members of the People's Legislative Assembly, the Provincial Regional People's Legislative Assembly, the Regency / City Regional People's Legislative Assembly, the Regional Representative Council, and the President and Vice President. Simultaneous general elections will be held on April 17, 2019. Simultaneous elections begin with a judicial review petition for Law Number 42 of 2008 concerning the Election of President and Vice President submitted by the Civil Society Coalition for Simultaneous Election. The Constitutional Court approved the simultaneous election through the Termination of the Constitutional Court Number 14 / PUU-XI / 2013 that the procurement

of separate legislative and presidential elections contradicted the 1945 Constitution, so that it could not be used as the basis for holding elections.<sup>50</sup>

The Constitutional Judge Council cancels article 3 paragraph (5), article 12 paragraph (1) and (2), article 14 paragraph (2) and article 112 Law Number 42 of 2008 concerning the Election of the President and Vice President (pipres), which regulates the implementation of the presidential election three months after the implementation of legislative elections. However, the Constitutional Court's decision did not necessarily apply to the 2014 elections, but it was valid in the 2019 election, because at that time all stages of the 2014 election were already running and approaching implementation.

### **Legal basis**

- 1945 Constitution
- Law Number 7 of 2017 concerning General Elections (combining three laws; Law Number 15 of 2011 concerning Election Organizers, Law Number 8 of 2012 and Law Number 42 of 2008 concerning General Elections of the President and Deputy President)
- MK Decree Number 14 / PUU-XI / 2013
- RI KPU Decree
- RI Bawaslu Decree

### **Election Organizers**

- General Election Commissions
- Election watchdog
- Election Organizer Honorary Council

### **Election system**

The Election System that will be used in the 2019 election is the same as the previous election, which is proportionally open. Where voters will still be able to directly vote for the person they want on the ballot paper which shows the name of the candidate and his party. Determination of the elected candidates is based on the most votes where seats that political parties get will be given to the legislative candidates from the political parties whose votes

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<sup>50</sup> <http://www.hukumonline.com/berita/baca/lt52e131d88b072/mk-putusan-pemilu-serentak-tahun-2019>

are the most. Later in each polling station (TPS) there will be a loma ballot box, for which voters will vote to elect members of the DPR, DPD, Provincial DPRD, Regency / City DPRD, and the President and Vice President.

To calculate the Legislative vote using the Sainte Lague technique, a method introduced by a Prancil mathematician named Andre Sainte Lague in 1910. In Indonesia this method was passed on July 21, 2017 in Law Number 7 of 2017 concerning General Elections. Article 414 paragraph (1) states that political parties must meet the parliamentary threshold as much as 4% of the number of valid votes nationally to be included in determining the acquisition of seats for DPR members.

After a political party meets the parliamentary threshold, the next step is to use the Sainte Lague method to convert votes into seats in the DPR.

**Article 415 paragraph (2):**

In the case of calculating the acquisition of DPR seats, the legitimate vote of each political party that meets the threshold of vote acquisition as referred to in article 414 paragraph (1) is divided by the divisor number 1 and followed sequentially by odd numbers 3; 5; 7 and so on.

**Article 415 paragraph (3):**

In the case of calculating the acquisition of seats in the provincial DPRD and Regency / City DPRD, the valid votes of each political party are divided by the divisor number 1 and followed sequentially by odd numbers 3; 5; 7 and so on.

## **Election participants**

Election participants are political parties for the election of DPR members, members of the Provincial DPRD, members of regency / city DPRD, individuals for the election of DPD members, and candidate pairs proposed by political parties or joint political parties for the election of the President and Vice President.

## **Political parties**

The political party participants of the 2019 electoral political party has been set by the General Election Commission as many as 20 political parties, including 4 local political parties from Aceh. Following are the names of 20 political parties participating in 2019 elections<sup>51</sup>:

1. Kebangkitan Bangsa Party (PKB)
2. Gerakan Indonesia Raya Party (GERINDRA)
3. Demokrasi Indonesia Perjuangan Party (PDI Perjuangan)
4. Golongan Karya Party (Golkar Party)
5. Nasdem Party
6. Gerakan Perubahan Indonesia Party (Garuda)
7. Berkarya Party
8. Keadilan Sejahtera Party (PKS)
9. Indonesian Unity Party (Perindo)
10. Persatuan Indonesia Party (PPP)
11. Solidaritas Indonesia Party (PSI)
12. Amanat Nasional Party (PAN)
13. Hati Nurani Rakyat Party (Hanura)
14. Demokrat Party
15. Aceh Party (PA) - politik lokal Aceh party
16. Paratai SIRA - politik lokal Aceh party

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<sup>51</sup> PKPU Number 5 of 2018 concerning amendments to the general election commission number 7 of 2017 concerning the stages, programs and schedule for holding the 2019 general elections

17. Aceh Regional Party (PD Aceh) - Aceh local political party
18. Nanggroe Aceh Party ((PNA) - Aceh local political party
19. Bulan Bintang Party (PBB)
20. Keadilan dan Persatuan Indonesia Party (PKP Indonesia) <sup>52</sup>

### **Election Stages**

1. Program and Budget Planning (August 17, 2017-31 March 2019)
2. Preparation of KPU Regulations (August 1, 2017 - March 31, 2019)
3. Socialization (August 12, 2017 - April 14, 2019)
4. Registration and verification of election participants (3 September, 2017 - 20 February, 2018)
5. Settlement of disputes on the determination of political parties participating in the election (February 19, 2018 - 17 April, 2018)
6. Establishment of the organizing body (January 16, 2018 - August 21, 2019)
7. Updating the voter list and arranging the voter list (17 December, 2017 - 18 May, 2019)
8. Preparation of overseas election lists (17 April, 2018 -17 April, 2019)
9. Arrangement and determination of electoral districts (Dapil) ( 17 December, 2017 - April 5, 2018)
10. Nomination of DPR, DPD, Provincial and DPRD Regency / City DPRD and nomination of President and Vice President (March 26, 2018 - September 21, 2018)
11. Settlement of disputes stipulating the nomination of members of the DPR, DPD and DPRD as well as the nomination of the President and Vice President (20 September, 2018 - 16 November, 2018)
12. Logistics (17 April, 2018 - 16 April, 2019)
13. Campaign of candidates for members of the DPR, DPD and DPRD and the nomination of the President and Vice President (23 September, 2018 - 13 April, 2019)
14. Campaign fund audits and reports (22 September, 2018 - 26 May, 2019)

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<sup>52</sup> <http://kpu.go.id/index.php/pages/detail/2018/906>

15. Quiet period (April 14, 201-16 April, 2019)
16. Voting and counting (April 17, 2019 - April 17 2019)
17. Recapitulation of the results of vote counting (April 18, 2019-22 May, 2019)
18. Settlement of disputes over election results of DPR, DPD and Provincial and Regency / City DPRDs
19. Settlement of Disputes and nomination of President and Vice President (23 May, 2019 - 15 June, 2019)
20. Determination of the acquisition of elected seats and candidates without requesting disputes over election results
21. Determination of the acquisition of elected candidates after the decision of the Constitutional Court
22. Inauguration of membership (July-September 2019)
23. Swearing / promise pronouncement

## **2. Election system of President and Vice President in 2019**

In the 2019 presidential elections, the presidential system will be used. The presidential threshold is the threshold for nominating the president for the presidential election. This threshold which later becomes a condition for proposing presidential candidates in the 2019 Presidential election.

The government proposes a presidential threshold of 20 percent of seats or 25 percent of national votes. Please note that the requirements for the 2019 presidential election use the threshold in the 2014 elections.

### **Article 222 of Law Number 7 of 2017:**

"The candidate pair is proposed by a Political Party or a combination of political parties participating in an election that meets the requirements for obtaining seats of at least 20% (twenty percent) of the number of DPR seats or obtaining 25% (twenty five percent) of nationally valid votes in the election of DPR members previous".

Article 222 of Law Number 7 of 2017 concerning General Elections is not in line with the principle of justice contained in the 1945 Constitution of Article 22 E paragraph (1) and



paragraph (2), because it treats political parties participating in the election differently in submitting presidential and vice presidential candidates.

Article 22 E of the 1945 Constitution:

Paragraph (1): General elections are carried out directly, publicly, freely, confidentially, honestly and fairly every five years.

Paragraph (2): General elections are held to elect members of the People's Legislative Assembly, the People's Legislative Assembly, the Regional Representative Council, Regional Representatives.

The 2019 election will be held simultaneously and the threshold becomes unfair because of the results of the previous election which made the decision. While in article 6 A paragraph 2 of the 1945 Constitution it is written that candidates for president and presidential candidates are submitted by political parties or joint political parties. This means that political parties can nominate candidates for president and vice president candidates without having to join political parties. This will also make the parties have a position of value over a presidential candidate.

The nomination threshold of 20% (twenty percent) of the number of DPR seats or obtaining 25% (twenty five percent) of nationally valid votes in the previous DPR member elections, will cause the Presidential nomination to be limited and only to certain parties. The public will later be trapped and have no choice to get alternative leaders through the political process. The result was that the presidential candidacy confirmed the recruitment of elitist politics and only involved certain people and decided by a group of people.

If saw the votes of 10 DPR political parties in the 2014 election <sup>53</sup>:

1. Nasdem Party 8,402. 812 (6.72 percent)
2. Kebangkitan Bangsa Party 11,298,957 (9.04 percent)
3. Keadilan Sejahtera Party 8,480,204 (6.79 percent)
4. Demokrasi Indonesia Perjuangan Party 23. 681,471 (18.95 percent)
5. Gokar Party 18,432,312 (14.75 percent)

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<sup>53</sup> <https://news.detik.com/berita/d-3568722/harus-koalisi-di-pilpres-begini-peta-kekuatan-parpol-di-dpr>

6. Gerindra Party 14,760,371 (11.81 percent)
7. Demokrat Party 12,728,913 (10.19 percent)
8. Amanat Nasional Party 9,481,621 (7.59 percent)
9. Persatuan Pembangunan Party 8,157,488 (6.53 percent)
10. Hanura Party 6,579,498 (5.26 percent)

The number of seats in the 10 political parties DPR:

1. Nasdem Party (36 seats or 6.4% DPR seats)
2. Kebangkitan Bangsa Party (47 seats or 8.4% DPR seats)
3. Keadilan Sejahtera Party (40 seats 7.1% DPR seats)
4. Demokrasi Indonesia Perjuangan Party (109 seats or 19.4% of DPR seats)
5. Gokar Party (16.2% of DPR seats)
6. Gerindra Party (73 seats or 13% of DPR seats)
7. Demokrat Party (61 seats or 10.9% DPR seats)
8. Amanat Nasional Party (48 seats or 8.6% of DPR seats)
9. Persatuan Pembangunan Party (39 seats or 7% DPR seats)
10. Hanura Party (16 seats or 2.9% of DPR seats)

Looking at the data, it can be seen that none of the political parties can later carry out the presidential and vice-presidential candidates themselves. PDIP as the winner in the election must also coalition with other political parties to reach a Presidential threshold of 20% (twenty percent) of the number of DPR seats or obtain 25% (twenty five percent) of nationally valid votes in the previous DPR member elections. From this it can be predicted that if two large coalitions from government supporters or opponents are solid, two presidential and vice presidential candidates will emerge as in the 2014 election.

This was proven on August 10, 2018 and on the last day of registration, there were only two pairs of candidates who applied to the General Election Commission. Prabowo couple - Sandiaga Uno was promoted by Gerindra, PKS and PAN parties. Joko Widodo's pair and Ma'ruf Amin were carried by nine political parties, namely PDIP, Nasdem Party,

Golkar Party, PPP, PKB, Hanura Party, PKPI, PSI and Perindo. This party coalition is called the Indonesia Work Coalition. But later in the file review, the KPU finally dropped two political parties from the Indonesia Kerja coalition, namely the Indonesian Solidarity Party and the Perindo Party. The omission was in the improvement of the file for the requirements for the nomination of presidential candidate Jokowi-Ma'ruf Amin. Currently, just waiting for the results of verification of the completeness and correctness of the file. If later there are deficiencies, you can still repair the file. The KPU will determine and announce the presidential and vice presidential candidates on September 20, 2018, a day later the serial number will be taken.

The implication is that those who have a bargaining position and political capital to then be able to carry the presidential and vice presidential candidates are those who have seats or have a valid vote from the legislative elections in the 2014. None of the political parties participating in the 2014 elections fulfill the requirements of 20% (twenty percent) of the number of DPR seats or obtain 25% (twenty five percent) of valid votes nationally. To be able to carry out the president and vice-president candidates this political party inevitably has to join other political parties, so they can reach the quota.

While the new political parties in the 2019 election do not have the capital to nominate the President and Vice President because they do not have the political capital required by the Act, the new political parties must join the political parties participating in the 2014 election.

### **C. Conclusion**

In the 2019 election for the first time the Republic of Indonesia will hold general elections simultaneously to elect members of the People's Legislative Assembly, the Provincial Regional People's Legislative Assembly, the Regency / City Regional People's Legislative Assembly, the Regional Representative Council, and the President and Vice President.

Presidential Elections which will be held in 2019 with a Presidential Threshold system by using the nomination threshold of 20% (twenty percent) of the number of DPR seats or obtaining 25% (twenty five percent) of nationally valid votes in the 2014 elections, this will restrict public opportunities and limit opportunities for alternative candidates to emerge. Do not give opportunity to the presidential and vice presidential candidates of the new political parties in the 2019 election.

The use of the Sainte-Laguë voting method will tend to benefit large parties. And Presidential candidates will be oriented to strengthening the presidential system adopted in Indonesia.

**The Election Organizers Ethics Council of Republic of Indonesia (DKPP RI) : New  
Chapter of Ethical Court And Democracy**

Ferry Fathurokhman

**Abstract**

In Indonesia, General Elections are conducted by the General Election Commission (KPU) and the Election Supervisory Agency (Bawaslu). Both institutions have the task for conducting the election of president, parliamentary members, and regional head from governor to regent /mayor in all over Indonesia. Several issues emerge when the Election organizers (KPU and Bawaslu) perform unprofessional conduct. For instances, what if they are partial, committing unequal treatment, breaching their code of ethics? In order to handle such problems, The Election Organizers Ethics Council of Republic of Indonesia (DKPP RI) then was formed independently in 2011 through an act to complete the electoral system, enforcing code of ethics, measuring the quality of democracy. Uniquely, the ethical court at DKPP is designed as a disclosure-trial. All parties are allowed to attend and observe the court session. Ethic has transformed in its modern and progressive form in Indonesia. Most of ethical courts are held in camera, yet since 2011 Indonesia makes a breakthrough in the field of general election particularly in terms of ethical court system. Up to February 2018, DKPP has been firing 458 election organizers due to ethical infringement. DKPP reassures that the election organizers should be credible and independent in order to hold a trustable general election. This paper will explain how the ethic works in practical level and a brief history of ethics development in Indonesia. In addition, this paper will also describe the implementation of restorative justice in regard to maximalist model in several verdicts of DKPP. The maximalist model is a different form of the common restorative justice. It needs no consent of all parties for dealing legal or ethical dispute. In conclusion, ethical court has become a new paradigm for elevating democracy to the next level and an example of the maximalist model that previously written in several books as a theory.

**Keywords:** Ethical Court, General Election, Democracy

## A. Introduction

The year 1955 was marked as the time that the first general election was held in Indonesia.<sup>54</sup> General election is a legal consequence to be held for any democratic country including Indonesia.<sup>55</sup> The next general elections were held in 1971, 1977, 1982, 1987, 1992, 1997, 1999, 2004, 2009 and 2014 respectively. In 1955, the General Election Institution (LPU) was formed by executive body, the same pattern occurred in 1971-1997, general election commission (KPU) was formed by executive body. This era of KPU was deemed as unfair and destroying the principle of impartial since the KPU was formed by the government as the ruling party there for the result of general election was predictable. It happened in the new order era when the result of general election was predictable, Golkar as the ruling party was always the winner of general election. At that time there was no direct general election for local leader. Local leader such governor, mayor and regent were elected by parliament member. Direct Presidential General Election was conducted in 2004 for the first time. This model of direct general election then implemented also for local leader. From 2015, 2017, and 2018 General Election Commission has been conducting direct general election for local leader simultaneously based on Law No 1/2015. Unlike the KPU in old and new order, in 1999-2014, KPU was formed by Legislative body. In fact the first KPU in reformation order (1999) was also involving political party member as one of the general election commission member. Currently the KPU is formed independently through a tight election stage by parliament as representative of Indonesian citizen.

Today, all the general elections are organized by general election commission independently. In the beginning, there was no institution who supervises general election and general election commission as well. But since 1982 a committee the so-called Election Supervisory Committee (Panwaslak) was formed by the KPU for supervising general election commissions and general election candidates. This committee was an *ad hoc* body under general election commission. By the Act No.22/2007 the Election Supervisory Agency (Bawaslu) was formed permanently, particularly at the state level. Then through a judicial review at constitutional court the Election Supervisory Agency (Bawaslu) at province level was also established permanently. The function of the Election Supervisory Agency (Bawaslu) is supervising General Election Procedure, and the addressee are General Election Commission and General Election Candidates.

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<sup>54</sup>29 September 1955 was the general election for parliament member whilst 15 Desember 1955 was for electing member of constituent council

<sup>55</sup><http://www.kpu.go.id/index.php/pages/index/MzOz>

Now we have KPU and Bawaslu at every level, from state level to a sub-district level. But then another question arises. Several issues emerge when the Election organizers (KPU and Bawaslu) perform unprofessional conduct. For instances, what if they are partial, committing unequal treatment, breaching their code of ethics? In order to handle such problems, The Election Organizers Ethics Council of Republic of Indonesia (DKPP RI) then was formed independently in 2011 through an act to complete the electoral system, enforcing code of ethics, measuring the quality of democracy. Previously, Ethic Council of General Election Commission (DK-KPU) was formed based on Act No 22/2007. DK-KPU was an ad hoc body, however it was an embryo of the birth of DKPP.

## **B. Discussion**

DKPP was established based on Act No. 15/2011 regarding General Election Organizer. Its authority is described in chapter V from art.109 to art.115. DKPP is a state body whom enforce infringement of general election organizers code of ethic. General Election itself is a body whom organizes general election i.e., general election commission (KPU) and Election Supervisory Agency (Bawaslu).<sup>56</sup> Therefore, DKPP has an important role to ensure the independent, integrity and credibility of general election organizer, to assure the ethic of general election organizers in order to achieve a trustable and qualified of general election result. In doing so DKPP is equipped with an authority, as described in article 112 Act No 15 /2011, for giving sanction such reprimand; layoff (temporary-discharged); or permanent discharge. Uniquely, the trial in DKPP is held in disclose system, therefore everyone is able to attend and observe the trial process. Most ethical court in Indonesia is held in camera. This model somehow is not satisfying. It is lack of transparency, and sometimes the result remains unclear. In the context of restorative justice, all the sanctions mentioned above<sup>57</sup> can be attached with restorative justice perspective in order to restoring the plaintiff (victim) from any harm that caused from the effect of the defendant policy or unethical conduct of general election organizers.

The justice system usually employs the adversarial system. As a consequence, the court becomes the 'battlefield' between the plaintiff and the defendant. In the end, the court's decision will end up with the winning and loose party. Therefore the court verdict is extremely important since it represents justice. However, justice that produced by the court often

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<sup>56</sup> Article 1 (5) Act 15 Year 2011.

<sup>57</sup> Reprimand; layoff (temporary-discharged); or permanent discharge

resulting the procedural justice instead of substantial justice. This is the weakness of conventional justice system. Restorative justice proponents analyze this as incompleteness and therefore proposes a new paradigm for handling a dispute. In regards to *restorative justice*, all parties are heard, the verdict is designed to restore the both party i.e. the plaintiff and the defendant. In particular, the defendant is required to take responsible by restoring any harm caused by the defendant. The term “restorative justice” itself has been becoming a familiar term originally in criminology and criminal law field. In fact, restorative justice starts to become a global trend on handling crime.

To understand what restorative justice is, I would like to look back to the initial term of restorative justice. In many literatures it seems that all of restorative justice proponents affirmed that the term “restorative justice” was coined by Albert Eglash.

Most of them also agree that its first appearance found in his 1977 paper,<sup>58</sup> *Beyond Restitution-Creative restitution*, which was presented at a conference on restitution in 1975.<sup>59</sup>

In his paper, Eglash described three faces of justice: (1) retributive justice; (2) distributive justice<sup>60</sup> and; (3) restorative justice. The first one relies heavily on punishment as its technique for handling crimes, while the second is based on therapeutic treatment of offender.<sup>61</sup> The third one, which is restorative justice, proposes restitution as its feature in handling crime. Eglash then named this restitution as creative restitution. He noted that, in

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<sup>58</sup> Except Daniel W. Van Ness and Karens Heetderks Strong who, at beginning, wrote the same until they made “clarification” footnote in their fourth edition book and noted that Eglash actually developed his idea about creative restitution (on his 1975 article), a restorative justice feature, within his series article published in 1958 and 1959. Ann Skelton (2005) has traced Eglash’s sources and found that restorative justice term emerged in 1956 book, written in German and then translated and adapted into English as *The Biblical Doctrine of Justice and Law*, written by Heinz-Horst Schrey, Hanz Hermann Walz & W.A.... Whitehouse. See further more in Daniel W Van Ness and Karen Heetderks Strong, *Restoring Justice, An Introduction to Restorative Justice* (4<sup>th</sup> edn, Anderson Publishing 2010), p. 22.

<sup>59</sup> The paper then published in an anthology in 1977 entitled *Restitution in Criminal Justice, A critical Assessment of Sanctions*.

<sup>60</sup> Distributive justice here should be regarded differently with distributive justice as oppose to commutative justice in term of penal law *vis-a-vis* civil law. It seems that Eglash referred to neo classic school notion when mentioning distributive justice which concern on offender rather than offence as classical school view. Most of criminal law scholars and criminologists called it rehabilitation model of criminal justice (or simply rehabilitative justice) instead of distributive justice. See for example Steve Mulligan who wrote “[restorative justice] is better understood through its goal and principles and in comparison to the paradigms that precede it, namely the retributive and rehabilitative philosophies of punishment.” Steve Mulligan, ‘From Retribution to Repair: Juvenile Justice and the History of Restorative Justice’ (2009) 31.U.La Verve L. Rev.139.

<sup>61</sup> The most effective penal reform for most criminal law scholars had been accomplished in modern society by shifting the focus of sentencing from punishment for reasons of desert to punishment as a means of rehabilitation and reform. It was a reform of the purpose of punishment from distributive to rehabilitative. See Wesley Cragg, *the Practice of Punishment, Toward a Theory of Restorative Justice* (Routledge 1992), p. 80.



many respects, retributive and distributive justice has some similarity which differs from restorative justice. For instance, both punishment and therapeutic treatment concern primarily offender's behavior while restorative justice focuses on the destructive or harmful consequences of that behavior, its effect on the victim of the criminal act. In the view of victim side, punishment and therapeutic treatment disregard the victim, except as witnesses. On the other hand, restorative justice makes victims and their needs an important consideration and gives them an important role to play both in achieving justice and in developing a rehabilitative or correctional program.<sup>62</sup> In my view creative restitution can be regarded also as an embryo of restorative justice program (beside Kitchener experiment).

Interestingly, as Eglash admitted, creative restitution was designed primarily for the offenders as he noted: "For me, restorative justice and restitution, like its two alternatives, punishment and treatment, is concerned primarily with offenders. Any benefit to victims is a bonus, gravy, but not the meat and potatoes of the process."<sup>63</sup> As we shall see later, the growth of restorative justice movement has emerged various definitions which wider than Eglash mentioned above, especially in term of its center concern.

Restorative justice however is a wide topic, one of category of restorative justice is based on its enforcement: voluntarily and coercion. In many literatures, this category is known also as "the purist" model and "the maximalist" model respectively. The purist relies on initial definition of restorative justice. Take for instance Toni Marshal whom, for many, categorized as the purist. He defined restorative justice in this way: "restorative justice is a process whereby all the parties with a stake in a particular offense come together to resolve collectively how to deal with the aftermath of the offense and its implications for the future." From Marshal's definition, it was clear that the initial notion of restorative justice is to "resolve collectively", not by one-side party, it means voluntary consent of each party is necessarily needed. On the other hand maximalists take different path by referring to Lode Walgrave and other who defined restorative justice as "all activities oriented to realize justice by restoring harm brought by a crime."<sup>64</sup> In maximalist view, the word "all activities" can be extended, therefore all measure can be done to realize justice as long the purpose is to

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<sup>62</sup> See further more in Albert Eglash, 'Beyond Restitution-Creative Restitution' in Joe Hudson and Burt Galaway (eds), *Restitution in Criminal Justice: A Critical Assessment of Sanctions* (Lexington Books, 1977) 91-99. <[www.lorennwalker.com/blog/?p=117](http://www.lorennwalker.com/blog/?p=117).

<sup>63</sup> *ibid* 99.

<sup>64</sup> Takahashi Norio, *Restorative Justice and Treatment of Offenders* Sonderdruck Aus, *Menschengerechtes Strafrecht. Festschrift Fur Albin Eser Zum 70. Geburtstag.* Verlag C.H. Beck Muncen 2005, p. 1434-35

restore the harm caused by the crime. This also means coercive way is enforceable to be enforced in restorative justice. For example it can be done by judge verdict regardless whether the offender agree or disagree with the verdict. It is in this category, I see that DKPP is able to employ the maximalist model.

In practical level at DKPP, victim's needs vary from demanding reprimand to permanent discharge. Often the plaintiff merely expects that his/her complaint is heard by the defendant, to explain that they were disappointed and ignored by the defendant. Basically, *restorative justice* values may be utilized in all type of DKPP's sanctions as long still in the context of restoring the harm that caused by the defendant. For instance, DKPP may hand down temporary-discharged verdict and instruct the defendant to restore the harm/loss by correcting its decision. This verdict is possible to apply since temporary-discharged verdict is basically a conditional verdict, the defendants may have their position back after correcting the decision.

### C. Conclusion

In short, the implementation of maximalist model may be utilized within court verdict that has coersive power to restore and fulfil plaintiff's needs, or other party affected by defendant's act. Interestingly, whilst maximalist proponents still develop this idea as theory, DKPP (Dewan Kehormatan Penyelenggara Pemilu) has been implementing restorative justice in term of maximalist model.

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<http://www.kpu.go.id/index.php/pages/index/MzQz>







## **Critiquing The Problem of Threshold Against the Constitutional Rights Of Political Parties in Proposing a Candidate for President and Vice President**

Ricca Anggraeni, Cipta Indralestari Rachman, and Muhammad Ihsan Maulana

### **Abstract:**

The political party electoral participants according to section 6A of the Constitution of the Republic of Indonesia 1945 had the right to propose candidates the President and Vice President. This re-affirmed through the law on political parties which determines that one of the privileges of the political party is proposing a candidate for President and Vice President in accordance with the provisions of the legislation. Then, in chapter 222 laws Number 7/2017 about Election, it set on about the requirements to be met by political parties to propose a candidate for President and Vice President. The requirement is, it must be met by political parties which must obtain at least 20% of the seats of House of Representatives seats or get 25% of the valid votes nationwide in the election for members of the House before. This provision gives the construction of thought with the interpretation about the political parties which gain the number of seats for less than 20% of the total number of House seats or less than 25% of the valid votes nationwide in the election of the previous member of Parliament cannot be propose a presidential candidate. This threshold requires and applies for petition *judicial review* to the Constitutional Courts (for the next will stated with MK). MK with the verdict numbered 53/PPUU-XV/2017 despise the material test and assess that the threshold requirements that are relevant to the presidential system. The problem then, political parties election participants will be dynamic. As it will happen in 2019, the year of election year that there are four (4) new political party namely Perindo, Partai Berkarya, Partai Gerakan Perubahan Indonesia (Garuda), and Partai Solidaritas Indonesia (PSI), which according to the provisions of any such threshold After the court's ruling confirmed the number 53/PPUU-XV/2017 could not propose a candidate for President and Vice President because it does not meet the threshold. A question regarding the end of constitutional rights of political parties to the electoral participants 2019 in the proposed candidate for President and Vice President's post verdict MK Number 53/PUU-XV/2017 relevance threshold determination. The constitutional rights of political parties should remain accommodating, so that the threshold is not a stumbling block for the fulfillment of the rights provided by the Constitution of the Republic of Indonesia 1945. If the threshold was a stumbling block, it meant democracy of Indonesia was in questioned. That question was solved through normative legal research methods with doctrinal approaches and legislation.

**Keywords:** political party, threshold, President and Vice of President, Constitutional Courts.

## **A. Introduction**

The dynamic of politic Indonesia, one of them can be seen with increased or decreased the number of political party which to be participant in the general election. Since was held the first general election in Indonesia, can be seen the dynamic of number political parties that became participants is 172, then, in the second general election in 1971, the number of participants is 10, even in the next election in 1977, 1982, 1987, 1992 and 1997, the number of political parties only 3 participants, i.e. Partai Persatuan Pembangunan, Golongan Karya and Partai Demokrasi Indonesia. At the general election in 1999, the number of political parties was increased to be 48, and in the 2004, decreased to be 24. Whereas in the elections of 2009, participants become 38 with 6 (six) the local political party in Aceh. At the 2014, the political party that became the participants of the election decreased to 12, whereas at the general election in 2019, the number of participant of political party became 16 with 4 the local political party in Aceh.<sup>1</sup>

Based on the description about the dynamic of politic Indonesia, can be seen that the political party has in the life of Indonesia's democracy to determine power transfer peacefully with the general elections. To accommodating it, the political party regulated in constitution of Indonesia is UUD Negara Kesatuan Republik Indonesia 1945 (UUD NRI 1945) and in the law on general election. UUD NRI 1945 regulating about political parties at the general election in chapter 6A of paragraph (2) stated of “pairing Presidential candidates and Vice President proposed by the political parties or the combined political party electoral participants prior to the implementation of the elections.” Then, in the chapter 22 E paragraph (3) of the UUD NRI 1945 which determines that "the participants of the general election to choose members of the House of representatives and a member of the regional House of representatives is a political party." From the two chapter above, it can be stated that the political parties in Indonesia have a role in the election to propose a candidate for President and Vice President, as well as select members of Parliament (DPR and DPRD).

The rules of political party in the law of general election is about political parties and general election participants and concept coalition of political party which contained in the general provisions. The rules about the political party of participants general electoral contained in Article 172 up to Article 180 in the law of 7/2017 about General Elections. Then, the article about the candidate of President and Vice President proposed in one (1)

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<sup>1</sup>[https://id.wikipedia.org/wiki/Daftar\\_partai\\_politik\\_di\\_Indonesia](https://id.wikipedia.org/wiki/Daftar_partai_politik_di_Indonesia).

pair of candidates by political parties or a coalition of political parties are regulated in articles 221 to article 239 of the Law about General Election.

From these articles that became the point of critics from academia and organizations nonprofit have been enthusiasts of the election, even the political party itself is Article 222 of which determines the requirements of the political parties or coalition of political parties to proposed candidates can apply for the President and Vice President. The article 222 in the Law about General Election, determines as follows:

"Candidates proposed by political parties or Combined political parties Election Participants who meet the requirements for obtaining a seat at least 20% (twenty percent) of the total number of parliament seats or gain 25% (twenty five percent) of the votes valid in national legislative elections before. "

Thus, can be interpreted with grammatical method that the political party or coalition of political party will be proposed the candidate of President and Vice President if gain of seats at least 20% from the total number of parliament seats, or gain 25% (twenty five percent) of the votes valid in national legislative elections before. In the general election 2019 context, who can proposed the candidate of President and Vice President is political party or coalition of political party whose gain the seat at least 20% of the number of seats of the parliament or gain 25% of the valid votes national in the election of members of Parliament in the 2014.

Whereas, if move to back time period, in general election of 2014, political parties that gain the number of seats was numbered 15 (fifteen) and that none of the political parties that are able to gain seats in the parliament at 20%, not even for the Partai Demokrasi Indonesia Perjuangan (PDI-P) which is designated as the political party winning the most votes.<sup>2</sup> It means is, with the quantitative methods, no political party which capable to be proposing party the candidate of President and Vice President in the general election 2019, unless that political party joint to a coalition to fulfill about the threshold. The translation above also propagate to new comer of political party whose yet to be participant at the general election in 2014 that might not able to fulfill the requirements for proposed a potential candidate (President and Vice-President).

The above reality, encourage a number of organizations such as the Kader Muda Demokrat (KMD), Advokat Cinta Tanah Air and personi.e.Habiburokhman even

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<sup>2</sup>DaniPrabowo. (2018, August 08). "Disahkan KPU, Ini Perolehan Suara Pemilu Legislatif 2014, Kompas Online. Access from <https://nasional.kompas.com/read/2014/05/09/2357075/Disahkan.KPU.Ini.Perolehan.Suara.Pemilu.Legislatif.2014>.



political parties namely PartaiIdaman to proposed a judicial review over Article 222 of the Law on General Elections to the Constitutional Court (MK).<sup>3</sup> MK ultimately decides to reject the proposed of the judicial review that are registered with the number of case 53/PUU-XV/2017. With the ruling of MK, the more affirming terms of requirement of political party and coalition of political party to proposed the candidate of President and Vice President with fulfill the number of threshold.

Rests on the critics thought,with the ruling of MK, gives rise to normative and political implications in the electoral system in Indonesia, while the dynamics of the political situation in the Indonesia continue to occur, among others, is increased and arises of political parties recently.Of course the political parties should have the same rights in the state with democracy. Moreover, in its development political party tend to be a connector between a government with society, and its average with spontaneously. It means, suddenly, could have arises a new political party that is considered capable of being a liaison between society and the container shaft power. With that threshold, the political party that is considered as facilities to communication and partner to defend the political interest until the shift in power is held, edged in accordance with the rule feared would not be fulfilled its due. In principle, TatuVanhannen meaning of democracy as a political system places different groups legally constituted entities reserve the right to pursue the institutional power to compete. Whereas, E.E Schattsneider meaning of democracy as aa competitive political system in which there is competition-competition leaders and organizations in carrying out public policy alternatives, so that the public can participate in the decision-making process.<sup>4</sup> From that view, it can be stated that the existence of a threshold in the election of the candidate for President and Vice President will trim the right of political parties to pursue institutional power. Therefore, the question in this study is about the constitutional rights of political parties to the general electoral participants 2019 in the proposed candidate for President and Vice President's post verdict MK Number 53/PUU-XV/2017 associated threshold determination.

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<sup>3</sup>RendiFerdifirdaus. (2018, August 18). "UU PemiluResmiDigugatKeMahkamahKonstitusi," Merdeka Online. Access from<https://www.merdeka.com/politik/uu-pemilu-resmi-digugat-ke-mahkamah-konstitusi.html>.Can be seen HasanudinAco. (2018, August 08). "KMD: Tolak Judicial Review PresidentialTreshold, Putusan MK LangkahMundurDemokrasi". Tribun Online.Access from <http://www.tribunnews.com/nasional/2018/01/16/kmd-tolak-judicial-review-presidential-threshold-putusan-mk-langkah-mundur-demokrasi>.

<sup>4</sup>M. Iwan Setiawan dan Mustafa Lutfi.(2015). *RisalahHukumdanPolitik di Indonesia*.Lampung: PKK-PUU FakultasHukumUniversitas Lampung.

These problems are examined with the use of this type of research doctrinal and use secondary data sourced from secondary legal materials. After the data is collected through methods of study in library, data is analyzed using normative.

## **B. Discussion**

### **1. Constitutional Right of Political Parties on Proposing Candidate of President and Vice President due to MK's Verdict regarding Threshold**

Political parties have big role on constructing the democracy and has been one of the main pillar, because the main control of the government in the context of determining the government, which is President and Vice President. As been stated on the Article 6A paragraph (1) of the Constitution of the Republic of Indonesia 1945 that pair of President and Vice President candidate proposed by a Political Party or coalition of political parties of the general election participants. The mechanism on proposing President Candidate based on this UUD 1945 are tend to be a representative democracy that is represent by the political party who won the generalelection. Constitutionally, the soon to be President must be proposed by political party that have been on the Parliament for then will be voted by all the citizens (direct democracy). This concept shows that on placing Presidents, Indonesia are considered to apply constitutional democracy.

According to the Constitution of the Republic of Indonesia 1945, Political Party has the right to propose candidate of Presidents and Vice President for the general election as long as the Political Party is one of the participant of the generalelection. On the UUD 1945 there are fulfill the requirements regarding the threshold in order to propose the President and Vice President candidate, therefore this threshold requirement regarding President and Vice President candidates been regulated on the Law about General Election has injured the constitutional democracy itself. The birth of this threshold refers to equalize parliaments and President due to the check and balances principals, where legislative and executive must be equal. Check and balance has been an important element of the separation of power principals which has been written on the constitution as the separation of power principals in order for a certain power does not become full of power.<sup>5</sup>

Determining the threshold is based on Article 222 The laws Number 7/2017 about General Election. This provisions caused the polemic, therefore, Article 222 has been proposed for judicial review to the Constitutional Court of Republic of Indonesia and has

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<sup>5</sup>Janedjri M. Gaffar.(2013). *Hukum Pemilu Dalam Yurisprudensi Mahkamah Konstitusi*. Jakarta: Konstitusi Press. p. 4.

been ruled as that this provision. According to the ruling number 53/PUU-XV/2017, is an open legal policy. According to this ruling constitutional court judge, SuhartoyodanSaldiIsra, have dissenting opinion.

Historically, in Indonesia the requirement for threshold, could also be seen at the general election of President and Vice President on 2004, 2009, and 2014. At this period, determining the threshold would be easy to be known because at this period general election of President and Vice President are held after the general election of Legislative. This means that to see whether the threshold has been fulfilled or not could be done just by referring to the gains of Political Party or Coalition of political parties at the Legislative general election that must be at least have 20% of the seats of parliament seats or get 25% of the valid votes nationwide in the general election for members of the House. These numbers will affect the next step of Political Party which participate on the general election whether they must have a coalition in order to propose a pair of candidate or not.<sup>6</sup>

But this will implicate differently after the ruling number 14/PUU-XI/2013 by MK which stated that the general election for legislative and general election for President and Vice President must be held simultaneously. This regulation will be applied for the 2019 general election, and based on the Law Number 7/2017 about General Election Article 222 stated that Political Party or Coalition of Political Parties must be at least have 20% of the seats of Parliament seats or get 25% of the valid votes nationwide in the general election for members of the House before in order to propose their pair of candidate.

The Constitutional Court of Indonesia ruling regarding the general election that must be held simultaneously which is petitioned by EffendyGhazali to have the judicial review regarding Article 3 paragraph (5), Article 9, Article 12 paragraph (1) and (2), Article 14 paragraph (2), and Article 112 Law Number 42/2008. EffendyGhazali stated in his petition that if general elections are held simultaneously, then Article 9 Law Number 42/2008 which regulates the threshold requirement will be automatically irrelevant. Effendy also add that according to Article 6A Verse (2) UUD 1945 that there are not any threshold to propose a pair of President and Vice President candidates.

After the ruling of the judicial review petitioned by EffendyGhazali, the Constitutional Court of Indonesia ruled the judicial review petitioned by YusrilIhzaMahendraNumber 108/PUU-XI/2013. At this petition, Yusril request the court to interpret the constitution regarding the execution of general election of President and Vice

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<sup>6</sup>Lembaga Ilmu Pengetahuan Indonesia, "Salah Kaprah Presidential Threshold," accessed through <http://lipi.go.id/berita/single/SALAH-KAPRAH-PRESIDENTIAL-THRESHOLD/7896>.

President, especially erase the presidential threshold as the requirement for Political Party or Coalition of Political Parties to propose their pair of President and Vice President candidate on the general election of President and Vice President because it has violated the constitutional right to nominate President and Vice President candidate and the UUD NRI 1945 does not mention any threshold.

With the retrieve of the means Article 22E paragraph (1) and paragraph (2) UUD 1945 regarding that legislative general election and president and vice president election should be held simultaneously, it will make the threshold irrelevant. It means that every political party that participated on the legislative general election, can propose their pair president and vice president candidate.<sup>7</sup>

It is hard to accept the thought of threshold requirement on the general election of President and Vice President if we referred to the choice on maintaining the presidential system during the amendment of the Constitution of the Republic of Indonesia 1945. Because, in the presidential system, legislative and president should be have direct mandate from citizen. At this logic, using the results of legislative general election as the threshold of proposing president and vice president is indeed a misleading perspective.<sup>8</sup> Moreover, when the legislative and executive general election will be held simultaneously this would create new problem.

Another problem is that threshold requirement will also derogate the right of political parties that has been participating in the general election. The implication of Article 222 the Law about General Election has distinguish political party into 3 classes. The first would be the political parties that have their seat on the House of Representative (DPR) which include PDI Perjuangan, Golkar, PKB, PAN, PKS, Nasdem Party, PPP, and Hanura Party. The second class would be the parties that has their votes but don't have their seat on the House of Representative that includes PBB and PKPI. The third class have neither votes nor the seat at the House of Representative but participate on the 2019 general election such as Perindo Party, Berkarya Party, Garuda Party, and PSI. This will affect the contestant, Parties that have reach the threshold requirement could propose their candidate while new parties can only support the election.

According to Law number 7/2017 about General Election, the candidate of President and Vice President proposed by a Political Party or a coalition of Political Parties that have reach the threshold referring to the previous general election or the 2014 general election.

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<sup>7</sup>*Ibid.*

<sup>8</sup>*Ibid.*, p. 6.

Article 222 Law about election stated that in order propose President and Vice President Candidate, Political Party or Coalition of Political Parties must obtain at least 20% of the seats of House of Representatives seats or get 25% of the valid votes nationwide in the generalelection for members of the House before. This regulation has also been implementing in the technical regulations that is the regulation of Commissions of General Election (PKPU) Number 22/2018 about Requirements on Proposing President and Vice President Candidate. Article 5 paragraph 1 PKPU Number 22/2018 specifically state that to propose President and Vice President Candidate, Political Party or Coalition of Political Parties must obtain at least 20% of the seats of House of Representatives seats or get 25% of the valid votes nationwide in the generalelection for members of the House before. This implicate that the regulation does not accommodate the right of new Political Parties to propose their candidate because they don't have any threshold on the general election before.<sup>9</sup>

The fact give a description that there is a derogation to the constitutional right of political party because of the threshold requirements happens to Perindo Party and PSI Party which their candidate is denied by Commission of General Election (KPU) as the result of not reaching the threshold requirements that is regulated on the Law about General Election and PKPU.<sup>10</sup> Where corresponding to the Constitution of the Republic of Indonesia 1945, proposing the pair of President and Vice President is a constitutional right of Political Party which is the participant of general election. As the basic law The Constitution of the Republic of Indonesia 1945 have given more than enough on constructing the process of proposing the pair of President and Vice President. As the basic norm this regulation could still be regulated by lower regulation, but the elaboration must not deviate something that has been definitively stated.<sup>11</sup>

It is a long process for Political Party to become the Participant of the general election. Start with registration, verification until the confirmation on becoming the participant of general election. Verification and registration of political party has been done equally whether it is the previous Political Party participant or a new Political Party. Yet, it becomes irrelevant when the registration has been done equally between participants but not

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<sup>9</sup>*Ibid.*, p. 21.

<sup>10</sup>PSI dan Partai Perindo Taken Out from the file of Proposing Jokowi Ma'ruf. <https://nasional.kompas.com/read/2018/08/10/15190211/psi-dan-partai-perindo-dicoret-dari-berkas-pencalonan-jokowi-maruf>. accessed on 10th August 2018.

<sup>11</sup>*Ibid.*

in the execution of general election due to the threshold requirement to propose the candidate President and Vice President.

## **2. Effect of Determination of Presidential Threshold Against the Democratic System in Indonesia**

On August 10, 2018 that was the final day of registration of candidates for President and Vice President for the general election in 2019. There are two candidates for President and Vice President who are nominated by a joint political party, namely presidential candidates and vice presidential candidates are Joko Widodo - Ma'ruf Amin from six parties sitting in parliament. They are PDIP, Golkar, PKB, PPP, The National Democratic Party, Hanura Party, and one party participating in the 2014 elections but not having seats in the parliament, it is PKPI, as well as two new parties namely PSI and Perindo. The second candidate is Prabowo Subianto-Sandiaga Salahudin Uno. They proposed from four parties sitting in parliament. They were PKS, PAN, Gerindra Party, and the Democratic Party, as well as a new party namely the Working Party. One of new party participating in the 2019 election did not determine the attitude of the Garuda Party.<sup>12</sup>

New parties such as PSI and Perindo were later dropped from the nomination file for candidates for President and Vice President.<sup>13</sup> PSI, Perindo and the Partai Berkarya are three new parties that did not have the right to participate in proposing candidates for president and vice president.

The constitutional rights of political parties that are hampered by the legal policy of the legislators are confirmed by the Constitutional Court through Decision Number 14 / PUU-XI / 2013 and Decision Number 53 / PUU-XV-2017, affirm that the provisions concerning the presidential threshold are open law policies or an open authority delegation that can be determined by the legislature.

Regard this matter, even though in principle, the establishment of the Law at least accommodates sustainability as a mirror of efficiency, justice, and democracy. The current principle of democracy has been interpreted more broadly than grammatical meaning,<sup>14</sup> namely the people's government or known as the government of the people, by

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<sup>12</sup>Wiwoho, B. dan Agus, F. (n.d.). Takut Diperalat, Partai Garuda Abstain di Pilpres 2019. Retrieved from <https://www.cnnindonesia.com/nasional/20180813124819-32-321824/takut-diperalat-partai-garuda-abstain-di-pilpres-2019>

<sup>13</sup>Meiliana, D. (2018, August 10). Retrieved August 18, 2018 from <https://nasional.kompas.com/read/2018/08/10/15190211/psi-dan-partai-perindo-dicoret-dari-berkas-pencalonan-jokowi-maruf>

<sup>14</sup>Retrieved August 14, 2018, from <https://kbbi.kemdikbud.go.id/entri/demokrasi>.

the people and for the people. Gould<sup>15</sup> in his book "Rethinking Democracy", classified three models of democratic theory: (1) liberal individualism models, (2) pluralist models, and (3) holistic social models. First, the liberal individualism democracy model is explained that democracy is a protector of people from the arbitrariness of government power, and occupies the government as a protector of the freedom of all people from threats and interference. The emphasis is on universal equality for all people and equality of rights for all people in the political process, marked by "one person one vote". In the second, models of pluralist democracy are the opposite of individualism which emphasizes individual personal interests. Pluralism focuses on the interests of the group as an aggregation of individual interests, and its appearance will lead to conflict in the political process. This pluralist democracy is carried out through institutions both in the form of political parties and extra-political groups that are in line with the interests of individuals, providing political alternatives capable of representing a plurality of groups. In the third, model of democracy is a holistic model of socialism individuals as part of the whole and in their roles and functions that must be played. Centralized authority is seen to express the general will or the most urgent interests of each individual with the control of the community both directly and through state apparatus.<sup>16</sup> This democratic model better illustrates the realization of democracy in the context of economic prosperity, because democratic democracy is shown in the freedom of the whole to actualize all potential through individual activities.<sup>17</sup>

In the Indonesian context, the concept of democracy is affirmed in Article 1 paragraph (2) of Constitution of the Republic of Indonesia, which reads "The locality is in the hands of the people and carried out according to the Constitution", so that the meaning of the people's sovereignty must examine the articles in the Basic Law as a limitation so as not to be trapped in the meaning of the highest power cannot be limited.

The election of the president and vice president is regulated in Article 6A paragraph (1) of the Constitution of the Republic of Indonesia which stipulates that the filling of the positions of president and vice president is carried out directly. Article 6A paragraph (2) of Constitution of the Republic of Indonesia stipulates that the candidate pairs of President and Vice President are proposed by political parties or a combination of political parties and general elections. These provisions can be interpreted as a political party participating in general elections as a means of popular sovereignty to be able to propose candidates for

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<sup>15</sup>Nurtjahyo, H. (2006). *Filsafat Demokrasi*. Jakarta, Indonesia: Bumiaksara.

<sup>16</sup>*Ibid.*, p. 62-63.

<sup>17</sup>*Ibid.*, p. 64.

President and Vice President. Whereas, the implementation of the election further regulated in the law.

The several academic, such as FeriAmsari from the Andalas University's Center for Constitutional Studies, was stated to have been over-interpreted by the legislator. The Actors in the Law on General Elections have determined the requirements for political parties to nominated candidates for president and vice president. In the formation of the Act, there are those who have been amputated by the legislators, including sustainability, justice and of course the principles of democracy.

As is known through readings of political and constitutional, democracy interpreted also as equality in politics, that is the equation equal rights and opportunities of each community, group, or political party in the electoral process. The equality of rights and opportunities are the main principle in a democratic country, so it cannot be overlooked or eliminated by the rule of law.<sup>18</sup> If equality of rights and opportunities in gaining political power through the general election are gone then justice does not materialize, so the country cannot be called democracy.

The general election is a tangible manifestation of procedural democracy which has been enshrined in the Constitution of the Republic of Indonesia. The regulation in the Constitution states that the general election as an instrument or means of channeling popular sovereignty in the form of people's political participation in the context of filling certain positions held periodic. It was stated by Mukhtarrija, Handayani and Riwanto<sup>19</sup> that elections was a means to elect and fill political positions in the government as representatives of the people which are held in a democratic and fair manner by having equal opportunities for each group, political party, or group without discrimination and regularly carried out and periodically regulated according to the country's constitution.

Democratic elections can be realized if there is integrity in organizing elections and election results.<sup>20</sup> On the side of the substance, indicators of democratic general elections according to Merloe must include three important things, namely: 1) whether there is recognition, protection, and fertilization of human rights (HAM); 2) there is fair competition

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<sup>18</sup>Mukhtarrija, M., et., al (2017). Inefektifitas Pengaturan Presidential Threshold dalam Undang-Undang Nomor 7 Tahun 2017 tentang Pemilihan Umum. *JH Ius Quia Iustum*, 24, 643-662. Retrieved August 18, 2018, from <https://media.neliti.com/media/publications/238225-inefektifitas-pengaturan-presidential-th-b671cc31.pdf>, p. 656.

<sup>19</sup>*Ibid.*, p. 654.

<sup>20</sup>Suswanto, G. (2015). *Pengawasan Pemilu Partisipatif: Gerakan Masyarakat Sipil untuk Demokrasi Indonesia*. Ciracas, Jakarta: Erlangga, p. 9



from the general election participants; 3) public trust in the general election that results in a legitimate government.<sup>21</sup>

The imposition of the threshold for the nomination of the president and vice president in the simultaneous electoral regime raises concerns that the three indicators of democratic elections are not realized. Lutfi Ansori argued that the problems that would arise from the presidential threshold provisions namely regarding the existence of the coalition and the presidential threshold standard.<sup>22</sup>

The coalition was formed to propose candidates for president and vice president to force political party, that do not meet the threshold for coalition with political parties that meet the threshold requirements of the presidential nomination. The other interest that lead to transactional politics.<sup>23</sup> In case of transactional politics, it injures three principles of democratic general elections as above; meanwhile, regarding the threshold benchmark is still an issue that is indicated by the existence of another judicial review submission to the Constitutional Court.<sup>24</sup>

The threshold for nominating the president and vice president is regulated by Law Number 7/2014 about General Elections and PKPU No. 20/2018 confirms that the implementation of the presidential and vice presidential election in 2019 excludes the principle of democratic representation through political parties as a vehicle for the people to channel their political aspirations.

### C. Conclusions

Provisions on the threshold for nominating the president and vice president as stipulated in Article 222 of Law Number 7 of 2017 concerning Elections provides an illustration of the constitutional rights' gap between political parties participating in the previous elections with political parties participating in the new elections to propose the nomination of presidential and vice presidential candidates. In equality, threshold for the nomination of the president and vice president in the general election simultaneously in 2019 as well injure the principle of democracy. Democracy which starts from the similarity of

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<sup>21</sup>Nugraha, H. S. (2015). "Redesain Kewenangan Mahkamah Konstitusi Dalam Penyelesaian Sengketa Perselisihan Hasil Pemilihan Umum Presiden Dan Wakil Presiden Di Indonesia." *Jurnal Hukum Ius Quia Iustum*, 22 (3), p. 427

<sup>22</sup>Ansori, L. (2017). "Telaah Terhadap Presidential Threshold dalam Pemilu Serentak 2019". *Jurnal Yuridis*, 4(1), 15-27. Retrieved August 18, 2018, from [ejournal.upnvj.ac.id/index.php/Yuridis/article/download/124/99](http://ejournal.upnvj.ac.id/index.php/Yuridis/article/download/124/99), p. 24-25.

<sup>23</sup>*Ibid.*, p. 25.

<sup>24</sup>Media, K. C. (2018, June 22). Ramai-ramai Menolak "Presidential Threshold"... Retrieved August 18, 2018, from <https://nasional.kompas.com/read/2018/06/22/09503321/ramai-ramai-menolak-presidential-threshold>.

constitutional rights, one of them is the right of political parties participating in the new elections to be able to nominate a president and vice president to be closed and must choose, and a vice president candidate from a coalition of political parties that have met the threshold.

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## **A Model Political Education to The Society to Create Democratic Elections**

Muhammad Iwan Satriawan and Evie Faridaturohmah

### **Abstract**

This research addresses to the model of political education for the society in order to realize the democratic election in Indonesia. The method used in this research is qualitative it compares the condition of development of democracy in Indonesia from year to year with theory of education that already exist. This is also related to the implementation of the election in Indonesia both in the local level (i.e the election of regional heads) and the national level (i.e president and legislative elections) are always colored by various violations such as money politic or the dismissal of teachers due to different election. Eventough UU No.2/2011 mentions that political parties have required to carry out the duties and function of political parties, that is political election, in fact political education do not run optimally. In other word, political parties have failed in carrying out their duties and obligations. Thus all elements of nations should responsible toward democracy in every election without depending on role of political parties.

**Keywords:** *Political education, political parties and democracy*

## A. Introduction

Election is now being centrality as the most democratic way to regulate the circulation of leadership. It ultimately distinguishes elections in other ways that have been known (i.e. coup d'etat). The close understanding between election and democracy can be seen from a number of definitions of democracy itself. As the concept proposed by Joseph Schumpeter with the Schumpeterian ideology. He places free and periodic election as the main criterion for qualification whether a political system is in a country as a democracy<sup>25</sup>.

Likewise, Indonesia claims as the third largest democracy in the world after America and India. It can be proven from the periodic election as an early indicator of the implementation of democratic practices in Indonesia.

Elections in Indonesia has been done about eleventh times starting from the old regime to the reform era<sup>26</sup>. From those times, the implementation of the election cannot be separated from the role of political parties. According to the article 1 paragraph, 1 UU no.2 of 2011 about political parties state that:

Political parties are organizations that are national in nature and formed by a group of Indonesian citizens voluntarily as the basis of their willingness and aspiration to fight for and defend the political interests of member, communities, nation and country, and to maintain the integrity of the unitary state of the Indonesian republic based on the Pancasila and constitution of the republic of Indonesia in 1945

Because of the importance of political parties, the state gives duties, right, and obligations as stated in law no.2 of 2011 concerning on political parties, one of which is to conduct political education. It is related to reform demands where everyone is given the freedom to gather, argue, and establish political parties as protected by law<sup>27</sup>. The freedom is then widely used by the community to establish political parties. There is a significant increase in the number of parties in Indonesia. in the new regime, political parties are only three and it develops into forty four political parties in the reform era.

Moreover, the authority to conduct political education by political parties is not given in the form of a blank check. It means there is government intervention in providing funding to political parties in order to carry out their duties and functions. It is regulated in article 34

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<sup>25</sup>Nur Hidayat Sardini, 2011, *Restorasi Penyelenggaraan Pemilu di Indonesia*, Yogyakarta:Fajar Media, p.1

<sup>26</sup> 1955,1971,1977,1982,1987,1992,1997,1999,2004,2009,2014

<sup>27</sup> Pasal 28 UUD 1945

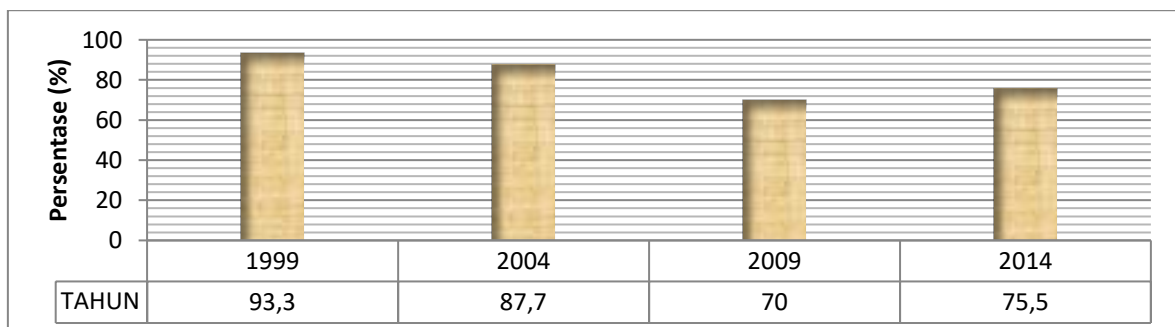
paragraph 1 of UU no. 2 of 2011 concerning on political parties “ the political party finances is funded by

- a. Contributions a member
- b. Legal contributions
- c. State assistance from the state’s income and expenditure budget, or regional income and expenditure.

Even so, in the course of political education carried out by political parties do not run optimally. Political education is only carried out once every five years and it is near the election both legislative and regional head election. The rest of the society learns independently based on their experience in conducting elections. This causes an increasing number of abstentions in every election. The participation of people in post-reform elections is presented as below.

**chart. 1**

**The Participation charts in elections year 1999-2014**



Source: KPU RI

From the graph above, it can be seen that there is a decrease in the involvement of people in the last four periods. This phenomena actually is not only the responsibility of political parties but also all elements of society starting from the election organizer, the government, NGOs (Non-Government Organizations) in both high school and universities. Hence, through this paper, researchers present the right political education method for the communities in realizing democratic elections in Indonesia.

## **B. Discussion**

### **1. Political Education**

Education plays an important role in the future development of a nation. By giving the right education to society, a state will give birth to the next generations with people who can improve or place a nation to be better in the following years.

Etymologically, education comes from the Latin word "educare" which means training. Khan defines education as a process of developing various kinds of potential that exist in humans so that they can develop well for themselves and their environment<sup>28</sup>. For Freire, education is a pilot project for social change to form a new society<sup>29</sup>. Making education as a pilot project means discussing a cultural system that is comprehensive and transcends the theoretical boundaries of certain political doctrines, and talks about the relationship between theory, social reality and the true meaning of emancipation.

Education in Indonesia is organized as an effort to create quality human resources based on the philosophy of life of Pancasila. In line with this mission Law No. 20/2003 concerning the national education system formulates education as a conscious and planned effort to realize a learning atmosphere and learning process so that students actively develop their potential to have religious spiritual strength, self-control, personality, intelligence, noble character and skills needed by him, society, nation and state.

Education has a close relationship with learning. Learning is essentially the process of interaction with all the situation that exists around the individual. It can be viewed as a process that is directed towards goals and the process itself goes through a wide range of experiences<sup>30</sup>.

One of the functions of education in many countries is to produce technical or administrative knowledge which is ultimately accumulated by dominant groups and used in controlling the economics, politics, and culture<sup>31</sup>.

On the other hand, the importance of formulating educational programs is not only as a political tool but also must be supported by educational institutions in developing legitimacy and production patterns, are two fundamental things in building state hegemony towards society. For instance, learners do not only prepare to be ready to work in facing globalization challenge, but educating them as future generations who can formulate the state

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<sup>28</sup>Khan, D.Y. 2010. *Pendidikan Karakter Berbasis Potensi Diri Mendongkrak Kualitas Pendidikan*. Yogyakarta: pelangi publishing, p.1

<sup>7</sup> Freire, P. 2004. *Politik Pendidikan Kebudayaan, Kekuasaan, dan pembebasan*. Terjemahan Prihantoro & Arif. Yogyakarta: pustaka pelajar, p..5

<sup>30</sup>Rusman, 2014, *Model-Model Pembelajaran*, Jakarta: Raja Grafindo, p.1

<sup>31</sup>M.Sirozi, 2005, *Politik Pendidikan*, Jakarta: Raja Grafindo, p. 67

policies is necessity. This phenomenon also spreads at the level of learners in various universities in Indonesia. They tend to compete to get the best score in order to pass with satisfying grades quickly. In another word, learners are mostly concern on the left brain, meanwhile, the development of the right ones often neglected.

## 2. Political party

The existence of political parties is one of manifestation of the implementation of human rights to gather, unite, and express opinions as well as for the sake of good democracy in a country. Through structured modern political party institution, the existence of periodic general elections and the operation of pressure group, democracy operates as a mechanism or an institutional arrangement for arriving at political decisions by means of competitive struggle for the people's vote<sup>32</sup>.

The term political party itself comes from two words, namely party and politics. The party itself comes from Latin "partire" which means to divide. Initially, the presence of parties in political life is considered negative. French revolutionary orator and agitator, Robespierre considers that the party is an organization that only concern on the interests of leaders. Meanwhile, George Washington believes that the party is a disseminator of hostility and dissatisfaction with the general public<sup>33</sup>. along with the changing times and the better level of public education, these negative assumptions are gradually diminishing so that eventually political parties play a full role in upholding the basic foundations of democracy in a country.

Furthermore, the term politic in the Dutch dictionary written by Van Der Tas is Beleid which means policy<sup>34</sup>. In English, it is called politics. while in Arabic, politic is called siyasah which then be interpreted as tactics. policy is defined as a behavior or action that reflects good or wise for each individual or official. It means the policy is more influenced by the character and conscience of every official, not merely because of power<sup>35</sup>.

According to Ranney and Kendall, political parties are seen as autonomous groups that make nominations and contest elections in the hope of eventually gaining and exercise

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<sup>32</sup>Ricardo Blaug and John Schwarzmantel in M.Ali Safa'at, 2011, *Pembubaran Partai Politik*, Jakarta:Rajawali Press, p.7

<sup>33</sup>Efriza,2012, *Political Explore*, Bandung:Alfabeta, p.213

<sup>34</sup>Sri Sumantri in M.Iwan Satriawan,2012, *Politik Hukum Pemerintahan Desa*,Yogyakarta:Jurnal PSHK-UII, p.128

<sup>35</sup>Sadjijino,2008, *Memahami beberapa bab pokok Hukum Administrasi*,Yogyakarta:Laksbang Pressindo, p.72



control of the personal and policies of government<sup>36</sup>. In the modern, political parties are a group that proposes candidates for public officials to be elected by the people so that it can overcome or influence the government<sup>37</sup>.

Based on the explanation above, the political experts generally describe four functions of political parties which include political communication, political socialization, political recruitment, and conflict management<sup>38</sup>. In line with them, Vyes Meny and Andrew Knapp define the functions of political parties as mobilization and integration, a means of forming influence on voting patterns, a means of political recruitment, and means of elaborating policy choices<sup>39</sup>.

### 3. Political education model

The progress of a civilization in a country depends on the level of education of its society as well as political practices. As a country that has just escaped from an authoritarian regime, Indonesia is actually is in a transition to the democracy. The phase between that situation is a vulnerable period. The possibility of returning to the previous conditions (authoritarian regime) is a very big chance if the new regime cannot solve the various governmental crises<sup>40</sup>.

Based on the various experience of countries that have just escaped from authoritarian to democratic regimes, they open up large opportunities for political and economic activities. This is in accordance with what Przeworski mentions as “north-west passage”<sup>41</sup>, means that new democracies immediately want to reach prosperity as practiced by countries in the west. So the practice of political and economic liberalization is inevitable.

The direct election of the president and vice president, followed by direct regional head elections, and the legislative candidate selection model cause the enemy candidates not only to cross political parties but also in internal parties where the candidate’s shelter.

Based on the description above, political understanding is formed because of the situation arise. It does not happen because of the school curriculum. The experience that

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<sup>36</sup>Efriza, *Op.Cit*, p..223

<sup>37</sup>Abdul Mukhtie Fadjar,2012, *Partai Politik Dalam Perkembangan Ketatanegaraan Indonesia*, Malang:Setara Press, p.13

<sup>38</sup>Miriam Budiardjo in Jimly Asshidiqie, 2006, *Parpol dan Pemilu sebagai Instrumen Demokrasi*, Jurnal Konstitusi,Vol.3,No.4,2006

<sup>39</sup>*Ibid*

<sup>40</sup>Valina Singka Subekti,2008,*Menyusun Konstitusi Transisi*,Jakarta:Rajawali Press,hlm.57

<sup>41</sup>Adam Przeworski,1995,*Sustainable Democracy*,Cambridge:Cambridge University Press,hlm.3

people get will be an important lesson for them to the succession of the following elections peacefully. It is such away to improve the level of social welfare of society in general. It can be proved by the increasing criticality of the people towards the candidates of political parties. To build a critical state of citizens, people usually involve in construct process. People actively create their subjective representations of objective reality. by observing i.e legislative candidate proposed by political parties, collecting information, associating what people known and then informing to others. Thus, people must individually find and transform the complex information, check information with the existing pattern and revise it if necessary<sup>42</sup>.

In another word, the political education model for Indonesian people particularly is not a political education as applies in schools with teachers, curriculum, and classroom activity. But it is more on participatory which is characterized by or involving participation; especially providing the opportunity for people to be involved in deciding how something is done. This model demands the activity of all stake holders to discuss and share concerning with the dynamics of local and national politics. Those can be done through socialization, small discussion in the public area, and seminar involving academics continuously. Then the result can be exposed on print and electronic media.

Political education as a way to educate people in the modern era should follow many changes along with the progress of science and technology because the information development cannot be stopped. people are mostly literate in technology so that an independent political education system is needed. The thing should be considered is that every election, whether it is full of peace and produce leaders who are trustworthy or election that is full of hostility, chaos, and producing an authoritarian leader. The success or the failure of political education is on people's experience because it leads people to become mature and wise in politics.

The chaos or hostility that usually occurs only at the top level or high class. Even if there is a level of chaos at low class, it caused the political elites are not satisfied or get lost in the political arena. The failure makes them create a movement as if their defeat is the defeat of society as a whole. They provoke through the power of money and information such as positioning themselves as people who persecute in order to get the sympathy of

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<sup>42</sup>Rusman, Op. Cit, hlm. 201

people. Actually what they do is for the advantage of individual politics, not for the benefit of the general public.

### C. Conclusion

Based on the previous explanation, it can be concluded that; First, political education for citizens is not only the duty of political parties but an obligation for all elements of people who care about politics such as by giving deep understanding to communities who are politically blind. Second, political education models for heterogeneous communities cannot use the curriculum system as in a formal education, but it is more on participation. Third, political education is more focused on the experience and the activeness of the communities to make corrections in every political activity so that the democratic election can be realized.

Even though political parties as are one element in realizing the democracy, They are unable to carry out their duties and functions well as stated by law. Thus, it becomes important for the government to evaluate and reduce the authority of parties in order to focus on their field.

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## **Redesign of Constitutional Ethics for Constitutional Court Judges Based on Pancasila Law in Realizing the Goal of the 16th SDGs**

Muhtadi and Indra Perwira

### **Abstract**

Decision of the Constitutional Court (MK) is final and binding. Binding everyone (*erga omnes*), permanent legal force (*in kracht van gewijsde*) and binding force (*resjudicata pro veritate habetur*), reflects justice, certainty and legal benefit. However, decision Number 66/PUU-XI/2013 states that the verdict of Number 18/PUU-VII/2009 being reviewed only listens to the applicant. The verdict relating to the position of the Corruption Eradication Commission (KPK) contains a contradiction between Decision Number 012-016-019/PUU-IV/2006, Number 19/PUU-V/2007, Number 5/PUU-IX/2011 and Number 49/PUU-XI/2013 with Number 36/PUU-XV/2017 which puts the KPK in the executive family so that it applies the relation of check and balances system. The final verdict comes preceded by political communication between the Chief Justice of the Constitutional Court who will terminate the membership period and his position to nominate again through the House of Representatives (DPR). Using the theory of moral and philosophical reading of the constitution, and the theory of Indonesian legal state based on Pancasila. Concluded that the reading on constitution morally made Pancasila as the living source of law, growing and developing inside society caused the judicial legal product (Constitutional Court) being accepted, and vice versa, negating the sense of justice of the people to distance the court from the hearts of the people, so that the verdict is not executorial.

**Keyword:** Redesign, constitutional ethics, constitutional justice, SDGs

## **A. Preliminary**

Strengthening judicial institutions is one of the 16th goals of the Sustainable Development Goals (SDGs). Besides the legal substance, the achievement of SDGs is inseparable from the legal structure as a whole system (Friedman, 1984, Soerjono Soekanto, 2008). Professionalism is shown by the application of law which not only aims at achieving law enforcement, but also justice. So that the law is not only written norms, but also interpreted as rules that live, grow and develop in society. Likewise justice, public sense of fairness is the indicator (Article 5 of Law No. 48/2009). In order to uphold the law and justice, the qualifications of having integrity and personality which are unblemished, honest, fair, professional, as well as experience in the legal field are an integral precondition. In addition, to ensure the state of character which is attached to constitutional judges, which is the object of this study, ethical awareness becomes inherent in the personality of court judges. So that every legal product of the court, especially the verdict that does not have an organ as well as conventional justice, will be carried out as an *erga omnes* decision.

However, there were at least two court verdicts which later became controversial, even one of them was rejected by the society so that it could not be implemented. The verdict that received community rejection was the case Number 66/PUU-XI/2013 concerning the Testing of Law No. 13/2009 concerning the Establishment of Maybrat Regency in West Papua Province, which was previously decided in case Number 18/PUU-VII/2009. Second decision that has a contradiction, not even with one decision with a similar object, but with four previous decisions. namely case No. 36/PUU-XV/2017 concerning Testing of Law No. 17/2014 concerning MPR, DPR, and DPD (MD3) which contradicts case No. 012-016-019/PUU-IV/2006, No. 19/PUU-V/2007, No. 37-39/PUU-VIII/2010, No. 5/PUU-IX/2011, because of that final decision, Arief Hidayat received a verbal reprimand for light ethical violations, while Akil Muchtar, the previous Chairperson of the Constitutional Court, a week after the Maybrat case was arrested by the KPK and dismissed dishonorably.

## **B. Theoretical Approach**

Indonesia is a legal state (Article 1 (3) of the 1945 Constitution), from the beginning, Indonesia recognized the principle of the rule of law (Fahmal. 2006). Muhammad Yamin (Gautama, 1973) wrote that "in the law-state of the Republic of Indonesia, citizens are governed and treated by laws of justice made by the people themselves, in a legitimate way and according to conditions which can be investigated or monitored by the people also.

Azhary (1995) concept of the State of Indonesian Law is closely related to *rechtsstaat* (Continental Europe), but not *rechtsstaat* and also not rule of law, although both types are found in the Indonesian Law State. the characteristics of the State of Indonesian Law based on Pancasila according to Azhary are: a. There is a close relationship between religion and the state; b. Relying on the principle of the Almighty God; c. Embracing religious freedom in a positive sense; d. Atheism is not justified and communism is prohibited; e. Adhering to the principle of kinship and harmony. Padmo Wahjono (1989) called it the legal state of Pancasila, with the principles found both in the Preamble and the articles of the 1945 Constitution as written constitution.

The constitution is a fundamental thing which every state law has, the content of the constitution not only regulates the fundamental rules of the state intended by Sri Soemantri (2006, Syahuri, 2006, Arto 2001) there are also basic norms for administrative, criminal and other laws (Manan, 2006) as an entire state system that shapes and regulates or directs government (Wherae, 1975). Thus, the constitution also contains statements of beliefs, principles and visions that were previously debated (Asshiddiqie, 1994). Therefore, understanding the Constitution is insufficiently focused on reading the articles, or relating to the redaction of the Constitution, but also paying attention to agreements, concepts (doctrines) used and living realities when the fathers of the constitution compile the Constitution 1945 (Manan, 2015).

Such an approach makes the constitution in moral reading (Dworkin, 1997), or moral and philosophical reading of the constitution (Asshiddiqie, 2014), from textual reading to contextual. So that enforcement of the constitution is not solely based on rule of law but morality-based paradigm or rule of ethics' (Asshiddiqie, 2014) with three main values of law as integrity, namely justice, fairness and procedural due process (Dworkin 1986), which emphasizes moral philosophical point of view and the principles of constitutional law in order to find the spirit of the constitution (Asshiddiqie, 2014).

Lon L. Fuller (1964) mention two moral clusters in positive law which it is accepted and obeyed by society as a good law, internal and external morals. Both moral groups of morality aspirations (morality of aspiration) which together with morality duty (morality of duty) make the law positive, so that law and morals are two things that cannot be separated. For Dworkin, (1977, 1986, 1997, 2002, 2006). Law is an integrity which includes justice, fairness and procedure due process. The law is not merely a system of rules, but there are legal principles that cannot be separated from the rules, even though the regulation does not

appear, so that the process of moral reading of the norm is needed Luijpen (Tanya, 2013). Attempted revive the doctrine of natural law that immersed in the egoism of modern humans, by placing humans in subjectivity as the only source of law has sociality and history, so that humans are not in a single pole, subject or object. The difference of laws and morals are distinguished because of their shape, but the substance of both has an affinity. The law gives form and morals fill it, morals direct goodness and keep evil away, the law values good and evil as normative standards. K. Nirmala, B.A.Karnakara Reddy and N. Aruni Nari, (2016), wrote:

*Both law and ethics focus on defining the perfect human behaviour, but they are not the same. Law is the government's attempt to formalize rightful behaviour, but it is rarely possible to enforce written laws. It depends on individual or business ethics to reduce unlawful incidents. Ethical concepts are more complex than written rules since it deals with human dilemmas that go beyond the formal language of law.*

### **C. Discussion and Conclusion**

Two of the Constitutional Court's verdicts that received wide attention and even one of them could not be carried out were the case of the capital city of Maybrat regency, Papua with No. 66/PUU-XI/2013 and No. 18/PUU-VII/2009, as well as the verdict related to the inquiry right of the DPR to the KPK in case No. 36/PUU-XV/2017 concerning Testing of Law No. 17/2014 concerning MPR, DPR, and DPD (MD3) which contradicts case No. 012-016-019/PUU-IV/2006, No. 19/PUU-V/2007, No. 37-39/PUU-VIII/2010, No. 5/PUU-IX/2011.

The problems found on the first decision related to the choice of the location of the capital of Maybrat Regency, Papua are not requested by the related parties, in this case the legislator and also the regional government of Papua Province, but only the applicants as contained in case No. 66/PUU-XI/2013 with a decision to grant the request. Whereas in a similar case of No. 18/PUU-VII/2009 related parties gave a view, which later the decision refused. As a result of these two different decisions, there was a refusal of the Maybrat community which resulted in the execution of the final decision. In addition to the refusal, the absence of sociological considerations on aspects of the state/regional finances that have been used by the development of the infrastructure government facilities in Maybrat also results in state/regional losses.



The second decision related to MD3 Law in case of No. 36/PUU-XV/2017 which contradicts the previous four decisions by placing the Corruption Eradication Commission (KPK) as the executive, while the four decisions are the opposite, that KPK is independent. Case Decision No. 36/PUU-XV/2017 one of the case which was preceded by political issues that arose between the KPK and DPR regarding the right of inquiry to the existence of the KPK which was almost simultaneously with the end of the membership period of Arief Hidayat as a court judge. The final decision, for example by ICW, seemed to confirm the truth of the compensation between the DPR and the membership period of Hidayat (Kompas, 08/02/2018). One of the effects of the dynamics, caused Hidayat was examined by the Ethics Council of the Constitutional Court, and declared to have committed a minor violation by being given an oral reprimand.

The diversion case of the Maybrat Regency in decision No. 66/PUU-XI/2013 in real judgments there are efforts not to involve decision makers, the DPR in determining the location of the district capital, by reasoning, the provisions are facultative, not mandatory, complete as follows:

...before considering the subject matter of the petition the Court needs to quote Article 54 of the Constitutional Court Law which states, "The Constitutional Court can request information and/or minutes of meetings relating to the petition being examined by the People's Consultative Assembly, DPR, Regional Representative Council, and/or President". Because the article uses the word "can", the Court does not have to hear the statements of the People's Consultative Assembly, the People's Legislative Assembly, the Regional Representative Council, and/or the President in examining a Law. In other words, the Court may request or not request information and/or minutes of meetings relating to the application being examined by the People's Consultative Assembly, the People's Legislative Assembly, the Regional Representative Council, and/or the President, depending on the urgency and relevance. Because the legal issues in the a quo petition are clear, the Court considers that there is no urgency and relevance to request information and/or minutes of meetings from the People's Consultative Assembly, the People's Legislative Assembly, the Regional Representative Council, and/or the President, so that the Court in deciding the petition a quo without first hearing the statement of the People's Consultative Assembly, the People's Legislative Assembly, the Regional Representative Council, and/or the President.

Although the principle of *audiatur et altera pars* or *eines mannes rede ist keines mannes rede* adopted in Law No. 48/2009 the practice is widely used in civil cases, court hearings should listen to the parties involved in making decisions regarding the determination of Maybrat's capital as outlined in Law No. 13/2009. This condition is different from the final result of a court similar case of No. 18/PUU-VII/2009 which rejected

the petitioners' petition, after the court judge heard the statements from the government and the DPR. That is, the two decisions that have different results are born because of differences in understanding and implementing Article 54 of the Constitutional Court Law. The previous ruling which rejected the parties' request to get broad support from the community, including the central government in this case the Ministry of Domestic Affairs, which later carried out the construction of the Maybrat government facilities until 2013, but at the time of the case No. 66 / PUU-XI / 2013, the Court in addition does not listening to the statements of related parties, also did not consider the state/regional finances that have been used in the construction of the regional capital.

The second case is principally a decision which is inconsistent in placing the position of the KPK in state institutions and relations between institutions. The first four decisions were stated at the beginning, all of which appointed the KPK as a separate institution from the executives, he was independent, but in the final decision related to the authority of the DPR to exercise the right of inquiry by making the KPK an object of the inquiry rights in turn put the KPK as an executive, not independent institution. However, the decision that makes KPK as one of the objects of the DPR's inquiry rights as regulated in Article 97 of the MD3 Law is correct. This means that the consideration used by the assembly is not the government's intervention in the exercise of its authority and duties in the field of investigation and prosecution of corruption cases, but on non-judicial administrative activities of the KPK, so that the existence of the KPK within the government does not mean it will not be independent in carrying out judicial work.

The decision of the MD3 Act is only a door which later evolved into an alleged ethical violation of judge Hidayat, which at the time would expire on his membership as a judge. The alleged violation was the presence of Hidayat at the DPR meeting place without an official invitation letter but rather a notification via WA (whatsapp), which was later alleged as lobbies to return to being a constitutional judge.

The decision of the Ethics Board itself according to one of the MK's researchers (interview 24/8/2018), was not unanimous, some said there were no violations, because the meeting had been informed beforehand to the Ethics Council and obtained approval to attend, but there were also proposals as a violation of the heavy level, which then gets the midpoint with the verbal warning signal.

The second decision is more on the scientific interpretation of constitutional law that experiences receding, which because the judges are different, there is a high probability of

disagreements, so the arguments will be different. Whereas in the first decision, related to the Maybrat Capital City, there was clearly no professionalism in applying the procedural law of the Constitutional Court, even allegedly having material interests behind it. So that, if it refers to Dworkin's model of legal integrity, or the characteristics of the legal state of Pancasila Azhari and Padmo Wahjono, the divine moral values have been clearly violated. Because the nature of divinity that does not take personal advantage and prioritize public interests is not reflected in the first panel's decision. Likewise humanity and civilization, due to this decision, the Maybrat people did not accept the diversion of the capital city from Aifat to Ayamaru, which had spent the state / regional budget so large as to build infrastructure, facilities and infrastructure of the government in Aifat.

Therefore, in order to guarantee the equality before the law, Article 54 of the Constitutional Court Law is not interpreted as one-sided (as interpretative interpretation) to be the absolute right of the Constitutional Court to request information/opinion of the parties related to the case being tested, which means interpreting the explanation of the two sides as intended in Article 4 Act No. 48/2009.

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## **International Cooperation against Transnational Corruption**

Ahmad Baharuddin Naim

### **Abstract**

Almost no country can live solitary (alone), without contact and cooperation with other countries. The life of the country as an organizational unit is similar to human life which is inseparable from relations with other human beings. So that the relationship or cooperation with other countries has become a necessity and necessity in the arrangement of relations between countries in the international world.

Many fields and aspects that can be carried out cooperation between countries with each other, one of which is cooperation for the prevention and eradication of criminal acts of corruption across national borders. Corruption can be said to occur and exist in almost every country, even in countries that are said to be advanced though. The perpetrators of corruption on a large scale, generally are educated people and have great power or important positions in government and the private world. To avoid pursuit of law enforcers in their home countries or to secure the results of corruption, the perpetrators of corruption intentionally fled to other countries or saved the results of their corruption in a country they considered safe. Facing this type of corruption that crosses national borders, sometimes a country's national law becomes ineffective and encounters several obstacles. To reduce these obstacles and to maximize efforts to fight corruption that is crossing national borders, international cooperation between countries is needed. To answer the problems in the research carried out by normative juridical research methods, the data is processed and analyzed with qualitative methods that aim to provide a clear picture of the problem under study.

Forms of international cooperation that can be done to tackle criminal acts of corruption that cross national borders can be carried out in the form of bilateral and multilateral agreements. Indonesia has strengthened international cooperation related to eradicating corruption. The steps taken were through a state meeting of the United Nations Anti-Corruption Convention. In the United Nations convention (UN) it was agreed that the forms of cooperation in the prevention of transnational crime include: Exchange of Criminal Information and Intelligence (Exchange of Information and Intelligence concerning Crime); Extradition; Mutual Legal Assistance in Criminal Matters / MLA (Reciprocal Assistance in Criminal Problems); Transfer of Criminal Proceeding (Transfer of the Legal Process of a Criminal Case); Transfer of Sentenced Person (Transfer of Prisoners); Joint Investigation; Joint Operation and others.

## **A. Introduction**

Corruption can be interpreted as a behavior that deviates from the official duties of a state office because of gains in status or money involving individuals (individuals, close relatives, groups themselves) or violating the rules of implementing some personal behavior, including ethical and moral issues in the view of the general public.

Corruption is one of the major problems and challenges faced by the international community at this time. As a result of acts of corruption have caused many losses in various sectors of life. The United Nations (UN) noted, corruption is a serious crime that can weaken social and economic development in all walks of life. Every year, the United Nations records about \$ 2.6 trillion lost due to corruption. This figure is equivalent to 5% of global GDP (Gross Domestic Income).

One effort to overcome corruption is to use the means of criminal law. Almost no country does not regulate the prohibition of acts of corruption, even though there are those who regulate it in separate (special) regulations and some regulate it in criminal regulations in general. Nevertheless, in principle, every act of corruption is prohibited and is considered as a violation of the law.

Overcoming or eradicating acts of corruption using national legal facilities is currently considered less effective. Along with the development of transportation and telecommunications technology, the flow of human movement to move from one place to another is so fast. This is very beneficial for the perpetrators of corruption on a large scale, which can move from one country to another in a fast tempo or move the results of their corruption to other countries with the intention to be hidden or disguised. The limitation of the implementation of a country's national law in eradicating acts of corruption that cross the territorial boundaries of a country greatly benefits the perpetrators of corruption like this.

Facing the above problems, cooperation between countries (international) is needed in overcoming corruption that crosses the territorial boundaries of a country. So that in this paper the focus of attention is on the importance of international cooperation in combating or overcoming corruption.

## **B. Discussion**

### **a. Corruption Acts across national borders**



The growth and development of international criminal acts and their regulatory needs begins with a long history of wars that have occurred since the era of development of traditional international societies up to the era of development in modern international society.

Basically, according to Romli Atmasasmita the term International Criminal Law was originally introduced and developed by international legal experts from mainland Europe such as: Friederich Meili in 1910 (Switzerland) Georg Schwarzenberger in 1950 (Germany); Gerhard Mueller in 1965 (Germany); J.P. Francois in 1967; Rolling in 1979 (Netherlands); Van Bemmelen in 1979 (Netherlands), followed by legal experts from the United States such as: Edmund Wise in 1965 and Cherif Bassiouni in 1986 (United States).

Based on the substance, international criminal law itself shows the existence of a set of rules and principles of criminal law governing international crime.

International Criminal Law is a combination between two different legal disciplines, namely the criminal aspects of international law and international aspects in criminal law. International Criminal Law is a law that determines national criminal law that will be applied to crimes that have obviously been committed when there are international elements in them. International Criminal Law: "the law which determines what national criminal law will apply if they contain an international element." Schwarzenberger states that international criminal law has entered the stage of formation. He outlines 6 (six) meanings of international criminal law, namely: 1. International criminal law in the sense of the territorial scope of national criminal law, 2. International criminal law in the sense of the international aspect of national criminal law, 3. International criminal law in the sense of internationalization aspects of national criminal law, 4. International criminal law in the meaning of national criminal law which is generally accepted in civilized nations, 5. International criminal law in the sense of international cooperation, 6. International criminal law in the material sense.

The six meanings of international criminal law are very related. The first definition of International Criminal Law is International Criminal Law which has the scope of crimes that violate the interests of the international community, but the authority to carry out arrests, detention and judiciary on perpetrators is entirely left to the state's criminal jurisdiction in the country's territorial boundaries. that is. The second definition of International Criminal Law concerns events where a country bound to international law is obliged to pay attention to sanctions for individual actions as stipulated in its national criminal law. The third definition of International Criminal Law is the provisions in international law that give

authority to the national state to take action on certain crimes within the limits of criminal jurisdiction and provide authority also to the national state to implement criminal jurisdiction outside of its territorial boundary against acts certain crimes, in accordance with the provisions in international law. The fourth definition of international criminal law is the provisions in national criminal law which are considered appropriate or in line with the demands of the interests of the international community. The fifth definition of international criminal law is all national criminal law enforcement activities or activities that require cooperation between countries, both bilaterally and multilaterally. The sixth definition of international criminal law is the object of discussion of international criminal law which has been established by the United Nations as an international crime and is a violation of *de iure gentium*, such as: piracy, genocide, aggression and war crimes.

The Bachelor of International Law, Roxburgh and Sir Arnold McNair, acknowledged the separation between "international delinquencies" and "international crimes". the definition of the first term is recognized in international custom law, but the notion of the second term is not in line with the structure of international law which confirms that; "International delinquency is not a crime because a decinkent country, as a sovereign state, cannot be punished, even if it can be forced to demand compensation for mistakes made by the state. Furthermore, the characteristics of the Law of the Nations as a law are inter, not above; sovereign countries, have ruled out the possibility of punishing the State because of an international delinquency

The development of science and technology, especially in the fields of transportation and telecommunications has changed the pattern of people's lives to be more dynamic. The pattern of relations of life between communities, is no longer limited to the scope of a single country, but has spread to the scope of cross-national relations as an international community association. This situation will certainly have implications for the forms and types of crimes that were previously conventional and individual or limited groups, becoming sophisticated, modern crimes organized with the complicated and widespread *modus operandi*, and the place where the acts were committed (*locus delicti*) is no longer only in one country, but has spread in various countries (*transnational crime*).

The conditions described above also occur in corruption crimes, as an example of the determination of former Garuda Indonesia Managing Director Emirsyah Satar as a suspect in a gratification case by the Corruption Eradication Commission (KPK). Determination of the status stems from the approval of deferred proceedings (DPA) issued by the Serious

Fraud Office (SFO), an important fraud investigating agency in the UK, to the Rolls-Royce company. Previously, SFO announced an investigation into alleged corruption by Rolls-Royce on December 23, 2013. As a result of the SFO investigation, Rolls-Royce conspired to commit corruption, falsify accounting and failed to prevent bribery. Upon the results of the investigation, Rolls-Royce agreed to pay a fine of more than £ 497 million and reimburse the cost of investigating SFO for 13 million pounds. From here, the Corruption Eradication Commission (KPK) determined the status of the suspect to Emirsyah Satar.

Another example, in 2014, Marubeni Corporation, a multinational company from Japan, was found guilty of corruption. The release, published by the US Department of Justice in 2014, stated that the Connecticut District Court convicted Marubeni on March 19, 2014 of violating anti-bribery provisions in accordance with the rules on foreign corruption practices (FCPA). -sama bribed several officials in Indonesia, including members of Parliament (House of Representatives / DPR) and officials of the National Electricity Company (PLN). Sogokan is a form of remuneration for assistance in securing projects with contracts worth 118 million US dollars. The project in question is the Steam Power Plant Construction Project at Tarahan Lampung. Furthermore, in examining the alleged corruption of the Tarahan Lampung Steam Power Plant construction project, arrived at the Indonesian Democratic Party of Struggle (PDIP) politician Emir Moeis. As a result, Emir Moeis was questioned and found guilty by the court. The panel of judges of the Jakarta Corruption Court sentenced him to three years in prison and a fine of Rp. 150 million, three months in prison. The former Chairperson of the House Commission XI was deemed to have received gratuities to win the Alstom Power Inc. consortium.

Based on the example above, it is illustrated that efforts to overcome and eradicate corruption are also the efforts of all nations in the international community. International concerns can be seen from the frequent discussion in various international forums, although with various expressions or designations, among others, included as a form of Crime business, economic crime, white collar crime, official crime or as a form of abuse of power

#### **b. International Cooperation in Corruption Crime Management**

The issue of preventing acts of corruption by international law has emerged for a long time. At least in Alejandro Posadas's article written in 2000, it has been explained that the struggle to eradicate corruption through international law has been around for the past ten years. He pointed out that at least there were two meetings which were concerned with

the issue of discussion of corruption at the transnational level, namely at the Inter-American Convention Aggression meeting and the next meeting which was held under the Organization for Economic Co-operation and Development (OECD).

Efforts to prevent and suppress the eradication of corruption in a country have been carried out, including efforts at the international level, such as the United Nations General Assembly (MU PBB) to establish corruption in a country so that it is included in the list of international crimes. (input from MU's annual agenda), because corruption is related to basic human rights, namely the decline in the level of income and income of the people, not only in the country where the crime occurred, but also the international community. These results have not yet materialized, because many countries have not shown awareness of the importance of improving the regional economy, so that the number of criminal acts still tends to increase. Including the interference of developed countries that oppose the UN General Assembly, because it still provides an opportunity for a place to store the proceeds of corruption, so that actors can easily transfer the results of corruption to other countries, including international banks and protect corruptors from legal snares and state law enforcement place of crime (refusal of extradition due to the absence of an extradition treaty, cooperation between political parties which are constrained by the law enforcement bureaucracy).

The Inter-American Convention Against Corruption (IACAC) is a meeting held by countries in the United States on March 29, 1996 in Venezuela and then has legal force or applies to signatory members on March 6, 1997. This meeting became the first international agreement to discuss corruption

The Organization for Economic Co-operation and Development (OECD) is an international organization that examines the economic field where member countries are mostly developed countries. In 1996 a Convention on Queuing corruption was formed which was later passed in 1997. Corruption language on economic development has become a major issue at this meeting.

Transfer the results of corruption to other countries, including international banks and protect corruptors from the law and enforce the law of the country where the crime occurred (refusing extradition because there was no extradition agreement, interpol cooperation that was hampered by law enforcement bureaucracy).

Every 5 (five) years, the United Nations (United Nations) regularly holds a Congress on Prevention of Crime and Treatment of Criminals or often called the United Nations Congress on Prevention on Crime and Treatment of Offenders. On the first occasion, this Congress was held in Geneva in 1955. Until now the UN congress has been held 12 times. The 12th Congress was immediately in Salvador in April 2010.

In the 10th UN Congress held in Vienna (Austria) in 2000, the issue of Corruption became the main topic of discussion. In the introduction under the theme International Cooperation in Combating Transnational Crime: New Challenges in the Twenty-first Century, it was stated that the theme of corruption had long been a priority for discussion. In resolution 54/128 of 17 December 1999, under the title "Action against Corruption", the UN General Assembly stressed the need to develop a global strategy against corruption and invited UN member states to review all domestic policies and regulations. each country to prevent and control corruption.

One of the most important international instruments for the prevention and eradication of corruption is the United Nations Convention against Corruption which has been signed by more than 140 countries. The first signing was held at an international convention held in Mérida, Yucatán, Mexico, on October 31, 2003.

In the United Nations convention (UN) it was agreed that the forms of cooperation in the prevention of transnational crime include: - Exchange of Criminal Information and Intelligence (Exchange of Information and Intelligence concerning Crime); - Extradition; - Mutual Legal Assistance in Criminal Matters / MLA (Reciprocal Assistance in Criminal Problems); - Transfer of Criminal Proceeding (Transfer of the Legal Process of a Criminal Case); - Transfer of Sentenced Person (Transfer of Prisoners); - Joint Investigation; and - Joint Operation and others.

According to the Convention, prevention of acts of corruption is one of the most important and main things. The most important chapter in the convention is dedicated to the prevention of corruption by considering the public sector and the private sector. One of them is by developing a preventive policy model such as: - establishment of an anti-corruption body; - increased transparency in campaign finance for elections and political parties; - promotion of efficiency and transparency of public services; - recruitment or acceptance of public servants (civil servants) based on merit; - the existence of a code of ethics aimed at public servants (civil servants) and they must submit to the code of ethics; - transparency and accountability of public finance; - the application of disciplinary and criminal actions

for corrupt civil servants; - the creation of special requirements especially in the highly vulnerable public sectors such as the judiciary and public procurement sector; - promotion and enforcement of public service standards; - for effective prevention of corruption, efforts and participation of all components of the community are needed; - calls on countries to actively promote the involvement of community-based non-governmental organizations (NGOs / NGOs), as well as other elements of civil society; - increasing public awareness (public awareness) of corruption including the adverse effects of corruption as well as things that can be done by people who know that TP corruption has occurred.

In carrying out prevention and eradication of criminal acts of corruption is the main priority of the Government of the Republic of Indonesia which is carried out at national and international levels. As a global citizen, Indonesia has always played an active role and demonstrated its leadership in efforts to eradicate corruption, among others, by hosting the President and host of the UNCAC Conference of the States Parties to the United Nations Convention Against Corruption-CoSP held in Bali, January 28 -1 February 2008.

In the first round of review implementation under the UNCAC framework, Indonesia was reviewed by England and Uzbekistan in 2010 and 2011. The review focused on Indonesia's implementation of Chapter III on Criminalization and Law Enforcement and Chapter IV on International Cooperation. The process resulted in a country report containing recommendations for the Government of Indonesia to fully implement the UNCAC provisions.

In the prevention and eradication of corruption, Indonesia has consistently participated actively in fighting for national positions in various mechanisms under the UNCAC, as well as the G20. In addition, Indonesia is also actively encouraging asset recovery efforts to recover assets that have been rushed by corruptors abroad. In an effort to recover assets, Indonesia actively cooperates with various countries in a bilateral context.

### **C. Conclusion**

Prevention and legal action against transnational acts of corruption (crossing national borders) will not be effective if they only rely on or use national law. The international community has shared concern to prevent and overcome transnational corruption crimes using legal means by cooperating both bilaterally and multilaterally.

International cooperation between countries in preventing and overcoming transnational corruption crimes can be expressed in the form of bilateral and multilateral international

agreements. In the end each international agreement must be implemented in the national law of each participant.

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## **Local Wisdom Existence in Indonesia's the Sentencing System**

Erna Dewi and Damanhuri Warganegara

### **Abstract**

Local wisdom was prevailing values within such society. Values believed the truthiness and became reference to behave daily within local society. Local wisdom such entity determined status of human within their community. This case meant that local wisdom which included creativity intelligence element and local knowledge from elites of it. The sentencing system knowledge which was known as characteristic against materiil law that had negative function. Therefore, it could been the basic or reason to eliminate action and basic to punish such people. Tradition of delik solution in Lampung was still prevailing and acknowledging the society's live (exist), it often occurred case that was already solved by local wisdom but it was still solved by criminal session process. In addition, it still acknowledged tradition law to solve tradition delik within legal society especially and legal state in general.

**Keywords:** Existence, Local wisdom,, tradition concealed

## A. Introduction

Local wisdom when seen from the function and presence could be comprehend as human effort to used their cognition to act and behave to something, object or event occurred within certain room. Explanation above, arrange etymologically, whereas wisdom comprehend as human ability to used their cognition in act and behave as a value result of such thing, object or event occurred. as such term, wisdom often called as policy<sup>43</sup>, whereas local was showed as place.

Substantially, local wisdom was such prevailing value within such society. Values that believed the trustiness and became reference to act and behave within local society daily live. Therefore very reasoned when Greetz said that local wisdom was such entity that very determine human prestige/status within their community. This case meant that local wisdom which in it include creativity intelligence element and local knowledge from elites and society was which determined to society civilization development.<sup>44</sup>

Whereas Moendarjito on Ayatrohaedi, that local culture element was potential as genius local because untested to sustained until recently therefore the characteristics was<sup>45</sup>, first, able to sustain to external culture, second, have ability to accommodate external culture, third, have ability to integrate external culture into original culture, fourth, have ability to control, fifth, could give direction to culture development.

Local wisdom was part that couldn't separated even belong to pluralism characteristics, because pluralism was such certainty presence various ethnic, norm system, culture even religion was such real evidence that pluralism was such real requirement and clear existence. Within philosophy discourse there had been debate of both monism and pluralism for long time. For monism all things were description from single meaning, and contrast with pluralism that seen reality was presence these various was such certainty from creative, difference process, and there were no thing that same all at once. But for Indonesia this case should acknowledge due to the writing listed on symbol of Burung Garuda "Bhineka Tunggal Ika" although different but keep one soul.

Local wisdom actually was already exist far before Indonesia Independent, that already acknowledged as subsystem from Indonesia that also known as tradition law. But

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<sup>43</sup>Ridwan, Nurma Ali, 2007. *Basic knowledge of Local Wisdom*. Jurnal Ibda Vol. 5 No. 1. P3M STAIN Purwokerto.

<sup>44</sup>*Ibid.* p. 3

<sup>45</sup><http://www.balipos> discover local wisdom for Bali society, accessed on September 4, 2010.

practically within legal maintenance, tradition law and unwritten law always ignored even the writer borrowed term from BardaNawawiArief, that tradition the sentencing system perceived “ditidurkanataudimatikan”. When colonial era, slept of unwritten law could be understanding because due to Dutch legal political at that time, but felt different when that policy also continued after independent. With presence Article 1 KUHP, unwritten law was never found and express completely to the surface, especially within legal judiciary implementation, this case was never develop properly about unwritten the sentencing system.<sup>46</sup>

Statement above mentioned legality principle which include within definition of Article 1 KUHP, it was one of fundamental principle that should maintain, but the usage must wise and careful, because when unwise and wasn't careful could be the boomerang, because if legal value exist and used in society couldn't distributed properly and totally reject, therefore legal values and local wisdom already killed by their own country through weapon/bullet/knife that obtained from ex colonial (through definition Article 1 KUHP/WvS).<sup>47</sup>

Based on explanation above, therefore the writer would like to made this writing by title “Local Wisdom Existence Within Tradition Concealed”. The method used was within this writing was normative legal research method by secondary data and data resource obtained from primary legal material such KUHP, secondary legal material such RUU KUHP, 2012, such literature, document and research result previously. That data then processed and analyzed in order to get the conclusion.

## **B. Discussion**

### **1. Local wisdom explanation**

There was called by local wisdom was how to behave and act such individual or group to respond certain changes within both physical and cultural environment scope. Local wisdom when seen from the function and existence could understand as human effort to used their cognition to act and behave to something, object or event occurred within certain room. Explanation above, arranged etymologically, whereas wisdom was comprehend as people

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<sup>46</sup><http://local> wisdom of ndonesia tradition the sentencing system, taken on July 25, 2012

<sup>47</sup>*Ibid*

ability to use their cognition to act and behave as an assessment result to something, object or event occurred. As such term of wisdom often called as “policy”.<sup>48</sup>

Local specifically refer to limited interaction room by limited value system too. As interaction room that already designed like that in it include such interaction pola between human and human or human with their physical environment. Such live setting that already established directly will produced values. That values which will the foundation of their relation or become reference their behavior.

That local wisdom was such explicit knowledge that rising from long periods, then evolutes together with society and their environment within local system that already experienced together.<sup>49</sup> That long evolution process and inherent to society could made local wisdom as potential energy system from society collective knowledge system to live together dynamically and peace. This explanation seen local wisdom not as behavior reference only, but further, it was could made human live dynamically with full civilization. Local wisdom often called as *local wisdom* that could comprehend as human effort by used their cognition to act and behave to something, object or event that occurred within certain room.<sup>50</sup>

Substantially, local wisdom was prevailing values within such society. Values that believed the truthiness and become reference to behave in daily life of local community. Therefore very reasoned if Greetz said that local wisdom was entity which very determined human status within their community. This case means that local wisdom that in it include creativity intelligence element and local knowledge from elites and society was which determined of society civilization development.<sup>51</sup>

Whereas Moendarjito on Ayatrohaedi, that local culture element was potential as genius local because untested to sustained until recently therefore the characteristics was,<sup>52</sup> first, able to sustain to external culture, second, have ability to accommodate external culture, third, have ability to integrate external culture into original culture, fourth, have ability to control, fifth, could give direction to culture development.

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<sup>48</sup>Ridwan, Nurma Ali, 2007. *Loc. Cit.*

<sup>49</sup>*Ibid*

<sup>50</sup>[http://ibdi.files.wordpress.com/2012/04/2basic\\_knowledge\\_of\\_local\\_wisdom.p.](http://ibdi.files.wordpress.com/2012/04/2basic_knowledge_of_local_wisdom.p.), diakses Kamis 18 November 2010.

<sup>51</sup>*Op. Cit.* p.3

<sup>52</sup><http://www.baliposdiscover> local wisdom for Bali people, accessed on September 4, 2010.

Those stated by NyomanSirtha, that local wisdom within society could be such, value, norm, ethic, belief, tradition, tradition law and certain rules. Therefore the type was various and they lived various culture of society, and the function was vary.<sup>53</sup> Then explain several function and meaning of local wisdom are: 1) Potential to conservation and natural resource cultivation ; 2) Potential to human resource development, for example related to recycle life ceremony, *handa pat rite* concept ; 3) Potential to culture and knowledge development, for example within saraswati ceremony, belief, veneration to panji ; 4) Potential as religious advice, belief, literature and challenge ; 5) Have social interpretation, for example communal integration ceremony ; 6) Have social interpretation, for example agriculture recycle ceremony ; 7) Have ethic and morale meaning, that created within ngaben and ancestors soul purity ceremony ; and 8) Have political meaning, *nyangkukmerana* and *patron client*<sup>54</sup>

According to FuadHasan, local wisdom as plural archipelago culture was such living reality that couldn't avoid of these various that should maintain, not to against, because this vary was such investment of idea and value therefore strengthened each other and to increasing perception appreciate each other of those various became comparative material to found similarity of life perspective that related to virtue and wisdom values.<sup>55</sup>

Local wisdom as knowledge phenomena by cited of Setiono opinion, that local wisdom was such effort to found the rightness which based on facts and signs prevailing specifically within certain society culture.<sup>56</sup> This definition could be same with definition about psychology indigenous that defined as scientific effort about behavior or native human though that wasn't transformed from outside<sup>57</sup> and that psychology indigenous was knowledge that describe about local wisdom, it was description about attitude and behavior that describe native culture.

Local wisdom more describe about such specific phenomena that usually will be characteristic of that community which could be seen from value perspective from various area in Indonesia, various examples could stated, for example Jambi society who know about *Slokaapi-apiterbangmalaminggap di ujungjagungmudo, biartujuh kali duniokaram,*

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<sup>53</sup><http://www.balipos.co.id>, *Ibid*

<sup>54</sup>*Ibid*

<sup>55</sup>Fuad Hasan, *Main discussions Bahasan identified Indonesian archipelago* within <http://www.kongrebudapat.go.id/news/article> accessed on November 27, 2012.

<sup>56</sup>Setiono, *Psikologi Indigenous Development in Indonesia*, within *Psychology cognition scientific UMS*, vol 6, Number 2 November 2002, p. 87.

<sup>57</sup>*Ibid*, p. 90.

*balikkedusunjugo*,<sup>58</sup> its mean that in fact, one day people will comeback to their village, statement that created within traditional poetry about love of nation for anyone, there was concept of *ambilbenihcampakkanserap*, its mean take something good and useful then throw away something bad, that expression content such advice that refer to education in order that every one able to differentiated which was the good ones and bad.<sup>59</sup> Papua, include belief of *TeAroNeweakLako* (nature is me) Erstberg and Grasberg mountains believed as Mother head, land called as natural resource carefully, also *Undau Mau* people, West Kalimantan, include tradition to develops environment wisdom within residential structuring design, by classified forest and the using, cultivation carried out by rotation by determined *bera* period and they recognized *tabu* therefore technology usage limiting on simple agriculture and safe environment technology<sup>60</sup>. Also Dayak people, East Kalimantan include *tanaulentradiation*, it was forest area dominate and belong to tradition society, land cultivation regulated and protected by tradition regulation.<sup>61</sup>

Then, local wisdom of Bali society known cultivating pola and water order organization it was *subak*, it give description how environment wisdom and local wisdom of society within land cultivation sector,<sup>62</sup> agriculture sector already exist within society live since past from prehistory until recently local wisdom was such positive behavior of human in interact with nature and surround environment that based on religion values, tradition and ancestors advice or local culture that built scientifically. Thus also by structuring legal system of Bali people and their social live that called as *awig-awig*.<sup>63</sup> Thus also within Batak culture by *dalihkannatolu*, such constitution and all at once become kinship system of Batak society. Such Master Piece of Batak Regulation which called as *DALIHANNATOLU*.<sup>64</sup>

*Dalihannatolu* was symbolic word to explain social structure of Batak society especially Batak Toba. From harafiah etymology, *DalihanNatolu* meant as fireplace that have three feet. In order that such caldron now fall down when used by society, minimum sustain by three stone of fireplace.<sup>65</sup> Fireplace that have three feet symbolize kinship group,

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<sup>58</sup>Adenry, Bernard T, 1999. *SocialEthic of AcrossCulture*, Kanisius, Yogyakarta, p. 17.

<sup>59</sup>*Ibid*, p. 20.

<sup>60</sup>Elly Burhani Faizqal dalam SP Daily, <http://www.papua.independent.com>, accessed on December3, 2012.

<sup>61</sup>*Ibid*

<sup>62</sup>I Ketut Gobyak, Refer to Local Wisdom, within<http://www.balipos.co.id> accessed on Desember 3, 2010.

<sup>63</sup>*Ibid* and also read Bergreen, Laurence, *Over The Edge of The World*, Harpercollins Publisher, Inc:ny.

<sup>64</sup>J.C Vergouven, *Societyand Tradition Law of Batak Toba*, LKIS, Yogyakarta, 2004, p. 317

<sup>65</sup>J.C Vergouven, *The Social Organization and Customary Law of The Toba Batak of North Sumatra*, 1930, p. 320.

first, hula-hula, as a group that must respected (*sombamarhula-hula*), second, *DonganTubu* (*sabutuha*), as same family that should maintain the harmonization of relation (*manatmardongantubu*), third, Boru, within daughter side who should cared (*elekmarboru*),<sup>66</sup>Dalihannatolu became central of all of activities related to Batak society's live, both happy and sorrow or when any conflicts occurred within Batak society that used as valued until recently, related to living environment within government program by term of *masipaturehutanabe* (*martabe*), it meant that batak society should improve their village, but keep refer to *Argado Bona Ni Pinasa*<sup>67</sup> it meant that their village have expensive value, therefore couldn't forget easily therefore should visited and cultivate due to culture as value concept. The same case with Java society, within property right of land sector, have *sedhumukbathuk*, *senyaribumi*, *wutahingindirathumekaningpethi* concept. Philosophy about land that inherited and interpret as part from the owner soul.<sup>68</sup>

Thus also with Lampung society who have various populations with comer population, therefore besides such mercy for Lampung at the same time al so such treatment for social wholeness, because various difference also become potential conflicts that create social disasters, nevertheless, in fact Lampung have qualified philosophy, such democratic philosophy, *Egaliterian*, philosophy that known as live philosophy of ulun Lampung or living principle of Lampung people who include of *Pill Pesenggiri*(willingness to improve and competitive), *NemuiNyimah*(openness), *NengahNyappur*(socialize), *Sakai Sembayan* (there are place) and *JulukAdok*( have status)<sup>69</sup> in fact social live colour of Lampung people could give such Indonesia face of "mini". Population who occupant end of this Sumatera Island include of various state ethnic. Almost a part of state ethnic in Indonesia include in Lampung such: Java, Sunda, Bali, Minangkabau, Batak, Semendo, Ogan, Bugis, Maluku, China, NTT, NTB etc, that become such multiethnic areas. These various cultures could integrate by living philosophy principle of that Lampung people above, it was such philosophy whereas Lampung people truly maintain their own respect or family, especially prestige of female, also interpret such live requirement that have high morale, high spirit, and aware with responsibility.<sup>70</sup>

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<sup>66</sup><http://www.tanobatak.naipospos.monang.2010.wordpress.com>. Accessed on WednesdayDecember 7,2010.

<sup>67</sup>*Ibid* and read also<http://jhonjerysihotang.wordpress.com>. Serpih-serpih budaya batak, accessed on December 7, 2010.

<sup>68</sup><http://www.kearifanlokalgunamemecahkanmasalah.html>. Diakses 10 Desember 2010.

<sup>69</sup>[http://www.fachrudin54blogspot.com/2010/10/menggalidanaktualisisasi\\_nilai-nilai.html](http://www.fachrudin54blogspot.com/2010/10/menggalidanaktualisisasi_nilai-nilai.html)diakses 8 Desember 2010, baca juga Hilman Hadikusumah, *Aturan-aturan Adat Lampung* dalam makalah, 1991.

<sup>70</sup>*Ibid*

Moreover explain by HilmanHadikusuma that elements used by PiilPesenghiri as NemuiNyimah are (openness) respect each other when be a guest and accept the others, visit with honest feeling whereas NengahNyappur are socialize and friendly with other ethnic, have sosial feeling, then Sakai Sembayan as helps each other behavior, whereas julukadok have title within etiquette in daily live, have juluk meaning was name (tradition title) for male/female, before and after married, that agreed by kinship way as nickname and legitimated traditionally<sup>71</sup> based on that explanation could interpreted that local wisdom of Lampung people through Lampung philosophy was such local wisdom that very strong to local development, especially to solve conflicts and as medium to created society welfare, as tradition/culture that develop in society.

Cited opinion from F.K Von Savigny said that law wasn't made, but grow and develops together with society (Volkgeist) and also often called by Living Law<sup>72</sup> then said that "law is and expression of the common counsousness or spirit of people" law not made, but grow and develop together with society ( *dasrichtwirdnichtgemaact, esist und word mitdemvolke*) if likes that, according to Von Savigny, law was born from society's spirit who accommodate society.<sup>73</sup> Based on main theory of Von Savigny that all laws initially created by tradition and custom society itself based on language, tradition belong to them,<sup>74</sup> Von Savigny emphasize that any society develops their custom law itself, because have language, tradition (include belief) and certain constitution.

Likes said by Friedrich Carl Von Savigny, could be seen from legal action and main function of law, are:

1. Legal action

Law isn't such concept within society because law was grow naturally within social intercourse whereas law always change due to social change.

With these Savigny statement therefore law within one country couldn't applied/used in other country because different societies also culture within such area will different to, also place and time.

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<sup>71</sup>Hilman Hadikusumah, 1980. *Main of Tradition law understanding*, Alumnus of Bandung, page. 68. And seen also working paper of lampung tradition regulation, which said within Congress of Indonesian Culture on 1991.

<sup>72</sup>Darmodihardjo, Darji dan Shidarta, 1995. *Main of Legal Philosophy ,What and How legal philosophy in Indonesia*, Ed. V. PT. Gramedia Pustaka Utama, Jakarta, page. 87.

<sup>73</sup>Hujbers, theo, 1982 *Legal Philosophy within Cross History*, Kanisius, Yogyakarta, page. 86.

<sup>74</sup>*Ibid*, hlm. 91.



## 2. Main function of law

Society concept within Savigny theory about this regulation could showed clearly how content and scope. Every societies develops their own custom because have tradition language and certain constitution. Savigny emphasize that both language and law were same/parallel, also couldn't applied to other society and other areas. Volkgeist could be seen within it law, therefore very important to follow Volkgeist evolution through research during the history.<sup>75</sup>

Related to that case above, as how Van Vollen Hoven shared tradition legal area became 19 areas in Indonesia by concept “*de gebruikengewonten and goldsdienstigeinstellingendetirlandes*”(prevalence, custom and local religion institutions).<sup>76</sup>Moreover Van Vollen Hoven said that the 19 environments above include Aceh, Gayo Alas Batak, Nias, Minangkabau, Mentawai, Sumatera Selatan, Enggano, Melayu, Bangka, Balitung, Kalimantan, MINahasa, Gorontalo, Toraja, Sulawesi Utara, Kepulauan Ternate, Maluku, Irian Barat, KepulauanTimur, Bali, Lombok, Jawa Tengah, JawaTimur, Madura, Solo, Yogyakarta, Jawa Barat, Jakarta. The nineteenth of that tradition environments above describes that tradition societies in Indonesia truly exist and live.<sup>77</sup>

What stated by Van VollenGoven was include dissimilarity about tradition society number in Indonesia with what implied within explanation of Chapter VI of Act 1945 (before been amendment). There stated that within Indonesia area at least include 250 *zelfbestuurendelandscappendanvolksgemeen-scappen*, likes village within society of both Java and Bali, nagari within Minangkabau society, dusun and marga within Palembang society. Mentioned areas have “original” structure and could assumed as special area.

In other side also presented by Roscoe Pound opinion as cited from MuchtarKusumaatmadja that as a tool of social engineering.<sup>78</sup> Then Roscoe Pound clarified that law was whole principles and norms that regulate society, including in it institution and process to create that law in reality such said by Roscoe Pound, could be seen through law making and main function of law, were:

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<sup>75</sup>Walter Friedman, 1994. *Theory and Legal Philosophy . Philosophyidealism and Problema of justice* (Susunan II). PT. Rajagrafindo Persada, Jakarta, p. 61.

<sup>76</sup><http://soetandyo.wordpress.com/20-10/07-23/eksistensihukumadatkonseptualisasipolitik>, accessed on Tuesday December 14, 2010, read aso Ade Saptono, legal and local wisdom, revitalization of Archipelago tradition law, Grasindo, 2010, p. 13.

<sup>77</sup>*Ibid.*

<sup>78</sup>Mochtar Kusumaatmadja, *Society Law andNational Law Development*, Bina Cipta, 1976, p. 32.

### 3. Legal making

Roscoe Pound known with his theory that law was a tool of social engineering. In order to meet their role as that tool therefore Pound made classification of interest that should be protected by law, were:

a. Public interest

State interest to maintain existence and state reality and interest for country to control social interest.

b. Individual interest

Interest in domestic relations and interest of substance.

c. Interest of personality

Physical integrity protection

Freedom of will

Reputation

Privacy

Freedom of belief and opinion<sup>79</sup>

d. Main function of law

One problem faced was found system and legal maintenance implementation that could transform legal function properly as social control function, conflict solution function, integrated function, ease function, newly function, welfare function and others.<sup>80</sup>

Recently, the differences of that legal function usually became element that made present dissimilarities about purpose of legal applied. There were more focused on social control or alteration functions, and others, each party demanded their own interests therefore rising legal problems now legal solution even rising conflict that blame each other.<sup>81</sup>

Likes discuss within topic previously within interest context according to Roscoe, detailed from these interests wasn't such valid list but changes due to society development

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<sup>79</sup>Mahmul Siregar, 2012, *Law is A tool of Social engineering is Legal as Social Engineer tool. Legal theory of Sociological Jurisprudence*, North Sumatera university, p. 15.

<sup>80</sup>Bagir Manan, *Daily Work, Between Implemented Legal Function and Legal Aim*, <http://www.badilag.net/>, 2012.

<sup>81</sup>*Ibid*

became very influence by time and social condition. When that interest setting arranged as permanent setting therefore that not as social engineering but as politic statement.<sup>82</sup>

## 2. Both centralism and pluralism laws

Pluralism is such certainty, presence various ethnic group, value system, culture even religious was such real evidence that pluralism was such real necessity also clear existence. Within philosophy word already occurred controversy about monism or pluralism since long time ago. For monism arena all of things was such description from single reality, and on the contrary for pluralism seen that reality that presence this variety was such certainty from creative process, difference and there was no thing that same all at once.

Study about legal pluralism could be seen from Werner Menski<sup>83</sup> opinion about element of Triangular Concept of Legal Pluralism, said that:

The inevitability plural nature of law was earlier subtly indicated through Chiba's concept of the "identity postulat" of every law. Thus model culminates in a rather hidden global concept of "legal culture" when Chiba writer:

"in so far as a legal culture is preserved, a "basic legal postulate for the people's cultural identity in law," which I prefer to call the identity postulate of a legal culture, must be presupposed as functioning, it guides people in choosing how to reformulate the whole structure of their law, including, among other, the combination of indigenous law and transplanted law, in order to maintain their accommodation to change circumstances".

Therefore, according to Menski, pluralism legal natural characteristic was something that couldn't ignored, and much difficulties that related to that legal plural characteristic, earlier showed through concept stated by Chiba about identity postulate. Model used by This, focused within one global concept which rather grouped global concept about legal culture, when Chiba writes, that:

"As long as a legal culture is preserved, a "basic legal postulate for the people's cultural identity in law," which I prefer to call the identity postulate of a legal culture, must be presupposed as functioning. It guides people in choosing how to reformulate the whole structure of their law, including, among other, the combination of indigenous law and transplanted law, in order to maintain their accommodation to change circumstances."

Then stated that: this identity postulate as a constantly negotiated central element of legal culture is at all times and directly linked to ethical values, social norms and posited

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<sup>82</sup>*Ibid*

<sup>83</sup>Werner Menski, 2006 page 600-610, seen also Achmad Ali, *Disclose Legal Theory andJudicature* Vol. 1 page. 186-194.

state-made legal rules as facts of human life in their various culture specific manifestations. This means that law as a global phenomenon is only the same all over the world in that it is everywhere composed of the same basic constituents of ethical values, social norms and state-made rule, but appeared in myriad culture-specific variations. This simply confirm the known basic premise that all laws are culture-specific and that legal matters like contract, marriage and murder are universal phenomena that seem to constantly change over time and space.

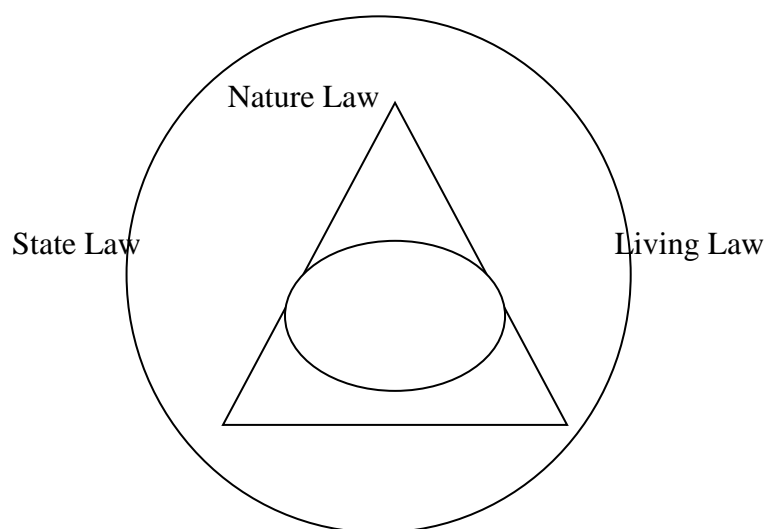
This “postulate identity” rise as central that continually negotiated element such continually legal culture, near and directly linked to ethical values, social norms and posited state-made legal rules as facts of human life in their various culture specific manifestations. It meant that, legal as such global phenomena have similarity all over the world in that it is everywhere composed of the same basic constituents of ethical values, social norms and state-made rule, but appeared in myriad culture-specific variations. This simply confirm the known basic premise that all laws are culture-specific and that legal matters like contract, marriage and murder are universal phenomena that seem to constantly change over time and space.

Menski also used 3 (three) types of main legal method, were:

1. State Law ( Law made by country);
2. Living Law (Living law within society)
3. Nature Law (Nature law or law which rise through value, ethics and religious).

Approximation above as diagram below:

Picture 2.1



Same argument presumably could be used when seen legal pluralism. When legal within existence based on presence difference “existence which came before essence,”<sup>84</sup> therefore legal pluralism was such certainty, it meant that presence variance between one law and other law was such existentiality rightness, was such rightness as legal authentic characteristic itself.

Not as pluralism that seen presence variance and difference within object such reality since initial. Legal pluralism as object from legal anthropology within development has understanding alteration. On 19 century legal sense as indication of “legal evolution” whereas within this understanding state law as order from sovereign arbiter<sup>85</sup> not from state by them it was difficult to accept. Because law existed within primitive society have no characteristic as legal within state law in general have positivism law. In fact, moreover, according to Norbert Rouland, that characteristic only showed the sophisticated social level, differential and legal scope level, and that characteristic was not real matter. Therefore legal could exist with or without its characteristics.

Then enters to 20 century, pluralism understanding as legal evolution type by a lot of arena was left. Next step of legal anthropology study about legal pluralism interpreted as such necessity for country that just independent colonialism was develop legal system based on that state values. In this stage clearly seen the meaning of pluralism within law, because in this stage existence of law from such state (that just independent) began seen as legal type that stand alone, besides acknowledge also presence other law that came from colonial country. This opinion certainty based on depth study by anthropologists who conclude that even within primitive society, legal already found.

Before presence pluralism law as course of legal anthropology, legal centralism as one of learning in seen legal previously presence within legal anthropology. Within legal centralism, legal seen uniform for all of people, stand alone and separated from all of other law and implemented by state organization. Within this legal centralism, presumably plural

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<sup>84</sup>Frase “Existence before esence” was famous frasa within eksistensialism philosophy, philosophy typewheras within this dissertation writing became the writer direction to seen existence of law, both national or local laws..

<sup>85</sup>Otje Salman, within Dr. Lili Rasjidi, SH., LL.M. And B. Arief Sidharta S.H (Shooter), p. 129

sense within law didn't obtained place within study of anthropology, therefore legal anthropology within it study more focused within presence one of legal only from one social group, and didn't want seen meeting with other law, in fact within anthropology of pluralism last interpreted by Griffiths as presence more than one legal order within such social arena (*by "legal pluralism " I mean the presence in a social field of more than one legal order*)<sup>86</sup> or by Santos legal pluralism interpreted as such legal system idea that more than one and operate in single political unit (*legal pluralism concerns the idea that more than one legal system operate in a single political unit*).<sup>87</sup>

Under this legal centralism concept variance or heterogeneity of law within society was not acknowledge the existence, because within legal centralism, the attention focused on state law as the only law within society. Although local and tradition law existed within society was acknowledge the existence, not more as the exception said that because tradition law in reality not placed in line by state law. Even within the most extreme type, legal study based by legal centralism as ontology base when seen the law, made and placed national legal system within superior position than legal existed within society, even impede our awareness about native law.<sup>88</sup> Even under legal thought as "RekayasaSosial"<sup>89</sup> and reinforcing state sovereignty concept made state law have comprehensive monolithic characteristic within human order. Therefore local law became recessive and marginalized within their life. Rousco Pound itself as famous figure in developing legal concept as "RekayasaSosial" seen legal centralism as such myth, legal idealism view and such claim that have illusion characteristic merely (legal pluralism is the fact legal centralism is myth, an ideal a claim an illusion).<sup>90</sup>

Premise from basic institution from pluralism was acknowledged heterogeneity variance as social reality. This variance substantially showed difference, and this difference that became objective condition from that pluralism. Therefore first requirement and such objective condition from pluralism was accept and acknowledge difference as basic in understanding the reality.

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<sup>86</sup>Griffiths, What is Legal Pluralism? Within Journal of Legal pluralism and unofficial law number 24/1986. The Foundation for journal of Legal Pluralism, 1986. p. 24.

<sup>87</sup>Boaventura De Saousa Santos, Toward A New Common Sense, Law, Science And Politics In the Paradigmatic Tansition, Routledge, New York, 1995. p. 114.

<sup>88</sup>Marc Galanter, Keadilan in Various rooms, Judicature Institution, Public Order and Society Law, within T.O. Ihromi-c (Penyubting, p. 117.

<sup>89</sup>Rousco Pound, Contemporary Juristic Theory, dalam D.I Llyod (ed), Introduction To Jurisprudence, Stevens London, 1965, p. 247-252.

<sup>90</sup>Ibid, p. 4.

Presence society who live in urban and rural areas, various religious, ideology, ethnic group, otoritarian government system, democracy, socialism/ communism to sekuler law and religious law was such social reality that existence was inevitably. This difference that made pluralism as such concept to obtain strong source within though treasure and knowledge because the ontology refer to fact and truly social reality.

### 3. Local Wisdom Within The sentencing system

The sentencing system knowledge differentiate two precepts against the law, character that against material law in this case which called as characteristic that against the law wasn't only contrast with written law but also when contrast with unwritten law. Whereas on the contrary precept of characteristic against the formal law said that against the law was incompatible with written law only,<sup>91</sup> local wisdom within the sentencing system knowledge known by precept characteristic against the material law within their negative function that could been the basic or reason to eliminate action and basic to punished people.

Related to this local wisdom in line with Savigny<sup>92</sup> opinion who tried to view law from historical perspective, that principally any law was different, and that difference depend on place and time of that prevailing law. Law must seen as transformation from spirit such state. That Savigny assumption implied, that law have no validity/or not applied universally, because any society already develop their legal environment itself, norm, tradition and their specific language.<sup>93</sup> All of that normative direction prefer as symbol, group that differentiated by other society group (as symbol of group identity) and as creation resource “world perspective” from related societies group.

National law development strategy based on living legal values within society, also seen within scientific meeting, such as Seminar of National Law that arranged many times and the result such as revolution, conclusion and report, that national law development should paid attention to tradition law as the living law within society.

Based on explanation above, clear that scientific society within legal sector, expected tradition law also including tradition the sentencing system become the resource from national law system and should studied deeply therefore could have important role as

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<sup>91</sup>Roeslan Saleh, 1983. *Characteristic against Law from Criminal Action*. Aksara Baru. Jakarta, p. 13.

<sup>92</sup>H.R. Otje Salman Soemadiningrat, 2002, *Rekonceptualization of Contemporary Tradition Law*, Alumnus Bandung, page 3. See also W.W. Friedman, Op. Cit. p. 137

<sup>93</sup>*Ibid*, p. 4.

national law resource that could support development implementation and reformation in legal sector.

Crime prevention strategy, by using tradition criminal law, in line with conclusion from Congress PBB 7 about The Prevention of Crime and the Treatment of Offender point 15,<sup>94</sup> that state:

Crime prevention and criminal justice shouldn't to be treated as isolated problems to be tackled by simplistic, fragmentary methods, but rather as complex wide-ranging activities requiring systematic strategies and differentiated approaches in relation to: a. The socio-economic, political and cultural context and circumstances of society in which they are applied ; b. The developmental stage, with special emphasis on the changes taking place and likely to occur and related requirements ; and c. The respective traditions and customs, making maximum and effective use of human indigenous options. From congress PBB this result, prevention strategy carried out from various factors such social, economy, politic and culture sectors including both tradition and customs.

Living tradition the sentencing system and keep alive, as long as there are culture human, it wouldn't eliminate by regulation. If Act will eliminate it, it will useless, even act the sentencing system will loss their wealth resource, because that tradition law are related closer to anthropology and sociology than act regulation.<sup>95</sup> This case due to Fridrich Von Savigny opinion (1779 – 1861) stated that *Recht is nimmergemacht*. How could that law established artificially as carried out in France by direction from Caesar Napoleon. However, actually law used as living organism; *esist und wirdmitdemvolke*. Law will keep alive and develop due to the society development based on authority itself both morally and culturally.

For people like Von Savigny, law only could describe as “it is” in fact within society. In other area, Henry Maine also stated that however, seen from historical development, if created within act design, the materials also obtained from resources of unwritten law from society law, except if it could be showed that its act materials totally came from mind of act maker.<sup>96</sup>

Article 2 verse (1) and (2) Act Definition about KUHP, 2012,<sup>97</sup> determine:

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<sup>94</sup>*Ibid*, p. 5.

<sup>95</sup>Hilman Hadikusuma, 1984. *Tradition The sentencing system*, Alumnus. Bandung, p. 20.

<sup>96</sup>Soetandyo Wignyosoebroto, 2012. *Law and Society Development and Problem such Introduction toward Legal Sociology Study*. Bayumeida Publishing. Mlaang, p. 69.

Act plan about The sentencing systembook(Jakarta: Directorate of Act, Directorate General of Law and Act of Legal and HAM Department) 2012. [www.legalitas.org](http://www.legalitas.org). Taken on January 23, 2011.



(1) Definition as stated within verse (1) not reducing prevailing of living law within society that determine people deserve to punished although that action not regulated within act regulation.

(2) Prevailing of living law within society as stated within verse (1) due to accordance with Pancasila values which acknowledged by state societies.

Then, explanation of Article 2 verse (1) RUU-KUHP, 2012, explain that such reality that within several certain areas in Indonesia still include living unwritten legal definition in society and prevailing as law within that area. This case also include within the sentencing system sector, it was usually called as tradition criminal action, therefore that case could regulate distinctly within KUHP. Definition from that verse was such exception from principle that criminal definition regulate within act. Acknowledgment of that tradition the sentencing system in order to meet justice sense that live in certain society.<sup>98</sup>

Given legal principle for judge to applied tradition the sentencing system by Planner Team of RUU-KUHP followed by consequence was by giving possibility to judge in order to give the tradition sanction although the type is such addition criminal only. Grafted tradition sanction such tradition obligation meeting within RUU-KUHP, 2012, due to conclusion from The Seventh United Nation Congress on the Prevention of Crime and the Treatment of Offender point 31,<sup>99</sup> that determined:

When new crime prevention measure are introduced, necessary precaution should be taken not to disrupt the smooth and effective functioning of traditional system, full attention being paid to the preservation of cultural identities and the protection of human rights.

Nevertheless, tradition responsibility grafted only as addition criminal due to definition of Article 67 of KUHP concept, but according to Article 100 RUU-KUHP, 2012 possibly punishment of tradition obligation meeting as main punishment. To clarified it will stated on that article 100.

Article 100:

(1) By give attention to definition of article 1 verse (4) judge could determine local tradition obligation meeting due to living law within society.

(2) Local tradition obligation meeting as mentioned within verse (1) are such main criminal which will give the priority, when criminal action carried out meet definition as mentioned within Article 1 Verse (3);

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<sup>98</sup>*Ibid.*

<sup>99</sup>*Op. Cit*, p. 10.

(3) Local tradition obligation/obligation due to living law within society as mentioned within Verse (1) called comparable with fine punishment of category 1 and could get replacement punishment for fine criminal, when local tradition obligation not meet.

(4) Replacement punishment as stated within Verse (3) also could as compensate punishment

Grafting such tradition the sentencing system within RUU-KUHP of 2012, as one of basic for judge to verdict case that the definition not regulated within KUHP, this case could be interpreted that planers of Concept National KUHP followed characteristic precept against materiil law within both negative and positive functions.

As already stated within explanation previously, that grafting of tradition the sentencing system within RUU-KUHP, 2012, followed consequently by planers it was by giving punishment set forward will have position as official punishment as product result of act maker within it position as criminal, therefore this tradition obligation criminal meeting of course expected will could met purpose from punishment.

Thus also grafted within Punishment Purpose within RUU-KUHP, 2012 within article 54 verse (1) sub C, that criminal purpose to solve conflict rising by criminal action, recovery the balance and bring peace sense within society.

When that punishment objective above related to tradition sanction such tradition obligation meeting, therefore tradition sanction such tradition obligation meeting expected could met punishment purpose, and that tradition sanction could used as good as possible within punishment system application in Indonesia progressively in the future.

#### **4. Local wisdom existence within tradition concealed solution**

##### **1. *Mewarei* because conflict**

Mewareiaction cause such conflict or certain event, such collision, fighting or other conflict. Generally activity carried out started by approach action and negotiation to party in problem. Usually before reach to tradition conversation stage carried out conversation inter family whereas family usually represent by wise person from family. This representative also represent by third party who have ability of that, moreover when there victim until die.<sup>100</sup>

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<sup>100</sup>Rizani Puspawiajaya, *Op. Cit.*

Within development, conflict might be come from people personally, group or village. Therefore it mewarei process not individually always, but might be carried out inter-village. When that conflict solution agreed by peace, therefore judicial procedure continued within stage picture within mewarei stage as such within mewarei program because goodness.

In the last stage add such confession program, related parties carried out “swear” program that won’t repeat that action, and if they did it again therefore who have the legal dispute will accursed. When that program involve inter-village therefore village leader of this program should arrange in tradition meeting house.

Besides formal sanction, within society could meet various informal sanctions that such reaction to deed considered not due to society expectation. Informal sanction generally came from custom, mores and public opinion. Usually this informal sanction described by symbolic sanction, whereas in practice called effective enough to prevent people carried out action that considered deviate from custom or mores.<sup>101</sup>

In line with opinion previously, Kimball Young and Raymond W.Mack<sup>102</sup> stated, that sanction within society used to carried out control social, forced norms and community to behave due to social expectation. There are various sanctions, begin from sanction that used of physical force to symbolic means only example of verbal sanction within society.

## **2. Tradition session process/Lampung Tradition Session**

Within implementation of tradition judicature, there are several stages that should be done, are: First stage, is First Process: 1) Victim party reporting case to punyimbangtuha, 2) PunyimbangTuha of victim party report to punyimbangtuha from doer party, 3) Punyimbangtuha of doer called doer to ask explanation concerning report from victim party, 4) After heard confession from doer punyimbangtuha of doer visiting punyimbangtuha of victim party to duscuss problem they faced, 5) From discussion result of both punyimbangtuha then take to ethnic punyimbang, 6) ethnic punyimbang reporting problem occurred to punyimbangmarga, and 7) after receice report from ethnic punyimbang, therefore punyimbangmarga invite all of punyimbangtuhadan ethnic within that marga area to discuss in order to determine the decision to doer (Tradition judicature process).

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<sup>101</sup>Kimball Young, Raymod W. Mack, *Sociology and Social Life*, Third Edition, New York American Book Company, 1965, p. 71.

<sup>102</sup>*Ibid.*

Second stage of Conflict Settlement process, as follow: 1) Punyimbangmarga ask explanation from both punyimbang tuha and ethnic both from vuctim or doer parties, 2) Then punyimbangmarga ask explanation to from both victim and doer parties to clarify explanation which said by each punyimbangtuha and ethnic with both doer and victim's explanations, 3) Punyimbangmarga ask to the victim and doer if they be ready if problem they faced solved by tradition law. When both parties ready or agreed to solve by tradition, therefore punyimbangmarga continue the tradition judicature process, and 4) Bypunyimbangmarga continue by tradition judicature process by asking the really problem with parties that have legal dispute (victim and doer parties).

Third stage, verdict determination process: 1) Before determine decision, penyimbangmarga always used tradition advices that directed to self-identity of Lampung people include of fill pasenggiri, bejulukbuadok, nemuinyimah, nengahnyappur and sakaisemboyan, then ask opinion or advice from tradition prominent figures who attend including religion figure of intelligence ethnic group and people who considered smart in that area, 2) From advice of those prominent figure who attend, then penyimbangmarga ask suggestion and opinion from both ethnic punyimbang of both victim and doer parties or other ethnic penyimbang, 3) After considering the suggestion and advice from tradition prominent figures, therefore penyimbangmarga determined such case by agreement signed and even swear and witnessed by all of penyimbang or prominent figure who attend.

Example of escape marriage within Lampungsociety:

1. Escape marriage solution within pepadun tradition of Lampung society.

When occurred escape marriage, before escape from home of such woman (mulei/muli) which will go to male family/menganai/mekhanai ( his fiancée) made such estate letter content of, about destination she will go ( male directed), apologize request and blessing from parents and family, also explains about tradition number she left (money) due to her tradition position level. If family of tradition penyimbang therefore the amount of money folded of Rp.24; could be Rp. 240.000; - 2.400,000;.

After female reach to male family's home (her fiancée), male party assigned 1 or 2 peoples to meet penyimbangtuha from female party in order to "ngantuksalah" or fault confess by take keris on tray layered by white cloth or tablecloth, in order to inform to female family if their daughter already in male family. From that *ngantuksalah* include 2 (two) possibility answers from female party are accept or reject. If rejects, therefore that case will

process through the sentencing system session, but if receive will continued by tradition course, are in the next day male party give side dish such fish and dish of raw vegetable to be shared to family of male party as information that their daughter already escape. After that continued by discussion about the amount of *uangjujur* and *waktusujud* (as replacement proposal program), then continued by determining of wedding time and the reception if used tradition or national program.

## 2. Solution of escape marriage on sebatin tradition society.

Escape marriage settlement on *adatsebatin* society almost same as solution way on *adatpepadun* society just different on first stage, are when first day girl (muli) take escape by male/mekhanai (her fiancée), female party follow (*nyusurtapak*) to where that girl take, then meet that girl directly to asked if this escape is her desired, if the answer is yes, therefore could receive by female party and male party already free to carried out discussion for next program definition (same as *adatpepadun* people), but on *adatsebatin* society do not determined tradition money amount and cost due to the discussion (*uangjujur*). On *adatsebatin* do not known “*sesan*” (deliverance goods from female party) if there are just gift from parent or family and it’s not called as *sesan* as within *pepadun* tradition.

When that escape such the girl desired (because taken/forced by male party), therefore female party could continued that case through criminal legal session as prevailing definition. Moreover could studied by presence legal pluralism as legal anthropology study, legal centralism as on of tendency in seen legal that previously presence within legal anthropology. Within legal centralism, legal seen uniform for all people, standing alone and a part from other laws and implement by state institution. Within this legal centralism, seems that plural thought within law don’t obtained room within anthropology study, it meant that legal anthropology within it stud more focused their attention to presence one rule only from one society group only, wouldn’t like meet with other law, in fact within legal anthropology of pluralism interpret by Griffiths as the presence in social field of more than one legal order)<sup>103</sup> or by Santos, legal pluralism concerns the idea that more than one legal system operate in a single political unit.<sup>104</sup>

Under this legal centralism variance or legal heterogeneous within society not acknowledge the existence, because within legal centralism focused on legal state as the

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<sup>103</sup>Griffiths, 1986. *Op. Cit.*

<sup>104</sup>Boaventura De Saousa Santos, 1995. *Op. Cit.*

legal system within society. If there are local or tradition laws within society are acknowledged the existence, not more as such exception. Said that because tradition law within it reality not placed same as legal state. Even within extreme type, legal study which based on legal centralism as basic ontology on seen the law, made and placed national legal centralism within most superior position compared with legal existed within society, even impede our awareness about native law.<sup>105</sup>

Therefore within legal maintenance in Indonesia tradition law or local wisdom existence are not functioned as state by BardaNawawiArief, that tradition the sentencing system was slept or killed buit own country.

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<sup>105</sup>Marc Galanter T.O. Ihromi-c (Penyunting), *Op. Cit.*

### **C. Conclusion**

Local wisdom in Indonesia already exist far before Indonesia independent, but recently still not functioned especially within legal maintenance nationally, but within concealed tradition solution within certain areas still acknowledged. This case could be seen from several requirements and existence of local wisdom as “The living law” as follow: Implemented several tradition legal sectors in the societies, a lot of justice seeker who tried to used local wisdom; keep functioned tradition institutions, undergone research and tradition legal ideas developments in academic areas, socialized tradition legal lessons in schools or university through formal education line, and nationally needs develop to several policies based on local wisdom.

Remind the local wisdom that such part of national wisdom and characteristic of pluralism, expected to the policy maker could give more attention and give priority to values and legal principles based on local wisdom in order to include within act definition and could applied within tradition concealed solution or criminal action that could solve by local wisdom. And also criminal legal maintenance in general.

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**Optimization of Criminal Law Enforcement Model Based on Integral and Scientific Approaches against Crime Spoliation (*Begal*) in Lampung (Study in Jurisdiction of Lampung Regional Police)**

Heni Siswanto and Aisyah Muda Cemerlang

**Abstract**

Existing conditions of the application of the criminal law enforcement model for such crimes were held by the Lampung Regional Police by forming a Special Team for Antibandit (TEKAB) 308. Tekab 308 applied a model of criminal law enforcement in a repressive manner. In carrying out its role, Tekab 308 is seen as successful with the Number of Crimes (NC) and Handling of Criminal Cases (HCC) decreasing. However, the role of Tekab 308 in dealing with crime is not optimal in eradicating, preventing and overcoming begal problems up to the roots.

Optimization of the model of criminal law enforcement against begal crimes needs to be seen from the aspect of work culture of police investigators because the choice of the model puts forward a repressive method, of course it will bring about the consequences. Therefore, in every member of the Tekab 308 must have legal knowledge, legal awareness and compliance, a sense of humanity, compassion and comprehensive considerations before acting decisively, including shooting in place against the perpetrators of begal or C3.

To support the work culture of police investigators, a scientific approach is needed. This approach is to produce a quality criminal law enforcement product that is more effective in eradicating crime. Case investigations based on the criminal law scientific approach aim to be oriented towards realizing the values of truth, justice, usefulness, and legal certainty. Through an integral scientific approach, it includes: (1) the juridical-scientific-religious approach; (2) juridical-contextual approach; and (3) the juridical approach is global or comparative. The scientific approach is to build a model that is able to eradicate, prevent and tackle begal crime optimally. Therefore, immediate repairs or restructuring need to be done.

Rearrangement based on the building of work culture and legal scientific approach of police investigators, including the need to strengthen commitment and integrity of moral and professional who are able to reject transactional ways that can weaken or thwart quality and effective criminal law enforcement. Why is that? Transactional efforts will influence/intervene in criminal law enforcement to be failed/not qualified by dirty games, bribery or other disgraceful acts.

**Keywords:** Optimization, model, criminal law enforcement, integral approach and, science, begal crime.

## **A. Introduction**

Criminal Code Book II concerning Crimes Articles 362, 363 and 365 of the Criminal Code. Matters relating to matters relating to other people, including C3, namely criminal acts with weighting, criminal acts, and motorized vehicle crime. Violations of crimes against perpetrators are threatened with the provision of a maximum of 5 years of criminality (Article 362); 7 to 9 years (Article 363); 9, 12 to 15 criminal years; lifetime; even sentenced to death (Article 365).

The three forms/types of criminal acts of theft are prominent crimes on the Lampung Crime Index.<sup>106</sup> All three are the three biggest sequences of criminal acts that occurred in Lampung in the 2013-2017 period. The three criminal acts of theft were sociologically identified as ‘theft/robbery/C3/beggars’ crimes.

The exposure of the Lampung Crime Index shows a problem with the application of the criminal law enforcement model for theft. The threat of serious criminal imposition at the stage of criminal law enforcement in abstracto (formulation/formulation of laws) and the response of repressive actions of law enforcement officers in the form of shooting perpetrators in the place, apparently has not dampened the guts, did not frighten or deter the perpetrators. Even during the last two years (2016-2017), the number of criminal acts of repression has increased, including the form of modus operandi for the crime of repeal committed.

Lampung’s crime of crimes has spread terror, rampant and very frightening for the people of Lampung and its surroundings in the areas of Jakarta, Bogor, Depok, Tangerang and Bekasi as well as a number of other areas. Therefore, it is appropriate that crime should be responded to immediately by building a police policy, as part of a criminal policy against criminal offenses at the investigation stage. The police investigation stage is the front guard in criminal law enforcement.

The model of criminal law enforcement that is held today by way of shortcuts that do not optimize the legal scientific approach (approach), so that enforcement of criminal law is still colored by law enforcement that is less qualified, in terms of legal scientific approach.

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<sup>106</sup>Data from the Lampung Province Central Statistics Agency (BPS) 2013-2017, Lampung in Figures 2017, Bandar Lampung: Statistics Indonesia in Bandar Lampung.

Therefore, in order for the model of criminal law enforcement to be a basis/reference in eradicating criminal offenses, it is necessary to optimize/strengthen based on integral approaches and scientific approaches.

Through an integral approach and scientific approach is expected to be able to formulate a model of criminal law enforcement against crime crimes that are considered most relevant to the characteristics/local wisdom of the Lampung community and the capacity of the Lampung Regional Police. For this reason, it is necessary to conduct a legal research entitled “Optimizing the Model of Criminal Law Enforcement Based on an Integral Approach and Scientific Approach in Facing Criminal Crimes in Lampung” (Study in the Legal Area of Lampung Regional Police).

## **B. Problem Formulation**

Based on the background above, the formulation of the problems that will be examined and studied in this study are:

1. What is the existing condition of the criminal law enforcement model for criminal offenses in Lampung?
2. How to optimize the model of criminal law enforcement that is able to effectively eradicate, prevent and overcome crime of crime through the work culture of police investigators?

## **C. Research Methods**

The problem approach in legal research is determined and limited from doctrinal legal research and socio-legal studies,<sup>107</sup> namely reviewing law as a social phenomenon related to criminal law enforcement.

Legal materials used in this study are primary legal materials and secondary legal materials. Field data in the form of interviews is used as a support to complete legal material analysis. Field data was obtained from five District Police Offices in the jurisdiction of the Lampung Regional Police (Lampung Police), namely Bandar Lampung City Police; North Lampung District Police; Central Lampung District Police; South Lampung District Police; and East Lampung District Police.

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<sup>107</sup>Hutchinson, Terry, *Researching and Writing in Law*, Sydney: Lawbook’s Co., 2002.

## D. Research Results and Discussion

### 1. Existing Condition of Criminal Law Enforcement Models Against Criminal Crimes in Lampung

The policies and directions of the Lampung Regional Police related to eradication, prevention and overcoming crimes of repeal are conveyed through directives and orders to intensify their handling and repression. The rise of perpetrators of such crimes needs to be balanced with the performance of the General Criminal Section conducted by Tekab 308. Tekab 308 in making forced efforts to eradicate perpetrators of crime by repressive measures. Actions carried out by paralysis through shooting to provide a deterrent effect on the perpetrators.

Tekab 308 is under the command/command of the Lampung Police Chief. Tekab 308 was also placed in each police station. However, at the crucial moment Lampung Police Chief has the right to take over Tekab 308 and can give instructions/mandate/delegate authority to the Dirreskrim of the Lampung Regional Police.

Polresta Bandarlampung through Satreskrim, especially TEKAB 308, has taken measures to suppress and streamline operations and raids in the jurisdiction of the Bandarlampung Police to be carried out on an ongoing basis and using an integral approach and scientific approach, among others by implementing the SPIS Program (Service and Protection Integrated System)<sup>108</sup> and Strong Point<sup>109</sup> Ranmor Service Bandarlampung Police. Data related to the Number of Crimes (NC)<sup>110</sup> and Handling of Crime Cases

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<sup>108</sup>The SPIS Program (Service and Protection Integrated System) is a program built by the City Police in Bandarlampung which is supported by the City Government of Bandarlampung. The program that can be downloaded through the Play Store “SPIS” application runs police assistance activities that are carried out easily, quickly and effectively against fire fighting assistance, ambulance, fast reaction patrol, decisive action and helping with sympathy. The SPIS Program service mechanism includes:

- a. People download the application through Play Store “SPIS”;
- b. People experience crime problems, need an ambulance or fire brigade, or the community experiences disaster;
- c. The public contacted the call center (08117293000) → received the management center → ordered the rapid reaction team (National Police, ambulance, fire fighters, TNI and Basarnas) to assist/serve.
- d. The community presses the SPIS icon according to the problems faced → received the management center → instructs the quick reaction team (National Police, ambulances, fire fighters, TNI, and Basarnas) to assist/serve.

<sup>109</sup>Strong Point Ranmor Polresta Bandarlampung is a unit that takes action to deal with criminal acts quickly and effectively, especially criminals who have high crime transfer mobility, especially perpetrators of crime/begal/curanmor (C3). Strong Point Units are placed in each area of the police/post/intersection or in the place of the crowd that has the potential for crime in 11 jurisdictions of the Police/KSKP. Strong points are carried out with personnel placement at the vulnerability points, such as the Unila entrance on the left with the tent filled from Members of Kedaton Police Station, Rajabasa Sector Police Station, Elephant Roundabout, Strong Point Tanjung Karang Barat Pos in Bambu Kuning and around, and so on.

<sup>110</sup>Number of Crimes (NC) in Indonesia Police terminology is Jumlah Tindak Pidana (JTP).

(HCC)<sup>111</sup>of Curat, Curas and Curanmor (C3) in the Period of 2015 - October 2017 Bandarlampung Police can be shown in the following table.

Table 1. Data on the Number of Crimes and Handling of Criminal Cases in Curat, Curas and Curanmor in Time 2015 - October 2017 Polresta Bandar Lampung

| No. | Case Type | Year 2015 |     | Year 2016 |     | Year 2017 Januari-Oktober |     |
|-----|-----------|-----------|-----|-----------|-----|---------------------------|-----|
|     |           | NC        | HCC | NC        | HCC | NC                        | HCC |
| 1   | Curat     | 413       | 377 | 387       | 379 | 137                       | 122 |
| 2   | Curas     | 110       | 129 | 99        | 133 | 72                        | 58  |
| 3   | Curanmor  | 557       | 281 | 428       | 311 | 214                       | 103 |
|     |           | 1.080     | 787 | 914       | 823 | 423                       | 283 |

Source: Secondary data from the Bandarlampung Police processed in 2017.

As a comparison, a similar table from North Lampung District Police can be presented.

Table 2. Data on the Number of Crimes and Handling of Criminal Cases in Curat, Curas and Curanmor (C3) in the Period of 2015-October 2017 Polres North Lampung

| No. | Case Type | Year 2015 |     | Year 2016 |     | Year 2017 Januari-Oktober |     |
|-----|-----------|-----------|-----|-----------|-----|---------------------------|-----|
|     |           | NC        | HCC | NC        | HCC | NC                        | HCC |
| 1   | Curat     | 218       | 87  | 252       | 96  | 180                       | 62  |
| 2   | Curas     | 39        | 19  | 52        | 34  | 45                        | 16  |
| 3   | Curanmor  | 296       | 80  | 286       | 95  | 202                       | 56  |
|     |           | 553       | 186 | 590       | 225 | 427                       | 134 |

Source: Secondary data from North Lampung District Police processed in 2017.

The number of hijacking events creates a bad image for Lampung Province which is often seen as an exporter of begal. This condition worsens Lampung's image in the eyes of investors who want to enter and invest in Lampung. The Lampung Regional Police, supported by the Governor of Lampung, immediately agreed to the establishment of TEKAB 308. The formation was in each police station throughout Lampung. Every time there is a hijacking or theft, there will be chasing, checking and closing the city, whether it is done on the inter-regency/city border. If the culprit can escape, then the next action is to screen and hack the communication tool to find out where the perpetrator is in real time.

Bandarlampung police chief implemented a repressive method similar to the city cover model, namely the Jargat method (interception). This method works effectively enough to suppress crime crimes and C3. In addition to the repressive model, counseling and mobilization activities were also carried out to the community involving Bhabinkamtibmas,

<sup>111</sup>Handling of Criminal Cases (HCC) in Indonesia Police terminologi is Penanganan Tindak Pidana (PTP).

Traffic Units, Patrols, and Sabhara. Deployment of Police Officers stationed throughout the Bandarlampung area. Police Slogans Are Everywhere Really implemented in earnest, considering that Bandarlampung is the priority place of destination for perpetrators, the C3 index crime is the highest, followed by curas and beggars in the third place.

The results of the analysis and evaluation of the role of TEKAB 308 in 2016 show that of the total index crime of the Number of Crimes and Handling of Criminal Crime that the number of Criminal Measures is higher than the number of Criminal Acts which are decreasing. Particularly related to perpetrators of criminal offenses of students/children/adolescents, the criminal threat imposed is 1/3 lighter than the adult offender.

The model of criminal law enforcement against crime is a repressive model. This repressive model chosen is sharp/narrative/suppressing/oppressing the perpetrators. The repressive model chosen is based on the nature of such crimes that are characterized by violence or threats of violence, harmful and detrimental to society. Such actors provide themselves with high-capacity, sharp-armed and/or armed (illegal) vehicles. Therefore, the policy of the Lampung Regional Police is carried out by the Ditreskrim of the Lampung Regional Police by forming Tekab 308. Furthermore, the establishment of Tekab 308 is carried out at each Polres / ta in all levels of the Lampung Regional Police.

In addition, empowered Pekon Discussion Program, revitalization of Bhabinkamtibmas personnel who are supported and coordinated with Babinsa personnel and hopes to get full support from all elements of Lampung society (public participation). Community empowerment is intended to suppress, eradicate, prevent and overcome crime crime effectively. However, begal is still moving like the pressure of the balloon bubble, there are still sporadic acts of crime in some areas in Lampung.

Existing conditions and the application of the model of criminal law enforcement against crime crimes include:

- a. Criminal law enforcement against crime/begal/C3 crimes is carried out by the General Criminal Investigation Service (Reskrim) in the Lampung Regional Police and in the Polres/ta in all levels of the Lampung Regional Police. Reskrim organizes criminal law enforcement through the Antibandit Special Team (TEKAB) 308. Tekab Achievement 308 to suppress and eradicate crime is deemed successful, as indicated by



the number of criminal acts and the settlement of criminal offenses is decreasing. However, its role has not been optimal in solving begal problems to the roots.

The role of Tekab 308 is deemed to be in accordance with its duty to disclose anything and wherever the crime/begal/C3 crimes occur. The police conduct law enforcement in a repressive, pre-emptive and preventive manner. In particular, Tekab 308 carried out repressive law enforcement tasks. Pre-emptive tasks carried out by Sabhara and preventive tasks were carried out by Bimmas. Preventive is done through applications, namely counseling, banner posting, and face to face. Pre-emission is carried out by patrolling, deploying police forces in the field, and raids. Whereas the Crime and Crime Division only knows the repressive model.

- b. The model of criminal law enforcement against crime crimes carried out by the Reskrim service through Tekab 308, namely applying a repressive model that is sharp/suppresses/suppresses/tells the perpetrators. The repressive enforcement of criminal law on crime crime is supported by a pre-emptive model run by the Sabhara Service and a preventive model run by the Bimmas Service. In fact, the model used in criminal law enforcement against crimes applies the three models simultaneously, but because the characteristics of such crimes are violent or threat of violence, the specials carried out by Tekab 308 are repressive models.

## **2. Optimizing the Model of Criminal Law Enforcement That Is Able to Effectively Eradicate, Prevent, and Overcome Crime of Legalization Through the Work Culture of Police Investigators**

Optimization means the need for law enforcement officers, especially the Police to utilize and improve/optimize the “scientific approach” in law enforcement efforts in Indonesia. According to Barda Nawawi Arief,<sup>112</sup> optimization contains multiple meanings or phenomena. On the one hand, it implies that in law enforcement, scientific approaches have been taken, but still need to be improved; and on the other hand contains the tendency of the phenomenon that in law enforcement so far, the culture/orientation/scientific approach

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<sup>112</sup>Barda Nawawi Arief, *Optimalisasi Kinerja Aparat Hukum dalam Penegakan Hukum Indonesia Melalui Pemanfaatan Pendekatan Keilmuan (Optimizing the Performance of Law Officers in Indonesian Law Enforcement Through the Utilization of the Scientific Approach)*, the paper is presented in the *National Seminar on the Indonesian Prosecutor's Performance Improvement Strategy (Strategi Peningkatan Kinerja Kejaksaan RI)*, in the Building of the UNDIP Postgraduate Program, 29 November 2008, p. 3.

(scientific culture/ approach) has been weakened/neglected/neglected/displaced because it optimizes the “other approach/orientation” or “partial approach”.

In essence, the quality of law enforcement cannot be separated from the aim of improving the quality of life of the people and the quality of sustainable development (sustainable society). The existence of “judicial mafia culture” (which is one form of law enforcement without “legal science”) can damage “sustainable development/sustainable society” because development resources are not only natural/physical resources, but also non-resource-physical. A good/healthy criminal justice system, which can guarantee justice (ensure justice), security of the citizens (the safety of citizens), honest, responsible, ethical, and efficient (a fair, responsible, ethical and efficient criminal justice system) and can foster trust and respect for the public (public trust and respect),<sup>113</sup> basically a non-physical resource that needs to be maintained for the next generation.<sup>114</sup>

The judicial mafia is essentially a form of exploitation that damages non-physical resources and can become a virus for healthy/ideal SPP, which means that it can damage the quality of people's lives.<sup>115</sup> According to Barda Nawawi Arief,<sup>116</sup> if the quality of criminal law enforcement is to be improved and regain high trust and respect from the community, then one of the fundamental efforts is:

Improving the quality of science in the process of making and enforcing it is said to be very basic, because (1) the quality of science, not only intended solely to improve the quality of education and the development of legal science itself, but also to improve the quality of values and products of the law enforcement process (in abstracto and in concreto). (2) the law is made with knowledge, then its use (application/enforcement) must also be with knowledge, namely legal science; not with the science of bribery or science and other means.

According to Barda Nawawi Arief<sup>117</sup> scientific approach (criminal law) that needs to be optimized / developed in criminal law enforcement in Indonesia through three integrally scientific approaches, namely: (1) juridical-scientific-religious approach; (2) juridical-contextual approach; and (3) a juridical approach with a global/comparative perspective, especially from the traditional family law and religious law system) to the third aspect of the

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<sup>113</sup>Documents and Resolution of 9/1995 UN Congress on Prevention of Crime and the Treatment of Offenders.

<sup>114</sup>Barda Nawawi Arief, *Optimalisasi Kinerja Aparat Hukum.....*, *op.cit.*, p. 5.

<sup>115</sup>Barda Nawawi Arief, *Pembangunan Sistem Hukum Nasional (Indonesia)*, Library Magister, Semarang, 2012, p. 10

<sup>116</sup>Barda Nawawi Arief, *Optimalisasi Kinerja Aparat Hukum.....*, *op.cit.*, p. 4

<sup>117</sup>Barda Nawawi Arief, *Pembangunan Sistem Hukum .....*, *op.cit.*, p. 11.

basic values/ideas of the field of criminal law substance (material criminal law, formal criminal law, and criminal law).

Based on the explanation stated above, optimizing the model of criminal law enforcement that is capable of effectively eradicating, preventing, and overcoming crime crimes through the work culture of police investigators, including:

1. Considering that the model of criminal law enforcement against such crimes puts forward a repressive model, the method chosen to optimize the criminal law enforcement model currently being implemented uses an integral approach and scientific approach. The integral approach is carried out by carrying out an integrated and simultaneous three models of criminal law enforcement simultaneously, namely a model of repressive, pre-emptive models and preventive models. Furthermore, prevention and mitigation efforts in dealing with begal crimes in the future need to be used criminal policy by applying an integrative approach by using non-formal penal and means facilities simultaneously and simultaneously. The means of reasoning are pursued through the stages of criminal law enforcement, both in abstracto and in concreto. Stages in abstracto are carried out through the improvement or construction of the substance of criminal material law, formal criminal law and criminal law. Meanwhile, in concreto stages include the stages of investigation, prosecution, court and the execution of court decisions (execution).

Scientific approach is applied to produce quality criminal law enforcement products that are effective and effectively applied to eradicate crime. Case investigations based on the scientific approach to criminal law are oriented towards realizing the values of truth, justice, usefulness, and legal certainty for perpetrators of crime, crime victims, and people who experience fear in dealing with problems.

2. In order to build a model for criminal law enforcement of criminal offenses that can be carried out effectively and be able to eradicate crime crime optimally, repressing/rearranging the model of criminal law enforcement must be carried out repressively by applying an integral approach and scientific approach. The model of criminal law enforcement against expropriation crimes needs to be reconstructed so that it is better able to eradicate, prevent, and overcome crime crimes effectively and optimally. Optimization related to the criminal law system and criminal law enforcement system, which prioritizes the work culture aspects of police investigators in combating begal crime. Also, still pay attention to other aspects, namely the substance

of the law and the legal structure in the field of criminal law and criminal law enforcement of crime.

## **E. Conclusion**

- a. Existing conditions and the application of the model of criminal law enforcement against crime crimes include:
  - 1) The Lampung Regional Police Policy related to criminal law enforcement against crime of delinquency/begal/C3 organized by the Lampung Regional Police and its staff in all Polres/ta is carried out by the General Criminal Investigation section. Reskrimum formed the 308 Antibandit Special Team (TEKAB 308) whose mark was the eradication of C3 crime. Achievement of Tekab 308 which runs a repressive model aims to suppress and eradicate begal crime. The role of Tekab 308 that has been carried out so far is deemed successful, as indicated by the decreasing number of Crimes and Criminal Settlement. However, the role of Tekab 308 is seen as not optimal, which is expected to completely eradicate the problem of begal up to its roots. Optimization is carried out by applying an integral approach and scientific approach so that quality criminal law enforcement can be held.
  - 2) The model of criminal law enforcement against crime crimes applied by the Tekab 308 section is a repressive model. The repressive model is sharp/eliminates/suppresses/suppresses/tells the perpetrators of C3. Repressive criminal law enforcement is supported by a pre-emptive model run by the Sabhara service and a preventive model run by the Bimmas service. However, the last two models were not run massively like the repressive model. Model choices lead to repressiveness because Tekab 308 faces the characteristics of crime/C3 which uses violence/threats of violence, use of firearms or sharp weapons, the use of motorized vehicles, the perpetrators can rob and injure/kill their victims. Therefore, the choice of model used by Tekab 308 has been proportional and is considered appropriate.
- b. Optimization of the model of criminal law enforcement against criminal offenses needs to be done because it is still not optimal, even though the existence of Tekab 308 is expected to be able to suppress and eradicate crime crime effectively, especially through the work culture of law enforcement officials because:
  - 1) The model of criminal law enforcement against such crimes puts forward a repressive model, so the method chosen to optimize the criminal law enforcement

model that is currently being implemented is seen in terms of the work culture of police investigators, namely should use an integral approach and scientific approach, especially for build/enhance the capacity of the Tekab 308 team which is oriented towards building a work culture to realize the values of truth and justice. Through the application of an integral approach that is carried out by carrying out an integrated and simultaneous three models of criminal law enforcement simultaneously, namely a model of repressive, pre-emptive and preventive models. Within each member of the Tekab 308 team, they still have legal awareness and compliance, humanity, compassion and comprehensive considerations before acting firmly against the perpetrators of C3. Strict police actions, such as firing off perpetrators on the spot are actions that are based on Standard Operating Procedures, measures of compliance with elements of C3 crime, unlawful acts and shooting on the spot are the last choices to be made, for example perpetrators attack, defend themselves from attacks by perpetrators who endanger themselves, members and the team as a whole.

- 2) Criminal policies in the effort to prevent and overcome begal crimes in the future need to be applied in an integrative approach by using non-formal penal facilities and facilities simultaneously and simultaneously. The means of reasoning are pursued through the stages of criminal law enforcement, both in abstract and in concreto stages. Stages in abstracto are carried out through the improvement or construction of the substance of criminal material law, formal criminal law and criminal law. Meanwhile, the in concreto stages include the stages of implementation and implementation through the stages of investigation, prosecution, court and the execution of court decisions (execution).

Scientific approaches are applied to produce quality criminal law enforcement products for crimes that can be effective to eradicate crime. Case investigations based on the criminal law scientific approach aim to be oriented towards realizing the values of truth, justice, usefulness, and legal certainty, including those who commit crimes, victims of crime, and people who experience fear in facing problems.

- 3) To build a model of criminal law enforcement of criminal offenses that can be carried out effectively and be able to eradicate begal crimes optimally, then repressing/rearranging the model of criminal law enforcement repressively needs to be done by applying an integral approach and scientific approach. The model of

criminal law enforcement needs to be reconstructed so that it is better able to eradicate, prevent and overcome crime of crime effectively and truthfully. Optimization related to the criminal law system and criminal law enforcement system, which prioritizes aspects of the work culture of law enforcement officers in combating legal crimes/C3. Also, still pay attention to other aspects, namely legal substance and legal structure in the field of criminal law and criminal law enforcement of begal crimes.

**a. Suggestions**

This research suggest : a) Existing conditions and the application of the criminal law enforcement model for crime crimes, then the suggestion that needs to be proposed is the need to increase the role of Tekab 308 to optimize the three models of criminal law enforcement and apply an integral approach to the use of the two existing efforts in criminal policies, namely the application of the penal means and non-formal means simultaneously and simultaneously. Of course, the work culture of the law enforcement officials must be balanced in eradicating crimes/ beggars/C3, including, among others, police law enforcement officers who are able to refuse transactional methods, offers from perpetrators of criminal acts or their families or networks or law enforcement officers who wish weaken/ thwart criminal law enforcement through transactional efforts or influence/ color/intervene in criminal law enforcement with dirty games, bribery or other disgraceful acts. The effect of the dirty game will certainly result in criminal/ failed/bad quality crime crime enforcement products. b) Optimizing the model of criminal law enforcement that is able to effectively eradicate, prevent, and overcome crime crimes through building a working culture of law enforcement officers, the suggestions that need to be put forward are to apply an integral scientific approach.

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**Penal Mediation as an Alternative Model of Restorative Justice  
in the Criminal Justice System of Children**

Henny Saida Flora

**Abstract**

Penal Mediation is a form of alternative dispute resolution outside the court commonly known as ADR or *Alternative Dispute Resolution*. Although in general the settlement of disputes out of court only in civil disputes, but in practice often also criminal case settled out of court with the discretion of law enforcement agencies or through consultation mechanisms/peace or remission institutions that exist in society. In the Criminal Justice System of Children for mediation has been regulated in Article 18 of Law Number 11 of 2012 on Criminal Justice System of Children. The provisions of this article is expected to result in a decision that is fair and reflects the restorative justice. Penal mediation is more oriented to the quality of the process rather than the result that would rely criminal guilt, needs unresolved conflict, peace of victims of fear. Penal mediation as an alternative to the criminal justice system today is very necessary because it is expected to reduce the accumulation of the case, is one of the dispute resolution process that is considered to be faster, cheaper and simpler, can provide the widest possible access to the parties to the conflict to obtain justice, and strengthen and maximize the function of the courts in resolving disputes in addition to the process of dropping criminal prosecution. Penal mediation is a breakthrough as an instrument of restorative justice can be performed by judges, prosecutors and investigators. The success of the deliberations in the penal mediation as an instrument of restorative justice does not result in termination of proceedings for a child, only affect the demands of the public prosecutor and the judge's decision in the form of action. Judges can only make a breakthrough penal mediation in court after the examination of the defendant, if the judges believe such actions proved, the defendant admitted his actions (as the main requirement), the victim was willing to forgive and qualifications mild case. If all these conditions are met, the judge postponed the hearing before the hearing demands and continued with the approach of restorative justice in the court mediation.

**Keywords:** Penal Mediation, Restorative Justice, Criminal Justice System of Children.

## **A. Introduction**

Mediation is a form of alternative dispute resolution (ADR) in addition to mediation there are several other forms of dispute resolution options, namely negotiation, conciliation, arbitration, expert opinion, Early Neutral Evaluation (ENE) and Facts Finding. The use of mediation in the beginning was to resolve racial, community and labor problems until it later developed to solve business cases and others quickly, cheaply and simply. the efficiency and effectiveness of the method used, making mediation increasingly influenced and supported until it began to be used as part of the justice system in many countries, including Indonesia.

Penal mediation is contained in the Supreme Court Regulation No. 1 of 2008 concerning Mediation Procedures in the Court. Using reasoning mediation can make it easier for both parties to complete their case through the negotiation process to obtain agreement from the parties with the help of the mediator. Penal mediation is used when both parties have not found a settlement point on the case, to take the settlement both parties use penal mediation as a last resort to obtain mutual agreement so as to create peace between the two parties.

ADR is generally used in civil cases not for criminal cases, although in general the resolution of disputes outside the court is only two in civil disputes, but in practice often criminal cases are settled outside the court through various discretion of law enforcement officers or through mechanism of deliberation / peace or forgiveness institutions that exist in the community, including family deliberations, village meetings and customary deliberations. The practice of resolving criminal cases outside the court so far has no formal legal basis, so there is often a case that informally has a peaceful settlement (even though the mechanism of customary law) is still processed in court according to applicable law.

Christopher W. Moore provides a definition in which the definition is almost the same as the mediation typing contained in the Supreme Court Regulation (PERMA) No.1 of 2008 concerning Mediation Procedures at the Court, namely: by the mediator. The mediator is a neutral party who assists the parties in the negotiation process in order to find a variety of possible dispute resolution without using a way to break or force a settlement ".

Mediation is different from negotiation, in mediation there is a third party that functions as a mediator. Conciliation is almost the same as mediation, but the conciliator has greater authority / role than the mediator. Mediation is also different from the court

proceedings ((litigation) or arbitration because the mediator does not have or has little power to decide.

Based on the current legislation in Indonesia (positive law) the principle of a criminal case cannot be resolved outside the court, although in certain cases it is possible to resolve criminal cases outside the court. Although in general dispute resolution across the court only exists in civil disputes, in practice often criminal cases are settled outside the court through various discretions of law enforcement officials or through deliberation / peace mechanisms or deep forgiveness institutions in the community (family, village or adat) which is done by determining the time and place, confronting the defendant, seeking mutual agreement.

Doing these three things, the results of the mediation of the penalty are known and obtained from each of the parties concerned. This reasoning mediation is not only outside the court, but also stands out from the criminal, but it is positive law, which facilitates the parties concerned in resolving cases specifically without going through the trial route, which aims to obtain the results of peace or forgive each other between the parties What is meant is.

The practice of resolving criminal cases outside the court has not had a formal legal basis, so there is often a case that informally has a peaceful settlement (even through the mechanism of customary law) but still processed in court in accordance with applicable law.

In the Child Criminal Justice System regarding this mediation can be said to have been regulated in Article 18 of Law Number 11 of 2012 concerning the Criminal Justice System of the Child which determines that in handling child cases, children of victims and or children of witnesses, social counselors, social workers, investigators, public prosecutors, judges and lawyers or other legal aid providers must pay attention to the best interests of the child and try to maintain a family atmosphere. In this provision it can be understood that in handling children in conflict with the law involved parties such as children of victims and / or children of witnesses, social advisers, social workers investigators, public prosecutors, judges and advocates or other legal aid providers, in determining criminal offenses against children .

The provisions of this article are expected to produce fair decisions and reflect restorative justice. Restorative justice is the settlement of criminal acts involving the perpetrator, the victim, the family of the perpetrator / victim and other related parties to

jointly seek a just solution by emphasizing the restoration of the original state and not retaliation (Article 1 point 6 of the Justice System Law Child Criminal).

Penal mediation as an alternative to the current justice system is very necessary because : 1) it is expected to reduce the accumulation of cases ; 2) it is one of the dispute resolution processes that are considered faster, cheaper, and simpler ; 3) can provide the widest possible access to the parties to the dispute to obtain justice ; and 4) strengthening and maximizing the function of court institutions in resolving disputes in addition to the process of imposing penalties

Penal mediation is more oriented to the quality of the process than the outcome, which relies on the perpetrator of the crime for his mistakes, the needs of the conflict are solved, the calm of the victim and fear.

### **B. Penal Mediation as A Restorative Justice Model**

Although reasoning mediation as a manifestation of restorative justice is not yet known in the criminal justice system in Indonesia, there are implied provisions that encourage the use of this mechanism in resolving child cases in conflict with the law. The legal basis of the judge's authority to conduct reasoning mediation is in the provisions of Article 16 paragraph (3) of Law Number 23 of 2002 concerning Child Protection which confirms that the arrest, detention and imprisonment of imprisonment for children is the last resort.

In addition, the Juvenile Court Law also stipulates that judges can impose penalties in the form of actions other than imprisonment, in the form of children being returned or children handed over to the state. This action is taken by considering the principles and objectives of the implementation of child protection as well as the basic principles of the Convention on the Rights of the Child, one of which is "in the best interests of the child". The best interest for children is that all actions related to children carried out by the government, society, legislative bodies and judicial bodies, must make the best interests for children as the main consideration.

The Law on Child Criminal Justice System is a legal umbrella for carrying out restorative justice and diversion for children who are dealing with the law. Penal mediation is a breakthrough as an instrument of restorative justice can already be done by judges, prosecutors and investigators. The success of deliberations in reasoning mediation as an instrument of restorative justice does not result in the dismissal of the justice process for children, only impacting the prosecutor's demands and the judge's decision in the form of

actions. The judge can only make a breakthrough in the judicial mediation in the court after the defendant's examination, namely if: a. The judge believes the act is proven; b. The defendant admitted his actions (as the main condition); c. Victims want to forgive; and d. Light case qualification.

If all these conditions are met, then the judge delays the hearing before hearing the claim and is followed by a restorative justice approach in the mediation room. If the mediation is successful in reaching an agreement, the result will be attached to the claim in the hope that the public prosecutor and the judge will consider the claim

Mediators in handling cases of children who are in conflict with the law are judges who serve in the district court, especially juvenile judges who are specifically assigned by the Chairperson of the District Court and determined by the Chief of the Supreme Court of the Republic of Indonesia who is authorized to conduct the trial. When serving as a mediator a child judge is accompanied by a child prosecutor in a community coach. Correctional Center as a co-mediator. This is in accordance with the opinion of Umbreit and Greenwood who explained that an important consideration in this mediation stage was the need to use co-mediators to assist the mediator, especially in complicated cases.

Being a child judge, there are two conditions that must be met, namely having experience as a judge in the district court and having interest, attention, dedication, and understanding the child's problems. When conducting a reasoning mediation in a child case with a legal conflict, the judge has the authority not to always imprison every time a child commits a crime.

Unlike mediation in civil cases in district courts or religious courts which require mediators, especially non-judges to take part in mediator training, the mediator who handles the child's case in conflict with the law does not have to be certified first. Although it is not necessary to take a certification training, the mediator should have adequate skills in handling child cases in conflict with the law in the forum of judicial mediation including, having insight into children, playing a neutral role, being patient, not easily provoked by emotions, can build trust in parties, can build the communication of the parties, can explore the hidden interests of both perpetrators and victims, can provide discourse relating to the case at hand, can provide alternative solutions for the perpetrators, victims and the community with the aim of restoring the perpetrators, victims and the community.

Gronfor explains the urgency of mediation training for child mediators to have the ability to hear, be neutral, open minded, and calm and courage to take action. Some characteristics that should be owned by a mediator in handling child cases in conflict with the law are: 1. good communication skills, especially in listening to reflection and assertiveness; 2. Expertise to negotiate and solve problems; 3. the ability to do the right leadership; 4. Good negotiating expertise; 5. commit to the philosophy and techniques of resolving non-violent disputes; and 6. Ability to understand and cooperate with the criminal justice system

Having these skills, the mediator can carry out his duties well. Mediators who do not have enough expertise and experience will experience difficulties in mediating child cases in conflict with the law because of the specificity and complexity of the case, especially if it is not supported by sufficient preparation.

The role of the mediator is very important in preparing victims and perpetrators before entering the process of reasoning so that they get enough information and have realistic expectations. If preparations are carried out properly, the parties will believe that reason mediation gives them the opportunity to solve the problems they face and the mediator only helps to reach an agreement that satisfies all parties. In addition, the mediator must also be careful in choosing or inviting parties who are useful to make the mediation process run smoothly, rather than interfere.

When carrying out its functions in the reasoning mediation process, and alternatives to play an active role by providing discourse, advice and alternative solutions. The role of the mediator is to assist in the development of dispute resolution, not like a passive mediator that only functions as a facilitator. The mediator acts most actively, when preparing the parties in the face of the mediation sessions and when making an agreement.

The role of mediators who are active in mediating child cases in conflict with the law, in Indonesia this leads to the dominant participation of mediators in each stage of the mediation process, from the start of mediation to drafting an agreement. this is caused by several factors, namely: 1) the type of mediated case is a criminal case that requires more intervention from the mediator; 2) position attached to the mediator as a child judge in the court as a state representative in helping to reach an agreement in accordance with positive criminal law; 3) the judge's habit to decide (to adjudicate) in every case in the court, so that he is not used to facilitating the mediation process; and 4) Expectations from the parties who

really expect the mediator as the person who has more authority, authority, knowledge and experience to help provide advice or even the best decision and satisfy all parties.

The dominant role of the mediator is also referred to as the mediator's directive, the mediation experts differ on the extent to which a mediator can intervene. When viewed as mediation by Western countries, it may be said that the parties have the authority to determine the process of the desired agreement. The mediator only functions as a facilitator who helps the parties to create a constructive atmosphere of mediation so that they can reach an agreement that satisfies all parties.

In accordance with the nature of reasoning mediation as a manifestation of restorative justice, the mediation model used is a transformative approach, where the parties are actively involved in determining the resolution of disputes that can achieve justice according to their will towards a change in the attitude and living conditions of victims and perpetrators for a better direction ( transformation) the community is expected to be transformed in this mediation model.

### **C. Penal Mediation Process in Child Criminal Justice**

The reasoning mediation carried out at the hearing stage in court is after the case has been transferred to the court by the public prosecutor. In mediation at this stage as in the civil case, the judge offered an alternative solution to the criminal case by means of peace to the parties, namely the perpetrator of the crime and the victim before the examination process before the court, by looking at the criteria of the crime committed by the defendant. This mediation if it reaches an agreement, the results can be used as an excuse to abolish the criminal offense. the mediator at this stage can be carried out by a judge or mediator from outside the court.

The implementation of this mediation is as follows: 1) the judge after studying the case and the criminal act committed by the defendant can offer reasoning mediation as an alternative to the settlement of the case with the peace of the parties; 2) if the parties agree, the agreement is voluntarily agreed to take part in the settlement of the case by mediation by both the perpetrator and the victim; 3) judges can act as mediators or with mediators outside the court who are qualified and certified; 4) mediation brings the perpetrators and victims together, on this occasion a reconciliation between the victim and the perpetrator is held, and payment of damages suffered by the victim; 5) penal mediation is carried out based on confidential principles, so that all events that occur and all statements that appear in the

mediation process must be kept confidential by the parties including the mediator; 6) if the mediation does not reach an agreement, the examination process before the court will continue as it should; and 7) if an agreement is reached where the parties mutually accept the outcome of the agreement (reconciliation) and agreed to pay compensation by the perpetrator to the victim, the outcome of the agreement as outlined in the deed of agreement becomes permanent as the court decision and is final, so that the perpetrator cannot be prosecuted and tried again in the criminal justice process.

In handling cases of children in conflict with the law, judges in addition to having an inherent obligation to carry out the principle of legality, should hold on to the principle of "in the public interest" in carrying out their duties and authority, the public interest here is connected with the best interests of the child, as a form of the realization of the fulfillment of the public interest for the community. This is in line with the general principles contained in the convention on children's rights, meaning that in all actions related to children carried out by state and private social welfare institutions, legal courts, administrative authorities or legislative bodies, the best interests of children must be taken into consideration the main.

Marshall and Merry said that reasoning mediation can make the offender more responsible than feeling insulted and marginalized when a crime is committed, the perpetrator is handled by the justice system. For the victims themselves there are several reasons that encourage them to choose the mediation process compared to the court, namely: 1) to hear the reason the perpetrator carried out the action; 2) communicate with the perpetrator about the consequences of the act; 3) helps the offender if possible; and 4) ensure the perpetrator does not repeat the same crime.

The process of reasoning mediation provides great benefits for both parties, namely victims and perpetrators. These benefits include: 1) victims can confront perpetrators, express their feelings, ask questions, and have a direct role in determining punishment; 2) the perpetrator is given the opportunity to be responsible for their actions and correct them to the victim; and 3) victims and perpetrators face to face as a person, not two opposing camps without faces, which makes them understand the actions taken, the conditions behind them and what must be done to improve the situation.

More detailed benefits of reasoning mediation, not only for victims and perpetrators, but also for courts and the wider community. The benefits of the reasoning mediation are:

#### **1. For victims**



- a. Recognize and learn the perpetrators
  - b. Ask questions to the perpetrator
  - c. Devoting feelings and needs after crime
  - d. Receive an apology and / or repair / compensation
  - e. Educating perpetrators about the consequences of their actions
  - f. Resolve existing conflicts
  - g. Become part of the criminal justice process
  - h. Forgetting the crime that happened
2. For actors
- a. Have responsibility for the crimes they commit
  - b. Knowing the consequences of actions
  - c. Apologize or offer repairs / compensation
  - d. Self-examination
3. For the court
- a. Learn how the victim's life is affected by the crime
  - b. Make a more realistic decision
4. For the community
- a. Receive an apology and / or reparation / compensation from the perpetrator
  - b. Helping reintegration of victims and perpetrators

Several factors of reasoning mediation were found which caused the victims to experience disappointment, namely:

1. Lack of follow-up of the perpetrator to the agreement that has been made
2. Submission of criminal acts that have been committed and the solution due to the process of judicial mediation
3. The amount of time needed to participate in the reasoning mediation process (if using shuttle mediation)

In accordance with the nature of disputes arising from criminal offenses, the main obstacle to the conduct of penal mediation is the rejection of the main parties involved, namely victims and perpetrators. Victims are reluctant to deal directly with the perpetrators in the reasoning mediation process because there are feelings of fear and anger towards the perpetrators, while the perpetrators feel ashamed and guilty when dealing with victims and the obligation to be responsible. Even though this happened, reasoning mediation was still carried out. The mediator can meet both parties in a separate place (shuttle mediation). This type of mediation is also called indirect mediation (indirect mediation). Marshaal and Merry also revealed the weaknesses or obstacles faced by reasoning mediation in dealing with children in conflict with the law, namely:

1. Operational problems.

a. Case recommendations for using mediation

This is a common problem that often occurs. Understanding and cooperation between law enforcement agencies is still lacking, making it difficult to convince them to recommend cases to be resolved through reasoning mediation.

b. Limited time

Because reasoning mediation is incorporated into the criminal justice system, there is limited time to mediate a case, even though the case is very complex or sensitive.

c. Lack of preparation and follow-up

Many mediators are less prepared to deal with a case, even though the level of complexity and sensitivity of each case varies. In addition, the mediator also often considers the task completed when the parties have reached an agreement. Even though follow-up in the form of supervision of the implementation of the agreement must also be carried out.

d. Indirect mediation

If this mediation process is used, it will take a lot of time and be less productive, compared to when the victim and the perpetrator meet directly.

e. Lack of resources

If the quantity and quality of limited human resources or resources in the form of facilities (such as mediation space) are not available, it will interfere with the course of the

reasoning mediation process. A special mediation room is absolutely necessary according to the principle of confidentiality of the mediation process that must be maintained.

2. Failure to maintain the original goal.

This happens because there is still a dominant paradigm and culture of the criminal justice system, until the purpose of the reasoning mediation incorporated in the system can fade or falter

3. Compensation

Often the perpetrators who commit crimes are indeed poor until they cannot afford the compensation submitted by the victim, which results in a failure to reach an agreement

4. Accountability of perpetrators

Many perpetrators only use penal mediation as a way to avoid criminal justice (prison). After the peace agreement was reached, they did not want to implement it

Although participation in the reasoning mediation process is basically voluntary, the victim and the perpetrator may still feel compelled to participate. If they do not participate or do not want to accept the resulting agreement, they will be responsible for a child who must be held in court and may be sentenced to a worse sentence.

**D. Conclusion**

Settlement by deliberation in resolving child crime cases is considered even though it is known that the child commits a crime. The problem faced by law enforcement is that there is no legal recourse for the settlement of criminal cases through mediation, the legal doctrine is still valid, criminal cases cannot be mediated, but the settlement of criminal cases through the mechanism of restorative justice institutions is an effort that needs to be responded positively by all elements of law enforcement and lovers of justice. Restorative justice or a recovering judicial process can reduce the socio-economic burden of the state and the energy of law enforcement in providing justice for the community. Completion of cases of children who commit criminal acts is very possible restorative justice settlement in a way that does not make revenge and also deliberated whether by using discretion or diversion. This is important for keeping / avoiding children from experiencing traumatic marks / labels as perpetrators of crime that can affect the development of children's lives in the future.

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## **Death Sentence in Hindu Perspective**

I Ketut Seregig

### **Abstract**

The application of death sentence for perpetrators of crime, especially in Narcotics Crime, is a spectacular legal action in law enforcement in Indonesia. The assertiveness of the President of the Republic of Indonesia in the enforcement of the law for the death row convicts makes the developed countries that uphold the totalitarian human rights do not move to protest against the political decision of the President of Indonesia which is considered to ignore the principles of human rights. The execution of death sentence was done by the attorney general, when there was no more legal efforts that can be taken by the death row convicts. In addition to Australia as well as the Netherlands, France and Germany continued to communicate with the Indonesian government, in order not to implement the death in the criminal proceeding. However, President Joko Widodo did not budge a bit on the protests or efforts made by the Australian Foreign Minister. The method used in this research was descriptive qualitative method with normative juridical analysis approach. It means that this study examined the values of Hinduism, whether the death for extra-ordinary crime is justified in Hinduism? The results can be concluded that death had existed since the Vedic era, among others implied in the Bhagavadgita teachings and listed in Manawadharmasastra (Hindu Law). The Death of this day was only for the most extraordinary crimes: crimes which threaten the defense and security of the state, this was evidenced in the war of kuruksetra between Pandavas and Kaurawa where Arjuna had to kill his grandfather and his own brothers. In this case Kresna Sang Awatara was the manifestation of God who was born into the world in upholding the Dharma. Moreover, in the Book of Manawadharmasastra sloka 349, 350, 351 it is stated that the death is justified if there is a criminal who kills the Brahmin.

**Keywords:** death sentence, narcotics,producer-dealer-traffickers

## A. Background

Since Joko Widodo became the 7th President of the Republic of Indonesia, the application of death for perpetrators of criminal acts is familiar to the people of Indonesia, especially in accelerating the execution of death row convicts of narcotics. The decisive action taken by the President came from a report on the massive narcotics case occurred in Indonesia, coupled with a report from BNN, that no less than 50 people died every day as a result of Narcotics. In every occasion, the President of the Republic of Indonesia has always states that narcotics must be fought by every citizen of Indonesia and the President declares that narcotics crime is an "extraordinary crime". According to the President, the perpetrators namely; producers, dealers and narcotics traffickers must be severely punished. The implication of this statement submitted by the President was the acceleration of execution of the death row convicts of bandar narkoba who already had a legal force.<sup>118</sup>

The execution of the death row convicts was carried out by the Attorney General HM. Prasetyo on the grounds that President Joko Widodo had rejected the petition for clemency filed by the death row convicts, so that there was no longer any legal effort (legal remedy) which could be taken by the death row convicts. With the rejection of clemencies submitted by the death row convicts, then there was only one more legal step could be exercised by the attorney general which is the execution. In the first phase, the attorney general's office had executed the execution of 6 (six) death row convicts, conducted on 18 January 2015, known as the execution of death Volume-I. The names of the convicted persons executed were; Nameona Denis (Malawi), Marcho Archer Cardoso Moreira (Brazil), Daniel Enemu (Nigeria), Ang Kiem Soei aka Kom Ho (Dutch), Tran Thi Bich Hanh (Vietnam), Rani Andriani aka Melisa Aprilia (Indonesian). The second phase, the attorney general's office had executed the execution of 8 (eight) death row convicts on April 29, 2015, which was called the execution of death Volume II. Those eight death row convicts were; Zhang Manquan, Chen Hongxin, Jian Yuxin, Gan Chunyi and Zhu Xuxiong, 2 (two) Indonesian Citizens; Benny Sudrajat aka Tandil Winardi and Iming Santoso, and one Dutch citizen named Nicolaas Garnick Josephus Gerardus aka Dick.

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<sup>118</sup>[www.rappler.com](http://www.rappler.com), tentang Pidato Presiden RI ke-7 *Joko Widodo* dalam peringatan Hari Anti Narkoba Internasional tanggal 26 Juni 2016, yang antara lain menyatakan “saya ingin ingatkan kepada kita semua, di kementerian, di lembaga, di aparat-aparat keamanan kita, terutama di Polri. Saya tegaskan sekali lagi kepada seluruh Kapolda, jajaran Polda, kepada jajaran Polres, Polsek semuanya, kejar mereka, hajar mereka, hantam mereka, kalau UU memperbolehkan *dor* mereka”.

The third-stage execution took place on July 29, 2016 against 14 (fourteen) men of death row convicts. This event was known as the Dead Execution Volume-III. Those fourteen death row convicts were; Humphrey Jefferson (Nigerian) d to death in 2004, Michael Titus (Nigerian) d to death in 2003, Ozias Sibanda (Nigerian), Eugene Ape (Nigerian), Prosecuted by 12 years imprisonment, death verdict, Obina Nwajagu (Nigerian), Okonkwo Nonso Kingsley (Nigerian), death in 2004, Freddy Budiman (Indonesian), death , Merri Utami (Indonesian), death in 2003, Agus Hadi and Pujo Lestari (Indonesian) Gurdip Singh (Indian) was d to death in 2005, Zulfiqar Ali (Pakistani) was d to death in June 2005, Seck Osmane (Senegalese) was d to death in 2004 and Frederick Luttar (WN Nigeria).<sup>119</sup>

In the view of modern society in developed countries the death is valued as an inhumane behavior. The right to live is the most essential entity of God. In the Netherlands the right to live is very high, for example, if there is an accident incident on the road, so the traffic cops in the country help the victims directly at the scene, although other drivers have to stop for hours, it does not matter to the people who are in Holland, because the Dutch government is very respectful of human rights, especially of the right to live. On the otehr hand, In Indonesia, in case of a traffic accident, the police must proceed as quickly as possible the crime scene and prioritize the smooth flow of traffic, as it violates the rights of others which are highly respected in a democratic country. In the event of a crime that harms the rights of the people, either soul or property, then the government as the holder of the people's mandate will take a fairly severe action, even to the death , which is solely done to defend the rights of the people.

## **B. Research Methods**

### **1. Types of Research and Approach**

This research was a qualitative study of the Hindu view of the death applied by the Judge in imposing criminal sanctions on the defendant. The approach used was literature approach and teksiology approach which were expected to provide in depth and scientific normative juridical information. The literary approach and the teksiological approach were intended to provide data originating from texts expressed in Hindu law and Bhagawadgita teachings, with the intention of providing another view that the death is not only applied by state law but is also contained in Balinese customary law, Manawadharma sastra and

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<sup>119</sup>[www.rappler.com](http://www.rappler.com) published July, 28, 2016, tentang daftar nama dan kasus 14 terpidana mati tahap tiga, 10 warga negara asing dan 4 warga Indonesia akan dieksekusi mati.

Bhagawadgita, so in law enforcement in Indonesia, the death in Hindu perspective is innocent, as long as the law provisions of the country do not conflict with the principles of human rights enforcement in Indonesia.

## 2. Types of Data and Data Gathering Technique

The data presented in this research were literary data obtained from observation, reading, quoting sloka text in Bhagawadgita and Manawa dharmasastra (Hindu Law), recording data / file and juridicially reviewing the death stated in the state law, Bhagawadgita and Manawa dharmasastra Book (Hindu law). The data collected was the data taken from the sloka texts sourced from the Book of Manawadharm literature (Hindu Law) and Bhagawad gita which outline the implicit and explicit deeds which can be convicted of death . The examination of the text containing the death was done by conducting a comparative analysis of the elements of death contained in the state law and the human acts which may be subject to the sanction of death as contained in the sloka of Bhagawadgita and Manawadharmasastra. Data gathering technique was done by using the juridical normative and juridical empiric approach as well as the literary approach, finding out references from books and journals related to the death , and *Manawadharm* and *Bhagawadgita* literary books obtained from public and private libraries. The types of data required in this study are as follows:

### a. Primary data

The data describing the death , were obtained from the Criminal Code (KUHP) and Law No: 35 of 1999, on Narcotics; reading, understanding and interpreting the contents of the *Bhagawadgita* book and understanding the elements of action described in chapter (sloka) 349, 350, 351 *Manawadharmasastra*. To explore public view about whether or not a death is feasible to be applied in criminal prosecution in Indonesia, the authors also conducted open interviews which were inserted in specific discussions, towards the participants who were considered as representatives of the society legal views, so that the results obtained will be sharper and more profound.

### b. Secondary data

The secondary data were the data about the death which were from the publication of scientific works done by previous researchers, scientific articles and theories stated by jurists in the books published by writers which have met the requirements of international standard book Numbers (ISBN).



## 1. Data Analysis

Qualitative analysis was done by taking data from various sources by implementing Socratic dialectic method in which the researcher delivered question and answer method to the participants of this research. The results of data collection are then analyzed which results will be conclusions that are objective and universal.<sup>120</sup>

Qualitative data analysis is inductive, meaning that the analysis was based on data obtained, then developed into a hypothesis. Hypothesis was formulated based on the data which was later enriched by more data gathered repeatedly so that it could be concluded whether the hypothesis was accepted or rejected based on data collected. If the hypothesis was hypothesis accepted, then the hypothesis was developed into theory. The analysis process was divided into 2 (two) sections, namely:

### a. Analysis Process before field study

The analysis was conducted on data from preliminary study or secondary data which would determine the focus of this research which was temporary so if the researcher did not find anything from what was observed, then the study would be developed in the field by changing the focus.

### b. Whilst Process in the field

Miles and huberman (1984) stated that the activity in qualitative data analysis is done interactively and continuously, so the data is saturated with actively during data analysis, among others: data reduction (summarizing a lot amount of data, choosing the principal thing, focusing on the important, seeking themes and patterns); Data display (the presentation of data in the form of brief descriptions, charts, relationships between categories of flowcharts and the like which are often used with narrative text); and conclusion / verification.

Spradley (1980) divides the process of analyzing qualitative data, among others; 1) domain analysis (obtaining a general and comprehensive picture of the object / research or social situation; 2) taxonomic analysis (the next selected domain described in detail to know its internal structure, with focused observation); 3) componential analysis (figuring out

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<sup>120</sup>Bertrand Russell. *History Of Western Philosophy and its Connection with Political and social Circumstances from the Earliest to the Present Day* (Sejarah Filsafat Barat dan kaitannya dengan kondisi sosio-politik dari zaman kuno hingga sekarang); diterjemahkan oleh Sigit Jatmiko, Agung Prihantoro, Imam Muttaqien, Imam Baihaqi, Muhammad Shodiq, penerbit Pustaka Pelajar, 2004: p.124.

specific traits on each internal structure by contrasting elements with questions through observation and selected interviews); 4) analysis of cultural themes (finding relationships between domains and relationships with the whole and subsequently expressed in the theme / title of the study).<sup>121</sup>

Associated with the data analysis method described above, the research in this journal used the theory of qualitative data analysis, meaning that the data obtained was sourced from Hindu teachings, namely Manawa Dharma Sastra, Bhagawadgita and the Law validated by the Unitary State of the Republic of Indonesia namely; Law Number 1 of 1946 on the Criminal Code and Law Number 35 of 2009 on Narcotics.

## 2. Theoretical Basis

The theory used to analyze in this journal was Moeljanto's view on the "error theory" which states that in the definition of criminal law there are 2 (two) notions of error: first, the definition of psychological error, which implies that error is seen as the psychological (inner) relationship between the maker and his deeds, which can be either intention or negligence. On the intention of this inner connection requires deeds and their consequences while in the negligence there is no such will. This case is the only descriptive state of the mind of the will to the deeds and consequences of the act. Based on what stated above, it can be concluded that there are two forms of error namely: Intention (*dolus*, *opzet*, *vorsatz*, intention) and negligence (*culpa*, *onachtzaamheid*, *nelatigheid*, negligence). To determine whether a person is intentional or not, there are 2 (two) theories, namely:

First; The Theory of Will which states that the core of intention is the will to realize the elements of the offense in the formulation of the law; Second: The theory of knowledge / imagining which states that the core of intentional means imagining what will arise as a consequence of his actions, and everyone can not wish a result, but can only imagine which will happen.

Moeljanto states that the person in the sense of a criminal act as a criminalized act, whoever violates the prohibition, in which elements are; Deeds (human); Which meets the formulation of the law (formal conditions); And is against the law.<sup>122</sup>

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<sup>121</sup> Sugiono. *Metode Penelitian Kualitatif, Kuantitatif dan R&D*, penerbit - AlfabetaBandung, 2007, p: 245, 264

<sup>122</sup> Moeljanto, *Perbuatan Pidana dan Pertanggungjawaban Dalam Hukum Pidana*, Bina Aksara, Jakarta: 1993-p.46

Related to the criminal proceedings, the author was guided by the Frank Remington Theory which introduces the Criminal Justice System as a judicial system known in Indonesia. In relation to this theory, that every perpetrator who will undergo the death must go through the process set out in the Criminal Justice System starting from the process of investigation, prosecution and then the judicial process. The success in using this theory lies in the extent to which subsystems are able to apply an approach which focuses on the quality of coordination, synchronization of the criminal justice component, supervising and controlling the use of power by components of the judicial system, the effectiveness of the crime prevention system takes precedence over the effectiveness of the settlement of cases; The use of law as an instrument to establish the administration of justice.<sup>123</sup>

### C. Discussion

To provide a contextual overview in examining the Hindu perspective of the death, the researcher will describe in advance about death contained in the Law enacted by the Unitary State of the Republic of Indonesia. This is intended to give the reader the idea that Hindu does not prohibit death by the state.

#### 1. Death in State Law

Since the Unitary State of the Republic of Indonesia is led by President Joko Widodo the execution of death increases very sharply, in which until now the implementation has been running as many as three stages. The reform in law enforcement is one of the presidential program (*nawacita*) of President Joko Widodo, which is characterized by the assertiveness and courage of the President in executing death row convicts who already have legal efforts. To provide an overview of the provisions of the Law regulating of the death, in the context of law enforcement against the perpetrators of terrorism in Indonesia, the Denpasar-Indonesia District Court has explicitly d the perpetrators of terrorist acts of Bali-1 bombing: Amrozi, Imam Samudera and Ali Ghufron aka Mukhlas, who proved to have committed a terrorist act on October 12, 2002 at Paddy's Pub Kuta and in front of Sari Club Denpasar Bali.

The death imposed on the defendant in accordance with the indictment of article 14 juncto article 6 of the **Government regulation in lieu of law** Number 1 of 2002 juncto

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<sup>123</sup> Moeljanto, *Perbuatan Pidana dan Pertanggungjawaban Dalam Hukum Pidana*, Bina Aksara, Jakarta: 1993-p.46

article 1 Act Number 15 Year 2003 juncto article 1 the **Government regulation in lieu of law** Number: 2 year 2002 juncto Article 1 Act Number 16 year 2003, on the eradication of terrorism and is also blamed for violating Article 55 paragraph 1 to (1) of the Criminal Code, for deliberately using violence or the threat of violence, causing an atmosphere of terror or fear of people in widespread or mass casualties by robbing the freedom or causing other people's loss of life and property. According to the statement of the head of the Attorney General Information Center Jasman Panjaitan, on Sunday morning November 9, 2008 at 00:15 WIB (Western Indonesian Time) those three death row convicts had been executed and declared dead. Normatively, the death sanction in the law is stated as follows:

**Government regulation in lieu of law Number: 1 year 2002**

In article 6 it is stated; Any person who deliberately uses violence or threats of violence creates an atmosphere of terror or fear to a widespread or massive victim by seizing independence or loss of life and property of another person, or resulting in damage or destruction of strategic vital objects or environmental or public facility or an international facility is in a criminal manner with capital punishment or life imprisonment or imprisonment of a minimum of 4 (four) years and a maximum of 20 (twenty) years. In article 8 it is stated; In a criminal for committing a criminal act of terrorism with the same criminal sanction referred to Article 6 for any person who:

- a. Destroys, creates unusable or damages buildings for air traffic security or foil efforts to secure such buildings;
- b. Causes the destruction, unavailability or damage of buildings for the safeguarding of air traffic, or the failure of business to secure such premises;
- c. Intentionally and unlawfully destroys, damages, picks up, or removes signs or equipment for flight security or thwarts the operation of such marks or equipment, or installs false marks or devices;
- d. Due to negligence causes a sign or device for aviation security to be destroyed, damaged, picked up or moved or causes incorrect sign or equipment for faulty flight security;
- e. Intentionally or unlawfully, destroys or otherwise makes the wear of an aircraft wholly or partly owned by another;
- f. Intentionally and unlawfully harms, destroys, makes an aircraft unusable or damaged;
- g. Due to his negligence causes aircraft to woe, disintegrate, unusable or damaged;
- h. With the intent to benefit himself or others against the law, to the insurer inflicts fire or explosion, an accident of destruction, damage or unauthorized use of an aircraft insured

against danger or insured cargo or wages to be received for the transport of its cargo, or for the purpose of the contents have been received by the deposit;

- i. In an aircraft by unlawful conduct, seizes or maintains seizures or controlling aircraft in flight;
- j. In aircraft with force or threat of violence or other forms of threat, seizes or maintains seizures or controlling the control of aircraft in flight;
- k. Undertakes jointly as a continuation of the evil conspiracy, carried out in advance, causes serious injury to a person, causes damage to the aircraft so as to compromise its flight, carried out in order to deprive the freedom or continues to deprive a person of liberty;
- l. Intentionally and unlawfully commits a violent act against an individual in an aircraft in flight, if such conduct could jeopardize the safety of the aircraft;
- m. Intentionally and unlawfully damages the aircraft within the service or causes damage to the aircraft causing it to be unable to fly or endangers the security of flight;
- n. Intentionally and unlawfully places or causes his or her place within an aircraft in service, in any manner, a device or material capable of destroying an aircraft which makes it unable to fly or causes damage to the aircraft that may compromise the security of the flight;
- o. Conducts jointly 2 (two) or more persons as a continuation of the evil conspiracy to commit by premeditation and causes serious injury to a person from the acts as referred to letter l, letter m, and letter n;
- p. Provides information which is known to be false and because the act endangers the safety of aircraft in flight;
- q. In an aircraft performs acts that may compromise the security of an in-flight aircraft;
- r. In an aircraft performs acts that may disrupt the order and order within the aircraft in flight.<sup>124</sup>

Based on the provisions set forth in article 6, 8 of government regulation in lieu of law Number 1 of 2002 mentioned above, it is clear that all acts of terror that result in mass loss of life and property damage, general facilities, air transportation, malicious conspiracy, crime plan resulting in serious injury, are in a criminal manner with capital punishment or life imprisonment or imprisonment of a minimum of 4 (four) years and a maximum of 20 (twenty) years.

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<sup>124</sup>Perpu Nomor: 1 Tahun 2002. Tentang Pemberantasan Tindak Pidana Terorisme.

**Law Number: 35 Year 2009**

In article 113 paragraph (2) it is stated; In the case of the act of producing, importing, exporting, or distributing narcotics of Group I, as referred to in paragraph (1) in the form of plants weighing more than 1 kilogram or exceeding 5 (five) tree trunks, or in non-plant form weighing more than 5 (five) Gram, the perpetrator shall be subject to capital punishment, life imprisonment or imprisonment of maximum of 5 (five) years and maximum of 20 (twenty) years and maximum fine as referred to paragraph (1) plus one third.

In article 114 paragraph (2) it is declared: In the case of the act of offering to be sold, sell, buy, mediate in the sale, exchange, surrender or accept narcotics of Group I as referred to paragraph (1) in the form of plants weighing more than 1 (One) kilogram or exceeding five trees or non-plant weighing 5 (five) grams, the perpetrator shall be subject to capital punishment, life imprisonment or imprisonment of a minimum of 6 (six) years and a maximum of 20 years and maximum fine as referred to in paragraph (1) plus one third.

In article 116 paragraph (2) it is stated; In the event of the use of narcotics against another person or the provision of narcotics of Group I for the use of another person as referred to paragraph (1) resulting in another person, dead or permanently disabled, the perpetrator shall be subject to capital punishment, life imprisonment or imprisonment of a minimum of 5 ( Five) years and a maximum of 20 (twenty) years and maximum fine as referred to paragraph (1) plus a fine of one third.

In article 118 paragraph (2) it is stated; In the case of the act of producing, importing, exporting, or distributing narcotics as meant in paragraph (1) weighing more than 5 (five) grams, the perpetrator shall be subject to capital punishment, life imprisonment or imprisonment of at least 5 (five) years and maximum 20 (twenty) years and maximum fine as referred to paragraph (1) plus a fine of one third.

In article 121 paragraph (2) it is stated; In the event that the use of narcotics against another person or the provision of Narcotics Group II for the use of another person as referred to paragraph (1) resulting in another person, dead or permanently disabled, the perpetrator shall be subject to capital punishment, life imprisonment or imprisonment of a minimum of

5 ( Five) years and a maximum of 20 (twenty) years and maximum fine as referred to paragraph (1) plus a fine of one third.<sup>125</sup>

### **Law Number: 1 of 1946, on the Criminal Code**

#### **Article 104 states:**

Treason for the purpose of killing or depriving liberty or abolishing the ability of the President or Vice President to rule is punishable by death sentence or life imprisonment or imprisonment of a maximum of twenty years.

#### **Article 110 states;**

- (1) The conspiracy to commit crimes under articles 104, 106, 107 and 108 is threatened under criminal penalties in those articles.
- (2) The same sentence applies to persons with the intent of articles 104, 106, and 108, preparing for or expediting crime:
  1. trying to mobilize another person to do, telling to do or to participate in order to provide assistance when performing or providing opportunities, means or information to commit a crime;
  2. trying to obtain opportunities, means or information to commit a crime for themselves or others;
  3. having inventory of goods which is known to be useful for committing a crime;
  4. preparing or having a plan to carry out a crime that aims to be informed to others;
  5. trying to prevent, obstruct, or thwart the actions held by the government to prevent or suppress the execution of a crime.<sup>126</sup>

### **The Death Sentence in Bhagavadgita**

In the Supreme Mahabharata which consists of 18 parwa (chapters), one of which describes the war of kuruksetra which tells the war between truth and evil. The civil war is between Pandavas as a symbol of truth and Kaurava as a symbol of evil. In this war the god Krishna the Awatara performs his duties as the Judge, who prosecutes Kaurava as a rampant

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<sup>125</sup>Undang-Undang Nomor: 35 tahun 2009, tentang Narkotika pasal 13, 14, 16, 18 dan 121.

<sup>126</sup>Hukum pidana.bphn.go.id/.../Bab I kejahatan terhadap Keamanan Negara. Kompilasi Hukum Pidana. 2010.

criminal in the world, while the Pandavas carry out the duties as executors led by Yudhisthira, carrying out the orders of the Awatara to execute the criminals of the country at that time who have committed fraud, Slander, cruelty in the State of Hastinapura. The criminals are none other than the brothers and relatives of the Pandavas themselves namely the group of Kauravas.<sup>127</sup>

In Bhagawadgita Krishna is personified as Awatara which means the divine power that descends into the world in establishing dharma (truth) by punishing Kaurawa which is the source of all evil, injustice, and cruelty, so that the world is full of darkness and humanity is on the verge of destruction. Law Enforcement or Righteousness (dharma) at that time was done on the divine power of God. In the sloka it is stated that the Awatara (divine power) descends into the world to recall the true status of man.

Through His teachings He seeks to reestablish the declining rules of truth (dharma) and to protect sincere humans defending the truth from spiritual setbacks. In this case God is always on the side of righteousness for He is the truth itself. Compassion is ultimately more powerful than hatred and cruelty. Truth (dharma) can always conquer evil (adharma). Destruction of crimes in the war is a form of death imposed on the Kauravas and all his followers. In this process of war justice, all of Kaurawa and his followers were killed as punishment for the crimes he committed. In this context dialogue occurs; Arjuna asked Krishna as stated in the following:

Bhagawadgita I Sloka 25

Bhiṣma-drona-pramukhataḥ, sarveṣāṁ ca mahi-ksitam,

Uvāsa pārtha paśyaitān, samavetan kurun iti

Meaning:

In front of Bhisma, Drona, and eminent leaders, Krisna said:

Watch them Arjuna, the descendants of Kuru this gathered.

Bhagawadgita I sloka 26

Tatrapasyat sthitan parthah, pitrn atha pitamahan,

Acaryan matulan bhratrn, putran poautran sakhims tatha

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<sup>127</sup>Pudja.G.Bhagawadgita (*Pancama Weda*). Penerbit Paramita Surabaya, 2005: p.16-20.



Meaning:

Then Arjuna saw there standing fathers, grandfathers, and teachers,  
uncles, brothers, and cousins, children, grandchildren, and friends.

Bhagawadgita I sloka 27

Svasuran suhrdas caiva, senayor ubhayor api,

Tan samiksya sa kaunteyah, sarvan bandhun avasthitan

Meaning:

And also Arjuna, seeing the in-laws, coworkers, all, relatives  
standing upright in the ranks of both sides.

Bhagawadgita I Sloka 31

Nimitani ca pasyami, viparitani kesava,

Na ca sreya nupasyami, hatva sva-janam ahave

Meaning:

And I saw a bad feeling, O Krishna, and it is not good

I killed my own people in this war.

Bhagawadgita IV-sloka 7

Yada yada hi darmasya, glanir bhavati bharata

Abhyutthanam, adharmasya, tadatmanam srjamy aham

Meaning:

Indeed when dharma diminishes its power and tyranny about to rampant,

O Arjuna, when I will create myself.

Bhagawadgita IV-sloka 8

Paritranya sadhunam vinasaya ca duskrtam

Dharma samsthapanarthaya sambhavami yuge-yuge

Meaning:

To protect the good people and to annihilate the wicked,

I was born into the world from time to time to uphold the dharma.<sup>128</sup>

In the dialogue between Arjuna and Krishna as described in sloka mentioned above it is known that Krishna showed Arjuna the people as his weapon target in kuru ksetra warfare. They are none other than their own grandfather, teacher, uncle, in-laws, cousins, children, grandchildren and friends. Arjuna the executor becomes limp, sad, and pity to the people whom he loves will be killed in this battle. The notion of killing enemies that Arjuna will face in this war is matters of law enforcement process against the criminals of the Kauravas because they are considered as criminals of the state and even regarded as the source and cause of tyranny in the world. At the end of the steps taken by Arjuna, the result is death for criminals.

The war of kuruksetra is only as a medium in executing the process of execution by the Pandavas as the Enforcer of the Truth. Then the questions raised by Arjuna to Krishna (The Awatara) were answered wisely with the highest spiritual discourses, namely the journey of the spirit/soul of human after death,<sup>129</sup> which is carefully described in sloka as the following:

Bhagawadgita II-sloka 11. Krishna said:

Aśocyān anvaśocas tvaṁ, prajñā-vādāṁś ca bhāsase,  
Gatāsun agatāsuṁś ca nāmośocanti panditāḥ

Meaning:

You grieve for those who are not worthy to be sad, But you speak of words of wisdom.

The wise will not grieve for the living and the dead.

Bhagawadgita II-sloka.12

Na tvevāhaṁ jātu nāsaṁ na tvaṁ neme janādhipāḥ,  
na caiva na bhavisyāmaḥ sarve vayam ataḥ param

Meaning:

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<sup>128</sup>Pudja.G. *Bhagawad Gita (Pancamo Weda)*, penerbit Paramita Surabaya. 2005: p.109-110

<sup>129</sup>*Ibid* p.37-44.

Neither I, thou, and these leaders have not been before,  
nor will they cease, even after death.

Bhagawadgita II-sloka.13

Dehino 'smin yatha dehe kosher yauvanam jara,  
tatha dehantara praptir dhiras tatra na muhyati.

Meaning:

Just as the spirit is in childhood, youth, and old age,  
as well as acquiring a new body, the wise will not be shaken.

Bhagawadgita II-sloka.14

Matra-sparsas tu kaunteya sitosna sukha-duhkha-dah,  
agamapayino 'nityas tams pointsasva bharata.

Meaning:

In fact, his relationship with Physical things, O Arjuna;  
cause heat and cold, medium and sorrow,  
who come and go, not eternal, accept it patiently, O Arjuna.

Bhagawadgita II-sloka.15

Yam hi na vyathayanty ete purusam purusarsabha,  
sama-duhkha-sukham dhiram so mrtatvaya kalpate.

Meaning:

Surely the one who is firm in his mind O Arjuna,  
who feels the same between already and happy,  
this kind of person who is worth of eternal life.

Bhagawadgita II-sloka.18

Antavanta ime deha nityasyoktahsaririnah,  
Anasino 'prameyasya tasmad yudhyasva harata.

Meaning:

Truly, the body of a lasting soul, Indestructible and infinite,  
will also end; Therefore fight, O Arjuna.

Bhagawadgita II-sloka 19

Yes six vetti hantaram yas cainam manyate hatam,  
ubhau tau na vijanto nayam hanti na hanyate

Meaning:

In fact, who thinks of him as a murderer and who thinks that  
he can be killed are both stupid because he never kills and be killed.

Bhagawadgita II-sloka 21

Vedavinasinam nityam ya six ajam avyayam,  
Katham sa purusah partha kam ghatayanti hanti kam

Meaning:

He who knows that, he who is not destroyed, is eternal, unborn,  
and unchanging, how can he kill or cause others can kill him, O Arjuna.

The words of Krishna in Bhagavad-Gita II sloka 11 to 15, sloka 18, 19, and sloka 21, are the supreme spiritual teachings of the spirit/soul's journey after death, that all human beings will experience death. Therefore in carrying out the obligations to be performed by Arjuna as the executor of his relatives, he was given the provision so as not to hesitate to take up arms in carrying out that obligation to destroy Kaurawa who has created tyranny in the world. Killing in this case implies an act of liberation of the spirit/soul that has been damaged, so as not to disturb the peace of the world inhabited by the wise in living his life until death pick him up.

Based on the above descriptions, the death sentence applied by the State of the Republic of Indonesia, especially against the perpetrators who committed extraordinary

crimes, namely; Crime of narcotics, terrorism, murder and theft by violence, when viewed in a Hindu perspective, it is justified because the perpetrators have created tyranny for the State and the Nation of Indonesia, so that the younger generation who became the hope of the Nation becomes weak which in the end will be a burden for the State. Narcotics have corrupted the mental and moral Nations. Then applying death sentence for the perpetrators, among others; producers, dealers and narcotics traffickers, according to Hindu views is innocent. Similarly punishing death for perpetrators who deliberately commit and or plan a murder is an act that is fair and wise if the perpetrator is given the death sentence.

### **The Death sentence in the Book Manawadharmasastra**

In the book of Manawadharmasastra there are three chapters that describe the law of death as set forth in chapters 349, 350, and 351.<sup>130</sup> The act of killing in Hinduism is justified in self-defense, protecting women and Brahmans, and is also justified in Hinduism when killing a murderer. Killing in connection with this teaching is intended as a form of capital punishment imposed on the offender. In Manawa dharmasastra it is stated as follows:

Article 349 states: *Atmanacca paritrane daksinanam. Ca samgarestri wiprabhyupapattau*  
*Ca ghnandharmena na du syati*

Meaning:

For the sake of self-defense, to obtain daksina for priests who have performed the ceremony and for the sake of protecting women and Brahmans, he does not sin, who kills in order to uphold the truth.

Article 350 states:

*Desert wā balawrddhau wa brāhmanan wā shoulder çrutam,*  
*ātatāyi namāyāntam hanyād ewāwicārayan*

Meaning:

Someone may kill a murderer without hesitation who with the purpose of killing is to get closer, whether he is a teacher, a child or an aged person or a Brahmin expert in the Vedas.

Article 351 states:

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<sup>130</sup>Pudja G.dan Sudharta Rai Tjokorda. *Terjemahan: Manawadharmasastra (Manu Dharmasastra) atau Weda Smrti Compidium Hukum Hindu*. 1973: p.509.

*Nātatāyi wade doso hantur bhawati kaccana,  
prakaçam waprakācam wa manvustam manyumrcchati.*

Meaning:

By killing a murderer, the murderer did not do anything wrong

He did it in public or not openly in that anger against anger.

Based on the description of the three articles mentioned above, stated in Manawadharmasastra, there are 2 (two) things that can be understood, namely; First, article 349 of Manawadharmasastra states that it is justified according to Hindu Law to kill in self-defense, to protect women and Brahmins (panditas); Second, article 350 states killing a murderer, in this case can be interpreted as a person who intentionally and or plan to do the act of killing directly (approaching), whether the victim is a child or an aged person or a Brahman expert in Veda, then his is death sentence. Then in article 351 of Manawadharmasastra's law book it is declared that executing a person who commits an act as regulated in chapters 349 and 350 of the Book of Manawadharmasastra is "innocent".

The descriptions of Hindu Law provisions mentioned above have provided us with an understanding that under Hindu law, the death sentence is not considered to be a sinner if the death law is a person who deliberately plots a murder against another person i.e. Killing Brahmins in the context of state law can be interpreted as killing of a cleric, or a saint, a religious leader, or killing innocent children. This description will also provide an overview for the people that the state punishing the perpetrators especially those related to crime as producers, dealers, and narcotics traffickers is not wrong and it is appropriate for such firm action to take place.

#### **D. Conclusion**

Based on the above discussion, the Hindu Legal View on the Death Sentence is as follows:

1. Hindu does not justify the death sentence committed against the person who only be the factor causing someone's indirect death, as stated in the Law of Hinduism (Manawadharmasastra), on chapter 349 which states that for the sake of self-defense, to obtain *daksina* for priests who have performed rituals and for the protection of women and Brahmins, he does not commit the sin of killing in order to uphold the truth; Article 350 states that one may kill a murderer, without hesitation, with the intent of killing

closely (directly), whether he is a teacher, a child or an aged person and or a Brahmin who is skilled in the Vedas; Chapter 351 states, by killing a murderer, the murderer does not do wrong, whether he is doing publicly or not openly, in that case anger against anger.

2. In connection with the Death Executions committed to the Drug Dealers, the act of drug traffickers which can kill the drug users indirectly, contrary to article 350, article 351 of ManawadharmasastraBook, because the intention in the article is direct murder (approaching).
3. Similarly in the Bhagavadgita Book, the dialogue between Arjuna and Krishna (The Awatara) which elaborates in depth that killing the enemy of the State in war (Kuruksetra War) is innocent, this is clearly described in the Bisma Parwa Chapter.

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## **The Implementation of Human Rights Instruments in Criminal Victims Protection**

Ino Susanti, Waty Suwarty H., and Petrus Irawan Panjaitan

### **Abstract**

The criminal act that causes a victim becomes problem as long as the human still live in this world until the end of their civilization. The main purpose of this study is to find how to implement human rights towards the protection of victim's right to get the restitution for the crimes that befall them. The importance of fulfilling the right of victims is to provide a balance between criminal law and human rights enforcement. The researcher used Socio-Legal Studies method to examine the development of criminal law towards reform or renewal in the policies in the Criminal Code and law enforcement contained in the Criminal Procedure Code, especially related to the victims' rights in obtaining justice through restitution. The Criminal Code and the Criminal Procedure Code explicitly did not regulate the protection of victims' rights, therefore to guarantee their fulfillment there must be a regulatory reform that clearly regulates the protection of victims' rights.

**Keywords:** Criminal Victims Protection, Arrangement in Human Rights Law, Arrangement in Indonesian Criminal Law.

## **A. Introduction**

The problem of crime which is a criminal act has become a problem that will never be resolved since the birth of man on the earth until the end of human civilization and in line with the development of society. Especially, with regard to the problem of criminal acts' victim, serious attention is started to be given with thought excavations assisted by the Victimology, primarily concerning about the criminal acts' victim through discussions in seminar forums organized by relevant institutions about how the position of the victim in a criminal act and the study of the crime victim's problem itself which is indeed relevant and useful to provide a rationale for understanding and tackling various problems of human behavior, which cause suffering related to continuing trauma which has an impact on various individual problems in society, nation and state .

Status of the victim needs to be studied because so far the aspect of victims has not been paid attention to, though, crime is almost inseparable from the existence of the victim and in each crime the victim has a certain position and role. The pluralistic condition of Indonesian society with different interests and the inequality of access to justice will always bring forth to marginalized groups. The Victims who are a minority group, either because of their numbers or because of the lack of access to obtain their rights as witnesses and or victims in the community structure becomes studies that need to be explored.

The condition mentioned above can be seen from the reaction of the people and the law enforcer toward the crime's victim of rape, where there are groups of people who tend to assume that the victim as the guilty one and contribute to the crime that befell him. So, victims tend to be ostracized rather than restored their condition and dignity. As a result, many victims are reluctant to participate in the criminal justice process because of the reaction of community and supported by law enforcement process conditions such as the difficulty of gathering evidence which is the main factor in the process of examining a criminal event.

The Criminal Procedure Code does not implicitly regulate the implementation of victims' protection for crime. In Chapter VI which regulates the Suspects and Defendants only determines the protection of the Suspect or Defendant to get protection from various possible human rights violations in the process of the judicial system. Then, in the provisions of chapter XII on the first part, it only regulates compensation for the suspect or his heirs because he was arrested, prosecuted and tried or subjected to other actions without reason based on law or due to errors regarding his person or the law applied, whereas, in the second

part, it only regulates the rehabilitation given to the suspect for arrest or detention of mistake that occur in criminal procedure and in subsequent chapters also not regulate the interests of victims of crime. Furthermore, in the last section which regulates interest relating to compensation, namely in Chapter XIII concerning the Merger of Cases for Compensation for Losses. However, it also does not explicitly regulate the interests of the victim, especially regarding the protection of their rights, but only in combination with the clause "loss to others", which in the explanation of the law is stated as including the loss of the victim.

In 2006, Law Number 13 of 2006 concerning Witness and Victim Protection (UUPSK) was born, but specifically did not regulate the legal guarantee of the suffering / loss of a person who has been a victim of a crime / criminal act that is identical to compensation / compensation for victims, except regulated in Article 7 paragraph (1) to paragraph (3) which reads:

- 1) Victims through LPSK have the right to submit to the court in the form of:
  - a. The right of compensation in cases of severe human rights violations;
  - b. The right of restitution or compensation which is the responsibility of the offender.
- 2) Decisions regarding compensation and restitution are given by the court.
- 3) Further provisions regarding the provision of compensation and restitution are regulated by Government Regulation.

Criminology is another science related to study crime. In a school (the flow) is a classical flow whose foundation is widely used as a reference for criminal law, namely, among others<sup>131</sup>: i). Individuals have basic rights including the right to life, freedom and wealth. ii). Everyone is considered equal before the law, therefore everyone should be treated equally. Iii). Crime is a violation of a social agreement, therefore crime is a social crime, iv). Punishment is only justified as long as the sentence is intended to maintain a social agreement.

Clearly the Law Number 13 of 2006 emphasizes more on the procedures for protecting Witnesses and Victims in terms of the implementation of criminal procedural law as a process of the judicial system. While the regulation on the right of victims to crime / criminal acts that befell them especially in the case of compensation is not immediately obtained, but must undergo a series of prosecution processes. Whereas it is fitting to be

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<sup>131</sup>Romli Atmasasmita, *Teori dan Kapita Selekta Kriminologi*, PT.Eresco, Bandung, 1992, p. 2.

guaranteed by the law firmly, weighing the issue has become an international agreement for countries that have recognized the world declaration of human rights, including Indonesia. In the end, this raises problems about how to protect criminal victims in criminal law in Indonesia and how to implement human rights instruments in protecting the rights of victims of crime.

## **B. Discussion**

### **1. Victim's Protection of Criminal Law in Indonesia**

Since it is realized that victims have a stake in crime, Criminology no longer sees crime victims as passive and innocent for the occurrence of crime, but victims can play an active role in the incidence of crime in the process of becoming a victim. Even wider victims are not only limited in their understanding of individuals or people, but can also be a group of people (collectives) and organizations. This is in accordance with the development of crime in the community, so that the assumption that has been held, that in a crime the victim is an innocent party at all then shifted because it turns out that the occurrence of a crime was caused by various complex aspects and related to social, cultural, politics, economics, society, members of society and related to emotional, rational, incidental and situational problems. On the other hand, it is also important to pay attention to the victim as a side who must be restored to his inner and outer state after experiencing another person's crime.

The Awareness about how important the position of victims brings balance to criminal law studies. Besides, that it directly brings more development of criminal law towards reform or renewal of views in the aspect of law enforcement policy, generally in terms of protection of human rights and specifically on aspects of protection of victims of crime in the criminal justice process. Renewal or reform here is interpreted as improving the better as stated by Barda Nawawi Arief<sup>132</sup>: "... because" to reform "contains the meaning" to make better ",... thus, the reform of the justice system or law enforcement system implies the renewal of the justice system towards better quality or briefly improving the quality of the justice system / law enforcement system ". In relation to this, the quality reform or renewal or improvement referred to is an increase in the form of adjustments, reassessments, reformulation and redevelopment of legislation or legal substance governing the rights of victims.

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<sup>132</sup>Barda Nawawi Arief, *Pendekatan Keilmuan dan Pendekatan Religius Dalam Rangka Optimalisasi Penegakan Hukum (Pidana) Di Indonesia*, Badan Penerbit Universitas Diponegoro, Semarang, 2010, p. 47-48.

Concern about these victims in the regulation of law enforcement in Indonesia is not taken seriously. Only at a glance is set forth in the regulation of criminal procedural law, especially concerning Compensation and Rehabilitation as regulated in Chapter XII Part One Replace Losses from Article 95 to Article 96 and in Chapter XII Part Two Rehabilitation in Article 97 paragraph (1), (2) and (3) Law Number 8 of 1981 concerning Criminal Procedure Law. However, in the regulation there is no specific stipulation regarding the victim in question, it is also for the person who experiences loss or suffering for the occurrence of a crime that befell him as a victim and the form of compensation which is his right.

Likewise with the birth of the UUPSK, it was not followed by the implementation of provisions' number specifically, related to the application of the articles mentioned above, especially those contained in compensation arrangements in the KUHAP which are guidelines for formal criminal law in Indonesia. As the main reference in Criminal law enforcement, it is fitting that renewal of the Criminal Procedure Code is also conducted, which among other things regulates more clearly the mechanism for fulfilling the rights of victims of crime more than just the arrangement as contained in Chapter XII Part One Change of Losses from Articles 95 to Article 96 and in Chapter XII Part Two Rehabilitation in Article 97 paragraphs (1), (2) and (3) above.

Scientific put an attention to Victimology, which is an integral part of crime studies in Criminology, is increasingly serious with the holding of an international Victimology symposium in Jerusalem on September 5-6, 1973<sup>133</sup>. The symposium discussed issues that included expanding insights on Criminology studies which fall under studies on crime victims, questioning the benefits of crime victim research separately from crime studies, the importance of victimization, namely the environment that determines the existence of crime victims or crime-prone environments, victims who must expanded to include victims of arbitrary authority, aspects of crime without victims, and so on.

The development and the use of Victimology in Indonesia should receive serious attention, the condition of victims who, if so far have received less attention, or not at all, the victims are often treated as a guilty should be renewed, in accordance with the results of the international victimology symposium which took the tenth time in the year of 2000 in Montreal. As for the issues that were agreed upon included: (1) terrorist issues and the concept of the Declaration of the Basic Principles of Justice for Victims of Crime and Abuse

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<sup>133</sup><https://ml.scribd.com/doc/102079534/VIKTIMOLOGI>.

of Power; the rights of the victims and the obligations of the perpetrators and the state against the victims, assistance to victims and secondary victimization, prevention of victimization, victim relations with the media, (2) empirical issues; ethical issues in victimology research, results of research on victim surveys (international and national), research's results on the attitude of violations' perpetrators toward their victims, (3) practical issues (the operation of the criminal justice system); position of victims in the criminal justice system, defense of victims of crime, service rights of victims of crime, protection of crime victims and witnesses, victims of crime and punishment of perpetrators, and aspects of restorative justice in the criminal justice system.

Then in subsequent developments after going through a long process, it came to the thought of the importance of making an arrangement about the victims, namely the establishment of the Law of the Republic of Indonesia Number: 13 of 2006 concerning Protection of Witnesses and Victims (UUPSK). Where clearly stated in Chapter I of the General Provisions in Article 1 point 2 that: "The victim is someone who suffered physical, mental, and / or economic loss caused by a criminal act".

However, the problem that must then become a concern is how to carry out the mandate given by the law. One of them is the provision in Article 7 paragraph (1) sub-section of the UUKK, which regulates: "The victim through the Witness and Victim Protection Agency has the right to submit to the court in the form of; the right to restitution or compensation which is the responsibility of the perpetrator of the crime ". But it is not in line with what is faced in practice that there is no mechanism that regulates the fulfillment of this right.

Then what must also be prepared is the legal culture of the Indonesian people in order to accept the thought of the need to pay attention to the interests of victims. This legal culture must be realized by changing the behavior of its law enforcement officers in implementing the Criminal Justice System (SPP). This is an equally important aspect, as said by Satjipto Rahardjo<sup>134</sup>: "In an effort to fix the law in Indonesia we need to pay close attention to the problem of nation behavior. Legal life does not only involve technical legal matters, such as legal education but concerns about education and fostering broader individual and social behavior ". Behavioral aspects also play an important role, a regulation cannot be implemented perfectly if it is not accompanied by good acceptance and then good

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<sup>134</sup>Satjipto Rahardjo, *Membedah Hukum Progresif*, Penerbit Buku Kompas, Jakarta, 2008, p. 5.

implementation of all parties involved in law enforcement. Changing the behavior of law in the context of paying attention to the interests of the victims becomes the main concern of parties involved in the criminal justice system.

Besides that, as a legal state that is obliged to prioritize human dignity as beings who have dignity and noble degrees, the state actually has an obligation to recognize, guarantee and protect its citizens in terms of certainty and equal treatment before the law as mandated in Article 28D paragraph (1), The 1945 Constitution which reads: "Everyone has the right to recognition, guarantees, protection and fair legal certainty and equal treatment before the law". In relation to the above, it is necessary to think about immediately changing the Criminal Procedure Code that is adjusted to the interests of victims in terms of obtaining their rights.

## **2. Implementation of Human Rights Instruments in the Victims' Protection**

Since the inception of the UUPSK, it should be emphasized that the protection of the victim's rights becomes a concern that is as important as the perpetrator and the crime itself. The law should explicitly implement the rights of victims as stated in the declaration of human rights. In this regard, several international human rights instruments become guidelines in its implementation, namely<sup>135</sup>;

1. The World Declaration on Human Rights (UDHR) received and announced by the United Nations General Assembly on December 10, 1948 through Resolution 217 A (III):

(a) In the Preamble, it is considered that the recognition of natural dignity and equal and irrevocable rights of all members of the human family is the basis of freedom, justice and peace in the world.

(b) In Article 7 of the World Declaration on Human Rights, it states that: "Every person is equal before the law and entitled to the same legal protection without discrimination. All are entitled to the same protection against any form of discrimination that is contrary to this Declaration, and to all incitements that lead to discrimination".

2. International Covenant on Civil and Political Rights established by General Assembly Resolution 2200 A (XXI) dated December 16, 1966, open for signature, Ratification and Accession:

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<sup>135</sup>UNHCR, Departemen Kehakiman dan HAM dan POLRI, *Instrumen Pokok Hak Asasi Manusia Internasional Bagi Aparatur Penegak Hukum*, Perpustakaan Nasional RI, Jakarta, 2002, p. 2.

(a) In the Preamble considering that in accordance with the principles proclaimed in the Charter of the United Nations, the recognition of the dignity and dignity and the equal and inseparable rights of all members of humanity is the foundation of freedom, justice and peace in the world, in addition, to recognize that these rights come from the dignity and inherent in every human being.

(b) In Article 17 paragraph (2) of the International Covenant on Civil and Political Rights it is said that: "Everyone has the right to legal protection against interference or attacks as mentioned above (Article 17 paragraph (1)).

3. Declaration of the Basic Principles of Justice for Victims and Power Misuses, which was ratified by General Assembly Resolutions 40/34 dated 29 November 1985, among others regulating:

(a). Criminal victims means people who have personally or collectively suffered losses, including physical or mental injury, emotional suffering, economic loss or considerable damage to their basic rights, through actions or deletions that are contrary to the criminal law applicable in countries members, including laws that prohibit abuse of power that can be subject to criminal penalties.

(b) A person can be considered a victim, based on this declaration, regardless of whether the perpetrator is identified, detained, submitted to court or punished and regardless of the familial relationship between the perpetrator and the victim. The term victim also includes, where appropriate, immediate relatives or dependents of direct victims of people who have suffered losses due to interference to help victims who are in a state of difficulty or prevent casualties.

(c) Opportunity to get justice and fair treatment: victims must be treated with love and respect for their dignity. Victims have the right to have the opportunity to use justice mechanisms and obtain compensation immediately, as determined by national legislation, for the losses suffered.

(d) The availability of court and administrative processes to address the needs of victims must be facilitated, one step by allowing the views and concerns of victims to be raised and considered at the appropriate stage of the work event where their personal interests are affected, without prejudice against the accused and in accordance with the national criminal court system concerned. The next step is to take action to reduce interference to the victim,



protect his personal freedom, if necessary, and ensure his safety, as well as the safety of his family and witnesses who testify in his interests, from intimidation and retaliation.

(e) Especially, regarding compensation / restitution as a form of protection of victims' rights regulated in clause: "Guilty people or third parties responsible for their behavior must, if appropriate, give a fair restitution to the victim, family or dependents. The restitution will include the return of property or payment for damage or loss suffered, replacement of costs incurred as a result of casualties, service provision and restoration of rights ". Then it is further regulated that: "The government must review the customs, regulations and laws to consider restitution as a choice of punishment available in a criminal case, in addition to other criminal sanctions.

4. Consideration in the preamble of the Universal Declaration of Human Rights which states that recognition of natural dignity and equal and irrevocable rights of all members of the human family is the basis of freedom, justice and peace in the world. Likewise in the Declaration of the Basic Principles of Justice for Victims of Crime and Power Misuses, which among other things state that the opportunity to obtain justice and fair treatment, the victim suppose to be treated wisely.

The thing mentioned above affirms that several principles have inspired international human rights<sup>136</sup>. Which principle is very fundamental from contemporaneous human rights (present) is the idea that puts all people born free and has equality in human rights which in the context of this study the protection of victims against their rights is compensated.

In line with that there has been a National Human Rights legal instrument that can be a guideline in its implementation, namely:

1. Amendments to the 1945 Constitution in several articles:

(a) Article 1 paragraph (3), which reads: "The State of Indonesia is a legal state".

(b) Article 28D paragraph (1), which reads: "Everyone has the right to recognition, guarantee, protection and fair legal certainty and equal treatment before the law".

(c) Article 28G Paragraph (1), which reads: "Everyone has the right to protection of his personal, family, honor, dignity and property under his control, as well as the right to security

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<sup>136</sup>Knut D Asplund, Marzuki Suparman, Eko Riyadi (ed), *Hak Asasi Manusia*, PUSHAM UII, Yogyakarta. 2008, p. 39.

and protection from threats from fear of doing or not doing something which is fundamental".

(d). Article 28I paragraph (2), which reads: "Everyone is free from discriminatory treatment on any basis and has the right to get protection from such discriminatory treatment". Furthermore, in Article 28I paragraph (4), it is stated that: "Protection, promotion, enforcement and fulfillment of human rights are the responsibility of the state, especially the government".

2. Law of the Republic of Indonesia Number 39 of 1999 concerning Human Rights:

(a) In the legal considerations of the law, it is stated that human rights are fundamental rights inherent in human beings, are universal and lasting, therefore they must be protected, respected, maintained and should not be ignored, reduced, or seized by anyone.

(b) In Article 3 paragraph (2) of this law, it is stated that: "Everyone has the right to recognition, guarantee, protection and fair legal recognition and obtains legal certainty and equal treatment before the law".

(c) In Article 5 paragraph (1) of the above law, it is stated that: "Every person is recognized as a personal human being who has the right to claim and obtain the same treatment and protection in accordance with his human dignity before the law".

3. In Article 34 paragraph (1), Chapter V concerning Victim Protection and Witness of the Law of the Republic of Indonesia Number 26 of 2000 concerning the Human Rights Court, which reads: "Every victim and witness in severe human rights violations has the right to protection physically and mentally from threats, interference, terror and violence from any party".

4. Law of the Republic of Indonesia Number 13 of 2006 concerning Protection of Witnesses and Victims, which among others regulates:

(a) In its legal considerations it is said that law enforcers in seeking and finding clarity about criminal acts committed by perpetrators of crime often experience difficulties because they cannot present Witnesses and / or Victims due to threats, both physical and psychological from certain parties".

(b) Whereas in connection with this matter, it is necessary to protect Witnesses and / or Victims who are very important in their existence in the criminal justice process.

(c) In Article 1 paragraph (2) of the law, it is stated that: "The victim is someone who has physical, mental and / or loss resulting from a criminal offense".

(d) Furthermore, in Article 1 paragraph (3), it is stated that: "The Witness and Victim Protection Agency, hereinafter referred to as LPSK, is an institution that has the duty and authority to provide protection and other rights to Witnesses and / or Victims as stipulated in the law this".

(e) Article 2, reads: "This law provides protection for Witnesses and Victims in all stages of the criminal justice process in the judicial environment".

(f) Republic of Indonesia Government Regulation Number 44 of 2008 concerning Provision of Compensation, Restitution and Assistance to Witnesses and Victims.

(g) Presidential Regulation Number 082 of 2008 concerning a place for Witness and Victim Protection Institutions.

(h) Regulation of the Witness and Victim Protection Agency Number 4 of 2012 concerning the Implementation of the Government's Internal Control System in the Witness and Victim Protection Agency Environment.

In addition, in terms of regulation in the Criminal Code, Barda said that: First of all it should be noted, that the notion of victim protection can be seen from 2 (two) meanings, namely: First, can be interpreted as protection the law is not to be a victim of a criminal act (meaning protection of human rights or legal interests of a person), Secondly, it can be interpreted as protection to obtain legal guarantees for the suffering / loss of a person who has been a victim of a criminal offense (so identical with the victim's sacrifice). The form of compensation can be in the form of good name recovery (rehabilitation), recovery of inner balance (including forgiveness), compensation (restitution, compensation, social welfare benefits / benefits) and so on.

Especially in the matter of providing compensation to victims, basically it is an integral part of human rights in the field of social security, as seen for example in the article 25 of the Universal Declaration of Human Rights. Furthermore it is said<sup>137</sup>, that protection is interpreted as compensation for the credit:

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<sup>137</sup>Barda Nawawi Arief, *Masalah Penegakan Hukum dan Kebijakan Penanggulangan Kejahatan*. Citra Aditya Bakti, Bandung, 2001, p. 56-59.

- a. The current Criminal Code does not or does not pay attention to victims. There is no criminal compensation in the Criminal Code, either as a principal or additional criminal. The possibility of the damage is only in Article 14 c of the Criminal Code, which is one of the conditions in conditional crimes. So compensation is not a form of crime, but it is only a condition for the convicted person not to undergo a principal sentence. In other words, the basic idea behind the thought of compensation is still oriented to the offender, not oriented to the victim.
- b. Against the background of a basic idea that is victim-oriented, the concept of giving a separate place / status to criminal compensation is one of the additional types of crimes which an effort to improve the criminal status of compensation as a general policy of punishment for all offenses.
- c. Compensation in the Criminal Code is only a requirement for a person not to undergo a crime (ie as a conditional criminal).
- d. In the Criminal Procedure Code there is a possibility of compensation in the process of merging cases, but the compensation here is civil, not as a criminal sanction.

In practice, the implementation of the UUPSK is only limited to the process of conducting hearings related to the presence of victims, that is, if there is a request from the Prosecutor to protect the victim, the chairman of the assembly who checks the case instructs the Prosecutor as the executor to protect with the help of police officers .As for protection in the form of collateral damages, or other rights for victims has not become the authority of judges or other law enforcement agencies to carry it out, because such matters are still an effort that must be taken by the victim by filing a claim for compensation in accordance with the provisions of the Criminal Procedure Code.

This is due to the fact that when seen from the history of the birth of the UUPSK itself, it originated from the desire (groups / elements) of the community who were first aware of the need to form this regulation. Unlike most other countries that have become members of the United Nations, Indonesia is a country that is reluctant to initiate the creation of instruments for witness and victim protection. Whereas it should be the obligation of the state through requests from the legal apparatus, namely<sup>138</sup>: the police, prosecutors or courts who always interact with witnesses and victims to leaders to realize the ratification received on the recognition of human rights relating to the protection of witnesses and victims as

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<sup>138</sup>[Id.m.wikipedia.org/wiki/Lembaga\\_Perlindungan\\_Saksi\\_dan\\_Korban](https://id.m.wikipedia.org/wiki/Lembaga_Perlindungan_Saksi_dan_Korban).

stipulated in the International Covenant Civil and Political Rights established by General Assembly Resolution 2200 A (XXI) dated December 16, 1966, and so on.

### **C. Conclusions**

From the above, it can be concluded that the implementation of Victim Protection has not accommodated matters that have been regulated in the Human Rights instrument to ensure maximum protection of victims' rights. This is because in the stage of criminal regulation in the Criminal Code and the implementation / implementation in the Criminal Procedure Code has not been equipped with an arrangement that requires protection of the victims' rights in question. From these conditions, it can be said that the future protection of crime victims still requires more explicit regulation, especially regarding provisions for compensation / restitution for victims and how victims can obtain the guarantee of rights that are fully supported by law enforcement facilities and infrastructure in Indonesia. For this reason the Criminal Code and Criminal Procedure Code need to be updated.

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## **Restructuring the Corruption Law Enforcement Model that Optimizes Corporation as Corruption Subject of Criminal Act**

Sunarto D.M. and Heni Siswanto

### **Abstract**

Existing conditions of the application of the corruption law enforcement model are that police officers apply a repressive model that puts forward the use of criminal or criminal aspects. However, police policies and police officers have not put in place and enforced corporations proportionally as perpetrators of corruption effectively because corporate characteristics are treated differently from the legal subjects of individuals; the difficulty of proving the element of error and the absence of criminal procedural law provisions governing the corporation as a criminal act of corruption; limited choice or form of criminal sanctions; and has not been enacted by the Supreme Court Regulation 13 of 2016 concerning the Procedures for Handling Criminal Cases by the Corporation, as a whole. Therefore, it is necessary to establish a police policy that motivates and encourages a work culture that strengthens or optimizes corporations as the subject of corruption, especially in dealing with corruption crimes that occur in Lampung. Corporate optimization as the subject of perpetrators of corruption in Lampung requires a renewal movement and work culture of the police to utilize and optimize the “scientific approach”. Enforcement of corruption law is time to apply scientific approach (scientific culture or approach). The scientific approach needs to be implemented integrally which includes: (1) the juridical-scientific-religious approach; (2) juridical-contextual approach; and (3) the juridical approach is global or comparative. The restructuring of the model of corruption law enforcement that optimizes corporations as the subject of corrupt crimes needs to be done integrally by implementing criminal policies related to the application of penal and non-formal means simultaneously and simultaneously. Restructuring efforts can be carried out including renewing the “substance” of law enforcement corruption including renewal of law enforcement in “abstracto” and “in concreto”; renewal of the “structure” of corruption law enforcement includes, among others, renewal or arrangement of institutions or institutions, management systems or procedures and mechanisms and supporting facilities or infrastructure; and the renewal of the “work culture” of corruption law enforcement includes, among others, the issue of legal awareness, legal behavior, legal education and criminal law, especially in relation to corruption law enforcement that makes corporations effective as perpetrators of corruption.

Keywords: Restructuring, model law enforcement corruption, corporate results, the subject of a criminal act.

## **A. Introduction**

The Government of the Republic of Indonesia on August 16, 1999 has enacted the Law of the Republic of Indonesia Number 31 of 1999 concerning the Eradication of Corruption Crimes. This law was enacted in accordance with the Law of the Republic of Indonesia Number 20 of 2001 concerning Amendments to Law Number 31 of 1999 concerning the Eradication of Corruption Crimes.

The enactment of the provisions of the Law on the Eradication of Criminal Acts of Corruption is based on the consideration<sup>139</sup> that criminal acts of corruption are very detrimental to the state's finances or the country's economy and hamper national development, so it must be eradicated in order to create a just and prosperous society based on Pancasila and the 1945 Constitution. Corruption crimes that have occurred so far in addition to harming state finances or the country's economy, also hamper the growth and continuity of national development which demands high efficiency.

As a formulation/legislation policy, in the early part of the regulation the provisions of the Corruption Eradication Act are regulated in Chapter I of the General Provisions Article 1 to 1 are stated expressly and clearly in relation to corporate regulation as the subject of corruption. In this case, the corporation is interpreted as a group of people and or organized wealth, both legal entities and non-legal entities. After mentioning the corporation, then the subject of other corruption crimes is mentioned, namely public servants and every person that includes individuals or corporations.

Criminal law enforcement by empowering/streamlining corporations as the subject of criminal acts of corruption can be seen as a conflict/discrimination in the application/application of corporate law. Criminal law enforcement at the formulation stage, the corporation is placed as the beginning of the formulation of the subject of criminal acts in Article 1 of Article 1 of the Corruption Eradication Act, but at the application stage and execution stage, the corporation is almost never empowered.

The subject of corporate corruption is very rarely enforced. Criminal law enforcement agencies tend to operationalize the subject of corruption in the form of civil servants or individuals. In fact, there are quite a lot of corruption cases involving corporations as subject of perpetrators. In fact, the impact made by corporations has caused

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<sup>139</sup>Considering a and b of the Republic of Indonesia Law Number 31 of 1999 concerning Eradication of Corruption Crimes.



the state's finances and the country's economy to be far more dangerous, more detrimental and more reprehensible than those who commit corruption in civil servants and individuals.

Criminal accountability and punishment for corporate subjects who commit corruption are very possible. Corruption acts or acts committed by corporations may be very detrimental to the state's finances and the country's economy, because the strength and power of the corporation related to its non-legal aspects include politics, economics, social and culture.

Corporative acts of corporations may be more detrimental to the financial and economic state of the country, but there are obstacles to the application of criminal sanctions against corporations as perpetrators of corruption, namely the formulation/formulation of criminal penalties is mild only in the form of fine penalties that are not optimal; additional criminal form of closure (temporary) of all or part of the company for a maximum period of 1 (one) year; in addition, the Criminal Procedure Code has not regulated the provisions of corporate criminal procedural law. The incomplete formulation and application policy makes corruption law enforcement officers less eager to threaten criminality against corporations. As a result, the corporation has the potential to act, repeat and not provide a deterrent effect to commit criminal acts of corruption.

Corporate placement as the subject of corruption in the enforcement of criminal law becomes very effective and becomes a deterrent to the subject of perpetrators of corruption. In addition, theoretical studies (doctrine) are very supportive to account for and convict corporations as the subject of criminal acts of corruption, according to view Ibrahim F.I. Shihata<sup>140</sup> that efforts to tackle corruption (“effort to combat corruption”) must be pursued through “economic reform”, “legal and judicial reform”, “administrative (civil service) reform”, “other institutional reforms”, “moral reform”, and “international measures”. Particularly related to the aspects of “legal and judicial reform”, the criminal law enforcement of criminal acts of corruption is also oriented to account for crimes and prosecution of the subject of corporate corruption.

Based on the explanation above, this research will be directed towards the theme “Restructuring the Model of Law Enforcement Corruption that Optimizes Corporations as Subjects of Corruption Crime”. Through this research can be rearranged the model of

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<sup>140</sup>Barda Nawawi Arief, “Some Criminal Law Enforcement Issues in Corruption Eradication”, a paper at the Law Seminar on Corruption Crimes, organized by Cirebon Lawyers Club (CLC), at Zamrud Hotel, Cirebon, 30 July 2005, p. 4.

criminal law enforcement in order to be able to provide the basis for the implementation of criminal law enforcement of criminal acts of corruption by optimizing the corporation effectively, integrally and quality.

## **B. Problems and Scope of Research**

### **1. Research Issues**

According to the explanation stated above, it is deemed necessary to formulate research problems in the form of several research questions (questions research) as follows:

- a. How is the existing condition of corruption law enforcement models related to the implementation of corporations as the subject of criminal acts of corruption?
- b. How to optimize the corporation as a subject of criminal acts of corruption in the face of corruption crimes in Lampung?
- c. How to restructure the corruption law enforcement model that optimizes corporations as the subject of corruption based on an integral approach in dealing with corruption crimes in Lampung in the future?

## **C. Methodology**

The problem approach in legal research is determined and limited from doctrinal legal research and socio-legal studies,<sup>141</sup> namely reviewing law as a social phenomenon related to criminal law enforcement.

Legal materials used in this study are primary legal materials and secondary legal materials. Field data in the form of interviews is used as a support to complete the analysis of legal material, sourced from the authorized agency in the field of corruption crime law enforcement in the legal area of the Lampung Regional Police. Field data was obtained from the Lampung Regional Police, Bandar Lampung District Police, North Lampung Regional Police, Central Lampung District Police, South Lampung District Police, and East Lampung District Police.

## **D. Research Results and Discussion**

### **1. Existing Conditions of Corruption Enforcement Models Regarding the Enforcement of Corporations as Subjects of Corruption**

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<sup>141</sup>Hutchinson, Terry, *Researching and Writing in Law*, Sydney: Lawbook's Co. 2002.

Existing conditions of the model of corruption law enforcement related to the application of corporations as the subject of corruption are corporations almost never used as the subject of corruption. Police investigators argue that there are differences in handling/prosecution with other cases, namely corporations are seen as legal subjects that are not the same as personal human law subjects. For this reason, handling is different, considering that corporations cannot be subject to criminal sanctions in the form of confinement, the treatment of law enforcement is different. This condition is regulated in Law Number 40 of 2007 concerning Limited Liability Companies and Law Number 5 of 1999 concerning Unfair Business Competition.

Corruption enforcement by making corporations the subject of corruption is understood by investigators will experience many difficulties in handling/ prosecuting the case. When investigators determine the corporation as a suspect, investigators can imagine that it will be difficult to prove the element of error. Investigators will find it very difficult to measure corporate errors because the corporation is controlled by the Management/Director. Considering that without the Directors, the corporation will not run. Therefore, investigators feel more effective in prosecuting and convicting individual perpetrators compared to corporations.

While at present the situation makes the corporation as the subject of corruption is considered important and urgent to be carried out in the enforcement of effective corruption criminal law. In the view of investigators, everything that smells of criminal acts is urgent and must be dealt with, so there is no gap for crimes let alone corruption crimes that are detrimental to the country's financial and economy. The police see that making the corporation the subject of corruption, the eradication of corruption is considered more effective. Actually, the effective issue is still debated, given the human resource of law enforcement is still limited in its ability to implement law enforcement against corporations. On the other hand, criminal procedural law regulating corporate handling and prosecution does not yet exist, so it is currently deemed ineffective.

Corporations are used as the subject of criminal acts of corruption. Criminal numbers are still nil or very little compared to individual subjects because they are more effective in sanctioning perpetrators, given that criminal sanctions are far more effective applied to people because there is criminal appropriation (imprisonment), while corporations can only be subject to administrative sanctions. Seeing the unequal condition, it is deemed necessary

to issue a Police Leadership policy that encourages and makes the corporation the subject of corruption.

Actually the problem of making a corporation as a legal subject of corruption can be ended with the issuance of Supreme Court Regulation 13 of 2016 concerning the Procedures for Handling Criminal Cases by Corporations. This regulation encourages and enforces corporations as the subject of criminal acts of corruption. Below is a regulation and procedure for corruption law enforcement or procedures for handling corruption cases that puts the corporation as the subject of corruption:

The above PERMA makes the following considerations:

- a. The corporation as an entity and legal subject whose existence contributes greatly to improving economic growth and national development, but in reality corporations sometimes also carry out various corporate crimes which have a detrimental effect on the state and society;
- b. The reality is that corporations can be a place to hide assets resulting from criminal acts that are not touched by the legal process in criminal liability;
- c. Many laws in Indonesia place corporations as the subject of crimes that can be held accountable, but cases with corporate law subjects submitted in criminal proceedings are still very limited, one of the causes is that procedures and procedures for examining corporations as perpetrators are still unclear, therefore it is deemed necessary to have guidelines for law enforcement officials in handling criminal cases committed by corporations;
- d. Based on the considerations as referred to in letter a to letter c, it is necessary to stipulate a Supreme Court Regulation concerning Procedures for Handling Criminal Cases by Corporations;

Based on the exposure that has been stated above, it shows that the existing conditions of the application of the corruption law enforcement model are the police apparatus, particularly the Criminal Investigation Department (corruption crime) applying a repressive model. The model that promotes the use of the aspect of reasoning that is narrating/destroying/suppressing/suppressing strongly and repressively is regulated in the material criminal law. Criminal law that regulates it in relation to the elements of criminal acts, errors/criminal and criminal liability and criminal prosecution.

However, police policies and police officers have not put in place and enforced corporations proportionally as perpetrators of corruption effectively. Police officers reason that corporations have different characteristics from the legal subjects of individuals, the difficulty of proving elements of error and the absence of provisions for criminal procedural law that regulate the provisions of accountability for corporations as perpetrators of corruption. Another reason is that the nature of the corporation that is different from humans makes limited choices/ forms of criminal sanctions.

In 2016 the Supreme Court Regulation 13 Year 2016 concerning the Procedure for Handling Corporate Criminal Cases was enforced, the police apparatus has not been enthusiastic and concerned about the existence of these provisions. Enact effective provisions. Impressed, there is a tendency to continue the habits formed so far, for reasons previously stated. Therefore, in the criminal law system, especially in relation to the culture of work law, there needs to be strong motivation and encouragement through police policies to effectively place and enforce corporations as perpetrators of corruption. The condition of the working culture towards the corruption law needs to be strengthened/optimized as a subject of criminal acts of corruption, especially in the face of corruption crimes in Lampung.

## **2. Corporate Optimization as the Subject of Actors of Corruption in Facing Corruption Crime from Lampung**

Optimization or strengthening of corporations as the subject of perpetrators of corruption in dealing with corruption crimes in Lampung implies the need for law enforcement officers, especially the police apparatus to utilize and improve/ optimize the “scientific approach”<sup>142</sup> in corruption enforcement efforts. Optimization<sup>143</sup> in this context can contain multiple meanings or phenomena. On the one hand, so far law enforcement has applied scientific approaches, but conditions still need to be improved; on the other hand

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<sup>142</sup>Scientific approach (law) can be interpreted as a method/method of approaching or understanding something (object/phenomenon) based on the logic of thinking/construction of thinking, certain concepts/frameworks/rationale (insight/outlook/orientation). Because the point of view/construction/orientation thinking about the law can vary, it is natural that there is often the mention of various kinds of scientific approaches. Among others, the term juridical/normative/ dogmatic (legalistic) approach, empirical/sociological (functional) approach, historical approach, comparative approach, philosophical approach (critical), policy approach (policy oriented approach), value approach (value oriented approach), a national-oriented approach, a global approach, a partial approach and a systemic/integral approach.

<sup>143</sup>Barda Nawawi Arief, *Optimalisasi Kinerja Aparat Hukum dalam Penegakan Hukum Indonesia Melalui Pemanfaatan Pendekatan Keilmuan (Optimizing the Performance of Law Officers in Indonesian Law Enforcement Through the Utilization of the Scientific Approach)*, the paper is presented in the National Seminar on the Indonesian Prosecutor's Performance Improvement Strategy (*Strategi Peningkatan Kinerja Kejaksaan RI*), in the Building of the UNDIP Postgraduate Program, 29 November 2008, p. 3.

implies that there is a tendency of the phenomenon that in law enforcement so far shows that the culture/orientation/scientific approach (scientific culture/approach) has been weakened/diminished/neglected/displaced because it optimizes the "other approach/orientation" or "approach Partial".

According to Barda Nawawi Arief,<sup>144</sup> if the quality of criminal law enforcement is to be improved and regain high trust and appreciation from the community, one of the fundamental efforts is to improve scientific quality in the process of making and enforcing it to be said to be very basic, because (1) scientific quality, not only intended solely to improve the quality of education and the development of legal science itself, but also to improve the quality of values and products from the law enforcement process (in abstracto and in concreto). (2) the law is made with knowledge, then its use (application/enforcement) must also be with knowledge, namely legal science; not with the science of bribery or science and other means.

Scientific approach (criminal law) that needs to be optimized/developed in criminal law enforcement in Indonesia through three integrally scientific approaches,<sup>145</sup> namely: (1) juridical-scientific-religious approach; (2) juridical-contextual approach; and (3) a juridical approach with a global/comparative perspective, especially from the traditional family law and religious law system) to the third aspect of the basic values/ideas of the field of criminal law substance (material criminal law, formal criminal law, and criminal law).

### **3. Restructuring the Corruption Enforcement Model that Optimizes Corporations as Subjects of Corruption Crime Based on Integral Approaches to Facing Corruption in Lampung in the Future**

Restructuring or rearranging the model of corruption law enforcement that optimizes corporations as the subject of corruption is carried out according to an integral approach that implements criminal policies related to the use of penal and non-formal means/efforts simultaneously and at the same time in the face of corruption in Lampung in the future. Integrity and commitment to build such a model of corruption law enforcement is considered important and urgent to create an effective legal work culture that is oriented and realizes truth, justice and legal certainty in combating corruption.

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<sup>144</sup>Barda Nawawi Arief, *Optimalisasi Kinerja...*, *Ibid.*, p. 4.

<sup>145</sup>Barda Nawawi Arief, Barda Nawawi Arief, *Pembangunan Sistem Hukum Nasional (Indonesia) (Development of the National Legal System (Indonesia))*, Pustaka Magister, Semarang, 2012, p. 11.

Barda Nawawi Arief<sup>146</sup> explained that the term restructuring meant “realignment”. In relation to rearranging the building of the Indonesian criminal law system, the term restructuring is very close to “rebuilding” the enforcement of criminal law. So the two terms are very closely related to the law reform and law development problems, especially related to “reform/development of criminal law enforcement” (reason enforcement reform/development or often referred to briefly as the term reform reform).

Criminal law reform (law reform) certainly with the way of legal reform/development/restructuring through integral criminal law enforcement policy. This restructuring of the policy of enforcing integral criminal law must be carried out in a criminal political scheme.<sup>147</sup> The criminal political scheme is integrated with the whole social policy and (national) development planning as an effort to protect the community (social defense) and efforts to achieve social welfare, namely the protection of the community to achieve community welfare by relying on integral criminal policies by using two means/at the same time, namely the non-formal efforts of reasoning and effort.

Criminal policies are not only implemented in law enforcement by using repressive penal/criminal cases, but also need to touch the root of the problem of crime, namely the conditions and causes of the emergence of corporations are not subject to criminal acts of corruption, including the existence of dirty games, bribery, or other disgraceful acts among perpetrators of corruption with corrupt law enforcement officers, which results in legal products being failed and not qualified.

Renewal of criminal law enforcement or the term “restructuring of criminal law enforcement” against corporations as perpetrators of corruption is essentially an effort to reform/restructure the entire criminal corruption system.

Criminal law enforcement is seen from the perspective of the legal system which consists of legal substance, legal structure and legal culture, so that criminal law enforcement reform (penal enforcement reform) can cover a very broad scope, which includes:<sup>148</sup>

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<sup>146</sup>Barda Nawawi Arief, *RUU KUHP Baru Sebuah Restrukturisasi/Rekonstruksi Sistem Hukum Pidana Indonesia (New Criminal Code Bill A Restructuring/Reconstruction of the Indonesian Criminal Law System)*, Badan Penerbit Universitas Diponegoro(Diponegoro University Publishing), Semarang, 2009, p. 1.

<sup>147</sup>Is. Heru Permana believes that criminal policy is a rational and organized effort from a society to overcome crime, in Is. Heru Permana *Criminal Politics*, Atma Jaya University, Yogyakarta, 2007, p. 9.

<sup>148</sup>Barda Nawawi Arief, *Criminal Law Reform in a Comparative Study Perspective*, Citra Aditya Bakti, Bandung, 2005, p. 11.

- a. Renewal of “substance” criminal law enforcement includes renewal of criminal law enforcement in “abstracto” and “in concreto”.
- b. Renewal of the “structure” of criminal law enforcement includes, among others, renewal or arrangement of institutions/institutions, management systems/procedures and mechanisms and supporting facilities/infrastructure of criminal law enforcement against corporations as perpetrators of corruption; and
- c. Renewal of “culture of criminal law enforcement” includes, among others, issues of legal awareness, legal behavior, legal education and criminal law, especially with regard to criminal law enforcement against corporations as perpetrators of corruption.



## **E. Conclusions**

Existing conditions of the application of the model of corruption law enforcement are carried out by the police apparatus, especially the Criminal Investigation Division (criminal acts of corruption) by applying a repressive model. A model that emphasizes the use of penal/criminal aspects. Criminal aspects which are narrative/destroying/suppressing/suppressing strongly and repressively are regulated in material criminal law. Criminal law that regulates it in relation to the elements of criminal acts, errors/criminal and criminal liability and criminal prosecution.

However, police policies and police officers have not put in place and enforced corporations proportionally as perpetrators of corruption effectively. Police officers reason that corporations have different characteristics from the legal subjects of individuals, the difficulty of proving elements of error and the absence of provisions for criminal procedural law that regulate the provisions of accountability for corporations as perpetrators of corruption. Another reason is that the nature of the corporation that is different from humans makes limited choices/forms of criminal sanctions.

In 2016 the Supreme Court Regulation 13 Year 2016 concerning the Procedure for Handling Criminal Cases by Corporations was enforced, the police apparatus has not been enthusiastic and concerned about the existence of the provisions of the regulations. Enact effective provisions. Impressed, there is a tendency to continue the habits formed so far, for reasons previously stated. Therefore, in the criminal law system, especially in relation to the culture of work law, there needs to be strong motivation and encouragement through police policies to effectively place and enforce corporations as perpetrators of corruption. The condition of the working culture towards the corruption law needs to be strengthened/optimized as a subject of criminal acts of corruption, especially in the face of corruption crimes in Lampung.

Optimization or strengthening of corporations as the subject of perpetrators of corruption in the face of corruption crimes in Lampung the need for police officers to utilize and improve/optimize the “scientific approach” in corruption enforcement efforts.

Enforcement of corruption criminal law is time to apply the cultural/scientific/scientific approach. Criminal law enforcement really needs to be improved in quality to regain high trust and appreciation from the community, so one of the fundamental efforts is to improve scientific quality in the process of making and enforcing it to be said to be very

basic, because (1) scientific quality to improve the quality of values and products from law enforcement processes (in abstracto and in concreto). (2) the law is made with knowledge, then its use (application/enforcement) must also be with knowledge, namely law. Scientific approach (criminal law) that needs to be optimized/developed in criminal law enforcement in Indonesia through three integrally scientific approaches.

Restructuring or rearranging the model of corruption law enforcement that optimizes corporations as the subject of corruption is carried out according to an integral approach that implements criminal policies related to the use of penal and non-formal means/efforts simultaneously and at the same time in the face of corruption in Lampung in the future. Integrity and commitment to build such a model of corruption law enforcement is considered important and urgent to create an effective legal work culture that is oriented and realizes truth, justice and legal certainty in combating corruption.

Efforts to restructure the model of corruption criminal law enforcement can be seen from the point of view of the legal system consisting of legal substance, legal structure and legal culture, so that criminal law enforcement reform (penal enforcement reform) can cover a very broad scope, which includes renewal “Substance” of criminal law enforcement includes renewal of criminal law enforcement in “abstracto” and “in concreto”; renewal of “structure” of criminal law enforcement includes, among others, renewal or arrangement of institutions/institutions, management systems/procedures and mechanisms and supporting facilities/infrastructure of criminal law enforcement against corporations as perpetrators of corruption; and renewal “culture” of criminal law enforcement includes, among others, issues of legal awareness, legal behavior, legal education and criminal law, especially with regard to criminal law enforcement against corporations as perpetrators of corruption.

Police policies and police officers need to place and enforce corporations proportionally as perpetrators of corruption effectively. Police officers need to immediately implement the Supreme Court Regulation 13 of 2016 concerning Procedures for Handling Corporate Criminal Cases. The legal work culture of the police apparatus needs to be motivated and strongly encouraged through police policy to effectively enforce corporations as perpetrators of corruption. The condition of the working culture towards the corruption law needs to be strengthened/optimized as a subject of criminal acts of corruption, especially in the face of corruption crimes in Lampung.

To optimize or strengthen corporations as the subject of perpetrators of corruption in dealing with corruption crimes in Lampung, the police need to utilize and improve/optimize the “scientific approach” in corruption enforcement efforts.

To restructure the corruption law enforcement model that optimizes corporations as the subject of corruption, it needs to be carried out according to an integral approach that implements criminal policies related to the use of penal and non-formal means/efforts simultaneously and simultaneously. Integrity and commitment to build such a model of corruption law enforcement is considered important and urgent to create an effective legal work culture that is oriented and realizes truth, justice and legal certainty in combating corruption.

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## **Considering Affected People Rights as a Human Rights in the Land Acquisition for Public Interests**

Ade Arif Firmansyah, HS. Tisnanta, and Malicia Evendia

### **Abstract**

Public land acquisition within the relational intersection between the interests of affected people, government, private sectors and communities will be subject to various problems ranging from conflict of indemnity to integration with spatial planning, development and environmental factors. Weak position of affected people often leads to loss in the form of guarantee of sustainable livelihoods after the land acquisition is completed. The existing legal instruments, both the 1945 Constitution and the Law No. 39 of 1999 on Human Rights, do not explicitly recognize the rights of affected people in the land acquisition for public purposes as a human right, so the authors deem it necessary to construct theoretical recognition of the affected people rights explicitly as a part of human rights. This paper used a critical paradigm optics that aimed to build up theoretical arguments to consider the rights of affected people explicitly in the land acquisition for the public interest as part of human rights, so that the position of the affected people will be stronger. Using doctrinal methods in constructing the theoretical arguments to be offered, this paper borrowed several theories as an analytical tool from Philipus M. Hadjon, Satjipto Rahardjo and the concept of hukum pengayoman from Sahardjo.

**Keywords:** affected people, human rights, land acquisition.

## A. Introduction

Development carried out by the state is basically done for the benefit of the nation with the greatest benefit to the welfare of the people. Development has a variety of forms and types, one of which is the construction to meet the public good or the public interest, in the context of the construction is done by building a specific infrastructure that is intended for public use by using a public land acquisition method.<sup>149</sup> Although public land acquisition is currently designed to support economic growth and the nation's competitiveness which become an important issue that is a priority policy of the governments of countries in the world.<sup>150</sup> In the implementation there is a conflict of interest and conflict between the direct affected people, the community and the government and the local government, even it gives the negative impact to indirect affected people due to many factors.<sup>151</sup>

For the example, one of problem that arises because a process of public land acquisition around the airport is the noise level of airport activity has caused various problems, ranging from decreased hearing levels to rising blood pressure of residents in the area around the airport.<sup>152</sup> Data from BPN as of September 2013, the number of land cases reached 4.223 cases. The number of cases is due to land acquisition under the pretext of public interest; sometimes wounding people, because of the use of land taken by the government is not as originally planned, and even tend to give birth to the former holders of the rights of society's woes.<sup>153</sup>

Until now, the mechanism of land acquisition for public purposes basically can be done in two ways as follows:

1. First, by land right discharge. The land right discharge stipulated in Law No. 2 of 2012 on Land Acquisition to Development for Public Interest refers to the implementation of

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<sup>149</sup> Drafting Team, (2010), *Academic Draft Act Number 2 Year 2012 on Land Acquisition to Development for Public Interest*, DPR-RI, Jakarta, P 1.

<sup>150</sup> Ade Arif Firmansyah and HS. Tisnanta, (2015), *Land Acquisition In Accelerating And Expansion Of Indonesia's Economic Development Program: A Review Of Law, Moral And Politic Relations*, South East Asia Journal of Contemporary Business, Economics and Law, Vol. 7, Issue 4 August, ISSN 2289-1560, p.18.

<sup>151</sup> Ade Arif Firmansyah, Yos Johan Utama and HS Tisnanta, (2017), *The Composition Of Land Saving Model Regulation: Eforts To Reduce Conflict In Land Acquisition For Public Interests*, International Journal of Business, Economics and Law, Vol. 13, Issue 4 (August), p. 101.

<sup>152</sup> Ade Arif Firmansyah, HS. Tisnanta, FX. Sumarja and Fathoni, (2016), *Law Design Of Institutions Coordination As An Efforts To Harmonize, Policy Housing Development Around The Airport In Indonesia*, South East Asia Journal of Contemporary Business, Economics and Law, Vol. 11, Issue 4 December, ISSN 2289-1560, p.52-53.

<sup>153</sup> Ade Arif Firmansyah, (2014), *Legal Protection Pattern Of Indonesia's Land Acquisition Regulation: Towards The Thickest Version Rule Of Law*, International Journal of Business, Economics and Law, Vol. 5, Issue 4 (Dec.), p. 142.

Presidential Decree No. 71 Year 2012 of Implementation of Land Acquisition of Development for Public Interest.

2. Second, by applying the land rights revocation to the president. Land right revocation provisions stipulated in Law No. 20 Year 1961 on Revocation of Land and Property objects that are therein, the Government Regulation No. 39 Year 1973 on Determination of Compensation Events By High Court Relating to Land Right Revocation and Assets objects on it, and the Presidential Instruction No. 9 of 1973 on Guidelines for Land Right Revocation and Assets objects on it.

The problems that arise include one of the reasons because it is still legalized the way to revoke land rights that stipulated in Law No. 20 Year 1961 and the lack of recognition of the rights of the owner or community in terms of land acquisition activities for the public interest as human rights. Weak position of affected people often leads to losses in the form of guarantee of sustainable livelihoods after the land acquisition is completed. The existing legal instruments, both the 1945 Constitution and the Law No. 39 of 1999 on Human Rights, do not explicitly recognize the rights of affected people in the land acquisition for public purposes as a human right, so the authors deem it necessary to construct theoretical recognition of the affected people rights is explicit as a part of human rights to legally strengthen the position of affected people in land acquisition for the public interest.

## **B. Discussion**

The term human rights is a translation of the term *droit's de l'homme* in French which means “human rights”, which in Dutch is called *menselijke rechten*.<sup>154</sup> According to John Locke, human rights are rights that are given directly by God the Creator as a natural right. Thus, human rights are rights that humans have solely because they are human. Mankind has it not because it is given to it by society or based on positive law, but solely based on its dignity as a human.<sup>155</sup>

Current developments, modern countries integrate various recognition of human rights into the constitution and further elaborated in the act. The matter is deemed necessary to better guarantee of legal certainty and justice in the fulfillment and enforcement of human rights. In Indonesia, the rights of affected people in land acquisition for the public interest

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<sup>154</sup>Budiyono and Rudy, (2014), *Konstitusi dan HAM*, Indepth Publishing, p. 57.

<sup>155</sup>Jack Donnely, (2000), *Universal Human Rights in Theory and Practice*, Cornell University Press, Itacha and London, P.7-12, in *Ibid...*p. 58.

need to be included in the category of human rights, this is one of the main causes due to the legalization of the way to revoke land rights in land acquisition for the public interest which the aspect of legal protection is weak.

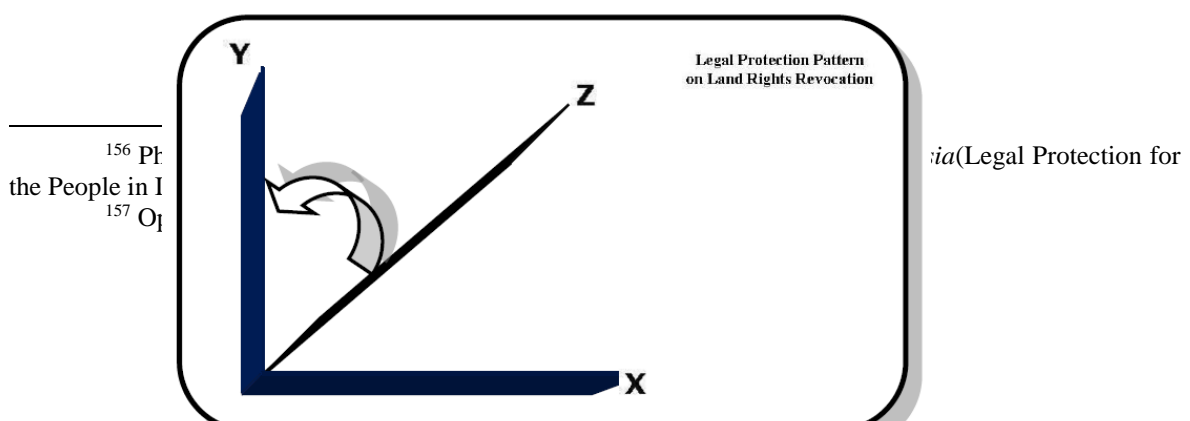
According to Philipus M. Hadjon, with "acts of government" as a central point, (associated with legal protection for the people), distinguished two kinds of legal protection, namely: preventive legal protection and repressive legal protection. In preventive legal protection, the people are given the opportunity to object (*inspraak*) or her opinion before a decision is the definitive form of government gets. Thus preventive legal protection aims to prevent disputes whereas the repressive legal protection aimed to resolving the dispute.<sup>156</sup>

Land rights revocation that stipulated in Law no. 20 of 1961 did not provide the legal protection that is preventive, because the regulation did not provide access for people to express opinions or objections in the process of land acquisition. However, the way the revocation of land rights provides legal protection that are repressive to appeal to the high court that his territory lay of the land and includes a place/object if it is not willing to accept the compensation provided for in the decree of the President as deemed less worthy numbers. The high court decides the matter in the first and the last.

Requests may appeal to the High Court not later than within one month from the date of the Decree of the President submitted to the concerned. No later than within one month after receipt of the appeal request, the case should have been checked by the concerned high court. Examination and judgment rendered in the shortest possible time. High court decision notified to the parties concern, it is not later than one month after the court judgment.

Legal protection regulation in the land rights revocation, if plotted on a picture to symbolize the X axis as a preventive legal protection and the Y axis as a repressive legal protection. Z axis as a legal protection can only be shifted toward the Y axis because it does not provide a preventive legal protection form. The picture of the shift towards the Y-axis, Z-axis are presented in picture one.

Picture 1: Legal Protection Pattern on Land Rights Revocation<sup>157</sup>





The weak position of the affected party in the revocation of the rights to land coupled with the condition of not explicitly regulating the rights of affected people as human rights. 1945 Constitution of Indonesia and the Law No. 39 of 1999 on Human Rights implicitly stipulate the rights of affected people in land acquisition for the public interest. Supposedly, due to the conditions of existing and applicable land procurement regulations that still allow the use of inhumane revocation of land rights, it is urgent to make the explicit rights of affected people as one type of human rights recognized and regulated in the constitution or act. Jimly Asshiddiqie divides the formulation of Human Rights in the 1945 Constitution Amendment Results in several groups of material as follows:<sup>158</sup>

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<sup>158</sup> Jimly Asshiddiqie, (2008), *Pokok-Pokok Hukum Tata Negara Indonesia: Pasca Reformasi*, Jakarta: PT Bhuna Ilmu Populer. In Ibid, Budiyono..... P. 101-103.

Table 1. Formulation of Human Rights in the 1945 Constitution

| <b>The Type of Human Rights</b>   |   |  |
|---|---|--|
| <b>Civil Rights</b>   | <b>Political, Economic, Social and Cultural Rights</b>  | <b>Special Rights and Rights to Development</b>  |
| <ul style="list-style-type: none"> <li>➤ Everyone has the right to live, maintain his life and life;</li> <li>➤ Everyone has the right to be free from torture, cruel, inhuman and degrading treatment or punishment;</li> <li>➤ Everyone has the right to be free from all forms of slavery;</li> <li>➤ Every person is free to embrace religion and worship according to his religion;</li> <li>➤ Everyone has the right to be free to have the confidence of the mind and conscience;</li> <li>➤ Everyone has the right to be recognized as a person before the law;</li> <li>➤ Everyone has the right to equal treatment before the law and government;</li> <li>➤ Everyone has the right not to be prosecuted for retroactive laws;</li> <li>➤ Everyone has the right to form a family and continue the descent through a legal marriage;</li> <li>➤ Everyone has the right to get citizenship status</li> <li>➤ Everyone has the right to be free to live in the territory of his country, leave and</li> </ul> | <ul style="list-style-type: none"> <li>➤ Every citizen has the right to associate, gather and express his opinion peacefully;</li> <li>➤ Every citizen has the right to choose and choose within the framework of the people's representative institution;</li> <li>➤ Every citizen can be appointed to public positions;</li> <li>➤ Everyone has the right to obtain and choose legitimate and appropriate work for humanity;</li> <li>➤ Everyone has the right to work, get rewarded, and get proper treatment in a fair working relationship;</li> <li>➤ Everyone has the right to own private property;</li> <li>➤ Every citizen has the right to social security that is needed to live properly and enable the development of himself as a dignified human being;</li> <li>➤ Everyone has the right to communicate and obtain information;</li> <li>➤ Every person obtains and chooses education and teaching;</li> <li>➤ Every person has the right to develop and benefit from science and technology, art and culture to improve the quality of life and welfare of humanity;</li> <li>➤ The state guarantees respect for cultural education and the rights of local communities in harmony with the times and levels of national civilization;</li> <li>➤ The state recognizes every culture as part of national culture;</li> <li>➤ The state upholds humanitarian ethics and moral values taught by every religion, and guarantee the independence of every citizen to embrace and live the teachings of his religion.</li> </ul> | <ul style="list-style-type: none"> <li>➤ Every citizen who has social problems, including isolated groups and who lives in a remote environment, has the right to get special facilities and treatment to obtain equal opportunities;</li> <li>➤ Women's rights are guaranteed and protected to achieve gender equality in national life;</li> <li>➤ Special rights inherent in women which are due to the guarantee function guaranteed and protected by law;</li> <li>➤ Every child has the right to love, attention and protection of parents, family, community and country for their physical and mental growth and personal development;</li> <li>➤ Every citizen has the right to participate in management and enjoy the benefits derived from the management of natural wealth;</li> <li>➤ Everyone has the right to have a clean and healthy environment;</li> <li>➤ Temporary policies, treatments or special actions that are set forth in legal legislation that are intended to equalize the level of development of certain groups that have experienced discrimination with other groups in society, and special treatment.</li> </ul> |

|   |  |  |
|---|--|--|
| <p>return to his country;</p> <ul style="list-style-type: none"> <li>➤ Everyone has the right to obtain political asylum;</li> <li>➤ Everyone has the right to be free from all forms of discriminatory treatment and has the right to obtain legal protection from such discriminatory treatment.</li> </ul> |  |  |
|---|--|--|

From table one above, there is no recognition of the affected party as part of human rights, whereas according to FAO research the constitutions of many countries provide for both the protection of private property rights and the power of the government to acquire land without the willing consent of the owner. There is, however, great variation. Some countries have broadly defined provisions for compulsory acquisition, while those of other countries are more specific.<sup>159</sup>

Article 4 of Law No. 39 of 1999 on human rights regulate the kind of human rights as follows: the right to life, the right not to be tortured, the right to personal freedom, mind and conscience, the right to religion, the right not to be enslaved, the right to be recognized as a person and equality before the law, and the right not to be prosecuted on the basis of a retroactive law is human rights that cannot be reduced under any circumstances and by anyone.

From further elaboration of these rights, there is absolutely nothing that regulates the rights of affected people in land acquisition for the public interest explicitly. That is, as legislation under the 1945 constitution, which details the types of human rights, law number 39 of 1999 concerning human rights has not completely elaborated the types of human rights.

Therefore, a progressive legal breakthrough is needed to protect the affected people in land acquisition for the public interest by regulating the rights of the affected people as human rights. This right is in line with the idea of progressive law and the concept of protection in Indonesian law.

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<sup>159</sup> FAO Team, (2009), *FAO Land Tenure Studies*, FAO, p. 7.

Likewise with the idea of progressive law, according to Satjipto Rahardjo<sup>160</sup> the idea of progressive law starts from the basic philosophical assumption that law is for man, not vice versa. Thus the existence of law is to serve and protect human beings, not the other way around. Law is regarded as an institution aimed at bringing people to a just, prosperous and happy life. Progressive law embraces a pro-justice legal ideology and a pro-people law.<sup>161</sup> The progressive legal character that requires the presence of law is associated with empowerment as its social goal, causing progressive law also close to the social engineering of Roscoe Pound.<sup>162</sup>

According to Arief Sidharta, Pancasila as a legal goal to manifest pengayoman,<sup>163</sup> to protect people passively by preventing arbitrary acts and actively by creating a human condition that allows human society to take place fairly so that every human being gets the opportunity broad and equal to develop the full potential of his humanity.<sup>164</sup> By being categorized as part of human rights, it is hoped that the affected people will be guaranteed more rights in land acquisition for the public interest, so that inhumane ways such as revocation of land rights are not taken by the government.

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<sup>160</sup> The idea of progressive law first appeared in 2002 through an article written by Satjipto Rahardjo on the Kompas newspaper entitled "Indonesia Requires Progressive Law Enforcement, June 15, 2002.

<sup>161</sup> Satjipto Rahardjo, (2009), *Hukum Progresif sebuah Sintesa Hukum Indonesia* (Progressive Law, an Indonesian Law Synthesis), Genta Publishing, Yogyakarta, p. 6.

<sup>162</sup> Roscoe Pound dalam dalam Bernard L. Tanya et al, (2010), *Teori Hukum Strategi Tertib Manusia Lintas Ruang dan Generasi* (The Law Theory of People's Ordered Strategy across Space and Generation), Declare that to achieve justice it is necessary to do progressive step, that is function of law to arrange change, Genta Publishing, Yogyakarta, p. 155.

<sup>163</sup> The word pengayoman was first introduced in the field of law by Sahardjo. According to Daniel S. Lev, in 1960 Sahardjo was replaced the blindfolded lady with scales by a stylized Banyan tree as Indonesia's symbol of justice, that inscribed with the Javanese word Pengajoman-protection and succor. It also represented a quickening of the process of transformation of the heritage of Dutch colonial law into Indonesian law. Daniel S. Lev, (1965), *The Lady and the Banyan Tree: Civil-Law Change in Indonesia*, *The American Journal of Comparative Law*, Vol. 14. No. 2 (spring). p. 282.

<sup>164</sup> Bernard Arief Sidharta, (2013), *Ilmu Hukum Indonesia, Upaya Pengembangan Ilmu Hukum Sistematis Yang Responsif Terhadap Perubahan Masyarakat* (Indonesian Jurisprudence, Efforts of Systematic Jurisprudence Development towards Responsive to Community Change), Genta Publishing, Yogyakarta, p. 105.

### **C. Conclusion**

Affected people rights in the land acquisition for public interests is very urgent and needs to be considered to be categorized as a human rights due to the urgency of the conditions caused by the acquisition of land for public interest which can lead to disruption of the sustainability of the affected people life.

The government and the House of Representatives need to review law number 39 of 1999 concerning human rights and insert the rights of affected people as one type of human rights to guarantee legal protection for the affected people in land acquisition for the public interest.

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**Land Law Position in Indonesia : the Perspective of Government Regulation No. 47/2015**

Adhimaz Kondang Pribadi

**Abstract**

Tanah Bengkok is a village asset as stated in the provisions of Law No.6 of 2014 Article 1 paragraph 11, that Village Assets are goods belonging to the Village that originate from the original wealth of the Village, purchased or obtained at the expense of the Village Budget and other rights legitimate. This is affirmed in Article 76 paragraph (1) of the Village Law: "Village assets can be in the form of village cash land, communal land, village markets, animal markets, boat moorings, village buildings, fish auctions, agricultural auctions, village forests, springs Village property, public baths, and other assets owned by the Village ". From the background above, the problem in the study is the legal position of the crooked land in the perspective of government regulation No. 47 of 2015, as well as the factors causing the loss of bent land. Answering these problems the researchers used a normative juridical approach and an empirical juridical approach. The data used are primary and secondary data. Primary data was data obtained directly from the purbolingo sub-district which originated from field studies, secondary data was data sourced from literature and other materials. The results of the study indicated that the land was bent according to the perspective of Government Regulation No. 47 of 2015, bent land was a village asset that was managed by the village apparatus as a salary allowance excluding the basic salary of the village government which was as manageable as the village apparatus. legal consequences if there was abuse against the pliers themselves. The factors causing the loss of bent land were 1) lack of supervision and transparency in the administration of village government. 2) economic factors. 3) educational factors. 4) factors that were not fixed. 5) legal factors. In line with this study, the researchers suggest: 1) It needs to be intensive supervision of the crooked land, because the crooked land is risky with fraud committed by village heads who make the land into a right to become crooked and even sell it. 2) Firm stance from the government against perpetrators of abuse of crooked land. 3) There must be an in-depth investigation and factual facts regarding the lost land that has been lost by the government.

**Keywords** : land law, tanah bengkok

## **A. Introduction**

Land is a very important necessity in the sustainability of people's lives, besides having a function as a place to grow land, it is also used as a place for people to build life on it. National Land Law is basically based on customary law on land, customary law itself is the main source of the development of land law in Indonesia, the conception of customary law can be formulated as a conception of a religious Communalistic. Harsono (2008: 228) states that "Communalistic religion, which allows control of land individually, with rights to land that are personal, as well as contain elements of togetherness".

The religious communalistic nature of the concept of National Land Law is shown by the Basic Agrarian Law No.5 of 1960 Article 1 paragraph 2: "All the earth, water and space, including natural wealth contained within the territory of the Republic of Indonesia, as gifts of God Almighty, they are the earth, water and space of the Indonesian people and they are national wealth.

This religious element of conception is shown by the statement that the earth, water and space in Indonesia, including the natural wealth contained therein, they are a gift from God Almighty to the Indonesian people. In the conception of customary law, the nature of customary rights in ulayat is still unclear, with the formulation, that ulayat land. According to Harsono (2008: 228) that "ulayat land is a shared property, which is believed to be a gift of an occult power or ancestral heritage to a group that is a customary law community," then, in the National Land Law, land which is a land with the Nation Indonesia, it is expressly stated as the Gift of God Almighty. Thus the religious nature becomes clear.

Customary law ulayat land is a land with the indigenous and tribal peoples concerned, so in the National Land Law all land in our territory is a land together with all the people of Indonesia, who have united into the Indonesian nation. This statement shows the Communalistic nature of the National Land legal conception.

Based on the Law of the Republic of Indonesia, the state is the main defender and recipient of the mandate of the people so that their interests and welfare are fulfilled, so that sovereignty is created for the people both broadly and comprehensively. As reflected in Article 33 paragraph (3) of the 1945 Constitution. Which states that: "The earth, water and natural resources contained therein are controlled by the State and used for the greatest prosperity of the people".



The Basic Agrarian Law, namely Law No.5 of 1960, began with its establishment, that in order to achieve what is stipulated in article 33 paragraph (3) the Basic Law is unnecessary and not in its place, that the Indonesian nation or state acts as landowners, it is more appropriate if the state, as an organization of power from all the people (nation) acts as the governing body.

From this point it must be seen the meaning of the provisions in the Basic Agrarian Law No.5 of 1960 article 2 paragraph 1 which states, that: Earth, water and space, including natural wealth contained therein, at the highest level controlled by the state " .

In accordance with the initial establishment, Harsono (2008: 574) stated that: The word "mastered" does not mean "owned", but the State as an organization of power which is guaranteed by the people at the highest level in terms of authority has the authority

1. Regulate and administer its designation, use, inventory and maintenance.
2. Determine and regulate the rights that can be owned by (part of) the earth, water and space.
3. Determine and regulate legal relations between people and legal actions concerning the earth, water and space.

In book II of the book of civil law (Civil Code) the land is categorized as ZAKEN or objects, the objects themselves in book II of the Civil Code are divided into 2 namely moving objects or non-permanent objects (roerende zaken) and immovable objects or fixed objects ( onroerende zaken). then the land is an immovable object or a fixed object (onroerende zaken).

Land according to the Basic Agrarian Law (UUPA), is divided into two, namely land rights and state land. Land rights are lands that already have rights on it, for example, the rights set out in Law No. 5 of 1960 concerning Basic Agrarian Regulations described in Article 16 paragraph (1) of the BAL stipulates the rights of land that can be given to people / communities both individually, in groups and legal entities which include: 1. property rights ; 2. right of use ; 3. use-building rights ; 4. right to use ; 5. rental rights ; 6. right to open land ; 7. right to collect forest products ; and 8. rights not included in the rights mentioned above

Whereas state land is lands that are directly controlled by the state, in the sense of lands that have not been claimed by individual rights by the Basic Agrarian Law (BAL), Like Crooked Land, which we commonly know as village-owned land.

Villages according to the provisions of Law No.6 of 2014 concerning the subject of more specific village governance are regulated in Article 1 of government regulation No. 47 of 2015 substitution of government regulation No.43 of 2014 as an explanation of the implementation of Law No.6 of 2014 concerning village governance, Villages are traditional villages and villages or other names, hereinafter referred to as Villages, are legal community units that have limits region authorized to regulate and manage government affairs, the interests of the local community based on community initiatives, rights of origin, and / or traditional rights recognized and respected in the government system of the Republic of Indonesia.

In connection with the administration in the village, the existence of government officials in the village or commonly called village officials or village apparatuses or other terms that have been getting crooked land, as long as they are administrators of the village administration which is the customary land used by the village (including Bondo Desa / Village wealth) . So the Bengkok land so far has been in exchange for their salary during their tenure as administrators of the village administration. Because prior to the Village Law the Village apparatus did not get a fixed income but got a Bengkok land in exchange for a salary.

The name Bengkok land is derived from the regional language in Java, which means that the village's cultivated land, Tanah Bengkok contains historical cultural elements as well as juridical elements. Actually, juridically after promulgation of Law Number 5 of 1960 concerning the provisions of the Agrarian Principles, hereinafter referred to as the BAL. Crooked Land no longer exists. The designation of the Crooked land should not have existed; if necessary, it could be called the former Bengkok land (formerly bent) or more appropriately called land of use rights.

The term bent land After the promulgation of the LoGA was transferred its status (Conversion) to use rights based on the provisions of the LoGA (Article VI Conversion) which states: land rights that give authority as similar to the rights referred to in Article 41 paragraph (1) as mentioned below, which at the start of this Act, are the rights of vrucht gebruik, gebruik, grant controleur, bruikleen, ganggam bauntuik, anggadah, bengkok, lgak, pituwas, and other rights under any name will also be further affirmed by the Minister of Agrarian Affairs, since the enactment of this law becomes the usufructuary rights in article 41 paragraph (1). Who gives the authority and obligations as owned by the rights holder at

the start of the entry into force of this law, as long as it does not conflict with the spirit and provisions of this law.

Based on Article VI the conversion provisions can be known about the contents, nature and embodiment of the right to use (the conversion process of the crooked right) in article 41 paragraph (1) of the LoGA which reads: The right to use is to use and / or collect proceeds from land that is directly controlled by the state or land owned by another person, who gives authority and obligations determined in the decision to grant it by an official authorized to give it or in an agreement with the landowner, which is not a lease agreement or land processing agreements, everything from origin does not conflict with the spirit and provisions of this law

Article 41 paragraph (2):

Use rights granted:

- a. During the specified period or as long as the land is used for certain purposes.
- b. With free payment or providing services in any form.

Although the new designation for the Land of Crooked / Land Ganjaran belongs to the Village is the right of use, but because the land which uses rights are still associated with the wearer with the position of the village administration, then people still like to call Tanah Bengkok because the term is generally popular, it is used as a traditional designation daily. So as a cultural name that is better known than the juridical use rights.

Tanah Bengkok is legally also part of village assets as stated in the provisions of Law No.6 of 2014 Article 1 number 11, that Village Assets are goods belonging to the Village that come from the original wealth of the Village, purchased or obtained at the expense of the Revenue and Expenditure Budget Village or other legitimate rights. This is affirmed in Article 76 paragraph (1) of the Village Law: "Village assets can be in the form of village cash land, communal land, village markets, animal markets, boat moorings, village buildings, fish auctions, agricultural auctions, village forests, springs Village property, public baths, and other assets owned by the Village".

Based on the rules above and the function of the law which regulates the existence of crooked land in its legal perspective the existence of crooked land in practice is currently not in accordance with the law, therefore various problems arise such as: unclear existence

of crooked land in the village , the crooked land of the village is used as an individual property of the village apparatus and it is used as inheritance for generations.

Therefore, based on the description above, the author will do a thesis entitled "Position Of Land Law Completed In Government Regulation Number 47 Year 2015 Amendment To Government Regulation Number 43 2014 On Regulation Of Law Number 06 Of 2014 On Village".

## **B. Problems and Research Methodes**

Based on the description of the background above, the problems in this study are:

- a. What is the legal position of crooked land in the perspective of government regulation No. 47 of 2015?
- b. What are the factors causing the loss of bent soil?

This study used a normative juridical approach and an empirical juridical approach. The normative juridical approach was legal research conducted by examining legal literature materials related to the topil studied (Soerjono Soekanto & Sri Mamudji, 2007: 11). There was an empirical juridical approach used in field research which was shown in the application of law.

## **C. Discussion**

### **1. Legal Status of Crooked Land According to the Perspective of Government Regulation Number 47 of 2015**

#### **a. The Position of the Land Law was Crooked Before the Enactment of the Agrarian Law**

Tanah Bengkok essentially contains historical cultural elements and juridical elements, historically Ter Har (1979) culturally states that the bent land has something to do with reward land which is finally understood as a crooked land. The crooked land itself is a land whose status is the right to use or is commonly known as land of reward. The land of historical rewards comes from the regulations made by the kings who were given their management rights to royal officers or village administrators in the name of the king (ambelijk profitrechts).

The term ambelijk profitrechts implies that the Bengko / Land Ganj Land is related to the position in the village government. In the division of reward or crooked land, especially those areas that are far from the center of the royal government, the influence of the distribution of usufructured land by the positions of the kings is greatly reduced, so that

the validity of the position or crooked land is based on the policy according to the customary laws of the villages.

Soepomo (1979) states that the records of this Ter Har view are in fact the influence of the kingdom in granting reward / crooked land that is only about the procedure or the formalities of granting usufructuary rights according to royal rules. But materially distributed as the right to use land is also a customary law partnership called ulayat rights. So the crooked land is culturally historically a customary land with customary law alliance is customary rights.

Juridically after the promulgation of the Basic Agrarian Law Number 5 of 1960 the designation of crooked land should not exist. The term bent land has been transferred to usufructuary rights, this usufructuary rights described in the LoGA Section VI Article 41 paragraph 1 are:

The right to use is the right to use and or collect the proceeds from land that is directly controlled by the state or land owned by another person, who gives the authority and obligations specified in the decision to grant it by an official authorized to give it or in an agreement with the owner without, which is not a lease agreement - rent or land management agreement, everything from origin does not conflict with the spirit and provisions of this Law.

Further clarified in the provisions (conversion) of the LoGA Article VI the conversion provisions state that:

Land rights that give authority as similar to the rights referred to in Article 41 paragraph (1) as mentioned below, which at the start of this Act, are the rights of vrucht gebruik, gebruik, grant controleur, bruikleen, ganggam bauntuik, anggaduh, bengkok, lgak, pituwas, and other rights under any name will also be further affirmed by the Minister of Agrarian Affairs, since the enactment of this law becomes the usufructuary rights in article 41 paragraph (1). Who gives the authority and obligations as owned by the rights holder at the start of the entry into force of this law, as long as it does not conflict with the spirit and provisions of this law

Based on Article VI the conversion provisions can be known about the contents, nature and manifestation of the right to use itself quite clearly, that the land rights at the entry into force of this UUPA, one of which is bent into usufructuary rights in accordance with the provisions regulated and fulfilling the requirements in the BAL Article 41 paragraph 2, namely the right to use is given:

- a. During the specified period or as long as the land is used for certain purposes.

b. With free payment or providing services in any form

The development of this crooked land after the enactment of the LoGA continues to change, starting from the regulation of the Minister of Home Affairs No. 1 of 1982 concerning the source of income and wealth of the village management and its guardians, which is explained in article 3 which states that what is meant by the village wealth source consists of:

- a. Village cash land, including crooked land,
- b. Public baths managed by the village,
- c. Village market,
- d. Recreational objects managed by the village,
- e. Village-owned buildings,
- f. Other wealth belonging to the village.

It was clarified again through the Instruction of the Minister of Home Affairs No. 26 of 1992 concerning the change in the status of crooked land and the like to the village treasury, making the management and supervision of crooked land into the village treasury. After that, it was set back in the Regulation of the Minister of Home Affairs No. 4 of 2007 concerning the Management of Village Wealth, Article 1 point 10 states that "village land is village-owned land in the form of crooked land, graves and titisara". So the land is not one of the land owned by the village. The village cash land is the wealth of the village that belongs to the village.

As for preventing abuse of crooked land from being misused by government officials, it has been regulated in PERMENDAGRI Number 4 of 2007 Article 15, namely:

1. Village wealth in the form of Village land is not permitted to be carried out by the release of ownership rights to other parties, unless needed for the public interest.
2. (2) The release of village land ownership rights as referred to in paragraph (1) shall be carried out after obtaining compensation according to the price which benefits the village by taking into account the market price and the Tax Object Sales Value (NJOP).
3. Reimbursement of compensation in the form of money must be used to buy other, better land and be located in the local village.

4. The release of village land ownership rights as referred to in paragraph (1) is determined by a Village Head Decree.
5. The decision of the village head as referred to in paragraph (3) is issued after obtaining approval from the BPD and obtaining written permission from the regent / mayor and the governor.

After the enactment of the Minister of Home Affairs Number 4 of 2007, Tanah Bengkulu was then regulated in the Village Law Number 6 of 2014, the regulation of which is stated in article 72 paragraph (1) letter (a) of village income as stipulated in article 71 paragraph 2 derived from: original village income consists of results of operations, results of assets, self-help and participation, mutual cooperation. Elucidation of article 72, paragraph (1) letter (a) ... what is meant by "original village income" is income derived from the authority of the village based on the rights of origin and authority of the local scale of the village. What is meant by "business results" includes the results of BUM Desa and bent land.

Then the Bengkulu Tanah is rearranged according to Government Regulation Number 43 of 2014, which means crooked land, the status of its legal position is included in the village income source which includes the Village APB so that the income of the village head is only limited to the income obtained from the local government.

The purpose of the bent land is the granting of the right to use the land controlled by the village to be enjoyed by the land in exchange for the salaries of those who carry out the tasks in the village administration. the right is in the form of rewards (a kind of gift to be enjoyed) to village officials. Based on history, According to Nugroho in his legal journal stated that the Bengkulu Land was divided into two versions, namely the version of customary law and the version of the colonial authority / legislation in the era of the Dutch East Indies.

### **1) Version of Customary Law**

Crooked Land is land used by Village government officials as a substitute for salaries as long as they carry out governmental duties in the Village. The right to crooked land by village government officials is customary use rights, not land ownership rights in customary law. This will bring legal consequences, if the task of the village government official has been completed then the Crooked Land must be returned to the Village as a village / Bando Deso asset.

Crooked Land cannot be separated from the origin of the establishment of a Village (Babat Desa). On the one hand because of the power to lead a village based on the discussion of all the people who participated in the process of establishing a village, as a reward for the task of leading and managing the village, it was given Bengkok Land / Land of Rewards / Land of Pecaton or Land of Pancen. On the other hand, besides the existence of crooked land, in the community there is also the existence of the Land of Gogolan or Tanah Pekulen. If we look at it based on the composition of the community in relation to the function of the villagers (gawai Desa) in the indigenous community in the countryside. In Java the arrangement is as follows:

Category I: Groups with the status of Gogol / Sikep / Kuli (people who are strong or have married).

Category II: Non Gogol / Sikep / coolie groups (people who are old and children).

Suhartono (1991), Gogol / Sikep / coolie in the village is a group or Sikep or coolies consisting of groups of indigenous community members who carry out the task of the village device (social tasks in the village government). The tasks are in the form of Village meetings, night watch, mutual cooperation, fire, flood, and other disasters and other forms of participation.

The status of Gogol brought compensation to get customary land called the Gogolan land as a source of livelihood for his family. Likewise with sikep status or coolie will get pekulen land. So the term is not to demean the status of a person in the community, precisely the decision is an honor because it is believed to be the bearer of the Village device (noble village duties)

The highest control of gogolan land remains in the village so the provisions on how to hold a fixed use rotation on the control of a village head or village headman, Susanto, (1991), state that a village head in the history of customary land has three (3) authorities in the land sector:

- a. *Authority in the field of customary law stipulates legal provisions relating to land (juridical authority).*
- b. *The authority to divide up the land according to anyone has the right to degraded land that will get land using adat and so on (distributive authority).*
- c. *General land and land transaction authority (supervision authority).*

The history of the existence of village lands actually comes from customary land rights controlled by customary law (Desa) alliances. Susanto, (1980), in his book that Van



Vollen Hoven referred to the land of ulayat rights as *Beschikkingsrechts*, the hallmark of ulayat land was Village land as a joint land which could be distributed to members of the Village who needed according to the requirements in local customary law. Therefore ulayat land can be likened to "land bank" in ancient times. Ulayat land is a 'depologistic' for the needs of land in indigenous and tribal communities.

In some areas of customary land according to Setiady (2013), commonly called Wewengkon-Jawa, Ulayat-Minangkabau, Tanah Marga-lampung, Panyampeto or Pawatasan-Kalimantan, Limpo-South Sulawesi, Pabumian or Payar-Bali.

## **2) Dutch Colonial Version**

Furthermore, the version of the Dutch Colonial Government said that the Crooked Land arose from the process of giving by the local government or there were those from the Regent or Resident. Examples of the provision of Crooked Land are based on several Ordinances known as *Inlandche Gemeente Ordonantie (IGO)*. There is an ordinance that applies to Java and Madura, there are also those outside Java and Madura, for example Sumatra Barat, Bengkulu, Palembang, Lampung etc. In Java and Madura arranged in Stb 1906 No. 83 jo Stb 1907 No. 212.

Then before the Dutch East Indies approached the hands of the Japanese army, the Ordinance was replaced, For Java and Madura was replaced with the Village Ordinance Stb 1941 No. 356, while outside Java and Madura are replaced with Stb 1938 No. 490. but these ordinances practically do not work. Thus the old ordinance still applies. In Java it still applies Stb. 1906 No. 83 jo Stb 1907 No 212.

Apart from the issue of ordinance, Crooked Land was determined by the Regent or Resident. The important thing to note is that the ordinance was merely material administration, the colonial government never provided state land (*Virjland Domein*), but Bengkok was taken from the village's own land which originated from the ulayat land of the local customary law community.

So the ordinances concerning the Crooked Land are merely formally showing the power of the colonial government in the affairs of the village land, including the occurrence of the Tanah Begkok. This is in line with colonial land law politics as stated in *Agrarische Besluit* which is famous for *Domein Verklaring's* statement on Stb 1970 No. 118 who did not recognize the indigenous rights of the Indonesian people including the ulayat. All

customary land only rides on the land of the Dutch East Indies government. Article 1 Agrarische Besluit states:

“Behoudens opvolging van de tweedw en de derde bepaling der voor meldewet blijfhel beginsel gehanhaafd, dat alle grond, wearop niet door anderen reggt van eigendom word bewezen, domein ven den staatis (By not reducing the validity of the provisions in paragraphs 2 and 3 of Agrarische Wet, the principle is maintained that all land that the other party cannot prove is that the land eigendom (his) is the domain / state property. ”

Article 1 Agrarische Besluit is known as the Asas Domein Verklaring which is a joint policy of colonial graria law or policy. Because the political enactment of the owner was impossible to prove the owner with proof of rights (according to western law) for the sake of law and automatically fell to the hands of the Dutch East Indies Government. In this case the Dutch colonial government displayed power in the process of gaining the crooked land by showing its power to regulate.

#### **b. Position of Crooked Land Law in the Perspective of Government Regulation Number 47 of 2015**

Government Regulation (PP) Number 47 of 2015 is a substitute for government regulation Number 43 of 2014 which clarifies the Law Number 6 of 2014 concerning village governance. Law Number 6 of 2014 in the words of the village and village government is explained in article 1 paragraph 1 and 3 namely:

Article 1 paragraph 1:

"Villages are traditional villages and villages or called by other names, hereinafter referred to as Villages, are legal community units that have territorial boundaries that are authorized to regulate and administer government affairs, the interests of local communities based on community initiatives, rights of origin, and / or rights traditionally recognized and respected in the government system of the Republic of Indonesia:

Article 1, paragraph 3

The Village Government is the Village Head or the other name is assisted by the Village apparatus as an organizer of the Village Government. Explained in the eighth chapter concerning the income of village government article 66, namely:

- (1) The Village Head and Village apparatus earn a fixed income every month.
- (2) The fixed income of the Village Head and the Village apparatus as referred to in paragraph (1) comes from the balance funds in the State Revenue and Expenditure

Budget received by the Regency / City and stipulated in the District / City Regional Revenue and Expenditure Budget.

(3) In addition to the fixed income as referred to in paragraph (1), the Village Head and the Village apparatus receive allowances sourced from the Village Revenue and Expenditure Budget.

(4) In addition to the fixed income as referred to in paragraph (1), the Village Head and Village apparatus obtain health insurance and can obtain other legitimate receipts.

(5) Further provisions concerning the amount of fixed income as referred to in paragraph (1) and allowances as referred to in paragraph (3) as well as other legal receipts as referred to in paragraph (4) shall be regulated in a Government Regulation.

In law number 6 of 2014 concerning the village of the position of crooked land regulated in article 72 paragraph (1) letter (a) village income as referred to in article 71 paragraph (2) comes from the original village income consisting of the results of operations, assets, self-help and participation, mutual cooperation. Article 72, Paragraph (1) Letter (a) .. What is meant by "Village original income" is income derived from the authority of the village based on the origin and the authority of the village's local scale. What is meant by "business results" includes the results of BUM Desa and bent land. Bent land is a village asset which is categorized as immovable. What is meant by village assets according to Government Regulation Number 47 of 2015 in Article 1 paragraph (11 and 12):

Article 11:

Village Assets are goods belonging to the Village that come from the original wealth of the Village, purchased or acquired at the expense of the Village APB or acquisition of other legitimate rights.

Article 12:

Village Property is the property of the Village in the form of movable goods and immovable property.

He also explained that according to Government Regulation No. 43 of 2014, the definition of crooked land is that the legal status is included in the village income source which includes the Village APB so that the income of the village head of Hanaya is limited to the income obtained from the local government.

After being stipulated on 30 June 2015 Government Regulation Number 47 of 2015 in lieu of Government Regulation Number 43 of 2014 concerning the explanatory regulations of

Law Number 6 of 2014 concerning the village, the changed legal status of the Land which was originally included in the Village Revenue and Expenditure Budget has been switched the function of being an allowance or commonly known as intensive beyond the basic salary earned by the village apparatus. As explained in article 100:

- 1) Village Expenditures specified in the Village Revenue and Expenditure Budget (APB) are used with the following provisions: a. At least 70% of the total village expenditure budget is used to fund the implementation of the Village Government, the implementation of village development, village community development, and the empowerment of village communities; and b. At most 30% of the total village expenditure budget is used for: 1. Permanent income and allowances for village heads and village officials; b. Village government operations; 3. Allowances and operational of the Village Consultative Body; and 4. Incentives for neighborhood and neighborhood associations.
- 2) Calculation of Village expenditure as referred to outside income derived from the management of bent land or other designations;
- 3) The results of management of bent land or other designations as intended can be used for additional benefits to the Village and Village apparatus in addition to fixed income and benefits to the Village;
- 4) Further provisions regarding the results of management of bent land or other designations as referred to as regulated by regents / mayors.

As explained above, the legal position of the land is bent according to the perspective of Government Regulation No. 47 of 2015, bent land is a village asset that is managed by the village apparatus as a salary allowance other than the basic salary of the village government which is as manageable as the village apparatus. so that it has legal consequences if there is abuse against the pliers themselves.

## **2. Factors Causing the Loss of Crooked Land in Purbolinggo**

Purbolinggo District, East Lampung Regency. Purbolinggo District prior to the division of districts, entered Central Lampung Regency. The subdistrict, which consists of 23 newly created villages, is mostly Javanese, originally from colonization in 1926 during the reign of the Dutch East Indies. The Purbolinggo region borders Sukadana Subdistrict, Bungur Subdistrict, Pekalongan District, and Seputih Raman District.

In the years 1942-1943 during the Japanese occupation, the Demang Assistant was changed to a sub-district and used by Fungunco (Assistant Demang), in 1943 it was changed to the Assistant Wedana led by an Assistant Wedana with its capital Sukadana.

In 1990, Purbolinggo Subdistrict, which was formerly a sub-district, turned into a definitive sub-district into Central Lampung Regency. At present, Purbolinggo District has an area of 6159.50 ha, divided into 12 villages namely Taman Asri, Taman Bogo, Add Dadi, Taman Cari, Taman Endah, Taman Fajar, Tegal Gondo, Toto Harjo, Add Luhur, Tanjung Inten, Tegal Yoso, and Tanjung Kesuma. Purbolinggo District is geographically adjacent to Way Bungur District in the north and Sukadana District in the south. Meanwhile in the east it is bordered by Way Kambas National Park and in the west borders with North Raman District

When viewed from the topography, all villages in Purbolinggo District have flat topography. The population of Purbolinggo District until March 2015 amounted to 41,725 people. The ratio between male and female population in 2015 was 104 male population compared to 100 female residents. Population data in Purbolinggo District can be seen at

Tabel 11. Total number of Population at Kecamatan Purbolinggo (data on March 2015)

| No | Name Village   |               | Totale Personnes |               |
|----|----------------|---------------|------------------|---------------|
|    | Male           | Female        | Male             | Female        |
| 1  | Taman Asri     | 1.814         | 1.778            | 3.592         |
| 2  | Taman Bogo     | 2.266         | 2.163            | 4.429         |
| 3  | Taman Cari     | 2.025         | 2.001            | 4.026         |
| 4  | Tambah Dadi    | 1.783         | 1.590            | 3.373         |
| 5  | Taman Endah    | 1.524         | 1.489            | 3.013         |
| 6  | Taman Fajar    | 1.655         | 1.751            | 3.406         |
| 7  | Tegal Gondo    | 1.005         | 999              | 2.004         |
| 8  | Toto Harjo     | 2.075         | 1.854            | 3.929         |
| 9  | Tanjung Inten  | 2.379         | 2.291            | 4.670         |
| 10 | Tegal Yoso     | 1.633         | 1.593            | 3.226         |
| 11 | Tanjung Kesuma | 2.015         | 1.904            | 3.919         |
| 12 | Tambah Luhur   | 1.094         | 1.044            | 2.138         |
|    | <b>Total</b>   | <b>21.268</b> | <b>20.457</b>    | <b>41.725</b> |

Source: Monograph of Purbolinggo District, 2015 (unpublished)

While seen from the assets of the crooked land itself, each village in Dipurbolinggo almost all has crooked land in each village, the numbers vary, but according to the data obtained,

the crooked land in Purbolingo is about 25 hectares, the largest and the lowest does not have it. Can be seen from the following table:

| No     | Name of Village | Surface (Ha) | Information |
|--------|-----------------|--------------|-------------|
| 1      | Taman Asri      | 0            | Nil         |
| 2      | Taman Bogo      | 15           |             |
| 3      | Taman Cari      | 2,5          |             |
| 4      | Tambah Dadi     | 18           |             |
| 5      | Taman Endah     | 3,25         |             |
| 6      | Taman Fajar     | 8            |             |
| 7      | Tegal Gondo     | 7            |             |
| 8      | Toto Harjo      | 11,8         |             |
| 9      | Tanjung Inten   | 24           |             |
| 10     | Tegal Yoso      | 0            | Nil         |
| 11     | Tanjung Kesuma  | 0            | Nil         |
| 12     | Tambah Luhur    | 25           |             |
| JUMLAH |                 | 114,55       |             |

Sumber: Purbolingo District from KASI PEMERINTAHAN

Seen from the table above it can be understood that purbolingo sub-district of 12 villages has 114.55 hectares of bent land assets which are owned by the village with a higher level of 25 hectares, which means the crooked land in purbolingo district should have 25 hectares of village but in fact some are lacking, there are even 3 villages that do not have crooked land. According to Maryanto (GOVERNMENT KASI) stated that "this data is only limited to recognition from the existing village head, because the absence of the land is not known by the subdistrict government". In the event that the loss of bent land does not mean that there is no natural disaster, the bent land is gone, there must be a factor that affects the loss of bent land. The factors for loss of bent land include:

1. Lack of supervision and openness in the administration of village governance

Lack of supervision and openness in the administration of village governance. This is because village communities are usually more concerned about carrying out their daily activities such as farming, trading, and fishing. Government affairs, budgeting is considered the work of smart people, village leaders only. The Village Consultative Body (BPD), youth organizations do not function because the majority of more migrate to big cities.

This community paradigm is the one who cultivates that the affairs of the village government are the responsibility of the village apparatus so that it creates concessions, where the community does not know what policies the government is doing regarding the

crooked land. Basically, when there is control from the community to the village apparatus, it is unlikely that the village apparatus can abuse its authority.

## 2. Economic factors

The feeling of wanting to be considered as a rich person is often considered when holding a position must have wealth above the average of the citizens. Thus, it greatly influences officials to feel rich so that they feel they have more value from the community, this will sometimes have an impact on the performance of the official himself who sometimes misuses his office in giving service to the community, so that fulfilling that desire will probably also by all means to be achieved to become rich, which is possible with one of the methods taken is to change the status of crooked lands to be owned by them or sold to other parties.

## 3. Educational factors

In general, people who are remote and far from urban areas are very low in education. So that the level of public intelligence also determines the level of mindset and behavior of rural communities, so that in the case of the transfer of rights to crooked land this is an expression of a low level of education so that in this society it is unable to act to defend the land rights it has.

## 4. Factors for Non-Permanent Law

The law is a regulation that regulates all forms of systems that exist both in terms of their individual arrangement and the nature of their overall regulation. The law on crooked land as well as those governing the crooked land basically continues to change according to government policy, this policy is taken in accordance with the wishes of the government. This policy is what causes a gap where the village government apparatus can make policies that benefit their own personal self.

## 5. Legal Factors

In the event of the transfer of ownership of the village crooked land, one of the reasons is the lack of mutual awareness of the agreement on land that belongs to the village so that the land that has been owned under local customary law after the enactment of the LoGA has not been managed about the certificate. Here, the role of the East Lampung Regency government is very much needed to continuously conduct legal counseling on the community periodically so that a public awareness about what is important is the certificate

of land ownership rights that should be owned by the village government. In self-government an awareness will also arise of the functions and responsibilities of a village head or village apparatus towards the village and its people, so that there will be no transitional action on village crooked land rights to other parties which is intentional from the village head or village apparatus. the right to crooked land can provide a very important lesson for the community and also for the government of East Lampung Regency itself.

#### **D. Conclusion**

The crooked land in Purbolinggo district which should be seen from the data of the crooked land of each village, 25 hectares per village in terms of the village where the existence of a crooked land is still intact, which is sublime, but in fact some of the crooked land in Purbolinggo district has no clarity about legal status and existence of the crooked land in the village. For example, there are three villages that have no bent land at all, such as: Tegal Yoso, Taman Asri and Tanjung Kesuma. Whereas the legal position of the land is bent according to the perspective of Government Regulation No. 47 of 2015, bent land is a village asset that is managed by the village apparatus as a salary allowance other than the basic salary of the village government which is as manageable as the right of use.

The factors causing the loss of bent land in Purbolinggo district according to the authors are:

- a. The lack of supervision and openness in the administration of village governance
- b. Economic factors
- c. Educational Factors
- d. The Factor of the Act is Not Fixed
- e. Legal Factors

It needs to be intensive supervision of crooked land, because crooked land is risky with fraud committed by village heads who make the land bent into property and even sell it. It needs the strict attitude of the government towards perpetrators of abuse of crooked land, the need for in-depth investigation and factual facts regarding the crooked land that has been lost by the government.



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## **In Making of a Responsive And Sustainable Environmental Budgeting in Province of Lampung**

Marlia Eka Putri A.T. and Fathoni

### **Abstract**

Basically, the management of regional finance is a subsystem of state finances management. The 1945 Constitution of the Unitary State of the Republic of Indonesia regulates it in Article 23C, for the management of state finances is must be held professionally, openly and responsibly. These three principles lead to the realization of good governance, both in government (central) and local government. This principle then evolves with the ongoing regional autonomy development, when the region has been given the authority to manage its regional finances, but still have to follow every rules in State Finance Act No.17 of 2003. In relation to environmental management, it can be traced from Article 45 of The Environmental Protection and Management Act No.32 of 2009 that give mandates to make an environment-based budgeting in order to create an environmental protection and management programs. The Regional Budget (*APBD*) of Lampung Province in 2017 has increased from Rp 6,8 Trillion to Rp 7,75 Trillion in the 2018. Budget allocation for the environment needs to be studied, both amount and budget, following the environmental-based budget indicators. This research is about to discuss about local budget which compiled in Regional Budget (*APBD*) of Lampung Province, whether it responsive and have paradigm of sustainable environment. The discussion in this study will use legal research methodology that is patterned normologis, so that law is understood as a set of norms of written regulation. Thus, it will be seen if the Provincial Government of Lampung Regional Regulation which has been running in the current year has meet the environmental responsive budget indicators. The reasearch is being approached with legislation methode and other relevant documents that apply in the area of regional finance as legal material for later being analyzed by the *Environmental Impact Assessment* (EIA) method and responsive law theory. The results of the research will be attempted to synchronize Regional Budget Establishment in Lampung Province with Responsive Budget Indicators and Sustainable Environmental Indicators.

**Keywords:** budget, sustainable, environment, government, Lampung

## A. Introduction

The provisions of Law Number 32 of 2009 of Environmental Protection and Management (UUPPLH-2009) provide obligations to the government and regional governments to allocate an adequate budget for the environment as stipulated in Article 45 of the UUPPLH-2009. In fact, the Government is obliged to allocate an adequate budget for special environmental allocation funds to be given to regions that have good environmental protection and management performance.

The Budget for Environmental Functions in the regions is still below 1% of the total *APBD*. The budget allocation for environmental functions in the regions is still low, which results in low environmental management capacity so that it can hamper the achievement of national priority targets in the environmental field. Many models are used by the government to encourage local governments to meet environmental budget allocations.

One of the environmental-based budget orientations is the plan to enact environmental taxes. The results of the research by Dahliana Hasan, et al., For example, revealed that environmental issues are one of the important issues discussed internationally. Various forums both at national and international levels have been formed to discuss environmental issues. The importance of this environmental issue is inseparable from the desire of various parties to save the earth from destruction and pollution that has occurred. Several activities related to environmental preservation such as the launching of 1,000,000 tree planting programs have been carried out in Indonesia. The activity is intended to increase public awareness of the importance of environmental management.<sup>1</sup> The application of environmental tax does not contradict and the authority can be given by forming this provision in the UUPPLH. Economic instruments in the Company Law need to be held as the Government's obligation to take policies in the field of taxation as incentives and disincentives for environmental management.<sup>2</sup>

The implementation of the environment-based budget is certainly not merely interpreted as a fiscal policy in the form of the authority of the state (central government and regional government) to attract environmental taxes from taxpayers. Environmental-based budgeting can also be seen from indicators that show that the budget (*APBN* and *APBD*) has

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<sup>1</sup> Dahliana Hasan, dkk. "Tinjauan Terhadap Rencana Penerapan Pajak Lingkungan Sebagai Instrumen Perlindungan Lingkungan Hidup Di Indonesia", *Jurnal Mimbar Hukum Volume 20, Nomor 3, Oktober 2008*, pp. 411 – 588.

<sup>2</sup> Koesnadi Hardjosoemantri, 2005, *Hukum Tata Lingkungan*, Gadjah Mada University Press, Yogyakarta, p.378.

indeed been spent on environmental interests. In this study, it will be more focused on the preparation of the *APBD* in Lampung Province as the field of study.

The drafting of the *APBD* is indeed bound by the provisions of the law that change every year, most recently by the Regulation of the Minister of Home Affairs of the Republic of Indonesia Number 33 of 2017 of Guidelines for Preparation of Regional Revenue and Expenditure Budget for 2018. This is done so that each *APBD* drafting follows the synchronized guidelines with the Government Work Plan (RKP) Year 2018 which is the elaboration of the fourth year of the implementation of the Presidential Regulation Number 2 of 2015 of The National Medium Term Development Plan (RPJMN) 2015-2019 which contains targets, policy directions and development strategies.

The *APBD* drafting guidelines are compiled and implemented using Thematic, Holistic, Integrative and Spatial approaches, as well as *money follows budget policies the program* by ensuring that only truly useful programs are allocated and not just because of the function of the functions of state institutions and regional governments. Even though the regional government runs the government based on the principle of regional autonomy, the achievement of national development priorities requires the coordination of all stakeholders, through the integration of national priorities / priority programs / priority activities carried out on a regional basis, including in Lampung Province.

The provincial and district / city governments must support the achievement of these national development priorities in accordance with the potential and conditions of each region, given the success of achieving national development priorities is highly dependent on policy synchronization between the provincial government and the government and between district / city governments and the government and the provincial government as outlined in the Regional Government Work Plan (RKPD). The synchronization of the policies of the Regional Government and the government is further outlined in the draft *APBD* General Policy (KUA) and the draft of the Temporary Budget Priority and Ceiling (PPAS) which are mutually agreed between the Regional Government and the Regional People's Legislative Assembly (DPRD) as the basis for the drafting of the Regional Regulation on *APBD* 2018 Fiscal Year.

Basically regional financial management is a subsystem of the implementation of state finances. The Republic of Indonesia Constitution regulates it in Article 23C, namely that the management of state finances is carried out professionally, openly and responsibly. These

three principles lead to the realization of *good governance*, both in the government (central) and local government. This principle then develops as regional autonomy continues, when regions are given the authority to regulate their regional finances, even though they are still subject to Law Number 17 of 2003 concerning State Finance. Regarding environmental management, it can be traced from Article 45 of Law Number 32 of 2009 concerning Environmental Protection and Management which mandates an environment-based budget, namely to finance environmental protection and management activities and development programs that are environmentally sound. The 2017 Lampung Province Regional Budget (*APBD*) of Rp. 6.8 Trillion increased to Rp. 7.75 Trillion in 2018. Budget allocations for the environment need to be assessed, both in terms of magnitude and budget, following environmental budget indicators.

Based on the explanation above, this study would like to discuss the regional budget prepared in the Lampung Province Regional Budget (*APBD*), whether responsive and sustainable environmental paradigm.

## **1.2. Research Issues**

Based on the description above, the proposed research questions are:

- a. Does the 2018 Regional Budgetting of Lampung Province meet these indicators in its making?
- b. How are the ideal of environmental-based budgeting indicators for being implemented in Lampung Province?

## **1.3. Research Objectives**

The purpose of this research is to compile answers to research questions proposed using legal research methods.

The theoretical benefit of this research is to apply the theory of state / regional finance that is associated with sustainable environmental theory. The practical aim of this research is to analyze the 2018 of Regional Budgetting of Lampung Province, whether it is oriented and paradigmatic about environmental conservation.

## **1.4. Framework**

The framework of this research thinking departs from the paradoxical nature of development which often leads to environmental damage. Development sometimes becomes an antinomy of environmental sustainability. The antithesis of this is sustainable

development which presupposes that development remains paradigmatic in environmental sustainability.

The legal thought used in this study is the legal thought of state / regional finance that will be linked to the environmental law though. Of course this legal thought is compared not to be contested, but instead to look for a center path.

The compiled indicators will be used to analyze the 2018 Regional Budgetting of Lampung Province and measure compliance with the guidelines that have been given.

## **B. Methods**

### **2.1. Inquiry Approach**

This research question will be explained by a normative juridical approach (dogmatic legal research) conducted by reviewing the laws and regulations relating to state finance and the environment. The approach used is the EIA (Environmental Impact Assessment) approach . The category of approach through regulation, opportunity, ability, communication, interests, process and ideology is used as a analysis means to examine the administration of governance about licensing and ease of investment in the region.

Green Budget Approach will also be used to formulate the budget indicators based on the environment in Lampung Provincial Budget 2018. The budget structure contained in the budget, whether it is in sync with the indicator.

### **2.2. Data collection**

Data collection methods that will be used in this study include:

- a. Collecting of legal documents related to research;
- b. Literature studies related to research;
- c. Correspondence method with competent elements related to research.

### **2.3. Data analysis method**

Data processing is done by reading and classifying data systematization. Legislation is analyzed by content of analysis . Processing of legal materials will be carried out through stages of positive legal description, systematization of positive law, positive legal analysis and positive legal interpretation. Then proceed with a systematic reflection on the legal reality in its application. Analysis of legal materials and data was carried out in analytical descriptive, namely reviewing legal concepts, legal principles, legal norms and

legal systems relating to budget preparation and environmental sustainability in the regions. Judging from the dogmatic legal aspect, analysis of legal materials was carried out by means of exposure and analysis. concerning the applicable legal structure, legal systematization, legal interpretation and assessment. Methods of legal interpretation to form the construction of meaningful responsive regional budgeting and sustainable environmental paradigm in Lampung Province. Thus, a responsive legal approach is also used in analyzing the data obtained in the study

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**Authority of Civil State Apparatus (ASN) Doctor Post Revoking  
the Registration Certificate**

Apriyanto

**Abstract**

One of the authorities of the Indonesian Medical Council (KKI) is revoking the registration certificate (STR) of a doctor and a dentist, as a result of violations of discipline. This sanction aims to provide protection for the community against the exploitative practices of medicine and does not meet the medical ethics resulting in a decline in public confidence towards the medical profession. Problems arose when a Civil State Apparatus (ASN) doctor received disciplinary sanctions for revocation of Registration Certificate (STR) by the Indonesian Medical Council. Service providers, according to the State Civil Apparatus Act, require competence according to their field of duty. Meanwhile, the revocation of Registration Certificate (STR) resulted in ASN doctors losing their functional position authority based on certain expertise and skills. This article discussed the authority of an ASN doctor post revocation of Registration Certificate (STR) based on the element of certainty, justice, and benefit of the law in the legal staffing.

**Keywords** :Civil State Apparatus (ASN), doctor, revocation of Registration Certificate (STR), State Civil Apparatus Act.

## A. Introduction

Authorization (*competence, behogdheid*) is the ability to carry out a public legal action or juridically the authority is the ability to act given by the applicable law to conduct legal relations.<sup>1</sup> The provision of health services by doctors and dentists has unique characteristics in the form of justification provided by law to take medical action against the human body in an effort to maintain and improve health status, which is not given to other professions. Medical actions against the human body that are carried out not by doctors or dentists can be classified as criminal acts.

Looking at the explanation above, every doctor / dentist who has completed education and wants to carry out medical practice is required to have permission. In government administration, the ownership of this permit is the nature of *expressimplied*.<sup>2</sup> governmental authority which has a clear meaning of purpose and purpose, is bound at a certain time, and is subject to the limitations of written law and unwritten law. Whereas the rules that underlie when and under what conditions can these authorities be used are *facultative* governmental authority,<sup>3</sup> which means that the government determines the requirements so that a doctor / dentist can practice medicine.

Normally permission is required to be written containing the conditions to protect the interests that are prohibited by law. Giving permission by the government to a doctor to carry out medical practice due to certain actions is given according to certain methods and conditions. According to Van der Pot "permission is used for certain cases where the government will only allow certain actions to be permitted in a certain way",<sup>4</sup> This also implies that the prohibited actions may still be excluded or permitted under the conditions specified. from this understanding shows that there is an institution that has technical and administrative appraisal capabilities for doctors who apply for a practice permit, which determines the conditions for granting permits, which are then appointed as licensors.

The Indonesian Medical Council (KKI) is a government-formed body that is responsible to the President of the Republic of Indonesia with the functions of regulating, authorizing, stipulating, and guiding doctors and dentists who carry out medical practices, in order to improve the quality of medical services, as contained in the Republic of Indonesia Law Indonesia Number 29 of 2004 concerning Medical Practices. One of the tasks of KKI is to register doctors and dentists and in carrying out their duties regarding this matter KKI has the authority to issue and revoke the registration certificate (STR) of doctors and dentists, temporary STR and conditional STR.

Authority for doctors / dentists who have obtained STR in conducting medical practice in accordance with their education and competence, which consists of:

- a. interview patients;
- b. examine the physical and mental of the patient;
- c. determine supporting investigations;
- d. make a diagnosis;
- e. determine the management and treatment of patients;
- f. carry out medical or dental actions;
- g. writing prescriptions for medicines and medical devices;
- h. issue a certificate from a doctor or dentist;
- i. store drugs in the amount and type permitted; and
- j. mix and deliver medicine to patients, for those who practice in remote areas where there is no pharmacy.<sup>5</sup>

Based on the source of authority, the authority of a doctor / dentist above is a form of personal authority, namely authority that originates from intelligence, experience, values or norms and ability to lead.<sup>6</sup>

In another part, in Chapter I General Provisions Article 1 paragraph 2 of Law Number 5 of 2014 of the Republic of Indonesia concerning State Civil Apparatus, "Employees of the State Civil Apparatus hereinafter referred to as ASN Employees are civil servants and government employees with work agreements appointed by officials of staffing officers and assigned tasks in a government position or entrusted with other state duties and paid according to the laws and regulations".<sup>7</sup> In the Big Indonesian Dictionary (KBBI) the meaning of the word given is not found. The closest thing is to "surrender" which means "giving or giving something to".<sup>8</sup> So that the meaning of "Submitted Duty" here can mean giving authority to carry out an activity. Based on the source, this type of authority takes the form of an official authority regarding the official authority received from the authority above it.<sup>9</sup>

There is an affirmation of the task of an ASN in Article 11 of Law Number 5 of 2014, namely:

- a. carry out public policies made by Personnel Supervisor Officials in accordance with the provisions of the legislation;
- b. provide professional and quality public services; and
- c. strengthen the unity and unity of the Unitary State of the Republic of Indonesia.<sup>10</sup>

In connection with the provision of professional public services, in the General Explanation of the ASN Act, it is to be able to carry out public service duties, government duties and certain development duties and to grant such authority an ASN must have a profession.<sup>11</sup> One type of position known in the ASN Act is a functional position. Regarding the number and type of functional positions required is the obligation of every government agency to compile these needs based on job analysis and workload analysis according to article 56 paragraph 1 of the ASN Act.<sup>12</sup>

In the General provisions of Chapter I of the Republic of Indonesia Government Regulation Number 16 of 1994 concerning the Functional Position of Civil Servants, the Functional Position of Civil Servants, hereinafter referred to as this Government Regulation, is a functional position indicating the duties, responsibilities, authority and rights of a civil servant in an organizational unit which in the execution of its duties is based on certain skills and / or skills and is independent in nature.<sup>13</sup>

In the Law of the Republic of Indonesia Number 29 of 2004 concerning Medical Practices, Article 1 number 11, a medical or dental profession is a medical or dental work carried out based on a scientific, competency acquired through tiered education, and a code of ethics that is serving the community.<sup>14</sup> Then a doctor can then also be appointed as a State Civil Apparatus in the functional position of a doctor.

An ASN with a functional doctor's position, which carries out a series of activities on patients in carrying out health efforts bound to his authority restrictions based on the ASN Act. However, the obligation to have a certain profession as an ASN employee led to the enactment of the *lex specialis derogat legi generali* principle. The principle of legal interpretation means that a specific law can override general law or in other words, this principle is used to resolve conflicts between a broader law and the substance of its regulation and the narrower substance of the regulation.<sup>15</sup> An ASN doctor, technically, in practicing medicine, it is also bound by the Law on Medical Practice.

Based on the explanation above, an ASN doctor has formal authority as an employee of the State Civil Apparatus according to the ASN Law, in the functional position of a doctor, as well as having personal authority as a doctor who performs health. Services based on the law on medical practice. Being appointed as an ASN means that as a civil servant a doctor must be loyal and obedient during his time as a Public Servant, although he can resign at any time, known as the *Contract Suigener which is theory*.<sup>16</sup>

Problems in government administration arise when an ASN doctor practicing according to the Medical Practice Law can be subject to sanctions for revocation of Registration Certificate (STR) by the Indonesian Medical Council (KKI), resulting in loss of personal authority in making health care efforts. Then what about formal authority as ASN has. This paper intended to explain the study of legal conformity between general authority standards that apply to all types of authority and specific authority standards for certain types of authority in the case above.

## **B. Revocation of Certificate of Doctor Registration by Indonesian Medical Council**

To be able to practice medicine, a doctor must at least follow the stages

1. Must have completed the medical profession education with a standard that has been approved by the Indonesian Medical Council (article 26 paragraph (1) of Law Number 29 of 2004 concerning Medical Practices);
2. Must complete medical education and training to get doctor's competence (Article 27 of Law Number 29 of 2004 Medical Practice);
3. Register to obtain Registration Certificate (STR) from KKI (article 29 paragraph (1) and (2) Law Number 29 of 2004 Medical Practice); and
4. Must have a practice permit issued by an authorized health official in the district / city where medical or dental practice is carried out, which is regulated by a ministerial decree (articles 36, 37 and 38 paragraph (1) of Law Number 29 of 2004 Medical Practice) ;

Medical professional education standards are prepared by associations of professional education institutions, while the medical profession is prepared by medical colleges and both coordinate with professional organizations, colleges, associations of teaching hospitals, the Ministry of National Education, and the Ministry of Health (article 26 paragraph (2) Law Number 29 years 2004 Medical Practice)

Medical Education and Training is organized by professional organizations and other institutions that are accredited by professional organizations and carried out in accordance with the standards set by the medical profession or dentistry organization. (Article 28 of Law Number 29 of 2004 Medical Practice). Registration Certificate (STR) issued by the Indonesian Medical Council with the requirements (article 29 paragraph (3) of Law Number 29 of 2004 Medical Practice):

- a. have a doctor's degree, specialist doctor, dentist, or specialist dentist;

- b. have a statement that has made an oath / appointment from a doctor or dentist;
- c. have a physical and mental health certificate;
- d. have a certificate of competence; and
- e. make a statement will comply with and implement the provisions of professional ethics.

Registration Certificate (STR) does not apply (article 33 of Law Number 29 of 2004 Medical Practice) because:

- a. revoked on the basis of the provisions of the legislation;
- b. expired and the person concerned does not re-register;
- c. at the request of the person concerned;
- d. the person concerned died; or
- e. revoked Indonesian Medical Council

Practical licenses are obtained on condition (article 38 paragraph (1) of Law Number 29 of 2004 Medical Practice):

- a. have a valid doctor's registration certificate;
- b. have a place of practice; and
- c. have recommendations from professional organizations.

And the license to practice is still valid as long as (article 38 paragraph (2) of Law Number 29 of 2004 Medical Practice):

- a. doctor's registration certificate or dentist registration certificate is still valid; and
- b. the place of practice is still in accordance with that stated in the practice permit.

Medical and legal ethics have an interdependence relationship. Ethics forms a person's awareness and obedience to do something. Personal actions that are based on ethics, when they are not in contact with the public, will not cause sanctions if deviations occur. But when in contact with the interests of the wider community, a legal consequence arises if the deed is carried out in the execution of the act. So that it needs legal protection and certainty for individuals involved in the act.

MKDKI (Indonesian Medical Discipline Honorary Assembly) is an autonomous institution of KKI, which was formed to enforce discipline in the implementation of medical practices which in carrying out their duties are independent and work based on written reports from people who feel disadvantaged in the practice of medicine by receiving

complaints, examining, and decide the case of the violation of the discipline of the doctor and dentist submitted.

The decision of the Indonesian Medical Discipline Honorary Council is in the form of an innocent statement or disciplinary sanction that binds doctors, dentists, and the Indonesian Medical Council. One of the disciplinary sanctions in the form of a recommendation to revoke registration certificates or practice permits. The impact is the revocation of STR by the Legal Medical Council. Until here there has been legal certainty given by KKI to these recommendations.

### **C. Doctor of ASN Authority Post-Revocation of Registration Certificate**

In the General Provisions of the Act - ASN Law which is referred to as Civil Servants (PNS) are Indonesian citizens who fulfill certain conditions, are appointed as permanent ASN Employees by official civil servants to occupy government positions or are assigned other state duties and are paid based on legislation invitation. Then still in the same chapter there is the title of functional officials who are ASN employees who occupy Functional Position in government agencies. This is in line with the General Explanation of the ASN Law, it is to be able to carry out public service duties, government duties, and certain development tasks and to grant such authority an ASN must have a profession.<sup>17</sup>rs in ASN is included in the health family.

The functional position of doctor,<sup>18</sup> it is determined by a regulation of the Minister in charge of government affairs in the field of Administrative Reform at the suggestion of the head of the relevant agency, in this case the Minister of Health.<sup>19</sup>

Article 138 of the State Civil Service Act states "When this Law comes into force, the provisions of the legislation concerning the code of ethics and settlement of violations of the code of ethics for certain functional positions are declared to remain valid as long as they do not conflict with this Law".

Judging from the explanation above, an ASN with a doctor's functional position can be subject to sanctions for revoking the authority of his personnel by revoking STR by KKI. The impact of this situation is that the doctor can no longer practice because the Law requires ST not to terminate the Practice Permit. While on the other hand the formal authority that it carries remains attached, because the revocation of STR does not necessarily remove its status as an ASN.

The existence of an ASN doctor whose STR has been revoked has an obligation to make decisions that must be carefully taken from the Personnel Supervisor, because decision making can result in changes in legal status in the aspects of organization, staffing and budget allocation.<sup>20</sup> These conditions can result in *spannungsverhältnis*, namely a tension with each other between the basic values of the law such as, benefit, justice and legal certainty.<sup>21</sup> The most affected by the revocation is the ASN Utilization Policy, mainly on ASN Management general policies, ASN job classifications, ASN Employee position competency standards, ASN Employee needs nationally, payroll scale, ASN Employee benefits, and PNS pension system.

In the ASN Act, it is known the term Personnel Supervisor who has the authority to determine the appointment, transfer, and dismissal of ASN Employees and the management of ASN Management in government agencies in accordance with the provisions of the legislation. The authority obtained is based on delegations from higher officials with responsibility and accountability to the recipient of the delegation, namely the Personnel Officer above. In article 68 paragraph (4) of the ASN Law, civil servants can move between and between High Leadership Position, Administrative Position, and Functional Position in Central Agencies and Regional Institutions based on qualifications, competencies, and performance appraisal.<sup>22</sup>

The basis of the decision making that is most likely to be carried out by the Officer of the Personnel Supervisor above, taking into account Article 68 of the ASN Law is Discretion. S.F. Marbun defines discretion as "a space of independence or authority given to government officials or other state administrators to issue regulations and / or decisions and / or perform concrete actions in dealing with concrete problems that arise suddenly, urgently and need to be resolved, while regulations the legislation does not regulate it, is incomplete or unclear."<sup>23</sup>

The choice of this action might be made possible because the legislation is incomplete and unclear so it requires further explanation, or overlapping regulations occur. Therefore discretion is given as the freedom to interpret the vague legal norms contained in the law.

In the case of the ASN doctor who revoked the STR, it requires Discretion from the official Personnel Supervisor, especially in the use of appropriate employment and



placement and it does not violate the applicable laws and regulations and the decision can be justified.

#### **D. Conclusion**

Revocation of the ASN Doctor's STR caused legal uncertainty, both for the doctor and the government agency where he worked. The most affected by the revocation is the ASN Utilization Policy, mainly on ASN Management general policies, ASN job classifications, ASN Employee position competency standards, ASN Employee needs nationally, payroll scale, ASN Employee benefits, and PNS pension system.

The precautionary principle in decision-making for use and placement after the revocation of ASN's doctor's STR is carried out by the staffing officer in his work environment, by utilizing the discretion he has in the form of Discretion, because the Law also allows a change in the position of an ASN.

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**The Effectiveness of the Regulation of Minister of Health Number 33 In 2015  
Concerning the Planning of Health Human Resources Need  
(A Study in Kota Metro Public Health Center)**

Defi Fitri Agustiani

**Abstract**

The health human resource planning is begun from regional, provincial, until national government health care facilities. The government provisioned Regulation of Minister of Health number 33 in 2015 concerning guides for health human resource need for health care institutions. In Metro, there were eleven Public Health Centres and all of them composed health human resource according to the need. The objective of this research was to find out the factors inhibiting Regulation of Minister of Health number 33 in 2015 concerning the health human resource planning in Metro public health centre and the effectiveness of implementation result of this human resource need planning. This research used normative and empirical jurisdiction approaches. Data were collected with literary research and field study and then analysed qualitatively. The result showed that the inhibiting factors for implementation of Regulation of Minister of Health number 33 in 2015 were limited structure and infrastructure, limited staffs for health human resource planning, abilities of staffs planning health human resources were not optimal. The analysis result of health human resource planning was not yet fully used for the base of health human resource procurement because there was no Major's Regulation concerning health human resource planning, the placement of health human resource was still using *top-down planning*. The placement of human resources was not based on their competence and it was not based on minimum standard of public health centre worker need.

**Keywords :** Planning, Health Human resources, Public Health Centre.

## A. Introduction

Health personnel are the main driving force in the National Health System (NHS). Health Human Resources planning is a process of estimating the number of available human resources based on the place, skills and behavior needed to provide health services<sup>1</sup>. Mandated in Law Number 36 2009 concerning Health that the government regulates the placement of health human resources for the distribution of health services. In Article 21 paragraph (1) of Law Number 36 in 2009, government regulates the planning, procurement, utilization, guidance and quality control of health personnel in the context of the implementation health services. Then in Article 26 paragraph (3) of Law Number 36 in 2009, the procurement and utilization of health personnel are carried out by taking into account the types of health services needed by the community, the number of health care facilities and the number of health workers in accordance with the existing health service workload.

Provisions concerning health personnel are regulated by Law Number 36 in 2014, Article 14 paragraph (2) states that health personnel planning is arranged in stages (starting from health service facilities, district / city regional governments, provincial governments, up to the national government) based on the availability of health workers and the need for implementation of development and health efforts. In an effort to meet the needs of health human resources in all parts of Indonesia, the government established the Decree of the Minister of Health (Kepmenkes) Number: 81/MENKES /SK/I/2004. But with the development of the times, the application of the Decree of the Minister of Health Number : 81/MENKES/SK/I/2004 is no longer appropriate in facing the challenges of health problems now and in the future.

The government then stipulated Permenkes Number 33 in 2015 concerning the guidelines for planning health human resources needs by using the Health Workload Analysis (ABK-Kes) method, minimum labor standards and projected health personnel needs for the population. In Grace A. Salamate's research, in the Southeast Minahasa District Health Office, it is known that health human resources are closely related to every function of a health organization and also interact among these functions. Health human resources can be a threat to the implementation of policies, strategies, programs, and procedures of an activity if it is not managed properly and appropriately The Southeast Minahasa District Health Office does not do equalization in the procurement of Health Human Resources, but

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<sup>1</sup> Sasmito, W. A. (2010). *Health System*. Jakarta: Radjawali Pers, p. 124

health human resources are the result of the appointment of employees with the minimum number of formations provided by the local government. There is no effort to propose additional power but there is a development and maintenance of health human resources through the guarantee of providing benefits from performance, as well as the use of health human resources through the opportunity to be able to develop his career<sup>2</sup>.

According to WHO (2006) the threshold of the number of health human resources that must be met by a country is 2.28 in 1,000 population (for doctors, midwives, nurses). Seeing these recommendations the number of personnel and the ratio of health workers in Indonesia (World Bank, 2008) have not met sufficient criteria, so that the number of human resources needs to be increased<sup>3</sup>.

Indonesia is one of 57 countries facing a crisis in health human resources, both in number and distribution, because health workers contribute 80% in achieving health development success. Planning for health human resources needs is needed in a systematic process to obtain explicit goals for the future, through efficient use of HR, available now and in the future.

Metro City is one of the Administrative Cities in Lampung Province, with the mission "Metro City Family Education and Tourism Based on a People's Economy Based on Partisipative Development". The vision of Metro City is to improve the quality of human resources through the education and health sectors. In Metro City there are 5 sub-districts, and 22 villages. The population of Metro City is 160,729 people which are served by 11 health center (2 health centers inpatient and 9 health centers outpatient)<sup>4</sup>.

Based on the background described above, the following problems are formulated:

- a. What are the inhibiting factors for the implementation of the Minister Health Regulation Number 33 in 2015 concerning the guidelines for the preparation of health human resources needs planning in Metro City Health Center?
- b. How is the effectiveness of the implementation results planning of health human resources needs at the Metro City Health Center?

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<sup>2</sup> Salamante, G. A. (2014, October). *Health Human Resource Planning Analysis in Public Health Southeast Minahasa Distric*. Retrieved Mei 5, 2018, from [ejurnal.unsrat.ac.id: https://ejurnal.unsrat.ac.id/index.php/jikmu/article/download/7683/7249](https://ejurnal.unsrat.ac.id/index.php/jikmu/article/download/7683/7249)

<sup>3</sup>Anna Kurniati, F. E. (2012). *Study Health Human Resources In Indonesia*. Jakarta: Salemba Medika. p. 46

<sup>4</sup>SubagPlanning, I. d. (2017). *Health Service Profile Metro City*. Metro Lampung: Dinkes Metro.

## Research Method

The problem approach in this research was normative juridical and empirical juridical approach. The data used in this research were secondary data and primary data. The research data collection procedure was carried out by means of literature study and field study. Data analysis was carried out qualitative data.

## B. Discussion

The inhibiting factors of the implementation the Minister Health Regulation Number 33 in 2015 concerning guidelines for planning health human resource needs. The results of the research revealed that the factors hindered the implementation of Permenkes Number 33 in 2015 were:

### a. Facilities

Now in the modern era and advance technology greatly affect the quality of health services. The government requires every health center to carry out information systems held electronically and non-electronically to support the achievement of targets *Millennium Development Goals* (MDGs).

In an effort to support the achievement of the MDGs targets, the availability of adequate health human resources is needed, and in order to produce a plan for the right health human resources needs, supporting facilities and facilities add are needed. Availability of facilities for optimal data management will produce quality Human Resources data viewed from the type, number and qualifications according to the needs of health centers in order to achieve health development goals.

### b. HR of health center

In Article 16 paragraph of Law Number 75 in 2014 concerning health center, human resources of health center consist of health workers and non-health workers who must be able to support administrative activities, financial administration, information systems, and other operational activities at the health center. Non-health workers are the administrative staff of the health center, with a minimum number of 3 people in the health center inpatient and non-inpatient urban areas.

From the data of human resources profile of health center in Metro City, it is known in 2017 at Metro City there were 2 health center non hospitalized with the number of human

resources already meeting the minimum standards of labor, namely Yosomulyo Health Center, Mulyojati Health Center, and 1 inpatient health center Summersari Bantul. So there were 8 health centers that still lack human resources, including the administrative staff of the health center<sup>5</sup>. The burden of work tasks that are too much and carried out only by one administrative staff at the health center results in exhaustion, longer work time and the maximum work results obtained.

c. Health center human resources competencies

Efforts to obtain health human resources according to competency standards, requires qualified human resources planning staff. In Law Number 75 in 2014 there is no clear mention of the competence of non-health workers at the health center. The standard of human resource capability is definitely not available, resulting in information on human resources capabilities based on subjective predictions. Human resources planning is a serious obstacle in calculating its potential, because humans are not machines can be expected to work.

Health center is a health facility that provides health services to the community, so there is an assumption that all people working in the health center are health workers. The placement of human resources with health education as administrative staff of health center still exists today. However, due to work demands, each job assignment must be carried out properly. Various efforts have been made to carry out work responsibilities, including improving competence, by:

a) Training

Competency-based training, helping in doing the work. Training is part of education that is specific, practical and immediate (Samsudin, 2006)<sup>6</sup>. Human resources training aims to improve the mastery of various job skills in a short time. The training method is divided into two categories, firstway *in-house on-site training*, in the form of training in the workplace (*on the job training*), seminars, workshops, mass media instructions (video, tape recorders and satellites) and computer-based instruction; the second way with external or on-side training is done through courses, seminars, workshops organized by professional associations and educational institutions<sup>7</sup>.

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<sup>5</sup>Subag Planning, I. d. (2017). *Health Service Profile Metro City*. Metro Lampung: Dinkes Metro.

<sup>6</sup>Hamali, A. Y. (2018). *Understanding of Human Resource Management*. Jakarta: a thousand books.p.

<sup>7</sup>Ibid. p. 64

Metro City Health Office has provided the widest possible opportunity for Puskesmas human resources to improve competency by participating in training, except that the training facilitated by the government is still in the form of education and leadership training for structural personnel. In particular the training for administrative functional staff of the puskesmas has never been given.

Employees who take education and training will experience changes in their work activities, because insight and knowledge increase and already have a framework in the future, although it must be admitted that not all of the results of attending education and training can effectively affect employee performance, but local governments can implement grading employees who have implemented education and training<sup>8</sup>.

#### b) Education

The provision of higher education for government employees is regulated in Law Number 12 in 2012. Improvement of education is carried out consciously and planned to develop its potential, so that it has the spiritual strength of religion, self-control, personality, intelligence, noble character and the skills needed by itself, society, nation and state<sup>9</sup>.

Metro City Health Office gives permission to health center human resources to continue their education, either by funding independently (study permits) or with the help of government fees (learning assignments). However, considering the limited human resources available at the health center, the age factor, and the Metro City regional regulations, study permits are not given to all health centers staff.

The purpose of education for human resources is implemented (Nasution, 1994) is to deepen the case solving theory, be able to make decisions appropriately, be able to take policies quickly, decisions and policies that have been made can be reviewed, and coordination with other areas of work is getting better<sup>10</sup>.

### **The effectiveness of the implementation results the planned analysis of health human resources needs at the Health Center.**

The legislation that has the lower level or higher has aims to community and law enforcement officials can carry it out consistently without distinguishing the community

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<sup>8</sup>Sri Hartini, T. S. (2017). *Civil Service Law Di Indonesia*. Jakarta: Sinar Grafika. p.111

<sup>9</sup>Ibid. p. 67

<sup>10</sup>Hamali, A. Y. (2018). *Understanding of Human Resource Management*. Jakarta: Buku Seribu. p. 69



from one another. In reality the stipulated legislation is often violated, so the rule does not apply effectively<sup>11</sup>.

Anthony Allot said about the effectiveness of the law, that the law would be effective if the purpose of its existence and its application could be prevented from undesirable actions to eliminate chaos. Effective law in general can make what is designed can be realized. If there is a failure, then it is likely that there will be an easy correction if there is a necessity to implement or apply the law in a different new atmosphere, the law will be able to solve it<sup>12</sup>.

The implementation of planning analysis of health human resources health needs in the city of Metro has not been effective, caused:

- a. There are no regional regulations regarding health Human resources planning

The Health Workforce Development Plan for 2011-2025, health workers are the main key in the successful achievement of development goals in the field of health in Indonesia, and in the framework of facing the era of globalization. There needs to be a comprehensive health workforce development plan that is prepared in a spirit of partnership involving all components of the nation, both the government across sectors in the central and regional levels.

In Law Number 23 in 2014 concerning Regional Government, health is one of the obligatory government affairs in basic services. The government and regional governments have the responsibility and authority to meet the needs of health human resources, especially in primary health care facilities, namely puskesmas.

Metro City Regional Government through the Regional Human Resources and Planner Agency, makes planning and placement of regional employees including health human resources, in accordance with the formation and analysis of positions in the Head of State Personnel Agency Regulation (Perka BKN Number 12 in 2011) concerning guidelines for implementing job analysis and Minister of Administrative and Bureaucratic Reform of the Republic of Indonesia (PERMENPAN RB Number 25 in 2016) regarding the executive office nomenclature (general functional) for civil servants within government agencies.

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<sup>11</sup>Salim HS, E. S. (2016). *Application of Legal Theory in Research and Dissertation* Jakarta: Raja Grafindo Perkasa.p. 301

<sup>12</sup> *Ibid.* p. 302

Furthermore, the government followed up on the regulations on health human resources by stipulating Minister of Health Regulation Number 33 in 2015 as a guideline for health human resources planning, because health human resources have technical functional positions that are different from other general functional positions. There are differences in the two government regulations, and the Mayor of Metro has not made a regional regulation policy for health Human resources planning in the Metro City health care facilities.

b. Health HR placement istop down planning

The Ministry of Health is fully responsible in the field of health, including human resources and determining placement in the area. According to Heywood P.F and Harahap N.P (2009), in principle of the regions have the authority to regulate health workers, but in reality the central government still controls all civil servants who work in the area<sup>13</sup>.

Decentralization is seen as a challenge in health development. There are various overlapping tasks and functions between the central government and local government. Some regulations in staff management are compiled and controlled by the central government and do not provide regional opportunities to meet local needs<sup>14</sup>.

The central government's efforts to support regional decentralization by making guidelines for the planning of health human resources needs, namely the Minister of Health Regulation Number 33 in 2015.

There are still few regions that follow the existing guidelines, because the process takes a long time, and little authority is possessed by the regional head, causing less interest in planning health Human resources. the Regional Human Resources and Planner Agency (BKPSDM) regions have more power than other agencies to select and recruit employees. This causes the type and amount of health human resources not to meet the needs of health facilities.

c. The placement of health human resources is not according to competence

The low competency and quality of health human resources in health centers results in low quality health services. The demands of quality health human resources are now increasingly urgent, because non-infectious diseases are increasing and on the other hand there are still high rates of infectious diseases.

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<sup>13</sup>Anna Kurniati, F. E. (2012). *Study of Health HR in Indonesia*. Jakarta: Salemba Medika. p.e 76

<sup>14</sup>*Ibid*, p. 78

To get good quality health human resources, plan Human resources health in health center must be carried out based on Law Number 36 in 2014 concerning Health Personnel in Article 13. Health workers are considered competent if they have fulfilled competency tests from professional organizations, for example doctors, nurses, midwives and others as evidenced by the Registration Certificate (STR).

Placement of HR Health is not according to competence means that it has ignored Article 26 of Law Number 36 in 2014, health workers who have been placed in health care facilities must carry out their duties in accordance with their competence and authority.

d. Minimum standards for the need for Health center staff.

The distribution and placement of health human resources is the authority of the government mandated in Article 26 of the Health Law Number 36 in 2009, ideally health human resources are well distributed so that they meet the specified ratio adequacy.

In Metro City the calculation of the ratio of health centers to 20,000 residents is 7.35. This means that every 20,000 people on average are served by 1 to 2 puskesmas units (with a standard 1 health center: 20,000 residents). The ratio of Puskesmas to the population has fulfilled the concept of Puskesmas working area, which is an average of one unit of Puskesmas serving 20,000 residents and its condition in Metro City every 20,000 residents are served 1-2 health center<sup>15</sup>.

From the above ratio it was concluded that the availability and adequacy of health workers had met the target. But in the implementation in the field there is still a lack of personnel, this is because the ratio of health facilities is very high so that more health workers are needed so that the number of health workers in health facilities such as health centers is in accordance with the amount available<sup>16</sup>.

Uneven or unbalanced distribution of health human resources (maldistribution) can occur in certain professions such as dentists, specialist doctors, pharmacists and sanitarians. In an effort to overcome the maldistribution the local government to make regulations governor or mayor/regent and streng then coordination with the BKPSDM for placement of

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<sup>15</sup>Subag Planning, I. d. (2017). *Health Cervice Profile Metro City*. Metro Lampung: Dinkes Metro.

<sup>16</sup> *Ibid.*

health human resources. District / city governments have low fiscal capacity to propose the need for employee formation to Menpan for financing<sup>17</sup>.

At present the Metro City government through BKPSDM makes HR planning based on the Head Regulation of the State Civil Service Agency Number 12 in 2011 concerning guidelines for implementing job analysis and the Minister of Administrative Reform and Bureaucratic Reform of the Republic of Indonesia Number 25 in 2016 concerning the executive position nomenclature for civil servants in the environment government agencies.

The large number of health human resources has a big impact on access to health service users, namely health service users can choose the type of service needed and accessibility of health services is getting closer, then with a large number of health human resources, the community is increasingly served, and health services are not looking for profit but providing the best service (*service excellent*)<sup>18</sup>.

### C. Conclusion

Based on the results of the discussion and research, it can be concluded as follows:

1. Some of the factors that inhibit the implementation of health Human resources planning in the health center are the availability of facilities or facilities that cannot be used optimally for health center management activities, the number of administrative staff at the puskesmas is not in accordance with the minimum standards of labor, and the competencies of existing human resources are not in accordance with the administrative duties health center.
2. The results of the analysis health Human resources planning in the health center (bottom up planning) have not been used effectively by the local government, caused:
  - a. There are no regional regulations that support health human resource planning at the health center.
  - b. The placement of health human resources is carried out by the regional government according to the regulation of the Head of BKN, by adjusting the central government planning for the regions (*top down planning*).

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<sup>17</sup>Health, K. (2016, April 5). *The Strengthening Health Human Resources Management in Distribution of Central-Regional Authority*. Retrieved Agustus 9, 2018, from Kemenkes website: [www.observatorisdmskindonesia.org/kajian-standar-kebutuhan-SDMK-di-fasyank](http://www.observatorisdmskindonesia.org/kajian-standar-kebutuhan-SDMK-di-fasyank)

<sup>18</sup>Anna Kurniati, F. E. (2012). *Study of Health HR in Indonesia*. Jakarta: Salemba Medika. p. 44

- c. The competencies possessed by health human resources are not considered in the placement and assignment of job positions at the health center.
- d. The minimum standard of labor for the puskesmas contained in Permenkes Number 75 in 2014 has not been used as a guide in the implementation of the distribution of health human resources.

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## **The Provincial Government Authority in Conducting Programmed Immunization**

Miravianti

### **Abstract**

In Indonesia immunization had started since 1956 and continues to date. During its implementation, immunization had gained some success; but on the other hand it also experienced obstacles so that some diseases that were actually preventable by immunization, became reappear. Both the central government, local government, the private sector and community participation play a very important role in the successful implementation of immunization. The decentralization system was adopted by Indonesia resulted in the authority of local governments. Through the principle of regional autonomy, it is expected that public services can run faster, closer and more precisely, including in the health sector. Unfortunately, the unpreparedness of the regional government often results in a number of health service distortions that also occur in the implementation of Programmed Immunization so that the results do not meet the target. The purpose of this study was to determine the regulation of Programmed Immunization in Indonesia and the Provincial Government's policy on the implementation of Programmed Immunization. The approach that was used in this study was a normative juridical approach. The results showed that Immunization was regulated by two legal regimes, namely the legal regime of regional government and the sectoral legal regime. Act Number 23 of 2014 regulated the administration of government affairs including in the health sector. While the sectoral legal regime products consisted of laws, government regulations, and ministerial regulations to regulate more clearly on specific aspects in order to support the regional government law. Programmed Immunization was clearly regulated in Chapter III of Health Minister Regulation Number 12 of 2017 concerning Implementation of Immunization. The provincial government's policy on implementing Programmed Immunization was still not optimal, because the average health budget was not in accordance with what was mandated by Law Number 36 of 2009 and was more widely used for infrastructure development than for preventive health efforts. Programmed Immunization is very effective and brings many benefits not only in the health sector, but also extends to the economic and welfare sectors. Governments that underestimate Programmed Immunization will lose the opportunity to increase development in their regions.

**Keywords:** Authority, Provincial Government, Programmed Immunization

## A. Introduction

Health is a healthy condition, both physically, mentally, spiritually, and socially, which allows everyone to live productively socially and economically.<sup>1</sup> Health is one of the human rights whose protection, promotion, enforcement and fulfillment are the responsibility of the state, especially the government.<sup>2</sup>

The state through the government makes efforts to maintain and improve the highest level of public health; which is carried out based on nondiscriminatory, participatory and sustainable principles.<sup>3</sup> The forms of health efforts carried out by the government are promotive, preventive, curative and rehabilitative.

One of health efforts is immunization. In Indonesia, immunization activities have been carried out since 1956 through smallpox immunization. In 1977 Indonesia launched the Immunization Development Program (PPI) as an application of the Expanded Program of Immunization (EPI) which was launched by WHO since 1974 to eradicate deadly infectious diseases that can be prevented through vaccination. EPI also emphasizes the accessibility of vaccines for all the world's population, including poor countries.<sup>4</sup> Until now immunization is part of the priority of supervision in the health sector until 2019 in order to achieve Universal Health Coverage (UHC).<sup>5</sup>

Through immunization, the government managed to eradicate smallpox in 1974, obtained Polio-Free Certification in 2014 and eliminated Tetanus in 2016.<sup>6</sup> However, immunization activities have not been maximally successful; showed by the incidence of the disease that can be prevented by immunization (PD3I), including measles, rubella and diphtheria. The Indonesian Pediatrician Association (IDAI) even stated that Diphtheria

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<sup>1</sup> Article 1 number 1 of Act Number 36 of 2009 concerning Health

<sup>2</sup> Article 28I paragraph (4) of the Constitution of the Republic of Indonesia 1945

<sup>3</sup> Act Number 36 of 2009 concerning Health

<sup>4</sup>Samsuridjal Djauzi & Dirga Sakti Rambe. (2013). *Imunisasi, Sejarah dan Masa Depan. Cermin Dunia Kedokteran-205/ vol. 40 no. 6* , p.468.

<sup>5</sup>Biro Komunikasi dan Pelayanan Masyarakat Kemenkes RI. (2018, Maret 14). *TBC, Stunting, Imunisasi Jadi Prioritas Pengawasan Itjen*. May 30, 2018. <http://www.depkes.go.id/article/view/18031500003/tbc-stunting-imunisasi-jadi-prioritas-pengawasan-itjen.html>

<sup>6</sup>Biro Komunikasi dan Pelayanan Masyarakat Kementerian Kesehatan RI. (2017, April 29). *Vaksin di Indonesia Berhasil Memasmi Cacar dan Polio serta Mengeliminasi Tetanus*. April 9, 2018. <http://www.depkes.go.id/article/view/17050200005/vaksin-di-indonesia-berhasil-membasmi-cacar-dan-polio-serta-mengelminasi-tetanus-.html>



Outbreak in Indonesia in December 2017 was the biggest outbreak in the world by infecting 170 districts / cities and 30 provinces, covering 954 cases and 44 deaths as a result.<sup>7</sup>

It should be underlined that the success of immunization activities is assessed by the number of coverage and quality of services. In order to achieve optimal coverage and quality of service, community participation and quality service management are very influential factors.<sup>8</sup> The role of the central government, local government, the private sector, and society is absolutely necessary.

As we know, the decentralization system adopted by Indonesia has its own advantages, known as the authority of the regional government which consists of the provincial and district / city governments. Through the principle of autonomy, service to the community is expected to take place faster, closer and more precisely; including in the health sector.

Unfortunately what is expected doesn't work smoothly. The unpreparedness of the regional government often results in a number of health service distortions that also occur in the implementation of Programmed Immunization so that the results do not meet the target.

As a party that is also responsible, the government, in this case the provincial government, is obliged to issue a health policy that is in accordance with its authority.

The problems in this study are:

1. How are the Programmed Immunization arrangements in Indonesia?
2. What is the provincial government's policy regarding the implementation of Programmed Immunization?

## **B. Research Method**

The approach taken in this study is a normative juridical approach.

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<sup>7</sup>Andri Saubani. (2017, Desember 18). *IDAI: Kasus Difteri di Indonesia Terbesar di Dunia*. April 9, 2018. <http://nasional.republika.co.id/berita/nasional/umum/17/12/18/p158xn409-idai-kasus-difteri-di-indonesia-terbesar-di-dunia>

<sup>8</sup>Tri Yunis Miko Wahyono. (2018). *Peningkatan Cakupan dan Mutu Imunisasi*. April 25, 2018. <http://www.depkes.go.id/resources/download/info-terkini/materi%20pra%20rakerkesnas%202018/Pakar%20Imunisasi.pdf>

## C. Discussion

Immunization is an attempt to actively induce / increase one's immunity to a disease so that if one day is exposed to the disease it will not hurt or only experience mild illness.<sup>9</sup> Immunization by vaccination brings various benefits: the body's defenses formed by several vaccines will be lifelong; cheaper and effective; harmless, where serious reactions are far less frequent than complications that arise when attacked by the disease naturally.<sup>10</sup>

Programmed Immunization is a mandatory immunization to someone as part of the community in order to protect the person from certain diseases.<sup>11</sup> The authority to carry out Programmed Immunization requires legal regulations as a basis for justifying the law of health authority.<sup>12</sup>

### 1. Regulation on Programmed Immunization in Indonesia

Broadly speaking, immunization is regulated by two legal regimes, namely the regional government legal regime and the sectoral legal regime. Act Number 23 of 2014 is the product of the legal regime of regional government as the main legal regime that regulates the implementation of government affairs. Health, including Programmed Immunization, is a government affair that is divided between the Central Government, Provincial Governments and Regency / City Governments, is mandatory, and is related to basic services.

The implementation of immunization is always related to 4 (four) affairs, namely health service; human health resources; pharmaceutical preparations, medical devices, and food drinks; as well as community empowerment in the health sector.<sup>13</sup> This is because Programmed Immunization is a form of health efforts aimed at the community, requiring Health Human Resources that are suitable both in number, type and capability, requiring the availability of safe and logistical support vaccines, and in dire need of community participation.

The sectoral legal products that regulate immunization are:

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<sup>9</sup> See the definition of immunization in Article 1 of the Health Minister Regulation Number 12 of 2017.

<sup>10</sup> Satgas Imunisasi Ikatan Dokter Anak Indonesia. (2014). *Pedoman Imunisasi di Indonesia Edisi 5*. Jakarta: Badan Penerbit Ikatan Dokter Anak Indonesia. p.7-8.

<sup>11</sup> See the definition of Programmed Immunization in Article 1 of the Health Minister Regulation Number 12 of 2017.

<sup>12</sup> Hendrik. (2016). *Etika dan Hukum Kesehatan*. Jakarta: EGC. p. 27

<sup>13</sup> See Division of Government Affairs in the Health Sector in Attachment to Act Number 23 of 2014 concerning Regional Government.

1. Act Number 4 of 1979 concerning Child Welfare;
2. Act Number 4 of 1984 concerning Outbreaks of Infectious Diseases;
3. Act Number 23 of 2002 concerning Child Protection;
4. Act Number 36 of 2009 concerning Health;
5. Act Number 36 of 2014 concerning Health Workers;
6. Government Regulation Number 40 of 1991 concerning Combating Outbreaks of Infectious Diseases;
7. Government Regulation Number 72 of 1998 concerning Safeguarding Pharmaceutical Preparations and Medical Tools;
8. Health Minister Regulation No. 82 of 2014 concerning Control of Infectious Diseases;

Not all of the above laws and regulations mention explicit immunization. Some use another term which can be interpreted as immunization, given that immunization is an active immunity through vaccination. But overall, these sectoral regulations have supported Programmed Immunization.

Programmed Immunization is clearly regulated in Chapter III of Health Minister Regulation Number 12 of 2017 concerning Implementation of Immunization.

## **2. Provincial Government Policy on Implementation of Programmed Immunization**

A policy is a reflection of the government's commitment to use the broadest authority possessed for the welfare of society. Local government policies can be seen from the Regional Medium Term Development Plan (RPJMD). RPJMD is a regional development planning document for a period of five years, which contains the vision, mission of the Regional Leader, direction of policies, strategies and development programs.<sup>14</sup>

The vision of the development of Lampung Province is the final condition of the Lampung region which is desired by all components of stakeholders in Lampung Province in the 2015-2019 period. The vision is "Lampung Maju dan Sejahtera 2019". Prosperous communities are guaranteed to get their rights and have equal opportunities to improve their

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<sup>14</sup>Bappeda Provinsi Lampung. (2015). *RPJMD Provinsi Lampung Tahun 2015-2019*. Bandar Lampung: Bappeda Provinsi Lampung.p. 5.1

lives, obtain employment, education, health, and social services as well as adequate basic needs.<sup>15</sup>

In order to realize the Vision of the Medium-Term Development of the Lampung Province in 2015-2019, five missions were formulated as follows: 1) improve economic development and strengthen regional independence; 2) improving infrastructure for economic development and social services; 3) improve the quality of education, health, science and technology and innovation, community culture, and tolerance of religious life that is tolerant; 4) improving the preservation of natural resources and sustainable environmental quality; 5) upholding the rule of law, developing democracy based on local wisdom, and strengthening good and anticipatory governance.<sup>16</sup>

In meeting the needs of health services for the community, the Lampung Provincial Government continues to increase and improve the quality and quantity of health facilities infrastructure. Infrastructure such as regional hospitals, puskesmas, supporting puskesmas, village maternity huts (polindes), to the preparation of health operational vehicles.<sup>17</sup> This is done considering Lampung Province is still facing various problems in the health sector.

Health problems include: 1) National Maternal Mortality Rate (MMR) of 359 per 100,000 live births; 2) the high maternal mortality rate in Lampung Province which is 158 cases (2013); 3) the high infant mortality rate (IMR) of Lampung Province which is 30 per 1000 live births and 159 cases of infant mortality; 4) still high child mortality rates which is 32 per 1000 live births; 5) still high cases of under-five mortality which is 64 cases; 6) there is still a lack of availability of basic health facilities and infrastructure, the ratio of Puskesmas is 3.68 per 100,000 population, below the national level which is 3.89; 7) low ratio of posyandu 1.07 at the bottom third nationally; 8) ratio of Puskesmas 1: 28,041 (data for 2012, which ideally is 1: 20,000; 9) low doctor ratio which is 11.4 while the national ratio is 13.7; 10) low nurse ratio which is 70.85 (2012) while national 96.2.<sup>18</sup>

As mentioned earlier, the third mission is an effort to develop and strengthen the quality of human resources in Lampung Province considering that human beings are positioned as development centers. The aim is to improve the development index and community health status, with the goal of increasing access and quality of health services,

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<sup>15</sup>*Ibid.* p. 5.6

<sup>16</sup>*Ibid.* p. 5.7.

<sup>17</sup>*Ibid.* p. 2.47.

<sup>18</sup>*Ibid.* p. 4.7.

especially for maternal and child health by reducing the IMR from 30 / 1.000 live births to 24/1.000 live births.<sup>19</sup>

The strategy of the Lampung Provincial Government in the health sector is to increase the ratio of availability of health facilities to population units. While the policy direction are: 1) guaranteeing access and quality of health services; 2) improve the quality of clean and healthy lifestyle and nutritious food; 3) improve the qualifications of the Provincial Hospital to become a referral and puskesmas according to medical standards; 4) increase the adequacy of medicines and medical supplies according to national standards; 5) guarantee the availability of health workers that are evenly distributed and quality; 6) developing a public health financing system; 7) increasing efforts to prevent, eradicate and control infectious and non-communicable diseases.<sup>20</sup>

As we know, the Lampung Province RPJMD 2015-2019 still focuses on health problems in reducing the Infant Mortality Rate and has not directly touched on the problem of implementing Program Immunization. Whereas, as mentioned above, the mortality rate for under-five children and under-five mortality cases in Lampung Province is still high. More deaths of children under five are caused by infections that can actually be prevented by immunization, such as measles and diphtheria. Pregnant women are also susceptible to disease, so they need to get certain immunizations before or during pregnancy as protection from infectious diseases that endanger themselves and their fetuses. By contributing to immunization as a target, it will automatically synergize to improve maternal and child health.

However, the Lampung Provincial Government implicitly included immunization into the 7th strategy of RPJMD in 2015-2019, which reads "increasing efforts to prevent, eradicate and control infectious and non-communicable diseases". The term prevention can be interpreted as an immunization. Immunization with vaccination is included in the series of highest prevention efforts (primary) which are intended to avoid the occurrence of illness or events that can cause a person to get sick or suffer injury and disability.<sup>21</sup> From an economic point of view, primary prevention is the most successful protection effort and requires less cost compared to treatment and hospital care. So it is not a surprise when Katz

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<sup>19</sup>*Ibid.* p. 5.15

<sup>20</sup>*Ibid.* p. 6.6

<sup>21</sup>Satgas Imunisasi Ikatan Dokter Anak Indonesia. (2014). *Op.cit.* p. 4-5.

states immunization as "the best contribution of science ever given by scientists in this world".<sup>22</sup>

In addition to the RPJMD, health policies can also be seen from the Provincial Health Office's Strategic Plan (Renstra) as one of the Provincial Government's Work Units which has the task of implementing provincial government affairs in the health sector. The 2015-2019 Lampung Provincial Health Office Strategic Plan is the elaboration of the Lampung Province RPJMD document. The indicator targets in the health sector to be achieved until 2019 are: 1) Infant Mortality Rate (IMR) decreases from 30/1000 live births to 24/1000 live births in 2019; 2) Maternal Mortality Rate (MMR) per 100,000 live births is expected to be 309 / 100,000 live births in 2019; 3) prevalence of malnourished children 17% in 2019; 4) TB Case Notification Rate (CNR) to 154 per 100,000 population in 2019; 5) decrease in the annual Parasite Incidence (API) to 0.10 per 1,000 population in 2019; 6) the prevalence of HIV-AIDS per 100 people aged > 15 years fell to 0.49 in 2019; 7) DHF morbidity rate per 100,000 population drops to 46 in 2019.<sup>23</sup>

From the description above, it appears that the achievement of the complete basic immunization coverage as part of the Programmed Immunization is not included in the indicator targets of the Lampung Provincial Health Office's Service Strategic Plan. Whereas the spearhead of the character of health services is the preventive effort.

The preparation of the RPJMD and the Provincial Provincial Health Office Renstra in 2015-2019 also refers to the Millennium Development Goals as a global policy. In the fourth MDG target, reducing child mortality, one of the sub-targets is the percentage of 1-year-old children immunized against measles. The target set by the MDGs in 2015 in accordance with the Regional Action Plan for Acceleration of the MDGs Achievement in Lampung Province is 100%, but the percentage achieved in that year is 99.60%.<sup>24</sup> This shows that the agreed targets are difficult to achieve and become a big homework for Lampung Province.

Currently the MDGs are continued by the SDGs (Sustainable Development Goals). More than 6 million children still die before their fifth birthday every year. About 16,000 children die every day because of preventable diseases such as measles and tuberculosis.

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<sup>22</sup>*Loc.cit.*

<sup>23</sup>Dinas Kesehatan Provinsi Lampung. (2016). *Rencana Strategis OPD Tahun 2015-2019 Dinas Kesehatan Provinsi Lampung*. Bandar Lampung: Dinas Kesehatan Provinsi Lampung.p. 42-43.

<sup>24</sup>Bappeda Provinsi Lampung. (2016). *Laporan Pencapaian Akhir Target Millenium Development Goals (MDGs) Provinsi Lampung 2015*. Bandar Lampung: Bappeda Provinsi Lampung.p. xvi.

Therefore, the SDGs are committed to preventing such deaths through immunization campaigns. The aim is to achieve universal health coverage, and provide access to medicines and vaccines that are safe and affordable for all. Supporting research and development for vaccines is an important part of this process as well.<sup>25</sup>

Immunization prevents a person from infectious diseases which then reduces morbidity and mortality. This individual's immunity breaks the chain of transmission of infectious diseases to those around him. This is what is called social benefit because in this case 5% -20% of children who are not immunized will also be protected, called the herd immunity (community immunity).<sup>26</sup>

David E. Bloom et al examined the value of vaccines. Neither cost-effectiveness nor cost-benefit analysis has so far taken full account of the broader economic impacts of immunization. These impacts stem from the fact that immunization protects individuals not only against getting an illness per se, but also against the long-term effects of that illness on their physical, emotional, and cognitive development.<sup>27</sup>

The importance of these effects is borne out by recent work demonstrating the link from improved health to economic growth. There are several channels through which health improves wealth.<sup>28</sup>

The health impact on education can be explained that healthy children are better able to attend school and to learn effectively while in class. On productivity; healthier workers have better attendance rates and are more energetic and mentally robust. On saving and investment; healthier people expect to live longer, so they have a greater incentive to save for retirement. Last, health can boost economies via a demographic dividend. A change in the age structure of the population (via the lowered fertility rates) can lead to significant economic benefits.<sup>29</sup>

The broad impact of immunization requires the Provincial Government to make it a priority. To make it happen, of course, a very large investment is needed in the form of revenue sources in accordance with the prevailing laws and regulations. This shows that

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<sup>25</sup>United Nations Development Programme Indonesia. (n.d.). *Sustainable Development Goals: Goal 3 Good Health and Well-Being*. Mei 19, 2018. <http://www.id.undp.org/content/indonesia/en/home/sustainable-development-goals/goal-3-good-health-and-well-being.html>

<sup>26</sup>Satgas Imunisasi Ikatan Dokter Anak Indonesia. (2014). *Op.cit.* p. 12.

<sup>27</sup>David E. Bloom., David Canning., Mark weston. (July-September 2005). The Value of Vaccination. *World Economics Vol. 6 No. 3* , 16-39.

<sup>28</sup>*Ibid.*

<sup>29</sup>*Ibid.*

there is a relation between a health policy and health economy that is in line with the principle of money follow function.

To determine the percentage portion of the health budget, the Provincial Government must refer to the provisions of Article 171 paragraph (2) of Law Number 36 of 2009, namely "The amount of the health budget of the provincial, district / city governments is allocated a minimum of 10% (ten percent) of the income budget and expenditure outside the salary area. "In addition, the utilization of the health budget is prioritized for the benefit of public services with a minimum amount of 2/3 (two thirds) of the health budget in the APBD.<sup>30</sup>

In Lampung Province, the average health budget has only reached 5.6%.<sup>31</sup> The health budget of Lampung Province which is also a source of funds for the implementation of Programmed Immunization has not been in accordance with the mandate of Law Number 36 of 2009.

As a result of the lack of government commitment and inadequate health budget, there will be health service distortions, including in the implementation of Programmed Immunization. The implementation of Programmed Immunization consists of planning, providing and distributing logistics, storing and maintaining logistics, providing management staff, implementing services, managing waste, and monitoring and evaluating.<sup>32</sup>

The responsibility of the Provincial Government based on the provisions of the Health Minister Regulation No. 12 of 2017 includes: planning that refers to global commitments as well as the RPJMN and Renstra targets; is responsible for the supply of Cold Chain equipment, Cold Chain support equipment, anaphylactic equipment, and Documentation of Immunization Services according to needs; distributing vaccines, ADSs, Safety Boxes, Documentation of Immunization Services, documents for storage of vaccines and logistic documents for districts / cities; provide a place in the form of a vaccine warehouse that meets the requirements; providing management staff for the implementation of Programmed Immunization that meets certain qualifications and competencies; carry out Programmed Immunization, both in all together and individually using vaccines provided by the central government; conduct periodic, continuous and tiered monitoring and evaluation

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<sup>30</sup> See the provisions of Article 171 paragraph (3) of Act Number 36 of 2009 concerning Health.

<sup>31</sup> Dinas Kesehatan Provinsi Lampung. (2016). *Op.cit.* p. 30.

<sup>32</sup> See the provisions of Article 12 paragraph (2) of Health Minister Regulation Number 12 of 2017.



to measure the performance of Program Immunization in the region, including the management of vaccine waste in the area.

Distortion of health services will have a direct impact on the series of activities in the implementation of Programmed Immunization. In order to be successful, immunization coverage and the level of immunity obtained must meet the required target. The problem of reducing the coverage and quality of immunization services in general is caused by several things, including: 1) the consequences of decentralization that have not been running properly; 2) lack of funds for routine immunization operations at the district / city level; 3) the number of regional expansion which is not supported by the availability of facilities and infrastructure; 4) lack of cross-sector coordination (Private Health Service Unit) especially regarding recording and reporting; 5) there is still a delay in the distribution of vaccines, from central to provincial, provincial to district / city, district / city to the puskesmas; 6) lack of quantity, quality and distribution of human resources; 7) lack of complete and accurate information about the importance of immunization programs.<sup>33</sup>

Health service distortion is seen in the results of Andi Leny Susyanty et al's research which shows the lack of regional policy support for immunization programs is characterized by the absence of specific policies in the region. Cross-sectoral advocacy and collaboration has not run optimally; even though it has already been done but there is no continuity. Generally regional policy support is in the form of coverage targets, while guidelines for implementing internal immunization / SOP have not been owned by all regions. The absence of funds is also still found, especially in districts / cities.<sup>34</sup>

The same study shows that in some districts / cities the planning proposals are still not ideal, namely using previous data plus an estimated 10 percent without calculating the Usage Index (IP) of the vaccine in the previous year. Supportive supervision to measure immunization performance is still not optimal due to budget constraints.<sup>35</sup> Sub-district / city planning proposals that are not good will greatly affect the planning at the provincial level.

The process of distributing vaccines from provinces to regencies / cities cannot be carried out as top-down as they should. There are distribution constraints, such as inadequate

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<sup>33</sup>See Attachment to Decree of the Health Minister Number 482 / MENKES / SK / IV / 2010 dated April 9, 2010 concerning Guidelines for the Universal Child Immunization National Immunization Acceleration Movement 2010-2014 (UCI GAIN 2010-2014)

<sup>34</sup>Andi Leny Susyanty., Rini Susanti., Muhammad Syaripuddin., & Yuyun Yuniar. (2014). Sistem Manajemen dan Persediaan Vaksin di Dua Provinsi di Indonesia. *Buletin Penelitian Kesehatan*, Vol. 42, No. 2 , 108-121.

<sup>35</sup>*Ibid.*

distribution facilities, ranging from transportation equipment, to the availability of vaccine carriers and lack of cool packs.<sup>36</sup>

Delays in distribution in the regions generally relate to limited operational funds, inadequate transportation facilities and geographical conditions in areas that are difficult to reach. Certain events can also hamper distribution, such as disasters, elections and social conflicts.<sup>37</sup>

In terms of human resources, the problems that arise are due to the many and fast mutations / turnover of employees, inappropriate placement of employees, excessive load (one employee is responsible for several programs at once), lack of knowledge and lack of all levels due to lack of systematic training.

In addition to the above problems, activities for the preparation of information materials and advocacy implementation are often overlooked as a way to increase immunization coverage. This activity generally does not get enough budget from the government and is almost always placed on other costs so that it is often crossed out in budget discussions.<sup>38</sup>

Lack of complete and accurate information has an impact on the mother's lack of knowledge about immunization needs; lack of knowledge about completeness of immunization; lack of knowledge about immunization schedules; fear of side effects and wrong perception of contraindications. Everything can be the cause of the rejection of immunization so that children do not or are not fully immunized. In addition, there are still cultures in several regions that hinder the implementation of immunization. Likewise with religious understanding that rejects immunization.<sup>39</sup>

From the description above, the Provincial Government should give adequate attention and budget allocation for the implementation of Program Immunization. So far the Provincial Government has generally prioritized infrastructure development and excluded preventive efforts. Even if preventive efforts get a larger portion, there will be a lot of savings and benefits obtained in the future.

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<sup>36</sup>*Ibid.*

<sup>37</sup> See Attachment to Decree of the Health Minister Number 482 / MENKES / SK / IV / 2010 dated April 9, 2010 concerning Guidelines for Universal Child Immunization 2010-2014 National Immunization Acceleration Movement (UCI GAIN 2010-2014).

<sup>38</sup>*Ibid.*

<sup>39</sup>*Ibid.*

Immunization is not just an issue related to health; it is also closely related to the economic sustainability of a region. The Provincial Government should assume immunization more as a broad form of investment, not just an expenditure that inflows the regional health budget.

#### **D. Conclusion**

Immunization which is part of health efforts is regulated by two legal regimes, namely the legal regime of regional government and the sectoral legal regime. Act Number 23 of 2014 regulates the administration of government affairs including in the health sector. While the sectoral legal regime products consist of laws, government regulations, and ministerial regulations to regulate more clearly on specific aspects in order to support the regional government law.

The implementation of Programmed Immunization requires policy support from the Provincial Government as a form of commitment to use the widest possible authority for the welfare of the community. Supporting policies are outlined in the form of an adequate health budget to carry out Programmed Immunization.

Programmed immunization as one of preventive efforts provides effective results and far greater benefits compared to curative and rehabilitative health efforts. It not only has a positive impact on health, but also has a very broad impact on people's lives, especially the economy and welfare. Governments that underestimate Programmed Immunization will lose the opportunity to increase development in their regions.

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## **Regulation**

The Constitution of the Republic of Indonesia 1945

Act Number 4 of 1979 concerning Child Welfare;

Act Number 4 of 1984 concerning Outbreaks of Infectious Diseases;

Act Number 23 of 2002 concerning Child Protection;

Act Number 36 of 2009 concerning Health;

Act Number 23 of 2014 concerning Regional Government;

Act Number 36 of 2014 concerning Health Workers;

Government Regulation Number 40 of 1991 concerning Combating Outbreaks of Infectious Diseases;

Government Regulation Number 72 of 1998 concerning Safeguarding Pharmaceutical Preparations and Medical Tools;

Health Minister Regulation No. 82 of 2014 concerning Control of Infectious Diseases;

Health Minister Regulation No. 12 of 2017 concerning Implementation of Immunization

Decree of the Health Minister Number 482 / MENKES / SK / IV / 2010 dated April 9, 2010 concerning Guidelines for Universal Child Immunization 2010-2014 National Immunization Acceleration Movement (UCI GAIN 2010-2014).

## **The Regional Government Authority in Provisioning Regional Regulation of Non-Smoking Area**

Rika Tri Okviyanti

### **Abstract**

Regional regulation is one of regional government instrument to implement its household affairs so that regional autonomy will be real and responsible. Health is one aspect regulated and managed by regional government, and among of them is related to high number of smokers. In order to reduce the number of active smokers and control the negative effects of smoking so as not to disturb and endanger the health of individuals, families, communities and the environment, the Government has set a policy related to the implementation of Non-Smoking Areas as the embodiment of public health right. This research used normative jurisdiction approach and data were analyzed qualitatively. The results showed that the bases for regional government authority in provisioning Regional Regulation of Non-smoking Area is Law Number 36 of 2009 on Health, Government Regulation Number 109 of 2012 on Securing Ingredients Containing Addictive Substances in the Form of Tobacco Products for Health, and Joint Regulations of the Minister of Health and Minister of Domestic Affairs Number 188 of 2011 and Number 7 of 2011 on Guidelines for the Implementation of Non-Smoking Areas, which is the embodiment of provision in Article 28H clause (1) of Constitution 1945. The implementation of the authority to stipulate Non-Smoking Areas by Regional Governments which is still low so it needs guidance from the Central Government.

**Keywords:** authority, regional government, regional government regulation.

## A. Introduction

Indonesia applies the regional autonomy system to the broadest possible autonomous principle. Regional autonomy is the embodiment of a decentralized system that divides authority from the Central Government to the Regions to achieve the goals in the way desired by each region by considering all aspects and factors that exist in the region<sup>288</sup>. With the concept of regional autonomy, it has led to the implementation of autonomous regional governments. According to Faisal Akbar as quoted by Agnes Gulo, et al, there are several things that show the success of an area in carrying out regional autonomy, namely:<sup>289</sup>

1. The ability of regions to carry out democratization of governance.
2. The ability of regions to carry out the efficiency of the implementation of government, including the revenues and expenditures of regional financing sources.
3. The ability of regions to overcome the problem of fulfilling the welfare of regional people.
4. The ability of regions to strengthen national unity.

Health is one aspect that is regulated and managed by the regional government, which was initially top-down (from the central government to the regional government) and is now a bottom-up (from the local government to the central government). Regional autonomy in the health sector provides many opportunities for the government to explore regional capabilities from various aspects, ranging from the commitment of leaders and communities to building health, regional health systems, regional health management, funds, facilities and infrastructure that are adequate, so that public health in the area is expected becomes better and higher<sup>290</sup>.

Regional regulation is one of regional government instrument to implement its household affairs so that regional autonomy will be real and responsible<sup>291</sup>. As a rule of law in general, the Regional Regulation is also part of the legal norms that will apply in society. Legal arrangements in the juridical context are basically motivated by the view that the rule

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<sup>288</sup>Yusnani Hasyimzoem, et al., 2017, *Hukum pemerintahan daerah*, Malang: Inteligencia Media, p.14

<sup>289</sup>Agnes Gulo, Muhammad Abduh, Pendastaren Tarigan, & Faisal Akbar Nasution, 2013, *Kebijakan pemerintah daerah dalam pengaturan sumber pendapatan asli daerah dalam kerangka otonomi daerah (Studi pada kabupaten nias barat)*, USU Law Journal, II (2), 1-13, p. 1-2

<sup>290</sup>Rizwan Hamdi, 2010, *Otonomi daerah dan pembangunan kesehatan di indonesia*. Retrieved April 16, 2018, from <https://www.kompasiana.com/rizwanhamdi/55002700a333112f7550fb54/otonomi-daerah-dan-pembangunan-kesehatan-di-indonesia>

<sup>291</sup>Rudy, 2012, *Hukum pemerintahan daerah perspektif konstitusionalisme indonesia*, Bandar Lampung: Indepth Publishing, p.78

of law must be understood as pouring legal norms with its empirical consequences<sup>292</sup>. Thus, every rule is indeed a reflection of a norm and conditions of reality in a society.

One of the reality conditions that requires legal regulation is the high number of smokers in Indonesia. Smoking has a big impact on the unhealthy environment and the health status of the community. Based on the results of the 2013 Basic Health Research (Riskesdas), the proportion of smokers in Indonesia reached 29,3%. In addition, the State of Indonesia also earned the nickname "baby smoker country" because so many active smokers are younger<sup>293</sup>. In the period 2008-2012, the number of active smokers in children under the age of 10 reached 239 thousand children<sup>294</sup>. In order to reduce the number of active smokers and control the negative effects of smoking so as not to disturb and endanger the health of individuals, families, communities and the environment, the Government has set a policy related to the implementation of Non-Smoking Areas as the embodiment of public health right.

Based on the above background, the formulation of the research problem is as follows:

- a. What is the basis of the Regional Government Authority in determining the Regional Regulation of Non-Smoking Areas?
- b. How is the implementation of the authority of the Regional Government in determining Non-Smoking Areas?

## **B. Research Methods**

This research was conducted using a normative juridical approach. Data analysis of this research uses normative qualitative method, which is analyzing secondary data in the form of sentences that are consistent, logical, effective, and systematic. The type of data used is secondary data, namely data obtained by researchers from library and documentation research.

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<sup>292</sup>*Ibid.*, p.79

<sup>293</sup>E.M. Cha, (n.d.), *Indonesia dijuluki baby smoker*. Retrieved October 18, 2017, from <http://www.tcsc-indonesia.org/indonesia-dijuluki-baby-smoker/>

<sup>294</sup>*Ibid.*



## C. Results

### 1. The Basis of the Regional Government Authority in Determining the Regional Regulation of Non-Smoking Areas

According to H.D. Stoud, as quoted by Ridwan H.R., the authority is the overall rules relating to the acquisition and use of government authority by public law subjects in public legal relations<sup>295</sup>. According to Ateng Syafrudin, authority is what is called formal power, power that comes from the power granted by law<sup>296</sup>. Therefore, the authority is essentially the power given to state equipment to run the government<sup>297</sup>.

One type of authority is the authority that is distinguished according to government affairs<sup>298</sup>. Government affairs are government functions which are the rights and obligations of each level and/or government structure to regulate and manage those functions which are its authority in order to protect, serve, empower and prosper the community<sup>299</sup>. The classification of government affairs in Indonesia is essentially divided into three categories, namely governmental affairs managed by the central government (government), governmental affairs managed by provincial governments, and governmental affairs managed by district/city governments<sup>300</sup>. Government affairs that become government affairs include foreign political affairs, defense, security, justice, national monetary and fiscal affairs, and religion. Government affairs which are the authority of the regional government are divided into compulsory affairs and optional affairs. Compulsory affairs means that the administration of government is guided by minimum service standards, implemented in stages, and determined by the government. As for optional governmental affairs are governmental affairs that actually exist and have the potential to improve the welfare of the community in accordance with the conditions, peculiarities, and superior potential of the region concerned<sup>301</sup>.

Based on the compulsory and optional affairs, in the framework of embodiment its implementation at the level of regional government, it is necessary to establish regulations at the regional level, both regional regulations and other regulations. Thus, the regional head

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<sup>295</sup>Salim H.S. & Erlies Septiana Nurbani, 2013, *Penerapan teori hukum pada penelitian tesis dan disertasi* (1st ed.), Jakarta: PT. Raja Grafindo Persada, p. 183

<sup>296</sup>*Ibid.*

<sup>297</sup>*Ibid.*, p. 186

<sup>298</sup>*Ibid.*

<sup>299</sup>*Ibid.*, p.189

<sup>300</sup>Siswanto Sunarno, 2008, *Hukum pemerintahan daerah di indonesia*, Jakarta : Sinar Grafika, p.34

<sup>301</sup>*Ibid.*, p. 35

in carrying out these affairs has been affixed with the authority to make local regulations and other policy regulations so that all these affairs can run well<sup>302</sup>.

Regional regulations as one type of national legislation include provincial regulations and district/city regulations. Regional regulations occupy the lowest level in the order of laws and regulations because the legal norms created in the regional regulation rely on earlier and higher legal norms. Legal norms essentially contain two things, namely the standard of assessment of what is considered good and what is not good, and the standard of behavior that is what must be carried out and what must be abandoned<sup>303</sup>. Legal norms are generally coercive and therefore impose sanctions. Legal norms in regional regulations, whether or not there are sanctions depends on the material regulated in regional regulations<sup>304</sup>. In the implementation of regional government, the existence of local regulations is very important and strategic because in addition to functioning as an operational basis for the implementation of regional governance, it also serves as a means to achieve community prosperity through the implementation of the government's main functions, namely public services, building economic facilities to increase economic growth and provide protection to the community<sup>305</sup>. In accordance with the provisions of Article 18 paragraph (6) of the 1945 Constitution, the Regional Government has the right to stipulate regional regulations and other regulations to implement autonomy and co-administration duties<sup>306</sup>. Furthermore, this authority is stipulated in Law Number 23 of 2014 on Regional Government, specifically Article 236 paragraph (1) which states that Regional Regulation is established in the framework of implementing regional autonomy and co-administration. Furthermore, in paragraphs (3) and (4) it is stated that the content material in the Regional Regulation is related to the implementation of Regional Autonomy and Co-Administration, further elaboration of the higher legislation provisions, and local content in accordance with the provisions of legislation.

Thus, the region has the right to make legal decisions in the form of regional regulations and other regulations to regulate its household affairs in order to realize public welfare. Therefore, the regional regulation as an operational basis for the implementation

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<sup>302</sup>Yusdiyanto, 2012, *Implementasi kewenangan kepala daerah dalam pembuatan perda dan peraturan lainnya*. *Fiat Justitia Jurnal Ilmu Hukum*, 6 (3). Retrieved August 12, 2018, from <http://jurnal.fh.unila.ac.id/index.php/fiat/article/view/353/312>

<sup>303</sup>Satjipto Rahardjo, 2014, *Ilmu hukum*, Bandung: Citra Aditya Bakti, p. 30

<sup>304</sup>Slamet Hariyadi, 2011, *Pembentukan peraturan daerah: metode perancangan dan teknik penyusunan*, Yogyakarta: Prudent Media, p. 2

<sup>305</sup>*Ibid.*

<sup>306</sup>*Ibid.*, p. 3

of regional governance in realizing regional autonomy can also be seen as a form of local legislation because in terms of its contents and the mechanism of its formation, regional regulations are similar to the Law<sup>307</sup>.

The basis of the authority of the Regional Government in determining the Regional Regulation on Non-Smoking Areas from a sectoral point of view are:

1. Article 115 paragraph (2) Law No. 36 of 2009 on Health. It states that the Regional Government is obliged to establish non-smoking area in its territory.
2. Article 52 of Government Regulation Number 109 of 2012 on Securing Ingredients Containing Addictive Substances in the Form of Tobacco Products for Health. It states that Regional Governments are obliged to establish Non-Smoking Areas in their territories by Regional Regulations.
3. Article 6 paragraph (1) of the Joint Regulation of the Minister of Health and Minister of Domestic Affairs Number 188 of 2011 and Number 7 of 2011 on Guidelines for the Implementation of Non-Smoking Areas. It states that further provisions concerning Non-Smoking Areas in provinces and districts/cities are regulated by provincial and district/city regional regulations.

The regulation of the Regional Government's authority in stipulating the Regional Regulation on Non-smoking area is an embodiment of the provisions of Article 28H paragraph (1) of the 1945 Constitution which states that everyone has the right to live prosperous physically and mentally, reside, and get a good and healthy environment, and have the right to obtain health services.

By paying attention to the basis of the authority of the Regional Government in stipulating the Regional Regulation on Non-smoking area, the type of authority of the regional government in determining the Regional Regulation on Non-smoking area is included in the attribution authority, namely the authority to make decisions (*besluit*) which are directly sourced from the law in the material sense<sup>308</sup>. Therefore, the authority gained by government organs through attribution is genuine authority<sup>309</sup>, because the authority is obtained directly from the legislation.

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<sup>307</sup>*Ibid.*

<sup>308</sup>Salim H.S. & Erlies Septiana Nurbani, *Op.cit.*, p. 195

<sup>309</sup>*Ibid.*

## 2. The Implementation of The Authority of The Regional Government in Determining Non-Smoking Areas

Stipulation of Non-Smoking Areas is an effort to protect the community against the risk of threats to health problems because of the contaminated environment by cigarette smoke<sup>310</sup>. Stipulation of the Regional Regulation on Non-Smoking Area is one of the government affairs that become the Regional Government authority. However in its implementation, the Regional Government must still refer to the provisions that have been set by the Central Government, namely referring to the Joint Regulation of the Minister of Health and Minister of Home Affairs Number 188 of 2011 and Number 7 of 2011 concerning Guidelines for the Implementation of Non-Smoking Areas.

The joint regulation was drafted by two ministries because both of ministries were very responsible for the issue of Non-Smoking Area stipulation, namely the Minister of Health has a role related to human health where cigarette smoke can cause various diseases that are harmful to public health, while the Minister of Home Affairs has a role in relation to the Regional Government in drafting the regional regulation on non-smoking areas and also in determining the places that are non-smoking areas<sup>311</sup>. guidelines for the non-smoking area then became a reference by the local government to make regulations, which hierarchically acted as the executor.

Until May 2018, only 62 provinces/regencies/cities have had regional regulations on non-smoking areas, where eleven regions have also implemented the non-smoking areas policy in all territory. The 11 regions are 1) Bali Province; 2) Lampung Province; 3) Tulang Bawang Barat Regency, Lampung Province; 4) Pringsewu Regency, Lampung Province; 5) West Lampung Regency, Lampung Province; 6) Kota Probolinggo, East Java Province; 7) Lubuklinggau City, South Sumatra Province; 8) Tanah Laut Regency, South Kalimantan Province; 9) Hulu Sungai Selatan Regency, South Kalimantan Province; 10) Bantaeng Regency, South Sulawesi Province; and 11) Bintan Regency, Riau Islands Province<sup>312</sup>. There are still few Regional Governments that have stipulated Regional Regulation on non-

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<sup>310</sup>Kementerian Kesehatan RI, 2010, *Pedoman pengembangan kawasan tanpa rokok*, Jakarta: Kementerian Kesehatan RI, p. 16

<sup>311</sup>Kwe Fei Lie Shirley, Endang Wahyati Y., & Tammy Juwono Siarif, 2016. Kebijakan tentang pedoman kawasan tanpa rokok dikaitkan dengan asas manfaat. *SOEPRA Jurnal Hukum Kesehatan*, 2 (1), 104-111, p. 108

<sup>312</sup>Wisubro. (2018, May 31). *Kawasan tanpa rokok sudah terwujud di 19 provinsi dan 309 kabupaten/kota*. Retrieved August 20, 2018, from <https://jpp.go.id/humaniora/kesehatan/321783-kawasan-tanpa-rokok-sudah-terwujud-di-19-provinsi-dan-309-kabupaten-kota>

smoking area indicating low implementation of authority in stipulating Regional Regulations on non-Smoking area, whereas the basis of its regulation has been very clear in legislation. Therefore, the Central Government needs to provide guidance to Regional Governments that have not yet established Regional Regulations on Non-Smoking Areas in order to create a Non-Smoking Area to improve better public health.

#### **D. Conclusion**

Based on what has been explained in chapter III of this paper, it can be concluded that the basis of the authority of the regional government to implement the regional regulation on non-smoking areas is clearly stated in the legislations, namely Law Number 36 of 2009 on Health, Government Regulation Number 109 of 2012 on Securing Ingredients Containing Addictive Substances in the Form of Tobacco Products for Health, and Joint Regulations of the Minister of Health and Minister of Domestic Affairs Number 188 of 2011 and Number 7 of 2011 on Guidelines for the Implementation of Non-Smoking Areas, which is the embodiment of provision in Article 28H clause (1) of Constitution 1945. The implementation of the authority in stipulating Regional Regulations on non-Smoking area which is still low so it needs guidance from the Central Government.

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## Legislations

Constitution 1945

Law Number 36 of 2009 on Health

Law Number 23 of 2014 on Regional Government

Government Regulation Number 109 of 2012 on Securing Ingredients Containing Addictive Substances in the Form of Tobacco Products for Health

Joint Regulations of the Minister of Health and Minister of Domestic Affairs Number 188 of 2011 and Number 7 of 2011 on Guidelines for the Implementation of Non-Smoking Areas

## **Analysis of Public Service Survey in West Lampung**

Robi Cahyadi K, Rudy, Rudi Wijaya, and Chaidir Ali

### **Abstract**

The performance of local governments in terms of service to the community is rarely assessed by the people who are given the service. As a result, local governments do not have accurate data on how the quality of service has been provided to the service users. This research tries to give analysis to the problem. This research was conducted in West Lampung District with focus to quantitative method by survey to 300 respondents of service user community in West Lampung District selected through random way. The study was conducted from April to May 2018 up to the data and analysis. The study focused only on services at four regional apparatus organizations (OPD) in West Lampung District. The results showed that public services performed by the organization of regional devices to the community of service users is quite good seen from several variables. However, dissatisfaction with services also arises, for example, on the timeliness of services, tariffs paid, professionalism of service personnel, working hours of service and input or criticism of service quality.

**Keywords:** Public Service, Survey, West Lampung

## **A. Introduction**

The main function of government is serving the people so that the government needs to continue to improve service quality. A measure of success implementation determined by the level of satisfaction service. Service recipient satisfaction is achieved if recipe service gets service according to required and expected. concomitant technology progress and people demand in the service sector, then organizer unit public service be prosecuted to fulfill the expectations of the community in carrying out services.

Public service carried out by the government apparatus not yet feeling to fulfill people's expectation. This can be seen from various complaint people be delivered through mass media and social networks. Naturally, that complaint if not handled, that is will give the adverse impact on the government. Furthermore, it can cause distrust from the community. One effort that must be done in improving public services is conducting a community satisfaction survey for service users by measuring the satisfaction of service users.

Community satisfaction surveys so far have used Ministerial Regulation Number 16 of 2014 concerning Guidelines for Community Satisfaction Surveys Against Organizing public service. This regulation is considered non-operational and technical description in the implementation. This regulation is deemed necessary to be adapted to a survey method that is applicable and easy to implement. This regulation is also intended to provide direction and clear guidelines for public service providers. New regulations then emerge, namely the Regulation of the Minister of Administrative Reform and Bureaucratic Reform of the Republic of Indonesia Number 14 of 2017 concerning Guidelines for the Preparation of Community Satisfaction Surveys for Public Service Providers Unit

In carrying out people satisfaction surveys, done with due regard to principles. First, transparency is the result of people satisfaction surveys be necessary to publish and easily accessible to people. Second, Participatory is in carrying out the people satisfaction surveys must involve people participation and other related parties to get the actual survey results. Third, Accountable, namely things that are regulated in people satisfaction survey have to implemented and accounted for correctly and consistently to interested parties based on general rules that apply. Fourth; Continuously, the people Satisfaction Survey must be carried out periodically and continue to find out the progress of improving service quality. Fifth; Justice, namely the implementation of the people Satisfaction Survey must reach all



service users without discriminate their economic status, culture, religion, class and geographical location and differences in physical and mental capabilities. Sixth; Neutrality in conducting people Satisfaction Surveys, surveyors should not have personal, class, and impartial interests.

People Satisfaction Survey is a comprehensive measurement activity concerning the level of community satisfaction on the service quality provided of public service organizer. One of them is done in West Lampung Regency. Regency which is directly adjacent to South Sumatra Province has a heterogeneous population and is also quite critical of the level of public services. Another reason is the level of public service in West Lampung is still in the yellow zone (medium) according to the Ombudsman RI survey of Lampung Representatives in previous years.

## **B. Method**

The survey method carried out in this study includes., implementation and survey techniques, steps for preparing people satisfaction surveys, data processing, monitoring, evaluation and reporting mechanisms, analysis of survey results. This survey is comprehensive and The results of the survey analysis are used to evaluate community satisfaction with the services provided. This public satisfaction survey in West Lampung uses a sampling method *Stratified Random Sampling*. This technique is used when the population has heterogeneous members/elements that are heterogeneous (not homogeneous) and stratified, whether proportional or not. (Sugiyono; 2006:93). This technique is suitable for taking samples from diverse populations, both in terms of population type, ethnicity, gender, occupation, education and diverse respondent/sample age.

This survey uses qualitative methods with measurements using a Likert Scale. Likert scale is a psychometric scale commonly used in questionnaires and is the scale most widely used in survey research. This method was developed by Rensis Likert. Likert scale is a scale that can be used to measure attitudes, opinions, and perceptions of a person or group of people towards a type of public service. On the Likert scale, respondents were asked to determine their level of agreement with a statement by choosing one of the available options.

## **1. Public Service Concept**

Donal W. Cowell in Module 1 of the Public Service Policy Paradigm in the Regional Autonomy Era Institution of State Administration(2007:30), that service is an activity or benefit offered by a party to another party and in essence it is intangible and does not produce ownership something, the production process may also not be associated with a physical product.

Lovelock, Christopher H in Module 1 of the Public Service Policy Paradigm in the Regional Autonomy Era Institution of State Administration (2007:30), that service is a product that is intangible,takes place briefly and is felt or experienced, meaning service is a product that has no form so that there is no form that is owned, and lasts for a moment and does not last long, but is experienced and felt by the recipient of the service

Kurniawan in Lijan Poltak (2006:5) that Public Service is the provision of services (serving) the needs of a person or community that has an interest in the organization in accordance with the main rules and procedures that have been established.

The basic elements of public service can be stated by the fulfillment of the sense of satisfaction of the people given by the government in accordance with their expectations. Inu Kencana (2004:100) that service consists of 3 main elements, namely:

1. Relative costs must be lower
2. The time to work is relatively faster
3. The quality provided is relatively better

Institution of State Administration in Module 1 of the Public Service Policy Paradigm in the Era of Regional Autonomy (2007:31), there are 3 important elements in the Public Service, namely:

1. Local government service provider shows that the Regional Government has a strong position as a regulator and as a service monopoly holder and making the Regional Government be static in providing services because the service is needed by a person or community or an organization have an interest. This dual position is one of the factors causing the bad Public Services carried out by the Regional Government because it will be difficult to sort between the interests of running a regulator function and carry out the function of improving service.

2. People, communities, or organizations that have an interest or need services (Service Recipients), basically do not have bargaining power or not in an equal position to receive services, so they do not have access to good service.
3. Customer satisfaction in receiving services, the element of customer satisfaction is the concern of Service Providers (Government).

## **2. Quality of Public Services**

Lijan Poltak Sinabela (2006:6) defining quality is:

“Everything that is able to meet customer desires or needs. Then Sampara Lukman in Lijan Poltak Lijan Poltak stated that basically quality refers to the basic meaning:

1. Quality consists of a number of product features, both direct privileges and attractive features that meet customer desires and provide satisfaction with product use
2. Quality consists of everything that is free from deficiency or damage”

Triguno (1997:76) that Quality is as:

“Standards that must be achieved by a person/group/organization regarding the quality of human resources, the quality of work methods, processes and work or products in the form of goods and services. Quality has a satisfying meaning to those served, both internally and externally in the optimal sense of fulfillment of the demands of the community“

People satisfaction standards according to ministerial regulation PAN & RB Number 14 of 2017 concerned Regarding Guidelines for Preparing Community Satisfaction Data Service Provider Units Publik, consists of nine standards, namely:

1. Requirements; is a requirement that must be met in the management of a type of service, both technical and administrative requirements
2. Systems, Mechanisms, and Procedures, procedures are standardized service procedures for providers and recipients of services, including complaints.
3. Settlement time; is the period of time needed to complete the entire service process from each type of service.

4. Fees / Rates; is the fee charged to the service recipient in managing and obtaining services from the organizer whose amount is determined based on an agreement between the organizer and the people.
5. Product type service specifications; is the result of services provided and received in accordance with the stipulated conditions.
6. Executing Competencies are abilities that must be possessed by the implementer including knowledge, skills, creativity, and experience.
7. Implementing behavior; is the attitude of officers in providing services
8. Handling complaints, suggestions and input is the procedure for the implementation of complaint handling and follow-up.
9. Means are all things that can be used as a tool in achieving goals and objectives. Infrastructure is everything that is the main support for the implementation of a process (business, development, project) Means are used for moving objects (computers, machines) and infrastructure for immovable objects (buildings). (Permen PAN&RB No 14 of 2017, page 8-9)

Lijan poltak Sinabela (2006:6) that the features of excellent service include:

1. Transparency, which is a service that is open, easy and accessible to all parties who need it and is provided adequately and easily to understand.
2. Accountability, namely services that can be accounted for in accordance with the laws
3. Conditional, namely services that are in accordance with the conditions and capabilities of the service provider and recipient by sticking to the principles of efficiency and effectiveness.
4. Participatory, which is a service that can encourage community participation in the delivery of public services by taking into account the aspirations, needs, and expectations of the community.
5. Equal rights, namely services that do not discriminate from any aspect, especially ethnicity, race, religion, class, social status.
6. The balance of rights and obligations, namely services that take into account aspects of justice between providers and recipients of public services.

Tjiptono (1997:14) that the principle of quality public service is:

1. Direct evidence, including physical facilities, equipment, employees, and means of communication.
2. Reliability, is the ability to provide promised services immediately, accurately, and satisfactorily.
3. Responsiveness (responsiveness), is the desire of the staff to assist customers and provide services responsively.
4. assurance, including the knowledge, ability, politeness, and trustworthiness of the staff; free from danger, risk or doubt
5. Empathy, including ease in making good communication relationships, personal attention, and understanding the needs of customers

Quality is a standard of service that must be provided in accordance with the dimensions of quality which include reliability, responsiveness, empathy, assurance and direct evidence to achieve customer satisfaction.

### **C. Discussion**

The people satisfaction survey was conducted in May 2018 in West Lampung Regency, on four regional device organizations (OPD), namely; Investment Office, PTSP and Labor, Department of Transportation, Department of Population and Civil Registration, and Alimuddin Umar Hospital. The survey was conducted on three hundred (300) respondents from West Lampung Regency who received services from the four OPD.

Table 1. Community understanding of the tasks and functions of DPO or agencies surveyed in West Lampung Regency

| No | Understanding of OPD                            | Understanding the tasks and functions of OPD | Partial Understand |
|----|---|--|--------------------|
| 1  | Investment Office, PTSP and Labor               | 3 %  | 35,6%              |
| 2  | Department of Transportation                    | 18 %   | 57,7 %             |
| 3  | Department of Population and Civil Registration | 36,7 %                                       | 49,3 %             |
| 4  | Alimuddin Umar Hospital                         | 31,7 %                                       | 47,3 %             |

Based on the data in table 1 above the understanding of community respondents on the duties and functions of the Population and Civil Registration Office (36.7%) was higher than the understanding of the tasks and other OPD functions surveyed. Many respondents only understood part of the tasks and functions of the OPD surveyed with an answer range of 35.6% to 57.7%.

Table 2. Amount of respondents who received services from OPD or agencies surveyed in West Lampung Regency

| No | Service Quantity                                | Often get service | Ever (even though only once) |
|----|---|-------------------|------------------------------|
| 1  | Investment Office, PTSP and Labor               | 1,4 %             | 75,3 %                       |
| 2  | Department of Transportation                    | 38,3 %            | 50,7 %                       |
| 3  | Department of Population and Civil Registration | 34 %              | 55 %                         |
| 4  | Alimuddin Umar Hospital                         | 14 %              | 47,7 %                       |

Based on respondents' answers, respondents most often received services from the Department of Transportation (38.3%) then the Department of Population and Civil Registration (34%) and only 1.4% of respondents who often received services from the

Investment Service, PTSP, and Labor. If traced back even though only one time received service, the respondent's answers ranged from 47.7% to 75.3%.

Table 3. The level of service from OPD or agencies surveyed in West Lampung Regency

| No | Service Level                                   | GOOD Answer | Answer QUITE GOOD |
|----|---|-------------|-------------------|
| 1  | Investment Office, PTSP and Labor               | 32,7 %      | 39,4 %            |
| 2  | Department of Transportation                    | 31,6 %      | 43,6 %            |
| 3  | Department of Population and Civil Registration | 38,7 %      | 32,3 %            |
| 4  | Alimuddin Umar Hospital                         | 44,3 %      | 35,3 %            |

Based on Table 3 in rank, Alimuddin Umar Hospital gets the first rank of the four OPDs surveyed in terms of service levels in good categories. Respondents gave a choice of 44.3% to give good value to Alimuddin Umar Hospital. Alimuddin Umar Hospital defeated the assessment of the Population and Civil Registry Service (38.7% of respondents rated it GOOD), Department of Investment (32.7% of respondents rate GOOD) and Transportation Agency (31.6% of respondents rate GOOD).

Table 4. The level of satisfaction with the services of OPD or agencies surveyed in West Lampung Regency

| No | Level of Satisfaction with Service              | PUAS Answer | Answer QUITE SATISFIED |
|----|---|-------------|------------------------|
| 1  | Investment Office, PTSP and Labor               | 22 %        | 44,7 %                 |
| 2  | Department of Transportation                    | 30,3 %      | 39,4 %                 |
| 3  | Department of Population and Civil Registration | 37 %        | 36,4 %                 |
| 4  | Alimuddin Umar Hospital                         | 38,4 %      | 40,3 %                 |

Based on Table 4 by ranking, Alimuddin Umar Hospital ranked first among the four OPDs surveyed in terms of the level of satisfaction with services in the PUAS answer

category. Respondents gave a choice of 38.4% to give a PUAS assessment to Alimuddin Umar Hospital. Alimuddin Umar Hospital defeated the assessment of the Population and Civil Registry Service (37% of respondents answered PUAS), the Investment Office (22% of respondents answered PUAS) and the Transportation Agency (30.3% of respondents answered PUAS).

Table 5. Place of respondent's complaint (for dissatisfaction or service satisfaction) from OPD or service surveyed in West Lampung Regency

| No | place of complaint against Service              | The highest % answer                        | Answer No. 2 % highest                    |
|----|---|---|---|
| 1  | Investment Office, PTSP and Labor               | 25 %<br>(confide in others)                 | 13,7 %<br>(storing by myself)             |
| 2  | Department of Transportation                    | 28,7 %<br>(Head of related services or PNS) | 24,7 %<br>(confide in others)             |
| 3  | Department of Population and Civil Registration | 28,7 %<br>(Confide in others)               | 27 %<br>(Head of related services or PNS) |
| 4  | Alimuddin Umar Hospital                         | 27,3 %<br>(Mass media)                      | 27 %<br>(confide in others)               |

Based on table 5 above, the place for complaints about the quality of OPD services (regarding satisfaction or dissatisfaction with services provided by OPD) is diverse. The highest respondent's response to the Investment Service, PTSP, and the labor complained to others (25%). The highest respondent's response to the Department of Transportation was to complain to the Head of the Transportation Service or his PNS (28.7%). The highest response of respondents to the Population and Civil Registry Service was to confide in others (28.7%). The highest response of respondents to Alimuddin Umar Hospital regarding complaints about the level of satisfaction or dissatisfaction with the quality of service is quite unique. Respondents chose to complain to Alimuddin Umar Hospital to the mass media (27.3%), even though the respondent's answer is only 0.3% greater than the answer to confide in others.

#### D. Conclusion

The people of West Lampung Regency who were represented by 300 respondents in this study did not understand the duties and functions of the four regional device organizations (OPD) that were used as objects in this study, only a part of the community



understands the tasks and functions of the OPD that are researched. Lack of understanding of the institution's performance also influences their assessment of OPD performance.

The transportation department is the OPD that most often provides services to the people in West Lampung Regency according to the results of this survey, followed by Department of Population and Civil Registration. Services, infrastructure services, and roads are most often carried out by the Department of Transportation followed by the service of making a resident card, and population documents carried out by the Department of Population and Civil Registration

The best level of service from the four OPD surveyed was Alimuddin Umar Hospital, followed by Department of Population and Civil Registration, Investment Office and Department of Transportation. Alimuddin Umar Hospital is considered to have fulfilled nine service standards including requirements, systems, procedures, time, rates, services, advice, facilities, and infrastructure addressed in the Ministerial regulation PAN & RB Number 14 of 2017.

The level of community satisfaction with the services of OPD was also won by Alimuddin Umar Hospital, followed by Department of Population and Civil Registration, Department of Transportation, and Investment Office. The response of the people who are dissatisfied with the services of OPD is channeled by the community to the mass media or directly report to the official superior or head of service where the community receives service.

The results of this survey became a benchmark for conducting similar surveys in other regional device organizations in other places, and also as an evaluation of the performance of civil servants in terms of doing the best service for the community of service users. The survey results are also used for policy materials on public services and to see trends in public services that have been provided by the organizers to the community and the performance of public service providers.

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Masyarakat Unit Penyelenggara Pelayanan Publik

## **Legal Protection of Nurse in Providing Health Service**

Ambar Widiyanto

### **Abstract**

Health is the right for every citizen. This is stated in the Constitution of 1945 in Article 28 H. Nurse Profession provide health services for public including circumcision. Circumcision is an invasive intervention, a medical treatment which directly influences the patient's body tissue intactness. The nurse is given an authority to do this treatment based on a delegation of authority by the medical worker. It is explained in the Law number 2014 concerning Nursing in Article 32 clause 3 that: the delegation of authority is followed by the responsibility delegation. The legal protection for nurse profession in doing circumcision is explained in the Law number 38 in 2014 concerning Nursing in Article 38 letter (a) that: the nurse during the practice has the right to have legal protection as long as the nurse does his/her duty according to the standards of service, standards of profession, standards of operating procedures, provisions of legislative regulations. This legal protection can be reviewed based on the administration law, civil law, and criminal law. Administratively, it is related to the regulations becoming the base for this treatment including the administrative document completeness for the nurse permit. In the civil law, it is concerned to elements in the Article 1365 of Civil Code Procedure (KUHAPerdata) concerning. The deed against the law or the Article 1234 of Civil Code Procedure (KUHAPerdata) concerning default/breach of contract. In the criminal law, it is concerned to whether there are elements of crime according to the provisions in the Criminal Code (KUHP). If all provisions in the legislative regulations have been fully satisfied, then the nurse profession in doing circumcision will have a legal protection.

**Keywords:** legal protection, nurse profession, circumcision treatment.

## **A. Introduction**

Health is the right of each citizen, and this is said in the Constitution 1945 Article 28H that “Each person has the right to live in welfare mentally and physically, to live and to get good and healthy natural environment, and to get health service”.<sup>1</sup> This health service is an effort done by the government and public to realize the objectives of health development.

One of health problems in Indonesia is the high rate of bladder tract infection (BTI). Indonesia is the fourth country with biggest inhabitants in the world after China, India, and United States. Circumcision treatment is a treatment to prevent bacteria causing that BTI disease. The research result done in Montreal Children Hospital, Canada, stated that circumcision is beneficial to prevent bladder tract infection for men. Men with intact penis foreskin will have high risk to get this disease.

Circumcision is a treatment to cut or remove the penis foreskin and this is an invasive treatment. In the Regulation of Minister of Health No.290/MENKES/PER/III/2008 concerning the Consent for Medical Treatment in Article 1 point 4, it is explained that the invasive treatment is a medical treatment which directly influenced the intactness of patient’s body tissue.

Middle Lampung district is a wide district in Lampung province with  $\pm$  4.789,82 km<sup>2</sup> of land width, 28 sub districts, 311 villages and 1,449,851 of people. There were 39 public health centers consisting of 10 with inpatient facilities and 29 with outpatient services. There were 78 physicians and 789 nurses.<sup>3</sup> The circumcision demands compared to existing physician numbers were unbalanced so parts of circumcision treatments must be done by nurse profession.

In doing circumcision, nurse often faced legal problems, including the following cases:

1. The nurse, Moch Syamsul Arifin, was reported to the Banyumas police office because an allegation of circumcision malpractice to the FM who suffered infection.<sup>4</sup> The reporter said the nurse had no right to do circumcision because he was not a physician.
2. The medical malpractice allegation to a nurse, in Tanjung Baru village of Baturaja Timur sub district of OKU district, who circumcised a male kid of 9 years old in Kemiling, Tanjung Baru village of Baturaja Timur sub district.

Based on that background, the researcher wanted to study further about “how did the legal protection for nurse profession in providing health service (circumcision) for public”.

## **B. Research method**

This was a descriptive research to elaborate completely, in detail, and systematically the research result in form of research report as a scientific work.<sup>6</sup> Informants in this research were Head of Health Office in Middle Lampung district, the head of PPNI in Middle Lampung district, and some nurses in Middle Lampung who did circumcision.

## **C. Research result**

The legal protection for nurse profession in doing circumcision can be viewed from some aspects; the aspects of administrative law, civil law and criminal law. According to Kuncoro<sup>7</sup>, the legal protection can be provided for the nurse profession doing circumcision, when the nurse administratively had obeyed all prevailing regulations and practically had satisfied all existing standards. This is explained in the Law number 38 in 2014 concerning Nursing, in Article 36 letter (a) that: the nurse in doing nursing practices has the right to receive legal protection as long as the nurse does the jobs according to service standards, profession standards, standards for operating procedures, and provisions of legislative regulations.

### **a. The Administrative Legal Protection Perspective**

Administratively, the legal protection for the nurse profession in doing circumcision is related to the regulations which are made as base in doing the circumcision treatment and regulations explaining the administrative document completeness that the nurse, who is going to do circumcision, must filled. The regulations becoming the base for circumcision treatment implementation by the nurse are:

1. Law number 36 in 2014 concerning the medical workers. It is explained in Article 1 clause 1 that: the health worker is a person serving in health field by having health knowledge and/or skill acquired from the health education which in a particular condition has an authority to conduct an effort for health purpose. The nurse belongs to health worker category, because the nurse has knowledge and/or skill acquired from the health education. It is explained in the Article 1 clause 4 that: a health effort is any activity and/or series of integrated and sustainable activities to maintain and improve the public health degree in the form of disease prevention, health improvement, sickness

- medication, and health recovery by the government and/or public. Circumcision is an effort for disease prevention; the bladder tract infection. According to Sumaryono<sup>8</sup>, the nurse provided with authority to do health efforts is the nurse who passed the competence test, and therefore the nurse is proven to have health knowledge and/or skill.
2. Law number 38 in 2014 concerning Nursing. It is explained in the Article 30 clause 1 letter (d) that: in doing the job to provide nursing care in the individual health effort field, the nurse has an authority to do nursing actions. The nursing action implementation is divided in to two; the action based on the delegation of authority and the action based on a mandate. The circumcision action is an action based on the delegation of authority. It is explained in the Article 32 clause 3 that: the delegation of authority for conducting a medical action is given from a medical worker to the nurse by the handover of responsibility. This explains that the circumcision action can be done by the nurse, and all consequences that may occur from that action become the responsibilities of the nurse doing circumcision.
  3. The Regulation of Minister of Health number 17 in 2013 concerning the amendment of the Regulation of Minister of Health number HK.02.02/MENKES/148/I/2010 concerning the Permit and Organization of Nurse Practices. It is explained in the Article 8 clause 6 that: the nursing actions as it is referred to in clause (5) includes the organization of nursing procedure, nursing observation, health education and counseling. The nursing procedure implementation as it is referred to in the above clause is doing nursing actions according to prevailing procedures. Circumcision action is a nursing action with a standardized implementation procedure, so that this action is based on the delegation of authority and it must be conducted based on the prevailing standards of operating procedures. According to Sabarno<sup>9</sup>, the circumcision whether done manually or by using modern equipment has already had standards of operating procedure (SOP), and the nurse doing this circumcision must be in accordance with the SOP.
  4. The Regulation of Lampung Province Government number 4 in 2011 concerning the Implementation of Nursing Practice. The nurse authority in doing circumcision action is written in the Article 14 clause 1 letter (e) and (f), that: the autonomous nursing actions as it is referred to in Article 13 clause (2) includes: (e) doing limited medical actions which are simple invasive actions, (f) provide services for birth control, immunization and circumcision without complications. According to Ali Subagiyo<sup>10</sup>, considering the Regulation of Lampung Province Government Number 4 in 2011

concerning the Implementation of Nursing Practice, it is clear that circumcision is an autonomous nursing action, so that this does not require a delegation of authority from the medical workers. However, by considering the Regulation of Minister of Health No.290/MENKES/PER/III/2008 concerning the Consent for Medical Action, Article 1 number 4, that: invasive action is a medical action which directly influence the intactness of patient's body tissue, it is better for the nurse to have awritten proof concerning the delegation of authority from the medical workers.

5. The Regulation of Middle Lampung regent Number 12 in 2017 concerning the Implementation of Nursing Practice. Middle Lampung district published Regulation of Middle Lampung regent Number 12 in 2017 concerning the Implementation of Nursing Practice, as a legal protection for the nursing profession in doing circumcision action and it is written in the Article 17 number 7 letter (a): in doing a job based on the delegation of authority as it is referred to in clause (1), the nurse has an authority to do medical action according to the nurse's competence upon the delegation of authority from medical workers. It means that the nurse is provided an authority to do circumcision action, but the nurse must have the related competence

The regulations explaining the completeness of administrative documents for the nurse doing the circumcision are:

1. Registration Letter (STR) The regulation explaining about the requirement for the nurse to have Registration Letter (STR) is the Law number 38 in 2014 concerning Nursing, Article 18 clause 1. It is explained that the nurse doing nursing practice must have the Registration Letter (STR). This means that if the nurse does not have STR, the nurse cannot do nursing practices, including circumcision action. One of requirements to have Registration Letter (STR) for the nurse is that the nurse must possess competence certificate and registered officially as the member of Association of National Nurse of Indonesia (PPNI) and it is proven by having the Member Identification Number (NIRA).
2. Member Identification Number (NIRA) A regulation explaining the requirement for having Member Identification Number (NIRA) is the PPNI organization regulation Number 050/DPP.PPNI/SK/K.S/VII/2016 concerning suggesting recommendation. Article 3 clause 1 explains that recommendation is provided for the Registration Letter (STR) for nurse and STR for foreign country nurse who had become the member of PPNI and had paid off membership fee according to the organizational regulation. This explains that in order to have STR, there must be a recommendation from the nurse



profession organization, and the nurse must be registered in the organization which is proven by the Member Identification Number.

3. Competence Certificate The Law number 38 in 2014 concerning nursing, Article 18 clause 3 letter (b) explains that: one of requirements to get Registration Letter (STR) is that a nurse must have competence certificate of profession certificate. STR is only given for the nurse who has a particular competence with profession certificate besides other administrative requirements. Even though a nurse has Registration Letter (STR), the nurse cannot do nursing practices, because STR is only a written proof provided by the nursing council for the nurse has had competence certificate or profession certificate and who has had other particular qualifications which are legally recognized, but this recognition to the nurse's competence is not a permit. To be able to practice, the nurse must have written permit from the government in form of nursing practice permit (SIPP).
4. The Nursing Practice Permit (SIPP) The Law number 38 in 2014 concerning Nursing, Article 19 clause 1 explains that: the nurse who commits nursing practice must have a permit. Clause 2 explains that: the permit as it is referred to in clause (1) is given in the form of Nursing Practice Permit (SIPP). According to Hairul Azman<sup>12</sup>, the written proof concerning the nurse's permit to commit nursing practice is the Nursing Practice Permit (SIPP), which is issued by the local government through Health office. All nurses doing nursing practice, both in the health service facilities or private practice must have that SIPP.

#### **b. The Civil Law Perspective**

In the perspective of civil law, the legal protection for the nurse profession to do circumcision will be available if in the implementation there is no deed against the law and default. *Deeds against the law* The regulation explaining the deeds against the law is explained by the Article 1365 of Civil Code (KUHPperdata), that: "for any deed against the law and causing the loss to another person will cause the person causing the loss because of his/her guilt to replace the loss." From this elaboration, there are elements of the deed against the law: there is a deed against the law, there is a mistake, and there is a causal relationship between the loss and the deed. Therefore, there must be no such elements present in th circumcision practice.

*Default/breach of contract* Default or breach of contract is a condition that an achievement or liability cannot be made as it is in the contract by a particular party in the related contract. The Civil Code (KUHPerdata) Article 1234 explains about: ‘each contract to provide something, to do something, or not to do something’. It can be concluded that the elements of default/breach of contract are: providing something, doing something, and not doing something.

However, it must be remembered that the contractual relationship in therapeutic transaction is *inspanning verbintenis* in nature, not a *resultaat verbintenis*, a contract with result as the achievement. Therefore, in the circumcision practice, when the circumcision action has been done at the best ways, this has been a form of achievement.

### **c. The Objectives of Legal Protection in Criminal law Perspective**

Even though administratively the nurse has obeyed all the legislative regulations, when there is any violated standard in the circumcision practice, which causes the loss to the patient, and it can be proven legally and convincingly, then it is a crime, and legal protection for the nurse profession can be provided. A criminal deed is an action prohibited and threatened by the criminal law, for anyone does the deed. The elements of a criminal action include: first, the deed is either an active or passive behavior that may cause any condition or manner that is prohibited by the law. That Second, a behavior and the caused result must have been against the law, both in formal and in material terms. Third, there is anything or any circumstance that follows the behavior or the result which is prohibited by the law.<sup>13</sup>

The circumcision action done by the nurse must be conducted according to the standard of operating procedure, standard of competence and standard of professional ethic. If any of these standards is violated so that a mistake occurs which causes loss to the patient, this can be criminally sanctioned upon the result of that action. However, there must be a proof and the elements against the law must be satisfied upon that action. The elements against the law include: there must be a deed (either doing or not doing), the deed is against the law (either in written or not in written), there is a loss, there is a causal relationship (causal law) between the deed against the law and the loss, and there is a guilt (*schuld*). The standards that a nurse must obey in circumcision practice include: standard of operating procedure, standard of competence, and standard of professional ethic.

*Standard of operating procedure* Standard of operating procedure is a series of standardized instructions/procedures to complete a particular job.<sup>14</sup> Circumcision practice

either manually or by modern method has a standard of operating procedure. *Standard of Competence* Standard of competence for the nurse is an agreed measurement or indicator related to a nurse's ability including knowledge, skill and attitude in completing a task or a job. The nurse's competence in doing circumcision practice is circumcising in a normal condition without any complication. *Standard of Professional Ethic* In doing nursing practices, including doing circumcision, the nurse must adhere the ethical code of nursing which consist of nurse's responsibilities to the client, to the nursing practices, to the public and state, to the working mates, and to other professions.

#### **D. Conclusion**

Circumcision is an invasive action, a medical treatment that influences the patient's body tissue intactness. This action can be done by the nurse based on the delegation of authority by the medial worker. The legal protection for the nurse profession in circumcision practice can be provided when the circumcision practice has been in accordance with the prevailing legislative regulations, in terms of administrative law, civil law, and criminal law

Government The government should formulate the Regulation of Minister of health as the elaboration of the Law number 38 in 2014 concerning Nursing by involving PPNI organization to provide clearer limitations concerning the authority of the nurse.

The Nurse The nurse must complete all required administrative documents and permit for nursing practice. The nurse must obey standard of operating procedure, standard of competence, and standard of professional ethic so that the nurse can be legally protected.

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## **The Legal Analysis of Vehicle Repossession Finance Companies**

Bani Muhammad Alif

### **Abstract**

Forced vehicle withdrawal by Consumer Financing and often using debt collector services is basically an act of execution. Though the implementation of such executions is not appropriate. A debtor who has not been able to pay off the debt due is a default. In this way, the creditor does have the right to guarantee the book that has been secured by the reason of default. A debt debt between the debtor and the creditor is generally preceded by an agreement. If the default creditor is based on the reason that the creditor can cancel the agreement. With the cancellation of the loan agreement, the withdrawal of goods that have been delivered to the consumer and the Consumer Financing agreement made previously is deemed null and void. The research method used is normative juridical research, data is processed and analyzed with qualitative methods that aim to provide a clear picture of the object under study. Cancellation of consumer financing agreements is not easy to do by creditors, because it must go through court decisions. Without cancellation, the creditor cannot confiscate the item that has been received by force. Even if creditors still insist on confiscating, then the action is a violation of the law. Creditors cannot be arbitrary with the expectation that violence will attract debtor vehicles that pay installments. In fact, this action is actually an act that violates the law and can be threatened with a criminal threat, namely Deprivation in Article 368 of the Criminal Code (KUHP). Forced vehicle collection by consumer finance companies through third party services is illegal, according to Law No. 42 of 1999 concerning Fiduciary Guarantees, the right of execution is the authority of the court, not the authority of sellers of debt collection services that are often leased by the company. In addition, the issuance of Minister of Finance Regulation No. 130 / PMK.010/2012 concerning Fiduciary Registration for Financing Companies Conducting Consumer Financing for Motor Vehicles with The imposition of Fiduciary Guarantees, companies are prohibited from forcibly withdrawing vehicles from consumers who experience delinquent payment of vehicle loans. The method that can be taken by creditors to resolve disputes with the debtor is through the court. This is in accordance with PMK No.130 / PMK.010 / 2012. In addition, the Kapolri Regulation (Perkap) No. 8 of 2011 concerning the Safeguarding of Fiduciary Guarantee Execution has actually been explained how the procedure for object retrieval of the above credit agreement has been attached to a fiduciary guarantee.

## **A. Introduction**

The increase in the number of motorized vehicles both two-wheeled and four-wheeled in Indonesia from year to year is increasing rapidly. This is inseparable from the increasing number of financial institutions (as creditors) that offer loans / credit to the public (debtors). Although financial institutions that provide loans to the public have determined a number of requirements that are quite strict, in fact there are still disputes or disputes between creditors and debtors.

For example, the news in the daily newspaper *Tribun Lampung* edition Saturday, April 15, 2017. In this case there was an action of seizure of credit motor vehicles carried out by the company PT. WOM Finance (director) against Herdaleni (debtor) even though the installments only have four months left. Herdaleni said that a few months ago, three officers who claimed to be from PT WOM Finance had come to her place of work and asked her to give up a delinquent credit motorcycle. With great compulsion, Herdaleni finally gave up her motorcycle because she was very scared at that time.

PT WOM Finance asked Herdaleni to pay off four months in installments in arrears along with fines. In addition there are additional costs for motorcycle withdrawals. Herdaleni was confused at the time why the cost of withdrawing the motorbike made was actually charged to her. Finally, because he did not accept his motorcycle being forcibly withdrawn, Herdaleni took the initiative to visit PT WOM Finance to pay installments for two months. But when he arrived there it did not fail because PT WOM Finance did not respond. They even insisted on asking for repayment of the four-month installments along with swollen administrative costs of around Rp. 5 million. While the total monthly installments are around Rp. 700,000. There Herdaleni felt that her rights as a consumer had been seized.

When confirmed to Andri, the officer of PT WOM Finance, stated that if Herdaleni wanted his motorbike back then he had to pay off the installments and the fine. While in other places, according to Candra Bangkit, Head of Ekosob LBH Bandar Lampung, according to the rules the company does not have the right to withdraw or take vehicles from consumers by force.

Disputes or disputes regarding motorized vehicle loan agreements are often found between consumers and business actors. To resolve the dispute is not as easy as expected. One side agreed to depart from the perspective of the agreement that disputes over agreements meant defaults and resolved through the general court. The other side is still

there who maintain that the motorcycle loan agreement is the relationship between consumers and business actors.

## **B. Discussion**

At present, all aspects of human activities or society cannot be separated from the role of means of transportation. The need for transportation is very important because of the increasing level of community activities so that in order to support it, the importance and amount of transportation is needed by the community. If in the past we assumed that owning a vehicle or means of transportation was a secondary need for humans, we cannot say that now. The presence of transportation equipment has become a primary need for some Indonesians.

This is then seen by business people as a promising business opportunity. Business actors, especially in the field of transportation, see this as land to offer vehicles for motorized vehicles, both two-wheeled and four-wheeled vehicles, to the general public. Even the businessmen are competing to give attractive offers to prospective customers by giving gifts, discounts, ease of purchase, namely by giving credit with a down payment or downpayment (DP) lightly. In addition, more and more businesses are marketing their products by making advertisements or creating promotions / exhibitions in strategic places such as supermarkets so that prospective customers are interested in buying them.

Buying and selling motorized vehicle transportation to consumers in addition to purchases in cash and directly, can also be done in installments or in other words with a credit system. As said before that with this credit purchase system, prospective customers will find it easier to get a motorized vehicle they want because they do not need to prepare large funds at that time, so this is certainly an attraction for prospective buyers and now more and more buyers are using how to purchase with this credit system. Although in practice this also often creates many more complex problems compared to the cash purchase system.

The socio-economic conditions of the Indonesian people are mostly still in the middle to lower classes. This means that the purchasing power of several community groups to meet their needs is still relatively low. This is certainly not in line with the need for motorized vehicles as a means of transportation, which at present as previously stated above has become one of the primary needs for some people. This is one of the problems also for motor vehicle entrepreneurs because even though with all kinds of promos and conveniences

provided, but if the purchasing power of the community as a prospective customer is still relatively low, then it is equally futile.

The low purchasing power of people towards the need for motorized vehicles is ultimately used by financial institutions that have the ability to provide cash for those in need. The financial institution in question is not a banking institution like the one previously known in the community, but a non-bank financial institution which in this case is called a financial institution. In this practice, the financing institution carries out some functions which were initially only able to be carried out by banking institutions, namely providing or channeling credit to the community. Practices like this in Indonesia are better known as Consumer Finance.

This Consumer Financing is basically similar to Consumer Credit, which was first known in the UK through the 1974 Consumer Credit Act (Consumer Credit Act 1974). The difference is only in financial service companies that finance it where Consumer Financing is financed by a Financing Company while Consumer Credit is financed by the Bank. This Financing Company is a business entity outside a bank and a non-bank financial institution specifically established to carry out activities in the business field of a Financing Institution.

This Consumer Financing Agency focuses its business activities on the financing function, which is to help provide cash for the people who need it. The rapid development of Consumer Financing institutions today can be seen from the high interest of the people to use their services. The main reason that people use in general is that the process is not difficult and the disbursement is fast and the installment system is light. However, in the practice of Consumer Financing, there is no risk, and the most frequent is related to the delay in returning credit by consumers, transfer of ownership of motorized vehicles, accidental damage to motorized vehicles or accidents which can reduce the sale and / or loss the selling value of the motorized vehicle.

Therefore, in the Consumer Financing agreement made by the Consumer Financing company unilaterally, clauses that bind consumers are always loaded to avoid these risks. In the end this also causes the Consumer Financing company to have special privileges for consumers which are realized in the form of authority such as being able to force consumers to take insurance programs, giving them the power to sell motorized vehicles which are used as collateral for loans, and to forcibly withdraw motor vehicles consumers default in the case of default payments. The existence of forced vehicle withdrawal as an



object of financing agreement if the consumer does not pay installments in accordance with the terms agreed in the agreement, often carried out by the debt collectors by means of physical and psychological coercion of the consumer.

Forced vehicle withdrawal carried out by Consumer Financing is basically an act of execution. In Article 29 of Law Number 42 of 1999 concerning Fiduciary Assurance, it is stated that execution is the execution of an executorial title by a fiduciary recipient (Consumer Financing Company) which can be carried out directly without going through a court because it has the same executive power as a court decision binding on the parties to implement the decision.

Yet according to some experts, the implementation of such executions is not appropriate. One expert who argued about the concept of execution was Subekti, where according to him the execution was an effort of the party won in the decision to obtain its rights with the help of legal force, forcing the defeated party to carry out the decision. The party that was defeated did not carry out the decision voluntarily, so the decision had to be forced on him with legal assistance. According to Retno Wulan Sutantio and Iskandar Oeripkartawinata who stated that execution was an act of coercion by the court against the losing party and did not implement the decision voluntarily.

Furthermore, Sudikno Mertokusumoyang said that the implementation of the decision / execution was the realization of the obligation of the parties concerned to fulfill the achievements stated in the decision. The law of execution according to R. Soepomo, is a law that regulates the ways and conditions used by State tools to help interested parties to carry out the Judge's decision if the losing party is not willing to fulfill the decision in a predetermined time.

If we look at the meaning of execution according to the legal parapakar above, it appears that the meaning of execution is basically limited to Execution by the Court (judge's decision), whereas what can also be executed according to the applicable procedural law (HIR and Rbg) which can also be executed is a copy / grosse Deed which contains the "For the sake of Justice Based on the One Godhead" which contains the obligation to pay a sum of money. Furthermore, it can be seen from the opinion of Bachtiar Sibarani, which states that execution is the forced implementation of court decisions that have permanent legal force / enforced implementation of treaty documents that are equated with court decisions that have permanent legal force. The verdict of the New State Court can be carried out if the

decision has legal force that still means that both the plaintiff and the defendant have received the verdict.

In connection with the Herdalen case above, Herdalen as a debtor who has not been able to pay off the debt, namely the installment of a motorcycle loan that is due is an act of default. In such a case, PT WOM Finance as the creditor does have the right to confiscate collateral guaranteed by Herdalen (in this case the motorcycle) for reasons of default. For these reasons, creditors usually send debtcollector to confiscate goods if they are unable to collect debts, where this is also seen by PT WOM Finance. A debt and debt creditor relationship generally begins with an agreement.

A motorcycle buyer on credit is a debtor who carries out a sale and purchase agreement with his dealer or with the Consumer Financing Company as a creditor. If the default debtor does not carry out his obligations to repay the loan, based on the reason the conditions are canceled, the creditor can cancel the agreement. With the cancellation of the agreement, the creditor can withdraw the items that have been handed over to the debtor, where in this case PT WOM Finance certainly feels Herdalen's arrears have been detrimental to PT WOM Finance so that the steps taken are forced withdrawals and Consumer Financing agreements made previously considered null and void.

But actually, the cancellation is not easy to do by creditors. The cancellation of the agreement must be declared by a court decision. Without a court decision, there is no cancellation, and without cancellation, the creditor cannot forcibly confiscate the goods received by the debtor. Even if creditors continue to force themselves to carry out foreclosures, then the action is a violation of law. Creditors cannot be arbitrary by force and violence attracting debtor vehicles that pay installments.

Forced withdrawal using the services of a debt collector is not an act / act that is legally justified, based on the above rules. In fact, this action is actually an act that violates the law and can be threatened with a criminal threat, namely: Deprivation in Article 368 of the Criminal Code (KUHP) "Whoever intends to benefit themselves or others against the law, forces a person with violence or threat of violence, to give something, all or part of which belongs to that person or other person; or to give debt or write off accounts, be threatened, because of extortion, with imprisonment for a maximum of nine years. "So it is clear, for debtors who are forcibly withdrawn their vehicles can immediately report the

withdrawal of the vehicle to the nearest police station, to request legal protection and report criminal offense committed by the debt collector.

Forced vehicle collection by PT WOM Finance through third party services is illegal, according to Law No. 42 of 1999 concerning Fiduciary Guarantees, the right of execution is the authority of the court, not the authority of sellers of debt collection services that are often hired by the company. In addition, the issuance of Minister of Finance Regulation No. 130 / PMK.010 / 2012 dated 7 August 2012 concerning Fiduciary Registration for Financing Companies Conducting Consumer Financing for Vehicles Motorized with the imposition of a Fiduciary Guarantee, it is expected that the occurrence of forced withdrawal by the Consumer Finance Company will not be repeated. Where, according to these provisions the company is prohibited from forcibly withdrawing vehicles from consumers who experience delinquent payment of vehicle loans.

With the issuance of the regulation, PT WOM Finance has no right to withdraw or take vehicles by force. As for the form of settlement of consumers who are negligent in paying payments for vehicle repayment obligations completed through legal channels. In accordance with the regulations in the PMK, customers or debtors who purchase motorcycles through this credit system will later be registered in a fiduciary manner. This fiduciary regulation itself applies very strongly because the debtor and creditor will be registered with the Ministry of Justice and Human Rights. Thus, the company and consumers concerned are mutually bound and have an agreement that must be undertaken. For example, for debtors, they will later get a fiduciary certificate, in which the motorbike agreement that has been held in their name cannot be transferred unilaterally.

If there is a unilateral transfer of vehicles without the knowledge of the financing party, this means that the customer or debtor is declared to have violated and committed a criminal act. So with the existence of this fiduciary regulation itself actually both parties between the debtor and creditor have their own strength. If earlier the debtor or customer could be more calm because there would be no takeover of forced vehicles, then the company would be stronger in terms of the risk of congestion and arrears. With this PMK regulation, if the customer does not pay for the motorized vehicle according to the agreement, the company will carry out the analysis. They will analyze the obstacles that cause customers to pay late. In this case the company will then still tolerate one to three months as long as the customer has good intentions to pay.

Furthermore, regarding this PMK regulation, it is expected that with this regulation the rate of arrears will continue to decrease from year to year. Coupled with the rules of Bank Indonesia (BI) which states that the minimum DP of vehicle credit must be 20% of the price of the vehicle, this will make the lending even more potential to capable customers. With the additional regulation from BI, the possibility of purchasing vehicle credit will be in the right consumers who can pay it off until the end of the installment.

So what is the legal method that can be taken by PT WOM Finance to resolve disputes with the debtor? Of course so that there is no loss on both sides, PT WOM Finance can submit a settlement through the court. This is in accordance with PMK No.130 / PMK.010 / 2012 and the legal process taken is as follows:

1. A dispute is heard (the creditor registers with the court to settle the case for trial);
2. Seizure of vehicles by the court;
3. Auctions of motor vehicles by the court (debtor debt will be repaid from the auction results and the remainder of the auction will be given to the debtor).

In addition, the Kapolri Regulation (Perkap) No. 8 of 2011 concerning the Safeguarding of Fiduciary Guarantee Execution has actually been explained how the procedure for object retrieval of the above credit agreement has been attached to a fiduciary guarantee.

### **C. Conclusion**

Deprivation of motorized vehicles which are obtained through credit made by a creditor through third party services is illegal, according to Law No. 42 of 1999 concerning Fiduciary Guarantee, the right of execution is the authority of the court, not the authority of the debt collector hired by creditors.

In the Minister of Finance Regulation No. 130 / PMK.010 / 2012 concerning Fiduciary Registration for Financing Companies Conducting Consumer Financing for Motorized Vehicles with Fiduciary Assurance, companies are prohibited from forcibly withdrawing vehicles from consumers / debtors who are in arrears in paying vehicle loans.

The method that can be taken by creditors to resolve disputes with the debtor is through the court. In addition, the Kapolri Regulation (Perkap) No. 8 of 2011 concerning the Safeguarding of Fiduciary Guarantee Execution has actually been explained how the procedure for object retrieval of the above credit agreement has been attached to a fiduciary guarantee.

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**Legal Aspects of the Informed Consent Completeness, Related with Patients' Rights and Duties and Responsibilities of the Hospital**

Diah Harsowati

**Abstract**

Fulfilling the informed consent completely is considered of fulfilling the patients' rights and protect both healthcare workers and hospitals from lawsuits. However, there is lack of review on the legal aspects of the informed consent completeness, related with patients' rights and duties and responsibilities of the hospital. This study aimed to understand and analyze the legal aspect of informed consent completeness, related with the patients' rights and duties, and the responsible of the hospital. The study was a normative juridical review from secondary data. Data sourced from literature reviews which included legislation, jurisprudence and other written legal literature books. Besides, it was also derived from unpublished research studies. The results of this study found that informed consent was defined as consent which provided by the patient or immediate family after receiving an adequate explanation of the medical or dental action to be performed on the patient. The purposes of informed consent were to fulfilling the patient's right and to protect both doctors and hospitals from lawsuits. Hospital is legally responsible for all losses caused by negligence committed by health workers in the hospital. Legal consequences of missing to obtain the informed consent should be considered by both patients, healthcare workers, and healthcare organizations.

**Keywords:** Informed consent completeness, right and duties patient, responsibilities of the hospital.

## A. Introduction

Hospital is a complex health service which provides both preventive, promotive, curative and rehabilitative services (The Indonesian Hospital Acts Number 44 in 2009). Patients as a core component of delivered health services have their rights and duties during the healthcare services which provided by the healthcare providers. One of the patients' rights is getting information on diagnoses and the treatments, the aim of treatments, treatment alternatives, the risks and the intended or unintended complications, and prognosis of the treatments including the treatment expenses; or even approving or refusing the provided treatments by the physician or the other healthcare workers<sup>1</sup>.

A medical doctor (MD) and/or a dentist has to provide a medical record in his/her professional working (The Indonesian Medical Practices Acts No. 29 in 2004). Medical record is a document which consists of patient's identity, patient's assessment, medication and treatment, and the other healthcare services which served to the patients (Indonesian Minister of Health Regulation (Permenkes RI) Number 269 in 2008 about Medical Records Definition). These medical records were also required for the hospital management, patient, and/or the healthcare worker itself. An informed consent is a part of medical record. Fulfilling the informed consent completely is considered of fulfilling the patients' rights.

According to the Indonesian Ministry of Health Regulation Number 290 article 17 verse (2) in 2008 stated that the healthcare providers are responsible for providing the informed consent. Furthermore, an incomplete of fulfilling the medical records or even there is no medical record document which considered as the written proof of medical treatments could be categorized as the act against the law. In the Indonesian Criminal Code article 351 stated that for those who performed the medical intervention without an informed consent, could be jailed between two to five years.

The approval on an informed consent is consent provided by the patient or immediate family after a complete explanation of the medical or dental action to be performed on the patient. This agreement is made before the patient gets the action, may be given orally or in writing. In carrying out his medical profession, doctors could not escape the errors or omissions that can cause disability and even death. This can undermine public's trust in health services. These events can lead to conflicts or misunderstandings that will lead to lawsuits. A hospital-based study in Semarang, Indonesia found that the incompleteness of

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<sup>1</sup>Nasution, B. J. (2005). *Hukum Kesehatan*. Jakarta: Rineka Jaya. hlm 11



fulfilling the informed consent was still existed<sup>2</sup>. Their findings showed 100% of informed consent was not fulfilled completely. Moreover, the other previous study also revealed that only 55% of informed consent in a teaching hospital was completely fulfilled<sup>3</sup>.

There is a complexity of law in the healthcare services implementation. However, there is lack of review on the legal aspects of the informed consent completeness, related with patients' rights and duties and responsibilities of the hospital. The research problems were addressed in this study were how the rules of filling informed consent before taking the medical actions, and how the legal impact of the completeness of informed consent for medical personnel. The aims of this study were to understand and analyze the legal aspect of informed consent completeness, related with the patients' rights and duties, and the responsible of the hospital.

## **B. Research Methodology**

The study was a normative juridical review from secondary data.<sup>4</sup> Reviewing all legislations and regulations on the implementation of informed consent fulfillment including patients' rights and duties, and also the hospitals' responsibilities was conducted in this study.

### **A. Study Approach**

A legitimate or *statute* approach was used in this present study. Legitimate/*statue* approach was carried out by examining all laws and regulations relating to the issue of the informed consent aspects, the rights and obligations of patients, and the responsibilities of the hospital.

### **B. Data Sources**

Besides, it was also derived from unpublished research studies<sup>5</sup>. Secondary data in this study included primary, secondary and tertiary legal materials<sup>6</sup> as follows:

#### **1. Primary Legal documents**

- a. Indonesian Civil Code (*KUHPerdata*)
- b. Indonesian Criminal Code (*KUHPidana*)

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<sup>2</sup>Khasna Fikriya, A. S. (2016). 'Analisis Persetujuan Tindakan Kedokteran (Informed Cosent) dalam Rangka Persiapan Akreditasi Rumah Sakit di Instalasi Bedah Sentral RSUD Kota Semarang'. *Jurnal Kesehatan Masyarakat Universitas Diponegoro Vol.4, no.1*, 1-11.

<sup>3</sup>Erwin Santosa, E. M. (2013). 'Kelengkapan Pengisian Berkas Rekam Medis Pelayanan Medik Rawat Jalan dan Patient Safety di RSGMP UMY'. *Universitas Muhammadiyah Yogyakarta*.

<sup>4</sup>RH, S. (1985). *Metodologi Penelitian Hukum*. Jakarta: Balai Aksara. hlm 24

<sup>5</sup>Soekanto, S. (1983). *Pengantar Penelitian Hukum*. Jakarta: Rineka Hak Cipta. hlm 151.

<sup>6</sup>*Ibid.*, Soekanto, S. hlm 33.

- c. The Indonesian Medical Practices Acts No. 29 in 2004
  - d. The Indonesian Health Acts Number 36 in 2009
  - e. The Indonesian Hospital Acts Number 44 in 2009
  - f. Indonesian Minister of Health Regulation (*Permenkes RI*) Number 290 in 2008 concerning on Approval of Medical Measures.
  - g. Indonesian Minister of Health Regulation (*Permenkes RI*) Number 340/Menkes/PER/III/2010 about Hospital Definition
  - h. Indonesian Minister of Health Regulation (*Permenkes RI*) Number 269 in 2008 about Medical Records Definition
  - i. Indonesian Minister of Health Regulation Number 2052 in 2011 concerning on Practice License and Implementation of Medical Practices
  - j. Decree of the Indonesian Minister of Health Number 434 in 1983 concerning on Implementation of the Indonesian Medical Ethics Code for Doctors in Indonesia
  - k. Decree of Medical Service Director General No. HK. 00.06.3.5.1886 on 21 April 1999 about Informed Consent Guideline
  - l. Indonesian Medical Ethics Code (*KODEKI*)
2. Secondary Legal documents

Secondary legal documents were literatures that supported or clarified primary legal documents, study results and various journals or bulletins related to the topic of this present study.

3. Tertiary Legal documents

Tertiary legal document was a legal document that provides guidance and clarifies data obtained from primary and secondary legal documents such as a legal dictionary, and/or health encyclopedia.

C. Data Collection and Procedure

Secondary data collection was carried out by literature reviews, namely by conducting and studying documents or examinations of literature related to the study topic. Then, collecting the legal documents, as well as clarifying and analyzing those documents.

D. Data Analysis

Data analysis was described in the explanations or narratively. From the data analysis, deductive conclusions were then drawn in order to address the research problems.

## C. Discussion

### A. Definition of informed consent

Informed consent or patient's approval to receive the medical or dental actions after a complete explanation by a medical doctor (MD) or dentist is a manifestation of therapeutic transaction between MD or dentist with the patient. The term of 'informed consent' is derived from informed which means the information has been provided properly, and 'consent' means approval or getting a permission (Indonesian Minister of Health Regulation Number 269 in 2008 about Medical Records Definition). So, informed consent is defined as a consent which provided by the patient or immediate family after receiving an adequate explanation of the medical or dental action to be performed on the patient.<sup>7</sup>

### B. Informed consent purposes

Informed consent has a dual purpose, first purpose is for the patient and second, for the doctor.<sup>8</sup> From the patient's side, informed consent purposes to:

1. Fulfill the patient's right in freely deciding his choice based on an adequate understanding
2. Protect from patients and subjects
3. Prevent fraud or coercion
4. Give stimulation to the medical profession to hold self-reflection
5. Promote of rational decisions
6. Create community involvement (in advancing the principle of autonomy as a social value and conducting supervision of biomedical investigations).

From the doctor's side, by providing an informed consent it means that they concerned on the authority limitation toward the patients, so they will take the medical actions more carefully, and finally could protect themselves from the lawsuits

### C. Patient's rights and duties

Basically the approval of medical action comes from the patient's human rights in the doctor-patient relationship, as follows:<sup>8</sup>

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<sup>7</sup>Ermawati. (2010). *Etika Keperawatan*. Jakarta: Trans Info Media. hlm 113.

<sup>8</sup>Ratman, D. (2013). *Aspek Hukum Informed Consent dan Rekam Medis dalam Transaksi Rekam Medis*. Bandung: Keni Media. hlm 15.

1. The right to determine one's own destiny.
2. Right to get information.

In the Indonesian Health Acts Number 36 Article 8 in 2009 stated that everyone has the right to get information about their health data including actions and treatment that has been or will be received from health workers. According to Indonesian Minister of Health Regulation Number 290/Menkes/Per/III/2008, obtaining a patient's consent before MD providing the medical treatments is a compulsory. This rule is in line with the Indonesian Medical Practices Acts Article 45 verse (1) and (2) as follows:

1. Every medical action which will be delivered by a doctor to the patient have to have a patient's consent.
2. The consent as the verse (1) is obtained after the patient received an adequate explanation.

Besides the rights, patients also have to understand on their duties in the hospital. According to Indonesian Minister of Health Regulation no. 69 in 2014, in accordance with article 31 of Hospital Acts No 44 in 2009 explained that several patients' duties such as:

1. Provide honest, complete and accurate information according to their ability and knowledge about their health problems;
2. Provide information about the financial capabilities and health insurance that they have;
3. Comply with the therapy plan recommended by health workers in the hospital and approved by the patient concerned after getting an explanation in accordance with the provisions of the legislation;
4. Accept all consequences for his personal decision to reject the therapeutic plan recommended by health personnel and/or not comply with the instructions given by health personnel in order to cure illness or health problems.

D. Provided information in the informed consent

In Article 45 verse (3) stated that the explanation which should be provided by the doctor toward the patient or his/her relatives at least covering these following items (The Indonesian Medical Practices Acts No. 29 in 2004):

1. Diagnosis and procedures for medical treatments
2. The purpose of medical treatment taken
3. Other alternative treatments and risks

4. Risks and conclusions that might occur, and
5. Prognosis for possible movements

E. Hospital rights, duties, and responsibilities

Those patient's human right should be fulfilled by the hospital as the healthcare provider organization, as mentioned in the Indonesian Hospital Acts in 2009, Number 44 Article 29 and 30 about the hospital's rights and duties. One of the hospital's duties is to conduct medical records, respect and also protect the patient rights. In addition, in the article 31 and 32 also mentioned that some patient's rights such as receive an adequate information that includes diagnosis and procedures for medical action, goals of medical action, alternative actions, risks and complications that may occur, and the prognosis of actions and estimated treatment costs. Eventually, the hospital is legally responsible for all losses caused by negligence committed by health workers in the hospital.

In the Approval of Medical Acts Guideline, it is stated that the Agreement on the Action of Medicine or Dentistry.<sup>9</sup>

1. It is the patient's approval or the legitimate representative of the medical or dental action plan submitted by the doctor or dentist, after receiving sufficient information to be able to make an agreement.
2. Approval of medical or dental actions is a unilateral statement from the patient and not an agreement between the patient and the doctor or dentist, so that it can be withdrawn at any time.
3. Approval of medical or dental actions is a process as well as the result of an effective communication between the patient and the doctor or dentist, and not just signing the consent form.

In the Code of Medical Ethics, as stated in the Decree of the Indonesian Minister of Health Number: 434/Menkes/X/1983 specifically mentioned the relationship between doctors and patients as follows:

1. Therapeutic transactions only specifically regulate the legal relationship between doctors and patients
2. Performed in a mutual trust or confidentiality, which implies that the patient or family of the patient must trust the doctor who is doing the treatment for the patients, as well as the

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<sup>9</sup>Indonesian Medical Council.(2006).Jakarta, hlm.1

doctor must trust the patient. Patients must be honest about all their complaints and all their ignorance of certain medications, so that doctors can provide appropriate therapy.

3. This particular legal relationship between doctors and patients includes emotional relationships, hopes and concerns of human beings over the recovery of patients.

In addition, there are several principles that doctors must adhere to when conducting therapeutic transactions according to Komalawati<sup>10</sup>:

1. Legality principle

The principle of legality is regulated in Medical Practice Acts Article 26-28 concerning the education standards of the medical and dentistry professions. The Medical Practice Acts also requires doctors to practice continuing education and training to find out the latest developments in medical science and technology. The legality principle also discusses the obligation of doctors to be obliged to have a Registration Certificate (*Surat Tanda Registrasi/STR*) before carrying out medical practice provided by the Indonesian Medical Council (*Konsil Kedokteran Indonesia/KKI*) with the following conditions:

- a. Have a doctor's degree, specialist doctor, dentist or specialist dentist.
- b. Have a statement that has made an oath / appointment from a doctor or dentist.
- c. Have a physical and mental health certificate.
- d. Have a competency certificate.
- e. Make a statement will fulfill and implement professional ethics

In addition, doctors are also required to have a Practice Permit Letter (*Surat Izin Praktek/SIP*) issued by a local health official in the regency/city where the doctor carries out the practice. In the Minister of Health Regulation No. 2052/Menkes/Per/X/2011 stated that there are three types of licenses that must be owned by doctors when carrying out their profession such as:

- a. Doctor's License Letter (*Surat Izin Dokter/SID*) which is a permit issued to doctors who carry out work in accordance with their profession in the territory of the Republic of Indonesia.

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<sup>10</sup>Isfandyarie, A. (2006). *Tanggung Jawab Hukum dan Sanksi bagi Dokter Buku I Cet I*. Jakarta: Prestasi Pustaka. hlm 75.

- b. Practice Permit Letter (*Surat Izin Praktek/SIP*), which is a permit issued to a doctor who carries out work in accordance with the field of profession as an individual private in addition to other duties/functions in the government or private health service unit.
- c. Practice Permit Letter (*Surat Izin Praktek/SIP*) solely, which is a permit issued to doctors who carry out work in accordance with their profession as an individual private, solely without duty to the government or private health care unit.

## 2. Balance Principle

The law functions do not only to provide certainty and protection for humans, but also must be able to improve the balance of the disturbed community order. The principle of balance is a principle that does not only apply to therapeutic transactions, but it also applies for general term. The implementation of health services must be carried out in a balanced manner between the interests of individuals and the community, between physical and mental, as well as the balance between goals and facilities, between facilities and results, between the benefits and risks arising from medical efforts carried out

## 3. Timely Principle

Timely principles play an important role in the health services provided by doctors. Because delays in providing services can have great consequences for patient safety. Speed and density in providing health services are important factors in patient recovery.

## 4. Principle of Good Faith

Good principles are derived from ethical principles, namely beneficence (doing good) that needs to be applied in health services by doctors. This principle is reflected in the respect for the rights of patients and the implementation of medical practices that always adhere to the standards of profession and medical ethics.

## 5. Principle of Honesty

The development of the doctor-patient therapeutic transaction has undergone a pattern change from the beginning considered the patient's position is lower than the doctor (vertical paternalistic) to be equal (horizontal contractual). This is because all medical measures to be taken by a doctor must be approved by the patient after the patient has obtained sufficient information regarding the disease and medical measures to be taken.

Even so, the position of the doctor will not be equal with the patient, this is because doctors have a higher knowledge regarding the technique of recognizing the disease and

treatment of the disease. Therapeutic transactions are more focused on agreements where doctors try to do their best and to the maximum extent possible to cure their patients or are called *inspanningverbinten*. So in this case what is demanded is not an agreement on results or certainty of recovery or success or called *resultaatverbinten*, but the agreement is in the form of effort or effort as much as possible from the doctor to heal the patient carefully based on proper medical science. Honesty of doctors and patients is important in the implementation of therapeutic transactions.

In fact, based on the Indonesian Health Acts Number 36 Article 56 verse (1) in 2009 mentioned that “Everyone has the right to accept or reject part or all of the delivered aids after receiving and understanding the complete information about the medical actions”, however, further explanation in the Article 56 verse (2) explained that the right to accept or reject as referred to in verse (1) does not apply to:

- a. Patient with communicable disease and might quickly spread into the wider community;
- b. Unconscious patients; or
- c. Severe mental disorders.

An agreement is an event where a person promises to someone else or where the two people promise to do something<sup>11</sup>. From an agreement will lead to a relationship between two people which is then called an engagement, where one party has the right to claim something from the other party, and the other party is obliged to fulfill the demand. In the other words, the agreement is one of the most common sources of engagement because the agreement law adheres to an open system so that community members are free to enter into agreements and the Act only purposed to complete the agreements made by the community. Referring to Article 1320 of the Indonesian Civil Code related to the requirements for the validity of an agreement, four conditions are required, including:

- a. Agree those who bind themselves
- b. Capable of making an agreement
- c. Regarding certain things
- d. A lawful reason

#### **D. Conclusions**

Based on the explanations above, some conclusions can be drawn as follows:

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<sup>11</sup>Subekti. (1990). *Hukum Perjanjian*. Jakarta: PT. Intermedia. Hlm 1.



1. As a part of medical records, the informed consent has to be provided clearly and completely by medical doctors or dentists as a legal aspect consideration.
2. Getting an adequate informed consent has been considered as a fulfillment of a patient's right and the healthcare provider's duty.
3. Besides understanding the patient's rights, patients also have to comply with their duties when they are admitted in a hospital.
4. A hospital is legally responsible for all losses caused by negligence committed by health workers in the hospital, including in missing to obtain the informed consent from patients.
5. Legal consequences of missing to obtain the informed consent should be considered by both patients, healthcare workers, and healthcare organizations.

As the suggestions, first, the hospital management should more encourage the doctors to provide the informed consents during their professional working in order to fulfill the patients' rights and to protect both hospitals and doctors from the unexpected lawsuits. Second, regular monitoring and evaluating the informed consent completeness would be benefit in order to reduce the lawsuits toward healthcare professionals and hospitals.

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- Subekti. (1990). *Hukum Perjanjian*. Jakarta: PT. Intermedia.

## **The Role of Government in Traditional Health Services**

Henita

### **Abstract**

The role of government is indispensable in the legal effort of traditional medicinal services. The problem of this study was how the role of government in traditional health services. The purpose of this study was to determine the role of government in traditional health services. This research used a normative juridical approach and it was supported by an empirical approach. Traditional medicine is a treatment and or treatment by means, medicines, and medication that refers to experience, skills and is applied in accordance with the norms prevailing in the society. Traditional Health Services is divided into three, namely traditional empirical, complementary, and integrated health services. The results of this study explained that the role of government in a country about traditional medicine was very influential on the development of traditional medicine and increased public confidence in its use, and the efficiency of traditional medicine. Traditional medicine attracted many people in the world because the cost was relatively cheap but in this issue the need for legislation or legal regulation in traditional health services to the society to prevent disability and death. The supporting factors such as, the need for legislation to regulate the authority of traditional treatment, the existence of good cooperation and support between government, private and society. While the inhibiting factors were lack of awareness and government controlled over the perpetrators of traditional medicine, there were no instructions/ specific regulations regarding the types of actions and traditional medicinal herbs.

**Keywords:** Government, Role, Traditional Treatment

## A. Introduction

To achieve national goals, sustainable development is carried out which is a comprehensive development program directed and integrated, including health development. Health is a human right and one of the elements of well-being that should be realized in accordance with the ideals of the Indonesian nation, as referred to in Pancasila and the Preamble of the Constitution of the Republic of Indonesia Year 1945. Health problems are consequences of behaviors that are tangible (known) or unconscious (unknown) actions that are detrimental to health or reduce the health status of the perpetrators themselves, or other people, or a group. Health problems mentioned here is not just limited to the categories of physical and mental illness in individuals and groups but also the social welfare category. WHO states that health is a perfect state of physical, mental, social, not only free from disease or weakness. The role of government is indispensable in the legal effort of traditional medicinal services. The role of government is to analyze the tasks that must be carried out by people or institutions that have a position in both formal and informal societies<sup>1</sup>.

Health development objectives stated in the GBHN are to improve the ability to live healthily and be able to overcome simple health problems, especially through prevention efforts and increasing efforts to spread health services to be affordable by the community to rural areas, traditional treatment efforts are the right alternative to modern medicine. White (1977), healthy is a condition where someone at the time of examination has no complaints or there are no signs of a disease and disorder. Drugs are material or guidance materials, including biological products used to modify or investigate physiological systems or pathological states for determination of diagnosis, prevention, cure, rehabilitation, health promotion, and contraception for men. Traditional medicine is an ingredient or ingredient in the form of plant ingredients, animal ingredients, mineral materials, sarin (galenic) preparations, or a mixture of these ingredients that have been traditionally used for treatment, and can be applied in accordance with the norms prevailing in the community<sup>2</sup>.

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<sup>1</sup> .H.S, Salim,. & Erlies Septiana. (2016). *Penerapan Teori Hukum Pada Penelitian Tesis Dan Disertasi*. Jakarta: Rajawali Pers.

<sup>2</sup>.Dita Fitriyani. (2015). *Konsep Sehat Berdasarkan Emosi Intelektual Sosial Fisik Spriritual*. Retrieved Mei 10, 2018, from <http://ditafitriyani.wordpress.com>.

The National Health System states that traditional medicine that is proven to be effective and efficient is to continue to be guided and guided and utilized for public health services. Health Act No. 36 of 2009 Article 59 states:

1. Based on the method of treatment, traditional health services are divided into:
  - a. Traditional health services that use skills, and
  - b. Traditional health services that use herbs.
2. Traditional health services as referred to in paragraph (1) are fostered and supervised by the Government so that their benefits and safety can be accounted for and not contrary to religious norms.
3. Further provisions concerning the procedures and types of traditional health services as referred to in paragraph (1) are regulated by Government Regulation.

Traditional treatment and traditional medicine have been integrated with the community, used in overcoming various health problems both in villages and in big cities. In fact the ability of the community to treat themselves, regarding the symptoms of illness and maintaining health. Therefore, this traditional health service is a great potential because it is close to the community, easy to obtain and relatively cheaper than modern medicine. At the household level, health services by individuals and families play a major role. Moreover, knowledge of traditional medicine and utilization of medicinal plants is an important element in improving the ability of individuals or families to obtain a healthy life<sup>3</sup>.

According to the Minister of Health of the Republic of Indonesia, in some Asian and African countries, about 80% of the population depends on traditional medicine for primary health care. Therefore, providing safe and effective traditional medicines can be an important tool to improve access to health care as a whole, and based on basic health research results in 2010, almost half (49.53%) of Indonesia's population aged 15 years and over consume herbal medicine. In addition, about five percent (4.36%) consume herbal medicine every day, while the rest that is widely chosen for consumption are liquid herbs (55.16%), powder (43.99%), and herbal medicine (20.43%). While the smallest proportion is an herbal medicine which is packaged in a modern form in capsule/ pill/tablet form (11.58%). Herbal medicine is widely used by people in Indonesia, a country with a large population and has a wealth, in the form of a variety of medicinal plants. Of the approximately 30,000 species of plants in Indonesia, 7,000 species are medicinal plants and 4,500 species are from Java. In

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<sup>3</sup>.Ari Fahri. (2015). *Pelayanan Tradisional*. Retrieved Mei 10, 2018, from <http://www.ariefahri.wordpress.com>.

addition, there are around 280,000 practitioners of traditional medicine in Indonesia<sup>4</sup>. According to Darma (2014), as many as 56 hospitals (hospitals) in 18 provinces have served non-conventional treatments such as alternative medicine or traditional herbs<sup>5</sup>.

According to a 2007 national health interview (NHIS) survey that includes a concerted survey of the use of a complementary health approach by Americans, an estimated 3.1 million adults in the United States have used acupuncture, a traditional Chinese medicine<sup>6</sup>. In China, a traditional medicine known as Chinese medicine has been developing for a long time; this treatment is classified in eastern medicine, which includes other traditional East Asian medicine such as Japan and Korea. The theory used refers to Yin-Yang philosophy. Traditional Chinese medicine often conflicts with western medicine (traditional Chinese medicine)<sup>7</sup>. The Chinese cabinet encouraged to research and development in the health sector, especially in traditional Chinese medicine, with more traditional Chinese medicines added to the list of basic national medicines. So that there are several additional regulations that are made to support traditional medicine (protecting ancient texts related to treatment) according to RRC prime minister Li Keqiang. The Chinese government encourages the pharmaceutical industry in China to use modern technology in researching traditional medicine, researchers are also included to try various traditional therapies and provide care for chronic diseases. The role of the government in cooperating with the private sector aims to develop a wider network. It is undeniable that the pharmaceutical industry in China is making changes to the quality control system and safety data related to medicines adapted to international standards. The traditional medicine system in Korea is known as Korea Oriental Medicine (KOM) or more popularly known as hangbang. The development of KOM can be seen from the many high schools that are in great demand by teenagers in Korea<sup>8</sup>.

Traditional medicine in India commonly referred to as ancient Ayurvedic medicine. Ayurveda is a tradition of ancient health care, which has been practiced in India. This treatment is documented in the sacred historical text known as the Vedas centuries ago, one

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<sup>4</sup> . Kementrian Kesehatan Republik Indonesia. (2011). *Integritas Pengobatan Tradisional Dalam Sistem Kesehatan Nasional*. Retrieved Mei 7, 2018, from <http://www.depkes.go.id>.

<sup>5</sup> .Darma Satria. (2013). *Bagian Patologi Anatomi FK Universitas Syiah Kuala*. Retrieved Mei 5, 2018, from <http://www.jurnal.unsyiah.ac>.

<sup>6</sup> .No Name. (2018). *Di Amerika Serikat, Pengobatan Tradisional China Juga Merakyat*. Retrieved Juni 24, 2018, from <http://dokterholistik.com>.

<sup>7</sup> .No Name. (n.d.). *Pengobatan Tradisional Tionghoa*. Retrieved Juni 24, 2018, from <https://id.m.wikipedia.org>.

<sup>8</sup> .Andinur Aminah. (2016). *Cina Dorong Pengobatan Tradisional*. Retrieved Juni 24, 2018, from <http://www.google.co.id.Republika.co.id>.

of which is now known as Yoga. More than 90% of Indians use ayurvedic treatment, according to the University of Minnesota Center for spirituality and healing. This tradition gained popularity in the western world, although it is still considered an alternative medicine<sup>9</sup>.

Furthermore, in India Prime Minister Narendra Modi has called for greater use of Indian medicines and sports. Besides India have established ministries to promote alternative therapies such as yoga and Ayurveda treatment. The establishment of the ministry in India came a few days after the government planned to establish a traditional drug regulatory agency. India wants to expand its presence in the global traditional medicine market which is estimated to be worth US \$ 100 billion. Hometrapsy also widely accepted in India, but the practice is still questioning the effectiveness of this traditional medicine. The success of this Ministry will depend on additional budget allocations, according to a government official. The government allocated \$ 174 million to develop and promote traditional health systems for the 2014-2015 fiscal years<sup>10</sup>.

Knowledge of traditional treatment methods is basically derived from the interaction of a person with family, neighbors, patients or families of patients with traditional medicine so that methods of treatment arise into several types, and of course community trust in an area. Utilization in processing knowledge about traditional medicine methods, the use of traditional medicine is divided into several forms, among others, as the use of environmentally friendly natural resources, the use for self-medication, treating family members or neighbors and as an additional economic resource<sup>11</sup>.

In Javanese Cosmology, the healing of illness must include the whole human element physical / born and invisible/inner. Javanese healing of disease conditions is based more on the principle of binary opposition, where one thing must be opposed by another. So that a balance will be achieved if the elements in the body are in a state of harmony. In rural areas in Java, many people work as farmers and fishermen, where not every day make money. Then the sick condition is a threat to them, which results in them being unable to work. This condition forces them to be ill in an attempt to not spend money. So traditional medicine such

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<sup>9</sup>.The Moonker. (2013). *Mengenal Aryurveda, Pengobatan Kuno Dari India*. Retrieved Juni 24, 2018, from <http://expresiku.blogspot.spiceflair.com>.

<sup>10</sup>.Reuters. (2014). *India Bentuk Kementrian Untuk Yoga Dan Obat Tradisional*. Retrieved Juni 24, 2018, from <http://www.google.voaindonesia.co.id>.

<sup>11</sup>.S. Sembiring,, & Drs. Sismudjito. (2015). Pengetahuan Dan Pemanfaatan Metode Pengobatan Tradisional Pada Masyarakat Desa Suka Nalu Kecamatan Barus Jahe. *Jurnal Prespektif Sosiologi* , p, 105-116.

as scraping (not spending money) to eliminate colds, is normal. Besides for the lower class, traditional medicine is felt to be of great benefit, because the cost is still within their reach, which is relatively cheap, does not require them to leave the house so there are no transportation costs to be borne. Moreover, for Indonesian people who are culturally diverse as well as their socio-economic level and knowledge, traditional medicine is deemed necessary so that traditional medicine needs to be recognized by the government and aligned with modern medical status. Traditional medicine is rational so it is necessary to promote deep cultural research so that the marginalization and stigma do not appear again. Supervision and coaching of traditional medicine need to be carried out as long as it is beneficial for them<sup>12</sup>.

The legal basis of the implementation of alternative traditional medicine in Indonesia is as follows: Kepmenkes No. 1076/2003 concerning the implementation of traditional medicine (battra), Kepmenkes No. 1109 / 2007 concerning complementary alternatives, Law No. 36 of 2009 Article 48 and Article 59, Permenkes No. 003/2010 concerning the certificate of herbal medicine. Doctors as part of the scientific community must be able to account for scientifically as well, all medical measures decided on the patient. A drug must first have a study of the theory. Furthermore, looking at the herbal medicine that has no side effects, this is just a justification of the testimony of a few people and there is no standard research. Complementary and Alternative Medicine (CAM) is supported by its development as a treatment method, but to be applied in the world of medicine need an in-depth scientific study (Evidence Base Medicine)<sup>13</sup>.

The field of pharmacy and medicine owned by the Islamic University of Bandung (UNISBA) as an institution that has a close connection with the development of traditional medicine, through education and teaching activities and conducting research activities and community service related to the development of traditional medicines contained in Al-Quran and Hadith so that it can benefit the wider community. The fields of pharmacy and medicine, as well as research institutions, conduct activities in an effort to produce empirical knowledge, theories, concepts, methodologies, models, or new information, which enrich science and technology. Research activities related to the development of traditional medicine in Al-Quran and Hadith need to be carried out continuously, including research

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<sup>12</sup> .AtikTriratnawati, A. (2010). Pengobatan Tradisional, Upaya Meminimalkan Biaya Kesehatan Masyarakat Desa Di Jawa. *Jurnal Manajemen Pelayanan Kesehatan*. Vol.13.No.2 , p. 402.

<sup>13</sup> .Darma Satria. (2013). Complementary and Alternative Medicine (CAM) : Fakta atau Janji. *Idea Nursing Journal Vol.IV. No.3* , p. 82-89.



on the chemical content of plants which are efficacious as medicine, research on chemical analysis of the content of plant active ingredients, pharmacology and toxicology research, manufacture of plant extracts, extract formulations in the form of medicinal preparations, toxicity research on formulations, and formulation product analytical research. Efficacious ingredients need to be managed optimally and cultivated professionally and utilized and improved in quality. Indonesian traditional medicine will be difficult to use by doctors if it is not supported by scientific research and evidence base, which can be verified rationally. Development and dedication to the community regarding the results of research and development of traditional medicines made from natural ingredients, it is expected that there will be feedback to universities that will be used as further development of science and technology. These activities can be in the form of counseling or coaching activities, and community empowerment in the use of traditional medicine as a means to improve the welfare of the community such as through the formation and fostering of small-scale traditional medicine industries, so that their businesses can be developed and survive, while ensuring that their products are useful and safe to use by the wider community. This is a form of cooperation between the government through universities and the community to promote traditional medicine in all forms and sectors<sup>14</sup>.

Based on the background description above, the problem in this study is how the role of the government in traditional health services.

## **B. Research Methods**

Based on the introduction above, then a research method is needed that plays an important role in achieving a goal. Research methods are ways of carrying out research (including activities to search, record, formulate, analyze and compile reports) based on facts or symptoms scientifically. The problem approach used in this study is normative juridical or library research, namely research on secondary data, the approach that will be used is the conceptual approach (conceptual approach) by examining theories and principles of law and the approach of legislation (normative approach) which is related to the government's responsibility for traditional empirical health services. Additionally supported by an empirical approach, which collects primary data, with field study techniques, data analysis is carried out qualitatively.

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<sup>14</sup>H. Wasito. (2008). Meningkatkan Peran Perguruan Tinggi Melalui Pengembangan Obat Tradisional. *Jurnal Mimbar*. Vol XXIV.No.2 , p. 117-126.

### **C. Results of Research and Discussion**

All people are seen as equal before the law, which aims to create an orderly society order, creates order and balance. With the achievement of order in the community, it is hoped that human interests will be fulfilled and protected. The law is said to be successful or effective if the norm is adhered to and implemented by the community and law enforcement officials themselves. The ineffectiveness of the law, due to bias which is caused, because the law is vague or unclear, the apparatus is inconsistent and or the community does not support the implementation of the law.

The Indonesian Ministry of Health divides this non-conventional treatment into two, namely traditional and complementary, in accordance with the regulations in the World Health Organization (WHO) Traditional Medicine Strategy 2014-2023. The alternative term has been changed to Traditional and Complementary Medicine (T & CM). Director of the Traditional Health Service of the Ministry of Health of the Republic of Indonesia, said, "Non-conventional medicine is divided into two. First, traditional medicine, which is a combination of skills knowledge and practices based on theories, beliefs, and experiences of certain cultural customs, whether they can be explained or not, which are used for health care, prevention, diagnosis, repair and physical and mental treatment (WHO)." The service is regulated in Law No. 36 of 2009 concerning health in Article 1 point 16. While the second is complementary medicine; namely a form of health care that is not part of the country's tradition and is not integrated into the dominant health care system.

PP No. 103 of 2014 describes the guidance and supervision of traditional health services. Traditional Health Services is divided into 3 (three), namely traditional empirical health services, for example using herbs such as herbal medicine. For this reason, the knowledge of TOGA (family medicinal plants) can be taught to health center staff. Furthermore, there are traditional complementary health services, such as acupuncture. The last is traditional health integration services, which combines traditional complementary with conventional. For example, doctors who have participated in acupuncture training and have competency certificates (cerkom) to be allowed to practice, combine the two treatments. For example, prescribe herbal medicine and provide acupuncture therapy. Furthermore, to establish a clinic, of course, the requirements are more stringent. In addition to the health, personnel must have a competency certificate issued by their respective collegiums, and have a STRTKT (Certificate of Registration of Traditional Health Workers)

from the Health Service. Must have SIPTKT (Traditional Health Worker Practice License) by the clinic and can only exist if there is a competency certificate<sup>15</sup>.

Moreover, to implement Government Regulation Number 103 of 2014 concerning Traditional Health Services, the Minister of Health of the Republic of Indonesia needs to stipulate Regulation of the Minister of Health Number 61 of 2016 concerning Empirical Traditional Health Services. So that Empirical Traditional Health Services are traditional health applications whose benefits and safety are empirically proven. In this Permenkes, it is stated that the place used to perform traditional empirical health care is called PantiSehat. With the existence of new regulations to support each other's legal provisions, it is still not maximal in the field.

The more people who need health services, the more health clinics are created. So that there is a Law No. 36 of 2014 concerning health workers including doctors, pharmacists, psychologists, nurses and others need to have a SIP (Practice Permit), as well as regulate the place of practice of health workers.

The role of government in a country about traditional medicine is very influential on the development of traditional medicine and increasing public trust in its use, as well as the efficiency of traditional medicine. The government has the authority given by law so that it causes every Government action based on the legislation. The government is obliged to build health which aims to increase awareness, willingness and ability to live healthy for every citizen, as well as fostering and supervising activities related to the implementation of traditional health services, because health is a human right, which can improve people's lives.

Furthermore, from the results of interviews with program holders of Primary and Traditional Health Services in the Provincial Health Office, the efforts that have been made by the Health Office in improving traditional treatment programs are carrying out advocacy and socialization of traditional empirical treatment services development programs through the district/city health office and at the puskesmas level. Technical training, hygienic manufacturing practices for herbal producers who work together or have registered practices in the Health Service.

Traditional empirical health services are carried out by traditional health professionals who have a code of ethics and professional discipline. In traditional health-

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<sup>15</sup>.Dinas Kesehatan Provinsi Lampung. (2016). *Laporan Pelayanan Kesehatan Dasar*. Bandar Lampung: Dinas Kesehatan Provinsi Lampung.

care Lampung, there are 493 STPT, while 6,182 have skills and 1,494 ingredients. They are not comparable to those in the field. Supervising with the Provincial Health Office, fostering, monitoring, evaluating, and supervising the implementation and achievement of traditional health programs, especially traditional empirical existing in districts/cities (promotive and preventive), providing access to information and education on the implementation of coaching. This is to implement every new regulation issued by the government. Support for Permenkes No. 26 of 2018 currently does not yet exist and has not been stated in the District / City Health Office Strategic Plan. This is because there is still a new Permenkes that is available and cannot be applied. Because of implementing a regulation, we must review the natural resources, human resources, technological advances of each region; cultural customs of a region, and others, these are all taken into consideration by the Health Office to socialize Permenkes 26 of 2018 concerning Licensing Services Integrated Electronics Health Sector.

The author can see that the implementation of Permenkes No.26 of 2018 is not effective. Many factors become obstacles in its implementation, such as the limitations of traditional empirical treatment service counselor officers, regulations that have no clarity in their application if applied in the field, the time limit for implementing regulations does not exist, and the lack of clarity in the application of sanctions also affects the disobedience of the community in implementing the regulation. In addition, people in Indonesia are heterogeneous with various tribes and religions, thus causing problems often encountered by health workers in conducting counseling about traditional empirical treatment services. Myths or beliefs related to traditional empirical treatment services are still found in the community.

Traditional medicine is of great interest to people in the world because of its relatively low cost but in this case the need for laws or legal regulations regarding authority in the context of traditional health services to the community to prevent disability and mental safety. Actually, in Indonesia, the law that protects the interests of consumers is not sufficient.

#### **D. Conclusion**

Based on the above discussion, the following conclusions are obtained:

The supporting factors of traditional medicine such as:

1. The need for legislation to regulate the authority to carry out traditional medicine,

2. The existence of good cooperation and support between the government, the private sector, and the community.

The inhibiting factors of traditional medicine include:

1. Lack of government care and control of traditional medicine practitioners,
2. There are no specific instructions/regulations regarding the types of actions and ingredients of traditional medicine.

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**The Effectiveness of Regulation of Minister Of Health Number 97 In 2014 To Delivery by Midwives In Primary Health Care Facilities To Reduce Maternal Mortality Rate**

Rina Apriyanti

**Abstract**

One indicator of Indonesia's health development is the Maternal and Newborn Mortality Rate. Maternal Mortality Rate in Indonesia is the second highest in Southeast Asia. According to the results of Riskesdas in 2010, deliveries performed by health workers in new health facilities reached 55.4% while the target of delivery services in health facilities was 90%. Issues: How is the implementation of Permenkes number 97 of 2014 on delivery services by midwives at primary health care facilities to reduce maternal mortality? What are the inhibiting factors that cause death in delivery services in primary health care facilities? This research method uses normative juridical research and empirical juridical research. Data was collected by literature study and field study. Results of discussion: factors influencing the implementation of Permenkes number 97 of 2014 in an effort to reduce maternal and infant mortality include geographic factors, socio-cultural factors, socio-economic factors, service utilization factors health, inadequate quality of facilities and infrastructure, as well as minimal public behavior and education in the health sector with conditions in remote areas with very long distances and unable to reach health care facilities so delivery services cannot be done in primary health care facilities, this means that there is no prohibition on delivery services in non primary health care facilities in special conditions if primary health care facilities cannot be reached by the community or in emergency conditions to save the lives of mothers and babies as an effort to reduce maternal mortality rate.

**Keywords:** midwife, delivery, primary health care facilities

## A. Introduction

Comprehensive health services include health services for pregnant women, maternity mothers, newborn babies, infants, toddlers, adolescents, to elderly health. Maternal Mortality Rate (MMR) and Infant Mortality Rate (IMR) are one indicator of the health development of the Indonesian people.

Maternal and Newborn Mortality in Indonesia is the second highest in Southeast Asia. The first order was occupied by the state of Laos with a figure of 357 per 100 thousand live births. When compared with the nearest neighboring countries, namely Singapore and Malaysia, the number of maternal deaths in Indonesia is still very large. When compared with neighboring countries, namely Singapore and Malaysia, the number of maternal deaths in Indonesia is still very large. Singapore in 2015 had a maternal mortality rate of seven per 100 thousand live births and Malaysia at 24 per 100 thousand live births.<sup>16</sup> One of the health problems in Indonesia is the high Maternal Mortality Rate (MMR) and Infant Mortality Rate (IMR). This needs attention by implementing an improvement program and improving maternal health, this improvement effort especially by the health department through maternal and child health programs.<sup>17</sup>

One of the causes of high MMR is the low utilization of delivery of health personnel. Geographical conditions, population distribution, socio-cultural and low levels of education are some of the factors causing the low utilization of health workers by the community (Depkes, 2009).<sup>18</sup> According to data from the Indonesian Demographic and Health Survey (IDHS), the Maternal Mortality Rate decreased in 2002 by 307 per 100,000 live births, in 2007 by 228 per 100,000 live births but in 2012 the Maternal Mortality Rate increased again to 359 per 100,000 live births and infant mortality rates decreased to 32 / 1,000 live births.<sup>19</sup> Based on the 2015 inter-census population survey, the Maternal Mortality Rate in Indonesia was 305 per 100,000 live births.<sup>20</sup> Thus, it is explained that the Maternal Mortality Rate (MMR) is still quite high so that a regulation is needed for health workers who provide

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<sup>16</sup>[https://kumparan.com/Maternal and Newborn Mortality in Indonesia is the second highest in Southeast Asia/](https://kumparan.com/Maternal%20and%20Newborn%20Mortality%20in%20Indonesia%20is%20the%20second%20highest%20in%20Southeast%20Asia/)Retrieved 22 juli 2018

<sup>17</sup>Sariyati, Endang Wahyati.2016. *Peran Bidan Dalam Pelaksanaan Permenkes Nomor 631/Menkes/PER/III/2011 tentang petunjuk Teknis Jaminan Persalinan*. SOEPRA Jurnal Hukum Kesehatan Vol.2, No.2.

<sup>18</sup>Ira Yusnita dkk.2015. *Analisis rendahnya Pemanfaatan Layanan Persalinan Tenaga Kesehatan di Wilayah Kerja Puskesmas Wakaokili Kabupaten Buton*. Jurnal Manajemen Kesehatan Indonesia Vol.03, No.01

<sup>19</sup>[https://www.depkes.go.id/inilah capaian kinerja kemenkes RI tahun 2015-2017/diakses](https://www.depkes.go.id/inilah%20capaian%20kinerja%20kemenkes%20RI%20tahun%202015-2017/diakses) pada 22 Mei 2018

<sup>20</sup>[https://gaya.tempo.com/angka kematian ibu di ndonesia tinggi masih jauh dari target/diaksespada](https://gaya.tempo.com/angka%20kematian%20ibu%20di%20ndonesia%20tinggi%20masih%20jauh%20dari%20target/diaksespada) 22 Mei 2018



childbirth assistance in health service facilities wherein in this case the midwife is the spearhead and has a lot of role in providing delivery services to people in need. According to the results of Riskesdas in 2010, deliveries performed by health workers in new health facilities reached 55.4% while the target of delivery services at health facilities was 90%.<sup>21</sup>

Primary health care facilities that provide delivery services include PONEC health centers, inpatient and maternity clinics, independent practice midwives, which are places of birth assistance that have been standardized and legally licensed with practice. Conversely, if giving birth at home and at any time requires emergency medical treatment, it cannot be treated immediately and requires a longer time so that it can cause delays in handling referral to the hospital. Efforts to reduce the Maternal Mortality Rate (MMR) should focus on the direct causes of maternal death, which occur 90% at the time of delivery and immediately after delivery due to bleeding. Maternal Mortality Rate (MMR) is one indicator for measuring women's health status. The rate of maternal mortality is a health problem that attracts the attention of WHO. Facts show that more than 350,000 worldwide die every year due to complications of pregnancy and childbirth (Priyanto, 2009). The highest cause of death in 2016, by 32 percent due to bleeding. While 26 percent due to hypertension that causes seizures, pregnancy poisoning that causes the mother to die.

The high cases of maternal death were also identified as an indirect result of the "three late" condition, namely; late in getting to know the danger signs and making decisions at the family level, late reaching the service place, and late to get adequate medical help (WHO, 2008).

These maternal deaths generally occur during pregnancy, childbirth and childbirth. According to the results of the Household Health Survey in 2001, the cause of maternal death in Indonesia was almost 90% at delivery and immediately after delivery.<sup>22</sup> Meanwhile, the risk is also higher due to the risk factors of delay, namely late recognition of danger signs, late taking decisions and being late to health facilities.

Delivery services by health workers with midwifery competencies in health facilities have been linked to health service program policies in an effort to reduce maternal mortality. Maternal health experts agree that the presence of health workers during labor and the early

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<sup>21</sup>[https://kesga.kemkes.go.id/images/pedoman/laporan\\_tahunan\\_2015.pdf/](https://kesga.kemkes.go.id/images/pedoman/laporan_tahunan_2015.pdf/) diakses pada 27 Mei 2018

<sup>22</sup>Fitria Nurlinda, Stefanus Supriyanto, 2014. *Pengaruh Faktor Karakteristik Individu, Psikologi dan Sosial Terhadap Pemilihan Tempat Persalinan di Fasilitas Kesehatan*. Jurnal Administrasi Kesehatan Indonesia Vol.2, No.4.

postpartum period is an important key to reducing maternal mortality. Childbirth assisted by trained health workers is proven to reduce the risk of maternal death (WHO, 2008).<sup>23</sup> Women who give birth in health care facilities make it possible to gain access to emergency obstetric services and newborn care (Unicef, 2012).

Minister of Health Regulation No. 97 of 2014 Article 14 paragraph (1) regulates that childbirth must be carried out at health care facilities (Fasyankes). The provision of childbirth must be carried out in health care facilities (Fasyankes) is a government policy in maintaining maternal health and reducing maternal and newborn deaths. In addition, in Article 14 paragraph (2) and paragraph (3) explain the 5 basic aspects of childbirth which are part of the Normal Maternity Care (APN) standard, which is to make clinical decisions, care for mothers and dear babies, infection prevention, recording (medical records) childbirth care, and referral in cases of maternal and newborn complications, all these aspects can only be done in health care facilities.<sup>24</sup> However, the implementation of Permenkes No. 97 of 2014 must be adjusted to the geographical and demographic conditions of the people in Indonesia. The implementation of Permenkes number 97 of 2014 with the problem of people in remote areas where the distance to health care facilities is very far and cannot be reached by the community so that it does not allow health workers to perform delivery services in primary health care facilities. The delivery service at the primary health care facility does not mean that the midwife is prohibited from providing childbirth services outside the primary health care facilities, but in certain conditions where primary health care facilities cannot be reached by the community or in emergency conditions, the midwife can do childbirth assistance outside health care facilities primary. Indonesia's population has increased from year to year. The increase in population can affect the three indicators of national welfare and development, namely economic, education and health. The increasing population in Indonesia has resulted in a decline in the level of the economy, education level and level of public health. This is because the more the population affects the greater income and social disparity between regions, ie the rich population gets richer, while the poor get poorer. The condition of people who experience poverty is certainly affecting their low level of education and health, because to be able to access education and health services, the community must have sufficient economic conditions to pay for the costs of these services.

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<sup>23</sup>Wahyuningsih, Heni Puji. *Etika Profesi Kebidanan*, Fitramaya, Yogyakarta. 2000.

<sup>24</sup> Permenkes nomor 97 tahun 2014

The high rate of maternal and child mortality is one of the problems that occur in Indonesia in the health sector. The factors that influence the delivery service by midwives in primary health care facilities, among others, are the low level of economic and community education in the health sector, education factors and minimal community behavior in health, environmental factors, health service factors, and nutritional status factors. minimal community. Therefore, efforts to improve maternal and child health should be addressed to these four health factors in order to create an independent society in the field of maternal and child health. This was revealed by Notoatmodjo (2005: 11) in his book entitled Health Promotion and Behavioral Sciences.<sup>25</sup> The problems in this study are: How is the implementation of Permenkes number 97 of 2014 concerning health services during pregnancy, childbirth and postpartum period, the provision of contraceptive services and sexual health services at delivery services by midwives in primary health care facilities as an effort to reduce maternal mortality and what factors influence the delivery service by midwives in primary health care facilities to reduce maternal and infant mortality. The research method used in this study is a juridical normative and juridical empirical approach to the application of Permenkes regulation number 97 of 2014 in an effort to reduce maternal and infant mortality. Normative juridical research includes research on principles or principles of law, legal understanding and legal provisions. This research is descriptive analytical to describe all the conditions found in research and analytical attempts to describe the results of the study. This study used a sample of midwives as delivery service staff at PONEID capable puskesmas midwives in Pringsewu District.

## **B. Results and Discussion**

### **1. Implementation of Permenkes number 97 of 2014 concerning health services before pregnancy, and postpartum period, implementation of contraceptive services, and sexual health services.**

The legislation that has the lower level or higher have aims to community and law enforcement officials can carry it out consistently without distinguishing the community from one another. In reality the stipulated legislation is often violated, so the rule does not apply effectively.<sup>26</sup>

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<sup>25</sup> Gina Indah P.Nastia dkk. *Promosi Kesehatan Ibu dan Anak Melalui Coporate Social Responsibility (CSR) Bidang Kesehatan Ibu dan anak*. Prosiding KS: Riset dan PKM Vol.2, No.3

<sup>26</sup> Salim HS.E.S. (2016). *Penerapan Teori Hukum Pada Penelitian dan Disertasi*. Jakarta ; raja Grafindo Perkasa. p. 302

Anthony Allot said about the effectiveness of the law, that the law would be effective if the purpose of its existence and its application could be prevented from undesirable actions to eliminate chaos. Effective law in general can make what is designed can be realized. If there is a failure, then it is likely that there will be an easy correction if there is a necessity to implement or apply the law in a different new atmosphere, the law will be able to solve it.<sup>27</sup>

Permenkes No. 97 of 2014 on Article 14 paragraph (1) and (2) regulates that childbirth must be carried out in health care facilities. The provision of childbirth must be carried out in health care facilities is a government policy in maintaining maternal health and reducing maternal and newborn deaths. In addition, Article 14 paragraph (2) describes the 5 basic aspects of childbirth which are part of the standard Normal Childbirth Care (APN), which is to make clinical decisions, care for mothers and dear babies, infection prevention, care (medical record) care childbirth, and referral in cases of maternal and newborn complications, all these aspects can only be done in the place of health care facilities.

However, the implementation of Permenkes No. 97 of 2014 must be adjusted to the geographical and demographic conditions of the people in Indonesia. The implementation of Permenkes number 97 of 2014 with the problem of people in remote areas where the distance to health care facilities is very far and cannot be reached by the community so that it does not allow health workers to perform delivery services in primary health care facilities. Childbirth services at these primary health care facilities do not mean that midwives are prohibited from providing delivery services in non primary health care facilities, but in certain conditions where primary health care facilities cannot be reached by the community or in emergency conditions, midwives can perform non-facility delivery services primary health care.

**2. Factors influencing the application of Permenkes number 97 of 2014 in an effort to reduce maternal and infant mortality include geographic factors, socio-cultural factors, socio-economic factors, health service utilization factors, inadequate quality of facilities and infrastructure, and behavior and minimal public education in the health sector**

The factor of education is one of the factors in determining the choice of place of birth. The higher the level of education, the higher the awareness to get better health services. The level of education for mothers who give birth in Puskesmas, and in non primary health care facilities.

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<sup>27</sup> *Ibid*, p. 302

Local socio-cultural factors greatly influence the mindset of mothers who will give birth in making the decision to choose a place of birth where health care facilities are located or in non-health care places or traditional birth attendants. and infection. Therefore, the community must get delivery services at the nearest health center to prevent the Classic Trias (bleeding, pregnancy poisoning or preeclampsia and infection).

### **C. Conclusion**

The application of Permenkes number 97 of 2014 is very necessary for delivery service policies by midwives in primary health care facilities because national targets for delivery services in health care facilities have not been achieved to reduce maternal mortality (AKI) and infant mortality (IMR), this is due there are still many deliveries in non-health care facilities, so giving birth in health care facilities is still low, not reaching the national target of 90 percent. Therefore, the government issued a regulation number 97 in 2014 as a government effort to reduce maternal mortality and infant mortality in Indonesia as an effort to reduce maternal and infant mortality. Factors influencing the implementation of Permenkes number 97 of 2014 as an effort to reduce maternal and infant mortality include geographic factors, socio-cultural factors, socio-economic factors, health service utilization factors, inadequate quality of facilities and infrastructure, and behavior and minimal public education in the health sector with conditions in remote areas with very long distances and unable to reach health care facilities so that delivery services cannot be performed in primary health care facilities, this means there is no prohibition on non-delivery services. primary health care facilities in special conditions if primary health care facilities cannot be reached by the community or in emergency conditions to save the lives of mothers and babies as an effort to reduce maternal and infant mortality in Indonesia.

Maternal and newborn deaths are still a major health problem. The problem of maternal and infant mortality has a complex cause, so the reduction efforts require the collaboration of various sectors such as health professionals, government and society. So the quality of our health personnel, of course also from health facilities, from the external side such us access from the community itself, of course, many things we need to try to unite reach national's target.

Midwives are expected to be more active to approach their supervised community. Primary healthcare center and district health office are suggested to do efforts to improve community knowledge, to train and assist dukun, and to review the incentive for midwives in order to be able increase the number of visits to pregnant women in their houses in the field.

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## **Implementation of Health Social Security in Human Rights Perspectives in Indonesia**

Sri Zanariyah, M. Najib Imanullah, Arief Suryono, and Adi Sulistiyono

### **Abstract**

The fundamental and basic aspects of humanity include the right to life and the right to life, and the protection of honor, dignity and human dignity. Article 28A of the amended 1945 Constitution provides that: Every person shall have the right to live and the right to preserve his life and life. The provisions of human rights in the Amendment of the 1945 Constitution Article 28A have to do with Article 28 H, that every person has the right to live a prosperous and spiritual life, to live and to have a good and healthy environment and to be entitled to health services, including this is the right to obtain social security. To fulfill the provisions of Human Rights regulated in the 1945 Constitution, on October 19, 2004, the government has issued Law Number 40 Year 2004 regarding National Social Security System (UUSJSN). As a follow-up of the issuance of the National Social Security System Law, then in 2011 has been issued Law No. 24 of 2011 on the Social Security Administering Agency (BPJS). The BPJS Law regulates the management of health insurance and employment security, the system of health insurance and employment guarantees similar to the social insurance system, so that health insurance is the same as health insurance and the provision of employment guarantees is similar to the provision of labor insurance. The study in this paper aims to discuss the implementation of social security organized by BPJS Health that can impact on human rights This study uses the method of doctrinal legal research, the type of secondary data through the approach of normative juridical.

**Keywords:** Human Rights, Health Insurance, BPJS Health

## **A. Background Issues**

The discussion on Human Rights (hereinafter written briefly on Human Rights), is not new, especially in Indonesia, has been widely discussed lately by the people nationally and internationally, if in a country having problems related to human rights, it will be easily spread in other countries, considering that information in this globalization era can be easily and quickly known by the world community, through the internet everyone can access all information, both positive and negative, as long as one can operate modern equipment in the field of telecommunications information.

The issue of human rights becomes important, because it can be linked to all actions or actions of someone against other people, even to the people from the authorities, which can be assessed from various policies that have been ratified and declared valid. If there are problems related to human rights, then the information will easily spread to a country not only through internal interaction, but without being prevented it will be easily known by external parties, namely other nations. Therefore all matters relating to human rights require serious attention from a nation, because it will affect other nations, so it demands various countries to discuss these human rights issues intensively.

Human rights or Natural Rights became an important study after World War II and at the time of the establishment of the United Nations in 1945, that human rights were a necessity in universal social reality. In the end there was a desire to formulate human rights in an international text, until on December 10, 1948 was successfully compiled, with the acceptance of the Universal Declaration of Human Rights, this declaration was signed by several leaders from several countries which were incorporated. in the United Nations (UN) in Paris. As a statement formulated in the Universal Declaration of Human Rights Charter, it is a moral commitment even though it has not been legally binding. However, this document has a very large influence, both morally, politically and educatively.<sup>1</sup>

Indonesia as a developing country and as a member of the United Nations (UN) must accept the provisions on human rights as written in the Universal Charter of the Declaration of Human Rights, as a provision that must be ratified in accordance with the basic state of Pancasila and the 1945 Constitution (UUD 1945 ) and Indonesian culture, therefore the 1945 Constitution has been amended I to IV of the 1945 Constitution, in which the provisions on human rights are written in a special chapter, namely Chapter XA on Human Rights, in

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<sup>1</sup>Miriam Budiardjo, *Dasar-dasar Ilmu Politik*, Jakarta, Gramedia, 1998, p. 124



Articles 28 A to Article 28 J. Legal protection relating to human rights, has been formulated in the 1945 Constitution as a result of amendments.

Human rights are defined as rights inherent in human dignity as creatures of God, and these rights are brought by humans from birth to the earth so that these rights are natural (natural), not human or state gifts.<sup>2</sup>The nature of the existence and basis of human rights is solely for the benefit of humanity itself, meaning that every human / individual can enjoy his human rights. Human rights are essentially a set of provisions or rules to protect citizens from the possibility of oppression, protection and or limitation of citizens' movement by the state. This means that there are certain restrictions imposed on the state so that the most essential citizens' rights are protected from the arbitrariness of power.<sup>3</sup> Humanitarian aspects that are very basic and fundamental, including the right to life and the right to live a life, as well as the protection of human dignity, dignity and dignity. Article 28A of the 1945 Constitution amended, regulates that: Everyone has the right to live and has the right to defend his life and life.

The contents of this article indicate that trying to live is including human rights that must be protected, surviving to live because of experiencing illness, surviving for life also means that someone is forbidden to be killed, so there are those who argue that capital punishment is a violation of human rights. Therefore, people who suffer from illness or who are threatened with a death require the availability of means to continue to live, even though the limits of human life are in the hands of God Almighty, but the right of everyone to maintain his life. The facilities needed are health facilities, the availability of medicines and medical equipment is sufficient, of course it is the government's obligation to provide it.

Indonesia as a country that upholds human rights, is implemented in the activities of everyday life, there are activities in the field of education that provide convenience to the children of the nation to receive education up to junior high school and even up to high school at schools established by the government, as well as schools established by private parties. Services in the field of health to the public include National Social Security (JSN), in order to fulfill the provisions in the Human Rights Law especially in Article 41 that every citizen has the right to social security needed for a decent life and for his personal development as a whole. The availability of employment opportunities that can

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<sup>2</sup>Mahfud MD, *Dasar & Struktur Ketatanegaraan Indonesia*, Jakarta, Rineka Cipta, 2001, p. 127

<sup>3</sup>Muladi, *Hak Asasi Manusia Hakekat, Konsep dan Implikasinya dalam Perspektif Hukum dan Masyarakat*, Bandung, PT. Refika Aditama, 2009, p. 39.

accommodate workers to reduce unemployment, so that it can improve the living standards of more prosperous people.

Provisions on Human Rights in the 1945 Constitution Article 28A has something to do with Article 28 H, that every person has the right to live physically and mentally, live, and get a good and healthy environment and is entitled to health services, including in this case the right to obtain guarantees social.

In order to fulfill the human rights provisions stipulated in this 1945 Constitution, on October 19, 2004 the government issued Law Number 40 of 2004 concerning the National Social Security System (hereinafter written briefly into the SJSN Law). As a follow up to the issuance of the National Social Security System Law, in 2011 Law No. 24 of 2011 concerning the Social Security Administering Agency (BPJS) was issued. The issuance of these two laws has an effect on national health insurance management, which includes the type of social insurance,<sup>4</sup> where the social insurance providers are the government. However, the management of health insurance can also be managed by the private sector as a commercial insurance, with the aim of making a profit.

Based on the background of the above problems, the problems that will be discussed are as follows:

1. Why does the implementation of national social security in managing national health insurance have an impact on human rights?
2. What is the implementation of health insurance programs in the view of human rights?

## **B. Method**

The study in this paper uses normative legal research methods, by conducting discussions based on the legislation governing human rights associated with the provisions governing the social security system in Indonesia, especially in the management of health social security. The problem approach is done by normative juridical method, the type of data used is secondary data sourced from primary legal materials, secondary legal materials and tertiary legal materials, collected through literature study, then analyzed qualitatively, and compiled deductively.

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<sup>4</sup> Sentosa Sembiring, *Hukum Asuransi*, Bandung, Nuansa Aulia, 2014, p. 7

## C. Discussion

### 1. Implementation of Health Social Security Can Impact on Human Rights (HAM)

With regard to national health insurance, before the existence of the National Social Security program (JSN) has been implemented in the implementation of social security in the health and employment sectors, the organizers are the Social Security Organizing Bodies as stipulated in Act Number 24 of 2011 concerning the National Social Security Organizing Agency ( then written briefly into the BPJSN Law), that health insurance was previously held in the Health Social Insurance program, regulated in Government Regulation Number 69 of 1991 concerning Health Maintenance of Civil Servants, Pension Recipients, Veterans, Independence Pioneers and their families. Health Social Insurance (Askes) includes compulsory insurance, because it is required by laws and regulations. In addition, Askes is an insurance that aims to provide protection to the community (social security), so that it is not for profit, even though the funds raised are from the Askes participant community..

Health social security is organized based on the social insurance system, in the last decade it has received serious attention in the community, this has something to do with the goal of a modern state that adheres to the welfare state, one of the indicators of achieving state goals is the availability of social security (social security) for the community, the form of social security includes social insurance, which is outlined in the form of legislation.<sup>5</sup>

The concept of a welfare state makes the state more instrumental in creating in creating prosperity. Indonesian society itself as a welfare state has organized various types of social insurance.<sup>6</sup> The implementation of human rights in the implementation of health insurance as a form of social security by the government must be carried out fairly to all citizens, so that the government must apply justice in the implementation of health insurance.

Jhon Stuart Mill gave the concept of justice in the form of protection against claims, namely to improve welfare and hold promises equally. Equally, it means that the position of a person is equal (equal in height), equal to his position or his position is balanced. Judging from its benefits, justice is equality, equal in a balanced position,<sup>7</sup> so that it can be said to be fair if everyone is placed equal, equal to achieving prosperity in society.

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<sup>5</sup> Bhisma Murti, *Dasar-dasar Asuransi Kesehatan*, Yogyakarta, Kanisius, 2000, p. 25

<sup>6</sup> M. Suparman Sastrawidjaja dan Endang, *Hukum Asuransi Perlindungan Terhadap Tertanggung. Asuransi Deposito. Usaha Perasuransian*. Bandung, Alumni, 1997, p. 121

<sup>7</sup>Salim HS, Erlies Septiana Nurbani, *Penerapan Teori Hukum pada Penelitian Disertasi dan Tesis*, Raja Grafindo Persada, Jakarta, 2014, p. 29

Social insurance arises because of the needs of the community for the implementation or fulfillment of a social security. Guarantees are needed because of the danger that occurs due to the ability or will of the community itself whose interests are protected by the state. Elements of social insurance are:

1. Insurers can be an organization under (government authority).
2. Insured (usually the wider community, members, or certain groups of people).
3. Risk (a loss that has been set and determined in advance).
4. Mandatory (based on a statutory provision, or other regulations). Whereas the purpose of social insurance is primarily to guarantee the protection of the need for social security for the wider community, therefore the guarantor is of course the wider community.<sup>8</sup>

The use of the term social insurance can be found in the SJSN Law, as stipulated in Article 1 number 3: Social insurance is a compulsory collection mechanism that originates from contributions to provide protection for the socio-economic risks that befall participants and / or their family members. Furthermore, it is also stipulated that the providers of social security are in accordance with Article 1 number 6: That the Social Security Organizer is a legal entity established to organize social security programs.

The types of social security programs that are protected, the arrangements in Article 18 of the SJSN Law include:

- a. Health insurance
- b. Accident insurance
- c. Pension plan
- d. Pension guarantee
- e. Life insurance

Especially regarding health insurance, it has been regulated in the Republic of Indonesia Presidential Regulation Number 12 of 2013 concerning Health Insurance, contained in Article 1 number 1, written that:

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<sup>8</sup>Sentosa Sembiring, *Op. Cit.* p. 102.

“Health insurance is a guarantee in the form of health protection so that participants get the benefits of health care and protection in meeting the basic health needs provided to every person who has paid contributions or is paid by the government”.

The Health Social Security Administering Body (BPJS Kesehatan) is a legal entity established to organize a Health Insurance program as stipulated in Article 1 number 3 of Government Regulation Number 12 of 2013 concerning Health Insurance. In connection with the participation of the health insurance program in Article 2 of the Government Regulation, includes the Contribution Aid Recipients (PBI) Health Insurance, namely the poor and the poor (Article 1 point 3) and not PBI Health Insurance, those who have sufficient income and are considered able to pay contributions to health insurance programs.

The description of health insurance above shows that the implementation of guarantees in order to meet the basic needs of a decent life for participants and / or their families, the implementation of health insurance is social insurance, the fulfillment of basic needs of decent living is the protection of human rights, as regulated in The 1945 Constitution regulates human rights, namely 28A which is also closely related to Article 28 H. Provisions on human rights are more concentrated with the issuance of the Law on Human Rights.

Human rights are rights that are inherently inherent in human beings as God's creatures, who must be given a separate space in the sense that they are protected by law to be carried out by everyone on earth including in Indonesia, which must be upheld and respected by everyone, government and society in general. However, everyone in carrying out their human rights must respect the rights of others, because other parties also have human rights that must be protected and respected.

For the Indonesian people, human rights as a thought and as a paradigm were not born together with the Universal Declaration of Human Rights (1948), although it cannot be denied that Indonesia as a member of the world organization is incorporated in the United Nations (UN), historically what happened on the 10th December 1948 was the culmination of the struggle of mankind after witnessing the atrocities of past wars. For Indonesia, the issue of human rights is not only a matter of foreign parties, because since formulating the 1945 Constitution the founders of the Republic have debated the issue of human rights.

The formulation of human rights in the 1945 Constitution is the result of a compromise or consensus between the notion that views are inappropriate to formulate

human rights in the Constitution in full with individualistic concerns and thoughts which argue that the Constitution should contain a complete provision of human rights. As a state of law, the provisions on human rights are not only to meet the demands of the national community and the international community, but more than that, all the provisions in the 1945 Constitution must be realized in the life of the nation and state. The government as a responsible party must have politic links to implement the provisions of the 1945 Constitution. Therefore, human rights are not only regulated in the 1945 Constitution, but must be formulated in the legislation followed by other implementing regulations. Provisions on human rights in the 1945 Constitution before being amended there are already formulations on human rights, as written in Article 27 of the 1945 Constitution, concerning equality in law and government, the right to decent work and livelihood, right and obligation in state defense, continued in Article 28 regulating freedom of association and assembly, issuing thoughts both verbally and in writing, after the amendment of human rights is arranged even more, written in Chapter XA on Human Rights, starting Article 28 A to Article 28 J.

Article 28A Amended 1945 Constitution, regulates that: "Everyone has the right to live and has the right to defend his life and life". The contents of this article indicate that trying to live is including human rights that must be protected. Therefore, people who suffer from illness or who are threatened with a death require the availability of means to continue to live, even though the limits of human life are in the hands of God Almighty, but the right of everyone to maintain his life. The facilities needed are health facilities, the availability of medicines and medical equipment is sufficient, of course it is the government's obligation to provide it.

Article 28A has something to do with Article 28 H, that everyone has the right to live physically and mentally prosperously, to reside, and to have a good and healthy living environment and the right to obtain health services, including in this case the right to obtain social security.

## **2. Organizing a Health Insurance Program in the Human Rights View (HAM)**

As a form of protection for the people's right to life, the right to healthy life, there have been steps taken by the government, by providing Community Health Centers (PUSKESMAS) which currently exist in each sub-district. PUSKESMAS services are not

only for outpatient care, but also for inpatient facilities for people who need intensive care. Health is everyone's need, often we hear the words "healthy are expensive" This shows how important health is for everyone, when a sick family will at least spend some money to buy drugs and even certain treatments by medical personnel, so that healthy living is all ideal people, therefore the government must be responsive to the health of the community.

The need for healthy living for the community can not all be addressed every time it is needed, but sometimes some people who are unable to cope with health-related problems, both for themselves and their families, so that there is a need for funds to be prepared when needed when a family is sick In fact, there should be prevention efforts to avoid suffering from illness, by consuming regular and healthy food. The need for health costs is a risk that must be faced by every family, if at certain times and wherever they are, there are family members who need to deal with health problems.

The risks faced can be borne alone, can also be transferred to other parties, transferred partially or completely. This risk contains uncertainty as the basis for the emergence of a business known as insurance, including insurance in the health sector. Health insurance can also be carried out by the government as a form of protection for the community, this government-run insurance is called compulsory insurance or social insurance. Health insurance can be carried out by private companies, where insurance managed by the private sector includes the type of commercial insurance, whether or not it depends on the willingness of the parties to make an agreement, namely the party who transfers risk (the insured) to the recipient of the risk (the insurer, namely the insurance company).

Insurance activities are an effort in order to fulfill the interests of individuals and groups in terms of overcoming the risks faced. The risk in question can relate to a person's soul or assets, in which a person's soul can experience problems related to declining health or illness, the risk faced is the need for costs to overcome these health problems. Risk is a condition that contains the possibility of deviations that are worse than expected results.<sup>9</sup>

One of human efforts to divert the risk on its own, is by entering into a risk transfer agreement with another party. Such agreements are referred to as insurance or insurance

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<sup>9</sup>Emmet J. Vaughan dan Therese Vaughan, *Fundamentals of Risk and Insurance*, Jhon Wiley & Sons, Inc, 9<sup>th</sup> Edition, 2003, p. 3.

agreements.<sup>10</sup> Although there are also insurance that is not based on an agreement between the parties, it is required by law, which is known as social insurance.

Insurance activities are risk management activities faced by everyone who has an interest in someone's interests, related to one's property or soul. However, whether or not insurance depends on the will of the parties, especially the will that has an interest in one's property or soul, is the freedom of a person or group to hold insurance. However, the government has a responsibility for the social protection of its citizens, to provide comfort, security, and convenience in providing solutions to risks that might occur to the community.

The form of government responsibility in providing social protection in the health sector is by building a social security system for the community. The social security system is an effort to realize prosperity, give a sense of security throughout human life, through a system approach, which must be orderly, systematic, measurable.<sup>11</sup>

The implementation of social security in the health sector in order to provide protection to the public who need facilities and infrastructure in the health sector, the implementation is carried out by an agency namely the Health Social Security Administering Body (BPJS Kesehatan), the implementation of social security for the community besides health, there is also BPJS Employment. This social implementation was previously included in health insurance (ASKES) which specifically provides protection to the public in the field of health, and the implementation of Labor Social Security (JAMSOSTEK), in the insurance sector are both included in compulsory social insurance.

The government, as the party that carries out social social security, must, of course, carry out an evaluation, whether the steps taken as a community protection organizing body are appropriate with what is done in the practice of its implementation. As an organizer of National Social Security carried out by the Health and Employment BPJS, it is obligatory for everyone to take part in this program independently or collectively through an institution where a person performs his work activities, which there are regular payments. Furthermore, the government's obligation to provide health services if BPJS members need the service. This means that the implementation of human rights on social security in the health sector has a burden that must be borne by both parties, everyone who needs health insurance is obliged to pay a sum of money on infrastructure in the health sector provided by the

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<sup>10</sup>Sri Rejeki Hartono, *Hukum Asuransi dan Perusahaan Asuransi*, Jakarta: Sinar Grafika, 1997. p. 15.

<sup>11</sup> Chazali H. Situmorang, *Reformasi Jaminan Sosial Di Indonesia Transformasi BPJS: "Indahnya Harapan Pahitnya Kegagalan"*, Depok, CINTA Indonesia, 2013, p. 3.



government, payment of money is a premium in insurance, while the provision of facilities and infrastructure in the health sector is a government obligation including the obligation of the insurer in insurance, namely social insurance in the health sector.

Everyone has the right to social security to be able to meet the basic needs of a decent life and increase his dignity and a prosperous society, for that the enactment of Law Number 40 of 2004 concerning the National Social Security System, so that the government organizes National Health Insurance (JKN) organized by The Social Security Organizing Body (hereinafter briefly written BPJS) Health, in addition there is an Employment Social Security Organizing Body, in which these two organizing bodies are health insurance providers (ASKES) and labor social security insurance (JAMSOSTEK), by analyzing these issues can be known about the problems that arise due to the policy of using BPJS cards, especially BPJS Health..

Social security is certainly not just a health problem, as the concept of George Rejda, that the concept of social security can be divided into 4 (four) approaches,<sup>12</sup> including through Social Insurance (Social Insurance), is a social security program that is mandatory according to the law for each provider employment and professional independent workers as a response to loss of income, caused by work accidents, illness, death before retirement, layoffs, and retirement.

The existence of social security, especially in the field of health (health insurance) with the issuance of the Health BPJS card, for each member of the community, which is carried out by the government in the practice of its use there is an impression for the card users in number two in the health services of patients who do not use the Health BPJS card that, so if you want to get excellent service someone does not use a Health BPJS card. Another problem in the practice of providing health protection is the use of Health Insurance cards (Askes) regulated in Government Regulation Number 69 of 1991 concerning Health Care of Civil Servants, Pension Recipients, Veterans, Independence Pioneers and Their Families, the validity of the Askes card can be shown when someone needs service certain medical by showing the BPJS Health and Askes Cards simultaneously, the Hospital asks which card to use, by explaining the difference between the use of the two cards.

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<sup>12</sup>Bambang Purwoko, *Sistem Proteksi Sosial Dalam Dimensi Ekonomi*, Jakarta, Oxford Graventa Indonesia, 2011, p. 39-45

Freedom to choose insurance by the community has been regulated in the laws and regulations relating to insurance. This does not mean free to choose insurance that is based on agreements including voluntary insurance, but the freedom to determine a service system that can be accepted, adjusted to the level of community ability, whether including groups of workers, or independent, even if unable to still be able to participate in the health insurance program with a burden country for payment of contributions.

The existence of health insurance carried out by state-owned enterprises and the private sector is in accordance with the implementation of human rights, where in addition to the government obliged to provide health services by providing infrastructure in the health sector in providing protection to the community, the community is given the freedom to exercise their right to choose insurance managed by the company Non-government health insurance in this case is a life insurance company based on an agreement or agreement between the parties, as described above.

The government's obligation to establish social security in the health sector is a mandate of the law that must be implemented, as government protection of the community, as stipulated in the amended 1945 Constitution, Law Number 39 of 1999 concerning Human Rights, and Law Number 40 of the Year 2004 concerning the National Social Security System (SJSN) and Law Number 24 of 2011 concerning the Social Security Administering Body (BPJS), these provisions form the basis for the establishment of the BPJS in the Health sector, in addition to the BPJS in the Manpower sector.

#### **D. Conclusions**

Based on the problems discussed in this writing, the conclusion: a) whereas the implementation of Health Social Security is the implementation of Human Rights (HAM) especially in Indonesia, as mandated in the amended 1945 Constitution, the provision of social health insurance, in addition to being carried out by the state in the compulsory BPJS Health program, there is a burden of contributions to be paid to BPJS, is only charged to those who work and are considered able to pay, while for poor people, contributions are borne by the government, so that the entire population can get social protection, namely the right to healthy living; b) whereas the implementation of the Health Insurance Program in the Human Rights View (HAM) can be implemented in the form of compulsory social health insurance, no community members are not guaranteed in the health social security program. the right to a healthy life is a human right protected by law.

As the implementation of human rights in terms of the right to a healthy life organized by the government through the holding of BPJS Health and held by private companies, the government should conduct intense supervision, so that health protection as human rights can be carried out properly, starting from the registration process to filing a claim when there is a risk related to health or soul in general.

In addition to government supervision, it can also provide guidance, so that the health social security program can continue to develop and be improved, so that people get protection from the government and health insurance providers or health insurance can carry out the obligations in accordance with the provisions of the law or agreements that have been agreed, people get comfort and convenience when they need services in the health sector.

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- RI Presidential Regulation Number 12 of 2013 concerning Health Insurance.

## **The Rights of HIV/AIDS Patients' Care: Medical Secrecy and Medical Record**

Suci Hawa

### **Abstract**

The objectives of this research were to find out the liability of doctors towards medical secrecy and medical record of HIV/AIDS patients' care and how the doctors fulfilled the rights of HIV/AIDS patients' care. This study was empirical research and the type was descriptive. The approach used normative juridical and empirical juridical. The data used primary data and secondary data. The data collection was done by interview, literature, and document study. Data processing was done by editing, selecting, classifying, and systemizing then it was conducted by qualitative analysis. The result and discussion of this research showed that in the HIV/AIDS patients' care, medical secrecy and medical record must be protected and cannot be disclosed to third party unless there was a reason. In fulfilling the rights of HIV/AIDS patients' care, the doctors should maintain the medical secrecy, medical record, and give the medical treatment to the HIV/AIDS patients based on the law provisions and related regulations. The findings suggest that the role of doctors in maintain medical secrecy and fulfilling the rights of HIV/AIDS patients could avoid marginalize, stigma, and discrimination.

**Keyword:** HIV/AIDS patients, Medical record, medical secrecy, the right

## **A. Introduction**

The Joint United Nations Programme on HIV/AIDS (UNAIDS) summarized that there were 39.5 million people who indicated of HIV/AIDS in over the world by the end of 2016. It was divided by 36.7 million people were living with HIV/AIDS, 1.8 million people were newly infected, and 1.0 million killed. It happened in Africa, Asia, America, and Europe (Beatty, Lula A., at al., 2004; Amollo, 2011; Jhonson, at al., 2002).

The latest data in 2016, Indonesia had 48.000 new HIV infections and 38.000 AIDS-related deaths. There were 620.000 people living with HIV in 2016, among whom 13% were accessing antiretroviral therapy. Among pregnant women living with HIV, 14% were accessing treatment or prophylaxis to prevent transmission of HIV to their children. An estimated 3.200 children were newly infected with HIV due to mother to child transmission. The key population most affected by HIV in Indonesia were: sex workers, gay men and other men who have sex with men, people who inject drugs, transgender people, and prisoners. A study by Patterson and London (2002) indicated that these groups (and others vulnerable to HIV infection and the impact of AIDS) are often characterized by social and economic disadvantage and discrimination; this leads to the observation that in each society, those people who before the arrival of HIV/AIDS were marginalized, stigmatized and discriminated against become over time those at highest risk of HIV infection. The stigma made a discrimination and broke the human right for the people with HIV (Human Immunodeficiency Virus) dan AIDS (Acquired Immunodeficiency Syndrome) (Ganghenggang, (2013). In Article 3 of Law No. 39 of 1999 on Human Rights, it is also stated everyone has the right of protection as human rights and human freedom, without any discrimination.

Avoiding marginalize, stigma, and discrimination towards HIV/AIDS patients, it is needed the role of health professional workers, especially a doctor. The main obligation of a doctor or other health workers is protecting the rights of HIV/AIDS patients. One of them is maintaining the medical secrecy of HIV/AIDS patients. In general, doctors have the liability to provide the information to the patients and also maintain the medical secrecy to the HIV/AIDS patients' care, in the form of the medical record. In essence, the relationship between doctors and HIV/AIDS patients creates the results of an examination that contains an explanation of the patients' health. The result of a doctors' examinations of HIV/AIDS patients are summarized in a medical record. Medical record is the file that contains of notes and documents about patients' identity, examination, treatment, action and other services that have been given to patients. The content of the medical record is the patients'

confidential property and must be kept by a doctor. This is stated in Article 12 of The Ministerial Regulation of Health No. 269 of 2008 on Medical Record. Medical record not only becomes a confidential of HIV/AIDS patients, but also part of the medical secrecy which is a doctor's moral obligation to keep it as a confidential.

The Hippocrates' medical regime, the obligation to uphold the confidentials of the doctors' work should always be fulfilled to create an atmosphere of absolute trust in the relationship between the doctors with the patients. Koeswadji, (1998) proposed the foundation for medical ethics and vows. The oath to maintain the medical secrecy is formulated as follows:

“When I may see or hear in the course of the treatment or even outside of the treatment in regard to the life of men, which on no account one must spread abroad, I will keep to myself hording such things shamefull to be spoken about.”

The rights of medical record in HIV/AIDS service is the patients' right to not be disclosed further. Based on Yustina (2014), the information regarding the data of HIV/AIDS patients is related to the patient's confidentials (medical secrecy). The medical secrecy is regulated in Article 1 No. 1 of The **Ministerial** Regulation of Health No. 36 of 2012 on Medical Secrecy, it is stated that the data and information about the health of a person obtained by health workers when carrying out their work or profession. Medical secrecy is the patients' rights that must be respected and maintained even after the patients die. If it was violated, there will be legal liability in the form of sanctions for those who disclose it. The importance of medical secrecy became one of the patients' rights, it was regulated in several laws and regulations in the health sector, especially in Law No. 29 of 2004 on Medical Practice. This protection guarantee of this medical secrecy is even regulated in the provisions of Law on Public Information Openness (KIP) which stated that information concerning person's health data is "excluded" in the type of public information.

On the other hand, the patients can allow the doctors to disclose to the importance parties. The HIV/AIDS patients can give their right to obtain the information, so they decide to be told what they suffered (Taufiq, 2011). The patients were rightful to disclose relevant information to their relative. This was supported by Gable et. al (2007) a doctor's duty to disclose a status of HIV/AIDS patients to the patients' partners who may be at risk of infection emanates from the legal concept of “duty to warn.” In order to warn the partners of an HIV/AIDS infected patient, the doctors may be authorized under law to obtain the

partners' names from the patients, confidentially tell the partners they may be infected, and provide the partners with HIV counseling and access to testing and other services when available. The doctors and other providers must conduct partner notification in a confidential manner to avoid violations of their patients' right to privacy and reduce possible stigma and discrimination.

In certain case, the handling of HIV/AIDS patients could make a doctor or health workers being dilemma, because the illness suffered by the HIV/AIDS patients can endanger the surrounding people, while the patients did not give a consent to disclose the confidential. Based on the Article 48 of Law No. 29 of 2004 on Medical Practices and Article 57 of Law No. 36 of 2009 on Health, which stated that on the one hand the doctors or health workers must keep the medical secrecy of the patients, on the other hand they must disclose the patients' confidential, while the universal principle adhered and adopted by the Government of Indonesia that everyone who checks HIV/AIDS with a voluntary and confidential (The Ministerial Regulation of Health No. 74 of 2014 on Implementation Guidelines for Counseling and HIV Test). It means that cannot be obliged because it contradicts human rights, so it needs prior informed consent, both the examination and the disclosure to be told by others.

As previously described, in HIV/AIDS patients' care the relationship between doctors and patients is based on very high trust. HIV/AIDS patients are willing to tell all the things related to the disease because they believe that the confidential will be kept by doctors who cure or treat them. The duty of doctors to keep things known for their position or occupation is based on moral norms, and in essence it includes moral obligation. The rights of patients confidential is part of the principle of moral autonomy, in part of one's autonomy which is determining who may know about the patients. Dewi, (2013) stated if the medical secrecy is violated, it must be a huge liability for a doctor, both morally and legally. The legal consequence of violation caused in the form of various legal sanctions for doctors who violate the obligation to hold medical secrecy.

One of the ways to protect the rights of HIV/AIDS patients and avoid marginalizing, stigmatizing, discriminating, is the role of doctors in maintaining a medical secrecy in accordance with the law and regulation. It is supported by Kirby (1995) was analyzed the AIDS paradox arises from a reflection on the nature of this epidemic and the features of the virus. By a paradox, one of the most effective laws we can offer to combat the spread of HIV



which causes AIDS is the protection of persons living with AIDS, and those about them, from discrimination.

## **B. Research Question**

The following two research questions are addressed: 1) how is the doctors' liability towards the medical secrecy and medical record of HIV/AIDS patients' care? 2) how is the role of the doctors in fulfilling the rights of HIV/AIDS patients's care?

## **C. Methodology**

This study was emperical research and the type was descriptive. The approach used normative juridical and emperical juridical. The data used primary data and secondary data. In primary data, the researcher has intervived dr. Erwin Iskandar, S.Ked., as the doctors who handled the HIV/AIDS patients in RSUD Liwa, Lampung Barat. Then, this research used secondary data including primary, secondary and tertiary legal materials. The data collection was done by interview, literature, and document study. Data processing was done by editing, selecting, clasifying, and systemizing then it was conducted by qualitative analysis.

## **D. Discussion**

### **1. The Doctors' liability towards the medical secrecy and medical record in of HIV/AIDS patients' care.**

The realization of the individual right of HIV patients' care is known by the concept of medical secrecy trilogy in a therapeutic relationship, namely informed consent, medical record, and medical secrecy. A doctor is liable for mantaining medical secrecy and medical record in accordance with ethic, profession, or legal. Based on Murtika and Prakoso, (1992) the liability of the doctors in maintaining medical secrecy and medical record in HIV/AIDS patients' care, as follow:

#### **a. Ethic liability**

The regulation which regulated the ethic liability of the doctors is the Indonesian Medical Ethics Code and the doctor's oath. Astuti (2009) said that the ethic code conducted a guideline of behavior and it has characteristics, such as rational, consistent, and universal. Juridically, the doctors in disclosing medical secrecy of HIV/AIDS patients must be in accordance with the applicable law and regulation. It means the doctors as the role holders have a juridical perspective in disclosing the medical secrecy of HIV/AIDS patients and

understanding the rights of patients which is also a doctor's obligation. However, dr. Erwin added:

" ... A doctor is obliged to keep the medical secrecy and medical record as far as the doctor's hypocrates oath has been said, that the confidential of the patients' illness, including the illness of HIV/AIDS patients will be fully kept by the doctors. However it is violated, a doctor has violated the code of ethic".

Thus, in the service of HIV/AIDS patients, a doctor must be liable ethically in maintaining the medical secrecy and medical record. A doctor who violated ethic code will get administrative sanction, not corporal or prison sentences (Astuti, 2013). In fact, there are several ethic violations in the form of moral sanctions, it called pure ethical violations. However, the violation is an ethicolegal violation, the sanction can be applied according to the applicable law.

In term of maintaining medical secrecy, ethically the liability for maintaining medical secrecy is contained in Article 16 of the Indonesian Medical Ethics Code (KODEKI), namely as follows: every doctor must keep everything he knows about a patient, even after the patients die. Then in the Doctor's Oath Remarks, the following reads: "I swear that: ..... I will keep everything I know because of my work and knowledge as a doctor."

The Ministerial Regulation of Health No. 74 of 2014 on Implementation Guidelines for Counseling and HIV Test stated that HIV testing which is carried out in confidentially, so that the health workers are not allowed to disclose the result to anyone outside without the patients' permission. The researcher concludes the ethic liability for maintaining the medical secrecy in order to carry out the ethic principle of the autonomy of HIV/AIDS patients, namely the right of autonomy. Carrying out the values of liability as written in Article 16 of the Indonesian Medical Ethics Code (KODEKI), as well as upholding the doctors' oath since they were made after taking medical education.

#### **b. Profession liability**

Doctors' rofessional iability is the liability related to doctor's profession concerning the ability and expertise of doctors in carrying out their professional duties (Astuti, 2013). Profession liability is divided into:

- 1) Education, experience and other qualifications

In carrying out the professional duties, a doctor must have an education degree which based on the field of expertise of his/her practicing. The foundation of knowledge gained during medical education, although the specialization and experience to help the patients.

2) The risk of care

The degree of risk care is attempted to be as small as possible, so that the side effects of treatment are kept as minimal as possible. In addition, the risk of care must be notified of the patients or his family, then the patients can choose an alternative to the treatment notified by the doctors.

3) Treatment equipment

The doctors should know about treatment equipment which using tools to help the patients.

The researcher concluded that in profession liability, the doctors should treat the HIV/AIDS patients based on the education, experience, and the qualification that gained during medical education. However, it not only helps the doctors to decrease the risk of care, but also giving the solution of treatment equipment.

**c. Legal Liability**

In legal liability, it was divided into three kinds. They were as follows:

**1) Civil liability**

**a) Default**

In term of maintaining the medical secrecy and patients' confidential of HIV/AIDS patients, the doctors may not disclose the disease to a third party, then the doctors must fulfill his obligations under the agreement by keeping the patients' confidential. It means the doctors disclose the confidential (medical record) without patients' permission, the patients can sue the doctors has defaulted and caused a damage. In default, it must be proven that the doctors was in agreement, then he has violated it (in this case, it must be based on professional errors). The patients must have some evidences of damage due to the non-fulfillment of the doctors' obligations in accordance with the medical profession standards that apply in a therapeutic contract. The case of damage in medical secrecy is not easy to implement, because the patients have not enough information from the doctors about doctors' duty in a therapeutic contract. According to the researcher, default is very difficult

in the authentication. Such as the character between the doctors and patients is *inspaningsverbintenis*.

### **b) Tort**

The tort is not born and preceded by an agreement. The liability caused a mistake including a classic form of civil liability. The tort of medical secrecy of HIV/AIDS patients is based on three principles regulated in Article 1365, 1366, 1367 of the Civil Code. The liability of medical secrecy which caused of tort can be sued according to 1365 of Civil Code. The doctors can be sued by the tort if the patients can show the doctors' fault due to his negligence in maintaining medical secrecy and the damage to the patients. The damage must be explained as doctors' negligence act, or there is a clear causal relationship and no justification. So that the doctors must pay compensation. Determining the doctors' fault, it refers to the standard of the medical profession. Then, the tort in medical secrecy can be identified with the action of doctors which is contrary to the applicable medical profession standards, namely the Medical Ethic Code of 2012.

## **2) Criminal Liability**

Criminal liability in maintaining medical secrecy of HIV/AIDS patients is an absolute matter from the point of criminal law. In the implementation, if there is a damage for the HIV/AIDS patients, then the patients must prove negligence or error caused by the doctors, and the proof refers to the criminal law provisions as referred to in the Criminal Code (KUHP) and other criminal provisions both in Law No. 29 of 2004 on Medical Practices, Law No. 36 of 2009 on Health, as well as other laws and regulations, such as Government Regulation No. 10 of 1966 on Obligation to Save Medical Secrecy and The Ministerial Regulation of Health No. 36 of 2012 on Medical Secrecy.

## **3) Administrative Liability**

A doctor is required to keep the medical secrecy of HIV/AIDS patients. They can not disclose it without the proper conditions. In the case of medical secrecy, the confidential of the patients is protected in Government Regulation No. 26 of 1960 on Doctor's Oath Remarks, then expanded by Government Regulation No. 10 of 1966 on Obligation to Save Medical Secrecy, and reaffirmed by The Ministerial Regulation of Health No. 36 of 2012 on Medical Secrecy. It can be concluded that the provision is violated then the doctors can be considered as having carried out administrative malpractice and may be subjected to administrative sanctions. These administrative sanctions can be in the form of written

warnings, recommendations for revocation of registration certificates (STR) or practice permits (SIP), as well as the obligation to attend education or training in medical or dental education institutions.

## **2. The Role of The Doctors in Fulfilling The Rights Of HIV/AIDS Patients' Care**

The fulfillment of the rights of HIV/AIDS patients, a doctor must be in accordance with Law No. 29 of 2004 on Medical Practices, as follows:

- 1) The HIV/AIDS Patients have the right to get a complete opinion and explanation about the medical actions to be taken by the doctors. These actions are in the form of diagnosis, goals, alternative actions, risks and complications that may occur and the prognosis of the action taken.
- 2) The HIV/AIDS Patients are entitled to get the services, or even refuse medical treatment from the doctors.
- 3) The HIV/AIDS Patients have the right to get the contents of the medical record as it became the property of the hospital, but it remains the patients' right.
- 4) The HIV/AIDS Patients must provide complete and honest information about their health problems, as well as comply with the applicable provisions and advice from doctors' instructions.

As the interview with dr. Erwin, the fulfillment of the most crucial rights of HIV/AIDS patients is as follows:

"... The HIV/AIDS patients have the right to get the information clearly. Then, they have the medical services in accordance with the patients' suffering, especially for HIV/AIDS patients, they have the rights to obtain appropriate supporting examinations and involve the closest family members. Beside of that, their confidentiality is guaranteed by the doctors".

The researcher conclude, that in fulfilling the right of HIV/AIDS patients refers to Law No. 29 of 2004 on Medical Practices. Although the doctors have an obligation to keep the medical record, but on the other hand they can disclose it based on appropriate term, condition, and procedure.

### **Disclosing the Medical Secrecy**

Disclosing the information about HIV/AIDS patients becomes a dilemma. For their family, such as: wife, children, father, and other family members, as if they do not know this, they will infect unconsciously. The provision of the laws and regulations, jurisprudence,

the habits that shape the law (*gewoonterecht*), in certain cases the obligation to keep the confidential can be excluded.

Related to this case, there are two conflicting opinions, namely the absolute establishment and relative establishment. For those who adhere to an absolute establishment, this medical secrecy will be kept without any exception. The adherents of this absolute establishment are very rigid and also do not understand that the medical secrecy is to make the community healthy, so that for certain reasons it may be disclosed. It is different from adherents of relative establishment who will always consider a more general public interest that must be considered rather than the patients' interest. It must be admitted that doctors who adhere to the relative establishment will not only have difficulties, but also the inner conflicts if they make the decision to disclose or keep the medical secrecy which raises this dilemma.

Based on the researcher's point of view, the relative establishment in addressing the disclosing of medical secrecy is the correct understanding, so the characteristic of medical secrecy is not absolute. dr. Erwin added, there are some conditions which became a consideration that medical secrecy can be disclosed. It has been clearly regulated in the laws and regulations related to medical secrecy, then it includes the procedures.

**a) The terms and condition**

Basically, the doctors are obliged in maintaining the confidentiality of his patients both expressed by the patients and the contents of the medical record, this is valid even until the patients die. Although, it is regulated by several laws and regulations of medical secrecy, but there are conditions and procedures for disclosing confidential medical information that are permitted. Medical secrecy can be disclosed as long as it is appropriate in the Health Ministerial Regulation No. 36 of 2012 on Medical Secrecy, as follows:

1. For the importance of the patients' health, this includes:
  - a. the importance of maintaining health, treatment, healing, and patients care; and
  - b. the administrative requirement, insurance payment or health financing guarantee.

Disclosing medical secrecy must be carried out with the consent of the patients both written and electronic system approval. Then the approval of the patients is stated to have been given at the time of registration at the health care facility. If the patients has

not and/or is not competent to give the consent, the approval can be given by the nearest family.

2. Appealing to the law enforcement official in the context of law enforcement, it can be carried out in the process of investigation, prosecution and trial. Disclosing medical secrecy can be through the provision of data and information in the form of *visum et repertum*, expert statements, witness testimony, and/or medical record. Disclosing the medical secrecy should be done in written form to get the whole medical record from the patients.
3. Appealing to the patients themselves, it can be done by giving the data and information both in oral and written. The third party who can obtain the data and information of the patients is the closest family.
4. Carrying out the provisions of laws and regulations, in the importance of upholding ethic, as well as the public importance, it is carried out without the consent of the patients. This medical secrecy can be disclosed without telling the patients' identity. The public importance includes:
  - a. medical audit;
  - b. infectious diseases;
  - c. health research for the country;
  - d. education for the future;
  - e. threatening individual and society's welfare.

To disclose medical secrecy for the public importance, the patients' identity can be disclosed to the institution or the authorized party. Then, it can be followed up in accordance with the provisions of the legislations.

#### **b) Approval Procedure of Disclosing Medical Secrecy**

The disclosure of medical secrecy refers to the patients' medical record. However, the information in the medical record can be disclosed through in written approval or permission from the patients. This is intended to protect the autonomy rights of patients and protect health care facilities in the legal act of protecting the confidentiality rights of medical secrecy. This is also confirmed by dr. Erwin, he said that:

"... The medical secrecy of HIV/AIDS patients could be disclosed to the family of the patients, especially both parents, husband and wife, or closest siblings. Besides that, the medical secrecy can be disclosed as a criminal case as long as there is a related police letter and it is appropriate with the provision of law and regulation. On the other hand, a doctor cannot disclose the medical secrecy to the wide community, because it can be a violation of the code of ethics".

It can be concluded that in protecting HIV/AIDS patients to avoid marginalizing, stigmatizing and discriminating from the society was maintaining the medical secrecy and medical record. The doctors were liable to protect the patients' medical secrecy based on ethic liability, profession liability, and legal liability. The role of the doctors in protecting the medical secrecy and fulfilling the fundamental rights to HIV/AIDS patients' care have given a good effect. Theoretically, the relation between health and human right has the important and complex context. It is supported by Brundtland, (2002) she said that the complex linkages between health and human rights will be happened if violations or lack of attention to human rights can have serious health consequences. It means that, if the doctors can deal with the rights of HIV/AIDS patients, so there will not a serious health consequence. Besides that, when the rights of patients was protected, the infection of HIV/AIDS Patients will be decreased. According to Haig, (2005) in the context of the HIV/AIDS epidemic, promotion and protection of human rights and promotion and protection of health are fundamentally linked. When human rights are not promoted and protected, it is harder to prevent HIV transmission. When these rights are not promoted and protected, the impact of the epidemic on individuals and communities is worse. A study conducted by Enoch and Piot, (2017) the prominence of rights in the HIV/AIDS response will continue to provide lessons and precedents for our response to other epidemics and evolving health threats.

#### **E. Conclusion and Suggestion**

It could be concluded that the role of doctors in maintaining the medical secrecy and medical records was the biggest liability in accordance with the law provision and medical ethic code. Through the role of the doctors, the rights of the HIV/AIDS patients would be fulfilled, especially the autonomy right and the right of medical treatment according to the patients' suffering. On the other hand, the role of doctors would provide a balance to health and human rights in reducing HIV transmission and avoiding marginalize, stigma, and discrimination.



The researcher suggested to the further research to do the next reasearch emperically by interviewing the HIV/AIDS patients directly. Then, it could be explained deeply how the the role goverment can collaborate with the health workers to keep the medical secrecy and help the HIV/AIDS patients to avoidmarginalizing, stigmating, and discriminating.

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The **Ministerial** Regulation of Health No. 36 of 2012 on Medical Secrecy.

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Indonesian Medical Ethic Code of 2012 (KODEKI).

### **Interview:**

dr. Erwin Iskandar, S.Ked as a doctor who handling HIV/AIDS Patients in RSUD Liwa, Lampung Barat.

## **Rights to Personal Data Base Warranty as Rights of Privacy Citizens**

Sulistino and Muhammad Syaiful Dahlan

### **Abstract**

In recent years, there has been a data collection society at large by governments and corporations, including personal data via the mobile device information technology, electronic systems of payment and the like. Personal data to individuals or businesses, has tremendous value as fundamental, and therefore should be protected as well. But it seems the government and private agencies that manage that data can not guarantee the security of such data so vulnerable to violations of even the types of crimes that will occur, either by parties from within and from outside agencies that have an interest in the data. A number of cases are directly related to the negligence of the management of personal data that lead to abuse these data for crimes committed by people who are not responsible, with the frequent occurrence of leaks of personal data that can cause unrest in society due to lack of assurance of security and confidentiality regarding data privacy in nature, it is important to strive for the establishment of the rule of law in which better ensure the security of personal data public. This is based on importance of the fundamental right to personal data that must be protected privacy security, because basically the privacy rights through data protection is an essential element for the freedom and dignity of the individual.

**Keyword:** Privacy and Right.

## **A. Introduction**

Indonesia is left behind in the discourse on the protection of the right to privacy, especially if it looks at the legislative framework from the protection of the right to privacy, both in terms of time and variety of protection. Although privacy protection has actually been known for a long time in Indonesia At least the Criminal Code contains several articles of criminal acts related to privacy such as prohibition to open letters, also prohibition to enter private land / property, and other criminal acts related to office crimes .

Although there has long been, but the protection of the right to privacy has not yet become part of the protection provided by the Constitution. It was not until 18 August 2000 that the protection of the right to privacy was part of constitutional protection. By this case the government is currently preparing a Personal Data Protection Bill that will be included in the National Legislation Program. The presence of the Personal Data Protection Act is also urgent, the absence of regulations that protect personal data and information. The government's efforts to disclose information and data held by the government really should be appreciated well, because with the openness the number of corruption in the public sector can also be suppressed. But at the same time, this also creates a crossing of interests, namely the interests of openness with the interest to protect the right to privacy. Law Number 14 of 2008 concerning Public Information Transparency also places special pressure on personal information and data classified as excluded information.

That's why these two rights must be balanced by making regulations or policies that protect information disclosure while also protecting the right to privacy. This policy is important to overcome the increasing disruption to the right to privacy, which is currently still minimized. That is why this article was prepared to encourage discourse on government plans to regulate and strengthen privacy protection while providing a middle ground for information disclosure. It is hoped that this book will provide an important basis for the importance of regulating privacy protection.

In the past few years, the right of privacy protection has become a subject that began to be discussed in depth among academics, government, and also human rights activists. The discussion of right of privacy protection surfaced with the widespread use of information technology and also the demand for information and data disclosure, especially those involving information and data controlled by government agencies. The use of massive information technology, especially in government institutions, requires major legal changes

regarding the right of privacy protection because changes in technology have improved the ways and methods for the collection, dissemination and use of personal information.

In the Indonesian context, privacy protection has actually been known for a long time. At least the Criminal Code contains several articles of criminal acts related to privacy such as the prohibition to open letters, and other criminal acts related to office crimes. Although there has long been, but privacy protection right has not yet become part of the protection provided by the Constitution. In August 18 2000, the right of privacy protection be the part of constitutional protection. Indonesia is left behind in the discourse on the protection of the right to privacy, especially if it looks at the legislative framework from the right of privacy protection, both in terms of time and variety of protection. Coverage of privacy protection is certainly not only related to personal data, but also other aspects of personal life.

Simply define the right to privacy as "claims from individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others". The extent of privacy coverage usually makes many settings regarding privacy in a country, both in type and level. The presence of government programs in the form of E-KTP in 2011 as well as the rampant use of application-based transportation services, make the potential for violations of personal data and information even higher.

Therefore, the government is currently drafting a Personal Data Protection Bill which will be included in the 2016 National Legislation Program. The draft law is expected to bridge the checkers' swim in the absence of regulations that protect personal data and information. The presence of the Personal Data Protection Act is also urgent, because of the demands for transparency in Government agencies. Indonesia is also one of the initiators of the movement *Open Government Partnership* (OGP) which was formed in September 2011 together with 7 other countries namely: the United States, Brazil, Mexico, United Kingdom, Norway, South Africa and the Philippines. As the initiator of OGP, Indonesia launched the movement Open Government Indonesia in January 2012. This OGI movement is basically an implementation of Law Number 14 of 2008 concerning Public Information Openness. Through this movement, Information Management and Documentation Officers have been formed in all ministries and institutions and around 30% of Regional Governments. Indonesia also managed to improve Open Budget Index (OBI) from 51 in 2010 to 59 in 2015.

The government's efforts to disclose information and data held by the government really should be appreciated well, because with the openness the number of corruption in the

public sector can also be suppressed. But at the same time, this also creates a crossing of interests, namely the interests of it with the interest to protect the right to privacy. Law Number 14 of 2008 concerning Public Information Transparency also places special pressure on personal information and data classified as excluded information. For this reason these two rights must be balanced by making regulations or policies that protect information disclosure while also protecting the right to privacy. This policy is important to overcome the increasing disruption to the right to privacy, which is currently still minimized.

## **B. Discussion**

Privacy is a concept that is difficult to define because it deals with something that is subjective. Basically everyone has a desire to keep some parts of his life, mind, emotions, and personal activities that are only to be known for himself or to choose his family members and closest friends. In general what is meant by the area of privacy will not be the same as person to person, from group to group, from community to community, and different also according to different ages, traditions and culture. But even though the area of privacy can be variation, the desire to protect privacy is universal. By definition privacy according *Warren and Brandes* is *Right to be left alone* while according to Slyke and Belanger is a person's ability to organize information about himself.

Privacy protection is developed to regulate the behavior of others that can interfere in various ways in one's life. Privacy in this context can be generally understood to limit the ability of others to obtain, disseminate, or use information about themselves. The history of privacy protection begins with the protection of one's residence (home) and then continues with the protection of information and communication through correspondence. Arranging the protection of the right to privacy initially is better known in Europe and America

At that time the law, although limited, had provided protection for activities "eavesdropping" talks within the home and also protected the house of a man from other illegal activities. In the United States, the protection of the right to privacy is began with the passing of the Bill of Rights from the United States Constitution. Third Amendment The United States Constitution prevents the government from ordering soldiers to settle in people's homes. The Fourth Amendment to the United States Constitution prevents the government from conducting illegal searches and seizures. Government officials are required to obtain approval from the Court to conduct searches through search warrants supported by sufficient preliminary evidence. And the Fifth Amendment to the United States Constitution guarantees that anyone cannot be forced to provide information against himself.

In the Indonesian context, the modern history of privacy began with the presence of the Dutch in Indonesia. The Dutch King's Decree No. 36 issued on July 25, 1893, could be considered the oldest regulation regarding the protection of privacy of communication in Indonesia.

Privacy protection arrangements begin to appear in the Criminal Code. Although the regulation of the protection of the right to privacy has been long enough in Indonesia, the protection of the right to privacy has only become a constitutional protection since the ratification of the Second Amendment to the 1945 Constitution through Article 28 G paragraph (1) and Article 28 H paragraph (4). Planning legislation regarding the protection of the right to privacy still occurs and that results in the weak protection of citizens from hacking the right to privacy.

The weak protection of citizens' privacy is also recognized by the government. The government itself wishes to also desire to encourage the protection of personal data in the form of laws. In fact, users of mobile service users in Southeast Asia and Oceania in 2016 were 950 million and at the end of 2020 is being estimated to reach 1,240 million. Data usage traffic increased nine-fold. This condition is susceptible to abuse of users' personal data.

The regulation concerning the privacy of the right to privacy is basically known and recognized in the legal regime both internationally and nationally. The regulation on privacy in various legal regimes is basically to protect privacy of a person against invalid invasion which can be carried out by the State or from the corporation. Regulations concerning privacy in the international human rights law regime are first regulated Deklarasi Universal Hak Asasi Manusia (DUHAM) in Article 12 which states *“No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.”*

More comprehensive arrangements are set forth in the International Covenant on Civil and Political Rights (Sipol Covenant) which is regulated in Article 17 which states *“No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation”*. Everyone has the right to the protection of the law against such interference or attacks. "The regional human rights law regime also regulates the protection of the right to privacy.

The regulation on the protection of the right to privacy in this international law regime is still general, therefore it is necessary to review the operational instructions of the various international regulations, how the State can play a role in protecting privacy. General Comment Number 16 The Sipol Covenant provides operational guidance on the protection provided by Article 17 of the Civil Covenant. In the General Comment No. 16 it is stated that basically Article 17 provides protection for every person from interference and unlawful and arbitrary interventions against personal, family, home, communication. This guarantee is needed to deal with interference and attacks that come from the State, other people, or from certain legal entities. Therefore the State is required to take legislative steps to protect this right.

Therefore, to see restrictions on the right to privacy is also regulated in the American Declaration of the Rights and Duties of Man, especially in Article 5 which states "Every person has the right to the protection of the law against abusive attacks upon his honor, his reputation, and his private and family life" Also in Article 9 which states "Every person has the right to the inviolability of his home." And also in Article 10 which states "Every person has the right to the inviolability and transmission of his correspondence." American Convention on Human Rights also provide similar protection against the right to privacy as stipulated in Article 11 which states "1. Everyone has the right to have his honor respected and his dignity recognized. 2. No one may be the object of arbitrary or interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation. 3. Everyone has the right to the protection of the law against such interference or attacks. "UN Human Rights Committee it was noted that there had been a decision regarding the right to privacy, especially privacy violations that could be justified under the provisions of Article 17 of the ICCPR.<sup>19</sup> In the Indonesian context, the first regulation on privacy began with the adoption of the Criminal Code by the Dutch East Indies government. Some of the known in the privacy settings in KUHP in Article 167 paragraph (1), Article 335 paragraph (1), Article 431 and Chapter XXVIII KUHP. This entire arrangement seeks to guarantee citizens from unauthorized attacks on privacy owned by citizens. Apart from these arrangements there are also various arrangements that provide protection for the right to privacy, especially in the field of communication such as Law Number 36 of 1999 concerning Telecommunications, Law Number. 30 of 2002 concerning KPK, Law Number. 11 of 2008 concerning Information and Electronic Transactions, Law Number 14 of 2008 concerning Public Information Openness, and Law Number. 35 of 2009 concerning



Narcotics. At the constitutional level, Article 28 G paragraph (1) provides protection for the right to privacy of citizens.

The right of privacy protection in legislation allows everyone to control the collection, access and use of personal information in government or in corporations. However, the reality is not as simple as that because there is the right to information also provides protection for the public to access information and data in the government, including personal data and information. Therefore aspects of privacy protection currently face new challenges, especially with the use and application of technology. Technology enables the collection and dissemination of personal information and data including sensitive personal information and data. With a tick, swimmers setting privacy in relation to access to information make citizens in a position that is vulnerable to privacy attacks that can be carried out by the government and corporations. To overcome this problem, the government took the initiative to draft a Personal Data and Information Protection Bill (RUU PDIP). This RUU PDIP was prepared because of the need to protect individual rights in the community in connection with the collection, processing, organizing, dissemination of personal data

Adequate protection of privacy regarding data and personal will be able to give the public confidence to provide personal data and information for the various interests of the larger community without being misused or violating their personal rights. The regulation on privacy of this personal data and information will make a large contribution towards the creation of order and progress in the information society. To overcome the problems that can arise between the interests of protecting privacy and the importance of maintaining the openness of information and data, better regulation is needed so that these two rights do not overlap can support the progress of democracy and human rights.

### **C. Conclusions**

Information disclosure and privacy protection basically have the same goal of encouraging accountability from the government to its people. Even though in some cases there is overlap and the risk of conflict, the two rights are basically complementary.

Because it is important to formulate and harmonize legislation both in terms of information disclosure legislation or for the protection of personal data, especially to have a good definition of personal information. The formulation of this personal information is important to be carefully formulated so as not to interfere with the interests of public information disclosure in the name of privacy protection. Recommendations by the

Government and DPR to immediately establish the Law on Data and Personal Information Protection by paying careful attention to five important matters, namely Definition of information. Personal, prioritizing laws, exceptions to privacy in the Information Disclosure Act, who can request access to personal information, and monitoring mechanisms and appeals. 2. In order for the Government and DPR to give additional authority to the Central Information Commission to carry out a monitoring mechanism for the protection of data and personal information. This authority is needed so that the right balancing mechanism can take place without the possibility of conflict between institutions when compared there are two separate institutions to examine information disclosure and privacy protection

**Why Indigenous Community Matter ?:  
The Persistence of Boti Tribal Community to Survive Their People,  
Lands, Norms and Values**

Budiyanto Dwi Prasetyo and Handoyo

**Abstract**

Prior to the outbreak of reformasi 1998 in Indonesia, indigenous people were not well known in national political discourse. The New Order regime's political economic interests have pushed indigenous peoples into the narrow canals that are taboo to talk about. However, the situation has changed in the 2000s decade. Indigenous groups in many regions in Indonesia began to show their existence and voiced their rights to enliven the human rights discourse. This phenomenon then leads people to a question: why does indigenous community matter? This paper will attempt to address the question through a multidisciplinary approach, which is social, cultural, and environmental approach. Instead of merely giving theoretical review, the paper provides a description the life of the Boti tribal community in Timor Island as a case study. The research in Boti has been conducted during 2016-2017. We employ the Indigenous Research Methodology Paradigm, which is qualitative. This method applies postcolonial indigenous interviews in the process of data collection. The four quadrants of medicine wheel were employed in data analysis. The paper concludes that the role of indigenous community is very important, especially in maintaining the natural environment and ecosystem based on its allocation. Moreover, change in land cover and land function that occurs in many places in Indonesia could not be blamed to indigenous people. Instead, massive modernization and massive physical development are the main causes of environmental degradation. In contrast, indigenous peoples such as in Boti, still survive with their traditional civilization inherited from their ancestors. They are able to save the population, maintain the customary land area, as well as keep the royal system alive, and supported by norms and values based on Halaika religion and the traditional laws of *banu*, *bunuk*, *nasi fain mate* and *kae*, which they profess. Nevertheless, up to now, the state seems to have not fully acknowledged their existence as a barrier to obtaining basic rights as the legitimated citizens is still there.

**Keywords:** indigenous, community, Boti, human rights.

## A. Introduction

The rise of indigenous term cannot be separated from the political constellation that accompanies within it. This definition tends to present a polemic about the politics of identity rather than helping naming traditional communities in the global world. The use of the term *masyarakat adat* or indigenous people, in some cases in Indonesia, for example, is more political as a tool for their struggle for existence rather than merely as a tool to define a community that is connected with land, place, or tradition (Afiff & Lowe, 2007).

The word “indigenous” tends to be connotated as nativeness. In fact, in the international level, the word “indigenous” is more focused on the issues of the sustainable history, distinctiveness, marginalization, self-identity, and self-governance (Dove, 2006). However, the definitions written in the Oxford dictionary (1999), ILO (1989), and the UN (1986) have similar points of view in interpreting indigenous people. Those sources defined indigenous people as entities that are different from the common (modern) society (Dove, 2006). Whereby, the existence of indigenous people is perceived as a given reality, and then the label, which is so much stereotypes within it, pinned in to the people who are called as indigenous. The words “natives” (*penduduk asli*) and “ever or still colonized,” are always used in the international discourse to define indigenous people. This becomes the most easily found evidence, which shows that the term indigenous people is merely labeling. In fact, those who are categorized as indigenous people have never defined themselves as indigenous.

The politics of identity seems to continue to color the use of indigenous word whether in academic or practical discourse. However, it does not mean that the struggle of indigenous people demanding their fundamental rights will stop here. Beside the basic rights, indigenous people are often treated unfairly in term of managing natural resource. In contrast, modern people do more destructive actions towards environment, and indirectly taking over the land, which is actually the territory of indigenous people (Goldtooth, 2004).

The case of biofuel industrialization in Indonesia becomes a clear example of state and corporates suppression against the basic rights of indigenous people. Instead of bringing profits to the agricultural development, increasing employment, and alleviating poverty, as well as improving sustainable energy, this project failed to achieve its goals. Moreover, this worsened by making indigenous people displaced from their lands and lost sources of food and clean water. This situation is likely to threaten the life indigenous people who are loyal to their civilization (Colbran, 2011).

Furthermore, indigenous people in Indonesia have not yet had a legal umbrella that fully protects their basic rights. The definition of “indigenous” and “tribal” communities mentioned in International Labour Organization (ILO) convention 169, has no direct similarity to the legal and legislative systems in Indonesia (Murray Li, 2000). Moreover, indigenous peoples in Soeharto era are more often referred to as estranged communities (*masyarakat terasing*) and isolated communities (*masyarakat terpencil*), which are put as problems rather than solutions to development (Murray Li, 2000).

In 1993, during the celebration of the International Year of Indigenous People, indigenous peoples activists in Indonesia officially started to use “indigenous people” to refer to “*masyarakat adat*.” This was agreed upon in a workshop in Tanah Toraja, initiated by the Network for Defense of Masyarakat Adat Rights (Jaringan Pembelaan Hak-Hak Masyarakat Adat: JAPHAMA) and Wahana Lingkungan Hidup (WALHI) in Tanah Toraja, Central Sulawesi (Afiff & Lowe, 2007). The use of “indigenous people” is strengthened after the fall of Soeharto in reformasi outbreak 1998. In 1999, indigenous people’ meeting was held in Jakarta initiated by twelve grassroots-level indigenous peoples organizations, which later they formed the Alliance of Indigenous Peoples of the Archipelago or AMAN (Alliance Masyarakat Adat Nusantara) (Afiff & Lowe, 2007). This organization then plays a central role in advocating the struggle of indigenous people for their fundamental rights in Indonesia. At least, this is similar to what happened in Brazil (Carvalho, 2000) and Bolivia (Hammond, 2011).

Efforts to achieve equal rights for indigenous people are not easy. It needs networks among actors who are involved in. It also demands accurate strategies to achieve its goal. For example, this effort can be started with awakening the respect for the indigenous land rights and followed by the involvement of indigenous people in the development process (Wiessner, 2008). Such involvement is a strategy that is widely suggested by indigenous scholars in order to find breakthrough for indigenous people having their basic rights. The term “strategic” refers to the elaboration between traditional and modern knowledge systems to find a win-win solution for both civilizations.

At the practical level, the strategy is often translated into the concept of indigeneity and integrated knowledge framework. Indigeneity, for example, carried out by indigenous people in Togean Island Sulawesi and Sosa Tribal Community in Sumatera, to politically united together for reclaiming their land that has been grabbed by the state and private corporations (Afiff & Lowe, 2007). Meanwhile, integrated knowledge has been

implemented in Australia, especially in the practice of environmental conservation management. Integrating knowledge was carried out by adopting the IEK (Indigenous Ecological Knowledge), which originally owned by the indigenous people, and mixed it together with modern knowledge in order to address the purpose of environmental conservation management issues (Gadgil, Berkes, & Folke, 1993; Hill, Grant, George, Robinson, & Abel, 2012; Stoianoff, 2017). This struggle is certainly very important whether in academic or practical discourse of indigenous people. Furthermore, supports from the indigenous fundamental rights' scholars and activists imply the importance of the existence of indigenous people as well.

This paper attempts to describe the answer of question saying, why indigenous people are important. In doing so, instead of the theoretical review, the paper provides an analytical description about the life of Boti tribal community in Timor Island as a case study. Theoretically, the Boti Tribe meets the category as indigenous people; nevertheless their existence is still very much ignored within the discourse of indigenous people at the national and even global level.

## **B. Methods**

This paper is developed based on the research project entitled “The Role of Traditional Law in Environmental and Forestry Development,” which was carried out for two years (2016-2017). This is a qualitative research that uses the Indigenous Research Methodology (Chilisa, 2012). This method applies postcolonial indigenous interviews, whether individual or group interviews, in the process of data collection.

Individual interview was conducted on community leaders who were key informants and had knowledge about social, cultural and environmental conditions at the research locus. They include Raja Boti, Meo, Neolaka, and the female figure of Boti, Mollo Benu, as well as competence officers from the village government. Individual interviews aimed to gather information from informants using postcolonial indigenous interviews techniques, where informants were freed for telling stories and constructing segments of stories about the topics that questioned.

On the other hand, the indigenous focus group interview method was conducted on Boti Tribal Community. In theory, this technique requires the involvement of 6-12 informants, but due to high enthusiasm, in 2016 interviews were conducted to 15 people and as many as 18 people in 2017. Indigenous focus group interviews aim to explore holistic

information about collective knowledge of the social, cultural and environmental conditions of Boti Tribal Community. Observation and collection of literature was also carried out to improve the data obtained from the interview process.

The four quadrants of medicine wheel techniques were employed in data analysis (Chilisa, 2012). This technique is carried out to interpret data from interviews into four parts, namely: (1) *content*, which explains how culture, community, family, peers, work, and social history are constructed by the informants. (2) *Mind*, explains how cognitive processes such as insight, memory, knowledge, and emotional processes such as feelings and self-esteem are expressed by the informants. (3) *Body*, all physical aspects of the informants who influence the answers, such as gender, genetic factors, and the physical condition. (4) *Spirit*, this is about the positive and negative sides of the socialization process on the practice of customary norms and laws as well as metaphysical issues explained by the informants in answering the questions. This analysis was carried out to reinforce the authenticity of the informants' answers to the questions posed. Every answer from each informant is triangulated by synchronizing and verifying, both with other informants' answers and with the results of literature collection and observation. The results of the analysis are presented in a descriptive narrative.

## C. Discussion

### a. Boti as a kingdom

Boti is the name of a village in Kie Subdistrict, South Central Timor District, East Nusa Tenggara Province, Indonesia. However, this village is slightly different from the villages in general. The name of Boti it self was taken from a name of an original kingdom in Timor Island, which is also, named Boti. Previously, Boti was noted as a colony of the Amanuban kingdom. But then it succeeded separating and forming the Boti kingdom (Prasetyo, 2017). The king (*usif*) was chosen based on how large they control the land. People who have controlled large amount of lands called as the chiefs (*amaf*). The Benu clan, which is now, becomes the *usif* of the Boti kingdom was once the landlord or *amaf* who had the most influenced on his ownership area (Kadati et al., 2013; Prasetyo, 2017).

The Boti kingdom is ruled by a *usif* who is assisted by king assistances in leading his community surrounding the palace (*sonaf*). The Boti Kingdom has a clear government structure, where by *usif* is the highest node of government. The *usif* role is very central in determining the activities of the Boti community. Every important decision must be in the

hands of *usif*. Once a decision has been made, everyone must obey it. Boti's royal government structure is divided into two functions, based on his affairs, namely *sonaf* security affairs (royal palace environment) led by *Meo* (warlords) and *sonaf* household affairs led by *Neolaka*.

These two *usif* assistances play an important role in regulating the lives of the Boti people. *Meo* is responsible for the security of *sonaf*, *usif*, and the Boti community. More than that, *Meo* was also assigned to regulate the relationship of the Boti kingdom with outsiders. Whereas *Neolaka* has the duty to \ regulate the lives of people in the *sonaf* environment, for example in the implementation of traditional ceremonies and rituals, the preparation and implementation of dry land agriculture, storage of harvest, regulation of harvest use, as well as the daily social, cultural and religious affairs of the Boti community (Suli Neolaka in focused group interview, 2016).

Meanwhile, the social culture system of the Boti community is known quite established. This system is able to maintain the balance relation between human-tohuman, human to nature, and humans to the God. These relations are regulated through the customary laws and local religious norms called *Halaika* (Prasetyo, 2017; Prasetyo & Ndolu, 2017; Rumung, 1998). Data gathered from observation shows that, even though they understand Indonesian language (*bahasa*), the Boti people do not use it as a tool for daily communication. They, however, use the native language of Timor Dawan called *Uab Meto*.

The complexity of human-nature-god relations is summarized in the application of customary laws in Boti. For example in the practices of customary law such as *Kae* (prohibition on taking the yield of agricultural crops before harvest time), *Banu* (prohibition on taking betel nut and coconut in a certain period in communal gardens), *Bunuk* (prohibition of stealing in private gardens that do not belong), and *Nasi Fain Mate* (prohibition to get in to the customary forest/hutan adat without permission). The norms of customary laws contain prohibitions and sanctions governing the use of natural resources by the Boti community (Prasetyo & Ndolu, 2017). These interrelated relationships occur because of the intensive and historical interaction process between human and nature, which then forms the religious beliefs and knowledge of sacred meanings as well as the ecological benefits of a place (Berkes, 2012; Gadgil et al., 1993; Gadgil, Olsson, Berkes, & Folke, 2003).

Furthermore, *Halaika* religion legitimizes the triangle relations of human-natural-god. The followers of *Halaika* religion only worship two Gods, *Uis Neno ma Uis Pah* (God of Heaven and God of the Earth) and believe in ancestral spirits (Prasetyo, 2017; Prasetyo



& Ndolu, 2017). However, *Halaik* is not included in the government-recognized religion. However, these religious beliefs are believed to have strong control power for Boti people to refrain from excessive exploitation of natural resources and use them sustainably (Berkes, 2012; Prasetyo & Ndolu, 2017).

## **B. Boti as a part of citizens**

As citizens, the Boti people are basically the same as other rural communities in Indonesia who are loyal to the Unitary State of the Republic of Indonesia. However, there are many questions raised by various parties, how can a kingdom that has its own structure, norms, language, religion, and even the government systems, be in the territory of a country that legally rules over the kingdom?

Since Wens John Rumung, a Flores journalist wrote his report in a book entitled “The Mystery of the Boti Tribe Life (*Misteri Kehidupan Suku Boti*),” slowly but sure, the life of the indigenous Boti tribe civilization was revealed (Rumung, 1998). Rumung tried to make the terms Boti *Dalam* (inner Boti) and Boti *Luar* (outer Boti) to explain the position of the Boti kingdom in the midst of the lives of Boti Villagers who recognized the Indonesian state. The meaning of Boti *Dalam* is a resident of subvillage/dusun A, which is part of the Boti Village government administrative area. Boti village itself has four dusun. The results of the two-year study (2016-2017) show that the Boti kingdom is currently localized only in dusun A (Prasetyo & Ndolu, 2017). Whereas the residents of Boti village who live outside the dusun A are referred as Boti *Luar* (Rumung, 1998). The population of Boti *Dalam* community in 2016 is only 316 inhabitants, and this number is predicted continue to decrease. In contrast, the population of Boti village in general experienced a significant increase from 2,148 people in 2010 to 2,240 in 2014 (Prasetyo & Ndolu, 2017).

A striking difference is, Boti *Dalam* is a loyal group of people to the Boti kingdom. They are *Halaika* adherents, apply customary laws, educate their children using self-taught method, and fulfill their daily needs from nature by farming, raising livestock, weaving (for women) and making crafts. Whereas, Boti *Luar* is a Boti villagers who are living outside dusun A, adheres to an official religion recognized by the government, sent their children to school, and use money and recognize the trading systems (Prasetyo & Ndolu, 2017; Rumung, 1998).

However, the Boti community does not want to problematize the existence of its kingdom within the territory of the Republic of Indonesia. The royal system adopted by the

Boti people is basically a civilization system that was built long ago before the Republic of Indonesia was formed. Therefore, it is very difficult to be able to put off what has become part of their civilization. For the Boti people, the emergence of the state was never seen as an enemy. No one is colonizing and to be colonized. So that the Boti kingdom can still survive culturally but still respect the presence of the state formally. So far, development programs can still run in Boti Village, including in *sonaf* Boti. For example piping programs for clean water, healthy toilet sanitation programs, and health programs that can improve the welfare of residents in the *sonaf* Boti neighborhood has been implemented successfully (Interview with Balsasar Benu, 2017).

Even though, in some cases, the government programs that are contrary to customary norms still have rejection from *usif*. The aim is none other than to maintain the authenticity of civilizations in the kingdom of Boti. An example of this is the electricity program in the Boti village. This program gets rejection from *usif* because it is contrary to the way of life of the Boti people who do not rely on electricity in their daily life. (Interview with Balsasar Benu & Namah Benu, 2017).

### **C. How Can Boti People Survive?**

Modern-oriented development is certainly the biggest challenge for any indigenous community. For example, infrastructure development has degraded indigenous communities in various regions of the world, in terms of its population, socio-culture values or civilization (Goldtooth, 2004). Furthermore, the environment in which they live is also affected because of changes in its function that is not in accordance with its ecosystem designation (Colbran, 2011).

This situation is also faced by the Boti tribal community. The lucrative offer from modern civilization that was inserted in development programs has forced the Boti people to be even stronger in defending its civilization. The erosion signals of the Boti royal civilization have been earlier detected by *usif* and his assistances in their *sonaf* neighbourhood. Even though, they do not give up and continue to strengthen their communities with social capitals they have. This becomes an important note on the reality that now appears in the *sonaf* Boti that they can still exist amidst the onslaught of the values and norms of modern towards their civilization.

Social capital is the potential resource that a community has to address social problems among them self in order to achieve mutual benefits. Social capital consists of the

networks, norms, and trust, which facilitate coordination and cooperation between the members within it (Putnam, 1993). In this paper, social capital is reduced to become three important things, namely the existence of a spirit of altruism, trust, and social networks. These forms of social capital are identified in the Boti indigenous community, which is manifested in the practice of their daily life as explained below.

### 1. Obedience to usif

Usif or king is a central figure that must be respected in the Boti indigenous community. The king is a symbol of the existence of the Boti people. The role of the king is the key for every activity that will be carried out, both by the Boti people itself, as well as by outsiders. The king's words are mandates and at the same time orders that cannot be rejected. For example, in the practice of applying Boti's customary laws, such as *nasi fain mate*, *banu*, or *kae*. Such traditional laws rely on the king's words. What should be done and what should not be done, when the king has said, the Boti people must obey it. The explanation about it as described by Suli Neolaka:

“The knowledge of Boti civilization must come from the King. And they cannot just compose or make their own stories about Boti culture. Knowledge must come and be heard from the king's mandate. They also have to apply what the king has ordered.” (Suli Neolaka in a focus group interview, 2017)

The strong authority of the king is also exemplified by several government projects that cannot be applied in *sonaf* Boti or *dusun A*. One of them is the program of electricity instalations. The program was rejected based on the usif decision. He con considers that the use of electricity can bring negative impacts on the Boti people, especially for the younger generation. The head of Boti village govenment, Balsasar O.I. Benu, has also justified this information.

“At first the king wanted electricity, but suddenly he came to me and said he didn't want to. I am afraid if later, the rain would not come down, the Boti people would all die. Who would responsible for it? Therefore, yes, I have obeyed what the king were asking for. We don't need to force it.” (Interview with Balsasar Benu, 2017)

*Usif* Boti, Namah Benu, explained that there would be so many drawbacks if the *sonaf* Boti accept the electricity installation program. He afraid if Boti people use of electricity, it will increase the need for other modern electronic goods, such as televisions, satellite dishes, and also there will be electricity bills. Television, for example, can be a medium for the entry of modern values that are not in line with Boti culture. Young people and children are really fulnerable to be influenced the urban's lifestyle by watching television.

“I persist with the tradition that *sonaf* Boti is not electrified. Electricity may exist but only outside the *sonaf*. There is nothing here and no. For example, for television and satellite dish, this is forbidden because our children will be influenced by city lifestyles. Modern culture will make them forget the original culture of Boti.” (Namah Benu in focused group interview, 2017).

According to Namah Benu, children and people in Boti Dalam should fulfill their entertainment needs by playing traditional musical instruments and dances. For example, playing gong and bonet dance. Besides being more economical, playing gongs and traditional dances such as bonet will be a medium for transferring knowledge about Boti culture and art to children and young people. However, *usif* does not rule out the possibility of cooperation with outside parties, both with the government and non government. As long as the program offered is beneficial and does not conflict with Boti norms and values, *usif* will support it.

“If there is a government program that is contrary to adat, I will reject it. But if there are programs that support the existence of adat, then we will walk together.”(Namah Benu in focused group interview, 2017).

For example, a healthy WC (water closet) program that successfully added and revitalizes a number of sanitation facilities in *sonaf* Boti neighbourhood. As far as everything is properly communicated, and through the prevailing adat procedures, it does not conflict with the Boti norms and values. Then the program was accepted. Sole Benu, who served as Meo gave an example:

“If there is a government program and they come to the village office, I will receive it as we are always respects the guests. Following that, I will bring their offers (programs) to *usif*. For example a healthy WC program. I received a guest from the government in the village office, and then I told the king that we wanted to work. This is a program from the government for improving Boti’s people. If there is a government program that is contrary to adat Boti, the king must be told, and whether or not the program is accepted, it depends on *usif*’s decision.” (Sole Benu in focus group interview, 2017)

Conceptually, this shows that the Boti people have a high altruistic attitude and trust in their king. This is a reflection of the social capital of the Boti indigenous people.

## **2. Concern for the younger generation**

The future of the Boti people highly depends on their next generation. It is known that the Boti people began to worry about the regeneration of the successors of their tribal

community. That attitude arises as a manifestation of the spirit of altruism that exists in every parent of the Boti tribe. They concerns that the existence of the population and the existence of their community in the future are threaten. One of the causes is the entry of cultural values and modern lifestyles brought by tourists who visit *sonaf* Boti. Therefore, the role of parents is very important to preserve the loyalty of their children to the king and the culture of Boti. Regarding this, Mollo Benu, the older sister of the usif said:

“Parents’ responsibility is highly important to keep their children loyal to the kingdom of Boti. Protecting their children from outside influences, for example from the modern lifestyle brought by tourists, is highly required. Parents should provide knowledge to their children that visitors come to Boti because of our noble culture. Therefore, parents must instill strong Boti culture into their children.”(Mollo Benu in focus group interview, 2017)

The parents in *sonaf* Boti basically have an oral tradition and telling stories to transfer their knowledge and culture to their children. However, it is known that inviting children to attend when there are traditional rituals and meetings is a more effective way. Therefore they can see and hear directly the ongoing traditional rituals. Nevertheless, this tradition began to diminish because many children were reluctant to attend the traditional rituals.

The Boti people belief, their kingdom will not collapse and be abandoned by the followers. This belief is not only mentioned in the *usif* words, Namah Benu, who swore to be the last person if his followers leave to Boti Luar (Interview with Namah Benu, 2017). The regeneration of Boti people has been thought of by the previous *usifs*. For example, the advice given by Nune Benu, a previous usif Boti, who is also the father of Namah Benu, stated that, if the Boti Dalam couple had a son, they should be prioritized him to become Boti Dalam people. If a Boti Dalam family wants their children to go to school, at least there must be a boy who stays in the Boti Dalam to become the next generation.

“... The late *usif*, Nune Benu, once advised me, if the Boti Dalam child wants to be prepared for going to school, it must be divided. For example, there are four children in a family. They can send two children to go to school while two other are kept to life inside the *sonaf*. Especially boys. Girls are not prioritized (schools) but prioritized to maintain weaving. Children who go to school are allowed to go to school as high as possible. But if they want to come back to being a Boti Dalam people in the future, they can do so as it is allowed by the *usif*... “ (Interview with Namah Benu 2016).

### 3. Civil rights protection initiatives

Head of Boti Village, Balsasar O.I. Benu, explained that the concerns of the traditional leaders in Boti against the weakening application of customary laws in Boti Village had been discussed with the village government. The discussion led to the willingness to make some form of formal or legal regulation, such as village regulation (*peraturan desa/perdes*) regarding the protection of the customary laws as well as its people. The *perdes* will not only adopt customary laws such as *nasi fain mate*, *banu*, *bunuk*, and *kae* as its content. More than that, it also regulates the efforts to protect the indigenous Boti community that adheres to *Halaika*.

“The village regulation will protect the indigenous people in Boti who adhere to *Halaika*, in order to get equal rights as other Boti villagers who have embraced state-admitted religion. We want Boti to remain one, be in one village and one culture. There is no Boti Dalam and Boti Luar. All are one as the residents of Boti Village” (Interview with Balsasar Benu, 2017).

#### **4. Good networks**

The experience of the Boti Village government in making previous *perdes* about antialcoholism made the Boti village government literate the procedure for making a *perdes*. This is certainly an important social capital in the making of the protection regarding customary laws and its people. Because, the Boti village government has mastered the existing networks as they experienced making the previous *perdes*. For example, there is a good relationship between the Boti Village government and the Timor Tengah Selatan (TTS) district government through the legal department in the process of *perdes* approval. So far, in TTS, there is no regional regulation (*peraturan daerah/perda*) about the protection of customary laws and its people. TTS district only has *perda* about the establishment of customary institutions that do not specifically regulate the protection of customary laws and indigenous peoples.

#### **5. Potential support from external institutions**

The results from mapping the actors who are involved in Boti's cultural preservation, it is revealed that there is the potential support from various external institutions that became social capital as well for the efforts of Boti cultural preservation. The external institutions could be the regional governments (*pemerintah daerah/pemda*) such as government tourism agencies (*dinas pariwisata*) and the education and cultural agencies (*dinas pendidikan dan*

*kebudayaan*), or non-governmental organizations such as local or International NGOs, mass media, and research institutions.

Support for writing the customary law is very likely to be obtained because these institutions have conducted programs in Boti village. The assumption is, when they carried out each program in Boti, it will be certain to touch the discourse on the Boti culture and its preservation efforts. Therefore, relations with these institutions, even though they have completed their programs in Boti village, can be re-established and re-developed to support the efforts of recording the norms of the customary laws.

#### **D. Conclusion**

This paper concludes that Boti tribal community is socially able to maintain its social system. Their social system includes the structure and function of the Boti community. Structurally, the Boti tribe still uses a royal system with norms, values and legal rules attached to it. Besides showing up their strong group identity, the Boti kingdom also becomes an institution that protects the Boti indigenous people against threats that may come from outside or inside the *sonaf*. The cultural system of the Boti tribe also has an important role in preserving the natural or environmental resources and maintaining the population of Boti people it self. Customary law such as *kae*, *banu*, *bunuk*, and *nasi fain mate*, are manifestations of the existence of the Boti cultural system that is able to maintain the balance of the environmental ecosystem. Furthermore, compliance with the king's command was able to maintain the population of the Boti tribe as well as to be faithful to the Halaika, the norms, values and customary law of Boti. However, future challenges for the Boti tribe continue to emerge. One of them is an effort to get state recognition for the existence of the Boti Tribe as indigenous community. This is very important to be followed up in order to fulfill the demand for their basic rights as citizens. This effort is likely to be done by utilizing the social capital owned by the Boti tribe, such as a spirit of altruism, trust, and social networka. These social capitals, at an advanced level, are certainly very possible to be used as resources to carry out an indiginity process to find a win-win solution to the problem of fulfilling the basic rights of the Boti community.

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**The Role of Indigenous Rights in The Management of Natural Resources  
Conservation Biodiversity Area and Ecosystems: Perspective Study Based on Politic  
of Law Paradigm**

Danggur Konradus

**Abstract**

The indigenous peoples did not recognize "right", but only recognized the religious mystical relationship with the nature as the mother of the life chain and their collective belief. In 1989, ILO declared the indigenous right to respond to the state policies that tended to stunt historical rights of indigenous people. Their historical rights to access the natural resources were limited by the juridical conditions. Their traditional rights and fundamental freedoms were stunted by a-humanist policies. Since the state strengthened its hegemony, the legal politic of natural resources tended to be positivistic and the government handed over the natural resources exploitation to corporations. Corporations often dredged natural resources within the territories of indigenous peoples. The transcendental values contained in local wisdom were faded. The customary law was powerless against the superiority of positive law. For that reason, the reform of natural resources conservation law is a must. Legal reform is intended to draft legal policies as a base for establishing a commission namely Local Wisdom Empowerment and Protection of Indigenous Rights Commission. The commission's purpose is to make policies that open access to the indigenous peoples to participate in managing natural resources. Through the commission, the local wisdom will be empowered and functioned as a social capital to build a sustainable conservation of biological resources. Therefore, the local wisdom will be able to maintain biodiversity as a nation's asset and support the ecological environment and people's welfare. Thus the holistic paradigm is more effective to solve the ecological and natural resource management problems. The holistic paradigm that is based on local wisdom values, ethics and morals as the soul of the management policy of natural resource conservation. It means that conservation area management remains within the framework of Pancasila values.

**Keywords:** Historical Rights of Indigenous Peoples, Holistic, Conservation, Local Wisdom

## A. Introduction

The indigenous peoples have different meanings. The indigenous peoples (*“adatrechtsgemeenschap”*) used for academic-theoretical. While the indigenous peoples (traditional, primordial) called as “The Indigenous Peoples” (Wignjosoebroto:2010: 47; Koesno :1996;) as maintained community, binded, and obey the organization and the culture (Wignjisoebroto:2012.)The indigenous people is a symbol of indigene group who has unwritten traditional and law (Koesno:1995).

“Adatrechtsgemeenschap” and “the indigenous people” are parks of norms (Magnis Suseno: 2012: 56), the place life norms were lived, the relationship with nature described by Ter Haar as a society full of values as basis of the relationship between unity of indigenous people with the real and intangible nature. The perspective between communion with nature was observed through a transcendental holistic perspective and real communalistic relationships between individuals, where the relationship became collective belief of indigenous people in inseparable frame.

Cornelius Van Vollenhoven, Ter Haar, considered *“Adatrechtsgemeenschap”* as a feature of customary law in a certain society and a human unity that settled in certain areas which have old customs, territories and natural resources both manifested and intangible (transcendental). The members of community were bound in sacred space inside their own norm frame (Samosir: 2013: 73). The indigenous traditions are crystallized in their collective beliefs in relation to the universe as a gift of God through their cultural values realization. Their perspective belief to be background of nature as the mother of mercy and the chain of life (Tukan: 2016; Isworo: 2017). Their collective belief guided their social behavior in relationship with nature (forests, water, biodiversity and ecosystems) and harmony of sustainable framework. Natural management (forests, water, biodiversity and ecosystems) based on local knowledge (local wisdom) had been in existence in their traditional society to keep the sustainable and maintained natural resources. The inseparable relationship was an ancestral tradition which in law perspective called “right”. The rights in positive legal perspective became an ancient / historical / traditional rights that recognized by social scientists and anthropology over the world. The “right” is not limited as ancient rights of natural resources, but also rights in broadest meaning, including traditional rights of art, culture, language, traditional symbols and so on. The author only focused on traditional rights of indigenous people in perspective of natural resources conservation, ecosystems biodiversity and the politic of law.

The traditional rights of indigeneous people can be considered as social capital of indigeneous people namely norms that should be integrated into national politic of natural resource conservation law so that the instrumental norms of conservation pro-indigeneous people , pro justice, pro local wisdom and pro environment and pro poverty or humanist legal politic. Infact at "*das sollen*", it did not reflect ideal law and tended to be "centralistic" and "dehumanist", separating traditional rights of indigeneous people according to the rightsinterpretation in accordance with the political products of conservation law that caused gab between rights state formulated with the traditional rights of indigeneous people.

The facts mentioned above raised the problems that were discussed in this paper. First, why is the local wisdom of indigenou peoples as their ancient right has not been optimally empowered by the legal politic of biodiversity and ecosystems conservation ? Second, how is the politic of law of natural resources conservation managing based on local wisdom as the historical right of indigeneous people? Both of these problems were examined with a holistic and humanistic legal political approach to answer various problems surrounding elimination of traditional rights by hegemonistic- centralistic politicof conservation law.

## **B. Discussion**

### **1. Dehumanist Politic of National Conservation Law**

Indonesia is a state based on rule of law, (Mahfud: 2010: 30) translation of "*rechtsstaat*" (Dutch) and "rule of law" (English). The concept of "*rechtsstaat*" relied on Continental European "Civil Law" legal system, while the concept of "rule of law" relied on the "common law system." (Marzuki: 2013: 43; Widiowati: 2016: 3; Wignjosoebroto: 2013: 21). The rule of law concept relied on law as opposed to the power state (*machtstaat*) which had absolutism character which legalize arbitrariness (Budiardjo: 1977: 11). On the contrary "rule of law system" holds principle "equality before the law". Fredrich Julius Stahl mentioned principle "*rechtsstaat*" is a respect for human rights, separation of powers, government based on regulations and administrative justice (Hamidjojo, 2004: 36-37) for authorities who violate state administrative law.

Politic of law came from Dutch language "*rechtspolitiek*" which consisted of two words "*politiek*" and "*recht*". (Bag: 1956: 234). The word "*politiek*" contained "*beleid*" means policy (wisdom) which means a concepts series and principles that form the outline and basis plan of work execution, leadership and way of action (Puspa: 1977: 130). Politic

also defined as an activity that involves process of determining goals and how to implement them, (Budiardjo: 1977: 4; Sitorus: 1965: 23; Soltan: 1961: 4; Dahana: 2015: 178). Politic as "architectonic" is the art of state (Riyanto: 2014: 37) and Hobbes called it "Deus Mortalis" means the power of mortal gods " and "omnepotens", namely the authority to make rules, withdraw tax and security. (Madung: 2103: 2). While "law" was translated from the words "ius" (latin), "recht" (Dutch), "law" (English) and "droit" (French).

Although the definition of legal politic had been interpreted by many different experts, the aim surely same namely oriented towards the same substance, namely how to realize the goal of state. Politic of law as a consequence rule of law also means state policy because its authority forming regulation that contain moral values (Tanya: 2014: 11), where the material is found inside cultural values of Indonesian society, namely "religious law, adat law, and mechanisms of local regulation", in which all of them are crystallized in Pancasila as a tree of law science, as product of nation law that will be preached. Hence, the state law policy, both formation, substance and implementation are oriented towards humanity, social unity and justice for the people.

Politic of law as an official legal policy will be applied by making new laws and revoking old laws, in order to achieve the state goal by authorized institutions (Mahfud: 2010b: 4) which becomes basic policy for determining direction, form, and the contents of the law (Wahyono: 1991: 26). The law was the will of authorities in a place and the development of law (Radhie: 1973: 3) to protect and prosper the people.

The established law purposed to create human welfare, so that the humanist legal policy contained moral values for state's goal realization in paragraph 4rd of the 1945 Constitution namely state responsibility to create happiness of the people. Robert B. Seidman and William J. Chambliss said workings of law do not work in a spacious room, inseparable from the influence of social forces that work simultaneously and dialectically. Law as a sub-system of the legal system and social system mutually influenced and/or influenced, is a logical implication that law is political product, like a law is framework of man and politic is meat attached to the bone (Sitorus: 1983: 54) namely in a same tone with the adage that said "law without power is wishful thinking, while power without the law of unrighteousness". (Rasjidi : 1995: 75) .

Based on doctrines above, infact the law is always in the ideological and political vortex of interest which David Trubek calls it a "purposive human action" (Marzuki: 2013: 4), while Marx called it a hidden invisible interest through positive law. Therefore, it can be

concluded that the law is the long process production which contain valuable legal substance and social reality as a reflection of the people soul.

The legal political substance could not be separated from the legal system, (Wignjosoebroto: 2013: 23) which interpreted as a network consisting of units (Sidharta: 2013: 102) which has a system until the basic law to concrete regulations. The legal system was interpreted as method of doing something (William Shorde & Voich, 1974: 123) which consists of three basic elements namely legal structure, legal substance and legal culture (Khozim: 2013: 16;), which can be categorized into two cultural groups law namely internal legal culture and external legal culture (Warrasih: 2011: 70). The law substance relates to overall legal rules, legal norms and legal principles both written and unwritten including court decisions. The legal structure determines material content of legal substance. Whereas legal culture determines the value and effectiveness of law which always contextual with pluralistic social reality.

Legal pluralism with humanistic democratic character will be in contradiction with legal centralism with dehumanist depressive character that considere only one law for all citizens by ignoring existence of other legal systems such as: religious law, adat law / adatrecht and mechanisms of local regulation indogenous people. Indonesian's perspective, the paradigm of legal centralism is very contrast with Indonesia's social reality that characterized by multi-cultural society. It was not surprising that legal centralism is utopia (Suseno: 2015: 245; Kleden: 2001: xxx; Kusumohamidjoyo: 2016: 213) in the middle of socio-cultural perspective of legal pluralism.

The positive law was based on written law, for example Law of the Republic of Indonesia Number 5 of 1990 about Conservation of Biological Resources and Ecosystems and Law of the Republic of Indonesia Number 41 of 1999 about Forest. The regulations are result of political process where the social norms have been integrated into positive legal norms. It did not recognize the other legal sources that can be applied as legal norms to control social reality. Infact in that social reality there was "folks law" namely customary law, religious law and habits that Eugen Ehrlich called it a lived legal reality in society besides state law. Therefore the law is not only legislation but also the law as a local regulation derived from a customary law, adat law / adatrecht, religious law and other social norms (Nurjaya: 2010: 37).

The ideal law as Fredman said is a legal system that contains legal structure, legal substance and legal culture that able to realize justice (*gerechmatigheid*), utility

(*doelmatigheid*) and legal certainty (*rechtmatigheid*). The law as social controller if the law has philosophical, sociological, juridical behavior. So, the legal pluralism opens the space for other local values wisdoms to be philosophical and sociological foundation in national conservation policy-making process. Legal pluralism is recognized as reality character from social groups, in other side legal centralism is a myth, ideal, dream, even illusion of pluralism society (Griffits: 1986: 4).

The social reality mentioned above is material legal source for national conservation law. But the social reality has never been accommodated by Law No.5 of 1990, and Law No.41 of 1999, both of regulations are legal politic based conservation-oriented and pro-capitalist-oriented that separate the indigenous people from their nature, so that author called it dehumanis legal politic . It means the legal politic of natural resource management conservation is no longer rooted from local wisdom of indegeous people. The circumstance is certainly contradictory to the real reality of life nation, namely: (a) based on the Pancasila values as the view of life and ideology of the nation where (b) The pluralistic society, both in terms of culture, religion, language, ethnicity, race and so on.

## **2. The Indigenous People and The Indigenous Rights**

For understanding customary law, firstly we must comprehensively understand structure of indigenous peoples where the customary law lived and developed in social change. The time dimension and customary law location is important. Traditional institution, power, life order of people are primary source of finding character, style and dynamics of indigenous people (Muhammad: 2013: 21) which Ter Haar constructed customary law as an organized group in an autonomous government that has material and immaterial property. The unity of indigenous people by Hazairin included a macro unit which includes authorities and environment formed "*clans*" in South Sumatra, "*nagari*" in Minangkabau, "*curia*" in Tapanuli. The traditional social reality is place of living norms (Soekanto: 2007: 93). Thus, the indigeneous law as community group whose their ancestors are novice humans in that place and obeyed local law in relation to agrarian resources that interpreted as economic sources, sacred space, and creative spaces for their culture. So, when the sources are lost by dehumanist political policy of natural resource law, it will automatically lose the economic resources, identity, and sacred space of idigenous people (Ruwiastuti: 2000: 177; Tukan: 2016).

Indonesian legislation defines indigenous people as a group of people were bound by their customary legal order as common citizen of a legal alliance and residence or descent

similarity (Minister of Agrarian & Spatial Planning No. 9 of 2015). This regulation affirms that meaning of communal rights and customary rights are same, so it creates confusion meaning. While the character of communal rights can be interpreted as the indigenous people authority to regulate but the civil dimension is manifestation of customary rights as owner. Conversely, communal rights are limited to private relationship of land (Sumardjono: 2015). According to explanation above, philosophical, sociological and juridical perspectives do not have not same views on traditional rights of indigenous people recognised (economy, politic, culture, identity, land, water, rivers, lakes, forests, traditional knowledge).

The traditional rights mentioned above can be called as historical rights as old as the existence of customary law community (Djatiman: 1999). It called historical rights because it remain alive and actively continue following social changes, but it still live in unity of indigenous peoples throughout the ages. J. Austin said that community had their own characteristics depending on their biography and social structure that live and develop in their history and will disappear (Soemadiningrat: 2002: 2). Likewise, a fair law for society unity is a law from the soul and womb of society as historical reality of the indigenous people, as Savigny imagined, the fair law is the maintenance of society soul (*volksgeist*) (Theo Huijbers: 1982: 118 )

The traditional rights of indigenous people include right to control, manage, regulate and manage themselves according to custom, identity, culture, belief systems and knowledge systems (indigenous knowledge) as indigenous rights obtained from their ancestors (Arizona: 2010). According to the author, the innate right consists of two layers, namely (i) ulayat rights (primary rights) as the highest right relating to their survival life, including the management of natural resources (water, forests, rivers, lakes, sea, biodiversity, ecosystem) (ii) secondary rights (art culture, identity, artwork, language, hair type etc.). The existence of traditional rights is inseparable from the maintained nation history in relation to natural resources for biodiversity conservation.

This paper explained that indigenous people did not recognize "rights", but only recognised relationships with their nature religiously. (Djatiman: 1999). Aristoteles and Plato never discussed "rights", but only discussed "*ius-iuris*" were equated with "right" in eighteenth century and defined as free human by any bond (Bertens: 2015: 140; Wiranata: 2005: 178), which used until today.

Then "ulayat" adopted from Minangkabau language was interpreted as right of legal alliance in territorial control, control over all objects and everything in their area which Van Vollenhouven called "*beschikkingsrecht*" (Samosir: 2012: 106). The position of ulayat rights



as the highest right of customary law community guarantees land using (Kertasoeputra: 1985: 85; Sudiyat: 1981: 1). Except Minangkabau area, thir areas are called "pertuanan", "Lingko" in the Manggarai (Lawang: 1999: 79; Garu: 2016: 345). In other words, the ulayat rights relate to natural resources, life space of citizens for all the time, never been exiled or revoked. For generations, the rights will still constitute the collective rights of indigenous right on land as their territory in the space of religious-magical relation(Samosir: 2012 : 10). According tothis reason the author called it the highest right possessed by indigenous people in relation to natural resources which is not only limited to the relationship of human economic life but also the magical-religious relationship in a single sacred space which is difficult to separate from the existence of the indigenous people.

### **3. The Indigenous Rights in Basic Norms, Instrumental Norms and International Convention**

#### **a. In Basic Norms**

After amendment the 1945 Constitution of the Republic of Indonesia, constitutional recognition of existence and traditional rights of indigenous people is mentioned in article 18-B paragraph 1; Article 28-I paragraph (3); Article 32 paragraph (1) and paragraph (3) of 1945 Constitution of Republic of Indonesia. The indigenous people existence and their historical rights based on these three articles. Recognition of indigenous people has three constitutional requirements, namely (i) as long as alive, (ii) in accordance with the development of society, (iii) in accordance with the principle of the unitary state of the Republic of Indonesia. This requirement is problematic for the nation against the existence of indigenous people and their rights. In one side, indigenous people already existed and had a legal order before independence of Indonesia and then their existence is required by the state. This constitutional problem still leaves a problem especially empowering the potential of local knowledge / wisdom in management of natural resources. That is why the extension of the indigenous people and their traditional rights are stunted, chained, held hostage and protected politically by the state but the role of their local knowledge of natural resources management is stunted (Konradus: 2018: 81-88). Even the indigenous people is cytigmatised as a barrier on forestry development, natural resources conservation and sustainable ecosystem.

#### **b. In Instrumental Norms**

Indonesia recognised indigenous people existence in instrumental norms related to natural resources, which raisedone word, namely "recognizing" and "respecting" the

indigenous people but minus traditional rights. Even that respect form has not explained the package, which is what it is like. Although theoretically and practically the rules related to indigenous people are regulated in instrumental norms, including Law No.5 of 1990, Law No. 41 of 1999 and other natural resource laws or autonomous regional governments. The practical implications rules of indigenous people regulates sectorally based on the substance of regulated object, as well as the overlapping instrumental norms of indigenous people. There is no state legalpolitic to regulate specifically indigenous people & their guarante traditional rights constitutionally,international conventions, and United Nation declarations.

The reality shows that legal certainty of state's recognition for indigenous existence and their traditional rights is still in gray zone which resulted annexation of customary rights by corporation and exile indigenous rights from biodiversity conservation of natural resources and forest. Therefore, juridical implementation in process of protecting indigenous historical right like a continuous crop that stunted and inefficient systematically. The constitutional mandated to form instrumental norm of indigeonous rights as necessity and made immediately by state so that existence of indigenous people, traditional rights, and political rights are immediately guaranteed by state for benefit of indigenous people.

c. In International Norms (Conventions)

International Conventions (ILO, Convention of biological diversity, economic, social, cultural rights, protection conventions and the promotion of cultural diversity) regulates the indigenous protection, for example International Labor Organization (ILO) Convention 169 of 1989 , substitute Convention 107 of 1957. This protection is inseparable from South African workers struggle(representing indigenous people over the world) as indigenous people who should have the highest power over all their natural resource rights, but in reality indigenous people is discriminated against by colonial policies which then implicate on marginalization of Africa indigenous peoples to access resources natural power. In historical note, colonizers never prospered colonized nations (Kleden: Kompas: 2017).

The indigenous people struggle of South Africa through an international forum successfully established the ILO Convention in 1957 No. 10 reaffirmed in the 1989 ILO Convention No. 169 which established the indigenous people rights namely right to self-identification (ii) the right to self-determination (iii) the right to protect, develop customs, traditions and institutions (iv) the right to get consultation, approval in the decision making process (v) the right to own, mastering managing land and natural resources (Negara: 2014.hlm.293-294). Therefore, exploration of mining minerals in indigenous peoples' lands

is ensured by the government to respect the rights of the indigenous people, not to respect the mining companies realized in the form of management permits.

The empowerment of indigenous peoples in managing natural resources of biodiversity and ecosystems was stipulated in Rio de Janeiro Convention in 1992, whereby countries are obliged to conserve biodiversity, share benefits equitably from the use of genetic resources, recognize local knowledge and traditional practice of indigenous people. Therefore, Indonesia is obliged to recognize and protect the indigenous people existence as stipulated in the 1945 Constitution (post amendment) in appropriate recognition and MPR Decree No. IX in 2001.

The indigenous people and their traditional rights was regulated outside the convention, namely several IUCN Resolutions - World Conservation Congress and most recently in South Korea Jeju. The latest IUCN resolution affirmed the protection and respect of indigenous people oriented to autonomous community that gives management recognition. The IUCN Congress wanted the countries participating to recognize rights and local wisdom of indigenous people as stated in the UNDRIP and ILO Convention 169. Therefore, Indonesia signed it so Indonesia must formulate legal policy as recommended in the international convention into indigenous people law politic which pro- indigenous people, justice, wisdom local, poverty and environment.

#### **4. Strengthening the Traditional Rights of the Indigenous People through the Indigenous People Commission**

The recognition of indigenous people and their traditional rights (especially natural sources) is still half-hearted by the state, only strengthened by international conventions. The state placed recognition of indigenous people at sectoral level caused the difference interpretation of indigenous people. Each of institutions interpreted according to their perspective, for example, the problem of planning program, its dimensions of existence and ideology. The institution that dominate the recognition namely Ministry of Forestry & environment; agrarian; marine and fisheries; agriculture; plantation and ministry of mineral resources). The indigenous people was just regulated in a sectoral manner showing the government does not want to protect indigenous people and their traditional rights. The Regional Government has authority to determine indigenous people in their area, but there is no reference from center government that raised uncertainty. The national commission of indigenous people has been urgently considered by government because there are thousands of tribes and indigenous people in this nation. Philippines has a commission, the "National

Commissions on Indigenous Communities / Indigenous peoples (NCCP)" later became the National Commission on ICCs / IPs (NCIP) with the determination of the Indigenous peoples Rights Act, 1977. (Bahar: 2008: 10). The reason to form indigenous people national commission: (i) restoration of indigenous people and their traditional rights that ignored by the state / even controlled by the private sector. (ii) the regulation that covers indigenous people has not been adequate or many regulations that regulate the existence of indigenous people. (iii) overcome constitutional conditionality which becomes a barrier of recognition. The commission is independent and directly under presidency to protect and advance the interests and welfare of indigenous people in accordance with beliefs, customs and traditions and institutions. The legal standing of indigenous people establishment namely decision of MPR No. IX / MPR / 200. The substance mandates House of Representatives and President to carry out agrarian reforms and uphold the principles of equitable and sustainable natural resource management (Negara : 2014: 583) so that formation of this commission can be interpreted from Article 4 letter (j) about management of natural resources in accordance with recognition and respect principle and protection of indigenous rights as MPR's provisions: agrarian reform and natural resource management must be carried out in accordance with recognizing principle, paying attention and protecting indigenous rights. The commission presence can overcome the barriers of recognition and respect indigenous rights that constitutional-oriented.

## **5. Conservation as Rescue Policy of Ecosystem**

### **a. Defenition of Conservation**

Conservation is translated from Latin word "**cumservatio**", "cum" (together) and "servatio" (service). Then "cumservatio" is service one another. Therefore "cumservatio" contains solidarity value between logos human beings and nature including its contents as God's creation. In English called "conservation" which means preservation, protection and maintenance. Conservation means maintaining something that belongs to each other, preventing damage from destruction by preserving. (Indonesian dictionary: 1995: 726).The integrated management of natural resources is not only animals, species but also plants, forests and the other. The way to prevent damage is designing unity against social economic and religious benefits. Conservation area is state's obligation. So, Indonesia as a mega-biodeiversity country remains an icon of the tropical forested nation.

"International Union Conservation of Nature" (IUCN) defines conservation as an integrated management process between air, water, soil, minerals and living organisms

including humans to achieve an increase the human life quality. IUCN considere conservation as an effort to create a quality life through the protection, maintenance, preservation and preservation of integral element of environment, both its natural components and biological components including the conservation of biological diversity from genes till ecosystems.

According to definitions above, conservation can be formulated as integrated management process in environmental management, protecting, maintaining, preserving, conserving and utilizing conservation areas and their ecosystems (forest) to be ecosystem that guarantee the survival of living creatures and provide ecological and religious benefits for indigenous peoples and peripheral community.

Referring to the definitions above, conservation can be formulated as a process of maintenance, protection and preservation of natural and non-biological natural resources from destruction, damage and wasteful utility.

The definition of conservation does not stand alone in some regulations but it is combined with the others conservation object namely living natural resources, soil and water, so that the regulation mentioned 'conservation of living natural resources' and 'soil and water conservation' . Article 1 point 2 Law No. 5 of 1990 about Conservation of Ecosystems and Biological Resources mentioned that conservation of living natural resources is management of living natural resources whose utilization is carried out wisely to ensure continuity of inventories while maintaining and improving the quality ,diversity, and value. Living natural resources are ecosystems, so ecosystem of living natural resources defined as a system of reciprocal relationships between elements in nature, both biological and non-living that are interdependent and influential (article 1 point 3). Whereas living natural resources are biological elements in nature which consist of vegetable natural resources (plants) and animal natural resources (animals) with non-living elements around them(Article 1 point 1). Soil and water conservation is an effort to protect, recover, improve and maintain the land function in accordance with capabilities and allotment of land to support sustainable development and sustainable life (Article 1 number 2 Law No. 37 of 2014 about Soil and Water Conservation)

b. Conservation Management Based on Local Wisdom Through Humanistic National Law Politic

Local wisdom or *local genius*, or *cultural identity* refers to one subject, namely indigenous people. Culture identity is used for utility in social economist perspective, so that cultural identity or local wisdom of indigenous people becomes tourism object, called "culture identity tourism". Local wisdom describes the way of thinking and acting of indigenous people according their ancestral culture in universe relation (Siombo: 2012: 36). Environment experts, customary law, sociology, anthropology define different local wisdoms. However, after Law No. 32 of 2009 established, local wisdom is defined in relation with environment and its management including: application ancestral values of life community, protection and sustainable environment management. For example, "*Bebetel Huma*" from Mentawai tribe, (prohibition of entering forest area without permission); "*Maduai Lao*" of Bajo tribe (prohibition for fishing on coral reefs); "*Uis Neo & Uis Pah*" of Boti Tribe in Timor (collective belief of Boti tribe, the Lord of Heavens (*Uis Neno* = Creator God) and the Ruler of Earth (*Uis Pah* = ancestral spirits). *Uis Neno and Uis Pah*, through trees, rocks and springs determined collectively as haunted place. They believe Uis Neno inside Uis Pah; "*Lingkon Pe'ang Tembong One*" from Manggarai tribe (displaying sacred space which describe fairness and equal distribution of land ownership, safeguarding forests and maintaining springs.) There are still many similar wisdoms that integrated into forestry and conservation legal norms.

Local wisdom of indigenous people above is a social fact of historical perspective where indigenous people knew their environment before conservation science and modern environmental science are formed. (Samekto: 2015: 46). The indigenous people involvement in managing sustainable conservation in accordance with basic norms of Article 18 B Constitution 1945 Republic of Indonesia and International Conventions including Rio de Janeiro Brazil convention, so that the traditional knowledge of indigenous people is guaranteed by the Constitution and International. Local wisdom in thoughtful ideas space, full of wisdom that has tangible and intangible views, and able to survive social change (Djatiman: 1999). Authority to determine legal relationship between people with natural resources (trees, water, animals, quarries / rocks, coastal areas, surface waters and under water) is authority of indigenous people themselves on their ancestral order which manifested in their local wisdom. The ability of indigenous people proved to maintain relationship between humans and nature in knowledge frame of indigenous people as individual local wisdom because local wisdom has cosmic centric belief relationship (Alfan: 2013: 22) which related to holism. (Lanur: 1995: 3)

The role of indigenous people with their local knowledge showed that state does not only provide protection and respect but social capital to strengthen their local wisdom by integrating local wisdom values into national conservation law where Pancasila parameter as legal paradigm in reconstructing politic of conservation law (Mahfud: 2012: 134 ). The reality reasoned modern law and primitive (local) law have the same universal foundation namely fulfilling desire of respectful human instincts and they called "the principle of reciprocity. The principle will be ineffective when state concept considers conservation in onside only, namely humans as logos (ratio). While other creatures are positioned as suppliers of logos needs. Everything is centered on human caused human biodiversity as center of attention and the others as fulfillment of human needs. Rene Descartes became an anthropocentric figure who considered nature as a resource to fulfill human needs that must be processed optimally for human interest, while the other supporter of human beings in ecosystem as a material source of human needs must be exploited. Descartes's view, positioning human in a respectable, noblest place above all other creatures oriented towards exploitation of natural resources.

According to the description above, application of local wisdom values in conservation management of natural resources has several practical benefits, namely (a) maintaining the sustainability of conservation areas, ecosystems, and forests to be key element to maintain harmony between biotic and abiotic environments. (b) the existence of forest care and biotic and abiotic environments preservation based on local policies. (c) the creation sustainable principle of biological resources conservation utilization and the ecosystem so that the efforts to preserve local wisdom resulting benefit for the present and next generations. The human actions that destroy conservation areas and use them wastefully become contradictions with saving human life.

### **C. Conclusion**

The traditional rights of indigenous people have been protected by the basic norms of the 1945 Constitution of the Republic of Indonesia and international legal norms. Therefore, indigenous people is legal subject as other legal subjects. Local wisdom of indigenous people as traditional rights has not been optimally empowered by politic of in natural resources conservation because: a) The state had not optimally found the local wisdom of indigenous people to protect forest and conservation of biodiversity area and ecosystem, whereas the indigenous people had their local wisdom for maintaining forest

areas (nature), conservation areas, and species protection. For example, local wisdom *Bebetel Huma* from Mentawai tribe, *Maduai Lao* from Bajo tribe (prohibition of fishing on coral reefs at sea); "*Uis Neo & Uis Pah*" from Boti Tribe in Timor; "*Lingkong Pe'ang Tembong One*" from Manggarai tribe. There are many more similar local wisdom in other region that integrated into forest and conservation values, and then elaborated through regional regulation ; b) Politic of law in conservation and forestry still have centralized character that separate indigenous people from their natural environment (forest & conservation areas). Consequently, their regulations marginalize the existence of their historical rights by dehumanist forest and conservation policies.

Politic of law in management of natural resources conservation and forest should contain philosophical, sociological and juridical aspects with a holistic approach. Law No. 5/1990 as basic rules had not been legal principle that pro: indigenous people, justice, local wisdom, poverty and environment. Consequently, the regulation must be reconstructed through politic of law that integrated into value of indigenous people and their local wisdom. Similarly with Law No.41 of 1999 about Forestry must be affirmed the traditional rights of indigenous people and policies related to production forest and protected forest. The regulation should pay attention to conservation forest as the womb of life and the chain of life. Production forest and protected forest contained conservation value ( springs, certain animals and plants) so that Indonesia will be mega biodiversity in international.

It is necessary to establish a National Commission for Indigenous People through special regulations as recognition of indigenous people and their traditional rights. The sectoral recognition of indigenous people & traditional rights created various interpretations driving opinion for half-hearted recognition of state. The discourse of this commission refers to the Decree of MPR No.IX / MPR / 2001, specifically article 4 letter (J) and the other related rules.

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## **Why Do belief of Followers Rebel ? The Indigenous Religion and Citizenship<sup>1</sup>**

Dewi Nurhalimah<sup>2</sup>

### **Abstract**

In 2017, Indonesian constitutional court made a history by accepting arguments that Aliran Kepercayaan (Indigenous religion or local faiths) was equal to religion which should be protected by the state. Debating about it started as early as Civil Administration law enacted. According to the Law No 23/2006 about Civil Administration, it is not the one of legitimate religion – Moslem, Christian, Catholic, Hindu, Buddha, and Confucius. Consequently, it should choose to confess one of legitimate religion even they never believe it; leave the religion column blank, or they never get an electronic identity card. This kind of discrimination forces the followers to ignore their right until constitutional court decides. Using the comparative law, this contribution attempted to answer the question of how freedom of religion has evolved in several jurisdictions, and how the concept of religious freedom has been interpreted and implemented in Indonesia.

**Keywords:** citizenship, constitution, Indigenous religion, religious freedom.

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<sup>1</sup> This contribution is part of a collection of articles growing out of conference 'Fundamental Rights focuses on research and development of fundamental rights relevant with social context and community dynamics' organized by faculty of law, Universitas Lampung, Bandar Lampung, Indonesia, on 7 September 2018.

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## A. Introduction

In Indonesia, the state cannot be separated from religion. The state regulates religion both in the constitution or other regulations. Article 28I paragraph (1) of the Indonesian Constitution<sup>3</sup> states that religious right is rights that cannot be reduced under any circumstances.<sup>4</sup> So, every citizen has a guarantee of legal protection in adhering to and believing in their religion.<sup>5</sup> But the problem is that the state regulates the religion embraced by the Indonesia population, namely Islam, Christianity, Catholicism, Hinduism, Buddhism, and Confucianism.<sup>6</sup>

In the reality, many people do not adhere to the 6 religious that recognized by the government, namely believers. Under the Civil Administration Act, the believers are treated differently –its beliefs are not written in the religious column. As a result, there is a lot of discrimination such as difficult to get identity card, family card; difficult to get a job because the religious column in the identity card is emptied; difficult to access social security; difficult to get a marriage and birth certificate; corpses were rejected to bury in the public grave because the religious column is emptied; the local officials often suggest for choosing one of 6 recognized religion.

Using the comparative law approach,<sup>7</sup> this article examined how freedom of religion had evolved in several jurisdictions, and how the concept of religious freedom had been interpreted and implemented in Indonesia. This paper was organized in four parts. Part I the indigenous religion in Indonesia. Part II the meaning of religious Freedom. Part III the indigenous religion right in the United States. Part IV critical thinking on Indonesian indigenous religion.

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<sup>3</sup> Constitution of Republic Indonesia year 1945.

<sup>4</sup> Rhona K. Smith, *Hukum Hak Asasi Manusia*, Yogyakarta: Pusham UII, 2008, at 15.

<sup>5</sup> In this case, the right to believe in religion demands the absence of intervention by external parties (both state and other social forces) against individual sovereignty. Based on the first generation theory of human rights, the state must not be too active (positive) against it, because it will lead to violations of religious rights.

<sup>6</sup> The explanation of Article 1 of the Prevention of Blasphemy Act No. 1/PNPS year 1965 “.....the religion embraced by Indonesian followers is Islam, Christianity, Catholicism, Hinduism, Buddhism and Confucianism. It can be proven by the history of the development of religions in Indonesia ... ”

<sup>7</sup> Mark Van Hoecke – a professor of comparative law at Queen Mary University of London - cited that comparative law as an instrument of learning and knowledge; an instrument of evolutionary and taxonomic science; contributing to one’s own legal system; and harmonization of law. Mark Van Hoeckey, *Methodology of Comparative Legal Research*, London: Boom Juridisch, at 2.

### a. The Indigenous Religion in Indonesia

The word indigenous refers to anything that is native to a particular geographical and environmental region.<sup>8</sup> Scholars often distinguish two types of indigenous religion.<sup>9</sup> One type has been practised by tribes of people that have lived in the same region of the world for perhaps thousands of years. The other type includes indigenous religions that were carried by people to other regions of the world.<sup>10</sup> Furthermore, the term of religion has not been agreed upon universally. There are different views among scholars – religion cannot include all or nearly all belief systems for both theoretical and practical reasons.<sup>11</sup> Indonesia in particular, on the constitution, has not been employed the standard concept of religion.<sup>12</sup> Although in the prevention of blasphemy act determines that indigenous religion or local faiths do not include on the concept of religion, the indigenous religion's followers are still growing.

The native religion already existed before any of the now recognized religion did. Rahmat Subagyo wrote that after attained Indonesian independence, there were approximately 250 local faiths in Kalimantan, Sumatra, Sulawesi, Ambon, Biak, Lombok, and Java.<sup>13</sup> In 1953, the Ministry of Religion Affairs noted that there were 360 groups of creed religion.<sup>14</sup> The Department of Culture and Tourism supervised around 245 traditional belief organizations at the central level and 945 branches, with around 10 million adherents.<sup>15</sup> However, the number of the adherent of Aliran Kepercayaan is still unclear as precise as available.

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<sup>8</sup> See Merriam Webster Dictionary.

<sup>9</sup> Religion, like any other philosophical concept does not have a single universally accepted definition. This is because religion deals with immaterial objects that cannot be empirically verified. It has been defined differently by people of diverse interest, academic and cultural background. Nana Osei Bonsu, African Traditional Religion: An Examination of Terminologies Used for Describing the Indigenous Faith of African People, Using an Afrocentric Paradigm, *Africology: The Journal of Pan African Studies*, Vol. 9. No.9, November 2016, at 109.

<sup>10</sup> See indigenous religions definition at Encyclopedia.

<sup>11</sup> They think that religion would lose its distinctiveness if it included all belief systems, which is implausible. Lee J. Strang, The Original Meaning of “Religion” in the First Amendment: A Test Case of Originalism’s Utilization of Corpus Linguistics. *Brigham Young University Law Review*, 2017, at 4.

<sup>12</sup> Article 29 Constitution of Republic Indonesia.

<sup>13</sup> Harun Hadiwijono, *Konsepsi Tentang Manusia dalam Kebatinan Jawa*, Jakarta: Sinar Harapan, at 10. Kustanti, *Aliran Kepercayaan Kulowargo Kapribaden di Surakarta (Suatu Kajian Sosial Religius)*, Surakarta: Universitas Sebelas Maret, 2006, at 5.

<sup>14</sup> Aryono, *Pergulatan Aliran Kepercayaan Dalam Panggung Politik Indonesia, 1950In-2010an: Romo Semono Sastrodihardjo dan Aliran Kapribaden*, *Jurnal Sejarah Citra Lekha*, Vol. 3, No. 1, 2018, at 58.

<sup>15</sup> Syamsul Arifin, *Attitudes to Human Rights and Freedom of Religion or Belief in Indonesia*, Yogyakarta: Kanisius, 2010, at 19.

Basically, the indigenous religions in Indonesia have a similarity to the other religion - they believe in God, Allah. Their highest doctrine is Manunggaling Kaula-Gusti which means the united of slave and god.<sup>16</sup>Kejawen is one of the ancient faiths which roots in the Indonesian island of Java. Kejawen is the Theological insight of Javanese as a result of the accumulation of various ancient traditions – Hinduism, Buddhism, Islam, and the traditions of the ancestors.<sup>17</sup> The accumulation is very smooth and thick. The core of this worldview is the capacity to maintain harmony and peace amongst different beliefs, concepts, and religions.<sup>18</sup>

Sunda Wiwitan, the other branch of indigenous religion, assumes Lord exists. They seeking Lord use the method of integrating some of Lord's concept or syncretism. Experience, dynamics, and creativity and the concepts were then used as a reference. Sunda Wiwitan is based on belief spirit or ancestral spirit and taught the content of ancient Sundanese texts from the 14<sup>th</sup>-17<sup>th</sup> AD.<sup>19</sup>

Malim is Batak's native religion. The followers are named Parmalim. They worship Mula Jadi Na Bolon and the Batak believed that Sisingamangaraja XII – a leader and kong of Batak – Mula Jadi Na Bolon's was chosen as prophet. Malim declared as Batak ethnic's

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<sup>16</sup> R.E. Djumali Kartahardja, *Materi aliran-Aliran Kebatinan di Indonesia*, Proyek Pengawas Kegiatan Aliran-Aliran/Faham-Faham, Departemen Agama, at 30 see *Eksistensi Tuhan Dalam Pandangan ALiran Kepercayaan dan Kebatinan*, at. 2.

<sup>17</sup>Media Zainul Bahri, *Research Report Indonesian Theosophical Society (1900-40) and the Idea of Religious Pluralism*, *Southeast Asian Studies*, Vol. 6., No. 1, April 2017, Kyoto University, pp 139-165.

<sup>18</sup>*Id.*

<sup>19</sup>The texts are *Sanghyang Siksa Kandang Karesian and Amanat Galunggung, Sanghyang Hayu, Sanghyang Ragadewata, Kawih Paningkes and Jatiraga or Jatiniskala, Tujur Buana, Syattariyah Keraton Kaprabonan, Sri Arjana and Bujungga Manik, and Sewaka Darma*. God in Sang Hyang Raga Dewa as supreme creator who is not created, as a maker but not made, and knows but is not known. See the text as follows:

Hanteu nu ngayuga aing (nothing makes me),  
Hanteu nu manggawe aing (no one created me),  
Aing ngaranganen maneh (I named myself),  
Sanghyang raga dewata (Sang Hyang Raga Dewata),  
Suing angaranan maneh (Why named myself?),  
Sanghyang raga dewata (as a Sang Hyang Raga Dewata?),  
Ngaran ning dewata oge (because of the name of God as well),  
Carek-(A)na tmen (his said is true),  
Rupa reka ku waya (the appearance is designed to exist),  
Ja aing nu ngayuga tan kayuga (I am the one who created but not created),  
Ja aing nu digawe tan kapigawe (I am the one who work but it is not done),  
Ja iang nu diguna tan kapiguna (I am the one who used but it is not used).

See Etty Saringendayati, Dede Mahzuni, *Lord in Sunda Wiwitan Perception*, *SSRG International Journal of Medical Science (SSRG-IJMS)*, Vol. 5 Issue 7, July 2018, at 24-25.

religion since the 1800s, Dutch colonizers sought to conquer Batak region.<sup>20</sup> In Indonesia, there are at least four elements of the group called the Aliran Kepercayaan:

1. A group of believers who belong to local beliefs (religions), such as the Dayak tribe (Kaharingan, Mquiry), the Batak tribe (Parmalim, the Raja Batak, Namulajadinabolon), the Badui Tribe, Sunda Wiwitan, Buhun (West Java) , Suku Anak Dalam / Kubu, Wana Tribe (Central Sulawesi), Tonaas Walian (Minahasa, North Sulawesi), Tolottang (South Sulawesi), Wetu Telu (Lombok), Naurus (Pulau Seram, Maluku) and various beliefs in Papua;;
2. Group of believers in God Almighty. Included in this category are Kejawen Kebatinan adherents, generally based on Java, including the Ngesti Tunggal Association (Pangestu), Sumarah, Susila Budi Dharma (Subud), Travel, Sapta Dharma, Tri Tunggal and Manunggal, the Eklasing Association Budi Murko, Sumarah Purbo, Hardo Pusoro Circle of Friends, Ngesti Tunggal, Mardi Santosaning Budi (MSB), Budi Luhur and others;
3. Groups of religious believers whose religious indications include religious sects, religious sects, groups of religious congregations such as Ahmadiyah, Buda Jawi Vishnu, Children of God, Jehovah, Krishna Day and others;
4. Groups of mystic or occult beliefs such as paranormal, forecasting, medicine, witchcraft, sorcery, magic and metaphysics.<sup>21</sup>

Majority indigenous religion branch in Indonesia develop as well as their generation. Their spirit comes from their circumstances and ancestors. They live happily like any other people, doing work, studying, married, till died. Unfortunately, this happiness changed<sup>22</sup>when they have business with the identity card and family card. They will face a lot of discrimination and inequality because the indigenous religion has not been covered by the Civil Administration Act.

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<sup>20</sup> Namira Puspendari, *The Increasing Intolerance towards Religious Minorities in Indonesia: Have the existing laws been protecting or marginalising them?*, Tilburg University, at 15.

<sup>21</sup>IGM Nurdjana, *Hukum dan Aliran Kepercayaan Menyimpang di Indonesia*, Yogyakarta:Pustaka Pelajar, 2009, at. 53

<sup>22</sup> Niels Mulder, *Kebatinan dan Hidup Sehari-hari Orang Jawa: Kelangsungan dan Perubahan Kulturil*, Jakarta: Gramedia, 1984, at. 7 See IGM Nurdjana, *Hukum dan Aliran Kepercayaan Menyimpang di Indonesia*, Yogyakarta:Pustaka Pelajar, 2009, at. 40



## **b. The Meaning of Religious Freedom**

The 1945 Constitution of Republic of Indonesia guarantees the religious freedom, as stated in Article 29:

- 1) The State shall be based upon the belief in the One and Only God.
- 2) The State guarantees all persons the freedom of worship, each according to his/her own religion or belief.

This article is belonging of human right chapter. According to Jack Donnely "Human rights are rights that humans have solely because they are human beings, human beings have them not because they are given to them by society or based on positive law, but solely based on their dignity as human beings"<sup>23</sup> in another sense even though everyone born with different colors of skin, gender, language, culture and citizenship, he still has these rights which is what is said to be the universal nature of these rights.<sup>24</sup> Apart from being universal, those rights also cannot be revoked. This means that no matter how bad treatment has been experienced by a person or how cruel a human being is, he will not stop being a human, therefore he still has those rights, in other words, those rights are inherent in him as human beings.<sup>25</sup> John Lock argues that all individuals are endowed with the inherent rights of life, freedom and ownership which are their own and cannot be revoked or reduced by the state.<sup>26</sup>

In its development, there are three generations of human rights recognized by the international community, namely the first, second, and third generation of human rights<sup>27</sup> There is this first generation period, human rights demands represent civil and political rights. These rights are essentially to protect the lives of human beings - which are included in this first generation include the right to life, physical needs, the right to freedom of

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<sup>23</sup> Jack Donnely, *Universal Human Rights in Theory and Practice*, Cornell University Press, ITHACA and London, 2003, pp 7-21, on Rhona K.M Smith *et al*, *Hukum Hak Asasi Manusia*, Yogyakarta: Pusham UII, 2008, at. 11.

<sup>24</sup> Adne Valen-Sendstad, *Theori of Human Rights in Relation to Understandings of Human Right Education: The Relevance to Diversity*, Birmingham: the University of Birmingham, 2010, at 6.

<sup>25</sup> *Ibid.*

<sup>26</sup> Through a social contract, the protection of an irrevocable right is surrendered to the state. But according to Locke if the state ignores the social contract by violating the individual natural rights, then the people are free to fell the president and replace it with a new government that can respect the human rights. *Ibid.*, at. 12.

<sup>27</sup> The second generation includes protection for economic, social and cultural rights. These rights arise from demands that the state can provide everyone's basic needs ranging from clothing, food, shelter, to health. The third generation includes the rights of solidarity and mutual rights. These rights arise from the demands of developing countries for a fair international order. Through the demands of the right to solidarity, developing countries want to create an international economic and legal order conducive to ensuring the following rights: 1) the right to development, 2) the right to peace, 3) the right to natural resources, 4) the right to clean environment, dan 5) the right to participate in cultural heritage. See Rhona *et al*, at. 15-16.

movement, asylum rights from oppression, protection of property rights, freedom of thought, religion and belief, freedom of assembly, and expressed thoughts, arbitrary rights of arbitrary detention and arrest, the right to be free from torture, the right to be free from the law which has receded and the right to a fair trial.

On 28 October 2005, the Indonesian government enacted the ICESCR (International Covenant on Economic, Social and Culture Right) into Law Number 11 of 2005 and ICCPR (International Covenant on Civil and Political Right)<sup>28</sup> introduced into Law Number 12 of 2005. This ratification raises as a consequence for the implementation of human rights because Indonesia has committed itself legally.<sup>29</sup> There are at least three main principles contained in the normative human rights angle, namely:

1. The principle of universality. It intended so that human rights ideas and norms are recognized and are expected to be universally or internationally enforced.
2. The principle of non-discrimination. This principle stems from the view that all human beings are equal. Everyone should not be distinguished from one another. This cannot be seen as a negative thing but must be seen as the wealth of mankind. Because humans come from a variety of skin colours like white, black, yellow and others. Religious diversity is also something that has a place in this non-discrimination nature. A person's limitation in religion is a human rights violation.<sup>30</sup>
3. The principle of impartiality. The point is that the settlement of disputes is not in favour of a particular party or class in society.<sup>31</sup>

If referring to the general comments of ICCPR, the understanding of religion and belief must be interpreted broadly. In other words, religion must not be interpreted narrowly. Religion or traditional and religious groups or newly established worshipers are included in

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<sup>28</sup> This is the core, non-binding document that explain the international right to religious freedom. The other document which is related is United ations Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion and Belief. Melissa A. Crouch, *Law and Religion in Indonesia: The Constitutional Court and the Blasphemy Law*, *Asian Journal of Comparative Law*, Vol. 7, Issue 1, 2012, at 2-.

<sup>29</sup> Oki W. Budijanto, *Penghormatan Hak Asasi Manusia Bagi penghayat Kepercayaan Di Kota Bandung*, Jakarta: Jurnal Hak Asasi Manusia, Vol 7 No 1, Juli 2016, at. 38.

<sup>30</sup> The term discrimination is not defined in the International Covenant on Civil Rights and Political Rights (International Covenant on Civil and Political Rights / ICCPR), including the principle of non-discrimination. However, the Human Rights Committee, through its General Comment Number 18 (General Comment) in 1989, stressed that the principle of "non-discrimination" should appear at the level of implementation. Alignment before the law and equality of legal protection without discrimination is the basis and general principle for efforts to protect human rights. Rachel Hodgkin and Peter Newell, *Implementation Handbook for the Convention on the Rights of the child*, New York, UNICEF, 1998.

<sup>31</sup> *Ibid*, at 39.

the meaning of religion. Article 18 paragraph (1) of Law No.12/2005 also protects people's beliefs from atheistic, non-god (non-theistic), Godless (theistic).

Unfortunately, before the ICCPR was passed into law, precisely before the reformation, the government has limited religion and belief. Like in the Prevention of Blasphemy Act and Civil Administration Act, which discriminate against minority religions or religious believers. So that, the representative of Aliran Kepercayaan lodged judicial reviews of the Prevention of Blasphemy Act to the constitutional court.<sup>32</sup> They applied two times for judicial review, and all these were rejected by judges.<sup>33</sup> The article for judicial review is Article 1 and Article 2 of the Prevention of Blasphemy Act on The Constitutional Court decision No. 140 / PUU-VII/2009:<sup>34</sup> Second, the Constitutional Court decision No. 84/PUU-X/2012 examined Article 4 of the Prevention of Blasphemy Act.<sup>35</sup>

These failures did not dim the spirit of the Aliran Kepercayaan's to get fairness. They lodged a judicial review again to challenge the 2013 Civil Administration Act.<sup>36</sup> There is a special thing which made their judicial review was granted by judges. They can demonstrate and convince judges that discrimination can occur. Therefore, the judges of Indonesian Constitutional Court agreed that Aliran Kepercayaan or local faith equal to the religion. Because the constitution states "religion and belief" as a unity which uses the conjunction "and" so Aliran Kepercayaan is comparable to religion.<sup>37</sup>

After hearing the Constitutional Court decision No. 97/PUU-XIV/2016 by judges, government serve ID card's changes and data collection for Aliran Kepercayaan's

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<sup>32</sup>Choirul Anam et. al, *Upaya Negara menjamin Hak-Hak Kelompok Minoritas di Indoensia (Sebuah Laporan Awal)*, *Loc.Cit.* at. 60

<sup>33</sup>Indonesia Constitutional Court, The Constitutional Court decision No. 140/PUU-VII/2009, at 121.

<sup>34</sup>Article 1 "Every person is prohibited intentionally in public telling, advocating or seeking general support, to interpret the religion adopted in Indonesia or perform religious activities that resemble the religious activities of the religion, which interpretations and activities deviate from the main the subject of religious teachings." Article 2 "(1) Anyone who violates the provisions in article 1 is given a strong order and warning to stop his actions in a decision with the Minister of Religion, the Minister / Attorney General and the Minister of Home Affairs. (2) If the violation in paragraph (1) is carried out by the Organization or a belief stream, then the President of the Republic of Indonesia may dissolve the Organization and declare the Organization or stream as a banned Organization / stream, one after another after the President has received consideration from the Minister of Religion, Minister / Attorney General and Minister of Home Affairs" Indonesian Constitutional Court, The Constitutional Court decision No140/PUU-VII/2009.

<sup>35</sup> Article 4 In the Criminal Code, a new article is held which reads as follows: Article 156a Sentenced to imprisonment for a maximum of five years whoever deliberately publicly issues feelings or commits an act: a) which is essentially hostile, misuse or desecration of a religion that is held in Indonesia; b) with the intention that people do not adhere to any religion, which is based on the Godhead of the Almighty.

<sup>36</sup> They examined Article 61, 64 of the Civil Administration Act. See the Constitutional Court decision No. 97/PUU-XIV/2016. See <http://www.thejakartapost.com/news/2017/11/07/constitutional-court-rules-indigenous-faiths-acknowledged-by-state.html>

<sup>37</sup> See the Constitutional Court decision No. 97/PUU-XIV/2016 at 140

followers.<sup>38</sup> It shows that even though the religious freedom guaranteed by the constitution, it is not directly realized in practice. The nut is harmonisation of law. Harmonisation aims to create consistency of laws, regulations, standards, and practices. Applying harmonisation likely will reduce legal uncertainty and legal dysfunction. In conclusion, fairness and legal certainty will be obtained if the regulations made well which covers living values.

### **c. The Indigenous Religion Right In United States**

In 2009, the United States, precisely Utah, there was a case which related to Native American religions. Namely U.S V Raymond S. Hardman in which it doubted to the judge why an individual who was not a member of a federally recognized tribe was foreclosed for a permit that may be used as a defence to criminal prosecution for possession of eagle feathers, while an identically situated individual may apply for a permit. If she was a member of a federally recognized tribe – the purpose was to perform religious ceremonies<sup>39</sup> Hardman emphasis added that this alternative would questionably ease the government-created burden on non-Native American adherents of Native American religions. But to determine whether it was possible to ease that burden without compromising the government’s two compelling interests, it was necessary to consider the nature of those interest and how recent developments have altered the measures necessary to advance them. Under the current system,<sup>40</sup> this court had heard testimony over several days from numerous witnesses.

Promoting Native American religion and culture, government’s historical obligation to respect Native American sovereignty and to protect Native American Culture. The result of “the meeting of protection from the abuse and exploitation of ceremonies”, decided that:

... There will be no non-Natives allowed in our sacred Ho-c o-ka (our sacred alters) where it involves our Seven Sacred Rites. The only protection with this in Government law is that only enrolled members can carry an eagle feather... the eagle feather stands for indigenous knowledge and guidance in our spiritual ways... the only participant allowed in the centre [for the Sundance ceremony] will be Native People. The non-native people need to understand and respect our decision...

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<sup>38</sup>Aliran Kepercayaan’s followers can write their belief in the religious column on ID card as Penghayat - for all of the Aliran Kepercayaan’s branch <https://www.merdeka.com/peristiwa/mulai-1-juli-2018-kolom-agama-di-ktp-diisi-aliran-kepercayaan.html>

<sup>39</sup>U.S. v Hardman, 622 Supp. 2d 1129 (D. Utah, 2009), pp 1129-1136.

<sup>40</sup> In this case, Dee Benson, district judge analyzed based on numerous regulation as follows:

1. Religious Freedom Restoration Act (RFRA),
2. Endangered Species Act (ESA),
3. Bald and Golden Eagle Protection Act (BGEPA), this act prohibits possession and other acts involving “any bald eagle... or any golden eagle, alive or dead, or any part, nest, or egg thereof”.
4. the Migratory Bird Treaty Act proscribes possession or other acts with regard to “any migratory bird, any part nest, egg of any such bird, or any product, whether or not manufactured, which consist, or is composed in whole or part, of any such bird or any part, nest, or egg thereof”.

Our purpose for the Sundance is for the survival of the future generations to come, first and foremost. If the Non-Native truly understand this purpose, they will also understand this decision and know that by their departure from this Ho-c- o-ka is their sincere contribution to the survival of our future generation.<sup>41</sup>

Supply and quality of feathers, over the last 20 years the number of eagles electrocuted went way up. The Fish and Wildlife Service has recognized that and the states have recognized that. We have instituted through the power companies to alleviate a lot of that mortality.

The judge analyzed and concluded that the government already offers its efforts to promote two compelling and competing interest. But the government, in this case, gave the only poor evidence –offered to suggest prohibitively high demand from Native American or non-Native American adherents is either not relevant to this case or is based on testimony, not credible reasons and inconsistent with other government evidence of a less speculative nature.<sup>42</sup>

#### **d. Critical Thinking on Indigenous Religion in Indonesia**

the previous discussion shows that there is a problem in understanding religious. This can be seen from several things found in this paper: first, there is no explanation of Article

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<sup>41</sup>U.S. v *Hardman*, 622 Supp. 2d 1129 (D. Utah, 2009), at 1137.

<sup>42</sup> The court extensively discussed for its conclusion that the interest of protecting the culture of federal recognized as Native American tribes control s in this case, as follows:

1. Since *Hardman* did not foreclose the Government relying upon either version of the compelling interest, the court elected to focus on the federally recognized tribes formulation of the interest as consistent with the language of *Hardman*, and based on Congress' obligation of trust to protect the rights and interests of federally recognized tribes and to promote their self-determination.
2. The federally recognized tribe formulation of the interest, said the court, is more consistent with the BGEPA and its language, which instructs the Secretary of the Interior to issue eagle permits "for the religious purposes of Native American tribes" rather than for the "Native American religion." This clearly indicated to the court that Congress specifically chose to tie the religious use exception to Native American tribes rather than to individual practitioners of Native religions.
3. The BGEPA's permit exception is consistent with the Supreme Court's longstanding interpretation of the Federal Government's relationship with Native American tribes. The exception, said the court, is derived from Congress' plenary power based on a history of treaties and the assumption of a "guardian-ward" status to legislate on beat of federally recognized Native American tribes, and is specifically related to the "the religious purposes of Native American tribes." It therefore draws a distinction between Native Americans and non-Native Americans based on the "quasi-sovereign" status of the tribes as political units rather than a discrete racial group, which would have run the risk of offending the equal protection component of the Due Process Clause of the Fifth Amendment (U.S. Const. Amend. V).
4. Finally, the court explained that it remained on safe grounds in regards to the Establishment Clause (U.S. Const. Amend. I) in its holding, citing the Supreme Court's conclusion that federally recognized tribes are political entities rather than a religious or racial class. 26 A.L.R. Fed. 3d Art. 1 (Originally published in 2017). Hadas Livnat, J.D., Validity, Construction, and Application of Bald and Golden Eagle Protection, *American Law Reports ALR Federal 3d*, Originally published in 2017.

29 of the Indonesian Constitution after the amendment. Second, there is an interpretation on the Prevention of Blasphemy Act in that the Aliran Kepercayaan is unrecognized. Third, the Civil Administration Act restricts and discriminates the Aliran Kepercayaan's followers. Based on the comparative law, Indonesia is in reverse with the US, this can be seen from its regulations in which they treat Native American religion exclusively - supporting all ceremonies even though it erodes the eagle which is the symbol of their country. While Indonesia has discriminated against them.

The author sees that the problems of indigenous religion freedom are at least caused by the following:

1. unclear religion and belief in the constitution;
2. unrecorded the number of Aliran Kepercayaan's followers;
3. unrepresented the Aliran Kepercayaan in the legislative branch;
4. disharmony among sector-specific regulations which related to the Aliran Kepercayaan.

Therefore, the author proposes that it is necessary to increase the harmonization of regulation - this is an important step in achieving legal certainty and avoiding overlapping authority. In addition, the Aliran Kepercayaan's followers should have representatives who sit in parliament to convey their group's aspirations.

## **B. Conclusion**

1. Religious freedom has been evolving widespread, in US Native American Religion has a higher position than those who are Non-Native American Religion. In Indonesia, Indigenous religion and religion are equal.
2. Religious freedom in Indonesia is interpreted differently. Before the Constitutional Court decision No. 97/PUU-XIV/2016, Indonesia de jure adopted religious freedom, but de facto it was not implemented.

## **The Paradox of National Development Indigenous Peoples under Human Rights Perspectives**

Mas Nana Jumena and Afandi Sitamala

### **Abstract**

Each developing country will continue to strive to promote the national development and welfare of its people in various ways. For Indonesia using technology and utilizing Natural Resources (SDA) it has. The legal basis in Utilization of Natural Resources (SDA) in Indonesia is mandated by the constitution in Article 33 of the 1945 Constitution. The provision is the basis for the government in managing natural resources for the people and national development. The existence of customary law communities that are also granted by the constitution in Article 28B paragraph (2) of the 1945 Constitution "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 accord ...". That which a legal contradiction (rule) that implement and translate the provisions of the constitution. The conflict between the interests of national development with respect and protection of indigenous and tribal peoples has always been a dilemma. But what will always be "defeated and marginalized" is customary law society by clause "for the public interest and national development". This condition makes the customary law community will be marginalized which then will only become a history. Like the Cisungsang customary community (Selamat Banten), which then covers Cikotok and Bayah areas, then the land findings of Gold, they finally left to the area of Mount Halimun. The Baduy customary law community residing in the South region of Lebak-Banten (study in this paper) which is currently beginning to disrupted its existence. Under these conditions how the role of law and government in translating recognizes and respects customary law community units and their rights (especially customary rights). While respect for the existence of these indigenous peoples has been recognized also by the United Nations through the General Resolution of 2007 (United Nations Declaration On The Rights Of Indigenous Peoples).

**Keywords:** Customs, Ulayat Rights, Government

## A. Introduction

The peoples of Baduy which lived in Lebak regency was known as one of the oldest society in Indonesia. Its existences has been known since the Pasundan (*Siliwangi*) empire era which has inhabit the *Kanekes* mountains, but its existence in a juridical manner was only been confirmed in 2001 with the enactment of the Lebak Regency Regional Regulation No.32/2001 regarding The Protection of Ulayat (Customary) Right of the Peoples of Baduy. Prior to this regulation, Baduy Peoples was only being acknowledged socially as indigenous peoples.

Baduy peoples are a community that lives in Kanekes village which located in sub district of Leuwidamar, Lebak regency. Baduy peoples have their own custom and characteristics compared to the Indonesian peoples in general.<sup>1</sup> As indigenous peoples, Baduy peoples have the Ulayat<sup>2</sup> right on the land and all of its resources. Before the enactment of the Lebak Regency Regional Regulation, Baduy peoples do not have Ulayat right protection, and their right could be easily seized by peoples outside of Baduy. It also easily seized by other private institutions.

As the Head of the Baduy peoples (*Jaro*) complained during the *Seba* event (visiting and giving agricultural products) a while ago, they stated that the land area of 5,136.8 hectares of Baduy peoples Ulayat Right in Lebak was considered by indigenous peoples to be insufficient for agricultural. But throughout the event, 3,000 hectares of which are protected and prohibited forest which the used has been regulated.<sup>3</sup> Currently, there are approximately 11,699 Baduy peoples in existence.<sup>4</sup>

Equally important, the decreasing factors of the used of Ulayat land for agricultural activities are mainly caused by external and internal factors. The internal factors usually caused by the increasing population of Baduy people themselves. While the external factors mainly caused by the activities peoples outside of Baduy who's expanded the plantation. Also, there are still land owned by the PTPN (PT. Perkebunan Nusantara) and also privatized

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<sup>1</sup>Article 1 number 6 Regional Regulation Lebak Regency No. 32 2001 Regarding The Protection on Ulayat Right of Baduy Peoples.

<sup>2</sup>Ulayat right is a policy that by law owned by the specific indigenous peoples on specific regions, where the indigenous peoples reside, and the peoples use the natural resources including land on that regins which used as their main source of income which emerge naturally from their ancestors(Article 1 number 4, Regional Regulation of Lebak Regency No.32 2001 regarding The Protection on Ulayat Right of Baduy Peoples)

<sup>3</sup><https://news.detik.com/berita/d-3487291/lahan-pertanian-baduy-menipis-bupati-lebak-janjikan-1200-ha-tanah>, last access on 2 July 2018

<sup>4</sup>*Ibid*



(HGU) which is unproductive and still not yet developed by the local government of Lebak.<sup>5</sup> The efforts to restore the land toward Ulayat right of Baduy peoples had been conducted by the local Government of Lebak since 2001. Amid the efforts, there are no significant progresses.

To illustrate, the government of Lebak still waiting the central government to make a move regarding the returned process of the land toward the peoples of Baduy. The central government has its own “agenda” toward the soil of peoples of Baduy. Hence, there shall be further economical calculations toward the decision. It’s like paradox that circle around between national development and the return of Ulayat right toward the peoples of Baduy.

For this reason the hegemony practice on indigenous people continued to judicial review in Constitutional Court (Mahkamah Konstitusi/ MK) as purposed by Kesepuhan Customary Law Society (Masyarakat Hukum Adat Kesepuhan/ MHAK) upon the Regulation No.41 1999 on Forestry. The MK decision No 35/35/PUU-X/2012 on materially test of Regulation No.41 1999 on Forestry granted by the MK judges as demanded by MHAK.

Therefore the MK decision urged the Lebak regency government to recognize the existence of indigenous peoples and its Ulayat right attached. In 2015 the regency of Lebak issued the Regulation of Lebak Regency No.8 2018 on the Recognition, Protection and Empowerment of Kesepuhan Customary Law Society. On this regulation, it stated that Customary Law Society is a group of peoples which stay together in a specific geographical area tied up to their ancestral origins, environments and also their value for economy, political, social, custom and regulation.<sup>6</sup> Then, it describes Kesepuhan as a whole customary law society that reside in Lebak regency.<sup>7</sup>

In essence MHAK has their own Ulayat right as similar as Baduy peoples, but there were different definition although substantially the same. Ulayat right or in different name can be called as the authority of MHAK to regulate communally the land use, territory, and natural resources that exist within the indigenous territories that are the become their source of life and income.<sup>8</sup> As mentioned on Regulation of Lebak Regency No.8 2015 on the

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<sup>5</sup><https://centralnews.co.id/2017/04/29/suku-baduy-diberi-luas-lahan-tambahan/>. last access on 2 July 2018

<sup>6</sup>Article 1 number 10 Regional Regulation of Lebak Regency No.8 2015

<sup>7</sup>Article 1 number 11 Regional Regulation of Lebak Regency No.8 2015

<sup>8</sup>Article 1 number 12 Regional Regulation of Lebak Regency No.8 2015 regarding Recognition, Protection and Empowerment of Kesepuhan Customary Law Society.

Recognition, Protection and Empowerment of Kesenpuhan Customary Law Society, currently there are 522 MHAK resides in Lebak regency.

Thus, there are two indigenous people in the Lebak regency:

1. The Customary Peoples of Baduy which lives in Kanekes village located in sub district of Leuwidamar, Lebak regency consist of two groups: Baduy Dalam (Inner Baduy) and Baduy Luar (Outer Baduy);
2. Kesenpuhan Customary Law Society (MHAK) which consists of 522 spread around Lebak regency, where in majority existed in the western and southern area of Lebak regency which commonly called as *incu putu*.<sup>9</sup>

The author will discuss about the peoples of Baduy including the Ulayat right attached to it, which currently still become a polemic, although the existence of Ulayat right of the peoples of Baduy formally had been set in article 3 Regulation No.5 1960 on Basic Agrarian Law (UUPA), while in article 5 it stated that the UUPA was formed by the customary law which implies that the state giving recognition and protection toward indigenous peoples and their Ulayat rights.

As the results of constitutional amendment UUD 1945 article 18 letter B, paragraph 2 and article 28 letter I paragraph 3 regarding the existence and the right of indigenous peoples Article 18 letter B paragraph 2 mentioned that “*The State shall recognize and respect, to be regulated by law, the homogeneity of societies with customary law along with their traditional rights for as long as they remain in existence and in agreement with societal development and with the principle of the Unitary State of the Republic of Indonesia*” Furthermore Article 28 letter I paragraph 3 mentioned that “*The cultural identities and rights of traditional communities are to be respected in conjunction with progressing times and civilization*”.

In a juridical manner the existence of indigenous people have recognized by the state, however the facts are not in line with what actually happened in indigenous peoples. Various issues occurred especially on the right of Ulayat and the decreasing number of customary land. Hence, we would like to profoundly discuss “*The Paradox between National Development and the Existence of Indigenous Peoples under Human Right Perspectives*”.

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<sup>9</sup>*Incu Putu* is peoples of Kesenpuhan which bound by Kesenpuhan regulation. (Article 1 number 20 Regional Regulation of Lebak Regency No.8 2015 regarding Recognition, Protection and Empowerment of Kesenpuhan Customary Law Society.)

## **B. Analysis**

### **1. The Development of Ulayat Right of The Peoples of Baduy**

As the aforementioned, the local government of Lebak regency had enacted several regulations regarding the Ulayat right for peoples of Baduy, as follows:

1. In 2001, the local government of Lebak regency enacted local regulations No.32 2001 regarding The Protection on Ulayat Right of Baduy Peoples;
2. Regent of Lebak Decree No 590/Kep.233.Huk/2002 regarding the Detail Border Provision on the Ulayat Right of Baduy Peoples in Kanekes Village, Leuwidamar sub district, Lebak Regency;
3. Kanekes Village Regulation No.1 2007 regarding The Protection of Indigenous Peoples of Tatar Kanekes<sup>10</sup> (Baduy) and Saba Cultures.

Thus three regulations specially related toward Baduy peoples had different substances, even though there had been a Regent of Lebak Decree No.590/Kep.233.Huk/2002 regarding the Detail Border Provision on the Ulayat Right of Baduy Peoples in Kanekes Village, Leuwidamar sub district, Lebak Regency, then again the issues keeps occurred regarding the land boundaries with people outside of Baduy. Likewise, the Kanekes Village Regulation No.1 2007 regarding The Protection of Indigenous Peoples of Tatar Kanekes (Baduy) and Saba Cultures which regulate how the attitudes and behavior toward people outside Baduy who visited (Saba Cultural) in the Baduy peoples border. However, there are no clear regulations on to set out the boundaries of the Ulayat right, while in the meantime the Ulayat land keeps decreasing day by day.

As noted above the decrease of Ulayat land is caused by the withheld release some of the Ulayat land by the PTPN and also private party that own special right to cultivate (HGU), the author argue that the reluctant to release the land caused by the economic reasons. The role of the government should be able to side up with the interests of the indigenous people as mandated by the constitution and the regulations beneath. However, it has been hampered down on appliance level. This situation raises a paradox, namely between national development and the fulfillment of the rights of indigenous peoples.

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<sup>10</sup> Tatar Kanekes is a region similar as village on administration level of Lebak Regency which consist of 58 villages (Article 2 paragraph (3) Kanekes Village Regulation Number 1 2007 regarding The Culture of Saba and The Protection toward Indigenous People of Tatar Kanekes)

The perspectives on paradox development as mentioned by Amartya Sen in 1992, in this view Amartya mentioned the paradox development is intended toward the development imbalance in developed compared to developing countries, where it also continues between city and village.<sup>11</sup> The development itself is only been seen from the economical and distribution of power perspectives only. Meanwhile morals and ethics which should be primary guide in development are actually deflated.<sup>12</sup>

In the meantime, the Ulayat right of Baduy peoples currently being “expelled” by the will to undergo plantation development. The government was not fully noticing the necessity of indigenous peoples especially the Ulayat right toward the peoples who mainly use the land as their source of income.

According to Boedi Harsono, Ulayat rights constitute a series of authority and obligations of a indigenous customary law, which relate to the land situated in the area of its territory as mentioned above as the main source of income and the peoples life attached overtime.<sup>13</sup>

According to Maria Soemardjono, the Ulayat right indicate the legal relation between legal society (the subject of rights) and for certain land or territory (object of right). Ulayat right contains the authority as follows:<sup>14</sup>

1. Administer and to regulate the use of land (intended for residential areas as well as farming and et cetera), as inventories (intended for new rice fields in timely manner and et cetera), and for land maintenance;
2. Regulate and decide the legal relation between peoples and the land (giving specific right toward specific subject);
3. Regulate and decide the legal relation between peoples and legal action regarding the land (buy and sell, heredity and et cetera).

Without question the recognition toward the existence of Ulayat right on several legislation are responsive and anticipative movement toward the incoming occurrence of dispute settlement process on Ulayat right of indigenous peoples, but with the slow process

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<sup>11</sup> Warjio. *Paradoks Politik Pembangunan*. Jurnal POLITEIA|Vol.6|No.2|Juli 2014  
ISSN: 0216-9290. Pg 83

<sup>12</sup>*Ibid*

<sup>13</sup> Boedi Harsono, *Hukum Agraria Indonesia: Sejarah Pembentukan Undang-Undang Pokok Agraria, Isi, dan Pelaksanaannya*, Djambatan: Jakarta, 2008, pg 185-186.

<sup>14</sup> Maria S. W. Soemardjono, *Kebijakan Pertanahan: Antara Regulasi dan Implementasi*, Kompas, Jakarta, 2009, pg.56

of dispute settlement causing uncertainty. In this regard, quoting Mahfud MD whose state out that responsive law is a legal product that reflects the sense of justice and the fulfillment of people's expectation.<sup>15</sup>

In any case land is one of the resources that becomes the interest and the needs of peoples, legal entities and or development sectors. Land is needed to carry out activities because land needs to be regulated through appropriate, consistent and just policies and regulations. The land regulations means to fulfill the basic human needs which can be seen in various legislation. The awareness toward the importance of the use of land related to human rights has begun since the Reformasi era.

Ulayat right as concrete legal relations at first were created by the ancestors when leaving or conferring the land to peoples in particular group.<sup>16</sup> Ulayat right itself is an inseparable part of customary law peoples.<sup>17</sup>

In general, there are two types of land rights, namely individual rights and legal partnership rights over to the land. The members of the legal alliance have the right to take out the crop of wild plants and animals from the land of the legal alliance. In addition they have the right to establish certain legal relations with the land and all contents contained in the land of legal partnership as objects.

In 1999 the Government through the Minister of Agrarian Affairs issued a Regulation of the Minister of Agrarian Number 5 1999 concerning Guidelines for the Settlement of Ulayat Rights of Customary Law Peoples, in Article 2 paragraph (2) provide an explanation of customary rights that are recognized for their existence if several elements were met:

1. There is a group of people who still feel bound by the customary law as a common citizen of a particular legal alliance, which recognizes and applies the provisions of the alliance in daily life;
2. There are certain Ulayat lands that become the living environment of the citizens of the legal alliance and where they take their daily necessities, and;
3. There is an order of customary law regarding the management, control and use of Ulayat land that is valid and obeyed by the citizens of the legal alliance.<sup>18</sup>

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<sup>15</sup> Moh. Mahfud MD, *Politik Hukum di Indonesia*, Jakarta: Rajawali Pers, 2012, pg. 31-32.

<sup>16</sup> Boedi Harsono, Dalam Rosalina. *Eksistensi Hak Ulayat Di Indonesia*. Jurnal Sasi Vol.16. No.3 Bulan Juli - September 2010, pg. 44.

<sup>17</sup>*Ibid*, pg. 44

<sup>18</sup>Maria Sumardjono, *Tanah Dalam Perspektif Hak Ekonomi, Sosial, dan Budaya*, Jakarta. Kompas, 2008, pg. 50

Muhammad Bakri stated that the recognition of Ulayat rights must also be followed by recognition of the rights of indigenous peoples inherent in Ulayat rights, as follows:

1. The right of customary law peoples to control all land in their jurisdiction (Ulayat right);
2. The rights of indigenous peoples to their customary land, namely:
  - a. Right to open land (forest);
  - b. The right to collect forest resources;
  - c. The right to collect the natural resources contained in the beneath the earth (mining material);
  - d. The right to take fish in rivers, lakes or beaches in the their jurisdiction;
  - e. The right to take wild animals in the forest that not belongs to others.<sup>19</sup>

In 2003, Republic of Indonesia enacted Presidential Decree No.34 2003 concerning National Policy in the Land Sector. This Decree also reaffirms the authority of the Regency/ City Government in the matter of land, also in the event of determination and dispute settlement of arable land were withdrawn to the National Land Agency (BPN) with Government Regulation No.10 2006 concerning Customary Forests and Dispute Settlement over areas that the state has declared as “forest area”.

Whereas currently there are many concepts and regulations related to Ulayat rights of indigenous peoples, but the mechanism or procedure for dispute settlement has not been clearly regulated, so that the problems will arise and never settled, furthermore what kind of mechanisms will be used whether toward court mechanism or via the customary law.

## **2. Ulayat Right in the Human Rights Perspectives**

Indigenous peoples referred in this article are people in a social organization structure that has a resident, leadership, wealth, and been living among the fellow members of the community.<sup>20</sup> It started with the enactment of Law No.39 1999 concerning Human Rights, the right to life, to preserve life and improve the standard of living. In this regards, improving

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<sup>19</sup>Muhammad Bakri, *Hak Menguasai Tanah Oleh Negara (Paradigma Baru Untuk Reforma Agraria)*, Malang: Universitas Brawijaya Press (UB PRESS), pg. 99.

<sup>20</sup> Zulherman Idris, *Hukum Adat Lembaga-Lembaganya, Keberadaan dan Perubahannya* (Suatu Pendekatan Pemahaman Hukum Adat Sebagai Sumber Hukum Indonesia Yang Tidak Tertulis). UIR Press, 2000, pg. 50

the standard of living will required land viability to fill out the sense of welfare in owning the land. This can be owned individually or collectively.

Human rights are an integral part of international law, so human rights law is known. The existence of minority groups and indigenous peoples related to article 1 of the International Covenant on Civil and Political Rights (ICCPR) which states: "that people have the right to determine their own destiny". The Recognition toward Customary Law Peoples by international world is translated as the term Indigenous Peoples (*Ips*).

In the Universal Declaration of Human Rights (UDHR) and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) this Declaration establishes the rights on culture, identity, language, employment, health, education and other things. The provisions of UNDRIP have been adopted by General Assembly Resolution 61/295 (UN General Assembly Resolution) on September 13, 2007. Indonesia is one of the countries that signed UNDRIP, so that the rights of Indigenous Peoples listed in this declaration bind Indonesia morally to recognize , respect and fulfill the rights of Indigenous Peoples in the territory of Indonesia.

The Declaration aims to maintain, strengthen and encourage the growth of custom, traditional cultural institutions. As in Indonesia, especially in Lebak District with the enactment of Regional Regulation No.32 2001 concerning Protection of Ulayat Rights of Baduy Peoples and Regional Regulation No.8 2015 concerning the Recognition, Protection and Empowerment of the Kesepuhan Customary Law Society is the implementation of the UNDRIP Declaration, although in fact the existence of the regional regulation No.8 2015 is due to the insistence of indigenous peoples and the Constitutional Court's Decision (MK) not initiated directly from the central government, the Regional Regulation recognizes the Unity of Kesepuhan Customary Law Society (MHAK) which consists of 522 spread around Lebak regency.

The UNDRIP Declaration prohibits discrimination against indigenous peoples and encourages their rights to remain clear and so that they achieve their vision of their own economic and social development. Ulayat right is a right since the time of the ancestors of local indigenous peoples and is an ancient right. Traditional rights which in this case are Ulayat rights of customary law peoples are not rights derived from which state granted. This is the same as the three fundamental and inherent rights in every human being, namely the right to life, the right to material and family rights.

In a number of articles on UNDRIP regulate the right of indigenous peoples to accept or reject various proposals or development plans that will be implemented in their customary territories. The principle governing the right to accept or reject this is known as free, prior, and informed consent (FPIC). The principles of FPIC reflect that a democratic country must respect and protect the rights of indigenous peoples, not discriminate, providing freedom to the people, including indigenous peoples, to participate in development, without pressure and manipulation.

In general the issue of Ulayat right which causes a dispute usually as follows:<sup>21</sup>

1. Disputes between Ulayat right holder which caused by unclear land borders;
2. Disputes due to fight over water resources;
3. When there is investor to use the Ulayat land, there will be dispute due to unclear borders;
4. Some Ulayat rights holders, without coordination with other members of the Ulayat alliance, took initiative to register the land to local National Land Agency (BPN). This raises a number of issues, namely the issue of the authority of who is allowed to take care of these Ulayat rights;
5. The use of customary heredity law which usually conflicted with national heredity law, hence dispute settlement will be hard to reach.

According to Maria Soemardjono, the dispute on Ulayat land or customary land whose settlement is through legal channels or mediation, in order to bind or adhere to the parties, needs to be based on a multi-dimensional approach (anthropology, sociology and so on, in addition to the juridical approach).

In other words, the formal juridical approach will never be effective. The law alone cannot be expected to overcome land issues that are so complex and that are sometimes not related to the application of existing laws and regulations. Support for various efforts is needed to guarantee the fulfillment of the economic rights of the community, so that at least similar issues can be minimized in the future.

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<sup>21</sup>Daniel S Nababan. *Perlindungan Hukum Terhadap Masyarakat Adat Menurut The United Nations*. JOM Fakultas Hukum Volume 2 Nomor 2 Oktober 2015, pg 7



The synchronization between positive law in the field of agrarian and Ulayat rights will occur if there requirements were met, namely:<sup>22</sup>

1. Objective understanding toward the term of state land, Ulayat land and rights on land in the context of customary law and positive law;
2. The approach that should be taken is persuasive-educative approach and not imposing unilateral will;
3. Cultural-religious approaches should be carried out through three elements of leadership, namely traditional leaders, religious leaders and formal leaders who truly understand customary and positive law (UUPA) and other implementing regulations.

### **C. Conclusion**

In indigenous communities the existence of Ulayat rights is one of the inherent basic rights to process and optimize land as the main source of income. The diversity of customary land in indigenous peoples is currently degraded due to the economic interests of the State and individuals or groups to utilize the land.

In Lebak, there are indigenous groups, namely Baduy indigenous people and the 522 Kasepuhan community unit group spread in the Lebak Regency region. Both groups have customary rights attached to it.

This paper focuses on the Baduy peoples who are currently asking for land to be used for agriculture and plantations, because Ulayat land is reduced so that the existing population is not enough to meet the needs of life. The decrease in land is caused by internal factors, namely in the form of population growth (population) and the external factors in the form of activities of people outside Baduy who participate in using Ulayat land. The settlement of the dispute has not effective enough due to no regulation regarding the mechanism for resolving the Ulayat rights, both in local regulations and other regulations.

The Regional Government immediately determines the effective mechanism for dispute settlement on Ulayat rights (land) between the Baduy indigenous people and the outside Baduy peoples whom also use Ulayat land.

Establishment of monitoring and evaluation body toward the people's plantations and private companies in the Baduy peoples, such as firm boundaries to separate Ulayat land and non-Ulayat land.

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<sup>22</sup>Maria S. W. Soemardjono, *Tanah Dalam Perspektif Hak Ekonomi Sosial dan Budaya*, *Op.cit*, pg. 189.

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**The Protection of the Right of Foreign Workers Based on the International Convention On the Protection of All Migrant Workers and Members of their Families 1990 and the Implementation in Indonesia**

Desy Churul Aini and Desia Rakhma Banjarani

**Abstract**

The rise of the problem of Foreign Workers or TKA is connected with the use of foreign workers and related to their irresponsibility in the country where they work, such as residence permit offense, and work permit. The other problems that arise from the non-fulfillment of the rights of foreign workers in both the sending and receiving countries are the lack of human rights protection, even in the instrument of the sending countries and receiving countries. Based on this background the focus of this paper is discusses the Protection of Foreign Workers based on the International Convention on the Protection of All Migrant Workers and Members of Their Families 1990 and the implementation in Indonesia. The method used is normative legal research methods and the data obtained are secondary data derived from literature sources such as literature, articles, and internet sites.

The Protection of the Right of Foreign Workers based on International Convention on the Protection of All Migrant Workers and Members of Their Families 1990 are including of the protection of basic freedoms, the guarantees of appropriate legal process, the consular protection, the protection of equality with local citizens, the protection from the deprivation of identity documents, the right of remittances, the right to access an information, the right of cultural local identity and the other rights for family members of foreign workers. The implementation of the International Convention on the Protection of All Migrant Workers and Members of Their Families 1990 (Migrant Workers Convention) in Indonesia is by ratified the convention into the Law Number 6 of 2012. After ratified the Migrant Workers Convention, then the government re-implements that convention by publishing several policies. The policy is Permenakertrans No. 16 of 2012 about the Procedures of Independent Return of Indonesian Workers from the State of Placement to the Origin State (The Independent Return of TKI) And PP No. 3 of 2013 about the Protection of Indonesian Workers in overseas. The Indonesian government also involves the district government in the implementation of the Migrant Workers Convention, by publishing a local regulation in the related of the regulation in the Migrant Workers Convention and the form of Socialization and conducting the Local Input Activities on Implementation of the UN Migrant Workers Convention.

**Keywords:** Right, Protection, and Foreign Worker

## A. Introduction

As one of the countries with the highest population in the world,<sup>1</sup> it can be ascertained that the existing human resources in Indonesia are more than enough to meet the workforce needs in Indonesia. Nevertheless, the fact is that Indonesia still receives human resources from other countries or commonly referred to as TKA (Foreign Workers)<sup>2</sup> to work in Indonesia. Based on data from the permission to employ foreign workers (IMTA) from the Ministry of Manpower and Transmigration (Kemenakertrans), the number of foreign workers or expatriates working in Indonesia in 2013 totaled 48,002 people. This number decreased compared to 2011 77,144 people, and in 2012 there were 57,826 people. Also, the Ministry of Manpower also noted that in 2014 there were 68,762 foreign workers (TKA) working in Indonesia. While the number of IMTA data in force in 2015 was 77,149 people, while in 2016 there were 80,375 and in 2017 there were 85,974 people. From 2016 to 2017 is increased by 6.93 percent. So, from 2015 to the end of 2017 the increase in the number of foreign workers entering Indonesia reached 11.40 percent. Based on data from the Central Statistics Agency (BPS), foreign workers in Indonesia are dominated by people from China, Japan, South Korea, India, Malaysia, the United States, Thailand, Australia, the Philippines, the United Kingdom, Singapore and other countries.<sup>3</sup>

However, when many foreign workers are working in Indonesia, in other sides, this is not comparable to a large number of unemployed people in Indonesia, as explained in the following table:

Table 1: Number of Indonesian Workers working and unemployed in the last five years

| In Million   | 2013  | 2014  | 2015  | 2016  | 2017  | 2018  |
|--------------|-------|-------|-------|-------|-------|-------|
| <i>Labor</i> | 120.2 | 121.9 | 122.4 | 127.8 | 128.1 | 133.9 |
| - Work       | 112.8 | 114.6 | 114.8 | 120.8 | 121.0 | 127.1 |
| - Unemployed | 7.4   | 7.2   | 7.6   | 7.0   | 7.0   | 6.9   |

Source: Central Statistics Agency (BPS) data from February 2018

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<sup>1</sup> Indonesia is ranked 4th with a population of 253.60 million in 2014, <https://finance.detik.com/berita-ekonomi-bisnis/d-2517461/country-with-residents-the-most-in-world-ri-in-4-large>, accessed on May 28, 2018, at 11:23 GMT

<sup>2</sup> Foreign Workers are every person who is not an Indonesian citizen who is able to do work, both inside and outside the employment relationship, in order to produce services or goods to meet the needs of the community. Abdul Khakim, *Dasar-Dasar Hukum Ketenagakerjaan Indonesia*, Bandung: Citra Aditya Bakti, 2009, p.27

<sup>3</sup> <https://ekonomi.kompas.com/read/2013/08/31/1410519/Jumlah.Tenaga.Asing.di.Indonesia.Menurun.pada.Tahun.2013>. accessed on August 8, 2018, at 11:00 GMT

Table 2: Unemployment in Indonesia (Relative)

|  | 2013 | 2014 | 2015 | 2016 | 2017 | 2018 |
|--|------|------|------|------|------|------|
| <b>Unemployment<br/>(% of the total workforce)</b> | 6.2  | 5.9  | 6.2  | 5.6  | 5.5  | 5.1  |

Source: Central Statistics Agency (BPS) data from February 2018

The Central Statistics Agency (BPS) revealed that in 2017, there had been an increase in the number of unemployed people in Indonesia by 10,000 people to 7.04 million people in August 2017 from August 2016 at 7.03 million people. From the table, it can be seen, there are still many citizens in Indonesia who do not have jobs, even the number of unemployment is decline. This can be attributed to the existence of foreign workers who reduce employment opportunities for Indonesian citizens to work in their own countries.

The need for foreign workers in Indonesia is still unavoidable; this is related to the large number of researchers who suggest that the entry of foreign workers or foreign workers can increase economic growth, employment opportunities, and wage rates.<sup>4</sup>This is as with the basic philosophy of using foreign workers as a series of efforts to increase investment, transfer of technology and transfer of skills to migrant workers, as well as the expansion of employment opportunities.<sup>5</sup> However, the presence of foreign workers often raises several problems in each country where they work, including Indonesia.

The problems of foreign workers arising in connection with the use of foreign workers related to the obligations of foreign workers not carried out in the country where they work are violations of residence permits and work permits. For example in Indonesia, the passport of foreign workers is written that the permit granted by the Indonesian government by immigration is to work as a foreign worker in Indonesia with a certain position and time even as a tourist. Not infrequently, user companies often hide these illegal foreign workers.<sup>6</sup>Other problems arising from the non-fulfillment of the rights of foreign workers in both sending and receiving countries are the lack of protection of human rights, both the sending instruments and the recipient countries. The regulation of the rights and

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<sup>4</sup>Nasri Bachtiar dan Rahmi Fahmi, "Pengaruh Tenaga Kerja Asing Terhadap Pertumbuhan Ekonomi dan Kesempatan Kerja: Suatu Tinjauan Literatur", *Jurnal Kependudukan Indonesia*, Vol.6, No.1, 2011, p. 63

<sup>5</sup>Ahmadi Miru, *Hukum Kontrak dan Perancangan Kontrak*, Jakarta: Rajagrafindo Persada, 2008, p. 35.

<sup>6</sup>Hesty Hastuti, "Permasalahan Hukum Tenaga Kerja Asing di Indonesia", *Final Report of the Research Team*, National Law Development Agency, Ministry of Law and Human Rights of the Republic of Indonesia, 2005, p. 11

obligations of foreign workers has been regulated in both international law and national law. But in practice, it is often the sending and receiving countries ignore the rights of migrant workers both from the standards of the fulfillment of skills and human rights.<sup>7</sup>

In Indonesia, the problems with foreign workers are based on the results of examining the use of foreign workers carried out by the Ministry of Manpower at the central and regional periods from January 2016 to December 2016, out of 69 companies examined, 1,324 people (without IMTA = 794 people, and Abuse of Position = 530 people).<sup>8</sup>To solve these problems, the Indonesian government has made strict regulations governing foreign workers. The regulation is contained in the Manpower Law that applies a selective policy on the use of foreign workers, namely those workers who have the capability and managerial qualities that are fixed to optimize the utilization of Indonesian labor by transferring the use of foreign labor technology.<sup>9</sup>In general, the legal basis governing Foreign Workers in Indonesia is included in Law Number 3 of 1958 concerning Placement of Foreign Workers, Law Number 14 of 1969 concerning Basic Provisions Regarding Labor, Law Number 25 of 1997 concerning Manpower, the most recent Manpower Law is Law Number 13 of 2003 concerning Manpower, Manpower and Transmigration Regulation of the Republic of Indonesia Number 12 of 2013 concerning Procedures for the Use of Foreign Workers and the most recent president has stipulated Presidential Regulation or Perpres No. 20 of 2018 concerning the Use of Foreign Workers.

Whereas in international law the regulation of the rights and obligations of foreign workers in other countries is regulated in several sources of international law,<sup>10</sup> such as international agreements in the form of conventions.<sup>11</sup>The convention that regulates the protection of foreign workers includes the International Convention on the Protection of All Migrants Workers and Members of Their Families 1990, International Covenant on

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<sup>7</sup>Naek Siregar dan Ahmad Syofyan, “Perlindungan Hak Pekerja Migran dalam Hukum Internasional dan Implementasinya di Indonesia”, *Journal Monograph, Faculty of Law, University of Lampung*, 2014, p. 148

<sup>8</sup>2016 Ministry of Manpower Data About Foreign Workers

<sup>9</sup>Hesty Hastuti, *Op.Cit.*, p. 74

<sup>10</sup>The source of international law is the material and process by which rules and rules governing the international community are developed. Conventional international law is passed through international agreements and can be in any form agreed upon by the countries involved in the agreement. agreements can be made on any basis except to the extent that the agreement is contrary to international law which includes the basic standards of any international action or obligations of member states under the UN Charter. An international agreement creates a law for parties involved in the agreement. Rhona K.M. Smith, *Hukum Hak Asasi Manusia*, Yogyakarta: PUSHAM UII, 2008, p. 58-59.

<sup>11</sup>Convention is one of the instruments usually used in multilateral agreements, both limited and open, which regulate matters that are considered very important, and usually these things are not simple and are arranged in detail. F.A. Whisnu Situni, *Identifikasi dan Reformulasi Sumber-Sumber Hukum Internasional*, Bandung: Mandar Maju, 1989, p.49

Economic Affairs, Social and Cultural Rights 1966, International Covenant on Civil and Political Rights 1976, and ILO Conventions. Some of these conventions have been ratified by various countries in the world, one of which is Indonesia. Indonesia itself has ratified the 1990 International Convention on the Protection of All Migrant Workers and Members of Their Families or the International Convention on the Protection of the Rights of Migrant Workers and Their Family Members in Law Number 6 of 2012.

The establishment of this convention is based on the enforcement of human rights contained in the Universal Declaration of Human Rights or the Declaration of Human Rights.<sup>12</sup>In particular, the 1990 Convention on the Protection of Migrant Workers regulated the various rights that must be obtained by every foreign worker in another country. These rights are intended for every foreign worker in various countries to be protected internationally. Even the protection of migrant worker rights in this convention does not only cover the rights of the workers concerned, but includes the protection of the rights of the families of the workers.

Although Indonesia already has various regulations both from national law and international law, in fact, there are still many problems involving foreign workers in Indonesia. As happened to PT. Hua Xing in Bogor, the company, was recorded by the Bekasi Immigration Office. 18 foreign workers from China violated permits, such as permission to work not according to their position. The other cases were found in Bandung. Namely, 34 illegal foreign workers were working in industrial areas in the East Priangan region. Head of the Immigration Information Section of Bandung Ida Ismalasari said they were from Korea, Japan, China, the United States, the Philippines, India, and Australia.<sup>13</sup>Human rights violations also occur in Indonesian workers who work in other countries; Migrant Care notes that 1.5 million Indonesian workers (TKI) have experienced human rights violations in various countries. Human rights violations experienced by Indonesian labor migrants are quite varied, such as not being paid by their employers, acts of violence, abuse, rape, and human trafficking.<sup>14</sup>

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<sup>12</sup> Preamble *International Convention on the Protection of All Migrant Workers and Members of Their Families 1990*

<sup>13</sup><http://mediaindonesia.com/read/detail/84976-pelanggaran-tka-terjadi-di-bogor>, accessed on June 7, 2018, at 11:19 GMT

<sup>14</sup><http://news.metrotvnews.com/read/2015/11/24/193901/1-5-juta-tki-alami-pelanggaran-ham-di-luar-negeri>, accessed on June 7, 2018, at 11:20 GMT

Based on that background, it is necessary to have an analysis of "Protection of Foreign Workers based on the International Convention on the Protection of the All Migrant Workers and Members of Their Families in 1990 and their implementation in Indonesia". The issue that will be discussed in this study is how to protect the rights and obligations of foreign workers in Indonesia based on the International Convention on the Protection of All Migrant Workers and Members of Their Families 1990? The research method used is normative legal research methods and the data obtained are secondary data derived from library sources such as literature, articles, and internet sites.

## **B. Discussion**

### **1. The Protection of Foreign Workers Based on the International Convention on the Protection of All Migrant Workers and Members of Their Families 1990**

Foreign Workers (TKA) have been defined in Law No. 13 of 2003 concerning Manpower, general provisions concerning TKA regulated in Article 1 paragraph (13) state that what is meant by TKA is a foreign national holding a visa with the intention of working in the territory of Indonesia. According to Budiono, there are several objectives for the placement of foreign workers in Indonesia, namely:<sup>15</sup>

- a. To fulfill the needs of the skilled and professional workforce in certain fields that cannot be filled by TKI.
- b. To accelerate the national development process by accelerating the process of technology transfer or transfer of knowledge, especially in the industrial sector.
- c. To provide an expansion of employment opportunities for Indonesian labor migrants.
- d. To Increase foreign investment as support for development capital in Indonesia.

In general, foreign workers in Indonesia are categorized into 2 (two) categories, namely:<sup>16</sup>

- a. TKA legal (has official documents); So that in order to enter Indonesia, every foreigner including TKA is required to have a valid Travel Document (Passport and Travel Letter like Passport) and have a valid Visa, unless otherwise stipulated under this law and international agreement (see the provisions of Article 8 Paragraph (1) and (2) the Migration Act).

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<sup>15</sup>Budiono, Abdul Rachmat, *Hukum Perburuhan Di Indonesia*, Jakarta: Rajagrafindo Persada, 1995, p. 115.

<sup>16</sup> Ahmad Jazuli, "Eksistensi Tenaga Kerja Asing di Indonesia dalam Perspektif Hukum Keimigrasian", *JIKH* Vol. 12 No.1, 2018, p. 94



- b. Illegal TKA (without official documents); Employers can employ foreign workers to work in Indonesia. However, if the use of foreign workers does not follow the rules outlined in Law Number 13 of 2003 concerning Manpower, it means that they have employed illegal foreign workers. The use of illegal foreign workers is illegal and consequences in the form of criminal sanctions.

The regulation on foreign workers is also regulated in several international conventions, one of which is the International Convention on the Protection of the Rights of All Migrants Workers and Members of Their Families 1990. The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families was formed on December 18, 1990, through the United Nations General Assembly by issuing Resolution Number A / RES / 45/158 concerning the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. The resolution contains all the rights of migrant workers and members of their families and states that they will take steps to ensure the implementation of this Convention. On September 22, 2004, in New York, the Government of Indonesia signed the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families without reservation.<sup>17</sup>

The definition of foreign workers in this Convention refers to the definition of migrant workers mentioned in Article 2, namely migrant workers referring to someone who is going to, middle, or has carried out activities that are paid for in a country where he is not a citizen. This definition refers to foreign workers working in other countries including Indonesia.

The signing demonstrates the seriousness of the State of Indonesia to protect, respect, promote and fulfill the rights of all foreign workers or migrant workers and members of their families, which in turn is expected to fulfill the welfare of migrant workers and their family members. The International Convention on the Protection of the Human Rights of All Migrant Workers and Members of Their Families is a comprehensive international convention, which focuses on protecting the rights of migrant workers and ensuring that these rights are protected and respected, valid on 1 July 2003 and Until January 2010 the country ratified 42 countries. The implementation of this convention has strengthened and complemented a series of provisions concerning human rights treaties issued by the United

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<sup>17</sup>[https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&lang=en&mtdsg\\_no=IV-13&src=IND](https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&lang=en&mtdsg_no=IV-13&src=IND), accessed on June 26, 2018, at 1:39 GMT

Nations (UN).<sup>18</sup>This Convention sets minimum standards that must be applied by States parties to migrant workers and their family members, regardless of their migration status, which consists of the following sections:<sup>19</sup>

- a. Part I concerning the scope and definition (Article 1-Article 6);
- b. Part II concerning non-discrimination about rights (Article 7);
- c. Part III concerning human rights for all migrant workers and their family members (Article 8-Article 5);
- d. Part IV concerning other rights of migrant workers and their family members who are documented or in normal situations (Article 36- Article 56);
- e. Part V concerning provisions that apply to certain groups of migrant workers and their family members (Article 57 and Article 63)
- f. Part VI on promoting good, equal, humane and legal conditions about the international migration of workers and their family members (Article 64-article 71);
- g. Part VII concerning the application of the convention (Article 72 - Article 78)
- h. Part VIII concerning general provisions (Article 79 Article 84);
- i. Part IX concerning the closing provisions (Article 85- Article 93).

The Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICRMW) defines the rights of migrant workers under two headlines: the human rights of all migrant workers and family members (Part III), and other rights of migrant workers and family members who are documented or legal (Part IV). Human rights apply to all migrant workers and their family members regardless of their legal status, while other rights apply only to migrant workers and documented family members. The Convention includes some rights that require special protection and provide additional guarantees given the particular vulnerability of migrant workers and their family members,<sup>20</sup> these rights can be outlined as follows:

a. The Rights of Basic Freedom

The Convention maintains an established right for all, including migrant workers, to leave a country and enter and live in their home country (Article 8), regardless of their

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<sup>18</sup> Any Suryani, “Pengaturan Perlindungan Hukum Bagi Tenaga Kerja Wanita Beserta Keluarganya Berdasarkan UU No. 6 Tahun 2012 Tentang Pengesahan Konvensi Internasional Perlindungan Buruh Migran Beserta Keluarganya”, *Jurnal Hukum & Pembangunan*, Vol. 46, No. 2, 2016, p. 268

<sup>19</sup>International Convention on the Protection of the Human Rights of All Migrant Workers and Member of Their Families 1990

<sup>20</sup> Any Suryani, *Op.Cit.*, hlm. 270

migration status. In human living and working conditions and physical (and sexual) abuse that migrant workers sometimes experience are addressed by reaffirming their rights to life (Article 9) and prohibiting cruel, inhuman or degrading treatment or punishment (Article 10), slavery or forced or compulsory labor (Article 11), as well as with the obligation of the state to protect migrant workers and their family members from violence, physical injury, threats and intimidation (Article 16). All migrant workers and members of their families are also entitled to basic freedoms such as freedom of thought, opinion and religion (Article 12), and the right to own and express opinions (Article 13). They must not be interfered with by their privacy, family, household, correspondence or other communication arbitrarily or illegally or obtain unauthorized attacks on their honor and good name (Article 14). Their property must not be taken arbitrarily (Article 15). Each child of a migrant worker must have rights on behalf of birth registration and nationality (Article 29).

b. Appropriate Legal Processes in Migration

The Convention explains in detail the need to guarantee the proper legal process for all migrant workers and their family members (Articles 16-20). Investigation, arrest, and detention must be carried out by existing procedures. If arrested, migrant workers must be informed by using the language they understand about the reason for the detention. The right to equality with local citizens of the State in front of the court and the hearing must be respected. If accused of a criminal offense, migrants must be given the necessary legal counsel and free translator assistance if needed. When sentenced, consideration of humanity regarding the status of the migrant person must be considered. Arbitrary expulsion or collective eviction of migrant workers is prohibited (Article 22).

c. Consular protection

The consular or diplomatic representative of the country of origin of the migrant must be notified immediately of the migrant detention if he requests it, and the migrant has the right to communicate with this authority (Article 16, para. 7). All migrants must be in possession of the protection and assistance of the consular authority or the diplomatic authority of the state including in the case of expulsion (Article 23).

d. Equality with Local People

All migrant workers must be treated the same as residents of the country of work regarding remuneration and terms of employment overtime, working hours, weekly holidays, days off with paid stays, safety, health, termination of employment contracts,

minimum age, restrictions on domestic work, and others (Article 25). They have the right to join a union or worker association and participate in meetings and activities (Article 26). Equality with local people also extends to emergency medical care (Article 28) and social security (Article 27), although it is not unimportant that the Convention links the right to social security with the fulfillment of requirements that may exist in domestic legislation and bilateral and multilateral agreements applicable. Children of a migrant worker have the right to access education by equal treatment with local citizens of the country concerned (Article 30).

e. Confiscation of Identity Documents

The Convention prohibits the practice of seizing passports of migrant workers by employers and clearly states that only public officials who are legalized by law are permitted to seize and destroy identity documents, entry permits, residence permits or work permits (Article 21).

f. Income Transferred

Until the period of stay in the country of employment ends, all migrant workers and their family members have the right to send their income and savings and their personal property (Article 32).

g. Right of Information

Migrant workers and members of their families have the right to obtain information from their countries of origin, transit countries and countries of employment regarding the rights arising from this Convention and the conditions of their acceptance, and their rights and obligations in these countries. Such information must be provided to migrant workers free of charge and using language understood by them (Article 33).

h. Appreciation of Cultural Identity

States parties must guarantee the respect for the cultural identity of all migrant workers and members of their families and are not permitted to prevent them from maintaining cultural links with their home countries (Article 31). States parties must also respect the freedom of religious and moral education provided by parents to their children by their own beliefs (Article 12 par. 4).

i. Responsibility to Obey Local Law

All migrant workers and members of their families are obliged to comply with the laws and regulations of the transit country or the country of employment and are obliged to respect the cultural identity of the population (Article 34).

- j. Other rights of migrant workers and family members who are documented
- 1) Migrant workers and documented family members have the right to freedom of movement in the territory of the country of employment and also the freedom to choose a place to live (Article 39).
  - 2) Migrant workers and documented family members must enjoy equality with local citizens of the country of employment in the following fields: access to education, employment instructions and placement services; job training and retraining; access to housing including social housing schemes and protection against exploitation with regard to rent; access to social and health services; access to cooperatives and independent companies; access to and participation in cultural life (Article 43). Family members of documented migrant workers must also enjoy equality with local nationals of the workplace regarding access to educational institutions and services, institutions and job guidance and training services, social and health services and participation in cultural life (Article 45). The country of employment must make policies aimed at facilitating the integration of children in the local school system, especially regarding teaching them local languages (Article 45 (2)). The country of employment can also provide special education schemes in the mother tongue of the children of migrant workers (Article 45 (4)), if necessary cooperate with the country of origin. Migrant workers and documented family members must not be taxed or costs higher or heavier than those charged to local residents in the same circumstances and must be entitled to tax deductions or exemptions that apply to local residents in same (Article 48). Migrant workers and documented family members must receive the same treatment as local citizens of the country of employment in terms of protection against dismissals, non-employment benefits, access to public employment schemes intended to eliminate unemployment and access to alternative employment if they lose their jobs or are decided from activities other paid (Article 54).
  - 3) Migrant workers and documented family members have the right to get complete information, at the latest on their entry into the workplace country, regarding all conditions that apply to their acceptance and especially the conditions related to their stay and paid activities that they may live (Article 37). The country of employment must

strive to authorize documented migrant workers to temporarily be absent without any impact on the validity of their stay and work (Article 38). Migrant workers and documented family members also have the right to form associations or trade unions in the country of employment (Article 40). They have the right to participate in the public affairs of their home country and have the right to vote and be elected in the country's general elections by the law (Article 41). Countries should consider making procedures or institutions to consider the special needs, aspirations, and obligations of migrant workers and their family members. Migrant workers must have their chosen representatives freely in this institution (Article 42). Migrants have the right to protect their family togetherness, and the state must take steps "deemed necessary" to facilitate family unification/reunification for documented migrant workers and their family members (Article 44). They get an exemption from import and export costs concerning personal and household goods and their work equipment (Article 46). Documented migrant workers also have the right to send money, and the state must take the necessary steps to facilitate the delivery (Article 47). If the employment contract is violated by the employer, migrant workers have the right to file a case with the authorities in the country of employment (Article 54 (d)).

## **2. The Implementation of the International Convention on the Protection of All Migrant Workers and Members of Their Families Against Protection of Foreign Workers 1990 in Indonesia**

On the establishment of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families 1990 on September 22, 2004, in New York, the Indonesian Government signed the convention without reservation. The signing shows the sincerity of the State of Indonesia to protect, respect, promote and fulfill the rights of all migrant workers and members of their families, which in turn is expected to fulfill the welfare of migrant workers and their family members. As one of the countries that have signed the International Convention on the Protection of the All Migrant Workers and Members of Their Families, Indonesia commits to ratify this Convention. Ratification of this Convention is expected to encourage the creation of universal ratification and the application of international standard principles and norms for the protection of the rights of all migrant workers and their family members globally.<sup>21</sup> Accordingly, on May 2, 2012, Indonesia

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<sup>21</sup> Any Suryani, *Op. Cit.*, p. 268

ratified the International Convention on the Protection of the Migrant Workers and Members of Their Families 1990 in Law Number 6 of 2012.<sup>22</sup>

Ratification of the Migrant Workers Convention is essentially an entry point for migrant worker legislation. This legislation can, in turn, create good relations at the bilateral, regional and even relations between all countries in various regions. In the Convention on Migrant Workers there is an obligation for a country to carry out a reporting obligation to the implementation of the contents of the convention, even ratification of an international human rights instrument will improve International Accountability from a country through a more objective and in-place manner, namely the discussion of the state party's report on the Committee Monitor (treaty monitoring bodies). If a country has not ratified the Migrant Workers Convention, it can be interpreted that the country has not been able to carry out protection to its citizens as a form of state responsibility.<sup>23</sup>

Before Indonesia ratified the Convention on Migrant Workers, Indonesia had its regulations governing Foreign Workers and is valid until now. TKA is obliged and complies with Law No. 13 of 2003 concerning Manpower which regulates the provisions concerning foreign workers working in the territory of Indonesia, these provisions are: Employers who employ foreign workers must have written permission from the minister or appointed official; Foreign Workers with certain positions; A certain period; TKA User Plans; Competency standards; Prohibition of occupying certain positions; Liability of compensation funds; and Obligation to repatriate TKA.<sup>24</sup>

Also, as for the Government of the Republic of Indonesia policy in protecting migrant workers as mandated by Law Number 39 of 2004 concerning Placement and Protection of Indonesian Migrant Workers Abroad as a strategic step by forming a task force (Satgas) that handles legal issues relating to workers migrants abroad. Then what was just passed was Perpres No. 20 of 2018 concerning the Use of Foreign Workers. Based on considerations to support the national economy and the expansion of employment opportunities through increased investment, the government considers it necessary to re-regulate the licensing of the use of foreign workers. Based on these considerations, on March 26, 2018, President

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<sup>22</sup>Direktorat Hak Asasi Manusia dan Kemanusiaan Kementerian Luar Negeri 2016, *Konvensi Internasional Tentang Perlindungan Hak-Hak Seluruh Pekerja Migran dan Anggota Keluarganya*, Jakarta: Kementerian Luar Negeri, 2016, p. i

<sup>23</sup>Atik Krustiyati, "Optimalisasi Perlindungan dan Bantuan Hukum Pekerja Migran Melalui Promosi Konvensi Pekerja Migran Tahun 2000", *Jurnal Dinamika Hukum*, Vol. 13, No.1, 2013, p. 140

<sup>24</sup>Suhandi, "Pengaturan Ketenagakerjaan Terhadap Tenaga Kerja Asing Dalam Pelaksanaan Masyarakat Ekonomi ASEAN di Indonesia", *Perspektif*, Vol. XXI, No. 2, 2016, p. 139

Joko Widodo has signed a Presidential Regulation (Perpres) Number 20 of 2018 concerning the Use of Foreign Workers.<sup>25</sup>

The provisions in Presidential Regulation Number 20 of 2018 concerning the Use of Foreign Workers have differences with the previous regulations, namely in Law No. 13 of 2003 concerning Manpower. To monitor the use of foreign workers in Indonesia, several mechanisms are needed, including the mechanism of requirements, monitoring mechanisms, and legal mechanisms. For the implementation of these mechanisms, it will involve several parties including the Ministry of the Republic of Indonesia. Based on Law No. 13 of 2003, supervision of foreign workers through the Ministry of Manpower and the Ministry of Energy and Mineral Resources, but in Presidential Regulation No. 20 of 2018, the mechanism of supervision of foreign workers is only through the Ministry of Manpower without involving the Ministry of Energy and Mineral Resources. Thus, it can be seen that there are different procedures in the regulation of foreign workers.

With the ratification of the International Convention on Protection of All Migrant Workers and Members of Their Families in the Law of the Republic of Indonesia (UURI) Number 6 of 2012, all regulations relating to the rights of foreign workers must be in accordance with the provisions of the convention, including provisions in Law No. 13 of 2003 concerning Manpower and the provisions in Perpres No. 20 of 2018 concerning the Use of Foreign Workers. Thus the provisions of these regulations can be made as follows:

Table 3: Comparison of Migrant Workers Conventions and Law No. 13 of 2003

| No. | The Indicator of Right in Migrant Workers Convention | Law No. 13 of 2003   | Analysis          |
|-----|--|--|-------------------|
| 1.  | The Rights of Basic Freedom                          | In Law No.13 of 2003, it is not clear about the rights that must be fulfilled by foreign workers, because in Chapter VIII the use of foreign workers only regulates the procedures for employing foreign workers technically. However, because foreign workers are classified as laborers regulated in Law No. 13 of 2003, the TKA | Already Fulfilled |

<sup>25</sup><http://setkab.go.id/inilah-perpres-nomor-20-tahun-2018-tentang-penggunaan-tenaga-kerja-asing/>, accessed on 8 August 2018, 11: 31 GMT



|    |  |   |                   |
|----|--|---|-------------------|
|    |  | also has the protection and welfare rights set out in Chapter X   |                   |
| 2. | Appropriate Legal Processes in Migration | Article 1 Point 13 states that foreign workers are foreign nationals holding visas with the intention of working in the territory of Indonesia. Then in Article 42, it is stipulated that every employer who employs foreign workers must have written permission from the Minister or appointed official. Thus, there are legal procedures related to migrant worker documents, even though the regulation does not have a broader description | Already Fulfilled |
| 3. | Consular Protection                      | Not mentioned in Law No. 13 of 2003   | Not Fulfilled     |
| 4. | Equality with Local People               | Not mentioned in Law No. 13 of 2003   | Not Fulfilled     |
| 5. | Confiscation of Identity Documents       | Not mentioned in Law No. 13 of 2003   | Not Fulfilled     |
| 6. | Income Transferred                       | Not mentioned in Law No. 13 of 2003   | Not Fulfilled     |
| 7. | Right of Information                     | Not mentioned in Law No. 13 of 2003   | Not Fulfilled     |
| 8. | Appreciation of Cultural Identity        | Not mentioned in Law No. 13 of 2003   | Not Fulfilled     |
| 9. | Responsibility to Obey Local Law         | Not mentioned in Law No. 13 of 2003   | Not Fulfilled     |

Table 4: Comparison of the Migrant Workers Convention and Perpres(Presidential Regulation)No. 20 of 2018

| No. | The Indicator of Right in Migrant Workers Convention | Perpres No. 20 of 2018   | Analysis          |
|-----|--|--|-------------------|
| 1.  | The Rights of Basic Freedom                          | Overall,Perpres No. 20 of 2018 regulates procedures for the use of foreign workers for employers, so that only a few articles regulate the rights that must be obtained by foreign workers. However, several | Already Fulfilled |

|    |  |  |                   |
|----|--|--|-------------------|
|    |  | articles regulate the right of foreign workers to obtain compensation, insurance, education, and training, namely in Article 24, Article 25 and Article 26.  |                   |
| 2. | Appropriate Legal Processes in Migration | In some articles in the presidential regulation, there are several roles of immigration officials in the procedures for using foreign workers. One of them is in Article 14 about the obligation of employers to submit data on prospective TKA to the Directorate General of Immigration. As well as other arrangements regarding residence permits are regulated in Article 19, Article 20, and Article 21 | Already Fulfilled |
| 3. | Consular Protection                      | Not mentioned in Perpres No. 20 of 2018  | Not Fulfilled     |
| 4. | Equality with Local People               | Not mentioned in Perpres No. 20 of 2018  | Not Fulfilled     |
| 5. | Confiscation of Identity Documents       | Not mentioned in Perpres No. 20 of 2018  | Not Fulfilled     |
| 6. | Income Transferred                       | Not mentioned in Perpres No. 20 of 2018  | Not Fulfilled     |
| 7. | Right of Information                     | Not mentioned in Perpres No. 20 of 2018  | Not Fulfilled     |
| 8. | Appreciation of Cultural Identity        | Not mentioned in Perpres No. 20 of 2018  | Not Fulfilled     |
| 9. | Responsibility to Obey Local Law         | Not mentioned in Perpres No. 20 of 2018  | Not Fulfilled     |

Based on the two tables above, it can be seen that the regulation of the rights of foreign workers has not been formulated in the detail of Indonesian regulations. Therefore, Indonesia ratified the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families in the Law of the Republic of Indonesia (UURI) Number 6 of 2012, to meet the regulatory needs in Indonesia regarding the rights of foreign workers.

After the ratification of the Migrant Workers Convention, the government has implemented that convention by issuing several policies. The policy is in the form of the establishment of Permenakertrans No. 16 of 2012 concerning the Procedure for Returning

Indonesian Workers from Placement Countries Independently to the Areas of Origin (Return of Independent Indonesian Migrant Workers). PP No. 3 of 2013 concerning Protection of Indonesian Migrant Workers Abroad (Protection of Indonesian Migrant Workers).<sup>26</sup> In addition to implementation at the national level, the Indonesian government also involves the district government in the framework of implementing the Migrant Workers Convention. In this case, one of the districts involved the Wonosobo District Government. The Wonosobo Government implemented the Migrant Workers Convention by carrying out good practices of Regional Government initiatives by collaborating with Civil Society on the protection of Indonesian Migrant Workers, namely through the Wonosobo District Regulation No.8/2016 concerning Placement and Protection of Indonesian Migrant Workers (Migrant Workers) from Wonosobo.<sup>27</sup>

In addition to implementation in Wonosobo District, there are several forms of implementation of other Migrant Workers Conventions in several Regencies in Indonesia. In this case, the implementation was in the form of a Regional Input and Socialization Activity on the Implementation of the UN Migrant Workers Convention which was held in cooperation with the Ministry of Foreign Affairs c.q Directorate of Human Rights and Humanity with SBMI and held in NTB District. This activity is one of the implementation of the 2017 National Human Rights Action and aims to complete the initial report of Indonesia on the Implementation of the International Convention on the Protection of the Rights of Migrant Workers and Members of Their Families, particularly related to the development of protection of migrant workers in the field including challenges and efforts to overcome them. The meeting was attended by 75 participants from representatives of central and regional agencies, Civil Society Organizations, academics, and the community which included representatives of former Indonesian Migrant Workers (Directorate of Human Rights and Humanity).

NTB was chosen to be one of the locations for organizing socialization activities considering NTB was among the top 10 sending regions for Indonesian Migrant Workers. In this case, the Provincial Government and Regency/City Government have carried out several good practices related to the protection and empowerment of Migrant Workers, among others: participation of 4 Districts/Cities in the Village of Productive Migrant

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<sup>26</sup><http://www.hukumonline.com/berita/baca/lt510a87e64c6b2/implementasi-konvensi-p-workers-migran-masih-minim>, accessed on June 23, 2018, at 20:40 GMT

<sup>27</sup><http://www.bnp2tki.go.id/read/12663/Komite-Work-Migran-PBB-Puas-With-L-report-Indonesia>, accessed on 23 June 2018, at 20:50 GMT

Workers, Issuance of Provincial Regulation No. 1/2016 concerning Protection of Indonesian Migrant Workers, Formation The first one-stop integrated service (LTSA) in Indonesia in 2016; and cooperation with several partner countries/donors in the economic empowerment of Full Migrant Workers.<sup>28</sup>

In connection with the assessment of the implementation of the Migrant Workers Convention in Indonesia, some civil society organizations considered the government was not yet consistent in carrying out the Migrant Workers Convention. This is based on the content of Law No. 39 of 2004 concerning Placement and Protection of Overseas Workers (PPTKLN), the regulation is considered to consider Indonesian migrant workers with an old paradigm still.<sup>29</sup>

But on the other side, Indonesia received praise during the dialogue with the UN Migrant Workers Committee regarding the initial Indonesian report on the implementation of the Migrant Workers Convention which took place in Geneva on 5-6 September 2017. In the dialogue, the committee was satisfied with the Indonesian report and appreciated the various efforts and Indonesia's commitment to protecting migrant workers.<sup>30</sup>

### **C. Conclusion**

The protection of the rights of foreign workers has been detailed and wide in the International Convention on the Protection of All Migrant Workers and Members of Their Families 1990, which consists of the protection of basic freedoms, the guarantees of appropriate legal processes, the consular protection, protection of equality with local citizens, the protection of the deprivation of identity documents, the right of remittances, the right to access information, the right of cultural local identity and the other rights for family members of foreign workers. Although based on the table of comparison of the Migrant Workers Convention and Indonesian Manpower Law, these rights have not been contained in the Indonesian Manpower Law, but the Indonesian government has made many efforts to implement the Migrant Workers Convention.

The implementation has been carried out with social efforts and legal efforts, in social efforts the government has carried out with socialization activities related to the

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<sup>28</sup><https://www.kemlu.go.id/id/berita/Pages/Kemlu-dan-Pemprov-NTB-Bersinergi-Protect-Workers-Migran-Indonesia.aspx>, accessed on June 23, 2018, at 20:57 GMT

<sup>29</sup><http://www.hukumonline.com/berita/baca/lt510a87e64c6b2/implementasi-konvensi-p-workers-migran-masih-minim>, accessed on June 23, 2018, at 20:40 GMT

<sup>30</sup><http://www.bnp2tki.go.id/read/12663/Komite-Work-Migran-PBB-Puas-With-L-report-Indonesia>, accessed on 23 June 2018, at 20:50 GMT

Implementation of the Migrant Workers Convention. Whereas through legal efforts, the Indonesian government has established a number of legal policies relating to the Migrant Workers Convention, including the Minister of Manpower and Transmigration Regulation No. 16 of 2012 concerning Procedures for Returning Indonesian Workers From Placement Countries Independently to the Areas of Origin (Returns of Indonesian Migrant Workers), PP (Government Regulation) No. 3 of 2013 concerning Protection of Indonesian Migrant Workers Abroad, and Wonosobo District Regulation No.8/2016 concerning Placement and Protection of Indonesian Migrant Workers (Migrant Workers) from Wonosobo.

#### **D. Recommendations**

Based on the table of comparison between the Convention on Migrant Workers and Indonesian Manpower Law, it can be seen that the provisions in Indonesian Manpower Law do not contain the rights of foreign workers as contained in the Migrant Workers Convention. Thus, to complete the implementation of the Migrant Workers Convention, it is recommended that the Indonesian Manpower Law can include provisions concerning the protection of the rights of Foreign Workers. This can be done by amending Law No. 13 of 2003, or by establishing a new regulation that specifically contains the protection of the rights of foreign workers.

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## **Warning Violations under International Humanitarian Law**

Dian Mahardika

### **Abstract**

The conflict in the middle east doesn't seem to be enough to reach here. In recent times there was a shooting at Palestinian medical personnel "Razan Al Najjar" (21th) carried out by Israeli militant groups to become evidence of a violation of international humanitarian law carried out by Israeli military groups against Palestinian medical personnel, which also violated Convention rules Geneva in 1949 in verse (24) the Geneva Convention was written "paramedics who search, collect, or treat injuries must get special protection". Research under the title "Paramedic Shooting by Israeli Militants in Review of International Humanitarian Law" has the formulation of the problem of actions that are not in accordance with the rules that have been set by international humanitarian law and whether the shooting by Israeli soldiers to Razan Al Najjar is a violation in war. The purpose of this study was to find out the regulations in international humanitarian law, actions that should not be carried out in war. The writer in conducting research used two approaches namely normative juridical. Normative juridical approach by examining and interpreting theoretical matters relating to the principles of law, conceptions, and legal norms relating to war violations according to international humanitarian law. Based on the results of the study it can be concluded that humanitarian law is a law that regulates relations between countries, military needs of a country, humanitarian law also gave rise to conventions such as the Hague Convention in 1899 and 1907, and also the Geneva Convention in 1949. It was concluded that the shooting of Razan Al Najjar was a war crime that violated International Humanitarian Law, which was clearly addressed in the Geneva Convention I in 1949 part IV article 24. Related to this case, the researcher suggests that Palestinians who faced the conflict must be integrated to build strength in order to face the power of the israel militant, for all Muslim women (especially) to be able to help pray for the war to end in a word of peace.

**Keyword :** international humanitarian law, geneva convention, international law



## A. Introduction

Regulations are made to be obeyed, lived and carried out. But what was done by Israel clearly violated the rules. The shooting carried out on Palestinian paramedics Razan Al Najjar occurred about 100 meters from the fence. At that time Razan Al Najjar was helping the injured demonstrators to take medical action. The issue of conflict and war is a warm conversation in relations between countries, coupled with the emergence of human victims as a result of the incident, both from the civilian side and the victims from the military. The conflict between Israel and Palestine is in the spotlight of the world about the influence of international humanitarian law in regulating the course of a war. The history behind the formation of the rules of international humanitarian law is to protect the victims of war and by the middle of the 19th century countries agreed on international regulations in a convention which they agreed to themselves.

The term Humanitarian Law, which is also commonly referred to as the International Humanitarian Law Applicable in Armed Conflict, was originally only known as the Law of War, which later developed into the Law of Armed Conflict and eventually became known as Law Humanitarian. International Humanitarian Law developed at the time of the 1949 Geneva convention and the Deen Hag Convention which later became an international role model on the Law of War.<sup>31</sup>

International Humanitarian Law was created as an effort to balance between military needs and the need for respect for human nature. The 1949 Geneva Convention became an international positive law which was part of international law, in general countries in the world did not dislike its existence because the Geneva Convention of 1949 aimed to humanize war. International Humanitarian Law is very necessary to meet humanitarian needs in the midst of situations of war and armed conflict. The International Committee of the Red Cross (ICRC) is present as a third party and acts as a non-state, the ICRC can operate wherever conflict areas are to ensure that the parties to the conflict will respect the rules of the Geneva Conventions agreed upon by the state countries in the world.

In the period of about 50 years since the adoption of the 1949 Geneva Conventions, humanity experienced an alarming number of armed conflicts. These armed conflicts occurred on almost all continents. During this period, the four Geneva Conventions of 1949

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<sup>31</sup> Reyhan Alfazory, *REVIEW BUKU TENTANG HUKUM INTERNASIONAL*,  
[https://www.academia.edu/34660986/REVIEW\\_BUKU\\_HUKUM\\_HUMANITER\\_INTERNASIONAL](https://www.academia.edu/34660986/REVIEW_BUKU_HUKUM_HUMANITER_INTERNASIONAL)

and the Second Supplementary Protocol of 1977 provided legal protection for people who were not, or who were no longer, participating directly in hostilities (ie wounded, sick victims, victims of sinking, people detained in connection with armed conflict, and civilians). Even so, in the same period there have also been many violations of these international agreements, resulting in suffering and death tolls that might have been avoided had International Humanitarian Law (HHI) been respected better.

**a. Problem**

1. What actions are not in accordance with international humanitarian law regulations?
2. Did the Israeli militant shootings on Palestinian paramedics include violations in the war?

**b. Purpose Of The Problem**

The purposes of making this paper are

1. To find out the rules in international humanitarian law
2. Actions that should not be carried out in war

**c. Writing Method**

The problem approach that was used in this study was the normative juridical approach. For this reason, research was needed which was a basic plan in the development of science. According to Soerjono Soekanto, the normative juridical approach is legal research conducted by examining library material or secondary data as the basic material to be investigated by conducting a search of the regulations and literature relating to the problem under study.<sup>32</sup>

Secondary data was data used in answering the problems that exist in this journal writing through literature study. Secondary data was the main data used in this writing. The author in this study used 3 (three) legal materials as follows:

**Primary and Secondary Legal Material:**

- a. Manuscript of Translation of Geneva Convention I in 1949;
- b. Manuscript of Translation of Geneva Convention II in 1949;
- c. Manuscript of Translation of Geneva Convention III in 1949;
- d. Manuscript of Translation of Geneva Convention IV in 1949;

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<sup>32</sup> Soerjono Soekanto & Sri Mamudji, *Normative Legal Research (A Short Review)*, Rajawali Pers, Jakarta, 2001, hlm. 13-14

- e. Manuscripts of Translation of the Hague Convention 1899 and 1907.

Material Secondary law was a legal material that provided an explanation of primary legal material, which consisted of literature, books relating to violations of war between Israel and Palestine. Secondary legal materials were obtained by means of document study, study problems from books, literature, papers and legal dictionaries and other materials related to material coupled with internet data search activities.

## **B. Discussion**

### **1. Actions that are not in accordance with International Humanitarian Law**

#### **a) Definition of International Humanitarian Law**

International humanitarian law is a part related to international law, international law itself is a law that regulates relations between countries that can be met in agreements that are mutually agreed upon between countries or can be encountered at conventions and treaties and in principle the State must comply as law. Humanitarian law represents a balance between humanitarian needs and military needs of countries. Along with the development of the international community, a number of countries around the world have contributed to the development of international humanitarian law. Today, international humanitarian law is recognized as a truly universal legal system.

International Humanitarian Law gave birth to the Hague convention of 1899 and 1907 governing the procedures and tools of war, and the Geneva convention of 1949 which regulated the protection of victims during the war. Where in the second convention mention the rules that must be run during the war. According to the Geneva Conventions, humanitarian activities require impartiality and must be useful for people regardless of race, color, religion or belief, gender, descent or wealth, or other similar criteria. Therefore, no one should be deprived of the opportunity to get help or protection just because he has certain beliefs, and no community may be left behind just because they are under the control of a party whose international community is trying to isolate it. The only priority order that can be determined must be based on the needs of the victim, and the order of priority in the provision of humanitarian assistance must match the urgency of the difficult situation of victims whose humanitarian assistance was intended to alleviate it.

#### **b) Actions that are not in accordance with International Humanitarian Law**

The actions intended by the author are violations that are regulated in International Humanitarian Law. Violation of International Humanitarian Law is a direct translation of

"Violation on International humanitarian law". Because of various international agreements both the Convention, Statute and Protocol provide the term violation for actions that are contrary to Humanitarian Law and subsequently among Humanitarian Law experts Prof. Haryomataram uses the term " war crimes "this is meant that the use of the term" violation of international humanitarian law "can be understood and interpreted as war crimes.<sup>33</sup>

The 1949 Geneva Convention, which codified HHI after World War II, also signaled the inclusion of elements of humanitarian law in the regulation of war crimes as a grave breach of the convention. Each of the Geneva Conventions (for people who are injured or sick on land, for people who are injured or sick at sea, prisoners of war, and civilians) contains their own lists of serious violations. Broadly speaking, the list is: intentional murder, torture or inhumane treatment (including medical experiments); intentionally causing severe suffering or serious injury to the body or health; widespread and inappropriate destruction which is not justified by military needs and carried out illegally and without reason; forcing prisoners of war or civilians to enter the armed forces from enemy rulers, deliberately eliminating the rights of prisoners of war or protected civilians to get a fair regular trial; deportation or transfer of civilians who are not based on law; detention of protected civilians who are not based on law; and take hostage. The 1977 Additional Protocol I extended the protection of the Geneva Convention to international conflicts by including as a gross violation: certain medical experiments; making civilians or a place as an unavoidable object or victim of attack; cheating on the use of the International Red Cross emblem; transfer of population from those in power to occupied territories; delays that cannot be justified in the return of prisoners of war; apartheid; attacks on historical monuments; and revoke the rights of a protected person from a fair trial. Under the Geneva Conventions and Additional Protocol I, countries must prosecute people accused of gross violations or send them to countries that want to do so.<sup>34</sup>

International Humanitarian Law categorizes an action that is illegal or violates the rules of HHI itself based on its consensus for the offender (crime) itself. Some of these actions involve prohibited methods or methods of warfare (according to "Hague law", namely laws derived from the Hague conventions of 1899 and 1907). In addition, there are actions that hurt protected people who are sick and injured, victims of shipwrecks or civilians (according

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<sup>33</sup> Shandi's Blog, *HUMANITARY INTERNATIONAL LAW VIOLATIONS*, <http://sandy-perfectionistboy.blogspot.com/2008/12/pelanggaran-hukum-humaniter.html> Accessed on August 24, 2018 at 9:00 a.m.

<sup>34</sup> *International Criminal Court for Former Yugoslavia*, Article 3

to "legal laws", ie laws originating from Geneva Conventions). War crimes can be categorized in 4 forms, namely:

- 1) War crimes on body and soul, such as murder 'cruel treatment and mistreatment of prisoners of war (including medical experiments); rape; intentional actions that cause severe suffering or serious injury to the body or health; and mutilation.
- 2) War crimes on property and objects, such as burning crops; deprivation of public goods or private property; destruction of cities without reason; destruction without military interests; attacks or bombardments on cities that are not defended, settlements, or buildings; acts of destruction are intentionally committed against certain cultural institutions.
- 3) War crimes on honor and justice, such as deportation of civilians in occupied territories; forcing prisoners of war or civilians to enter the armed forces from enemy rulers; deliberately eliminate the rights of prisoners of war or civilians who are protected to get a fair regular trial; and execution without trial.
- 4) War crimes in the rules of war, such as cheating in the use of the International Red Cross emblem; the use of toxic weapons or other weapons that are counted causes unnecessary suffering.

## **2. Palestinian paramedics shot by Israeli militants**

Still thinking about the events that occurred in June, precisely on June 1, 2018, there was a shooting carried out by one of the Israeli military on Palestinian Medics named Razan Al Najjar (21 years). At that time Razan Al Najjar was undergoing his humanitarian task of giving medical help to injured demonstrators on the battlefield, but what experienced by Razan made all nations in the world turbulent, how could the paramedics who were supposed to get protection in the war were shot dead in battlefield, with the identity of the white robe worn and also at that time Razan and several other paramedics had raised both hands as a marker that Razan needed to get protection as if ignored.

Based on several paramedic colleagues and also demonstrators who witnessed the shooting aimed at Razan Al Najjar said that it was true that Razan's presence was at the front line to provide help. Moving on from the shooting case, International Humanitarian Law has regulated the protection of health workers who serve during the war.

Through the Geneva I convention in 1949 article 24 chapter IV, the contents of which: "Health service members are specifically employed to search for or collect, transport or care for the wounded and sick, or to prevent disease, and staff employed specifically in the

administration of health units and buildings, as well as clergy serving in the army, must be respected and protected in all circumstances."<sup>35</sup>

There are several articles in the 1949 Geneva I Convention, chapter IV which are intended to protect paramedics on duty. Some of these articles read:

Article 25

“Members of the army who are specially trained to be hired, if necessary as bodyguards of hospitals, nurses or assistants to lift stretchers, in seeking or collecting, transporting or caring for the wounded and sick, must also be respected and protected if they are doing its obligations when they meet an enemy or fall into the hands of an enemy”<sup>36</sup>

Article 26

“Members of the National Red Cross Association and other Members of the Voluntary Helper Association who are recognized and authorized by the Government, who may carry out the same obligations as members of the health service referred to in article 24, have the same position as members of the health service mentioned in that article , as long as members of the associations are subject to military laws and regulations. Each High Contracting Party must notify the other party either in peace or at the beginning or during the course of the hostilities, but always before when they actually hire them, the names of the associations that have been given permission to, on their responsibilities, give assistance to the service health remains the army.”<sup>37</sup>

Article 27

“A recognized association from a neutral country may only second members of its service and health units to a Party in dispute after obtaining prior approval from its own Government and obtaining permission from the Party in the dispute concerned. Members of the health service and these units will be placed under the authority of the Party in the dispute. The neutral government must inform the party of the opposite party of the country that received the assistance. The party to the dispute that received the assistance is required to notify the other party about the assistance before using it. This assistance should not be considered as an intervention in a dispute. Members of the health service referred to in the

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<sup>35</sup> Translation of the 1949 Geneva Convention Part I concerning Protection of Victims of Land Battle War, quoted from [https://www.academia.edu/12654405/Translation\\_Konvensi\\_Jenewa\\_1949\\_Bagian\\_I\\_tentang\\_Protection](https://www.academia.edu/12654405/Translation_Konvensi_Jenewa_1949_Bagian_I_tentang_Protection)

<sup>36</sup> *Ibid.*,

<sup>37</sup> *Ibid.*,

first paragraph must be provided as needed with identification cards as specified in article 40 before leaving the neutral country from where they came from.”<sup>38</sup>

#### Article 28

“Members of the health service referred to in Articles 24 and 26, which fall into the hands of an opposing Party, will be retained to be employed only as far as health, spiritual necessity and the number of prisoners of war need it.

The health service member who was retained for employment would not be seen as a prisoner of war. Nevertheless, they must at least benefit from all the provisions of the Geneva Convention regarding the treatment of prisoners of war on 12 August 1949. In the context of the law and military regulations of the detaining state and under the competent service, members of the health service may continue to work , in accordance with the ethics of the profession, their health and spiritual obligations for the benefit of prisoners of war, preferably for the benefit of the prisoners of war from the army in which they themselves belong. They must then get the following facilities to carry out their health and spiritual obligations:

- a) They will be allowed to periodically visit prisoners of war who are in work units or hospitals outside the place of detention. The holding country must provide the transportation equipment they need.
- b) In each place of detention, the highest ranking senior health officer must be accountable to the military authorities of the place of detention for office activities from members of the health service detained for employment. For this purpose, from the outset of the breakdown of hostilities, Parties to the dispute must agree on the equality of rank of members of their health services, including the health services of the associations referred to in article 26. In all issues arising from their obligations, then health officers and religious leaders must be able to deal directly with the military and health authorities of the place of detention, who must provide them with the facilities they might need to make correspondence on these matters.
- c) Although members of the health service and religious leaders employed in places of detention must submit to internal discipline, they may not be obliged to do any work other than their health and religious obligations. During hostilities, Parties to the dispute must make arrangements to release where possible members of the health service are employed and establish the procedure of release. There are no prior

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<sup>38</sup> *Ibid.*,

provisions freeing the Retaining State from its obligations regarding its health and spiritual well-being of prisoners of war.<sup>39</sup>

#### Article 29

“Members of the auxiliary health service referred to in Article 25 who have fallen into the hands of the enemy, are prisoners of war, but must be employed in their health obligations as long as the circumstances require it.”<sup>40</sup>

#### Article 30

“Members of the health and religious services whose detention are employed are not very necessary according to the provisions of Article 28, must be returned to the Parties in a dispute where they are included, as soon as an open path for their return and military interests permit it. While waiting for their return, they will not be considered prisoners of war. However, they must at least benefit from all the provisions of the Geneva Convention concerning the Treatment of Prisoners of War on 12 August 1949. They must continue to fulfill their obligations under the authority of the opposing party and should continue to carry out care for the wounded and sick of the Party in a dispute where they themselves are classified. At the time of their departure they must bring along their property, personal property, valuables and tools”<sup>41</sup>

#### Article 31

The selection of members of the health and religious services to be returned according to Article 30 must be done without regard to any consideration of ethnicity, religion or political opinion, but should be in accordance with the time frame of arrest and the state of their health. Starting from the outbreak of hostilities, Parties to the dispute may determine with special agreement, the percentage of members of the health and religious services to be detained for employment, in accordance with the number of prisoners and the distribution of members of these services in places of detention.

#### Article 32

The people referred to in Article 27 who have fallen into the hands of the opposing Party may not be held captive. Unless there is another agreement, they must be given permission to return to their country, or if this is not possible, to the territory of the Party in dispute for

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<sup>39</sup> *Ibid.*,

<sup>40</sup> *Ibid.*,

<sup>41</sup> *Ibid.*,



whom they work, as soon as a road is open to their return and military considerations allow it. While waiting for their release they must continue their work under the direction of the opposing party, they should work in the care of the injured and sick from the parties in the dispute for whom they have worked. When departing, they must bring along their property, personal belongings and valuables and tools, weapons and if possible their transportation equipment. Parties to the dispute must guarantee to members of the health and religious services, as long as they are in the same power, food, accommodation, benefits and wages as those given to members of the same services of their army. The food must, however, be sufficient in quantity and quality and its variation to maintain these members in normal health.<sup>42</sup>

### C. Conclusion

Based on what the author poured from writing about a small part of the rules of International Humanitarian Law, it can be concluded that International Humanitarian Law is a law created on the basis of the needs of International Law governing relations between States, which also gave birth to conventions such as the Hague Convention 1899 and 1907 which regulated the procedures and tools of war, and the Geneva convention of 1949 which regulated the protection of victims during the war. When viewed from the ongoing conflict between Israel and Palestine, so many violations or crimes in the war carried out by Israel against Palestine, one of which was a shooting aimed at Razan Al Najjar, a paramedic who at that time carried out his duties to help injured demonstrators on the battlefield. But what the Israeli army has done is clearly in violation of International Humanitarian Law set out in the Geneva Convention I 1949 section IV article 24 which contains "*Health service members specifically employed to search for or collect, transport or care for the injured and sick, or to prevent disease, and staff employed specifically in the administration of health units and buildings, as well as clergy in charge of the army, must be respected and protected in all circumstances.*"

In addition to article 24, there are several other articles which regulate how medical personnel should be protected during the war, which is contained in articles 25, 26, 27, 28, 29, 30, 31, 32 of Geneva Convention I in 1949.

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<sup>42</sup> *Ibid.*

The suggestion that the writer can convey is that Palestinians who face the conflict must unite to build strength to be able to face the power of the israel militant, for all Muslim citizens (especially) to be able to help pray for the war to end in a word of peace.

## **Cooperation Agreement between Pharmacist and Apothecary Owner**

Refmidawati

### **Abstract**

Establishment of a pharmacy cannot be separated from the role of a pharmacist because all pharmacy facilities are required to have a pharmacist. It is an absolute requirement if you want to establish a pharmacy facility and not all pharmacy owners are pharmacists. Freedom of contract is the core of an agreement, implicitly giving guidance that in contracting the parties are assumed to have a balanced position. The urgency of agreement arrangement in business practices is to guarantee the exchange of interests (rights and obligations) to take place in a balanced manner for the parties, so that a fair and mutually beneficial relationship is established. The problem of this research is how is the legal relationship between the pharmacist and the owner of the pharmacy facility. The purpose of this study was to determine the legal relationship between pharmacists and pharmacy facility owners. The results of this study showed that the regulations regarding cooperation agreements between pharmacists and pharmacy owners are very few. The regulation also does not clearly provide a description of what is meant by a cooperation agreement between pharmacists and the owner of a pharmacy facility.

**Keywords: Agreement, Cooperation, Pharmacist.**

## A. Introduction

Basically, the agreements start with the form or inequality of interests between the parties. The formulation of agreement relations generally is always preceded by a negotiation process between the parties. With negotiation the parties create forms of settlement to bring together what is desired through the process of bargaining.<sup>1</sup>

The establishment of a pharmacy cannot be separated from the authority because all pharmacy facilities are required to have a pharmacist. That is a must if you want to establish facilities and not all of owners are pharmacists. Facility owners can be businessmen, government / private hospitals, etc to establish pharmacy business. A pharmacist may only manage one pharmacy, not more than one pharmacy, in accordance with The Regulation of Health Minister No. 31 of 2016 about Amendments to the Regulation of the Minister of Health No. 889 of 2011 concerning Registration, Practice Permit and Pharmaceutical Work Permit in Article 18, and also in the Minister of Health Circular Number HK.02.02 / MENKES / 24/2017 concerning the key to its implementation.

An agreement can happen because a pharmacy facility can never establish a pharmacy without a pharmacist. Must attach a work permit, agreement on cooperation between the pharmacist and the owner of pharmacy and also attach a recommendation letter from the organization of Indonesian Pharmacist Association (IAI).

Because in reality there are many problems in implementing the contents of the agreement eventhough this agreement has been brought by both parties to legal institutions namely notaries.

One of a collaboration is the things beyond the basic salary or standard demands in employment, such as salary, bonus, accommodation, transport payment, and etc that regulated with the Minister of Manpower and Transmigration Regulation No. 7 of 2013 concerning Minimum Wages and Minister of Manpower and Transmigration Regulation No. 6 of 2016 concerning Religious Holidays Allowances for Workers / Workers. Therefore, in the collaboration the pharmacist should also get things outside of all of those. An example is prescription payment from every recipe that comes in, the pharmacist gets the percentage; also get a pharmacy profit sharing every year, and bonuses or other facilities for pharmacists. Other facilities are aimed at improving the quality of its human resources by facilitating pharmacy seminars held by pharmacy experts to increase knowledge in the latest

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<sup>1</sup> Budiono, H. (2014). *Ajaran Umum Hukum Perjanjian dan Penerapannya di Bidang Kenotariatan*. Bandung: PT. Citra Aditya Bakti.

pharmaceutical fields. Unfortunately, the facilities above are often not obtained by the pharmacist.

What happens is that between the pharmacist and the pharmacy facilitator are bound by a cooperation contract, but in practice the position of the pharmacist is same as another employee in the company because they only get salary there is no bonus than salary. Giving salary and allowances is not an element of cooperation.

The arrangement of the cooperation agreement between the pharmacist who manages the pharmacy and the owner of the pharmacy facility is still very small. In the provisions of Article 8 of the Minister of Health Regulation Number: 922 / MENKES / PER / X / 1993 concerning the Provisions and Procedures for Granting Pharmacy Permits, it is stated that the pharmacist uses the other party's facilities so the use of said facilities must be based on a cooperation agreement between the pharmacist and the owner of the facility.<sup>2</sup> But that regulation does not provide a description of what is meant by a cooperation agreement between pharmacists who manage pharmacies and owners of pharmacy facilities. However, it can be said that this cooperation agreement is an agreement that regulates the legal relationship between pharmacists as managers and owners of facilities that provide pharmacy facilities. In Article 3 paragraph (2) Chapter II Regulation of the Minister of Health Number 9 of 2017 concerning Pharmacy, it also regulates that the Pharmacist who establishes the Pharmacy in collaboration with the owner of the pharmacy must be carried out completely by the pharmacist concerned.

Based on the background described above, the formulation of the problem that is the basis of the discussion in the proposal is as follows: What is the Legal Relationship between Pharmacists and Pharmacy Facility Owners?

## **B. Discussion**

According to The Permenkes RI No. 1332 of 2002 concerning Amendments to the Minister of Health Regulation No. 922 of 1993 concerning Provisions and Procedures for Granting Pharmacy Permits, Pharmacy is a specific place, where pharmacy works and distribution of pharmaceutical preparations, other medical supplies to the community is a pharmacy service facility where pharmacy practices are carried out by Pharmacists. And in Permenkes RI No. 9 of 2017 About Pharmacy, Pharmacy is a pharmaceutical service facility where pharmacy practices are carried out by Pharmacists. As a scholar health worker,

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<sup>2</sup>Umar, R. (2016). *Asas Kebebasan Berkontrak dalam Perjanjian Kerjasama antara Apoteker dengan pemilik sarana apotek*. Retrieved April 2, 2018, from <http://www.jurnal.um.ac.id>.

Pharmacists can act as entrepreneurs, health workers in hospitals, and management pharmacies. But essentially the pharmacist is a professional who is bound by the oath and code of ethics of the pharmacist.

The agreement between the pharmacist and the pharmacy facility owner in managing the pharmacy that has been agreed upon by both parties can bind both parties as binding the law for the parties that make an agreement, because it has been made to fulfill the legal requirements of the agreement as intended by Article 1320 of the Civil Code. If one party does not carry out its obligations properly, then the party can be prosecuted for compensation. In this way, the responsibility for compensation made by one of the parties gives the consequences to the other parties to fulfil the achievements that made by the parties in an agreement.<sup>3</sup>

The agreement according to its name is divided into two types, they are named agreement and unnamed agreement. Unnamed agreements are agreements that arise, grow, and develop in society. This type of agreement was not known at the time the Civil Code was promulgated. An example of an anonymous agreement is a cooperation agreement between a pharmacist and a pharmacy owner.<sup>4</sup>

The cooperation agreement between the pharmacist and the owner of the pharmacy facility is carried out in written form, in order to have legal evidence for the parties. The agreement can be made with an authentic deed, which is a written agreement that made before an authorized official, in this case a notary, and can also be made under a deed, namely a written agreement not made before an authorized official. If in the implementation of the cooperation agreement between the pharmacist and the owner of the pharmacy facility, a dispute arises, the settlement can be agreed upon through deliberation or mediation and if it does not bring the outcome of the next settlement through legal proceedings through the court.<sup>5</sup>

The basis of the Cooperation Agreement between the Pharmacist and the pharmacy owner is Article 8 of the Regulation of the Minister of Health No. 922 / MENKES / PER / X / 1993 concerning Provisions and Procedures for Granting Pharmacy Permits stating that pharmacists are using other party facilities, the use of said facilities must be based on an agreement collaboration between pharmacists and facility owners, and in article 3 paragraph

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<sup>3</sup> Ibid. hlm. 6

<sup>4</sup> Ibid. p. 2.

<sup>5</sup>Salim, H., & Erlies, S. (2015). *Penerapan Teori Hukum pada Penelitian Disertasi dan Tesis*. Jakarta: PT. Raja Grafindo Persada.

(2) of the Minister of Health Regulation No. 9 of 2017, namely in the case of pharmacists who set up pharmacies in collaboration with capital owners, pharmacy work must be carried out completely by the pharmacist concerned.

In an agreement there are two important elements that must exist, they Objective Element and Subjective Element. Objective elements are lawful and certain things, while subjective elements are capable of acting and agreement. With these two things there is an object that is promised and there is a subject. So, it can be said with regard to the object that was agreed upon, the above matter could be made an agreement or agreement. These four things have fulfilled the legal requirements of the agreement based on Article 1320 of the Civil Code.

### **1. Subjective Elements**

In the subjective element there is an agreement or conformity of willing and competency. In the event that a subjective condition is not fulfilled, the agreement is not null and void, but one party has the right to request that the agreement be cancelled. The party who can request the cancellation is an incompetent party or a party who agrees (permits) non-freely. So, the agreement that has been made remains binding as long as it is not cancelled (by the judge) at the request of the party entitled to request the cancellation.<sup>6</sup>

The subject here is between the pharmacist and the owner of the pharmacy facility. Why the owner of the facility is as a subject that because the pharmacy owner is not necessarily a pharmacist, while the pharmacist is needed by the owner of the facility to establish a pharmacy. Below will be mentioned about the pharmacist's duties and responsibilities in the pharmacy in accordance with the contents of the agreement.

### **1. Pharmacist's Rights and Obligations in Pharmacy Management**

The obligation of a pharmacist as mentioned in article 1 paragraph 1 of Government Regulation Number 51 of 2009 concerning Pharmaceutical Work, the definition is the making of including quality control of pharmaceutical preparations, safeguards, procurement, storage and distribution or distribution of drugs, drug management, drug services on doctor's prescription, drug information services, as well as drug development, traditional medicine and drug ingredients. The management (pharmacy work) of the pharmacy becomes the duty and responsibility of a pharmacist and is carried out based on Law Number 7 of 1963 concerning Pharmacy ". In Permenkes RI No. 73 of 2016 concerning the Standards of Pharmaceutical Services at the Pharmacy, in Article 3 paragraphs 1, 2 and

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<sup>6</sup>Subekti, R. (2005). *Hukum Perjanjian*. Jakarta: PT. Intermasa.

3 describes the standard of pharmacy services in pharmacies that must be carried out by a pharmacist, those are:

Standard Pharmaceutical services at the Pharmacy include standards:

- a. Management of pharmaceutical preparations, medical equipment for medical supplies and consumables.
- b. Clinical pharmacy services

The Pharmacist's right is to obtain Pharmacist service standards in health care facilities in accordance with those set by the Pharmacist Organization, namely the Indonesian Pharmacist Association Lampung Region SK. PD IAI Lampung No. 04 / A1-SK / PD-IAI / LPG / XII / 2016, and obtain other services in accordance with what was promised in the collaboration.

## 2. Obligations of the Owner of a Pharmacy Facility

- a. Owners of pharmacy facilities are obliged to provide infrastructure such as pharmacy buildings and parking lots, pharmacy equipment, medical equipment and supplies in the field of pharmacy, other supplies such as fire extinguishers all of which are in control of the pharmacy owners.
- b. The owner of the facility is obliged to provide allocation funds for the continuity of the pharmacy during the first year, such as Capital and RAPB.

## 2. Objective Elements

In the event that the objective requirement is not fulfilled, then the agreement is null and void, meaning that it was originally considered to have never been born of an agreement and there has never been an engagement. The objective element that must be fulfilled is a certain thing (object) meaning that what is agreed must be clear enough and a lawful cause or a legitimate cause.<sup>7</sup>

The object of this writing is what will be cooperated between the Pharmacist and the owner of the pharmacy facility. Because this agreement is a cooperation agreement, it means that there are things that must be agreed upon regarding the continuity of the pharmacy on the pharmacy's journey, such as the distribution of profits from the sale of non-prescription drugs, the distribution of prescription money, as well as other facilities for the pharmacist's own resources for the sake of the good of the pharmacy itself, and if there is a problem in the pharmacy for example there is an error in pharmacy practices (medical mall practice), to

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<sup>7</sup> *Ibid.* p. 20.



the extent that the pharmacist and the owner of the pharmacy are responsible for this. Who will bear the loss of both material and non-material, the pharmacist is alone or borne together with the owner of the facility and resolved by deliberation and consensus. And that should all be clearly stated in the contents of the agreement.

The absence of clear legal arrangements from the government regarding the content that should be in cooperation makes pharmacists who do not understand the law feel discomfort in carrying out their pharmacy practices.

### **C. Conclusion**

There is no clear legal regulation from the government regarding the contents that should be in the cooperation agreement between the pharmacist and the PSA. The cooperation agreements between pharmacists and PSA have always been in the form of standard contracts that tend to be more profitable for the PSA.

Pharmacists feel that their position is more as an employee, not as appropriate for a party in a cooperation agreement where the pharmacist does not get what is supposed to be his right, namely income outside of salary and holiday allowances. Salary and THR are not elements of a cooperative agreement, but a work agreement between the worker and the employer. The government should issue a regulation that clearly regulates cooperation agreements between pharmacists and PSAs that can accommodate the interests of both parties.

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## Regulation:

The Act of Republic Indonesia Number 36 Year 2006 Concerning Health.

The Health Minister Regulation of Republic Indonesia Number 9 year 2017 Concerning Pharmacies

The Health Minister Regulation of Republic Indonesia Number 31 year 2016 Concerning Amendments to the health minister's regulation number 889 year 2011 Concerning Registration, Permit to Practice and Work Permit of Health Workers

Circular Letter HK.02.02/Menkes/24/2017 Concerning The Implementation Guidelines of The Republic Indonesia Minister of Health Regulation Number 31 year 2016

The Health Minister Regulation of Republic Indonesia Number 922 year 1993 Concerning The Provisions and Procedures for Granting Pharmacy Permits

Civil Code (KUHPerdata)

## Pancasila's Freedom of Speech

Rudi Natamiharja, Heryandi and Stefany Mindoria

### Abstract

Having a massive population of over 261 million, Indonesia is the third world's largest democracy country in the world. A country with the most ethnic diversity, race, religion, and culture. These elements cannot be neglected and they become Indonesian legislation sources. The rules of law as a fundament of state mentioned on the new Constitutional of Indonesia. After the massive revision of Constitution in 2000, the protections for human rights are also guaranty and find their place as a fundamental rights. Twenty years after the Indonesian Reformation (*Reformasi*), the guaranty of protection for freedom of speech, as one part of basic rights, still inconsistency. The case of Prita is one of many cases of freedom of expression in Indonesia and it became a negative image of freedom of expression. After two decades, how is the development of the guaranty of human rights especially the freedom of speech in Indonesia? Pancasila as the fundament of all local regulations gives a different perspective and become the exceptionality of Indonesia. This research uses jurisprudences and empirical cases studies on freedom of speech. By using Indonesian legal instruments relative to the protection of speech, this article will provide answers what are the characteristic of Indonesia protection on freedom of speech. We conclude that, the protection of the right to speech is already present before the Pancasila and before the establishment of Indonesia in 1945. This freedom of speech called "*tapa-pepe*". Indonesia freedom of speech norm should be not contradicting from five principles of Pancasila: belief in the One and Only God, a just and civilized humanity, a unified Indonesia, democracy, led by the wisdom of the representatives of the People and Social justice for all Indonesians.

**Keywords:** Human Rights, Fundamental Rights, freedom expression, freedom speech, Pancasila, Indonesia

## A. Introduction

Protection of freedom of speech will not be upright without legal guarantees. Indonesia as a legal state<sup>8</sup> is obliged to provide guarantees to human rights including the right to freedom of speech which is a branch of the fundamental right of freedom of expression. It is said to be fundamental because in the Indonesian state system that promotes people's aspirations, the right to speak is a pillar of a democratic state. This right must be guaranteed by law. The concept of a rule of law for Indonesia is unique. Of the many types of state of law, Indonesia is known as a legal state that has a philosophy of Pancasila.

For the first time, the concept of the state of law in Indonesia was raised by Muhammad Tahir Azhary<sup>9</sup> in his thesis defended in 1991.<sup>10</sup> According to him, Indonesia has its own characteristic, the "rule of law Pancasila". In addition, he highlighted other perspectives with more precision on the notion. He explains that there are five models of the rule of law, including (1) the rule of law under Islamic law, which is based on two primordial sources: the Koran and the tradition of the prophet Muhamed (sunnah); 2) a rule of law from the western world practiced by the Netherlands, Germany, and France; (3) the rule of law stemming from the Anglo-Saxon system or common law practiced by Great Britain and the United States; 4) a socialist state of law<sup>11</sup> practiced by communist states such as China or Russia; and, 5) the rule of law Pancasila.<sup>12</sup>

According to Azhary, the constitutional law professor in Indonesia, the Indonesian model has its own characteristics. Based on Indonesian culture, the term "rule of law Pancasila" is quite different from "*rechtsstaat*" and "rule of law". Two definitions of the rule of law Pancasila are envisaged: in a broad sense, the rule of law Pancasila has its roots in the "*rechtsstaat*" and the "rule of law"; but in a more precise definition, the rule of law Pancasila

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<sup>8</sup>The status of the state of Indonesian law is contained in the 1945 Constitution in Article 1 paragraph 3.

<sup>9</sup>He did a research concerning the rule of law from the point of view of Islamic law theories. He defended his thesis on March 9, 1991, at the Faculty of Law of Universitas Indonesia. The best-known and oldest law school in Indonesia, created in 1924 by the Dutch colonizer.

<sup>10</sup>Muhammad Tahir Azhary, *Rule of Law: Study on the Theories of Islamic Law*, Jakarta, Universitas Indonesia, p. 107.

<sup>11</sup>This notion was also used by Alain Beitone in his article "Rule of law". Alain Beitone, "Rule of law".

<sup>12</sup>Pancasila is the foundation of the official ideology of the Indonesian state. It includes five principles considered to be inseparable and interdependent: 1. The belief in one God (Ketuhanan Yang Maha Esa), 2. The just and civilized humanity (Kemanusiaan yang adil dan beradab), 3. The Indonesian unity (Persatuan Indonesia), 4. Democracy Wisely Conducted, in Concertation and Representation (Kerakyatan yang dipimpin oleh hikmat kebijaksanaan dalam permusyawaratan / perwakilan), 5. Social justice for all Indonesian people (Keadilan bagi seluruh rakyat Indonesia). Pancasila is at the top of the hierarchy of standards.

has particular elements that are: 1) no separation between the state and religion, there is an important relationship between the state and religion in the functioning of the Indonesian government; 2) establishment of the first Indonesian principle (Pancasila) "Almighty God"; 3) positive freedom of religion<sup>13</sup>; 4) prohibition of atheism or communism; 5) principle of fraternity and union.<sup>14</sup>

Jimly Asshidiqie<sup>15</sup> believes that the concept of the rule of law has evolved considerably. According to him, it has grown in importance over time and has become more complex. He considers that today, the characteristic of the state of law Pancasila Azhary is not always relevant.

In this debate around the concept, the rule of law Pancasila is the most appropriate for Indonesia. Indeed, this one has its own model and a singular notion, "Pancasila". However, it is not known worldwide especially in the field of lawyers. That is why it is necessary to present the Pancasila in order to analyze its influence on Indonesian legislation.

Pancasila has also become a legal basis in determining all regulations and decisions that become positive law. Likewise, the right to freedom of speech is framed by the five principles of Pancasila. These five principles have a very broad interpretation and the writer tries to interpret and relate the first principle of "Believe in the One and Only God" with the Freedom of Indonesian citizens to speak. What restrictions are attached to Indonesian citizens in using the right to freedom of speech based on the first principle of Pancasila.

## **B. Discussion**

The freedom of speech possessed by every human being is not absolute. In Indonesia, the freedom also has very clear but sometimes unmeasured boundaries. That is, even though every human being has freedom, but there are still limitations and limitations that are often debated. No, bro That is one of the characteristics of basic rights, freedom of speech. For example, if in France or America can speak freely about religion, criticize a belief by issuing opinions about religion or matters relating to religion, then this does not apply in Indonesia.

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<sup>13</sup>Oemar Seno Adji finds that freedom of religion can be classified as positive and negative freedom of religion. In the United States, according to Sir Alfred Denning's conception, American religious freedom is both positive and negative, in other words, we can be believers or atheists. Positive religious freedom in Indonesia means there is no place for non-belief. The encouragement of atheism is therefore forbidden. In his introduction "the history of Indonesia" Drakeley confirmed this situation in Indonesia. According to him the religious communities in Indonesia are tolerant, there is no discrimination of the state. In spite of everything being atheist is forbidden.

<sup>14</sup>Muhammad Tahir Azhary, *Rule of Law: Study on the Theories of Islamic Law*, op. cit., p. 107-118.

<sup>15</sup>First President of the Indonesian Constitutional Court 2003-2009.

## **1. Case Position**

This article will try to discuss two cases of freedom expression in Indonesia: Prita Mulyasari cases and Basuki Tjahya Purnama. We choose this case because the first is the most known case freedom of expression in Indonesia after the Era of Reformation of Indonesia Constitution. The second case is the case of Ahok (Basuki Tjahya Purnama, the most influenced case where the religion is concern inside

### **The case of Prita Mulyasari an overview of the state of freedom of opinion in Indonesia**

To be able to know the state of freedom of expression, we can learn valuable lessons from the Prita case. Even though this case is not directly related to the first Article of Pancasila. But at least this case is a new case in the age of advanced sophistication of communication and can provide an overview to the reader about the current situation. Prita was charged with publicly defaming the honor of Omni International Hospital and two doctors, Dr. Hengky Gosal and Dr. Grace. The cause has been an unsatisfactory service from the hospital. Through the email of August 7, 2008, she sent her feelings of discontent to her friends. She complains about the quality of the hospital's service during her treatment. A month later, she is prosecuted in civil cases in court. The court of first instance issued decision No. 300 / Pdt.G / 2008 / PN. TNG, Prita was found guilty. After making an appeal on 8 September 2009, the second instance court (Pengadilan Tinggi Banten) delivered judgment no. 71 / Pdt / 2009 / PT. BTN, and again, Prita's effort failed. The appeal judges decided that she was guilty. She appealed to the Supreme Court (Mahkamah Agung). The latter delivered judgment No. 300 K / Pdt / 2010 on September 29, 2010, Prita is found not guilty.

During the civil trial, on 30 April 2009, the Prosecutor filed the criminal file to prosecute Prita. On May 13, 2009, she was taken into custody although she is the mother of two children, including a child who is breastfeeding. On December 29, 2009, the court of first instance rendered judgment No. 1269 / PID.B / 2009 / PN. TNG and acknowledged that Prita is not guilty. On 11 January 2010, the Prosecutor appealed on points of law to the Supreme Court and then on June 2010 the Court of Cassation delivered judgment no. 822 K / Pid. Sus / 2010 who sentenced Prita to six months in prison.

Against this judgment, Prita's lawyer appealed to the Court of Cassation for review. On 17 September 2012, the Indonesian Supreme Court (Mahkamah Agung) delivered its judgment no. 225 PK / Pid. Sus / 2011. The latter repeals Supreme Court Decision No. 822 K / Pid. Sus / 2010, now Prita is not guilty both in criminal and civil matters.

This case is not the only one nor the first one in the field of freedom of opinion in Indonesia, but it is particular, as it is the first case where the Law No. 11 of 2008 on information and electronic transactions has been enacted. The Prosecutor supports its basis in relation to Article 27 (3) of the Law and Article 310 of the Criminal Code.

Article 27 (3) of Law 11 of 2008 states that "Any Person who knowingly and without authority distributes and/or transmits and/or causes to be accessible Electronic Information and/or Electronic Records with contents of affronts and/or defamation".<sup>16</sup> According to the provision of Article 45, the violation of Article 27 (3) will be punishable by a prison term of up to 4 years and a maximum fine of Rp 750 million (approximately 50,000 euros).<sup>17</sup>

Article 27 (3) is not sufficiently clear on the concept of contempt. It must therefore clarify it by Article 310 paragraph 1 of the Penal Code which states that:

"The person who intentionally harms someone's honour or reputation by charging him with a certain fact, with the obvious intent to give publicity thereof, shall, being guilty of slander, be punished by a maximum imprisonment of nine months or a maximum fine of four thousand five hundred rupiahs"<sup>18</sup>

Through the decision of the Supreme Court, which was that of the civil complaint of lawyer Prita, we can analyze that the Supreme Court opted to give primacy to the freedom of opinion in relation to a good reputation of a legal person (the company Omni International Hospital). We also find that the judgment of the judges of the Prita Court of Cassation is a revolutionary step for freedom of opinion in Indonesia. Indeed, we can not know if the verdict of the judgment of the Court of Cassation against Prita, the condemnation physically and materially, will bury the freedom of opinion in Indonesia.

We must not neglect the moral and material support of the people, especially Internet users, who have rallied in favor of Prita. A fundraiser has reached more than 55,000 €. It is the most important support in Indonesian history. This proves to us that the majority of

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<sup>16</sup>This article is translated by University of Boston and in Indonesian version "Setiap Orang dengan sengaja dan tanpa hak mendistribusikan dan / atau mentransmisikan dan / atau dapat diaktasnya informasi elektronik dan / atau dokumen elektronik yang memiliki muatan penghinaan dan / atau pencemaran nama baik "

<sup>17</sup>Article 45 was revised in 2016 and 28 October 2016 became applicable. Before the revision, the punishment is 6 years in prison and about 60 000 €. According to the regulations in Indonesia, during the investigation a person can be seized in custody for a penalty of more than 5 years in prison. The revision no longer allows an arrest of a person presumes a violation of Article 27 (3).

<sup>18</sup> The Indonesian version "Barang siapa sengaja menyerang kehormatan atau nama baik seseorang dengan menuduhkan sesuatu hal, yang maksudnya terang supaya hal itu diketahui umum, diancam karena pencemaran dengan pidana penjara paling lama sembilan bulan atau pidana denda paling banyak empat ribu lima ratus rupiah"

Indonesians are aware of the importance of freedom of expression in order to express their opinions.

If we analyze the procedure in which the case has crossed several degrees of jurisdiction, we want the judges to be more attentive to their decisions. In this case, they must also master the field of freedom of expression and opinion.

**The case of Basuki Tjahya Purnama (Ahok) a description of freedom of speech in the context of the first article of Pancasila**

The blasphemy case experienced by Basuki is not the first in Indonesia. However, this event became very well because this case exists when information was easily and quickly spreads. On 27 September 2016, during his working visit to the Thousand Islands (north of Jakarta) Governor Jakarta Basuki Tjahya Purnama (Ahok), gave his opinion and conveyed his dissatisfaction with the practice of some Muslims who tried to deceive regional voters in 2017 using a verse from the Koran.

Chapter five of the Qur'an called al Maidah or "the table served" mentions in verse 51, "O believers! Do not take for allies Jews and Christians; They are allies of one another. And one of you who takes them for allies becomes one of them. Allah does not guide unjust people." There are several interpretations of the word "ally" in this verse. The interpretations of Indonesian Muslims are grouped into two main parts. The radical part interprets that "ally" is like "a leader" while other Muslims have a more liberal interpretation: an ally can be defined as "a friend or someone you can count on". In his speech, as a Christian, Ahok tried to clarify to the citizens of Jakarta that he was not deceived by the Muslims who used the verse of the Koran to ban him from voting because he was non-Muslim.

A few weeks later, Ahok's speech became prominent through the circulation of a video that the Jakarta government usually disseminated to make the public aware of the work for the purpose of public transparency. Looking at this picture, the reaction of Indonesian Muslims divides into two divergent opinions. Some of the Muslims who do not feel comfortable being attacked by this opinion and some think that Ahok has incited hatred of Muslims. On November 4, 2016, more than one million manifestos, Ahok's opinion opponents, gather to meet in the street in downtown Jakarta. Their claim is simply that the governor of Jakarta, Basuki Tjahya Purnama, be checked and judged because of his opinion that incites contempt. According to the interpretation of these Muslim groups, they believe that Ahok insulted not only their leader and their ulama as liars and spread lies, but also attacked the Qur'an, a Muslim holy book, saying that the book is a lie. From different



opinions, this circulates between the against and for the freedom of opinion of the Governor. His right to be re-elected for the next period (2017-2022) is therefore threatened. On November 16, 2016, the investigation of the National Police announces that he is the suspect of the crime of blasphemy under the section on public order Article 156a of the Criminal Code:

"By imprisonment for up to five years shall be punished anyone who deliberately in public expresses feelings or commits an act (a) who primarily have the character of being in enmity with, abusing or staining a religion, adhered to Indonesia. (b) With the intention of preventing a person from adhering to a religion based on the belief of Almighty God ".<sup>19</sup>

This article was added in 1965 by the provision of Presidential Decree No.1/PNPS/1965 on the prevention of abuse of religion and blasphemy. University of Indonesia criminal law professor Nasrullah says that Indonesia does not have a specific piece of blasphemy law. Article 152 (a) was added to this fact in the 1960s when there was an act against the religion of Islam (the man who put his foot on the Koran). At the time, this act could not be condemned either by the penal code or other because there was no legal basis that could penalize him.

On May 9, 2017, the judge rendered his decision. Ahok is sentenced to two years in prison. The Ahok case shows us that all acts against a religion or anti-religion whether in the name of freedom of expression or otherwise may be classified as blasphemy. To determine an expression against or against religion this act must be determined as hatred against religion. There are two ways to find this evidence during the investigative process: the actor confesses that he has an intention; otherwise it is based on different opinions of specialists, legal doctrines and religions.

Freedom of expression in Indonesia is thus a right in itself, as well as an element of other rights protected by the Constitution such as freedom of religion in Article 28E, paragraph 1, "Every person is free to embrace religion and worship according to his religion...".

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<sup>19</sup>The Indonesian version "Dipidana dengan pidana penjara selama-lamanya lima tahun barang siapa dengan sengaja di muka umum mengeluarkan perasaan atau melakukan perbuatan: a. yang pada pokoknya bersifat permusuhan, penyalahgunaan atau penodaan terhadap suatu agama yang dianut di Indonesia; b. dengan maksud agar supaya orang tidak menganut agama apa pun juga, yang bersendikan Ketuhanan Yang Maha Esa."

There are ten cases of blasphemy since the creation of Presidential Decree No. 1 / PNPS / 1965. In Indonesia, all protest actions related to blasphemy cases can influence the judges' decision and eventually put the defendants in jail.

## 1. The Indonesian Constitutional System and the Protection of Liberties

### **Pancasila: a concept based on five Indonesian principles**

The word "Pancasila" comes from Sanskrit, *panca* "five" and *sila* "principle". This linguistic origin comes from Buddhism, present on the archipelago since the 9th century.<sup>20</sup> The five fundamental points of Pancasila are: the belief in a unique god, humanity, unity, democracy, justice as mentioned by Alexandre Messanger in his book<sup>21</sup>:

The Pancasila which consists of five principles based on faith in one God - monotheism without privileging Islam - on the right and civilized humanity, on the unity of the country, on democracy guided by the spirit of consultation and of consensus and on the sovereignty of the people. The five principles of Pancasila are similar to the five principles<sup>22</sup> of Buddhism<sup>23</sup>.

The five Pancasila norms are the five moral principles and ethical codes that should govern political life. They are also the sources of the creation of Indonesian constitutions, laws and other norms. The values of Pancasila, as set out in the Preamble to the 1945 Constitution, are a fundamental agreement and the establishment of the nation-state. This constitutes the "common thread" that leads to the realization of the ideals of society, the nation, and the state.<sup>24</sup> It is for this reason that these values are written into the preamble of

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<sup>20</sup>Steven Drakeley, *The History of Indonesia*, ABC-CLIO, 2005, p. 6.

<sup>21</sup>Alexandre Messanger, *Indonesia*, Editions L'Harmattan, 1999, p. 17.

<sup>22</sup>The five principles of the Buddhist are (1) Panatipata veramani sikkhapadam samadiyami (we swear not to kill), (2) Adinnadana veramani sikkhapadam samadiyami (we swear not to steal), (3) Kamesu miccharaca veramni sikkhapadam samadiyami (we swear to do not commit adultery), (4) Musavada veramani sikkhapadam samadiyami (we swear not to lie), and (5) Sura meraya pamadatthana veramani sikkhapadam samadiyami (we swear not to drink until drunkenness).

<sup>23</sup>Faisal Ismail, *Islam, Politics and Ideology in Indonesia: A Study of the Process of Muslim Acceptance of the Pancasila*, 1995, p. 3.

<sup>24</sup>Mahkamah Konstitusi Republik Indonesia, *Comprehensive Document of the 1945 Constitution Review Book I*, Jakarta, Jenderal Sekretariat in Kepaniteraan Mahkamah Konstitusi, 2010, p. 4.

the Constitution<sup>25</sup>. Although Indonesia has undergone three changes in its constitution, Pancasila remains a sacred symbol, landmark, and pillar for the nation.<sup>26</sup>

A difference of opinion regarding the choice of Pancasila as the foundation of the state appeared in May 1945, just a few months before the proclamation of independence of the republic, read by Soekarno and Hatta before the Indonesian citizens gathered in Jakarta. This brings to the question about the origin of the creation of the concept of Pancasila and the identity of its founding fathers.

### **Pancasila: an ideology formulated by founding fathers**

An interesting question arises about the creator of the idea of Pancasila. It is the foundation of the law, a legal source placed at the top of the hierarchy of standards. It has also become an ideology of the Indonesian nation, possible thanks to great men of that time: Soekarno, Mohammad Yamin, Muhammad Hatta, and Soepomo. These are the four founding fathers whose role in this section. On June 1, 1945, Soekarno was the third and last man to speak to the assembly in charge of the preparation of independence. He talks about the foundation of the state that constitutes Indonesian nationalism, humanity, social justice and faith in God by always promoting culture. It was he who proposed the name Panca Dharma before Pancasila was finally chosen by the assembly. Soekarno has finalized its position for these principles to be named Pancasila.<sup>27</sup>

Mohammad Yamin, for his part, gave his opinion on the four principles of nationalism, humanity, certainty in one God, the sovereignty of the people and social justice. For its part, Soepomo having followed a training course at a higher level than the others proposed the elements of unification and fraternity inspired by Japan. He also stressed the importance of being a believer and a practitioner. Regarding the question of the sovereignty of the people, he insists that the head of state must, in the future, integrate the citizen.

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<sup>25</sup>The last paragraph of the preamble of the Constitution is "In accordance with which, with the aim of forming a state government of Indonesia which must protect all the people of Indonesia and the entire country of origin of Indonesia, with the aim of advancing general prosperity, developing the intellectual life of the nation, and contributing to the implementation of a world order based on freedom, peace and lasting social justice, Indonesia's national independence is laid down in a State Constitution of Indonesia, which must be established as the State of the Republic of Indonesia with the sovereignty of the people and based on the belief in 'One God, on the just and civilized humanity, on the unity of Indonesia and on democracy which is guided by the force of wisdom resulting from deliberation / representation, so as to achieve social justice for all people from Indonesia » .

<sup>26</sup>Constitutional Court In Indonesia, Complete Document of the 1945 Constitutional Review Book I, p. 1

<sup>27</sup>Constitutional Court In Indonesia, Complete Document of the 1945 Constitutional Review Book I, p. 23

Therefore, it is necessary to create a national assembly whose objective is the consultation of the people. The orientation towards an Eastern culture has, moreover, been raised. The Asian identity has been stated so that the archipelago becomes unified and becomes a unitary state called Indonesia.<sup>28</sup>

Hatta will be the man who will summarize the ideas proposed by the founders. Among the 33 members who posed the question of Indonesia's ideology, Soekarno once again insists that Pancasila is the "*philosophischegrondslag*"<sup>29</sup> or the philosophical basis of the state of Indonesia.<sup>30</sup> Since then, Pancasila has become a sacred symbol and ideology of the country.

Based on the First Precept of Pancasila, it can be warned that. First, Religion in Indonesia is a book that has a high meaning of high life. The Indonesian nation is a nation that holds entertainment values above all else. Religious values in Indonesia are different from those in Islamic countries which are very strong and of course with the Qur'an and Hadith. In Indonesia, all religions get equal rights and portions without perspective or not. Religious divisions, can destroy the nation. Therefore respect for religion in Indonesia is not negotiable anymore. Actions can be done through a transparent process as a form of humiliation. Then there lies the Resilience of free speech.

### **Freedom of speech before Pancasila “Tapa pepe”**

In Indonesia freedom of speech was available before the birth of Indonesia and the existence of Pancasila which was known as *tapa pepe* which meant sunbathing in the sun. *Tapa pepe* itself is a form of local wisdom of Yogyakarta residents, the way of the small people to convey their aspirations to both the Surakarta Sunanate and the Yogyakarta Sultanate. *Tapa Pepe* used to be done until the time of the Sultan of Hamengkubuwono VIII or the mid-1900s. Tapa pepe with the intention to seek justice, complaining to get the attention of the Sultan. The method of *tapa pepe* is done by sitting cross-legged between two twin banyan trees in the North Square. They face south or towards Pagelaran and SitiHinggil

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<sup>28</sup>The spirit of a unitary state is mentioned in Article 1, first point of the Indonesian Constitution. This point remains without revision.

<sup>29</sup>This term comes from Dutch. As a child of the aristocracy, he has a privilege of European education in Indonesia. He is fluent in English and Dutch.

<sup>30</sup>Mahkamah Konstitusi Republik Indonesia, Comprehensive Document of the 1945 Constitution Review Book I, Jakarta, Jenderal Sekretariat in Kepaniteraan Mahkamah Konstitusi, 2010, p. 24.

using white clothes.<sup>31</sup> *Thistapa pepe* can arrive before days. Things that relate directly to the level that you want to complain about, and are also related to the courage and bravery of those who want to face the sultan.<sup>32</sup>

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<sup>31</sup> Bagus Kurniawan. *Tapa Pepe, Cara Mengadu Kawula Yogyakarta kepada Raja*. Quoted from <https://news.detik.com/berita-jawa-tengah/d-3562354/tapa-pepe-cara-mengadu-kawula-yogyakarta-kepada-raja>, Detik, (accessed August 27, 2018)

<sup>32</sup> Ki Herman Sinung Janutama, 2012, *Pisowanan Alit 1 Nuswantara Negeri Keramat*, p. 1 LKIS Yogyakarta: Yogyakarta

## **The Notary's Role in the Implementation of Tax Amnesty in Batam City**

Agus Riyanto, Lenny Husna, Padrisan Jamba, and Frangky Silitonga

### **Abstract**

This research aimed to find the efforts made by Notaries in Batam City when exercising their authority regarding the implementation of Tax Amnesty and its purpose analyzed the legal protection of Notaries related to the deeds made in the framework of the implementation of Tax Amnesty. This research shown analytical descriptive, that research intended to provide an overview of the results of research accompanied by legal analysis related to the legal aspects as qualitative data of the implementation of the role of the Notary in the implementation of Tax Amnesty. Its approach used library research and interviews as data collecting techniques. The results of this research shown that in principle Notaries in Batam adheres to various statutory provisions in exercising their authority, both those regulated in the UUJN and the Tax Amnesty Law and other laws that related to the Tax Amnesty implementation with regard to at least 3 things that relates to the types of Deeds, protecting themselves with various statements, and taking into account the date or time period. Next, legal protection for notaries related to Tax Amnesty implementation could be seen in 2 legal aspects namely civil and criminal. In a civil perspective, there is a legal notary adhering to the principle of responsibility based on fault, so that if an error committed by the complainant, the notary could not be held accountable whereas from a criminal law perspective, the Notary from the beginning before carrying out his position would be protected by the existence of a denial right, namely the obligation of the Notary which did not speak, even before the court, including giving testimony regarding the making of deeds and documents related to Tax Amnesty.

**Keywords:** Protection, report, tax amnesty, taxpayer.

## **A. Introduction**

Tax is the largest source of state revenue from the country. The economists, tax is not merely a government tool to meet funding needs, but also to influence community behavior, they could be economic and psychological behavior. It should not be burden on the community but on the one hand it's the potential for considerable revenue and probably, on the other hand for the government often makes the benefits and role of taxes seen differently, depend on point of view of each party (Sumarsono, 2010).

The amount of tax revenue cannot be separated from the role of taxpayers in the tax levies. The implementation of Self Assessment System in the tax levy system in Indonesia that gives authority, trust and responsibility to taxpayers in carrying out their obligations and tax rights, including in carrying out their obligations and tax rights (Waluyo, 2006).

The phenomenon in Indonesia shows that state revenues from the tax aspect are very low. The phenomenon of low tax compliance, the amount of funds parked abroad and the poor database of national taxation certainly requires a major step to reform the national tax system(I Made Bagiada, I Nyoman Darmayasa, 2016).

For this reason, special measures and policy breakthroughs are needed to encourage the transfer of assets into the territory of the Republic of Indonesia and at the same time provide security guarantees for Indonesian citizens who wish to transfer and disclose their assets in the form of tax amnesty. The breakthrough policy in the form of Tax Amnesty on the transfer of these Assets is set forth in the Law of the Republic of Indonesia Number 11 of 2016 concerning Tax Amnesty (PP Law).

Especially for the Notary profession, Law Number 11 of 2016 concerning Tax Amnesty provides a special mandate. Notaries are given an important role to assist taxpayers in terms of legalizing a number of documents required by law. Article 15 paragraph (2) determines that the Notary plays a role in the event that the taxpayer wishes to transfer rights to immovable property such as land or buildings through a statement signed by both parties before a Notary.

The implementation of these various provisions in various regions such as Batam City as an industrial city requires the readiness and anticipation of various parties including Notaries. This is because many investors and entrepreneurs are the target of the Tax Amnesty program living in Batam City. The location of Batam is also close to Singapore and Malaysia, where the population of the three countries is intensely related, even marriages

occur between Batam residents and Malaysians / Singaporeans. In this case, the Notary in carrying out the role in the framework of the Tax Defense Act must be careful if the assets reported in the Tax Amnesty program are foreigners' property or the property of Batam residents who are married to foreigners.

Some of the above legal problems in the field cause unrest for Notaries as public officials who are on the one hand given the role of succeeding the implementation of Tax Amnesty but on the other hand there are obligations of Notary law to carry out the laws and regulations related to the implementation of the Notary's office.

### **1. Formulation of the problem**

Based on the background of the problem described in the explanation above, the formulation of the problems are: a. What efforts are made by Notaries in Batam City so that they are not mistaken / wrong in exercising their authority regarding the implementation of Tax Amnesty? b. What is the legal protection for Notaries regarding the deeds and documents made in the context of administering Tax Amnesty? The objectives of the research are as follows: a. knowing the efforts made by Notaries in Batam City so that they are not mistaken / wrong in carrying out their authority regarding the implementation of Tax Amnesty. b. Analyzing the legal protection of Notaries related to the deeds and documents made in the context of the implementation of Tax Amnesty.

### **2. Research Methods**

The research method used by the author qualitative using a juridical approach. Data sources used in this study secondary data are data by interviewing several Notaries in Batam City.

### **B. Discussion**

Efforts made by the Batam City Notary in order not to be mistaken / wrong in carrying out their authority regarding the implementation of Tax Amnesty. Normally, Notaries including those who exercise their authority and positions in the City of Batam have an important role in the successful implementation of the Tax Amnesty Law). This role starts from legalizing important documents for Tax Amnesty such as Declaration of Assets for Tax Amnesty, as well as the pouring of Deed or Statement of Property Ownership. This Deed or Letter will later form the basis for the renaming / transfer of rights to property previously in the name of another person.



The role can only be made by a Notary as a General Officer as well as regulated in Article 15 paragraph (1) of Law Number 2 of 2014 concerning Amendments to Law Number 30 of 2004 concerning Notary Position (UUJN). UUJN regulates that the Notary has the authority to make authentic Deed regarding all actions, agreements, and stipulations required by law and / or desired by those concerned to be stated in the authentic Deed, to guarantee the certainty of the date of making it, keep it, give gross of copies and quotations of the Deed, all of which as long as the Deed is not also assigned or excluded to other officials or other persons determined by law, including the Tax Amnesty Act.

Notary in Batam City, in principle adhered to various statutory provisions in carrying out its authority, both regulated in the UUJN and the Tax Amnesty Act and other laws were related to the implementation of Tax Amnesty. Specifically it related to the legalization of the statement and the pouring of the Notarial Statement Deed, there were several things that the Notary in the City of Batam did to ensure that the action was safe, in the sense that it was not wrong / wrong in exercising its authority regarding the implementation of Tax Amnesty, including the following:

#### **1. Pay attention to the types of certificates**

Actually the type of deed used in the implementation of Tax Amnesty is not different from other types of general deeds which are often made by a Notary, for example the Deed of Declaration and various deeds of transfer or sale and purchase before a Notary / Land Deed Making Officer. However, what needs to be watched out is for example related to the transfer of land and buildings, where the land and buildings actually belong to foreign citizens (WNA) or those who have a husband or wife of foreigners. This is because according to Law Number 5 of 1960 concerning Basic Agrarian Basic Regulations which is better known as the Basic Agrarian Law (UUPA), regulates that foreigners are only allowed to have land rights in the form or type of use rights. Therefore, the Notary needs to check the identity of the party who intends to make a statement for the purpose of transferring land rights, whether there are elements of foreign citizens in it. Checking this identity is not enough by looking at the Identity Card (KTP) but also the Family Card and Marriage Certificate / Book. This is because to check that someone is married to a foreign national or Indonesian citizen, it cannot be done by checking the KTP, but it must see the CoW and Marriage Certificate. Moreover, this is because in Batam City, there are several Indonesian citizens who are married to foreign nationals. Perhaps because the location of Batam City is

adjacent to Singapore and Malaysia, so the marriage between Batam people and Singaporeans or Malaysians is commonly done.

It is interesting to note that marriages between a man and a woman who are not or have not been recorded at the Marriage Registry Office (Office of Religious Affairs for Muslims, and Civil Registry Office for other than Islam) result in their status being considered unmarried although marriage like this is considered legal, their marriage does not have any juridical consequences. Therefore, for example an Indonesian citizen who is married to a foreign national and their marriage is not recorded at the Civil Registry Office / KUA, the Indonesian citizen can do the transfer of land rights (both ownership rights, rights to use buildings and rights to use).

In addition to the issue of ownership of assets in the form of land and buildings by foreigners, the problem faced by the Notary or PPAT in Batam City related to Tax Amnesty is a matter of the time limit for the implementation of the Reverse Name related to Tax Amnesty which is limited to a maximum of 31 December 2017. This deadline in Batam City it is difficult to implement given the condition of Batam where the implementation of returning the name of the land and buildings requires the Rights Transition Permit (IPH) of the Batam City Business Entity (BP Batam) which is sometimes delayed so that even if someone reports Tax Amnesty and has paid a ransom, when it will reverse the name of the assets in the form of land and buildings is not overtaken by time.

Therefore, in the future, it is necessary to pay attention to the implementation of a national program that must be harmonized with programs in the regions, so that the two can run well and in parallel. Next is if the land and buildings owned by AJB have not been carried out in front of PPAT or have just been bound with a Buy and Sell Agreement (PPJB) and Power of Attorney to Sell (KUM), then the Notary / PPAT will need to call the party whose name is still listed in the land and building certificate. The person whose name is listed in the certificate must first sign the PPJB cancellation deed with the party whose name is "borrowed" by the actual owner who carries out the Tax Amnesty. The problem that arises is if the party or person whose name is listed in the certificate has passed away or his domicile and residence are no longer known.

An alternative solution can be done by doing two AJB processes in front of PPAT, namely the first AJB PPAT process (between the parties listed in the certificate and the party whose name is actually borrowed by PPJB). After returning the name of the certificate, the new certificate is then transferred again to the real owner. Tax Amnesty principals usually

avoid this because this process will lead to multiple PPAT AJB fees as well as double tax fees.

Furthermore, similar to the prohibition of foreigners having HM and HGB, also for example a Notary when they will legalize a Share Ownership Statement of a company that is partly or wholly owned by a foreign national. Article 1 number 3 of Act Number 25 of 2007 concerning Investment regulates that foreigners who invest their shares in Indonesia in the form of ownership of a company, the company must be in the form of Foreign Investment (PMA), not a Limited Liability Company (PT) for Indonesian citizens and Indonesian legal entities only as shareholders. Therefore, if there is an Indonesian citizen who comes to the Notary's office to legalize a Statement of Share ownership of a PT, it is necessary to check whether there is an element of foreigners in the PT. If there is a foreign element, so as not to become a problem in the future (for example, there are findings from relevant agencies that there is a foreign element in the PT), then the Notary should not legalize the document.

## **2. Protecting yourself with various statements**

In relation to the implementation of Tax Amnesty, the Batam City Notary will usually equip him by paying attention to 4 things that must be considered, especially with regard to statements from the people who come to his office. *First*, the Notary will ask the public to make a statement that the assets or assets that will be reported in Tax Amnesty are not from the proceeds of crime such as corruption, drugs, gambling, money laundering and other criminal acts that apply in the field of criminal law.

*Second*, the client must make a statement that all actions or actions of the people who need Notary services related to Tax Amnesty implementation will free the Notary and Notary employees if later it turns out that the Tax Amnesty implementation is contrary to the law in particular criminal law. *Third*, the client must make a statement that the assets involved are actually within the framework of the Tax Amnesty program, not on other motives.

Fourth is a statement from the client that the assets owned do not exceed 5 (five) parcels of land (especially ownership rights) and not more than 5,000 M<sup>2</sup>. This is because the ownership of land with the status of ownership for the benefit of a residential house in Indonesia is limited to a maximum of 5 (five) plots of land or a maximum area of 5000 M<sup>2</sup> (five thousand square meters) in accordance with article 2 paragraph (1) letter e and article 4 paragraph (3) Minister of State for Agrarian Affairs / Head of BPN Number 6 of 1998 concerning the granting of Ownership Rights to Land for Abandoned Houses. Limitation of

Agricultural Land Ownership is regulated in Article 1 PERPU 56/1960 which later becomes Law 56/1960 concerning the Determination of Agricultural Land Area.

### **3. Pay attention to the Date**

Regarding the date, the Notary will pay attention to the calendar, whether with such a period of time can help clients related to Tax Amnesty. This is because, especially in the transfer of land and building rights, it takes a lot of time due to various procedures that have to be done by a Notary, starting from checking the UN payment report on land and buildings, checking the original certificate at the Land Office, whether there are problems / constraints related to the certificate or no, the tax payment party disposes, for example the grantor/ seller and the party receiving the transfer, for example the recipient / buyer.

Legal protection against Notaries related to the deeds and documents made in the context of administering Tax Amnesty. Law according to Sudikno Mertokusumo is the whole collection of rules or principles in a common life, the overall behavior that applies in a common life that can be imposed with a sanction (Mertokusumo, 1986). Thus, if it is associated with legal protection, it can be interpreted as providing guarantees or certainty that someone will get what is their rights and obligations or protection of their interests so that the person concerned is safe in accordance with the rules or regulations that apply in society (Utama, 2015). Legal protection must be based on a provision and rule of law that serves to provide justice and become a means to realize prosperity for all people (Raharjo, 2000). Protection, justice and welfare aimed at legal subjects, namely supporters of rights and obligations, is not an exception for a Notary (Adjie, 2009).

In relation to the implementation of Tax Amnesty, the Law on Notary Position (UUJN) has recognized the existence of notaries as general officials, who in carrying out all their duties need legal protection. This legal protection is in the context of a notary as a position, not as a person. Legal protection for Notaries who exercise their authority related to Tax Amnesty implementation in accordance with the prevailing laws and regulations can generally be described in 2 (two) legal aspects namely civil and criminal.

In the perspective of civil law, the legal protection of Notary in the implementation of Tax Amnesty is related to the responsibility of the Notary who adheres to the principle of responsibility based on fault (liability), in making an authentic deed. The Notary can be held accountable civilly if the deed made there is a mistake or intentional violation by the Notary. Conversely, if the element of error or violation occurs from the parties facing the public or

not as a client of the Notary, so long as the Notary carries out his authority according to the rules, the Notary concerned cannot be held accountable, because the Notary only records what is conveyed by the parties to be included in the deed or in the legalization process related to Tax Amnesty, the Notary in his position as a public official authorized by the legislation to ratify the letter. In the process of legalization or legalization, the Notary is not responsible for the contents of the Statement Letter made by Tax Amnesty participants.

In this case, the responsibility of the Notary is to ensure that the Tax Amnesty participant is the correct one who makes an asset ownership statement. The notary must match the person based on identity (identity card). Therefore, if it is found on the day of the meeting that the complainant submits false information or incorrect information, both in relation to the identity of the face and the contents of the statement, then it is the responsibility of the parties / adherents. In this case, the Notary cannot be held accountable civilly if it turns out that the person facing the identity is not the person listed in the identity card (KTP) brought and shown to the Notary, nor does the contents of the statement correspond to the actual reality.

If it is addressed by other deeds, then basically the Notary is not responsible for the contents of the deed that was made before him because regarding the contents of the deed is the will and agreement desired by the parties / adherents. In other words, the Notary only worries about what happened, what he saw, and experienced from the parties / faces, the following adjusted the formal requirements for making an authentic deed, then poured it into the deed. Notaries are not required to investigate the truth of the material content of the authentic deed. This requires the Notary to be neutral and impartial while providing a kind of legal advice to the client who requests legal advice from the Notary concerned (Afifah, 2017). While a violation of these provisions, then in Article 41 of the amendment to UUJN determines if the Notary commits an unlawful act or a violation of Article 38, Article 39, and Article 40 of the Amendment Act on the UUJN, then the Notary deed will only have proof as an underhanded deed. As a result of notarial deeds like that, it can be a reason for the person facing the loss or the party to claim compensation for compensation, compensation and interest to the Notary.

Regarding the mistake in violating the law, in civil law it does not differentiate between the mistakes caused by the intentions of the perpetrator, but it is also because of the mistaken or inaccuracy of the perpetrator. This provision is in accordance with what was stated by Riduan Syahrani as follows: "no less careful" (Syahrani, 1998).

Related to the legal protection given to (Position) the Notary is regulated in Article 66 of the UUJN Amendment. Article 66 regulates the establishment of a Notary Honorary Council (MKN) consisting of representatives from Notary, government and academia, which functions as legal protection institutions for the Notary Position related to the deed made by or before him. MKN is expected to provide an optimal legal contribution for Notary institutions in carrying out their duties as legal protection institutions. Regarding the regulation regarding the position and form of legal protection from this Constitutional Court, it has not been explicitly regulated in the UUJN or in the form of other laws and regulations. The position of MKN in providing a legal protection for Notaries is an independent institution, because in this case the existence of MKN is not a subdivision of the government that appoints it. MKN in carrying out its authority to issue a decision is not influenced by other parties or institutions, so that in this case the decision produced by this MKN cannot be contested (Enggarwati, 2015).

Whereas from the perspective of criminal law, the Notary from the beginning before carrying out his position has been protected. This can be seen in the Notary Position Oath in Article 4 and the obligation of the Notary in Article 16 paragraph (1) letter (e) UUJN requires the Notary to not speak, even in court. This means that a Notary is not allowed to give testimony about what is contained in the deed (Adjie, Menjalin Pemikiran-Pendapat Tentang Kenotariatan , 2012). Furthermore, in the explanation of Article 16 paragraph (1) letter (f) UUJN stated that "keep everything confidential regarding the deed he made and all information obtained in order to make the deed in accordance with the oath of office of the notary". To avoid the arbitrary actions of law enforcers against Notaries, Article 66 Paragraph (1) UUJN regulates the existence of Notary Honorary Assembly (MKN), as a legal protection institution for Notaries who function to conduct preliminary examinations in the Notary organization's session to give approval or rejection to investigators from the police, prosecutors, or judges who call the Notary to be examined in the court process.

This means that if in the future there is a dispute or criminal case due to Tax Amnesty implementation involving the Notary in the process, for example, there is a false case in the Statement issued by a Notary, then the investigator must pay attention to the provisions of the UUJN. Then in the next process at the investigation level, for example the investigator wants to take the minutes of deed and the summons of the Notary, Article 66 of the UUJN regulates that for the purposes of the judicial process, investigators, public prosecutors or judges with MKN approval are authorized: take a copy of Minutes of Deed and letters

attached in Minutes of Deed. This means that when the Notary Honorary Council does not agree, the notary does not need to be present in the investigation process.

In the Criminal Procedure Code, it also regulates the existence of the Rights of the Notary Notary as stipulated in: 1) Article 170 of the Criminal Procedure Code; 2) Article 1909 number 3 of the Criminal Code; 3) Article 146 paragraph (1) number 3 HIR; 4) Article 277 HIR; 5) Article 4 UUHN and Article 16 paragraph (1) letter e UUJN. For example Article 170 of the Criminal Procedure Code affirms that someone who is due to work, dignity or position is required to keep a secret, can ask to be released from the obligation to provide information as a witness, namely about the matter entrusted to them. In the trial, the Judge then determines whether the reasons for the request are valid or not. Furthermore, in Article 1909 of the Criminal Code, it is stated that all capable people to be witnesses, there are obliged to give testimony before the Judge, except for being able to request exemption from the obligation to give testimony; anyone who because of his position, job or position is required by law to keep something confidential, but only about the matters entrusted to him because of his position, occupation and position. Based on these provisions, the Notary as a public official must use the right of employment to not speak or provide information in the case of investigations, investigations or hearings before the court. The last form of protection is through a Notary organization, namely the Indonesian Notary Association who will accompany during the Notary Honorary Council session. Even in some cases THIS will assist and provide legal assistance to the notary. The Indonesian Notary Association (INI) is the only Notary Organization regulated in Article 82 of the UUJN which determines that a Notary meets in a single notary organization and a notary organization as referred to is the Indonesian Notary Association.

The Notary Organization is the only free and independent Notary profession that was formed with the intent and purpose to improve the quality of the notary profession. Furthermore, in Article 4 Amendment to the Articles of Association of the Indonesian Notary Association Extraordinary Congress of the Indonesian Banten Notary Association dated May 29-30 2015, it was agreed that one business / activity carried out was to fight for and maintain the interests, existence, role, function and position of the Notary Institution in Indonesia according with the dignity of the profession in the position of Notary.

### **C. Conclusion**

Based on the results of the research and discussion that raised by the researcher, the following conclusions can be drawn: first, the efforts made by Notaries in Batam City so that

they are not mistaken/ wrong in exercising their authority regarding the implementation of Tax Amnesty are in principle the Batam City Notary adheres to various provisions legislation in carrying out its authority, both regulated in the UUJN and the Tax Amnesty Act and other legislation related to the implementation of Tax Amnesty by paying attention to at least 3 (three) things, namely relating to the types of Deeds, protecting themselves with various statements , and by observing the date or time period. Second, the legal protection for Notaries who carry out their authority related to Tax Amnesty implementation in accordance with the prevailing laws and regulations, generally it can be described in 2 (two) legal aspects namely civil and criminal. From the perspective of civil law, the legal protection of Notary in the implementation of Tax Amnesty is related to the responsibility of the Notary who adheres to the principle of responsibility based on fault of liability, so that if the error is committed by the complainant, the Notary cannot be held accountable. Whereas from the perspective of criminal law, the Notary from the beginning before carrying out his position has been protected by the existence of a denial right, namely the obligation of the Notary to not speak, even in court. This means that a Notary is not allowed to give testimony regarding the making of deeds and documents related to the implementation of Tax Amnesty.



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## Regulation:

- Kitab Undang-Undang Hukum Perdata  
Herzien Inlandsch Reglement (HIR)  
Undang-undang Nomor 5 tahun 1960 Tentang Peraturan Dasar Pokok-Pokok Agraria  
*Undang-undang Nomor 56 tahun 1960* Tentang Penetapan Luas Tanah Pertanian.  
*Undang-Undang Nomor 8 Tahun 1981* Tentang Hukum Acara Pidana  
Undang-Undang Nomor 25 Tahun 2007 Tentang Penanaman Modal  
Undang-Undang Nomor 2 Tahun 2014 Tentang Perubahan Atas Undang-Undang Nomor 30 Tahun 2004 Tentang Jabatan Notaris  
Undang-Undang Nomor 8 Tahun 2010 Tentang Pencegahan dan Pemberantasan Tindak Pidana Pencucian Uang  
Undang-Undang Nomor 11 tahun 2016 Tentang Pengampunan Pajak

**Prohibition of Land Ownership for Citizens of Non Indigenous  
in The Special Region of Yogyakarta**

Shandi Patria Airlangga, F.X. Sumarja, and Sri Sulastuti

**Abstract**

The development of land regulations in Indonesia is very diverse, one of which is in The Special Region of Yogyakarta (DIY). DIY was once a kingdom called the Ngayogyakarta Hadiningrat Sultanate and the Kadipaten Pakualaman (Keraton). Keraton Palace is the center of DIY government led by Sri Sultan Hamengku Buwono as Governor, and Adipati Paku Alam as its deputy. Land regulations in DIY are subject to Law Number 5 of 1960 concerning Basic Agrarian Principles (UUPA). But there is a difference, namely the specialty of DIY which is regulated in Law Number 13 of 2012 concerning the Privileges of The Special Region of Yogyakarta, that Sultan has the right to regulate its own territory. Based on the history of DIY, there were frequent disputes between indigenous Indonesian citizens, with Chinese people who came to Indonesia. The research method used in this paper uses normative research methods, using journals, books, and legislation relating to the specialty of Yogyakarta. After reviewing the results of research from other researchers, found the facts that the dispute was caused by various factors which led to the stipulation of the Instruction of the Deputy Regional Head of DIY Number K.898/I/A/1975 concerning the Uniformity of the Policy for the Granting of Rights to Land to a Non-Native Indonesian Citizen. The instruction contained the prohibition for Indonesian citizens of Chinese descent to have a Property Rights Certificate (SHM) on land in DIY. This caused a reaction from Indonesian citizens of Chinese descent, many of them who sued but never succeeded. The Sultan has reason not to revoke the instruction. The legal politics behind these policies is an effort to increase local revenue (PAD), maintain the economic natures of indigenous people, and protect land which is an important asset for DIY.

**Keywords:** Politics, Law, Non Indigenous, Yogyakarta, Instructions, Chinese

## A. Introduction

Land is essentially the top layer of the earth which is a place where humans live. Initially the land was communally owned by a group of people who lived together. But over time, some people agree to make rules that land can be owned and transferred by individuals with certain limits.

The Republic of Indonesia has long regulated land rights, especially land rights. Article 9 of Law Number 5 of 1960 concerning Basic Regulations on Agrarian Principles (UUPA) regulates that only Indonesian citizens (WNI) have the right to own land rights in Indonesia.

However, there was an instruction from the deputy regional head in a swapraja area, namely The Special Region of Yogyakarta (DIY) which was considered contradictory to the UUPA. That is the Instruction of Deputy Regional Head of DIY Number K.898/I/A/1975 concerning Uniformity of Policy on the Granting of Rights to Land to a Non-Indigenous Indonesian Citizen. In the instruction, it is stipulated that non-native Indonesians, especially ethnic Chinese, are forbidden to own land with the status of ownership rights in DIY, but only to be given rights to land other than property rights.

Juridically, the privilege of Yogyakarta has been recognized in the country of Indonesia, as stipulated in Article 18B paragraph (1) of the 1945 Constitution that the state recognizes and respects regional governments that are specific or special. As a mandate from the article, Law Number 13 of 2012 concerning the Privileges of Special Region of Yogyakarta is stipulated. On that basis, the Sultan has the right to claim and have authority over his land or called the *Sultan Ground* (SG). In Article 1 number 4, regulates that the Ngayogyakarta Hadiningrat Sultanate is a valuable Indonesian cultural heritage. This is what distinguishes DIY from other provinces, that foreigner may not take control more than to damage the culture of the Keraton Royal Palace.

Based on the above background, this paper will discuss about the legal politics behind the prohibition of land ownership for non-native Indonesians in Yogyakarta, especially Chinese ethnicity, so that the problem can be formulated as follows: Why does the DIY local government apply the prohibition on ownership of land to non-native Indonesians, especially ethnic Chinese?

## **B. Methods**

The research method used in this paper uses normative research methods, using books on land law, scientific journals written by other researchers relating to this paper as secondary data, and laws and regulations relating to the special features of The Special Region of Yogyakarta.

## **C. Discussion**

### **1. Kasultanan Ngayogyakarta Hadiningrat**

The Special Region of Yogyakarta (DIY) is a provincial level in Indonesia, precisely in the southern part of Java Island which is a fusion of the Yogyakarta Sultanate and the Paku Alaman Duchy. Before the State of the Republic of Indonesia became independent, DIY already had its own system of government, namely the Kasultanan which was commonly called the autonomous region. The Sultanate was named the Ngayogyakarta Hadiningrat Sultanate and the Kadipaten Pakualaman which was founded by Pangeran Mangkubumi entitled Sri Sultan Hamengku Buwono I (1755) and Prince Notokusumo entitled Adipati Paku Alam I (1813). The Dutch East Indies Government recognized the existence of the sultanate, and made political contracts listed in Staatsblaad Number 47 of 1942.

According to Djuaendah Hasan was supported by Ter Haar<sup>1</sup>, Land law in the UUPA rests on customary law. This proves that DIY which has a strong customary law, still obeys the land regulations contained in the UUPA. Most autonomous regions are agrarian, land is a valuable thing for their people. The king is the only landowner in the royal area, so that only the king has ownership rights to the land, while the people are only loaned out.<sup>2</sup>

Indonesian Proclamation on August 17, 1945, opened a new sheet for Indonesian legal life (*clean state*). After independence, there were approximately 250 autonomous regions in Indonesia whose existence was abolished. Then all the land controlled by the swapraja party changed its name to swapraja land. On September 23, 1960, the Indonesian government enacted Law Number 5 of 1960 concerning the Basic Principles of Agrarian Principles (UUPA), so that all land was controlled by the state.<sup>3</sup>

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<sup>1</sup> Supriadi, *Op.Cit.*, p. 6.

<sup>2</sup> Hendro Prabowo, *Pluralisme Hukum dan Penguasaan Tanah di DIY*, 2.

<sup>3</sup> *Ibid.*

DIY was the only swapraja region that managed to survive during the colonial era to the present, so the Ngayogyakarta Hadiningrat Sultanate still had territory and palace namely the Ngayogyakarta Hadiningrat Palace (Keraton Kingdom), the people and the government bureaucracy which was confirmed as a special area by the center.

Indonesian citizens are native Indonesians and other nationals who are legalized by law as Indonesian citizens. Indonesian citizens have been given privileges, one of which is the property rights (property rights). Since the issuance of the Instruction of the Deputy Regional Head of DIY Number K.898 / I / A / 1975 concerning Uniformity of Policy on the Granting of Rights to Land to a Non-Indigenous Indonesian Citizen, they are not allowed to have a Certificate of Ownership (SHM) on land, but only may be granted land use rights. This was condemned by non-native Indonesians, especially Chinese. Sri Sultan Hamengku Buwono IX argued that the regulation was in accordance with the 1945 Constitution.

Some Indonesian citizens from ethnic Chinese, sued the instructions of the deputy regional head with the following legislation:

- 1) Article 28H paragraph (4) of the 1945 Constitution;
- 2) Law Number 5 of 1960 concerning UUPA;
- 3) Law Number 12 of 2006 concerning Citizenship of the Republic of Indonesia; and
- 4) Law Number 40 of 2008 concerning the Elimination of Racial and Ethnic Discrimination.

Some even sued the President of the Republic of Indonesia No. 26 of 1998 concerning Stopping the Use of Indigenous and Non-Indigenous Terms.

According to Mahfud MD<sup>4</sup>, if there is a discrepancy/contradiction, a legal norm with other legal norms that are higher than the Pancasila hierarchy, then there will be constitutionality and non-alignment. So that the lower legal norms are null and void.

Actually the lawsuit can be overcome with a few points. Article 11 paragraphs (1) and (2) of the UUPA have stipulated that in order to prevent control over life that goes beyond the limits, it is necessary to have policies for national interests in ensuring the protection of the interests of the weak economic group. So, the sultan automatically has a

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<sup>4</sup> Moh. Mahfud MD, et al, 2012, *Prosiding Kongres Pancasila IV: Strategi Pelembagaan Nilai-nilai Pancasila dalam Menegakkan Konstitusionalitas Indonesia*, Yogyakarta: Pusat Studi Pancasila UGM, p. 123.

strong foundation to protect indigenous people with a weak economy in DIY along with the prevention of over-mastery based on the law of the UUPA. Governor's instruction 898/1975 was also a product of false legislation, namely the policy of Sri Sultan Hamengkubuwono IX which was authorized by his representative in order to protect his weak people.<sup>5</sup>

If analogous, this prohibition has a similar value as applied by Indonesia, that foreign nationals may not own land rights in Indonesia. But only given the right to use, the right to lease the building, or the land with the status lease hold.<sup>6</sup>

## **2. A Brief History of the Government of Yogyakarta with Chinese Ethnicity in Indonesia**

Basically in Indonesia there are only 2 (two) types of citizens, namely Indonesian citizens (Indonesian citizens) and foreigners (foreign nationals). Especially in DIY, people often distinguish native Indonesians from non-native Indonesians. The researcher has arrived at the fact finding behind the implementation of the 898/1975 Instruction. Based on the results of the research of other researchers, in DIY not all indigenous Indonesian economy citizens were weak, and not all non-native economy citizens were strong. It can be understood that the DIY government prioritizes indigenous Indonesians compared to non-native Indonesians. It was inseparable from the long series of Chinese ethnic history in DIY in the Dutch colonial era.

*First*, Chinese people have been in Yogyakarta since 1755. At that time the Chinese had good relations with the Javanese people and the Keraton Party. According to Peter Carey<sup>7</sup>, good relations between the Javanese people and the Chinese in DIY, began to decline around the 19th century, which was caused by the involvement of Chinese in the internal conflict of the Palace. Plus when the Chinese volunteered themselves to be instruments of the ruler of an economic policy that strangled the people. The arbitrary toll road tax collection system and the opium trade entrusted to the Chinese caused the relationship with the indigenous people to become increasingly distant. Then there was a rebellion from the Royal Palace, known as Prince Diponegoro. Since that time Prince Diponegoro forbade his troops to get in close contact with the Chinese, because they were considered as enemies of the Javanese people.

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<sup>5</sup> Firdausi Safitri, *Tinjauan Yuridis tentang Hak Kepemilikan Atas Tanah Bagi Masyarakat Tionghoa di Daerah Istimewa Yogyakarta*.

<sup>6</sup> FX. Sumarja, *Larangan Pengasingan Tanah dan Peluang Investasi Asing di Indonesia*.

<sup>7</sup> Budi Susanto, 2003, *Identitas dan Postkolonialitas di Indonesia*, Yogyakarta: Kanisius, p. 73-76.

*Secondly*, some of the economic fields of the Javanese people, at that time were fairly bleak. Bad conditions also hit Indonesian batik traders in Surakarta City. So in 1911 an Islamic Trade Association was formed with the aim of building joint forces to counter the strategies of Chinese traders.<sup>8</sup>

*Third*, the Ngejaman monument is a form of expression of gratitude from the Chinese people to Sri Sultan Hamengku Buwono for being given the choice to be able to live in DIY and get protection from Dutch aggression II. After the incident, the Regional Land Office in DIY could no longer make land title certificates for Indonesian citizens of Chinese descent.

### **3. State of Social and Economic of DIY Community**

Based on empirical data from other studies, it was ascertained that Sri Sultan Hamengku Buwono IX in his position as regional head and king, took over all former Dutch companies in various agriculture based sectors, such as tobacco and sugar cane. Also several companies such as tobacco factories, Madukismo sugar factories, shopping centers, inns, and others.<sup>9</sup> This was done to increase local revenue and maintain the stability of the DIY economy.

Chinese ethnicity in DIY mostly uses building rights for their homes. The grace period for the use of building rights is quite long, which is 30 years, and can still be extended. Of course the use of building rights must be in accordance with the permits of the local land office. That way, you can add local revenue from the costs of the administration of building rights.

The main objective of Instruction 898/1975 is also of course to maintain economic equality for indigenous people whose economies are weak compared to Chinese people who are famous for their foresight in determining the place and strategy of doing business. This rule is also useful to keep DIY land assets from being controlled by foreigners, because some studies have also proven that there are still many violations from internal and external parties. These violations include, among other things, the existence of ethnic Chinese who have certificates of ownership of land in DIY, and the existence of falsification of names on ID cards by bribing a notary who is not responsible for changing the data of the Chinese ethnic so that they can trick land officials.

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<sup>8</sup> Sutrisno Kutoyo, 1997, *Sejarah Daerah Daerah Istimewa Yogyakarta*, Jakarta: Direktorat Jenderal Kebudayaan, p. 277.

<sup>9</sup> Suryanto, Ahmad Djunaedi, dan Sudaryono, *Aspek Budaya dalam Keistimewaan Tata Ruang Kota Yogyakarta*.

#### **D. Conclusion**

Based on the above discussion, it can be concluded that the Instruction of the Deputy Regional Head of DIY Number K.898 / I / A / 1975 concerning Uniformity of Policy on the Granting of Rights to Land to a Non-Indigenous Indonesian Citizen cannot be sued. Article 11 paragraph (1) and (2) of the UUPA, regulates the limitation of control over land and regulates the interests of the weak economic class.

A long history of disputes between indigenous people and Chinese descent has taken place, which has implications for land policy in DIY. Until now Sri Sultan Hamengku Buwono X did not revoke Instruction 898/1975 because it was in accordance with the UUPA and the 1945 Constitution.

Legal politics that occur behind the Instruction, is influenced by juridical, historical, and socio-economic factors. Where the Sultan is worried that there will be economic disparity between indigenous people and ethnic Chinese, so that it has the potential to trigger a split. Residents of Chinese descent are considered experts in business, because from the beginning of their arrival to Indonesia the aim was to trade. Indigenous people's economy must be prioritized, then instructions for Instruction 898/1975 were made to limit the movement of Chinese citizens in doing business in DIY, and to increase local revenue from land loans by non-native Indonesians in Yogyakarta. The regulation was also issued to keep land assets in DIY from being controlled by foreigners.



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**Juridical Review on Human Rights Protection of Indonesian Overseas Workers  
Based on National Law and International Law**

Siti Azizah and Desia Rakhma Banjarani

**Abstract**

Everyone has the right to get a job and livelihood. So it means that the state has a responsibility to provide an opportunity for their citizens to get domestic or overseas job. The problems about labor in Indonesia are regulated in Law Number 37 of 1999 about International Relations which describes the type of protection for Indonesian citizens are working overseas. Based that background, this research discussed about how legal protection efforts for Indonesian workers overseas were affected by the execution of the death penalty. The type of research used normative research, and the data collection method was used an analytical research method that used fact finding research by referring to book, journal, charter agreement, and website.

**Keywords:** Human Rights, Indonesian Workers, Protection.

## **A. Introduction**

Indonesian Overseas Workers (TKI) or often referred as foreign exchange heroes to the state of Indonesia often do not get their rights as a hero; such as their right to get protection, decent wages, proper treatment and even the opportunity to leave for home country. However, their efforts to obtain decent work by go abroad, certainly have to sacrifice many things including time with family in their home country.<sup>1</sup>

Nowadays, the media actually only broadcast the negative news are related to overseas workers. For example, about the number of violence committed by employers against migrant workers, as well as other cases such as migrant workers who are threatened with capital punishment. That was forms the mindset of the Indonesian people that migrant workers are merely hired workers who try their fate overseas by risking their lives, because not necessarily they can return to their homeland in "intact" state. The facts about migrant workers who are threatened with death sentence in other countries would be very worried for some parties, especially the families concerned, the article of death row inmates can only be released from the death penalty if there is a ransom paid in compensation for the victim. One example is the disappointment of the government and the Indonesian people over the execution of death sentence given to SitiZaenab on Tuesday, April 14, 2015, without any prior notice. Siti was sentenced to death since 2001, for grabbing and stabbing her employer's stomach. According to his confession, he was only trying to defend himself from the attempted rape his employer was about to commit. Violent protests from the Indonesian government have also been directed to the Saudi government that was late in providing information prior to the execution.

One of the fundamental problems in facing of Indonesia along its journey to become an independent nation is the problem of unemployment. The existence of the problem is indicates that the available employment in Indonesia is not able to accommodate the labor force explosion. As a result, unemployment is becomes one of the serious problems in the circle of national problems called poverty. In the era of globalization, migration abroad is a common thing done by some Indonesian citizens (WNI) for a particular purpose. Indonesian citizens abroad are among others Indonesian labor (TKI), professional, students, businessmen and religious affairs. There is a tendency of Indonesian non-Indonesian citizens

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<sup>1</sup>Sekapur Sirih. (2007). "Praktek Hukuman Mati di Indonesia". p. 1. Terdapat dalam [https://www.kontras.org/hmati/data/Working%20Paper\\_Hukuman\\_Mati\\_di\\_Indonesia.pdf](https://www.kontras.org/hmati/data/Working%20Paper_Hukuman_Mati_di_Indonesia.pdf). Accessed on 1 Januari 2018, at 12.11 WIB.

who leave overseas not to cause much trouble compared to Indonesian labor, this is due to differences in educational background and economy. In another side, Indonesian labor migration can contribute considerably to the economic development of the country, but the other side, some issues are faced by Indonesian labor migration.

The problem of Indonesian workforce is increasingly prominent is due to the number of Indonesian workers who are willing to work overseas increasingly from year to year, especially since the occurrence of the economic crisis that hit Indonesia. There are at least three key factors affecting the increasing phenomenon of labor migration, namely: first. pull factor, resulting from demographic changes and labor demand by industrialized nations. Second, the push factor, this is related to population problems, unemployment and crisis persuasion. And the third is the existence of networks between countries based on aspects of family, culture and history. One of the main causes of increased labor migration is poverty in the countryside. The International Labor Organization (ILO) data from 2003-2004 notes that migration has not been able to solve the global unemployment rate which currently reaches approximately 580 million people. The problem of Indonesian labor abroad is important for the Government of the Republic of Indonesia, especially the Representative of the Republic of Indonesia abroad, because it is in line with the Preamble of the 1945 Constitution of the fourth paragraph that is to protect the entire nation and the entire Indonesian blood spill.

In addition to the above, based on Law Number 37 Year 1999 about International Relations, it is also mentioned that:

*Article 19: Representatives of the Republic of Indonesia shall be obliged to provide protection, protection and legal assistance to Indonesian citizens and legal entities abroad in accordance with national legislation and international customary law.*

*Article 21: In the event that Indonesian citizens are in real danger, the representatives of the Republic of Indonesia shall be obliged to provide protection, assist and gather them in safe territory and seek to repatriate them to Indonesia at the expense of the state.*

Since the old time, the duty of an ambassador or diplomatic officials was to represent the state in the accreditation country and as a liaison between the governments of both countries. In the country of accreditation, they follow the various developments that occur and report it to the sending country. They also protect citizens and the interests of their countries in the accreditation. In carrying out the duties and functions of protection, which

means an ambassador protecting the personal, property, interests of its citizens abroad. This protection is an authority granted by the International Law to the sending countries, meaning that the sending country may safeguard its citizens residing in the country.

Based on this background, an analysis of "Juridical Review on Human Rights Protection for Indonesian Overseas Workers Based on National Law and International Law" The main issue to be discussed in this paper is how juridical review on human rights protection for Indonesian overseas workers under national law and international law? The research method is used normative law research method with data collection method is used analitative research method. In collecting data in this paper, the author is used fact finding research by referring to journal books, Charter, Agreement, official web, and so on.<sup>2</sup>

## **B. Discussion**

### **1. The Regulation of Legal Protection of By the State For the Overseas Workers**

Everyone has the right to get a job and a decent of living. This phrase illustrates that the state has an obligation to form a state where it provides an opportunity for its citizens to work so as to obtain a decent life. But the slow pace of development in the economic field has resulted in economic disparities between central and regional levels, so that has an impact on people livelihoods, like unemployment are rising, the increasing of poor people, and job field are difficult to find. The slow pace of development in the economic field has resulted in a narrowing of employment opportunities for Indonesians. This is what causes the high poverty rate, in addition, a limited ability and limited fund to be the main trigger of the increase of people to seek the job in other country.

### **2. The Legal Protection by The State For Labor Based on National Regulation**

#### **a. The Colonial Period and The Old Order Government Period (1945-1966)**

In the colonial period, Indonesia's human resources already have the value of expediency for the invaders. The poor Indonesians are employed to build an infrastructure that supports colonizers to colonize Indonesia without being paid and coerced. At that time, there was no protection nor the assistance of the government to protect the Indonesian citizens who were forced to be sent abroad to become coolies and also no assistance from the state to return them to Indonesia in the condition of Indonesia has not reached the independence and there are many independence upheavals in various regions in Indonesia.

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<sup>2</sup>Soerjono Soekanto, *Pengantar Penelitian Hukum*, Jakarta: Penerbit Universitas Indonesia, 2012, p. 9

The entering of the independence of Indonesia, the old order government period is an early history for the establishment of the Ministry of Labor Institutions in the era of Indonesian independence. Through The Government Regulation Number 3 Year 1947 established an agency that takes care of labor issues in Indonesia under the Ministry of Labor. In the Soekarno era, TKI who has worked in other country especially in Malaysia, it still continued. Although the mobility of the population to abroad are not too evolve because the focus of Sukarno's government is still on the early development of a country that has long been occupied by the colonial. In the era of Soekarno, there was no legislation to protect Indonesian workers to working abroad, because the government was still focused on domestic development.

#### **b. The New Order Government Period (1966-1998)**

The beginning of the Development Cabinet IV is turned into the Ministry of Manpower and Transmigration, while the Coporation are established their own ministry. Then the Ministry of Manpower and Transmigration attempts to reduce the delivery of uneducated labor but otherwise their trying to improve educated workers. This is because there are so many Indonesian migrant workers who have sexual harassment, violence, torture, and even returned home because their death. Since 1970, the government has issued Interagency Interdepartmental Policy (AKAD) and Inter-Country Intercourse (AKAN). This expenditure is then outlined in the form of Government Regulation Number 4 Year 1970. This regulation gives authority to the government and private parties to regulate the process of sending migrant workers abroad.

In 1984, a Memorandum of Understanding (MoU) was established between Indonesia and Malaysia on the regulation of migration flows from Indonesia to Malaysia signed in Medan on May 12, 1984 (later known as Medan Agreement), the agreement is implemented by the regulation as well as supervising the flow of labor migration from Indonesia to Malaysia. During the government of Soeharto President, regulations on migrant workers who began to work abroad and began to be structured in the delivery of migrant workers and have begun efforts to improve the ability of migrant workers, so that the Indonesian workers do not just work as a heaver.

#### **c. The Reformation Period**

During the government of Habibie President, Indonesia has issued two policies about labor, there are the Decree of the Minister of Manpower Number 204 of 1999 concerning of

the Placement of Indonesian Overseas Workers and the establishment of social insurance schemes for migrant workers as stipulated in the Ministerial Decree Number 92 of 1998. But in the decision of minister's not much discussed about the issue of protection for Indonesian workers and only focused on issues that are relating to managerial and operational aspects with little offensive protection.

In the government of Gusdur President, Indonesia has released the regulation about the protection to women workers, it is reinforced to provide the protection with the issuance of Presidential Decree Number 109 of 2001 in conjunction with Ministerial Decree Number 053 Year 2001. Through this Presidential Decree, Indonesia government is established a new Directorate in the Department of Foreign Affairs, that is Directorate of Protection of Indonesian Citizens and Legal Entity Indonesia (BHI). Gusdur revoked Law Number 25 Year 1997 about Labor which is eskploitatif regulation, anti union and there is no protection against TKI andGusdur also made the Regulation of the Minister of Manpower Number 150 of 2000 on severance pay to anticipate the impact of the dismissal of workers.

During the government of Megawati President, there was the problem of the illegal workers especially in 2004, so the Presidentof Megawati established the Law Number 39 of 2004 about the Placement and Protection of Indonesian Migrant Workers Abroad (PPTKILN). In addition, the President of Megawati also established the National Agency for the Placement and Protection of Indonesian Migrant Workers (BNP2TKI). However, The Law Number 39 of 2004 only focuses on placement and not many articles that regulate the protection of migrant workers while abroad.

#### **d. The Governement of Susilo BambangYudhoyono**

The high number of migrant workers abroad that is directly proportional to the increasing of unemployment in Indonesia, it is the sign of the Indonesia economic condition in opening of the new domestic job field has not been resolved. The large number of migrants working abroad, especially in Malaysia, is not equipped with the needs of these migrants such as the standard protection for migrants who are working in the destination country.

The period of SBY government is the most period to issue the regulations about migration of TKI, there are (a) Presidential Decree Number 81 of 2006 about the Establishment of BNP2TKI whose operational structure involves various elements of central government agencies related to the services of Indonesian migrant workers, including Kemenlu, Kemenhub, Kementrans, Police, Ministry of Social Affairs, Ministry of National

Education, Ministry of Health, Immigration (Kemenhukam), Sesneg, and others, (b) Inpres Number 6 of 2006 about TKILN Placement and Protection System Reform Policy. This Presidential Instruction was formed by the instruction of SBY on the ministry's line as the output of complaints Indonesian migrant workers in Malaysia and Qatar, (c) Presidential Instruction RI Number 3 on 2006 concerning Investment Climate Policy Package. One point in that regulation is about the removal of Training Center (BLK) from the founding of PPTKIS, (d) Presidential Decree Number 02 of 2007 about the Establishment of BNP2TKI with Jumbuh Hidayat as its Chairman, (e) Regulation of the Minister of Manpower and Transmigration of Indonesia (Permenakertrans). (F) Permenakertrans Number 14 on 2010 which discusses about the separation of responsibilities of Kemnakertras RI as regulator and BNP2TKI as the operational responsibility and (g) Permenakertrans Number 7 on 2010 about TKI Insurance. This regulation is a revision of the previous Permen about insurance in 2008.

### **3. The Legal Protection by The State For Labor Based on International Law**

The legal protection for Indonesian workers, it is not enough by only use Indonesian legislation because the work space of Indonesian workers is abroad. So the government needs to ratified the international conventions, which is related to legal protection for Indonesian workers, so that they can do maximum protection. Indonesia has ratified many international conventions, but there are still emerging problems related to the insecurity of Indonesian migrant workers that working abroad and even more and more complicated problems. This needs to be re-analyzed very closely. Whether the domestic regulations are not in accordance with the development of problems that arise related to the protection of Indonesian labor migrants, or indeed the Indonesian government has not implemented for all the regulations even nationally and internationally about the protection of labor migrants.



Table of International Conventions Ratified by Indonesia

| Number | International Conventions  | ILO Conventions   |
|--------|--|---|
| 1.     | The Universal Declaration of Human Rights of 1948 was ratified in 2000   | ILO Convention Number 29: about Forced Labor 1930, enacted in 1932, ratified in 1950  |
| 2.     | The Convention on the Elimination of All Forms of Racial Discrimination of 1963, was ratified in 1999  | ILO Convention Number 87: about the Freedom of Association and Protection of the Right to Organize In 1948, it was ratified in 1998                   |
| 3.     | The International Convention on Economic, Social and Cultural Rights 1966, was ratified in 2006  | ILO Convention Number 98: about the Right to Organize and the Right to Conferment In 1949, ratified in 1957   |
| 4.     | The International Convention on Civil and Political Rights 1966, was ratified in 2006  | ILO Convention Number 100: Concerning the Equal Remuneration In 1951, ratified in 1957  |
| 5.     | The Convention on the Elimination of All Forms of Discrimination against Women in 1979, ratified in 1984   | ILO Convention Number 105: about Forced Labor on 1957, ratified in 1999   |
| 6.     | The Convention Against Torture and Other Cruel, In Human or Degrading Treatment / Punishment 1984, ratified in 1998  | ILO Convention No.111: about Discrimination in Employment and Occupation on 1958, ratified in 1999  |
| 7.     | The Convention on the Rights of the Child 1990, was ratified in 1990   | ILO Convention Number 138: about the Minimum Age Limit for Labor Allowable Employment of 1973, ratified in 1999                                       |
| 8.     | The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families 1990, entered into force in 2003, ratified in 2012 | ILO Convention Number 144: about the Tripartite Consultation (International Labor Standards) of 1976, ratified in 1990                                |
| 9.     | The United Nations Convention of Against Transnational Organized Crime 2000, was ratified in 2009  | ILO Convention Number 182 about the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor, on 1999, ratified in 2000 |
| 10.    | Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children The "Palermo Protocol" of 2000, was ratified in 2009                  |   |

Source: secondary data, processed 2015

#### 4. Criminal Acts Experienced by Migrant Workers Which Sentenced by Death Penalty in Other Country

In the placement of migrant workers in various countries, there are many cases faced by TKI. The efforts is undertaken by the Indonesia government to handle even to prevent the occurrence of cases faced by TKI has been implemented. The various cases that struck migrant workers working abroad were so heartbreaking. The cases are trafficking, rape, torture and even murder often appear on national and international news. Many Indonesian migrant workers who died or even detained in their countries work because many are theirs become a suspects of killing their employers. Ministry of Foreign Affairs (Kemenlu) revealed that there are 303 Indonesian citizens who are under sentence of death from 1999 until 2011. Of the 303 people, three of them have been executed, two in Saudi Arabia and one in Egypt.<sup>3</sup>

Table of The Largest Country Complaints of Problematic Migrant Workers by Country Placement Period January 1, 2014 – December 31, 2014

| Number | State                | Number of Problematic Migrant Workers |
|--------|----------------------|---------------------------------------|
| 1.     | ArabSaudi            | 1.296                                 |
| 2.     | Malaysia             | 893                                   |
| 3.     | United Arab Emirates | 280                                   |
| 4.     | Taiwan               | 277                                   |
| 5.     | Oman                 | 155                                   |
| 6.     | Singapore            | 154                                   |
| 7.     | Jordan               | 132                                   |
| 8.     | Syria                | 129                                   |
| 9.     | Qatar                | 126                                   |
| 10.    | Hongkong             | 89                                    |

Most of the defendants who were sentenced to death were female workers who worked as domestic servants. This happens because it is not entirely wrong from the TKI. In

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<sup>3</sup>BayuGalih, Daftar 303 TKI yang TerancamEksekusiMati: Arab Saudi AdalahNegaraYang Paling BanyakMemvonis TKI denganHukumanMati, 2011,(online)<http://nasional.news.viva.co.id/news/read/228120-inilah-data-303-tki-terancam-eksekusimati>,diakses tanggal 20 Januari2015

practice, migrant workers who are abroad are still not able to be lifted degree of humanity. So do not be surprised if migrant workers sent overseas just like slaves.<sup>4</sup>

## **5. An Analysis of Indonesian Laws Regulation Related to Legal Protection for Migrant Workers are being Sentenced to Death Abroad in Indonesian Regulations**

### **a. The Scope of Legislations Law Protection for Indonesian Workers**

In the regulatory function, the state intervenes directly by making regulations governing labor, so that employment is no longer part of private law but public law.<sup>5</sup>For that reason, the government regulates the protection of laborers working abroad as outlined in Law Number 13 of 2003 about Manpower, the regulation of Indonesian labor abroad through Law Number 39 of 2004 on the Placement and Protection of Indonesian Migrant Workers in Other Country and then Indonesia ratified the United Nations Convention on the Protection of the Rights of Migrant Workers and Members of Their Families 1990.<sup>6</sup>While in the supervision function, the state must supervise in the field of manpower, this is the supervision in Pre-Placement Period, Placement Period and Post Placement. The function is technically, the government will establish supervision in the field of manpower.<sup>7</sup>

When labor migrants are having difficulties in workong such as that have been described, the state should be obliged to provide protection for workers even the workers are legal and illegal. In the Universal Declaration of Human Rights (UDHR) regulates respect for human rights and freedoms as the foundation of justice, liberty and peace.<sup>8</sup>Referring to the laws and regulations that have been reviewed above, it is known how unclear regulations in providing protection for migrant workers abroad. Some conventions are already ratified, but in the implementation is still proportional to the expected.

### **b. The Forms of the Greatest Legal Protection For Overseas Workers**

The protection of migrant workers is the part of the right to work, and the right to work is a human right. The right is mentioned in Article 23 of the Universal Declaration of Human Rights (UDHR) and Article 6 of the International Covenant on Economic, Social

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<sup>4</sup> Harjoni Desky, (article) Mengembalikan Derajat Kemanusiaan TKI, 2009, p. 3

<sup>5</sup>*Ibid.*

<sup>6</sup>*Ibid.*

<sup>7</sup>*Ibid.*, p. 13

<sup>8</sup>Achie Sudiarti Luhulima, *Hak Perempuan: UU No. 7 Tahun 1984 Tentang Pengesahan Konvensi Mengenai Penghapusan Segala Bentuk Diskriminasi Terhadap Wanita*, Jakarta: Yayasan Obor Indonesia, 2007, p. 38

and Cultural Rights.<sup>9</sup>The form of protection from the government is the issuance of Law Number 39 of 2004 concerning the Placement and Protection of Indonesian Migrant Workers Abroad. However, the weakness of the law is that the protection is still widely. Then Permenakertrans Number 14 Year 2010 about the Implementation of Placement and Protection of TKI. However, in the Permenakertrans the form of protection for TKI is only still in the domain area where the protection is handed over to the provincial office by coordinating with BP3TKI, districts/municipal agencies and relevant government agencies in providing placement and protection services for migrant workers in accordance with their respective duties.<sup>10</sup>The government regulation number 13 of 2013 on the Protection of Indonesian Migrant Workers abroad in this Government Regulation, there are three types of protection provided:

- 1) Pre-placement protection;
- 2) Protection during placement period;
- 3) Post-placement protection.

The establishment of that regulation is can be expected that TKI will get suffice protection at the time of pre-placement, placement and post-placement period. Indonesia has ratified the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families in an effort to protect the labor migrants who are in troubled. The role of PJTKI in placement of TKI to the destination country should also assist in handling the problematic of TKI. In pre-placement, PJTKI has a very large role in determining the placement of prospective migrant workers. Under the Indonesian Migrant Worker Placement and Protection Act, Article 12, Indonesian migrant workers must go through an authorized agency to obtain employment abroad.<sup>11</sup>

### C. Conclusion

The forms of legal protection for Indonesian workers abroad who defend are bound to over limits of legislation in Indonesia. Based on Article 78 paragraph (1) of Law number

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<sup>9</sup>Sri Lestari Rahayu, SitiMuslimah, Sasmini, “Perlindungan HAM PekerjaMigran:KajianNormatifKewajiban Indonesia BerdasarkanPrinsip-Prinsipdan Norma-NormaHukumInternasional”,*The Unpublished Journal of Yustisia*, (2013), p. 115

<sup>10</sup>Pasal 42 Permenakertrans No. 14 Tahun 2010 tentang Pelaksanaan Penempatan danPerlindungan Tenaga KerjaIndonesia

<sup>11</sup>Chapter II in Government Regulation Number 13 of 2013 on the Protection of Indonesian Migrant Workers Abroad in 2011. In Article 18 mentions some rights of migrant workers who are bound by legal matters

39 of 2004, the representatives of the Republic of Indonesia are provide the protection to overseas migrant workers in accordance with international law and customs. Article 17 of Government Regulation number 3 of 2013 on the Protection of Indonesian Migrant Workers abroad are provides a legal assistance such as providing assistance and other assistance and providing diplomatic efforts to negotiate with the families of the victims. Article 18 of the International Convention also mentions the protection of the rights of all migrant workers concerning counseling efforts when migrant workers are involved in criminal cases. There are several other international convention rules that also regulated the protection of Indonesian citizens especially the TKI that have been ratified but not yet made into national law so that the implementation is not contrary to the laws and regulations.

So that the need the judicial review on existing laws related to the protection of the law of migrant workers who are convicted of death due to defending are forced to exceed the limit. Especially the convention that has been ratified, so that the law will be made more clear and decisive to handle the case of migrant workers in trouble.

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## **Building and Empowering Rural Society Through Village Fund**

Ahmad Taufik

### **Abstract**

The objective of this research was to find out the implementation of the village fund since the enactment of the Law number 6 in 2014 concerning Village and the Regulation of Ministry of Villages, Disadvantaged Regions and Transmigration (Permendes) Number 19 in 2017 concerning the Provision of Village Fund Use Priority in 2018 toward the Rural Society Development and Empowerment Management in Way Huwi Village of Jati Agung Sub-district in South Lampung District. In the period of 2015-2018, the total of Village Fund expended by Indonesia through National Income and Expense Budget (APBN) was Rp. 187.68 billion. The national achievements up to 2017 included the construction of rural roads of 123,145 kilometers, 5,220 village markets, 26,070 Village Owned Corporation (BUMDes), 1,927 water reservoirs, 28,091 water irrigation, 38,217 kilometers of drainage, and other achievements in other fields. This was a descriptive qualitative research to find out facts for describing, getting data description systematically, factually and accurately. The objective of this research was to find out the management of Village Fund of Rp. 2,936,311,228 received from 2015 to 2018 for the public development and empowerment. The problems were no even distribution in doing developments as a whole and in the village scaled business activities to improve public incomes, low understanding of village apparatus in implementing the Village Fund based on the priority scale, and less

**Keywords:** Building, Empowering Rural Society, Village Fund

## A. Introduction

Etymologically, the word village (*desa*) comes from Sanskrit word of *deca* and it is similar to *dusun, desi, Negara, negeri, nagaro, negory (nagarom)* which means homeland, land of birth or land of origin, the ancestor land which refers to an integration of life and norms with clear limits.<sup>1</sup>

Historically, the village development in Indonesia had been started in the Dutch colonial government, it could be seen in the publication of *Indische Staatsregeling* and *Regerings Reglement (RR)* in 1854, dan *Inlandsche Gemeente Ordonantie (IGO)* in 1906 which applied for villages in Java and Madura islands. In 1938 another rule also applied, the *Inlandsche Gemeente Ordonantie voor de Buitenge Westen (IGOB)* for villages outside Java island.<sup>2</sup>

The Law number 22 in 1948 concerning the principles or regional Government returned village to have rights in regulating and managing its own household. Law number 1 in 1957 concerning Principles of regional Government provided temporal autonomy with new actions for districts under province, and then the Law number 18 in 1965 provided rights to the traditional village to select the ruler and to have its own properties. The Law number 5 in 1979 concerning Village Government regulated the uniformity of villages in java and it caused the social order for *nagari, gampong, marga* and other types of traditional village order had gone. At the post-reformation era, the Law number 22 in 1999 and the Law number 32 in 2004 concerning Regional Government were enacted and they positioned villages as parts of decentralization and autonomy. The Law number 23 in 2014 concerning Regional government has implementations where rural society is the extension of the higher government level.

The Law number 6 in 2014 concerning Village (the Law of Village) explains that the village and traditional village, or thereafter it is called as village, is an integration of law society having region borders which has authorities to regulate and manage its own affairs,

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<sup>1</sup> Yusnani Hasyimzoem, *Hukum Pemerintahan Daerah*, Rajawali pers, PT. Rajagrafindo Persada, Jakarta, 2017, p. 131

<sup>2</sup>Geliat Negara Mengatur Desa, *Historia.id*, 16 September 2015, <http://historia.id/modern/articles/geliat-negara-mengatur-desa-P4WKj>, (diunduh Pada tanggal 30 Juli 2018)



right of origin, and/or traditional right which are recognized and honored in the government system of Indonesia Unitary State.

According to Bagir Manan, the organization of village government is by means of village forum. The village government is allowed to regulate itself concerning anything dealing with village interest, growth and development for the village household affairs, not coming for handing over, but to grow and develop upon its own initiatives. This autonomous initiative to regulate and manage village interests is the core of village household system.<sup>3</sup>

In the Law of Village in Article 1 number 7 it states that “the village development is an effort to improve life quality and living for as much as the rural society welfare”. There are two approaches according to the Law of Village: “the village to develop” and “developing the village” which are integrated in the village development planning.<sup>4</sup>

In the Government Regulation number 8 in 2016 concerning the second amendment for the Government Regulation number 60 in 2014 concerning the Village Fund coming from National Income and Expense Budget (APBN), which is transferred to Regional Income and Expense Budget (APBD) of district and municipal, the objective of the Village Fund is to realize the inclusive economy growth by more evenly distributing incomes.<sup>5</sup>

In an international conference with a theme of “*Rural Inequalities: evaluating Approaches to Overcome Disparities*” held by *International Fund for Agriculture Development* (IFAD) in Rome in 2 May 2018, the Village Fund became inspiration for other countries to mitigate poverty and to empower rural economy and they were going to replicate what had been done in Indonesia; to develop from rural area.<sup>6</sup>

During 4 years, the Village Fund budget had been expensed by the national government in 2015 was Rp. 20.7 billion and averagely each village received Rp. 280 million. It increased into Rp. 46.98 billion in 2016 and averagely each village received Rp. 628 million. It increased into Rp. 60 billion in 2017 and 2018 and averagely each village received Rp. 800 million.

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<sup>3</sup> Bagir Manan, *Hubungan Antara Pusat dan Daerah Menurut UUD 1945*, Jakarta, Pustaka Sinar Harapan, 1994, p. 164-165

<sup>4</sup>Penjelasan Undang-Undang Republik Indonesia No. 6 Tahun 2014 tentang Desa

<sup>5</sup>Khuswatun Hasanah, Slamet Riyadi, Denok Kurniasih, *Implementasi Kebijakan Dana Desa, IJPA-The Indonesia Journal of Publik Administration*, Volume 3 Nomor 2 Desember 2017, p.14

<sup>6</sup>Keberhasilan Dana Desa di Akui Dunia, *Berita Desa*, 4 Mei 2018, <http://www.berdesa.com/keberhasilan-dana-desa-di-akui-dunia>, (diakses pada tanggal 18 Agustus 2018)

The development outcomes up to 2017 included the construction of rural roads of more than 123,145 kilometers; 37,496 fresh water connections; 18,072 units of early age schools; 5,314 of village birthing clinics; 108,484 facilities for bathing-washing-toilet; 3,106 village markets; 103,405 drainage and irrigation units; 11,424 units of Integrated Health Service Post (*Posyandu*); 28,091 units of water reservoir; and up to 2017 the mitigation of poverty was 17.7 million poor people in 2014 into 17.1 million poor people in 2017 with percentage of poor people 14.09% which decreased into 13.93%.

The objective of this paper was to discuss the implementation of Regulation of Ministry of Villages, Disadvantaged Regions and Transmigration (Permendes) Number 19 in 2017 concerning the Provision of Village Fund Use Priority in 2018 toward the Rural Society Development and Empowerment Management in Way Huwi Village of Jati Agung Sub-district in South Lampung District.

This was a descriptive qualitative research to find out facts for describing, getting data description systematically, factually and accurately. The research subjects referred to the legislative regulations and the facts in the field. According to Peter Mahmud Marzuki, this was a research by approaching the legislative regulations; to study all of legislative regulations and regulations related to the legal issue in the research.<sup>7</sup>

The data sources were primary data coming from the actors and any related parties, and secondary data coming from documents of regulations, planning and reports. Informants were selected with purposive sampling where informants were selected by varying considerations related to the research. Informants were the Village Head as the authority to use the budget and Village Secretary as the program coordinator, Village Representative Board, Village Supervisor, sub-district officials related to the Village Fund, village people as parts of public management and empowerment.

## **B. Research Result and Discussion**

In the National Middle Term Development Plan (RPJMN) in 2015-2019, the target of rural area development is to reduce 26% underdeveloped villages in 2011 into 20% in 2019; reducing underdeveloped villages up to 5000 villages or to make at least 2000 autonomous villages. The use of Village Fund needs to be directed for the mitigation of underdeveloped village to realize the village autonomy.

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<sup>7</sup>Peter Mahmud Marzuki, *Penelitian Hukum*, Prenata Media Grup, Jakarta, 2016, Hlm. 133

The Law number 6 in 2014 concerning Village Fund explains that the implementation of Village Fund includes three ministries; the Ministry of Domestic Affairs, Ministry of Finance, and Ministry of Villages, Disadvantaged Regions and Transmigration. The regional governments is involved to transfer the village fund into the village account.

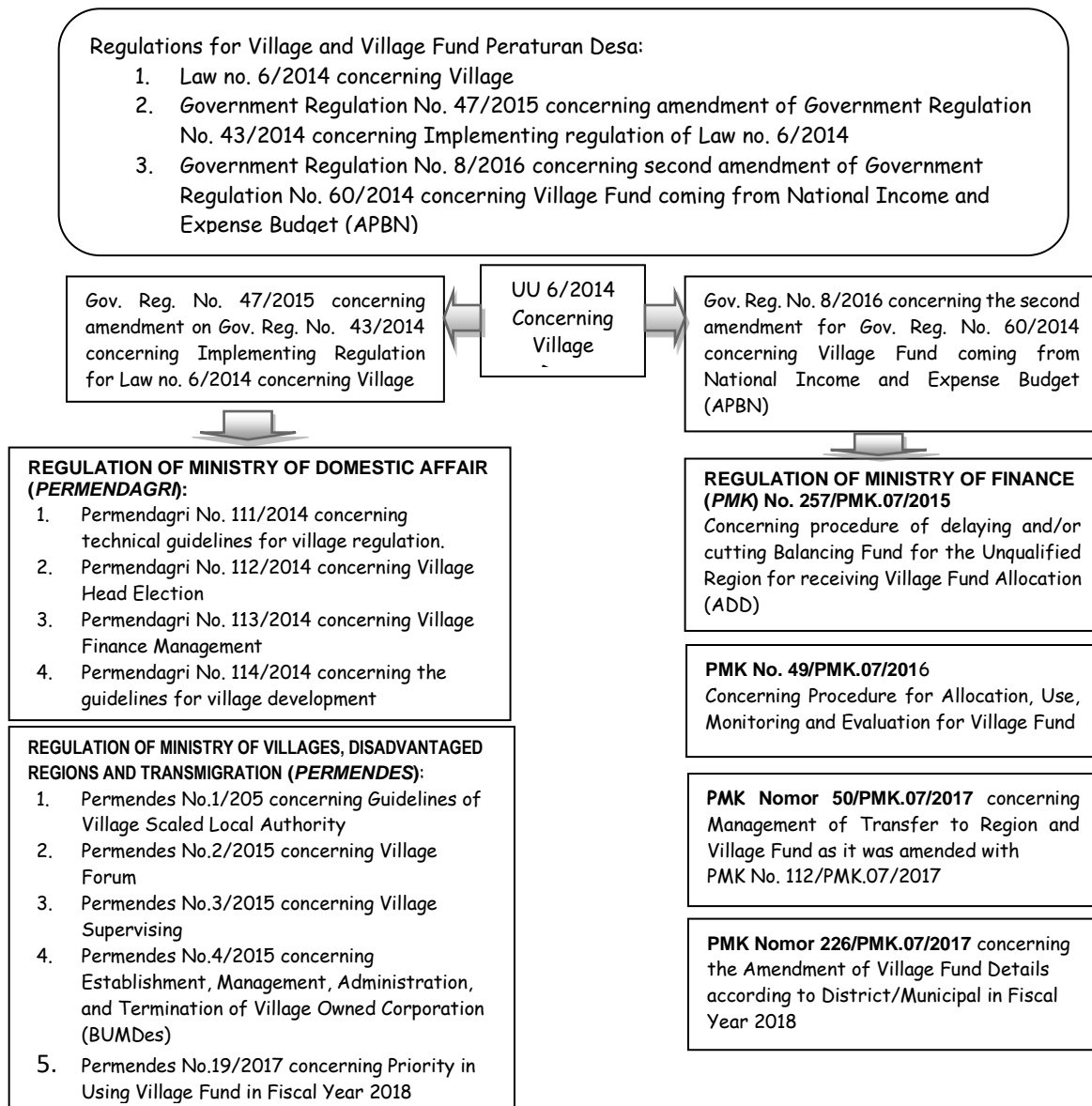
The Ministry of Finance is responsible in budgeting the Village Fund which is provisioned by National Income and Expense Budget (APBN) by provisioning details of village fund from the General State Treasury Account (RKUN) to the General Regional Treasury Account (RKUD), and then from RKUD the village fund is transferred into Village Treasury Account (RKD). The Ministry of Villages, Disadvantaged Regions and Transmigration is responsible for provisioning the general guidelines and priority for the village fund use. The Ministry of Domestic Affairs is responsible in implementing the capacity building for the village apparatus.<sup>8</sup>

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<sup>8</sup>Nyimas Latifah Letty Aziz, *Otonomi Desa dan Efektifitas Dana Desa*. Peneliti Pusat Penelitian Politik, Lembaga Ilmu Pengetahuan Indonesia, Jurnal Penelitian Politik, Volume 13 Nomor 2 Desember 2016, p. 199

## 1. The Legal Base of Village Fund in Indonesia

*Figure 1. Legal Base for Village Fund*



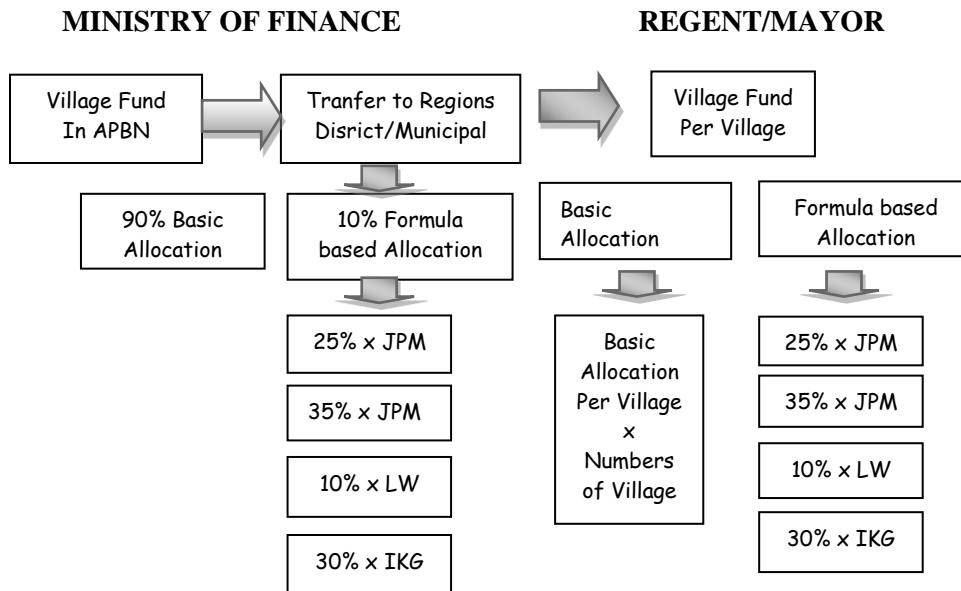
Source: Ministry of Finance, 2017

## 2. Implementation of Village Fund in Development

Way Huwi location geographically is a part of 21 villages in Jati Agung sub district areas of South Lampung district. It is located 4 kilometers it he southern of sub-district center. Way Huwi land width is 26.63 hectares with strategic position having direct borders with Bandar Lampung municipal and it becomes cross sections of roads into East lampung district and Metro municipal. It has borders with Jati Mulyo village in the north, Harapan

Jaya village of Bandar Lampung municipal in the south, Way Kandis village of Bandar Lampung municipal in the west, and PTP Way Galih in the east.<sup>9</sup>

**Figure 2.** the proportion and weight of formulation of Village Fund allocation in National Income and Expense Budget (APBN) in 2015-2017. Proporsi dan bobot formula



Keterangan :  
 JP : Numbers of inhabitants  
 JPM : Numbers of poor people  
 LW : Land Width  
 IKG : index of geographic difficulty

Source: Ministry of Finance, 2017

**Table 1.** Village Fund receipt in 2015-2018 by Way Huwi village of Jati Agung sub-district of South Lampung district

| Village Fund    |                 |                 |   |                   |
|-----------------|-----------------|-----------------|---|-------------------|
| 2015            |                 |                 | 2018  | Total             |
| Rp. 303,746,989 | Rp. 879,058,611 | Rp. 879,987,003 | Rp. 873,520,625<br>(Village Fund in 2018)<br>Rp. 174,704,087<br>(First Stage 20%) | Rp. 2,936,311,228 |

Source: Village Income and Expense Budget in 2015-2018

Based on the Regional Government No. 60 in 2014, the Village Fund is 10% from the National Income and Expense Budget (APBN) from and outside of regional fund

<sup>9</sup>Source: Profile of Way Huwi village, Jati Agung sub district, South Lampung district in 2015.

transfer, and the disbursement is done gradually. According to the Regulation of Minister of Domestic Affairs No. 113 in 2014 concerning the Village Financial Management, the realization of fund disbursement to the village treasury account is signed by the village head and village secretary. The village financial management includes planning, implementation, administration, reporting and accountability.<sup>10</sup>

The village fund transfer in 2015 was done in three stages. The first stage, in April, the village fund was transferred 40%. Second stage, 40% was transferred in August, and 20% was transferred in October at the third stage. In 2015, Way Huwi village received Rp. 303,746,989. This Village Fund was used completely for developments of rural road hardening (*onderlagh*) with 530 M<sup>2</sup> work volume.

In 2016, Village Fund was transferred in two stages; 60% in March and 40% in August. The reason for the change was to ensure whether the village fund transfer was punctual and in proper amount to prevent delays in village fund transfer in the next stage. In 2016, Way Huwi village received Rp.879,058,611. It was used for water irrigation construction in sub-village 1 and sub-village 2 with work volume of 3,658 M<sup>2</sup> and fund village of Rp. 484,354,935.

In 2017, Way Huwi village received Rp.879,987,003. It was used for developing infrastructure in form of paving blocks which cost Rp. 625,027,387. The block paving works in 2017 were divided into three stages. Total volume of block paving work in 2017 was 3,462 M<sup>2</sup>.

According to Regulation of Ministry of Villages, Disadvantaged Regions and Transmigration (Permendes) Number 19 in 2017 concerning the Provision of Village Fund Use Priority in 2018, there were some changes in the direction and policy to transfer Village Fund by perfecting the formula for Village Fund allocation, which was focused to poverty and gap mitigation, to improve village fund management quality and to sharpen the use of village fund for public development and empowerment. The formulation perfection was done by adjusting the proportion of Basic Allocation and Formula-based Allocation and providing affirmation to underdeveloped and very-underdeveloped villages with high rate of poor inhabitants. Village fund reformulation was done by reducing portion which was divided evenly from 90% into 77% from the village fund budget platform, affirmation

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<sup>10</sup>Bambang Suryadi, *Memahami Permendagri tentang Desa*, Lampung, Sai wawai Publishing, cetakan pertama, Februari 2016, Hlm.11

allocation for underdeveloped and very-underdeveloped villages was 3%, improving village fund portion which was divided based on the formula from 10% into 20% and changing weight into prioritizing the poor villages.

**Table 2.** *The changes of village fund details in South Lampung district*  
(in thousand rupiah rupiah)

| District      | Numbers of village | Basic allocation per village | Basic allocation | Affirmation allocation | Formula-based Allocation | Total       |
|---------------|--------------------|------------------------------|------------------|------------------------|--------------------------|-------------|
| South Lampung | 256                | 616,345                      | 157,784,320      | 11,973,724             | 55,761,738               | 225,519,782 |

*Source: Enclosure of Regulation of Minister of Finance of Republic of Indonesia RI No. 226/PMK.07/2017 concerning Changes in Village Fund Details according to District/Municipal in Fiscal Year 2018*

In the Regulation of Minister of Finance No. 225.PMK.07/2017 concerning Management of Transfer to Regions and Village Fund signed by Minister of Finance, Sri Mulyani Indrawati, in 29 December 2017, the program for transferring Village Fund was transferred in three stages.

The first stage transfer was 20% from the budget platform, and the soonest was transferred in the second week of January and no longer than third week of June 2018. The requirements that the village must satisfied were: Village regulation (Perdes) concerning Village Income and Expense Budget (APBDes), Regional Regulation concerning Regional Income and Expense Budget (APBD) and Regulation of Regional head concerning procedures for allocation and details of Village Fund per village. Subsequently the Regional Government (district government) delivered the documents of APBD provisioning stating the budget for Village Fund, Village Allocation Fund (ADD) and tax sharing, and village retribution and delivered the regulation of Regional head concerning the provision of Village Fund details to the State Treasury Office (KPPN), in order to disburse 20% of the first stage fund transfer.

The second transfer was 40% of budget platform, at soonest by the end of March 2018 or no later than the fourth week of June 2018. The requirement was a report of realization for using the first stage budget, and then the regional government delivered realization report of the Village Fund transfer and delivered consolidation report of the previous year.

The third stage transfer of 40% would be transferred at soonest by July 2018 after requirements for the first stage and second stage of Village fund transfers were at least had been 75%, the Village Fund absorption reached 75% and output achievement of 50%.<sup>11</sup>

In 2018 the directions of Village Fund policy are: first, to perfect formula for allocating Village Fund, secondly, to focus poverty and gap mitigation, third, to improve Village Fund management quality, and fourth, to sharpen priority of Village Fund use for public development and empowerment. Way Huwi village in 2018 received Village Fund of Rp.873,520,625. 20% (Rp. 174,704,087) of first stage transfer was received in 3 May 2018 and it was used from May to June 2018. This was used to build paving block in sub-village 9 and 8 with work volume of 1,200 M<sup>2</sup>. The paving block construction was done by involving public around the projects to provide them with direct income.

According to Minister of Finance, the 40% of second stage Village Fund transfer in fiscal year 2018 must be disbursed at soonest by the end of March 2018 and no later than fourth week of June 2018. However, there were some problems dealing with the second village fund disbursement because the accountability report in the first stage transfer of Village Fund must be delivered. The realization of the second stage transfer would be in September by first finishing the accountability report for the first stage transfer of Village Fund, and the realization of budget use and development proposal for the next term. The Village Fund report was delivered to the sub-district government, district government, and village supervisor.<sup>12</sup>

**Table 3:** Volume and absorption of workforce from Village Fund in 2015-2018 (Source: Village Fund Report of Way Huwi village in 2015-2018)

| Project                                   | wage/day                |        |            |                         | Volume                | Total of cost     |
|---|-------------------------|--------|------------|-------------------------|-----------------------|-------------------|
|   | Rp. 75,000              |        | Rp. 90,000 |                         |                       |                   |
|   | Days                    | labors | days       | labors                  |                       |                   |
| Road hardening                            | 24                      | 15     | 24         | 2                       | 530 M <sup>2</sup>    | Rp. 303,746,989   |
| Irrigation                                | 48                      | 10     | 48         | 5                       | 3,658 M <sup>2</sup>  | Rp. 484,354,935   |
| Paving                                    | 48                      | 30     | 48         | 10                      | 12,000 M <sup>2</sup> | Rp. 799,731,474   |
| Total                                     |                         |        |            |                         |                       | Rp. 1,587,833,398 |
| Effect of development in Way Huwi village |                         |        |            |                         |                       |                   |
| Labor absorption                          | 55 persons x Rp. 75,000 |        |            | 17 persons x Rp. 90,000 |                       |                   |
| Income improvement                        | Rp. 171,000,000         |        |            | Rp. 69,000,000          |                       |                   |

<sup>11</sup>Pemerintah, Ubah Skema Penyaluran Dana Desa 2018, Kontan.co.id, 15 Januari 2018, <http://nasional.kontan.co.id/news/pemerintah-ubah-skema-penyalaran-dana-desa->, (downloaded at 1 August 2018)

<sup>12</sup> Interview results with Way Huwi Village Secretary in Thursday, 16 August 2018, 11:30 am.



### **3. Public Development and Empowerment Field**

According to Regulation of Ministry of Villages, Disadvantaged Regions and Transmigration (Permendes) Number 19 in 2017, the public empowerment is directed into planning, implementation and monitoring the village development, capacity development and village public resilience, information system development, supporting basic social service activities, supporting capital and management of productive economy activities, supporting economy effort management, supporting natural environment preservation, developing inter-village cooperation and village cooperation with third parties, supporting and handling natural disasters and extra ordinary events and in other fields.

The public empowerment had just been done in 2016-2017. It included the village apparatus training, training for Village Representative Board, implementation of 10 main program of Family Welfare Development (PKK), activities for Forum for Village Development (MusBangDes), birth control service, maternal and child health service, treasury training, public welfare activities, village contest and youth activities. The public development field included development for public order and security, the republic of Indonesia freedom anniversary activity, the ceremony for religious days, religious gathering and development, development of mosque youth and Qoran reciting contest.

Considering the magnitude of Village Fund expensed by national government, good monitoring with interconnection to related institutions to monitoring and audit owned by the government and law enforcers is required. There are many reports from public concerning deviations and allegations of Village Fund abuse. Up to the end of 2016, Corruption Eradication Commission (KPK) had received 600 reports and 300 of them were followed up.<sup>13</sup>

Monitoring can be done by active participating public in the village forum and public can also report directly the village fund abuse through phone line to 1500040 or by SMS to mobile number 087788990040 or 081288990040 and each report will be followed up in maximum of 2 x 24 hours.<sup>14</sup>

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<sup>13</sup>Laporan Penyelewengan Dana Desa Meningkatkan, Koran Jakarta, 19 May 2017, <http://www.koran-jakarta.com/laporan-penyelengan-dana-desa-meningkat>, (accessed at 2 August 2018)

<sup>14</sup>Pemerintah ajak Masyarakat Awasi Dana Desa, Begini Caranya, Tempo.co, 19 August 2017, <http://bisnis.tempo.co/read/9013/pemerintah-ajak-masyarakat-awasi-dana-desa-begini-caranya>, (accessed at 2 August 2018)

The village fund monitoring can also be done by an application developed by the Board of Development and Finance Monitoring (BPKP) by using option of ‘Village Fund Abuse’ in the Village Financial System (Siskudes) at the “method for good purchasing through an account.”<sup>15</sup>

### **C. Conclusion**

The enactment of the Law No. 6 in 2014 concerning Village was the starting point for village recognition by the state, where before this the village was considered to be a part of regional autonomy which depended on the regional government. The Law of Village provides a full authority to the village in managing finance provided directly by national government through a provisioned budget in the National income and Expense Budget (APBN).

The Law of Village is a government program in Indonesia to provide Village Fund for all villages in Indonesia regions. The objective of village development is to improve life quality and quality of living and to improve rural people welfare by using two approaches: ‘the village to develop’ and ‘developing the village’.

In the international level, the Village Fund received positive appreciation and it became a references and example for other countries for poverty mitigation by empowering public economy and by supporting public life quality based on agriculture. In the last four years, the government has spent a total of Rp. 187.68 billion for all villages in Indonesia regions.

For Way Huwi village of Jati Agung sub district in South Lampung district, during four years, up to the first stage transfer in May 2018, there was Rp. 2,237,496,690 of Village Fund had been managed from a total of Rp.2,936,311,228 in the fiscal year of 2018 including third stage transfer. The development outcomes in Way Huwi villages included road hardening, irrigation improvement, and paving block construction which cost Rp. 1,587,833,398.

The outcomes in public empowerment included trainings for village apparatus and Village Representative Board, empower some people for security and order keepers, funding Qoran Education Schools, paying religious teachers, funding health services (Integrated Health Service Post or Posyandu) and improving Family Welfare Development (PKK), and

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<sup>15</sup>Pantau Dana Desa Bisa Lewat aplikasi, 18 May 2017, <http://nasional.kontan.co.id/news/pantau-dana-desa-bisa-lewat-aplikasi>, (accessed at 2 August 2018)

supporting sport activities. Outcomes in the public development included activities for Freedom of Republic of Indonesia anniversary, religious ceremonies, religious gathering and mosque youth activities, and conducting Qoran reciting contest.

Considering the width of the village areas, the village apparatus must also consider development in other areas. During four years the development was not evenly distributed into all village areas to provide public benefit sharing and distribution.

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**Reconstruction of Protection The Right of Land  
Within Tradition Law Society in the Perspective of Human Right**

Candra Perbawati

**Abstract**

Land was one of very important natural resource, it's meant for human live, wasn't as the function as agriculture production factor only which produce various food materials, moreover within agrarian country such as Indonesia, but also because it's social culture function. Human Rights was such basic right that naturally adhered on human self, universally and eternal, therefore must protected, respected, maintained and wasn't ignored, reduce or seized by any person. It's meant that, any people was have obligation to acknowledge and respecting human rignht of other people. This obligation also prevailed for state and government to respecting, acknowledge, protect, assist and assured their people rights without presence discrimination. Why the right of land wasn't give protection yet concerning society in tradition law? How reconstruction the right of land which able to give right protection concerning tradition law society ? was two problematic within this article. By socio legal approach was used within positivism paradigm will answer the problem in this article. This article was aimed to found why the right of land wasn't give protection yet concerning society tradition law and reconstruct Of Right land which could give protection concerning property right of tradition law society land in the perspective Human Rights.

**Keywords:** The Right of land ,Tradition law Society, Protection,Reconstruction

## **A. Introduction**

Right of land within tradition society law was such basic right, it's meant that the right was really useful as tradition law society existence, that symbolise respectability values, proud of tradition law society. Right accomplishment of land within tradition law society, therefore political right of tradition law society able to grow and develop, it's meant political democracy within tradition law society also able to grow easier. related to right of land within tradition society law, therefore constitution acknowledge, but right about that land must put within social function plan, therefore state have authority to dominate land, therefore occurred balance of in using right and obligation also freedom and responsibility. Based on right to dominate became possess of, therefore in several area occurred authority misapplication by government, empirical reality occurred in several area was still include various weakness within regulation level legal formally, whereas not determined yet regulation specifically which regulate about admiration, accomplishment and protection about land of tradition law society.

Conflict about right of land within tradition law society occurred in Indonesian was showed that Indonesian law wasn't able yet to reach the purpose, it was for justice, usage and certainty, whether from formulation, implementation or maintenance process, if related to Human Right protection by state, justice within conception of Pancasila legal state, there were emphasizing about the importance of balance among right and obligation between freedom and responsibility within Human right maintenance.

Seen the reality above, therefore in develop legal politic of property right concerning tradition law society land was need to harmonised between state legal politic and tradition society law politic, therefore the law became harmonious, accepted by society, not in conflict with law within both national and international level. Law construct was law that give certainty, usage and give justice sense to society.

Initially, UUPA was aimed to place Indonesian state as legal governance expression from Indonesian society. UUPA formulators were committed to modernizing tradition law and made it more compatible with new Indonesian state needs, as one of independence state member in the world. This case was stated distinctly that " prevailing agrarian law from earth, water and air was tradition law, but implementation form that tradition law must compatible with general interest of state within republic unity principle, with Indonesian socialism principle and principle which stated within UUPA and future regulation, as with religion rule

requirement also" (Article 5 UUPA).

Based on land affairs law political history above, was impact on right law political development about right of land tradition law society was one of them were occurred conflict with right of land within tradition law society in Indonesian.

From explanation above, therefore problem submitted within this writing was include two case, it was: (1) Why the right of land wasn't give protection yet concerning society in tradition law? How reconstruction the right of land which able to give right protection concerning tradition law society ?

## **B. Research Method**

Qualitative-constructive method by socio-legal approach was used in this research. Data investigation was followed analysis of Mathew B Miles and A. Michel Huberman model that used to collected, reduced, present data and conclude/verification. Theory used was explained phenomena of research invention was state law theory, legal working theory, Legal System theory, Prismatic Society theory,. Final purpose of this research was make ideal land affairs legal construction which protecting right concerning right of land within tradition law society.

This research including qualitative research tradition by operation study of Post Positivism paradigm<sup>16</sup>. Through qualitative method was possibly the researcher to understand society personally and seen them as theirselves expressed their world view<sup>17</sup>. By qualitative method, research able to found reasons from such social phenomena<sup>18</sup>, our able to found undiscovered meanings behind both subject or object researcher. Within qualitative research tradition wasn't known population, because it's research sample was case study.

Based on stand point above, therefore this research grouped into socio-legal research method<sup>19</sup>. According to Soetandiyo Wignjosoebroto<sup>20</sup> called as not doctrinal approach, it

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<sup>16</sup> Guba and Lincoln detailed within paradigm of post positivism ontology was have realism 'critical' characteristic within modification epistemology, dualism or objective between researcher and researched was both entities that not totally independent. Within modification methodology, experimental. See Elin Indarti, *Ilmu Teori, dan Filsafat, Suatu kalinan Paradigmatik*, Working paper are present within upgrading of *Methodology Undip*, 2015.

<sup>17</sup> Robert Bodgan and Teven J Taylor, *Kualitatif Dasar-Dasar Penelitian*, Terjemahan Khozin Afandi, Usaha Nasional, Surabaya, 1993, page 10

<sup>18</sup> Sanapiah Faisal, Varian-Varian Kontemporer Penelitian Sosial dalam Burhan Bungin (ed) *Metodologi Penelitian Kualitatif*, Rajawali Press, Jakarta, 2001, Page.28

<sup>19</sup> Within socio-legal research there are two aspects of researchs, first legal research, it was permanent research, there were several material within norm context, act regulation and second socio research, meant method and social science theories about law to assist researcher in take analysis. This Approach.

<sup>20</sup> Soetandiyo Wignjosoebroto, *Op.Cit.*, .183

was such study which view law as meaning through interpretation process, it's meant any legal product will determined by interpretation made and agreed by actors related within making process and legal implementation. Law could comprehend by participation, experience and total comprehension (Verstehen). This approach was used to comprehend law within it's society context, it was such method that have non doctrinal characteristic.

Through socio-legal research method, legal object wil interpreted as a part from social subsystem among other social subsystem. Understanding law within it's society context, it's meant there was connection which couldn't separated between law and society, as social basic. According to Tamanaha<sup>21</sup>, relationship of both law and society was have the frame called "the Law-Society Frameworks", that have certain characteristic. That relation could be seen within two basic component. First component include from two main themes, it was idea that stated the law as society characteristic and idea that legal function was maintain social order. Second component was Law society relationship, including three basic elements, it was custom/consent, morality/reason, positive law.

Socio-legal studies using, therefore this research will studied legal principles about land during this time already presence injustice because unable in giving right protection of ulayat land within tradition law society in Mesuji. The reality that land affairs legal principles about right of ulayat land wasn't give right protection of ulayat land within tradition law society based on local wisdom value from making process (in abstracto) or the implementation (inconreto) wasn't run properly.

Social setting in this research was legal society of Mesuji tradition and other parties needed. Within data collection used deep interview method, related observation and document study. Data validation by using Triangulation of resource. Data obtained was analyzed by combining inductive logical (primary data) and deductive logical (secondary data). Data legality technique was analysed by Triangulation of data analysis model from both Mathew B Miles and A. Michel Hubermn.

In determining informant was using purposive, until reach saturation point in the meaning of completeness and validation was enough to analysis interest. In this research, researcher determine main informant previously as the way opening to appoint other people who able to give information related to both problem and research purpose.

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<sup>21</sup> Brian Z. Tamanaha, *Op.cit*, page 1-2, also Suteki, *Kebijakan Tidak Menegakkan Hukum (Non Enforcement of Law) Demi Keadilan Substantif*, Pidato Pengukuhan Guru Besar Ilmu Hukum Fakultas Hukum Undip Tanggal 4 Agustus 2010), page. 41



Main instrument of this research was researcher, because it was indept research. Supporting instrument was script book, rrcording tool, photo camera and others.

In order to obtain data was used literature study method and interview, also documentation. Data analysis used triangulation by using analysis technique of Mathew B. Mileas and A. Michel Huberman models<sup>22</sup>. By three lines, it was data reduction, presentation and conclusion/verification.

### **C. Theory Plan**

Effort to revealed problem include within problem formulation was used several theories as thinking plan which could be used as analysis point. First problem Why the right of land wasn't give protection yet concerning society in tradition law? analysed using legal system theory from Lawrence M Friedman also theory legal working from responsive legal theory of Philipe Nonet and Philip Selznick.. To analyzed second problem “”How reconstruction the right of land which able to give right protection concerning tradition law society. To theory Prismatic from Fred W.RIGGS.

To comprehend legal working was needed usage social sciences in organizw and constructing the law. Therefore in constructing defense legal politic to right regulation of right land within legal society needed assistance from social sciences in order that law as such internalization from developing values within society.

### **D. Discussion**

#### **1. Why the right of land wasn't give protection yet concerning society in tradition law?**

Why the right of land wasn't give protection yet concerning society in tradition law "analyzed by using responsive legal theory of Philipe Nonet and Philip Selznick. Both Philipe Nonet and Philip Selznick ideas on responsive law was tried to including elements and social science influence into legal science influence by using social science strategy. There was social science perspective that must be paid attention to legal working totally, therefore law wasn't only content forcefulness and oppression elements<sup>23</sup>

Social science approach was treat legal experience as something changes and contextual. By responsive law, Nonet and Selznick was promising correct institutional,

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<sup>22</sup> Mathew B.Miler and A,Michel Huberman,*Analisis Data Kualitatif*,Jakarta,UI Press.page.22

<sup>23</sup> Philippe Nonet and Selznick, *Law and Society in Transition; Toward Responsive Law*,*hukum responsip*,Nusa Media, Page .231

eternal and stable. Development model could be rearranged by focus on autonomous law, by refer to conflicts on that stage which rise not only risk repressive type return, but also possibility occurred larger responsibility. Responsive law was oriented on result, purposes which will be reached outside the law. Within responsive law, law arrested was negotiated, not appease through subordination.

Responsive law characteristic was found implicit values which include within regulation and policy. In this legal model, they stated disagreement concerning doctrine they called as basic interpretation and not flexible. By responsive law approach expected could assist to solve the problem occurred in society, therefore law really able to prosperous society of larger interest, not for them who in power.

Responsive HAM legal concept here was, that HAM legal making must process participatively by responsive substance about necessity and social aspiration due to reality of human right in Indonesia.

Participation process was required two things, were:

1. DPR put theirself as society formal political power, and not act self as Act conceceptor, moreover monopolize issued process to evaluation of Act product. Participative process according to Habermas was required to expand political debate within parliament to civil people.

Political decision making wasn't state apparatus and society representative only, but also all of citizen who participate within collective discourse. Sovereignty citizenry wasn't substance which frozen in society representative association, but also include within citizen forum.

2. Required civil society organization became intellectual power to studied and formulated legal need of civil people became intelectual power.

There were several reason why land affairs law the implementation wasn't protecting property right concerning tradition law society land as follows:

- a. Philosophically, land affairs legal politic was Dutch inheritance law (*Agrarischewet*) which used both structure and modern legal culture of west people who prioritising individual interest and oriented on economy interest (profit oriented) and seek enjoyment (hedonism). That land affairs law construction was legal construction which

used both structure and modern legal culture of west people who protecting individual right only. That construction wasn't due to structure and culture of tradition law society, therefore it was imposible to accomodate develop values within communal and social tradition law society.

- b. Substantially, national land affairs legal politic party in it's existence already used HAM perspective but the implementation wasn't yet. Regukation about acknowledgment of tradition law society laws was existed, but in implementation wasn't acknowledge and protected. In fact, within national land affairs legal politic, there were article that arrange about tradition law society existence, it's meant, there were acknowledgement to tradition law socity, but in implementation wasn't acknowledge and protect it. State precisely protecting business usage right owner and ignoring property right of tradition law society land. In fact, the exixtence tradition law society was still acknowledge, therefore must be in it implementation also acknowledge. For example was Forestry Act and Lampung Governoor Regulationin konflik land of Mesuji.
- c. In implementation land affairs legal politic was presence the problem, for example: law couldn't work properly, land affairs legal politic wasn't used HAM perps\ective yet (in it's implementation), therefore damaged tradition law society. Then, national land affairs legal politic in implementation was rise the problem, it was society wasn't prosperous. In reality, state only protecting ellite interest and ignoring tradition law society interest. Tradition law society wasn't free anymore to used the forest, in fact forest was as tradition law society living resource. If tradition law society cultivate forest as cut down the forest, such as engage in farming in the forest, take material in the forest, that action was called as legal violance. Therefore, land affairs legal politic concept in this cae was legal politic of property right concerning tradition law society land, in implementation wasn't made society prosperous.

## **2 Reconstruction the right of land which able to give right protection concerning tradition law society**

According to Lawrence M. Friedman within Legal Theory System<sup>24</sup> was include three basic legal components, it was structure (institutional), substance and culture. In reconstructing national land affairs law must began from those three components. Reconstruction concerning substance and institutional structure was important, because will

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<sup>24</sup> Lawrence M. Friedman, *Legal Theory System, russel, sage poundation,*,page 25

determine that it will function or not within society law.

Local rule making of property right concerning new tradition law as reconstruction both substance and legal institutional structure. Through that Local Rule, protection concerning property right of tradition law society land could be implemented.

There were several reason why land affairs law the implementation wasn't protecting property right concerning tradition law society land as follows:

- a. Philosophically, land affairs legal politic was Dutch inheritance law (Agrarischewet) which used both structure and modern legal culture of west people who prioritising individual interest and oriented on economy interest (profit oriented) and seek enjoyment (hedonism). That land affairs law construction was legal construction which used both structure and modern legal culture of west people who protecting individual right only. That construction wasn't due to structure and culture of tradition law society, therefore it was imposible to accomodate develop values within communal and social tradition law society.
- b. Substantially, national land affairs legal politic party in it's existence already used HAM perspective but the implementation wasn't yet. Regukation about acknowledgment of tradition law society laws was existed, but in implementation wasn't acknowledge and protected. In fact, within national land affairs legal politic, there were article that arrange about tradition law society existence, it's meant, there were acknowledgement to tradition law society, but in implementation wasn't acknowledge and protect it. State precisely protecting business usage right owner and ignoring property right of tradition law society land. In fact, the exixtence tradition law society was still acknowledge, therefore must be in it implementation also acknowledge. For example was Forestry Act and Lampung Governoor Regulationin konflik land of Mesuji.
- c. In implementation land affairs legal politic was presence the problem, for example: law couldn't work properly, land affairs legal politic wasn't used HAM perps\ective yet (in it's implementation), therefore damaged tradition law society. Then, national land affairs legal politic in implementation was rise the problem, it was society wasn't prosperous. In reality, state only protecting ellite interest and ignoring tradition law society interest. Tradition law society wasn't free anymore to used the forest, in fact forest was as tradition law society living resource. If tradition law society cultivate forest as cut down the forest, such as engage in farming in the forest, take material in the forest, that action was called

as legal violance. Therefore, land affairs legal politic concept in this cae was legal politic of property right concerning tradition law society land, in implementation wasn't made society prosperous.

- 1) Construction of legal protection concerning property right of tradition society law that have HAM perspective was used Prismatic Society-FW Riggs concept

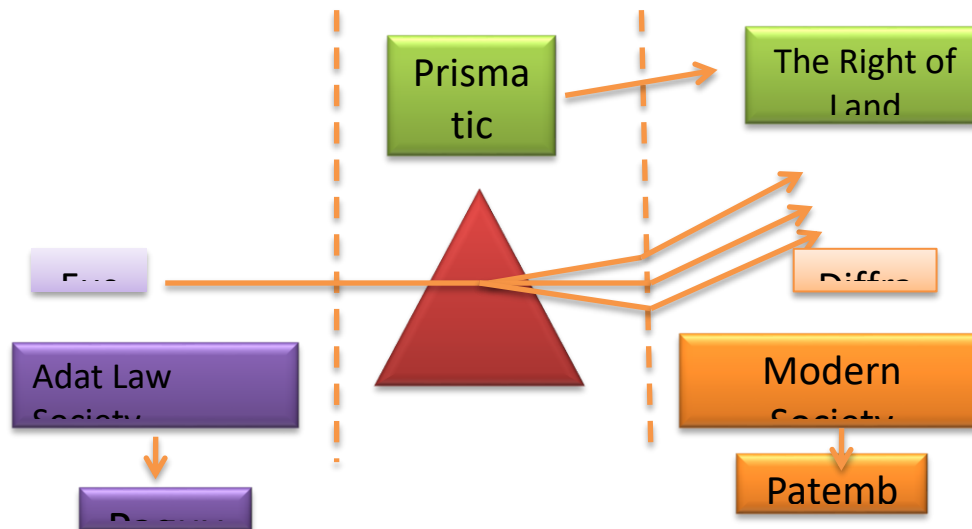
Legal concept of Prismatic Society was legal concept as solution to settle two culture problems include in society.<sup>25</sup> Within society include two cultures, it was which based on (gemainchaft) dan gesellschaft. Legal construction of property right concerning new tradition law society land was harmonious law which combine between national land affairs values and tradition law. Due to Prismatic society concept, that legal construction of property right concerning new tradition law society land was the solution to overcome problem faced.

Legal politic of property right concerning new tradition law was such combination of both modern and tradition values which could leaving out concept dichotomy, it was individual-liberal and communal-social. That context was due to Indonesia law which based on Pancasila, which reject those both concept but take the positive value by acknowledge presence individual interest and all at once put public interest on personal interest. By those new legal politic, expected tradition law society could get the protection, therefore that legal politic could work properly and prosperous society.

### **Reconstruction Of Protection The Right Of Land Within Tradition Law Society In The Perspectif Of Human Right In Prismatic Theory by Fred W. Riggs**

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<sup>25</sup> Fred W, Riggs, *Administration in Developing Countris*, The Theory of Prismatic Socitey, Hought Mifflin Company, Boston, 1964



### C. Conclusion and Suggestion

1. The right of land wasn't give protection yet concerning society in tradition law, this is because :

- a. Philosophically, land affairs legal politic was Dutch inheritance law (Agrarischewet) which used both structure and modern legal culture of west people who prioritising individual interest and oriented on economy interest (profit oriented) and seek enjoyment (hedonism). That land affairs law construction was legal construction which used both structure and modern legal culture of west people who protecting individual right only. That construction wasn't due to structure and culture of tradition law society, therefore it was imposible to accomodate develop values within communal and social tradition law society.
- b. Substantially, national land affairs legal politic party in it's existence already used HAM perspective but the implementation wasn't yet. Regukation about acknowledgment of tradition law society laws was existed, but in implementation wasn't acknowledge and protected. In fact, within national land affairs legal politic, there were article that arrange about tradition law society existence, it's meant, there were acknowledgement to tradition law society, but in implementation wasn't acknowledge and protect it. State precisely protecting business usage right owner and ignoring property right of tradition law society land. In fact, the existence tradition law society was still acknowledge, therefore

must be in its implementation also acknowledge. For example was Forestry Act and Lampung Governor Regulation in conflict of land of Mesuji.

- c. In implementation of land affairs legal politics was present the problem, for example: law couldn't work properly, land affairs legal politics wasn't used from HAM perspective yet (in its implementation), therefore damaged traditional law society. Then, national land affairs legal politics in implementation was rise the problem, it was society wasn't prosperous. In reality, state only protecting elite interest and ignoring traditional law society interest. Traditional law society wasn't free anymore to use the forest, in fact forest was as traditional law society living resource. If traditional law society cultivate forest as cut down the forest, such as engage in farming in the forest, take material in the forest, that action was called as legal violence. Therefore, land affairs legal politics concept in this case was legal politics of property right concerning traditional law society land, in implementation wasn't made society prosperous.

2. Reconstruction of the right of land which able to give right protection concerning traditional law

#### Society

- 1) Construction of legal protection concerning property right of traditional society law that have HAM perspective was used Prismatic Society-FW Riggs concept

Legal concept of Prismatic Society was legal concept as solution to settle two culture problems include in society. Within society include two cultures, it was which based on (*gemeinschaft*) dan *gesellschaft*. Legal construction of property right concerning new traditional law society land was harmonious law which combine between national land affairs values and traditional law. Due to Prismatic society concept, that legal construction of property right concerning new traditional law society land was the solution to overcome problem faced.

Based on conclusion above therefore could deliver recommendation as follows:

Recommendation proposed was as follows:

1. For the law making institution or policy maker whether Government, DPR, DPRD, President and Regulator in Indonesian to take development within regulation, because

existed regulation, regulation wasn't protecting right concerning right land of tradition law societ. therefore both Government and regulator in Indonesian made Local rule of Right protection concerning right land By presence that Local Rule, therefore when there were annoyance concerning right of right land of state tradition law society able to protect because there were include the legal standing. It's meant by presence that local rule, right protection of right land of tradition law society could implemented. For entreprenour or investor should be when will open the area must ask explanation clearly not only to Government who give license but also to tradition law society, therefore land that made business area wasn't made the conflict. When this case implemented properly, therefore will avoid the conflict with society.

2. For rule sactioning institution, in this case have a duty to escort, controlling until pulled out regulation when that rule in conflict. Competent institution, in this case was Court of Institution or Supreme Court, both these institution must have sensitivity to the function as "consitution guardian". Department of Agrarian affairs and Room system, that have important role within legal working of right concerning ulayat land of tradition law society, must brave to applied responsive policy for right protection of right land withintradition law society .



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Brian Z. Tamanaha, *Op.cit*, page 1-2, also Suteki, *Kebijakan Tidak Menegakkan Hukum (Non Enforcement of Law) Demi Keadilan Substantif*, Pidato Pengukuhan Guru Besar Ilmu Hukum Fakultas Hukum Undip Tanggal 4 Agustus 2010),

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## UNDANG-UNDANG

Undang-Undang Dasar NRI 1945

UU No. 5 Tahun 1960, tentang UUPA

UU No. 11 tahun 1967 tentang Pertambangan

UU No. 39 Tahun 1999, tentang Hak Azasi Manusia

UU No. 41 Tahun 1999 tentang Kehutanan

UU No. 23 Tahun 2014 Tentang Pemerintahan Daerah

Kepmen PMNA dan Tata Ruang No. 9 Tahun 2015

## **The Construction of Village Regulation Formulation**

Rudy, Yusnani Hasyimzum, Roro Rukmi W P, and Siti Khoiriah

### **Abstract**

Village development has Become the core of Indonesia new direction of development. Law No. 6 the Year 2014 on Village put the cornerstone of that development. For its purpose, almost 1 billion rupiahs has been allocated to every village in Indonesia. This has been regarded as a new direction since the village had been abandoned for a long time. Since 1979, the government using Law No. 5 the Year 1979 on Village Government has been killing the village very softly by altering the structure and limiting the authority. Thus Spake eliminating the autonomy of the village across Indonesia.

The new direction of development, however, runs slowly as many villages are not ready for the changes. This side, the government has enacted many regulations to govern the management of the village and to bring the village back to its foot by giving its autonomy. One of village autonomy is to formulate the village regulation as its development machine. The need for good regulations is very urgent in this new development since Become village regulation is the foundation of village autonomy. Within the analysis above, this paper is trying to construct current formulation village regulation models by analyzing the legal framework of regulation formulation regimes.

**Keywords:** Construction, Village Regulations, Formulation.

## **A. Introduction**

The village is the origin of the formation of society and government in Indonesia. Long before the nation of Indonesia is formed, or other social groups or other indigenous villages, have become an important part of the archipelago. The village is the pioneer of the democratic system of autonomous and sovereign. Since long, the village has systems and mechanisms of governance and social norms respectively. In the past, the village even has the legal establishment of systems and models of nurturing in the form of ancient law books. In Lampung in the past for example, of the Code of Kuntara Raja Niti and the Book of the Law Cepalo.

Ironically, the village is often overlooked in the development of Indonesia as a whole. Since 1979, the government through Law No. 5 1979 Local Administration has conducted a structured and systematic action to turn off village autonomy. Death of village autonomy has long made the villages in Indonesia asleep for a long time, some even die in the long sleep. This makes the ability of the legal establishment be dead in the villages throughout Indonesia.

It was only in 2014, the State through Law No. 6 2014 has stamped footsteps of decentralization in the village. With this law, the village authorities to regulate and manage the affairs of government, the interests of the local community by community initiatives, the right of the origin, and/or customary rights recognized and respected in the governance system of the Republic of Indonesia.

With this authority, the village had a very broad autonomy and have a support of a very large facility. This is evidenced by the village fund transfer obligation by the central government to every village with a number that can be said to be fantastic. Noted, village funds from year to year is constantly increasing. In 2015, the village fund budget is Rp. 20 trillion in 2016 to Rp. 47 trillion, and in 2017 USD. 60 trillion. Lampung Province itself recorded in the Village Fund received disbursements amounting to 1.9 trillion in 2017.

The problems that arise later, with a very broad autonomy of the village, the village and the local government was shocked and looked unprepared. It is evident from the many irregularities and failures that occur in response to the autonomy of the village. The evaluation results of the Village Fund in 2015 and 2016 were released by the finance ministry showed some irregularities that are common throughout Indonesia. Evaluations indicate that the use of village funds much that violates the rules administratively even lead to corruption.

Whereas the Village Fund can be a weapon of comprehensive development. Swift as the village fund as budget decentralization policy to the rural areas is actually an attempt equitable development and a path for the strengthening of rural empowerment. The goal is absolutely to be defenseless villages so as to create a trickle-down effect of development and rural welfare. Problems village fund only a small fraction of problems in development and rural empowerment. Therefore, development of law as commander in rural development should be given a greater role.

I Nyoman Nurjaya explained that the development of national law has put the domination and discrimination of legal regulations state against local communities, neglect, displacing and even "turn off" the values, principles, and norms of the people (customary law / folk law / indigenous law / custom law). Various laws, such as Act No. 5 of 1979 brought as a result of the loss of rights, loss of control over the village of "property rights", including the right to organize a decent life that was previously sourced on and set in the customary law of community-community.

This statement is reinforced by Zen Zanibar MS, that villagers had had a scope broad authority, financial resources and more independent, in the era before the reforms has been degraded position and authority, so that the dependence of the autonomous regions of higher stood out even likely to reach its nadir, One of the keys to restoring the spirit of village autonomy in order to power is through laws that protect development in the village.

Satjipto Rahardjo, Confirms that many positive roles that can be played by the law, namely:

1. The creation of new legal institutions that expedite and encourage development;
2. Securing the results diperoleh by labor and business;
3. Development of justice for development;
4. Giving legitimacy to these changes;
5. Usage-overhaul law to overhaul;
6. Dispute resolution; Setting power of government.

The role of the law, in this case, are in all stages of development ranging from the planning, implementation of the legislative, decision making in the executive and administrative, drafting arrangements that are civil, even the settlement of disputes.

Researchers Publications Legislation Development Law based Pengayoman found that the process of formation and the substantive law determined by the ability of legal drafter and stakeholders in the development of the law. The involvement of stakeholders and expert multidisciplinary important to get legal models aegis formula.

## **B. Discussion**

### **1. Village Law and Rural Development Prospects**

Historically the village is the origin of the formation of political society and government in Indonesia long before the nation-state is formed. The social structure of a type of village, indigenous peoples and others has become a social institution that has a very important position.

Proclamation of independence held on 17 August 1945. 1945 was passed on August 18, 1945. When approved, the 1945 Constitution has no memory of explanation. Chapter VI, Article 18 only regulates large autonomous regions and autonomous regions and direct small autonomous regions (*zelfbestuurende landschappen*) and the government of the indigenous communities (*volksgemeenschappen* or *Inlandsche gemeente*) is converted to a special autonomous region / asymmetrical.

Mohammad Yamin on May 29, 1945, BPUPKI Assembly speech that Dutch policies that govern rural communities in indirect rule overburden and duty rather than empower them. The Netherlands, which only recognizes indigenous communities (*Inlandsche gemeente*) as a legal entity (*rechtspersoon* or corporation) does not affect the increase in capacity of the institution to enhance the welfare of the village. Therefore, the village must be reformed and rationalized in accordance with the spirit of the age to be a foot rule.

In the same session, Soepomo on 15 July 1945 addressed autonomous regions (*zelfbestuurende lanschappen*) and *volksgemeenschappen* or *dorfgemeinschaften* such as villages in Java, villages in Minangkabau, clans in Palembang, huta and kuria in Tapanuli, gampong in Aceh converted into autonomous regions special small because it has an original arrangement (Yamin, 1971; State Secretariat, 1995).

Moh. Yamin and Supomo idea forth in Article 18. Article 1945 is then followed up by Law No. 22/1948 and Law No. 19/1965. UU no. 22/1948 alter the indigenous community governance (Inlandsche gemeente) became an autonomous region called Village (Small Town). UU no. 19/1965 change Inlandsche gemeente be based autonomous indigenous region called Desapraja.

Article 18 later amended to become Article 18, 18A, 18B. Article 18, 18A, and 18B paragraph (1) governs the autonomous regional government of regular and non-regular government of the autonomous regions / asymmetrical. The regular autonomous region consisting of autonomous regional administration of provincial and district/city. The local government non-regular / asymmetrical consist of a special autonomous regional administration and special autonomous regional administration. As for Article 18B (2) organize, the State recognizes and respects units of indigenous and tribal peoples who are still alive. Customary law community unit instead of the village government.

Meanwhile, the village is set in the Act No. Law No. 5/1979 Juncto Law No. 22/1999 Juncto Law No. 32/2004 Juncto 6/2014. This village is a state organization formed by states, not the formation of indigenous customary institutions. So, country village formed under Law No. Law No. 5/1979 Juncto Law No. 22/1999 Juncto Law No. 32/2004 Juncto 6/2014 has nothing to do with the unity of indigenous peoples. Customary law community unit described in Law No. 41/1999, UU no. 18/2004, UU no. 32/2009, UU no. 21/2001, And the Decision of the Constitutional, ie organic community that is bound and abide by customary law. Characteristics are members of the community has the feeling of a group (in-group feeling), indigenous governance institutions, indigenous objects, customary law norms, and specific area as shelter and livelihoods. The concept of customary law community unit together with the concept of indigenous peoples in the United Nations Declaration on the Rights of Indigenous Peoples in 2007.

Laws that regulate a special set of the latest village now has none. The government has enacted Law No. 6 of 2014 on the Village (Village Law). Interest enactment village setting in this Act is a further elaboration of the provisions referred to in Article 18 paragraph (7) and Article 18B (2) of the Constitution of the Republic of Indonesia Year 1945, namely:

- a. give recognition and respect for the existing village with diversity before and after the formation of the Republic of Indonesia;

- b. provide clarity and legal certainty on the status of the village in the constitutional system of the Republic of Indonesia in order to realize justice for all Indonesian people;
- c. preserve and promote the customs, traditions, and culture of the village;
- d. encouraging initiative, movement, and the participation of the village community to the development potential and assets together for the welfare of the village;
- e. Village Government establish a professional, efficient and effective, transparent and accountable;
- f. improve public services for the people of the village in order to accelerate the realization of the general welfare;
- g. increase social resilience village culture in order to realize the village communities are able to maintain social cohesion as part of national security;
- h. improve the economy of the village community and address the disparity of national development; and
- i. strengthen the village community as a subject of development.

The preamble of the Act confirms the enactment of the Law Rural background with the words "... in the course of constitution of the Republic of Indonesia, the Village has evolved in various forms that need to be protected and empowered in order to be powerful, advanced, independent, and democratic so as to create a solid foundation in implementing governance and development towards a just, prosperous, and prosper "

The village that has grown need protection and empowerment so that it becomes:

- a. Strong village;
- b. Advanced villages;
- c. Independent village; and
- d. Democratic village.

The implications of the establishment of the village with such properties are expected to be a solid foundation in implementing governance and development towards a just, prosperous, and prosper. Strong impression that can be seen from consideration in the formation of the Village Law is the desire of countries to establish institutions more advanced villages, protecting, and nurturing.

The village authority includes:

- a. authorized under the right origin;
- b. Village-scale local authority;
- c. authority assigned by the Government, the Provincial Government, or the Government of Regency / City; and
- d. other powers assigned by the Government, the Provincial Government, or the Government of Regency / City in accordance with the provisions of the legislation.

In the village of the new regulatory regime. Namely, Act No. 6 of 2014 on the village found a conception of recognition on village autonomy embodied in village-scale local authority arrangements contained in the provisions of Article 19. Then, the recognition of village autonomy is then able to be key to the village to implement development.

The exercise of authority by right of the origin and village-scale local authority as referred to in Article 19 letters a and b are set and maintained by the village.

The provisions of article 20 further strengthens the conception of village autonomy, due to the implementation of local authority-scale village fully in the hands of the village without having to make a report hierarchically to the district as well as the higher government, as reflected in the regulatory regime prior to Act No. 6 of 2014 on The village passed.

Meanwhile, the Government Regulation No. 47 of 2015 on the amendment of Government Regulation No. 43 the Year 2014 concerning the Implementation Regulations of Law No. 6 of 2014 on the village of Desa Authority ruled that Article include:

- a. authorized under the right origin;
- b. Village-scale local authority;
- c. authority assigned by the government, provincial government, or local government district/city; and
- d. other powers assigned by the government, provincial government, or local government district/city in accordance with the provisions of the legislation.

The village authority is based on the right of origin as referred to in Article 33 letter the least consist of:

- a. a system of indigenous organizations;



- b. institution building society;
- c. fostering institutions and customary laws;
- d. Rural land management cash; and
- e. Rural community development role.

While the local authority of the village scale as referred to in Article 33 letter b at least consist of the authority:

- a. boat moorings management;
- b. The village market management;
- c. management of public baths;
- d. management of irrigation networks;
- e. The village community settlement environmental management;
- f. development of public health and management of integrated health posts;
- g. development and cultivation of art galleries and learning;
- h. management of village libraries and reading centers;
- i. bombings Village;
- j. Village-scale water management; and
- k. Rural road construction between settlements to agricultural areas.

- (1) In addition to the authority referred to in paragraph (1) and (2), the minister who held government affairs in the field of domestic governance specifies the type of village authority in accordance with the circumstances, conditions and local needs.

Government Regulation (PP) No. 47 the Year 2015 on the Amendment Regulation No. 43 of 2014 provides elaboration on village autonomy embodied in the local authority of the village scale.

Technical level, the Regulation of the Minister of Rural, Rural Development and the Transmigration Republic of Indonesia Number 1 Year 2015 on Guidelines for the Authority Based Origins Rights and the Local Authority Village Scale set that scale local authority of the village include:

- a. Rural areas of government,
- b. Rural development;
- c. The village community; and
- d. The village community empowerment.

Village autonomy in the form of village-scale local authority is divided into four categories. The village-scale local authority in the field of village government include the following:

- a. determination and demarcation Village;
- b. administrative and information systems development Village;
- c. spatial development and social map of the village;
- d. labor data collection and classification of the village;
- e. working population census on agriculture and non-agricultural sectors;
- f. population census according to the number of working-age population, labor force, job seekers, and the labor force participation rate;
- g. data collection on population aged 15 years and over who worked by employment type of work and employment status;
- h. data collection working for population abroad;
- i. establishment of village government organizations;
- j. the establishment of the Village Consultative Body
- k. establishment of village officials;
- l. BUM determination Village;
- m. APBDesa determination;
- n. establishment of village regulations;
- o. establishment of cooperation between the village;
- p. licensing the use of the convention center or village hall;
- q. Village potency data;
- r. granting permission management rights over village land;

- s. Village determination in an emergency such as an occurrence of disasters, conflict, food insecurity, disease, disorder and other exceptional events in the scale of the village;
- t. Village records management; and
- u. the establishment of security posts and other preparedness posts in accordance with the needs and social conditions of the villagers.

The village-scale local authority in the fields of village development as referred to in Article 8 b letter:

- a. A village of basic services;
- b. Rural infrastructure;
- c. Local economic development of the village; and
- d. utilization of natural resources and the environment Village.

The village-scale local authority in the field of infrastructure the village as referred to in Article 10 letter b include:

- a. development and maintenance of office and village hall;
- b. Rural road construction and maintenance;
- c. construction and maintenance of farm roads;
- d. construction and maintenance of village ponds;
- e. development of new and renewable energy;
- f. construction and maintenance of places of worship;
- g. The village cemetery management and ruins;
- h. development and maintenance of environmental sanitation;
- i. development and management of large-scale clean water Village;
- j. development and maintenance of tertiary irrigation;
- k. construction and maintenance of village courts;
- l. construction and maintenance of village parks;
- m. development and maintenance as well as channel management for aquaculture; and

n. the development of production facilities in the village.

The village-scale local authority areas of local economic development of the village as referred to in Article 10 letter c include the following:

- a. development and management of village markets and stalls Village;
- b. development and management of the fish auction belonged to the village;
- c. The village-based micro-enterprise development;
- d. utilization of village-based microfinance;
- e. development and management of fish kerambajaring buoyancy and charts;
- f. development and management of barns and determination of village food reserves;
- g. determination leading commodity farming and fishing village;
- h. implementation arrangements pest and diseases in an integrated agriculture and fisheries;
- i. determination of the type of fertilizer and organic feed for agriculture and fisheries;
- j. development of local seed;
- k. collectively livestock development;
- l. development and management of energy-independent;
- m. BUM establishment and management of the Village;
- n. development and management of boat moorings;
- o. pasture management;
- p. Rural tourism development beyond tourism development master plan of the district/city;
- q. management of fish breeding centers;
- r. the development of appropriate technology for the processing of agricultural and fishery products; and
- s. development of agricultural production systems that rely on resources, institutional and local culture.

especially agro-tourism business activities.

## **2. Regulation of the village as a Tool for Development**

After nearly seventy years of independence, the Republic of Indonesia now has a law that specifically regulates the village government administration after passage of Act No. 6 of 2014 on the village on January 15, 2014. One very important part of the Law on the Village is the setting of the Village Regulations. The existence of Village Regulations now has a clear legal basis and strong.

Act No. 6 of 2014 About the village Village Regulations stipulates that the legislation is set by the Head of Village along Village Consultative Body. This rule applies in particular rural areas and is a further elaboration of the legislation which is higher by taking into account the social and cultural conditions of local villagers. Therefore, the Village Regulations prohibited contrary to public interest and/or legislation are higher. Society has the right to provide input orally or in writing or discussion to prepare a draft Regulation village.

Village Regulations specifically set out in Article 69 governing the provision of the following conditions:

- a. Type of regulation in the village consists of a village regulation, together with the village chief rules, and regulations of the chief.
- b. Village Regulations prohibited contrary to public interest and/or laws and regulations are higher.
- c. Village regulations set by the Village Head as discussed and agreed on Village Consultative Body.
- d. The draft Regulation of the village on the village budget, levies, layout, and organization of village government must obtain an evaluation of the Regent / Mayor before setting into village regulations.
- e. The draft Regulation shall be consulted to the community village Village.
- f. Rural communities have the right to provide input to the draft Regulation of the village.
- g. Village regulations and rules promulgated in the Gazette of the village chief and the village secretary village Village News.

- h. In the implementation of village regulations referred to in paragraph (1), the village head as a village chief Regulation establishes rules of procedure.

In particular, Article 26 paragraph (2) d of the Law on Rural stipulates that "the mayor is authorized to determine Village Regulations. Then Article 55 letter a Law on the village set that has the function Village Consultative Body "to discuss and agree with draft Regulation village together". Furthermore, under Article 69 of the Law on the Village that "Rule Type village consists of Village Regulations, together with the village chief rules, and regulations of the Village Head". Also provided for in Article 69 that "The draft Regulation shall be consulted to the community village Village" and "Rural communities have the right to provide input to the Draft Regulation of the village". This indicates that the formation of Village Regulation holds the principle of participatory and responsive as it involves the community in the process of formation.

At the macro level, the ability of the village and the community in building laws that underpin planning and implementation is very minimal. Discussions with many heads of villages, including the village head winner of the national village at findings that the village head and the village has a minimal knowledge in terms of the formation of village regulations. This could lead to potential legal violations and failure to achieve widespread rural development that protect and nurture.

Why is the law of development? The answer is none other than the law and other activities that have a relationship interrelated to create a protective and nurturing development. Amartya Sen, in his work is phenomenal stressed that the development of the legal sector will impact the general development so that the legal reform and the development of legal institutions is the key to accelerated development. Therefore, the Act village with various arrangements has the potential to reduce poverty, improve public health and social inequality through the mechanism of community empowerment.

Moreover, because of the use of village funds as the backbone of rural development must be preceded by the establishment of regulations and preparation of village development plans so that it can be measured. Failure and incompetence in the preparation of legal documents and documents of development planning have led to the failure of development in the village as a whole.

The success of rural development in the framework of regional autonomy as a national strategic issue then rely on the strength of accountability and the power of the

powerless rural communities. Therefore, community development which is supported by law enforcement in the countryside becomes an important key to the success of the rural development. The village needs to be legislation that is good, and the fact that the village does not have Traffic shaping regulations and the development of document ignited researchers to think about the legal development models is right for the village. At this point investigators then offer legal development model shelter in the village as a model village protection and empowerment.

Legal development in this study is defined as the development of improvement strategies village regulations both from the aspect of process and substance. In the aspect of the process, which need attention are planning the construction of village regulations systematic and synchronous, transparency and stakeholder involvement in the establishment of laws and regulations, including models and their implications for the formulation of norms of justice and protection. While the substance aspect is to make sure that the village regulation can be tools of social engineering for the success of rural development in accordance with the characteristics of their respective villages. The main focus is on how villagers could take more of a role in producing the law that would regulate, protect, and nurture herself.

Therefore, the research team consists of researchers from academia multidisciplinary legal, academic sociology of law, academic medical health, and academia rural areas. It is the mandate of the model law itself requires the aegis of forming multidisciplinary and law to work with multiple stakeholders.

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## **Urgent Construction of Indigenous Village Regulation in Indonesia**

Yulia Neta, Rudi Wijaya, and Tia Nurhawa

### **Abstract**

Discourses on indigenous law and its related aspects in Indonesia have experienced long dynamics. The provisions of the Indonesian Constitution itself have mandated the state to acknowledge and respect the unity of indigenous and tribal peoples in Indonesia under certain conditions. Practically, those acknowledgement and respect were regulated by several laws; including Law No. 6 of 2014 on Villages. The spirit of acknowledging rights of village origin, either actualized by recognizing another type of village which is the traditional village. In the event of reviewing, provisions on indigenous villages in Law No. 6 of 2014 on Villages, it means to strengthen the status and position of indigenous peoples. Using the dogmatic normative legal research method, this paper seeks to elaborate the contemporary construction of indigenous village regulation in Indonesia along with the problems encountered. The results of this study at least give the conclusion that; firstly, the indigenous village is a manifestation of the rights of the origin of rural communities which is inhabited by indigenous peoples, thereby it is strengthening the position of indigenous peoples. Secondly, the authority of indigenous village regulation, which is the joint responsibility between the Government, Provincial and Regency/Municipal Governments, is concentrated on Regency/Municipal Government. Thirdly, the main problem faced in indigenous village regulation is the unclear acknowledgment mechanism of indigenous peoples, because of their scattered regulation in several sectoral laws.

**Keywords:** Indigenuous Village, Indigenous People

## A. Introduction

The flow of democratization in Indonesia which is politically marked by the fall of President Soeharto's government (in Indonesia known as New Order) now has been strengthened in several aspects, one of which is the village administration. If at the beginning of the amendment to the Indonesian Constitution, the aspect of democratization was directed at the implementation of general elections and the strengthening of regional autonomy, now the aspect of democratization had arrived at the village level.<sup>1</sup>

Law No. 6 of 2014 on Villages (here in and after will be called UU Desa) which was ratified and promulgated on January 15, 2014 along with various juridical-technical implementation regulations has led to a complex Village construction. The division of authority which is at least spread to the Ministry of the Interior and the Ministry of Villages, each of which raises its own paradigm in giving positions to the village.

Etymologically, the word “desa” comes from Sanskrit, deca, which means homeland, land of origin, or birthplace. The definition of the village is then poured into the Village Law as a legal community unit that has a territorial boundary that is authorized to regulate and manage government affairs of the interests of the local community based on community initiatives, rights of origin, and / or traditional rights that are recognized and respected in the Unitary State government system Republic of Indonesia.<sup>2</sup> Reading the text of the definition can also be described that the village - in this case the village government has all authority because it basically has a "village autonomy".<sup>3</sup>

One of the monumental arrangements in the regulation in UU Desa is regarding indigenous village. In the UU Desa, indigenous village was placed as a term parallel to the village. Indigenous village are no longer and not just a form of status characterized by sub-variants of the village, but rather a separate form that is aligned with the term village. In this context, basically the recognition of the origin rights of indigenous people as one of the absolute conditions of this indigenous village is recognized by the government.

Using the method of writing normative law, this paper seeks to narrate the main arrangements regarding Indigenous Village regulated in the Village Law. Through the narrative, it can be found the construction of traditional village arrangements in Indonesia as well as the problems faced in the effort to implement the regulation regarding the indigenous village.

## B. Analysis

### 1. The Indigenous Village and Indigenous People

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<sup>1</sup>This is what led to the term village autonomy, which by many legal scholars was seen as not or outside regional autonomy.

<sup>2</sup>Armen Yasir, 2017, *Hukum Pemerintahan Desa*, Bandar Lampung:Zam-Zam Tower. p. 13.

<sup>3</sup>Village Autonomy in Indonesia has experienced ups and downs. As for now, village autonomy has returned and strengthened many things, especially the recognition of the rights of origin which had been lost at the time of the previous law. The previous Village Law placed the village as a government unit with rights which were left over from regional autonomy. For more information in Armen Yasir, *Hukum Pemerintahan Desa*, *Ibid*, p. 25-32.

It has been mentioned earlier if the traditional village is defined as parallel as the village. However, UU Desa still provides some special provisions.<sup>4</sup> In principle, this particular provision is one of the tribute for traditional villages which has the characteristics and also other special necessary.

The authority that given by UU Desa to organize this Traditional Village is tiered to the government and regional governments both provincial and district / city. In this case, the central government will be the regulator that determines general policies related to this traditional village. The product that will be issued is the legislation that underlies all the legal rules under it, including local law products. Slightly different from the region, if you look at the indigenous people (which will be discussed later) as its main embryo, in this case the differences of characteristics and necessary between regions will made different perspectives in regulating traditional villages as a form of strengthening the status of indigenous peoples.

When looking at Article 97 of UU Desa, it will specified clearly that indigenous people are the main embryo of the existence of Indigenous Village. Article 97 requires indigenous people as the main provision that cannot be eliminated at all. The three provisions specified by this article are about indigenous peoples. It means, without the existence of indigenous people, there is no traditional village.

In more complete terms, the existence of indigenous people as the main provision of Indigenous Village itself is faced with certain barriers that is indigenous people are actually still alive, are seen in accordance with the development of society, and also accordance with the principles of the Unitary Republic of Indonesia. The norm is very identical to the norm of Article 18B paragraph (2) Indonesian Constitution, which contains regulations concerning the responsibility of the state to recognize and tribute the unity of indigenous people.

Further paragraph Article 96 paragraph (2) describes each component of each barrier above. Indigenous people are considered to be alive if they have territories and at least have a community whose citizens have a shared feeling in the group, indigenous governance institutions, assets and / or traditional objects, and also set of customary law norms. If one of these components is not fulfilled, then the indigenous people is not exist.

Regarding conformity with the development of society, there is a paradigm that places indigenous people as subordinate entities of the community. It means, the indigenous people are seen as one form of society, which stated to be indigenous people it needs to go through a process of recognition. Facts that are known together about the population of

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<sup>4</sup>This Special Provision of Indigenous Villages is regulated in Chapter XIII which consists of Article 96 to Article 111 of the Village Law.

indigenous people are certainly not as many as modern society will be placing indigenous people on the marginalized society side. Back to discuss about conformity with the development of society, UU Desa requires that the existence of indigenous people had to be recognized based on the applicable law, in this case general law or sectoral law, as well as traditional rights are recognized by the indigenous people concerned and the wider community, and also its not contrary to human rights.

Furthermore, the principle of NKRI, indigenous people cannot threaten the sovereignty and integrity of the Republic of Indonesia and the substance of their customary law norms does not conflict with the provisions of the law. Indonesia's previous experience has provided the fact that several groups in the region tried to separate themselves from the Unitary Republic of Indonesia, which in this case could in the future be in the name of indigenous people. This is what needs to be avoided to give recognition to indigenous people that are not in accordance with the principles of the Republic of Indonesia. These three things are the main requirements for the establishment of indigenous village.

If all three barriers are fulfilled, then custom can be formed. Establishment of traditional villages with all their possibilities, in this case stipulated by Regency / City Regional Regulations.<sup>5</sup> The picture of the regulation regarding the obligations of the district / city regional government has indicated that the regency / city government has a more intensive role with the villages and the future indigenous village to be formed. This is reinforced by the obligation to facilitate the implementation of the incorporation of indigenous village as stipulated in Article 99 paragraph (2), the transfer of the wealth of indigenous village that become kelurahan in Article 100 paragraph (2), the division of authority for indigenous village management in Article 101 of UU Desa.

Regarding the authority of the traditional village, Article 103 of the Village Law has normatively specified what the indigenous village authority is. Indigenous village Authority based on the rights of origin includes:

- b. regulation and implementation of government based on the original order;*
- c. regulation and management of ulayat or customary territories;*
- d. preservation of the social and cultural values of indigenous village;*
- e. settlement of customary disputes based on customary law in force in the indigenous village in an area that is in line with the principles of human rights by prioritizing settlement by deliberation;*
- f. organizing a peace trial for the indigenous village court in accordance with the provisions of the law;*

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<sup>5</sup>Article 98 of UU Desa.

- g. *the maintenance of the peace and order of the Indigenous Village based on customary law in force in the Adat Village; and*
- h. *development of customary law life in accordance with the socio-cultural conditions of the indigenous village community.*

The above authorities are the authority that originates from the right of origin of the indigenous village. Beyond that, there is still the authority of indigenous villages in the status level as a village, as well as village authority given by other laws and regulations.

## **2. Indigenous Village Arrangement**

The paradigm used in traditional villages in the UU Desa is to view indigenous village as village entities that have different characteristics from the village in general. Traditional villages are seen as village entities that have traditional influences on the local government system, management of local resources, and social and cultural life. However, it should be noted that the indigenous village is not placed as a sub-variant of the village, but rather becomes a typology that is parallel to the understanding of the village itself.<sup>6</sup> Confirmation of this can be found again in article 6, which expressly states that the village consists of indigenous villages and villages.

Another important thing that has implications for indigenous villages is regarding village management. The UU Desa grants authority to the Government, Provincial Governments, and Regency / City Regional Governments in conducting village management.<sup>7</sup> The intended village arrangement is the formation, deletion, merger, status change, and determination of the village. The paradigm and construction of the village's arrangement of indigenous villages has various logical consequences, namely:

1. *one or several villages are designated as indigenous villages,*
2. *more than one village is designated as one indigenous village,*
3. *one indigenous village is divided into more than one indigenous village,*
4. *one indigenous village is divided into indigenous villagedan village,*
5. *one indigenous village is transformed into an ordinary village,*
6. *removal of indigenous villages.*

The goods have certainly given feedback on the existence of indigenous villages. If you look back at the definition of the village as previously mentioned, it can also be seen

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<sup>6</sup>This has been found since in Article 1 number 1 of the Village Law, which contains an understanding of the Village. Villages, in the Village Law, are defined as traditional villages and villages (and so on), which means that the understanding of traditional villages themselves already stands parallel to the village, no longer a sub-variant of the village typology, which in practice is often found such as tourist villages, friendly villages children, village education, etc.

<sup>7</sup>Article 6 paragraph (1) of UU Desa

that the indigenous village can normatively turn into a kelurahan without having to become a village first because of the understanding of the indigenous village aligned with the definition of the village itself. Similarly, on the contrary, a kelurahan can be determined to be an indigenous village without having to turn into a village first.

The origin rights of this indigenous village also on norms in UU Desa provide a stronger construction of customary institutions, which may have previously only been in the form of traditional institutions that had difficulty implementing their customary powers. Some literature on customary law has given a lot of images about a customary institution or governance ranging from solid and egalitarian<sup>8</sup> to weak and vulnerable.<sup>9</sup>

### 1. Implementation Obstacles

As discussed earlier, indigenous people as the main conditions for the formation of indigenous village, certainly have implications for the indigenous recognition of peoples themselves. The acknowledgment explained in this Act is recognition in the law, both general and sectoral. At present the indigenous people in the existing laws in Indonesia are still spread in sectoral laws (including the UU Desa itself), and do not have a specific law. The efforts of legislators to form the Law on Customary Law Community itself have occurred, however, as of November 2018, this seems to have not met the end point.<sup>10</sup>

The implication of the absence of separate laws on indigenous people is that a model of clear recognition of indigenous peoples itself has not been found. When talking about recognition, the existence of indigenous people had been recognized by the Indonesian constitution. However, talking about the determination of indigenous village concretely will talk about a concrete indigenous people too. It means, the mechanism of recognition for indigenous peoples is necessary. For example, recognition through a *beschikking*, which certainly has a legal basis for regulation. This regulation is currently lacking in the form or model

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<sup>8</sup>Such as the Kasepuhan Ciptagelar community, which although not yet a traditional village, but the practice of customary governance shows a practice of village administration that puts forward the customary law. For more information in Rudi Wijaya, 2018, *Perlindungan Hak Konstitusional Masyarakat Hukum Adat (Studi pada Masyarakat Kasepuhan Ciptagelar Kabupaten Sukabumi Provinsi Jawa Barat)*, Skripsi pada Bagian Hukum Tata Negara Fakultas Hukum Universitas Lampung.

<sup>9</sup>Such as the tribal society researched by Jared Diamond in Papua, which he termed as "a number of tribes have big people who function as weak leaders, but he only leads with the ability to persuade and personality, not recognized authority". Jared refers to an entity which is a proto of indigenous peoples, which then if collected will be equivalent to indigenous people. In Jared Diamond, *The World Until Yesterday*, Jakarta: KPG. Pg. 18.

<sup>10</sup>The establishment of the Law on indigenous people is coming from two legislative institutions, namely the DPR and DPD. Each has a draft, with a substance that certainly has similarities and differences.

that is truly concrete and of a general nature. This brings further implications that indigenous peoples are seen as partially as each law.

The problems in recognition and efforts to fulfill the constitutional rights of indigenous people, it has derived from two factors, which is internal factors and external factors. Internal factors lead to indigenous people which are difficult and adhere to the ethnocentrism concept so that it does not hamper recognition by the state, not to mention the added conflicts between indigenous peoples. Second, external factors, which can at least be sourced from the government (regulatory factors), private companies, especially large-scale ones (economic motives), and communities outside indigenous people.<sup>11</sup> That problems requires a separate settlement mechanism (whether wrapped in a model of recognition, protection, etc.) that demands the role of the government, which in practice makes a regulation.

Some regions may have local law products that try to accommodate indigenous peoples' arrangements. This is a strategic step that will sustain the sustainability of traditional villages. However, not all regions do this, so that for regions that have indigenous peoples but do not have legal products, they will experience difficulties in implementing the recognition of indigenous peoples as a component of traditional villages.

Legal development in many neglected areas in Indonesia<sup>12</sup>, which results in at least two forms of regional law irregularities, namely the development of copy paste law from the central government without regard to specifics and regions, or the introduction of higher<sup>13</sup> laws and regulations resulting in chaotic legal development in the regions. These problems when faced with the regulation of traditional villages in the level of regional autonomy certainly give an obligation to build a quality legislative space that maintains constitutionality. Existing local legal products are never guaranteed to be quality legal products. On the contrary, it cannot be justified as a legal product with poor quality. Therefore, for regions that do not yet have regulations on indigenous peoples and indigenous

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<sup>11</sup>Siti Khoiriah dan Rudi Wijaya, *Problematika Pemenuhan Hak Konstitusional Masyarakat Hukum Adat*, dalam *Hak Asasi Manusia: Dialektika Universalisme dan Relativisme di Indonesia*, Yogyakarta: LkiS. p. 345-360.

<sup>12</sup>Rudy. 2017, *Pembangunan Hukum Di Daerah: Membangun Legislasi yang Mengayomi*. Bandar Lampung, AURA Publishing.

<sup>13</sup>Rudy, 2017, *Strategi Pembangunan Hukum di Kabupaten Lampung Timur*, dalam *Refleksi Akhir Tahun 2017 Dewan Riset Daerah Kabupaten Lampung Timur*, Bandar Lampung: AURA Publishing. p. 93.

villages, as long as there are indogenous peoples in their area, then the regulation on indogenous villages is still needed.

### **C. Conclusion**

The results of this study at least give the conclusion that; firstly, the indigenous village is a manifestation of the rights of the origin of rural communities which is inhabited by indigenous peoples, thereby it is strengthening the position of indigenous peoples. Secondly, the authority of indigenous village regulation, which is the joint responsibility between the Government, Provincial and Regency/Municipal Governments, is concentrated on Regency/Municipal Government. Thirdly, the main problem faced in indigenous village regulation is the unclear acknowledgment mechanism of indigenous peoples, because of their scattered regulation in several sectoral laws.



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### Peraturan Perundang-undangan Indonesia

Undang-Undang Dasar Negara Republik Indonesia Tahun 1945

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## **The Influence of Mass Media on Traffic Awareness Consciousness and Transportation in the City of Bandar Lampung**

Eddy Rifai, Husna Purnama, Nila Sari Dewi, and Akbar Prima Rifai

### **Abstract**

The study examined the safety of traffic and road transport. Mass media can play a role in increasing the awareness of the community through its duties and functions as a means of communication and information. Research method with empirical and qualitative approach with chi-square statistical test were used. The results showed that mass media (reading newspaper) influenced public awareness in traffic safety and road transport in the form of knowledge about road safety and road transport, positive attitude toward traffic safety and road transport and its behavior toward traffic safety and transport. Based on the calculation result, there was a significant difference between the mass media and the public awareness in traffic safety and road transport manifested through knowledge, positive attitude, and behavior in accordance with the business of road safety and road transport.

**Keywords:** *Influence, mass media, road transport and traffic awareness.*

## **A. Introduction**

Driving safety aims to reduce traffic accident victims on the road. This is because the number of traffic accident victims is much higher than the accident of sea, rail and air transportation. Even more concerning is the data from the Police of the Republic of Indonesia, involving motorcycles account for about 70% of the total cases of road traffic accidents. Coupled with the increase in the number of two-wheeled motorcycles in Indonesia has now reached 24-30% within one year, and not accompanied by adequate infrastructure development. As a result the potential for accidents to be greater (for two wheels, the percentage of accidents more than 67%<sup>14</sup>, and the report of Chief of Police 29 December 2010, an increase in accident rate from the previous knowing of 1.04% ie in 2009 as many as 59,164 cases and in 2010 as many as 61,606 cases).

Therefore it is important to pay attention to safety in driving on the highway or using the highway. Our indiscipline (the human factor) in driving a vehicle or using a road is also a determinant of an accident, in addition to the vehicle's own factor, natural conditions, and road infrastructure. So, safety riding is not the only way to solve this problem, but it needs a lot of work to reduce traffic accidents, including: Infrastructure Design (Vehicle Safety); Rules for Road User; Safety Campaign, and Advocacy Group (Advocacy Group).

In Law no. 22 of 2009 concerning Road Traffic and Transportation (UULAJ) stated that road traffic and transportation is a unified traffic system which includes road (vehicle) transportation, traffic networks, infrastructure (infrastructure), vehicles, drivers, road users and its management. The arrangements in the UULAJ above are merely paper sheets without any public awareness campaigns on road traffic. One of the media that can melakanakan it is through mass communication.

Mass communication in a developing country and implementing development in all sectors of life plays a very important role. Especially like the state of Indonesia, with geographical location and situation conditions in accordance with the national insight of Indonesia is Wawasan Nusantara requires that mass communication can establish relationships between one area with other regions, communicating and information to smooth the national development and also play a role in improving national resilience in the

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<sup>14</sup> Dirjen Kementerian Perhubungan Darat dalam Workshop tentang Keselamatan di Hotel Salak Bogor, 27 April 2015.

form of counteracting the increasingly sophisticated influences of mass mass communication and continuously entering Indonesian territory.

One of the tools in mass communication is the mass media, in the form of printed mass media and electronic mass media. Mass media have a very large contribution in the implementation of development, it is mainly realized through increased public participation in development, one of which is driven by the mass media.

Likewise in relation to increasing public awareness which is one part of development policy, the mass media acts as a means of communication and information to increase knowledge, attitudes and behavior of the community towards the laws and regulations which subsequently realize public awareness. Mass media in the form of electronic mass media such as television and radio or printed mass media such as newspapers and magazines and online media.

In line with the reform era that facilitates the licensing of newspaper publishing, there is an increase in the number of newspapers in the city of Bandar Lampung. If up to 1998 there are only 2 (two) publications with each of approximately 5,000 copies. In 2010 there were 17 (seventeen) publications in daily and weekly forms with a total copy of 30,000 copies<sup>15</sup>.

In the era of 2010s, online media can still be counted on the fingers, in 2016 the number reached 70 online media<sup>16</sup>. The increase in the number of publishers and issuance of publishing should increase the role and function of the mass media in increasing public awareness, including public awareness of the safety campaign traffic and road transport.

Based on the above description, the main problem in the research is: "Does the mass media affect the public awareness of traffic safety and road transport campaign?". From the main issue there are sub-issues as follows:

1. Does the mass media affect public knowledge in traffic and road safety campaigns?
2. Does the mass media affect public attitudes in traffic and road safety campaigns?
3. Does the mass media affect public behavior in traffic and road safety campaigns?

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<sup>15</sup>PWI Lampung, 2010, h. 15.

<sup>16</sup>Dewan Pers, FGD Indeks Kemerdekaan Pers 2016, Bandar Lampung

The scope of the study is a study in the field of education related to mass communication and the field of transportation techniques concerning traffic and road transport. Research with location objects in Bandar Lampung in 2016.

## **B. Research Method**

The research took the area or research location in Bandar Lampung City. The population of research is the people in Bandar Lampung City who subscribe to Daily Newspaper (SKH) Lampung Post totaling 71.004 people (SKH Lampung Post, 2015). In the sampling of the community done by multistage random sampling technique.

Primary data source in this study is the people of Bandar Lampung City which randomly has been selected as a respondent, while the secondary data source in the form of library materials. The main tools used in data collection are questionnaire, interview, and observation techniques, whereas to obtain secondary data is done by literature study. The collected data is processed through processing activities and data presentation that includes editing, coding, evaluation, and tabulation.

## **C. Literature Review**

### **1. Mass Media and Community Awareness Development**

#### **a. Understanding Mass Media**

The press as a publishing institution is a mass media that organizes communication activities. It is so called, because press publishing has the activity of conveying information, ideas, attitudes, etc. in writing or through pictures (photographs, illustrations, caricatures) from the communicator to the receiving (communicant) is a part of the communication process.

At first communication activity is only through utterance utterance from communicator to communicant either between individual with individual, individual with group or vice versa in situation and condition very limited. With the development of society, including the development of science and technology, the process of communication activity also develops, so that communication is no longer local with the natural media only, but has a wide range of media that can connect a great distance and with unlimited scope such as contained in the present decade.

Understanding communication put forward by Edwin Emery as "The art of transmitting information, ideas, and attitudes from one person to another."<sup>17</sup> From this definition there are three important components in communication, namely: communicators (who send messages), messages (information, ideas and attitudes) and communicants (who receive messages). Communicators as messengers and communicants have a close interaction and even interdependensi between them. Communicators associated with the communicant will usually see who or under what conditions the object of the communicant. If there are different communicant differences, then the message will be delivered there will be some differences in delivery.

Message messages conveyed by the communicator and received by the target (communicant), at the initial level are not simply accepted and responded to, except through perceptions that are processed based on the frame of mind of the target whether tuned in (the same) with the communicator's thinking pattern. If there is an equation then there is the process of interiorization (the process of thinking) to accept or reject the message conveyed communicator. If it is the same, then there is communication between people. If it is not the same then there is deinteriorization, that is a different message altogether with the target perception.

If the communication has been tuned in, then the communicant issues a conception of the results of processing the message through his thinking pattern (perception) by the communicator received as feedback in various signs or signals. In the relationship between publishing the press and its readers, the interpersona communication is in the form of satisfaction in reading the press release, subscribing, sending readers letters, and so on. Communication between press publications with readers will not continue if the parties who communicate do not use ways to touch a person's perception. A person's perception depends on experience, knowledge, and desire. In this case there are three basic elements for one's perception to be touched as follows:

- a. must touch past experience;
- b. interests of present-day communicants (present interest);
- c. expectation of future (future hope).

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<sup>17</sup>M. Djen Amar, 1980. "Komunikasi Massa dan Sibernetika", Makalah PWI Jaya, Jakarta, p..2.

According to Norbert Wiener who wrote a book called *Cybernetics*, is associated with the science of cybernetic communication means that information can be used for positive or negative purposes in moving the opinions and attitudes of others. Wiener's cybernetics theory is better known as information theory and is the basis of computers that are widely used today in obtaining the right answers from complex data sets.

Computer, a tool for obtaining data and mathematical formula formulas. Cybernetics reveals that the human mind is like a computer machine that can be filled with desirable data in the form of the symbol of the lowest continuous emblem in the subconscious of man, which one will become reality in the actions and deeds of man.

The relationship between someone's "actions" and "brain contents" is crucial. Automatically, one's consciousness and subconscious drive the nervous system and its brain to control one's self in order to perform an act of physical deed that can satisfy the picture of the image that is in his mind. The same as the system with a computer, that to provide answers to answers we want the computer requires complete data or information about the problem that we will solve. Every person's actions, whether good or bad are the answers to the problematic problems that arise, because every thought is filled with various good and bad spiritual food ingredients.

Humans think with pictures, this picture is a kind of data in a computer. Our habits of collecting images but not casting pictures, because the image is deposited continuously is what comes true. Subconsciously thinking with a picture image, even though awareness is already sleeping he will remain always active. Images in the subconscious can not be lost forever, which can be simply set aside and replaced with other images needed. Images that are set aside at any time can be reappeared.

Press publishing as one part of communication activity has a very big role in shaping the image images contained in the human brain. Mass media through its continuous coverage and reach out to the public widely become one of the media that make up knowledge, affect the attitude and behavior of the readers. Similarly, the public readers of press publishing affect press publishing to meet the needs of information needs it needs.

In communicating between the communicator with the communicant requires a medium that can deliver and receive messages. There are a variety of media that people use to communicate according to the distance, time, space, situation and conditions. Therefore, especially in mass media communications, Edwin Emery states "Mass Communication

delivering informations, ideas, and attitudes to asizable and diversified audiences trough use of the media developed for that purpose."<sup>18</sup>

Thus, in addition to the above three components, in mass communication there are other components of the media as a means or means of conveying messages from communicants and communicators, and there are differences in the nature of the audience (communicant), the nature of the form of communication, and the nature komunikatornya.

In terms of day-to-day, the notion of mass communication raises the shadow of television, radio, newspapers, and so on. However, this technical equipment can not be mixed with "process" in mass communication. Mass communication, not merely a synonym for communication with the help of radio, television or other modern engineering techniques. Although modern technology is essentially for this process, its existence does not always indicate the ongoing form of communication called mass communication. A broadcast of television to the public about the political convention is mass communication; while broadcasts in closed circuits where industrial operations are monitored by an engineer is not mass communication.<sup>19</sup>

Mass communication is aimed at "wide audiences", which are heterogeneous and anonymous. If the message message is only addressed to a particular individual individual it can not be viewed as mass communication, such as letters, telephones, telegrams, and the like. However, the criteria that can be used for a wide audience are relative and require further specifications. We view "broad" an audience if a communication is carried out over a period of time and during that period of time the communicator cannot interact with the audience face-to-face.

The second characteristic is that the audience of a mass communication is "heterogeneous". A mass communication solely aimed at the elite or exclusive audiences excluding mass communication. For example, the transmission of news (by any means) that is clearly used for members of a particular party, government, or class is not a mass communication. News stories that are communicated to the masses mean that the news is given to a group of individuals with various positions in the community, people of various ages, men, or women, various levels of education, from various geographical locations, and so on. In fact, at present there is a tendency to "demobilize mass media" with operations

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<sup>18</sup>Ibid., p.43

<sup>19</sup>C.R. Wright, 1986. *Sosiologi Komunikasi Massa*, Remadja Karya, Bandung, p.3.



including cable television for limited circuits, shoppers publishing (shopping guidelines), magazines published for certain professional fields, and so on.<sup>20</sup>

Third, the criteria of "anonymity" means that members of the audience are individually unknown or unknown to the communicator. This does not mean they are isolated. Of course, there is evidence that many mass communications take place or take place within small groups of people; and even if physically isolated, the members of the audience are covered in a number of primary and secondary social groupings whose reaction can be modified against the message. But with respect to communicators, the message is addressed to "anyone who needs".

According to Ignas Kleden Mass communication has characteristics as a general communication, fast and cursory. Mass communication in general is a means of excellent. Anything that is done through mass communication then changes its form to become social, so that what is announced through mass communication, actually has come out of private space and entered what is called the publicum forum<sup>21</sup>. Its "general" character can cause it as a subject for censorship or social control through institutions, public opinion, and other mechanisms of social mechanisms. Simultaneity messages its ability to reach a wide range of people in a span of time stating the social forces that have an impact. The trajectory of mass communication has led to an emphasis on timeliness, superficiality, and sensationalism in the message messages communicated.

Mass communication is an organized communication. A communicator in the mass media works through a complex organization in which there is an extensive division of labor and a certain cost along with the work. In the end it can be said that the development of technology today has enabled a new form of human communication, mass communication. This new form of mass communication can be distinguished from the older types with the following main characteristics: This communication is directed towards a relatively broader, heterogeneous and anonymous audience; the message message is delivered in general, can often reach a wide audience simultaneously, and is at a glance; the communicator tends to be, or operate within, a complex organization so that it may involve large financing.

Journalism as part of mass communication is defined by G.F. Mott "is an effort to produce words and images, related to the implementation of moving ideas with sound."<sup>22</sup>

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<sup>20</sup>Alvin Toffler, 1990. *Gelombang Ketiga (Bagian Kedua)*. PT. Pantja Simpati, Jakarta, p.115.

<sup>21</sup>Jakob Oetama, 1987. *Perspektif Pers Indonesia*. LP3ES, Jakarta, p.i

<sup>22</sup>Amar, Op.cit., p.31.

Such a definition is actually incomplete because it emphasizes more on words and images that can be identified with television, radio or film media, while the other most important aspect of journalism is writing and drawing as a manifestation of newspaper publishing, magazines, etc.

A more complete understanding, although M. Djen Amar's general character is still stated "Journalism is an activity of gathering, processing and spreading the news to the public with an area as wide and as fast as possible."<sup>23</sup> Journalistic activities to disseminate such news, as described in the above definition, give rise to divisions in journalism, namely printed journalism, such as newspapers, magazines, tabloids, etc., and electronic journalism, such as radio, television, and others.

In Article 1 of Law Number 40 of 1999 concerning the Press (Press Law) the understanding of the press is described as follows: "The social institution is a national struggle tool which has a work as one of the general mass communication media in the form of regular publishing at the time of publication, equipped with tools or not equipped with self-proprietary apparatus of printing, photo tools, clichés, stencil machine machines or other technical means. "

The definition of the Press Law if it is elaborated covers two aspects, namely about the press organization and the press function. The implementation of the press as stated in the Press Law, as a social institution concerning two aspects of journalism, namely the editorial and managerial aspects. The redaksional side of the message will be communicated by a communicator in a mass media organization, consisting of journalists (editor-in-chief, editorial staff, reporters, correspondents, etc.) and parties outside the organization who deliver messages through mass media, while the managerial aspect or the company is an activity of managing the entire message to be produced into print media with tools such as machines, photos, etc. which are then distributed to a wide audience (communicants). In this aspect what stands out is the economic or business factor.

b. The role of Mass Media in the Development of Public Awareness

Fred S. Siebert in his book "Four Theories of The Press" classifies the functions of the press in the following four theories:

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<sup>23</sup>*Ibid.*

1. Libertarian Theory: The press to provide information, entertain, sell, especially express truth and oversee actions by the government as freely as possible;
2. Authoritarian theory: The press to support and develop the politics of the ruling government and to serve the state;
3. Theory of social responsibility: The press is to provide information, entertain, sell, especially to present conflict of political parties, express the truth in accordance with freedom but is limited by a sense of social responsibility, because the purpose of the press is to build the community itself;
4. Totalitarian Theory: The press is to support the success and continuity of the system of socialism, especially the dictatorship of communism.

From the four theories above, the Indonesian press embraces the theory of social responsibility. It can be said that, because it is stated in Article 2 paragraph (1) of the Press Law as follows: "National press is an instrument of national struggle and is a mass media that is active, dynamic, creative, educative, informatory and has a social function of encouraging and nurturing the mind critical and progressive embraces all the embodiments of Indonesian society. "

From these provisions, it can be said that the press theory applied in Indonesia is social responsibility, namely having a social function, a driver, a fostering of social ideas and for community development. Furthermore, the elaboration of social responsibility theory, according to Floyd G. Arfan and Rochadi S. has six functions:

- a. Collecting information, discussing and exchanging thoughts about general events;
- b. Provide information to the people so that they have the skills to participate in regulating the country;
- c. Guard and secure privacy rights;
- d. Serve the economic system by using advertising;
- e. Maintenance of welfare and entertainment;
- f. The press has an obligation to cultivate its own abilities so that it can free itself from the influence of influence and pressure in finance.

The function of the function clearly states that the press has a very large role in social life that concerns the political, economic, social and cultural fields. The function function in Article 2 paragraph (3) of the Press Law is described as follows: "In order to increase its role in development, the press functions as an objective disseminator of information, channeling people's aspirations to broaden communication and community participation as well as

constructive social control. this needs to develop positive interaction between government, the press and society. "

According to Paul Lazarsfeld and Robert K. Merton, the function of mass communication (in this case the news published in newspapers), among others, has the function of conferring status (conferral status), and inauguration of social norms or ethics. Awarding status means that news that reports individual individuals often increases their prestige, meaning that the community bestows upon people a high public status. Mass communication has the function of being moral if communication strengthens social control over members of community members who bring behavior deviations into the views of society.<sup>24</sup>

With the publication of development news stories in newspapers, for example, it means publishing information about the activities of the government together with the community to carry out development and openness to the problems that exist in development. This state of affairs creates conditions for social conditions for the community to participate and support the implementation of development in their environment and try to solve the problems that exist in development. Thus the process of loading news that is communicated to the masses increases community participation in development.

Therefore, it can be said that the mass media has a very large role in improving the knowledge, understanding, and behavior of the community both through its function as a means of channeling reciprocal communication between government and society in development, as well as the formation of knowledge, attitudes and behavior of the community regarding problem of problems in development itself.

Nevertheless, the application of functional function of mass media will be effective and efficient if mass media can "communicate" with society reader, that is by processing message in such a way that mass media as communicator can tuned in with reader as communicant.

## **2. Road and Traffic Safety Campaigns**

The following is an example of information that hopefully will be useful for traffic safety and road transportation that is not only about safety riding, which is a major factor in driving safety.

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<sup>24</sup>Wright, *Op. Cit.*, p.60.

### (1) Infrastructure Planning (Infrastructure Design)

The term "design" is actually broader than planning, because design can mean an applied art / technique / design, architecture, and various other creative achievements that have a process to create and create new objects in a creative way, whether they are tangible plans, proposals, or other real-life objects

The infrastructure of the main traffic flow is the road itself, then the walk (sidewalk), jogging track (if any), bicyclists, drift or roundabout can be used as a tool for road safety. For example, how a road is more comfortable and convenient for its users including visibility, trees, lamp retaining, street lighting, road classification, hydrants, or roadblock placement.

Many roads are designed to bend (convex) so that the water when the rain quickly pulled over, but when we do not design a good drainage, water puddles (especially with mud) can also trigger an accident in driving such as the distance of the brake is too long so the steering sometimes difficult to control. Road slop including slope of the road, the use of concrete and asphalt becomes very important including hydro-planning and plan the placement of traffic signs that exist.

### (2) Vehicle Safety (Vehicle Safety)

There are many kinds of vehicles on the road and need great attention, ie cars, trucks, and two-wheeled vehicles such as bicycles, motorcycles, bajai, and modified motorcycles. Here, safety in driving can be increased by reducing the chance of the driver or driver to make mistakes (human error) such as by designing or making vehicles that can prevent fatal consequences in the event of an accident, such as:

- a. Anti-jam brake system (ABS)
- b. Traction control system (TCS)
- c. Electronic brake control system (EBD)
- d. Night Vision Helper System (Night Vision)
- e. Vehicle distance warning system (Anti Collision Alert)
- f. Safety Belt

g. Air Bag

If the vehicle is considered less safe or doubtful for safety considerations on the road, you should choose a better vehicle or better condition. For other vehicles carrying cargo, accidents can also be caused by the lack of strong ties.

(3) Rules (Safety) of Road User

Road users can also be people who are walking or can be animals that cross the street. If the animal has its owner, then the owner should also pay attention to the safety of other road users. Indonesia already has its laws governing the road users such as using helmets, must have driving license, the vehicle must also be complete (have double mirrors), turn on the lights, and others.

To deal with road safety issues can be done through the 5 E approach (Engineering, Education, Enforcement, Encouragement, Emergency response).

1. Engineering, coaching and building safe road infrastructure
2. Education, through road safety education
3. Encouragement, through coaching
4. Enforcement, through consistent law enforcement;
5. Emergency response through the handling of the victims of the right accidents

The Government has also issued a National Road Safety General Plan (RUNK 2011-2035) and has been followed up with Presidential Instruction Number 4 of 2013 concerning a decade of road safety action program with the goal of realizing 5 (Five) Pillars of Road Safety Action including:

Pillar I is Road Safety Management, with the coordinator of the Minister of National Development Planning, which focus to;

1. Road Safety Alignment and Coordination;
2. Emergency Vehicle Traffic Protocol;
3. Road Safety Research;
4. Injury Surveillance and Integrated Information Systems;
5. Road Safety Funds;
6. Road Safety Partnership;
7. Public Transport Safety Management System;
8. Completion of Road Safety Regulations;

Pillar II is Road Safety, with the coordinator of the Minister of Public Works focusing on:

1. Road safety agency
2. Planning and Implementation of occupational work
3. Planning and Implementation of Road Equipment;
4. Application of Speed Management
5. Conducting an Improved Standard of Roadworthiness that is safe;
6. Road Safety Environment;
7. Roadside activities of safety;

Pillar III is the Vehicle of Safety, with the coordinator of the Minister of Transportation which focuses on:

1. Implementation and Repair of Periodic Testing Procedures and Type Test;
2. Speed Limitation of Vehicles;
3. Overloading;
4. Vehicle Elimination (Scrapping);
5. Determination of Public Transportation Vehicle Safety Standards;

Pillar IV, namely Safe Road User Behavior, with the coordinator of the Indonesian National Police Chief who focuses on:

1. Vehicle Operation Compliance;
2. Examination of Driver Condition;
3. Driver Health Checks; Improved Facilities and Infrastructures of Driver License Test System;
4. Completion of the Procedure for Test of Driving Permits;
5. Technical Guidance of Driving Schools;
6. Handling of 5 (Five) Main Plus Risk Factors;
7. Use of Electronic Law Enforcement;
8. Formal Education in Road Safety;
9. Safety Campaign;

Pillar V, namely Pre and Post-Accident Handling, with the Coordinator of the Minister of Health focusing on:

1. Pre-Accident Handling
2. Post-Accident Handling;

3. Guarantee of Accident Victims Treated at Referral Hospital;
4. Allocation of Insurance Premiums for Road Safety Funds;
5. Pre-and Post-Accident Research on Victims.<sup>25</sup>

#### **D. Discussion**

The influence of mass media in shaping the behavior of its readers has been proven through the formation of useful skills knowledge learned from mass media such as photography, computer usage instructions, recipes, and so on. But not all that the mass media affects the reader's audience's behavior, because learning from the mass media does not depend only on the element of "stimulus" in the mass media, but a complicated learning process takes place, so it takes psychological theory that explains this kind of learning event.

The psychological theory that can explain the behavioral influence of mass media is the "social learning theory" of Bandura. According to Bandura, we learn not only from direct experience, but from imitation or imitation. Behavior is the result of cognitive and affective factors and social relationships. That is, we are able to have certain skills, if there is a positive relationship between the "stimulus" we observe and our characteristics, in the form of attention, understanding, and acceptance.

Similarly Schramm said, mass media cannot play a direct role in shaping the behavior of the community, but must be supported by interpersonal communication so that the messages conveyed can be carried out properly. According to Schramm, without giving the opportunity to communicate and make the whole group involved in efforts to change, it will not achieve the expected results. That is why the basic principles of rural communications forums are gathering farmer groups, introducing renewal through mass media and allowing the group to discuss and decide for themselves what they want to do. The main thing is not the discussion solely, even though the way of discussion is important but the most important thing is their participation in decision making and implementation.

Increased awareness of the campaign on traffic and road safety cannot be accepted or treated as autonomous, which legitimizes its presence in society on its own strength. That is, it can not simply apply and therefore must be obeyed, solely for the reason that it is a legitimate institution and that it does not need other reasons to legitimize its presence, for example by basing it on forces or processes outside the system.

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<sup>25</sup>Trisusilo Hidayati, "Pelopor Keselamatan Transportasi Jalan Indonesia", Makalah, 2016, h.5.



To further clarify the influence of the two variables above, statistical tests were performed using Chi-Square (X<sup>2</sup>) technique, as follows:

### 1. Relationships between Mass Media and Knowledge about Awareness of Traffic Safety and Road Transport

Table 1. Chi-Square table (X<sup>2</sup>) on the influence of reading newspapers to the knowledge of traffic safety and road transport

| No  | Fo | Fh    | fo-fh | (fo-fh) <sup>2</sup> | (fo-fh) <sup>2</sup><br>fh |
|-----|----|-------|-------|----------------------|----------------------------|
| 1   | 44 | 36,26 | 7,74  | 59,91                | 1,65                       |
| 2   | 23 | 22,20 | 0,80  | 0,61                 | 0,03                       |
| 3   | 7  | 15,54 | -8,54 | 72,93                | 4,69                       |
| 4   | 5  | 12,74 | -7,74 | 59,91                | 4,70                       |
| 5   | 7  | 7,80  | -0,80 | 0,61                 | 0,08                       |
| 6   | 14 | 5,46  | 8,54  | 72,93                | 13,36                      |
| Jml | -  | -     | 0,00  | -                    | 24,51                      |

Source: processed field data

From the result of statistical test using Chi-Square (X<sup>2</sup>) technique, X<sup>2</sup> counted 24,51, whereas at 99% significance level with df 2 is 9,21. After being compared with the probability distribution X<sup>2</sup> (X<sup>2</sup> table) it turns out that the X<sup>2</sup> results are greater than X<sup>2</sup> tables.

The results of these calculations indicate that there are significant differences between reading newspapers and knowledge of traffic safety and road transport. Thus, from the results of this statistical test means that there is true influence of the mass media on people's knowledge about traffic safety and road transport.

### 2. Relationship between Mass Media and Attitudes to Traffic Safety and Road Transportation

Table 2. Chi-Square (X<sup>2</sup>) work table on the effect of reading newspaper on the attitude of road safety and road transport.

| No | Fo | fh    | fo-fh | (fo-fh) <sup>2</sup> | (fo-fh) <sup>2</sup><br>fh |
|----|----|-------|-------|----------------------|----------------------------|
| 1  | 38 | 33,32 | 4,68  | 21,90                | 0,66                       |
| 2  | 24 | 20,40 | 3,60  | 12,96                | 0,64                       |
| 3  | 6  | 14,28 | -8,28 | 68,56                | 4,80                       |
| 4  | 11 | 15,68 | -4,68 | 21,90                | 1,40                       |
| 5  | 6  | 9,60  | -3,60 | 12,96                | 1,35                       |
| 6  | 15 | 6,72  | 8,28  | 68,56                | 10,20                      |

|     |   |   |      |   |       |
|-----|---|---|------|---|-------|
| Jml | - | - | 0,00 | - | 19,05 |
|-----|---|---|------|---|-------|

Source : Processed field data

From the results of statistical tests using Chi-Square technique (X<sup>2</sup>), it is known that the X<sup>2</sup> count results is 19.05, while at the 99% significance level with df 2 is 9.21. After being compared with the probability distribution X<sup>2</sup> (X<sup>2</sup> table) it turns out that the X<sup>2</sup> results are greater than X<sup>2</sup> tables.

The results of these calculations indicate that there is a significant difference between reading a newspaper with a positive attitude about traffic safety and road transportation. Thus, from the results of this statistical test, it means that there is true influence of the mass media on the positive attitude of the community regarding traffic safety and road transportation.

### 3. Relationship between Mass Media and Behavior in Traffic Safety and Road Transportation

Table 3. Chi-Square work table (X<sup>2</sup>) about the effect of reading the newspaper on the behavior of road safety and road transport.

| No  | Fo | fh    | fo-fh | (fo-fh) <sup>2</sup> | $\frac{(fo-fh)^2}{fh}$ |
|-----|----|-------|-------|----------------------|------------------------|
| 1   | 30 | 30,87 | -0,87 | 0,76                 | 0,02                   |
| 2   | 25 | 18,90 | 6,10  | 37,21                | 1,97                   |
| 3   | 8  | 13,23 | -5,23 | 27,35                | 2,07                   |
| 4   | 19 | 18,13 | 0,87  | 0,76                 | 0,04                   |
| 5   | 5  | 11,10 | -6,10 | 37,21                | 3,35                   |
| 6   | 13 | 7,77  | 5,23  | 27,35                | 3,52                   |
| Jml | -  | -     | 0,00  | -                    | 10,97                  |

Source : Processed field data

From the results of statistical tests using the Chi-Square technique (X<sup>2</sup>), it is known that the X<sup>2</sup> count is 10.97, while at the 99% significance level with df 2 is 9.21. After being compared with the probability distribution X<sup>2</sup> (X<sup>2</sup> table) it turns out that the X<sup>2</sup> results are greater than X<sup>2</sup> tables.

The results of these calculations indicate that there are significant differences between reading newspapers and behavior about traffic safety and road transport. Thus, from the results of this statistical test means that there is true influence of the mass media on people's behavior about traffic safety and road transportation.

Based on the results of the calculation of the tables above, there is a significant difference between the mass media and public awareness in traffic safety and road transport which is realized through the knowledge, attitudes and behavior of the community in traffic safety and road transportation.

Even so, the results of the above calculations also show that the mass media has a greater influence on people's knowledge about traffic safety and road transport, then followed by a positive attitude and then behaves in accordance with the traffic safety and road transport efforts. This difference in influence shows that there are respondents who know and behave positively in traffic safety and road transport but do not behave in accordance with traffic safety and road transportation.

Nevertheless, the above calculations also show that mass media have greater influence on public knowledge about traffic safety and road transport, followed by positive attitude and then behave in accordance with traffic safety and road transportation. The existence of this effect difference shows that there are respondents who know and be positive in the safety of traffic and road transport but do not behave in accordance with the safety of traffic and road transport.

From interviews conducted with respondents, revealed among others the presence of respondents who know and be positive that doing deliberation activities.

Therefore, although the mass media influences public awareness in traffic safety and road transport, the greatest influence is on knowledge and attitude, but less on behavior. This is a serious issue, as there are risks, lack of community behavior that is compatible with road safety and road transport efforts and overly trusting the government apparatus in overcoming traffic safety and road transport will increase the problem of road safety and road transport , given the limitations and constraints of government officials such as lack of personnel, facilities and infrastructure, financing, expertise and skills, and so on.

As the theories put forward above, it is necessary to improve public behavior in the safety of traffic and road transport, among others through "verbal communication" between government apparatus and the community. Thus the community is involved in the planning, implementation and evaluation of the activities traffic safety and road transport, so that community behavior can be improved in traffic safety and road transport.

## **E. Closing**

### **1. Conclusion**

Based on the above description can be summed up things as follows:

- 1) Traffic safety and road transport are effective if people have awareness in traffic safety and road transport. Mass media can play a role in increasing the awareness of the community through its duties and functions as a means of communication and information.
- 2) The mass media (reading the newspapers) influences public awareness in traffic safety and road transport in the form of knowledge on road safety and road transport, positive attitude towards traffic safety and road transport and its behavior towards traffic safety and road transport.
- 3) Based on the results of the calculation there is a significant difference between mass media and public awareness in traffic safety and road transport realized through knowledge, positive attitude, and behavior appropriate to the business of traffic safety and road transport.
- 4) Significant differences in levels due to the majority of respondents who are knowledgeable and have positive attitudes toward traffic safety and road transport, show less behavior in accordance with traffic safety and road transport.

### **2. Suggestions**

- 1) It is necessary to improve the professionalism of journalists in the news of crime in the mass media, so that the news has a positive influence in raising public awareness in traffic safety and road transport.
- 2) There should be improved "verbal communication" between government and society to discuss issues and jointly plan joint efforts to realize public awareness in traffic safety and road transport.

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**Effectiveness of the Fine of Traffic Compliance Based on Law Number 22 of 2009 on Highway Traffic and Transportation in Baturaja City : Study of Case City/Village Transportation at Terminal Type A Batu Kuning Baturaja**

Nora Soraya Sinabutar

**Abstract**

The effectiveness of ticketing fines is one implementation measuring of provisions for crossing traffic. Related to crossing traffic, city / village transport drivers at type A BatuKuningBaturaja terminal have not been implemented effectively. City / village delivery drivers do not carry out regular terminal functions. It can be seen from the difficulty of mobilizing the city / village which usually increases from the accusation of ticketing from the police. This study aimed to determine ticket penalties for consultation in traffic referring to Law Number 22 of 2009 concerning Highway Traffic and Transportation in the city of Baturaja, (Study of Case Driver for City / Village Transportation at terminal type A BatuKuningBaturaja). In addition, data was obtained from interviews with the local police, the ticketing fine at the type A BatuKuningBaturaja terminal had not given a deterrent effect to the offenders. This can be seen from the violations of drivers of city / village vehicles which are always increasing. Related to this case, this paper used a normative empirical research method. Data sources in research through literature (Library Research) and field research (Field Research). Data techniques used were interviews and questionnaires. The effectiveness of ticketing fines on the provisions in traffic is based on Law Number 22 of 2009 concerning Highway Traffic and Transportation, success programs, successes, programs, level of inputs and outputs, as well as the objectives of the implementation of ticket penalties.

**Keywords:** effectiveness, ticket penalty, law, traffic, transportation city / village

## **A. Introduction**

The Indonesian state is a country based on law, in accordance with the 1945 Constitution article 1 paragraph (3) which states that "Indonesia is a country based on law (rechtsstaat)" for that law is an instrumental part of the fundamental elements of the state namely Pancasila, which is used as a guideline for every element in the country in running the country. So the state element cannot be arbitrary in exercising its power.

As a legal state, every aspect of government action both in the field of regulation and in the service field must be based on legislation or based on legality, including traffic and road transport problems, hereinafter abbreviated as LLAJ. Traffic and road transport systems have a strategic role as a means to facilitate the flow of transportation of goods and services. Based on Law Number 22 of 2009, "Road traffic and transportation must be developed with the potential and role to realize security, prosperity, traffic order and road transportation in order to support economic development and regional development".

Based of Law Number 22 Year 2009 clause1 Number 1 states that "LLAJ is a unified system consisting of Traffic, Road Transportation, Traffic Networks and Road Transportation, Traffic Infrastructure and Road Transportation, Vehicles, Drivers, Road Users, and management ". Regarding LLAJ as a unified system, management in the LLAJ field is a management and coordination that is carried out jointly by several related agencies. At present, there are many problems related to traffic compliance.

Traffic compliance in principle is the action of road users in fulfilling their obligations in accordance with the provisions of legislation No. 2 of 2009 concerning road traffic and transportation and the implementing regulations of traffic in a country. Predicate road users obey in the sense of discipline and obedience when using the highway.

Compliance with traffic from road users is an important factor in realizing the effectiveness of the enactment of the Act. The higher the traffic compliance, the lower the traffic violations, and vice versa. In reality there are still many people who commit traffic violations due to lack of awareness and compliance to comply with the rules. Thus, sanctions are needed that can be used so that road users abide by their obligations.

Violating the provisions of Law Number 22 of 2009, the traffic police will take steps to investigate and process the violation to be brought to court. Traffic violations that are examined according to the examination of cases of traffic violations are certain violations. In accordance with the intentions contained in the rapid inspection program, this case does

not require an Examination Minutes (BAP). Minutes are omitted and replaced with a form that is easier by just filling it out by law enforcement officers (police traffic units), this form (form) is called "Proof of Certain Traffic Violations" abbreviated TILANG.

The term Tilang is often encountered in every region, this shows that in every area there are traffic violations including the baturaja area. Baturaja is the main city of OganKomeriungUlu district, South Sumatra Province. This main OKU is the result of the breakdown of the previous area, only one is now divided into three, namely East OKU with the city of Martapura, OKU Selatan with its city MuaraDua and OKU Parent with its city Baturaja. The Baturaja area after the expansion experienced a lot of development, including the construction of a Terminal, Type ABaturaja Terminal was built in the BatuKuning area where after completion the construction caused many violations committed by the drivers of the village transportation.

One of the fundamental problems in implementing traffic and road transport laws is the problem at the level of traffic compliance of city transport drivers who often stop or park carelessly, not inside the city transportation terminal, often hung in market areas so that it disrupts the passage of traffic. Whereas it is clear in Law Number 22 of 2009 that in Article 302 states that Everyone driving a General Motor Vehicle transports people who do not stop other than at a designated place, check, drop off passengers other than at the stop, or pass the road network other than determined in the route permit as referred to in Article 126 shall be subject to a maximum imprisonment of 1 (one) month or a fine of no more than Rp. 250,000 (two hundred fifty thousand rupiahs).

That is why the authors are interested in conducting research on the effectiveness of ticket penalties for compliance in traffic based on Law Number 22 of 2009 concerning Highway Traffic and Transportation in the city of Baturaja (case study of driver of village transportation in type A BatuKuningBaturaja terminal).

## **2. Problem Formulation**

Based on the explanation in the background, the problem in this study is the extent to which the effectiveness of ticket penalties for compliance in traffic is based on Law Number 22 of 2009 concerning Highway Traffic and Transport in the city of Baturaja (case study of drivers of village transportation on terminal type A BatuKuningBaturaja).



### **3. Research Objectives**

The purpose of this study was to determine the extent to which the effectiveness of ticketing penalties for compliance in traffic was based on Law Number 22 of 2009 concerning Highway Traffic and Transportation in the city of Baturaja (case study of driver of village transportation at type ABatuKuningBaturaja terminal).

#### **B. Literature Review**

##### **1. Effectiveness**

An activity can be said to be successful if the goal expected by a party can be achieved. Effectiveness is a key element to achieve goals, and to see how far the goals are set. It is called effective when the goals or targets are achieved as determined.

The word effectiveness according to EncklopediaIndonesia, shows that there is a goal. A business is said to be effective when the business reaches its goal. The effective meaning of the word comes from the English discussion, that is, effective that is, good results, effective, correct, right. Whereas according to the Dictionary Discuss Indonesia effectively means; there is an effect (effect, effect, impression, efficacious, or effectual, can bring results or be effective).

This is in accordance to Rihardini (2012) which states that "Effectiveness is a measurement in the sense of achieving a predetermined goal". (Rihadini, 2012) Meanwhile, according to Hidayat in Rihardini, (2012), stated that:

"Effectiveness is a measure that states how far the target has been achieved. Where the greater the percentage of targets achieved, the higher the effectiveness. (Rihadini, 2012)

According to Cambel in Simangunsong (2011) measurement of effectiveness in general and the most prominent are:

1. The success of the program
2. Target success
3. Satisfaction with the program
4. Level of input and output
5. Achievement of overall goals (Simangunson, 2011)

From some understanding of effectiveness, the researcher can conclude that effectiveness is a measure that states how far the target has been achieved. Where the greater the percentage of targets achieved, the higher the effectiveness. The level of effectiveness can be measured by comparing the plan or target that has been determined with the results achieved. If the results achieved are in accordance with the target, then the work or results of the work are said to be effective, but if they are not achieved according to plan, then it is said to be ineffective.

## **2. The nature of Law Number 22 of 2009 concerning Road Traffic and Transportation**

Law No. 22 of 2009 concerning Highway Traffic and Transport initiated by the Ministry of Transportation, was made so that the implementation of road traffic and transportation is in line with the expectations of the people, in line with the conditions and needs of the current road traffic and transportation, and in line with other laws.

By realizing the importance of the role of transportation, traffic and road transportation must be arranged in a national transportation system in an integrated manner and able to realize the availability of transportation services that are in accordance with the level of traffic needs and transportation services that are orderly, comfortable, fast, organized, smooth and at a cost affordable by people's purchasing power. (A. AcoAgus, Mustari, Firman Umar, 2016)

For this reason the government has issued a policy in the field of land transportation, namely with the issuance of Law No. 22 of 2009 concerning Road Traffic and Transportation as Substitute Law No. 14 of 1992, and Government Regulation No. 41 of 1993 concerning Road Transportation which is still valid even though PP No. 41 of 1993 is an implementing regulation of Law No. 14 of 2003 because it was mentioned in Article 324 of Law No. 22 of 2009 that: "When this Law comes into force, all implementing regulations of Law Number 14 of 1992 concerning Road Traffic and Transportation (State Gazette of the Republic of Indonesia of 1992 Number 49, Supplement to the State Gazette of the Republic of Indonesia Number 3480) are stated remain valid as long as it does not conflict or has not been replaced with a new one based on this Act".

In Article 2 and Article 3 of the Road Traffic and Transport Act (hereinafter abbreviated as UULLAJ) regulates the principles and objectives of transportation. The principle of traffic management is regulated in Article 2 of UULLAJ namely: Road Traffic and Transport is carried out by taking into account: a) transparent principles, b) accountable

principles, c) sustainable principles, d) participatory principles, e) useful principles, f) principles efficient and effective, g) balanced principles, h) integrated principles and i) independent principles.

While Article 3 UULAJ mention about the purpose of the Traffic and Road Transport namely:

- a. The realization of the service of Traffic and Transportation Roads that are safe, safe, orderly, smooth, and integrated with other modes of transportation to encourage the national economy, promote public welfare, strengthen the unity and integrity of the nation, and be able to uphold the dignity of the nation;
- b. The realization of national ethics and culture;
- c. The realization of law enforcement and legal certainty for the community.

With the enactment of Law No. 22 of 2009 is expected to help realize legal certainty for parties related to the implementation of transportation services, both transportation entrepreneurs, workers (drivers / drivers) and passengers. Operationally, transportation activities are carried out by drivers or transport drivers where the driver is the party who binds himself to carry out transportation activities on the orders of the transport or transport businessman.

The driver in carrying out his duties has the responsibility to be able to carry out its obligations namely transporting passengers to the destination that has been agreed safely, meaning that in the process of transferring from one place to the destination can take place unimpeded and the passenger is in good health, without danger, injury sick or dead. So that the purpose of transportation can be carried out smoothly and in accordance with the value of the use of the community.

### **3. Ticketing Sanctions**

According to Van Den Steenhoven in Hadikusuma (2004). "Sanctions are elements as legal elements, namely the threat of the use of physical coercion, official authority, the application of regular provisions, and the reaction of the people who are not spontaneous in nature". (Hadikusuma, 2004) Then added by Mertokusumo (2011) that "Sanctions are nothing but a reaction, the consequences or consequences of violations of social rules". (Mertokusumo, 2011)

From some of the opinions of the experts above, it can be concluded that the meaning of sanctions is an act or action taken consciously and intentionally by a person or group of people against another person due to negligence or behavior that is not in accordance with

the values that apply in their environment. Where these actions cause sorrow or suffering with the intention that the suffering is truly felt and finally aware of his mistakes to go towards goodness.

Traffic violations which are often referred to as ticketing are the scope of criminal law stipulated in Law Number 22 of 2009. Violations of criminal law can be given legal action directly from the authorities and there is no need to wait for reports or complaints from the injured party. Sanctions for traffic violations are within the scope of criminal law.

In criminal law there are also two types of actions, namely crime and violation, crime is an act that is not only contrary to the law but also contrary to moral values, religious values and sense of justice, for example stealing, killing, and so on. While violations are acts that are only prohibited by law. (Soekanto, 2013)

In this case it is a traffic violation for example such as not wearing a helmet, not using a seat belt in driving, and so on. Sanctions given to traffic violators are in the form of sanctions which are generally called the term "ticket". The procedure for carrying out this ticket is if clearly the legal investigator / assistant investigator in law sees, knows, the occurrence of certain road traffic violations as stated in the traffic violation table. The investigator has the right to take action against the perpetrators of traffic violations in accordance with the provisions in accordance with applicable law. (A. AcoAgus, Mustari, Firman Umar, 2016).

## **1. Methods**

Based on the formulation of the problem and the purpose of the study, the approach used in this study is an empirical normative approach. Empirical normative legal research is a legal study of the implementation or implementation of normative legal provisions (codification, laws, or contracts) in action on any particular legal event that occurs in society.

The specifications in this research are descriptive analysis, which describes the prevailing laws and regulations associated with legal theories and the practice of implementing positive law, which concerns the problem of drivers of city / village transportation. Descriptive research is a type of research that provides an overview or description of a situation as clear and comprehensive as possible regarding all matters relating to the effectiveness of ticket penalties for compliance in traffic based on Law Number 22 of 2009 concerning Highway Traffic and Transportation in the city of Baturaja( case study of driver of village transportation at type A BatuKuningBaturaja terminal)

The analytical method used is qualitative analysis, which means deciphering quality data in the form of regular, collapsed, logical, overlapping, and effective sentences, thus

facilitating data interpretation and understanding the results of the analysis. (Muhammad, 2004) The purpose of using qualitative analysis is to obtain views on the effectiveness of ticket penalties for compliance in traffic based on Law Number 22 of 2009 concerning Highway Traffic and Transportation in the city of Baturaja (case study of drivers of village transport at the terminal type A BatuKuningBaturaja).

### **C. Discussion**

Traffic violations are not a new thing, but this problem does not go down even further in every region, many things that have been done by the government to reduce the number of traffic violations, including using ticket penalties. The ticket fine also applies to drivers of city / village transportation who operate waiting, raising and lowering passengers outside the terminal. Terminal Type A BatuBaturaja Yellow is the only terminal in the Baturaja Region, but this terminal does not operate like a terminal as it should.



Since August 23, 2016 Type A BatuKuning Terminal, OganKomeriungUlu Regency (OKU) was officially taken over by the central government, Type A BatuKuning Terminal is not the only terminal taken over, there are 6 terminals in Sumsel which were taken over by the Center. He took over the type A BatuKuning terminal which is a regional asset of Baturaja, allegedly because the Terminal did not function optimally and even did not appear to function at all. This was evident from the absence of cars coming in and out like a terminal in general.

Before localization of the location of the type A terminal was located in the center of Baturaja city, adjacent to the Baturaja Central Market, but due to spatial planning, the

Regional Government of Baturaja Localized the Terminal to become the Licensing Office and DUKCAPIL Office. So that the Baturaja Terminal was moved to the BatuKuning area which was not strategically located and difficult to reach. The transfer of the Terminal has a huge impact on the driver of the city / village transportation, because the location is very far away the driver feels objected if he has to enter the terminal first to enter the city and the passenger does not want to have to wait, up and down at the terminal location.

The objection made by the driver of the city / village transportation is a violation of Law No. 22 of 2009, that in Article 302 states that Everyone driving a General Motor Vehicle transports people who do not stop other than in a designated place, check, drop off passengers other than at a place of dismissal, or passing a road network other than those specified in the route permit as referred to in Article 126 shall be subject to a maximum imprisonment of 1 (one) month or a fine of no more than Rp250,000.00 (two hundred fifty thousand rupiahs).

Based on the results of the researchers' interviews with the relevant police, the city / village transport driver's violations were consciously carried out, the drivers thought that the Terminal was too far away and made it difficult for them to get passengers, the loss that the natural transport driver made because paying fines with losing passengers was not comparable . So that it does not provide a deterrent effect on drivers of city / village transportation who have been given fine sanctions, they still violate Law Number 22 of 2009 concerning Highway Traffic and Transportation in the city of Baturaja.

From the results of the research questionnaire regarding legal compliance for drivers of urban / rural transportation is very low, in general the legal compliance that is owned by the driver is strongly influenced by two fundamental factors, namely:

1. internal factors include knowledge and understanding of low-level urban / village transport drivers regarding legal provisions, lack of awareness of drivers to comply with applicable law. City / village transport drivers assume that, if they already have complete vehicle documents and have a driving license, it is considered as something that can freely carry out activities to find passengers, and is considered to comply with Law No. 22 of 2009 concerning Traffic and Highway Transportation. Therefore, researchers assume that transport drivers do not have good knowledge.
2. external factors include the behavior of passengers who do not want to wait, go up and down the terminal due to being far away, and want to be picked up or just waiting outside

the terminal more precisely in the city center so that it often causes congestion, as well as law enforcement by the police (police, transportation service) is not strict so that the effectiveness of ticket penalties in traffic compliance has not been implemented.

Effectiveness is a measure that states how far the target has been achieved. Where the greater the percentage of targets achieved, the higher the effectiveness. To analyze it using five indicators of effectiveness, namely:

1. The success of the fine ticketing program for drivers of city / village angkots in Baturaja is still low, judging by the lack of city / village transport vehicles that want to operate in and out of BatuKuningBaturaja terminal, even though they often get ticket penalties because they often wait, raise and lower passengers outside the terminal.
2. The success of the ticket ticket fine for drivers of city / village transportation is still low, because the driver knows that his actions violate the law, but the driver argues that paying fines is not a loss, rather than having to enter the terminal which is far from the city center and quiet.
3. Satisfaction with the ticket fine program, for drivers of city / village transport ticketed fines actually harms themselves, because they have to spend a certain amount of money they have collected all day, but the awareness to obey to obey is still low, so they still carry out activities outside the terminal passenger.
4. The level of input and output of the ticketing fine program is still low, judging by the increasing number of drivers for urban / rural transportation that has received ticket penalties more than once.
5. The achievement of the overarching goal of applying ticketing fines to drivers of urban / rural transport is still low, for local government drivers who have been wrong, because moving the terminal away from the city center, so that the driver is too far to wait, raise and lower passengers in the terminal obtained by the driver of the city / village transportation is much reduced if they have to enter the terminal because the passengers also do not have the awareness to comply with the proper rules.

#### **D. Conclusions**

The effectiveness of ticket penalties for compliance in traffic based on Law Number 22 of 2009 concerning Road Traffic and Transportation in the city of Baturaja can be seen from five things in general, namely the first success of the program, the second success of the target, the third satisfaction with the program, the fourth level input and output as well as the fifth achievement of the overall goal of applying ticket penalties.

From the discussion data, it can be concluded that the effectiveness of ticket penalties for traffic compliance based on Law Number 22 of 2009 concerning Highway Traffic and Transportation in Baturaja city has not been effectively implemented because the drivers of urban / village transportation violations have always increased despite frequent fines ticket from the police.

Based on the above conclusions, the advice that can be given is to increase the effectiveness of ticket penalties for compliance in traffic based on Law Number 22 of 2009 concerning Highway Traffic and Transportation in the city of Baturaja, not only the duty of law enforcement officers, but all parties who using the highway, be it the driver of the city / village transportation, motorists, pedestrians and all the people in it have an obligation to become good citizens (good citizens) who put forward the law-abiding attitude.



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**Freight Forwarding Through Air Cargo  
(Study on Garuda Indonesia Airline Company)**

Ratna Syamsiar

**Abstract**

Air freight is used for country economic traffic. This activity uses air cargo aircraft on one trip or more from one airport to another airport or to several domestic and foreign airports. PT Garuda as a carrier company uses two delivery system wherein door to door service and port to door service. The problem in this research is about the goods transportation agreement between PT Garuda Indonesia and the sender, legal relationship, and transportation process by air cargo. In addition, this study used normative law as research method. It used primary data and secondary data, with data collection procedure through supporting data. After collecting the data, the data was collected and processed by data selection, assessment, data qualification then it would be analyzed qualitatively. The result of the research showed that the agreement of carriage between PT Garuda Indonesia and the sender of valid goods was proven by the agreement of the signing of the document of the transport agreement and the documents of the delivery of goods. The legal relationship between PT Garuda Indonesia and the sender had the rights and obligations. The sender shall pay the freight fee according to the contents of the agreement, and shall be entitled to the freight delivered to the destination safely. PT Garuda Indonesia was required to maintain the safety of the goods. PT Garuda Indonesia often uses the port to door service system with the reason that PT Garuda is often directly involved in the process of packing goods in the warehouse to minimize the occurrence of breach of contract and force major in the process of delivery of goods through air cargo.

**Keywords:** air cargo, freight forwarding, and legal relations

## A. Introduction

The importance of means of transportation is reflected by the increasing of the needs of transportation services for the mobility of passengers and goods, both for domestic and international purpose and for its role as the driver of economic development in the whole region. As the technological developments, many people more often use airplanes as their means of transportation in the certain island or between islands. Therefore, flight management should be organized in the integrated national transportation system that could meet the public necessities and have the high standard for the safety level and effectiveness.

There are two parties in the air transport activities that is PT. Garuda Indonesia, and service users which is called consignor which are bound by a transport agreement. As an agreement is a manifestation of a legal relationship that is civil in nature, it contains rights and obligations that must be carried out and fulfilled, commonly known as "achievement".<sup>1</sup>

Theoretically, the transport agreement is an engagement in which one party undertakes to safely moving people or goods from one place to another, undertaking to pay the fees.<sup>2</sup> The main problem in freight transportation using air cargo of PT Garuda is the two shipping systems applied, namely *door to door service* and *port to port service*. The process of air freight forwarding requires reciprocal agreements between the carrier and the sender. The carrier ties itself back and forth between the carrier and the shipper. Furthermore, the carrier binds himself to carry out the delivery of goods from the place of departure to the place of destination safely, as the sender commit themselves to pay transportation costs.

Legitimate cargo or cargo goods are protected by law to be loaded on the means of transportation and sent to their destination safely. Legitimate cargo means that it does not conflict with the provisions of the law or public order and decency. Goods that are protected by law may not be damaged, eliminated, destroyed or stolen by other parties that cause harm to their owners. For that to be protected, the goods must be packaged and loaded in the transport equipment to be transported to the destination. The process of carrying out the transportation begins with an agreement that raises the agreement followed by packing the goods until the delivery of the goods to the destination. Based on the description above, the

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<sup>1</sup>Achievement in the law of execution is the execution of the agreement that has been agreed upon by the procedure that has been shared. according to the law in Indonesia there are several achievements, including: giving something; change something; or don't do something.

<sup>2</sup>R. Subekti 1995. *Aneka Perjanjian*. Bandung: PT Citra Aditya, p. 69

author is interested to conduct research "Implementation of Transportation of Goods through Air Cargo (Study at PT Garuda Indonesia)".

## **2. Problem Formulation and Scope**

Based on the description of the background above, the formulation of the problem in this study are as follows:

1. How is the agreement of goods transportation using air cargo between PT Garuda Indonesia and the consignor?
2. What is the legal relationship between the carrier and the sender once using air cargo of PT Garuda Indonesia?
3. What is the mechanism of goods transportation using PT Garuda Indonesia air cargo?

The scope of this research field of science is economic law, especially commercial transport act, while the scope of research substance includes the implementation of goods transportation using air cargo.

## **B. Literature Review**

### **1. Air Cargo Transportation**

According to Abdulkadir Muhammad, transportation as a process of loading goods or passengers into transportation equipment, carrying goods or passengers from the place of loading to the destination, and lowering the goods or passengers from the transportation equipment to the designated place.<sup>3</sup> Furthermore, he added that transportation has three main dimensions, namely transportation as business, agreement and process.

Commercial transport in a small scope includes moving of goods safely from one place to the destination. Air cargo is all goods sent by air to be traded, either between regions or cities in the country or between countries (international) known as import-export.

Currently, the world of aviation is divided into two parts:

1. passenger aircraft which is a special aircraft to transport passengers, baggage and cargo (letters and documents).
2. cargo aircraft is special aircraft to transport cargo only.<sup>4</sup>

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<sup>3</sup>Abdulkadir Muhammad, 2008. *Hukum Pengangkutan Niaga*. Bandung: PT Citra Aditya Bakti, p.19

<sup>4</sup>Sulton Usman Adji, Joko Prakoso. 1991. *Hukum Pengangkutan di Indonesia*. Jakarta: PT Rineka Cipta, p. 1

Air cargo is sending goods without passengers that could be via airlines or freight forwarders. Packaging carried out by air is called a pallet.<sup>5</sup> Transportation of goods using aircraft cargo has several advantages: faster, can reach remote areas, hilly areas are difficult to reach other transportation, frequency and schedule can be given more regularly.

#### Characteristics of Air Cargo Transportation

a. The result is intangible but can be marked by the utilization of time and place. The production unit is available in sea-km and tons-km. Seat-km (available seat-km) is a seat that is flown within one km. Tons of km available are one ton of goods in one km. If the seat-km and the volume of tons available have been used by users, the production becomes *revenue passenger-km*, and *revenue cargo-km*.<sup>6</sup>

b. Elastic Demand

The request for air transport services is *delivered demand*, which is as a result of other demands. Because tariffs are expensive, there is a change in demand prices to be elastic.

c. Agile

The company in its nature is dynamic which quickly adapts the development of aircraft technology. Advanced technology adjustments not only in engineering, but also in other fields, management systems, methods, regulations and procedures, and policy.

d. There is always government interference, as in general transportation activities involve the interest of many people, in addition to maintaining a balance between passengers and operators.

e. (in this case concerning tariffs), a large amount of investment and guaranteeing flight safety.<sup>7</sup>

#### 1) Object of Air Cargo Transport

a. Cargo Goods

Cargo goods are goods that are legal and protected by law, loaded in a conveyor and transported to the destination. Legitimate means that it is in accordance with or not

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<sup>5</sup>Pallet is a means to transport goods in order to transport goods in large enough volumes

<sup>6</sup>Toto Thohir Suriaatmadja. 2005. *Pengangkutan Kargo Udara*. Bandung: Puska bani Quraisy, p.21

<sup>7</sup>Toto Thohir Suriaatmadja. Op.Cit., p. 22

prohibited by law, does not conflict with public order or decency.<sup>8</sup> Protected by law means that it is not eliminated, destroyed or stolen by anyone resulting in harming the owner. Cargo goods are divided into three categories, namely : general cargo, bulk cargo, homogenous cargo.

#### b. Transport Documents

Document is an identity of the items to be sent. Various types of documents in air transport are as follows: Air Mail (SMU) for domestic flights and AWB (Air Way Bill) for international flights.<sup>9</sup>

These provisions can be provided by consumers that this air cargo contents are more complete than passenger tickets or baggage tickets. But the legal position is the same as the passenger ticket or baggage ticket, meaning that if the ticket does not exist, there is an error in it, or if it is lost, then the air agreement can still be proved by other evidence.<sup>10</sup> The process of cargo transportation can directly contact the airline company as a carrier through the cargo agent to take care of the shipment of goods. After the requirements are met, the sender will get the required documents in accordance with the purpose of shipping the goods. After that, a cargo reservation is made through a "booking procedure". Previously the goods were checked by customs, to make sure that that it did not violate customs regulations. Then, the goods will be stored in the warehouse to wait for delivery according to the reservation. Here are some cargo terminology: Air Way Bill, Master Air Way Bill, Cargo Air Way bill, Cargo Transfer, Cargo Transit. Furthermore, additional cargo terminology according to the Cargo Handling Standard Operation Procedure, among others: Storage, Rebuild Up Device Unit (ULD), Cargo Delivery, Unloading, Cargo Manifest, Customs Excise (BC 1.2), Break Down, Goods Export Notification (PEB), Notification List Export Goods (DPEP).

#### c. Transportation costs

are contra-performance against the handling of shipping documents, finding facilities to transport goods, cargo control services and warehousing services. Costs are given to expeditors, transporters, loading and unloading services, and warehousing services based on the agreement of the parties

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<sup>8</sup>Abdulkadir Muhammad. *Op. Cit.*, p. 130

<sup>9</sup>Abdulkadir Muhammad. *Op. Cit.*, p. 130

<sup>10</sup>HasnilBasriSiregar. 2002. *HukumPengangkutan*. Medan: KelomokStudiHukumFakultasHukum USU. p. 44

## 2. Air Cargo Transport Agreement

An agreement can be said to be a legal agreement if it has fulfilled the conditions set out in Article 1320 of the KUHPdt, among others: agree, skills for making an engagement; a certain thing; a lawful reason.<sup>11</sup>

Article 1313 of the KUHPdt explains that an agreement is an act by which one or more other persons, the transport agreement is an agreement whereby one party agrees to be able to safely bring people or goods from one place to another, while the other party is willing to pay the fee.<sup>12</sup>

Parties interested in air cargo transportation are supporters of rights and obligations in the transport law relationship. These parties are directly involved in the air freight agreement because of their position as parties to the agreement, such as transporting companies and goods senders. The carrier is obliged to carry out the transportation of certain goods from one place to the destination, while the obligation of the sender to pay transportation costs.

Parties who are indirectly bound to the transport agreement, but not parties, but act on behalf of or for the benefit of other parties, such as freight forwarding companies, travel agent companies, loading and unloading companies, warehousing companies or because of obtaining rights in the transport agreement, namely the recipient of the shipment.

Therefore the main duty of the transporter is to transport the goods to the destination safely to be handed over to the recipient (Article 1235 jo. Article 1338 paragraphs 1 and 3 of the KUHPdt). The obligation of the sender to pay the transport money as a counter-achievement of the transportation carried out by the carrier. At the destination, the item is received by the recipient, who may be the sender himself or someone else.<sup>13</sup>

Based on this description, the basic concept of air cargo agreements is made between the sender and the cargo carrier. The basic concept of the agreement is Article 1313 KUHPdt, Article 1320 KUHPdt, and Article 1235 jo. Article 1338 paragraph 1 and 3 of the KUHPdt.

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<sup>11</sup>R. Subekti 1995. *Aneka Perjanjian*. Bandung: PT Citra Aditya. p. 70

<sup>12</sup>Abdulkadir Muhammad.. *Op. Cit.*, p. 2

<sup>13</sup>M.N Nasution, M.N. 2008. *ManajemenTransportasi* .Jakarta :Ghalia Indonesia. p. 27

## 2) Types of Air Transport Activities

Based on the implementing agencies, the types of air transport activities are divided into 2 (two) types of transportation, namely:

1. Commercial air transportation, by charging fees for service users, who can be both regular and leased (Charter).
  - a. Air Cargo, which is an airline company specializing in air freight services for goods.
  - b. Air Charter is an airline company engaged in aircraft leasing in individuals, groups and other companies.
  - c. Air Taxi is an airline company engaged in aircraft leasing and also its operating schedule.
  - d. Helicopter Service, a company engaged in transportation services for passengers using helicopters, from one airport to another airport in one city.
  - e. Air Line is a company engaged in the field of air transport services both passengers and goods, owns and or or controls a number of aircraft or a fleet of aircraft, operating according to a fixed and regular schedule and has a rate applicable to the public.
2. Non-commercial air transportation, without any fees, includes transportation activities that use civil aircraft and are authorized to conduct business activities, these activities are supporting or complementary such as photographing activities, surveys, distribution of pamphlets etc. and transportation activities that are intended for the benefit of the implementation of the duties of the agency or agency that is in the form of insurance such as air transport organized by the armed forces and government agencies.

Based on the implementing agency, air cargo activities in this study are air line activities, recognizing that a number of aircraft fleets operate according to a fixed and regular schedule and have tariffs applicable to the public. PT Garuda Indonesia is in the form of an air line because the company is engaged in air freight services, applies to the general type of air transport with a fixed and regular operating schedule and owns and or controls a number of aircraft.

### **A. Rights and Obligations of the Parties in Transportation**

Commercial air transport companies must prioritize the transportation of goods whose owners have fulfilled their obligations in accordance with the agreed commercial air



transport agreement. This is regulated in Article 41 (1) of Government Regulation No.40 of 1995 concerning Air Freight.

In air transport, the transport obligation is regulated in the law, namely in Article 1235 jo, 1338 numbers (1) and (3) KUHPdt, which in essence means that the obligation of the carrier is to transport or carry out the transportation of goods to their destination safely. With the aim of cargo goods can be handed over to the recipient completely and not damaged or lacking, and not late.

In Article 468 KUHD explains that the implementation of the transport agreement that the carrier is obliged to maintain the safety of the goods that must be transported, starting from the time of receipt until the delivery of the goods.

The carrier has an obligation to transport goods from one place to another place safely.<sup>14</sup> The obligation of the transporter is to transport goods and issue transport documents. The right of the sender is to get the treatment of good transportation for the goods and the delivery of the goods runs smoothly until the destination. The sender also has the right to ask the transporter to issue a transport document known as *Bill of Lading* or Concession.<sup>15</sup> The sender's obligation is to pay the transportation fee or money to the carrier as on agreement. Based on the above description of the concept of the rights and obligations of the parties in transportation, commercial air transport companies are obliged to prioritize the goods that its owners have carried out the obligations as on the agreement.

### **C. Research Method**

Research is a scientific activity that is based on certain methods and systematic thinking, which aims to reveal the truth systematically, methodologically and consistently. Systematic means using a particular system, methodologically means using a method or a certain method and consistent means that nothing is contradictory in a particular framework.<sup>16</sup>

#### **1. Type of Research**

This type of research is applied normative law research. The subject matter of the study in applied normative is the implementation of positive legal provisions and factual

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<sup>14</sup>SoegijatnaTjakranegara. 1995. *HukumPengangkutanBarangdanPenumpang*. Jakarta: RinekaCipta. p. 67

<sup>15</sup>Abdulkadir Muhammad, *Op. Cit.*, p. 48-56

<sup>16</sup>Abdulkadir Muhammad, *HukundanPenelitianHukum*, (Bandung: PT Citra Aditya Bakti, 2004), p.

contracts on any particular legal event that occurs in the community in order to achieve the intended purpose.<sup>17</sup> In applied normative there is a combination of 2 (two) stages of study, namely:

- a. The first stage is a study of applicable normative law;
- b. The second stage is the application of events *in concreto* in order to achieve the stated goals. The application can be realized through real actions and legal documents. Application results will create understanding of the realization of the implementation of normative legal provisions that have been carried out appropriately or not.<sup>18</sup>

For this reason, this study will examine the air cargo transportation agreement, the legal relationship between transporters and shippers, the process of carrying out air freight

## 2. Problem Approach

The problem approach is the process of solving or solving problems through predetermined stages to achieve the research objectives. The problem approach used in this study is the normative juridical approach. Normative problem approach, reviewing the norms or rules of the law that apply and relating to the problem under study.

## 3. Data Source

### a. Data Collection Techniques

The data used in this study is secondary data which is carried out by following the stages as follows:

- 1) Determination of secondary data sources (primary and secondary sources), in the form of legislation, legal documents, legal records and literature in the field of legal science;
- 2) Identification of secondary data (primary and secondary legal materials) needed, namely the process of finding and recognizing legal material in the form of relevant statutory provisions, name of document, name of legal record and title, author's name, year of publication and legal work;
- 3) Inventory of relevant data and problem formulation (subject matter) by means of citation or recording;

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<sup>17</sup>Ibid, p. 52.

<sup>18</sup>Ibid., p.53

- 4) Assessment of data that has been collected to determine its relevance to the needs of the formulation of the research problem.

#### **b. Data processing and analysis**

- 1) Data processing that has been collected is done in the following ways:
  - a) Data selection :all data collected for research to be selected according to the subject matter discussed.
  - b) Data classification :datagrouping in accordance with the framework of the prescribed discussion;
- 2) Data compilation :data system matching in accordance with the problems to be studied.
- 3) Data analysis method

Qualitative analysis means deciphering the quality of data in a regular, collapsed, logical and non-overlapping and effective sentence to facilitate interpretation and understanding of the results of the analysis. Comprehensive means that in-depth data analysis from various aspects in accordance with the scope of research. Complete means that none of the left behind parts has entered the analysis.

#### **D. Research Results and Discussion**

##### **1. Agreement on the Transport of Goods Using Air Cargo between PT Garuda Indonesia and the Sender**

Based on the interview with Mr. Tohsan SE as sales marketing and head of the PT Garuda cargo warehouse on August 30, 2017 and a literature study, the transport agreement between PT Garuda Indonesia and the shipper (exporter) began with the existence of service information export, cargo transportation or other services. PT Garuda Indonesia makes a service offering needed by the shipper. The service offer is conducted by way of PT Garuda Indonesia will send the goods by submitting a letter of offer for a *Handling* or tender job.

The Handling Job Offer Letter contains the form of service provision provided by PT Garuda Indonesia, that consist of arranging export import documents, regulating the delivery of goods and controlling goods, providing transportation facilities such as trucks, cargo planes and other heavy equipment, as well as providing warehousing services. If the goods sender wants,PT Garuda Indonesia with the sender of the goods negotiates to establish

a service fee agreement. After an agreement has been made, a transport agreement is prepared completed with complementary documents. The document begins with a Handling Work Agreement Letter signed by both parties.

The implementation of the agreement to transport goods using air cargo by PT Garuda Indonesia has two systems used, namely *Door to Door Service* and the *Port to Door Service System*. The transportation of goods using air cargo by PT Garuda Indonesia often uses *Port to Door Service*, starting with the loading of goods in the warehouse loading goods (loading warehouse) until demolition in the receiving warehouse. Therefore, this study specializes in the implementation of the transportation of goods using air cargo with the *Port to Door Service System*.

## **2. Legal Relations between the Carrier and the Sender in the Process of Freightling Using Air cargo PT Garuda Indonesia**

Based on the results of the study, the rights and obligations of the carrier are as follows:

1. The rights of the transporter are:

- a) To obtain complete information about the condition and nature of the goods.
- b) To refuse requests for the delivery of prohibited or illegal goods such as drugs, marijuana, morphine or items that do not have a permit.
- c) To receive or collect transportation costs and other costs from the shipper.
- d) To terminate the employment agreement.

2. The obligations of the transporter are as follows:

- a) Carry out transportation and maintain the safety of goods transported.
- b) To choose and provide pallet that is suitable for use.
- c) To prepare all rooms for stockpiling of goods in the aircraft until they are appropriate and safe for compaction of goods.
- d) To provide air cargo aircraft that are feasible.
- e) To equip the aircraft sufficient officers and can carry out their respective duties.
- f) Provide sufficient equipment for the aircraft.
- g) Protect, secure, keep the cargo from being damaged, the load is not lost.

h) Make a report on the handover of goods.

As the explanation above, the carrier has the right to receive transportation costs and reject the contents of goods that are prohibited by law or dangerous goods. While the obligation of the carrier is to carry out transportation and maintain the safety of the goods transported, take care of required documents such as Export Declaration (PEB) and *Bill of Lading* and issue documents needed in the process of unloading and delivering goods.

### **3. Mechanism For Transportation Of Goods Using Air Cargo Pt Garuda Indonesia**

The implementation of air cargo transportation by PT Garuda Indonesia uses the following two systems:

#### **a. Door to Door Service System or Container Yard Container Yard (CY/CY).**

The *Port to Door Service* system in carrying out the transportation uses air cargo, the goods to be transported are loaded at the sending warehouse and unloaded at the receiving warehouse. *Door to door service system* as a system for delivering air cargo by picking up items to be sent from the address given to the destination address. Air cargo transportation is not responsible for the loading of goods into containers, aircraft and goods demolition services, does not provide goods loading services and loading warehouses. The transport company is responsible to the sender of the goods if the container is damaged.

This means that PT Garuda Indonesia is only responsible for the amount of goods in accordance with the information of the sending party and is not responsible if there is an error in filling/loading the goods into the container both regarding the amount of goods, net or dirty weight.

#### **b. Portto Door Service Systemor Container Freight Station to ContainerYard (CFC/CY)**

If using the system there is a *Port Door Service system*, the goods that will be transported in the loading of goods and goods to be unloaded in the receiving warehouse so that PT Garuda Indonesia is directly involved in the goods to be transported into containers.

The transportation of goods using cargo by PT Garuda Indonesia, which uses the *port to door service* system, starts from the loading of goods (loading warehouse) until the unloading of goods in the receiving warehouse. In carrying out the transportation of goods using air cargo there is another party of the Aircraft Cargo Expedition (EMPU) as the representative of the sender and the Container Terminal Unit (UTPK) that in charge of unloading the goods.

The stages in carrying out air cargo transportation are as follows:

a. Submission and receipt of goods

Transportation using air cargo with a *port to door service system*, the sender loads the goods into the container itself and the carrier is responsible for unloading the container at the destination (receiving warehouse). The responsibility of the carrier since air cargo (container) is transported by the carrier, air cargo transportation is not responsible for filling goods into containers, but only providing containers delivered to the sending warehouse.

Before the preparation and dismantling, the goods is entered into a warehouse (loading warehouse). The goods filling in the container is responsible until the loading warehouse, after that PT Garuda Indonesia takes over the responsibility until the demolition in the receiving warehouse.

b. Loading goods into container

Before the goods are loaded into the container, the sender must record the sending items to the container service company e.g. the identity and the quantity of goods, the desired loading conditions and the destination.

By signing *shipping instruction* (SI), the agreement has been made. Based on SI, container service companies submit export request with PEB (notification of export of goods) to the Customs office. As Article Decree of the General of Customs No. Kep-PER 32/BC/2014 concerning Customs Procedures in the Export Field explains that Export Declaration shall be documented, including:

- 1) Completeness and correctness of PEB data filling;
- 2) The truth of the calculation and repayment of customs fees for goods affected by export costs.
- 3) The required customs documents.
- 4) The completeness of the complementary documents in order to fulfill customs provisions in the export sector.

Customs complementary documents required as referred to in letter c above are in the form of *invoices* and *packing lists*. Other customs complementary documents which are required in letter d above as proof of deposit, letter of acknowledgment of exporters

registered export approval letter from the Ministry of Industry and Trade, Certificate of quality of goods, export permit.

After the document is complete and correct, the PEB is given a number and date of registration. However, the following documents are still needed:

- 1) with the provisions of PT Garuda Indonesia as the proxy of the sender, it is obliged to submit other customs complementary documents required to the official before or after loading the goods in the customs area.
- 2) If using electronic data or forms, PEB is given a number and date of registration after PT Garuda Indonesia completes the required requirements.
- 3) If PEB data are founded as incomplete or incorrect, PEB is returned to Garuda Indonesia with a notice of refusal.

After the PEB is given a number and date of registration, it is issued:

- 1) Export approval signed by officials,
- 2) Notification of physical inspection of goods, if there is no physical inspection, PT Garuda Indonesia must submit other required complementary customs documents.
- 3) Notification of inspection is required for physical goods to export.

Furthermore, the export approval letter is duplicated for 5 (five) times as follows:

- 1) First sheet for each sender / exporter.
- 2) Sheet of both parties consolidating
- 3) The third sheet for temporary hoarding entrepreneurs (TPS).
- 4) Fourth sheet for transporters.
- 5) The fifth sheet for customs offices loading into transport facilities.

Physical inspection of goods is carried out in the customs area that could be carried out in an export warehouse at the request of the exporter or other place used by exporters to store goods. Inspection of goods in the customs area must be completed within 24 hours by the relevant agency. If the physical inspection of goods is carried out outside the customs area, PEB is registered no later than 2 (two) working days before the physical inspection. In case of physical inspection items in the exporter warehouse, stuffing and sealing must be carried out on the goods packaging.

If false notification regarding the number and type of goods found in the PEB, there will be administrative sanctions in the form of fines based on Act No.10 of 1995 Jo. Article 82 (6) of Law Number 7 of 2006 concerning Customs, "Anyone who misrepresents the type and/or amount of goods in the customs notification of exports which results in the non-fulfilment of state levies in the export sector is subject to administrative sanctions in the form of the least fine 100% of the levies (one hundred percent) of the state levies in export prizes that are underpaid and at most 1,000% (one thousand percent) of state levies paid for underpaid exports.

Based on the interview with Mr. Tohsan SE, PT Garuda Indonesia sales marketing and literature studies, before export goods are loaded into containers, cargo goods are wrapped into a *pallet* that is a cube-like box. *Pallet* assortment includes wooden pallet, *pallet* wrapped in plastic and metal box (*pallet* made of iron). After that, the cargo is given the identity of the sender's name, the recipient's name, number of the box, code and / or warning symbol that is required to be followed by those who carry out *cargo handling work*.

Furthermore, PT Garuda will submit to the warehouse the stacking of *port to door service* or provide containers to the sender for loading goods in accordance with the agreement form of the parties. The transport of goods is carried out after the container is filled with the sender at the sending warehouse if the transportation is in the form of *door to door service*.

Transporting in the form of *door to door service*, PT Garuda Indonesia submits an application to the stacking warehouse and is forwarded to UPT to carry out the loading of goods from the truck into the storage warehouse. Furthermore, PT Garuda Indonesia pulled the empty *container* from the depot *container* to be taken to the *stuffing* location / location of the container load, after the stuffing container using a *forklift* (arranging the goods into the *container* warehouse), the *container* was sealed by the PT Garuda Indonesia officers inside and the container was taken to airport to be lowered at the airport Customs and Excise *stake* and then transported to the aircraft. The sender submits the shipment of goods to the stacking warehouse based on the shipping instruction (SI) that he clicks on.

The responsibility for the goods is still on the sending party until receipt by the carrier, after the carrier receives the goods the airline company issues a *bill of lading* to the sender. The warehouse must be responsible for the safety of the goods in accordance with the conditions at the time the goods are received while they are still under their supervision



after being received at the *port to door* warehouse. The items are arranged in a container, then the carrier will issue documents in the *tally sheet*, *stuffing list* and minutes of the warehouse handover (UTPK).

c. Moving the Container to the Airport

After the goods are loaded in the container, then it will be transferred from the *port to door service* location to the airport by UTPK which means the responsibility of the goods is moved from the *port to door service* to UTPK.

The unloading goods by certain companies is carried out from and to the aircraft, including:

- 1) Unloading goods from /to planes, airports, trailers into the aircraft;
- 2) Taking goods from stockpiles/place of accumulation of goods in the warehouse and arrange them using a forklift;
- 3) Taking from the field of accumulation of goods into an air cargo then arrange them to the aircraft hull or vice versa.

d. Loading of goods into the aircraft

PT Garuda Indonesia will issue *shipping orders* to give orders to the aircraft to receive goods that have been loaded into containers as well as aircraft ready at the airport in accordance with the *shipping order* to be transported to the destination port or receiving warehouse. The responsibility of UTPK is transferred to the airline, a *bill of lading* will be issued according to the name of each sender.

The transporting aircraft whose means of transportation leave the customs area, provides the exported goods that are transported by using the notification to the customs official no later than 3 (three) working days from the date of departure of the carrier suggestion. *Outward manifest* is a list of cargo that is transported by means of transport from the origin airport outside the customs area.

The official in the loading office who receives an outward manifest reconciles between PEB and the outward manifest received and submits unreconciled PEB data to the Head of the Customs Office and the Officer in charge of the investigation.

Transporters who do not meet the stipulated conditions will be subject to sanctions. If the export goods are not entirely included in the customs area, PT Garuda Indonesia must make corrections of PEB and report to the official

e. Submission of Cargo Goods at the Recipient Airport

Notification of departing of goods to the destination airport is stated by the dates, days and hours of the departure. The destination airport will estimates when the aircraft will arrive. After arriving at the destination airport, the carrier will submit the documents needed to get the service needed.

Once unloading the cargo from the aircraft to the destination airport, the responsibility of the carrier is transferred to the loading and unloading party. Cargo goods is brought to the warehouse and are handed over to the recipient of the goods witnessed by the sending parties represented by EMPU, flight agents and transporters.

The airline company will examine the authenticity and validity of the deposit carried by the consignee. After being declared valid, the transporter will issue a *delivery order* (D / O), which is a warrant to the warehouse that *port too door service* to deliver the goods in accordance with what is stated in the D/O to the consignee. The recipient of the goods will check the condition of the goods received in the warehouse (UTPK) and sign the minutes of delivery of goods. Thus ended the responsibility of PT Garuda Indonesia in organizing transportation. PT Garuda Indonesia often uses *port to door service* with the aim of minimizing the occurrence of defaults in the air cargo shipments.

**E. Conclusion**

1. The transport agreement between PT Garuda Indonesia and the sender of goods begins with the work of export services, container transport and other services. PT Garuda Indonesia conducts marketing of transportation services needed by the sender.
2. The legal relationship between the carrier and the sender wherein the sender is obliged to pay the transportation fee according to the agreement, and has the right to receive the goods safely at the destination from Garuda Indonesia.
3. PT Garuda Indonesia often uses the second system: a *port to door service* system that enable them to directly involved in the process of packing goods in a loading warehouse to minimize the occurrence of defaults and force majeure in the air cargo delivery process.

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## Peraturan Perundang-undangan:

Kitab Undang-Undang Hukum Perdata (Burgelijk Wetboek)

Kitab Undang-Undang Hukum Dagang (WvK)

Odonasi Pengangkutan Udara Indonesia

Undang-Undang RI No. 1 Tahun 2009 Tentang Penerbangan

## **Disability Rights Protection on Public Transportation Facilities in Bandar Lampung**

Rizky Pradana Putra Laksana Panjaitan and Ria Wierma Putri

### **Abstract**

Nowadays, people with disabilities are often ignored by the government, not only in the fulfillment of their rights, but also in terms of their participation in daily life. The rights of disabilities people are governed by the basic rules of the Republic of Indonesia in article 28 H paragraph (2) and in Article 28 I Paragraph (2) of the 1945 Constitution. However, the provision of facilities in favor of disabilities people in Indonesia is still minimal, it does not mention the situation in Lampung, especially in public transportation facilities. The aim of this research was to see how the disability rights fulfillment on public transportation facilities in Bandar Lampung using judicial empirical methods. By reviewing the existence laws in Indonesia and see the facts in the community. The results of this research and observation in Bandar Lampung in fulfilling the rights of the disability were only limited to sidewalk in one corner of the city which was the only one yet it was not feasible. Ideally, at least the disabilities person should be provided, it does not just the sidewalk but also for the pedestrian bridge and the bus stop. Therefore, the Local Government should prepare local regulation in Bandar Lampung for arranging the fulfillment of the rights of people with disability on public transportation facilities.

**Keywords:** Disability; Disability Rights; Public Transportation Facilities

## A. Introduction

Man as God's creation has many advantages and disadvantages. the advantages and disadvantages of humans do activities in survival. Excess used to maximize results and deficiency does not obstruct humans to do their best. humans as individuals need to interact with the environment because of its nature as a social being. human as individual need to interact with the environment because of its nature as a social being. To do good interaction with the environment and others needs adjustment. not only people with disabilities, but also the Facilities support for their activities. In 2007 United Nations Convention on the Right of Person with Disabilities (CRPD) in New York, United States, states have agreed that persons with disabilities are persons with longstanding physical, mental, intellectual or sensory limitations. As an integral component of a country, persons with disabilities have the same rights as other normal people. The rights of persons with disabilities have been regulated by Constitution of the Indonesian republic in article 28 H paragraph 2 of the 1945 Constitution which reads: "Everyone shall have the right to special convenience and treatment to have equal opportunities and benefits in order to achieve equality and justice". Also stipulated in article 28 I paragraph 2 of the 1945 Constitution which reads:

*"Every person shall have the right to be free from discriminatory treatment on any basis and entitled to protection against such discriminatory behavior".*

The government has also regulated further the protection of the disability in Article 42 Act number 39 of 1999 of Republic Indonesia which reads:

*"Every elderly citizen, physically disabled and / or mentally disabled shall be entitled to special care, education, training, and assistance at the expense of the State, to ensure a decent life in accordance with the dignity of his humanity, confidence, and ability to participate in the life of society, nation, and state ".*

Referring to the regulation above that the existing regulations in Indonesia provide a guarantee for every citizen to gain prosperity. Conditions that forbid discrimination and the obligation of fair treatment of every citizen as well as a constitutional guarantee for citizens with limited physical and psychological conditions.<sup>1</sup> The Government is expected to give sufficient attention to persons with disabilities, including in terms of accessibility of

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<sup>1</sup> Hardjanti, D.K. 2016. 'Kajian Yuridis Tentang Penyandang Disabilitas'. *Perspektif Hukum*. Vol. 16. No. 1. p. 3

public services.<sup>2</sup> Government is required to provide accessibility for persons with disabilities, accessibility is easily accessible. The role of the government in fulfilling the rights of the life of the disabled is very important. The government needs to give special attention in facilitating access to public facilities such as education, employment, public transportation, and other means as the fulfillment of government obligations in service to the community. The public service should pay attention to the principles of justice and non-discrimination, as stated in ActNo.25 of 2009 on Public Services. According to the law, public service can be defined good if it meets several principles as follows: a) Public Interest; b) Legal Certainty; c) Equal Rights; d) Balance of Rights and Obligations; e) Professionalism; f) Participatory; g) Treatment / non-discriminatory equation; h) Openness; i) Accountability; j) Special Facilities and Treatment for Vulnerable Groups; k) Timeliness; l) Speed of Convenience and Affordability.<sup>3</sup> According on this paper will discuss the role of government in fulfilling the rights of persons with disabilities through public transportation means. This paper also discusses the important role of communities in supporting a comfortable environment for people with disabilities.

Based on the description on the background, then the formulation of this research problem is as follows: How is the protection of persons with disabilities on public transport facilities in Bandar Lampung?

## **B. Literature Review**

Disability is a world's social fact including Indonesia. Disability has been at the center of attention of the United Nations for the sake of building social welfare for the entire world community, upholding human rights in social life and rejecting discrimination against the disability.

The occurrence of violations and crimes experienced by persons with disabilities that make them feel unacceptable in the community environment. Violations occur because persons with disabilities are not considered part of a citizen, not even a human being<sup>4</sup>. This discrimination will make the individual as if they cannot afford the consequences of disability that result in the government being impartial of the rights they ought to have.

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<sup>2</sup> Mutia, Nilda, Rinaldi, Yanis. 2017. 'Pelaksanaan Pelayanan Publik Bagi Penyandang Disabilitas Di Kota Banda Aceh'. *JIM Bidang Hukum Kenegaraan*. Vol. 1. p. 56

<sup>3</sup> Rahayu, Sugi. *Et al.* 2013. 'Pelayanan Publik Bidang Transportasi Bagi Difabel Di Daerah Istimewa Yogyakarta'. *SOCIA*. Vol. 10. p. 110.

<sup>4</sup> Nursyamsi, Fajri. *Et al.* 2015 'Kerangka Hukum Penyandang Disabilitas di Indonesia: Menuju Indonesia Ramah Disabilitas'. Edisi Kesatu. Pusat Studi Hukum dan Kebijakan Indonesia. Jakarta

Though the lack of an individual does not mean the individual is not capable, but they are capable in a way that unlike most people do and maybe by taking a longer time<sup>5</sup>.

Based on the records in the Ministry of Social Affairs in 2017, only eight provinces have regulations on disability. The eight provinces are DI Yogyakarta, East Java, West Java, Central Java, DKI Jakarta, Bangka Belitung, Riau Islands, and Bali<sup>6</sup>. These cities are the first city who initiated a friendly city for people with disabilities by emphasizing the local regulation on facilities and infrastructure for disabilities. Those cities are regions that have made local regulations whose regulate about ability. For example, in the provincial regulation Bali states three scope of protection and fulfillment of disability rights, namely equality of opportunity, accessibility, rehabilitation. Government involvement in carrying out administrative tasks for all its people with the ease of public facilities. The form of ease provided by the government by facilitating public facilities that are friendly to persons with disabilities, where public facilities include public buildings, public roads, public transport, and landscaping<sup>7</sup>. Disability regional regulations will be a legal protection for the fulfillment and protection of the rights of persons with disabilities at the regional level. In the effort to fulfill disability rights, local governments play a role by regulating a regulation as a guideline for the public to see the importance of disability rights to be fulfilled.

### C. People With Disability and Their Rights

Disability is a part of society that has less place in social interaction in the community. Persons with disabilities have issues that are always underestimated and do not attach importance to their rights as human beings. Disability has the meaning that

*"Persons with disabilities are anyone who experiences physical, intellectual, mental, and / or sensory limitations for a long time in interacting with the environment can experience obstacles and difficulties to participate fully and effectively with other citizens based on similarities rights."<sup>8</sup>*

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<sup>5</sup> Murdiyanti,dhini. 2012. *Aksesibilitas Sarana Dan Prasarana Transportasi Yang Ramah Penyandang Disabilitas (studi kasus transjakarta)*. Retrieved from lib.ui.ac.id/file?file=digital/20308395-S42644.

<sup>6</sup> OJE, 2017,Hanya Delapan Provinsi Memiliki Perda Disabilitas, <http://news.metrotvnews.com/peristiwa/GKdQJjmN-hanya-delapan-provinsi-memiliki-perda-disabilitas>

<sup>7</sup> I Kadek Indyana Pranantha, Anak Agung Sri Utari, Kewenangan Pemerintah Provinsi Bali Terhadap Perlindungan Disabilitas, <https://ojs.unud.ac.id/index.php/Kerthanegara/article/view/21995/14588>. p. 3

<sup>8</sup> Article 1 paragraph 1 of Act No. 8 of 2016 about people with disabilities

in accordance with the definition above it can be interpreted that persons with disabilities can be categorized into four groups in accordance with the article 4 of Act No. 8 of 2016, namely:

- a. People with physical disabilities, namely impaired movement function, including amputation, paralysis or stiffness, paraplegi, cerebral palsy (CP), due to stroke, due to leprosy, and small people.
- b. Persons with intellectual disabilities, namely disruption of thought function because the level of intelligence is below average, including slow learning, grahita disability (*mental retardation*) and down syndrome.
- c. People with mental disabilities, namely disruption of thought, emotion and behavior functions, including:
  - ✓ psychosocial include schizophrenia, bipolar, depression, anxiety, and personality disorder; and
  - ✓ developmental disabilities that affect social interaction abilities include autism and hyperactivity.
- d. Persons with sensory disabilities, namely disruption of one of the functions of the five senses, including visual disability, hearing impairment, and / or speech disability.

Disability is an issue that has existed long ago. However, attention to the importance of legal protection for people with disabilities has only recently been realized. As a manifestation of the protection of constitutional rights, the basis for juridical fulfillment of the rights of persons with disabilities is contained in Article 28 H paragraph (2) in conjunction with Article 28 I paragraph (2) of the Constitution of the Republic of Indonesia. In the context of Article 28H paragraph (2) the 1945 Constitution of the Republic of Indonesia is clarified by Article 5 paragraph (3) jo Article 42 paragraph (2) of Act No. 39 of 1999. Article 5 paragraph (3) Act No. 39 of 1999 states that:

*"Everyone who belongs to a vulnerable group of people has the right to receive more treatment and protection with regard to their specificity."*

This arrangement is strengthened by Article 42 paragraph (2) of Act No. 39 of 1999 which stipulates that every person with a disability, elderly people, pregnant women and children are entitled to special facilities and treatment. In Indonesia the regulation regarding persons with disabilities begins with the establishment of Act No. 4 of 1997 about disabled



people. After that the previous regulation was replaced by the Convention on the Rights of People with Disabilities (CRPD) and ratified into Act No. 19 of 2011. The difference that CRPD has with other international conventions is to have a wide range of objectives, meaning and scope of disability protection. The formation of the convention is based on the agreement of member countries on how the rights of persons with disabilities in social life can be fulfilled.

By holding a CRPD convention that has these principles it is expected that non-discrimination occurs for persons with disabilities. Countries ratifying the convention recognize the need to promote and protect human rights as persons with disabilities, including those who need more intensive support. Recognizing the importance of accessibility to the physical, social, economic and cultural environment for health and education, as well as information and communication, which enable people with disabilities to fully enjoy all human rights and fundamental freedoms. Disability rights that must be fulfilled are disability must be free from torture or cruel, inhuman treatment, humiliate human dignity, free from exploitation, violence and ill-treatment, and have the right to respect their mental and physical integrity based on similarities with people other. This includes the right to get social protection and services in the context of independence, as well as in emergencies.

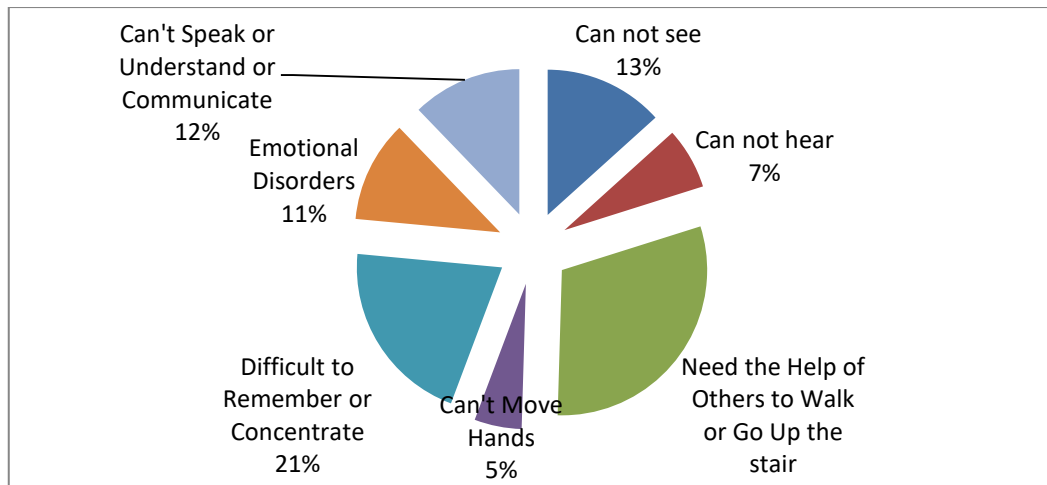
Therefore, with the development of the community paradigm for people with disabilities, there is a paradigm shift in the community towards people with disabilities. This shift resulted in new regulations for people with disabilities regulated in Act No. 8 of 2016 concerning people with disabilities.

Based on data from the 2015 inter-census population survey (SUPAS) regarding the number of persons with disabilities in Lampung Province, there is table 1

**Table 1:** Data on Disabled Persons in Lampung Province

| <b>Disability Data Aged 10 Years and Over 2015</b> |              |
|--|--------------|
| <b>Group Name</b>                                  | <b>Total</b> |
| Can not see  | 9,503        |
| Can not hear                                       | 4,870        |
| Need the Help of Others to Walk or Go Up the stair | 21,649       |
| Can't Move Hands                                   | 3,756        |
| Difficult to Remember or Concentrate               | 14,814       |
| Emotional Disorders                                | 8,076        |

|  |        |
|--|--------|
| Can't Speak or Understand or Communicate | 8,710  |
| Can't Take Care of Yourself              | 15,564 |



#### D. Accessibility of Public Transportation Facilities and Infrastructure for Disability

Humans as social beings who have to interact with other people are in desperate need of transportation to carry out their activities. Human mobility is very fast affecting the development of society and the region itself. The provision of transportation facilities must be feasible for all people. The provision of these facilities is the responsibility of the government. The government here is the central government to the regional government as a representative of a country. The State is responsible for ensuring and enhancing the complete realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination in all forms of fundamental disability<sup>9</sup>.

Carrying out transportation facilities by the government must pay attention to all aspects and classes in the community and the implementation of these facilities must be accessible. Furthermore, in article 9 there is the concept of affirmative action for people with disabilities, namely by providing an explanation of the arrangement that accessibility has the purpose of creating conditions and a more supportive environment for people with disabilities to socialize in the community. The regulation emphasizes the provision of minimal access for persons with disabilities to the public space as mandated by Article 9 of the CRPD. According to the Minister of Public Works Regulation No. 30 of 2006 Article 1 paragraph (3) Accessibility is the facility provided for all people including persons with

<sup>9</sup> Opening Convention on The Rights of People with Disabilities letter V

disabilities and the elderly to realize equal opportunities in all aspects of life and livelihood. The regulation also discussed the principle as a basic guideline for the provision of public facilities and infrastructure, namely:

- a. Safety  
every building that is general in an environment is built, must pay attention to safety for all people.
- b. Convenience  
everyone can reach all places or buildings that are general in an environment.
- c. Usability  
everyone must be able to use all places or buildings that are general in an environment.
- d. Independence  
everyone must be able to reach, enter and use all places or buildings that are general in an environment without the need for help from others.

Based on these principles, accessibility for service users with special needs on transportation facilities includes at least<sup>10</sup>:

- a. Aids to go up and down from and to the means of transportation;
- b. A safe and easily accessible door;
- c. Audio/visual information about travel which is easy to access;
- d. Special signs / instructions on service areas in transportation facilities that are easily accessible;
- e. Priority seating and easily accessible toilets; and
- f. Provision of assistive facilities that are easy to access, safe and comfortable.

Accessibility for users of special needs services in transportation infrastructure, including:

- a. Guiding block tiles on transportation infrastructure (pedestrian, window, toilet etc.);
- b. Special signs / instructions on accessible service areas (parking, toilet counters etc.);
- c. Visual / audio information related to travel information;
- d. Accessible doors / gates with dimensions that fit the width of the wheelchair;

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<sup>10</sup> Article 3 Transportation Minister Regulation No. 98 of 2017 about the provision of accessibility to public transportation services for users with special needs.

- e. The area pick up and drop off the passengers;
- f. Ramp with the appropriate slope;
- g. Access to pick up and drop off passengers accessible to high rise buildings; the toilet is accessible with the dimensions of the toilet door that fits the width of the wheelchair;
- h. Special ticket counter that is easily accessible;
- i. Waiting room with priority seats;
- j. The nursery / nursery room is equipped with sofa facilities, women's waist-high baby tafel, air conditioning, sink, trash can, and drinking water dispenser;
- k. Polyclinic;
- l. Children's playroom;
- m. Parking lot;
- n. Access to fire hazards;
- o. Availability of ready wheelchairs.

Based on the rules above, it is a minimum standard for providing public facilities and infrastructure for people with disabilities. According to this article, public servants in the provision of public transportation facilities and infrastructure must adjust to the provisions based on the ministerial regulation if the regions have not regulated them in local regulations.

#### **E. Accessibility of Public Transportation Facilities and Infrastructure for Disability in Bandar Lampung**

The provision of disability facilities by local government will be very positive in the community. But the reality is not. In Bandar Lampung City, the Lampung provincial government in the provision of transportation facilities and infrastructure is still relatively low. The awareness of the local government and the citizen of Bandar Lampung city towards the fulfillment of disability rights is considered insufficient.

Based on the reality in the city of Bandar Lampung, public transport facilities and infrastructure have not met the minimum standards set by Act No. 8 of 2016. Here are some examples of public transportation facilities and infrastructure that are often used by the public:

- a. Sidewalk

This is a condition of sidewalks in Bandar Lampung City which located on R. A. Kartini roads which is not suitable for pedestrians, especially those with disabilities.



Picture 1  
(courtesy: rizky pradana putra laksana panjaitan)

b. Pedestrian Bridge

This is a condition of the outdated and not disability-friendly Pedestrian Bridge in Bandar Lampung City on Radin Inten street.



Picture 2  
(courtesy: rizky pradana putra laksana panjaitan)

c. Bus Stop

This is the condition of a bus stop in Bandar Lampung City on Prof. Dr. Sumantri Brojonegoro which is not disability-friendly.



Picture 3

(courtesy: rizky pradana putra laksana panjaitan)

d. Parking Lot

This is the condition of a parking lot in one of the traditional markets in Bandar Lampung, namely the Bambu Kuning market.



Picture 4

(courtesy: rizky pradana putra laksana panjaitan)

e. Bus

This is a condition of Trans Bandar Lampung bus that is not disability-friendly.



Picture 5

(courtesy: rizky pradana putra laksana panjaitan)

## **F. Urgency for The Establishment of Regional Regulations For Disability in Lampung Province**

A dignified country is a country that respects, appreciate, fulfills and provides protection for every citizen without exception. The issue of persons with disabilities or people who have different abilities is often known as "difable" (differently abled people) or now known as "disability" is the problem that rarely gets the attention of the Government or the community<sup>11</sup>. As a country that recognizes human rights and is written in the constitution is an obligation of the state of Indonesia to carry out these obligations.

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<sup>11</sup> Harahap, R.R. Bustanuddin. 2015. 'Perlindungan Hukum Terhadap Penyandang Disabilitas Menurut Convention On The Rights Of Persons With Disabilities (CRPD)'. *Jurnal Inovatif*. Vol. VIII. p. 18

The welfare principle specified in the 1945 Constitution of the Republic of Indonesia (constitution) has a general and fundamental nature, therefore the implementation must be regulated in organic laws or in other lower law. Arrangements that at the same time provide constitutional guarantees for citizens to obtain welfare (although not explicitly stated) at least provide a very strong position related to citizens' rights and at the same time constitute the mandate and responsibility that must be carried out by the state (organizer)<sup>12</sup>. With the formation of a regional regulation on disability, it is possible for the Lampung regional government to regulate itself the authority of the Lampung government in accordance with the resources and conditions that exist in the Lampung Motherland accurately and proportionally. When a regional regulation does not exist, it will become a gap for the regional government to neglect and in Act No. 23 of 2014 concerning regional autonomy the regional government is given authority in accordance with local needs in managing its own policies.<sup>13</sup>. The establishment of regional regulations must follow the hierarchy of laws and regulations and fulfill human rights and accessibility for persons with disabilities. Through the implementation of the formation of regional regulations for the disabled, the provincial government of Lampung has carried out the orders contained in Act No. 8 of 2016.

## **G. Conclusion**

The provision of transportation facilities and infrastructure by the Lampung regional government still lack. Rights of persons with disabilities are also human rights that must be fulfilled. Human rights which are also written in the constitution are the ideals of the Indonesian state as a country that recognizes human rights. The State of Indonesia as a country that recognizes the principle of welfare must support the welfare of every citizen without exception. Provision of transportation facilities and infrastructure that supports accessibility for disability is the right initial step from the provincial government of Lampung to realize the ideals of the Indonesian State in fulfilling the rights of persons with disabilities. By forming a regional regulation that is guided by the hierarchy of laws and regulations, a regional regulation for disability can be formed that is appropriate and integrated. The establishment of the regional regulation is also the right step to eliminate the stigma in the community that people with disabilities are group two who do not interfere in social, political and cultural life in Lampung, thus the need for rapid and appropriate steps

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<sup>12</sup>*Op. Cit.* p. 3

<sup>13</sup> Kertaning Tyas, 2017, Pentingnya Perda Disabilitas untuk Memastikan Komitmen Daerah Memenuhi Hak Difabel, <https://www.solider.id/baca/3832-pentingnya-perda-disabilitas-memastikan-komitmen-daerah-memenuhi-hak-difabel>.

from the Lampung Provincial government to form regional regulations about the fulfillment of facilities and infrastructure for disability.

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Transportation Minister Regulation No. 98 of 2017 about the Provision of Accessibility to Public Transportation Services for Users with Special Needs.



**Rule of Law Marriage in Indonesia on Sanctions  
Prohibition of Criminal Practice Unregistered Marriages**

Achmad Yustian Jaya Sesunan

**Abstract**

Unregistered marriage or siri marriage is defined as a secret marriage, as opposed to the marriage to be generally performed open way. Marriage siri occurs effect of trafficking, one partner or both still below age, no approved one party family and no allowed husband do polygamy by his wife or rules Indonesian law that prohibits polygamy state officials make practice this survive. Siri Marriage Census conducted by the institution self-help community (NGO) Empowerment Woman Head Family (Pekka), 25 percent people in Indonesia do unregistered marriage and marriage are custom in 2012. That wedding this no recorded in the country. Census this conducted in 111 villages from 17 provinces. There are several province of unregistered marriages numbers above 50 percent. In NTT 78 percent, Banten 65 percent, and NTB 54 percent. Marriage siri have adverse effects for women and their children because they does not have a clear status in the eyes of the law and women are seen as mere means of satisfying lust by irresponsible men. It is this act that causes the loss of the sacred meaning of marriage as a sacred bond in the name of God Almighty. Based on the above statement, it is necessary to have the rule of marriage law which contains criminal sanctions for the perpetrators of siri marriage practice.

**Keywords : Marriage, Unregistered marriage**

## A. Introduction

Marriage or commonly called mating according to its original meaning is an intimate relationship between a man and woman, but according to majazi ( *methaporic* ) or legal meaning is a contract of agreement or commonly called an engagement between the two brides for an unlimited period of time and which makes halal intimate relations as a husband the wife between the two of them so as to get offspring as the next generation which is the responsibility of both husband and wife in terms of maintaining and directing their education or in terms of acting for the community (born physically).

Everyday Indonesian is commonly used as a marriage contract. Marriage means marriage while the contract means agreement or engagement. So the marriage contract means a sacred agreement to bind yourself in marriage between a woman and a man to form a happy and eternal family.<sup>14</sup>

Since the enactment of the Marriage Law which is 44 years old, there have been social problems caused by the effects of social changes that occur in the community , namely phenomenon siri marriage which causes concern in the community. Coupled with changes in the digital era where people easily access the internet.

Siri marriage is gathered or mixed, whereas according to the Shari'a the essence is the contract (marriage) and also by means of majaz is al-wath'u (sexual relations) in the opinion of the sahih, because nothing is known about the mention of the word marriage in the book of Allah - Subhanahu wa ta'ala - except for the meaning of at-tazwiij (marriage). Marriage siri is also interpreted as a marriage that is carried out without a legal marriage guardian from the woman.<sup>15</sup>

The word "siri" has the origin of Arabic "sirrun" which means secret, or something that is hidden. Through the root of this word Siri marriage is interpreted as an undisclosed marriage, in contrast to the marriage to the general which is done in a blatant manner. Legitimate marriage by way of religion and also customs, but not announced to the general public, and also not registered in an official way in the state registration agency , namely the Office of Religious Affairs (KUA) for Muslims and also the Civil Registry Office (KCS) for non-Muslims.<sup>16</sup>

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<sup>14</sup>Wati Rahmi Ria and Muhamad Zulfikar, *Islamic Law*, Sinar Sakti, Bandar Lampung, 2015, p. 48

<sup>15</sup><https://www.satujam.com/nikah-siri/> accessed on 9 October 2017 at 22.20 WIB

<sup>16</sup><https://toplintas.com/pengertian-nikah-siri/> accessed on 9 October 2017 at 23.04 WIB

This case of siri marriage and underage marriage is nothing new. In censuses conducted by non-governmental organizations (NGOs) Empowering female heads of household (PEKKA), 25 percent of the people in Indonesia conduct traditional marriage and marriage in 2012. This means that this marriage is not recorded in the country.

This census was carried out in 111 villages from 17 provinces. There are several provinces where the rate of siren is above 50 percent. In NTT 78 percent, Banten 65 percent, and NTB 54 percent.<sup>17</sup>

Throughout 2015 data on undocumented marriages (religious or customary marriages) which were reported to the National Commission on Violence Against Women were 71 cases. 50 of them claimed to have been married to a siri and 18 of them were married as a second or third wife.

Throughout 2015 data on undocumented marriages (religious or customary marriages) which were reported to the National Commission on Violence Against Women were 71 cases. 50 of them claimed to have been married to a siri and 18 of them were married as a second or third wife. 25 cases of victims' husbands remarried in sirimerriage and 10 cases of divorced women in religion.<sup>18</sup>

One of the most famous cases is the website nikahsirri.com. Siri marriage services sold by sites managed by Aris Wahyudi as founder actually not much different from Ashley Madison service which was founded in 2002 in Canada. The site facilitates people who are already married to establish relationships with other people.<sup>19</sup> This received a strong reaction from Indonesian citizens and immediately took serious action to close the service before operating more widely, although until now the site is still accessible. The impact caused in addition to being rejected by the Indonesian people also caused problems for Marriage Registration Officers as determined by Law No. 1 of 1974. Among them (for men) there were those who made the marriage for the first time, and there were also those who married the second time or the umpteenth time (polygamy). Because the marriage is not registered with the Marriage Registration Officer (PPN), so that the woman / wife arises and develops in the community with the term "Wife of Savings".

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<sup>17</sup><https://www.merdeka.com/peristiwa/25-persen-masyarakat-indonesia-melakukan-nikah-siri.html> accessed on 7 June 2018 at 10.04 WIB

<sup>18</sup><https://www.komnasperempuan.go.id/reads-perkawinan-tidak-tercatata> accessed on August 27 2018 at 19.21 WIB

<sup>19</sup><http://teknologi.metrotvnews.com/news-teknologi/wkBA31qb-layanan-nikah-siri-online-bukan-fenomena-baru-contoh> accessed on 9 October 2017 at 21.15 WIB

Phenomenon of siri marriage is one impact change social in the community . Social change causes shifts and changes in existing social relations, so that efforts are needed to overcome these conditions.<sup>20</sup>

Based on the description of the background of the above problems, relevant issues can be formulated to be studied and discussed as follows:

1. What are the causes and consequences of the marriage siri ?
2. How is it criminal lawset about siri marriage ?

## 1.2. Research methods

Legal research is a scientific activity, which is based on certain methods, systematics and thoughts which aim to study one or several specific legal symptoms by analyzing them.<sup>21</sup>The problem approach used in this study is the normative juridical approach and qualitative research methods

In collecting data as evidence of the practice of siri marriage and how many Indonesians do this, the authors use qualitative research methods by collecting data from online news and articles either issued by government agencies or articles issued based on the opinions of legal experts or experts in Islam relate to siri marriage

The normative juridical approach is carried out by studying, seeing and examining several theoretical matters related to the principles of law, conception, views, legal doctrines, legal regulations and legal systems relating to the problem of this research. The normative juridical problem approach is intended to obtain a clear understanding of the subject matter regarding the symptoms and objects being studied which are theoretical based on the literature and literature relating to the issues to be discussed.

## **B. Discussion**

### 2. 1 . CAUSES AND FACTORS FROM SIRI MARRIAGE

#### 2. 1 .1. CAUSING FACTORS FROM SIRI MARRIAGE

The factors that led to the occurrence of siri marriage are as follows:

- 1) Lack of Community Legal Awareness

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<sup>20</sup>Satjipto Rahardjo, *Legal Sociology*, Genta Publishing, Yogyakarta, 2010, p. 25

<sup>21</sup>Soerjono Soekanto, *Introduction to Legal Research*, Rineka Cipta, Jakarta, 1986, p. 43.

There are still many of our people who do not fully understand the importance of marriage registration. Even if in reality the marriage was registered at KUA, some of them might just be just participating; consider it to be a tradition commonly practiced by local people; or the marriage registration is only seen as an administrative matter; not yet accompanied by full awareness of the aspects of the benefits of recording the marriage

## 2) Apathy Attitudes of Some Communities to Law

Some people are not care about the regulatory provisions concerning marriage. SyekhPuji's unregistered marriage case with underage women named Ulfa as in the mass media is a clear example of apathy towards the validity of state law. From the available news, we can understand that there were two things that were ignored by Sheikh Puji, namely, first, the marriage was polygamy that was not permitted in court, and secondly, he did not want to apply for marriage dispensation even though it was clear that the prospective wife was still under age.

Such an attitude of apathy, especially those carried out by a public figure, is indeed a major obstacle to implementation law enforcement . Because what is done by a character will usually be imitated by those who idolize him. Therefore, the legal handling of the case that befell Sheikh Puji is appropriate so as not to be a bad precedent for the Indonesian people who are currently trying to position the rule of law.

## 3) The Terms of Marriage Registration Are Not Firm

As we know, the provisions of article 2 of Act No.1 / 1974 are the principal principles of marriage validity. The provisions of paragraphs (1) and (2) in the article must be understood as cumulative conditions, not requirements for the legitimate alternative of a marriage. From the legal facts and / or legal norms it is actually enough to be the basis for the community against the obligation to record their marriage. However, these provisions contain weaknesses because the article is multi-interpretation and also not accompanied by sanctions for those who break it. In other words, the marriage registration provisions in the law are indecisive.

## 4) Strictly Licensed Polygamy

Law No.1 / 1974 adheres to the principle of monogamy, but still provides concessions for those whose religion permits polygamy (one of them is Islam) with very strict requirements. A person who wants to carry out polygamy must fulfill at least one alternative requirement that is determined in a limited manner in the law, namely:

- the wife cannot carry out her obligations as a wife;
- the wife gets a disability or an incurable disease;
- the wife cannot give birth to children (Article 4 paragraph (2) of Law 1/1974)

Instead the court will consider and will give permission for polygamy to someone who requests it if the following cumulative conditions are met:

- the approval of his wife / wives;
- there is certainty that the husband is able to guarantee the necessities of life of the wives and their children;
- there is a guarantee that the husband will be fair to their wives and children;

Being able to guarantee the necessities of life for his wives and children is very relative in nature. Similarly, the husband will be fair to his wives and children is very subjective in nature, so the assessment of the last two conditions will depend on the sense of justice of the judge himself.

The strictness of the polygamy permit also causes the person to prefer marriage under the hand or a siri marriage because the continuation (procedure) of underhand marriage is simpler and more quickly achieves the goal of marriage itself.

Especially for civil servants, both civilian and military, to be able to get polygamy unless they have to fulfill the above conditions, they must also obtain authorization from the competent authority, in accordance with Government Regulation No.10 / 1983 concerning Marriage and Divorce Permits for Civil Servants jo . PP 45/1990. Similarly, the TNI must obtain permission from their superiors in accordance with the applicable regulations, so that those concerned must take a long process.

It is difficult and the length of the process and obstacles in the form of bureaucracy in granting permits indeed aims to selectively strengthen the acceptance of polygamy for civil servants and avoid arbitrariness in the case of more than one marriage, so that civil servants are expected to be good examples and examples in accordance with their functions as state servants and community servants. As a result of the prohibition of polygamy or the difficulty of obtaining a polygamy permit, it opened the door of prostitution, concubinage, living together and illegal polygamy.

5) Increase economy family

Siri marriage in Cisarua and Sukaresmi where Indonesian citizens marry foreigners because of Indonesian citizens wanting to improve the family economy as admitted by Santi who claimed to be married in a siri with an Arab people.

After marrying an Arab people, Santi made a house by her husband, so that the Santi family's economy gradually lifted. The same thing was experienced by Ella after having made a house by an Arabian husband. There are even some families in Cisarua after getting married, her brothers bought a motorcycle with one motorbike by her husband.<sup>22</sup>

### 2.2.2 RESULTING FROM SIRI MARRIAGE

The victim of siri marriage was experienced by a woman from East Java with the initials AMA. He was married by a man with the initials YTN, an echelon III official in the Kendal District Government. When I found out that AMA was pregnant, YTN did not want to be responsible. AMA has visited YTN's house, but her family requested that the person abort her pregnancy.<sup>23</sup>

The artist's case was Machica Mochtar despite having won in the Constitutional Court regarding the status of children born out of wedlock where the siri's wife's verdict could prove that his son was a biological child of his father based on DNA tests, but the lawsuit filed with the Supreme Court was completely rejected by Machica's marriage with Moerdiono. or the status of Muhammad Iqbal Ramadhan is a true result of Machica's relationship with Moerdiono. As a result of this decision, the status of the child of Machica Mochtar was not recognized by the state of this case as an example due to the marriage of the siri where marital and child status results from Siri's marriage were questioned. In the event of a dispute, it must be proven first whether the marriage has taken place and whether the child produced during the marriage is the child of his biological father. Based on the above case, the authors conclude the consequences of the marriage of Siri are as follows:

- 1) As a result of the wife / woman:
  - He is not recognized as a legitimate wife

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<sup>22</sup>MINISTRY OF EMPOWERMENT OF WOMEN AND PROTECTION OF CHILDREN, Report of the Study of Siri Marriage and its Impact in West Java Province (<https://www.kemenpppa.go.id/lib/uploads/list/34529-lorkan-riset-perkawinan-sirri-dan-dampak.pdf> accessed on August 27 2018 at 8.41 WIB), p. 35-36

<sup>23</sup><https://www.jawapos.com/jpg-today/28/09/2017/cerita-wanita-asal-jatim-yang-jadi-korban-nikah-siri-oknum-pejabat> accessed on September 18 2018 at 10:59 p.m.

- not entitled to a living from the husband
- do not get inheritance from her husband if her husband dies
- not entitled to property, if there is a divorce, because it is legally positive, the marriage is never considered to have occurred

In this case the women are most likely to receive losses if they do a siri marriage, not to mention that later women will experience difficulties in interacting and socializing with the community. Because of the general view, the community considers that he has lived with men outside of marriage or as savings wives.

## 2) Effects on children:

In connection with the presence of children born out of wedlock as stipulated in Article 43 paragraph (1) of Law No. 1 of 1974, relevant in the Constitutional Court's ruling in the Decision Number 46 / PUU - VIII / 2010 as follows:

"A child born out of wedlock has a civil relationship with his mother and his mother's family and with a man as his father that can be proven based on science and technology and / or other evidence according to the law to have blood relations, including civil relations with his father's family".<sup>24</sup>

The judge may only decide based on the evidence specified by the Act. The evidence according to the Act (Article 164 HIR, 284 RBg, 1866 BW) includes:<sup>25</sup>

- written evidence (letter)
- witness
- supposition
- recognition
- oath

The inheritance system of the Civil Code provides that even if the child is an out of wedlock, if he is recognized by his biological parents, he is the main heir. Regarding the size of the child's part, it is regulated according to the Act.<sup>26</sup>

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<sup>24</sup>Muhammad Syaifuddin et al., *Divorce Law*, Sinar Grafika, Jakarta, 2013, p. 355-356

<sup>25</sup>Nunung Rodliyah, *Law of Religious Courts*, Justice Publisher, Bandar Lampung, 2014, p. 114

<sup>26</sup>Aprilianti and Rosida Idrus, *Inheritance Law According to the Civil Code (Burgerlijk Wetboek)*, Lampung University, Bandar Lampung, 2011, p. 21



If referring to Article 285 of the KUHPdt which states that if there is recognition from his father, so that it creates a legal relationship between the heir and the child outside of marriage, the recognition of the child outside of marriage may not harm the wife and biological children of the testator.

The position of heirs for children a siri marriage according to Islamic law is debated. However, UstadzBachtiar Nasir explained First, marriage that fulfills all the terms and conditions of marriage in Islam, especially the existence of a guardian and two fair witnesses, but the marriage was not recorded in the record of the government agency in charge of it, namely the Office of Religious Affairs (KUA) . This marriage law according to Islam is religiously valid and among ulama is often also called 'urfi' marriage. Muslims are strongly discouraged from marriages like this because it is feared that the rights of those who are bound to marry will be eliminated, especially the rights of their wives and the rights of children born from marriages due to the lack of strong legality which stipulates that they are legitimate husband and wife.

In fact, the majority of scholars today require couples who want to get married to register their marriages in authorized institutions to protect the rights of each party in marriage. Secondly, a marriage attended by a guardian and two witnesses, but the witness was asked to promise to keep the marriage secret and not to announce the marriage to the public. So the person who knows the marriage is the family of the husband and wife and the two witnesses. The scholars disagree about the validity of marriage like this. Jumhurulama said, the marriage was legitimate but the law was makruh. Their reason, the announcement of marriage to the public is not a legal requirement for a marriage because it is enough with the testimonies of witnesses. Hadith which orders to announce marriage is only recommended and not obligatory.

Islamic Law to children born out of wedlock series of first and second types to get the inheritance rights of both parents. Third, marriage between men and women without guardians and sometimes also without witnesses. This marriage law is null and both must be separated. Because, one of the legal requirements of marriage according to jumhurulama is the approval of the female guardian and there are witnesses. The Messenger of Allah said, "A marriage is not valid except with a guardian and two fair witnesses." (HR Daruquthni, Baihaqi, and Hakim). Ibn Hazm said in the book *Muhalla-him* that there is nothing valid in this chapter about two fair witnesses except this sanad.

In another narrative Aisha narrates, "Any woman who marries without permission, her marriage is null and void. If he has been intercepted, he has the right to get a dowry because he has justified his genitals. If there is a quarrel between them, the authority is the guardian of the person who does not have a guardian." (HR Tirmizi, Abu Daud, Ibn Majah, Ibn Hibban and Hakim). The child of the third category siri marriage only gets inheritance rights from his mother and does not get inheritance rights from his father because the marriage of his parents is illegal according to Islamic law. So, the child is given to his mother, but can get other than inheritance rights, such as gifts, wills, and grants from his father.<sup>27</sup>

## 2.2 Rules Criminal Regarding Siri's marriage

Marriage siri no arranged in law criminal , but arranged with Article 284 of the Criminal Code is essentially if one partner or both have been bound marriage , having sex with a partner who is not husband or his wife then they worn article adultery .

If seen from impact unregistered marriage, then the marriage siri need arranged in Constitution law criminal because of marriage siri no only harm for victims along with child the results of a siri marriage , but wife legitimately also harmed with siri marriage that after knowing husband have wife another. It should also be regulated that the headman that practices siri marriage must also be punished in addition to the siri marriage agent because it supports acts that are detrimental to the perpetrator, the family of the perpetrator and the victim.

### **C. Conclusion**

Rules are made to provide convenience for the community and provide legal certainty for the general public. The rules are also adjusted to the development of the era to prevent bad behavior and cause harm to the community as a result of social changes that occur in the community. Rules regarding marriage in Indonesia must be revised because they are no longer in line with the social changes that occur in society. The practice of siri marriage is one of the phenomena due to social changes that occur in society.

Law criminal must make rules regarding unregistered marriages that ensnare the perpetrator and headman who do the siri marriage that because of marriage siri have impact negative for mother and child victim of siri marriage.

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<sup>27</sup><https://jalmilaip.wordpress.com/2012/02/29/hak-waris-anak-nikah-siri/> accessed on 18 October 2017 at 00.44 WIB

The government should revise the rules on marriage law in Indonesia because constitution that no corresponding again and purpose revise to prevent the occurrence of siri marriage practices.

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## **Models of Policy Making : Juvenile Detention Center and Self-Reliance Program**

Bayu Sujadmiko and Intan Fitri Meutia

### **Abstract**

The Research examines the formulation process of juvenile detention center in giving education based on equality principal and character building. The Center focus on arranges the youth in economic future and personality. The goal is the kids has economic-literacy, life-skill and acceptable to society. This strategy also goes to Indonesian Sustainable Development Goals for creating the Child-Friendly Center and best generation.

The object is located on juvenile detention center Tegineneng, Lampung Province. The research found 359 children on 14-18 years old between junior and senior high school grade. Education course did by a contract teacher from private and government school accompanied with The Center officer and Education Department. Additionally, the kids also learn about music, painting, singing and discourse. The result shows that the programs are not only create the formal education but also develop their hard skill. .

**Keynotes:** *Policy, Juvenile Detention Center, and Child.*

## **A. Introduction**

In the opening of the 1945 Constitution, the aim of the Indonesian nation was to educate the lives of the nation. Supported by Article 31 of the 1945 Constitution, which states, "Every citizen has the right to education". Education is the right of all nations that is the mandate of the law

Education is essentially a basic effort to develop personality and ability or expertise in harmoniously organic organizing unity, inside and outside of school and lasts a lifetime. Ensuring the quality of inclusive and fair education and promoting opportunities for lifelong learning for all is still the main focus of development in Indonesia. One education that is still in the spotlight is the need for guidance for child inmates who are still in school age. It's the rights of these prisoners' - children to continue to get equal formal education when they are in Juvenile Center - LPKA (Special Child Development Institution).

## **B. Prison : Education and Skill**

Education for children is very important. With education, children will learn about new things. In UN regulations for the protection of adolescents who lose their freedom, it is explained that adolescents who lose their freedom are entitled to obtain (Waluyadi, 2009: 57-63):

- a. Education;
- b. Skills training and work training;
- c. Recreation;
- d. Embrace religion;
- e. Get health care;
- f. Notification of health and
- g. Connect with the wider community

In Indonesia, the government has implemented a 9-year compulsory education policy and is now proclaiming government policies that are being pursued, namely to organize a 12-year compulsory education program. This of course applies also to children of inmates who are undergoing a sentence process in prisons (correctional institutions) to get proper education in accordance with applicable policies. In essence, prisoners as human beings and human resources must be treated well, including the fulfillment of educational rights for

children in prisons. Even though they are in prison but their educational rights must not be ignored. Strengthening schools in correctional institutions by opening access for residents, especially child prisons, is noteworthy so that children can continue to study and continue their education.

If prison children do not get adequate education, they cannot have good knowledge after breathing free air to face the world outside of competitive prisons. They will be isolated, unable to actualize themselves in the life of the nation and state, become ignorant and left behind so they are likely to be ostracized and unacceptable upon their return to society. The big impact of that, Indonesia will be short of individuals and good resources, character, and capable of advancing civilization and welfare of the people due to not being able to expand the reach of education to Children's Prisons. For this reason a curriculum and a teacher are needed in accordance with educational methods for prison children

Education obtained by prisoners in the Penitentiary is seen as being able to bridge the implementation of the educational process that has ceased in formal education. In this case Outdoor School Education has its own role as complement from school education. That is, that education outside of school is carried out to supplement the knowledge and skills that are lacking or cannot be obtained in school education. The needs of assisted people will be equipped with knowledge, skills, life skills, and attitudes to develop themselves, develop a profession, work, independent business, or to continue their education to a higher level can be achieved through non-formal education. Educational programs in Correctional Institutions are emphasized on coaching and training activities for prisoners (inmates). The scope of coaching inmates in Correctional Institutions is divided into two fields, namely personality development programs and independence development programs. One of the places where the independence program takes place is in the form of skills development carried out in the workshop, where one of the skills learned is electronic skills development. This skills development program is one form of self-reliance that provides prisoners with the ability to improve work skills and independence for entrepreneurship in the field of electronics or electronic service. The existence of education for prisoners with the expected skills development program can later become a quality human being and able to play a role in development and economic growth. This means that inmates can use their skills and knowledge to open employment opportunities with entrepreneurs in the electronic field such as service services. Education patterns based on independence in prison children begin with an understanding of economic knowledge towards understanding the concept of

entrepreneurship. In the matter of independence, it is expected that children will be able to build a mindset of love for the homeland, domestic production to be willing and proud to produce their own production.

The background of different cases of inmates with different characters will certainly influence the implementation of the training program provided. If residents have undergone skills development and have skills, but it is not balanced by showing entrepreneurial behavior will not be realized. In other words, the inmates must have an entrepreneurial attitude to shape entrepreneurial behavior that will be used as a provision after leaving the Penitentiary. No less important accompaniment is in terms of character education. Where this character will shape how prison children are able to socialize with the surrounding environment when they leave the LPKA. When these children have character, they will be able to participate in creating a safe, comfortable and peaceful environment.

### **C. Juvenile Detention Center (LPKA)**

This research was conducted in the Juvenile Detention Center Class II Bandar Lampung in Tegineneng, Pesawaran, Lampung Province. Later it is expected that the formulated policy model cannot only be applied in LPKA Class II in Bandar Lampung but all LPKA in Indonesia. Therefore, the educational rights of the children can be achieved with the aim of independence and character.

LPKA according to Article 1 of Law No. 11/2012 concerning Child Criminal Justice System (SPPA) is an institution or place where children undergo their criminal period. In LPKA, the child will be classified according to age, sex, length of time of sentence imposed, type of crime, and other criteria in accordance with needs or in the framework of coaching.

Based on the Regulation of the Minister of Law and Human Rights of the Republic of Indonesia Number 18 of 2015 concerning the Organization and Work Procedure of LPKA, it organizes the following functions:

- b. Registrations and classifications starting from acceptance, recording both manually and electronically, assessment, classification, and program planning.*
- c. Coaching which includes education, care, alleviation, and skills training, as well as information services.*
- d. Treatment that includes food, beverage and distribution of health equipment and services.*
- e. Supervision and enforcement of disciplines which include supervision administration,*

*prevention and enforcement of discipline and management of complaints, and*  
f. *Management of general affairs which includes personnel affairs, administration, budget planning, management of financial affairs and equipment and household.*

The implementation of the tasks and functions of LPKA includes coaching, maintenance, upholding discipline, and increasing knowledge and understanding, as well as the services of correctional officers in the implementation of the duties and functions of the LPKA to be in harmony with the concept and perception of thought in the Law Number 11 of 2012 concerning Child Criminal Justice System and Law Number 12 of 1995 concerning Corrections. The realization of the effective and efficient implementation of the tasks and functions of LPKA is highly expected in order to improve the quality of correctional services for children in particular and the community at large.

#### **D. Friendly Models**

LPKA has to shown by the design, both the bedroom and the other kid rooms such as learning and playing space like the playground and no longer a prison. We were indeed ordered in accordance with Law No. 11 of 2012 concerning the juvenile justice system to change the pattern of guidance to this children.

The atmosphere is no longer like a prison, but a place of education. The room design also uses attractive color paints equipped with an educational, learning and recreation arena. The government also has to changed the companion with training and clothes like educators, not complete uniforms with ranks. This concept, kids who is forced to enter in coaching still feels comfortable and psychologically uplifted, not like prisoners. In the future, it will also be immediately separated between prison and LPKA.

For formal education, LPKA should collaborates with the Department of Youth and Sports Education (Disdikpora). It will brings real education system with the right teacher.

#### **E. Conclusion**

Facilities and infrastructure in LPKA Tegineneng are still lack. Existing facilities and infrastructure cannot support the overall interest and talent development program, especially in the arts and music fields. The absence of attention from the Government is one of the causes of the lack of facilities and infrastructure.

Human resources (Trustees) are very influential factors in coaching in LPKA. The coach comes from LPKA Tegineneng and from the relevant agencies that have cooperated with. Constraints found, namely the LPKA Tegineneng must always hold a system of



cooperation with relevant agencies. Even so the coaching carried out by the coach runs effectively because there are no child inmates who repeat the crime (*resedivis*)

Psychological Children are an important factor considering the child's age has an unstable mental state. Children who in their criminal period had experience conflict or problems, especially children in the environment of fellow other perpetrators. LPKA Tegineneng should have innovates concerning counseling guidance. This counseling goes well and is able to maintain the psychological state of child inmates.

Child discipline in carrying out coaching shows the level of seriousness of the child in following the coaching. The imposition of scheduled sanctions and coaching are able to make child prisoners disciplined in carrying out coaching in LPKA Tegineneng.

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## Legal Protection to Support the Implementation of Breastfeeding Counseling

Lenny Syahnimar

### Abstract

Law No.36/2009 stipulates that every infant deserves to exclusive Breastfeeding up to six months from being born. Various benefits from this exclusive right for them are reducing the morbidity and mortality, optimizing the growth, and nurturing the intelligence. In 2017, the number of infants who breastfeed exclusively reached 46,74% of 44% strategic plan target, however, this number decreased from 2016 and fourteen provinces had not reached the target. One of the efforts to increase the parents' awareness and knowledge of breastfeeding, as well as improving mother's attitude in breastfeeding her baby is a counseling service at the health facility. This research was aimed to identify the laws that regulate the legal protection of breastfeeding counseling implementation and its obstacle at the health facility. The research was done by using a juridical approach and literature study where the data were analyzed qualitatively. The result shown that a number of laws had been issued to protect the execution of this effort, namely, Law No.39/1999, Law No.36/2009, Government Regulation No. 33/2012, and Presidential DecreeNo.36/1990. In addition, the Minister of Health was similarly issuing the regulation No.43/2016, No.97/2014, and No.25/2014. Moreover, Decree of Minister of Health No.450/MENKES/SK/IV/2004 and Regulation of Minister of Women Empowerment and Child Protection No.03/2010 also approved and released. However, the implementation is not ideal yet because lack of human resources, limited infrastructure facilities, lack of technical guidance of counseling, lack of personal commitment of counselor, and lack of monitoring.

**Keywords :** breastfeeding, breastfeeding counseling, infant right.

## A. Introduction

Everyone, include baby, has the right to be recognized, guaranteed, legally protected and certainty as well as the right to prosper and obtain health services.<sup>1,2</sup>The fulfillment of nutrition is the basic right of children. One of the efforts to improve children's health and nutrition as mandated in the 1945 Constitution<sup>3</sup>and the International Child Rights Convention<sup>4</sup>which has been ratified by Presidential Decree No.36/1990 is providing the best food for children under 2 years old. To achieve this, the National Strategy for Increasing the Giving of Breast-milk and complementary food recommends that good and proper feeding for infants and children 0-24 months is (1)immediatebreastfeeding after birth for at least 1 hour; (2)exclusive breastfeeding until the age of 6 months; (3)providing complementary foods starting at the age of 6 months; (4)continue breastfeeding until the age of 2 years or more.<sup>5</sup>

Legal protection for babies to fulfill the right to exclusive breastfeeding is regulation issued by the government, the availability of institutions and facilities, and the protection of cultural beliefs and practices that can harm the health of the baby. The purpose of this protection is to ensure the fulfillment of the baby's right to live, grow, develop and participate optimally.

The government, through Regulation No.33/2012<sup>6</sup>and Decree of the Minister of Health No.450/MENKES/SK/VI/2004<sup>7</sup>, is responsible for guaranteeing the baby's right to get breastfeeding and stipulates that they exclusively breastfeeding from birth to six months, except for medical indications.<sup>8</sup>

UNICEF states 30,000 infant deaths in Indonesia and 10 million deaths of children under five in the world each year can be prevented through exclusive breastfeeding for six months from birth, without additional food or drinks to the baby. This is confirmed by Lancet

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<sup>1</sup>The 1945 Constitution of The Republic of Indonesia, Article 28D section (1), Article 28H section (1)

<sup>2</sup>Kementerian Kesehatan RI. (2012). *Pokok-pokok Peraturan Pemerintah No. 33 Tahun 2012 tentang Pemberian Air Susu Ibu Eksklusif*. Jakarta: Kementerian Kesehatan RI.,p.5.

<sup>3</sup>The 1945 Constitution of The Republic of Indonesia, Article 28B section (2)

<sup>4</sup>Convention on the Rights of the Child, Article 24

<sup>5</sup>Kementerian Kesehatan RI. (2014). *Panduan Penyelenggaraan Pelatihan Konseling Pemberian Makan Bayi dan Anak (PMBA)*. Jakarta: Kementerian Kesehatan RI., p.2.

<sup>6</sup>Government Regulation No.33/2012, Article 6.

<sup>7</sup>Decree of the Minister of Health No.450/MENKES/SK/VI/2004, 2<sup>nd</sup> dictum.

<sup>8</sup>Law No.36/2009, Article 129,Article 128 section (1).

(2010) that exclusive breastfeeding can reduce the infant mortality rate by 13% and reduce the prevalence of short toddlers.<sup>9</sup>

Referring to the 2016-2017 strategic plan's target, the coverage of exclusive breastfeeding for infants aged less than 6 months has reached the target.<sup>10</sup>In 2017, the percentage reached the strategic plan's target, however, this number decreased compared to 2016 and 14 provinces have not reached the target.<sup>11</sup>

The optimal achievement of exclusive breastfeeding is not yet optimal because the social conditions of the community such as (1) mother is not confident to be able to breastfeed properly to fulfill all the nutrient needed by the baby, (2) lack of mother's knowledge, lack of family support, tradition or culture that can inhibit breastfeeding, and low public awareness about the benefits of exclusive breastfeeding, (3) lack of support from health workers, healthcare facilities, as well as from employers and providers of public and special facilities, and the influence of improper promotion from baby food and beverage producers and other baby products.<sup>12</sup>

Nurhira (2014) classified the causes of the low percentage of exclusive breastfeeding in Indonesia in two problems, namely internal and external problems. Internal problems consist of physical and psychological problems, delayed initiation of breastfeeding, work, and maternal education. While external problems include family problems, food security, geographic areas, the role of the media, water, hygiene and sanitation, health professionals, poverty, cultural beliefs and practices, and government involvement.<sup>13</sup>

Government involvement is the key to build a situation conducive to breastfeeding. However, making policies that are not fundamental, providing educational materials without supporting assistance, inefficient regulations, and there are no specific guidelines to apply the regulations are obstacles to executing the breastfeeding policies.<sup>14</sup>

While Peni (2017) found the cause of this low coverage because predisposing factors (motivation, attitudes, education, and work), enabling factors (support from service

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<sup>9</sup>Kementerian Kesehatan RI. (2012)., *Op.Cit.*, p.7.

<sup>10</sup>Kementerian Kesehatan RI. (2017). *Profil Kesehatan Indonesia Tahun 2016*. Jakarta: Kementerian Kesehatan RI., p.138-139.

<sup>11</sup>Kementerian Kesehatan RI. (2018). *Data dan Informasi Profil Kesehatan Indonesia 2017*. Jakarta: Kementerian Kesehatan RI., p.118.

<sup>12</sup>Kementerian Kesehatan RI. (2012). *Lo.Cit.*

<sup>13</sup>Nurhira, A.K. (2014). Menelusuri Akar Masalah Rendahnya Persentase Pemberian ASI Eksklusif di Indonesia . *Jurnal Al Hikmah, Volume XV, No. 1*, 106-118., p.108-113.

<sup>14</sup>*ibid*, p.114.

providers including infrastructure), and reinforcing factors (the role of health workers and people closest such as mother and mother-in-law). Furthermore, the inhibiting factors are the incessant promotion of formula milk, false beliefs about exclusive breastfeeding, and the presence of prestige factors, maternal and infant health, no counselors and not running Ten Steps to Breastfeeding Success.<sup>15</sup>

Understanding and motivation are the main keys to successful breastfeeding, include the efforts to ensure that pregnancy is normal. To achieve this, the partner, as well as the family, is included when the mother follows prenatal breastfeeding. Thus, the role and support in the realization to exclusive breastfeeding become complete. Breastfeeding success requires a minimum of 7 contacts with health workers or lactation counselors.<sup>16</sup>

Breastfeeding counseling was found to be associated with exclusive breastfeeding. Counseling can help clients to get the right information to let them be more confident to solve their own problems.<sup>17</sup> In addition, the promotion of exclusive breastfeeding with counseling methods is better for improving maternal knowledge and attitudes, compared to general counseling methods.<sup>18</sup> This is in line with Moudy, et.al. (2013) that pregnant women who are more likely to get lactation counseling at the time of pregnancy examination are better able to provide exclusive breastfeeding<sup>19</sup> and Citra (2018) mentions the frequency of antenatal care and lactation counseling were related to exclusive breastfeeding.<sup>20</sup>

Based on the description above, the purpose of this study is to identify the importance of breastfeeding counseling in fulfilling the infant's right to exclusive breastfeeding and how the legislation provides protection and guarantees in the implementation of breastfeeding counseling to fulfill the infant's rights and barriers to breastfeeding counseling.

This research was conducted using a normative juridical approach. Data is collected through literature study and analyzed qualitatively.

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<sup>15</sup>Peni S. R. (2017). *Faktor Penyebab Rendahnya Cakupan Pemberian ASI Eksklusif (Studi Kasus di Wilayah Kerja Puskesmas Cilacap Tengah I)*. Surakarta: eprints.uns.ac.id., abstract.

<sup>16</sup>Noroyono W. (2010). Program Pranatal untuk keberhasilan Menyusui. In IDAI, *Indonesia Menyusui* (pp.38-44). Jakarta: Badan Penerbit IDAI., p.40-41.

<sup>17</sup>Moudy E. U. D, et.al (2013). Frekuensi Pemeriksaan Kehamilan, Konseling Laktasi, dan Pemberian Air Susu Ibu Eksklusif. *Jurnal Kesehatan Masyarakat nasional, Volume 7, No. 12, Juli 2013*, 557-561., p.559.

<sup>18</sup>Danila, G, et.al. (2011). Promosi ASI Eksklusif Memakai Metode Konseling Dengan Penyuluhan Terhadap Pengetahuan dan Sikap Pada Ibu Menyusui. *Jurnal Kesehatan Masyarakat, Volume 6, No.1, September 2011*, 4-9., p.4.

<sup>19</sup>Moudy E. U. D, et.al. *Op.Cit.*, p.560.

<sup>20</sup>Citra E. A. (2018). Hubungan Frekuensi Pemeriksaan Kehamilan dan Konseling Laktasi Dengan Pemberian Air Susu Ibu (ASI) Eksklusif di Desa Sambi Rejo Kabupaten Semarang. *ejournal.ar.rum, volume 2, No. 2*, 20-26., p.20.

## **B. Results and Analysis**

### **2. The Importance of Breastfeeding Counseling to Fulfill the Infant's Right with Exclusive Breastfeeding**

Breastfeeding is a natural thing, but it does not just happen. It is recommended that breastfeeding should be studied long before the birth process occurs and this does not directly condition a mother to be able to breastfeed her child. Many futile efforts are carried out by health workers because lack of knowledge, mothers do not know the benefit and how to do it, and how breast milk is produced.<sup>21</sup>

One of the efforts to improve the knowledge and abilities of individuals or families is counseling because everyone has different problems and reasons.<sup>22</sup> Counseling is a form of an approach used to help individuals and families gain a better understanding of themselves and the problems they face. After counseling, they are expected to be able to take steps to overcome and solve the problems. In the process of counseling, communication and human relations skills are urgently required. The counseling process involves the combination of expertise in nutrition, physiology, and psychology that focuses on behavior change and its relationship to the problem at hand. The end of the counseling process is a change in maternal behavior towards a better direction. The principle is that humans are born in a neutral state, the environment and experience experienced will shape their behavior.<sup>23</sup>

The success of exclusive breastfeeding requires a minimum of seven contacts with health workers or lactation counselors. Knowledge guidance before the birth process should be done at least 2 times. The first visit talks and discusses the benefits and management of breastfeeding, the second visit discusses the detail of the process of breastfeeding and possible future problems faced by the mother. Employment is often becoming a concern to prevent the ability of the mother in breastfeeding exclusively. Hence, pre-natal guidance is needed to eliminate maternal anxiety and provide knowledge.<sup>24</sup> Education should be

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<sup>21</sup>I Gusti A. N. P.(2010). Revitalisasi Rumah Sakit Sayang Bayi. In IDAI, *Indonesia Menyusui* (pp. 25-37). Jakarta: Badan Penerbit IDAI.,p.28.

<sup>22</sup>Reni A. H. (2017). *Buku Ajar Dasar Promosi Kesehatan dan Ilmu Perilaku*.Depok: Rajawali Pers.,p.66.

<sup>23</sup>Cornelia, et.al. (2013). *Konseling Gizi*. Jakarta: Penebar Plus.,p.12-13,21.

<sup>24</sup>Noroyono, W.,*Lo.Cit*.

organized by healthcare facilities with the concept of edutainment to provide a fun, interesting, and intense knowledge of breastfeeding.<sup>25</sup>

After the birth process, there are other 5 times contacts with health workers. The first contact is made at birth by making early skin contact between mother and baby. The second contact after birth is done in 24 hours to guide nursing position in sleeping/sitting (adjusted to the mother's condition) and helps the mother attach the baby's mouth to the breast well. Subsequent contact is carried out within 1 week of birth to find various difficulties and provide support for the mother to continue breastfeeding. The 6th and 7th meetings are usually held 1 and 2 months after birth.<sup>26</sup>

In breastfeeding counseling, changes in maternal behavior can refer to the transtheoretical model. There are six stages of change that must be passed, namely:<sup>27</sup> (1) Pre-contemplation, (2) Contemplation, (3) Preparation, (4) Action, (5) Maintenance, and (6) Relapse.

Breastfeeding is difficult in its implementation because mothers are now working a lot to support the family and limited maternity leave after birth. The unavailability of space and time for breastfeeding are additional obstacles. To overcome these issues the mother should be prepared long before birth occurs, taught how to milk, and saving breast-milk to help them when working.<sup>28</sup>

Successful counseling factors are:

1. The counselor is willing to be a good listener and create a comfortable atmosphere, giving rise to open communication between counselors and mothers to let them explore mother's knowledge and develop it better.<sup>29</sup>
2. Counselors are able to foster mother's trust and motivation, therefore, mothers can receive counselors as sources of information that have an impact on the mother's courage to reveal the ignorance faced previously.<sup>30</sup>

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<sup>25</sup>I Gusti A. N. P., *Lo.Cit.*

<sup>26</sup>Noroyono, W., *Lo.Cit.*

<sup>27</sup>Cornelia, e.a., *Op.Cit.*, p.22

<sup>28</sup>I Gusti A. N. P., *Op.Cit.*, p.32-33.

<sup>29</sup>Azwar (2003), *Pelaksanaan Pemberian ASI Eksklusif di Indonesia*, in Ramlan, d. (2015). Pengaruh Konseling Gizi dan Laktasi Intensif dan Dukungan Suami Terhadap Pemberian Air Susu Ibu (ASI) Eksklusif Sampai Umur 1 Bulan. *Jurnal Gizi Indonesia*, Volume 3, No. 2, Juni 2015, 101-107., p.105

<sup>30</sup>*ibid.*

3. The material presented came from the problems that the mother wanted to know and their experience in the previous child to let them get a better understanding of the material delivered.<sup>31</sup>
4. Delivered in a language that is easy to understand, combined with the opinions of experts and some research results.<sup>32</sup>
5. Counseling intensity. Frequent and repeated information or knowledge can improve one's knowledge retention.<sup>33</sup>

The above factors are in line with Ria's (2013) study, intensive lactation counseling, which is 4 times at prenatal and 5 times at postnatal, has an effect on increasing knowledge, changing attitudes and increasing the number of mothers who provide exclusive breastfeeding until the age of 3 months.<sup>34</sup> Likewise, with Tetty, et.al (2015), breastfeeding counseling given by pregnant women to childbirth significantly increased the score of mother's knowledge and attitudes about exclusive breastfeeding and the success of exclusive breastfeeding by 90%.<sup>35</sup>

Research by Ramlan (2015) stated that intensive nutrition and lactation counseling is 3 times during pregnancy examination 7-8 months of pregnancy and 2 times after giving birth through home visits affecting the increase in knowledge, mother's attitude about exclusive breastfeeding. Husband's support had a positive effect on exclusive breastfeeding in the first month.<sup>36</sup> This was reinforced by Nuraeni (2014) who said that the group given the counseling and mentoring intervention had a 7 times greater chance of giving colostrum to their babies compared to the group of respondents who were not given counseling and assistance to their husbands.<sup>37</sup>

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<sup>31</sup>*ibid.*

<sup>32</sup>*ibid.*

<sup>33</sup>Notoatmodjo (2003), Pendidikan dan Perilaku Kesehatan, in Ramlan, d. (2015). Pengaruh Konseling Gizi dan Laktasi Intensif dan Dukungan Suami Terhadap Pemberian Air Susu Ibu (ASI) Eksklusif Sampai Umur 1 Bulan. *Jurnal Gizi Indonesia, Volume 3, No. 2, Juni 2015*, 101-107., p.105

<sup>34</sup>Ambarwati, R. e. (2013). Pengaruh Konseling laktasi Intensif Terhadap Pemberian Air Susu Ibu (ASI) Eksklusif Sampai 3 Bulan. *Jurnal Gizi Indonesia, Volume 2, No. 1, Desember 2013*, 15-23., p.22.

<sup>35</sup>Tetty H. D, et.al. (2015). Pertumbuhan Bayi dan Pemberian ASI Eksklusif Oleh Ibu Penerima Konseling Menyusui dan Makanan Tambahan Torbangun. *J. Gizi Pangan, Volume 10, Nomor 2, Juli 2015*, 77-84., p.77.

<sup>36</sup>Ramlan, e. a. (2015). Pengaruh Konseling Gizi dan Laktasi Intensif dan Dukungan Suami Terhadap Pemberian Air Susu Ibu (ASI) Eksklusif Sampai Umur 1 Bulan. *Jurnal Gizi Indonesia, Volume 3, No. 2, Juni 2015*, 101-107., p.107

<sup>37</sup>Nuraeni, e. a. (2014). Pengaruh Pelaksanaan Konseling dan Pendampingan Suami Terhadap Keberhasilan Ibu Menyusui Dalam Pemberian Kolustrum. *Jurnal Kebidanan, Volume 3, No. 6, April 2014*, 45-49., p.48.



Based on the description above concluded that counseling interventions that place mothers as subjects give enormous impact to the mother's participation in counseling, thus increasing the breastfeeding. In addition, the father's participation in counseling will increase his support in breastfeeding.

The AyahASI movement has been running since 2011 as a campaign that husbands have an important role in the process of breastfeeding. Husbands as spokespersons and protectors consciously provide support to their wives, listen to complaints and entertain her, become partners who are willing to reduce the heavy burden of nursing mothers and good ASIP logistics managers.<sup>38</sup>

### **3. Legislation that Provides Protection and Guarantee on Breastfeeding Counseling Implementation in Efforts to Fulfill the Infant's Right with Exclusive Breastfeeding**

Child, include infant, protection principles are they cannot fight alone, the best interest of the child, life-circle approach and carried out in cross-sectoral. Fetus in the womb needs to be protected with good nutrition through the mother. If he is born, breast milk and other primary health services are needed so that the child is free from the possibility of disability and illness.<sup>39</sup>

The 2015-2019 RI Ministry of Health strategic plan, placing exclusive breastfeeding as one of the targets of community nutrition services. The indicator of achievement is the percentage of babies less than 6 months who receive exclusive breastfeeding by 50%.<sup>40</sup> The government supports breastfeeding through various policies, including:<sup>41</sup>

1. Law No.39/1999, Article 49 section (2).
2. Law No.13/2003, Article 82 section (1) and Article 83.
3. Law No.36/2009, Article 128, Article 129 section (1).

In order to implement the Law, with the aim of ensuring the fulfillment of the infant's right to exclusive breastfeeding, protection to mothers in providing exclusive breastfeeding, and increasing the role and support of families, communities, local governments, and the government towards exclusive breastfeeding, several regulations are issued, which are :

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<sup>38</sup>Aditia S, et.al. (2018). *Catatan AyahASI : Ditambah-tambahin*. Tangerang: Buah Hati.,p.13,27,28.

<sup>39</sup>Maidin G.(2013).*Perlindungan Hukum Terhadap Anak dan Perempuan*. Bandung : PT Refika Aditama., p.71-72

<sup>40</sup>Minister of Health Decree No.HK-02.02/MENKES/52/2015, p.75,76,114.

<sup>41</sup>F.B.Monika (2014). *Buku Pintar ASI dan Menyusui*. Jakarta: Noura Books.,p.253.

1. Government Regulation No.33/2012: Article 2, Article 6, Article 30, Article 34 and Article 37.
2. Regulation of the Minister of Health No.15/2013: Article 3, Article 4, Article 5 and Article 6.
3. Regulation of the Minister of Health No.23/2014: Article 16
4. Joint Ministerial Regulation 3 (Minister of Women's Empowerment and Child Protection, Minister of Manpower and Transmigration, and Minister of Health) - No.48/Men.PP/XII/2008, PER.27/MEN/XII/2008, and No.1177/MENKES/PB/XII/2008: Article 2
5. Decree of the Minister of Health no.450/MENKES/SK/VI/2004 on the second dictum.

The role of healthcare facilities is very prominent in determining the start of breastfeeding activities. To facilitate this, WHO introduced the Ten steps to successful breastfeeding<sup>42</sup> in Indonesia as outlined in the Attachment to the Decree of the Minister of Health No.450/MENKES/SK/VI/2004.

To achieve optimal utilization of exclusive breastfeeding, the right to obtain information and education about health including the promotion of the benefits of breast-milk has been regulated, among others in:

1. Convention on the Rights of the Child, Article 24. (ratification by Presidential Decree No.36/1990).
2. Law No.36/2009: Article 7, Article 62 section (1), Article 142 section (4),
3. Government Regulation No.33/2012: Article 3, Article 4, Article 5, Article 13, Article 14, and Article 33.
4. Joint Ministerial Regulation 3 (Minister of Women's Empowerment and Child Protection, Minister of Manpower and Transmigration, and Minister of Health) - No.48/Men.PP/XII/2008, PER.27/MEN/XII/2008, and No.1177/MENKES/PB/XII/2008: Article 3 section (3)
5. Regulation of the Minister of Health No.43/2016: Article 2
6. Regulation of the Minister of Health No.97/2014: Article 12, Article 13, Article 14 section (2), Article 15 section (1) and (4)
7. Regulation of the Minister of Health No.25/2014: Article 6, Article 7, Article 9 and Article 20.

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<sup>42</sup>I Gusti, A. N. P., *Op.Cit.* p.27

8. Regulation of the Minister of Health No.23/2014: Article 14
9. Regulation of Minister of Women Empowerment and Child Protection No.03/2010
10. Decree of the Minister of Health No.450/MENKES/SK/VI/2004, Attachment 3.
11. Minister of Health Decree No.284/MENKES/SK/III/2004

Information and education on exclusive breastfeeding that needs to be submitted, in accordance with Government Regulation No.33/2012 Article 13 section (2), at least concerning:

1. Benefit and advantages of breastfeeding,
2. Maternal nutrition, preparation and maintenance of breastfeeding
3. The negative effects of bottle feeding partially on breastfeeding, namely the provision of food/drinks other than breast-milk given to infants using bottles, and
4. Difficulties to change the decision not to give breast-milk, which is a condition that the mother has decided not to breastfeed at the beginning and difficult to change her mind.

Moreover, section (3) of the same article states that the provision of information and exclusive breastfeeding education can be done through general counseling, breastfeeding counseling, and assistance. Assistance is conducted through the provision of moral support, guidance, assistance and supervision of mothers and babies during immediately breastfeeding activities and/or during early breastfeeding.

In accordance with Article 13 section (4) these activities can be carried out by trained health personnel, namely workers who have knowledge and/or skills regarding breastfeeding through training, including breastfeeding counselors. If it is not implemented, administrative sanctions are imposed according to article 14.

In the standard of antenatal care which is a comprehensive and quality health service, counseling is 1 in 10 T.<sup>43</sup> Effective materials about early breastfeeding initiation and exclusive breastfeeding on antenatal visits include skin-to-skin contact messages for immediate breastfeeding, colostrum, joint care, breast milk only 6 months, no formula milk, desire to breastfeed, explanation of the importance of breast-milk and treatment of nipples.<sup>44</sup>

Breastfeeding counseling is also part of the child's health efforts carried out since the fetus in the womb through giving counseling to his parents.<sup>45</sup> As a tool, you can use the

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<sup>43</sup>Minister of Health Regulation No.43/2016,p.13

<sup>44</sup>Minister of Health Regulation No.97/2014,p. 49

<sup>45</sup>Minister of Health Regulation No.25/2014, Article 6,9,20.

KIABook or other health media. The use of the KIA book as a guidebook owned by mothers and children, contains information and child health records, including services provided to both.<sup>46</sup>

#### 4. Barriers to Breastfeeding Counseling

According to WHO (2011), stated in Government Regulation No.33/2012, every health facility needs to have a trained breastfeeding counselor who has the competence to assist the mother and her family in immediate breastfeeding and exclusively breastfeeding for six months.<sup>47</sup>In addition, the availability of counselors is needed at breastfeeding facilities at public facilities. The spearhead of breastfeeding counseling is breastfeeding counselors. Breastfeeding counselors have been trained based on the Implementation Guidelines for Breastfeeding Counseling Training from the Indonesian Ministry of Health.

Barriers in the implementation of counseling can be grouped into three things, namely:

##### 1. Regulations issued.

###### a. Government Regulation No.33/2012, Article 6.

This does not place breastfeeding as a mother's obligation even though it is a baby's right (Law No.36/2009, Article 128). If the mother does not breastfeed her baby then she cannot be sanctioned.<sup>48</sup>However, the decision should be to know the consequences because the obligation to the child born is to raise and care so that the child grows and develops in a healthy and optimal manner.<sup>49</sup>

###### b. Definition of trained personnel in Government Regulation No.33/2012, Article 13.

c. The Minister of Health's Regulation on Guidelines for integrated antenatal care and child health efforts has not explained in detail the provision of breastfeeding counseling. This causes the implementation of counseling is still not optimal. It should be determined through the rules below regarding seven breastfeeding contacts between mother and officer.

d. There is no official guide to counseling implementation guidelines as a standard of service provided. Implementation based on the guidebook used during training.<sup>50</sup>

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<sup>46</sup>Minister of Health Decree No.284/Menkes/SK/III/2004

<sup>47</sup>Ika M,et.al. (2014). Evaluasi Pelaksanaan Konseling Menyusui. *Jurnal Kesehatan Masyarakat Nasional*, Volume 9, No. 1, Agustus 2014, 78-86.,p.79.

<sup>48</sup>Kementerian Kesehatan RI. (2012)., *Op.Cit.*,p.15

<sup>49</sup>Law No.36/2009, Article 132.

<sup>50</sup>Ika M,et.al., *Op. Cit.*,p.85

Based on Ministerial Regulation on Utilization of State Apparatus and Bureaucratic Reform No.15/2014 Article 1, service standards are benchmarks that are used as guidelines for service delivery and reference for the assessment of service quality as an obligation and promise of the organizer to the public in the context of quality, fast, easy, affordable and measurable services.

This includes collaboration and integration from those who deal with mothers and babies, such as obstetricians, pediatricians, midwives, nurses and nutritionists. A clear official guide makes optimal division of tasks and responsibilities carried out so that it is expected to obtain satisfactory results.

- e. There has been no confirmation of the program resulting in the absence of sanctions. The reprimand sanction is only given if you see the counselor does not provide breastfeeding counseling or is not appropriate to give breastfeeding counseling.<sup>51</sup>
  - f. The implementation of policy commitments Ten steps to successful breastfeeding and supervision is not carried out specifically and routinely.<sup>52</sup>
2. Institutional and availability of facilities
- a. Not all puskesmas have breast milk room. If initially there was, but it has been converted into another function. Thus, mothers difficult to breastfeed at government facilities. The health office needs to emphasize the importance of breastfeeding space in health facilities and provide adequate infrastructure to support and facilitate the implementation of breastfeeding counseling.<sup>53</sup>
  - b. The availability of counselors in healthcare facilities has not been fulfilled and there are no counselors in public facilities.
  - c. Inadequate facilities and infrastructure, such as leaflets, and kit counseling.<sup>54</sup>

As a form of support for exclusive breastfeeding every workplace and public place facilities must provide breast-milk space facilities and infrastructure in accordance with minimum standards and needs.<sup>55</sup>

### 3. Cultural beliefs and practices

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<sup>51</sup>*ibid.*

<sup>52</sup>Damanik, R. Y. (2015). Hambatan Kinerja Konselor Menyusui Dalam Meningkatkan Cakupan Pemberian ASI Eksklusif di Kota Kupang. *Indonesian Journal of Human Nutrition, Volume 2, No. 1, Juni 2015*, 1-10., p.7-8

<sup>53</sup>Murtiyarini, I. d. (2014)., *Op.Cit.*, p.84

<sup>54</sup>Damanik, R. Y. (2015)., *Lo.Cit.*

<sup>55</sup>Minister of Health Regulation No.15/2013 : Article 3, Article 7, Article 9 section (3)

Patriatic culture, nuclear family and extended family, opinions of fat babies are healthy babies, and marketing of aggressive breast milk substitutes. This gives rise to a false perception of child development and disrupts mother and baby bonding. Families must be able to be conditioned to be a supporting factor by involving them in counseling as well as increasing community support through Government Regulation No.33/2012 Article 37.

### **C. Conclusion**

Breastfeeding counseling is carried out as a guarantee of the fulfillment of children's rights to exclusive breastfeeding. Breastfeeding success requires understanding, motivation and support from various parties. Breastfeeding counseling improves maternal knowledge and attitudes and influences exclusive breastfeeding behavior.

A number of laws had been issued to protect and guarantee the implementation of these efforts, namely, Law No.39/1999, Law No.13/2003, Law No.36/2009, Government Regulation No.33/2012, and Presidential Decree No.36/1990. In addition, the Minister of Health also issued Regulation No.43/2016, No.97/2014, No.25/2014, No.23/2014, and No.15/2013. Then, Joint Ministerial Regulation 3 (Minister of Women's Empowerment and Child Protection, Minister of Manpower and Transmigration, and Minister of Health) - No.48/Men.PP/XII/2008, PER.27/MEN/XII/2008, and No.1177/MENKES/PB/XII/2008 and Minister of Health Decree No.450/MENKES/SK/IV/2004. However, the implementation has not been ideal because there is no official guide for the implementation of counseling, limited facilities and availability of counselors, commitment to implement the 10 Steps to Successful Breastfeeding that have not been optimal, and erroneous cultural beliefs and practices.

### **Recommendation**

1. Counseling with the edutainment concept will be fun for counselors, mothers, and families.
2. For policymakers in Government, improving legislation to support mothers for exclusive breastfeeding, by increasing maternity leave time, flexible maternity leave, strengthening medical care at health facilities by including breastfeeding counseling and protecting mothers against the aggressive marketing of infant formula so mothers can gain confidence in their breastfeeding abilities. Also drafting Minister of Health Decree regarding seven breastfeeding contacts between mother and counselor.

3. To overcome the limitations of counselors, nutrition workers can be declared to be counselors without going through Breastfeeding Counselor Training because the material during education has supported this.
4. Increase community support, among others, through the scientific refresher on breastfeeding counseling by PERSAGI, AyahASI Movement, DesaASI, and ASI-friendly workplace.

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### **Legislation:**

- The 1945 Constitution of The Republic of Indonesia  
Convention on the Rights of the Child, 1990  
LawNo.36/2009  
LawNo.13/2003  
LawNo.39/1999  
Law No.23/1992  
Government Regulation No.33/2012  
Presidential Decree No.36/1990  
Joint Ministerial Regulation 3 (Minister of Women's Empowerment and Child Protection, Minister of Manpower and Transmigration, and Minister of Health) -  
No.48/Men.PP/XII/2008,PER.27/MEN/XII/2008,and No.1177/MENKES/PB/XII/2008  
Minister of Health Regulation No.43/2016  
Minister of Health Regulation No.97/2014  
Minister of Health Regulation No.25/2014  
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Minister of Health Decree No.450/MENKES/SK/VI/2004  
Minister of Health Decree No.284/MENKES/SK/III/2004

## **Legal Protection of Children: Child Soldier Recruitment in Somalia**

Bahjah Ayu Bakta and Misbahul Ilham

### **Abstract**

This article discusses the provision relating discourse of legal protection of children regarding child Soldier recruitment in Somalia. It argues that children rights in armed conflicts are protected by the UN (the convention of a child) document which has been ratified regarding children in armed conflicts. Those convention forced international obligations for Somalia in realizing protocol to Somalia's regulations. In term between the convention that Somalia has to ensure children is not utilized as heard in armed conflicts. In fact, there are children still utilized and harassment by a soldier. It shows the implementation of regulations among convention, national law and laws in society found experienced several obstacles. Legal facts and social facts face a serious challenge of abusing and utilization children which can not be implemented by some existing provisions. Jenewa Convention had been ensured that children right must be considered in its application. This article uses a doctrinal legal research by focused on analyzing the implementation of legal principle and norm and to ensure abstract law rules as a measure of truth in legal studies. This article also uses a socio-legal study is an effort to further explore problems by insufficiently in legal studies, but it should also the attention of norm context in their application. It concludes that Humanitarian law is sufficient to regulate child protection in armed conflict, both are concerned direct involvement of children or indirectly in one hostility and also child protection as a victim of the armed conflict. it's just that the provisions that have been regulated both internationally and nationally can be implemented seriously so that children's rights are not reduced by arbitrariness and illegal recruiting in armed conflicts.

**Keywords:** child soldier recruitment, International Law, Humanitarian Law, Somalia

## **A. Introduction**

Child is an highly important instrument for the sustainability of a nation's generation. Every child has the right to live freedom from violence. In addition, according to report released by the World Health Organization (WHO) ensures around 40 million children under 15 years old drive to victims of violence each year (UNICEF, 2012, Ringkasan Kajian Perlindungan). The number of violence increased occurs due to economic, social, and lack of equality which in this case becomes the concentration of several countries and organizations that works for the development of children.(Grover, 2013)

As the armed conflict develops worldwide, more and more children become victims of war brutality. In many countries, boys and girls are recruited as child soldiers by armed forces and groups, both forcible and voluntary. Child soldiers perform various tasks including participation in combat, mine laying, spying, cooking and even sexual slavery. The new Child Soldiers Prevention Act requires the state Department to publish each year. The new list includes the Democratic Republic of Congo, Mali, Nigeria, Somalia, South Sudan, Sudan, Syria, and Yemen. (Human Rights Watch, 2017).

Somalia is the most eastern African country that extends from the south of the equator north to the bay and occupies an important geopolitical position between sub-Saharan Africa and the Arab and southwestern Asian countries. The state capital of Somalia is Mogadishu, which lies just north of the equator in the Indian Ocean. Right in the 14th century Somali society flocked to Islam and started their expansion south from the arid meadows to their current border which is traditionally known as Somalilan. The majority Somalis are nomadic shepherds who have quite a tough competition due to scarce resources so often involved in bloody hostilities or warfare with the tribe and the surrounding community.

A long history of Somalia has been recorded since 1991, Somalia has not had a strong central government in the world arena precisely since the fall of the Siad Barre regime. Siad Barre was appointed president just after he succeeded in overthrowing and leading a coup against President Abdirashid Ali Shermarke's regime. In his 22 years of leadership, Siad Barre is known as a dictatorial leader. Barre was ousted from power in 1991 which was later replaced by the president of Ali Mahdi Muhammad. Political, economic and social issues are at the root of the cause of the problems in Somalia. This makes the Somali state more vulnerable to intervention, both within and outside the country.

Not only a country with the nickname of failed states alone, Somalia is also a country that never separated from the problem of child involvement in civil war. Somalia is one of the state that not signed of the UNICEF Convention on the Rights of the Child, but it doesn't mean not prohibits governments from allowing children under 15 to participate in the war and also prohibits kidnapping of children (Gaffey, Conor, 2016, Children Are Fighting Al-Shabab's Bloody War in Somalia).

On June 16, 2016, an official with United Nations said that there were less than 5,000 child soldiers in Somalia belonging to the Al-Shabab group that until then continued to recruiting (UN Reports). This number occupies the highest number of countries that recruit the most child soldiers in the world. This was later reinforced by Human Rights Watch (HRW) findings in 2012 which reported that Somalia is currently focusing on international crimes committed by Al-Shabab groups against children. The report also focused on the attacks on schoolchildren, teachers, and school, the use of students (schoolchildren) as "human shields" while using schools as firing positions without regard to the risk of injury or death to the students inside the school (Grover, Sonja, 2013, Humanity's Children, Berlin, Springer Berlin Heidelberg).

As the time goes by laws of war or called with humanitarian law have progressed which have focused on the protection of civilians and militants. This is suspected to prevent many casualties from falling into armed conflict or war. In the past 40 years, international law has developed to better protect children from military exploitation. The fact that child soldiers are still widely used in the war precisely in Somalia is what has become my focus in writing this issue. Based on above explanation, Somalia does not give a safe place for freedom of the child for absolute freedom of human rights without respecting other people rights and society and as a whole.

## **B. Discussion**

### **1. International Provisions on The Right of The Child**

Child protection is a struggle to prevent, resolve harassment, abandonment, exploitation and abuse experienced by children in the world (Convention on The Right of the Child). Nowadays there are a lot conflicts that are taking place around the world and continue to result in violence. It has a lot of impact on the country itself. Malnourished, uneducated, without skills and psychologically scared, children are such a common impacts of armed conflict. From this impact it is necessary to provide policy on the protection of

civilians and children. Because it can not be denied that people who are very vulnerable to war are children.

The Convention on the Rights of the Child (CRC) is the most comprehensive document on the rights of children (The Convention on The Rights of the Child). Based purely on the number of substantive rights it sets forth, as distinct from implementation measures, it is the longest U.N. human rights treaty in force and unusual in that it not only addresses the granting and implementation of rights in peacetime, but also the treatment of children in situations of armed conflict (Law Library of Congress). The CRC is primarily concerned with four aspects of children's rights ("the four 'P's"): participation by children in decisions affecting them; protection of children against discrimination and all forms of neglect and exploitation; prevention of harm to them; and provision of assistance to children for their basic needs (9). For the purposes of the CRC, a child is defined as "every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier" (article 1).

The United Nations adopted two protocols to the CRC on May 25, 2000, the Optional Protocol to the CRC on the Sale of Children, Child Prostitution, and Child Pornography 2000 (Sex Trafficking Protocol) and the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (Child Soldiers Protocol). The Child Soldiers Protocol 15 reaffirms in its Preamble that "the rights of children require special protection," notes "the harmful and widespread impact of armed conflict on children," and condemns their being targeted in such situations. It also refers to inclusion as a war crime in the Rome Statute of the International Criminal Court "the conscripting or enlisting children under the age of 15 years or using them to participate actively in hostilities in both international and non-international armed conflicts (The Child Soldiers Protocol). The Preamble takes note of the definition of a child in article 1 of the CRC and expresses the conviction that raising the age of possible recruitment will contribute effectively to implementing the principle of the best interests of the child as a primary consideration in all actions concerning children (The Child Soldiers Protocol).

The Child Soldiers Protocol extends the minimum age requirement for direct participation in armed conflict and conscription to eighteen (articles 1 and 2, respectively) and forbids rebel or other non-governmental armed forces "under any circumstances," to recruit or to use in hostilities persons under that age (article 4). It does not prescribe the age eighteen minimum for voluntary recruitment, but requires States Parties to raise the minimum age for it from fifteen (as set out in article 38, paragraph 3, of the CRC; i.e., to

sixteen years of age) and to deposit a binding declaration setting forth the minimum age permitted for voluntary recruitment and describing safeguards adopted to ensure voluntariness (article 3(1-3), in part) (According to article 3(5), “the requirement to raise the age in paragraph 1 of the present article does not apply to schools operated by or under the control of the armed forces of the States Parties, in keeping with articles 28 and 29 of the Convention on the Rights of the Child.” See also Revaz, *supra* note 7).

The Child Soldiers Protocol requires States Parties to take “all feasible measures to ensure” the demobilization or release from service of children recruited into armed conflict or used in hostilities and, “when necessary,” to accord “all appropriate assistance” for the children’s rehabilitation and social reintegration (article 6(1) and(3)). Child protection under international law is also governed by the Geneva Conventions. This is in line with the Convention on the Rights of the Child. Subsequently to the Geneva Conventions described in Chapter II of Article 24 that the parties to the conflict must take the necessary measures to ensure that child- children under the age of 15 who are orphaned or separated from their families as a result of war, do not lose their resources and that their care, education and trust are facilitated in all situations. Education given to the maximum extent possible entrusted to parties who have the same cultural and traditions.

## **2. National Provisions on The Right of The Child in Somalia**

Somalia has not ratified the Convention on the Rights of the Child and so the Convention is not part of national law and cannot be cited in national courts. In reality, the world recognizes the existence of customary law which later became part of the source of the law. The Provisional Constitution of Somalia is the very first instrument to take a look at to found legal basis of right to freedom of the child.

In keeping with its universalistic nature, rights of the child must be respected and implemented in a non-discriminatory manner, since equality in human rights necessarily implies equality of all in their basic rights as mandated by Somalia Constitution exactly in Article 29 (1) “*Every child has the right to a good and righteous name and a nationality from birth*”, Article 29(2)“*Every child has the right to be protected from mistreatment, neglect, abuse, or degradation*”, Article 29(3)“*No child may perform work or provide services that are not suitable for the child’s age or create a risk to the child’s health or development in any way*”, Article 29 (4)“*Every child may be detained only as a last resort, for a limited time, in appropriate conditions, and must be detained separately from adults with the exception of the child’s immediate family. The child’s immediate family must be*

*informed of the child's detention as soon as practicable”, Article 29 (5) “Every child shall have the right to legal aid paid for by the State if the child might otherwise suffer Injustice”, Article 29 (6) “Every child has the right to be protected from armed conflict, and not to be used in armed conflict”, Article 29(7) “In every matter concerning a child, the child's best interests are of paramount importance”, Article 29(8) “In this Article, the word “child” means a person under 18 years of age”.*

### **3. Al-Shabaab**

Al-Shabab was a militant group formed around 2006. Al-Shabab emerged as the wing of the militant Somali hard-line fighter by lifting the spirit of Islamic unity that was initially controlled in Mogadishu in 2006 (BBC News). In early 2006 Al-Shabaab fighters played a significant role in the conflict by supporting and directly involved in the Islamic Courts Union (ICU) against a coalition of Mogadishu warlords that the United States covertly supported in an attempt to prevent the spread of militant Islamism. In this conflict, Al-Shabaab managed to dominate and strengthen the line so that it can easily control Somalia (BBC News).

According to the report, a task force in Somalia verified the recruitment and use of 6,163 children – 5,993 boys and 230 girls – during the period from April 1, 2010 to July 31, 2016, with more than 30 percent of the cases in 2012 (Al-Jazeera, 2017). In reality, there are so many cases of child abuse in Somalia. Cases of a child soldiers recruitment always happens every year. Since late September 2017, Al-Shabab has ordered elders, teachers in Islamic religious schools, and communities in rural areas to provide hundreds of children as young as 8 or face attack. The armed group's increasingly aggressive child recruitment campaign started in mid-2017 with reprisals against communities that refused. In recent months, hundreds of children, many unaccompanied, have fled their homes to escape forced recruitment (Human Rights Watch, 2017).

Al-Shabab is an affiliate of Al-Qaeda with a massive number of soldiers, seven to nine thousand soldiers remaining nowadays (Global Conflict Tracker). Today, Al-Shabab still dominates rural areas in southern and central Somalia. The movement of Al-Shabab in the Kenyan region is also quite and strong, seen on several occasions preaching to their captives (BBC News). It is intended to increase public support in areas outside Somalia to form a joint security force with Kenya in which the country's government has long been hampered by corruption. Al-Shabab topped the glory around 2011 by occupying strategic area in Mogadishu and Kismayo's port (Global Conflict Tracker).

The goal of Al-Shabab itself is to reinforce the spirit of Islam in the African region that begins with the establishment of an Islamic state in Somalia (Council on Foreign Relations). Along the way, Al-Shabab has been a great influential on the development of the Somali state. Instead of progressing to the point of light, in fact the presence of Al-Shabab increasingly create a chaos for Somali government. The strength of Al-Shabab in Somalia is strong enough to make other countries reluctant to intervene in the matter. As well as Somalia society, Kenya are also become victim of attack by Al-Shabaab. On 2nd April 2015, Al-Shabab launched an attack on Garissa University, which lies on the border between Somalia and Kenya. From the news that reported by the BBC, there are about 140 people who died caused by attack was allegedly targeting Christian religious students (BBC News). Previously circle 2013, Al-Shabab also claimed the attack that occurred in Nairobi, Kenya. They namely Westgate Spectacle killed about 35 people and 150 people were injured (BBC News). The attack was allegedly responding to the presence of Kenyan troops in Somalia. From some of the attacks carried out by Al-Shabab enough to signal that the military power of Al-Shabab can not be underestimated.

### **C. Conclusion**

The violance of the child became one of the most matter in armed conflict, definitely Somalia. Child soldiers perform various tasks including participation in combat, mine laying, spying, cooking and even sexual slavery. The new Child Soldiers Prevention Act requires the state Department to publish the list each year. The new list includes the Democratic Republic of Congo, Mali, Nigeria, Somalia, South Sudan, Sudan, Syria, and Yemen. Many child soldiers have been deliberately recruited, others abducted and some coerced into fighting to protect their families.

### **Suggestion**

**Respect to the right of the child.** Somalia have to respect to the right of the child inits Constitution and its Law on Human Rights. The respect to human rights in general also became the spirit to stop the armed conflict.

**Resolurtion from Security Council.** The Security Council has primary responsibilityfor the maintenance of International peace and security. Furthermore, The Security Council also can recommends to the General Assembly to arise the child soldiers's issue.



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## **Implementation of Children Rights in the Field of the Law**

Nikmah Rosidah and Chaidir Ali

### **Abstract**

In the 1989 Convention on the Rights of the Child, inter alia, the child is entitled to special protection and shall have the opportunity guaranteed by law and other means to enable him to develop himself physically, psychologically, morally, spiritually and socially in a normal conditions, normal situation according to his freedom and dignity. The implementation that goal into law based on the best interests of the child should be the primary consideration. Based on data from the National Commission for Child Protection (Komnas PA), in 2017/2018 the number of children facing the law is 3,983 children. Out of the relatively large number indicates that the rights of children in Indonesia have not been maximally obtained. The issues discussed are: (1) Why is the right earned by the child not yet maximally based on the law? (2) What steps are needed to achieve maximum child rights? This writing uses the normative juridical method. Based on the analysis, it has been found that the right of children dealing with the law has not been maximally implemented in the handling of legal matters related to them. Because children are the generation and hope of the nation, children's rights must be fulfilled as much as possible.

**Keywords :** Implementation, Childrens Right, Facing Law.

## A. Introduction

Children are an important asset for the nation. The interest comes from the fact that later, the succession of a country, the future and the survival of a country. These tasks will be carried out by the children of Indonesia as the next generation of the nation. Because of the importance of children's role in the continuity and future of country. Encouraging regulation in one of the articles of the 1945 Constitution of the State of the Republic of Indonesia is needed to ensure the protection of the child. It is mentioned in the provisions of Article 28B paragraph 2 of the 1945 Constitution of the State of the Republic of Indonesia which stipulated that: *“Every child shall have the right to live, grow and to develop and shall have theright to protection from violence and discrimination”*.

However, what we need to understood is, although in his nature a child is a sacred being. However, it is not close the possibility when those have growing up later. Those children will be trapped in mischief, which is not uncommon the delinquency will lead to a crime. As we know if there is a crime that has been regulated in the prevailing laws and regulations in Indonesia was violated. So, it will lead to a consequence that is nothing but punishment of the offender. It is only done as a form of law enforcement to reach a peaceful and prosperous society. However, what if the perpetrator of a crime is a child? Is it appropriate for a child to be punished for his mistakes? Is it an effective way to make the child aware of his mistakes? Then, would not it disrupt the growth and development of children who dealing with the law.

Those doubts of the enforcement of the criminal law which in this case are accommodated through Law Number 8 Year 1981 regarding Criminal Procedure Law, tried to be overcome by the Government of the Republic of Indonesia with the enactment of Law Number 11 Year 2012 regarding the Child Criminal Justice System. The distinguishing factor between these two criminal procedural instruments is the emergence of diversion which requires the settlement of a criminal case of a child out of court. This diversionary effort then seems to be a panacea for fear of the fate and future of children who dealing with the law. Thus, it is hoped that through this diversionary effort children who are who dealing with the law would not waste their childhood by being spent for the duration of the sentence. However, at the level of its implementation turned out to not be able to run properly. As for

not being able to run well diversion efforts is none other than caused by factors that influence law enforcement as proposed by Soerjono Soekanto. These factors consist of:<sup>1</sup>

- a. Its Own Legal Factor;
- b. Law Enforcers Factor;
- c. Facility Factor;
- d. Community Factor;
- e. Cultural Factor.

Using the method of normative juridical research, the method of research approaching a problem through a normative analyses. This research is about analyzing the causes of failure of diversion efforts withing the society and how to overcome these failure in the implementation of the diversion effort as the fullfilment of the children rights in the field of the law.

## **B. Discussion**

### **1. Protection of the Rights of the Child**

Indonesia has ratified the Convention of the Right of The Child through Presidential Decree No. 36/1990 on the Ratification of the Convention of the Right of The Child. The Convention contains the affirmation of the rights of the child, the protection of the child by the state, and the participation of various parties (state, public and private) in ensuring the protection of the rights of the child.

In the opening of this convention which later described normatively in the trunk, among others about:

- a. Recognition that for the sake of the child's development fully and harmoniously the child must be able to grow and develop in a family environment with full of affection and understanding;
- b. Children with various physical and mental inadequacies require special attention and care including the need for legal protection;

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<sup>1</sup>Soekanto, 2014, *Faktor-Faktor yang Mempengaruhi Penegakan Hukum*, RajaGrafindo, Jakarta, p. 8

- c. Child protection is undertaken with due regard to the importance of the role of the cultural and cultural values of each nation insofar as to include the harmonious protection and development of the child.<sup>2</sup>

The child who is dealing with the law in this case is an immature child emotionally, intellectually, mentally and psychologically in accounting for his actions. Specifically Law Number 11 Year 2012 on the Child Criminal Justice System determines that the child is had already 12 (twelve) years old but not yet 18 (eighteen) years old who is suspected of committing a crime.<sup>3</sup>

It is important to guarantee on the certainty of child growth and development in harmony. Being one of the important issues in the development of criminal law, in this case with the enactment of Law Number 11 Year 2012 on Child Criminal Justice System becomes the proof which becomes the legal protection instrument for children dealing with the law. Where in the regulation, the CCJS Law emphasizes its enforcement based on restorative justice and not based on retributive justice.

## **2. Shifting of The Retributive Justice towards Restorative Justice**

As we have explained above, in generally the criminal law enforcement instrument or which becomes the formal law of the criminal law applicable on the basis of Law Number 1 Year 1946 is the Law Number 8 Year 1981 regarding Criminal Procedure Code. Where in the enforcement of Law No. 8 of 1981 on Criminal Procedure Law as a formal law of the criminal law has a purpose to:

“seek and obtain or at least approach the material truth, is the complete truth of a criminal case by applying the criminal procedural provisions honestly and appropriately in order to find out who is the perpetrator who can be charged for a violation of the law, and further request the examination and the decision of the court to find out whether it is proved that a criminal offense has been committed and whether the accused person is to be blamed”.<sup>4</sup>

If we consider the formulation of the purpose of Law No. 8 of 1981 on the Criminal Procedure Code, thus, we can conclude that the form of justice that would be accommodated by Law No. 8 of 1981 on the Criminal Procedure Code is retributive justice, which is

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<sup>2</sup>Rosidah, 2014, *Budaya Hukum Hakim Anak di Indonesia*, Pustaka Magister, Semarang, p. 48-49

<sup>3</sup>Pasal 1 angka 3 Undang-Undang Nomor 11 Tahun 2012 tentang Sistem Peradilan Pidana Anak

<sup>4</sup>Hamzah, 2015, *Hukum Acara Pidana Indonesia*, Sinar Grafika, Jakarta, p. 9

basically in combination with the theory of punishment. Criminal law provided pursuant to this criminal procedure is aimed at:<sup>5</sup>

- a. Retaliation, making the offender suffer;
- b. Prevention efforts, prevent the occurrence of criminal acts;
- c. Rehabilitate the perpetrators;
- d. Protecting the public.

However, this raises a doubt if this form of justice is imposed on a child dealing with the law. It will be able to affect the mental, psychological and receptive development of the child when returning to society. Therefore, criminal law enforcement and punishment should not be seen as the only hope for completing or resolving crimes completely, because in essence crime is a "humanitarian problem" and a "social problem", which cannot be solved solely with criminal law. As a social problem, crime is a dynamic social phenomenon that is always growing and associated with other complex phenomena and social structures.<sup>6</sup>

The inability of retributive justice to accommodate the protection of children's rights further encourages the idea of a more equal justice between the recovery of justice for victims and the perpetrators of child crime. To achieve that goal, thus, the idea of restorative justice emerges as a reaction to the discontent of retributive justice which emphasizes only 3 (three) needs of the criminal justice system:

- a. Sanction the perpetrator;
- b. Helping to rehabilitate the perpetrator;
- c. Strengthen community security and safety.

Restorative justice then satisfies the fourth requirement of the criminal justice system that is the need to remedy and restore the victims of crime and society as much as possible.<sup>7</sup> Restorative justice aims to empower victims, perpetrators, families and communities to remedy an unlawful act, using awareness and persistence as the foundation for improving social life.<sup>8</sup> Restorative justice is being the major reflection of the CCJS Law.

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<sup>5</sup>Rosidah, 2011, *Asas-Asas Hukum Pidana*, Pusataka Magister, Semarang, p. 71

<sup>6</sup>Maroni, 2016, *Pengantar Politik Hukum Pidana*, Aura, Bandar Lampung, p. 43

<sup>7</sup>Muladi dan Diah Sulistyani RS, 2016, *Kompleksitas Perkembangan Tindak Pidana dan Kebijakan Kriminal*, Alumni, Bandung, p. 114

<sup>8</sup>Rosidah, 2014, *Loc.Cit*, p. 103

### 3. Diversion and Its Rejection

As a form of restorative justice, the idea of diversion was formally established in articles 6 through 14 of Law No. 11 of 2012 on the Child Criminal Justice System. Diversion itself can be interpreted normatively based on article 1 point 7 of the CCJS Law as: *“the transfer of settlement of cases from the criminal justice process to proceedings outside the criminal justice”*

According to the Academic Paper Draft Law on Child Criminal Justice System it is argued that diversion is a transfer of settlement of cases of children suspected of committing certain criminal acts from a formal criminal process to a peaceful settlement between a suspect or a defendant or a perpetrator of a crime with a victim who is facilitated by the family and / or the community, child's social advocates, police, prosecutors or judges.<sup>9</sup>

Diversion itself has several objectives as set forth in article 6 of CCJS Law which consists of:

- a. Achieve the peace between victim and child;
- b. Finishing a child's case out of court;
- c. Avoid children from deprivation of liberty;
- d. Encourage people to participate;
- e. Infuse a sense of responsibility to the child.

The case pursued by diversion can be seen from several provisions set forth in article 7 of the CCJS Law. In Article 7 paragraph (1) of the CCJS Law for example determines that: *“at the level of investigation, prosecution, and examination of a child's case in a district court must be attempted to diversify.”*

Indeed, in general cases of children filed at the district court level are often classified as Criminal Offenses. However, if we recall the purpose of the diversion as set forth in article 6 of the CCJS Law and the investigation of cases in the High Court of a devolutive nature. Thus, there is reason to justify that diversion may also be attempted at the High Court examination level.<sup>10</sup> Then, in the provisions of Article 7 Paragraph (2) of the CCJS Law, we

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<sup>9</sup>M. Nasir Djamil, 2013, *Anak Bukan untuk Dihukum*, Sinar Grafika, Jakarta, hlm. 137 dalam R. Wiyono, 2016, *Sistem Peradilan Pidana Anak*, Sinar Grafika, Jakarta, p. 47

<sup>10</sup>Ibid, p. 50



can concluded that the case of a child who is obliged to be diverted while conducting an investigation, prosecution and examination in a district court is a case of a child whose crimes are:

- a. Threatened with imprisonment under 7 (seven) years, and the explanation of article 7 paragraph (2) letter a of the CCJS Law determine that the provision of "imprisonment under 7 (seven) years refers to the criminal law;
- b. It is not a crime repetition.

In his opinion R.Wiyono pointed out that if there is a criminal offense in contrary to the above two conditions in which it would cause logical consequences of child crime to be not obliged to diversion. Thus, the notion of "not obliged to be diverted" has a meaning that is not imperative or facultative. This means for a crime of a child who is punishable by imprisonment of more than 7 (seven) years or in the case of a child committing a criminal act. It can be attempted to divert.<sup>11</sup>

However, according to M Nasir Djamil, former chairman of the House of Representatives' Committee for Child Criminal Justice Commission III, said that the aforementioned matters may have logical consequences for the actions of children who is dealing with the law to be not required to be diverted. Caused if the child is threatened with imprisonment more than 7 (seven) years. Hence, the crime is a serious criminal offense or if he / she commits a repetition of a crime. Thus, it can be concluded that the purpose of diversion. That is to instill a sense of responsibility to the child not to repeat a similar criminal act is not achieved. Thus, resulting in the logical consequences of the diversionary effort against it is not mandatory.<sup>12</sup>

Although the diversion effort has been designed in such way, however, at the level of its implementation, not infrequently these diversion efforts experienced rejection by the victim or the victim's family. This can be seen from one example of a case that occurred in the jurisdiction of the Kotabumi District Attorney, where there is a suspect with the initials HS Bin Y who commits a criminal act of fencing as stipulated in article 480 of the Criminal Code. The North Lampung Police Investigator who handles the case carried out the legal process of investigation based on Police Report Number: LP / 930 / XI / 2014 / POLDA LPG / RES LU, Investigation Order Number: SP. Sidik / 659 / XI / 2013 / Reskrim dated 26

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<sup>11</sup>Ibid, p. 51

<sup>12</sup>Ibid, p. 51-52

November 2013, and Notice of Commencement of Investigation Number: SPDP / 197 / XI / 2014 / Reskrim.

The State Prosecutors of Kotabumi through the Public Prosecutor in this case conduct a diversion effort as outlined in the Minutes of Diversity Number: 02 / N.8.13 / Ep.1 / 12/2014. The point of diversion is the perpetrator to compensate the victim of Rp. 2,000,000, the perpetrator promised not to repeat his actions and if the agreement is not met then the legal process will continue. However, the victim and the victim's family subsequently refused this diversion attempt. Due to the intention of made HS to be processed in court and properly punished as regulated in Criminal Code. Because of the criminal acts committed by HS has been disturbing local residents. Thus, the victim and the victim's family want HS to be sentenced to prison in accordance with his actions. Although in the end, the Kotabumi District Court through Determination Number: 11 / Pid.Sus-Anak / 2014 / PN.Kbu stipulates the process of examination of the child and ordered the prosecutor to remove the child from the prisons of Kotabumi Children's Prison. Because the Judge considers that the diversion at the Court's examination level has been successful.

The above case examples show that conceptually, diversion does have a noble purpose. However, at the time of implementation, people tend to refuse to implement diversion efforts primarily by victims or families of victims.

#### **4. Factors Affecting Law Enforcement (Diversion)**

As we have explained in the beginning of this paper. According Soerjono Soekanto, there are at least 5 (five) factors that affect law enforcement, not least in the diversionary effort. In fact, it can be said that these five factors determine whether the diversion can be implemented or not by all parties. The five factors are:<sup>13</sup>

- a. The legal factor itself, which in this case is limited to the law alone;
- b. Law enforcers factors, namely parties related to law enforcement;
- c. Facility Factor, namely facilities that support law enforcement;
- d. Community, ie the environment in which the law is applicable or applied;
- e. Cultural factors, namely the work, creativity, and sense that is based on human initiative in the social life.

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<sup>13</sup>Soekanto, 2014, *Faktor-Faktor yang Mempengaruhi Penegakan Hukum*, RajaGrafindo, Jakarta, p.

Specifically in the enforcement of CCJS Law these five factors have the following effect:

a. The legal factor itself.

Criminalization of law enforcement agencies as provided for in articles 96, 100 and 101 of the CCJS Law. It has been subjected to judicial review by the Constitutional Court. Where based on Decision No. 110 / PUU.X / 2012 the three formulas of criminal provisions in the CCJS Law are contrary to the 1945 Constitution and therefore have no binding power. In this case, it resulted in the diversion of pursuits under the provisions of the CCJS Law to have no force of force. Thus, if law enforcement officers, inter alia: investigators, prosecutors, judges and court officials, are deliberately not performing a diversion-seeking duty as defined in the CCJS Law. Thus, these law enforcers cannot be sanctioned for their actions. This then becomes quite risky because diversion becomes unenforceable against law enforcement to work to the fullest.

b. Law Enforcers Factor.

As we have described above. Based on the decision of the Constitutional Court Number 110 / PUU.X / 2012 decided the revocation of article 96, 100 and 101 of the CCJS Law. It is feared that diversionary implementation will be difficult. Due to the absence of compulsory force of law enforcers to seek maximum diversion, even if law enforcement officers continue to seek diversion as a way of settling child crime cases, the degree of understanding of law enforcement agencies in seeking diversion will play a significant role in the success of diversionary efforts in a case of child crime. For example, as the case in the Kotabumi District Court we have described at the beginning of this paper shows that the knowledge of law enforcement is very important.

c. Facility Factor.

Then, in case of handling this child case, not infrequently the factors of this tool greatly affect the process of investigation of a child crime case. Like a special examination room of children in police or local police station. Or sometimes in the case of the child in question should be arrested. The absence of a child-specific cell becomes a problem that is quite difficult to solve. Whereas in this case the child

should be treated not like a criminal, however, it must be treated as someone who needs to be made aware of his wrong behavior and taught to be responsible.

d. Community Factor.

In this case it is sometimes people tend to refuse to diversion in a crime that involves the child as the perpetrator. It is then necessary to be socialized to the public that it is important to keep the mental and psychic children in contact with the law. Because, if the child is actually even punished where later he will be sentenced to prison and placed in a penitentiary, it has consequences that the child will be constantly mixing with people committing the criminal acts within the prison. In addition, the inclusion of the child into a correctional institution will not necessarily guarantee that the child will realize his or her guilt. Especially based on the criminology approach in which the division of criminals by Lindesmith and Dunham classifies criminals to be: 1. Criminals whose whole orientation is guided by a group of offenders; 2. Criminals whose orientation is largely guided by non-lawbreakers. So, we can draw a conclusion that in the end if a child who committed a crime was put in a penitentiary. He will have the potential to become one of the types of criminals of the two categories presented by Lindesmith and Dunham. In addition, community awareness needs to be willing to accept children who commit such crimes to re-blend in the community concerned. Without stigmatization of errors that the child ever did.

e. Cultural Factor.

In the case of non-penal criminal countermeasures. Cultural factors play an important role. Therefore, cultural factors greatly affect the mental health of the people concerned. Due to this factor is closely related to the pattern of community life concerned with the settlement of child criminal cases. It is hoped that by putting forward the noble values that exist in society. The victim does not simply seek falsehood from the child offender or even attempts to blackmail the child offender in the case of compensation for the crime committed by the child. Although the compensation is included in one of the elements of the diversionary effort.

### **C. Conclusion**

In the end it can be explained that the diversionary effort includes a form of reform of criminal law that is ultimum remedium. This means that criminal law is the last drug in

the eradication of crime. In addition, diversion effort is necessary because it is in line with the mandate of the 1945 Constitution specifically concerning the protection of children's rights and growth. In addition, because of the five factors that influence law enforcement, it plays an important role in the implementation of diversion in Indonesia. Thus, a legal awareness effort is needed to awaken the stakeholders in this case is the community, especially to be able to accept the concept of restorative justice as well as the concept of diversion. It is hoped that in the future the problems of diversion implementation which accept the acceptance factor by society can be reduced as much as possible. Thus, the diversion effort can run optimally in terms of settling cases of child crime.

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## **The Violation of The International Code of Marketing of Breast-Milksubstitutes in Sumatera Island Indonesia**

Ritma Fathi Khalida, Upi Fitriyanti and Helen Emdaniar Kawulusan

### **Abstract**

This paper is to measure compliance with the International Code of Marketing of Breast-milk Substitutes ('the Code') in Sumatera Island of Indonesia. The study was a cross-sectional survey using the self-enumeration survey. The subject is a total of 310 women consist of 28 pregnant women and 282 mothers of infants 0-24 months in ten provinces of Sumatera Island in Indonesia. We found that 34,2% of the women received free sample and 32,3% received gifts from Breastmilk Substitutes (BMS) companies. The study found that 32,3% of the women received advice and promotion breast-milk substitutes from health workers and 58,4% had seen promotion and advertising of BMS in healthcare facilities. The study also reported that 97,7% of the women exposed advertisement materials for breast-milk substitutes and 58,6% of the women contacted directly or indirectly by the BMS company's representatives. We can conclude the violations of the Code by breast-milk substitute companies and their representatives were found in all provinces studied. Violation by health facilities and health workers also found in all province studied. A regular monitoring system by an independent institution should be in place to ensure the compliance of the Code. Following that monitoring, a firm law enforcement by government is needed to ensure that exclusive breastfeeding program can be conducted without unethical BMS promotions.

**Keywords:** International Code, Marketing, violation

## **A. Introduction**

Breastfeeding has health benefits for mothers and babies, both short-term benefits in reducing infant and postpartum maternal mortality rates and long-term benefits in reducing future health risks (Victora et al., 2016). Breastmilk is the best nutrition for babies, contains living cells, DNA, hormones, active enzymes, various kinds of protection factors, growth factors, and other components that cannot be copied by any formula (Benson & Masor, 1994). Breastfeeding can also reduce health risks in the future. Breastfeeding reduces the risk of adolescent and adult cardiovascular and metabolic diseases (Mcdade et al., 2014). Children who are breastfed for a longer period have lower rates of infectious disease and mortality (Victora et al., 2016). Breastfeeding reduces the risk of Sudden Infant Death Syndrome (SIDS) in infants, reduces the risk of babies getting diarrhea and respiratory infections, and saves 16% of babies from death if the baby is breastfed from the first day of birth and 22% if the baby is breastfed for 1 hour from birth (Edmond et al., 2017).

For mothers, breastfeeding reduces the risk of bleeding and anemia after childbirth (Edmond et al., 2017), as a natural contraceptive (lactation amenorrhea) (Victora et al., 2016), accelerating uterine wasting to accelerate postpartum recovery, reduces the risk of breast cancer, ovarian cancer and endometrial cancer (Monika F.B., 2014).

However, even though breastfeeding provides many health benefits for mother and baby, the rate of breastfeeding is not in line with expectations. According to World Health Organization, (2018: 2) "Globally, three out of five children under 6 months of age are not exclusively breastfed and only 45% of children continue breastfeeding for 2 years". Similar data also occurs in Indonesia, according to Ministry of Health Republic of Indonesia, (Kemenkes RI, 2018) the number of babies who received exclusive breastfeeding for up to 6 months throughout Indonesia are only 35.73%. This number has not reached the target set by the government, the Ministry of Health of Indonesia is targeting in 2017, 44% of babies in Indonesia are exclusively breastfed up to 6 months (Kemenkes R.I, 2013).

Declining breastfeeding rates also occur in many parts of the world. This is certainly worrying, over 12,400 preventable child and maternal deaths per year in the seven countries could be attributed to inadequate breastfeeding. (Walters et al., 2016). According to the WHO (1981) the decline of breastfeeding rates is influenced by several factors, relating to socio-cultural factors and social and cultural factors and other factors, including the promotion of manufacturers' breastmilk substitute. Therefore, the WHO urged "Member



countries to review sales promotion activities on baby foods and to introduce appropriate remedial measures, including advertisement codes and legislation where necessary".

On 21 May 1981 the WHO International Code of Marketing Breast Milk Substitutes (the Code) was passed by 118 votes to 1, the US casting the sole negative vote. This code arouses out of concerns over a significant increase in mortality, malnutrition and diarrhea in very young infants in developing countries (including Indonesia) are associated with aggressive formula marketing.

According to theWHO, (2018) the legal status of the Indonesian Code is Many Provision in Law, Indonesia adopts many of the Code, although its coverage is only exclusive breastfeeding protection for 6 months. Indonesian regulation also does not included milk for mothers and growing-up formula. There are 3 regulations that adopt the Code issued by the Government of Indonesia, i.e.:

- Law Number 36 Tahun 2009 About Health
- Government Decree Number 33 2012 about exclusive breastfeeding
- Regulation of The Ministry of Health Number 39 2013 about infant formula

As a form of support for the protection of exclusive breastfeeding, several provincial and city governments in Sumatera also issued Local Regulations as seen in table 1. Although many rules have been made, violations of the code still occur. Some previous studies of Code violations conducted in Indonesia were Durako et al.,(2016) and Hidayana et al., (2016).

Table 1. Breastfeeding Protection Regulation

| National Regulation  | Name                            |
|--|---------------------------------|
| Law Number 36 2009   | National Health Law             |
| Government Decree Number 33 2012                                     | Exclusive Breastfeeding         |
| Regulation of The Ministry of Health Number 39 2013                  | Infant Formula and Baby Product |
| <b>Local Regulation</b>  |                                 |
| Governor Regulation Number 17 2014, Lampung Province                 | Exclusive Breastfeeding         |
| Local Regulation Number 15 2014, West Sumatera Province              | Exclusive Breastfeeding         |
| Governor Regulation Number 49 2016, Nangroe Aceh Darussalam Province | Exclusive Breastfeeding         |

|  |  |
|--|--|
| Local Regulation Number 3 2017,<br>Bengkulu City       | Exclusive Breastfeeding  |
| Local Regulation Number 4 2017,<br>Pangkal Pinang City | Early Breastfeeding<br>Initiation and Exclusive<br>Breastfeeding |

**B. Method**

The study was conducted as a cross-sectional survey using the self-enumeration survey. We carried out a survey using the google form by giving thirteenth closed questions relating to the articles in the Code that focused on infant formula (including growing-up formula) promotion. A summary of the article of The Code were present in table 2. The results of the survey were analyzed in the form of percentage of The Code violations that occurred. Some definitions we use in this survey can be seen in table 3. The subject of this survey is pregnant women and women with baby under 24 months in ten provinces of Sumatera Island, Indonesia. The characteristic of the participant is presented in table 4.

Table 2. Summary of the Articles of the WHO International Code of Marketing Breast Milk Substitutes (Brady, 2012)

|  |
|--|
| <b>Marketing Breast Milk Substitutes</b>   |
| No advertising to the public   |
| No free samples or gifts to mothers  |
| No promotion of products in healthcare facilities  |
| No contact of mothers by company representatives   |
| No gifts or samples to health workers  |
| No baby pictures idealizing formula  |
| No unsuitable products such as sweetened condensed milk to be promoted for babies  |
| Information to health workers to be scientific   |
| All information to be objective and to explain the benefits and superiority of breastfeeding   |
| Health professionals to disclose to their institution any fellowships, research grants, or conferences provided by baby food manufacturers                 |
| Manufacturers and distributors to comply with above even if country has not implemented the Code   |
| Professional groups, non-governmental organizations and individuals to inform manufacturers, distributors and governments of activities violating the Code |

**Strengthening Children Education in The Environment Based on Law No. 35 of 2014  
on The Amendment to Law No. 23 of 2002 on Child Protection**

Siti khoiriah and Yeti Yuniarsih

**Abstract**

The child is a gift of the god who is entrusted to every parents. The existence of the child is inevitability, because it is a consequence of human biological needs. Constitutionally this has regulated on article 28B clause (2) UUD NRI 1945 about responsibility to guarantee viability, and protection against children. Now days we can find a lot of violence increased and according to data of Komisi Perlindungan Anak Indonesia (KPAI) from 2011 to 2014 there was a significant increase. Every years the violence increased by 50%. in 2013 there were 4311 cases of violence and in 2014 there were 5066 cases. Up to 26,954 cases of violence against children in 2010-2017. Government efforts have been made through the determination of the policy of Law No. 35 of 2014 on the amendment to Law No. 23 of 2002 on Child Protection. However, the rate of violence against children has always increased because most people do not understand the contents of the law, and a lot of parents don't know how to educate their children by good method , in fact they use verbal abuse to educate their children and children who have violence experience in their life will interfere their psychological, they will have a sense of traumatic. These trauma will inhibit their emotional, mental, physical, cognitive and welfare development of children. Using the socio-legal research method, this paper attempted to describe the problematic in the implementation of Law No. 35 of 2014 on the amendment to Law No. 23 of 2002 on child protection. The results gave conclusion that the society haven't understood about the concept of educating children in the family, there was tendency to discriminate against children in the family environment. Indispensable intervention at every level of government to be able make social engineering including by making regulations in strengthening the concept and application of children education in the family based on Law No. 35 of 2014 2014 on the amendment to Law No. 23 of 2002 on child protection.

**Keywords:** children, concept of educating children, verbal abuse,

## A. Introduction

Child Rights is a part of human rights contained in the 1945 Constitution (UUD 1945), and the provisions of the Convention on the Rights of the Child (*Convention on the Rights of the Child*) ratified by the Indonesian government through Presidential Decree No. 36 of 1990 concerning Endorsement *Convention on the Rights of the Child*, then it also stated in Law No. 4 of 1979 concerning Child Welfare and Law Number 23 of 2002. Law No. 35 of 2014 concerning Child Protection (Child Protection Act) all of which put forward the general principles of child protection, namely non-discrimination, the best interests for children, survival and growth and respect for children's participation.<sup>1</sup>

In terms of norms, Indonesia can be categorized as a country with a major commitment to child protection. This commitment does not only contain in the law alone but explicitly stated in the 1945 Constitution of the Republic of Indonesia.

The Constitution also pays great attention to the protection of children from violence. Article 28 B paragraph (2) confirms that "Every child has the right to get survive, grow, and develop and it is entitled to protect them from violence and discrimination."<sup>2</sup>

According to the constitution, the state ensures that no child anywhere is not protected on the other side, the state also does not allow Indonesian children to receive acts of violence in any form, whenever and wherever.<sup>3</sup>

The increase cases of child abuse that occur in Indonesia are considered as one indicator of the poor quality of child protection. The existence of children who have not been able to live independently is certainly in desperate need of people as a shelter. The question often raised is the extent to which the government has sought to provide (legal) protection to children so that children can obtain guarantees for their survival and livelihood as part of human rights. In fact, based on Article 20 of the Child Protection Act, those who are responsible and responsible for the implementation of child protection are the state, government, community, family, and parents.<sup>4</sup>

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<sup>1</sup>Trini Handayani, "Peningkatan Ketahanan Keluarga Melalui Optimalisasi Pola Asuh Maternalistik dan Pencegahan Kejadian Pedofilia", *Jurnal Ilmu Hukum*, Volume 3 Nomor 3 Tahun 2016, p. 1.

<sup>2</sup>Undang-Undang Dasar 1945

<sup>3</sup>Laurensius Alriman, "Partisipasi Daerah Dalam Perlindungan Anak Yang Berkelanjutan di Indonesia", *Jurnal Ilmu Hukum*, Volume 7, No 2 oktober 2016, p. 2.

<sup>4</sup>Vina Kartikasari, "Tinjauan Yuridis tentang Urgensi Perlindungan Hukum Terhadap Anak sebagai Korban Tindak Pidana Pemerkosaan" *Skripsi*, Universitas Brawijaya, 2013, p. 8.

*Komisi Perlindungan Anak Indonesia* (KPAI) stated that violence against children is always increasing every year. The results of KPAI's monitoring from 2011 to 2014 have seen a significant increase. In 2011 there were 2178 cases of violence, in 2012 there were 3512 cases, in 2013 there were 4311 cases, in 2014 there were 5066 cases," said Deputy Chairman of KPAI, Maria Advianti to Harian Terbit, Sunday (06/14/2015).<sup>5</sup>Data from *Komisi Perlindungan Anak Indonesia*(KPAI) stated that there were at least 2737 cases of violence against children in 2017. Not including those who still experience discrimination because of the issue of racial intolerance and physical condition. In the last 7 years found as many as 26,954 child cases based on 9 clusters, 3 of which are the highest cases.<sup>6</sup>According to Terry E. Lawson, child psychiatrists divides child abuse into 4 (four) types, namely emotional abuse, verbal abuse, physical abuse and sexual abuse. Verbal abuse occurs when you find out your child is asking for attention, telling the child to "shut up" or "don't cry". The child starts talking and she continues to use verbal violence like, "you are stupid", "you are fussy", "you are insolent", and so on.<sup>7</sup>

Kompas daily newspaper January 23, 2008, told the story of a person who was very attractive in his physical appearance, his body was athletic and had a handsome face. His profession as a doctor and economically well-established, but behind that ideal picture, the doctor had a lack of voice that was very soft. This made it difficult for patients and their interlocutors to understand what was being said. The cause of all this was the doctor's past experience, when he was a child he was always the source of his father's teasing and ridicule. The effect was a great feeling of shame and regards it as an insult.<sup>8</sup>Another case was that the beautiful teenage girl with yellow skin struggled to forget the incident that claimed her honor. January 2017, she was raped. She jumped over the part when he told the story of his life, really did not want to remember it again. Even though the body's wounds had healed, his inner wounds were still gaping. Girls shed tears every time they remembered events after events.<sup>9</sup>

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<sup>5</sup><http://www.kpai.go.id/berita/kpai-pelaku-kekerasan-terhadap-anak-tiap-tahun-meningkat>, diakses 27 Agustus 2018.

<sup>6</sup><https://peranperempuan.id/kpai-26-954-kasus-kekerasan-terhadap-anak/>, diakses 27 Agustus 2018

<sup>7</sup> Solihin, Lianny, "Tindakan Kekerasan pada Anak dalam Keluarga", *Jurnal Pendidikan Penabur*, No.03 / Th.III / Desember 2004

<sup>8</sup>*Jurnal Nursing Studies*, Volume 1, Nomor 1 Tahun 2012, Halaman 22 – 29 Online di : <https://ejournal-s1.undip.ac.id/index.php/jnursing>

<sup>9</sup><https://megapolitan.kompas.com/read/2017/04/03/18280011/luka.batin.yang.sulit.pulih.pada.anak.kurban.kekerasan>

Sorensen stated that children who have been victims of verbal violence from parents will be people who have multiple personalities as a mechanism to overcome the problem, namely on one side tends to be active in the behavior of social interaction, and damage to children's self-esteem. On the other hand, children can also demonstrate behavior such as fear when together with adults, regressive behavior (for example bedwetting, injuring others / themselves), relationships less familiar with peers, avoiding school activities, fear and anxiety excessive when meeting people who are unknown or known and behave mischievously and aggressively.<sup>10</sup>

Educating children is essentially a real effort on the part of the parents to develop the totality of the potential that exists in the child. The future of children in the future will depend on the experience gained by the child including the factors of education and parenting. At present, there are not a few parents who teach their own interests with the excuse of child welfare so that sometimes their role as parents is to educate and care for neglected children. Thus parents are a major milestone in providing welfare to children.

Using socio-legal research methods, this paper explained about efforts to prevent and reduce the number of verbal violence against children through parenting based on Law No. 35 of 2014 concerning Child Protection, the aim was to provide understanding to people who did not understand the concept of educating children in the family there was a tendency to commit verbal violence against children in the family environment.

## **B. Discussion**

Children are part of the younger generation as one of the human resources which is the potential and successor to the ideals of the nation's struggle, which has a strategic role and has special characteristics and traits, requiring guidance and protection in order to ensure physical, mental and social growth and development in a complete, harmonious, harmonious and balanced manner.<sup>11</sup>

In positive law in Indonesia, there is a diversity of understanding of children, this is because each law and regulation regulates the criteria for children..<sup>12</sup>

The regulations governing the criteria for children are;

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<sup>10</sup> Sorensen, Marilyn, J. (2003). *Breaking the chain of low self-esteem*. Canada : Raincoast Books.

<sup>11</sup> Mohammad Taufik Makarao, (et.al), *Hukum Perlindungan Anak dan Penghapusan Kekerasan Dalam RumahTangga*, Rineka Cipta, Jakarta, 2003, p. 1.

<sup>12</sup> Martah Riananda Dan Siti Khoiriah, *Hukum Perlindungan Perempuan dan Anak*, Buku Ajar, Zam-Zam Tower: Bandar Lampung, 2017, p. 122.

1. The Criminal Code, the definition of a child in a crime that is regulated in the provisions of Article 45 of the Criminal Code states that in the case of determining a crime against an immature person because of doing something before the age of sixteen, the judge can determine: ordered that the guilty be returned to his parents, guardians or maintenance, without any penalty; or order that the guilty be handed over to the government without any penalty, if an act, if the act is a crime or a violation based on the article 489, 490, 492, 496, 497, 503-505, 514, 517-519, 526, 531, 532, 536 and 2 years have not passed since being found guilty of a crime or one of the violations mentioned above, and the verdict has become permanent or imposes a penalty on the guilty.
2. Civil Code The definition of a child in civil law regulated in the provisions of article 330 paragraph (1) of the Civil Code states that those who are immature are those who have not reached even 21 (twenty-one) years of age and are not married first.
3. In the general provisions of Article 1 paragraph (2) of Law No.4 of 1979 concerning the welfare of Children, it is stated that the child is someone who has not reached the age of 21 (twenty-one) and has never married.
4. Whereas in general provisions Article 1 paragraph (1) of Law No. 35 of 2014 concerning Child Protection states that a child is someone who is not yet 18 (eighteen) years old, including children who are still in the womb.

After seeing the various definitions or understanding of the child above there is a difference in the determination of age limits contained in the legislation in Indonesia. Related to this case, the law used for the age limitation.

According to R.A Koesnoen said that children are young people, young at age, young in their souls and in their life experience, hence easily affected by their surroundings.<sup>13</sup>

While Kartini Kartono said that the child is a normal human being who is young and is determining the identity and is very unstable so that it is easily affected by the environment.<sup>14</sup>

Based on this definition, a child is a person who is not yet mature and unable to protect himself, so protection measures are needed to realize the welfare of children by providing guarantees for the fulfillment of their rights and the treatment without

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<sup>13</sup>R.A Koesnoen, *Susunan Pidana Dalam Negara Sosialis Indonesia*, Sumur, Bandung 1984, p. 120.

<sup>14</sup>Kartini Kartono, *Gangguan-Gangguan Psikis*, Sinar Baru, Bandung, 1981, p. 189.

discrimination. Regarding children as victims of violent crime, children are entitled to legal protection, because child protection is all activities to guarantee, protect children and their rights so that they can live, grow and develop optimally in accordance with human dignity. For the sake of the realization of Indonesian children who are noble and prosperous, child protection efforts need to be carried out as early as possible, ie from the fetus in the womb to a child aged 18 (eighteen) years.

It is undeniable that every act of violence against children both in physical form and other forms of violence is always followed by verbal violence. Verbal violence is violence towards feeling using words with harsh words without touching them physically. Slanderous words, words that threaten, frighten, insult, or exaggerate the mistakes of others.<sup>15</sup> Sorensen stated that children who have been victims of verbal violence from parents will be people who have multiple personalities as a mechanism to overcome the problem, namely on the one hand tend to be active in the behavior of social interaction, and damage to children's self-esteem. On the other hand, children can also demonstrate behavior such as fear when together with adults, regressive behavior (for example bedwetting, injuring others / themselves), relationships less familiar with peers, avoiding school activities, fear and anxiety excessive when meet people who are unknown or known and behave mischievously and aggressively<sup>16</sup>

According to Hampton verbal violence has various characteristics, namely:<sup>17</sup>:

- a. Verbal violence is very painful and is usually carried out by the person closest to the victim who has the opportunity to commit verbal violence, which is the victim ultimately trust the perpetrator that something is wrong with him and starts to feel worthless and he is a source of trouble.
- b. Verbal violence may occur in invisible behavior (such as comments, brainwashing with demeaning views).
- c. Verbal violence is very manipulative and aims to control the victim, which is a hidden aggression that will make the victim confused and finally easy to control where the victim finally trusts the perpetrator that there is something. Although the way to do it is smooth (comments and brainwashing) but still the main goal is to control and manipulate.

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<sup>15</sup> Sutikno, Raja Bambang. (2010). *The Power of 4Q*. Jakarta: Gramedia Pustaka Utama.

<sup>16</sup> Sorensen, Marilyn, J. (2003). *Breaking the chain of low self-esteem*. Canada : Raincoast Books.

<sup>17</sup> Hampton, Robert. L. (1999). *Family Violence 2th edition*. Thousand Wound : Sage Publications,



- d. Verbal violence makes the victim's self-esteem decrease without realizing it by the victim and increasingly withdraws from his environment so that the victim will change his behavior and surrender to the behavior whether it is realized or not.
- e. Verbal violence is unpredictable, in reality, sometimes the offender cursed, was rude, issued scathing comments, dropped or compared with better people.
- f. Verbal violence may increase in intensity, frequency, and variation. Verbal violence may be covered with jokes so that it is not obvious but through the victim. Verbal violence may also be followed by physical violence starting with minor accidents such as pushing or throwing the thing

According to Tower, there are various forms of verbal violence, namely;<sup>18</sup>

- a. Snapping, which is scolding loudly, among others:
  - rebuked, was berating loud words
  - judge, is to judge or act as a judge
  - cursing, is issuing dirty words
- b. Cursing, that is, saying mean words, inappropriate, unfavorable in expressing anger or irritation, among others:
  - denounce, that is blasphemous blatant
  - spurts are to spray words from the mouth
  - cursing is issuing dirty words to take an oath
- c. Give a negative/labeling nickname, which is giving identification marks through the form of words, including:
  - classifying, is classification, grouping based on something that suits the class
- d. Minimize and harass the child's ability, which is to make the existence of children low, including:
  - ignoring, neglecting, wasting
  - aside, is to get rid of the edge
  - underestimation is looking down
  - relieve, is to make or consider light
  - It's easy, it's easy, makes it easy

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<sup>18</sup> Tower-Crosson, C. 2005. *Understanding child abuse and neglect* (6th ed). Boston: Alyn and Bacon, Pearson Educational Company

- defamation is despicable, despicable

There are various types of verbal violence categories, namely:

- a. Refuse to share information
- b. Attack / oppose
- c. Deny and diver their partner's perception from the reality of situations of verbal violence
- d. Humorous violence
- e. Limit and divert
- f. Accusing and throwing errors
- g. Men-judge and criticize

A survey found that verbal abuse occurred at home with children of all ages and verbal abuse usually occurred in teenagers who lived at home. In adolescence, verbal abuse has impacts such as anxiety, withdrawal, low self-esteem, deviant behavior, and poor school values (Ferguson, 2009; Kaya, Gidycz, Warkentin, Loh, & Weiland, 2005; Solomon & Serres, 1999; Vissing et al., 1991) dalam (Jennifer Loh, 2015).

The factors of parents doing this action are due to two things, the first is due to the factors of the child and the second is due to the parents. Parents assume that their children aged 3 and 4 are naughty children, so they often do this to their children. The factor of parents is due to the character possessed by the parents themselves. Parents who have a strong character tend to be more often verbal abuse behavior in children. A person's character is influenced by the family background that was previously owned. This is what causes the chain of violence in families.<sup>19</sup>

Children who grow less confident, sluggish and slow to absorb information are one of the real examples of victims of verbal violence. According to psychologist Peg Streep, the internalization of the messages conveyed is condescending, mocking, embarrassing - will change the child's personality, self-esteem, and behavior. So, the impact can be all the time, and can be passed down from generation to generation: children who are raised with nagging will do the same to their children.<sup>20</sup>

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<sup>19</sup>JURNAL NURSING STUDIES, Volume 1, Nomor 1 Tahun 2012, Halaman 22 – 29 Online di : <http://ejournal-s1.undip.ac.id/index.php/jnursing>

<sup>20</sup><http://archive.rimanews.com/budaya/pendidikan/read/20161120/308482/Warisan-Abadi-Kekerasan-Verbal>

## Parenting Pattern

In Law No. 35 of 2014 Article 26 paragraph (1) Parents are obliged and responsible for: a. nurturing, maintaining, educating, and protecting children; b. grow your child according to their abilities, talents, and interests; c. prevent the occurrence of marriage at the age of the Child, and D. provide character education and the cultivation of moral values in children.

Parenting is a very important thing because it will affect the process of growth and development of children. Childcare patterns are closely related to the situation of the mother, especially health, education, knowledge, skill and practices on childcare. In various studies, it has been shown that the structure and character of that nurtures toddlers has a very large effect on the relationship between mother and child. The conceptual framework proposed by UNCEF (1997) emphasizes that the three components of food, health, and care are factors that play a role in supporting optimal child growth and development.<sup>21</sup>

Parenting patterns will greatly affect children's psychological development, parenting is a long process in the life of a child from prenatal to adult<sup>22</sup>. According to Baumrind identified 3 main patterns of parenting:

1. Democratic parenting is flexible, decisive, fair and logical
2. Authoritarian parenting expect absolute obedience and see that children need to be controlled
3. Permissive parenting allows children to manage their own lives with lack of control from parents

Factors that influence parenting among educational, cultural and environmental knowledge. Own knowledge is obtained through formal education. The majority of parents' cultures learn parenting practices from their own parents. After having children the parents practice the upbringing. Some of the practices they received, but some of them left. Unfortunately, when parental methods are passed on from one generation to the next, good and bad practices are continued.<sup>23</sup>

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<sup>21</sup>Enggal Wildan Prabowo, Ishartono dan Meilanny Budiarti, Pola Asuh Anak Oleh Ibu Usia Dini, *PROSIDING & Riset & PKM*, Volume 3, Nomor 2, ISSN: 2442-4480, hlm 176.

<sup>22</sup>Trini Handayani, "Peningkatan Ketahanan Keluarga melalui Optimalisasi Pola Asuh Meternalistik dalam Pencegahan Kejadian Pedofilia", *PJIH* Vol. 3 No. 3 Tahun 2016, hal 11.

<sup>23</sup>Syifa Khoirunnisa, Nita Fitria, Helwiyah Rofi, Gamaran, "Pola Asuh Orang Tua yang Dipersepsikan Remaja SMA Negeri Jatinangor Kabupaten Sumedang", *Jurnal Ilmu Keperawatan*, Volume III, Nomor 2, September 2015, ISSN: 2338-7246, p. 54.

The role of father or fathering refers more to his role in Parenting. This is because fathering is part of Parenting. Ideally, fathers and mothers take on complementary roles in household life and marriage, including the role of a complete model for children in living their lives.<sup>24</sup>

### C. Results

Cases of child abuse continue to increase. Government efforts have been made through the enactment of Law No. 35 of 2014 concerning amendments to Law No. 23 of 2002 concerning Child Protection, but so far the community does not understand the concept of educating children in the family, there is a tendency to commit verbal violence against children in the family environment. Interventions that are very necessary at every level of government to be able to make social engineering include making regulations to strengthen the concept and application of child education in families based on Law No. 35 of 2014 2014 concerning amendments to Law No. 23 of 2002 concerning child protection.

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## **Children Rights on Public Sphere**

Thania Christy Corne and Rehulina

### **Abstract**

A chance for children to play is first and foremost a matter of human rights. Play provides opportunities for children and young people to be free to choose what they do, and to challenge themselves, take risks and enjoy freedoms. Implementation of children's right to play is essential to create the condition for children's optimum well-being and development. In Indonesia, most of the communities often discriminate children's roles, needs and rights. Until now it is still found many problems of children protection and make them as victim. The method used in this research was Juridical-Empirical. This research explored various aspects and dimension of children rights to play. To fulfill the rights of children regarding the concept of Children-Friendly-City and its implementation, a framework has been developed by The Ministry of Women Empowerment and Child Protection of the Republic of Indonesia by declaring Children-Friendly-City Policy (KLA) No.02/2009 to go further since the World Fit for Children Declaration. As the effort for reaching out Children-Friendly-City predicate, government needs to make a regulation about a program that can guarantee children rights to play, such as by create Children-Friendly-Integrated-Public-Sphere in every part of cities.

**Keywords:** Children rights, conceptual framework, facilities, public space.

## A. Introduction

Legally, the term "child" may refer to anyone below the age of majority or some other age limit. The United Nations Conventions on the Rights of the Child defines child as "a human being below the age of 18 years unless under the law applicable to the child, majority is attained earlier".<sup>25</sup>This is ratified by 192 of 194 member countries. The term "child" may also refer to someone below another legally defined age limit unconnected to the age of majority. In Singapore, for example, a "child" is legally defined as someone under the age of 14 under the "Children and Young Persons Act" whereas the age of majority is 21.<sup>26</sup>

Children generally have fewer rights than adults and they are classed as unable to make serious decisions. They also legally must always be under the care of a responsible adult or child custody, whether their parents divorce or not. The rights of the child is a part of Human Rights which must be guaranteed, protected and fulfilled by parents, family, community, government and country.

As enshrined in the United Nations Convention on the Rights of the Child (UNCRC, 1989), all children and young people have the right to play and have an intrinsic need to play, and according to this statement, it means that children and young people need a place to play or a public sphere where they can masquerade. This paper described various rights of children that have been ignored by the government. The role of law as a guide in realizing the rights of children must be achieved. The local government role is also an important matter in realizing the rights of children. This paper also contained idea on a strategic policy recommendation for local government to establish regulations on children's public sphere in order to assist the fulfillment of children's rights.

## B. Literature Review

Ensuring children's rights to be fulfilled are important concerns. The first children's right as enshrined in the United Nations Convention on the Rights of the Child (UNCRC, 1989) is the right to play. It is not only by letting them to play, but also by building a place or sphere for them as facilities to get their rights to play. In this case, government role is the

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<sup>25</sup>"Convention on the Rights of the Child". The Policy Press, Office of the United Nations High Commissioner for Human Rights.

<sup>26</sup>"[Children and Young Persons Act](#)". Singapore Statutes Online. Retrieved 29 July 2018.

most effective part to chase children's right to play. By facilitating them with a place to play, it means that the government has fulfilled their responsibility of children's right.

In 2000, Child-Friendly-Cities program was initiated by United Nation. This program becomes tool in accelerating the implementation of the Convention on the Rights of the Child (CRC) from legal framework to the strategies and programs that fit for children. One of the Child-Friendly-Cities scopes is infrastructure development which is related to the implementation of child rights; playground. We can find out some provinces in Indonesia that have been built a public sphere for children to play, they are usually called with Children-Friendly-Integrated-Public-Sphere (CFIPS). To understand the concept of CFIPS, we begin with the conceptual relatives of the model. The genesis of the concept lies in Jakarta, which promises to serve citizens and was built in un-strategic location, usually in crowded resident. Another precursor of CFIPS is mostly built by Corporate Social Responsibility funds, so all the governments have to do is set up the land. The most important characteristics of CFIPS is its facilities, it contains of green space, playground, closed-circuit television camera and multi-purposed rooms. This comprehensiveness is the distinguishing factor of the CFIPS, which creates a holistic definition of what it would look like.

### **C. Children's Rights**

Member states of the United Nations (UN) have written conventions that say they agree to participate in creating a peaceful and righteous world. With the establishment of the 1989 Convention on the Rights of the Child, the government should be able to ensure that every child is treated fairly. This is a promise made by the government to ensure that children's rights are respected, protected and fulfilled.

According to this Convention, there are ten fundamental children's rights to be fulfilled, these include:

1. The right to play;
2. The right to get education;
3. Right to be protected from violence;
4. The right to get an identity;
5. The right to get nationality status;
6. The right to get food;
7. The right to get health;
8. Right to get recreation;



9. The right to get the equality;
10. The right to have a role in development.

The implementation of children's rights fulfillment in Indonesia is based on the principle of Pancasila, the 1945 Constitution, and the basic principles of the Convention on the Rights of the Child (CRC). Child rights are part of human rights that must be guaranteed, protected and fulfilled by parents, family, community, government and the state. A child has the rights, namely: non-discrimination; best interests for children; the rights to life, survival and development; and respect for children's opinions.

### **1. Child Friendly City (CFC)**

A child-friendly city (CFC) is a city, town, community or any system of local governance committed to improve the children's life within their jurisdiction by realizing their rights as articulated in the UN Convention on the Rights of the Child<sup>27</sup>. In practice, it is a city, town or community in which the voices, needs, priorities and rights of children are an integral part of public policies, programs and decisions.

Broadly speaking, it is a city, town or community which children:

- Are protected from exploitation, violence and abuse;
- Have a good start in life and grow up healthy and cared for;
- Have access to get quality social services;
- Experience quality, inclusive and participatory education and skills development;
- Express their opinions and influence decisions that affect them;
- Participate in family, cultural, city/community and social life;
- Live in a safe secure and clean environment with access to green spaces;
- Meet friends and have places to play and to enjoy themselves;
- Have a fair chance in life regardless of their ethnic origin, religion, income, gender or ability.

While the primary responsibility for ensuring that children's rights are realized lies with governments, other stakeholders such as civil society organizations, the private sector, academia and the media, as well as children themselves, also have an important role to play in building child-friendly cities.

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<sup>27</sup>Child Friendly Cities Initiative, UNICEF. *Child-Friendly City*, online retrieved on 20 August 2018. <https://childfriendlycities.org/what-is-a-child-friendly-city>

The process for the city or district to enroll the CFC initiative starts with the mayor accepting the initiative, and officially creating by decree the Task Force that is responsible for implementing the CFC in the locality. The basic steps are described in Table 1. The minister of Women Empowerment and Child Protection also acknowledges the importance of involving children in all the phases describe below<sup>28</sup>. The process of involving children has been implemented mainly through the Children Forum Initiative at local level (city/district, and sometimes at village level).

**Table 1: Process for the CFC Strategy in Indonesia**

| <b>Phase</b>             | <b>Brief description</b>   |
|--------------------------|--|
| <b>a. Preparation</b>    | Mayor/Bupati agrees in the initiative participate, and creates the city's CFC/D (KLA) Task Force. Initial indicators are collected, taken into consideration, if it is possible, the disaggregation of it by sex and children's age. |
| <b>b. Planning</b>       | Preparation of RAD – Regional, District and/or City Action Plan Development; document that contains policies, programs, and activities to be implemented in the city, including the CFC/D initiative.                                |
| <b>c. Implementation</b> | Implementation of the actions that are going to be the basis for the indicators. Much of it, if not all the implementations are done by the Task Force.  |
| <b>d. Monitoring</b>     | Monitoring of the initiative, including the indicators. Identification of the bottlenecks to the realization of children's rights.   |
| <b>e. Evaluation</b>     | At National level, the independent panel commissioned by the Ministry of Women Empowerment and Child Protection conducts the evaluation.   |
| <b>f. Reporting</b>      | At National level, the independent panel commissioned by the Ministry of Women Empowerment and Child Protection conducts the evaluation.   |

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<sup>28</sup> Marcio A. Carvalho, Zubedy Koteng. 2014. *Final Report of Systematic Assessment of The Child Friendly City/District (CFC/D) initiative in Indonesia.*

## 2. Children Friendly Integrated Public Sphere and The Right to Play

A chance for children to play is first and foremost a matter of human rights. As enshrined in the United Nations Convention on the Rights of the Child (UNCRC, 1989), all children and young people have the rights to play and have an intrinsic need to play.<sup>29</sup>

Playing is one of the most important aspects of child development, how well the children play, it can determine how well their development. Playing is a free choice for children, it happens because of their willing, and it is because they want to get something or because of coercion.

Article 17 of the Convention on the Rights of the Child states how important playing for children. Children need to play so that they can grow, learn and play. Hopefully, children can take part in the application of daily life. Research showed that playing was fundamental to children's development, and in the early years it was very important for their brain growth.

The availability of the CFIPS proves that the government takes part in fulfilling children's rights. This is because CFIPS is one of the facilities and infrastructure provided by the government to facilitate children in the environment. Both children in urban and rural areas are the same that their inherent rights must be fulfilled by parents, the community and the government.

Article 31 of the Convention on the Rights of the Child states that the government must guarantee the right to play for all children. There are three things that the government must do, there are<sup>30</sup>:

1. **Respect for children's rights:** the government must not stop children and teenagers from enjoying their right to play;
2. **Protecting children's rights:** the government must stop others from obstructing children's rights to play;
3. **Fulfilling children's rights:** the government must ensure that all children get the service, provision and opportunity for them to enjoy their rights to play.

Children Friendly Integrated Public Sphere (CFIPS) becomes one of the public spaces that has a vital function in the future of urban development. CFIPS becomes a space for children to grow. Therefore, Lampung urban development must pay attention to the

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<sup>29</sup> Young Researchers Investigate. 2013. 'The Right to Play', *Northern Ireland Playboard Young Research Team Report*. p. 4

<sup>30</sup>*Ibid.* p. 7

provision of open spaces, especially those that are friendly for children. There are four important things that need to be considered in creating a child-friendly public space, those things are:

**a. Location**

Public spaces should be built attractively, safely and naturally, where children can engage in activities without fear, while learning to take care of nature and play.

**b. Participation**

Public space is built by including children's role in their planning and development.

**c. Community**

Public space must be built with the community, the community can act as an initiator to oversee public space.

**d. Health**

The public space is built with a vision that will have a positive impact on the health of its owner.

In this case, Lampung Provincial Government as an object of this paper that was trying to achieve the title of Child Friendly City should pay attention to the Minister of Women's Empowerment and Child Protection Regulation No. 13 of 2011 concerning Development Guidance for Child-Friendly Districts/Cities.

**D. Local Government Strategy Ideas In Fulfilling The Rights of The Child To Play  
In Lampung Province**

The development of CFIPS in realizing the Child-Friendly-Cities aims to build district/city government initiatives that lead to efforts to transform the concept of children's rights into policies, programs and activities to ensure the fulfillment of children's rights in districts/cities. For this reason, the Lampung Provincial Government should make efforts to maximize service to children's rights, such as:

1. Issuing a Regional Regulation concerning the Child-Friendly-Cities regulation which becomes the legal basis for districts/cities in realizing the CFIPS and guaranteeing the fulfillment of children's rights.
2. Establish a Child Friendly City task force as an observer and coordinate the efforts of policies, programs and activities to realize Child-Friendly-Cities.
3. In accordance with Article 2 letter c of the Lampung Provincial Regulation No. 4 of 2008 that state:

*“Services for children's rights are carried out on the principle of child survival and development”*

As well as in article 3 letter a of the Lampung Provincial Regulation No. 4 of 2008:

*“Ensure efforts to protect, respect and fulfill children's rights”*

Article 3 letter b of Lampung Provincial Regulation No. 4 of 2008:

*“Ensuring the implementation of the best benefits for children in every policy making”*

Thus, the Lampung Provincial Government needs to build CFIPS as a form of care and guarantee of the fulfillment of children's rights.

## **E. Conclusion**

In its effort to secure the rights of children, The Ministry of Women Empowerment and Child Protection of the Republic of Indonesia declared Children-Friendly-City Policy (CFC) No.02/2009 to go further since the World Fit for Children Declaration. CFC becomes tool in accelerating the implementation of the Convention on the Rights of the Child (CRC) from legal framework to the strategies and programs that fit for children. CFC shall be a city that guarantees and protects the rights of every child as a part of urban community. This means, children will have an equal proportion in participating in family life, community, and social, also accessing basic services; health and education, protection from human trafficking and violence, for feeling safe and unharmed while walking down the streets, in an unpolluted environment, and playing with others. One of the CFC scopes is infrastructure development which related to the implementation of child rights; playground. Playground is a place of interaction, communication, and expression that can be accessed by children coming from various backgrounds. This is relevant to the function of playground which also can be used as an open space for relaxation as well as environmental conservation, the green are. The term of Playground in this case refers to an open space equipped with playing facilities for children, under adult supervision.

In other ways, local government also has a fundamental role in realizing children's right to play by build Children-Friendly-Integrated-Public-Sphere. In carrying out of its role, Local Governments throughout Indonesia need to formulate policies and regulations on CFIPS in order to realize the enforcement of children's rights.

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**Violation Against Woman and Children  
(Analysis Declaration on The Elimination of Violence Against Women Toward  
Sustainable Development Goals)**

Yunita Maya Putri

**Abstract**

Violence is a manifestation of human emotional behavior, rather than rational behavior. Violence can occur physically or mentally. At present various cases of violence occur which victims are women and children. Therefore, the problem is, how far we are responsible for finding solutions to this problem. From the above topic, there are several things that can be questioned, namely (a) what is violence; (b) why victims of violence tend to be experienced by groups of women and children; and (c) how is the solution. These three things deserve attention, because all this time seen in terms of ethics, morals and law, everyone must know that acts of violence are human behavior that is inappropriate. Interestingly, among those who knew about the violence were the closest people and some of them were deliberately and ever did it, even the victims who appeared seemed to be left alone, whether it was stolen or indeed was a humanitarian phenomenon in this century. Violence is not only an individual problem or a national problem, but it is a global problem, even transnational. "Violence against women," gender based violence "whose victims are women, while children are also known as" working children "," street children "and so on. In the context of human rights protection, as human beings, women and children have the same rights as other human beings on this earth, namely the rights that are understood as natural inherent rights since they were born, and without them humans cannot live as human beings naturally. Violence against women and children is an obstacle to development success. However, acts of violence will have an impact on a lack of confidence, inhibit women's ability to participate in social activities, disrupt their health, reduce autonomy, both in the economic, political, socio-cultural and physical fields. Likewise with children, confidence in themselves in their soul growth will be disrupted and can hinder the process of mental development and its future.

**Keywords:** human rights, violence, women and children.

## **A. Introduction**

Cultural development is based on creating interactions between individuals who are members of a particular community or population. Various types of inter and intergender interactions can be so dynamic. Forms of negative interaction will cause violence. Violence comes from Latin, namely *Violentus*. The word starts from the word *vī* or *vīs*, which means power or powerful. The implementation of the word is contained in the basic principles in Roman public and private law (Berger, 1953) which is an expression, both physically and verbally. Actions of expression reflect acts of aggression and attacks on a person's freedom or dignity that can be carried out by individuals or groups of people. This incident is generally related to its authority, that is, if it is translated freely, it can be interpreted that all authorities can be carried out freely without regard to the validity of the use or acts of arbitrariness.

With the growing issue of gender equality in Indonesia, there is a correlation between the issue of violence against objects from violence itself. The issue of gender itself is defined as a problem involving injustice that has a negative impact on women. For example, subordination (aging), the assumption that women are weak, unable to lead, whiny. This resulted in women being number two after men. The stigma develops in a directed manner, so it is not uncommon to find cases of violence against women. Some types of violence against women become an issue that develops internationally, due to the similarity of patterns of action that occur and motives that tend to be the same.

Violence against women, or internationally known as Violence Against Women (VAW) and Sexual and Gender Based Violence (SGBV) are acts of crime with women as their main object. The United Nations (2014) defines that violence against women is a manifestation of an unequal power relationship between women and men. Furthermore, violence against women has a meaning as a crucial social mechanism in which women are forced to occupy subordinate positions compared to men. Furthermore, Annan (2006), quoted by Azad (2010) states that violence against women is the culmination of the problem of pandemic proportions. At least 1 in 3 women in the world have experienced physical violence, abuse, and even murder.

Violence against women has varied characteristics. The most common stigma attached to this phenomenon is the violence committed by individuals against women in the form of violence by using physical (sexual violence), verbal (including insulting), psychological (harassment), by someone in the environment. Based on data compiled by



WHO (2013), it is estimated that around 35 percent of women around the world have experienced physical and sexual violence by partners and non-partners at certain points in their lives. But surprisingly, several studies in a number of countries show that 70 percent of women have experienced physical or sexual violence from their partners throughout their lives (European Union Agency for Fundamental Rights, 2014). Furthermore, women who have experienced physical or sexual violence have more than twice as many abortions as those who have not experienced such acts of violence. Even in certain regions, these women tend to be depressed more easily, and have more than 1.5 opportunities for HIV compared to those who do not experience violence by their partners (Washington Metropolitan Area Transit Authority, 2016).

The systemic impact resulting from violence against women seizes the attention of the world, where international desires for violence against women can be eliminated and even eliminated. The problem is, there is an incorrect assumption when women protect themselves from violence sometimes leading to criminal actions that cannot be separated from the law. This background made the United Nations formulate and declare a Declaration on the Elimination of Violence Against Women (DEVAW) in 1993 which coincided with International Women's Day (UN, 2007).

The declaration is expected to be implemented by each country in an effort to eradicate violence against women. This DEVAW document is composed of U.N's efforts. Commission on the Status of Women and the U.N. Economic and Social Council to overcome violence against women is increasingly rampant. Although DEVAW which is an extension of the UN does not have binding legal force, the scope of its nature tends to be universal and provides constructive statements that are active against the international community. DEVAW defines violence against women explicitly as a whole sexual crime and intimidation.

The world effort in reducing violence against women is considered not so significant. Based on Fried's (2003) report, despite many advocacy efforts and the involvement of women's activist organizations, the problem was expressed as "forms and actions that cannot be accepted by human rights throughout the world". A broader strategy to reduce this problem is stated in Goal 5 (Goal 5) of the Sustainable Development Goals (SDGs), namely Gender Equality or gender equality, with the statement "achieving gender equality and strengthening all women".

Ending all forms of discrimination against women is not only the basis of efforts to uphold human rights, but is also very crucial in accelerating the achievement of sustainable development. SDGs stipulates that in 2030 gender equality will be achieved with one of the indicators is reducing the number of discrimination and violence against women. It has been proven that strengthening the women's sector has a layered effect, and helps improve economic development, as well as the development of nations throughout the world. Furthermore, references and descriptions of efforts to prevent violence against women need to be analyzed for their effectiveness, to what extent they are able to reduce the number of human rights violations. Therefore, a comprehensive study needs to be carried out to assess the components of violence against women and their scope.

#### **B. Formulation of Problems**

Based on the background described, there are several problems as follows:

Why does violence occur with women as objects?

To what extent is DEVAW's implementation able to influence the prevention of violence against women?

What is the relationship between DEVAW and the achievement of SDGs?

#### **C. Discussion**

##### **Components and Proportions of Violence against Women**

Based on historical records, the main causes and origins of gender subordination to women and why violence occurred to women began with Berne's (1917) note stating that "since humans are able to interact with each other, positive, negative, like, dislike interactions will arise, agree and disagree. The contradictory nature of the individual will lead to disputes. Instinctively, women have been stigmatized as having low and weak positions. As a result, superior conditions are owned by men and harassment is unavoidable. Law in Ancient Rome made it possible and legalized husbands to beat their wives, even to death.

“Berne's statement was supported by the Ireland (1996) report that the Middle Ages in Europe were filled with torture of women who were suspected of being followers of cults, witches, and spreaders of diseases or epidemics. A long history of violence against women has a close relationship with the disinterest of women in the development of that era. Furthermore, women are only classified as "goods" and "slaves". This stigma continues to

cling unconsciously from generation to generation. This historical view of women eventually accumulates as an outlet for superior people (Toren, 1994).

Descriptions regarding the patriarchy and world system of women's status quo referring to gender inequality, recorded in legal status in certain countries and regions of the world. The proportion of violence against women was contained in the UN declaration in the 1993 DEVAW, which stated that "violence against women is a manifestation of historically unequal power relations between men and women, which has led to domination over and against women by men and to the prevention of the full advancement of women, and that violence against women is one of the crucial social mechanisms by women who are forced into a subordinate position compared to men. "

Various forms and components of violence against women are in developed and developing countries. The proportions also vary, and cannot be quantified, except for a particular culture or religion that has a tradition with a certain scope. For example, dowry or the purchase of women as brides and the burning of brides' lives is rampant in countries like India, Bangladesh, Sri Lanka and Nepal. Violence using hard water is also common in Cambodia and other Southeast Asian countries. Murder practices such as honor killing, namely the murder of women legally because of harassment / abuse of men, often occur in Middle Eastern and South Asian countries. Furthermore, extreme cases such as female genital mutilation are also common in the African continent. Not to mention such cases of underage marriage, kidnapping, trafficking, and other forms of violence occur in all parts of the world.

The component and scope of violence against women proves that gender positions play a major role in determining who the object is and who the subject is. Several case studies have raised the opinion that culture, religion, and environmental conditions can also influence violence against women, both directly and indirectly. These data indicate that violence against women has broad dimensions and can happen to anyone, as well as anywhere.

Violence against women is increasingly diverse and across space, while prevention and handling systems move slowly. The worsening of the domestic violence situation which is marked by the unfolding of the wife's murder case (femicida), the high divorce claim by the wife, requires a comprehensive resolution and touches the root of the problem. The

increasing openness of polygamy and the flexibility of child marriages are thought to have contributed to the worsening of domestic violence.

Based on its category, violence against women can occur in an open place, the environment is closed, and at any time in a person's life period (Fried, 2003). The dimension of the question "why violence occurs in women" does have an aspect of answers that need to be expressed ontologically and comprehensively, but based on the historical record, violence against women can occur due to the superiority of one gender and a weak stigma on women who have been embedded in their minds. individual.

### **Devaw Implementation in Prevention of Violence against Women**

To elaborate the extent to which the implementation of DEVAW in preventing violence against women, it is necessary to limit the scope so that performance indicators can be more measurable. The meaning of violence against women is outlined in Recommendation Rec (2002) 5 by the European Commission including, but not limited to:

Violence that occurs in the family environment, namely mental aggression, psychological and emotional abuse, rape and sexual abuse, incest, sexual mutilation and other traditional practices that are harmful to women, including forced marriage;

Violence that occurs in the general community, including intimidation in the work environment, and human trafficking;

Violence committed or initiated by the state or government of a region or country;

Violence against women's human rights in conflict situations, especially hostage, sexual slavery, human trafficking with the aim of economic exploitation

But it should be noted that there is no broad definition of violence against women, which is acceptable to all people due to the opposition to the concepts of masculinity and femininity.

Article 3 of the DEVAW Document states that "women have the right to obtain protection of human rights and fundamental freedoms in politics, economics, social, cultural and other fields. This includes the right to life, equality, freedom and security, protection under the same law, freedom from all forms of discrimination, obtaining high standards for physical and mental health, workplace justice, and escape from the object of torture. “

Furthermore, Article 4 DEVAW describes implementation stages and forms in an effort to eliminate violence against women. In the article, DEVAW describes that PPB

member countries need to make regulations and policies that protect women in the violence efforts that will occur. One of the points is as follows:

"Comprehensively developing a preventive approach that will protect women from violence and re-victimization of women does not happen again as a result of laws that tend to be insensitive to gender equality."

Article 4 DEVAW also demands that these efforts should be included in the budget of each country, so that the handling and prevention of violence against women is comprehensive and massive. Directly, DEVAW instructs all UN member states to implement all 6 articles contained in the UN Document. If viewed from a world perspective, DEVAW tends to provide preventive efforts by limiting the scope of violence against women.

Indonesia as a member of the UN, formed the National Commission on Violence Against Women. The institution is an independent state institution for the enforcement of Indonesian women's human rights. Komnas Perempuan was formed through Presidential Decree No. 181 of 1998, on October 9, 1998, which was reinforced by Presidential Regulation No. 65 of 2005

In its journey to increase preventive efforts from increasing cases of violence against women each year nationally, the National Commission on Violence Against Women (Komnas Perempuan) records cases of violence against women received by various community institutions and government institutions spread in almost all provinces in Indonesia, as well as direct complaints received by Komnas Perempuan through the Referral Complaints Unit (UPR) and through official Komnas Perempuan e-mails, within the past one year. In 2017 Komnas Perempuan sent 751 forms to Komnas Perempuan partner institutions throughout Indonesia with a response rate of 32%, namely 237 forms.

On the other hand, the state tends to encourage family harmony through mediation efforts. Including the public which increasingly promotes the integrity of marriage institutions through the issue of over criminalization of adultery, closure of localization, without seeing the root of the problem of violence against women. Violence against cyber-based women is violence that surfaces massively but lacks reporting and handling. Even though these crimes against women can have a long impact, where victimization of potential victims for life and perpetrators have more space to be free because the law is not yet capable to prevent and deal with it. Sexual crimes show an increase or expansion of form, including

incest cases with biological father perpetrators or perpetrators of sexual abuse of children under 5 years old. Although there have been punishments intended to ensnare the public through the castration regulation, there is not much change in the existing sexual violence emergency. This shows that there is a disconnection in the analysis of the country against the causes of sexual violence by handling it.

The explanation above gives an understanding that the implementation of DEVAW which was launched since 1993 has not had a significant impact in eliminating violence against women. Furthermore, all countries in the world are only limited to providing legal umbrella, not to the point of persuasive educational approaches. The regulations that have been made are effective in facilitating advocacy efforts and recording violence against women. But the thing that needs to be emphasized is that the substance of DEVAW which frees gender inequality and gender discrimination has not been able to be fully implemented by world countries.

### **Devaw Contribution to Achievements of SDGs**

The adoption of DEVAW by certain countries acts collectively to achieve a common goal. Since it was declared in 1993, the world has formulated an effort to cover all actions that can prevent and reduce acts of violence against women. Therefore, DEVAW greatly contributes to comprehensive regulations that have been established by the United Nations.

The world through the United Nations has set 17 common goals as outlined in the UN Development Program Document, with the official name "Transforming our World: the 2030 Agenda for Sustainable Development", or commonly abbreviated as Agenda 2030 (United Nations, 2015). The stated goals have a broad and interdependent scope, but each goal has separate targets that need to be achieved. There are 169 total targets in total, which must be achieved to complete the 17 objectives of the SDGs. One of the 17 goals is Gender Equality which is the No. No. 5.

Goal No. 5 of the SDGs give orders to the state to provide a stigma of gender equality for each community. Around 143 countries have recorded gender equality between men and women in their constitution in 2014. However, around 52 other countries have not taken this action. This is due to the result of discrimination of women is still a legal system and form of social norms.

The specific description of Goal No. 5 are:

End all forms of discrimination against women

End all forms of violence against women in the general and family areas, and all forms of exploitation

End the form of harassment practices, including children, forced marriage, and genital mutilation

Equality of rights in public works and services

Ensure that women get equal opportunities in implementing leadership and policy making in economic, political and social aspects.

Ensuring broad access to reproductive health and reproductive rights.

Giving women equal rights to economic resources, such as land, property and employment, is a crucial target for realizing Goal No. 5.

Nationally, all indicators on Goal No. 5 has been listed in Bappenas and the Ministry of Education and Culture. There are 24 indicators to determine the success of these achievements. All indicators used took a span of time from 1990 to 2014, and the data used came from BPS, Bappenas, World Bank and Komnas Perempuan (UNDP Report, 2015). Targets such as the Gender Development Index, the prevalence of violence, the percentage of women's representation, and the level of women's participation generally show devices that are ready to be measured globally. That is, the availability of data is a form of implementation that has been carried out in accordance with RJPMN Indonesia.

DEVAW mandate in each country, implemented simultaneously with the achievement of SDGs. This can be seen from the Principles of the Presidential Directive in the Cabinet Meeting 12/23/2016, which directs:

Optimizing the coordination role of KemenPPN / Bappenas in development, considering that almost all Sustainable Development Goals (TPB / SDGs) have been accommodated in the RPJMN;

Involving all parties (government, parliament, CSOs & media, philanthropy & business, experts & academics) to work together in accordance with the roles, functions and capabilities of the parties;

Existing institutions can directly work, both strategically and operationally.

Several other countries have poured out specific forms of DEVAW regulation and alignment with the achievement of SDGs. However, the extent to which its contribution has not been able to be measured clearly is because the time step is not yet possible to make measurements.

#### **D. Conclusion**

Violence against women results from negative interactions between individuals and unequal gender stigma. The DEVAW Declaration is slowly able to effectively reduce violence against women in certain conditions and conditions, but it needs more effort by the state government to reduce the number of violence against women by giving actions that more touch the layered segments of society.

The contribution of the DEVAW declaration is actually capable of achieving overall SDGs achievement based on predetermined measurement indicators.

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