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Preface

Praise and gratitude always we pray to the Lord of Universe, GOD Almighty (ALLAH SWT), who always gives a mercy and blessing for mankind. Thus, we can attend the international conference in healthy and halcyon conditions without any obstacles.

First of all, on behalf of Rector of Muhammadiyah University of Metro warmly welcomes for the presence of keynote speakers and the participants of international conference in various colleges, either domestic or overseas. Especially for a chairman of Indonesian's People Consultative Assembly or MPR-RI, Mr. Zulkifli Hasan; and a chairman of Higher Education Assembly of the Central Board of Muhammadiyah, Prof. Lincolyn Arsyad.

Secondly, we do apologize if in providing services to the keynote speakers and the participants of the international conference are below of your expectations, all of those are caused by our capability limitation.

Thirdly, through this international conference, intended as a reflection of our commitment consistently improve the quality of education and accommodate more opportunities in academic collaboration.

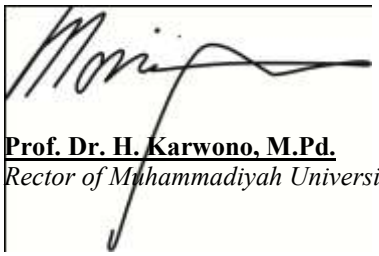
Therefore, I believe that this international conference will be able to present an interesting discussion on the topics, by prominent speakers from Malaysia, Indonesia, Brunei and Thailand, which contribute to the development of knowledge and hopefully will encourage more research on this region.

In this beautiful occasion, I would like to congratulate to the organizers of international conference who have organized this event, hence, the event can be held most efficiently. Perhaps, it will support Muhammadiyah University of Metro to actualize its mission to become one of *international standard universities* in the near future.

Finally, once again I would like to say, welcome to all the distinguished guests and participants of the international conference.

Muhammadiyah University of Metro will give the best to help you recognize this Lampung land. Please enjoy our hospitality and have a pleasant experience in the international conference. Thank you.

Metro, November 7th, 2016



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Law and Human Rights in ASEAN Countries: Challenges and Prospects

Nehaluddin Ahmad*[1]

*SULTAN SHARIF ALI ISLAMIC UNIVERSITY, BRUNEI DARUSSALAM

Abstract
Traditionally, the rule of law has not been viewed as a unifying concept amongst ASEAN countries. ASEAN was established principally as a political organisation. It did not set out to be an organisation focused on human rights. Its formative instrument- the 'Bangkok Declaration' 1967- did not mention the term 'human rights', and the term itself was viewed with many hesitation by various governments in the region. They viewed the idea incompatible with their principles for social unity and stability, effective economic development and sovereignty. However, the position has changed with the establishment of the ASEAN Inter-governmental Commission on Human Rights (AICHR). The paper aims to examine the relationship between law and human rights in ASEAN countries addressing the challenges and prospects in promoting and protecting human rights. This paper adopts a legal library research methodology focusing mainly on primary and secondary legal sources. The paper argues that unlike the European Union (EU), ASEAN is a strictly inter-governmental organisation. This means that the enforcement of citizen's rights and rule of law are entirely a prerogative of the member states. The paper also argues that the ASEAN Charter framed human rights as goals of the organisation but did not specify the concreate means by which those goals would be achieved or the sanctions that would follow non-compliance. The paper concludes that to secure human rights in ASEAN, consensus on human rights issues among member states is urgently needed.

Keywords: ASEAN, EU, Human Rights, Rule of Law

1. INTRODUCTION

The Association of South-East Asian Nations (ASEAN) was formed as a regional inter-governmental organisation in 1967 through the Bangkok Declaration. The ASEAN was established principally as a political organisation. Its formative instrument- the Bangkok Declaration 1967- did not mention the term 'human rights', and the term itself was viewed with hesitation by various governments in the region [1, 2]. Regardless of what has been said here, the idea for an ASEAN human rights body was not particularly new. It emerged in 1993, after the UN World Conference on Human Rights adopted the Vienna Declaration and Programme of Action and called on member states to establish regional human rights where they did not already exist [3]. ASEAN Foreign Ministers convened soon afterward and agreed that "ASEAN should also consider the establishment of an appropriate regional mechanism on human rights [4]".Hence, it is important to note that a regional human rights body took 16 years to come to fruition in Southeast Asia. On the other hand, looking at law per se in ASEAN, it is vital to note that the degree of application of the rule of law in individual ASEAN countries varies according to their specific contexts and capacities. These variations do not reflect 'competing conceptions' as much they are different notes on the same normative register for the rule of law in ASEAN [5]. Bearing all this in mind, developing an institution dedicated to human rights was challenging in an institution with a long-standing commitment to strong state sovereignty and a weak record of human rights enforcement.

The paper aims to examine the relationship between law and human rights in ASEAN countries focussing on the challenges and prospects in promoting and protecting human rights in the region. The paper is divided into four parts excluding the introduction. The first part addresses the relationship between law and human rights in ASEAN. This part of the discussion is important in order to understand the role that law can play in terms of promoting and protecting human rights. The second part deals with the challenges faced by ASEAN in the context of promoting and protecting human rights in the region. The third part addresses the future prospects in promoting and protecting human rights in ASEAN. Under this part, the discussion will revolve on the issue of future prospects despite the availability of the challenges faced by ASEAN in its quest to promote and protect human rights in the region. The fourth part shall focus on the conclusion. This part will embrace some recommendations bearing in mind that from the very beginning ASEAN developed a set of diplomatic norms and practices designed to discourage political interference.

2. RELATIONSHIP BETWEEN LAW AND HUMAN RIGHTS IN ASEAN

Unlike the European Union (EU), ASEAN is a strictly inter-governmental organisation. This means that the enforcement of citizen's rights and rule of law are entirely a prerogative of the member states. Given the great diversity of political systems in the region, rights granted to citizens and the enforcement of citizens' rights vary

[1] Corresponding Author. Phone Number:+6737168603, *E-Mail Address*: ahmadnehal@yahoo.com

markedly. Limited space allows only for exemplary evidence as far as the rule of law in individual member countries is concerned. Traditionally, the rule of law has not been viewed as a unifying concept amongst ASEAN countries, but as a "protean" one.As mentioned earlier, while the degree of the application of the rule of law in individual ASEAN countries varies according to their specific contexts and capacities, recent global and regional developments have helped to crystallise a growing but firm consensus about the basic elements of the rule of law [6]. These developments include broad global acceptance for a UN definition of the rule of law linking the concept to human rights and democracy; the incorporation of the rule of law (and this linkage) in the ASEAN Charter; and the entrenchment of the rule of law and human rights as part and parcel of ASEAN's move toward becoming a rule-based and integrated community with shared values [7].

Regardless of the approach taken by the ASEAN countries in terms of the relationship between law and human rights, there is no doubt that there appears to be a growing consensus on the constitutive elements or central principles of the rule of law as a principle of good governance; and acceptance that the rule of law is compatible with strengthening democracy and promoting and protecting fundamental human rights. Thus, the advent of the ASEAN Charter opened the door to integrating human rights into ASEAN framework. For example, in the national context, certain ASEAN countries have made human rights a part of their national agendas by setting up human rights commissions. At the international level, individual ASEAN member states have displayed a greater openness to acceding to human rights conventions and have participated vigorously in human rights debates within United Nations fora [8]. This may be seen as an unequivocal acceptance that human rights are a matter of legitimate international concern; how this concern should be expressed, however, is still open to question. At the sub-regional level, ASEAN states have departed from previous practice by discussing the issue of human rights in formal meetings, albeit stressing that human rights are contingent upon distinct economic and cultural conditions of the region[9]. Though all these may sound to be good news in promoting and protecting human rights in the region, it is sad to note that Article 1(7) of the ASEAN Charter identifies human rights as an explicit goal of the Association but again places that objective in dynamic tension with the rights of sovereign member states. The espoused goal is: "to strengthen democracy, enhance good governance and the rule of law, and to promote and protect human rights and fundamental freedoms, with due regard to the rights and responsibilities of the Member States of ASEAN". The provision treats human rights as norms to be reconciled with sometimes balanced against norms of sovereignty and non-interference [10].

From the foregoing discussion above, it is undeniable fact that although the legal systems in the region seem to be different and to a certain extent maybe a hindrance in promoting and protecting human rights, the ASEAN Charter marked a significant step in the establishment of a formal ASEAN human rights system, which may help to form a solid foundation for the development of those legal instruments and independent mechanisms required to strengthen human rights protection in the region.

3. CHALLENGES FACED BY ASEAN IN PROMOTING AND PROTECTING HUMAN RIGHTS

As stated earlier that ASEAN was established principally as a political organisation, there is no doubt that it did not set out to be an organisation focused on human rights. However, the advent of the ASEAN Charter in 2007 has raised hopes in the region for the promotion and protection of human rights. Regardless of the ASEAN Charter, the following are some of the challenges faced by ASEAN countries in promoting and protecting human rights in the region:

3.1 Non-Interference and Sovereignty in Southeast Asia

The non-interference principle seems to remain a permanent fixture of ASEAN as it made its way into the ASEAN Charter, and constrains the ASEAN Inter-governmental Commission on Human Rights (AICHR's) mandate. Although used interchangeably, non-interference seems to suggest a wider application than non-intervention as described in the United Nations Charter's Article 2(4). The Article stipulates that all UN member states shall refrain from the threat or use of force against the territorial integrity or political independence of any state. Hence, it would suffice to note that non-interference is a core component of sovereignty. Sovereignty is an institutionalised legal or juridical status, not a viable or sociological condition [11]. In the context of this paper, it is important to note that criticisms of traditional understandings of sovereignty commonly point to globalization as having eroded or fragmented state sovereignty practically and judicially [12]. In this paper, the author will use the term non-interference since this is the preferred term of ASEAN.

Having said all that, it is important to make reference to Article 2 of the ASEAN Charter. The Article provides that the Commission will promote and protect human rights in a manner consistent with the norm of non-interference, with deference to the primary responsibility of states and "avoidance of double standards and politicisation". Instead ASEAN will pursue a "constructive and non-confrontational approach," stress "cooperation," and take an evolutionary approach [13]". Based on the principle of non-interference, we are bound to face some pertinent questions. How shall for example the AICHR "contribute to the realisation of the purposes of ASEAN as set out in the ASEAN Charter in order to promote stability and harmony in the region,

friendship and cooperation among ASEAN [14]" when the purposes, on the one hand, is "to promote and protect human rights and fundamental freedoms of peoples of ASEAN [15]", and on the other, "to respect the principles of ASEAN as embodied in Article 2 of the ASEAN Charter, in particular: (a) respect for the independence, sovereignty, equality, territorial integrity and national identity of all ASEAN Member States"?

In addition to the above, it is important to note that the principle of non-interference is hardly something unique to ASEAN, but finds prominent places in other organisational structures as well, most notably other regional human rights regimes organisations such as the Organisation of American Statesby virtue of Article 3(e) and the African Union as a result of Article 4(g). Despite the principle of non-interference remains strong in other regional human rights regimes, they have been able to consolidate it, at least to some extent, with the abilities of human rights organs to scrutinise and render binding decisions [16]. So in principle at least there does not have to be a complete contradiction between accepting, by the political will of a state, the decisions of an international body and the principle of non-interference. However, when it comes to ASEAN, it is obvious that the principle is interpreted and applied quite rigidly, especially when it comes to human rights. This is one of the major reasons why pushing human rights under ASEAN has been a very difficult process [17].

Still on the principle of non-interference as one of the challenges faced by ASEAN countries in promoting and protecting human rights in the region, Eberhard Ronald pointed out that the ASEAN Human Rights Declaration would have run counter to the ASEAN Charter had it adopted the universality principle in accordance to the Vienna Declaration [18]. Furthermore, Lee Jones argued that the non-interference principle in ASEAN is not as static as it seems. ASEAN's history of interference and intervention, and its current process of integration, point to a more dynamic and flexible approach to non-interference and sovereignty than what is commonly perceived [19]. Jones argued that ASEAN has undergone a diverse range of sovereignty regimes, and that when ASEAN states intervene militarily it was primarily to protect domestic order [20].

In discussing the principle of non-interference, reference must be made to Article 1(7) of the ASEAN Charter as well. This Article is also seen as a hindrance in promoting and protecting human rights in the region. The Article treats human rights as norms to be reconciled with and sometimes balanced against norms of sovereignty and non-interference. Thus, the ASEAN Charter appears to be inadequate to bring about any real changes in terms of promoting and protecting human rights in the region.

3.2 The Consensus Requirement

The principle of consensus-based decision making is hardly controversial in the operation of ASEAN. The officials who comprise the commission are government appointees (normally from foreign ministries) and accountable to their host governments [21]. They are called "Representatives" rather than "commissioners," which puts emphasis on their loyalty to home capitals [22]. With this kind of atmosphere in place, it makes it difficult to reach a conclusive decision bearing in mind that the problem lies in the fact that within ASEAN, no lower standard exists- no two-thirds majority or simple majority is prescribed in cases where consensus cannot be reached [23]. In short, the Southeast Asian 'culture' of dealing with one another- the ASEAN WAY- will make it very difficult to move forward in sensitive issues such as human rights. The ASEAN Charter procedurally provides that decision-making in ASEAN shall be based on consultation and consensus without any real dispute settling mechanism. Perhaps, it is important here to make reference to Article 20 of the ASEAN Charter [24], which provides that the Commissions decisions shall be based consultation and consensus. The problem with this provision is that, such an arrangement means that each state would be able to reject any criticism of its own human rights record by veto. Clearly, this could either lead to hampered progress or to adoption of weak positions based on the lowest common denominator [25].

3.3 The ASEAN Values Debate

This debate has been used in ASEAN as a blanket means not to codify core human rights norms (or the first-generation civil and political rights) in its constitutive instruments, the Treat of Amity and Cooperation (TAC) and the Bangkok Declaration. Its declarations, treaties, and protocols across its forty-year history have likewise denied express codification of these norms. Instead, ASEAN has focused much of its effort towards codification and enforcement of "second-generation" human rights norms on economic and social rights throughout the region [26]. This lack of codification of "first-generation" rights fuelled the "Asian values" debate in the 1990s, led by some Southeast Asian heads of state who decried "Western imperialism" through "Western imposition of rights" deemed antithetical to "Asian values" [27]. Because of this approach, accession of ASEAN countries to international human rights treaties is still unsatisfactory. Several ASEAN states, including Brunei Darussalam, Malaysia, Singapore and Thailand, have entered substantial reservations on certain provisions of the international human rights treaties. Singapore, for instance, has made all its international obligations subject to the city state's law and constitution, while Malaysia and Brunei Darussalam have subjected obligations to Islamic and domestic law [28]. Spokesmen from some ASEAN states, particularly Singapore and Malaysia, buoyed atop a wave of impressive economic development and growth rates, have challenged the Universalist

pretensions of human rights law. Under the relativistic banner of "Asian values," they champion an alternative model of domestic governance and development [29]. It could be argued that the "right to culture" has been invoked as a competing right that qualifies, if not exempts, observance of core human rights norms on civil and political rights as far as some ASEAN countries are concerned. This has indeed hampered the promotion and protection of human rights in the region.

3.4 Lack of Enforcement Mechanism

The AICHR does not possess any compliance or enforcement mechanism, which means that there is no mechanism for submitting complaints and receiving binding judgments and remedies. For example, ASEAN declarations putatively strengthening citizens' rights suffer from a key problem member states sought to remedy with the Charter. They are of a non-binding nature and without any legal mechanisms to enforce them. The call of ASEAN reformists to establish an ASEAN Court of Justice has not made it into the Charter. Neither have proposals to impose sanctions on member countries failing to comply with the obligations the Charter entails. As mentioned earlier, the AICHR does not install mechanisms for human rights victims to complain. Neither does the ASEAN Commission for Women and Children (ACWC). It is indeed sad to note that the Charter framed human rights as goals of the Association, but did not specify the concrete means by which those goals would be achieved or the sanctions that would follow non-compliance [30].

3.5 Weak Independent Authority

This point is closely related to the lack of enforcement mechanisms addressed above. There is no doubt that regional human rights bodies can serve as an independent adjudicators and enforcement agencies when they are given sufficient autonomy and backed by enough political muscle [31]. For example, they can serve as "norm incubators" that provide fertile institutional ground for the development and dissemination of human rights principles. Perhaps it is important to point out that the European Court of Human Rights and Inter-American Commission and Court of Human Rights are the best regional examples of courts that can indeed promote and protect human rights. Both courts can investigate cases brought by private citizens and issues judgments against states. Some have argued that Southeast Asia merits a similar regional court that could offer Southeast Asian citizens fairer hearings than many could get at home [32]. However, as mentioned earlier, the AICHR is far from that model, both in terms of political independence and institutional power.

4. PROSPECTS FOR ASEAN IN PROMOTING AND PROTECTING HUMAN RIGHTS

Regardless of the challenges discussed in this paper, it is pertinent to note that we cannot totally deny the fact that there are some positive prospects for the future in terms of promoting and protecting human rights in the region. Change will not happen overnight; regional institutions cannot soar too far above the plane of relevant political will without getting their wings clipped [33]. Those that have developed real teeth- such as the European Union (EU) earned its influence gradually. If ASEAN is to build influence, it will have to do the same. The following are some of the future prospects for ASEAN in promoting and protecting human rights in the region:

4.1 Impact of the Asian Charter in The Region

With the signing of the ASEAN Charter in 2008, the Charter added democracy, respect for human rights, rule of law and good governance to the sovereignty norms dominating the ASEAN Way, the grouping's established repository of cooperation norms. The subsequent formation of a human rights body and the enactment of an ASEAN Human Rights Declaration (AHRD) created new avenues for strengthening citizen's rights in the region. In other words, the adoption of the Declaration represents a significant milestone in the development of the ASEAN human rights system and underlines both its current significance and future possibilities [34]. Despite the criticisms levelled against the Charter, it is important to note that regional human rights systems are not fixed products, established at particular points in history, but rather are works-in-progress, evolving over time. The European Convention on Human Rights (ECHR), for instance, was adopted in 1950 and came into force in 1953, but it evolved slowly over the next sixty years with the cumulative addition of substantive protocols [35]. It reached an important milestone in 1998, for instance when Protocol 11 abolished the European Commission on Human Rights, eliminating its filtering of cases sent to the European Court of Human Rights and subjecting national parties to the compulsory jurisdiction of the Court by eliminating optional derogations [36]. What began as a political construct, therefore, evolved gradually to become a powerful judicial mechanism. It would suffice to note that the ASEAN human rights system is on a similar road, in many respects, starting out as a political project, but evolving along the path to becoming, potentially, an authoritative law-making and law-enforcing body.

4.2 Application of International Human Rights Conventions in the Region

All ASEAN states have ratified the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Convention on the Rights of the Child (CRC), the provisions of which ASEAN states pledge to uphold in the Terms of Reference of the ASEAN Commission on Women and Children (ACWC). Among other rights, CEDAW guarantees equal rights for women [37], including rights to property and rights regarding marriage and family planning [38]. CEDAW also prohibits trafficking in women [39] and grants women equal rights to participate in government [40]. The CRC guarantees children the right to life, a broad range of rights relating to legal processes, freedom of association and assembly, freedom to practice religion and culture, and rights to asylum, expression and information, health, education, and privacy. Both conventions guarantee the right to nationality [41]. Although the two conventions have been signed by all the ASEAN states and even making some reservations to certain provisions as mentioned earlier, this should not be used as a ground to deny the impact of these two conventions which can clearly be seen in several ASEAN State's national constitutions. For instance, the right to life can be seen in Article 5(1) of the Malaysian Federal Constitution, Articles 32 and 38 of the Cambodian Constitution, Article 353 of the Myanmar Constitution, and Article 9(1) of the Singapore Constitution etc.

4.3 Parliamentary Role

One of the longstanding features of the ASEAN is that it is basically an inter-governmental, inter-State organisation. Despite the many references to people's participation in its various instruments, there is still no people's organ in the structure of ASEAN itself [42]. There is no ASEAN Parliament or Assembly. This invites reflection on how to 'popularise' ASEAN in the more people-centred sense both structurally and substantively. The ASEAN Inter-Parliamentary Assembly (AIPA) now has representation from parliamentarians from all ten ASEAN countries, and it may, one day, sow the seeds and open the door to the much needed presence of a regional parliament in the ASEAN structure. On a forward-looking note, the dynamic which could be propelled as the next crucial step for ASEAN is to take the quantum leap to set up formally in the ASEAN structure a regional Parliament or Assembly, and the AIPA could be a platform for this. This would help to respond to the need for checks and balances at the ASEAN level in regard to human rights protection and be a possible voice of the peoples of the region in this regard [43].

4.4 Better Implementation of Existing Domestic Laws

The future looks bright in terms of narrowing the gap between legislation and implementation in the region. As the Association moves forward, we are likely to witness some positive developments in the area of promoting and protecting human rights. In order to promote and protect human rights in the region, apart from focusing mainly on the ASEAN Charter, the best protection for ordinary people will be better implementation of existing domestic laws, strengthening of legal bodies and improvements in legal education, which, in turn, will facilitate effective implementation of ASEAN mechanisms. In this regard, the region to a certain extent is moving towards that direction with the establishment of Human Rights Commissions at national level or into their domestic laws and they are tasked with promoting and protecting human rights. Interesting, four ASEAN countries (namely, Indonesia, Malaysia, Thailand and the Philippines) now have national human rights commissions which are accepted internationally as independent, and they act as promoters and protectors of human rights in the most direct sense [44]. Furthermore, every ASEAN member state has existing domestic laws if routinely and robustly implemented could be strong tools to promote and protect human rights, even if not couched in specific human rights language. In almost all ASEAN countries, the grounds and procedure for arrest, trial and detention are prescribed by law. Employing right-based language, their criminal procedure codes expressly provide for, at least in theory, the fair and equal enforcement of due process protections.

4.5 Presence of Civil Society Actors and Networks in the Region

The number of civil society actors, such as NGOs, working on the issue of ASEAN and human rights has grown considerably throughout the years [45]. While some take a low-key approach, others adopt a more assertive role. While some are linked with academic institutions, others are more grassroots-oriented. While some are more local in inputs and networking, others are more from the international field [46]. A key message concerning the role of civil society is that in their plurality, they act as an important check-and-balance for the promotion and protection of human rights in the region and they deserve to be well supported as part of the building of a comprehensive human rights system for the region. Generally, civil society groups are in a position of applying pressure on the government to succumb to the will of the citizens or members of the public. Hence, civil society groups and other citizens or collectives could change the cost-benefit calculation of their national leaders even if reshaping their leaders' normative beliefs proves too formidable a task.

5. CONCLUSION

The discussion in this paper shows that the challenges of promoting and protecting human rights in ASEAN do not end with the adoption of the ASEAN Human Rights Declaration. Ensuring the effective implementation of the Declaration and mainstreaming the values contained therein remains a crucial challenge, particularly for the AICHR and all relevant mechanisms in ASEAN. The commitment to promote and protect human rights in ASEAN is high. ASEAN and its member states have striven to bring their constitution and rights legislation in consonance with international standards and long term improvements of citizens' rights can be identified. Noteworthy in this respect are the more recent political reforms in Myanmar. Of recent, we have witnessed some positive developments in the area of human rights. In Malaysia, the Internal Security Act 1960 has been abolished as the law allows for detention without trial. In Singapore, a relaxation of security-related limitations of citizens' rights can be observed. It cannot be denied that loopholes and weak enforcement still account for serious gaps between norm and reality even in more democratic countries. However, most constitutions of the region provide for essential citizens' rights. They guarantee a broad range of fundamental freedoms, political and civic rights as well as economic and social rights [47]. Most ASEAN countries grant rights of political participation, press freedom, freedoms of association, assembly, speech and information, freedoms of thought and conscience, the protection of privacy, habeas corpus rights, and protection from arbitrary treatment by state authorities, due process and equality before the law.

In addition to the above, at the international level, individual ASEAN member states have displayed a greater openness to acceding to human rights conventions and have participated vigorously in human rights debates within the United Nations. However, there is no doubt altogether that the process of the enhancement and protection of human rights has started slowly with the formation of the AICHR. The future looks bright, but concerted effort is needed from the regional body. Hence, to secure human rights in ASEAN, some initiatives have to be taken such as: a process of community building; awareness enhancement through various channels of communication, consensus on human rights issue among member states; adopting compliance and enforcement mechanisms; establishing ASEAN Parliament or Assembly; introduction of a review process for monitoring member states to see their performance in the promotion and protection of human rights; support from the international community in the development of civil society; focusing attention on establishing the groundwork for an institutionalised human rights culture at the grassroots level, line by line, precept by precept and government action must be called to account first through the internal check of an active civil society, and then through the external check of the international community.

As a concluding remark, it is inevitable to point out that the expectations facing ASEAN are thus high, especially as a consequence of the Charter and the birth of the various bodies mentioned in this paper. The challenge now is to progress beyond the legitimisation of human rights through those entry points to the actualisation of human rights in terms of genuine protection and implementation of human rights in the region.

REFERENCES

[1] S. Sharon, and K. Sree (compilers), The 2nd ASEAN Reader, Institute of Southeast Asian Studies, Singapore, 2003.
[2] M. Vitit, Legal Cooperation among ASEAN Countries, Institute of Security and International Studies, Bangkok, 1997.
[3] Vienna Declaration and Programme for Action, adopted by the World Conference on Human Rights on 25 June 1993, Article 37.
[4] Joint Communique of the 26th ASEAN Ministerial Meeting, Singapore, July 23-24, 1993, para 18, available athttp://asean.org/?static_post=joint-communique-of-the-twenty-sixth-asean-ministerial-meeting-singapore-23-24-july-1993 (accessed September 9, 2016).
[5] M. Mohan, Rule of Law for Human Rights in the ASEAN Region: A Base-line Study, Human Resource Centre, Indonesia, 2011, pp. 5-20.
[6] Ibid., at p. 8.
[7] Ibid., at p. 9.
[8] L.A. Thio, "Implementing Human Rights in ASEAN Countries: "Promises to keep and miles to go before I sleep"," Yale Human Rights and Development Journal, vol. 2, no. 1, pp. 1-86, February 2014.
[9] Ibid., at p. 4.
[10] J.D. Ciorciari, "Institutionalizing Human Rights in Southeast Asia," (paper presented at the International Conference on Issues and Trends in Southeast Asia Centre for Southeast Asian Studies, University of Michigan, October 22, 2010).
[11] K.J. Holsti, Taming the Sovereigns- Institutional Change in International Politics, Cambridge University Press, New York, 2004, pp. 1-349.
[12] G. Kvanvig, "ASEAN, Sovereignty and Human Rights," unpublished.
[13] Articles 2.4- 2.5 of the ASEAN Charter.

[14] Article 1.3 of the ASEAN Charter.
[15] Article 1.1 of the ASEAN Charter.
[16] W. Beyer, Assessing an ASEAN Human Rights Regime- A New Dawn for Human Rights in Southeast Asia? Lund University, Faculty of Law, Master Thesis, 2011.
[17] H.D. Phan, The ASEAN Intergovernmental Commission on Human Rights and Beyond, East-West Centre, Washington DC, 2009, pp.1-2.
[18] E. Ronald, "The ASEAN Approach to Human Rights," The Jakarta Post, December 6, 2012, available athttp://www.thejakartapost.com/news/2012/12/06/the-asean-approach-human-rights.html (accessed September 9, 2016).
[19] J. Lee, ASEAN, Sovereignty and Intervention in Southeast Asia, Palgrave MacMillan, New York, 2012, pp. 1-262.
[20] Ibid.
[21] AICHR Terms of Reference, Article 5.2.
[22] Cha-am Hua Hin Declaration on the Intergovernmental Commission on Human Rights, adopted in Cha-am Hua Hin, Thailand, October 23, 2009, Article 3.
[23] W. Beyer, supra, note 16.
[24] AICHR Terms of Reference, Article 6.1.
[25] Y. Ginbar, "Human Rights in ASEAN- Setting Sail or Treading Water?," Human Rights Law Review, vol. 10, no. 3, pp. 504-518, August 2010.
[26] D.A. Desierto, "Universalizing Core Human Rights in the "New" ASEAN: A Reassessment of Culture and Development Justifications against the Global Rejection of Impunity," Gottingen Journal of International Law, vol.1, no. 1, pp. 77-114, 2009.
[27] Ibid., at p. 93.
[28] S. Linton, "ASEAN States, Their Reservations to Human Rights Treaties and the Proposed ASEAN Commission on Women and Children," Human Rights Quarterly, vol. 30, pp. 436-493, May 2008.
[29] L.A. Thio, supra, note 8, at p. 2.
[30] R. Sukma, Political Development: A Democracy Agenda for ASEAN?, in Hard Choices, ed. Donald K. Emmerson, ISEAS- Yusof Ishak Institute, Cambridge University Press, 2008, pp.135-150.
[31] J.D. Ciorciari, supra, note 10.
[32] H.D. Phan, supra, note 17, at p. 2.
[33] J.D. Ciorciari, supra, note 10.
[34] G. Clarke, "The Evolving ASEAN Human Rights System: The ASEAN Human Rights Declaration," Northwestern Journal of International Human Rights, vol. 11, no. 1, pp 1-27, 2012.
[35] Ibid., at p. 25.
[36] Ibid.
[37] CEDAW, Articles 2-4 and 15.
[38] CEDAW, Article 6.
[39] CEDAW, Article 6.
[40] CEDAW, Article 7.
[41] CEDAW, Article 9 & CRC, Article 7.
[42] V. Muntarhbhorn, "Development of the ASEAN Human Rights Mechanism," (paper requested by the European Parliament's Subcommittee on Human Rights, Directorate-General for External Policies of the Union, Policy Department, Brussels, September 2012).
[43] Ibid.
[44] Ibid.
[45] Ibid.
[46] Ibid.
[47] P. Stockmann, Indonesia's Struggle for Rule of Law, eds. M. Bunte and A. Ufen in Post-Suharto Indonesia, Routledge, London, 2009, pp. 53-80.

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Challenges and Solutions of Higher Education Institutions in Asia in the Face of the ASEAN Economic Community (AEC)

Ab. Halim bin Tamuri*[1], Norfaizah binti Othman*[2]

*SELANGOR INTERNATIONAL ISLAMIC COLLEGE UNIVERSITY SELANGOR, MALAYSIA

Abstract
This paper identifies challenges and solutions of higher education in the ASEAN economic community. The discussion is divided into human index development followed by the development of higher education in ASEAN. The article then discusses the challenges faced by ASEAN countries concerning ASEAN economic community. The final part of the discussion focuses on several solutions for a higher education institution. The most important aspect is to develop a real framework of cooperation among ASEAN countries. This comprises four important aspects, namely the establishment of an ASEAN Research and Development (R&D) Centre; improvement of the quality of publication and university ranking; reformation of educators and researchers; and standardisation of academic programmes among ASEAN higher education institutions.
Keywords: Solutions of Higher Education Institutions, ASEAN Economic Community, Human Index Development

1. INTRODUCTION

The Association of Southeast Asian Nations (ASEAN) was established on August 8, 1967, in Bangkok. It consists of five original member countries, namely Indonesia, Malaysia, Philippines, Singapore and Thailand. The membership has expanded and currently includes five additional member countries, namely Brunei, Myanmar, Cambodia, Laos, and Vietnam. The total population in the ASEAN region is more than 600 million people with a cumulative gross domestic product (GDP) of US$1.8 trillion and total trade valued at $2 trillion [1]. The main emphasis of ASEAN has been regional cooperation for the benefit of all member countries. To obtain this regional cooperation, in January 2007, the ASEAN leaders affirmed their strong commitment to accelerate the establishment of an ASEAN Economic Community (AEC) by 2015. The main objective of AEC is to transform ASEAN into a region with free movement of goods, services, investment, skilled labour and the free flow of capital [2]. In addition, it is hoped that the close cooperation through the AEC will decrease economic and development gaps between ASEAN countries. Disparities exist in term of national income levels and access to technology, urban and rural inequalities, and gender gaps in some countries and regions within countries. Poverty in rural areas, where the majority of ASEAN members live, has been difficult to address and has a significant impact on the educational and economic opportunities available to the populations in these areas.

Even though ASEAN countries are diverse in size, the level of development, language and religion, they share the goal to be united as one. Regardless of their differences, these ten countries share a similar emphasis on human resource development. Human resource development is the important key in developing ASEAN to enter the knowledge-based economy and global environment. Education, as a fundamental human right, is considered critical and strategic for developing their human resources to increase integration and competitiveness [3]. Governments play a role by providing high-quality education and learning to all people. However, opening access to quality education and learning the opportunity to all people is not always easy as there are a number of challenges. Therefore, the main objective of this paper to identify challenges and solutions for higher education in the ASEAN economic community.

2. HUMAN DEVELOPMENT INDEX

Human development is a development of expanding an individual's options. It places importance on three essentials; for individuals to lead a lengthy and good life, to obtain knowledge, and to have rights to use resources required for a respectable living standard. The Human Development Index (HDI) has become a standard for measuring human development. Its element indices assess life expectancy, literacy and education, as well as GDP per capita. The HDI is a statistical tool used to measure a country's overall achievement in its social and economic dimensions. The social and economic dimensions of a country are based on the health of people, their level of education and their standard of living. The 2015 Human Development Report (HDR) keeps the same cut-off points for the four categories of human development achievements that were introduced in the 2014 HDR: 1) very high human development (0.8 and above); 2) high human development (0.700–0.799);

[1] Corresponding Author. *E-Mail Address*: tamuri@kuis.edu.my
[2] Corresponding Co-Author. *E-Mail Address*: norfaizah@kuis.edu.my.

3) medium human development (0.550–0.699) and 4) low human development (below 0.550). Table 1 shows the education index for ASEAN countries from 1990-2014. Colum one revealed the HDI rank by country. Singapore is the highest ranking for HDI followed by Brunei. On average, both Singapore and Brunei are categorised under very high human development. Meanwhile, Malaysia and Thailand are categorised under high human development. Indonesia, Philippines and Vietnam are categorised under medium human development. Laos and Cambodia are under low human development. Overall, the indices showed an increasing pattern throughout the period.

Table 1 Education Index: ASEAN Countries

HDI Rank	Country	1990	1995	2000	2005	2010	2011	2012	2013	2014
31	Brunei Darussalam	0.78	0.80	0.82	0.84	0.84	0.85	0.85	0.85	0.856
143	Cambodia	0.36	0.38	0.42	0.49	0.54	0.54	0.55	0.55	0.555
110	Indonesia	0.53	0.56	0.60	0.64	0.67	0.67	0.68	0.68	0.684
141	Laos People's Democratic Republic	0.39	0.42	0.46	0.50	0.54	0.55	0.56	0.57	0.575
62	Malaysia	0.64	0.68	0.72	0.73	0.77	0.77	0.77	0.78	0.779
148	Myanmar	0.35	0.39	0.43	0.48	0.52	0.52	0.53	0.53	0.536
115	Philippines	0.58	0.59	0.62	0.64	0.65	0.65	0.66	0.66	0.668
11	Singapore	0.71	0.77	0.82	0.84	0.89	0.90	0.91	0.91	0.912
93	Thailand	0.57	0.61	0.65	0.68	0.72	0.72	0.72	0.72	0.726
116	Viet Nam	0.47	0.53	0.58	0.62	0.65	0.66	0.66	0.66	0.666

(Source: UNDP, International Human Development Indicators, 2015).
Download the data: http://hdrstats.undp.org/en/indicators/default.

3. DEVELOPMENT OF HIGHER EDUCATION IN ASEAN

Education plays a vital role in creating a knowledge-based society and contributing to the enhancement of ASEAN competitiveness [4]. The main objectives of education in the ASEAN community are to advance and prioritise education and focus on creating knowledge-based society; achieving access to primary education; promoting early child care development and enhancing awareness of ASEAN to youth through education [5]. The government of each member country has taken key steps in the development of their higher educational policies. Table 2 shows the policies and objectives of higher education for each country in ASEAN. Most of the ASEAN countries like Brunei, Cambodia, Indonesia, Laos, Myanmar, Vietnam and Philippines focus on improving the quality of higher education. Singapore plans to mould its human capital with cross-cultural skills, critical and inventive thinking and communication skill. Meanwhile, Malaysia and Thailand focus on becoming regional hubs for higher education in ASEAN. ASEAN countries face several challenges in achieving these objectives.

Table 2 Development of Higher Education Policies in ASEAN

Countries	Policies	Objectives
Brunei	The 21st Century National Education System (SPN 21) - 2012	1. Equip students with necessary skills and knowledge that is necessary for them to compete in both local and international job market. 2. Gear nation towards quality education and better economic performance.
Cambodia	Educational Strategic Plan (2006 -2010)	1. Increase opportunities for higher education among prioritised students (poor students, female students, students from remote areas). 2. Improve quality and efficiency of education service and institutional development and capacity building.
Indonesia	Higher Education Long Term Strategy (2003 – 2010)	1. Integrate internal and external quality assurance by developing the HEI database. 2. Implement new paradigm in education management and quality improvement.
Laos	Higher Education and Skills for Growth in Lao PDR -2012	1. Improve the quality of higher education. 2. Improve functional skills among students that are required to be employable in the future. 3. Prioritise underfunded fields such as science and engineering.
Malaysia	National Education Strategic Plan (NHESP - 2020)	1. Make Malaysia a hub of higher education excellence. 2. Develop human capital with first class mentality. 3. Reposition country's higher education to meet current and future

		challenges.
Myanmar	Long Term Education Development Plan (2001 – 2030)	1. Generate a learning society capable of facing the challenges of the knowledge-based society. 2. Development of human resource, expansion of research, promotion of quality education, and preservation of national identity and values.
Philippines	Long Term Development Plan (2010 – 2020)	1. Broaden the access of disadvantaged groups to higher education. 2. Improve the quality of HEIs, programmes and graduates to match the demands of domestic and global markets. 3. Strengthen research activities in HEIs. 4. Expand alternative learning systems/modality in higher education.
Singapore	21st Century competencies in academic curriculum (2012 – 2014)	1. Prepare students to thrive in a fast-changing and highly connected world. 2. Develop civic literacy, global awareness, cross-cultural skills, critical and inventive thinking and communication skills. 3. Refine teaching approaches and assessment methods. 4. Develop tools for holistic feedback and assessment.
Thailand	Long Term Higher Education Plan – Phase 2 (2008 – 2022)	1. Focus on education ethics. 2. Focus on linking education with employability. 3. Development of Thailand as a regional hub for higher education. 4. Innovation to improve national competitiveness. 5. Liberalisation of trade in education services and the future employment in AEC. 6. Encourage educational institutions to produce graduates who are equipped with professional skills, language skills and inter – cultural skills
Vietnam	Education Development Strategy (2008 – 2020)	1. Develop high-quality human resource to match the socio-economic structure and modernisation of country. 2. Enhance national competitiveness in the regional economic integration. 3. Focus on linking educational training with job placement and demands of employability.

4. CHALLENGES IN HIGHER EDUCATION FOR ASEAN COMMUNITY

The following discussion will focus on challenges by ASEAN countries:

4.1 Brunei Darussalam

The Ministry of Education continues to work hard to develop and prepare the nation's youth for employment in realising its vision 2035. Every citizen and residence are given opportunities to equip themselves with knowledge and skills required by the industry. Various departments within the Ministry of Education have been coordinating and collaborating with relevant stakeholders in addressing the needs and implementation of inclusive education in Brunei. Ensuring support for the different at-risk groups poses a challenge in terms of manpower, resources, information, understanding and acceptance [6].

4.2 Cambodia

Higher education in Cambodia still faces significant challenges in term of access, equality, quality, relevance, funding and management and administration. A drastic increase in enrolment for higher education in Cambodia caused triple challenges to build a mature core system in order to assure the minimum levels of quality [7].

4.3 Indonesia

One of the key challenges faced by the Indonesian higher education institution is the inability to support the number of enrolments due to the small size of the institutions [8]. Besides, [9] Indonesia also faces challenges in term of financing, quality of teaching and research, difficulties of access and equity and limited accreditation. Comparing with neighbouring countries, the relatively low research outputs are correlated with the insufficient budgets allocated for research. The majority of institutions do not have the financial and academic basis to conduct research; thus, they should concentrate their efforts on developing high-quality, relevant teaching. Furthermore, Indonesia only allocated 0.08 % of its GDP for research in 2013. An accreditation system is necessary to access the progress and quality of Indonesian higher education. The biggest challenge is that approximately 20% of institutions or study programmes are unaccredited.

4.4 Laos PDR

In the case of Laos, the major challenges faced in higher education are to produce and provide good quality human resources to meet the needs of the country's socio-economic development. Currently, higher education in Laos is described as lacking a clear vision, appropriate policy, strategy, and master plan to meet regional and international quality and competitiveness [10].

4.5 Malaysia

To become a regional hub of educational excellence, Malaysia must first and foremost address the challenges within Malaysian universities. The fall in the position of premier Malaysian universities like Universiti Malaya and Universiti Sains Malaysia in the Times Higher Education (THES) 2005 and later in THES 2007 signifies a crisis within Malaysian universities. If higher education in Malaysia is to reach its aspirations laid out in the National Higher Education Strategic Plan (NHESP), then these rankings must be viewed as an important wake-up call for the country to tackle the fundamental problems within institutions of higher education in Malaysia. It is hoped that with the rating system for Malaysian higher education institutions in place for all local universities, both public and private, it will work towards achieving a Band 6 (outstanding) on the ranking. HE in Malaysia needs to reposition the country's higher education to meet current and future challenges through the internalisation policies. The NHESP has outlined a number of strategies that will be adopted to transform Malaysia's higher education in order to provide a solid foundation for the future.

4.6 Myanmar

One of the key challenges of higher education in Myanmar is to create strong research activities by expanding activities of research to international collaborations [11].

4.7 Philippines

As for higher education in the Philippines, local, regional and international stakeholders collaborate toward improving the country's higher education sector by implementing reforms that enable the acquisition of knowledge, development of skills, values and attitudes which will enhance productivity, globalisation and competitiveness of graduates [12] and address the challenges arising from unanticipated environmental, social, and economic change [13].

4.8 Singapore

To become an educational hub for the ASEAN region, the government of Singapore has broadly promoted the internationalisation of national policy and recruited prestigious foreign universities to establish local campuses. This strategy is important to expand access for the local students to develop their potential.

4.9 Thailand

To become the regional education hub in South-East Asia, one of the key challenges of the Royal Thai Government is to upgrade the quality of Thai universities while upholding their academic freedom and social responsibility [14]. Ultimately, Thailand aims to attract more foreign students to continue their study in Thailand. In addition, to ensure their students stay competitive in the international market place, the Kingdom of Thailand aim to accelerate the development of university research activities nationwide to enhance national competitiveness.

4.10 Vietnam

The main concern in Vietnam's higher education is the lack of quality. Most university graduates do not have the adequate capacity to cope with rapid industrial and technological changes [15]. In order to improve the quality of higher education, Vietnam underwent structural adjustments including improvement of higher education programmes and teaching and learning methods, development of lecturing staff and higher education managers, increase in research, etc [16].

5. SOLUTIONS HIGHER EDUCATION FOR ASEAN COMMUNITY

Research education is central to any education system since it will provide significant data for the success of the process of teaching and learning. Today, there are a lot of issues regarding education which need to be explored or studied especially in higher education. Several important aspects of higher education should be reviewed together or reformed collectively by the educational experts and authorities. This issue can be seen from several perspectives such as research, publication, consultation, curriculum design, teaching and learning as well as evaluation and assessment. A significant number of books, journals, reports and documents should also be published.

There is a pressing need to promote a platform in which researchers in ASEAN countries should work together in terms of research. Given its shared community and interest, ASEAN members should work together to enhance the quality of education in their countries. All best education practices should be based on research, and this aspect could be distributed and conducted by universities and other higher education institutions across

ASEAN. Cultivating research through various fields of research of education and developing international networking are some of the steps that can be promoted by all scholars, experts and academicians in higher education institutions.

Globalisation has created unprecedented challenges. In terms of higher education, [17] emphasised that most of the Southeast Asia countries lack qualified faculty staff, declining academic community, limited experience of quality assurance processes, lack equitable access for all students, lack infrastructures, geographic spread and diversity of universities, have poor use of English, and limited research expertise. AEC poses similar challenges to the higher educational institutions in ASEAN. The education system in ASEAN countries is diverse; therefore, students involved in the intra-regional movement may face many problems in terms of cultural diversity, language and communication barriers, instructional practices and curriculum incomparability.

A real framework of cooperation should be established by ASEAN countries, particularly among their higher educational institutions. In facing the ASEAN economic community, it is hoped that this framework will enable all higher educational institutions to work together to achieve these objectives:

a. To encourage and carry out joint research and studies among ASEAN experts and academicians.
b. To disseminate findings of research, knowledge, skill and experience.
c. To publish journals, books and materials among academicians and researchers.
d. To support the development of the educational system and policy of every ASEAN member especially the less developed countries.
e. To promote cooperation and create greater networking and smart partnership among researchers in various fields of education.

Several aspects should be taken seriously into consideration by scholars, experts and academicians to develop the ASEAN regional framework of educational networking and collaboration. Firstly, it is very important to establish an ASEAN Research and Development (R&D) Centre to raise funds and coordinate research and publication for scholars, experts and academicians for ASEAN higher education institutions. This R&D centre will mainly organise research and publish material based on niche areas needed by ASEAN countries. Therefore, teachers, educators or lecturers will be involved in active debates, forums, discussions, seminars and workshops which are frequently organised. They could be able to freely give their ideas, opinions and suggestions to improve and strengthen their research, training, modules and courses based on the research conducted. A research-based institution at the ASEAN level should be jointly established by the governments, universities as well as non-governmental organisations. Every ASEAN country should actively play their roles and financially assist the development of this research institution. They should invite other researchers from ASEAN higher education institutions to participate in research. They could receive research funds from governments, private sectors and NGOs to do joint research regarding important aspects of ASEAN such as the economy, politics, society and education. It is imperative that the philosophy of research education is based on the ASEAN context to improve the quality of education. For example, religion and religious values should be considered seriously in the ASEAN educational system and to eliminate negativities that may influence ASEAN youth.

Secondly, improvement of the quality of publication and university ranking. Today, only a few numbers universities in ASEAN were included in the world's highly ranked universities. In the context of Malaysia, from nearly 500 higher education institutions in 2016, there were less than ten universities included in the top best universities such as UM, UPM, UTM, UKM and UTP. Several factors influence the rankings such as the lack of research funds, indexed journals and books, English language barriers as well as the number of academicians and researchers. Publishing in SCOPUS and ISI indexed journals requires a high level of English writing proficiency. There are thousands of higher education institutions in ASEAN producing a large number of academicians and graduates. This indicates that these higher educational institutions have their quality standards despite not having been included in the world top universities. Thus, there is a need to develop an ASEAN ranking system and criteria as well the ASEAN publications index to promote academic writing and ensure quality standards. Many academicians and researcher are trapped by the current trend of writing in ISI and SCOPUS journals or publications. This issue has become more serious since there are irresponsible people who have manipulated the academicians' eagerness to be published in ISI and SCOPUS publications. Unfortunately, the fee rates of some of the journals are exorbitant and fake journals have emerged. These journals have been blacklisted by the authorities. One solution is that all ASEAN higher education institutions should engage more actively in regional journals and book publications. There should be more MOUs and MOAs among these institutions to increase the number of quality journals and books. A series of discourses and seminars should be organised by ASEAN higher educational institutions to form and produce the ASEAN University Index and the ASEAN Index for Publication and Research.

Thirdly, reformation of educators and researchers. To improve abilities to face challenges as well to provide solutions to higher education institutions, all scholars, experts and academicians should actively carry out research regarding in planning and implementing the integration of knowledge. The development of technology

and ICT provide new approaches to developing the education system. Cultivating research among academician should be one of the main agenda in the higher education system. Research lends support to theories and provides data for interpretation. A correct understanding among educators is essential to ensure that they are able to fulfil their duties based on facts and not based on personal perception or assumption.

In educating the 21st century generation, academicians should use the latest pedagogy and approaches in the process of teaching and learning. Besides research and publication, every academician should become effective educators in and outside the classroom. In a borderless world, access to information is critical. *E-learning, blended learning, MOOC*, *mobile learning*, *modular, workplace,* etc. are some of the current approaches used in many higher educational institutions. Strong networking among higher educational institutions within ASEAN countries will provide wider educational opportunities to their students. Students will be able to share and obtain knowledge from other universities in ASEAN as well as from other countries via the internet and open sources information. As a result, it will enhance the students' knowledge and information. Students' mobility is another effective mechanism to improve students' knowledge, social skills, experience and international networking.

Fourth, standardisation of academic programmes among ASEAN higher education institutions. Thousands of higher educational institutions exist in ASEAN offering various levels and types of programmes. A standard quality assurance should be developed and recognised by every ASEAN country. This standard will give a new way for student exchange, joint awarding programmes, guidelines for transfer credits and degree recognition by all ASEAN countries. This standard will directly improve the quality of academic programmes offered in these higher educational institutions, and it becomes the benchmark academic standard of ASEAN. It will also be very helpful for the stakeholders, educational authorities and industries to evaluate and improve the quality of the programmes offered by these higher educational institutions.

6. CONCLUSION

In ASEAN countries, education is a critical and strategic approach to developing human resources. The government plays a role by providing high-quality education and learning to all people. However, providing access to quality education and learning the opportunity to all people is not always easy and every ASEAN country has different levels and quality of education. Each country has its challenges, and there is an urgent need to develop practical solutions. To achieve the goals of the ASEAN economic community, a real framework of cooperation should be established by ASEAN countries. It is hoped that the framework will encourage joint research among ASEAN experts and academicians. This will promote disseminating the research findings, knowledge, skill and experience as well as to publish journals, books and materials among academicians and researchers. This framework will also support the development of the educational system and policy of every country of ASEAN especially the less developed countries and to promote cooperation and create greater networking and smart partnership among researchers in various fields of education.

REFERENCES

[1] Yaakub, N. (2015). *Special lecture on Challenges in education towards the realization of ASEAN community 2015*.
[2] Aring, M. (2015). ASEAN Economic Community 2015: Enhancing competitiveness and employability through skill development. *ILO Asia-Pacific Working Paper Series, ISSN: 2227-4405*, 1–36.
[3] Dulyadaweesid, N. (2013). Thailand's Educational Strategic Plan in Preparation for the ASEAN Community. *Paper Presented at the Asian Conference on Education 2013, Osaka, Japan. Retrieved at http://www.iafor.org/offprints/ace2013-offprints/ACE2013_offprint _0273.pdf*, 1–10.
[4] Pyakurel, S. (2014). *Asean economic community and its effects on university education: a case study of skill verification by the means of professional certification examination*.
[5] *Op.cit.,*
[6] Ministry of Education. (2008). *The development of Education Brunei Darussalam*.
[7] Williams, J. H., Kitamura, Y., & Keng, C. S. (2014). Higher Education in Cambodia : Expansion and quality improvement. *Higher Education Forum*, *11*, 67–89.
[8] *Op.cit.,*
[9] Logli, C. (n.d.). *Higher education in Indonesia: Contemporary challenges in governance, access, and quality Chiara*. New York: Handbook of Asian Higher Education.
[10] Siharath, B. (2007). The Higher Education in Lao PDR and Roles of International Cooperation for Its University Development - National University of Laos I . Introduction, 1–14.
[11] *Op.cit.,*
[12] *Ibid,*
[13] Galang, A. P., & Galang, A. P. (2010). Environmental education for sustainability in higher education institutions in the Philippines. *International Journal of Sustainability in Higher Education*, *11*(2), 173–183. http://doi.org/10.1108/14676371011031892
[14] *Op.cit.,*

[15] Oliver, D. E. (2004). Higher Education Challenges in Developing Countries: The Case of Vietnam. *International Journal of Educational Policy, Research, & Practice*, *5*(2), 3–18.
[16] *Op.cit.,*
[17] *Op.cit.,*

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توريث الوراثة النبوية أهم أعمال علماء الإسلام

[1]Ismail Lutfi*
*FATHONI UNIVERSITY, THAILAND

Abstract
This paper is to study the bequeathing inheritance of the Prophet, which is considered the most important mission of all the Muslim scholars. The Lordship of Almighty Allah on His servants is sending down His Messengers to mankind and the most prestigious status is the status of the message and the prophet hood that He hath chosen the messengers and the prophets from among His creations to preach Islam as the way of life, the best of them is the Prophet Muhammad Peace Be Upon Him. This paper discuss the status of the Muslim scholars in the Islamic point of view to whom Almighty Allah has made them honors upon others who follows the ways of the prophets of those who have sacrificed in bringing the followers to the right path, helping them from injustice, encouraging them to do good deeds and forbidding wrong and calling them to Allah in most peaceful ways and wisdom. These constitute the solicitation of the prophet hood inherited by the followers of the Messengers in the past until the present day and will be continuing to the Day of Judgment. The findings of the study are as the following; the blessing and the Lordship of Allah on His servants is that He has given them the life and other living factors and He has honored his servants with the Quran sent down to them as the guidance of life to Islam, the true religion of Almighty Allah. Almighty Allah has honored the servants with the true religion and the revelation of the holy scriptures and the holy scripture of Al Qur'an is considered the final revelation and the most sublime law and Almighty Allah has sent down the messengers and the prophets from the first prophet, Adam Alaihis salam to the last prophet Muhammad Peace Be Upon Him where the last prophet, Muhammad Peace Be Upon Him is considered the most sublime among them. Inheritance from the prophet and religious heritage are the two laws of almighty Allah where we need to pay full attention in the persistence of religion in human life. The most importance of inheriting the messengers is bequeathing inheritance of the Prophet through Al-Quran and the Tradition of the prophet.

Keywords: the bequeathing inheritance of the Prophet, the status of the Muslim scholars

بسم الله الرحمن الرحيم

اَلْحَمْدُ لِلَّهِ نَحْمَدُهُ وَنَسْتَعِيْنُهِ وَنَسْتَغْفِرُهُ وَنَسْتَهْدِيْهِ وَنَتُوْبُ إِلَيْهِ، وَنَعُوْذُ بِاللهِ مِنْ شُرُوْرِ أَنْفُسِنَا وَمِنْ سَيِّئَاتِ أَعْمَالِنَا، مَنْ يَهْدِهِ اللَّهُ فَلاَ مُضِلَّ لَهُ، وَمَنْ يُضْلِلْهُ فَلاَ هَادِيَ لَهُ. أَشْهَدُ أَنْ لاَ إِلَهَ إِلاَّ اللَّهُ وَحْدَهُ لاَ شَرِيْكَ لَهُ، وَأَشْهَدُ أَنَّ مُحَمَّدًا عَبْدُهُ وَرَسُوْلُهُ. اَللّٰهُمَّ صَلِّ وَسَلِّمْ وَبَارِكْ عَلَى نَبِيِّنَا وَحَبِيْبِنَا الْمُصْطَفَى مُحَمَّدٍ، وَعَلَى آلِهِ وَصَحْبِهِ أَجْمَعِيْنَ. أَمَّا بَعْدُ:

ٹ ڈ ڇ ڇ ڇ ڇ ڍ ڍ ڌ ڌ ڎ ڎ ڇ[2]

إن من ربوبية الله تعالى للعباد هو إرسال الرسل إليهم من الملائكة والناس، وأفضل منازل الخلق عند الله وعند عباده الصالحين منزلة الرسالة والنبوّة حيث اصطفى الله من بين خلقه رسلا وأنبياء لإبلاغ دين الله الإسلام لهم، فهم بذلك لا شك أفضل خلق الله أجمعين، لأنهم هم الوسائط بين الله وبين عباده في تبليغ رسالاته وتعريف دينه نظاما للحياة الطيبة. وإن أفضلهم وسيّدهم النبيّ الأميّ محمد بن عبد الله × ، فجعله أزكى العالمين نفوسا وأكملهم روحا وعلوما وأعمالا وأعظمهم محبة وقبولا في قلوب الناس.

1 ـ مكانة العلماء عند الإسلام

1 ـ چڈ ڈ ٹ ٹ ڈ ڈ ف ف ڤ ڤ ڤ ڤ ڃ ڃ چ چ[3]چ

المتفرد بالإلهية لجميع الخلائق وأن الجميع عبيده وخلقه والفقراء إليه و[هو الغني] شهد الله وكفى به شهيدا وهو أصدق الشاهدين وأعدلهم وأصدق القائلين:

وهذه خصوصية عظيمة للعلماء في هذا المقام[عقد الله] ٹ ٹ ڈ ڈ ف [لسوف، ثم قرن شهادة ملائكته وأولي العلم بشهادته

إنه تعالى جعل أشرف مراتب الناس بعدهم مرتبة خلافتهم ونيابتهم في أممهم فإنهم يخلفونهم على منهاجهم وطريقتهم من تضحيتهم اللازمة وإرشادهم الضال وتعليمهم الجاهل ونصرهم المظلوم وأخذهم على يد الظالم وأمرهم بالمعروف ونهيهم عن المنكر والدعوة إلى الله بالحكمة للمستجيبين والموعظة الحسنة للمعرضين والغافلين، والجدل بالتي هي أحسن للمعاندين المعارضين. فهذه أحوال اتباع المرسلين و[4]ورثة النبيين

2 ـ چڃ ڃ ڃ ڃ ڈ ڈ ژ ژ ڑ ڑ ک ک ک ک گ[5]چ

أن هذه سبيله أي طريقته ومسلكه[چ ڃ ڃ] عن هذه الآية بقول ابن كثير رحمه الله: يقول تعالى لرسوله ﷺ إلى الثقلين الإنس والجن، أمراً له أن يخبر الناس وسنته وهي الدعوة إلى شهادة أن لا إله إلا الله وحده لا شريك له، يدعو إلى الله بها على بصيرة من ذلك ويقين وبرهان، هو وكل من تبعه وآمن به يدعو إلى ما ثم أمر أن ينزهه تنزيها عن الشرك (وأعلن ذلك لهم[ڈ ڈ ڈ ڈ ژ ژ] دعا إليه رسول الله ﷺ على بصيرة ويقين وبرهان عقلي وشرعي قائلا): [ڑ ک ک ک ک گ].[6]

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* بحث يقدم إلى المؤتمر العالمي الذي عقد، بمشيئة الله، بجامعة المحمدية ميترو، لمفونج، إندونيسيا في 12 ـ 14 ذو الحجة 1438 هـ الموافق 2/11/2016م

1 هو رئيس جامعة فطاني جنوب تايلاند، ورئيس مشترك لمجلس التعاون بين الأديان للسلام (IRC) بإندونيسيا، وعضو المجلس الأعلى لرابطة العالم الإسلامي بمكة المكرمة

2 القرآن الكريم سورة الحج 22 :75

3 القرآن الكريم سورة الحج 22 :75

4 انظر: ابن القيم فضل العلم والعلماء ص 63

5 القرآن الكريم سورة يوسف 12 :108

6 تفسير القرآن العظيم لابن كثير 4/422

تلك هي دعوة من ورثة النبوة التي يرثها أتباع الرسول ﷺ ممن آمن به وعلّم من علمه منذ أيام الصحابة رضي الله عنهم إلى يومنا هذا ثم إلى يوم القيامة بإذن الله. فهؤلاء أتباع الرسول ﷺ وخلفاؤه حقا وهم ورثة النبوة دون الناس وهم أولوا العلم الذين اتبعوه فقاموا بما جاء به النبي ﷺ علما وعملا ودعوة وهداية وجهادا وصبرا وناشرا رحمة دينه للعالمين، وعلى رأسهم إمامهم الأكبر أبو بكر الصديق ÷ ثم من بعده. ذلك ترتيب ربّ العالمين لعباده المتقين في كتابه الحكيم قائلا چ چ چ چ چ چ ڇ ڇ ڇ ڇ ڍ ڍ ڌ ڌ ڎ ڎ ڈ ژ ژ ڑ ڑ ک ک ک گ گ گ گ ڳ ڳ[7] جعلنا الله منهم بمنه وكرمه.

2 - ورثة النبوة: القرآن والسنة

1 - چ ٻ ٻ ٻ ٻ پ پ پ پ ڀ ڀ ڀ ڀ ٺ ٺ ٺ ٿ ٿ ٿ ٿ ٹ ٹ ٹ ٹ ڤ ڤ ڤ ڤ ڦ ڦ ڦ ڦ ڄ ڄ ڄ ڄ ڃ ڃ ڃ ڃ چ چ چ چ ڇ ڇ[8] چ

وعن هذه الآية؛ قال ابن عباس ÷ : >هم أمة محمد ورثهم الله تعالى كل كتاب أنزله، فظالمهم يغفر له، ومقتصدهم يحاسب حسابا يسيرا، وسابقهم يدخل الجنة بغير حساب<[9].

ومن ذلك تبين أنه الكل اصطفاه الله لوراثة هذا القرآن العظيم وإن تفاوتت مراتبهم وتميّزت أحوالهم، فلكل منهم قسط من وراثته حتى الظالم لنفسه، فإن ما معه من أصل الإيمان وعلوم الإيمان وأعمال الإيمان من وراثة الكتاب. لأن المراد بوراثة الكتاب وراثة علمه وعمله ودراسة ألفاظه وفهم معانيه والعمل بمقتضاه والدعوة إليه. تلك أمة محمد ﷺ أمة الإجابة، أمة واحدة، أمة وسطا فكانوا خير أمة أخرجت للناس".

وفي تفسير ابن كثير لهذه الآية قال: فالعلماء أغبط الناس بهذه النعمة وأولى الناس بهذه الرحمة وأكثر حظا من هذه الوراثة. فإنهم كما روي عن قيس بن كثير قال : "قدم رجل من المدينة على أبي الدرداء وهو بدمشق فقال : ما أقدمك يا أخي؟ فقال : حديث بلغني أنك تحدثه عن رسول الله ﷺ قال: أما جئت لحاجة؟ قال : لا . قال : أما قدمت لتجارة؟ قال : لا . قال : ما جئت إلا في طلب هذا الحديث؟ قال : نعم. قال رضي الله عنه : فإني سمعت رسول الله ﷺ يقول: (**مَنْ سَلَكَ طَرِيقًا يَبْتَغِيْ فِيْهِ عِلْمًا سَلَكَ اللهُ بِهِ طَرِيْقًا إِلَى الْجَنَّةِ، وَإِنَّ الْمَلَائِكَةَ لَتَضَعُ أَجْنِحَتَهَا رِضَاءً لِطَالِبِ الْعِلْمِ، وَإِنَّ الْعَالِمَ لَيَسْتَغْفِرُ لَهُ مَنْ فِي السَّمَوَاتِ وَمَنْ فِي الْأَرْضِ حَتَّى الْحِيْتَانُ فِي الْمَاءِ. وَفَضْلُ الْعَالِمِ عَلَى الْعَابِدِ كَفَضْلِ الْقَمَرِ عَلَى سَائِرِ الْكَوَاكِبِ، وَإِنَّ الْعُلَمَاءَ هُمْ وَرَثَةُ الْأَنْبِيَاءِ، وَإِنَّ الْأَنْبِيَاءَ لَمْ يُوَرِّثُوْا دِيْنَارًا وَلَا دِرْهَمًا، وَإِنَّمَا وَرَّثُوْا الْعِلْمَ فَمَنْ أَخَذَ بِهِ أَخَذَ بِحَظٍّ وَافِرٍ**[10].

وعَنْ أَبِيْ الدرداء أيضا قال : سمعت رسول الله ﷺ يقول: ... **وَالْعُلَمَاءُ وَرَثَةُ الْأَنْبِيَاءِ لَمْ يُوَرِّثُوْا دِيْنَارًا وَلَا دِرْهَمًا إِنَّمَا وَرَّثُوْا الْعِلْمَ فَمَنْ أَخَذَ بِالْعِلْمِ أَخَذَ بِحَظٍّ وَافِرٍ**[11].

وزاد في رواية أخر **وَمَوْتُ الْعَالِمِ مُصِيْبَةٌ لَا تُجْبَرُ وَثُلْمَةٌ لَا تُسَدُّ وَنَجْمٌ طُمِسَ، وَمَوْتُ قَبِيْلَةٍ أَيْسَرُ**[12] **مِنْ مَوْتِ عَالِمٍ**

وقد روي عن الحسن البصري بإسناد صحيح **قَالُوا يَقُوْلُوْنَ: مَوْتُ الْعَالِمِ ثُلْمَةٌ فِي الْإِسْلَامِ لَا يَسُدُّهَا شَيْءٌ مَا اخْتَلَفَ اللَّيْلُ**[13] **وَالنَّهَارُ**

المراد بالعلم هو علم الوحي من الله سواء كان القرآن أو السنة لأن بهذا العلم عُبِدَ اللهُ وحده وأُثْنِيَ عليه ومُجِّدَ، وبه عُرِف الحلالُ من الحرام وبه عُرِف فضلُ الإسلام على غيره، كما عُرِف به حقيقة الحياة والممات وحقيقة الدنيا والآخرة وحقيقة الجنة والنار.

هذا العلم الذي يحتاج إليه الناس ذلك هو الدين كما قال الإمام أحمد : الناس أحوج إلى العلم منهم إلى الطعام والشراب، لأن الطعام والشراب يحتاج إليه في اليوم مرة أو مرتين، والعلم يحتاج إليه في كل وقت[14].

وهذا العلم الذي خص الله به الإنسان من بين المخلوقات لما أودعه من عجائبه وآياته الدالة على ربوبيته وقدرته وعلمه وحكمته وكمال رحمته وأنه لا إله غيره ولا رب سواه.

عَنْ أَبِيْ هُرَيْرَةَ، أَنَّهُ مَرَّ بِالسُّوْقِ فَوَجَدَهُمْ فِيْ تِجَارَاتِهِمْ وَبُيُوْعَاتِهِمْ، فَقَالَ: "أَنْتُمْ هَهُنَا فِيْمَا أَنْتُمْ فِيْهِ وَمِيْرَاثُ رَسُوْلِ اللهِ × يُقْسَمُ فِيْ مَسْجِدِهِ ... فَقَامُوْا سِرَاعًا إِلَى الْمَسْجِدِ فَلَمْ يَجِدُوْا فِيْهِ إِلَّا الْقُرْآنَ وَالذِّكْرَ وَمَجَالِسَ الْعِلْمِ، فَقَالُوْا: أَيْنَ مَا قُلْتَ يَا أَبَا هُرَيْرَةَ؟ فَقَالَ: هَذَا مِيْرَاثُ مُحَمَّدٍ ﷺ مُقَسَّمٌ بَيْنَ وَرَثَتِهِ وَلَيْسَ بِمَوَارِيْثِكُمْ وَدُنْيَاكُمْ"[15].

3 - توريث الوراثة (التعليم والتزكية)

1 - چ ڦ ڦ ڄ ڄ ڄ ڄ ڃ ڃ ڃ ڃ چ چ چ چ ڇ ڇ ڇ ڇ ڍ ڍ ڌ ڌ ڎ ڎ ڈ ژ ژ ڑ ڑ ک ک ک گ گ گ گ ڳ ڳ[16] چ

وورث النبي زكريا عليه السلام تلك سنة الله في وراثة دينه الحنيف إلى أن يرث الأرض ومن عليها وذلك من نبي أو رسول إلى آخر كما كان النبي داود عليه السلام ، ثم أخيرا ورث المصطفى النبي الأمي الذي لا نبي بعد، محمد بن عبد الله ﷺ العلماء الربانيين؛ بدءاً من الخلفاء الراشدين رضي الله عنهم ثم النبي يحيى عليه السلام ثم الأمراء المؤمنين والعلماء والوارثين، فكانوا ورثة النبوة والأنبياء. أعانهم الله على توريث الوراثة.

2 - چ ٻ ٻ ٻ ٻ پ پ پ پ ڀ ڀ ڀ ڀ ٺ ٺ ٺ ٺ ٿ ٿ ٿ ٿ ٹ ٹ ٹ ٹ ڤ ڤ ڤ ڤ ڦ ڦ ڦ ڦ ڄ ڄ ڄ ڄ ڃ ڃ ڃ ڃ چ چ چ چ ڇ ڇ ڇ ڇ ڍ ڍ ڌ ڌ ڎ ڎ ڈ ژ ژ ڑ ڑ ک ک ک گ گ گ گ ڳ ڳ[17] چ

وذلك لما أحسّ من نفسه الضعف وخاف أن يموت، ولم يكن أحد ينوب منابه في دعوة الخلق إلى الله عز وجل في توريث نبوته لابنه يحيى عليه السلام تلك قصة زكريا عليه السلام يعني ضعف العظم الذي هو عماد البدن والنصح لهم شكا إلى ربه ضعفه الظاهر والباطن فناداى ربه نداء خفيا لكمال الإخلاص قائلا: لأن الشيب دليل الضعف والكبر ورسول الموت ونذيره فتوسل إلى الله تعالى بضعفه وعجزه. وهذا من أحب الوسائل إلى الله لأنه يدل [كله وهذا من الوسائل التي يتوسل إلى الله، بإنعامه عليه وإجابته دعوته على التبري من الحول والقوة، وتعلق القلب كليا بحول الله وقوته والظاهر أنه زكريا لم ير فيهم أحدا فيه لياقة للإمامة والنبوة يقوم بواجب القيام السابقة، فسأل الذي أحسن إليه سابقا أن يتمم إحسانه لاحقا.

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[7] القرآن الكريم سورة النساء 12 : 69-70
[8] القرآن الكريم سورة فاطر 1 :31-35-32
[9] تفسير جامع البيان للطبري 20/465
[10] تفسير القرآن العظيم لابن كثير 6/487
[11] حديث حسن: حديث أخرجه الإمام أحمد رقم 21715، أبو داود رقم 3641 ، الترمذي رقم 2682، ابن ماجة رقم 223
[12] حديث ضعيف: أخرجه ابن شاهين في الترغيب في فضائل الأعمال رقم 215، والبيهقي في شعب الإيمان رقم 1576، و ابن عبد البر في جامع بيان العلم وفضله رقم 179
[13] أخرجه الدارمي رقم 333، و ابن عبد البر في جامع بيان العلم وفضله رقم 1021
[14] فضل العلم والعلماء لابن القيم 36
[15] حديث أخرجه الطبراني في الأوسط رقم 1429، وصحيح الترغيب والترهيب رقم 70 ، سنده حسن
[16] القرآن الكريم سورة النمل 16 :27
[17] القرآن الكريم سورة مريم 2 :12-16

من بعد موته. وهذا تبين نصح النبي زكريا وشدة اهتمامه في أمر التوريث لأمته فدعا ربه أن يرزقه ولدا وليا يرث نبوته من بعده راجيا كل الرجاء من قدرة الله يعني ولدا صالحا يرضاه الله، وتكون وليا نبيا مر[illegible]ضيا [illegible] [العظيمة، رغم اشتكائه بأن امرأته عاقر.

[illegible] عند الله وعند خلقه بعده. وهذه الولاية ولاية الدين وميراث النبوة والعلم والعمل. فرحمه ربه واستجاب دعاءه فقال:

[illegible] [18].

3 -[illegible]

[illegible]

هذه المنّة التي امتن الله بها على عباده أعظم المنن وأكبر النعم بل أصلها وهي الامتنان عليهم بهذا الرسول الكريم الذين أنفذهم الله به من الضلالة والهلكة إذ كانو في ضلال

ومن أهم مهمات الرسول هو توريث ورثتهم إلى أمته من خلال ثلاث طرق:

سواء كانت تلاوته في الصلاة أم في خ[illegible]رتجهات [أولا:

يعني تصفية أفكارهم ونفوسهم وخلقهم من الشرك والدنس والخبث وسائر مساوئ الأخلاق والحياة التي كانو متلبسين بها في[illegible] [ثانيا:تركهم وجاهليتهم.

يعني تعليم الناس معاني القرآن وحقيقة السنة التي هي ترجمة [illegible] [ثالثا:القرآن لمعانيه.

تلك عملية نبوية لتوريث الكتاب والحكمة وهما ورثة الأنبياء وذلك بالوسائل والطرق والأساسية التالية:

1 - التلاوة على الأمة

2 - والتزكية أو التربية

3 - والتعليم لمعاني القرآن والسنة المشتملة على جميع احتياجات الناس على مستويات الفرد والأسرة والمجتمع والدولة والدنيا كلها.

وبذلك يتمكن الناس من الوصول إلى الطريق المؤدي إلى السعادة في الدنيا والآخرة والخروج من الظلمات إلى النور ومن الضلال إلى الهدى.

فبدلوه وغيروه وقلبوه وخالفوه واستبدلوا بالتوحيد شركا واليقين شكا وابتدعوا أشياء لم يأذن بها[illegible] [illegible]العرب كانوا قديما متمسكين بدين إبراهيم الخليل أهل الكتاب قد بدلوا كتبهم وحرفوها وغيروها وأولوها محرفين الكلم عن مواضعه فبعث الله محمد صلوات الله وسلامه عليه بشرع عظيم كامل شامل لجميع الخلق فيه هدايتهم لجميع ما يحتاجون إليه من أمر معاشهم ومعادهم والدعوة لهم إلى رضوان الله وجنته والنهي عن سخط الله وناره.

4 - ختاما

من خلال هذا البحث العاجل توصلت إلى عدد من الحقائق التالية:

أولا: إن من رحمة الله وربوبيته لخلقه أن خلق لهم الحياة وأنزل لهم الرزق وأكرمهم بالقرآن كمنهج حياة طيبة الذي هو دين الله الحق وهو الإسلام.

ثانيا: إن إكرام الله لعباده بالدين القويم بإنزال الكتب، وآخر كتبه وأفضل شرائعه هو القرآن الكريم. وإرسال الأنبياء والمرسلين من أولهم آدم ونوح إلى أخرهم وأفضلهم النبي الخاتم محمد بن عبد الله ×.

ثالثا: الوراثة والتوريث في الدين سنتان من سنن الله يجب أن نعتني بهما في أمر إقامة الدين في حياة البشر.

رابعا: أهمّ أعمال ورثة الأنبياء هو توريث وراثة النبوة وهي القرآن والسنة لمن بعدهم بالطريقة النبوية الصحيحة، وهي التلاوة والتزكية والت

وَصَلَّى اللَّهُ عَلَى نَبِيِّنَا مُحَمَّدٍ وَعَلَى آلِهِ وَصَحْبِهِ أَجْمَعِيْنَ. وَسُبْحَانَ رَبِّكَ رَبِّ الْعِزَّةِ عَمَّا يَصِفُوْنَ، وَسَلَامٌ عَلَى الْمُرْسَلِيْنَ ، وَالْحَمْدُ لِلَّهِ رَبِّ الْعَالَمِ

[18] القرآن الكريم سورة مريم 12:7 انظر: السعدي في تفسيره

[19] القرآن الكريم سورة الجمعة 62:2

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Human Rights Tribunal for the Settlement of the 1965-1966 Events?

Manunggal K. Wardaya*[1]

*UNIVERSITAS JENDERAL SOEDIRMAN (UNSOED), PURWOKERTO, INDONESIA

Abstract
Essentially, the demand to hold the perpetrators of the 1965-1966 events accountable is in line with the obligation that should be fulfilled by the Indonesian government to uphold the principle of equality before the law. By bringing the perpetrators to justice, the notion that there is no one above the law will find its realization in practice and not merely be a slogan that is only good on paper. In relation to this, the judiciary is expected to be functioning according to its constitutional design as the ultimate forum to adjudicate when there is a violation of rights and or freedom.

Keywords: Gross Violations of Human Rights, Justice, Victims

1. INTRODUCTION

This paper aims to provide an assessment over the prospect to settle the 1965-1966 events through court mechanism. Issues related to the applicability of Law No. 26 of 2000 on Human Rights Court (HRC) on the 1965-1966 events will be the first matter to be discussed. Other issues namely the rejection of the Attorney General Office (AGO) and steps and or procedures that should be carried out to have a tribunal for the events established will be the next subjects to be discussed. The paper will be concluded with an overview over the prospect to use court mechanism for the settlement of the events.

2. RESULT AND DISCUSSION

2.1 Retroactive Application of Law No. 26 of 2000 on the 1965-1966 Events?

Article 2 of the ICCPR

The right not to be prosecuted under retroactive laws has a special place within the international human rights law. This right is enshrined as one of the human rights and liberties in the Universal Declaration of Human Rights (UDHR) as well as in the International Covenant on Civil and Political Rights (ICCPR). Article 2 of the ICCPR provides:

a. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
b. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

As a State Party to the ICCPR, Indonesia is bound to fulfill the treaty obligations in Article 2 being mentioned above. In the context of the right not to be prosecuted under retrospective laws, the Indonesian government has to take necessary steps to ensure the enjoyment of this right by all individuals within the territory of the Republic of Indonesia without distinction of any kind.

Article 28I [1] of the 1945 Constitution states:

The rights to life, freedom from torture, freedom of thought and conscience, freedom of religion, freedom from enslavement, recognition as a person before the law, and the right not to be tried under a law with retrospective effect are all human rights that cannot be limited under any circumstances.

As seen in the above quote, the 1945 Constitution explicitly states the right not to be tried with retrospective effect along with several other rights and liberties as one of the human rights that cannot be limited under any circumstances. The phrase "...human rights that cannot be limited under any circumstances" in the formulation of Article 28 [2] above also implies the strength of this right considering that no limitation under any circumstances can be applied on it.

2.2 Retroactive Application: Contrary to the 1945 Constitution?

In relation to serious crimes or gross violations of human rights, Indonesia has Law No. 26 of 2000 on Human Rights Court. The jurisdiction of the HRC Law is not limited only to crimes committed ever since the

[1] Corresponding Author. Phone Number: -, *E-Mail Address:* Manunggal.wardaya@gmail.com]

day of its enactment. Cases of gross violations of human rights committed prior to the enactment of the Law can also be examined and adjudicated. The investigation and prosecution of such cases are made possible by the HRC Law itself through Article 43 [3] which provide the legal basis for the existence of ad hoc human rights courts to hear and adjudicate past serious crimes.

The ad hoc court itself, pursuant to Article 43 [4], is located within the Court of General Jurisdiction and would be established through a Presidential Decree upon the recommendation of the People's Representative Council. In relation to this, Article 44 of the Law states that the examination of cases of past violations would be carried out by applying the provisions of the HRC Law. To sum up, Law No. 26 of 2000 on the Human Rights Court is applicable for the case of crimes against humanity in the events. Article 43 of the HRC Law removes the obstacle to prosecute cases of past abuse, including the 1965-1966 events, by providing an institution called ad hoc human rights courts.

2.3 Human Rights Court for the Settlement of the 1965-1966 Events?

Pursuant to Article 43 [5], an ad hoc court would exist only if the President ratified a legal instrument in the form of presidential decree as the legal basis of the court. The decree itself would not be made based on the initiative of the President, but only be issued upon a recommendation of the People's Representative Council which states that an ad hoc court for a certain case of past violations of human rights is needed. In this case, the issuance of the decree is merely a follow-up of the recommendation of the Council and will serve as the legal basis for the establishment of the court. Pursuant to the elucidation of Article 43 [6], the recommendation of the Council should be based on the gross violation of human rights which is restricted to a certain location and time which took place prior to the promulgation of the HRC Law.

In practice, the authority possessed by the People's Representative Council in the issuance of a recommendation being discussed in the paragraph above even used to be very decisive. Although the duty to carry out an investigation and preliminary investigation on cases of past serious crimes are in the hands of the NHRC and the AGO, Article 43 [7] used to be implemented in such a way as if the Council is an institution that has the final say to determine whether or not gross violations of human rights had taken place. Such implementation happened due to the word 'allegation' in the original formulation of the elucidation of Article 43 [8]. The formulation of the original elucidation of Article 43 [9] states:

In case the People's Representative Council recommend the establishment of an ad hoc Human Rights Court, the People's Representative Council based on the allegation of gross violation of human rights which is limited to certain location and time which took place prior to the promulgation of this legislation.

The implementation that was based on the original formulation of elucidation Article 43 [10] of the HRC Law as discussed above were evident in the case of Trisakti and Semanggi, two cases of alleged human rights violations which took place prior to the enactment of the HRC Law. In these two cases, the Council stated that there were no human rights violations albeit the NHRC and the AGO stated the opposite. Given that the[2] People's Representative Council is in essence a political institution with a lot of political interest in it, an implementation of authority that is based on such interpretation is likely prone to be used for certain political interest. Such authority would make it possible for the Council to ignore whatever the findings of the investigator in order to protect the perpetrators of human rights.

However, the injustice that might possibly occur due to the implementation of authority that is based on the original elucidation of Article 43 [11] being described above would not going to happen again in the case of the 1965-1966 events. The Constitutional Court through Decision No. 18/PUU-V/2007 ruled out that the word "allegation" in the original elucidation potentially distort the achievement of justice since it would open the opportunity for the Parliament to use its own consideration in determining whether or not the alleged violation has occurred. According to the Court, the allegation of whether or not a past human rights violation had occurred should be based on the work of other institutions that have the duty to investigate namely the NHRC and the AGO. However, the word "allegation" in the original formulation of the elucidation of Article 43 [12] could be interpreted differently from the mechanism as mentioned by the Court above. Realizing this potential threat, the Court annulled the word "allegation" to ensure that the elucidation no longer be interpreted as if giving an authority to the Council to decide whether gross violations of human rights had taken place. The ruling of the Court has made that the recommendation of the Council, including on the case of the 1965-1966 events, would always be based on the work of the NHRC and the AGO.

The effort to establish an ad hoc tribunal to try the perpetrators of the 1965-1966 events seems to be, at least until the writing of this chapter, far from fruitful due to the rejection of the AGO to follow up the recommendation of the NHRC. Instead of carrying out an inquiry, the AGO insisted that the report being submitted by the NHRC is insufficient to be followed up with an investigation. The insufficiency of the report that was meant by the AGO is that the NHRC did not follow the instruction to improve the report especially on

the two issues regarding the formal as well as material requirement. The formal requirement in question, according to the AGO, is that the investigator of the NHRC were not sworn while the material requirement in question is that the NHRC should conduct additional examination on several witnesses. The examination, according to the AGO, is needed so that the identification of individuals allegedly responsible for the crimes can be made. The process to establish an ad hoc court for the case of the 1965-1966 events find an impasse exactly at this stage. The NHRC finally stop in submitting improvements of the final report to the AGO, while the latter keep on refusing to follow up with an investigation. Since there is no investigation had been made by the AGO, a result of investigation as a basis to recommend that an ad hoc court is needed is by itself will never be obtained.

The deadlock situation related to the follow up of the investigation process by the AGO being described above is inseparable with the HRC Law that divides the function to carry out preliminary investigation and investigation on two different bodies; the NHRC and the AGO. The consequence of such division is that the result of the investigation of the NHRC might always be questioned by the AGO. The provision of Article 20 [13] of the HRC Law that states:

In case the investigator consider that the result of preliminary investigation as referred in section [14] insufficient, the investigator return the result of the preliminary investigation to the preliminary investigator with an instruction to complete and within thirty (30) days since the reception of the result of the preliminary investigation, the preliminary investigator should complete the result.

As seen above, Article 20 [15] stipulates that the AGO might consider whether a report submitted by the NHRC is sufficient. In relation to this, the elucidation of Article 20 [16] states that "insufficient" means that not enough to fulfilling the elements of gross violations of human rights to be followed up with an investigation. However, the word "insufficient" has been interpreted differently by the AGO in the case of the 1965-1966 events by questioning the material as well as formal requirements in the investigation of the NHRC.

With the authority to assess the completeness of a report submitted by the NHRC being discussed above, the AGO could potentially hamper the establishment process of an ad hoc court by continuously returning the report to the NHRC. The provision of Article 20 [17] of the HRC Law which determines that an investigation would have to be carried out by the AGO once it consider that the report being submitted by the NHRC is complete could always be used a reason to delay the investigation simply by stating the opposite. This is the phenomenon that is seen in the case of the rejection of the report of the NHRC by the AGO. The AGO has always refused to follow up the recommendation on the ground that the report of the NHRC is still need improvements. Since the status of the report is still considered incomplete, an investigation as a follow up of the preliminary investigation could not be carried out.

Suppose the AGO consider that the report of the NHRC regarding the case of the 1965-1966 events is complete and that no revision is necessary, the AGO will follow up the report with an investigation. Pursuant to Article 21 [18] the authority to conduct an investigation for gross violations of human rights would be in the hands of the AGO although in performing this duty it may appoint ad hoc investigators from governmental institutions and or the society. The HRC Law gives 90 days for the AGO to finish the investigation and pursuant to Article 22 [19] an extension of 90 days could be granted by the Head of the Human Rights Court in which the case is examined. Should the investigation still could not be finished, another 60 days of extension could be granted to the AGO, again by the Head of the Human Rights Court.

However, provisions regarding extension for an investigation of a case to be examined by a Human Rights Court above could be problematic if it would be applied to cases of past human rights violations. The remaining question is that if the AGO needed extra time to finish its investigation on the case of the 1965-1966 events then to whom it should ask an extension? This is because unlike in an investigation carried out for a case to be examined by a regular human rights court, an ad hoc court to examine the case of the 1965-1966 would had not been established when the investigation of the AGO is conducted.

3. CONCLUSION

There is basically no legal impediment to resolve various violent actions in the 1965-1966 events through court mechanism as expected by the society especially the victims and or their families. Individuals and or military commanders being mentioned in the report of the NHRC as responsible for crimes against humanity in the events might be brought to justice to account for their deeds. The institution that would examine the case would be an ad hoc human rights court to be set up through a legal instrument in the form of Presidential decree. The investigation as well as prosecution of people allegedly involved and or complicit in the events by applying the provisions of the HRC Law to the case would not be contradictory to the constitution. Instead, such settlement is in line with the mandate of the 1945 Constitution as well as the obligation that should be admired by Indonesia as a civilized country.

A recommendation from the People's Representative Council to the President to issue a Presidential decree to establish an ad hoc human rights court is a *conditio sine qua non* for an ad hoc human rights court for the

1965-1966 events can be established. Since the recommendation can only be made by the Council after considering the result of investigation by the AGO, it is important for the latter to follow up the preliminary investigation which has been carried out by the NHRC with an investigation. As long as the AGO does not follow the recommendation of the NHRC, the People's Representative Council would never have a reason to recommend the President to establish an ad hoc human rights tribunal for the events. In relation to this issue, the formulation of Article 23 [20] of the HRC Law which divides the function to carry out a preliminary investigation and investigation as a contributing factor that causing delay in the process of investigation by the AGO.

Last but not least, still there is a possibility that the AGO would refuse to investigate on the ground that the ad hoc human rights for the case of the 1965-1966 events is not yet established. Although this reason, at least until the writing of this dissertation, is not being stated by the AGO yet, the refusal of the AGO to carry out an investigation on the alleged human rights violation in the 1965-1966 events can still possibly happen.

REFERENCE

[1] Kegley CW and Raymond GA, *The Global Future: A Brief Introduction to World Politics* (3rd edn, Wadsworth 2010)
[2] *Ibid*
[3] *Ibid*
[4] Komisi Nasional Hak Asasi Manusia, *Ringkasan Eksekutif Pelanggaran Hak Asasi Manusia Berat* (Komnasham RI 2014)
[5] *Ibid*
[6] *Ibid*
[7] *Ibid*
[8] *Ibid*
[9] *Ibid*
[10] *Ibid*
[11] *Ibid*
[12] *Ibid*
[13] Kuper J, *International Law Concerning Child Civilian in Armed Conflict* (Oxford University Press 1997)
[14] *Ibid*
[15] *Ibid*
[16] *Ibid*
[17] *Ibid*
[18] Kegley CW and Raymond GA, op. cit.
[19] Komnasham RI 2014, op.cit.
[20] *Ibid*

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Fair Competition through Price Agreement between Businessmen Associated in ASEAN Economic Community

Azizah*[1]

*ISLAMIC UNIVERSITY OGAN KOMERING ILIR, KAYUAGUNG, SOUTH SUMATERA, INDONESIA

Abstract
Fair competition is one of the keys to succeed for the fair market economic system. Through price fixing agreements between businessmen in the ASEAN countries, it will cause the market equilibrium with no ignoring the interests of businessmen and the people. Based on these issues, then the legal problems are namely: 1) how is the health competition between businessmen in the ASEAN economic community, 2) how should the setting of price agreements between businessmen in the ASEAN economic community. This paper is a study of hermeneutics using normative approach, philosophy of law, sociology of law, comparative law and political law. The study concluded that: 1) the attempts setting of fair competition between businesses in the ASEAN economic community that need to be applied in the form of agreement, 2) in its development, price fixing agreements between businessmen that are members of the ASEAN economic community still balance with the interests of the public as consumers.

Keywords: Unfair Competition, Price Agreements, Businessmen Communities, the AEC

1. INTRODUCTION

Economic activity is an activity that cannot be separated from human life; even economic activity has[1] existed since humans know the culture. Economic activity is an important pillar in the dynamics of human life, because human beings have always had a good life needs a primary, secondary or tertiary, and the more complex human needs will also increase the economic activities [1].

In economic activity, is inseparable from the competition between businesses, where it is a requirement for the implementation of market economy, especially in an era of global demand free market economic system, so that competition among businesses will be more open. Sometimes the competition is fair competition, but can also occur to entrepreneurs in order to gain maximum profit doing unfair competition [2].

Fair competition is one of the keys to success for the fair market economic system. In the implementation, it is manifested in two ways, namely, through the enforcement of competition law and through competition policy conducive to the development of economic sectors [3].

AEC is formed as an economic area where one of the pillars of his can create high competition, which requires a policy that includes competition policy and consumer protection, so as to create economic growth balanced integrated into the global economy, with no prejudice to the interests of businesses and consumer protection.

For comparison, in Indonesia there are examples of cases pricing agreements. For example: Decision on case number 08 / KPP-1/2005; South Jakarta District Court Decision number 01 / KPPU2006 / PN. Jak-Sel; Supreme Court Decision No. 03 K / KPPU / 2006 on Sugar Import Services Delivery Survey, that PT. Surveyor Indonesia (Persero) and PT Superintending Company of Indonesia (Persero) has been agreed to or entered into a Memorandum of Understanding to form KSO for the verification or technical surveillance of import of sugar. verdict Case Number 10 / KPPU-L / 2005 concerning Cartel Trading Salt to North Sumatra; the Commission's Decision No. 25 / KPPU-L / 2009; Central Jakarta District Court Decision No. 02 / KPPU / 2010 / PN-Jak-Pus; Supreme Court Decision No. 613K / PDT.SUS / 2011 Pricing Fuel Surcharge.

Noting from the normative side, this paper focuses its efforts on setting healthy competition between businesses in the ASEAN economic community and the need for regulation that balances price fixing agreements between businessmen standing with the public as consumers.

2. LITERATURE REVIEW

Rawls argues that the free market is basically in line with the same freedom and equality of opportunities fair. Furthermore, Rawls's theory of distributive justice stated that the market gives freedom and equal opportunities for all economic actors. Freedom is a value and one of the most important rights possessed by humans, and is secured by a system of market economy. The market provides an opportunity for self-determination of human beings is free, market economy guarantees the same freedoms and opportunities fair [4].

[1]Corresponding Author. No Telp: -, *E-Mail Address:* aazizah895@gmail.com

The monopoly is the enemy of the free market, inhibiting the expansion of markets and hinders rapid economic growth [5]. Monopoly has a negative effect, among other things: first, the monopoly will lead to higher prices for consumers and make consumers worse circumstances. Second, the monopoly is the enemy of good management, because it avoids the competition. Thus, Smith would like to emphasize that the free market is a mechanism to restore the balance between the interests of producers and consumers, between the interests of traders or businessmen and ordinary people. Balance referred to Smith in this case is the balance of the market [6]. Market equilibrium in this case would be an advantage in a perfectly competitive market.

If in a situation arises agreements and conditions that are not balanced, then these imbalances should be examined from three aspects of the agreement, namely the act, the charge contents of the agreement and its implementation. In a re-negotiation process, the stages that precede the choice of solutions to achieve a balance back, can be recognized on the use of the principle of balance. Renegotiation will emerge as the first choice compared with the use of mediation in the courts. The purpose of the negotiations is to give a concrete content of the new charge against the treaty. In this case the parties have the option to restore the balance by declaring that the legal act invalid, altered and adjusted, or canceled to partially or wholly [7].

In the perspective of the agreement, the balance is also given emphasis on the bargaining position of the parties must be balanced. In other words, lack of balance positions of the parties, will result in these agreements become unbalanced and allowing political intervention to redress the balance. The balance of bargaining power in question, relating to the determination of the rights and obligations of each party [8].

Either the principles of contract law who live in the awareness of Indonesian law (the spirit of mutual cooperation, kinship, pillars, improper, inappropriate and barrel) as reflected in customary law and the principles of modern law (principle of consensus, the principle of freedom contract) as found in the development of contract law in the Netherlands, which is reflected in legislation, legal practice and jurisprudence, which argued in one principle, namely the principle of balance. Additionally, he examines the principle of the binding force that agreement relied on factors idea and real. Idea factor is based on Pancasila and the real factors emerge from positive law and legal practice in Indonesia [9]. Therefore, the un-equilibrium in competition law in particular price fixing agreement, there will be inflicted businesses, payload contents of the agreement, as well as the implementation of the agreement. The position of the parties in question, it will also cause un-equilibrium.

This paper interpret, analyze healthy competition through price fixing agreements are carried out by operators who are members of the AEC, the form of price fixing agreement within the law remains guided so that there is a balance between businesses and consumer protection.

3. RESEARCH METHOD

The consistency with the issues studied, the legal research is classified in the study of hermeneutics. Hermeneutic approach to the problem of legal research refers to the understanding of the layers of legal science, which consists of a layer of law philosophy of law, legal theory and jurisprudence, which includes practical legal science and other legal sciences [10].

Some approaches that are relevant for use in an attempt to understand and explain more fully the legal issues to be studied further in the study of hermeneutics, namely: a normative approach, the comparative approach legal, sociological approach, the philosophical approach of law and political law. The results of the analysis of legal materials normative-prescriptive, then it is interacted with the fact societal empirical-descriptive (have) analyzed using the methods of hermeneutics law (legal hermeneutic method) are presented in the form of qualitative descriptive, which is a procedure for qualitative analyzes that produce descriptive data-analytical, that "what is stated by the informant in written or verbal and real behavior, studied as a whole". So that would be obtained conclusions [11].

4. RESULT AND DISCUSSION.

4.1 The issue of Unfair Business Competition Comparison

The Sherman Act was passed in 1890 the United States Congress as a reaction against the business practices castrating competition (anti-competitive practices). Enactment of the Sherman Act is to address the widespread cartelization (cartelization) and monopolization (monopolization) in the American economy. The provisions of the Criminal Law, Employers who abuse their monopolistic position, then the company may be forced to break up into several units, and entrepreneurs are liable to imprisonment [12]. Things are arranged in the Sherman Act may be expressed as follows: The Sherman Act Provides:

a. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.
b. The Act also provides: “Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony”.

c. The Act put responsibility upon government, attorneys and district courts to pursue and investigate trusts, companies, and organizations suspected of violating the Act.

Based on the Article 2 of the Sherman Antitrust Act above, note that:

"in evaluating this claim in regard to price fixing charges, several responses must be considered. No price is intrinsically reasonable, except by reference to its determination in a competitive market. Price serve to allocate resources and production and price fixing distorts this market process. Courts are unable to measure marginal cost on which a theoretically reasonable price would be based. Price reasonableness is an ever changing concept responsive to market and cost conditions. What is reasonable one day may not be the next. To prevent abuse of the reasonableness defense, then, courts would have to supervise business pricing daily. Not only does this seem undesirable from the business manager's view point, but it is also beyond judicial competence. Finally, price fixing agreements concentrate market power and impair the competitive process. Unless the arrangement fulfills on overriding need, its effect is to destroy independent values worth preserving [13].

Assessment of Competition Law in Asia, Japan certainly cannot be abandoned. Countries which have economic power in the world number two has Law Competition since 1947, called the Japan Anti Monopoly Act (JAMA / AMA). The existence of AMA is meant as a way to restore the condition of the Japanese economy after the defeat in World War II. In principle, the AMA has three (3) basic prohibitions, namely: (1) Private monopolization. (2) Cartel or Unreasonable Restraint of Trade (URT). (3) Unfair Trade Practices (UTP).

These three fundamental prohibitions has become a framework for understanding the AMA, resulting in the implementation, the parties will be easier to use as a reference [14]. There are important changes, including the Fair Trade Commission (FTC), which had rarely apply criminal sanctions for violations of the cartel, so that companies that perform cartels often repeat his actions back for sanctions that are not meaningful. The first change: applying administrative sanctions such as fines, second: the alleged violations were carried out by using the approach of market structure, when a company has a market share of 50% or if more than two companies by 75%, then the penalty can be the solution for the company into a company with a market share small. Third: FTC Japan introduced a price reporting system; Japanese FTC can do a prohibition on cartel agreements along the cartel could be proven directly or indirectly [15]. Therefore, the Japanese FTC has set firmly on the analysis of market structure approach that can be used to resolve cases alleged to have violated the monopoly.

4.2 The Issue of Fair Competition.

AEC is currently not yet have a union role on which the arrangement of business competition. Later on, however, AEC should have a union role of business competition, such as the EU. But of course it takes time union role and commitment together to accommodate and adapt competition rule already in force in the respective ASEAN countries. Healthy competition is not enough just national, but also regional (ASEAN). Encouraging economic policy open competitive without the supervision of the activities of their own business competition means letting open markets and open up great opportunities monopoly. Besides, there is no special commission in ASEAN which oversees competition between businesses to prevent unfair competition and monopoly. Almost all ASEAN countries already have specific rules on competition law. But in terms of content and institutional structures is different relative. Its structure as an independent agency is like Indonesia and Malaysia. (Journal competes Edition 42 in 2013).

4.3 The Development Pricing Agreement which Equilibrium Principle

Balanced as the state of burden sharing on both sides are in equilibrium. In the context of the balance, understood as a state of silence or the alignment of the various styles that worked and did not even dominate the other, or because no one other master elements [16].

The principles of balance can be reviewed of the ethical and juridical. As an ethical principle, the principle of equilibrium roots in the balance of customary law, which is recognition of the equality of the individual standing with the community in a common life. [17] The balance of spiritual in character or soul, refers to the understanding of the absence of turbulence psychiatric anymore, and has achieved a rapprochement or harmony between the desire and ability of man consciously embodied in an action that result really desired or targeted only pursued an improvement in the lives This means that the word "equal" on the one hand is limited by the will (which is raised by a favorable judgment or circumstances). On the other hand, the belief in the ability functions to realize the desired outcome or result. Within the constraints of the two sides (the will and confidence of the parties), it was reached a balance in a positive sense. As a juridical principle, the equilibrium principle underlying agreement between the parties, can be raised attachment juridical decent or fair. The search for these criteria should begin by sorting out facts or conditions that gave rise to legal bond will be assessed and tested regarding the juridical attachment based on the equilibrium principal [18]. Therefore, the equilibrium in question has a holding capacity of the entrepreneurs and the position of the public as consumers.

5. CONCLUSION

a. The efforts setting of fair competition between businesses in the ASEAN economic community need to be applied in the form of the agreement.
b. In its development, price fixing agreements between businesses that are members of the ASEAN economic community remains to balance the interests of society as consumer. The other side, indispensable union rule that applies to businesses within the scope of the ASEAN countries, so that businesses will feel protected by law.

REFERENCE

[1] Azizah, (2014). *The Equilibrium Principle in Competition Law: The Meaning and Functioning of the Equilibrium Principle in The Decisions of The Supervisory Commission Competition about Pricing Agreements Based Approach to Market Structure, Ph.D Thesis,* Sriwijaya University, South Sumatera, p. 6.
[2] Azizah, (2014). *The Equilibrium Principle in Competition Law: The Meaning and Functioning of The Equilibrium Principle in The Decisions of The Supervisory Commission Competition about Pricing Agreements Based Approach to Market Structure, Ph.D Thesis,* Sriwijaya University, South Sumatera, p. 6-7.
[3] Hermansyah, (2009), *Principles of Competition Law in Indonesia*, Kencana Prenada Media Group, Jakarta, p. 15.
[4] Rawls, John, (2006), *The Justice Theory,* Pustaka Pelajar, Yogyakarta, p. 13.
[5] Dua, Mikhael, (2008), *The Economics Philosophy,* Kanisius, Yogyakarta, p. 53.
[6] Dua, Mikhael, (2008), *The Economics Philosophy,* Kanisius, Yogyakarta, p. 53.
[7] Budiono, Herlien, (2006), *The Equilibrium Principle for Contract Law Indonesia: Based Contract Law Principles Wigati Indonesia,* Citra Aditya Bakti, Bandung, p. 509.
[8] Hernoko, Agus Yudha, (2011), *Contract Law: Principle of Proportionality in Commercial Contracts*, Kencana Prenada Media Group, Jakarta, p. 78-80.
[9] Budiono, Herlien, (2006), *The Equilibrium Principle for Contract Law Indonesia: Based Contract Law Principles Wigati Indonesia,* Citra Aditya Bakti, Bandung, p. 1-14.
[10] Hadjon, Philipus M. and Tatiek Sri Djatmiati, (2005), *Legal Argumentation/Legal Opinion): Steps of Legal Problem Solving dan Legal Opinion Drafting*, Gadjah Mada University Press, Yogyakarta, p. 10.
[11] Soekanto, Soerjono and Sri Mamudji, (2001), *Normative Legal Research a Brief Overview*, PT. RajaGrafindo Persada, Jakarta, p. 250.
[12] Rainer Adam, Samuel Siahaan and A.M. Tri Anggraini, (2006), *Competition and the Market Economy in Indonesia*, Friedrich Naumann Stiftung, Indonesia, p. 46.
[13] Gellhorn, Ernest and William E. Kovacic, (1994), A*ntitrust and Economics in an nutshell.* West Publishing Co., USA. p. 179.
[14] Kiptiyah, Sholihatun, (2008), *How to Set the cartel in the State Sakura: A Knowledge, Journal of Competition*, 12th Edition, KPPU-RI, hlm. 18.
[15] Adi Nugroho, Susanti, (2012), *Competition Law in Indonesia: In Theory and Practice and Application of Law*, Kencana Prenada Media Group, Jakarta, p. 77-78.
[16] Van Dale, (1982), *Groot Woordenboek der Nederlandse Taal, Tiende Druk*, Utrecht/Antwerpen, p. 651.
[17] Budiono, Herlien, op. cit. p. 304-307.
[18] *Ibid*

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The Use of Freies Ermessen (Discretion) in the Activity of Central Government and Local Government

Aldri Frinaldi*[1]

*PADANG STATE UNIVERSITY, WEST SUMATRA, INDONESIA

Abstract
Nowadays Indonesia has a tendency to apply the legal system administratively, which dominate in every activities include public administration must be on rules written. There are conditions in making of legislations that runs low, or their conditions had not been anticipated in certain condition. Besides, there is the dynamic development of social life runs rapidly that requires immediate treatment by government or local government. In this circumstance, it requires the autonomy of the government to act in dealing with issues that happened. The use of freies ermessen can be shown to emerge certain innovation from the bureaucracy reformation for public interest. The form of this freies ermessen can be shown in some forms such as circular letter, guidance, and announcement, abstract and general letter of decision as well as in a form f regulation which is called pseudo-wet giving.

Keyword: Discretion, Government, Local Government, Regulation Administration

1. INTRODUCTION

Government and local government in performing the task and it function constantly experiencing many things. So, it is often required to take immediate action for the public interest. Because, with the principle, countries must realizing the welfare state (*negara kesejahteraan*) which gave rise to the obligation of governments and to be actively involved in the control of economic and social life of society.

By growing and expanding the duties and authority and responsibility of the government, it is often pose a dilemma and contradiction situation caused by the government action based on law [1]. Meanwhile, sometimes the life of society and state which handle by the apparatus and government officer has been no regulation in written law. If any government action and local government based on law or waiting for the law which is made by the current situation, it is necessary to have a freedom to act and tackle the problems that may occur. In the other hand, if there is no available facilities and space then of course there will be stagnation because public administration certainly hampered with this situation and waiting for the availability of the laws and regulation.

For guarantee and provide a legal basis to local government (bestuur hendeling) which was done as a lawful act (legitimate and justified), it is accountable and responsible, then any government action must be based on a fair legal, dignified and democratic [2].

For more in depth, this article discussed the problem about how the used of freies ermessen (discretion) by the authorized party in the local government activities. This article also was done by using aspects of the legislation of Republic Indonesia No. 30 year 2014 about government administration.

2. FREIES ERMESSEN CONCEPT (DISCRETION)

Discretion is a freedom of action or taking decision according to the point of view of the officer itself [3]. Freies ermessen (discretion) is an inherent freedom for the government or state administration [4]. Discretion is a freedom which is given by some entity or administration officer in the framework of governance in running bestuur zorg, because of the freedom that is owned by the state administration able to give optimal public services for the economic social life [5].

Whereas in the point of view of Islamic law, ijtihad is the same with discretion or freies ermessen, the article of the excavation process o law committed by the mujtahid in deciding the law is not only in the provisions of Al Quran or As Sunnah, but rather look for the situation and condition in creating justice and benefit for the people. Discretion or ijtihad are equal because the decisions and legal law based on their own initiative [6].

3. THE USE AND THE LIMIT OF FREIES ERMESSEN (DISCRETION) IN THE GOVERNMENT ACTIVITIES AND LOCAL GOVERNMENT.

Organization of government activities and local government must be active to create people welfare. This effort makes government and local government interfere the field of socio-economic life of society (public service). So that, public administrator may not refuse in making decision or acting under the pretext of the absence of legislation (rechtsvacuum)

[1] Corresponding Author. E-mail adress: --

A suggestion is its development along with the dynamics of community life that is increasingly complex and fast which finally face deadlocked issues. The principle of legality that is rigid and tends to bind the government seems difficult especially in anticipation the new development that has not been regulating explicitly [7].

The action of the officer in using written discretion can be permission, dispensation, attribute, delegation and mandate. Other form of the discretion is an unwritten action. [8] Propose a free decision is not depend on written decision. This decision left to the circumstances and condition that may occur. In the current situation according to his job, an officer must be issued an urgent policy without having written. One of them can be direct orders or direct order through electronics for example by using calls.

Next, related to the responsibility of the discretion [9], any use of authority by government officer, there is a responsibility, this case is the same with deen bevoegdheid zonder verantwooordenlijkheid (no authority without accountability. If there are irregularities for each authority whether from civil organization or local government organization, they must bear the legal responsibility according to who will be the suspect. This responsibility can be job responsibilities or personal responsibilities.

Therefore, there needs to be clear and strict restrictions for every authority in order to prevent an abusing. Government officer in local government who takes an action must think about the consideration of appropriate response based on the authority. Thus the use of authority is made for public interest and has clear benefits. For example, the central government and local government in this case asked residents of a volcano to leave a particular location temporarily with the consideration of the volcano could erupt because of the active volcano. We need quick action to avoid the community living around the volcano and trying to move the community to the save radius or kinds of relocation conducted by the central government and local government.

For the example, police officer has the rights to open and close the traffic in current situation. This action is used to reduce the traffic jam. Another example, Regional Work Units (*Satuan Kerja Perangkat Daerah*) which has a scope in the fields of transportation, installing the signs traffic 'prohibited parking' it is being done with a helpful consideration for public services especially for highway.

Another that, the government has rights to organize, collect taxes, enforce the law, impose sanction etc. with a purpose to achieve the statehood that must followed by the legal protection of the people of various government actions that may lead to a certain loss. This responsibility is able to give space for the emergence of community participation in the democratic life.

In line with the division of authority in the laws no 23 year 2014 local governments which also contain an obligation for the head of the area under the provisions of the applicable law will require innovation in performing the duty to improve public confidence and satisfaction. Then in this law also shortly describe the licensing arrangement given by the provincial government and the county or city government to promote growth and accelerated development for the welfare requires the creativity of local leaders in innovation.

Any form of innovation to be done in good faith using a procedure in accordance with the provisions of applicable law. Hence each of these actions should be accountable. With the principle of accountability for all actions taken by officials or the government apparatus, it is an effort for a balance in government. The positions of central government and local government with citizens in achieving goals of social justice and execution of government function.

Although government officer and local government officer were given the freedom, they are not allowed to be done with the aim of abuses. The holders of discretion authority must use judgment in making decisions to act not only based on their conscience, but also based on rational assessment and proportional so that these action can be measured his criteria. Therefore, the measures taken can be justified according to the laws.

With this existing principle of accountability for all acts committed by the officer, it is an effort to create balances of government position and local government with the society in reaching the purpose of social justice and the function of government.

Although the government officer and local government give the freedom, it is not justified to do with the purpose of abuse. The officers who hold discretion must use judgment in making decisions to act; it is also based on rational judgment and proportional. So the actions taken could be accounted in accordance with the provisions of applicable law.

Freies Ermessen which owned by the local government, can be refer to the article 18, paragraph 6 which shown the local government have the rights to set local regulations and other regulations to implement regional autonomy. The phrase of 'regulations' give a chance to make regulations under local regulations in order to interpret its own regarding the settlement of problems in running a government.

Next, in laws also explain about government administration, also described things that related to anyone who can use freies ermessen (discretion). In laws, discretion can only be done by authorized government. The use of discretion aims to: a. launched a government organization; b. to fulfill the emptiness of law; c. provides legal certainty; d. overcomes the stagnation of government for the benefit and the public interest. The discretion of government officer consists of: a. decision making based on laws; b. decision making because laws not regulate it; c. decision making if the law is incomplete or not clear; d. decision making of the government stagnation for

the wider interest. The officer who used discretion must fulfill requirement: a. accordance with the purpose of discretion; b. do not against the law; c. accordance with AUPB; d. based on an objective reason; e. do not create conflict of interest; and f. carried out in good faith.

These laws regulate law arising from the use of discretion, for the example, if the discretion exceeds the limit or do not based on applicable provision, the use of discretion become invalid. The use of discretion can be confound the authority if it is inappropriate with the purpose or against with general principle of good governance (AUPB). Through this case, the use of discretion may be canceled. If the discretion issued by the officer who has not authorized, the use of discretion will be invalid.

Therefore, the central officer and local government officer include district head must understand and notice the general principle of good governance. It is intended to avoid the abuse of authority or irregularities that could harm the state.

Another that, administrative law action in using this discretion may also be filed as a law enforcement efforts if there are those who feel aggrieved with propose the decision which is made by Indonesian Administration Court, in UU No. 5 year 1986 and UU No. 9 year 2004 about Indonesian Administration Court.

This law states clearly the procedure and the limited along with the responsibility of the use freies ermessen (discretion). To avoid irregularities or misuse, discretion also describe about the process and responsibilities in doing innovation for development purposes. The significant growing development, one of them can be reach by the grown innovation of the central officer or local government officer.

4. CONCLUSION

With the authority in the form of freies ermessen, the apparatus in the context of administration have a wider capability to get an action based on law in order to serve the public interest. Freies ermessen (discretion) not allowed against with the general principle and the other ban as mention in UU Republic Indonesia No. 30 year 2014 about government administration and other rules. Any actions taken by the authority must be accountable morally based on applicable law.

REFERENCES

[1] S.F.Marbun.1997. Peradilan Administrasi Negara dan Upaya Administratif di Indonesia, Cetakan Pertama, Yogyakarta; Liberty.
[2] Winahyu, Erwiningsih. 2006. Peranan Hukum Dalam Pertanggungjawaban Perbuatan Pemerintahan (Bestuurshandeling) (Suatu kajian dalam Kebijakan Pembangunan Hukum). Jurnal Ilmu Hukum, 9 (2).
[3] S. Prajudi Atmosudirjo. 1994.Hukum Administrasi Negara. Edisi Revisi. Ghalia Indonesia, Jakarta.
[4] Ridwan HR. 2011. Hukum Administrasi Negara. Edisi Revisi. Jakarta : Rajawali Pers.
[5] Laica Marzuki. 1996. Peraturan Kebijaksanaan (Beleidsregel) Hakikat serta Julista Mustamu, Diskresidan Tanggungjawab serta Fungsinya Selaku Sarana Hukum Pemerintahan, Makalah pada Penataran Nasional Hukum Acara dan Hukum Administrasi Negara, Fakultas Hukum Universitas Hasanudin, Ujung Pandang 26-31 Agustus 1996.
[6] Aristoni. 2014. Tindakan Hukum Diskresi dalam Konsep Welfare State Perspektif Hukum Administrasi Negara dan Hukum Islam. Jurnal Penelitian, 8 (2), 221-246. Unpublished
[7] Fathudin. 2015. Tindak Pidana Korupsi (Dugaan Penyalahgunaan Wewenang) Pejabat Publik (Perspektif Undang-Undang Nomor 30 Tahun 2014 Tentang Administrasi Pemerintahan). Jurnal Cita Hukum. Vol. II No. 1 Juni 2015; 115-132. journal.uinjkt.ac.id/index.php/citahukum/article/download/1844/1741. unpublished
[8] Muchamad Arif Agung Nugroho.2012. Perintah Pejabat Tata Usaha Negara Melalui Telepon dan Akibat Hukumnya.Jurnal Ilmiah Ilmu Hukum QISTI. Vol. 6 No. 1 Januari 2012. unpublished
[9] Julista Mustamu. 2011. Diskresi Dan Tanggungjawab Administrasi Pemerintahan. Jurnal Sasi Vol. 17 No. 2 Bulan April-Juni 2011; 1-9. Unpublished

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Development of Legal System in Indonesia that based on the Value Pancasila

Aristo Evandy A.Barlian[*1]

UNIVERSITI KEBANGSAAN MALAYSIA, SELANGOR, MALAYSIA

Abstract

Indonesia is a plural or pluralistic society, which includes a variety of awareness both personal and group. In the development of the legal system in Indonesia, which became an important part of cultural and community awareness is very influential in the development. Indonesia is a culture and awareness of the law is no single or uniform, although in principle there are various similarities in the pluralistic society. Existing equation should be used to formulate a legal union, although many different cultures in Indonesia. Pancasila is the philosophical basis for the formation of the unitary state of Indonesia, therefore, for the realization of national unity in enacting a national law in Indonesia must be based on Pancasila and the 1945 Constitution as the supreme norm. The objective of this study will clarify that the law enacted at this time still does not reflect the values of Pancasila and impressed liberalism, as the law is currently drafted and enforced on the basis of normative thinking less backed up to a statement of the case and the plural society , namely empirical thinking. Methodology This study will explain the values of Pancasila and culture in the development of legislation that affects the development of the other, which can be reviewed comprehensively in this paper. Thus for the sake of the welfare of the nation and public awareness of the law, the results of this study will explain the need for the development of legal systems that systemic and continuously keeping with the character of the Indonesian nation, namely the development of legislation based on the Pancasila.

Keywords: Development Act, the Public Awareness of Development, Value Pancasila.

1. INTRODUCTION

Indonesia currently has the ideology of Pancasila, the Indonesian legal system still uses the Dutch culture that tends individual and contrary to the principles of Pancasila, which brings together all the differences that exist in Indonesia. Principles which tend to individualism makes many injustices occur and differences of opinion on the legal system in Indonesia, it nor even many cultural liberalism and capitalism others that the adoption of legislation in Indonesia, it is clearly undesirable for Indonesia's plural because not corresponds with the ambition to create unity and eliminate differences in accordance with Pancasila.

Indonesian law that is inconsistent with the principles of Pancasila will lead to conflict and injustice on the territory of Indonesia's plural. In creating multi-dimensional development system and the development of all the elements that exist in Indonesia, should start from the development of its legal system, when the development of the legal system in accordance with the ideals of the nation and the state philosophy, the development of other terms will be run in accordance with the ideals of the nation.

2. METHOD

This study will use the methodology of normative study which will examine the system of legal development in Indonesia, The methodology of this study will explain the values of Pancasila and culture in the development of legislation that affects the development of the other, which can be studied comprehensively in the paper this work. The analysis of material obtained in this study using descriptive analysis. Materials obtained will be analyzed in depth to describe the object of study. This study showed the development of the legal system in Indonesia, the development of the legal system in Indonesia include the development and construction of the system that is in accordance with the principles of Pancasila.

3. RESULT AND DISCUSSION

3.1 The Development of Law System in Indonesia.

Development in the field of law is one of the areas of development is very important, it is because the law is viewed from its function not only works as a bodyguard social against various forms of deviant behavior that is not productive in the development process, but the law also have ability to make social change which is a function that can be played by the law in perform various changes or social engineering. In addition to these two functions, the development of the law is also aimed at the business of giving legal protection to the people in order to create a sense of peace, comfort, security and public order of society, where all three of these conditions

[1] Corresponding Author. Phone Number : +6017-3549741, +62897-5775771 *E-mail Address*: aristoevandy26@yahoo.com

is a prerequisite for involvement and public participation actively in the development process based on the values of human rights.

The third function of the law, in the context of the development course instructed how to make all aspects and components in the country aimed at accelerating the development of its own success. The development policy of the current law enforcement efforts are focused on the rule of law-based and uphold human rights in order to achieve prosperity, peace and order of society, with of course stick to the principle of democracy through various stages of development of the law.

The development has two sides in changing things for the better; one hand serves to improve the quality of human life, while on the other hand can reduce the quality of human life. Provide development contribution significant changes positive or negative meaning. It is therefore necessary in order to determine its development pipeline design development, including the calculation of the risks and how to mitigate the risks of development. Development of the law, must be viewed holistically as a conscious effort, systematic, and continuing to build a society, nation, and state that the more developed, prosperous, secure, and peaceful in the frames and foundation law is fair.

The development of law in Indonesia is closely related to the manufacturing process of the law or your statutory regulations for Indonesia to use the legal system of common law that is written law, the development of law in Indonesia should develop legal writing allowing normative values that live in the community for drafted in such a way and then enforced by the public authority to be the norm of public (law making process), then the process of implementation and enforcement (law enforcement) that allows the law to be fostered and developed into life and works very functional (living law in action), whether the process of construction and development of legal awareness of society that allows the law and the legal system built obtain social support in the broad sense (legal awareness). In other words, the development of laws that systemically addressing:

a. The material laws and procedures,
b. Institutions, including officials involved in it, mechanism of legal institutions, as well as the supporting infrastructures necessary for it, and related,
c. Awareness of the law and legal culture of society which is the subject of the law is concerned.

The quality of the new law can be known after the law was implemented. Bad law will lead to bad consequences and laws that will produce a good effect. The law is a normative science (das sollen) and science reality (das sein) if the content of legal norms do not correspond to reality then there will not be called to justice. The rules of life in society that sometimes conflict with national law is enacted by the government, so the justice community sometimes conflict with the rule of law is enacted government. In a report to the United Nations congress VI / 1980 law said the further switch of feelings and value of life in society, the greater the distrust of the legal system of the country. So the reform of the law should clearly see the values that live in the community such as customs, local wisdom and culture of the people who believed in Indonesia, because the law regardless of culture will be far from the ideals of the expected development.

Many of his mafia, corruption and crime within the state proves that the legal system in the country is still not effective in ensnare various crimes, laws have always defended the strong oppress the weak, the law is only made for personal use and not for public use, destruction various elements of the country in terms of economy, education, health, social, cultural and others attributed to the weak development of the legal system. Hence the need for the development of the legal system appropriate, effective and sustainable as was characteristic of the nation, namely Indonesia Pancasila system.

3.2 Pancasila as The Indonesian Development Philosophy.

The legal system of Indonesia is the national legal system of Pancasila For all the law is in Indonesia should be based on Pancasila. As a basic of Pancasila Indonesia as well as the source of all sources of law in Indonesia, Pancasila means that the position is placed at the highest position in law (Grundnorm) in Indonesia, although since Indonesia's independence is still used by the Dutch law, Pancasila position in this case the guidelines and directions for each nation Indonesia in formulating and improving laws law in Indonesia. See that the law is constantly changing and keeping up with society, so any changes that occur will always be tailored to the aspirations of the Indonesian people who refer to the Pancasila.

In order to be fair and prosperous society that became the foundation of Indonesia's Pancasila, hence the need for the rule of law and order in the society and the state set to achieve that goal. Suitable conditions and mold the course all the rules that exist in Indonesia should be based also on Pancasila. But in fact the creation and practice of law in Indonesia is of course a lot of ups and downs caused that in the era of globalization at the present time many new problems that arise in the homeland, especially the issue of corruption, nepotism, and the inclusion of culture from outside affecting on cultural changes in society. These changes will have an impact on new life in society which of course brings new effects in terms of the law in Indonesia. The law in Indonesia also continues to change to fit in with the existing problems. In fact, Indonesia is still using a lot of Dutch

inheritance law because Indonesia was a Dutch colony and legal use of this turkey difficult to coordinate with Indonesian culture "Mutual Cooperation (*Gotong Royong)*".

Dutch Law has been used since Indonesia's independence so far that it becomes difficult to be customized to the culture of Indonesia in accordance with the values of Pancasila, whether the number of foreign cultures that go in Indonesia has eroded the culture, systems, customs and values of law in Indonesia or not in line with the objectives of the Pancasila. Development of law in Indonesia will be better if the law heritage turkeys tend to be liberal and individualistic which can be converted into law in accordance with the culture and values of the society that is enshrined in the Pancasila. Pancasila as the foundation of law in Indonesia can be protective in the face of new problems that arise both from western culture and the problems of adaptation of new laws from abroad. Pancasila as the foundation of law in Indonesia can be protective in the face of new problems that arise both from western culture and the problems of adaptation of new laws from abroad. Therefore Pancasila should remain the foundation of the Indonesian nation in the face of new problems and the problems of the law.

Pancasila has the basic values that illustrate the people of Indonesia in the conduct of national life. The values contained in Pancasila are very influential on people's lives and integrity of the nation, values such as:

a. Belief in the almighty God, means every nation Indonesia has and given the presence of God in their lives. The act must be based on religion.
b. Humanitarian civilized, means every nation Indonesia upholds humanity and not discriminate against any race or group.
c. Unity of Indonesia means every nation upholds the principle of unity in spite of many differences but importance country must come first.
d. Democracy guided by wisdom and discretion in consultation and representation, means the nation of Indonesia recognizes leadership democratically elected by the people in the national interest.
e. Social justice for all Indonesian people, means the people of Indonesia to provide fair treatment for all citizens without distinction of any background people of Indonesia.

These five principles underlie the development of law in the country of Indonesia. These precepts can be summed up into three principles of Pancasila, namely the divine, the human and social values. In the divine that the law is there to be drafted by the justice of the Supreme Lord, in the humanity that the law is enacted must uphold human rights in accordance with the souls of humanity, and the community recognizes that in legislative drafting and its implementation must see community values that exist in every culture in Indonesia. Therefore the development or reform of the law in Indonesia cannot be separated from the values contained in Pancasila as the law does not have the 3 value is not the national law of Indonesia.

In addition Pancasila, Indonesia also holds Trisakti principles of their ancestors in the development of the nation. Trisakti principle is used in carrying out the development and reform of the law relating to economic, social, cultural as well as new items are present in Indonesia. Trisakti has values such as :

a. Sovereign in politics, means that Indonesia should have a role in the international world.
b. Economic independently, means Indonesia can design and develop a pattern of economic cooperation with the countries of the industry with confidence and mutual benefit.
c. Personality and culture, means the Indonesian nation must have a good attitude and moral development and has personally honored.

The principle of Trisakti Indonesia is expected to compete with developed countries and developing countries from all fields. Trisakti this concept remains to be done if the public awareness and the quality is still bad legislation with liberalism and capitalism as inconsistent with the purposes of God in Pancasila, the result will appear as corrupt mafia, drug dealers and terrorists who would harm the country's development. Pancasila as the development of legal thought is necessarily a good reference from all areas of political, economic, social, and culture in Indonesia.

Pancasila in political development should enhance human dignity by placing the supreme power is of the people, by the people and for the people in the Indonesian political system in accordance with Pancasila as the thought is a democratic political system. Thus, need to be developed based on the concept of citizenship in the precepts of Pancasila IV, either on moral foundations of the principles of Pancasila. Then, in succession, the Indonesian political system developed on the moral divinity, humanity, unity, democracy and justice. Moral is a cornerstone of citizens and maintenance of a decent political order and moral behavior for policy development in Indonesia.

Pancasila is the thought of economic development with the economic system of moral values of Pancasila. In particular, the economic system shall be based on the principles of God's moral and humanitarian Please I Pancasila on Sila II that produces humane economic system. Economic system respects human nature, both as individual beings, social, personal as well as mortal beings gods. Economic system based on Pancasila different with liberalism and capitalism economic system that only benefits individuals without attention to the other man. The economic system in contrast to the economic system in the capitalist system and liberal does not think about the welfare of other people. Pancasila departed from the human as a whole and man as the subject.

Therefore, the economic system should be with the system and economic development with the goal of overall well-being of the family based on human values. Economic development must refrain from forms of free competition; monopoly will lead to oppression, injustice, suffering, and misery citizens.

Pancasila as the thought of economic development refers Please IV Pancasila, while the economic development of Indonesia's economic system, namely the Economic Development Democracy or Democratic Development Economics or Economic System Pancasila which the economy for the greater prosperity of the people with justice for the citizens of Indonesia where political economy provides opportunities , support, and community economic development, including cooperatives, small businesses, and medium-sized enterprises as a key pillar of economic development. Therefore, the economy is organized as a joint effort based on the principle of family that is able to develop concrete programs of local government in the era of regional autonomy that is more independent and better able to create a fair and equitable regional development. Thus, the economy will be able to empower local people / citizens in economically, making it more just, democratic, transparency, and participation. In the economy, the role of protecting the public by enacting legislation that the valued of Pancasila.

Pancasila is the thought of social and cultural development of humanity because it is based on the fact Pancasila and its own human nature. It is the moral Humanity of Man must be able to develop itself from the homo become human. According to please the unity of Indonesia, social and cultural development is developed on the basis of respect for social values and cultures vary across the archipelago towards the achievement of a sense of unity as a nation. There needs to be recognition of and respect for cultural and social life of various groups of the Indonesian people so that they feel valued and accepted as citizens. Thus, social and cultural development does not create a gap, envy, discrimination, and social injustice.

New thinking in national development in Indonesia are thinking of sustainable development, which is in the planning and implementation should be held with respect for the rights of the communities involved in the state's right to regulate national life and individual human rights sustainable development, which is in the planning and implementation should be maintained respect the rights of cultural communities involved, as well as the right of states to regulate the rights of national and individual balanced (section 2 Pancasila).

Cultural rights community can be as an intermediary / mediator / arbitrator between the state and individual rights. Such thinking can overcome the centralized planning system and society that ignores the plurality and diversity of Indonesian culture. Thus, the era of regional autonomy will not lead to autonomous tribes, but it will combine the development of local / regional to regional development and national development (section 4 Pancasila), so that it will ensure the balance and fairness (section 5 Pancasila) in order to strengthen national unity to be able to uphold the sovereignty and territorial integrity of the Republic of Indonesia (section 3 Pancasila). It can be said that every value that is in the Pancasila relate to each other hand and the ideology of development policy across the multidimensional system in Indonesia.

4. RESEARCH FINDINGS

4.1 Development of Indonesian Law that Systemic and Continuously.

In the development of legal basis of the government is a government of Indonesia to protect society (social defense) and the public welfare (social welfare) which is an effort of national goals. Achieving national goals (social welfare and social defense), via conduction state sovereignty of the people and democracy based on Pancasila and the Constitution of 1945. The implementation of the state implemented through national development in all aspects of national life [1]. In the end, the national development effort is to achieve quality of life for a just and prosperous society. Achieving quality of life for a just and prosperous society undertaken by the Indonesian government through national sustainable development / sustainability (sustainable development) including the development of national legislation by the Indonesian government that is programmed in the Long Term Development Plan in Indonesia.

Development of national legislation in Indonesia is part of the national development system aimed at creating a national goal to protect all the people and the nation, and the entire homeland of Indonesia, promote the general welfare, educating the nation and participate in world order based on freedom, lasting peace, and social justice through the legal system of the country. Program development of the law should be a priority because of changes to the Constitution of the Republic of Indonesia Year 1945 has broad implications The constitutional and fundamental in the system that need to be followed by changes in legislation / regulation of the legal system [2].

There is a systemic relationship between national development with the development of national legal systems in the achievement of national goals, namely the welfare and protection of the global community and to participate in the establishment of world order. Track achievements cannot be separated-miss with the ideals of the Declaration of Independence and the Constitution of 1945. The development of the national legal system which aims at realizing the cause of social welfare and protection of the public, given meaning by the Government as the legal system that adheres to the principle that fixed nationality concept recognize diversity or

diversity of laws such as customary law, Islamic law, the law of another religion, law and contemporary western law, as well as formulating various nodes into a single functional between the various rules are available through consolidation to certain laws that do, either partially, or in the form of codification [3]. Thus the development of the national legal system should pay attention to the values of the habit of living in society.

Law in Indonesia is playing an important role in the development process. Regional differences make each area only accentuate their system and do not realize the importance of sustainable development of the unity of the Pancasila ideology which is very important for the country. At the moment the law Indonesia has yet to show the development of the law in line with expectations and a sense of justice, because the law at the moment still do not really favor the interests of the people, many laws are made only to protect the interests individual and group, and the law does not implement the values that live in a society like the Pancasila, because Pancasila is the philosophical reasons that exist in Indonesian society [4].

Efforts to implement the values of life in society, is the duty of every public awareness in order to realize the country's laws in a fair and democratic development of the legal system of the country to establish legislation aspiration, on justice and truth serve interests of the people and the nation in the frame of the Unitary Republic of Indonesia. Development for Systemic law is development that is done thoroughly and reviewed continuously following the changing times. In business development and legal reform, the replacement of the legislation should be done for legal reasons colonial legacy is not in accordance with the development of society either does not contain certainty, justice, truth, and do not pay attention to the values of the habit of living in public in accordance with Pancasila [5].

Reform of the legal system is a joint development of the legal system that is no longer compatible with the nation state. The law is part / sub-system of the legal system consisting of "legal substance", "legal structure" and "legal culture". Thus if applicable to the renewal and development of the legal system must be built through reform "the substance of the law" reform "legal structure" and renewal "legal culture". Development of the reform law (Legal substance) consists of all the rules of law in Indonesia. Reform of the system is done to adjust the biological values of life in society and the values of Pancasila in Indonesian law is still not perfect and still thought liberal. Development and reform of the legal structure (Legal structure) including legal reforms related to the institutional, administrative, and management of institutions of law enforcement (investigation, prosecution, courts, implementing crime), including coordination between law enforcement the national, regional, and international.

Cultural development and reform of the culture law in Indonesia has an important role and is very important in law enforcement in Indonesia because the law is very much determined by the legal culture in the form of values, views and attitudes of the people concerned. If the culture of law is ignored, there will be failure of the modern legal system and cause a variety of new crimes. In the framework of the enforcement of criminal law in Indonesia is needed to increase the quality of the role of legal culture through cultural and behavioral professionals the positions of law enforcement, education and the construction of individual behavior and social area not only to the post of law enforcement Law but all elements of society and government.

The development of law in Indonesia is not only reform of laws and reform the structure of the law, but enforcement of the law should be enforced by legal culture is explored, made of the values contained in Pancasila awareness and ideals of law (rechtidee), moral ideals, freedom of the individual and the nation, humanity, peace, political ideals and the destination country and reflects the value of life in society and the values contained in Pancasila.

With the role of the legal culture that is rooted from ancestral values cherished and appreciated by the people of Indonesia, then the law is enforced as a means of safeguarding the interests of society and the means of effective community supervision of all aspects. In the end, the active participation of society in the process of law enforcement is the key of success of development in the field of law and development in other fields, whether the active participation of the community can be achieved if people realize exactly know their rights and obligations in the existing law.

5. CONCLUSION

The legal system of heritage turkeys and foreign legal systems is not in line with the many people in Indonesia, when the Pancasila is not done properly, it will hinder the development of all areas in Indonesia. Very difficult to insert the idea of development in the legal system of development goals Indonesian law therefore there must be reform of the law in accordance with the customs of the people of Indonesia Development of Indonesian law is the priority of development in all its aspects in Indonesia because it must be done in a systematic, comprehensive, and sustainable in terms of material, structure, and culture according to the concept of Pancasila values in order to realize the objectives of the development of the Indonesian nation that continues to improve.

REFERENCES

[1] GBHN Indonesia, Tap MPR RI Nomor IV/MPR/1999, Tahun 1999-2004.
[2] *Ibid*
[3] *Ibid*
[4] *Ibid*
[5] *Ibid*

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The Perception of Religious Leaders in Maintaining the Harmonization in Aceh: an Analysis of *Siyasah Syar'iyyah*

Fauzi*[1]

*UNIVERSITAS ISLAM NEGERI (UIN) AR-RANIRY BANDA ACEH, BANDA ACEH, INDONESIA

Abstract

Aceh currently experiences dynamic situations within inter-and intra-religious adherents. Aceh, however, has proved itself throughout the history as the reliable place for any religious adherents. In order to restore the Aceh condition to its normal state, the cooperation between the government and the religious leaders will be among the important influencing factors. In this study, the role of the leaders regards to the harmonization of the religious followers in Aceh. Findings showed that, first, the condition of Aceh was still perceived as harmonious, although with a little dynamic. Second, the conflicts occurred among religions in Aceh were generally caused by the external factors, although a small portion of the economic and socio-cultural aspects also had some influence. And, third, the religious leaders have not worked optimally yet to sustain the harmonization in Aceh. Its need the leaders because, first, they have more knowledge on the condition and aspiration of their followers; second, they can share information on the followers' real condition for the governor's consideration in the new regulations, programs, and so forth; and third, they possess a sacred authority that can be used to calm any conflict.

Keywords: Perception, Religious Leaders, Harmonization, Siyasah Syar'iyyah

1. INTRODUCTION

Aceh Singkil experienced unrest on Tuesday, October 13, 2015. Although the unrest had subsided, the security managed to control the condition with much difficulty. The angry mass moved from Simpang Kanan, and then the church in Suka Makmur Villlage, Gunung Meriah, was burnt. According to some local paper, the unrest happened because the local community was not satisfied with the agreement of the local government, *ulema* (Islamic scholar) figures and non-govermental organizations in terms of the established church.

Some conflicts also happened within intra-religious adherents. In Aceh, the *ahl al-sunnah wal jam'ah* (Aswaja) and Wahabi dispute has enhanced the conflict cases in Aceh. As a result, Baiturrahman, the historical and provincial mosque in Aceh was also targeted. Serambi Indonesia noted that at least there were three incidents related to the management of Masjid Raya Baiturrahman. First, on June 19, 2015, the followers (*jama'ah)* from Aceh Islamic Scholars Association, State of Aceh Islamic Scholars Council, and Islamic Defenders Front came to take charge of the management of Baiturrahman, of which the changes included the use of cane during sermon and the calling of prayer (*adhan)* twice in Friday prayer. Second, on September 10, 2015, the *dayah ulema* and *santri* (students) claimed to be of the Aswaja made long march in Banda Aceh and forced the governor to sign the 13 petitions. Third, on October 1, 2015, the vice governor of Aceh signed the 12 points proposed by a mass who called themselves Aswaja devotees.

The dispute, according to al-Chaidar, was due to Aceh having a conservative attitude of which the phenomenon known as religion re-conservation, while on the other hand, modernism penetrated massively in Aceh. He said that the wahabism or salafism was rejected during the Baiturrahman case in Aceh. This was a kind of escapism which views that take-over of the mosque is based on pragmatic rituals and clashes within a civilization.

In 2013, as many as 20 people took by force the pulpit (*mimbar*) of Masjid Jama'atul Thullab in Arongan, Bireuen. This group entered the mosque and asked the people to stop the Friday prayer. While the request was ignored by the people, the group went on to take over the pulpit and carried it out the mosque despite many trying to block their effort. Even so, the sermon kept continued, and the preacher (*khatib*) sat on the plastic chair instead. Sources mentioned that the issue occurred because the group did not want the Friday congregated prayer to be held in there since another mosque was available around 700 meters from the disputed mosque, located in Balee Village.

In this case, however, religious leaders have a great and important role to guide their religious adherents (ummah). They are the only figures whom their *ummah* are willing to listen to although various interests may still be present to affect the *ummah* condition. Today in Indonesia, such conflicts have been spread throughout the nation. Optimizing the function of religious leaders in order to keep calm any religion-based conflict is considered a huge step for a better Indonesia. Therefore, with a diversity of religions namely, Islam, Catholic, Protestant, Hindu, Budhha, and Confucianism, Indonesia needs a system to prevent similar conditions to occur.

[1] Corresponding Author. Phone Number:-, *E-mail address*: fauzisaleh09@gmail.com.

In the basis of *siyasah syar'iyah,* the government should intervene in order to stabilize the situation and condition of its society. Religion as a part of the nation's identity is a sensitive issue, and thus, the religious leaders play a huge role in cases of religion-based conflict. Religious leaders can be defined as persons who are trusted by their *ummah* to lead the religious institutions and the community and to keep the sacred religious symbols. In the history of Islam, 'Umar ibn Khattab made sure any religious adherents could implement their own religious teachings in their life. 'Umar ibn Khattab was very strict in implementing the freedom principle in his country. This was because Prophet Muhammad p.b.u.h (peace be upon him) had taught the early Moslems how to appreciate each other, even to the non-believers.

The rationale of the significance of the religious leaders' presence can be understood from when the leaders are able to spread the wisdom and the peace; the *ummah* will also do as what their leaders have done. If the leaders are not involved in building the harmony among religions, the peaceful condition will not happen within the society. Religion is inseparably attached to politics as well as often put at the forefront in mobilizing people to enrich support the politician to take over resourceful regions or even states [2]. Involvement of faith-based actors in conflict resolution process is not a new phenomenon. Faith-based actors including clergy (e.g., the pope, priests, imams, rabbis), religiously inspired leaders (e.g., Gandhi, Martin Luther King Jr.), and religiously motivated movements and organizations have always played a role in resolving conflicts [3].

How is the role of religious leaders to prevent and solve conflict? In the perspective of *siyasah syar'iyyah*, the leaders are authorized to do or not to do things in order to make sure *al-maslahah* can be applied. They should consider making the regulation which responds to the condition and situation. Based on above discussions, the present paper wanted to figure out how the current condition of religious adherents' harmony in Aceh was, what the factors leading to disharmony among the adherents in Aceh were, and how the role of the religious leaders in order to keep the harmony among the adherents in Aceh was.

2. SIYASAH SYAR'IYYAH

Siyasah syar'iyyah has several definitions. First, a policy used for public interest. Policy makers must ensure that what they regulate refers exactly to the needs of the society. Second, the policy taken among the possible alternatives is the one closer to *jalb al-maslahah* and *daf' al-mafsadah*. Third, *siyasah* is within the scope of *ijtihadi* which deals with any public affair-related issue and with no explicit *dalil* (statement) from the Quran and the Hadith, thusit is referred to the policy of the *imam* (leader). Therefore, in terms of *siyasah syar'iyyah*, the *ulema* utilize the methods of *qiyas* and *maslahah al-mursalah* [4].

Siyasah al-Syar'iyyah refers to the *haqiqat* (essence) of something. First, it is related to managing and regulating the human life. Second, the management and regulation should be executed by *uli al-amr*. Third, the aim is to create the *al-maslahah* (benefits) and avoid the *madharrah* (harms). And fourth, it is not contradicted with the *shariah* (Islamic law) [5].

Maslahah means any benefit to the public which not only relates to matters not regulated by the precise texts of law, but also to the matters subjected to such regulation; so much so that it is legitimate to make it prevail over precise rules or over conflicting or contradicting regulations related to five major interests (religion, physical integrity, descendance, patrimony, and mental faculty) [6].The meaning of *siyasah syar'iyyah* is the policy of the leader to keep *al-maslahah* among human beings or to apply the law of Allah, and to keep morals in domestic affairs as far as it does not contradict with the *nash*, explicitly or implicitly [7].

In the case of *siyasah*, it should be led by the one who has *amanah* (trust) to perform his obligation toward his *ummah*, and realize their daily needs [8]. The points that should be paid attention in *al-siyasah al-syari'iyyah* include the government should give freedom for rights, freedom in choice of the religion, as well as freedom in thought and economy for any individual or community. The point here is there is no force in embracing any religion or opinion, or taking off the property for the other without one's permission [9].

Siyasah Syar'iyyah gives the authority to the leader to stipulate the bill or regulation which contains the *al-maslahah*. According to al-Mawardi, there were at least 20 points which were related to *siyasah syar'iyyah,* of which he called as *wilayah*. Among the important *wilayah* were *wilayat al-qada'* (authority to stipulate the judge who decides the case in the court if some disputes happened), *wilayah al-niqabah* (authority to do census on the population), *fi ma takhtatlif al-ahkam min al-bilad* (authority to stipulate the authorized district), and *wilayat fi ahkam al-jara'im* (authority to stipulate the law of either *hudud* (regulated punishment stipulated in the Quran and Hadits) or *ta'ziri* (punishment authorized to the leaders), and others [10].

The leaders have the authority to stipulate the law based on *firasat* (sensitivity of thought), *amarat* (the symbols and characters), and *qara'in* (the hidden indications). Therefore, *siyasah syar'iyyah* focuses more on *fiqh dusturi* (comprehension of thelaw)*, mali* (financial)*, dawli* (internationa), and *harbi* with theory of *qiyas, maslahah, sad al-dhari'ah, al-'urf, and istihsan*, also *kuliyyah fiqhiyyah*. The basic in *imamah* (leadership) and *wilayah* (authority) was *al-syura* (discussion) and *ridha* (pleasure). The principle was mentioned in Qs. Al-Syura: 38 as well as Qs. Ali 'Imran: 159. This principle was also found in the Hadiths among them: Hadith on inviting to make consultation with Prophet p.b.u.h (al-Bukhari, no. 4178). In terms of *hadith ifk* (gossip spread

by the hypocrite on 'Aisyah r.a), the Messenger p.b.u.h invited people to consult with him (al-Bukhari, no. 4757). The Messenger p.b.u.h also invited people to the consultation on the day of Badr War [11].

The important points that the leaders are obliged to implement include, first, moderate attitude, called as *wasata.* This is referred to the capacity to understand the context, priority scales in the collective life, natural law as a given from God, contribution to each other, and understanding the religion text comprehensively [12]. Second, open for a dialog. Third, tolerance that refers to awareness of variety and diversity, function of religion, no force on faith, and humbling and cooperating in the world affairs. And, forth, understand the religion [13].

The function of the rulers in Islam as stated in the Quran is: "Those (Muslim leaders) who, if We give them power in the land, (they) enjoin *Iqamat al –Salah* (i.e to perform the five compulsory congregational *Salah* (prayers)), pay *Zakah* (alms), and they enjoin *al-ma'ruf* (i.e. Islamic Monotheism and all that Islam orders one to do), and forbid *al-munkar* (i.e. disbelief, polytheism and all that Islam has forbidden) (i.e. they make the Qur'an the law of their country in all spheres of life.) and with Allah rests the end of (all) matters (of creatures)".

The verse shows that the rulers have to develop those virtues which Allah expects him to have and to be enriched by them, and to enjoin *ma'ruf* and forbid *munkar.* Therefore, from the Islamic perspective, the leader of a state is governed by a sense of trust, whereby he is responsible to those by whom he is appointed and accountable before Allah for whatever is entrusted to him. This sphere of mutual responsibility may generate a harmonious interaction, a feeling of social solidarity, love and help, and an obligation to respect and maintain the supremacy of goodness and justice and guarantee the protection of the lawful rights of all members of society [14].

The public role of Islam creates an opportunity for movements to situate in the already accepted narrative of religion as a social tool. For example, religious movement in Egypt has positioned Isla as a solution to the problem of government corruption.

God's message has been preserved and made known publicly through centuries; and no human being can add to it or detract from it. The ideology of Islam is not totalitarian. It does not dictate details that dominate every moment or make an imperative for any human thought and move, nor does it claim to provide a definitive prescription in advance for every specific problem that may emerge at any time in the future [15].

Siyasah syariah can be divided to at least four terms. First, *siyasah dusturiyyah,* which is related to *siyasah tasyri'iyyah* (installing the law), *siyasah qadhaiyyah* (judgment), and *siyasah idariyyah* (administration). This *siyasah* is related to how to form the government and also the right of society individually and collectively and any relationship between the leader and the public. Second, *siyasah dawliyyah,* which is related to the relationship among the nations, and Moslems and non-Moslems in a country, etc. Third, *siyasah maliyyah,* which is related to the rights of poor, distribution of welfare, and banking. And, forth, *siyasah harbiyyah,* which is related to the aspects of war and peace (Suyuthi, 1997). The ruler in Islam, according to 'Ali Jarisyah as quoted Moh. Fauzi, [16], should focus on four pillars: *aqidah, akhlaq, syiar*, and law practicing. These should be implemented well as the foundation in Islam.

One of the important theories in *siyasah syar'iyyah* is *hisbah*. *Hisbah* is to command the good things and forbid the bad ones as Allah mentions in Qs. Ali 'Imran/3: 104. *Hisbah* is related to three issues: to command someone to do the things related to Allah's rights, to the good things related to human rights, and to the things related to the rights between Allah's and human beings' [17].

3. METHOD and TECHNIQUES of DATA COLLECTION

The method applied in this study is distributing the questionnaire to the respondents, including the religious leaders. The number of the respondents was 76 persons from Islam, Catholic, Protestant, Hindu, and Buddha. Data were taken in April 2016. Some of the leaders were interviewed as well as some members of Interreligious Harmony Forum (IHF) of Aceh Province.

The techniques of data collection included questionnaire, interview, and Focus Group Discussion. Here, the researcher distributed the questionnaire to each respondent. The questionnaire consisted of 13 questions dividing into three research questions. The questionnaire used the Likert scale with the following format: score of 5 for strongly agree, 4 for agree, 3 for neither agree nor disagree, 2 for disagree, and 1 for strongly disagree. The interview was conducted with several leaders in Aceh; among others were religious leaders, academicians and the chief of Religion Comparison.

4. DATA ANALYSIS

4.1 The current condition of religious adherents' harmony in Aceh

Harmonization within religious followers is the principle for the construction and development of Aceh. For this item, about 69.7 percent of the respondents answered strongly agree while the rest 15.7 percent agreed. Here, it is indicated that the religious leaders were aware of the importance of the harmonization among religious adherents. This finding was supported by the statement from Priest Nokon (2016), the leader of Protestant church. He said there was no serious problem in terms of living harmoniously in Aceh, more

especially in Sabang, a municipality in Aceh. Moreover, there is a good interaction which has been built here including in Syukuran (expressing gratitude to God) Party. This shows that Aceh has developed a good relationship and interaction among diverse religion followers.

Harmonization is one of the significant factors to build the better province as well as the nation. In the view of *siyasah syar'iyyah*, harmonization is closer to *maslahah* (public interest) that needs to be built for the public prosperity. One cannot live better if one lives in a conflict area, no matter what type of conflict is. The religion-induced conflict is usually more sensitive and can potentially enhance and affect other cases.

Again, the protection which the state must grant to the citizens is not limited to the tangible factors for their existence, such as the person and possession, but must be extended to their dignity and honor, and the privacy of their homes as well [18]. The state has a responsibility to protect its citizens from any bothering so they can live peacefully. The state stabilization can be measured with the condition in the province, in this context is Aceh.

Generally, the harmonization of the religious adherents in Aceh is quite stable even though with a little dynamic. It is known from the responses of the religious leaders on the condition of current Aceh. They agreed that Aceh was generally considered stable, although there were some dynamic relationships happened. However, such small cases could not make Aceh become a religion-based conflict area. As many as 68.5%of the religious leaders agreed that Aceh is a harmonious place for their followers while 15.7% of them strongly agreed. About only 1.1 %disagreed with the statement. To conclude, the religious leaders perceived Aceh as a stable province for inter- and intra- religious adherents.

In Islamic history, one of the factors to upgrade the condition of Madinah, which was called as *civilized town,* was stability. The Messenger p.b.u.h made several agreements with the different tribes and religious adherents in order to keep and sustain the peaceful condition. The issue that should be propagated here is to upgrade the understanding among the religious adherents inter- and intra- community. Here, the role of the government is very important in conditioning the area to be better and harmonious.

Siyasah syar'iyyah emphasizes the leaders to take important actions so that the society can live peacefully and implement their own beliefs without any bothering. Aceh has a great potential to build and develop the society to be better and prosperous. It, however, needs a synergic relationship especially among the followers of different religions. In this respect, the government has an obligation to make sure that the society is able to perform their worship (ibadah) according to their beliefs and faiths as mentioned in *Undang-undang Dasar* (The Basic Bill of Indonesia) 1945 Article 29.

The religious leaders play a very important role. Professor A. Hamid Sarong (20160, deputy chief of IHF Aceh Province said the religious leaders should trenghten their followers on what the teachings of their religion were, and not mixed with other understanding. If the *ummah* well understand the teachings of their religions, they will be able to learn how to properly live individually as well as collectively.

Idaman Simbering (2016), one of the Protestant leaders, said the participation of religious leaders started from the low level for conditioning the harmonization. The participation was initiated by themselves, not because of the invitation or support from the government. The stability of Aceh is not only for making the place peaceful for any worship but also for enhancing the economic value. It is because the investors will be attracted to invest here once the situation is conducive. The investment will need a large number of workers, and thus, this situation will enhance the economic prosperity in Aceh.

The harmonization in Aceh can be established because each religion teaches its *ummah* on the issue. This statement is used to show how far the function of the teachings of each religion regarding the harmonious life. The respondents agreed with the statement that the religions teach the *ummah* for harmonization. It is shown from a figure of 44.9% agreed and 30.3%strongly agreed. On the other hand, 5.6% were neutral, 2.2% chose disagree, and 1.1% gave no answer. A. Hamid Sarong (2016) also said that the understanding of the *ummah* about their religions has led to living more harmoniously.

The leaders' perspective had rejected the idea that religion was the source of conflict. The leaders of religions admitted that it was hard to teach people how to interact with each other. Even so, Islam still teaches its *ummah* how to appreciate each other. In this case, Islam introduces three types of brotherhood: *islamiyyah* (internal relationship), *insaniyyah* (external relationship), and *'alamiyyah* (relationship for all creatures). The leaders argued that when conflict occurred, we could not blame any individual, however, there were causes behind the conflict such as economic, political, or social issues.

As the *locus classic* us of pluralism, Indonesia is also a place where a variety of socio-culture develops, as well as where social conflicts emerge. During 1990s, social conflicts happened in the form of atrocities, separatism, demonstration and many others, which were caused by two factors: the polarization of social economy and the lack of comprehensive understanding of the religion [19].

The religious leaders in Aceh have an important role to build harmonization among the people. For this statement, the respondents agreed about 37.1% and 48.3% strongly agreed. It can be seen that the leaders were aware of their position in the society. The government and the society as a whole really need their contribution to build a harmonious *ummah*.

As previously discussed, the leaders should make a rule to keep stabilized the society. The rule could be based on sensitivity of thought, the symbols and characters, and the hidden indications. In Aceh context, the leaders of religions could show the hidden indications as a consideration in the Aceh regional by laws. The leaders have first hand information and issues, which can be a good source to find the root problem of the *ummah*. They become the middle persons to transfer the aspirations of their *ummah* to the government to be used as a consideration in planning the short-, medium-, and long-term programs.

4.2 The factors leading to disharmony among the adherents in Aceh

The unstable economic condition among the newcomers and the locals who have different religion backgrounds may be one of the disharmonized causes. The leaders saw the economic factor was not too dominant to disrupt the harmonious life in Aceh. However, 30.3% of them agreed and 12.4% strongly agreed that economy contributed in the emergence of the conflict. Meanwhile, 24.7% of them disagreed that the economic was the disharmonized factor. The rest of 18.0% were neither agree nor disagree with the statement.

As previously stated, there are two important factors in building the country: *syura* (consultation) and *ridha* (pleasure). Both are intangible. The current Aceh condition should be "healed" by the *ruhiyyah* (spiritual) approach, and not just by the material aspects. The Acehnese economy after the tsunami was better. Yet, it was not able to stop the conflict in Aceh i.e., the social and religion-induced cases. Therefore, the government should use the persuasive method in order to build c*ivilized society,* one of which is through the religious approach.

According to *siyasah syar'iyyah,* the religious leaders are the protector and helper whom Allah has granted them a trust as the vicegerent, authority agent, but not the owner [20]. These leaders should be more responsive to the problems happened within the *ummah*. In this regard, the members of the IHF should also be more effective. Yet, in fact, 80 % of the forum could not work in the regency. The IHF would only be considered by the regent once the conflict occurred. This was because the members of the IHF were not very active and only gave the consideration to the regent and the governor to prevent any possible problems. Nevertheless, data such as mapping of conflict or mapping of harmonization should be hold by the members of the IHF [21].

The importance of social organization and any religious institution was to help the government to build the harmonization in Aceh. The informal institutions are sometimes more effective in forming a civilized society and a good relationship with each other. Here, the government should invite all the elements of the society and organizations to support the harmonization among the *ummah* in Aceh.

Another point of disharmony is the difference of cultures and customs. This was what the religious leaders predominantly perceived. About 52% of the leaders agreed with the statement and 12% strongly agreed. It is known that culture and customs could impact the stabilization of the society. About 19.1 % of the leaders disagreed with this statement. In conclusion, the culture should be preserved and should make the society understand one another. Since the motto of Indonesia is called "Bhinneka Tunggal Ika"--unity in diversity, the government should ensure that the more the cultures are, the richer they contribute to the country.

Culture is an important identity and an effective approach to solve any problem. How about different cultures? When Moslems first came to Aceh, they experienced a strong local tradition. One of the ways to introduce Islam to the locals at the time was by having a spiritual (Sufism) trend. Then, a long, continuous interaction and acculturation occurred between them. At that point, the locals were not only Islamized but the Islamic religion was also indigenized. Naturally, the degree and extent of symbiotic assimilation varied from place to place and from one community to another. This tradition continues up to the present and affects the way Islam has been accepted and practiced by the people [22].

Furthermore, the local conditions and ethnic traditions were in the process of assimilation and co-optation with the incoming Islamic religious and legal doctrines. In Aceh, for example, Islamic law had been the law of the country and customary traditions became an integral part of it. However in some other parts, this process of interaction had created tension or even conflict. Some conflicts had been accelerated by power and political interests or outside interference [23].

However, what disrupted the harmonization the most among the adherents of religions was the external factors. According the leaders, the external factors played an important role to disharmonize the society. The external factors here referred to the things which were not expected by the society to happen. About 47.4% of the respondents agreed with this statement, and 2.1% strongly agreed. However, about 10.5% of them disagreed and 1.3% strongly disagreed. Meanwhile, 19.7% of them neither agreed nor disagreed.

Each individual wanted to do something to bother and make the other uncomfortable. To this, the leaders have been aware of such situation and thus let the *ummah* be aware of it, too. By doing so, it is expected that the conflict among the people could be prevented and avoided.

In regard to that, the government should anticipate such cases so that any conflict could be avoided in the future. Conflict is inevitably the cause of destruction to the human life in short and long time period. The society should understand that the development of the state can be well run if the harmonious condition is maintained.

4.3 The role of religious leaders in forming the harmonization in Aceh

The role of religious leaders was not very optimal in Aceh for the harmonization to realize within the religious adherents. On the question whether or not the religious leaders spent more time for the harmonization among the religious adherents in Aceh, 56.8% of the respondents said they did not. Meanwhile, 13.5% strongly agreed with this item. In this regard, when the conflicts occurred inter- or intra- religion, the leaders took no strategic position to solve the problem.

Aceh has been very harmonized and ready to live together with other different faiths. This was supported by the activity that taught the Acehnese how to live side by side with others as what has been done by Religious Affairs Office and Kesbangpol as well as the IHF. If the government did not provide with the relevant activities, it would meana disharmonious life within the society.

However, the religious leaders have actively participated to solve conflict of religions in Aceh according to 18.9% of the respondents, and 1.4% strongly supported that the leaders have made more concrete actions for the conflict while 2.7% of them had no answer for this.

A number of the horizontal conflicts at several places in Aceh had little contribution of the religious leaders. This statement supported the previous discussion. There were conflicts occurred in Aceh several times which were religion-based conflicts. The emergence of horizontal conflicts according to respondents was because the leaders of religions have not taken a serious action to handle the issues. The respondents agreed with this statement at about 57.9% and 13.2% strongly agreed. Yet, 15.8% of them disagreed and 3.9% strongly disagreed.

In the Quran, the importance of advice and reminding the others is explicitly stated: to remind *tanfa'* (gave the benefit) anyone to believe. Therefore, advice is a crucial point. Moreover, the leaders have to sustain a good condition of the *ummah*. The *nass* asks people to work hard in order to make the people aware of how huge the importance of harmonious life for them is.

In *siyasah syar'iyyah*, the leaders have an obligation to *amar 'maruf nahy munkar* (invite to the good things and avoid the bad things). What they have done today is precisely good. *Ma'ruf* is the normal things in human life and does not contradict the good habits. Something should be done here is to normalize the condition in Aceh. Historians have claimed that Aceh was a very conducive place to live during the days of *Sultanate*. Many religions lived well. According to the chief of the IHF Aceh, Ziauddin, a proof that Aceh accommodated multicultural living is Gampong Peunayong. Peunayong in previous days was the village where many Chinese lived and among them were Christians, Protestants, Hindus, as well as Buddhists. Besides, churches and monasteriesare ever standing from long time ago.

In this case, the leaders can have some administration to give more attention to public affairs (i.e., harmonization) and when such a regulation is made, the society will need to obey. The role of the government is to sustain the condition and to keep harmonization through *Qanun* which ensures that each religious adherent has the right to perform any worship based on their respective faiths. To date, the government does not invite the religious leaders for the harmonization issue in Indonesia. If the government invites all religious leaders for this issue, the government should also be present and cooperate with the religious leaders because after all the government has a share of responsibility in this.

Till now, the local government – according the religious leaders- has not given serious concern to them in order to build the harmonization among the religious adherents. About 50% of the respondents agreed with the statement and 21.3% strongly agreed. Meanwhile, 13.3% disagreed and 1.3 strongly disagreed. The rest in doubt reached 13.3 %.

The religious leaders are needed by the local government to be listened to their opinion in sustaining the harmonization. According to the leaders, their opinions are very important for the government to accommodate the harmonization among the *ummah*. 69.7% of them strongly agreed with the idea and 30.3% agreed.

What happened in Singkil showed that the contribution of the government and the religious leaders was necessary for preventing the conflict. Here, it is clear the government or any related institution was not ready to face such a problem. The disharmony appeared was because the adherents were less appreciative towards each other or, in other words, they were not ready to learn that there were many schools of thoughts in one religion. As a result, the dispute over the authority of the mosque, the cane issue, and the pulpit case had happened.

According to *Siyasah al-Syar'iyyah*, the leaders have a high position to handle their *ummah*. They also have to be held responsible for the problem caused by their *ummah*'s negligence. Therefore, the government should call all leaders of religions to take care and pay attention to the problems and cases experienced by the *ummah*. It is relevant to the hadith in whichthe Prophet p.b.u.h said that "each of you is a leader and each leader takes responsibility of what he/she leads".

For the minority, the duties of the religious leader are: to teach, to lead, and to protect. These are also the responsibilities of the religion leaders. As for the problem in Aceh which involved the minority, especially the Christians, there is no enough information as of now. So, it can be perceived that they still do not support the

rule. The government has a responsibility to socialize the rule to all levels of the society such as *Qanun* or other regulations. Only by doing so, the Protestant leaders and all adherents can understand and support the harmonization.

5. CONCLUSION

The harmonization among religions in Aceh has been built since the time of the Aceh Sultanate. Over time, a number of dynamic changes happened in Aceh due to various problems, i.e., social interaction, economy, and others. In this regard, one of the important aspects to maintain the harmony is the presence of the religious leaders, who are considered to have vast understanding on their respective religions and the characteristics of their followers.

In the leaders' view, Aceh today is still in harmony and the relationship inter- and intra- religious followers is also good, as well as the relationship with the government. However, the disharmony among the adherents in Aceh was dominantly caused by the external factors although the internal aspects such as economy, culture, and politics were also involved. Further, it is found that the work of the religious leaders is not optimal yet in maintaining the harmonization among religious adherents in Aceh. The only influential role they did was giving advice to the society to live in harmony with one another.

REFERENCES

[1] A. Djaluli. (2003). *Fiqh Siyasah.* Jakarta: Kencana Prenada Media Group.
[2] Andrew, Bakaki. (n.y). *The Role of Religion in Leadership for Conflict Resolution dan Peace-building,* Sri Lanka: Sri Lanka International Buddhist Academy
[3] Bercovitch, Jacob. and S. Ayse Kadayifci-Orellana. (2009) "Religion and Mediation: Role of Faith-Based Actors in International Conflict Resolution", *International Negotiation.* Leiden: Koninklijke Brill, p. 3
[4] A. Djaluli. (2003). *Op.Cit.*
[5] *Ibid*
[6] *Ibid*
[7] Qasim, Abdurrahman Abdul Aziz. (n.y). *al-Islam wa Taqnin al-Ahkam.* Riyad: Jami'ah Riyad.
[8] al-Matiri, Hakim. (2013). *Usul al-Syari'iyyah fi al-Ahkam al-Siyasah.* Kuwait: Jami'ah al-Kuwait.
[9] al-Syahud, Ali ibn Naif. (2012). *Al-Muhadhdhab fi fiqh al-Siyasah al-Syar'iyyah.* Kairo: np.
[10] *Ibid*
[11] Lubis, Nur Ahmad Fadhil. (2000). *A History of Islamic law in Indonesia.* Medan: IAIN Press.
[12] Moh. Fauzi. (2008). *Formalisasi Syariat Islam di Indonesia.* Yogyakarta: Walisongo Press.
[13] Saleh, Fauzi. (2015). "Etika Kerukunan Umat Beragama dalam Perspektif Islam: Landasan, Batasan dan Praktik", in Safrilsyah, *Sosio-Religi dan Dinamika Kerukunan Umat Beragama.* Banda Aceh: Ushuluddin Publishing. p. 59-60
[14] Anad Abd Rashid and Arifin Mamat. (2013). "Educational View of the Islamic Leadership: Are the Islamic Leaders Performing Their Responsibility", *International Journal of Humanities and Social Science,* Vol. 3 No. 3, February 2013, p. 181
[15] Fathi Osman. (n.y). *Islam in a Modern State: Democracy and the Concept of Shura.* USA: Center for Muslim-Christian Understanding History and Internal Affairs George Washington University.
[16] Fauzi, *Op.Cit.*
[17] Al-Mawardi. (2006). *al-Ahkam al-Sultaniyyah* translated into Indonesian by Fadhli Bahri. Jakarta: Darul Falah.
[18] Asad, Muhammad. (2007). *The Principle of State and Government in Islam.* Kuala Lumpur: Islamic Book Trust.
[19] Arifin, Syamsul, *Op.Cit.*
[20] Black, Anthony. (2006). *The History of Islamic Political Thought: from the Prophet to the Present*, translated into Indonesian by Abdullah Ali and Mariana Ariestyawati. Jakarta: Serambi.
[21] Lubis, Nur Ahmad Fadhil, *Op.Cit.*
[22] *Ibid.*
[23] *Ibid.*

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Rahn Implementation in Sungai Lulut the District of Banjar (Islamic Law Review)

Galuh Nashrullah Kartika Mayangsari Rofam*[1]

*UNISKA MUHAMMAD ARSYAD AL BANJARI, BANJARMASIN, INDONESIA

Abstract
Rahn is one muamalah transaction that commonly done both in rural and urban areas, which is known as sanda. In practice, sanda has many things that deviate from Islamic law, both contract and implementation. Sanda is often performed as part of the choice of the farming community, in order to overcome the economic problems. This qualitative research is using a phenomenological approach. Through the Husserl's phenomenological approach; epoche-eidetic vision, the author tries to understand a reality purely on the practice of Rahn in Sungai Lulut the District of Banjar community, then analyzed through the perspective of Islamic law. This study found that although there is a mismatch against Islamic law, sanda remains the Sungai Lulut community's choice. Convenience in the transaction and the closeness of kinship elements as well as elements of indigenous causes persistence of irregularities in sanda practice. Even though they understand Islam properly, it get less priority in indigenous communities. The purpose of this research is to study the implementation of Islamic legal theory (the Rahn concept) in Banjar community. This research is expected to contribute to the Sungai Lulut the Distrik of Banjar community in particular and observers of Islamic law in general, so that between theory and practice is expected to run consistent.

Keywords: Rahn, sanda, Customs, Islamic Law.

1. INTRODUCTION

Rahn in Indonesian language is one of the many muamalah transactions undertaken by the community either in the countryside or in urban areas. In the countryside, particularly Rahn in Sungai Lulut is known by the term Sanda. In practice, the sanda in Sungai Lulut has something that strayed from the Islamic Law, both in the contract as well as its implementation.

In this study, researcher trying to unravel the implementation of concept Rahn in muamalah syar'iah --which by most of the community of Sungai Lulut is known as Sanda,-- in the perspective of Islamic law.

The purpose of this study was to examine the implementation of the theory of Islamic law, namely the implementation of Rahn concept in Sungai Lulut. This research is expected to contribute positively to the society and local observers of Islamic law in particular, so that between theory and practice is expected to walk in accord.

Rahn is made on an item that has a value of property according to the view of sharee'ah to guarantee the debts, in whole or in part a debt can be taken because there is already stuff the warranty, and can be used as payment of a debt if the debt that cannot be paid [1].

According to Rahn Islamic Sharia means detention or restraint. [2] So with the pawn contract makes both sides have shared responsibility. Who have debts to pay off his debts responsibly, while 2 people are responsible to ensure the integrity of the goods guarantees? If the debt was paid, then the detention or confinement of the contract by reason of it being off. So both are free from the responsibilities of each.

If someone wants to owe to others, then he made good his stuff is in the form of chattels or goods not moving or in the form of cattle that are within his power as collateral until he paid off his debts. Basically a fixed guarantee of goods held by the recipient of the pawn, but if there is an agreement between two parties (the pawn giver and receiver) then the pawn items can be handed over to another person who is fair and able to keep the mandate [3]. The owner of the goods (which owed) is called *Rahn* (the pawn) and recipient of the goods (the pawn giver) is called murtahin and is pawned (rahn) goods or *marhun*.

Banjar is a Regency of the famous religious atmosphere. It is supported by the large number of influential scholars who generally will determine the pattern of thought and behavior muamalah on people. No exception on the sale and purchase contract, such as Banjar society has the particularity of which is not owned and practiced on the community in other areas, i.e. with "Sell potluck" or with a contract like. While in theory the Rahn, Banjar society familiar with Sanda who in fact slightly different on a contract and practice.

Based on the background of the problems the author pointed out previously, the outline of the problem in this research are as follows:

a. How is the understanding of the people of Sungai Lulut the Banjar Regency concept Rahn?
b. How is the practice of Rahn on Sungai Lulut the Banjar Regency?

[1] Corresponding Author. No Telp: -, *E-Mail Address:* Ganash_kamasaro@yahoo.co.id

c. How does the implementation of Rahn on Sungai Lulut the Banjar Regency to the perspective of Islamic law?

The goal of the research is to be able to:

a. As the contributions to the public understanding of Sungai Lulut the Banjar Regency society about Rahn concept
b. Contribute intellectual practices Rahn in Banjar Regency Lulut River.
c. In order to increase public awareness of the importance of knowing the practices Rahn in the perspective of Islamic law.
d. The results of this research will be useful for readers that concern with studies focused on Islamic law.

2. LITERATURE REVIEW

Research on Rahn has been made, either in the form of studies financed by the agency or institution as well as in the form of books and journals.

The *Rahn* topic of research is as follows:

a. Analysis of The Efficiency of the Sharia and The Influence of Pawn Shops And Prospect of Growth Assets in Indonesia

   Research conducted by Dita Nur Amanda in 2016 is one of the best researches on the Economic Research Forum and the XIV Islamic finance organized by the IAEI in Padang. Quantitative research concludes that the efficiency of Islamic pawn shops reached 100 per cent for 2008-2014 compared with competitors who only 97.42 per cent.

b. The Golden Pawn in the perspective of Islamic law by Normalia Andriani

   The thesis describes about two main things, first, the Golden pawn of Akkad and the pledge of good practices both on pawn shops and on Islamic banking in Surabaya.

3. RESEARCH METHODOLOGY

3.1 Data Sources

The data is taken from the community of Sungai lulut the Banjar Regency, expert's opinions formulated in books, scientific journals and other scholarly writings.

This is qualitative research [4] using historical phenomenological approaches. The historical approach used to create reconstructions of the past in a systematic and objective manner of collecting, evaluating. Verify and synthesize evidence to uphold the facts and gain a strong conclusion. [5] Historical or history is a science in which covered various events with attention to the elements of time, place, object, background and actors from these events [6].

The Phenomenological approach recognizes the existence of truth empiric ethics that requires reason to track and explain and argue. A basic assumption of the phenomenological approach is that knowledge is inseparable from the moral views, both on a level to observe, gather data, analyze, and in making conclusions. Mounting the phenomenology of approach of the human capacity to think the reflective, even further to use the logic of inductive logic is beside the reflected and deductive logic, as well as materially and probabilistic logic. Phenomenological approach to lifting the meaning of ethics in theorized and concept [7].

The main task, according to Husserl phenomenology is to establish linkages between human and reality. The Association encourages humans to study phenomena that exist with the direct experience of reality. So the experience will provide an interpretation that is the reality of essence. Husserl uses the term phenomenology to show what appears in our consciousness by natural manifests without putting our minds to him or the categories according to the expression of Husserl *zurruck zu den Saxony selbt* (return on reality itself) [8].

In other words the phenomenology appears naturalist as the phenomena and let the phenomenon goes for what it is, because the mind is only a theoretical bound by a sensory experience that is relatively subjective while the phenomenon is a reality that is objective. By letting the phenomenon goes by itself, and then what are the works of consciousness which are related to the objects as well as the establishment of the foundations is observed. Phenomenology outlines what is seen by releasing every pretension that he was able to explain something about what's outside of awareness, so that by releasing all the thoughts of the phenomenon and of all that is not the essence of the phenomenon, it will be creating a pure sense. Phenomenology bridging humans to reveal phenomena of noumena [9].

Husserl in its phenomenology method using fundamental *Epoche* and *eidetic* aims to release or eliminate interference from thoughts and theories that existed against the phenomenon, and let the phenomenon goes by itself. Because directly or indirectly such theories have provided a view that might be wrong against an existing phenomena and cause the truth of reality away from such phenomena. So by clearing the phenomenon of the theory then the phenomenon will remain pristine and Pure. Husserl with his attempted composing *Epoche* metodos that revealing, as if "saw" an essential circumstances in each object of knowledge that perhaps there were interfered with, without reflection and knowledge. After getting a fenomea-a phenomenon that pure Husserl proceeded to the second method, Eiditic Vision or collectively, the "Reduction", i.e. reducing or filter

the phenomena that exist to get to her or Eidos-essence. With the Eiditic Vision it will be filtered and wasted from the phenomena of feelings, thoughts and views are formed from the experience [10].

With the method of epoche-eidetic vision Husserl [11], the author tries to offer how to understand a reality in pure, related practice *Rahn* at Sungai Lulut the Banjar Regency Community, due to the tendency of the reality hidden by theories that have developed earlier. This is because the reality of it is always influenced by the sensorial experience that tends to be bound by space and time. Therefore, in order for the essence of reality that may be unreadable, then the phenomenology seeks to reveal the essence of reality without separating the essence of its phenomena with how to let go of all thoughts and sensorial experience that affected it. So paramount in phenomenology is the study of what exactly faced without allowing any factors intervening and keep them away from the direct analysis effort against the essence. [12] This is in line with Kenneth Letter quoted in the book Noeng Muhadjir i.e. demands unity of the subject of researchers with subjects of research objects, supporting the involvement of researchers in the subject field and live up to what is in the field [13].

Ontologically approach in the study of Phenomenology of religion admits four truths (sensual, logic, ethics, transcendental). It's just the transcendent distinguished between the insaniyah truth and the ilahiyah truth [14]. The ilahiyah truth is obtained by interpreting and developing its meaning but still not able to reach the substantial truth. In addition to his opinion, if positivism emphasizes objectivity following the methods of the natural sciences and value free, then the phenomenology has the basic oriented values (value-bound) [15].

3.2 Data Analysis

Data analysis is the process of finding and compiling systematic data which is obtained from field notes, interviews, and documentation, by way of organizing the data into categories, outlining to the units, make the synthesis, compiled into a pattern, choose which are important and which will be studied, and make conclusions [16].

Qualitative data analysis is inductive in nature, i.e. an analysis based on the data obtained, further developed the pattern of a specific relationship or hypothesis being formulated. Based on the hypothesis formulated from these data, then look for the data again repeatedly next so that it can be concluded whether the hypothesis is accepted or rejected based on the data collected. [17] If the data that can be collected repeatedly with the technique of triangulation, the hypothesis is accepted, then the hypothesis was developed into a theory.

3.3 Theoretical Framework

Contract pledge aims to trust and guarantee debt not seeking profit and results, then the person who holds the pawn it, the action items utilizing utilize goods it will not look qirodl and every qirodl is utilizing the riba. If those collateral goods in the form of cattle that could have taken her milk or it could be ridden by utilizing in return have to feed.

It's become the habit of the Arabs, that when people are mortgaged goods are not able to pay loan pawn goods then it is ejected [18].

It means: If you are on the journey (and *bermu'amalah* not in cash) you're not getting a writer, then let there be a dependent item held (by the *berepiutang*) However if some of you trust one another, then let that which is held to fulfill his tasks (loan) and let him devoted to Allah, his God and (the witnesses) do not hide their testimony and whoever hid it, then surely it is a sinner heart; and Allâh is knowing all what you do [19].

It means: "milk of dairy animal may be taken if as Borg (collateral) and should be fed by the holder of the mortgage (*pemegang gadai*), can ride those animals if the beast as a Borg, people who ride and take the milk should be fed [20]."

4. DISCUSSION

Any contract or transaction aims to that the principle of fairness is achieved, either the akad is *tijarah* or *tabarru* '. Form of contract which is quite popular in the farmers' community in Banjar is called *sanda*. From a legal point of view, *sanda* categories include customary law, which in terms of understanding meaning of sanda contract (gadai). In this case, who became the object of this transaction is land, fields or orchards as well as residential homes. Land, both fields or orchards as well as residential homes are rawned (*digadaikan*; Banjar) through agreements that lead to submitted someone's land and to receive a cash payment with the conspiracy that the land will be handed the right to take their land back by paying the same amount of money owed. As long as the soil has not been redeemed or repaid, then the result of the pawn holders belong entirely to thus it is considered to be interest from the debt. [21] The timing of the redemption of up to *penggadai*, therefore *penggadai* are not allowed to perform the redemption before the harvest. If this is done then *penggadai* must indemnify the holder of pledge in accordance with the agreement, usually replacing the costs that have been associated with the object of pledge report issued as purchase of fertilizers and seeds.

In the customary law of the land surrender that is still going on with the contract of selling off the land surrender while the transient occurred with pawn transactions. [22] To revoke all land transactions conducted by Community law must be known or done by the head of the Alliance for the enactment of laws is quite known by

the parties to the transaction and the head of the communion, [23] while the transactions that occurred in the civil law, transactions of land according to customary law does not need to be substantiated by authentic deed (notary deed) but quite known and witnessed by the head of the communion only. In this case when the head of his Alliance refused to witness the transaction had occurred then the transaction shall not apply to any third party [24].

In Islamic law, a discussion about the practice of this sort is not found in particular. This practice is seen from the perspective of Islamic law, one side, similar to selling because of the migration of treasure master rights are rawned, including the right to exploit the results. While the other side, he is also similar to rahn (pledge) because there is an element of the right to redeem the property is rawned. [25] About this practice, the majority of scholars do not justify such customs because they contain an element of exploitation to the detriment of the owner of the pawn. [26] Akad is when it says fully as a contract selling also can not due to the status of ownership of the goods object to still be in the possession of the rawner. Similarly, if it is said as the Akkadian rahn also contained a disability where the originally objects should imprecise rahn utilized without the express permission of the owner of the pledged 7 in addition, this practice is prohibited due to the occurrence of the so-called two contract in one transaction with the sale and purchase contract and a pledge made in a time so that could happen the uncertainty (gharar) concerning the contract which is enforceable.

4.1 The practice of Sanda in Sungai Lulut the Banjar Regency

Sungai Lulut is one of the rural areas in South Kalimantan, most of the original population made their living as farmers. Therefore, many found the area of rice fields. There are many cases that occur as river Lulut where the practice of sanda is already going on for decades. In this case occurred in a 10-year term sanda, so *disandaakan* (*digadaikan*) 15 *borangan* of rice fields with as many as 35 grams of gold. This gold is redeemable and handed over to the *penggadai*. *Sandaan* land is located on the roadside is great and very fertile due to water irrigation. Subsequent transactions are written on paper that was witnessed by four witnesses who came from a family of each party without listing a piece of postage labels and then the content of this agreement is held by two parties Transact. When there is an additional sandaan and loan, simply written on paper with the first treaty without the return witness was ever involved.

Loan is equivalented with gold, but gold from time to time will always go up the value of selling. This could only happen because of the pawn holders require penyandaan by using the quantity of money that is equivalenced with the value of gold at that time. The position of the *penggadai* is the ones who need a loan, and then inevitably it must accept the terms of the recipient of the pawn. factors of ease and kinship being the reason for this deal though *penggadai* realize that he harmed, meaning to the value of gold always rises resulted in difficulties in redeeming debt, that the benefit from the land of rice fields completely not belongs to him during the debt has not been paid off.

10 years later, *penggadai* have the ability to redeem its own rice paddies back by handing money to Rp. 17,150,000. Over 10 years, any benefits that are in the land of rice fields belongs to the following pledge holder obligations issued zakat when harvest arrives.

In other cases, the object of sanda is a land of rice fields of about 30 *borongan*, using loan *banih* as many as 75 *blek*. The *banih* then cashed and handed over to *penggadai*. Then because of the urgent needs, forcing the *penggadai* to add the amount of the loan again that in the end the amount of overall debt/loan almost equals the price of the land of rice fields that is *digadaikan*. Then there is no other option for him except sell land rice field which became the object of sanda last in full to the holder of the mortgage. The pawn holders then buy rice at prices prevailing in the market reduced a number of loans/debts are paid.

During the land of rice fields is not redeemed, then fully benefit from the land of paddy fields belongs to the holder of the mortgage. In this case, the holder of the mortgage on the land of paddy fields and produce rice that is then issued Zakat when harvest arrives. The reason they do this is because of an urgent need, and have no other way more easy and simple. Custom in the area using the price of rice that equivalented with money.

The third case is a house as the object of sanda. The House becomes a pawn holders full rights in terms of its utility. If the homeowner turned out to need a place to stay, then the homeowner may use the House, by paying a sum of money that is mutually agreed. . This is done because of the pawn holders feel aggrieved if the guarantee of the goods used by *penggadai* for free.

4.2 Result

There are some similarities which aspects influenced the occurrence of these three cases the practice of sanda in the top. First, because it is easy. In the practice of sanda, one simply expresses the intent to local rich people commonly make loans. In all three cases above, easily and quickly is the main reason why they want to practise sanda. Second, because of the interlacing of kinship or close neighbors. This is also the reason because it is easy to communicate. Third, the object in the form of goods not moving *sandaan*, land rice fields or house.

This is a treasure that they usually have. As for the difference lies in: first, the time limit. In the second case, the penggadai in the initial agreement spells out no time limit for redemption. So two of these cases, the practice of sanda lasts a long time. Secondly, loans are granted. For the first case is gold as the benchmark price, the

second case in the form of banih, and the third case occurred the rahn tersamarkan contract with the akad ijarah. When using gold and banih, who coined the terms the receiving party is a fiduciary. This happens because the *penggadai* when it is in a position that is in need and do not have the ability to do bargaining, giving leeway for recipients pledge to "play on his own role" to *penggadai* want to accept the terms of the loan. It can also be seen from the absence of limits sandaan. This indicates that *penggadai* when it was in dire need of funds. Superior existence (*penerima gadai*) and inverior (*penggadai*).

5. CONCLUSION

Through discussion of the above it can be concluded that;

a. There is a difference of understanding in the community of the river Lulut against the concept of sanda with the influence of custom and concept rahn in the perspective of Islamic law. Consideration of the Islamic law, does not apply in the indigenous communities, although all parties to the transaction have enough knowledge in Islam.
b. In fact, the practice of sanda in the river Lulut does not comply with the concept of Rahn in Islamic law. The existence of a contract that is overlapping and unclear (gharar). Both parties want the ease and practicality, while ignoring the purpose of the contract, namely Rahn Tabarru ' is not a commercial contract. This encourages the more development of the authorities (superior) cracking down on the underdog. Religion or religious rules in no longer a consideration in deciding the matter (*mu'amalah).*
c. In Islamic law, implementation of *sanda* in the Sungai Lulut is not justified because there are elements of gharar and the unclear contract between *the tabarru '* contract and a commercial contract. The holder of the collateral must not exploit such articles, because it's not his collateral goods, rights holders against collateral that is only as a guarantee for accounts receivable which he gave and if the debtor is not able to pay off his debts he could sell or appreciate such goods to pay off his debts, but if that collateral goods is animals that could be ridden, it can be utilized.

REFERENCES

[1] Sabiq, A.-S. (1990). *Fiqh as-Sunnah, Jilid III.*
[2] Basyir, A. A. (1983). *Hukum Islam tentang Riba Utang Piutang Gadai.* Bandung: al-Ma'arif.
[3] Fikri, A. (t.t). *Al-Mu'amalah al-Maddiyyah Wa al-Adabiyah.* Mesir: Dar al-Fikri.
[4] Miles, M. B. (n.d.). *Qualitative Data Analysis, 2nd Edition an Expunded Sourcebook.* Sage: Sage Publication.
[5] Berg, B. (2001). *Qualitative Research Methodes for social Sciences (4th. ed)* . Boston: Allin & Bacon.
[6] Arikunto, S. (2007). *Manajemen Penelitian.* Jakarta: Rineka Cipta.
[7] Muhadjir, N. (2002). *Metodologi Penelitian Kualitatif, (Yogyakarta: Rake Sarasin, 2002.* Yogyakarta: Rake Sarasin.
[8] Muslih, M. (2008). *Filsafat Ilmu: Kajian Atas Asumsi Dasar Paradigm dan Kerangka Teori Ilmu Pengetahuan.* Yogyakarta: Belukar.
[9] Langeveld, M. (2001). *Menuju ke Pemikiran Filsafat.* Jakarta: Pustaka Sarjana.
[10] *Ibid.*
[11] *Ibid.*
[12] Djam'annuri. (2003). *Studi Agama-agama: Sejarah dan Pemikiran.* Yogyakarta: Pustaka Rihlah.
[13] Muhadjir, N. (1996). *Metodologi Penelitian Kualitatif Pendekatan Posivistik,Rasionalistik, Phenomenologik, dan Realisme metaphisik Telaah Studi Teks dan Penelitian Agama.* Yogyakarta: PT. Bayu Indra Grafika.
[14] *Ibid.*
[15] *Ibid.*
[16] Patton, M. Q. (1987). *Qualitative Evaluation Methode (Baverly Hills: Sage Publication, 1987.* Baverly Hills: Sage Publication.
[17] Bungin, B. (2003). *Analisis Data Penelitian Kualitatif.* Jakarta: RajaGrafindo Perkasa.
[18] Sabiq, S. (1983). *Fiqhus Sunnah,Jilid dua.* Beirut Lebanon: beirutDar Kutub Al Araby.
[19] Q.S.Al Baqarah: 283
[20] Bukhori, A. A. (t.t). *Shohih Bukhori, Juz II.* Semarang: Usaha Keluarga.
[21] Abdul Aziz Dahlan, et. al. (ed). (1996). *Ensiklopedi Hukum Islam, Jilid 2, Cet. 1* . Jakarta: PT Ichtiar Baru van Houve.
[22] Sudiyat, I. (1981). *Hukum Adat; Sketsa Asas.* Yogyakarta: Liberti.
[23] Supomo. (1982). *Hukum Tanah Adat.* Jakarta: Pratnya Pramita.
[24] Haar, T. (1960). *Hukum Tanah Adat.* Jakarta: Gronigen.
[25] Abdul Aziz Dahlan, et. al., op. cit.
[26] Tim Redaksi Fokus Media. (2008). *Kompilasi Hukum Ekonomi Syariah: Peraturan Mahkamah Agung Republik Indonesia Nomor 02 Tahun 2008.* Bandung: Fokusmedia.

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Passive Euthanasia on Indonesia Law and Human Rights

Eddy Rifai*[1], Hery Wardoyo*[2], Tomy Pasca Rifai*[3]
UNIVERSITY OF LAMPUNG, LAMPUNG,INDONESIA

Abstract
Discussion regarding passive euthanasia is strongly related to the law and human rights as noted in the Article 6 (1) International Covenant on Civil and Political Rights assert that *"Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life*" which has been ratified by Indonesia Law No. 12 of 2005. Hence, this research perspective mainly focuses on the law regarding medical issues especially the passive euthanasia, which occurs indirectly from a doctor with the request or consent of the patient and/or the family to refuse, discontinue, or reject medical efforts. Further, there are two types of legal relationships between patients and doctors in the health services, which is contractual and the therapeutic relationship in relation to laws and regulations, i.e. the regulation of the Minister of Health No. 37 of 2014, Law of Health No. 36 of 2009, Law of Medical Practices No. 29 of 2004 and the Indonesia code of medical ethics which states that "*Every doctor should always remember his duty to protect the lives of human beings*". The purpose is to study the procedures of with-drawing life supports, medical records, and the informed consent. Furthermore, the major issue is that the legality of passive euthanasia will mentality force the terminate-ill patient to perform passive euthanasia (healthcare cost versus the right to live), hence we suggest to tighten the procedures regarding passive euthanasia.

Keywords: Passive Euthanasia, With-Drawing Life Supports, Healthcare Cost, Right to Live.

1. INTRODUCTION

The concept of euthanasia conceptualized is the right to die; this right is always faced with the right to life guaranteed by the constitution. Euthanasia has gone through a long development stage and raises the pros and cons as well as the dilemma in several countries, including Indonesia. Such a dilemma of euthanasia cannot be separated from the aspects of science advancement in the fields of medication. Euthanasia (eu = good, Thanatos = death), actually cannot be separated from the right to self-determination (the right of self-determination) in the patient. This right is one of the main elements of human rights and because that's always interesting to be discussed.

Euthanasia can be classified in the type as follows:

a. Active Euthanasia: The euthanasia that is deliberately performed by a physician or other health professionals to shorten or end a patient's life. It is prohibited (including in Indonesia), except in countries that have allowed it through legislation.
b. Passive Euthanasia: The doctor or other medical health personnel, is no longer provide medical help deliberately to prolong a patient's life, by stopping the infusion, stop the food supply, stop the breathing aids or delay surgery.
c. Auto euthanasia: A patient refuses expressly the medical treatment and he knew this would shorten or end his life. With the rejection, he made consent (hand written statement). Auto euthanasia is essentially passive euthanasia on demand.

The every coin that has two sides, it same which euthanasia has pros and cons. The euthanasia pros and cons, which is:[1]

Pros (reasons for euthanasia)

a. Unbearable pain as the reason for euthanasia: Probably the major argument in favor of euthanasia is that the person involved is in great pain. However, the advances are constantly being made in the treatment of pain and, as they advance, the case for euthanasia/assisted-suicide is proportionally weakened.
b. Demanding a "right to commit suicide": Probably the second most common point pro-euthanasia people bring up is this so-called "right." But what we are talking about is not giving a right to the person who is killed, but to the person who does the killing. In other words, euthanasia is not about the right to die. It's about the right to suicide.
c. People should not be forced to stay alive. There comes a time when continued attempts to cure are not compassionate, wise, or medically sound. That's where hospice, including in-home hospice care, can be of such help. That is the time when all efforts should be placed on making the patient's remaining time

[1] Corresponding Author. No Telp: -, *E-Mail Address: eddyrifai63@gmail.com*,
[2] Corresponding Co-Author. No Telp: -, *E-Mail Address*:
[3] Corresponding Co-Author. No Telp: -, *E-Mail Address*: *tomypasca1@gmail.com*

comfortable. Then, all interventions should be directed to alleviating pain and other symptoms as well as to the provision of emotional and spiritual support for both the patient and the patient's loved ones.

Cons (arguments against euthanasia)

a. Euthanasia would not only be for people who are "terminally ill." There are two problems regarding the definition of "terminal" and the changes that have already taken place to extend euthanasia to those who aren't "terminally ill."
b. Euthanasia can become a means of health care cost containment. Perhaps one of the most important developments in recent years is the increasing emphasis placed on health care providers to contain costs. In such a climate, euthanasia certainly could become a means of cost containment.
c. Euthanasia will only be voluntary. However, the emotional and psychological pressures could become overpowering for depressed or dependent people. If the choice of euthanasia is considered as good as a decision to receive care, many people will feel guilty for not choosing death. Financial considerations, added to the concern about "being a burden," could serve as powerful forces that would lead a person to "choose" euthanasia or assisted suicide.
d. Euthanasia is a rejection of the importance and value of human life. People who support euthanasia often say that it is already considered permissible to take human life under some circumstances such as self-defense - but they miss the point that when one kills for self-defense they are saving an innocent life - either their own or someone else's. With euthanasia no one's life is being saved - life is only taken.

The active euthanasia is prohibited and punishable by Indonesia law, however, the practice of healthcare is still going through with the discontinuation of treatment (passive euthanasia) which is legal if the passive euthanasia act follows the procedure in the law. Further, in the Indonesia code of medical ethics assert that; "*A doctor must constantly strive to carry out their profession in accordance with the highest professional standards*". Hence, the doctor who doing medical activities as a medical profession must be in accordance with the latest medical science, law and religion. Further, the Indonesia code of medical ethics also asserts that "e*very doctor should always remember his duty to protect the lives of human beings*". This means that in the action is aimed at maintaining the health of human. Hence, the profession of a doctor should not do: terminate the pregnancy (abortion provocatus) and ending the life of a patient although according to the science and knowledge, the patient may not be healed again (euthanasia). Further, the passive euthanasia may have relevance to the rights i.e. the rights of patients, the right to information, the right to give consent, the right to choose a doctor, the right to choose the hospital, the right to medical confidentiality, the right to refuse treatment, the right to refuse a medical procedure, the right to stop treatment as asserted in the regulation of the Minister of Health No. 37 of 2014 regarding the determination of death and utilization of organ donors, Law of Health No. 36 of 2009 and Law of Medical Practices No. 29 of 2004.

Based on the above description regarding the problem in this research, hence we assert that:

a. How is the perspective regarding the passive euthanasia in Indonesia?
b. How is the legal procedure regarding the passive euthanasia in Indonesia?

2. RESEARCH METHOD

2.1 Type of Research

This type of this research is descriptive analytical research that seeks to describe and elaborate on issues relating to the passive euthanasia in Indonesia, specially to study the regulation of the Minister of Health No. 37 of 2014 regarding the determination of death and utilization of organ donors. The approach used is a normative juridical approach that is based on legislation, theories, and concepts related to writing research.

In relation to normative research, the approach used is:

a. The statute approach, which is an approach made to the rules of law relating to the Criminal Code, Civil Code, the regulation of the Minister of Health No. 37 of 2014 regarding the determination of death and utilization of organ donors, Law of Health No. 36 of 2009, Law of Medical Practices No. 29 of 2004, Law No. 39 of 1999 on Human Rights and the implementation of some regulations related to the object of research.
b. The legal philosophy, this study uses the approach of the philosophy of law because of the problems studied not only with respect to legal aspects alone, but also with regard to the moral aspects and values of society.

2.2 Type of Data

The source of data derived from literature data, whereas other types of data in the form of secondary data, i.e. data obtained by searching the literature as well as regulations and norms relating to the issues to be addressed in this study. Secondary data include:

a. Primary legal materials, namely: the Criminal Code, Civil Code, the regulation of the Minister of Health No. 37 of 2014 regarding the determination of death and utilization of organ donors, Law of Health No.

36 of 2009, Law of Medical Practices No. 29 of 2004, Law No. 39 of 1999 on Human Rights and the implementation of some regulations related to the object of research.

b. Secondary law, namely government regulation, Regulation and Decree of the Ministry, as well as other rules relating to passive euthanasia in Indonesia.
c. Tertiary legal materials i.e. scientific works, seminar materials and results of research scholars relating to the subject matter covered.

2.3 Data Collection and Processing Procedures

In the data collection, the authors take steps as follows: To obtain secondary data, carried out by a series of documentaries by reading, citing the books, studying the legislation, documents and other information related to the issues to be discussed.

Once the data is collected, the data processing methods are:

a. *Editing*, in this case, the incoming data will be checked completeness, clarity, and relevance to research.
b. *Evaluating*, i.e. to examine and scrutinize the data to be given an assessment of whether the data can be accounted for credibility and used for research.

2.4 Data Analysis

To analyze the collected data the author uses qualitative analysis. Qualitative analysis was carried out to delineate the realities that exist based on the results of research in the form of explanations, from the analysis, can be concluded inductively, that way of thinking in making a conclusion to the issues discussed in general based on facts that are special.

3. THE RESULT OF RESEARCH

The framework in this study begins by pointing to the reality of euthanasia in the practice of health care. The practice is manifested in the form of omission medical and / or discontinuation of treatment, or any activity to hasten death. Such actions are known as passive euthanasia. Basically, euthanasia is prohibited and contrary to religious values, social and medical ethics contained in the Indonesia code of medical ethics. However, The complexity of the legal relationship in health care embodied in the therapeutic transaction, makes it very difficult to qualify the passive euthanasia act as a crime. Since the framework of the legal relationship that the concept of passive euthanasia is a medical procedure that is legal in the relationships doctor - patient and family within the framework of the therapeutic transaction. The relationship includes the relationships administrative law, the civil and criminal law in relation to health.

Passive euthanasia is closely related to medical treatment withdrawal. This is generally not yet widely known among the public. Medical Negligence is one in which the medical action of providing health care is not according to the standard procedure. It can be said is an act of withdrawal from medical doctors, which is not providing any health care to patients with a variety of reasons related to the health care system. Medical Negligence in hospitals, especially special for the poor person or on the grounds of poor patients must meet several administrative requirements. In the Indonesian legal system in general medical withdrawal treatment is regulated in the regulation of the Minister of Health No. 37 of 2014 regarding the determination of death and utilization of organ donors.

In health care services, there is a reality of the events of medical treatment withdrawal and discontinuation of treatment. Both events can be categorized as an act of passive euthanasia. Since, judging from the act, euthanasia can be classified into active euthanasia and passive euthanasia. If a doctor's medical action undertaken directly has resulted the death of the patient, for instance by giving drugs that can kill the patient, hence the doctor can be regarded an act of active euthanasia. But if the actions performed by a doctor to a patient which does not directly cause the patient's death, such as by stopping the life support (life support device), then the action of the doctor can be regarded as an act of passive euthanasia. [2]

The problems encountered in health care (especially physician and the patient's family) are to determine when treatment for a patient person is no longer have the hope of recovery. Further, the difficult decisions must still be done, since if the treatment still provided to patients who is no longer has the hope of recovery, hence the action of the doctor's medication can actually be considered unethical (unbearable pain as the reason for euthanasia). The medical criteria should always be used to determine whether a medication or a treatment is useful or not. All of this will be based on the knowledge, skills, technology and experience possessed by doctors who related to the quality of life of patients. Circumstances (quality of life) of patients should be perceived in the context of culture and value system espoused, including life goals and life expectations. Dimensions of quality of life of patients are physical symptoms, functional ability (activity), family welfare, spiritual, social functioning, satisfaction with treatment (including financial matters), future orientation, sexual life and function in work.[3]

In the Article 14 Paragraph 1, 2, 3 and 4 on the Regulation of the Minister of Health of the Republic of Indonesia Number 37 Year 2014 Regarding the Determination of Death and Organ Donor Utilization, explained the terms of the suspension or delay of therapy live help which are:

a. In the patients who are in a state that cannot be recovered due to the illness (terminal state) and medical treatment have been in vain (Futile) hence it can do the discontinuation or withdrawal of life support therapy.
b. The policy on the criteria regarding the patient's condition and the state of useless medical treatment is determined by the Director or the Head of the Hospital.
c. The decision to stop or withdraw the life support therapy for the patients referred to in paragraph (1) shall be conducted by a team of doctors who treat patients in consultation with a team of doctors appointed by the Medical Committee or the Ethics Committee.
d. The action plan termination or suspension of life support therapy should be informed and obtained the consent of the patient's family or representing the patient.

Further, on Article 15 Paragraph 1 and 2 of the said law assert that:

a. The Family of patients can ask a doctor to perform the termination or withdrawal of life support therapy or ask the patient condition assessment regarding the stopping or withdraw of life support therapy.
b. The decision to stop or withdraw the life support therapy for the patients referred to in paragraph (1) shall be conducted by a team of doctors who treat patients in consultation with a team of doctors appointed by the Medical Committee or the Ethics Committee.

In conclusion, if the patient is in a state that cannot be recovered due to illness (terminal state) and medical treatment has been in vain (Futile) hence the passive euthanasia can be performed which the discontinuation or withdrawal the life support therapy. Furthermore, the patient's family can also ask the doctor to suspend or withdraw the life support therapy or ask regarding the patient state assessment. Meanwhile, the decision to discontinue or suspend therapy medical life support action is carried out by a team of doctors who treat patients in consultation with a team of doctors appointed by the Medical Committee or the Ethics Committee.

However, even though the doctors and medical personnel can perform passive euthanasia legally because in accordance with the procedures that are justified by the law, the author suggests that doctors and medical personnel to be back on medical code of ethics in Article 10 of the Decree of the Minister of Health No. 434 / Menkes / SK / X / 1983 Article 11 Code of Medical Ethics Indonesia Year 2012 states: *"Every doctor should always remember his duty to protect the lives of human beings"*.

REFERENCE

[1] Dame Cicely Saunders, *Euthanasia: Right To Die*, Social Science Research Network Journal,http://www.ssrn.com, 2010.
[2] Sugiri, *Euthanasia: A struggle between Reason, Moral and Legal* (in the book Bioethics: Enclosing the Minotaur in the Labyrinth, Publisher: Pustaka Percik, Salatiga. 2009.
[3] Sunaryadi Tejawinata, *The Palliative Care is the Human Rights*, asserted on palliative worldwide commemoration on seminar day dated October 26, 2008, Surabaya. (The Center for Development of Palliative Care and Pain-Relief Hospital Dr. Soetomo on the period 1992-2006)

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The Protection and People's Rights Disability as Constitutional Rights through the Public Service Regulations

Dedi Putra*[1] and Darwin Manalu*[2]

*UNIVERSITY OF LAMPUNG, LAMPUNG, INDONESIA

Abstract

The respect, protection, and fulfillment of the rights of persons with disabilities is an obligation of the state as stipulated in Article 42 of Law No. 39 of 1999 on human rights. Persons with disabilities has been experiencing a lot of discrimination that has not met the right of persons with disabilities. Disability should have the same opportunity in the effort to develop itself. Fulfillment of the rights of persons with disabilities is still considered as a social problem that the new policy with its rights is social security, social assistance, and increase social welfare. Protection and fulfillment of the rights of persons with disabilities can be done by providing and facilitating access to public services. The right to obtain public services should also be reserved for disabled people. The right to obtain public services for disabled people should be seen as a constitutional right. The regulation of public services should provide protection and fulfillment of the constitutional rights of the disabled in obtaining public services. This paper will discuss the law enforcement ideal in strengthening the rights of persons with disabilities as constitutional rights through fair regulation of public services. This paper uses a method normative approach to legislation.

Keywords: Protection and Fulfillment of the Disability Rights, Constitutional Rights, and the Regulation of Public Services

1. INTRODUCTION

Indonesia as a member of the United Nations have ratified the Convention on the Rights of Persons with Disabilities which was then poured in Law No. 19 of 2011 on Ratification of the Convention on the Rights of Persons with Disabilities, ratified on Tuesday, October 18, 2011. The Convention on the Rights of Persons with Disabilities (CRPD) is an international normative framework established to promote, protect and ensure the rights rights of people with disabilities as part of human rights. In particular arrangements on human rights stipulated in Law No. 39 of 1999 on Human Rights (hereinafter referred to as the Human Rights Act). The Human Rights Act also regulates the rights of persons with disabilities, namely in Article 42 of the Human Rights Act states that:

Every citizen who is elderly, physically disabled or mentally handicapped is entitled to receive care, education, training, and special assistance at the expense of the state, to ensure a decent life in accordance with the dignity of humanity, increase a confidence, and ability to participate in community life, nation, and country [1].

The provisions of Article 42 of Law Human Rights and Law with disabilities long, namely Law No. 4 of 1997 on Persons with Disabilities was formulated with disabilities synonymous with the connotation of "disability" is included. The use of the word "disabled" in both the formulation of norms and in the implementation of the norm is more emphasis on compassion. When it should be persons with disabilities not to be pitied, but must be filled with all of their rights.

The rights of persons with disabilities are also guaranteed in the Constitution as the constitutional rights especially those in Chapter XA on Human Rights. As it must be held constitutional rights action against the fulfillment of these rights. The fulfillment of these rights would not be released from the obligation of government as one of the power holders. The government has the power to create rules / policies as a representation of the government to realize and protect these rights. The government's obligation set out in Article 28 that the protection, promotion, enforcement and fulfillment of human rights is the responsibility of the state, especially the government. In accordance with the mandate of the constitution when it was put in the constitution of human rights then there are two possibilities: first, the government will be weak when it does not realize that right and secondly, the government will be strong when the realization of these rights. So the best option is that the government must realize the constitutional rights of persons with disabilities through the provision of good accessibility [2].

But in fact the rights of persons with disabilities as constitutional rights are often ignored. Persons with disabilities experience various forms of discrimination. It is evident from the lack of fulfillment facilities and access in support of persons with disabilities in public places, subtle rejection and harsh at the time of applying

[1] Corresponding Author. Phone Number:-, *E-mail address*: dediputra1412011092@gmail.com
[2] Corresponding Co-Author. Phone Number:-, *E-mail address*: yohanesmanalu1@gmail.com

for a job, denial of education as there are many schools and colleges that reject prospective students and students with disabilities because it is felt not being able to receive lessons given [3]. Various problems with a disability are caused by a warped perspective of persons with disabilities are still on charity approach based not on human rights based. The perspective has spawned a product of government policy that negates the existence of persons with disabilities. This has resulted in persons with disabilities to live in the restrictions, obstacles, difficulties, and the reduction or removal of the rights of persons with disabilities. Conditions that make people with disabilities become an integral part of society in general, which then injure the principle of equality (equality). Persons with disabilities must be seen as human beings with the same rights and opportunities towards a prosperous life, self-contained, and without discrimination [4]

Based on the exposure that has been described above, there are several issues to be discussed further:

a. Firstly, how to shape the policy of the affirmative government in realizing the principle of equal rights to disabled people to gain accessibility through public service regulations.
b. Secondly, how to understand "State Welfare Law" justifies the rights of persons with disabilities as a constitutional right.

2. RESEARCH METHODS

The method used in this paper is a method normative approach to legislation. The method used in this paper refers to the legal norms contained in the legislation see the level of implementation of the norm to an event that is concrete. The nature of this study is descriptive analytical, revealing the legislation relating to the legal theories that the object of research.

3. DISCUSSION

a. Form Affirmative government policies in realizing the principle of equal rights to disabled people to gain accessibility through public service regulations.

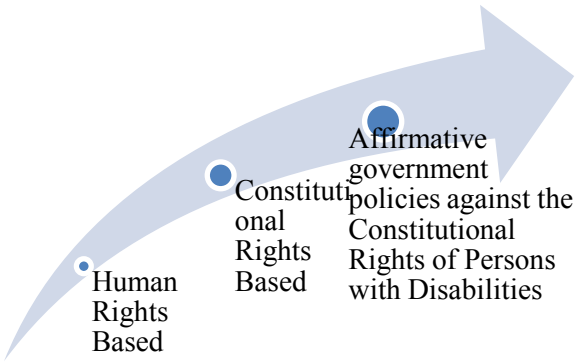
Table 1. The constitutional rights of persons with disabilities are neglected.

The Kind of Rights	National Law	Das Sein to implemented Norms
Rights to Education	1. 1.Article 28 Letter H and I of the 1945 Constitution 2. Law No. 20/2003 on the National Education System 3. Law No. 23/2002 on Child Protection jo. UU no. 35/2014 on the Amendment of the Act No. 23/2002 4. Law No. 8/2016 on Disability 5. 5. Law No. 39/1999 on Human Rights	1. Still there is the Department of Education makes the requirements in the new admission "prospective students should not physically disable". 2. Students with disabilities are often identified should attend Special Schools not in the regular school. 3. Support budgets of central and local government in the delivery of education to children with disabilities are still very low.
Rights to Health	1. Article 34 paragraph (2) and (3) of the 1945 Constitution 2. Law No. 36/2009 on Health	1. Persons with disabilities are still considered / likened to a sick person. 2. Refusal and reduction of health care to Persons with Disabilities.
Right to Public Facilities, Building and Transportation	1. Law No. 22/2009 on LLAJ 2. Law No. 28/2002 on Building	There are still a lot of public service facilities / building of basic services e.g. hospitals, houses of worship, schools, government office buildings and sidewalks are not physically access because the building is stepped-stairs and unavailable incline.
Rights to works	1. Article 28D (2) of the 1945 Constitution 2. Law No. 13/2003 on Manpower 3. Law No. 39/1999 on Human Rights 4. Law No. 8/2016 on Disability	1. Discrimination in recruitment, assessment and career level workers with disabilities. 2. Understanding of businessmen, government officials against their quota of 1% as a liability was minimal.
Rights to Livelihood Decent	1. Article 27 (2) and Article 28H paragraph (1) of the 1945 Constitution	1. Persons with disabilities are not getting the data collection as recipients of social security in a comprehensive manner.

Standards and Social Protection	2. Law No. 11/2009 on Social Welfare 3. Law No. 40/2009 on the Social Security System 4. Law No. 39/1999 on Human Rights 5. Law No. 8/2016 on Disability	2. Economic Empowerment Program disbursed People's Welfare and the Ministry of Cooperatives and SMEs are not empowered with disabilities
Rights to Information and Communication	1. Article 28F of the 1945 Constitution 2. Law No. 14/2008 on Public Information Openness	1. The limited information that is accessible to the deaf and blind in a variety of public service facilities such as airports, stations, hospitals, houses of worship, etc. 2. There are no government attention Cq MCIT in providing / facilitating the use of sign language and Braille in public dialogue forums e.g. candidates in the election debate.
Rights to Political Participation	1. Article 28H paragraph (2) and Article 28 paragraph (2) of the 1945 Constitution 2. Law No. 8/2015 on Amendments to the Law No. No. 1/2015 about Perppu 1/2014 on the election of Governors, Regents and Mayors Being Act jo. UU no. 10/2016 3. Law No. 12/2005 on the Ratification of the Convention on Civil and Political Rights	1. Discrimination in the data collection as voters 2. The absence of a deaf interpreter media 3. There are no tools stain 4. Officers Prop KPU / Regency / City, PPK.PPS still many who do not understand the importance of access for the general election with disabilities. 5. The absence of legal sanctions of election supervisors relating to the election organizer is not the availability of infrastructure access election

In "The Objectivist Modest View of Human Rights" that human rights as set forth in the constitution of their constitutional rights, the relationship tends to be normative (more specifically can be called right to sue). When this right is manifested at law fact will help everyone have an equal opportunity to earn a decent living [5]. In Table 1, as has been the author described it appears that at the level of implementation rules relating to the rights of persons with disabilities, there are still many rights of persons with disabilities as constitutional rights are neglected. In relation to the public service in accordance with Article 4 letter c, g and j Law 25 of 2009 on Public Service that public service delivery are basically equal rights, non-discriminatory and accommodate the facility and special treatment for vulnerable groups. It is clear that in fact, mainstreaming these provisions are not fulfilled properly. Human Rights tend to be just like scribbles the paper without meaning. In fact, if we refer to the perspective of universalism that human rights should be viewed as "human being". The perspective thus gave birth to a product of government policy that is based on "human rights based not charity-based." This paradigm shift will be illustrated by the chart below [6]

Chart 1. Transitional Constitutional Rights of Persons with Disabilities



Change the paradigm of "charity-based" towards human rights or constitutional rights based consequence affirmative forms of government policies towards the protection of the constitutional rights of persons with disabilities. By doing that transition, it will be a little outlines some of the things that can be an instrument for protected the constitutional rights of persons with disabilities.

Table 2. Things That Can Become Instrument to Protected Constitutional Rights of Persons with Disabilities

No.	Instrument Protection of Constitutional Rights Disability
1	Policy related to the assertion that the child with disabilities have the same rights as non-disabled children to attend common school / regular (either in the form of regulatory and non-regulatory)
2	The need for strict monitoring of the right to education for persons with disabilities
3	Early orientation program for the accessibility of healthcare to persons with disabilities
4	The need for a shift in perspective that the "defect" is not synonymous with "sick"
5	Need for increased public facilities with a wide range of procurement for the needs of persons with disabilities
6	Divergences on the realization of the obligations of the quota of 1% of institutions in the world of work for persons with disabilities

According in table 2 are realized, the constitutional rights of persons with disabilities will be met. If the rights of persons with disabilities are met, then it is definitely equal rights for persons with disabilities will be realized.

b. The Concept "State Welfare Law" and "Justification" Rights of Persons with Disabilities as a Constitutional Right

Theory welfare state law is the combination of the concept of state law and the welfare state. The main focus of state welfare laws is to increase welfare by giving an active role to the state to organize the general welfare *(bestuurzorgh*) through public services, at the same time contribute to maintaining order and security of people in order to realize the objectives of the state, namely the prosperity and welfare of the masses *(bonum Publicum*) and not the welfare of certain groups (*coetuum particulare bonum*) or individual (*bonum privatum*).

In the idea of state welfare laws, the rights of persons with disabilities as the constitutional rights become destinations are counted. In the state's welfare laws following I will describe through theory Z Brian Tamanaha in table form.

Tabel 3:The Thickest Substantive Version [7]

No	Forms	Explanation
1	*Formal Legality*	State laws characterized as having properties of which include: Principles prospectivitas and should not be retroactive, apply common-binding on everyone, obviously the public, and relatively stable. In this sense the law pedictibilas highly preferred.
2	*Democracy and legality*	Vibrant democracy that is offset by a law guaranteeing legal certainty. However, as a procedural mode of legitimation, democracy also contains similar limitations formal legality so that it can also bring bad practices of authoritarian power.
3	*Individual Rights*	The existence of the guarantee and protection of property rights, private contracts, and autonomous person.
4	*Social Welfare*	Equations that are fundamental and essential, welfare, and preservation of maintaining about a man in the community.

If we understand carefully that individual rights were later authors interpret their constitutional rights disabilities there is a correlation with the "Social Welfare" or state welfare laws.[3]Welfare is a top priority in the idea of the welfare state law puts the "social interest" as the "central substantial" and should not be reduced to a "marginal residual". In the context of the embodiment of the constitutional rights of persons with disabilities is gaining justification by the understanding of the welfare state law. By justifying the constitutional rights of persons with disabilities through the regulation of public services better understand the meaning of the welfare state will look and welfare benefits will be realized. Because understanding the welfare state requires broad community interests including the rights of persons with disabilities are met either through regulation of public services as well as law enforcement position "social interest" things to be counted.

2. CONCLUSION

Pursuant to Article 1 paragraph 1 of Law No. 8 2016 on Disability, people with disabilities are all people who have physical limitations, intellectual, mental, and / or sensory long periods which in interaction with the environment may experience obstacles and difficulties to participate fully and effectively with other citizens based equal rights [8]. Furthermore, Article 3 letters a and b that provision states that the implementation and fulfillment of the rights of persons with disabilities aims to realize the respect, promotion, protection and fulfillment of human rights and fundamental freedoms of persons with disabilities full and equal and guarantee the respect, promotion, protection, and fulfillment of rights as inherent dignity of persons with disabilities themselves.

Protection and fulfillment of the rights of persons with disabilities as a constitutional right is still a dilemma. The basis of this problem is due to both the perspective of policy-makers and the public mindset is still based on a "charity-based" rather than "human rights-based" or "constitutional rights based". This gave rise to the perspective that such products are not pro-government policies of the constitutional rights of persons with disabilities and also the existence of disability due to polarization. The need for the integrity of the government to achieve equality of persons with disabilities as a minority that must to be protected as a form of constitutional responsibility of the government against the constitutional rights of persons with disabilities

REFERENCE

[1] Undang-Undang Nomor 39 tahun 1999 tentang Hak Asasi Manusia.
[2] Jessica M. F. Huges () "Constructing a United Disability Community: The National Council on Disability's Discourse of Unity in the Deliberative System around Disability Rights," Journal of Public Deliberation: Vol. 12: Iss. 1, Article 8.
[3] Intan Nadia, "Persoalan Disabilitas", diakses dari http://www.kompasiana.com/intanintanan/persoalan-disabilitas_552e5c726ea8341d548b45b3, Pada tanggal 29 Oktober 2016 , Pukul 22:09 WIB
[4] Arthur W. Blaser, "Making Rights a Reality? Disability Rights Activists and Legal Mobilization by Lisa Vanhala", (Cambridge, UK and New York: Cambridge University Press, 2011).
[5] Allen Buchanan, "Equality and human Rights", dalam Article Politics, Philosophy and Economics (London: Sage Publication Ltd, 2005).
[6] *Ibid*
[7] Brian Z. Tamanaha, "On The Rule of Law", (Cambridge : University Press, 2004).
[8] Pasal 1 angka 1 UU No. 8 tahun 2016 tentang Penyandang Disabilitas.

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Undefinited Authorize Capital in Company Establishment According Government Regulation Number 29 Year 2016 Related of "Eazy of Doing Business" in Indonesia

Nur Hayati*[1]

*INDONUSA ESA UNGGUL UNIVERSITY, JAKARTA, INDONESIA.

Abstract
To expedite the development process and economic growth through investment, the Government has taken steps to increase of business in Indonesia. In consideration of the above-mentioned points, it is necessary to change the authorized capital of a Limited Liability Company into an amount left to the discretion of the founders of a Limited Liability Company by agreement, on condition that the founders of a Limited Liability Company have net assets within the criteria for micro, small, and medium business. The government policy to give founders of Limited Liability Company discretion to set the amount of authorized capital aims to increase investment as regulate by Government Regulation Number 29 of 2016. According hierarchy of law, government regulation lower than act, so the substance or government regulation cannot contradictive with the substance of the act. This study will be analyzed about the different of those regulations with normative method. The major issue are finding answer about question "how about binding strength of government regulation number 29 of 2016 compare the act number 40 of 2007" and "how about legality of Company who establish according government regulation number 29 of 2016. Finally, we have conclusion that substance about authorize capital of regulation number 29 or 2016 is not conflict with act number 40 of 2007. We can look that as a discretion who made government to support the program of "eazy of doing business" in Indonesia. Looking from hierarchy of those regulations, although regulation number 29 or 2016 up down than act number 40 of 2007 that can make special rules as not conflict.

Keywords: Authorize Capital, Limited liability Companies, Business, Law

1. INTRODUCTION

To reduce unpredictable situation in business, Limited Liability Company can be a solution. In limited liability Company, the share holders separate some capital to build the business. According to Article 32 of Act Number 40 year 2007 Concerning Limited Liability Companies, regarding authorized capital, regulated that:

a. Authorized capital shall be at least IDR 50,000,000 (fifty million Rupiah).
b. Statutes regulating certain business activities may determine a minimum amount for Companies' authorized capital which is greater than the provision for authorized capital contemplated in paragraph [1].
c. Changes in the amount of authorized capital contemplated in paragraph [2] must be stipulated by Government Regulation.
d. Refer to the regulation above; authorized capital shall be at least IDR 50,000,000 (fifty million Rupiah). For special company, legal regulation can determinate minimum authorized capital more than IDR 50,000,000 (fifty million Rupiah). For the replacement must be stipulated by Government Regulation.

Following that investment policies must always embrace people's economics that involves the development of micro, small, and medium business, and cooperatives, so Investment has become a part of the management of national economy and is positioned to improve the development and growth of the national economy, Indonesia government release a Government Regulation Number 29 Of 2016 concerning change In Authorized Capital of limited Liability Companies.

According to Government Regulation Number 29 of 2016 concerning change In Authorized Capital of limited Liability Companies, regulated that undifinited an authorized capital.

In consideration of the above-mentioned points, it is necessary to change the authorized capital of a Limited Liability Company into an amount left to the discretion of the founders of a Limited Liability Company by agreement, on condition that the founders of a Limited Liability Company have net assets within the criteria for micro, small, and medium business.

The government policy to give founders of Limited Liability Company discretion to set the amount of authorized capital aims to increase investment as regulate by Government Regulation Number 29 of 2016. According hierarchy of law, government regulation lower than act, so the substance or government regulation cannot contradictive with the substance of the act.

[1] Corresponding Author. No Telp: -, *E-Mail Address:* notarisppat.nurhayati@gmail.com

This study will be analyzed about the different of those regulations with normative method.

This paper written for discuss of major issues that:

a. How about binding strength of government regulation number 29 of 2016 compare the act number 40 of 2007 regarding to legality of Company who establish with authorized capital less than least IDR 50,000,000(fifty million rupiah)?
b. What is the meaning of legal proof of the capital subscribed?

The Purpose of The Study is to find the answer of major issues that:

a. How about binding strength of government regulation number 7 or 2016 compare the act number 40 of 2007 regarding to legality of Company who establish with authorized capital less than least IDR 50,000,000(fifty million rupiah)
b. What is the meaning of legal proof of the capital subscribed?

2. METHOD

This papers uses normative juridical method, with the starting point of the policy of government to reduce authorized capital from legal rule that defined less than least IDR 50,000,000 (fifty million rupiah) became undefined authorized capital for micro, small, and medium business according of Government Regulation Number 7 of 2016.

The approach that is used in this study research is conceptual approach, to understand the concepts of regulation about authorized capital, as well as deal with the concept authorized capital as voluntary and mandatory norm. Legal materials used are all the rules relating to authorized capital regarding establish a private company. The Materials are then analyzed descriptively with the deduction method. With this technique, researchers analyze the rules, doctrines and theories about authorized capital regarding establish a private company, then pulled more specifically on the implementation model of authorized capital regarding establish a private company.

3. RESULT AND DISCUSSION

To the founder of the Limited Liability intended as an attempt Government to respect In order to accelerate the process of development and economic growth through capital investment, the government has taken the steps to attract domestic and foreign investors who will invest in Indonesia by making a policy through the provision of facilities and convenience for investors. Efforts to increase planting to capital through provision of facilities for investors is still low even tend to be counter-productive.

These include marked by numerous regulations that encumber even more circles businesses including lead investor in Indonesia's competitiveness decline. To ensure a conducive investment climate, the government has enacted the Law Number 40 Year 2007 regarding Limited liability company which came into force on August 16, 2007.

However, in practice there is a substance that is quite difficult to implement and difficult the business world, especially to novice entrepreneurs. Therefore, it is necessary to make adjustments regulations with the development needs of the community. Such adjustments are intended to provide ease of doing business, and better ensure the business world in order to change the investment the amount of basic capital felt still burdensome for budding entrepreneurs.

Conditions ease of doing business in the form of changes to the authorized capital stock Limited originally specified at least IDR 50,000,000.00 (fifty million rupiah) be submitted entirely on the agreement of the founders of limited liability companies. Submission of determining the amount of capital the Company Limited freedom of contract that gives hope broadest freedom for the public to have an agreement on establishing a Limited Liability Company based provisions in civil law.

Government policy in giving freedom to the founders of Limited Liability Company determining the amount of the authorized capital, but aims to provide ease of doing business for the entrepreneurs start their business in order also to increase investment, which in turn will encourage the growth of micro, small and medium enterprises.

4. CONCLUSION

As has been explained before, although government regulation number 7 of 2016 regulated special conditions regarding to authorized capital IDR 50,000,000 (fifty million rupiah), those mean legal and not contradictive with Law of The Republic Of Indonesia Number 40 Of 2007 Concerning Limited Liability Companies. Those special conditions just apply for micro, small, and medium business and can be excuse condition.

According Article 32 of Act Number 40 year 2007 Concerning Limited Liability Companies, the Changes in the amount of authorized capital must be stipulated by Government Regulation. So, when government

regulation number 7 of 2016 not determinate minimum authorized capital it's constitute legal as delegation mandate from the act.

The meaning of legal proof of the capital subscribed are include many document that proofing about the payment of capital share from shareholders

REFERENCE

[1] Regulation of the Government of the Republic of Indonesia Number 7 of 2016 concerning change In Authorized Capital of limited Liability Companies
[2] Law of the Republic of Indonesia Number 40 of 2007 Concerning Limited Liability Companies

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Institutionalization of Alternative Dispute Resolution (ADR) in Indonesia to Facing ASEAN Economic Community (AEC)

Yessy Meryantika Sari*[1]
*OGAN KOMERING ILIR KAYUAGUNG ISLAMIC UNIVERSITY

Abstract
Alternative dispute resolution can be one option the parties to resolve business disputes when the settlement of disputes through the courts used are considered less advantageous for businesses and consumers alike. Although there is still a shortage of the power of law and legal compliance agreements and the development of professional arbitration institution. This paper analyzes the institutionalization of ADR in Indonesia as ASEAN countries member and how readiness Indonesian National Board of Arbitration to facing AEC. A basic distinction is drawn regulation in Indonesia. The method used in this paper is a descriptive analysis normative legal method. In this case the author uses literature study from a legal perspective and regulatory in Indonesia. This paper discusses the development of institutional ADR, which includes institutional ADR in indigenous people in Indonesia, the institutionalization of ADR outside the court and the institutionalization of ADR in courts as well as the readiness of BANI as an independent agency that provides alternative dispute resolution services.

Keywords: Institutionalization, Alternative Dispute Resolution (ADR), Indonesian National Board of Arbitration (BANI), ASEAN Economic Community (AEC).

1. INTRODUCTION

Enforcement of the world market, especially in the region give birth to a single economic system or [1]. It will be a lot of foreign investment and international trade that occurs and the implications for increased business disputes across borders. Dispute with a partner or a business partner is deemed detrimental to the reputation of businesses and potentially reduce the confidence of clients, customers, and consumers. So that business disputes are generally highly classified by business parties.

Business dispute resolution mechanisms , in general, can be reached through litigation and non-litigation [2]. Settlement of disputes through the courts is used for this is considered less advantageous for businesses and individual consumers. Besides being costly, too time-consuming and cumbersome. So the business community prefers to conduct negotiations to resolve business disputes between businesses, because it guaranteed the confidential nature of the dispute [3] although there is still a shortage of the power of law and compliance with legal agreements and the development of arbitration institutions are professional and negotiations are considered inadequate [4],

In Indonesia, there are many parties who offer services negotiations or arbitration for the business sector. Arbitration existing, limited to the formal institutions of institutionalized [5] set up by the government as BANI, BAMUI and P3BI, while negotiations are informal services available in professional associations.

The negotiation and arbitration have good opportunities as an alternative dispute resolution business compared to a settlement through legal institutions are often considered not a favorable option. Therefore, negotiations and arbitration need to be developed. Development of professional associations need attention because Indonesia is currently faced with the AEC, it will possibly sign a mediator /arbitrator professionals from abroad [6]. This becomes a challenge when Indonesia did not prepare by developing an institutional [7] ADR and professional associations in the field, then the power of Indonesia will miss its competitiveness to compete in their own country facing professionals from abroad.

Based on the above background, the authors are interested in conducting a study on institutional and readiness of Indonesia arbitration institutions in the face of the AEC. As for the problem in this paper is to review about ADR institutions in Indonesia as ASEAN member countries have different legal systems in other countries as well as the readiness of BANI to face the AEC.

2. RESEARCH METHOD

The paper is moved from the existing regulations in Indonesia. So the research methods used in this paper is a normative legal research method (normative legal research) that is descriptive analysis. Normative research called a doctrinal study, namely: the research object of study documents legislation and library materials. Type of research, then the approach used in this study is a normative approach or dogmatic law (legal dogmatic

[1] Corresponding Author. No Telp: -, *E-Mail Address:* yessymsari@gmail.com

approach) as the main approach. In this case, the author uses literature from the perspective of the law and regulations. Information and data obtained are derived from sources literature review in this paper were analyzed using content analysis method (content analysis), legislation, to then be deduced.

3. RESULT AND DISCUSSION

In the resolution of business disputes, the parties have the freedom to choose what dispute resolution forum will be selected? The principle of freedom of the parties (*Partijvrijheid*) is recognized in law system prevailing in Indonesia [8]. This is in accordance with the provisions of Article 1338 paragraph (1) of the Penal Code say that "all agreements made legally valid as law for those who made it". Theoretically, there are two forums to choose the parties to the problem solving, namely through the courts (litigation) or out of court (non-litigation). The legal basis for the parties to choose a forum to resolve business disputes also set out clearly in Law No. 48 of 1999 on Judicial Power. Article 58 states: "Efforts can do settlement of civil disputes outside the courts through arbitress country or alternative dispute resolution". Under Article 58 of Law 48 of 2009 on Judge directionary above, it can be seen that the parties are given the freedom to choose the settlement of disputes, whether through forum court or alternative dispute resolution. One alternative dispute resolution that can be chosen by the parties is through the mechanism of arbitration.

3.1 Institutional Development ADR

ADR as an alternative dispute resolution outside the court is expected to play a role in preventing and resolving business disputes in society so that the problem of institutional ADR also is important to note. ADR also institutional development cannot be separated from the socio-economic-political Indonesia as a whole, and particularly the development of legal culture, housekeeping judiciary and equality of bargaining power and access to information for people [9]. The views and behavior of society is a prerequisite that determines the success of ADR [10].

Besides, it is also the government's role in the development of the ADR system in Indonesia is very need for terms of implementation of the program educational and human resource development professional negotiators, especially local / local arbitrator or professional associations, as well as the popularization of ADR in the community. In view of the legal aspects of ADR has been some product of legislation that gives the opportunity to run or manage the implementation of general and sectored negotiations in Indonesia. In particular, ADR components are most in need of legal legitimacy is arbitration. In arbitration, the referee's decision requires the force of law clear and precise application [11]. Without the legal certainty of the legal force arbitral award, the arbitration would not be desirable or public trust as an option to resolve the dispute.

3.2 Institutionalization of ADR in Indonesian Indigenous People

During this time the public is already familiar with the settlement of the case with the show of peace, well known as an event deliberation, and also different types of events settlement through customs agency [12]. In many cases in rural areas (remotes area) are far from urban areas and that they have a life that is traditional and customary laws and adopting simple as patterns of interaction, traditional settlement patterns are very effective as a solution to the case that they are dealing with. In addition to its legal certainty, but also contains the basic elements of reconciliation as a result, no one felt defeated (win-win solution). And with the fact that, it seems to be very unfortunate if the reconciliatory solution in the event through the Institute of Indigenous customary law be time lost. Moreover, if explored more deeply (Duc in Altum) to the root of the philosophy contained in the basic principles of customary law, typically found there are unique things that are indigenous (local genius) that even the world of modern civilization urban areas was necessary and feasible to draw inspiration from it [13].

The settlement with deliberation between the parties to the dispute has been commonly known and adopted by the people of Indonesia during this time [14]. Even the term 'deliberation' was seen to contain personal philosophy typical of Indonesia, which is formulated into Pancasila as the foundation of the basics of life of society, nation, and state of Indonesia. Customary law is the law which is based on norms of everyday life that are directly incurred as a statement of the culture of the native Indonesia in this case as the statement of a sense of justice in connection strings attached, so clearly seen that customary law is the law of indigenous peoples in Indonesia are made by the Indonesian people themselves hereditary based value consciousness manifested in the habits of daily life by using measurements of reasoning and a sense of justice [15]. But with the change of the pattern of community life of traditional society to a modern society, a paradigm shift in the community dispute resolution. This is partly because, since birth policies, among others, the government attempted to do justice uniformity through Law No. 1/1951, customary justice referred to in Staatblad. 1932 No. 80 were eliminated gradually, while the village justice referred to in Staatblad. 1935 No. 102 is still maintained continuously included linkages with General Jurisdiction [16].

The development of the livelihoods for communities to influence the development of dispute settlement patterns encountered. Unification of the Indonesian judicial system, on the one hand, is the consequences for the

legal system of Indonesia to adopt the Civil Law System as a legacy of the colonial legal system [17]. But on the other side of society hope to resolve disputes through the courts is precisely returned to find new problems in the form of resistance to an injunction against any particular case because it is considered by the parties in part no sense of fairness. Because the process of dispute resolution through the courts resulted in the decision that is adversarial that have not been able to embrace the common interest, since the decision is a win-lose solution [18], where there are those who feel a win and on the other side there are those who feel defeated. Therefore strengthening Indigenous Institute APS can to be good for the object of the dispute is private and civil, as well as in the category of public disputes need to be developed, because in the context of the Indonesian legal system it is possible when referring to the basic rules in the Act No. 30 of 1999 and is associated with the rule in PERMA No. 1 of 2008 as well as the variety of rules relating to others. Strengthening institutions that as APS containing justice, could be applied to the start of a change in mindset around post-colonial to the nomenclature of "indigenous peoples" is no longer just positioned as "authority take care of itself" but a union of people as human collective responsibility assignment countries apply the truths that restorative justice [19].

3.3 Institutionalization of ADR Outside Court

In the context of Indonesian law, Arbitration regulated in Law Number 30 of 1999 on Arbitration and Alternative Dispute Resolution. In Fact, it says that every dispute arise can be resolved through national or international arbitration in accordance with the agreement of the parties to the dispute and also stipulates that the dispute should be based on the rules and regulations (rules and regulations) on the arbitration institution agreed upon by the parties to the dispute. If an arbitration forum has decided to "award" to the parties to the dispute, then according to Indonesian law the award must be registered with the court for its implementation. For arbitration award issued by the national, award must be registered at the court where the defendant is domiciled or where the object of the dispute is located. If the investment dispute settlement the parties choose international arbitration forum, the implementation of the award of arbitration can only be done after obtaining the approval of the Central Jakarta District Court. In the case of the Indonesian government become parties to the dispute in the settlement through arbitration, then the approval of the Supreme Court shall be requested prior to the award Furthermore, international arbitration decision can only be implemented in Indonesia if the arbitration institution which decides a dispute is in one of the countries parties to the New York Convention [20].

Dispute resolution through arbitration resulted in an arbitration award is final and binding, which is a final decision and have is legally enforceable and binding on the parties. So against an arbitral award may not be filed an appeal, an appeal or reconsideration is one of the advantages of arbitration to avoid the disputes are increasingly prolonged. However, in practice, there is a possibility that the implementation of an international arbitration award may acquire resistance through the courts in Indonesia. The possibility that one side can be understood as legal efforts continued, but the one the other hand can be rated as the neglect of arbitration as a means of dispute resolution that is recognized by the Act [21].

In addition, it is undeniable that in fact, not all decisions generated through this arbitration will give satisfaction to the parties. There are times when the arbitration decision is not implemented voluntarily by the parties. It can be caused because there are things in the decision on the dispute discredited or there are other reasons. In this case, the court has a major role in developing the arbitration. Law No. 30 of 1999 on Arbitration and Alternative Dispute Resolution allows the intervention of the court in the settlement of disputes through arbitration if one party feels dissatisfied with an arbitration award that is by applying for the cancellation of the arbitral award filed with the District Court [22].

Basically, to file a request for cancellation of the arbitration decision should be based on the reasons stated in Article 70 of Law No. 30 of 1999 on Arbitration and Alternative Dispute Resolution. However, the reasons used as the basis for the cancellation of an arbitral award can only be lodged against the arbitration decision, which was registered in court and must first be found by a court decision.

Article 70 of Law No. 30 of 1999 on Arbitration and Alternative Dispute Resolution has set out clear regarding the cancellation of an arbitral award [23]. In the aforementioned article states that the arbitration ruling parties may apply for cancellation if the rulings are suspected to contain elements are as follows: a). Letters or documents are filed in the examination after adjudication recognized otherwise false or counterfeit; b). Once the decision is taken those documents which are decisive, which is hidden by the other party; or c). The decision taken by the ruse carried out by one of the parties in the dispute.

3.4 Institutionalization of ADR in the Courts

Similar with the strengthening of the traditional institution of an alternative dispute resolution institution, there is also the prevailing Dading event, in any event, a civil case [24], which has continued until today. Events peace settlement in court civil cases always can be taken up by a decision of the case is legally binding (inkracht). In the current development of ADR no longer solely used to settle the dispute out of court but also be used to resolve the dispute in court. Which is known for mediation in court (court-annexed) [25]? This

phenomenon is not only growing in Indonesia but first developed in other developed countries such as Germany, Japan, and other developed countries. In Indonesia, the court mediation procedure is governed by the Supreme Court Regulation No. 2 of 2003 as amended by the Supreme Court Regulation No. 1 of 2008 on Mediation in court. In the Supreme Court, Regulation No. 1 of 2008 can be seen that mediation must be done by civil litigants in court on the day of the first trial. Mediation is done so that the parties can resolve the dispute between them with peace. Civil court judge is obliged to submit to the parties to the dispute to mediation or the path of peace and that the content of a peace agreement that is made into Court Judge's decision. In the Indonesian civil procedural law in the justice of the peace process is known as Dading. The judges generally feel more appreciated and respected, besides of course the lighter duties, because the judge's decision will be read: punishing the parties Plaintiff and Defendant to obey all the peace of the decision in this case. With that, a decision on a solution Dading inkracht and can be directly executed by the parties themselves.

In addition, the court also has a role in the execution of the arbitral award as implementers of the execution [26]. But the new courts play a role in executions arbitration decision if there is a request from interested parties because in this case, the court is passive. [27]. In the implementation of the arbitration decision, the court guided by the Law No. 30 of 1999 on Arbitration and Alternative Dispute Resolution, 1958 New York Convention on the Recognition and Implementation of International Arbitration or foreign, as well as PERMA No. 1 Year 1990 on the Implementation of Foreign Arbitral Awards. In other words, the court in the execution of the arbitral award has the most important role is as an executor or executors arbitral award. To be carried out executions, the arbitral award must be registered, because if they are not registered with the arbitration decision cannot be executed. In the case of delay in registration, the arbitration decision can still be made, but it depends on the consideration of the Chairman of the Court [28].

3.5 The readiness of the Indonesian National Arbitration Board (BANI)

Indonesian National Arbitration Board (BANI) is an institution that was born in 1977. BANI was established as an independent agency that provides services related to mediation, arbitration and dispute resolution outside the court for the support of business associations that are members of the Indonesian Chamber of Commerce and Industry (KADIN). Settlement of business disputes through arbitration, especially less well-known and understood by the public. And a perception that BANI as arbitration agency business is considered expensive and the possibility of its decision cannot be executed and submitted to the court [29] a challenge for BANI as an institutional body set up by the government to resolve business disputes, especially in the era of the ASEAN economic community. In the practice of law that has occurred in Indonesia, the Court accepted the case had been decided by BANI and the contract has been evident stated that arbitration as a dispute resolution choice to be a factor BANI as alternative dispute resolution institutions institutionally does not have the power and the authority of execution. Compliance with the agreement that was made into a major point or in other words the legal awareness of the consequences of the choice of alternative dispute resolution has been decided not matched by good faith.

In addition, the law disharmony can inhibit the development of institutional ADR in Indonesia. Thus the need for harmonization and legal understanding between the judiciary and alternative dispute resolution in this regard BANI for the practice of law can be run effectively and quickly. In addition to professional development and the referee negotiators in Indonesia must be consistent with the rules and codes of professional conduct that apply internationally, international ADR entities, as well as capable of competing with the negotiator/international referees [30]. To deal with AEC, BANI as Institutions alternative dispute resolution, currently has 73 arbitrators in the country and 57 arbitrators abroad domicile at Jakarta and has a representative office is only available in 6 major cities in Indonesia, namely in Surabaya, Bandung, Pontianak, Denpasar, Palembang, Medan, and Batam, has been a challenge for BANI to face the labor market as a consequence of the AEC. If BANI not immediately responding to these challenges, it will no doubt be unable to compete with association or foreign dispute resolution body operating in Indonesia later. The development of the association and the profession needs to be improved through the recruitment, education, and specialized training as a negotiator or arbitrator locally, given the pluralistic Indonesian society, hence the need for negotiators local / arbiter local professionals be a positive thing for the existence of the Indonesian nation in the face of AEC.

Strengthening internal BANI organization also needs attention, as the leading sector in alternative dispute resolution for the community, BANI must have strong institutional organizations. Dualism organization [31] The current must be addressed in order to resolve disputes BANI performance can be optimized for people, especially businessmen.

4. CONCLUSION

The development of institutional ADR, in the which includes institutional ADR indigenous people in Indonesia, is possible because in accordance with the philosophy of the Indonesian nation is "deliberation-consensus" known in adatrecht. UU no. 30 of 1999 and is associated with the rule in PERMA No. 1 of 2008

became the basis for the enactment of the institution can be custom ADR. The Institutionalization of ADR outside the court has set in its own legal order, namely in Law No. 30, 2009. However, in practice, there is a possibility that the execution of the decision of the arbitration can acquire resistance through the courts in Indonesia even cancellation may be filed with the trial judge referred to in Article 70 quo. The Institutionalization of ADR in courts is possible with the event Dading in any event civil cases. Reorganization of BANI as an independent agency that provides alternative dispute resolution services and the development of professional associations, education and training for negotiators local / local and socialization BANI arbitrators and ADR education to the community could be an attempt to prepare for the AEC.

REFERENCE

[1] R. I. Tektona, "Arbitrase Sebagai Alternatif Solusi Penyelesaian Sengketa Bisnis di Luar Pengadilan," *Pandecta Res. Law J.*, vol. 6, no. 1, 2011.
[2] Rika Lestari, "Perbandingan Hukum Penyelesaian Sengketa Secara Mediasi di Pengadilan dan Di Luar Pengadilan di Indonesia," *Ilmu Hukum Journal,* vo. 3, no. 2, p. 217-237.
[3] Richard J and L. Boyd, "An Alternative to Alternative Dispute Resolution," *Employee Relation Law Journal.,* vol. 29, no. 3, Winter 2003. p. 73-82.
[4] *Ibid.*
[5] Sufiarina, E. F. Fakhhriah, "Kewajiban Upaya Non Ajudikasi Sebagai Syarat Mendaftarkan Gugatan Guna Mewujudkan Peradilan Sederhana, Cepat, dan Biaya Ringan (Tinjauan atas PERMA No. 1 Tahun 2008), *Padjajaran Ilmu Hukum Journal*., vol. 1, no. 1, 2014. p. 166-132.
[6] R. I. Tektona, op. cit.
[7] Clemente, Tina S. "Challenges of the ASEAN Economic Community 2015: Focus on the Philippines." Asian Politics & Policy, vol. 5, no. 4, 2013, p. 677+. InfoTrac Business and Economics Collection 2017, go.galegroup.com/ps/i.do?p=GPS&sw=w&u=kpt02022&v=2.1&it=r&id=GALE%7CA353211971&asid=0d5e97e7dfad083d17ebb64a6d3aca31. Accessed 29 Oct. 2016
[8] R. I. Tektona, op. cit.
[9] S. Margono, "Penyelesian Sengketa Bisnis (Alternative Dispute Resolution/ADR)", Jakarta: Ghalia Indonesia, 2010.
[10] R. I. Tektona, op. cit.
[11] S. Margono, op. cit.
[12] N. Simanjuntak, "Penguatan Lembaga Adat Sebagai Alternatif Penyelesaian Sengketa," *Negara Hukum Journal*., vol. 4, no. 1, June 2013. p. 35-66.
[13] *Ibid.*
[14] Rika Lestari, op. cit.
[15] N. V. Ariani, "Alternatif Penyelesaian Sengketa Bisnis di Luar Pengadilan," *Rechtsvinding Journal*., vol. 1, no. 2, August 2012. p. 227-294.
[16] *Ibid.*
[17] *Ibid.*
[18] Rika Lestari, op. cit.
[19] N. Simanjuntak, op.cit.
[20] M. Hikmah, "Implementasi Konvensi New York 1958 dalam Perkara-Perkara Arbitrase Internasional di Indonesia," *Opinio Juris Journal*., vol. 13, May-August 2013. p. 81.
[21] M. Hikmah, op. cit.
[22] M. Andriansyah, "Pembatalan putusan arbitrase nasional oleh pengadilan negeri," *J. Cita Huk.*, vol. 2, no. 2, 2014.
[23] G. H. Tampongangoy, "Arbitrase Merupakan Upaya Hukum Dalam Penyelesaian Sengketa Dagang Internasional," *Lex Et Societatie Journal UNSRAT.*, vol. 3, no. 1, 2015.
[24] N. Simanjuntak, op.cit.
[25] S. Margono, op. cit.
[26] Joejoen Tjahjani, "Peranan Pengadilan dalam Pelaksanaan Putusan Arbitrase," *Jurnal Independen*., vol. 2,no. 1, p. 26-39.
[27] *Ibid.*
[28] *Ibid.*
[29] S. Margono, op. cit.
[30] S. Margono, op. cit.
[31] H. Agustin, "BANI Riwayatmu Kini", *Newspaper Hukum Online.Com*, Oktober 2016.

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Environmental Rights in the Indonesian Environmental Law (EMAs) Toward the Establishment of ASEAN Human Rights Court

Febrian Zen[*1], Achmad Romsan[*2]

*SRIWIJAYA UNIVERSITY, SOUTH SUMATRA, INDONESIA

Abstract

The notion of environmental rights is not clearly defined in the first EMA 1982 and the second EMA 1997. In the third EMA 2009, the notion of environmental rights is integrated into human rights. The questions are how to implement the protection of the people's environmental human rights; does Human Rights Court have jurisdiction over the environmental human rights violation. These questions arise in correlation of The ASEAN Economic Community (AEC). Under the AEC, the ASEAN Court of Human Rights will be established. If the community environmental rights is not clear formulated in the EMA, therefore the role of National Commission of Human Rights (KOMNAS HAM) and of the Environmental Court will be less important. As the peoples from ASEAN countries will be able to submit their claims of their environmental human rights impaired to the SEAN Commission of Human Rights. This paper tries to examine and analyze the community environmental disputes which have been decided by the District Court within the period of the application of the EMAs. All the data obtained are in form of secondary data and are descriptively and qualitatively analyzed. The findings conclude that environmental rights and also environmental human rights as protected rights are not fully protected the victims of pollution and environmental degradation. As a result, there must be an amendment to the existing environmental human rights law instruments, including the law on human rights court in Indonesia to include environmental issues.

Keywords: Environmental Rights, Environmental Human Rights, Indonesian Environmental Management Acts (EMAs), Environmental Disputes.

1. INTRODUCTION

The birth of environmental awareness in Indonesian is not that long. That was when the Government of Indonesia (GoI) enacted the 1982 Law No. 4 on Basic Provisions on Environmental Management (hereinafter cited as EMA 1982 or the first EMA). Besides this law was considered as the "super law" for it can solve all environmental problems but also it function as the "umbrella provisions". Meaning, all the future laws should have referred to the EMA 1982. The EMA 1982 is in form of basic provisions. As a result there are many articles and provisions require further implementing legislation and regulations.

The first case where the judge used the EMA 1982 was the "Burung Cendrawasi case" (The Paradise Birds Case) (1984). Herein in this case the accused dr. Peter Suhanda was the accused and prosecuted for he had committed to catch the birds of paradise are not included in the permit that he got from the Department Forestry. The term environmental rights, herein, is not very clear formulated in the first EMA 1982. Whether the right to a good and healthy environment as regulated under Article 5 is regarded as environmental rights. Then in the 1977 Law No. 23 on the Environmental Management. (Hereinafter cited as EMA 1977 or the Second EMA) Provision on so called "environmental right" is transferred into. In the elucidation of that articles only stress on the obligation of everybody. While the explanation of "a good and healthy environment" is not found in the elucidation of that provision. Furthermore in the 2009 Law No. 32 on the Protection of and of the Management of the Environment (hereinafter cited as EMA 2009 or the third EMA) the provision on environmental rights is integrated into human rights.

Furthermore, during the application of the EMAs regulations or since 1982 up to 2009 there have been 41 community environmental disputes. All of the cases begin with the disruption of people's economic activities as a result of pollution and environmental degradation. None of the Court verdicts mentioning that pollution has disrupted environmental rights of the people. Starting from the condition above the objective of the paper discussing about the extent of people can use environmental rights as basis of their claim.

2. METHOD.

This paper approaches the problems from the angle of pure legal science which is commonly known as legal research. Legal research is also acknowledged as doctrinal research. [1] Doctrinal research involves arranging, ordering and analysis of legal structure, legal framework and close reading of case laws in the search for

[1] Corresponding Author. Phone Number: -, *E-Mail Address:* febrian_zen@yahoo.com.sg.
[2] Corresponding Co-Author. Phone Number: -, *E-Mail Address:* aromsan@fh.unsri.id / aromsan@yahoo.com

finding answers to a compelling issue. Doctrinal research concern with critical review of legislation and of decision processes, their underlying policy. Thus doctrinal research may be theoretical, pure legal, academic, conventional, armchair research, pure theoretical research or pure research, basic research or fundamental research [2]. [3] Doctrinal research refers to a scientific research that is methodological, systematic, and consistent.

In this context, all the data gathered are in form of primary and secondary data. Court verdicts, laws and regulations are primary data. Meanwhile, the secondary data are gathered from library study. All the data obtained are descriptively and quantitatively analyzed.

3. THE ENVIRONMENTAL RIGHTS.

The people in general may not be able to escape from the pollution and environmental degradation as the negative impacts of development as existing laws do not fully protect their environmental rights. Moreover, theories and definitions advanced by scholars dealing with those rights are still ill-developed. Some terms offered by scholars such as "healthy environment" Thorne [4], "decent environment [5], "free from pollution environment" [6]. Other scholar like Boyle links the term environmental rights into human rights. Hereinafter, in court cases, such as the European Court of Human Rights, the term environmental rights interpreted as the rights which have been formulated in the European Convention of Human Rights [7]. Nevertheless, the term environmental rights are interpreted as "neighboring noise." To Romsan, "the difficulty in seeking the clear legal formulation of environmental rights is because this issue deals with ethical questions that refer to livelihood, ecological or biological sustainability. Furthermore, in many States' constitution the term in question refer to the right to a good and healthy environment. For example Article 5 of the First and the Second EMA). Furthermore, Shelton is of the opinion that the notion of environmental rights is the reformulation and expansion of existing human rights and duties in the context of environmental protection. Reformation between simple application of existing rights to the goal o environmental protection and recognition of a new fully fledged right to environment. However, Romsan is of the opinion that environmental rights may be as that of right as formulated in many States' legal instruments, one of them is what has been stipulated in the 1945 Indonesian Constitution and the 1999 Law No. 39 on Human Rights and also the 2009 Law No. 32 on the Protection of and the Management of the Environment. Thus, the environmental rights beside refer to the right to a good and healthy environment, it also refer to the rights to life, the right to marry an continue the decent, self development, justice, security and prosperity. If pollution impairs the right to life therefore another rights which attach to human beings will be impaired as well.

4. THE CONTEXT OF HUMAN RIGHT

Many scholars have connected the notion of environmental rights into human rights. The term he scholars use vary from one to another. For example: Boyle used the term "human rights and the Environment," Romsan prefers to use the term "environmental human rights." While the Blue Dot Movement provides parameters for the combination of the term above are breathing the clean air, drinking clean water, consuming safe food, accessing nature, knowing about pollutant and contaminants release to the local environment. Nevertheless, the examples the organization above provides contain the notion environmental human rights.

Actually, when one looks back to the birth of the linkage of environmental rights to human rights is that the 1972 Stockholm Declaration on Human Environment. In Principle 1 mentions that "Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations…" Therefore in the Principle 1 of the Rio de Janeiro of 1992 that connection is restated but in a different formulation. It says: "Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature". In its further development, the notion of environmental human rights has been a constitutional right that is guaranteed under many States' constitution.

5. PROBLEMS

As what had been mentioned above the notion of the difficulty in formulation the term environmental right, beside there is no consensus amongst the scholars n the definition of such term but also the term environmental rights touches the area of ethics which correlates the moral human beings to ad also the value and moral status of the environment and its nonhuman contents. It becomes clearer when that term is connected to term of human rights. In the Principle 1 of the Stockholm Declaration, environmental human rights is seen as fundamental rights, which include the right to freedom, quality and adequate condition of life in a decent environment. These rights are implicit referred to as the responsibility of human beings to protect the environment for the present and future generation.

Based on the description above, it is not surprisingly that amongst the 41 environmental community disputes that solved through litigation and non-litigation, the victims of the environmental pollution and degradation are not in a very favorable position. Some factors aggravate the verdicts of the district courts are beside the verdicts

are not very keen in interpreting people's environmental rights but also the term environmental rights is an ethics term. Ethics refers to values accepted by individual societies within the context of social interaction.

Under the unlucky condition of the victims of environmental pollution, therefore, there must be a break through made by the judges at the district courts in solving the community environmental disputes. Actually, the notion of environmental human rights has been guaranteed in the 1945 Constitution and protected under the human rights law and environmental law. Herein, the legal and political goodwill of the judges is the paramount for the people to claim their environmental justice. An example of this has been practiced by the Supreme Court of Pakistan in *Shelda Zia vs. WPDA PLD* that the right to life includes the right to live in an unpolluted environment. The right to life is therefore elaborated in *Amanullah Khan vs. Chairman, Medical Research Council*. The Supreme Court of Pakistan interpreted the right to life as equal to quality of life. In other cases, such as *the West Pakistan Salt Miners Labour Union vs. The Director, Industries and Mineral Development, Lahore*, the right to safe and unpolluted drinking water as part of the right to life. Thus, the environmental human rights are right to life of every person in a decent environment including flora and fauna.

6. THE CONTEXT OF ASEAN HUMAN RIGHTS.

Although the ASEAN Human Rights Court has not been established yet but anticipation is needed in order to protect the ASEAN's people from pollution and environmental degradation. For this, there is a good example of a practice where individual or group of people's claim on the violation of people's environmental rights can be submitted to the European Human Rights Court. Herein, in the Convention there is no such article dealing with environmental. On the other side, there are so many claim that the European people's environmental rights have been violated submitted either individually or in group of people. Herein in this case, the Commission realizes that violation to environmental rights is also the violation to human rights. People will not be able to enjoy their human rights if their environmental rights are impaired. For that, the European Human Commission makes some interpretation to articles or provisions in the European Charter. For example, the right to life, the right to privacy and the right to own property and so forth are articles that can be used for environmental matters.

Thus in the connection with the future role of ASEAN HUMAN Rights, there must be some articles dealing with environment. This is important as the legal reference for the ASEAN Commission of Human Rights in examining claim submitted by ASEAN people.

7. CONCLUSIONS

Looking at the three EMAs that have been applied in Indonesia, the notion of environmental rights is still ill defined. There is an article in the first and the second EMA deal with "everybody has the right to a good and healthy environment". However, this provision still unclear whether it can also be regarded as environmental rights.

In the third EMA, the notion of environmental rights is integrated to the notion of human rights. This integration is known as the notion of environmental human rights. From this, all community environmental disputes-related human rights violation, theoretically, can be submitted to Human Rights Court

Observing to all community environmental dispute that occur since 1982 up to 2015, there are found some elements of human rights have been violated. Nevertheless, submitting environmental-related human rights cases to Human Rights Court will be in consistent to the 2000 Law No. 26 on Human Rights Court. This law only deals with two kind of serious human rights violation. Those are: Crime of genocide and crime against humanity. Under this environmental matter is not in line with this law. In other word, the Court has no jurisdiction over environmental matter.

In the context of future role of ASEAN Human Rights Court, environmental provision must be in the scope of ASEAN Human Rights Charter. By this, the ASEAN, either they are individually or in group can submit their application to the ASEAN Commission whenever they have their environmental rights impaired.

REFERENCES

[1] Anwarul Yaqin, 2007Legal Research and Writing, Lexis Nexis, Malaysia.
[2] *Ibid*
[3] Suryono Sukamto, *Pengantar Penelitian Hukum,* Penerbit Universitas Indonesia (UI-Press), 1984.
[4] Thorme, M.,Establishing Environment as a Human Rights, 1990-1991 19 *Denv. J. Int'lL. & Pol'y* 301-342.
[5] Nickle, J. W, "The Human Rights to a Safe Environment: Philosophical Perspective on Its Scope and Justification", *18 Yale. J. Inter'IL*, p281-993.
[6] Sakina Shaik Ahma Yusoff, *Penyediaan Kertas Cadangan Tesis Siswaza*, Program Suaikenal Siswaza Baru Sm II sesi 2002/2003, 30 Oktover 2002.
[7] Alan Boyle, *Human Rights Approaches to Environmental Protection,* Claredon Press-Oxford, 1986.

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Pluralism, Tolerance and New Age

Marsudi Utoyo*[1]

*SEKOLAH TINGGI ILMU HUKUM SUMPAH PEMUDA, SOUTH SUMATRA, INDONESIA

Abstract
Understanding of religious pluralism that is taught in the context of Pancasila is a perspective seats the all religions in the same position so that the position of all religions in equal assume. Islam, Catholicism, Protestantism, Hinduism, Buddhism, Confucianism, other religions and beliefs based understanding local cultures is a reality that still exists in Indonesia. Pluralism is carried here departs from socio-religious, in which religious pluralism as a basis that bring forth to respect other religions and other beliefs that exist in Indonesia. In Article 29, paragraphs 1 and 2 of the Constitution of the Republic of Indonesia in 1945, the state provides the freedom and tolerance on the life of religious freedom. The cornerstone of religious life is based orthopraxis religious life meaning, truth, glory, and majesty of God Almighty which we live and ring in the faith that we profess, should be evident in the praxis of everyday life in the form of attitudes and religious tolerance.

Keywords: Pluralism, Tolerance, New Age.

1. INTRODUCTION

1.1 Background

Pluralism has some perspective, social, cultural and political. In a social perspective, pluralism counteract the domination and hegemony groups or religious sects, as well as negating the concentration of social power on one group or stream. While the perspective of cultural pluralism prevent loss of flow due to religious school destroyed by the mainstream hegemonic, and on the other hand the arrogance counteract mainstream religious denominations that are often tempted or historically-empirical abuse and oppression flow or any other religion. While political pluralism could be the basis for the guarantee of freedom of belief and expression without fear of threats of violence, because of their conflict of interest between the management body in religious beliefs. [1]

Religious pluralism has a strong affinity for democratic life in the future, and can therefore be used as the basis for understanding and attitude towards religion and the existence of a plurality of religious denominations that exist, as well as being the basis for a democratic civil society empowerment and uphold human dignity. [2]

Free to move from one religion to another, free to express their opinion and religious teachings are embraced (free ijtihad). Abraham Kuyper dividing freedom of religion (religious freedom) into three terms, religious pluralism, social pluralism and confessional pluralism. Religious pluralism means that a person has the right to choose and change religion without interference from others. Confessional pluralism means that, in addition to the human right to choose, also has the right to practice the religion of his choice. Social pluralism that is, religion has the right to be the conscience of society. [3]

Normative-institutional, policy of religious tolerance has been defined in the legislation, but the level of praxis, a formula that this ideal cannot be fully translated by some of our communities into everyday life with an indication of the persistence of the conflict and turmoil in society that carries religious issues. Democracy in the context of religious freedom in Indonesia empirically, freedom of religion in Indonesia is not going well, it is evident there is still a religion banned because it was considered "deviant". There are still outbreaks of violence by one religion or sect against another religion or sect. Therefore, the State or the government no right to prohibit any religion (which is already recognized) unless the religion disturbing public order. In fact, Indonesia is a country of Pancasila which reflects the "diversity" with the motto Unity in Diversity her.

1.2 Issues

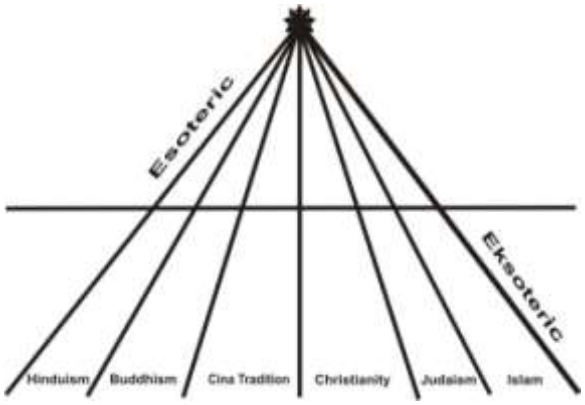
Based on the description of the background of the problems mentioned above, it is a problem in this journal are How to understand and analyze the public's understanding of Indonesia on Discourse of Religious Pluralism in Indonesia?

1.3 Theoretical Framework

Frithjof Schuon, Bearers of ideas "Transcendent Unity of Religions", "Transcendent Unity of Religions" is one of the major theories in the discourse of Religious Pluralism. He was a German scholar who by Seyyed Hossein Nasr regarded as the most authoritative in this matter. Schuon with his theory that the birth of Basel, Switzerland, on June 18, 1907 is convinced that even at the level of the outer religions are different, but in essence all religions are equal. In other words, the unity of religions at the level of the transcendent. For Frithjof Schuon, in his book "Finding Common Ground Religions, translator Saafroedin Bahar." Stating that this life

[1] Corresponding Author. Phone Number: - *E-Mail Address:* mar_utoyo@yahoo.com

there are levels-the levels. Metaphysical terms, only in the Lord, which is the highest level, there is a meeting point of different religions. Whereas the level below it, religion was different from each other. Epistemological terms can also be said that the difference between one religion to another religion are also shrinking and fused the highest level, while the level beneath various religions divided. [4]



Picture 1: Transcendent Unity of Religions

Confidence Schuon above depart from its view that all religions have two realities or essence, that the exoteric and the esoteric. Its exoteric is the essence of birth, which at this level all religions have a dogma, laws, rituals and beliefs were different, and even conflicting. While the esoteric nature is our inner nature, where all religions with all our differences and disagreements had been met. Herein lies the meeting point of religions. So exoteric level like the 'body' of religion while the esoteric level is the "heart" of religion. Exoteric levels vary, but the esoteric level is the same. That's why this Schuon called his theory "the transcendent unity of religions" (the transcendent unity of religions).

2. RESULT AND DISCUSSION

Indonesia recorded the history of the national struggle, UUD1945 applicable until now is the work of designer Constitution Committee chaired by Ir Soekarno (Bung Karno). The work of the Constitution Designing Committee, August 18, 1945 passed by the Indonesian Independence Preparatory Committee (PPKI) chaired by Bung Karno, became the RI Constitution, known as the 1945 Constitution Preamble taken from draft preamble of the Constitution (which by Prof Mr H Muh Yamin called Charter Jakarta), after the precepts of Pancasila (state ideology), enhanced. Basic I originally read "Godhead", with the obligation to enforce Sharia Law for adherents, refined into "belief in one God". Said "according to the bases" on basic II eliminated, so that it becomes "just and civilized humanity". Between the word "consultative and representative" in principle IV by a slash, resulting in "populist, led by the inner wisdom consultative / representative". Average basic V unchanged. From this was born of Article 29 paragraph (1) of the 1945 Constitution, which reads "The State is based on belief in one God." Muslim leaders in the deliberations deal led by Bung Hatta, as a follow up of Bung Hatta meeting with representatives from eastern Indonesia Christian on the afternoon of August 17, 1945. They met Bung Hatta dwelling, with the appeal that the Constitution will formed not engraved the word "enforce sharia law for adherents" are listed in the Jakarta Charter, but a general nature. They also emphasized that if their call is not cared for, they will not know anything anymore with the affairs of Indonesia. In terms of article 29 paragraph 2 of the Wongsonegoro proposed adding the words "and belief", which then reads "The State guarantees the freedom of each citizen to profess any religion and to worship according to their religion and their respective beliefs". [6]

Amendments to the 1945 Constitution Article 28E (1) which states, "Everyone is free to embrace religion and to worship according to their religion ...." And Section 28E (2) reads: "Everyone has the right to freedom of belief to believe, express thoughts and attitudes, according to his conscience. "in addition, religious freedom is also set forth in Article 29 paragraph (2) that," the State guarantees the freedom of each citizen to profess his own religion and to worship according to their religion or belief of it. " In addition, the first principle of Pancasila also confirmed dianutnya understood that the Republic of Indonesia godless Almighty. In the course of time, Article 29 paragraph (2) and the first principle of Pancasila was interpreted broadly so as to include also the sense: [7] The freedom to believe in god or atheist; Ungodliness and freedom of religion or motivated only alone but not religious; The freedom to believe in god Almighty for the post of state, governments, or to become civil servants, while as an ordinary citizen may atheist or atheist, should religion or not; The freedom to believe in god and religion officially recognized by legislation.

Musdah Mulia found normative religious freedom contains eight elements. First, the freedom for everyone to the religion or belief. Second, the freedom to manifest religion or belief in the form of ritual and worship. Third, freedom from any form of coercion. Fourth, freedom from discrimination. Fifth, the freedom that recognizes the rights of parents or guardians. Sixth, freedom for all religious communities to organize or association. Seventh, the freedom for everyone to manifest religious teachings can only be limited by the Act. Eighth, the state guarantees the fulfillment of the right internal freedom for everyone, and it is non-derogability. [8]

Influence globalisasasi give a new pattern in the religions, of globalization emerged two streams, one of which want to change religious doctrine in accordance with changing times (accept globalization) and the flow

again wants to maintain religion in position (resisting globalization), but both sacrifice creed (theology) from each religion. The second pattern is formed on the notion of religious pluralism. Then the discourse of religious pluralism that is rolling in Indonesia can not be separated from the role of scholars and scholars. [9] The discourse of this pluralism has changed the reality of the diversity of religions and theology influences that exist in every religion to be changed. An example is the expression Azyumardi Azra former rector of UIN Syarif Hidayatullah Jakarta said that Islam is composed of a variety of shapes and Islam that Islam is not one but many kinds and flow. [10]

Discourse of religious pluralism has existed since the 18th century. [11] If traced its historical discourse of the philosophers emerged which views on religious teachings. This discourse then to Indonesia by scholars and intellectuals who studied in the West or agree with the ideas of the West. [12] The Western scholars view religion as an object of scientific study, and the research had to be subjective as possible. They studied several religions based on sociological and historical approach is not normative. Study abroad their religion is not to be practiced but, they learn the religion simply as a research study. Thus, Islam has a perfect deemed not / has not been perfect, in line with the changing times are always changing, so Islam has been perfect and universal was regarded as a religion that historically and should join other religions in order to achieve perfection. Whereas in Islam are the principal (proposal) that cannot be changed anytime soon, but that furu 'can vary in accordance with the rules that govern them.

Then, the discourse of religious pluralism seems so busy talking mass mediated, workshops, studies. This discourse is also taken seriously by the MUI, so MUI (Majelis Ulama Indonesia) in 2005 issued a fatwa illegitimate to understand religious pluralism. Pluralism fatwa issued by MUI that thinking was increasingly prevalent in the community. Because of religious pluralism invites to people of faith to doubt the rights of religious beliefs. Hesitations are caused because of religious pluralism embed ideology relativism. [13] From the notion of relativity interpretation of religion then it will result in something even more dangerous, namely; flow nihilism religious truth. [14]

Religious people herded in the region dubious reasoning, namely; accept all the truth of religion, because all religions are equal, namely equally true by followers who hold them. According to the pluralists, humans are creatures relative. Thus, the interpretation of religious truth that is achieved is relative, not absolute. Therefore, no one can absolutize his opinion and claimed that his opinion is the truth. [15]

Opinion of the ideas / human interpretation relative Issuer answered by Wan Mohd Nor Wan Daud. [16] According to him, such an opinion is wrong, at first glance seems logical and beautiful. Though God menganugrahi human mind to think, and to arrive at some degree of confidence that certainly at the human level and not at the level of God. With reason and conviction that we know where the Truth and what is falsehood. Meanwhile, according to Adian Husaini, humans are commanded believe the absolute truth, on a human level, not at the level of God. Because it is not possible. Is the truth K k large or small, the important thing is that the human mind can reach the stage of certainty and confidence (`Ilm). [17]

Discourse of religious pluralism in Indonesia can not be separated from the role of Indonesian Muslim scholar Nurcholish Madjid ie, through the idea of inclusive Islam, [18] Islam and pluralist. The idea of theology Nurcholish Madjid Then followed and modified by Budhy Munawar Rachman became the exclusive theology, inclusive and paralelis. Inclusive attitude means other religions is an implicit form of our religion, which means that other religions are wrong path, the plural is misleading his followers while other religions are roads that are equally legitimate to achieve the same truth. The idea of an inclusive Islam owned Nurcholish Madjid is to follow owned by Christian theology. An inclusive Christian emerged since the end of Vatican Council II (1962-1965), Roman Catholic theology the concept of change, from (Extra Ecclesiam Nulla Salus) be inclusive theology.

Inclusive Christian theology is then modified by Nurcholish Madjid into Islamic theology inclusive, then presented Nurcholish Madjid culture during a speech at Taman Ismail Marzuki on 21 Okober 1992. He gave a speech title "Some Reflections on Religious Life in Indonesia for Future Generations". In his speech, he initiated about Islam as a religion that Hanif and inclusive and launched a strong criticism against the symptoms of fundamentalism and religious radicalism. To support the idea of the idea of inclusive language, Nurcholish Madjid redefining the meaning of Islam. [19] Islam in his view is not only a special name for a religion, but the designation can be used all religions. Who resigned to God's religion is a form of Islam. Through this idea, he gave a new definition of Islam. From the definition of Islam which he had then any religion is a form of Islam. Though the Prophet [20] has to define Islam is a religion whose religious name was given directly from God and Islam is not the name of human imagination.

Redefinition of the meaning of Islam by Nurcholish Madjid Islam in his book The Doctrine and Civilization; Because of these principles then all true religion is essentially "al-islam", i.e., all taught by resignation to the Creator, God Almighty. In the Holy Bible we find repeated assertion that religion previous prophets before Prophet Muhammad s.a.w. is all of al-Islam because core all of it the doctrine of resignation to God. On this basis, the religion brought by Prophet Muhammad is called Islam, because he consciously and with full

deliberation teaches resignation to God, so that the religion of the Prophet Mohammed is al-Islam par excellence, but not the only, and are not unique in the sense stand alone, but appear in a series with religions other al-Islam, which has been performed earlier. [21]

3. CONCLUSION

Understand and analyze the understanding in Indonesia about an idea of Religious Pluralism in Indonesia should be based on Pancasila, the teachings understand pluralism cannot be interpreted according to personal opinion and in the name of a religion, because the understanding of pluralism that one would give rise to a teaching or understand the new form of "new age" which will be raises misguided understandings in religious life in Indonesia.

4. RECOMMENDATIONS

The government should be more selective and careful in determining whether or not deviant group / person in translating the understanding of a religion or belief, so as not to cause conflict among adherents.

REFERENCE

[1] Haryatmoko, *Pluralisme Agama dalam Perspektif Filsafat,* IAIN Sunan Kalijaga, Yogyakarta, 1999, p.98
[2] Billah. M.M, *Pluralitas Agama di Indonesia: Memilih Kerangka Pemahaman atas Keberadaan Aliran Keagamaan dari Perspektif Teologi dan HAM*, UIN Malang, Malang, 2007, p.8-9
[3] Schuon, Frithjof, *Mencari Titik Temu Agama-agama,* Yayasan Obor Indonesia, Jakarta, 1987. P.12
[4] Ibid, p.11
[5] www. islamlib.com. *Artikel kebebasan beragama dan berkeyakinan*, diakses, 7 Januari 2013.
[6] Pranarka, A.M.W., *Sejarah Pemikiran Pancasila*, CSIS, Jakarta, 1985, p.38-39
[7] Jimly Asshiddiqie, *JAMINAN KONSTITUSIONAL DAN REALITAS SOSIAL KEADILAN DAN PENGHORMATAN ATAS HAK-HAK ASASI MANUSIA (Masalah-Masalah Kebebasan Beragama, Kesetaraan Gender, Hak-hak Difabel, dan Orientasi Seksual)*, 2007, p.1
[8] Siti Musdah Mulia. "*Ada Apa dengan Kebebasan Beragama*". http: //www. elsam. or.id/new/index. php?id =368&lang= in&act =view&ca t=c/101/ diakses tanggal 12 Oktober 2016.
[9] Sumanto Al Qurtuby*, Lubang Hitam Agama*, Rumah Kata, Yogyakarta, 2005, p.45
[10] Azyumardi Azra, Pluralisme Islam dalam Perspektif Historis, *Nilai-nilai Pluralisme dalam Islam,* (ed) Sururin, Bandung, Kerjasama Fatayat NU dan *The Ford Foundation*, Bandung, 2005, hlm 150
[11] Anis Malik Thoha*, Tren Pluralisme Agama*, Perspektif, Jakarta, 2005, p.16
[12] http://www.asiafoundation.org/Location/indonesia.html Lihat, Hamid Fahmy Zarkasyi*, Liberalisasi Pemikiran Islam*, CIOS, Ponorogo, 2007, p.85-90
[13] Arief Budiman dalam *Dialog Kritik dan Identitas Agama*, Seri Dian I/Tahun I, Dian/Interfidei, Yogyakarta, 1993, p.185
[14] St. Sunardi, *Dialog: Kritik dan Identitas Agama*, Dian/Interfidei, Yogyakarta, 1993, hlm 69.
[15] Siti Musdah Mulia, *"Pluralisme Agama dan Masa Depan Indonesia",* Nilai-nilai Pluralisme dalam Islam, (ed) Sururin, Fatayat NU, Bandung, 2005, p, 233-235
[16] Wan Mohd Nor Wan Daud seorang pemikir dan intelektual yang beliau menjabat Deputy Director ISTAC.
[17] Adian Husaini, *Hegemoni Kristen-Barat dalam Studi Islam di Perguruan Tinggi*, Gema Insani, Jakarta, 2006, hlm 195-199.
[18] Dawam Raharjo memberikan julukan pada Nurcholish Madjid dengan seorang yang inklusif., dikutip dari http://islamlib.com/id/artikel/membedah-pluralisme-cak-nur/ tanggal 15 Oktober 2016.
[19] Nurcholish Madjid, *Islam Doktrin dan Peradaban*, penerbit Paramadina, Jakarta, 2000, hlm 426-440
[20] Adian Husaini, *Wajah peradaban Barat dari Hegemoni Kristen ke dominasi Sekular-liberal*, Gema Insani, Jakarta, 2005, p.345
[21] Abukabakar Muhammad, *Membangun Manusia Seutuhnya Menurut Al-Qur'an*, Al-Ikhlas, Surabaya, 2007, p.39

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Integral and Qualified Criminal Law Enforcement Model in Dealing with Vehicle Robbery: A Legal Strenghtening

Heni Siswanto*[1], Maroni*[2], Fathoni* [3]
UNIVERSITY OF LAMPUNG, LAMPUNG, INDONESIA

Abstract
The crime of theft with violence, theft of motorcycles, and robbery has spread terror massively. It becomes a very frighteningly specter for people in Lampung. To resolve it, it is necessary to build a "Criminal Law Enforcement Policy" (CLE) through effective policy. The question of this paper are about the condition of the existing model of CLE against the crimes in Lampung; and the application of integral and quality of the CLE model of in dealing with crime and robbery on the investigation in the future. The research approach used is legal study (jurisprudence) approach, which is based on ideas and the recent approach. The first step of this research begins with doctrinal legal research by using statute approach, an analytical approach (analytical approach), and the conceptual approach. As a complement, it also uses the approach of socio-legal studies, which examine the law as a social phenomenon related to the enforcement of criminal law. The research location is in the jurisdiction of the Lampung Police. The final results are expected to be obtained through legal research are building a model of the integral and qualified CLE applications in dealing with the crime of vehicle theft on the stage of investigation. Model application of CLE will be able to provide guidance in combating this crime, effective, non-transactional, and based on the science of law. The most relevant application model was applied in accordance with the typology and characteristics of the Lampung Police jurisdiction.

Keywords: Model, CLE, Integral, Qualified

1. INTRODUCTION

Lampung is one of the provinces in Indonesia which has a high number *Crime Index* in Indonesia, which is 77 per 100,000 population. This is partly due to the number of unemployed (183 500 inhabitants) and a high unemployment rate (4.54%) in Lampung Province. Based on the projections of the 2010 Population Census, the population growth rate of 1.21% / year, the 2016 population of 8.205 million inhabitants ranged Lampung [1]. Criminology and social generally agreed that the figure and the unemployment rate affects the amount of crime.

For example, the formula in Section 362 Penal Code, "Whoever took the goods things that are wholly or partially belongs to another person with the intent to have unlawfully, threatened due to theft, with a maximum imprisonment of five years" The formulation of the crime of theft as set forth in criminal Code of the above suggests that the crime of theft contain elements of "taking the goods of others with the intent owned". This phrase assumes that the items taken not belong taker / thief. In other words, the thief does not have the financial ability to keep the item legally through the mechanism of buying and selling. Financial limitations can occur in unemployment.

Empirical data based on interviews with the Provincial Police Lampung, obtained data about the high crime rate in the province of Lampung. Figures motorcycle theft, for example, had reached 20-30 motorcycles a day. In order to cope with a high crime rate, even the police chief of Lampung, Brigadier General (Pol) Ike Edwin and his vice, Krishna Murti, has a "headquarter Outside Headquarters" for service closer to the community. In fact, in December 2015, the number of robbery in Lampung ever reaches 0, when the Lampung Police Chief Brigadier General (Pol) Edward Syah Pernong formed a special team *Antibandit (Tekab)* 308. The operation performed Tekab-308 has managed to catch the perpetrator robber hiding in Jabung, East Lampung.

Theft crime even occurred also in the city of Bandar Lampung as its capital. Most cases are vehichle theft; there were 557 cases, and 413 cases of theft by weighting. Lampung Crime Index revealed any problems in the criminal law enforcement (hereinafter abbreviated, CLE) against the crime of theft. The threat of severe criminal punishment phase *in concreto* CLE turns out not to scare or discourage perpetrators of robbery. Even during 6 (six) months shows the number of criminal offenses (JTP) robbery of the types spout, spout and vehicles theft increasing, including the form of the modus operandi of robbery crime was committed.

Robbery crime has spread terror, rampant and becomes a very frightening specter for people in Lampung, in Jakarta, Bogor, Depok, Tangerang and Bekasi (Jabodetabek) and a number of other areas that have spread throughout Indonesia. These crimes cause the victim to murder and properties are not few in number. Therefore,

[1] Corresponding Author. Phone Number:-, *E-mail address*: heni.siswanto@fh.unila.ac.id
[2] Corresponding Co-Author. Phone Number:-, *E-mail address*: maroni.1960@fh.unila.ac.id
[3] Corresponding Co-Author. Phone Number:-, *E-mail address*: fathoni@fh.unila.ac.id

it is necessary to build CLE policies through effective police policy that is able to eradicate / eliminate / eradicate crime robbery.

Given the nature of crime robbery very dangerous, harmful and alarming, the eradication of crime robbery need a commitment in terms of handling and prosecution robbery effective, systemic and comprehensive. CLE is held not to be partial and applies a shortcut. CLE implemented integrally and qualified in dealing with crime robbery, occurring either now or in the future.

CLE on stage application phase (*in concreto*) is still influenced by the customs / culture dirty game and use the shortcuts without optimizing the scientific application of the law. Procedures for CLE corrupt, collusive and transactional. Law enforcement officers in exchange of power CLE with certain benefits to manipulate a case or set of foul play. Culture of dirty game in the form of deeds of bribes or other misconduct will make degenerate / low quality products from CLE. As a result, there is a failure CLE to realize the truth and substantive justice.

To build CLE integral and qualified in dealing with crime nozzle, robbery, and vehicles theft required an in-depth research to find a model CLE integral, effective, non-transactional and based on scientific law (quality). CLE model to be produced using the classic methods of law enforcement, namely preventive and repressive, but is equipped with an approach called pre-emptive approach by prioritizing calls and more humane approach. For the case of the province of Lampung, Lampung Provincial Police has launched a program "Factoring Glare" (Factoring Glare is a local wisdom Lampung form of coordination activities and friendship to find the best solution in solving a problem) in the resolution of the case or the conflict in the community. Specialized in handling crime nozzle, robbery, and vehicles theft, Lampung Police have formed a special team Antibandit (Tekab) 308. Law enforcement thus has to accommodate the "restorative justice" and patterns deliberative.

Until the preliminary report was made, a team of researchers recently completed empirical study to the Provincial Police and Police Lampung Bandar Lampung.

The specific objectives to be obtained from this study are:

a. To assess, map and critically analyze the recent CLE model today. CLE model is measured and assessed quality integral in dealing with crime and robbery on the stages of the investigation. Investigations are held in a number of Police in the jurisdiction of the Lampung Police. The recent models will be evaluated, selected and reconstructed as the application of CLE model that are most relevant to be applied in accordance with the typology and characteristics of the environment in the jurisdiction of the Lampung Police,
b. To build an application of CLE model are integral and qualified in dealing with robbery crime at the stage of investigation in the future. Model application of CLE will be able to provide guidance in combating crime hijacking an integral, effective, and non-transactional and based on the science of law. Through that model will be to produce the expected product quality criminal enforcement against crime robbery.

This study has at least two of urgency (virtue), namely:

a. To study critically the recent CLE model. Models of criminal enforcement of existing measured integral and qualified in dealing with crime robbery at this stage of the investigation. It was important, because the models will be reconstructed as a model CLE applications that are most relevant. Thus, through this research can be applied to CLE model in accordance with the typology and characteristics of the environment in the jurisdiction of the Lampung Police.
b. To develop a science of criminal law, particularly in the field of crime robbery eradication. The development of science that is consistent with model building related application of CLE policies within the framework of an robbery integral eradication, effective, non-transactional and based on the science of law. In the context of scientific development so that, this research also will enrich scientific publications in the field of criminal law and CLE, at least in an accredited national journal.

2. DISCUSSION

CLE can be defined as: (a) The entire series of events organizer / maintenance balance of rights and obligations of citizens according to human dignity and responsibility of each according to function fairly and equitably with the rule of law, rule of law and the law in the field of criminal law is the embodiment of Pancasila and the Constitution of the Republic of Indonesia Year 1945; (b) Overall legal activities / law enforcement toward implementing the rule of law, justice, and the protection of human dignity, order, peace and the rule of law in the field of criminal law in accordance with the Constitution of the Republic of Indonesia Year 1945.

Enforcement of criminal law consists of two core stages. The first phase, CLE *"in abstracto*" is the stage of the product formulation of legislation by the legislature. This stage can be called the stage of formulation / legislation. CLE "in abstracto" is legislation (law making) or changes in legislation (law reform). The second stage, CLE "in *concreto*" (law enforcement). Both vehicles theft CLE case within the framework of the

attainment of objectives, vision and mission of national development and support the realization of the CLE systems (CLES) nationally in eradicating.

CLE "in abstracto" through the legislative process / formulation / manufacturing of *legislation.* The process of this formulation is the very early stages of the process of strategic CLE "in *concreto*". Therefore, the error / weakness at this stage of the legislative policy / formulation is a strategic error that could undermine efforts CLE "in concreto", ie CLE is done at the application of policies and policy execution [2].

2.1 Integral Approach

Criminal Law Enforcement (CLE) visits integrally an entanglement tightly / alignment / integrality / unity of the various sub-systems / aspects / components of the legal system consisting of components "legal substance" *(legal substance),* "the structure of the law" *(legal structure*), and "legal culture" *(legal culture)* in the field of criminal law. As a CLE process is closely linked to these three components, namely the rule of law / legislation (component substantive / normative), agency / structure / law enforcement (component structural / institutional and mechanisms for procedural / administrative), and cultural values legal (cultural component) [3] more focused on the values of philosophy of law, legal values that live in the community and awareness / attitudes legal behavior / social, and educational / science of law [4].

Based on the understanding of the integral system, the definition of the law enforcement system or the judicial system can be viewed from various aspects / components:

a. Legal Substances: essentially judiciary / legal system is a system of enforcement of the substantive law in the field of criminal law covering criminal law material, formal criminal law and CLE.
b. Legal Structure*:* judiciary / legal system is basically a system operation / functioning of agencies / institutions / law enforcement agencies in carrying out the functions / their respective authorities in the field of CLE consists of 4 (four) sub- system, namely:
   1) "investigation" (by agency / institution investigator);
   2) "prosecution" (by agency / institution prosecution);
   3) "judge and pronounce sentence / punishment" (judicial body); and
   4) enforcement (by agency / implementing agency / execution).

The fourth stage / subsystem that is an integral part of CLE system that is integral that is often referred to as integrated criminal justice system. Legal culture: the court system / the law enforcement system is basically the embodiment of the system "cultural values of law" which can include the philosophy of law, principles of law, legal theory, legal science and awareness / attitudes legal behavior.

Implementation of CLE currently tends to optimize approach / orientation / partial legal thinking which saw law / criminal provision with "blinders". Solely pursuing supremacy / enforcement of the law or simply certainty / formal law enforcement course, the quality of law enforcement limited to justice based on laws that are not able to realize the substantive justice, the rule / enforcement of the substantive values / material, the rule / law enforcement the material, which embodies justice based on scientific culture that can promote the quality of law enforcement is able to realize the substantive justice, that justice is based on Pancasila or justice based on God.

2.2 Optimization of Law Scientific Approach (Qualified)

In essence the quality of law enforcement cannot be separated from the goal of improving quality of life and quality of sustainable development *(sustainable development / sustainable society).* A culture of mob justice which is one form of law enforcement without legal science, can impair quality of life and quality of sustainable development because resources *(resources)* development is not only natural resources / physical, but also non-physical resources.

The criminal justice system (SPP) good / healthy, to ensure fairness *(ensuring justice),* the security of citizens *(the safety of citizens),* honest, responsible, ethical, and efficient *(a fair, responsible, ethical and efficient Criminal Justice System),* and to foster the trust and respect of society *(public trust and respect),* essentially a non-physical resources that need to be maintained continuity for the next generation. Judicial mafia in essence a form of exploitation damaging non-physical resources and can be a virus for SPP healthy / ideal; This means it can impair quality of life.

According to Barda Nawawi Arief that if CLE is really going to be improved and won the confidence and high esteem of the people, then one of the fundamental measures are:

Improving the quality of science in the making and enforcement is said to be very important, since (1) the quality of science, not only meant solely to improve the quality of education and the development of legal science itself, but also to improve the quality value and the product of the process of law enforcement *(in abstracto* or *in concreto).* (2) The laws are made by science, and then the user (application / enforcement) must also be with the science, the science of law; not by science or science bribes and other means.

Scientific approach (legal) can be interpreted as a method / how to approach or understand things (objects / phenomena), based on the logic of thinking / construction thought, concept / framework / rationale (insight / view / orientation) specific. Because viewpoint / construction / orientation of thinking about the law can vary, it

is often found any mention of the term reasonable scientific approach (legal) of various kinds. Among others, called the approach juridical / normative / dogmatic (legalistic), approach to empirical / sociological (functional), approaches historical, comparative approach, the approach philosophic (critical), policy-oriented approach, value-oriented approach, insight-oriented approach on national, global approach, partial approach and a systemic approach / integral.

According to Barda Nawawi Arief, the approaches (criminal law) that need to be optimized / developed in CLE in Indonesia through three integral scientific approach, namely: (1) a scientific approach to the juridical-religious; (2) The juridical-contextual approach; and (3) the approach juridical global perspective / comparative, especially of the family system of law traditional and *religious law system)* against aspects of the substance of value / idea-third basic areas of substance criminal law (criminal law materiel, criminal law formal, and law enforcement criminal).

CLE is currently still low-quality manner *in concreto* as a matter of law enforcement, because of a culture of bribes / culture shortcut / culture "blinders" which certainly does not fit the culture of science, which can inhibit / degrading / destroy the quality of criminal enforcement. The current CLE is not yet built / is formed integrally on the system of norms / integral substance of the criminal law in accordance with the approaches and ideas of balance.

If CLE is really going to be improved and won the confidence and high esteem of the people, then one of the fundamental efforts is to improve the quality of science in the process of making and enforcement. Quality of science, not only meant solely to improve the quality of education and the development of legal science itself, but also to improve the quality and value of the product of the process of law enforcement *(in abstracto* or *in concreto)*. Similarly, a legal product, better legislative product, and products judicial / judiciary would be more qualified to use the science / scientific approach.

Cultural issues misconduct (foul play) and the problem of optimizing culture / orientation / approach of science *(scientific culture / approach)* in law enforcement seems to be a phenomenon that much public scrutiny. The Indicator of decrease quality scientific approach with an approach / other orientation in law enforcement, it is seen in a variety of phenomena such as:

a. Their reality is often disturbed the public, that there is a culture of bribery, material culture, or culture dirty game / despicable commonly known by the term culture “Mafia” in the practice of law enforcement. Various terms have sprung up, among others, the transaction term legal / lawsuits, case brokers, broker case (*Markus*), extortion, selling demands / verdict and so forth. A culture of bribes (a dirty game / despicable) is an indicator of the lack of scientific culture.
b. Often bring in expert witnesses from among experts / legal experts. This phenomenon suggesting the declining quality of science (law) among the law enforcement agencies, because that asked about legal issues / jurisprudence that should have been known by law enforcement officials (who incidentally is also a lawyer). At the very least, even this phenomenon indicates the existence of a culture / pragmatic approach / shortcut / bypass in understanding the law / legal studies, which only wants to quickly extract / *extract* of his course (of the expert witness / experts), without having bothered to dig itself.
c. In the practice of law enforcement seen their symptoms / tendency to think the law is partial and only see the law / criminal provision with "blinders". Separating between the legal norms with the principles, the purpose of punishment, and values / ideas existing basis and recognized in the science / theory / unwritten law; between certainty of law / formal legal fight with legal certainty / unlawful material; between law (legislation) and jurisprudence; between jurisprudence with divinity (moral / religious); many who know the guidance of the law, but it does not know the meaning of justice based on the (guidance) Belief in God Almighty; separating the three main issues of criminal law (criminal offenses; fault; criminal) with the whole criminal system; separating law enforcement (law) criminal with signposts (system) national law enforcement; or separating the criminal law system with National Legal System (*Siskumnas*).

CLE on stage *in concreto* (application phase) is still influenced by the customs / culture dirty game and shortcuts committed by unscrupulous law enforcement officials are corrupt and collusive with the offender. Barda Nawawi Arief stated that the term dirty game more striking than the Mafia, because it gives the impression to other forms of misconduct that occurred during the court proceedings. Though not a few complaints of people who become the object of extortion and misconduct / gross more games before the case is transferred to the court.

CLE is interfered with the culture of bribes, cultural material / material / goods / services, or a dirty game culture / misconduct. The general public is familiar with such terms as culture Mafia in practice CLE. Various terms are emerging, such as the term transaction legal / lawsuits, touts case, case broker (*Markus*), extortion, selling Warrant Termination of Investigation (SP-3) or surety, ease the suspect / defendant out of the detention room, product engineering law / demands / verdict, election booths prison, ease convicts / prisoners out of the

criminal chamber, and so on. A culture of bribery, foul play or misconduct is an indicator of the lack of cultural / scientific approach to the law.

2.3 Reconstruction of CLE

CLE is integral in dealing with crime problems robbery in the future need to be reconstructed / rebuilt / rearranged in an integrated manner through integralities systemic seen from the legal system *(legal system)* consists of components of legal substances *(legal substance),* legal structure *(legal structure)* and legal culture *(legal culture);* integralities substance materially include criminal law, criminal law and the formal implementation of the criminal law; and integralistic functional, including: education, legislation, and adjudication.

Reconstruction of CLE is integrally covers a very broad scope includes the renewal of the substance of the criminal law, reform the structure of criminal law, and the renewal of a culture of criminal law on the crime robbery examined logically or antilogies or by other means systematic, within the overall device norm (law) robbery crime, but also see the importance of the social effects of the establishment of norms (law) and the importance of social background in CLE crime robbery which covers a broad approach that has been overshadowed by aspects of philosophical, sociological, anthropological, historical, and comparative.

CLE in dealing with crime robbery need to integrate normative juridical approach and juridical factual for justice that characterized Indonesia, namely justice Pancasila which implies fairness, religious, humanistic, justice, democratic, nationalistic, and social justice, not just the formal justice but justice substance and policy-oriented national development and the development of national law or the national legal systems.

Study / assessment CLE is integral in dealing with crime robbery seen from the legal system consists of a *legal substance, legal structure* and *legal culture* that has been stated above, then reconstruct / rebuild integralities CLE in integralities systemic, integralities substantial, and integralistic functional covers a very broad scope, which includes:[5]

a. Renewal of the substance of the criminal law system (substantial) covers renewal / development integrality substantive criminal law covers the substance of criminal law materiel *(Materielle Strafrecht),* the substance of the criminal law of formal *(Strafverfahrensrecht / Strafprozes-srecht),* and legal implementation of the criminal *(Strafvollstreckungs-recht).* The third sub-system that is an integral system of punishment, because the criminal law may not be operationalized / enforced concrete with only one subsystem.
b. Renewal of the structure of criminal law (structural system), which includes among other things the renewal or restructuring institutions / agencies, management systems / management of the mechanism, and facilities / infrastructure support of CLE system; and
c. Renewal of criminal law culture (cultural system), which includes among others, issues of legal consciousness, legal behavior, legal education and criminalistics.

Renewal of criminal law or used the term reconstruction of the criminal law *(law reform)* against CLE is integral in dealing with crime robbery essentially a renewal effort / CLE towards combating crime reconstruction robbery.

Reconstruction of the building Indonesian criminal justice system, that is to rebuild the national criminal justice system, in this case in the face of CLE robbery. Thus, the term is closely related to issues of law reform and law development, particularly with regard to the renewal / development system of criminal law, more specifically the renewal / construction / reconstruction CLE integrally face of robbery in future are examined from the point of the legal system consisting of legal substance, legal structure and legal culture.

Renewal of criminal law or used the term reconstruction of the criminal law (law reform) against CLE is integral in dealing with crime robbery essentially a renewal effort / reconstruction CLE against prohibition / eradication of crime robbery. Reconstruction of rebuilding national criminal justice systems. The term that is closely related to issues of law reform and law development, particularly with regard to the renewal / development system of criminal law (penal system reform / development or penal reform), more specifically the renewal / construction / reconstruction of CLE is integral in dealing with crime robbery seen from system point of law (legal system) consisting of legal substance, legal structure and legal culture.

Renewal of criminal law (law reform) aimed at combating crime robbery, overcome, suppress and eradicate evil robbery of course with the legal development / reconstruction CLE integrally face the evil robbery in the era of globalization. CLE is integrally reconstruction has to be done to achieve the welfare of the community. Therefore, combat and overcome the evil of robbery should be done in the legal system.Efforts to rebuild / overhaul CLE is integral in dealing with crime robbery as efforts to combat crime robbery in the era of globalization, of course, by making corrections to the law makers, law enforcement officials at all stages of the criminal justice process, decision and policy makers in central and local governments areas that still apply the mindset that CLE robbery crimes as ordinary crimes / conventional / traditional, formal legal nature, oriented to the values of colonial criminal law that are individualistic and secular.

Law reform / reconstruction of CLE in dealing with crime hijacking an integral and quality in the future towards thinking the concept of critical law that would be practical guidance in conducting legal reasoning based on the signs of national law in the constitution and laws of character / Indonesian local wisdom to protect human rights, and accommodate globalization that could provide substantive justice, which is based on values of justice sourced legal ideals of Pancasila.

Reconstruct / rebuild CLE integrally oriented national development policies and the development of national laws or the national legal system air-Pancasila, which focused on the issue of *legal substance,* then there is a large reconstruction faced, namely the reconstruction of the system / the substance of national law which may be called reconstruction substantial. Reconstruction of the national legal systems in the field of criminal law is currently being piloted, with the concept of the penal Code bill. Indonesian criminal law reform contains within it the renewal or reconstruction of legal thought (concept, basic ideas, principles, theories, think juridical construction) within the context of national development / construction of national law. Reconstruction / renewal of legal thinking in the field of criminal law, it can be seen from several sides / aspects / phases.

2.4 Humanism Law Enforcement

Law enforcement, as well as the overall law, is always concerned with man and humanity. Crime, both crimes and violations, essentially is wounding to human values. Theft of an item or object is essentially theft against humanity human values. Thus, integral approach to law enforcement that has been in line with humane human activity. Although in the end, the crimes should be also considered as a crime, and every crime must be punished.

When the problems of humanity have escaped our notice, it is worse than the issue of dehumanization itself, because it not only shows respect for the decline of civilization on human dignity, but worse than that, our existence as humans questionable. As autonomous beings whose souls me-body and soul-spirit men, human beings live their lives and livelihood as an individual that had a community. In the study of law, rule of law is then formed a pattern of behavior. Humans do not start with her life by making the legal system, but rather to build a community. New life together called community was born of law.

At first, the law is the need for an orderly society, but in its development, the law becomes esoteric, it evolved into a sophisticated system [6].This is where the foundation of the legal system is built, namely a situation in which the majority of a social group in the habit of keeping the commandments supported by the threat posed by the person or people who are sovereign, their own habits do not obey anyone. The law is meant here is the criminal law, which according to HLA Hart is something we obey or not we obey and what is required by the provisions shall have said to be a "liability". If we disobey, we are said to be "unlawful", and what we have done is something that legally "wrong", "a breach of duty", or a "mistake." In a criminal offense nozzle, robbery, and vehicles theft, enforcement humane laws can walk by promoting efforts to pre-emptive, preventive and repressive. In law enforcement, this is acceptable, but from the perspective of criminology and victimology, would need to attempt the "other" to prevent the offense is repeated.

3. CONCLUSION

a. Drafting a model law enforcement in criminal acts nozzle, robbery and vehicles theft in Lampung Province still emphasize law enforcement and repressive, namely the establishment of the “Tekab-308”;
b. The application of models of law enforcement in criminal acts nozzle, robbery and vehicles theft in Lampung Province on the policy requires law enforcement officials, especially the police who will be the leading sector, so need research cooperation between universities and the police in establishing the rule of law is patterned cantonal Lampung.

REFERENCES

[1] Central Bureau of Statistics (BPS), *Monthly Report October 2016 Socio-Economic Data,* Jakarta: BPS, p. 57.
[2] Arief, Barda Nawawi , *Masalah Penegakan Hukum dan Kebijakan Hukum Pidana dalam Penanggulangan Kejahatan*, Kencana, Jakarta, 2008.
[3] ----------, *Pembaharuan Hukum Pidana dalam Perspektif Kajian Perbandingan*, Citra Aditya Bakti, Bandung, 2005.
[4] *Ibid.*
[5] Arief, Barda Nawawi, *Pembaharuan/Rekonstruksi Pendidikan dan Pengembangan Ilmu Hukum Pidana dalam Konteks Wawasan Nasional dan Global*, makalah disajikan dalam Kongres ASPEHUPIKI dan Seminar Pengaruh Globalisasi terhadap Hukum Pidana dan Kriminologi Menghadapi Kejahatan Transnasional, Hotel Savoy Homann, Bandung, 17 Maret 2008.
[6] Satjipto Rahardjo, 2009, *Hukum dan Perilaku*, Jakarta: Kompas Media Nusantara, p. 5.

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Reinforcement the Role of BANI (Indonesian National Board of Arbitration) By Justice Decision to Face Trade Dispute on ASEAN Economic Community

Safrin Salam*[1]

*MUHAMMADIYAH UNIVERSITY OF BUTON, BABAU CITY, SOUTHEST SULAWESI, INDONESIA

Abstract
The purpose of this study were 1) to know and understand the legal considerations of the application of the reasons for cancellation of the award of article 70 of Law No. 30 in a 1999 Supreme Court decision No. 199 K/Pdt.Sus/2012 ensure legal certainty in relation to the disputing parties, and 2) to determine the strength of the legal enforceability of arbitral awards article 60 of Law No. 30 in a 1999 after the Supreme Court Decision No. 199 K/Pdt.Sus/2012. This research is a normative law. The Method used is juridical - normative by interpretation method for analyzing secondary data.. The results showed that the application of the Law Consideration Reasons for Cancellation of Arbitration Award Article 70 of Law No. 30 of 1999 on Arbitration and Alternative Dispute Resolution in Decision No. MA. 199 K/Pdt.Sus/2012 is a legal consideration of all the cancellation decision is not accepted or rejected application for cancellation of the award under the legal grounds contained in Article 70 of Law No. 30, 1999. As well as the Power of Legal Enforceability of Arbitration Decision Article 70 and Article 60 of Law no. 30 of 1999 on Arbitration and Alternative Dispute Resolution after the Supreme Court decision No. 199 K/Pdt.Sus/2012 is the Supreme Court decision No. 199 K/Pdt.Sus/2012 strengthen the principle of final and binding arbitration attached to the decision issued by the Institute of Arbitration. (Ad-Hoc Arbitration Tribunal, BANI, etc.)

Keywords: BANI, Justice Decision, Trade Dispute, ASEAN Economic Community.

1. INTRODUCTION

Globalization current developments and the commitment of the States which are members of the ASEAN Economic Community have brought the Indonesian nation in the free market and free competition. With the free market and free competition as well as to facilitate and cured, then the nations of the world make up a multi-national agreement with the goal of achieving economic able to support the development of free international. With the development of economic and business activity, it is not possible to avoid the occurrence of a dispute (dispute) between the parties involved. The existence of this dispute could impact on the development of economic inefficiency, reduced productivity, infertility business and higher production costs. The dispute may occur due to the different interests of each of the parties, that is, when there is an interaction between two or more people, where one party believes that its interests are not the same as the interests of others. Said the dispute (conflict; dispute) should not only be destructive (destructive) and adverse (harmful), but the building (constructive), interesting / challenging (challenging) as well as a dynamic catalyst of change (a catalyst for change). Dispute resolution is one of a series of transactions. Conventionally, the settlement of disputes are usually in the business world, such as in trade, banking, mining projects, oil and gas, energy, infrastructure, and so conducted through litigation.

Against such a dispute, essentially legislation in Indonesia has provided a means to solve problems that can be taken, namely through the judicial (litigation) and outside the court (non litigation). As a comparison, litigation (court), most of his job is to resolve the dispute with the verdict (constitutive) for example, passed a decision on the disputed inheritance, tort and some small duties is deterrence dispute by dropping a court warrant (declaratory) e.g. designated guardian, determination adopted children and others. The use of formal and official way this forms of litigation and non-litigation. Formal and official, is directed to avoid coercion secondary (secondary enforcement system) were identified as law enforcement conducted by an interested party or a group of people in the form of vigilantism (eigenrechting) coupled persuasive physical violence.

Therefore some of the shortcomings of that, some people tend to prefer resolving disputes out of court. Although each community has its own way to solve the problem, however, evolving business world universally and globally began to recognize other forms of dispute resolution that is homogeneous, profitable, providing security and justice for the parties.

Based on these reasons, there developed a system of dispute resolution through arbitration. Arbitration as a means of dispute resolution that is based on the agreement of the parties in business circles is typically used as an option in resolving disputes that may arise. Arbitration is another form of adjudication, the adjudication of

[1] Corresponding Author. Phone Number: -, *E-Mail Address:* salamsafrin2@gmail.com

private, for litigation involving personal dispute that distinguishes it from litigation through the courts. The private nature of arbitration provides benefits beyond adjudication through the district court.

Dispute resolution through arbitration basically has several advantages compared with through the courts. Settlement dispute through arbitration in the need to ensure legal certainty investor in ASEAN community is a priority to be implemented by the Government. The only advantages that when the dispute is resolved through the Arbitration Institute, especially in disputes among ASEAN Countries is the nature of "confidential", the advantage of being there as an arbitration decision was not published as a court decision is required to be pronounced in public sessions, thus allowing their publication in a daily newspaper or electronic mass media.

In Indonesia, the arbitration as a dispute resolution mechanism outside the court had been long enough known. , Arbitration in Indonesia is regulated in Law No. 30 of 1999 on Arbitration and Alternative Dispute Resolution. Settlement of disputes through the Arbitration Institute is BANI (Indonesian National Board of Arbitration) to produce an arbitration award is final and binding, which is a final decision and has permanent legal force and binding on the parties. (Article 60 of Law 30 of 1999 on Arbitration and Dispute Solution). However, it is undeniable that there is in fact not all decisions are generated through BANI (Indonesian National Board of Arbitration) will give satisfaction to the parties. In this case, the court has a major role in developing the arbitration.

Request cancellation of the arbitral award shall be submitted to the District Court. That is, the District Court is authorized to check whether the elements in Article 70 of Law No. 30 of 1999 met or not. Granting the right for the court to intervene in the arbitration authority is possible if it can be proven the existence of acts of forgery, fraud or embezzlement as referred to in Article 70 of Law No. 30 of 1999. Under these provisions, it is basically a request for revocation of the decision does not constitute a legal remedy of appeal as provided in the settlement through the courts. Therefore, without a specific reason, in principle not possible to prosecute return an arbitration award. Just not satisfied any of the parties is not possible cancellation has been submitted.

It is important to keep the fulfillment of the principle of the arbitral award is final and binding. If one party wants to change the establishment and settlement of disputes through the State Justice (District Court), the provisions binding disappears, the competence of the arbitration into competency District Court. In other words, the arbitration clause agreed upon by the parties in their agreement that does not apply absolutely.

In the implementation of the arbitration decision, the losing party often unwilling to voluntarily implement the arbitration decision. To be the implementation of the arbitral award must surely involve the Court. The court's involvement is unavoidable, given the imposition of an arbitral award can only be done by the court in the form of determination of execution. Of course this will lead to the settlement of disputes which is expected to be completed in a short time, it will become increasingly protracted. This will create legal uncertainty for investors who have a legal issue, especially in the countries of ASEAN. By him that this study will assess comprehensively strengthening BANI decision in resolving trade disputes in ASEAN countries.

Based on the description on the background of the above, the principal problem in this research are as follows?

a. What legal considerations of the application of the reasons for the cancellation of the award under Article 70 of Law No. 30, 1999 in the Supreme Court decision No. 199 K / Pdt.Sus / 2012 related to ensuring legal certainty of the parties to the dispute ?
b. How does the force of law enforceability of the arbitral award of Article 60 of Law No. 30, 1999 after the Supreme Court decision No. 199 K / Pdt.Sus / 2012?

2. RESULT AND DISCUSSION

2.1 Legal Considerations Application Reasons Cancellation Arbitral Pursuant to Article 70 of Law No. 30 of 1999 in Supreme Court Decision No. 199 K / Pdt.Sus / 2012 Relation Ensure Legal Certainty In the disputing parties

Whereas the Respondent I (*PT. HUTAMA Karya*) and Respondent II (PT. HUTAMA BINAMAINT JOIN OPERATION) has entered into a collaboration / joint operation by forming a container named HUTAMA BINAMAINT JOIN OPERATION. Then Applicant (PT. TUNAS DIPTAPERSADA) to give jobs to Respondent I and Respondent II (HUTAMA BINAMAINT JOIN OPERATION) to work on development projects *Griya Kemayoran* Complex located at Industrial Road No. 9-11, Central Jakarta corresponding Work Order No. 004 / TDP / SPK / PMBG / 1 / 96 issued by the applicant. Work Order No. 004 / TDP / SPK / PMBG / 1 / 96 issued by the Applicant regarding the provisions on the implementation of the Project Development and provisions for disputes that will occur in the future will be created beforehand Wholesale Agreement. During the Wholesale Agreement mentioned in item 3 above have not been made, because there are still awaiting an agreement on the content of the agreement between the Petitioner and Respondent Volume I and II, the Respondent I and Respondent II stay in the work of development in accordance with the Project Work Order No. 004 / TDP / SPK / PMBG / I / 96 issued by the applicant, the conduct of the Project Development *Griya Kemayoran* undertaken by Respondent I and Respondent II turned out in the implementation of development

projects undertaken by Respondent I and Respondent II has been delayed and is behind schedule time specified in the work order; Based on the principal case above, the authors conducted a legal analysis of the legal considerations of the Supreme Court decision No. No. 199 K / Pdt.Sus / 2012 i.e.

a. Remedy cancellation request arbitration ruling by PT. SHOOTS DIPTAPERSADA has ever been submitted previously by the applicant (exceptio nebis in idem). It is based on a request for cancellation of the Ad-Hoc Arbitration Award No. 01 / X / AD-HOC / 2002 dated October 2002 ("Ad-Hoc Arbitration Decision No. 01 / X / AD-HOC / 2002"). The reason is in accordance with the jurisprudence of the Supreme Court R.I. by Jurisprudence of the applicability of the principle of law nebis in idem, namely as stated in the Decision of the Supreme Court R.I. No. 1149 K / Sip / 1982 dated March 10, 1983 which set the legal rules as follows: "Against this case is connected with the previous case, which has no decision M.A apply the principle of ne bis in idem; considering both the case is essentially the same objectives, namely: a statement of unauthorized sale and purchase of the land and the parties essentially equally".
   In the Supreme Court decision No. No. 199 K / Pdt.Sus / 2012, the applicant has applied for cancellation of the arbitration decision to the central Jakarta district court in which the same subjects in Case No. Arbitral Cancellation 477, that the Applicant and the Respondent. While the views of the object both in the Petition and Case of Cancellation Arbitral No. 477 also has the same object, namely: the cancellation of the Ad-Hoc Arbitral No. 01 / X / AD-HOC / 2002. Based on this reason, it is clear this cancellation request nebis in idem.
b. Addition of time to file an annulment decision abitrase overdue (exceptio peremptoria temporisl). Terms of request for cancellation of the arbitration decision is Article 71 of Law No. 30 of 1999 on Arbitration and Alternative Dispute Resolution ("Law No. 30/1999"), which reads quoted below.
   "Application for cancellation of the arbitral award must be submitted in writing within a period of 30 (thirty) days from the day of delivery and registration of the arbitration decision to the District Court Clerk".
   Based on the fact of the trial the applicant to apply to the 2829 (two thousand eight hundred and twenty-nine) counted from. it has violated the provisions of Article 71 of Law No. 30/1999 for submission has exceeded the time limit set that is longer than 30 (thirty) days from the day of delivery and registration of the arbitration decision. The provisions in Article 71 of Law No. 30/1999 mentioned above, the provisions of Article 1946 of the Civil Code regulates the legal remedies that have exceeded the time limit (expired), as quoted below.
   "Through time is a legal means to obtain something or a reason to be released from an engagement with the lapse of a certain time and the fulfillment of the conditions specified in the law".
   The Supreme Court R.I. through the Permanent Jurisprudence has shown his attitude to a remedy which has exceeded the time limit (expired), namely as stated in the Decision of the Supreme Court R.I. No. 237 K / Sip / 1968 dated July 20, 1968 which set the legal rules as follows:
   "The application for an appeal has exceeded the grace specified in Article 115 paragraph (1) of the Supreme Court of the Republic of Indonesia, therefore, should be declared unacceptable".
   Based on the reasons for the determination of the time limit cancellation request arbitration decision in relation to the Supreme Court decision No. No. 199 K / Pdt.Sus / 2012 on the application the applicant has passed the time in 2829 (two thousand eight hundred and twenty-nine) days. Authors interpret the limits of the grace period is calculated by the Supreme Court, commencing when the arbitration decision is registered in court not based on the verdict has been delivered in person (the applicant) and the power and incomplete explanation accounting time applicants in 2829 so-called passing of time.
c. The next consideration is the request for the applicant MA vague (exceptio obscuur Libelum) where the application is submitted by the applicant argued for (quod non, where it was rejected) Ad-Hoc Arbitration Award No. 01 / X / AD-HOC / 2002 contains / satisfy the elements of Article 70 letter a and Section 70 letter b and c and Article 70 of Law No. 30/1999. That means, the Petition refers to more than one (1) legal basis, even three (3) provisions of articles at the same time that each will be described as below.
d. Pursuant to Article 70 letter a of Law No. 30/1999, the cancellation of an arbitral award may be submitted only if the letter or document that is false or false otherwise recognized, which documents have been used in the examination of the arbitration.
e. Pursuant to Article 70 letter b of Law No. 30/1999, the cancellation of an arbitral award may be filed if there is a prescriptive document known to be hidden by the other party after the arbitration decision handed down;
f. Pursuant to Article 70 letter c of Law No. 30/1999, basically determines the arbitral award are taken from the results of a ruse conducted by one of the parties in the dispute may be the basis of the cancellation of the arbitration decision.

According to the aforementioned three articles MA has objects that are very different from each other, where the object of the letter or false documents, was different from the constituents on their prescriptive document known hidden by the other party.

Based on five (5) conditions that must exist in petitum this petition, then in the Supreme Court decision No. No. 199 K / Pdt.Sus / 2012 true that the petition filed by the applicant does not meet the formal requirements of a petition in which the applicant combines three (3) object cancellation petition reasons being the object of the arbitration decision in article 70 of Law No. 30, 1999. In fact, according to the authors, MA did found it that law against Article 70 of Law No. 30, 1999. MA explaining the meaning of Article 70 of Law No. 30, 1999 in the Supreme Court decision No. No. 199 K / Pdt.Sus / 2012 are:

a. Pursuant to Article 70 letter a of Law No. 30/1999, the cancellation of an arbitral award may be submitted only if the letter or document that is false or false otherwise recognized, which documents have been used in the examination of the arbitration;
b. Pursuant to Article 70 letter b of Law No. 30/1999, the cancellation of an arbitral award may be filed if there is a prescriptive document known to be hidden by the other party after the arbitration decision handed down;
c. Pursuant to Article 70 letter c of Law No. 30/1999, basically determines the arbitral award are taken from the results of a ruse conducted by one of the parties in the dispute may be the basis of the cancellation of the arbitration decision.

2.2 Power of Arbitral Law Applicability of Article 60 of Law No. 30, 1999 after the Supreme Court decision No. 199 K / Pdt.Sus / 2012 Relation Ensure Legal Certainty In the disputing parties.

Law No. 30 of 1999 on Arbitration and Alternative Dispute Resolution governing the cancellation of arbitration decision in article 70 which stipulates that parties may confess request for cancellation if the decision is thought to contain the following elements:

a. Letters or documents are filed in the examination, after adjudication, recognized or otherwise false;
b. Once the decision is taken those documents which are decisive, which is hidden by the other party;
c. Decision taken from the ruse carried out by one of the parties in the dispute.

The arbitration decision No. 01 / X / AD-HOC / 2002. Based on the fact that the applicant's hearing before the defendant has been found guilty of breach of contract under which PT. HUTAMA Karya (Persero) and Respondent II PT. HUTAMA BINAMAINT JOIN OPERATION has entered into a collaboration / joint operation by forming a container named HUTAMA BINAMAINT JOIN OPERATION. PT. SHOOTS DIPTAPERSADA give the job to HUTAMA BINAMAINT JOIN OPERATION to work on development projects *Griya Kemayoran* Complex located at Industrial Road No. 9-11, Central Jakarta corresponding Work Order No. 004 / TDP / SPK / PMBG / l / 96 issued by the applicant. Whereas on Work Order No. 004 / TDP / SPK / PMBG / l / 96 issued by the Applicant regarding the provisions on the implementation of the Project devolepment and provisions for disputes that will occur in the future will be created beforehand Wholesale Agreement.

That during the Wholesale Agreement has not been made, because there are still awaiting an agreement on the content of the agreement between the Petitioner and Respondent Volume I and II, the Respondent I and Respondent II stay in the work of development in accordance with the Project Work Order No. 004 / TDP / SPK / PMBG / I / 96 issued by the applicant. The author considers that rights and obligations have been met HUTAMA BINAMAINT JOIN OPERATION has fulfilled its obligations in spite of a package deal the two sides have not been made. But until the project contract agreement has not been made by PT. TUNAS DIPTAPERSADA.

So according to the author, one of the things that led to defaults by PT. Shoots Diptapersada namely PT. Shoots Diptapersada not meet the feat at all; where PT Tunas Diptapersada not fulfill his promise to make a package deal with Hutama Binamaint.

In this case PT. Shoots Diptapersada not altogether determines what achievements and what things are becoming accomplishment of HUTAMA BINAMAINT JOIN OPERATION in the form of a package deal. Then PT. SHOOTS DIPTAPERSADA filed a Request Cancellation to the West Jakarta District Court that has been disconnected in case Number: 477 / Pdt.G / 2002 / PN.JKT.BAR dated December 13, 2002 in conjunction with the Supreme Court of Appeal ruling that has been disconnected in case Number: 2908 K / pdt / 2003 dated January 24, 2006 jo reconsideration Decision that have been disconnected in case Number: 73 PK / pdt / 2008 dated 26 September 2008 where the decision has been decided to declare petition cannot be accepted (niet ontvankelijk verklaard). Then according to the provisions of civil law the applicant is entitled to file an application Cancellation arbitration decision again to the West Jakarta District Court.

According to the author of the cancellation request arbitration award received by the West Jakarta District Court in accordance with the applicable law, which according to article 646 Rv set absolute and relative competence of the arbitral award cancellation of the settlement:

a. absolute competence, falls into the jurisdiction of the courts
b. Average relative competence, under the authority of the district court that issued the order of execution.

Request cancellation awards have been received by the court is not the only mechanism the end of the breakdown of this business dispute but the losing party could resubmit the application for cancellation of the arbitration decision through an appeal or cassation to the Supreme Court.

In consideration of the law of the Supreme Court decision No. 199 K / Pdt.Sus / 2012, the Supreme Court decision reinforces the arbitration Ad-Hoc No. 01 / X / AD-HOC / 2002 in which the Supreme Court rejected the request for cancellation of the arbitral award PT TUNAS DIPTAPERSADA. The author assesses the Supreme Court actually apply the principle of final and binding on the arbitration decision is based on legal grounds that the use of the legal reasons cancellation of the arbitral award of Article 70 of Law No. 30, 1999 have boundaries. This is reinforced by the discovery of the law by the Supreme Court in the Supreme Court decision No. 1999 K / Pdt.Sus / 2012, ie

a. Pursuant to Article 70 letter a of Law No. 30/1999, the cancellation of an arbitral award may be submitted only if the letter or document that is false or false otherwise recognized, which documents have been used in the examination of the arbitration;
b. Pursuant to Article 70 letter b of Law No. 30/1999, the cancellation of an arbitral award may be filed if there is a prescriptive document known to be hidden by the other party after the arbitration decision handed down;
c. Pursuant to Article 70 letter c of Law No. 30/1999, basically determines the arbitral award are taken from the results of a ruse conducted by one of the parties in the dispute may be the basis of the cancellation of the arbitration decision.

Based on the above explanation, the authors found that the Supreme Court decision No. 199 K / Pdt.Sus / 2012 did not follow the legal reasons cancellation of the arbitral award of Article 643 Rv. While the cancellation of arbitration decision in accordance with Act No. 30 1999 Special were set consists of 3 (three) articles, namely article 70, article 71 and article 72. Based on the reasons for cancellation of the arbitration decision that exist in Law No. 30 In 1999, the authors examine consideration of the Supreme Court decision No. 199 K / Pdt.Sus / 2012 arbitration decision based annulment of Article 71 and Article 72 of Law No. 30 In 1999, as in one of the considerations that decision arbitration cancellation request has been overdue (peremptoria exceptio temporis). Based on this description it is clear, the Supreme Court in deciding the request for cancellation of the arbitration decision based on a legal rule of Law No. 30, 1999. The matter further, according to the author whether the cancellation request arbitration ruling Law 30, 1999 following the rule of law Rv, ICSID, BANI, or UNCITRAL. The author assesses Article 60 and Article 70 of Law No. 30 1999 realizing that Law No. 30, 1999 acknowledged the cancellation and also does not recognize the cancellation of the arbitral award.

Based Ad-Hoc Arbitration decision to the Supreme Court's decision can be found applicability of the principle of final and binding on the arbitration decision tested. The Supreme Court decision No. 199 K / Pdt.Sus / 2012 can be tested with the purpose of law Gustav Radbruch theory; he thinks there are three (3) the purpose of the law is:

a. Justice;
b. expediency; and
c. Legal certainty

3. CONCLUSION

Application of Legal Considerations Reasons Cancellation Arbitral Article 70 of Law No. 30 of 1999 on Arbitration and Alternative Dispute Resolution in Supreme Court Decision No. 199 K / Pdt.Sus / 2012 Relation Ensure Legal Certainty In the disputing parties are not all the reasons for the cancellation request arbitration decision, based on Article 70 of Law No. 30, 1999. Power of Arbitral Law Applicability of Article 70 and Article 60 of Law No. 30 of 1999 on Arbitration and Alternative Dispute Resolution after the Supreme Court decision No. 199 K / Pdt.Sus / 2012 was the Supreme Court decision No. 1999 K / Pdt.Sus / 2012 reinforces the principle of final and binding attached to the arbitral award issued by the Arbitration Institute (Assembly Ad-Hoc arbitration, BANI, etc.). Law No. 30 of 1999 on Arbitration and Alternative Dispute Resolution need to be amended to ensure legal certainty investors especially after the ASEAN economic community for authors find this blurring of the meaning of Article 60 and Article 70 of Law No. 30 of 1999 even both the District Court and Supreme Court using its own interpretation of Article 70 of Law No. 30, 1999. Decision MA. 199 K / Pdt.Sus / 2012 as a precedent could be a reference for the legislators to enhance in particular the elucidation of Article 70, as well as to benchmark limit time limit cancellation request arbitration decision. There needs to be consistency and harmonization in the implementation of the cancellation request arbitration decision at every level of the judiciary either arbitration institution, the District Court and the Supreme Court to maintain the principle of final and binding on the arbitration decision.

REFERENCE

[1] Abdulkadir Muhammad, 1999, *Hukum Perusahaan Indonesia*, Citra Aditya Bakti, Bandung. pp- 408
[2] Erman Rajagukguk, 2000, *Arbitrase dalam Putusan Pengadilan*, Chandra Pratama, Jakarta. pp-4
[3] Frans Hendra Winarta, 2011. *Hukum Penyelesaian Sengketa*, Sinar Grafika, Jakarta. pp-2
[4] I Wayan Wiryawan & I Ketut Artadi, 2010, *Penyelesaian Sengketa di Luar Pengadilan*, Udyana University Press, Denpasar-Bali. pp-3
[5] Gunawan Widjaja dan Ahmad Yani, 2004. *Hukum Arbitrase*, Raja Grafindo persada, Jakartan. pp-1
[6] M. Husseyn Umar, *Memahami Undang-Undang Nomor 30 Tahun 1999 Tentang Arbitrase Dan Alternatif Penyelesaian Sengketa Sebuah Ikhtisar, Seminar E-Commerce dan Mekanisme Penyelesaiannya Melalui Arbitrase/Alternatif Penyelesaian Sengketa*, Hotel Mulia, Jakarta 3 Oktober 2000. pp-7
[7] M. Yahya Harahap, 2008, *Hukum Acara Perdata, Tentang Gugatan, Persidangan, Penyitaan, Pembuktian, dan Putusan Pengadilan*, Sinar Grafika, Jakarta. pp-126
[8] Suyud Margono, 2004. *ADR & Arbitrase Proses Pelembagaan dan Aspek Hukum*, Ghalia Indonesia, Bandung. pp-12
[9] Yusuf Shofie, 2003, *Penyelesaian Sengketa Konsumen Menurut UUPK Teori & Praktik Penegakan Hukum*, PT Citra Aditya Bakti, Bandung. pp-12

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Tax Amnesty as an Instrument to Enhance Investment and Tax Collection Bureaucracy in Indonesia to Create Economic Welfare and Social Justice

M Farid Al Rianto*[1]

*UNIVERSITY OF LAMPUNG, LAMPUNG, INDONESIA

Abstract
Indonesian less obey to pay taxes implicate to the minimum national income. Indonesian Tax Amnesty Act 11, 2016 enforce the tax payer reveal their wealth which hided in purpose to avoid taxes which counted until December 31, 2015 by paying administrative fines which is 200% gain ratio of their unrevealed and hided taxes in the end of the Tax Amnesty Act period. To avoid the administrative sanctions, there are two ways how to pay and calculate the tax redeem: First, paying 2%,3%, or 5% of the tax debt if the wealth is in or outside Indonesia but ready to move it up by investing them in Indonesia. Second, paying 4%,6%, or 10% of the tax debt if the wealth is outside Indonesia without moving it up to Indonesia. It indicates the tax payer will move their wealth in purpose to pay less taxes debt, so the huge money that coming down to Indonesia will become a good investment to growth the nation's economic. In the other side, the tax collection will help the government to making a record of the tax payer and their taxes for easy future collection. In the end, this normative legal research will create economic welfare by fulfillment of tax debt and social justice by fulfillment of tax payer equality.

Keywords: Tax Amnesty, Tax Reveal, Tax Debt, Economic Welfare, Social Justice

1. INTRODUCTION

Tax Amnesty which happening in Indonesia through Act no 11, 2016 is in purpose to revealed the tax payer which hiding their wealth to avoid taxes. Government data on Indonesians hiding assets overseas, last estimated at Rp 11.45 quadrillion, has also been strengthened and validated by the recent leakage of the Panama Papers on companies setting up special-purpose vehicles in tax haven countries. [1]

The purpose of this policy is to ask Indonesian outside the country which hiding their wealth to coming home and develop Indonesia. This thing is to develop our nation investment and also fulfilling the social justice aspect as the same tax payer that compared with others nation society.

How this policy asks Indonesian outside to coming home and develops Indonesia is by taking the tax amnesty. First, every tax payer need to redeem their unpaid taxes since January 1, 1985 until December 31, 2015 by paying 2, 3, and 5 percent of the wealth value if the wealth is in Indonesia nor outside which will be moved and invested in Indonesia. Second, every tax payer had a second choice to redeem their unpaid taxes since January 1, 1985 until December 31, 2015 by paying 4, 6, and 10 percent of the wealth value if the wealth is outside of Indonesia and stay still the same outside. [2] 200 percent fines will be applied for every tax payer if there is an unpaid or unrevealed tax. [3]

Through this policy we need to elaborate the concrete reason and also the description of the provision which will gain the investment and tax collection bureaucracy to create economic welfare and social justice.

Based on the background, there are several issues that will be showed in this research, which are:

a. How is Indonesian Tax Amnesty Enhance the Domestic Investment?
b. How is Indonesian Tax Amnesty Enhance the Tax Collection Bureaucracy?
c. How are Domestic Investment and Tax Collection Bureaucracy as an Instrument to Create Economic Welfare and Social Justice?

2. RESEARCH METHOD

This research is using Dogmatic Legal Research. A legal research based on written materials or secondary data to analyze theoretically about legal principle, legal doctrine, regulation and law system. [4] This Dogmatic Legal Research is concepted as it written on the law act or law is concepted as a norm for measuring how normal people behave. [5] And also this research is using two conceptual approach which are economic and morality. This approach used into the Tax Policy which separated by individual and quality differences. The economic approach require a fulfillment on efficiency in individual differences and liberty in quality differences to create economic welfare, and the moral approach require a fulfillment on justice in individual differences and excellence in quality differences to create social justice [6].

[1] Corresponding Author. Phone Number: -, *E-Mail Address*: -

3. DISCUSSION

3.1 Less Amnesty for Nation Economic Growth Through the Investment

There are two different clause of the tax amnesty provision. First, every tax payer need to redeem their unpaid taxes since January 1, 1985 until December 31, 2015 by 2% of the wealth value which counted to the third month since the Act was enacted to the gazette, 3% of the wealth value which counted from the fourth month until December 31, 2016 since the Act was enacted to the gazette, or 5% of the wealth value which counted from January 1, 2017 until March 31, 2017. This clause is applied to the wealth neither in Indonesia nor outside which will be repatriated. Second, every tax payer need to redeem their unpaid taxes since January 1, 1985 until December 31, 2015 by 4% of the wealth value which counted to the third month since the Act was enacted to the gazette, 6% of the wealth value which counted from the fourth month until December 31, 2016 since the Act was enacted to the gazette, or 10% of the wealth value which counted from January 1, 2017 until March 31, 2017. This clause is applied to the wealth outside Indonesia

Until September 28, 2016 the wealth declaration for tax amnesty program are Rp. 2.751 Billion of domestic declaration, Rp. 983 Billion of foreign declaration, and Rp. 143 Billion of repatriation declaration. [7] After looking on the data we conclude that for national investment interest, tax amnesty need to get more repatriation declare. Because we need a real currency/physically of the money that circulating inside Indonesia. As we can see as holdings of foreign money increase relative to domestic money, the relative value of foreign money will fall, or the foreign currency will depreciate. [8] Indonesian Rupiah that flew in the other countries need to get back to Indonesia with repatriation to make a good investment atmosphere and gaining the rate currency of Rupiah. But, looking on the data, foreign declaration is still very high, it's all because of nation deposit interest value. In 2015 Indonesian monetary ministry had tried to increase national bank deposits interest to 11%, and it's quite interesting than Singapore which only got 4%. [9] But it was before Tax Amnesty Program, and government should put more effort to make sure the society know that the national deposits interest is better than other Asian Country.

The investment target on Tax Amnesty will be covered until March 31, 2017 that should be 6 months left. It is a short time to advertise that Indonesia has a better deposits interest than other countries, than the repatriation declarer need to choose the right investment and also easy to pick as it told on Harry Markowitz's Theory which is Modern Porto-folio Theory (MPT). The MPT is a theory of investment which attempts to maximize portfolio expected return for a given amount of portfolio risk, or equivalently minimize risk for a given level of expected return, by carefully choosing the proportions of various assets. Although the MPT is widely used in practice in the financial industry, in recent years, the basic assumptions of the MPT have been widely challenged [10].

Basically, investment is one of the tax amnesty program is having a great purpose. As we know that investment is in purpose to: [11]

a. Gain national economic growth.
b. Job opportunities.
c. Gain sustainable economic development
d. Gain national business competitiveness skills
e. Gain the national technology skills and capacity.
f. Enhance the development of social economy.
g. Process the potential economy to a real economic power by using the investment domestic or foreign funding.
h. Gain the welfare of society.

3.2 Tax Amnesty Sanction as an Indexing Tool Supporter of The Tax Collection Bureaucracy

Tax Amnesty 200% fines from the wealth calculation which unpaid and unrevealed from the tax payer is going to be a reason for everyone to noted their wealth in the taxation directory. The information that would index which are: [12]

a. Personal Information of Tax Payer (Includes Person or Firm);
b. Main Number Of Tax Payer;
c. Total Wealth;
d. Tax Loan (Income Tax).

So, the taxation directory will be easy to collect the tax payer in the future that based on the amnesty program collection. The big fines program should be the tool supporter to index the tax payer easier.

Basically, there are three models of the taxation method: [13]

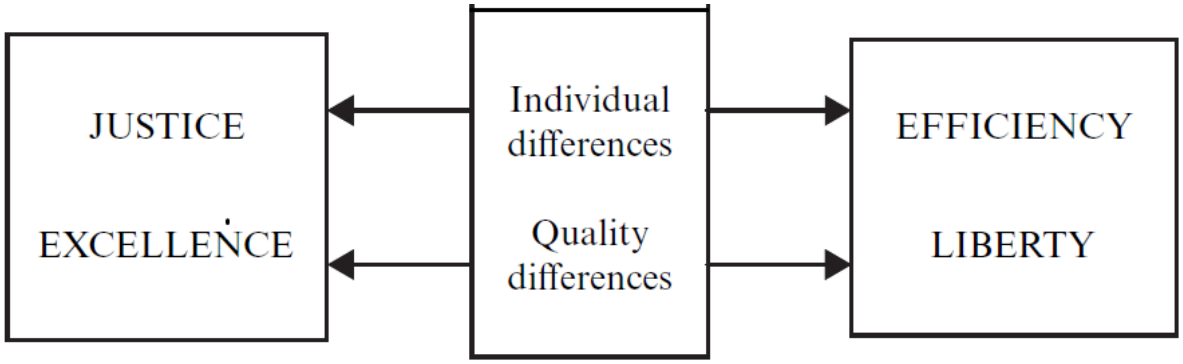
a. Feasible taxes for the government, such as commodity taxes, and the government's revenue needs. The models typically rule out lump-sum taxes, which would cause no economic distortion;
b. Each model specifies how individuals and firms respond to taxes. That is, individuals have preferences about goods and leisure; firms have a given technology for producing goods; and individuals and firms interact in a given market structure (often perfect competition);

c. Objective function for evaluating different configurations of taxes. In the simplest models, the government's objective is to minimize the excess burden generated by the tax system while raising a set amount of revenue. The more complicated models balance efficiency considerations with equity concerns. The models that include equity are usually more concerned with vertical equity rather than either horizontal equity or the benefit principle.

At the first Indonesian Government set up the second model which taxationing a person and a firm. But after the obey less of taxes, the government set amount of the revenue which not burdening the entire society that not paying tax through tax amnesty.

3.3 Investment and Tax Collection Bureaucracy Enhancement as an Instrument to Create Economic Welfare and Social Justice

Investment and Tax Collection Bureaucracy enhancement which explained in chapter 4.1 and 4.2 are using economic welfare and social justice approach. We can see the approach scope from figure below: [14]



Figures. 1 - Taxation Model Approach

If the taxation model would like to fulfill the economic welfare, the policy needs to fulfill the efficiency aspect for the individual and fulfill the liberty aspect for the quality of the policy implementation. In the other side, to fulfill the social justice, the policy needs to fulfill the justice aspect for every individual and fulfill the excellence aspect for the quality of the policy implementation.

4. CONCLUSION

a. To growth the nation investment, Tax Amnesty's repatriation needs to be taken than a foreign declaration, because investment due to the development needs a real rate currency that circulates in Indonesia. After sawing the real data on first collection term, the repatriation still in the lowest part of the amnesty option. So, the government need to advertise more to the nation about the Indonesia's deposit interest is more benefit able than other countries does. The short term of Tax Amnesty period is need to be solved by the tax payer that repatriated to choose their suitable Porto-folio of investment, and Modern Porto-folio Theory is the suitable way to choose for investment decision.

b. The Tax Amnesty 200% administrative fines for unpaid and unrevealed are the best choose for supporting tools to indexing the tax payer wealth and also income tax. It's helping out for future tax collection due to the indexed information that every tax payer has been paid on amnesty program.

c. Tax Amnesty's program to investment would be create a economic welfare by fulfilling the efficiency aspect for the individual and fulfill the liberty aspect for the quality of the policy implementation. And tax collection bureaucracy would be create a social justice by the justice aspect for every individual and fulfill the excellence aspect for the quality of the policy implementation.

REFERENCES

[1] http://www.thejakartapost.com/news/2016/06/21/tax-amnesty-tells-evaders-stop-hiding-and-come-home.html [31/10/2016]
[2] Article 4 point (1) and (2) Indonesian Act No 11, 2016 Tax Amnesty
[3] Article 18 point (3) Indonesian Act No 11, 2016 Tax Amnesty
[4] Soerjono Soekanto and Sri Mamudji, *Penelitian Hukum Normatif: Suatu Tinjauan Singkat,* Jakarta: Raja Grafindo Persada Press, 2003, pp. 13.
[5] Amiruddin and H. Zainal Asikin, *Pengantar Metode Penelitian Hukum,* Jakarta: Raja Grafindo Persada Press, 2006, pp. 118.
[6] Yuichi Shionoya, *Economy and Morality "The Philosophy of The Walfare State",* Massachusetts: Edward

Elgar Publishing, Inc, 2005, pp. 40.
[7] http://bisnis.liputan6.com/read/2637540/dana-deklarasi-dan-repatriasi-tax-amnesty-capai-rp-3876-triliun [31/10/2016]
[8] University of Texas Arlington Paper, Chapter 18 – Exchange Rate Theories, Texas: Texas Arlington University Press, pp. 458.
[9] http://ekbis.sindonews.com/read/1049004/33/menkeu-klaim-bunga-deposito-ri-lebih-menarik-dari-singapura-1443526677 [31/10/2016]
[10] Iyiola Imisore, Munirat Yusuf, and Nwufo Christopher, *The Modern Portofolio Theory as an Investment Decision Tool,* "Journal of Accounting and Taxation Vol. 4(2)", March 2012, pp.20.
[11] Investment Purpose on Indonesian Act No 25, 2007 Investment
[12] Article 8 Indonesian Act No 11, 2016 Tax Amnesty
[13] William M. Gentry, *Optimal Taxation,* Columbia: Columbia University Press, 2012, pp. 307.
[14] Yuichi Shionoya's Economic Welfare and Social Justice Theory on *Economy and Morality "The Philosophy of The Walfare State"*

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Juridical Review of International and Transnational Crime Based on International Law

Desy Churul Aini*[1], Desia Rakhma Banjarani*[2]

UNIVERSITY OF LAMPUNG, LAMPUNG, INDONESIA

Abstract
Along with the times and technology, there are various forms of crime often thrive, it's caused by the progress of information and communication technologies that facilitate everyone to reach out to all aspects of life. Even the progress can encourage the formation of various types of crime in the world. Indonesia was also not spared from the development of transnational crimes; it is caused by several factors such as ASEAN Economic Community's program, which is supported by the Open Skies Agreement, as well as the strategic position of Indonesia. With the formation of various types of crime in the world, then it can be difficult to distinguish between international crime and transnational crime. The distinction of the two crimes are intended to clarify the position of each type of crime, so there is no mistake in the placement of legal principles that apply to both types of these different crimes. This research was conducted to discuss the issue of how juridical reviews of international crime and transnational crime based on international law, which aims to explain the various forms of international crime and transnational crime by international treaty. This research used normative legal approach (literature). The results showed that the scope of international crimes and transnational crime are different. Forms of international crimes since the Nuremberg Court (1945) to the ICTY (1993), ICTR (1994) and the ICC (1998) included four types of crimes namely: genocide, crimes against humanity, war crimes and aggression. While other forms of transnational crime based on the UN Convention on Transnational Crime Organized Crime mentioned a number of crimes, namely money laundering, corruption, illegal trafficking of protected plants and wildlifes, crimes against art objects of cultural, human trafficking, migrant smuggling and illegal production and trafficking of firearms.

Keywords: Scope, Statute, UNTOC and Crime

1. PRELIMINARY

Progressions in information and communication technologies affected societies, both in the fields of politic, economic, law and culture. The progression of science and technology is one of the globalization. Globalization as it is known as the process of the entry of world's scope.

Transnational crimes due to the progress of science and technologies had happened in some countries, one of the crimes that occurred in Indonesia in 2015 and that was a cybernetic crime that used voice over IP (VoIP) or technology of voice conversations remotely via internet, which were being misused with scams. This crime was so organized that made by Japan's largest criminal organization or commonly called Yakuza. But the subjects of this crime are Taiwan-China, so that these crimes included in transnational crime.

The abuse of science and technology also occurred in the politics that involved mass media as propaganda activities. Propaganda is communication activities to influence the masses, so that the mass media is the most appropriate tool to do that [1]. Propaganda through mass media had occurred in Indonesia, namely by the Indonesian Communist Party (PKI) in order to achieve their goals, i.e. communist revolution. That propaganda is done by through mastery of the elements of the press, among others, between the news agencies and the Indonesian Journalists Association (PWI) [2].

In addition to the progress of science and technology among the factors that favor transnational crimes, this is due to the ASEAN Economic Community (AEC) as a development program of economic development has an impact both good and bad effects. One of the bad effects of the AEC is often utilized to develop crime offenders. AEC as a vehicle for free trade and free markets in the Southeast Asia region which promotes the mobility of people, goods, services, capital and investment in and out freely between countries without any obstacles.

Besides the existence of AEC is increasingly supported by the Open Skies Agreement which provides freedom in the mobilization of everyone. That is because the Open Skies Agreement is regulations that can provide the ability for airlines to provide air services convenient and affordable. Enforcement of freedom in the EAC system will not only help in the economic development but also would potentially give transnational crime will increase in the region of Southeast Asia, which then extends to every Asean member countries. So it is very harmful to the country's sovereignty and threatens the Ministry of the Interior (Kemdagri) Indonesia.

[1] Corresponding Author. Phone Number:-, *E-Mail Address*:-
[2] Corresponding Author. Phone Number:-, *E-Mail Address*:-

State of Indonesia as one of the agents of the EAC is formed several policies to attain the objectives of the EAC. One such policy is visa exemption that makes it easy for foreigners entering Indonesia that aims to bring in foreign exchange. The policy can be said to be good for Indonesia in addition to bringing the policy of foreign exchange can also bring foreign investors to support the development of Indonesia, but in spite of the favorable effects that are adverse effects of these policies are threatening the country's security. That is because, with everyone enter Indonesia freely allowing for they also expanded their criminal networks has previous form in each country.

The policy has been a factor of crimes committed by foreigners as the Yakuza. By looking at these conditions, the possibility also turned out other groups that allegedly part of a syndicate on international criminal groups still roam freely like Nigeria, Cameroon and Brazil. So that the current condition of Indonesia could be said to have become a full nest of international crimes. Moreover, the increasing number of cases of drug entry into the territory of Indonesia by all means and the influx of tens or hundreds or thousands of workers from China is a threat to the security of Indonesia at the expense of the quality of the next generation.

In addition to the science and technology and government policy factors, other factors that encourage a wide range of transnational crime can occur in Indonesia is a factor that is so strategic location of Indonesia. From the geographical point of view Indonesia is a country that has a cross position is strategic, both in terms of traffic of the world economy, and in terms of geopolitics and security, because Indonesia is located between two continents (Asia and Australia) and two oceans (the Pacific Ocean and the Indian Ocean) , Based on this strategic position will have implications on the social, political, economic, cultural, defense and security. So important for Indonesia to identify transnational crime is legally under international law that distinguished the international crime and transnational crime.

The importance of identifying transnational crime is in addition due to the proliferation of various types of crimes that occurred in Indonesia involving even the legal aspects of other countries that require proper law enforcement. That is because in the enforcement of the necessary qualifications appropriate type of crime in order to avoid errors in the placement of this type of crime, where if something goes wrong it will have an impact on a mistake in the placement of the principles of law itself as the ideals of creating a justice. If the errors in qualifying crime then law enforcement will deviate from its purpose in society namely that peace is achieved as a result of formal law enforcement [3]

In addition, if the errors in the placement of such laws then the offender will also has benefit. If the agent of these crimes can be free from law enforcement because of errors qualification of crimes the offender cannot be prosecuted again, it is supported on a principle in criminal law the principle of *ne bis in idem*, which means people cannot be prosecuted again because of the act which for him has been decided by judge. So that these crimes will be growing both in scope of transnational crime and international crime, it would require an identification that distinguishes the two types of crimes based on the scope.

The importance of placing the principles of the law of international crime and transnational crime as it can be used as an analytical tool in the prevention and combating transnational crime and international crime [4]. So, we need a special study in the context of transnational crime and international developments in this case because transnational crime and international issues can impact on the social fabric of the nation Indonesia [5].

Based on the above background, the issue will be addressed in this study is how the judicial review of international crime and transnational crime? The method used is a normative legal research method and data were obtained on secondary data derived from literature sources such as literature, articles and Internet sites.

2. DISCUSSION

2.1 The International Crime

International crime often synonymous with crimes against humanity in the form of human rights violations, it is because if a crime against humanity carried out already confirmed no human rights are violated. Acts in violation of international law it is considered as a crime by the state or military condemned the world as less than human behavior [6].

In determining the scope of international crime, some experts have different ideas. However, the scope of international crimes earlier agreed upon by the international community through the United Nations which is composed of the crime of aggression, war crimes, genocide, sea piracy, kidnapping and narcotics [7]

In addition the scope of international crimes contained in the third draft of the International Criminal Law or the International Criminal Code of 1954, has been set to the 13 crimes that can be punished under international law as crimes against the peace and security of all mankind. Thirteenth criminal offenses are as follows [8]:

a. The act of preparation for aggression and acts of aggression.
b. Preparation of the use of armed force against another country.
c. Organize or support weapons intended to enter the territory of a country.
d. Provide support for acts of terrorism carried out in a foreign country.
e. Any violation of the agreement that has been approved weapons limitation.

f. The annexation of foreign territory.
g. Genocide (Genocide).
h. Violations of the laws and customs of war.
i. Each understanding, soliciting, and attempt to commit the offense in paragraph 8 above.
j. Piracy (Hijacking).
k. Slavery (Slavery).
l. Apartheid.
m. Threat and use of force against internationally protected persons.

One expert who revealed the scope of transnational crime is Dautrricourt in his paper, "*The Concept of International Criminal Jurisdiction- Definition and Limitation of the Subject*" mentions some form of international crime consists of: terrorism, slavery, the slave trade, trafficking in women and children, illegal trafficking in narcotics, distribution of pornographic publications, piracy at sea, air piracy, counterfeiting of currency, and the destruction of cables under the sea [9].

However, different definitions of international crimes that include four types of international crime, namely the core crimes of genocide, crimes against humanity, war crimes, and crimes against the peace/aggression. It is also stressed that basically raises the crimes of international concern such as piracy, slavery, torture, terrorism, and trafficking of drugs included in the category of international crime, because it is not (yet) be the jurisdiction of the court / tribunal.

The types of international crimes that have been revealed by this Cryer in accordance with what is stated in some of the sources of international law on international crimes. Sources of international law is an important contribution to the definition of international crimes, these sources consist of the statutes of the Nuremberg trials, Tokyo, ICTY, ICTR, and the Rome Statute. Statute of the Nuremberg Tribunal in 1945 was the first to decipher the crimes which until now regarded as international crimes, crimes against peace, war crimes, and crimes against humanity.

International court next contribution is very important in the process of defining offenses including "international crimes" is the *Charter of the International Military Tribunal for the Far East* or the Charter Court International Military Tokyo which gave a definition of international crimes, namely crimes against peace, war crimes, and crimes against humanity (article 5, international military tribunal Tokyo)

Additionally Yugoslavia Criminal Court Statute or the Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY) 1993, ICTY Statute contributed greatly to the development of the concept of individual criminal responsibility and command responsibility, where they are considered individually criminally responsible not only those who do but also who ordered to commit a crime. Different from the Statute of the International Military Tribunal Nurnberg and Tokyo Statute of the International Military Tribunal, ICTY Statute provides additional scope in the definition of international crimes, where genocide became one of the forms of international crime. Besides, the other international crimes stipulated in the Statute of the ICTY are war crimes and crimes against humanity.

International crime is also defined in the Statute of the Court of Criminal Rwanda or the Statute of the International Criminal Tribunal for Rwanda (ICTR) in 1994 in the statute it states that the authority of the court is to prosecute those responsible international crimes that fall into the jurisdiction of the ICTR are: genocide (Article 2); crimes against humanity (Article 3); and a violation of article 3 of the entire 1949 Geneva Conventions and their Additional Protocol II of 1977 (Article 4).

Next in 1994 was born as a milestone in the Rome Statute of the International Criminal Court (ICC) which provides wider coverage than the statute of international crimes before an international tribunal. The Rome Statute states that the definition of international crimes and would be within the jurisdiction of the international criminal court is a crime of genocide, the crime of aggression, war crimes, and crimes against humanity.

Although, according to some experts the scope of international crime there is a difference, but based on some of the statutes of the international court is essentially the scope of international crimes have in common. Thus the classification of international crime could be seen from several sources of international law such as the Statute of the Nuremberg and Tokyo, the Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY) in 1993, the Statute of the International Criminal Tribunal for Rwanda (ICTR) in 1994 and the Rome Statute which states that which is included in the form of international crime in broad outline, namely genocide, crimes against humanity, war crimes and crimes of aggression.

2.2 Transnational Crime

The understanding of the term "transnational crime" as a new nomenclature is recognized in international law, namely Convention against Transnational Organized Crime (Convention against Transnational Organized Crime) [10]: [11] Characteristics of "transnational crimes" is set in Convention against Transnational organized Crime (Convention against Transnational organized Crimes),. In Article 3 of the Convention UNTOC affirmed that the elements of transnational crime are as follows:

a. In more than one region of the country;
b. In a country, but the preparation, planning, direction or control of the offense was committed in the territory of another country;
c. In an area of the country, but it involves a group of organized criminal who commits an offense in more than one region of the country; or
d. In an area of the country, but the impact on the offense is perceived in other countries.

In addition Bassiouni also reveals elements of transnational crime are an international crime that contains three elements namely the elements of international, transnational element, and necessity. International element includes an element of threat to the peace of the world, the threat of indirect peace and security in the world, and to shake the feeling of humanity.[3] While the transnational elements include elements or actions that have an impact on more than one country, acts that involve or impact on the citizens of more than one country, and the infrastructure and the methods used beyond the territorial boundaries of a country. The element needs (necessity) are included in the elements will need cooperation between countries to do prevention.

While transnational crime is a term juridical about the science of crime, which was created by the United Nation the field of crime prevention and criminal justice in terms of identifying the phenomenon of specific criminal that transcends international borders, violating the laws of several countries, or have an impact on other countries [12].

Besides, the nature of transnational crime that knows no boundaries of a country. Some aspects of transnational crime is not limited to certain areas such as the place of occurrence, the consequences thereof, nor the purpose of the crime itself [13].

Use of the term transnational, specifically used to indicate a crime committed by an individual, where the crime itself, the individual can be charged with the responsibility under national law or international law. Perpetrators of international crimes must be distinguished from international crime perpetrator is the State. This is due that the State can only be charged with the responsibility of an international criminal (international criminal responsibility of states) [14]. If linked to international crime, the different transnational crime with international crime although basically an act of cross-border crime but transnational crime has different scope with international crimes. This can be reviewed judicially in the rules of international law.

Transnational as has been the United Nations Identification of the UNTOC consists of 18 types of transnational crime, namely money laundering, terrorism, theft of objects of art and culture, the theft of intellectual property, illegal trafficking of soldiers and weapons, aircraft hijacking, pirates, insurance fraud (fraud), computer crime, environmental crime, trafficking in persons, trading human body parts, illicit drug trafficking, fraudulent bankruptcy, infiltration of legal business, corruption, bribery of public, and bribery of party Officials.

Meanwhile, international crime, as was explained earlier that the scope of the statute of international crimes by some international court composed of genocide, crimes against humanity, war crimes and crimes of aggression. Therefore, from the description of the scope of transnational crime, it can be seen that different transnational crime with a transnational international crime but crime is part of an international crime.

3. CONCLUSION

a. International Crimes are crimes that have elements of that action having an impact on more than one country and it involves or has an impact on the citizens of more than one country as well as facilities and infrastructure and the methods used appeared to have exceeded the limits territorial boundaries of a country.
b. Transnational crime has elements as stipulated in Article 3 of the Convention UNTOC is a crime in more than one region of the country; in a country, but the preparation, planning, direction or control of the offense was committed in the territory of another country; in an area of the country, but it involves a group of organized criminal who commits an offense in more than one region of the country; or in an area of the country, but the impact on the offense is perceived in other countries.
c. The difference between international crime and transnational crime lies in the scope of the crimes set out in international legal sources. The scope of international crimes by the Statute of the Nuremberg, Tokyo, ICTY, ICTR and the Rome Statute composed of genocide, crimes against humanity, war crimes and crimes of aggression. While Transnational as has been the United Nations Identification of the UNTOC consists of 18 types of transnational crime, namely money laundering (money laundering), terrorism (terrorism), theft of objects of art and culture, the theft of intellectual property, illegal trafficking of soldiers and weapons, aircraft hijacking, pirates , insurance fraud (fraud), computer crime (cyber crime), environmental crime (crimes against the environment), trafficking in persons (human smuggling), trading human body parts, illicit drug trafficking (drug smuggling), fraudulent bankruptcy (cheating), infiltration

of legal business (infiltration of legal business), corruption (corruption), bribery of public. (Bribery of public officials), and bribery of party Officials (bribery of party officials).

REFERENCE

[1] Shoelhi, Mohammad. 2012. *Propaganda dalam Komunikasi Internasional*. Bandung: Simbiosa Rekatama Media
[2] Mustopo, Habib. 2006. *Sejarah.* Jakarta: Ghalia Indonesia
[3] Kallo, Syafruddin. 2012. *TeoridanPenemuanHukum*. Medan: Universitas Sumatera Utara
[4] Atmasasmita, Romli. 2006. *Pengantar Hukum Pidana Internasional*. Bandung: Refika Aditama Cryer, Robert. 2010. Hakan Friman. Darryl Robinson dan Elizabeth Wilmshurst, *An Introduction to International Criminal Law and Procedure*. Cambridge: Cambridge University Press
[5] Atmasasmita, Romli, *Ibid.*
[6] JawahirThontowi dan PronotoIskandar. 2006. *HukumInternasional Kontemporer*.Bandung: RefikaAdiatama
[7] Siswanto, Heni. 2016. *HukumPidanaInternasionalTeoridanPraktik*. Bandar Lampung: Aura
[8] Maskun, international crime classification, 2013, accessed on http://www.negarahukum.com/hukum/klasifkasi-kejahatan-internasional.html
[9] Atmasasmita, Romli, *Op.Cit.*
[10] Phillip C. Jessup (1968).
[11] Convention Palermo (2000).
[12] https://wisuda.unud.ac.id/pdf/1103005099-2-BAB%20I.pdf, accessed on 25 October 2016, at 19:30 gmt
[13] Shinta Agustina, Perdagangan Perempuan dan Anak sebagai Kejahatan Transnasional: Permasalahan dan Penanggulangannya di Indonesia, *Jurnal Hukum Projustitia*, Vol. 24, No.1, 2006
[14] http://news.liputan6.com/read/2320521/jejak-kejahatan-yakuza-di-indonesia, accessed on 4 October 2016, at 09:42 gmt

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Dwelling Time (Welfare Society or Welfare Interest Groups)

Raden Arief Fadlilah*[1]
*UNIVERSITY OF LAMPUNG, LAMPUNG, INDONESIA

Abstract
Dwelling time is a measure of the time it takes container imports, since the containers unloaded from ships (berthing) to get out of the harbor area (gate out). Influence dwelling time becomes a special view of the developments in the economy due to a lot of legal violations in licensing unloading the ship carried. In practice corruptive behavior occurs that causes inefficiency, it is necessary regulatory certainty to ensure the loading and unloading activities went so well that raises efficiency This study uses normative legal approach that is associated with the economic approach. This study is the law of the approach of economic analysis of law, which includes: (1) Transactions Cost Economy who evaluate the efficiency of legal regulations with regard to the majority of private law; (2) The New Economics Institute; (3) The theory of "Public Of Choice". The results of the research that the implementation of the dwelling time was originally intended for the efficiency of loading and unloading time it resulted in inefficiency. In the implemented economic efficiency and establish rules that raise tax rates for imported goods and the maximization of the entire technical implementation of the service dwelling time by streamlining arrangements and commitment of the various stakeholders for the realization of people's welfare.

Keywords: Dwelling Time, Law, Economics, Efficient, Welfare

1. INTRODUCTION

Historically, modern dwelling time is growing very rapidly over the past thirty years by the pressure from organisations of civil society and the connections in global level. [1] Dwelling time is the time that is calculated from a container (container) dismantled and removed (unloading) from the container ship to leave the port terminals through the main door. The main growing concerns being voiced is the behavior of corporate / personal interests for the sake of profit maximization, it is common practice in ways that are not fair and unethical, and in many cases can even be categorized as crimes involving.

Until the decade of 1960-70's, the idea of dwelling time continues to grow. The birth of the International Convention on Facilitation of International Maritime Traffic, in 1965 by the Intergovernmental Maritime Consultative Organization (IMCO) has a goal expedite sea links between countries by preventing delays unnecessary from a passenger ship, crew and cargo, both at the time of arrival and the departure of the ship. The Convention was aimed at promoting cooperation among its participants to achieve uniformity as far as possible the formalities of documents and procedures relating to international shipping traffic, and it will make a good relation each country in the sea subtantion.

In the port laws in our country Law No. 17 of 2008 organizing the activities in the port set out in article 68 to article 108 are includes: set and guide, control, and supervision of activities of ports, safety and security of port, and / or, customs, immigration, carantina. Thus Act No. 17 of 2008 not accommodates the application of the dwelling time in service activities such as what is mandated by ISO 9001. The application of dwelling time in our country contained in PP 60 Year 2014 on Implementation and utilization of loading and unloading of goods to and from ships contained in Article 2 that its contents regulate the business activities of loading and unloading of goods is a business activity that is engaged in the loading and unloading of goods from and to the ship in ports, Act This law was also has not set out clear on the application of dwelling time in running better services.

Port has an important role in contributing to the economy of this country. Pier is a big role in a country, other than as an economic driver; the port also plays a key role as the builder of civilization. Port that move the economy from the bottom to the top that have a remarkable contribution as a counterweight economy rescuers even the country's economic growth so that shows the results of the plume. By the contribution of a large port like this, the economy should be improved.

In fact all is inversely proportional to the contribution given by the government. The port is far from the so-called efficient to perform a good services still difficult, especially with the wages of port workers who lack the necessities of life are increasing. The position of the port is very difficult to consent as the basis of loading and unloading in a port in its implementation. Permission expected it was not just a regulation to promote economic recovery the next day, but also the welfare needs of the state and society appropriately according to human standards.

[1] Corresponding Author. Phone Number: -, *E-Mail Address:* Arieffadlilah459@gmail.com

To regulate the legal relationship between the stevedoring company with the other participants, the holding of an employment agreement between stevedoring companies and related participants which usually contains elements of the job, and duties etc.

Sociologically *perseroan terbatas* not get a freedom. As a company that deals with other participants. And the other side is that basically determines the fast or slow loading and unloading activities. As remember the position of the company should be in accordance with standards of good corporate hence the need for government intervention to provide legal protection.

In the concept of a state of law, the enactment of the principle of legal certainty where this principle is to ensure legal certainty binding is through a rule that is like legislation. Mandate of ISO 9001 on quality management systems are one of them in the field of licensing services is still minimal and the absence of a strong legal law in the set is clearly in the Act No. 17 of 2008 regulating the cruise not accommodate the dwelling time is in the allocation to the welfare state and employers, in wish with good regulations in the dwelling time of this state and the community to get his welfare so that later there will be positive domino effect if a majority "funds" dwelling time in the allotment for the welfare of the state and society will thus be raised a strong emotional bond between the state and entrepreneurs with the company.

2. RESULT AND DISCUSSION

Long times ago the ports there were originally built on rivers and inland waters, then develop gradually, the port was built on the seashore open along with the development of human civilization. The role and function of the port at that time only as a trading activity, so that facilities such as ports and management that exists today. Piers is a place that consists of land and / or water with certain limits as the government activities and exploitation activities are used as a vessel rests, up and down the passenger and / or unloading of goods, such as terminals and berths equipped with facility safety and security of shipping and port support activities as well as the displacement of intra and intermodal transport.

So the port as a terminal the economy, we can conclude that the activities in a node in the chain of the transport system as well as a gate (gate way) especially in the ocean transportation in the ordinary course of freight traffic, container, movement of passengers and animals, thus the port has a role and functions essential to economic growth. The development of maritime traffic, loading and unloading technology, increased trade between the island and abroad, the quality of the role and functions of the port as a terminal for goods and ships need to be upgraded consistently and continuously to keep pace with the growth of economic and trade activities from year to year / Overview On Dwelling Condition Time Dwelling Time has an important role in contributing to the economy of this country. Dwelling Time is a big role in a country, other than as an economic driver Dwelling Time also plays a major role as a builder of civilization. Dwelling Time is moving economic sector both below and above also have an extraordinary contribution as a counterweight economy rescuers even the country's economic growth so that shows the results of the plume. With the contribution of the dwelling time great like this then of the life of the state must be prosperous.

According to the World Bank definition, dwelling time or waiting time unloading time is calculated from a container (container) dismantled and removed (unloading) from the container ship to leave the port terminals through the main door. The process that determines the length dwelling time in port is divided into three stages, namely the pre-clearance, customs clearance, and post-clearance. Pre-clearance is the process of laying the container in a temporary reservoir (TPS) in the port and the preparation of documents imported goods notification (PIB). As for customs clearance is the process of physical inspection of container (especially for the red line), and verification of documents by the Customs and expenditure approval letter expenditures (SPPB). While the post-clearance activities when the container is transported to the outside of the port area and the owner of the container to make a payment to port operators [2].

Dwelling Management Time and Yor (Yard Occupancy Ratio) a port plays an important role in reducing or effecting a component Freight Logistics Costs. From the various analyzes and observations of harbor logistics practitioners, as a perspective on the management of government agencies and Yor Dwelling Time is divided into two, namely: (1) too Port Centric, or (2) too Customs Centric.

The views Customs Centric is a problem Dwelling Time and Yor was caused by about the length of the documents and customs clearances which causes the container to settle for too long in Quay Container Yard so Yor quickly to 100%, and finally there is no more land available for the process of loading the container for ships next.

View of Port Centric with Under Law 17 of 2008 on Shipping differentiated where the Port Authority and which port operator. As for other relevant government agencies such as the Port Health Office, Immigration, Quarantine and Customs should be or should be subject to the Port Authority. While the port operator is Party Organizers Piers defined in Law 17 of 2008 as BUP (Enterprises Port) which land and property by state-owned ports are concessioned to the BUP on the approval of the Ministry of Transportation. Thus the effort to reduce

Dwelling Time and Yor port was entirely the responsibility of the Port Authority. Cause Dwelling Time And yor up to illustrate the cause Dwelling Time and Yor are as follows:

a. The physical ratio Quay Yard temporary storage that is not balanced by growth in production throughput at the port of loading and unloading. This is now a matter of the capacity of GSL (Ground Slots) temporary Quay Yard provided it causes Dwelling Time is around 15 days.
b. The absence of significant growth in the Implementing MITA importation into the Customs so that customs process relies on pre-inspection that is greater than the post-inspection. As a result of pre-inspection of goods is restrained; no sooner out of the Yard Quay harbor so Dwelling Time and yor ride.
c. Lack of vigilance in cross-sectoral coordination that government agencies held by the Port Authority under the Act 17 of 2008 and all must submit to the Port Authority. It was naive because officials at the Port Authority was proven to not understand the chain of processes that cause Yor Dwelling Time and height, so that the cross-sectoral interaction with it does not have the authority of the knowledge in question.
d. The government's inability to touch fellow Coordination Management Logistics Service Provider consisting of: Shipping Agents, Freight Forwarders, Trucking Company and Warehouse Operator around the harbor in order to take solid coordination at the Quay container port operator Yard to facilitate loading and unloading activities as land at Quay Yard available and adequate.
e. The Role of CMEA too Customs Centric making proposals and composition of the matrix problems that do not hit the intended target and consequently Dwelling Time and Yor never finished even years.
f. Monitoring Dwelling Time and Yor supported by inaccurate data, namely: the starting date was taken from the container settles ETA (Estimation of Time Arrival) vessel; that should be taken from each date and time of container touched Quay Yard. The end date Dwelling Time taken from each container out GATE Quay Yard.
g. The absence of solid coordination in the Process Over Brengen that can help decrease Dwelling Time and yor. Coordination in OverBrengen process involving various related party Logistics Service Provider, namely: Container Terminal, Freight Forwarders, Trucking Companies and business Purpose Warehouse TPS [3].

All of the above conditions is inversely proportional to the process that has been given by the dwelling time. Dwelling Time is still far from what is called good, because there are many loading and unloading process implementation that does not comply with the applicable SOP. There are still a lot of fraud that happened to get maximize profits in the process of implementation of the dwelling time.

3. CONCLUSION

Dwelling time is a measure of the time it takes container imports, since the containers unloaded from ships (berthing) to get out of the harbor area (gate out). Influence dwelling time becomes a special view of the developments in the economy due to a lot of legal violations in licensing unloading the ship carried. In practice corruptive behavior occurs that causes inefficiency, it is necessary regulatory certainty to ensure the loading and unloading activities went so well that raises efficiency This study uses normative legal approach that is associated with the economic approach.

This study is the law of the approach of economic analysis of law, which includes: (1) Transactions Cost Economy who evaluates the efficiency of legal regulations with regard to the majority of private law; (2) The New Economics Institute; (3) The theory of "Public of Choice".

The results of the research that the implementation of the dwelling time was originally intended for the efficiency of loading and unloading time it resulted in inefficiency. In the implemented economic efficiency and establish rules that raise tax rates for imported goods and the maximization of the entire technical implementation of the service dwelling time by streamlining arrangements and commitment of the various stakeholders for the realization of people's welfare.

REFERENCE

[1] World Bank Indicators-Indonesia, (2011), Forest Area (SQ KM) In Indonesia, http://tradingeconomics.com, diakses tanggal 4 Maret 2011.
[2] Kasali, Rhenald. 2010. *Myelin: Mobilisasi Intengibles sebagai Kekuatan Perubahan*. Jakarta: Gramedia Pustaka Utama
[3] Sangian, Rudi, Manajemen Dwelling Time dan YOR Pelabuhan Serta Pengaruhnya Terhadap Biaya Logistik. Kompasiana.com/rudysangian, 25 Juli 2014 07:59:56. Diakses tanggal 2 September 2015.

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The Protection of the Rights and Resources of the Villages towards the ASEAN Economic Community through Village Law: Optimizing the Villages Resources in Indonesia

I Ketut Dharma Putra Yoga[*1], Aria Alim Wijaya[*2], Alief Aji Junadil Desang[*3]
*UNIVERSITY OF LAMPUNG, LAMPUNG, INDONESIA

Abstract
The ASEAN Economic Community (AEC) is the economic integration of ASEAN members as a single market to minimalize the obstacles to do the economic activities characterized by free flow of goods, services, and investments, as well as a freer flow of capital and skills. AEC will Affect all elements of society, include urban and urban community. The village is one AEC object, not only on the product quality of the village, but also the quality of human resources. In Act Number 6 of Year 2014 about Village, there are Recognition Principles and the Subsidiary Principle. Flow of free trade in the village raises rural industrialization as a form of optimization village resources. Industry village can be formed through certification village resources. In the village stratification need to be made grouping, core competencies and one village one product through product standardization and local wisdom. Certification of resources is of recognition of existing resources in the village for retained as a form of local knowledge that is ready for a competitive free market, for example data collection of the plantation products, forest products, expertise, human resources and also to collect data on the art and local culture. This paper will discuss about the protection of the rights and resources of the village towards the free market through village regulations of the Republic of Indonesia. Implementation of the new rules in the optimization of resources is in the village as an AEC industry.

Keywords: ASEAN Economic Community, Village Law, Village Industry

1. INTORDUCTION

1.1 Background

ASEAN Economic Community is a program that is contained in the ASEAN as a form of economic integration in the region and is aimed for improving the economic welfare of society in every country in Southeast Asia. ASEAN leaders have agreed to realize the AEC in 2015 with four pillars, namely a single market and production base; highly competitive economic region; region with equitable economic development; and a region fully integrated with the global economy. For Indonesia, the implementation of the AEC should be a challenge for Indonesia to increase the potential of all aspects. Challenges to be faced by Indonesia are internal in the country but even more competition with other ASEAN countries and other countries outside ASEAN, China and India.

The Indonesian government has shown its commitment to consensus, one of the commitments the Government of Indonesia, has issued Act Number 6 of Year 2014 about Village. Rural development is an important development of national. Village development is the foundation and will be the strength of the State, the village government is the basis of the lowest administrative structure of the Indonesian government, and the village is a miniature of a country. The strength of Indonesia is how stakeholders involved can make the village a great potential in the face of the AEC.

Number of Villages in Indonesia is 74.093 villages. This amount can be classified relatively underdeveloped villages 20.167, 51.022 and 2.904 classified as developing village has become independence village. According to Planning of Indonesia, in 2019 will be targeted the independence village will increase to 2,000 villages. That commitment is reflected in the government it spent for the village of Rp. 102.2 trillion in the year 74.093 2015. Indonesia has only 4% of village self-sufficient. This minimal amount so has implications for the competitiveness of the village to meet the challenges ahead, namely the global market or AEC.

In an empowerment of natural resources must be done effectively and efficiently. One form of resource management that needs to be developed is doing an inventory of resources through village's resource certification. Certification resource is of recognition of existing resources in the village for retained as a form of local knowledge that is ready for a competitive free market [1].

1.2 Formulations of Problem

Based on the description above, the formulation of the problem of this paper are:

[1] Corresponding Author. Phone Number: -, *E-Mail Address:*
[2] Corresponding Co-Author. Phone Number: -, *E-Mail Address:* aria.aw215@gmail.com
[3] Corresponding Co-Author. Phone Number: -, *E-Mail Address:*

a. How does the Indonesian government protect the rights of the village and the village resources in order to compete in the AEC?
b. How does the government of Indonesia optimize village local products in order to compete in the AEC?

2. DISCUSSION

2.1 The Protection of Rights and Resources of the Village by Government of Indonesia

The village as region in the territory of the Republic of Indonesia must not be separated from the object of free market competition, not only to the quality of products / goods that produced by village, but human resources as natural resource managers, cultural and social capital must be confronted on economic competition. The village is the foundation and will be the strength of the State; the village government is the basis of the lowest administrative structure of the Indonesian government.

The village has a tremendous resource that will not create prosperity in the era of free competition if it is not able to compete, if it is not built creative efforts in developing social capital. The formation of "socio-economic society creative rural or rural community" when it is developed by improving the competitiveness will boost economic growth and development of rural areas are more developed and persisted exist in free market competition [2].

The Indonesian government has shown its commitment to consensus, one of the commitments the Government of Indonesia, has issued Act Number 6 of Year 2014 about Village. Rural development is an important development of the construction of the Village. The law brought the concept of Rural Development aims to improve the welfare of the villagers and the quality of human life as well as poverty reduction through the provision of basic needs fulfillment, infrastructure development, local economic development potential, as well as the use of natural resources and environmentally sustainable manner by using two (2) approaches, the Village building and "build a village that is integrated in the planning of Rural Development. This, along with the Vision, Mission Nawa Cita. Indonesian President that starts from the periphery to strengthen rural areas is within the framework of a unitary state. Rural Development has strategic objectives in the years 2015-2019.

Discourse village resource management becomes interesting to examine further, especially the village with the spirit of Act Number 6 of Year 2014 about Village, concerning the village with revolutionary principle. The principle of village is namely Subsidiary and Recognition. Recognition Principle as a form of state recognition of the right of the origin of the village, and subsidiary principle, authorizes the establishment of local scale and decisions locally for the benefit of the villagers, so that the village has the right to manage and control over resources for the benefit of the village communities, so both the principles should encourage villagers to improve resource governance for competitiveness.

During this time, the village is always set on a process of natural resource utilization by local governments without providing a clear compensation and prosperity for the people of the village itself. However, with the issuance of Act Number 6 of Year 2014 about Village, the village has an authority of its own to manage the products they have. The village and the device have the authority to manage and market their products. On the other hand, the role of central and local governments is also needed to keep watch over and protect the rights of villages to manage their own natural resources [3].

2.2 Optimizing Village Local Product in order to Compete in ASEAN Economic Community

Village becomes an important role in the progress of the region. The village as the center of barns, the village as a tourist destination, the village as the realm of home industry and micro-industry, the village as a supplier of trained human resources as well. That's why every village in the country should develop its potential based on the diversity of its available resources for the sake of competition era.

Now the government has allocated funds of the village with a clear legal, because it should be flushing the village fund to develop the potential that exists in the village in order to promote their economic activities. During this time the village more self-sufficient or self-help in developing their potential. With the village fund is expected to be the more potential villages translate them into a form of rural development that is targeted and able to face global turmoil. Productive businesses that can drive the rural economy as well be a lot of job opportunities, reduce urbanization, reduce unemployment and reduce poverty means that the rural economy is able to penetrate the global market. Indeed a lot of resources in villages that can be used optimally, such as the tourism potential and the other talismans of his supporters, where the beauty and the uniqueness of the village, as well as the culinary customs of life are things that are interesting to be cultivated. Travel is packed with rustic feel is certainly something new and attract tourists, especially foreign tourists so as to bring in foreign exchange. Not to mention the resources that are capable of supporting the growth of the creative industries, such as the art of batik, weaving, carving up the art of music. In the fields based on natural resources such as natural springs sources can also be used in addition as a tourist destination areas as well as a source of mineral water to clean the water supply business. Then there is the potential for a certain crop fields, ranging from food crops to plant herbs that have high sales value can also be utilized.

Certification of the resource is recognition of existing resources in the village for retained as a form of local knowledge that is ready for a competitive free market. The survey of local fruits agricultural products, plantation, forest products, as a superior product is competitive to compete in the free market. How to conduct an inventory of skills of human resources skilled. Industry referred to is the emergence of businesses in agriculture, fisheries, plantation, fisheries, tourism, etc. are based on the potential of village resources to the industrial scale, which will have an impact on the uptake of local skilled workforce to compete.

An overview of how the village was able to build the people's welfare, we can learn from best practice governance villages Hua xi located in the province of Jiang Shu of China, through the leadership of the village head Wu Renbao now finally become the village's most advanced in the world, the village took the initiative to launch their own business in accordance with the conditions and needs of each market. So, after the villages allowed to use the land to produce the desired as what market needs. Village Hua Xi after successfully increased agricultural production through mechanization, they really develop the business industry in the settlements, build steel mills and pipe-steel. Businesses become larger after Wu Renbao combine several surrounding villages, increase the amount of labor needed for industry. So that the steel production reached 2.2 million tons a year, while pipes of various types of bicycles, motorcycles and household furnishings, nearly 300 thousand tons / year. From the production of Hua Xi village had no exports to the US, Canada, Europe, Australia.

Act Number 6 of Year 2014 about Village reaffirmed that the village can establish village-owned enterprises. BUMDes (The Enterprise that own by Village) is a business entity of all or most of the capital is owned by Village through direct investments originating from the wealth of the village in order to manage assets, services, and other business for the welfare of the villagers. Thus BUMDes is the Institute of Business Village which is managed by the Community and Village Government in strengthening the economics of the village and in shape based on the needs and potential of the village. BUMDes also is a pillar of economic activity in the village that serves as a social institution (social institution) and commercial (commercial institution).In special provisions on village-owned enterprises in Act Number 6 of Year 2014 about Village stipulated in Chapter X, with 4 chapters, namely Article 87 through Article 90. In Chapter X of the Act the village is mentioned that the village can establish village-owned enterprises called BUMDes run with the spirit of brotherhood and mutual cooperation.

Now the government has given the village budget that can be utilized to develop the potential of the village, just creativity village chiefs and heads of the responsible answer to the management and oversight of the use of village funds not only that but also were able to observe related turmoil or competition that will penetrate the era AEC. In addition to develop the village, the village fund can also be used for training expertise (skills), increasing the capacity of rural business groups to enable villagers more eager to hone their entrepreneurial spirit is then able to provide added value to the development of village. Because many potential that could be utilized today, then by the village fund policy issued by the government, it is expected that the next villages are scattered throughout the country, especially rural area. Certification of Local Resources and based on all wisdom of local entities are supposed to be good to face the competition of the ASEAN Economic Community.

3. FINAL

Act Number 6 of Year 2014 about Village in Indonesia brought the concept of Rural Development which aims to improve the welfare of the villagers and the quality of human life as well as poverty reduction through the provision of basic needs fulfillment, infrastructure development, local economic development potential, as well as the use of natural resources and environmentally sustainable manner.

Certification of resources must be a strategic part of the village to get in this era of free competition so that villagers do not get run over in the struggle market. Certification is a mapping step before getting aggressive market forces that we cannot deny. Because many potential village that can be used today, then by the village fund policy issued by the government, it is expected that the next villages are scattered throughout the country, especially rural area of the county can gradually build support-infrastructure. In the face the ASEAN Economic Community (AEC), Indonesia need the support of the natural resources and human resources as a government asset that village officials. In between these resources are more involved or contributed most, if Indonesia could make the AEC as the chances to compete and build the village economic as well. The village apparatuses who became organizer of rural development, which contribute to achieving the vision and mission of Nawacita in order to independent village throughout Indonesia.

REFERENCES

[1] Totok Mardikanto, Pemberdayaan Masyarakat, (Bandung: ALFABETA, 2015), p. 100
[2] Peter Hagel, Pembangunan Desa dan Lembaga Swadaya Masyarakat, Rajawali Press, Jakarta, 1992.
[3] Mashuri Maschab, Pemerintahan Desa di Indonesia, PAU Studi Sosial Universitas Gajah Mada, Yogyakarta, 1992.

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ASEAN Economic Community: Balancing Investment and Socio-Economic Rights

James Reinaldo Rumpia*[1]

*UNIVERSITY OF LAMPUNG, LAMPUNG, INDONESIA

Abstract
ASEAN Economic Community (AEC) promotes the development and economic welfare in ASEAN nation. Indonesia, on the other side, accepts it as a big chance of investment. Through investment, the government hopes to achieve economic development. Policies, regulation, even deregulation has been made for a friendly investment. But, there is no guaranteed investment will also bring social welfare. Regulation is not only as a tool for investment but also to protect socio-economic rights of people's. As the example, the regulation made for protecting the local worker, or employment opportunities. The regulation also provided for protection and empowerment for small and middle economies or the poverty alleviation. This condition will be the dilemma for the government to balance the investment and to fulfill socio-economic rights at the same time. Truly are UUDNRI 1945 already formulating to solve this dilemma? We can learn from article 33 UUDNRI 1945, about the idea to keep it economic development work together in harmony with the will to fulfill socio-economic rights. This paper focuses on seeing how regulation consistence in fulfills socio-economic rights in AEC Free Trade, with the normative method through legislation, social, and economic approach, The research result describe the regulations used for facing AEC dominate by investment design and forgot about socio-economic rights.

Keywords: ASEAN Economic Community, Investment, Socio-Economic Rights

1. INTRODUCTION

ASEAN Economic Community is a big chance for empowering economic and welfare for Indonesia. This big chance then responded with investment. The condition then obligates the regulation to open easy requirement for the investment. Then the law is only to keep and push efficiency in economic.

The orientation of regulation to guarantee the foreign investment is has been done by Indonesia. As the example of the law number 25 the year 2007 about capital investment: 1) the equal treatment of foreign and local investors; 2) Nationalization or expropriation of property rights of investors are not possible, except by legislation; 3) foreign companies are given the flexibility to make the transfer and repatriation of foreign exchange; and 4) the business field wide open, except the production of arms and business fields that are prohibited by law.

As is also the perspective of investment incentives through regulation, not just passively provided by the state. The state also helps ensure the availability of investment incentives through the choice of law. E.Carbonara and F Parisi, dividing the freedom of foreign investors in the choice of law, within three (3) forms [1] :1) restrictive; 2) semi-restrictive, and 3) a liberal. When looked at from the provisions of Article 1338 Civil Code, the real contract in Indonesia is among the types of semi-restrictive. This is because the provisions of the article do not give full freedom on contract. Contracts must not violate any applicable law, contrary to morality and public order. But the perception of pro-investment thus cannot be used as a basis for improved welfare for all Indonesian people.

Socio-economic inequality, always inversely related to the issue of economic growth. Pro investment does not guarantee the welfare and economic growth acquired simultaneously. This opinion was reinforced by Caroline L Paine in her research for 129 non-OCED countries with 500 thousand Populations, found globalization and foreign investment is not followed by social and economic rights [2].Such conditions then should be a reflection that the orientation of regulation not merely on economic growth.

States have a big responsibility to keep running an investment and ensuring social and economic rights of the people. The idea of the balance between investment and social protection of economic rights of the people has actually crystallized in Article 33 UUDNRI 1945. The orientation of the intended by Article 33 UUDNRI 1945 is the embodiment of the people's welfare, which is based on social and economic rights. But undeniably, the idea of well-being often cannot be realized in other legislation, particularly in the economic field were vulnerable to pressures of the free market and globalization

Globalization and free market suppress the formation of law can deviate from ideas / ideals UUDNRI 1945. If the international rule or non-state actors, drastically influence, limiting and Strengthens the authority of the state to make their international and domestic policy [3]. The major influence on national policy, worrying about

[1] Corresponding Author. Phone Number: -, *E-Mail Address :* jamesreinaldor@gmail.com

the guarantee of socio-economic rights of the people of Indonesia. Whereas the socio-economic rights, specifically used for the challenges of the ASEAN Economic Community.

This paper uses the normative method, with a political approach, and economics. The purpose of this paper is to look at the consistency of the legislation, in ensuring socio-economic rights of the people, such as socio-economic rights of workers, basic service, and empowerment of small economies. This description is expected to be the basic orientation of economic growth based on the welfare of the Indonesian people, particularly in the face of the ASEAN free market.

2. NATIONAL ECONOMY AND GLOBAL CHALLENGES

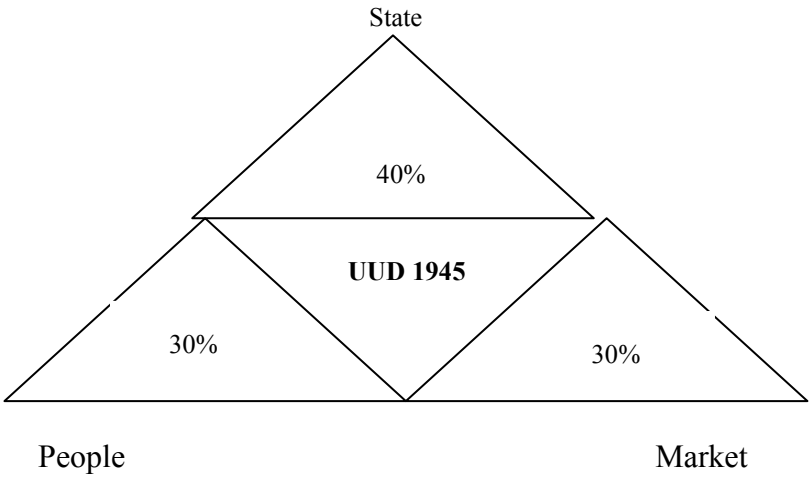
Influence and global challenges is a determinant factor in influencing the administration of the state. The strength of the relationship between countries, it can even form joint global governance. The government is not just an effort to maintain peace. However, evolve as global economic governance that also affects the national economy.

Global efforts to strengthen governance by Daniel D Bradlow has thrived: [4] First, they must have the same issue (development of the weakest society, and poorest individuals). [5] Second, the respect of international law principals. [6] Third, comprehensive coverage of needs of mechanism and institution must applicable to every interest and Involved stakeholders. [7] Fourth, coordinated specialization where every actors and stakeholder consistent and support the needs of global economic governance [*Ibid,* page 990]. Such conditions could no longer make the independent national economy, without any intervention from outside the country.

Global pressure further confirmed its existence in a legal product. Frank J Garcia argue globalization can Affect in 4 (four) ways: a) [8] changing the needs of the client (scope of needs is not interstate but wider across the nation); b) changing the substance of the law (law adapting and response to society, in case of globalization and technology); c) Changing the nature of regulation; d) changing the purpose and role (globalization can make and Affect state, to create strong vs. weak law). The necessity of adjustment of product legislation is also revealed by Van Der Vlies. Van Der Vlies, argues if the legislative bodies must create the which is the lawsuits to the global perspective, and it's not the only expression of state will. [9] Global influence is so great, allowing the policy direction of the country completely swept desired by global, i.e. the free market.

The state responsible for economic development then seemed to disappear. The welfare of the people then becomes an issue that could be set aside for the sake of the freedom of the market. Freedom of the market will bring its own sovereignty, over the sovereignty of the people. Edi Swasono argues sovereignty if the market cannot evicting the people's sovereignty. [10] The state will change into the corporate state, not the nation state. [11] The hope for economic development will be pushed by the free-market. [12] But on the other hand, if the market efficiency and freedom pressed will turn off the creativity and economic growth.

The State then required maintaining a balance between the goals of state control with the freedom of the market. Article 33 UUDNRI 1945 to maintain the ideals of balance between control and freedom of the market. State control of the resource sectors for the prosperity of the people. Kwik Kian Gie concludes: there are many people believe Indonesia economic system has reformulated Become mutual cooperation. [13] Formulations of this cooperation can be depicted in the relationship between the actors involved in the economy. Jimly Asshiddiqie illustrates the triadic relationship of economic actors namely the state, the market, and society as follows [14]:



Source: Economic Constitution, Jimly Asshiddiqie

States are given a larger portion of the economy, than any other actor. Countries should not really take off in the market, or the public. Dominance over society or the market will damage the balance and led to inequality. Inequality in the relationship will affect efforts to ensure the orderly realization of freedom, justice surely, and equitable prosperity. [15] State thus has a responsibility to ensure a balance between each sector. Similar delivered by Thurrow, he ensures that the community will be a success, if there is a balance between individual and collective needs, and to achieve the country takes an active role as well as representatives of the people's interests. [16] The idea of balance has revealed relatively successful in design if able to be realized in the legislation.

3. BALANCING LEGISLATION (SOCIO-ECONOMIC RIGHTS AND INVESTMENT) TO FACING ASEAN FREE TRADE

Free trade era gives pressure on the perspective and legislation. Indonesia in the near future will face the ASEAN Free Trade Area. The situation will bring Indonesia perspective become more pro with the market interest. The state, in the other side must reconsider for the only market interest. Interest of the people and state intervention, must clearly guaranteed. The legislation product which has been made must orient to the protection of social and economic rights. Then, how far our legislation fulfills the responsibility to ensure socio-economic rights.

The observation for the economic-socio rights based legislation will be start on the legislation after the reform. Type of legislation will be separated into state responsibility on welfare. How far the legislation ensure the socio-economic rights. The classification is based on the issue of each product. The observation of the legislation will be discussed based on periods.

After the reform (periods 1998-2004), issue of human rights protection are so strong and pledge, but in the other hand the issue of the protection of socio-economic rights, seems not so strong.

Legislation around 1998-2004
1. Law number 13/1998 about elderly welfare
2. Law number 39/1999 about human rights
3. Law number 21/2000 about labor union
4. Law number 23/2002 about child protection
5. Law number 13/2003 about man power
6. Law number 2/2004 about settlement of industrial relations
7. Law number 40/2004 about Social securities
8. Law number 41/2004 about Wakaf

As example, in the law number 39/1999 about human rights as the platform of human rights protection, it proved under of human rights there is no complete recognition about economic rights. Economic rights are be regulated only by 4 (four) article, that is article 1 number 3, article 64, article 71 and article72. All of it just said about group discrimination on economic, child exploitation on economic and unclear implementation about economic rights.

The uncertain guarantee also found in the legislation base on manpower and works issue. Overall the law related to man power and worker not fully protecting and empowering them. As an example on the law number 21/2001 about labor union, the state only guarantees the freedom to create a union. The union's welfare it depends on their performance, and state not involved in this condition. The unfair condition related to worker welfare is also found on the law number 13/2003 about man power. The interest of company is a priority beyond the manpower interest. The form of protection from the regulation bases on workers issue, then will not fully protecting worker if facing the ASEAN Free Trade. The worker not only must protect, but also must empower. In the law number 25/2004 about national development planning, there is no clear clause for the society participation. Article 6 and 7 only provide society able to participate, but how to participate there is no clear sentence, in the end, development planning only on the government perspective. The participation of the people, are not accommodate by the regulation. The law around 1998-2004, it's not clear to ensure socio-economic rights.

The laws around 2005-2010, also have many gaps on fulfillment socio-economic rights.

Periods 2005-2010
1. Law number 12/2005 about ratification of international covenant on civil and political rights
2. Law number 16/2006 about extension of agriculture, fishery and forestry
3. Law number 20/2008 about micro, small and medium enterprise.
4. Law number 36/2009 about health
5. Law number 52/2009 about population and family development.

Law number 12/2005 about ratification of the international covenant on civil and political rights as the commitment of people rights. The problem is economic right of the citizen, is not guarantee by the regulation. In the Law number 16/2006 about the extension of agriculture, fishery, and forestry, we can conclude about the state strategy to improve the human resource on agriculture, fishery, and forestry. The local government has been delegate by the state, as the director of the extension. On the other side, we must concern about the type of the extension. The government must be ready to improve the participant not only to follow the program.

The social and economic responsibility of the state also provided on the micro and small economic. Law number 20/2008 about micro, small and medium enterprise provides the protection and empowerment of small, micro and medium economies. Article 7 describes the state response for the capital, facilities and infrastructure, information, licenses, promotion, partnership, and business opportunities. The aspects which have been describes must set on the challenge for the globalization.

The problem of unclear guarantee of social rights, also found in regulation about health. Law number 36/2009 about health, on the article 20 and 172 declare about government responsibility without clear provision. The management and state allocation should be provided.

On the periods 2011-2016 there are 6 legislation products, which is related to state responsibility on the citizen welfare and economic.

Periods 2011-2016
1. Law number 13/2011 about the poor
2. Law number 19/2013 about protection and empowerment of farmers
3. Law number 3/2014 about the industry
4. Law number 7/2014 about commerce
5. Law number 7/2016 about protection and empowerment of fisherman
6. Law number 8/ 2016 about disability.

First, the law number 13/2011 about the poor. The law provided a form of self-development, social aids, and legal. Development for the poor on economic, only provided on article 24. The view of poor people protection, only as social problems but the economic guarantee and development not provided.

In this period, there also the legislation about farmer and fisherman empowerment. Law number 19/2013 about protection and empowerment of farmer, provide protection and empowerment for the farmer. Local government becomes central actor to empowerment and protection. The local government pushes the insurance for the farmer. It was very revolutionary movement to protect the farmer. Article 7,8 regulates local government responsibility to achieve the welfare program for the farmer. In the law number 7/2016 about protection and empowerment of fisherman, the role of local government also important to achieve the empowerment for fisherman. Article 13, 14, and 15 regulates the local government responsibility on planning and implantation of empowerment. This law on the other side already recognizes the role of women. In the article 45, involvement and role of women being agenda of women. But how the strategy to ensure the empowerment of women is not clearly yet.

4. CONCLUSION

The research result describes the regulations used for facing AEC dominate by investment design and neglect the socio economic rights. Even there is much legislation, oriented for social welfare. The legislation is not truly clear on guarantee of socio-economic rights. The mainly problems, are the regulation always throwing responsibility to guarantee the rights. On the other side, the problems also about the value in every legislation, starting to only follow the interest and will of global and markets.

REFERENCE

[1] Emanuela Carbonara, dan Francesco Parisi, *Choice of Law and Legal Evolution: Rethinking The Market for Legal Rules,* Journal of Public Choice, Volume 139, 2009, Issue 3/4, Dodrecht: Springer Science & business, page 464.

[2] Caroline L Paine, Bringing Home the Bacon or Not? Globalization and Government Respect for Economic and Social Rights, Human rights review, 09/2009, Volume 10, Issue 3, Dordrecht Netherlands: Springer Science & Business Media, page 426.

[3] Andreas Follesdal, *Global Distributive Justice? State Boundaries as a Normative Problem,* Global Constitutionalism, Volume 1 issue 2, July 2012, Cambridge: Cambridge University Press, page 275.

[4] Daniel D Bradlow, *A Framework For Assessing Global Economic Governance,* Boston College Law Review, 05/2013, Volume 54, Issue 3, United State: Boston College School of Law page 982.

[5] *Ibid,* page 982-983.

[6] *Ibid.*

[7] *Ibid,* page 989.
[8] Frank J Garcia, *Introduction: Globalization, Power, States, and Role of The Law,* Boston College Law Review, 05/2013, Volume 54, Issue 3, United State: Boston College School of Law page 907-909.
[9] I.C. van derv lies, *Legislation in a Global Perspective,* in J Arnscheidt, et.all, *Law Making For Development Exploration into the Theory and Practice of International Legislative Projects,* Leiden: Leiden University Press, 2008, page 133.
[10] Sri Edi Swasono, *Daulat-Rakyat versus Daulat Pasar,* Yogyakarta: Pustep-UGM, 2005, page 34-35.
[11] *Ibid.*
[12] *Ibid.*
[13] Kwik Kian Gie, *Nasib Rakyat Indonesia dalam Era Kemerdekaan,* Jakarta: Pt Gramedia Pustaka Utama, 2016, page 46.
[14] Jimly Asshiddiqie, *Konstitusi Ekonomi,* Jakarta: Kompas Media Nusantara, 2010, page 377.
[15] *Ibid,* page 378.
[16] Milan Mesaric, Neoliberalism Vs. Planning As A Institute of Socio-Economic Development, Montenegrin Journal of Economic, volume 8, issue 3, 2012, Montenegro: Ekonomska Laboratorija za Istrazivanje Tranzicije, page 23.

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The Prevention of Violation the Rights of Suspects by Police in Law Enforcement (An Effort to Build a Culture of Human Rights-Based Police Law)

Slamet Haryadi*[1]

*STIH MUHAMMADIYAH KOTABUMI, LAMPUNG, INDONESIA

Abstract

The national police, as well as being the stronghold of law enforcement, has such a duty of protection of human rights. The problem is precisely the police in carrying out law enforcement more violates Human Rights, both administrative and procedural violations, and violations of physical/violence. It occurs in the case of the light up to the case that the heavy procedural infringement. The violation of human rights by police as if becomes habit. Therefore, reinterpret human rights and human rights violations are understood by Police, is an attempt to answer the problem. Prevention of human rights violations requires such a cognitive approach. Placing mindset (thought) in the cognitive structure of apparatus as subject to change. The understanding of the criminal law and human rights instruments as knowledge and new awareness. Starting from the mental activity of apparatus for directing and controlling the mind for all the good things and open to do as well as close the negative things and not commendable. The police who realized that they have evidence of the important position that are empowered to enforce the law will give justice to man with wisdom and tact.

Keywords: Violation the Rights of Suspects, Police in Law Enforcement, Culture of Human Rights

1. INTRODUCTION

The reports of Commission Services Administration Complaints in 2015, noted that the data human rights violations which were done by the police was 2734. It is in contrast with reports of complaints of human rights violations by the prosecution only 252, and court 640.

Referring to the Convention on Civil and Political Rights, *Code of Conduct for Law Enforcement Officials* put a heavy duty protection of human rights of the public to the law enforcement officials, especially the police. The reality is still a lot of human right violations which are committed by the police. Human rights violations are not merely personal, but also structural, as an indirect means to uncover or solve problems.

The Law No. 8 of 1981 on the Code of Criminal Procedure (KUHAP), replaces *Het Herziene Inlandsch Reglement* (HIR) as an umbrella law on criminal procedure in Indonesia set up the entire process of inquiry, investigation, prosecution, judicial, investigation, appeals High Court to appeal and judicial review to the Supreme Court has a passion for lifting and placing the suspect or the accused on an equal footing before the law, through the guarantee of protection of the rights of suspects / defendants.

Some of the principles that underlie the protection of the rights of suspects such as: equal treatment before the law, presumption of innocence, and the judiciary should be done quickly, simply, and the cost of lightweight, free, honest, and impartial basis must be applied consistently in all levels of court. In practice, some different forms of violations of the rights of suspects and defendants. As for the removal of BAP by witnesses, torture to obtain confessions from suspects, unlawful arrest until engineering cases.

The police is as a component of the criminal justice system [1] is the entrance of law enforcement. Police is expected to be the bastion of law enforcement at the same time protecting human rights. Since, it is very worrying when the police were supposed to carry out the law and protect, but they violate human rights.

Based on the background above, it is needed the efforts to be formulated as the basic prevention of human rights violations by the police as, How is the prevention of Human Rights Violations in law enforcement?

2. RESEARCH METHODOLOGY

To answer the problems, the writer uses the paradigm of constructivism, [2] with the type of Socio legal. [3] It is to take out of the law of the objective world to the subjective as an effort to put the law is no longer in a vacuum, but causality interact with some aspects of intellectual and social Police in selecting and taking appropriate legal action and do not violate human rights. Reflective and interpretive approach is used to analyze referring to the tradition of hermeneutic as peculiar in human studies. Hermeneutic method is used to gain an understanding of the findings that is obtained from records constructive dialogue. Doing by way of explaining the processes formulating the meaning and explaining how the meanings of happenings that are contained in the

[1] Corresponding Author. Phone Number: -, *E-Mail Address*: slametharyadisukandar@yahoo.com

language and actions of law enforcement officers of the law, as an attempt to enforce the law. Furthermore, describing the results of reading and interpreting by arranging the construction of prevention of human rights violations.

3. PREVENTION OF HUMAN RIGHTS VIOLATIONS BY POLICE IN LAW ENFORCEMENT HUMAN RIGHTS VIOLATIONS AND LAW ENFORCEMENT BY POLICE

Human right is rights that already belonged to someone since they were in the womb. Human rights apply universally. The basic of Human Rights is stated in the Universal Declaration of Human Right. In the Constitution of 1945 of the Republic of Indonesia, as contained in paragraph 1 of article 27, article 28 and article 29, paragraph 2, article 31, paragraph 1 and article 30 paragraph 1.

Human rights in law enforcement [4] can be found in Explanation of the Criminal Procedure Code, [5] there are 10 principles that should serve as a guide for law enforcement officials, especially the police to protect the rights of suspects, and can be divided into general principles and special principles, namely :

General principles:

a. Equal Treatment upfront without any discrimination of law;
b. The presumption of innocence;
c. The right to obtain (compensation) and rehabilitation;
d. The right to receive legal assistance;
e. The rights of the defendant's presence at trial;
f. Free trial done, fast and simple cost;
g. The judiciary is open to the public.

Special principles:

a. Infringement of individual rights (detention, search, confiscation) should be done by law and carried out with a warrant;
b. The right of a suspect to be informed about defendent and suspect;
c. The obligation of the court to control the execution of court rulings.

Although, the Criminal Code has been explicitly reflects an understanding of human rights by placing the human rights principles, in the implementation has not been providing protection for the rights of suspects, especially the poor. In the context of law enforcement, police with the limited human resources in the field of inquiry and investigation, especially in the regions, studying the material and formal criminal law is not an easy thing.

It requires a lot of time and thought, and it requires skill intellects of Police (investigators) the Bachelor of Law and Bachelor of Laws as investigators, whereas the number of investigators in the police institution is limited. This situation is increasingly making Police investigators expanded the number of helpers (NCO rank), which is actually in terms of capabilities, knowledge of the law and lack of intellect can be assured. Such a rank is certainly not in harmony if reviewed from the point of balance in the line of the public prosecutor or the judge.

This case becomes thing which is often found inadequate investigation and unfocused, resulting in frequent violations of the rights of suspects, as complained in a lot of complaints. Such as: intimidation, torture, forced to admit the deed, and reconstruction directed. Secondly, as the absence of the right to freedom from torture. Police attached by force, using ways of suppression and violence in order to give recognition. In addition, the existence of the offence of ignoring the right to legal assistance. Police investigators are still often prohibit/suspect using its own lawyers. Police did not provide lawyers for defendants even though the penalty of more than five years, if there is an appointed lawyer of concern is the behavior of a designated lawyer does not provide legal assistance to its full potential.

The other violations are violations of the right to be free from arbitrary arrest. Two forms of violations are violent arrests, and arrests without warrant. It all cannot be separated from the old habit of making laws just as security approach. 1) The arrest and detention of a person for the sake of maintaining stability, without law. 2) The application of a culture of violence to crack down on citizens who are considered an extreme. 3) The silencing freedom of the press by means of Letter of Business Permit (SIUP). 4) Restrictions on the right to association and assembly and expression, because it was feared would be the opposition government [6].

Two International Human Rights Covenants, which were ratified by Act 11 of 2005 (for the Covenant on Economic, Social, Cultural), and by Act 12 of 2005 (for the Covenant of Civil and Political). [7] Additionally, the Police specifically have had Police Regulation No. 8 of 2009 on Implementation Principles and Human Rights Standards in the Discharge of Duties, in fact up to now protection of human rights is still a mere formality, in paktik still often happens violations.

In the context of the criminal justice system, the police as a criminal offense entrance have a big hand in expediting the process of examination before the court which made Prosecutors and Judges in proving a

suspect's guilt or innocence so that it can be punished or free. It also largely depends on results investigation of Police (investigators).

4. DEFINITION OF THE LEGAL RIGHTS OF SUSPECTS IN INVESTIGATION

Based on the explanation above, the various forms of violations which are committed by the police in the handling of criminal acts can be classified as (1) the administrative and procedural violations, and (2) physical violations of suspect. The violation of administrative and procedural in inquiry levels can occur in the form of light until the case is classified as severe procedural violations. Referring from several types of rights violations suspects were based on analysis of the practice of investigation and application of the Code of Criminal Procedure fundamentally can be interpreted as follows.

The police in carrying out their functions as Investigator almost never officially and the procedural rights of suspects tell to accompany by legal counsel when handling a criminal offence. The granting of the right of the suspect to obtain legal aid is an important instrument in a fair legal process in law enforcement and the protection of fundamental Human Rights is a part specifically for the rights of freedom and for the rights of the soul. Mentoring legal counsel basically reflecting the implementation of the principle of legality Article 1 of the Code of Penal (Penal Code). This provision has the substance and the same purpose, namely as a form of legal protection of the right to freedom and rights to body and soul of a suspect. Thus it is feasible if legal aid is seen as a concrete manifestation of the principle of legality.

In the explanation of Act No. 18 of 2003 about the advocate, affirm, "in an attempt to embody the principles of State law in the life of society and State, the role and functions of the profession as Advocates of free, independent and responsible is the important thing, in addition to the judiciary and law enforcement agencies such as the police and the Prosecutor's Office. Through the legal service which is provided, advocate professional stints for justice under the law for the benefit of people seeking justice, including an attempt to empower communities to realize their fundamental rights before the law. Advocate as one element of the judicial system is one of the pillars in upholding the rule of law and human rights.

Despite the common explanation of the Advocate Law has laid a component Advocate as an important professions in the criminal justice system in fact the issue of protection of rights of suspects in particular mentoring by Advocate or Legal Counsel is in fact faced with the conditions of financial capability suspect to be assisted by Advocates and the provisions of criminal penalty of 5 years and above are required legal counselor. Therefore, it is understood the provisions of Article 54 of the Criminal Procedure Code, if studied and searched for its meaning, it can be found that in principle the right to legal aid was recognized, but not included in the rights that are required. There are certain conditions or requirements that must be met before the right to legal aid has become 'mandatory' or necessity. The special requirements concerning; (I) The financial capability; and, (ii) legal penalties for alleged criminal acts referred to in Article 56 paragraph (1) and (2) Criminal Procedure Code.

5. THE VIOLATION OF HUMAN RIGHT BY POLICE

The efforts to prevent violations of human rights of suspects in criminal cases any investigation by the police is to do with how to interpret the meaning of human rights. Reinterpret human rights and human rights violations are expected to help reflecting the common sense is wrong in interpreting and understanding the application of human rights over the years. Therefore, it can prevent and reduce or even stop the practice of human rights violations that occurred in investigating that have become part of the habit of Police

The police is the main subject and Central in shaping the reality of their life. Their position is important in the criminal justice system, therefore, reserves the right to change and fix errors that occur in all its institutions. When the police on its activities perform good deeds and actions in accordance with the law, humane, fair and trustworthy. As a result the offense will get a positive response from the community. However, the opposite will happen if law enforcement officers committing despicable, dishonest, abuse of authority, or practice alleged human rights violations, then, people will be condemned and sass.

The study of the violations of the rights of suspects in the process of investigation both in textual or contextual can be summed up as follows 1) custom that takes place continuously, 2) lack of understanding of the science of criminal law and Human Rights instruments and their application pattern. Therefore, it was time Police that make changes internally (reform). The use of modal awareness (*common sense*) and openness requires that Police conducting the prevention of human rights violations. Police along with knowledge and consciousness will be able to think better to be able to determine a better choice anyway.

In the understanding of the legal constructivism [8] Police with such an authority possessed, has the freedom to construct the law based on knowledge and experience. Having an important role in the achievement of law enforcement fair and impartial. Therefore, the reconstruction of critical reasoning and reinterpretation of the meaning of human rights and violations of human rights in cognition and legal action is needed.

Starting from the knowledge of Human Rights and the human rights abuses either as in the Code of Criminal Procedure as well as the various instruments of Human Rights, the police has a chance to establish

himself again. An attempt of change and improvement in the activity of investigation has the meaning of the prevention of violations of the rights of suspects. The understanding of the science of criminal law and criminal procedure law and human rights instruments as a whole is the process of how to change or re-arrange the legal way of thinking, the police in deciding an act of punishment.

The concept of prevention of rights abuses of suspect refers to the dialectic of law values and humanity are integral. Both are used to describe the implementation of the science of criminal law as a discipline law that must be managed and human values in the form of legal action, as well as the meaning given to the law [9]. A certain way, the values of the conceptual, practical and integrated into the activities of the institutions of law and interpretation the text of law [10].

More precisely, the science of criminal law and human rights instruments lay down the basic principles of humanitarian values is used as a lawless manner that upholds the values of truth and justice that is contextual to the national legal system. Both conceptually and practically are being together in investigative activity in the handling of criminal acts. The arbitrate practices that determine the true meaning of the prevention of human rights violations of suspects.

Police who has mastery of criminal law (material / formal) and understanding of human rights instruments will reflect a thought, speech, and actions that reflect the culture of law sublime, containing the value system is derived from legal theory and practice of criminal law, as well as religious beliefs or philosophy of Pancasila which become signs lawless ways in the community.

With the construction of the legal reasoning as above, then the police are required to have awareness. In terms of ability to observe carefully, demanding the ability to see connections, irregularities, mistakes were veiled. As well as a cautious attitude toward his justification (rationalization) sought from all things that are not relevant, the prejudices, the blind of the sense of personal feelings or group / class [11].

Based on this, the logical form of the work will proceed on the attempts to build.

a. Awareness uphold truth and justice essentially put the essence of human dignity that have a natural tendency to do good for others.
b. Awareness enforce the law without rights violations of suspects requires the scientific method, critical attitude, and the objective is rooted in truth and humanity as a reference.
c. Conduct interpetasi (understanding), constructing, and systematization dialectically, criminal cases, covers acts, errors, and accountability in order to become concrete.
d. Do an honest, open, and consistent and put the presumption of innocence as a principle of procedural law that should take precedence in determining fair legal action, for sure, and worth to society.

Efforts to prevent human rights violations in the investigation require a cognitive approach. Placing mindset (thought) in the cognitive structure of apparatus are subject to change. The understanding of the science of criminal law and human rights instruments as knowledge and new awareness. Starting from mental activity apparatus to direct and control the mind for all things positive and open to do as well as closing the things that are negative and uncomplimentary.

The police were aware that they have important positions that are empowered to enforce the law will provide justice to the people wisely [12]. Thus it includes upholding a human right is a noble and sublime legal action to enforce the law because it is part of the responsibility of the Police to promote truth and honesty for the good of society.

In this phase, the Police expand and modify mental representations in understanding a criminal case, cognition is trying to stimulate the science of criminal law and human rights instruments, the function that the law be obeyed and human rights are respected.

If cognitive models depicted preventing human rights violations would look like the following.

Table Model Abuse Prevention Cognitive Rights of Suspects by Police

No.	Parameter	Mental Activity	Scheme of Knowledge	Improvements To Be Constructed	Mental Change To Be Achieved
1	2	3	4	5	6
1	The concept of Cognitive Science of Criminal Law and Human Rights Instruments	Accommodation	The Cognitive Concepts IHP and human rights instruments as the object of a new internal knowledge.	new understanding to interpretation and reinterpretation as well as modifying the mental representation in understanding reality	Police stimulate colleagues to be part of internal knowledge through understanding of the science of criminal law and human rights instruments

6. CONCLUSION

Based on the exposure that has been described above, the conclusions are as follows:

Law enforcement in the investigation process by the police, the implementation still in accordance with the protection of the rights of suspects. Efforts to create a business-Ham normative protection has been carried out. But not able to touch the humanity of Police (investigator / investigator). Through cultural policy. The cognitive approach to answer the weakness of human rights protection by the police.

The concept of cognitive protection and prevention of human rights violations are needed to unravel the root of the problem and finding transforming the values of knowledge of criminal law and human rights instruments in the implementation of human rights-based law enforcement.

REFERENCE

[1] Mardjono Reksodiputro, *Kriminologi dan Sistem Peradilan Pidana, Kumpulan Karangan Buku Kedua* (Jakarta:PPKPH UI,1994) p.97.
[2] Egon G.Guba, Yvonna S.Lincoln, *Berbagai Paradigma yang Bersaing dalam Penelitian Kualitiatif* , dalam Norman k.Denzin dan Yvonna S.Lincoln, Ed. *Handbook of Qualitative Research* Terj.Daryatno Dkk Yogyakarta:Pustaka Pelajar. p..130 dan 137.
[3] Soetandyo Wignjosoebroto, *RagamPenelitian Hukum dalam Sulistyowati Irianto dan Shidarta Ed. Metode Penelitian Hukum Konstelasi dan Refleksi* (Jakarta:Yayasan Obor,2011), p..121-140.
[4] Iza Fadri, *HAM dan Polri dalam Penegakan Hukum di Indonesia*. Jurnal Hak Asasi Manusia, Dignitas, Volume VII No. 1 Tahun 2011, ISSN 1693-3559
[5] Mardjono Reksodiputro, *Hak Asasi Manusia Dalam Sistem Peradilan Pidana Indonesia, Kumpulan Karangan, Buku Ke III* (Jakarta:PPK-LKUI,1997), p..32-33.
[6] Iza Fadri, Jurnal Hak Asasi Manusia, *Op.Cit.*
[7] Henry Simarmata, *Kovenan HAM Internasional, Pandangan Umum Mengenai Signifikansi dan Perkembangan*, Jurnal HAM Komnas HAM, Vol.4 2007.
[8] Erlyn Indarti, 2010, *Diskresi dan Paradigma Sebuah Telaah Filsafat Hukum*, Pidato Pengukuhan Guru Besar Filsafat Hukum pada Fakultas Hukum Undip Semarang, 4 November.p..36.
[9] Bell, John, *Comparative Law and Legal Theory dalam Krawietz*,. W. Maccormick N, dan Von wright (Eds), 1995. *Prescriptive Formality and Normative Rationality in Modern Legal System*, Berlin:Duncker and Humblot.
[10] Bell, John, *Comparative Law and Legal Theory dalam Krawietz*,. W. Maccormick N, dan Von wright (Eds), 1995. *Prescriptive Formality and Normative Rationality in Modern Legal System*, (Berlin:Duncker and Humblot,1995), p.19-31.
[11] W. Puspoprodjo, *Logika Ilmu Menalar*, (Bandung:Pustaka Setia,2004). p.11.
[12] Gisela Labouvievief dalam John W.Santrock, *Adolesence, Op.Cit.* p.114

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Imbalance of Management Access Natural Resources in an Agrarian Conflict

Ricco Andreas*[1]

*UNIVERSITY OF LAMPUNG, LAMPUNG, INDONESIA.

Abstract
A natural resource is one of human rights. One of the constitution basic materials of 1945 is secure the human rights and the constitutional right. The constitutional right of citizens which secured within the constitution of 1945 covering various aspects such as civil, political, economic, and social. It is stated in article 33 paragraph (3) the constitution basic of 1945.
Permition access to use forest that can be used by the community is very difficult, but many mastery forest given to private sector "company", this hamper the fell victim to sekema function transfer of forest, as investment of foresty development. Agrarian conflict appears now; travel the distribution of land carut gods marut done by the state. In the management of access natural resources, the distribution of the state land not return lands to the community, like a spirit the constitution Number 5 years 1960, of the agrarian article 16, the state disaffirming and instead memeberikan ease to a company, on access to permit penguasan forestry resources. The conflict of forestry resource in indonesia have minimal conflict resolution, until finally it bore misery and loss of the basic rights of the community, to get a management of foresty natural resourcest, the cause of dispute on forsty sector is one of these policies governance to forest, expected as one of the conflict dispute forest in indonesia. In terms of behavior management by the association vie, it will produce prosperous for. It clears that why insistence on agrarian reforma not completed, including a lack of law protection in form of the agrarian constitution renewa.

Keywords: Natural Resources, Access, Agrarian Conflict, Imbalance

6. INTRODUCTION

Agrarian conflict that comes up at this time, is imbalances of the New Order regime in the course of distribution of land is complicated by the state in the management of access to natural resources, it triggers agrarian conflicts that until now could not be resolved, in the distribution of state land instead of returning land as the spirit of Act-un even handed jungle to be controlled by the company instead of returning to the community for the community to manage. In terms of the management will be undertaken by the firm view that would result for the public welfare.

Natural resources are one of human rights. One material Act of 1945 is to ensure the human rights and constitutional rights of citizens. Constitutional rights of citizens guaranteed by the Constitution in 1945 covering various aspects of life, whether civil, political, economic, and social and listed in Article 33 paragraph (3) of the Act of 1945.

Access the forest utilization license can be done by the people is very difficult, but the number of forest tenure granted to the private sector "Company", it causes people to become victims manner forest conversion, as construction investment kehutanaan. Agrarian conflicts that arise at this time, the trip shattered land distribution carried out by the state. In the management of access to natural resources, in the distribution of state land not return the land to the community, such as the spirit of Act No. 5 of 1960 on Agrarian Thaun Article 16, states deny and instead given convenience to the company, the access permission tenure of forest resources.

The number of poor people in Lampung in September 2013 reached 1134.28 thousand people (45.39 percent), decreased 28.8 thousand people (0.47 percent) compared to the poor people in March 2013 which amounted to 1163.06 thousand people (14, 86 percent) [1]. Throughout 2015 the land conflict is likely to increase, from collected Indonesian [2] Peasant Union.

Conflict of forestry resources in Indonesia, a conflict that minimal settlement, until finally gave birth to misery and loss of basic rights of the people, to get permits management of natural resources in the sector kehutanaan, the cause of the dispute in the forestry sector is the policy of forest governance, suspected as one forest disputes the causes of conflict in Indonesia. In terms of the management undertaken by the company's view, that will generate prosperity for society. It is also clear why the insistence of the agrarian reform never materialized, including a lack of legal umbrella of the agrarian reform law. By then cloned partitions gaps in knowledge about the "**Imbalance of Management Access Natural Resources in an Agrarian Conflict**" related problems. Based on the description of the background issues above, the issues to be studied are: bagamana provide easy access in the management of natural resources to the community

[1] Corresponding Author. Phone Number:-, *E-Mail Address:* andreasricco@gmail.com

7. RESEARCH METHOD

Approach the problem in this research using normative juridical approach. Normative Approach is intended as an attempt to understand the problem by staying on or relied on the legal field [3].Sources and types of data used in the research, secondary data is data obtained form sources that are closely related to the primary legal materials and can help to analyze and understand the primary data in the form of legislation, books, literature and articles -artikel.

The data collection is done with a literature study (library reserch), carried out with a series of activities such as reading, studying, and quotes from the literature as well as conduct an assessment of the provisions of the legislation relating to the subject matter. The processing is done to facilitate the analysis of the data that has been obtained in accordance with the problems studied. The processing of the data in question includes the following stages:

The placement activities and compile related data and is an integral and integrated round on subpokok discussion thus simplifying data interpretation. Analysis of data used in this study is a qualitative analysis. The data analysis is to describe the data in the form of sentences are arranged in a systematic, clear and detailed are then interpreted to derive a conclusion. Inferences made by the inductive method, which outlines the things that are special and draw general conclusions [4].

8. RESULT AND DISCUSSION

The forests are a gift of God Almighty and became a natural wealth that is priceless. Forests have real benefits to the lives and livelihood of the people, ecological, social, cultural and economic, in a balanced and dynamic. Therefore, the forest must be managed and maintained, protected and used sustainably. But much has happened in the forestry sector is one of conflict access to natural resources [5].The number of people who can not access due to inequality in order to access natural resources.

Agrarian conflict that comes up at this time, is the inequality of the New Order regime in perjalanaan distribution of land shattered by the state in the management of access to natural resources, it triggers agrarian conflicts that until now could not be resolved, in the distribution of state land instead of returning land such as BAL spirit instead handed over to forest controlled by the company instead of returning to the community for the community to manage. In terms of the management will be undertaken by the firm view that would result prosperity for the community.

With Accordingly community is disadvantaged by the many people who can not access natural resources, is a violation of human rights because people are not given the right to be able to access sumbr natural resources in the country, the conflict is causing misery and many criminalization of farmers in the forestry sector.

Homeland Empowerment Program Forest

In the context of forestry and human survival, forests are essential to the lives of millions of people in Indonesia. Approximately 48.8 million people live in the country's forests and about 10.2 million of whom are poor people. Overall, about 20 million Indonesian people live in rural areas near the forest, [6] This means that the forestry sector is used as an alternative livelihood when the economic hardship that is by utilizing non-timber forest products more than usual. From the perspective of poverty, forest resources should be protected or there are alternative social safety nets that can be created to replace it.

Over the past three decades, forest resources have become a major capital development of the national economy have a positive effect among others towards increasing foreign exchange earnings, employment, and promote regional development and economic growth. Unfortunately due to various things, in line with the development of civilization, the above conditions have been increasingly difficult to find in the present. Conditions were very prominent these days is getting damaged forests, while the surrounding community is not prosperous. The role of the forestry sector in the national economy is now fading as the increasing complexity of the problems and forestry crimes that destroy forest resources.

In the field, both of these activities involve the wider community. Public participation is to foster a love of the community towards the planting of trees so that future tree planting activities are no longer funded by the Government but became non-governmental activities. Empowerment of forest they live in forest areas as they planted hardwood trees that rubber wood for empowerment and as their livelihood, the notion that society is as a destroyer of forests can be proved people can conservationist forest.

Thus, the commitment of all parties to preserve the forest, both to the conservation, protection forest, and production forest, is a form of civil defense in protecting the life of the nation, the state, and even the earth [7]. Save the forest means to save the earth and the life in it. With forest tenure is not only given to the company as franchise holders, communities can also be as a preserver of forests in other words, the conflict can be reduced because people can engage in the management of natural resources. With sistwm rental can be provided by the government as well as with companies that can hire very much in control of natural resources.

9. CONCLUSION

Natural resources are one of human rights. One material Act of 1945 is to ensure the human rights and constitutional rights of citizens. Constitutional rights of citizens guaranteed by the Constitution in 1945 covering various aspects of life, whether civil, political, economic, and social and listed in Article 33 paragraph (3) of the Act of 1945.

The government should involve the wider community. Public participation in the sector is to manage the natural resources that today are still lots controlled by the company. The community is only as spectators, people can also. Implement community programs can also run the empowerment of forest they live in forest areas as they planted hardwood trees that rubber wood for empowerment and as their livelihood, the notion that society is as a destroyer of forests can be proved people can conservationist forest. And the problems that often arise conflicts can be reduced because the public can also access the forest resources on a lease or empowerment of government.

REFERENCE

[1] Angka Kemiskinan Lampung September 2013, dilansir dari Badan Statistik Provinsi Lampung, 2 Januari 2014
[2] Indonesia labor union , this figure has risen by 60 percent compared with the conflict agrarian occurring in last year as 143 cases , conflict largest across areas indonesai with the total area of conflict of 770,341 agrarian.
[3] Soerjono Soekanto. *Pengantar Penelitian Hukum* . Rineka Cipta . Jakarta .1986. pg.55
[4] *Ibid.*1986.pg.102
[5] Bernhard limbong, *Hukum Agraria nasional*, Margaretha Pustaka, Tahun 2012, pg 106
[6] The cifor), about 6 million people earn a living from forest resources cifor, in addition to provide jobs and income for the, forest also important to pay for household needs the community families in forest area, as for firewood, drugs, food, building materials, and other articles.
[7] http://www.setneg.go.id/index.php?option=com_content&task=view&id=527 04-10-2016

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The Issues of Environmental Human Rights in the Indonesian Environmental Human Rights Law Instruments: the Future Role of ASEAN Human Rights Court

Achmad Romsan[*1], Febrian Zen[*2], Akhmad Idris[*3], Nurhidayatuloh[*4], Farida Ali[*5]
*SRIWIJAYA UNIVERSITY, OGAN ILIR, SOUTH SUMATRA, INDONESIA.

Abstract
The integration of environmental rights into human rights instruments, derived from Principle 1 of the 1972 Stockholm Declaration, has been adopted into domestic laws of many countries. In Indonesia, the combination of rights above is constitutional right guaranteed under Article 28 H of the 2nd amendment of the 1945 Constitution and protected under Law of 2009 Law No. 32 on Environmental Protection and Environmental Management and Law of 1999 No. 39 on Human Rights. Many argue that violation of environmental rights will also impair human rights and that cases may be submitted to Human Rights Court for adjudication. In Indonesia, environmental cases submission to Human Rights Court is seen to be impossible since they are inconsistent with the Law of 2000 No. 26 on Human Rights Court. Also, many verdicts of the District Courts reflect the hesitation of the judiciary in interpreting the people's environmental human rights in Indonesia. Using the comparative approach, this paper will observe and analyze the possibility of extending the jurisdiction of Indonesian Human Rights Court to include environmental matters similar to that undertaken by the European Human Rights Court in handling environmental matters. The purposes of the study are to examine the verdicts of the district courts relating to the community environmental disputes; to look at the practice of The European Human Rights Court in solving the individual and the community environmental disputes. The method of the study: all the data gathered are obtained from secondary data and are descriptively and qualitatively analyzed. The conclusion: In the context of the establishment of ASEAN Human Rights Court, using human rights mechanisms that should be considered in solving the environmental conflict in Indonesia. Since pollution and environmental degradation disturb the people's enjoyment to human rights.

Keywords: Environmental Rights, Indonesian Environmental Management Act, Environmental Declarations, Indonesian Human Rights Act, Human Rights Conventions, European Human Rights Court, Environmental Cases.

10. INTRODUCTION

The birth of the first the EMA No. 4 of 1982 was identified as the landmark of environmental awareness in Indonesia. However, this law was then replaced by the second EMA of 1977 and the last improvement of the content of the EMA was in 2009 when the Government of Indonesia (GoI) enacted the 2009 Law No. 32 on The Protection of and the Management of the Environment.

In the first and the second EMAs only recognize environmental rights were saying that "everybody has the right to a good and healthy environment." The provisions above do not clearly provide for the clear definition of the environmental rights. The issues are: how to claim that right, and what mechanisms people will use if they want to claim their environmental rights. An interpretation might be through public participation in environmental decision-making processes. Unfortunately, this provision was also unclear since questions on how the public participation conducted, who represent who, what mechanisms the people may involve. The issues in the first EMA was found to be fatal, after a number of environmental conflicts arose. Such issues on the capacity of the environmental NGOs to stand before the court (legal standing), the notion of class action or representative action, how the disputants solve their conflicts. All the issues above colored the enforcement of the first EMA. The loopholes found in the first EMA were then improved by the second EMA of 1977. The Law 1977 has acknowledged the notion of the legal standing of the environmental NGOs, representative actions or class action. Mechanisms for solving conflict were introduced through litigation and non-litigation. Unfortunately, there is an environmental disaster erupted, the hot volcano mudflow in Sidoarjo (2004). This case is regarded as the big environmental disaster for ten thousands of people were stranded. A number of human rights elements were violated such as the right to life, education, economy, property and so on. This case also inspired the birth of the third EMA which later on known as the 2009 Law No. 32 on the Protection of and the Management of the Environment.

[1] Corresponding Author. Phone Number:-, *E-mail address* : aromsan@fh.unsri.ac.id aromsan@yahoo.com
[2] Corresponding Co-Author. Phone Number:-, *E-mail address* : akhmadidris@fh.unsri.ac.id
[3] Corresponding Co-Author. Phone Number:-, *E-mail address* : a.idrs@yahoo.co.id
[4] Corresponding Co-Author. Phone Number:-, *E-mail address* : nurhidayatuloh@fh.unsri.ac.id;
[5] Corresponding Co-Author. Phone Number:-, *E-mail address* : hidate.ugm@gmail.com) (umikrachmi@yahoo.com)

Based on the explanation above, this paper will focus the discussion on the issues regarding the notion of environmental human rights which has been formulated in the environmental law instrument and human rights instruments. Prior to this the paper will discuss the methodology of the paper, the discussion and closed with a conclusion

11. RESEARCH METHOD

There are some approaches used in the legal study or legal research, such as historical approach, jurisprudential approach, comparative approach and analytical and critical approach [1]. While the jurisprudential approach concern about law and legal system [2]. Further, the comparative approach concern with various kinds of laws that involve the discovery, explanation, and evaluation of similarities and differences [3]. The last approach is analytical and critical approaches are used since the material needed may be available in libraries, archives, and other data based [4]. The technique of data collecting: Primary and secondary data are collected through library study. Most of the primary data are in form of statutes, legislatures, and regulations issued by national authorities. All the data are descriptively and qualitatively analyzed.

12. RESULT AND DISCUSSION

There are a number of articles discussing the link between the environment and human rights. For example, Ruppel, opines that there is a correlation between human rights violation with environmental impairment. [5] The concept of sustainable development cannot be realized if the implementation of such development programs always impairs the environmental rights. Meanwhile, [6] environmental rights from the perspective of development without impairing the environment. This article is different from that of traditional research since it reviewed environmental rights from the perspective of harmonious development between human beings and nature rather than from the perspective of law.

The conclusion the author above made is that environmental rights may become the safeguard and defend human rights and ultimately facilitate producing better conditions of life on earth by stretching and expanding the theory of traditional human rights. Studied conducted by Oliver C. Ruppe, in Namibia has proven that there is a close relationship between human rights violation, specifically in Namibia with the impairment of environment. Herein, the role of law is, however, quite prominent in safeguarding the environment.

Hereinafter, there are international environmental declarations stating the nexus of environmental rights to human rights, The 1972 Stockholm Declaration on Human Environment and The 1992 Rio Declaration on Environment and Development. The weaknesses of these declarations are: firstly, there is no terminology of human rights rather than what has been stressed in Principle 1. Secondly, they have no legal instruments for the States to be bound for they are only declarations. The issues of relating to environmental rights and human rights, such as the right to live for present and future generation in an adequate environment, the rights to access information, public participation in decision-making and right to access to justice in environmental matters were not accommodated by the declarations above but the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, The strengths of the 1998 Aarhus Convention are firstly it has international legal instrument in form of "convention" which means that the government of the States is able to adopt, to access, to adhere, or to ratify it into their national jurisdiction. The Aarhus is more detail specifying mechanisms to manifest environmental rights. But again, the Aarhus Convention is only applied for the European countries only beside it does not also implicitly or explicitly states that crime against environmental rights is a crime against human rights or a crime against humanity.

The 2002 Johannesburg Declaration on Health and Sustainable Development mentions that the sustain-able development may only be achieved if the people of the world live in a healthy environment. Exploitation of the world natural resources must be based on the carrying capacity of the resources. The world natural resources do not belong to the present generation but borrow it from the future generation. Since poverty is the cause of environmental problems, the Declaration encourages integrated action towards economic growth and equity, conservation of natural resources and the environment, and social development. Each of these pillars is mutually supportive of the others, creating an interconnected sustainable development triad, which underpins good health cooperation among the states. In general, all the literature and international conventions have some strengths and weaknesses.

13. ISSUES IN INTERNATIONAL LAW

One thing makes environmental declarations echoed all over the world is because they offer a new model for environmental management which based on the interest of the environment itself and also for human survival both for the present and future generations. Balancing between human needs and environmental protection is a major feature of the modern environmental management. Sustainability principle, “Only One Earth” and “environment and development” are principle and motto promoted by the environmental declarations. Nonetheless, the environmental declaration is soft law and the process of soft law being the customary

international law or international law requires certain requirements [7]. The historical background of international law and international human rights law created are also a factor making the process of environmental human rights becomes very slow compared to those of environmental declarations and conventions. That is also the reason why in international law, the notion of environmental human rights is not found.

The notion of environmental human rights had been acknowledged in some international conventions, such as the Convention on the Rights of the Child, ILO Convention No. 169. In any case, compared to international law, the notion of environmental human rights is more progressively develop in the domestic laws. It was predicted that at least 55 countries have legalized the notion of environmental human rights into their national laws inter alia the Indonesian Environmental Law, the constitution of The Republic of Belarus, Brazil, the French, Republic of Georgia, Norway, Slovenia, Argentina, Chile, Costa Rica, Cuba, Ecuador, El Salvador, Honduras, Nicaragua and Paraguay. Off that number, there are only five ASEAN members countries such as Indonesia, Burma, Philippines, Thailand and Vietnam have the environmental human rights stipulated in their national environmental legislations. The notion of environmental human rights also embodied in the regional conventions on human rights such as Article 11 of the 1988 San Salvador Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights. The rights above exist in the European Convention on Human Rights in 1976. Here, fusing the value of environmental human rights into national constitutions is strong indicators of national opinion juries and represents the highest level of national law operating as a lex suprema. Environmental human rights are in the process of growing to international law.

It is sad to say that in many international human rights instruments do not provide any articles deal with the concept of or the notion of environmental human rights. The traumatic experiences of the World- Wars make the world attention focused on the international cooperation in the field of economic and humanitarian matters to prevent massive human rights violation. The weakness of international human rights instruments still excludes the right to a good and healthy environment as part of human rights elements. The essential elements of human rights concept under international law are the notions of liberty, freedom, and equality. René Cassin advocated in his Haque Academy lecture that the "existing concept of human rights protection should be extended in order to include the right to a good and healthy environment, i.e., freedom from pollution and the corresponding rights to pure air and water".

An obstacle may arise in formulating the concept of environmental rights as an element of human rights under international law lies on the fact that, for example, the United Nations as one of the international organizations are not in a position to actively protect such rights. Its rules and resolutions include no binding force to make the international community respect environmental rights. Therefore, the only way to formulate the concept of human rights is terms of good and healthy environmental might best be attained at a more limited regional and national level.

Some terms in international human rights instruments above may be analogized with environmental human rights likewise the rights to life, property, health, information, family, and home life, or related to a quality of life issues, the right to health, and the right to a clean environment. Amongst the terms, the right to life included in Universal Declaration of Human Rights (UDHR), International Covenant on Civil and Political Rights (ICCPR), and International Covenant on Economic, Social and Cultural Rights (ICESCR) is the closest one to the right to a clean environment.

14. ISSUES IN THE ENVIRONMENT-AL DECLARATIONS

The disparity of natural resources in some parts of the world has led to the birth of rich and poor countries but none of them can escape from environmental problems. The developed countries face environmental problems as the side effect of the advancement of technology whilst the developing countries face environmental problems as the effect of the economic backward. Air, water and land-based pollution, the depletion of ozone layer threaten the existence of human race. International cooperation in international environmental law is a must in combating the problems above.

The UN. Conference on the Human Environment had opened the world's eye that there is a strong bond of human's activities to their environment. Human beings, flora, and fauna have indispensable rights although they have some similarities and some differences. Evidence for this linkage has been politically formulated the 1972 Stockholm Declaration and the 1992 Rio Declaration. The question is how to make that link into reality since the current human rights norms and the increased number of environmental cases around the globe is no longer adequate. It is noted that the environmental declarations are not strong law. They have no legal instrument to make the states comply. The concept of environmental human rights cannot be executed thoroughly. It needs some parameters to make it into reality.

It was in 1998, the Aarhus Convention was signed on June 25, 1998, in the Danish city of Arhus, known as the Aarhus Convention. It entered into force on 30 October 2001. As a multilateral environmental agreement, the Aarhus Convention is distinctive from other environmental agreements which impose obligation the parties have

to each other. The Aarhus covers obligations that Parties have to the public [and] it goes further than any other convention in imposing clear obligations on Parties and public authorities towards the public as far as access to information, public participation and access to justice are concerned.

The Aarhus Convention provides for the floor not the ceilings as those environmental declarations above. Under the Convention Parties may introduce measures for broader access to information, more extensive public participation in decision-making and wider access to justice in environmental matters than required by the Convention. The Convention also makes it clear that existing rights and protection beyond those of the Convention may be preserved. Finally, the general provisions call for the promotion of the Aarhus principles in international decision-making, processes, and organizations. Article 4, 6 and Article 9 of the Convention are the core Convention where the State Parties to the Convention have to implement them into their national laws. The three articles above become the three pillars of the Convention that: (a) Pillar I: Access to Information (Article 4, and Article 5); (b) Pillar II: Public Participation in decision making (Article 6, 7 and Article 8) and (c) Pillar III: Access to justice (Article 9)

Overall, the Aarhus has bridged the concept of environmental rights, human rights and the sustainable development as promoted by the previous environmental declarations. Many countries in the world have signed and ratified the Aarhus Convention but many countries also, due to some internal political consideration have not yet signed or ratified the Convention.

There is a trend that although the Aarhus Convention only popular in the Europe and Central Asia regions that the respect of environmental human rights has been manifested the constitutions of the countries as mentioned above. Indeed, the Stockholm and the Rio Declaration are designed as the idealistic model for the States for their environmental management legislations and the 1998 Aarhus Convention has filled the gap left by the two environmental conventions above.

15. ISSUES IN INDONESIAN ENVIRONMENTAL HUMAN RIGHTS.

The birth of human rights awareness in 1998 has an impact on the recognition of environmental rights. In the 1999 Law No. 39 provides recognition on the peoples' environmental rights (Article 9:3). It is important to note that environmental human rights herein are located under Chapter III deals with Human Rights and Human Freedom. More specifically under the Part One: The rights to life. Meaning, human rights law has acknowledged he linkage of environmental rights to human rights. Furthermore the notion of environmental human rights has attained its solid foundation in the 2009 Law No. 32 on the Protection of and the Management of the Environment. Article 3 where the objectives of and the management of the environment are, inter alia, to assure the fulfillment of and the protection of the rights of the environment as part of human rights. Thus environmental human rights are protected rights under the laws above. In the 2000 second amendment of the 1945 Constitution has guaranteed that the right to a good and healthy environment is everybody's human rights. Therefore, the notion of environmental human rights is also constitutional rights. Overall, environmental human rights are legal rights and constitutional rights. The very main issues dealing with the notion of environmental human rights is how to make the protected rights above which has been guaranteed in the 1945 Constitution into reality.

As one knows that since 1988 up to 2015, there are numerous community environmental disputes with the industries, palm plantations. Those disputes are Exponent 66 vs. APHI (1998), Laguna Mandiri (1998), WALHI vs. Pt. Pakerin (1998), Pt. Palur Raya Dispute (1998), Kalimantan Peat Land Case (1999), Banger case (1999), Pt. Sumber Sehat (Kudus) (1998), Way Seputi River (2000), Tawang Mas (Semarang) (2000), Pekanbaru Smog Case (2000), Kelian Equatorial Mining (2001), WALHI vs. PT. Freeport (2001), Transgenic Cotton Case (2001), Pt. Lapindo Case (2004) and Pt. Bumi Mekar Hijau (BMH) vs. Menlh. Although some of the cases above are solved through non-litigation and litigation but sadly so say that the victims of environmental pollution are always defeated in the courts. Meanwhile human rights mechanisms as a basis for the claim in community environmental disputes-related human rights never been adjudicated..

16. FUTURE ASEAN HUMAN RIGHTS COURT

Now ASEAN nations have entered the era of ASEAN Economic Community (AEC). AEAN single market is common thing applied during the Europeans countries are integrated into one big economic community called the European Economic Community. Herein, all European peoples have the rights to work in all parts of the European countries. The European Convention on Human Rights accommodates the need of the people whose rights has been violated. Herein the establishment of European Human Rights Court is designed to accommodate the claim submitted by the European people. Although in the European Charter of Human Rights does not have any provision in regard to environmental matters, the Commissioners has accepted complain by individual whose human rights have been impaired. Many cases dealing with environmental human rights have been solved by the European Court of Human Rights.

In the connection of the absent of community environmental disputes related to human rights violation, the establishment of ASEAN Human Rights Court will be the last recourse.

For the moment, the Indonesian Commission of Human Rights has limited jurisdiction over the environmental cases. That limitation centers of the 2000 Law No. 26 on Human Rights Court which only examines gross human rights violation which includes the crime of genocide and crime against humanity. While environmental pollution and degradation are under the jurisdiction of Indonesian Human Rights Court. The best solution for this is the amendment of the 2000 Law No. 26 on Human Rights Court to include environmental matters under the article of crime against humanity.

17. CLOSING REMARKS

Although the environmental declarations provide no obligation for the States' ratification but they have caused to the changing views of the countries in the world of environmental resources and economic development patterns.

The notion of environmental human rights contained in the 1972 Stockholm Declaration indicates that there is a strong bond between the human being and their environment. The right to live, the right to health, the right to form the family and have children may be able to realize if the environment is free from pollution and environmental degradation.

Since the environmental declarations are soft law, therefore, the Aarhus Convention of 1998 empowered those declarations into reality. The notion of environmental human rights may be able to perform if people have accessed to environmental information, have accessed to participate in environmental decision-making processes, and have accessed to environmental justice. Many countries have those requirements in their domestic laws. In contrast, many countries, such as Indonesia, also have not yet ratified the Aarhus Convention resulting in the lack of legal instruments to implement the Aarhus Convention.

The notion of environmental human rights, the combination of environmental rights with human rights values, is not in existence in international law but it progressively develops in regional and national laws of human rights and national laws. At the regional level, the submission of environmental cases to human rights court is admissible under the European Convention on Human Rights but it is incompatible ratione matriae to the Indonesian law of the 2000 Law no. 26 on Human Rights Court as well as under the 2009 Law no. 32 on Environmental Management Act. The Human Rights Court Law of 2000 no. 26 only recognizes the severe human rights violation such as crimes against humanity and genocide. Whilst environmental rights violations are not yet considered as crimes against human rights. It needs the political commitment of the Indonesian Member of People's Representative Council to include the rights to a good and healthy environment is one of the human rights elements and also a political declaration of the National Commission on Human Rights and the Indonesian Human Rights court to admit environmental rights violation is the violation of human rights.

REFERENCES

[1] Sakina Shaik Ahmad Yusoff, Penyediaan Kertas Cadangan Tesis Siswaz, Program Suaikenal Siswaa Baru Sem. II sesi 2002/2003, 30 Oktober 2002, p 25.
[2] Achmad Romsan, Environmental Human Rights: Problems of Implementation in Indonesia, PhD Thesis, Fakulti Undang-Undang, Universiti Kebangsaan Malaysia.
[3] *Ibid.*
[4] Awarul Yaqin, Legal Research and Writing, Lexis Nexis, Malaysia, 2007.
[5] Giorgetta. Suilli, "The right to a healthy environment, human rights and sustainable development" 2 International Environmental Agreements: Politics, Law and Economic, (2002).
[6] Demin, C., ad Zhengaia, D., 'Environmental Rights on the perspective of harmonious development between human beings and nature.' Law School of Chongqing University, Chongqing 400044, China (2008) 18 (1) China Population Resources and Environment, p. 189-192.
[7] Mochtar Kusumaatmadja, Pengantar Hukum Internasional, Buku I- Bagian Umum,Penerbit Binacipta, Bandung, Indonesia, 1978.

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Influence of Islamic Perspectives on Itsbat Marriage Petition in Religion Court of Metro City

Intan Pelangi[*1], Ariza Umami[*2]
*MUHAMMADIYAH UNIVERSITY OF METRO, LAMPUNG, INDONESDIA

Abstract
Marriage is a bond between a man and a woman committed to becoming a family. Marriage is a legal social form that describes the smallest social accountability and its legal certainty. Register marriage is a form of welfare in Islamic law family. Islamic Compilations Law (KHI) also regulates *itsbat* marriage or the institution of marriage that is done by competent authorities on her marriage was not recorded. The aim of this research was to determine the influence of Islamic perspective in an *itsbat* marriage petition at the Religious Court in Metro city as one of the agencies, legal guarantee to the community of Moslems. The author conducted the research used empiric jurisdictional approach. The analytical method used was descriptive qualitative data. The result of this research is Islam perception becomes the most important thing to regulates *itsbat* marriage with the divorce as the main factors.

Keywords: Islamic Perspective, Religion Court, Itsbat Marriage

1. INTRODUCTION

In Islam, marriage is a physically and mentally bond between a man and a woman committed by the ceremony with the aim of being a *sakinah, mawadah warahmah* family. Harmonious family is basically formed by two dimensions, those are: quality of life and stability [1]. By the valid marriage, the relationship between men and women occurs in dignity according to the position of man as a social being. Marriage is also a beginning of a small institution in the family.

In the Holy Quran, Allah has set up an Islamic concept of marriage and imposes limits on Islamic marriage laws. Indonesia is not only a religious country but also a constitutional state that guarantees happiness to its people. Marriage is a form of legal social that symbolizes the smallest accountability. As the legitimacy of the human desire distribution, the marriage will be meaningful if the distribution of desire is clearly accountable as the survival of mankind and world civilization.

Listing of marriage is one of the government's efforts in applying orderly marriage. By the marriage recording, people will have legitimate law confessions for their marriage, thus if there is a dispute in the future who caused by the marriage, they will get the proper legal protection. In fact, the marriage that happened among the people is not fully applied in accordance with the applicable laws. Some of mating processes refer to the respective religious rules.

This fact should be realized, that indeed Indonesia is a country that recognizes the existence of legal pluralism. And the consequence is that legal issue become personal realm that cannot be imposed. A small example that becomes a trend in the society is unregistered marriage which is the legal options based on the context of religion, that the pressure essence is not only a legal relationship but also the Divine relationship. On the other hand there is role of the government in carrying out its function to maintain public order, especially concerning the registration of marriage in worldly affairs. When it all happened, and the mistakes cannot be avoided, a problem arises. In the end, not least of people who are aware that the dimensions of the world and the hereafter must goes hand in hand. *Isbat* marriage application becomes an alternative option in minimizing the problems that will arise later. To determine the influence of religion perception towards the high of *ithbat* marriage petition in the Religious Court of Metro city is needed more research.

2. THEORETICAL REVIEW

Reception theory is a theory which states that Islamic law applied in Indonesia to embrace Islam if Islamic law has really impregnated in Customary Law, then by seeing the particular clauses in Marriage Law have no hesitations to accept the argument that Islamic law has instantly become a source of law without requiring assistance/intermediary Customary law [2].

Marriage is a fundamental right of every citizen that has been mentioned in article 28 B paragraph (1) in the Constitution of 1945 as the result of the second amendment that: (1) Everyone has the right to form a family and continue the descent through legal marriage. However as a citizen living in a life of the nation (Indonesia), in

[1] Corresponding Author. Phone Number: +62-81373-401083, *E-Mail Address:* ipelangi54@yahoo.com
[2] Corresponding Co-Author. Phone Number: -, *E-Mail Address:* arizaumami@yahoo.com

conducting a marriage must necessarily follow the rules of applicable laws and regulations in the State of Indonesia, one of which marriage is listed in KUA as evidenced by the Marriage Certificate.

3. RESEARCH METHODOLOGY

Research on **"Influence of Islamic Perspectives on Marriage *Itsbat* Petition in Religion Court of Metro City"** is an empirical juridical. This kind of research is done by examining all the facts or real events in the field which is the primary data or namely field research. To support and complement the primary data, then it also conducted librarian research.

This empirical research is juridical sociological, the research aims to observe the reactions and interactions that occur when the norm is at work in society. In juridical sociological research, the task of the researcher is to complete what is behind the implementation of legislation [3].

The results of this study manifested in a report that is descriptive analytical. The research result called descriptive because it is expected to provide a clear, comprehensive, and systematic about the issues discussed or studied in the research. It is called analytical because the data that has been collected, both obtained from field research and literature are analyzed using qualitative methods.

4. DISCUSSION AND RESULT

4.1 Islam

[4] Islam means obedience or surrender. Surrender to Allah is called "Muslims". According to the Quran a Muslim is one who makes peace with Allah and the fellow of human beings. At peace with God means surrenders to Allah safely and prosperous. All the will of Allah that must be followed is His command. The entire command consists of an assortment of commands are matters that need to be done or avoided. Those commands and prohibitions are usually outlined in a "Law".

According to Akhmad Sukardja Islamic law is the regulations formulated by the revelation of Allah and the Sunnah of the Prophet about behaviour of the mukallaf recognized and enforceable along binding on all Muslims. Islamic law cannot be separated from the religion of Islam, which consists of *Aqeedah*, *Shari'ah* and Morals. Formally, Islamic Law is one of enforcement of Islam that is on the side of the *sharia*.

In essence, marriage is an outward love that is given by Allah to His people. In Islam, love is one of the pillars in marriage. While cooperation is the duty of marriage, and guarantee the further love.

[5] in his journal, one of the important concepts of Islam is ordered to manifest and maintain beneficiaries of humanity "where there are beneficiaries, there are the laws of Allah". [6] the concept of *maqashid al syariah* with the concept of beneficiaries that is Measured with the theory of social justice. *Maqashid al Sharia* concept aims to realize the goodness or badness at the same time reaping the benefits and reject harmful.

Maqashid Al Sharia is also the value of religion or religious perspective that becomes the guideline in the development of Islamic law. That the intention *Maqashid Al Sharia* are; 1) Maintaining religion *(hifzh al-din)*, 2) Maintaining the soul *(al-nafs hifzh)*, 3) Maintaining reasonable *(hifzh al-'aql)*, 4) Maintaining descent *(hifzh al-nashl),* 5) Maintaining the property *(hifzh al-mal)*.

4.2 Status of Marriage in Islam

Marriage is very important in human life, both individuals and groups. By the legal marriage, the relationships between men and women occurred honourably. Therefore, it is quite appropriate if Islam set it in detail. Islamic marriage according to its origin included in *Fiqh Munakahat* which regulates the provision of marriage according to Islam. Islam is one and applies to the whole world and of all time. Marriage is a physically and mentally bonding between a man and woman as husband and wife with the intention of forming an eternal and happy family based on Allah Almighty [7]. Article 2 of Islamic Law Compilation affirms that marriage is an agreement that is very strong *(mitsaqan ghalidhan)* to obey Allah's commands and the implementation is included in worship. The principles of marriage law that are sourced from the Holly Qur'an and *Al Hadith*, which is then outlined into the lines of the law through the Constitution No. 1 of 1974.

According to Islam, every legal act must fulfil the two elements, namely the terms and conditions. Term is a central element in a legal act, and the condition is an additional element that must be fulfilled.

Further, the elements of marriage are as follow:

a. Groom
b. Bride
c. Bride's guardian
d. Two witnesses
e. *Ijab* and *Qobul*

The terms of the legitimate Marriage:

a. The bride is legally married by the man who would become her husband
b. Attended by two male witnesses
c. The bride's guardian who do the contract

For the terms and conditions differences in marriage is slightly different. It would not be different if some of the *ulama* explain it in detail into a condition of marriage. What becomes the object of the marriage ceremony is not the one who is in the agreement but what is in the mutual consent that is the lawful conduct of reciprocal relationship between husband and wife. This means the presence of marriage ceremony does not occurring the mastery of husband towards his wife or the otherwise [8].

4.3 Itsbat of The Marriage

According to Rais Asasriwarni Syuriyah PW NU West Sumatra *itsbat* marriage comes from Arabic which consists of Itsbat and marriage. *Ithbat* derived from the Arabic language, namely the establishment, affirmation, and acknowledgment. According to KBBI *(Kamus Besar Bahasa Indonesia)*, *ithbat* marriage is the determination of the truth (validity) of marriage. *Ithbat* marriage is the endorsement of marriage that has been held according to Islamic religious laws, which is not recorded by KUA or PPN authorities (the Chairman of Indonesian Supreme Court No. KMA/032/SK/2006 on Guidelines for Court Duties and Administration).

The Marriage Registration aims to realize the order of marriage in society, whether marriage based on Islamic law or marriages conducted besides Islamic law [9]. The Islamic Law Compilation also provides the formulation of a legal marriage and the provisions for orderliness of marriage. In Article 7 paragraph (1) The Islamic Law Compilation (KHI) and Article 100 of the Civil Code is explained, the existence of a marriage can only be proved by a marriage certificate which is recorded in the register. Even it is affirmed that marriage certificate is the only evidence of marriage. In other words, the marriage that is registered at PPN *(Pegawai Pencatat Nikah)* of KUA *(Kantor Urusan Agama)* in the District will be provided a Marriage Certificate or Marriage Book is a constitutive element (that makes) the marriage.

Ithbat marriage is jurisdiction volunteer matter, which is a unilateral matter or no opponent. There is only applicant that pleaded on a determination of marriage. Voluntary matter is basically unacceptable, unless for the legislation purpose.

4.4 Basic Law of Itsbat Marriage

Basic Law of *ithbat* marriage is contained in the Act No.1 of 1974 Jo Government Regulation No.9 of 1975. However, this authority evolved and expanded into The Islamic Law Compilation (KHI) Article 7, paragraph 2 and 3 in paragraph (2) states: "*Ithbat* marriage submitted to the Religious Court", in paragraph (3) states: *Ithbat* marriage into the Religious Courts is limited on the matters relating to:

a. The existence of marriage in the framework of divorce settlement;
b. The loss of a marriage certificate;
c. The existence of doubt on the legitimacy of a condition of lawful marriage;
d. Marriages conducted by those who have no impediment marriage according to Law No. 1 of 1974

In legalizing the marriage that is held in the presence of PPN is a marriage which is in accordance with Article 2 paragraph (2) of Law No.1 of 1974 on Marriage so it has been legal and legitimate, thus will get certificate quotation of marriage. In contrast, if the marriage is not conducted accordance with the laws and does not get a marriage certificate as an authentic evidence then it in relation to a civil issue. This kind of marriage should get the legality to obtain legal assurance related to administrative problems. It is also related to the civil rights which is in associate with the child's status or child's birth certificate that is needed later. What should be explained in the verification is not the law but the events. The problem of marriage legalization can be lodged with the evidence as contained in Article 164; those are the written evidence, witness evidence, evidence of allegation, evidence of recognition, and vows [10].

4. RESULT

Petition of *Itsbat* marriage received by the Religious Court of Metro, there were 88 requests were decided during 2015. There are 17 *itsbat* marriage proposals since 2015 up to July 2016, 10 of them have not been decided and 7 others have been granted and decided by the Religious Court of Metro.

In this case, the government also has a part in assisting to promote the importance of marriage registration in accordance with law. *Ithbat* is a product of the Religious Courts, it means not the actual court and it is termed as jurisdiction volunteer. It is said not the actual court because in the judicial process there are only Petitioners. In other words, the applicants themselves plead for the determination of the marriage or the course of marriage. In case of volunteer, there is no dispute which mean single or no opponent. Essentially, such a case cannot be accepted but only to serve the interests of the rule or statute.

5. CLOSING

Based on the tentative result of the research, the researcher concludes that the perception of religion and the concept of *maqashid sharia* are fundamentally affecting the high number of *itsbat* marriage petition in the Religious Court Metro.

There are several things of understanding the concept of *maqashid sharia*, namely Keeping descent *(hifz al nashl)*, Keeping Religion *(Hifz al-din)*, Keeping treasure *(Hifz al-mal)* being the view in the petition of *ithbat* marriage. The perception of religion and the *maqashid sharia* theory lead to the awareness of law of the people who have not register their marriage. *Ithbat* marriage petition is closely related to the legality of the marriage and also due to the existing law as it is. Additionally, *isbat* marriage petition can also provide a clear legal certainty on the marriage.

REFERENCES

[1] Syaifuddin Amir. 2007. *Hukum Perkawinan Islam di Indonesia*. Jakarta. Pranada Media. Hlm.41
[2] Soemiyati, 2004, *Hukum Perkawinan Islam dan Undang-Undang Perkawinan*, Yogyakarta,Liberty. Hlm. 1
[3] Fajar Mukti, Yulianto A.2007. *Dualisme Penelitian Hukum.*Yogyakarta. Lab FH Universitas Muhammadiyah Yogyakarta. Hlm.14
[4] Musjtari Nurul Dewi dan Fitriyanti Fadia .2008. *Hukum Perbankan Syariah dan Takaful*. Yogyakarta. Lab Fakultas Hukum Universitas Muhammadiyah Yogyakarta.
[5] Yubsir Hasani. 2012. p.335
[6] Mas'udi, Masdar Farid, "Zakat: Etika Pajak dan Belanja Negara Untuk Rakyat", *Makalah* pada Seminar Nasional Reformasi Pengelolaan Pajak dan Zakat: Peluang dan Tantangan Terkini, Program Studi Keuangan Islam Fakultas Syari'ah UIN Sunan Kalijaga Yogyakarta, 18 September 2006.
[7] Zainudin, Ali.2012. *Hukum Perdata Islam di Indonesia*. Jakarta. Sinar Grafik. p. 7)
[8] Azhar Bashir Akhmad. 2004. Hukum Islam Tentang Riba, Hutang Piutang dan Gadai. cet. 2, Bandung: PT. Al-Ma'arif. p.13
[9] Zainudin, Ali, op.cit. p. 26
[10] Mukti Arto, 2005*, Praktek Perkara Perdata Pada Peradilan Agama,* Yogyakarta, Pustaka Pelajar. P.140.

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Discourse Gender in Perspective of Human Rights: a Turning Point Protection Laws toward Female Workers

Anisa Cahaya Pratiwi[*1], Teta Anisah AR[*2], Reza Torio Kamba[*3]
*UNIVERSITY OF LAMPUNG, LAMPUNG, INDONESIA

Abstract
Indonesia as legal state ensures protection of human rights for each citizen. Recognition human rights in Indonesia cannot be separated from insurance against equal rights to have jobs between the man and woman. The one of gender discrimination can be felt in the workplace. Protection toward female workers is to ensure of fundamental rights workers / labor of women and ensure an equal opportunity and treatment without discrimination to realize prosperous female workers and their household by keep considering the development the business world. Every worker women is having fundamental rights as regulated by law. In a juridical manner the constitution of 1945 provide legal protection toward any person to obtain work and the decent life for humanity. The form of an acknowledgement of women's rights internationally also had been recognized by the passing CEDAW (Convention on the Elimination of All Forms of Discrimination against Women). It means, there is no again discrimination against women's rights to work and develop it. Basically female workers are having huge enough contribution toward the implementation of the national development. For it, protection laws toward labor woman very important for guaranteeing a decent welfare for female workers and his family without any discrimination gender. The purpose of this research is to assess legal protection that has been given by the government on the welfare of female workers.

Keywords: Protection of Human Rights, Female Workers, and Gender Discrimination.

1. INTRODUCTION

The protection of the law and human rights of workers is the fulfillment of the basic rights of grime and protected by the constitution as envisaged in article 27 clause 2 of The Constitution of Republic of Indonesia Year 1945 which reads "each citizen is entitled to employment and livelihood that was appropriate for humanity".

But Today, Still so much discriminates the treatment of women in opportunity at works. Actually there are many regulations that regulate on protection for female, which are in the rule of law national and international that was between another:

a. *Convention on the Elimination of All Forms of Discrimination Again Women* As has been ratified by Act Number 7 Year 1984 about (CEDAW)
b. ILO *Convention Number 183 Year 2000 on Maternity Protection* (ILO conventions on protection maternitas)
c. Act Number 13 Year 2003 about labor (Labor laws)
d. Act Number 39 Year 1999 about human right (human right act)
e. Act Number 36 Year 2009 about Health (Health act)

Demands work made many women must work on a night shift especially in service sector 24 hours. The risk of work at night larger happened than planned by day. Besides security risk on the self female workers itself , there will be negative impact inflicted on health , because the body should exert oneself to keep working at the time at which should be a body resting.

Basically female workers have a significant contribution to the implementation of national development. A labor organization international (ILO) said "the difference employee salary women and men declining 0.6 % from 1995.

2. DISCUSSION

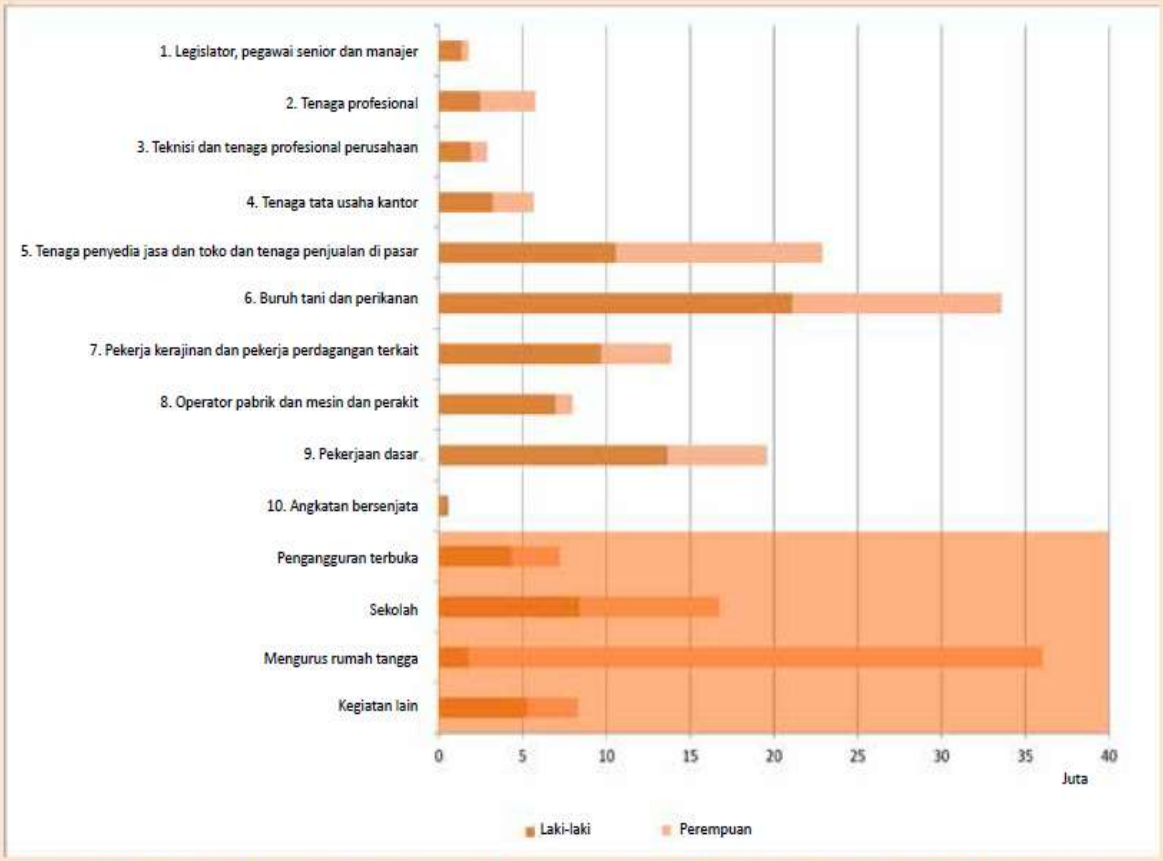
In society, business leaders often be attached as office men, while women were be attached as an element his supporters If obtaining a position in work, usually women be attached with workers family are not taken into account fruits of his labor. This shows that the increase in quantitative the participation of women with the sacred printing productive have not been in accordance with the spirit of gender equality [1].

[1] Corresponding Author. Phone Number:-, *E-Mail Address*: anisacahaya82@gmail.com
[2] Corresponding Co-Author. Phone Number:-, *E-Mail Address*:-
[3] Corresponding Co-Author. Phone Number:-, *E-Mail Address*:-

The purpose of individuals to work not only to find only money , but even more than that , which is to fulfill other needs such as the need to valued , forming attachment social and feel competent in the job. According to the data obtained from the ILO to Indonesia. For the last few years, the ratio work inhabitant of Indonesia quite higher than to the average global, this was partly to the high the percentage of people working age and limited choice of income outside the world of work. There was a big difference in the ratio work inhabitant of between the man and woman, and between the age 15 to 24 year olds with the age of 25 upward [2]. For example, man of any age 25 years old and upward having the ratio work the highest population (estimated about 89,5 % in February 2015. As a comparison, young women having the ratio of job lowest population, (estimated 32.6 % in the same period (see the picture at the bottom). The ratio of the people that is comparative low among young this is because of the participation of young people in the field of education and training center, a trend that should be able to help strengthen competitiveness and productivity labor force in the coming years .The trend gender showed a small increase from time to time, where women are having significant the labor force participation rate lower than men [3].

Discrimination in the workplace resulting in women difficulties obtaining the work they want .In addition the women are having wages lower than they than men.

Segregasi gender di Indonesia, Agustus 2014 (juta jiwa)[12]



Sumber: BPS (2014) Keadaan Angkatan Kerja di Indonesia: Agustus 2014, Badan Pusat Statistik, Jakarta.

This shows that there are many women outside the world of work. Many women who did not participate in the work force caused the responsibility of the family, where there are many women said that they fully involved in the household (see picture above) [4]. This situation confirms that there has been gender difference in terms of the division of responsibility family and participation in women in the work force likely to change of the nature of inequality gender in Indonesia [5].

3. CONCLUSION

Female worker still experience discrimination in the workplace. While the ability of women when plunge in the workplace no doubt quality. Because at the moment many women are able to occupy high positions in government, companies and also the other domestic work. That means many women contributed to national

development. But for the protection of law and human rights against female worker is still very low, for those that were working as labor of employee many women get discrimination, it is like a lack of the security for workers women who work for a late night, and also for those who underage and was pregnant. This is the duty of government and all sides have to actively and acting upon all forms of discrimination against women in the world of work.

REFERENCES

[1] Angger Wiji Rahayu**,** *Perempuan dan Belenggu Peran Kultural*, Jurnal Perempuan edisi 29/1/2015
[2] Tren Ketenagakerjaan dan Sosial di Indonesia 2014 – 2015, (Memperkuat daya saing dan produktivitas melalui pekerjaan layak) Hak Cipta © International Labour Organization 2015. First Edition 2015. p.11
[3] *Ibid*,. Tren Ketenagakerjaan… p. 11.
[4] *Ibid*., Tren Ketenagakerjaan… p. 13-14.
[5] *Ibid*., Tren Ketenagakerjaan. p. 15.

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Urgency Based Education Right in Indonesia in Dealing ASEAN Economic Community (Case Study 2003 until 2016)

Achmad Ibrahim Wijaya*[1], Abdur Rahman Husen*[2]
*UNIVERSITY OF LAMPUNG, LAMPUNG, INDONESIA

Abstract
One of the challenges will be faced by the ASEAN Economic Community; Indonesia is a superior human resource and global competitiveness. Human resources in question can only be done through a human right-based education. Education is a human right-based education regard to human rights in access to quality education and equitable, However in fact, Indonesia still not yet can ideal execute. But in fact, Indonesia is still not able to implement it ideal. This paper has a goal to knowing why education with Human right in Indonesia still not yet good executes. This study aims to find out what was the cause of human rights-based education in Indonesia has not been able to be implemented optimally, as well as the urgency of the matter. This paper uses a qualitative method. We use a reference source of journals, scientific articles, legislation governing, reliable article, international law has been ratified by Indonesia, as well as efforts undertaken by Indonesia from 2003 - 2015. These results indicate that the reality of education providers Indonesia is still not optimal in implementing human rights-based education that has been declared by UNESCO. The reason among indifference, law, and imbalance government program and effect to progressed country development and the implications for the development and construction of the State. The conclusion of this paper is that the importance of a right-based education in order to print the human resources

Keywords: Education, Human Rights, Government, Student, Law, Human Resources, the ASEAN Economic Community.

1. INTRODUCTION

1.1 Background

Indonesia, a country with a population of nearly 250 million people, placing Indonesia as the country with the fourth largest number of population after China, India, and the United States. Indonesia also has the largest area in ASEAN. Indonesia also has a demographic bonus that be great potential in the development of Natural Resources plus abundant. This has led Indonesia to become an influential country in ASEAN.

The entry into force of the ASEAN free market or the so-called ASEAN Economic Community would be a challenge for Indonesia. ASEAN economic community or abbreviated to MEA true economic integration at the same time is a competition that puts the quality of products and services. One of the components in the face of MEA is the readiness of qualified human resources. In this case, the quality of human resources can only be produced through education for human rights. Human rights-based education in truth is education which concerns the right to access quality education, fair and equitable manner.

In fact, according to UNESCO study is less than optimal Indonesian education rights-based education for students. Of course this must be addressed seriously by stakeholders (policy holder) and society in general, because education is a Rights-based UNESCO recommendation for all countries in the world, including Indonesia who carries out the recommendations of the UNESCO program. Rights-based education has a very vital role in the printing quality of human resources and global competitiveness, in order to face the competition in the AEC.

1.2 PROBLEM FORMULATION

a. What is the AEC?
b. What is the condition of Indonesia in the ASEAN Economic Community?
c. How to print quality human resources?
d. What is the urgency of Human Rights based education?
e. What has been done by the government in implementing human rights-based education?

1.3 OBJECTIVES AND BENEFITS

Aims to explain the urgency of rights-based education in order to face the MEA and the steps that have been made by the government and the obstacles encountered. The case study starting from 2003, because that year was the formulation of a regional free trade ASEAN.

[1] Corresponding Author. Phone Number:-, *E-Mail Address:* abramskeizer@gmail.com
[2] Corresponding Co-Author. Phone Number:-, *E-Mail Address:* ar.husen.gmail.com

As a material or substance to determine the condition of the Rights-based education in the face of the MEA as well as on the development of education in Indonesia ranges from 2003 until 2016.

1.4 SCOPE

The scope of this paper is the evaluation of government policy in a rights-based education span of 2003 s / d in 2016 to face the MEA.

2. METHODOLOGY

The methodology in this paper is qualitative, evaluative and descriptive. Qualitative because it comes on literature and articles reliable, evaluative because valuate within a certain timeframe, and descriptive in order to pay attention to rights-based education program that changed the implementation from time to time.

3. DISCUSSION

3.1 History and Understanding of the ASEAN Economic Community

AEC pass quite a long preparation. The AEC was originally a program that sparked discourse when the ASEAN Summit to 9 held in Bali on October 7-8, 2003. During the meeting, the idea emerged to create a strong economic integration program in 2020. This is because the process globalization of trade is increasingly competitive; it is also the desire to emulate China and India in terms of development and economic growth.

Initially the program will be implemented in 2020 and accelerated in late 2015, because of the spirit will pursue their economic future.

The ASEAN Economic Community is the integration of Economics and regional free trade like NAFTA, EEC, ECOWAS, and the organization of other regional free trade. There are 5 current gain freedoms, namely goods, services, capital, investment and skilled labor, so that countries with a current quality have the most advantages in this program.

3.2 Conditions Human Resources, Economics and Education of Indonesia in facing the challenges of MEA

In the field of human development index, according to research UNDP in 2015, Indonesia ranks 110th out of 188 countries tested. Indonesia 68.38 value that causes Indonesia ranks fifth in the region ASEAN. In this table, displayed five countries with the highest HDI in the region and an overview of HDI Indonesia. This table 5 biggest HDI in 2014 from UNDP.

No	Country	Value
1	Singapore	91,18
2	Brunei Darussalam	85,66
3	Malaysia	77,92
4	Thailand	72,58
5	Indonesia	68,38

Component	Indonesia
Life Expectancy	70,78
Years of Schooling Expectancy	12,55
Years of Schooling Expectancy	7,84
GNP (Rp)	10.150.000
HDI	69,55

That's about Indonesia HDI Index at 2015 from UNDP. HDI Indonesia included in the category "Medium". HDI fight important in the economy of a country, because he was the principal actors in carrying out these activities. Quality human resources is more meaningful than the abundant resources, because of the ability to process natural resources is very important. State of Singapore, for example, since the inception of this country has many problems, such as unemployment, which reached approximately 3 million people, extremely poor sanitation, inadequate infrastructure and others. Singapore government do a progressive policy, namely fixing of education, as the most important component in building a reliable human qualities. Thus, Singapore is the country forward and get HDI with the category of "very high", so that Singapore is certainly better prepared than Indonesia in the ASEAN Economic Community.

Economic growth in Indonesia is the world's third largest after China which ranks first, and India at the second position. Indonesia's economic growth in 2015 reached 4.79%, and in the second quarter 2016 rose by 0.39% to 5.18%. Indonesia has a GDP of $ 861.93 billion in 2015's first major ASEAN se.

Nevertheless, the economy in Indonesia is not without problems. Poverty and unemployment is still a chore that must be resolved Indonesia. According to Central Bureau of Statistics, unemployment in Indonesia reached 6.18% in 2015. Unemployment, cause a reduction in state revenue potential and purchasing power with implications for the development and economic growth, which is also associated with poverty. That is to say that not only human development directly related to economic growth, but unemployment also relates; in this case is the main scorer poverty. Unemployment, due to be the workforce that is not proportional to the number of jobs, so that only the labor forces that meets requirements able to compete in the reception work.

Unemployment as a cause of poverty in Indonesia is very alarming. According to Central Bureau of Statistics, the poverty rate in Indonesia in 2015 as of September, reaching 28.51 million figures. And on March 2016, was reduced to 28.1 million.

3.3 The condition of education in Indonesia is equally alarming. The dropout rate remains a complicated task. According to Central Bureau of Statistics, the number of school dropouts is total 2,9 Million.

3.4 Urgency Human Rights-Based Education

Rights-based education is a system of organizing education that takes into account rights to access education in a fair and smooth. With advance elements of education, has directly improve the quality of human resources and increase the value of the HDI, which is able to compete in the AEC. Human resources as a result of human development have implications for economic growth [1].

An education volunteer UN, the UNESCO regional workshop held in the Philippines suggests the urgency of rights-based education through the International arena paper entitled Universalizing the Right to Education of Good Quality: A Rights-based Approach to Achieving Education for All [2].

In the paper, [3] introduce four schemes will be rights-based education, namely:

a. Availability (Availability) This scheme describes the obligation of the government pay attention to three aspects of education as a social, political, cultural and economic. Emphasizes the obligation of government to establish a school that values diversity, freedom and affordability for students, also to students who have disabilities.
b. Affordability (Accessibility) where the government to prevent and eliminate discrimination in educational institutions, as many cases of discrimination that led to the disruption of learning activities.
c. Acceptance (Acceptability) Where a standard of quality of education, including learning methods, materials, language of instruction and other woods must be accepted by learners.
d. Adaptability (Adaptability) where schools must adjust to the circumstances and background of the students, not vice versa, as adopted by the paradigm of traditional education.

Rights-based education must meet the scheme above 4 simultaneous and comprehensive, and is continuous. In the run-based education Rights, the Indonesian government has ratified the treaty, covenant, or the declaration of the world related to the world of education. As issued Government Regulation No. 19 of 2005 on National Education Standards, which governs the regulation of the development and implementation of education-based human rights implicitly? The Indonesian government has also taken other policies in the period 2003 - 2016, namely:

a. School Operational Assistance Fund

   Based on the regulation number 69 of 2005 is non-personnel aid program for elementary and secondary education as the implementing agency compulsory.
b. Bidikmisi Scholarships

   The scholarship is intended for students who cannot afford college. These scholarships are enforced starting in 2010.
c. Educational Fund Management Institution (LPDP)

   LPDP is a government agency that provides scholarship programs, research funding and investment. LPDP It is a separate institution since 2012.

In addition to these policies, the Indonesian government had also rolled out some policies that create controversy and immediately evaluated. As for the policy, including:

a. National Exam

   National Examination is an evaluation of primary and secondary education nationally. This exam through a long history and cause motion pros and cons, because this test had been a student passing standard benchmark. This makes some of the judge's actions would not be fair, because the quality of education in Indonesia is not evenly distributed and do not meet the four rights-based education scheme. So that by 2015, the Indonesian government decided that the National Examination is not the sole measure of students' graduation.
b. School Stubs international standard

   Stub international school is a step in the Indonesian government in setting up the school of international standard and competition in order to face the challenges of global human resources. This policy reaping the pros and cons. This policy is considered to make the inequality between educational institutions. The reality is still a lot of gaps and gap area educational institutions; a problem of implementation of human rights-based education. Besides school fees are expensive, far from the required affordability scheme based human rights education. Thus, the Constitutional Court made the decision to remove the standard school status pioneering international school or who became an international school in 2013.

In addition, there is also a program or case according to our research contrary to the rights-based education scheme, due to violation of one of the rights-based education scheme in the Indonesian region, namely: Line without a college entrance test for the Koran memorizers at several campuses of State in Indonesia

Rights-based education requires justice and free from schemes they offer. Justice here is justice in the evaluation and free from discrimination. The system is clearly discriminatory, because it can be a stumbling block for those who have no competence in the field of academic who memorized the Qur'an, can also make jealousy directed towards people of other faiths who are a minority in Indonesia. Moreover, the college held a reception path is universities, educational institutions teaching system aims to accommodate all students regardless of denomination, race or ethnic origin. This system is a system that is unfair, because privileging one group.

4. CONCLUSION

Human rights-based education has an important role in economic growth; due to quality education will have implications on Indonesia's economic growth, as did the State of Singapore. This is because Indonesia has abundant natural resources and surplus labor. If not accompanied by an increase in human resources via education based on human rights, then Indonesia will only be a spectator, without having to do much in the arena of the ASEAN economies.

However, this implementation is not optimal, because there are many policy mistakes, which continue to be evaluated from time to time. And our job is to assess and evaluate the performance of government programs from time to time.

REFERENCES:

[1] Toley. James. 2013. "Sekolah Untuk Kaum Miskin; Pelajaran Paling Menakjubkan Dari Masyarakat Paling Miskin di Dunia." Pustaka Alvabet.
[2] Tomasevski, Katarina. 2004. "Manual On Right Based Education Global Human Rights Requirements Made Simple". UNESCO. Published.
[3] *Ibid.*

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Education as a Primary Tool of Human Rights Enforcement and National Development

Gibran M. Sanjaya*[1]

*UNIVERSITY OF LAMPUNG, LAMPUNG, INDONESIA

Abstract

National development will be well implemented only on a nation with educated people and guaranteed human rights, even further; education is the main crutch in human rights enforcement. However, Indonesia was ranked by PISA as 10 worst of education system from 76 countries that means alteration of national education system is needed. Considering Indonesia stands before thousands of island and diverse of cultures and religions, the people require adequate education about the character of their community and their local excellence. The purpose of that should be implemented clearly when look into the current codition of Indonesia, such as urbanization without the decent education from rural society who affect a high social gap. Those things will hamper the national development. The Law No. 20 of 2003 has regulated local content that can increase the education implementation based on local excellence, but the lessons of local content is not different with another lessons that students learn in the class room. Education can't be interpreted as limited as education which "institutionalized" that take shelter inside the classroom because education is far more than that. Good education should be the core concern of government in order to maximize Indonesia's national development and capability in global economic.This paper offers to evolve local content in Law No. 20 of 2003 so the people of Indonesia can compete with other countries in facing AEC. The research method that used for this paper is normative-juridical.

Keywords: ASEAN Economic Community, Education, Human Rights, Local Content, National Development

1. INTRODUCTION

Education is conscious and deliberate effort to realize the learning atmosphere and process so learners can actively develop their potency to have strength in religious spiritual, self-control, personality, intelligence, noble character, and skills that are needed by themselves, society, nation, and country. [1] Father of National Education in Indonesia), education is a requirement in life of growing children, as for the meaning, education guides every power of nature that exist in those children, so they as human and as member of society are able to reach safety and highest blissfulness [2].

[3] Education has a glorious position. But in this postmodern era, the people of Indonesia's perception to education itself is very identical with "institutionalized education", or "education that accomplished inside the class with teachers, books, and whiteboard", meanwhile, education is never been as simple as that.

Moreover, in this globalization era, education instead interpreted as "opium" that used for in this globalization era, education it seems become an "opium" which only served to calm tensions and increasing the power of public imagination about work.. The main parents considerations to send their child to school is to get a job that adequate with the investment that implanted in school. The word investment is the word that derived from economic domain. The question is why public opinion has become so strong that hold assumption about the aim of education is similar with searching for job? This is nothing but a result of a dominant pragmatism culture in our society and our education. Pragmatism that comes from economic habits has penetrated into education world. Conflict of interest between idealism (based on academic value) and pragmatism (based on corporation value) in education world is always happen. There are three possibility relations between idealism and pragmatism education. The first possibility, making academic values is based on education institution; second, making corporation values is based on academic institution; third, making academic and corporation values together are based on education institution, because these two values are in the equal position, no one above the other. Positioning the values into education institution has serious implication [4].

In the context about national development, if education is always identified with getting a job, surely national development will not going anywhere according to its nature. Indonesian national development is a development paradigm that was built on Pancasila experience which is complete Indonesian human development and whole Indonesian community development, with Pancasila as the basis, goals, and guidelines [5]. Sila the 2nd contain "Just and civilized humanity", the words "just" and "civilized" are very tick of its presence with education, however, it certainly not an education with its relation as "parents' investment to their child".

ASEAN Economic Society is demanding Indonesia to have competitiveness in many ways, especially in economical aspect. However, economical system like any other cannot be implemented as desired if the

[1]Corresponding Author. Phone Number: -, *E-Mail Address:* gibranms2@gmail.com

government and the people of Indonesia are still having low consciousness on the position of education that, in fact, is more noble than just a mere tool for searching a job.

Based on the background, there are several issues that will be showed in this research, which are:

a. How is the relation between education, human rights, and national development?
b. Which kind of education that the people of Indonesia need?

2. RESEARCH METHOD

This research is using Normative Legal Research. In Normative Legal Research, written laws also examined from many aspects, such as theoretical, philosophical, comparison, structure or composition, consistency, general explanation and explanation in every article, formality and strength on tying Laws and the language that used is language of law. So it can be concluded that Normative Legal Research has a very wide scope.

3. DISCUSSION

3.1 Education: the Crucial Part of National Development and Human Rights Enforcement

Education is a way to conserve cultures and national development that can never be separated with the culture itself. Now, in reformation era which has been freed from dictator authoritarian, education needs new ways in its application for national development that be expected can bring Indonesia to meet its glory in sector of economic, social-cultural, and politics.

As Figure 1 shown, education and prosperity have fundamental relation in national development, which means education also has identical relation with human rights enforcement. Without well-educated people, there would not be prosperous society and without prosperous society, human rights must be not upheld.

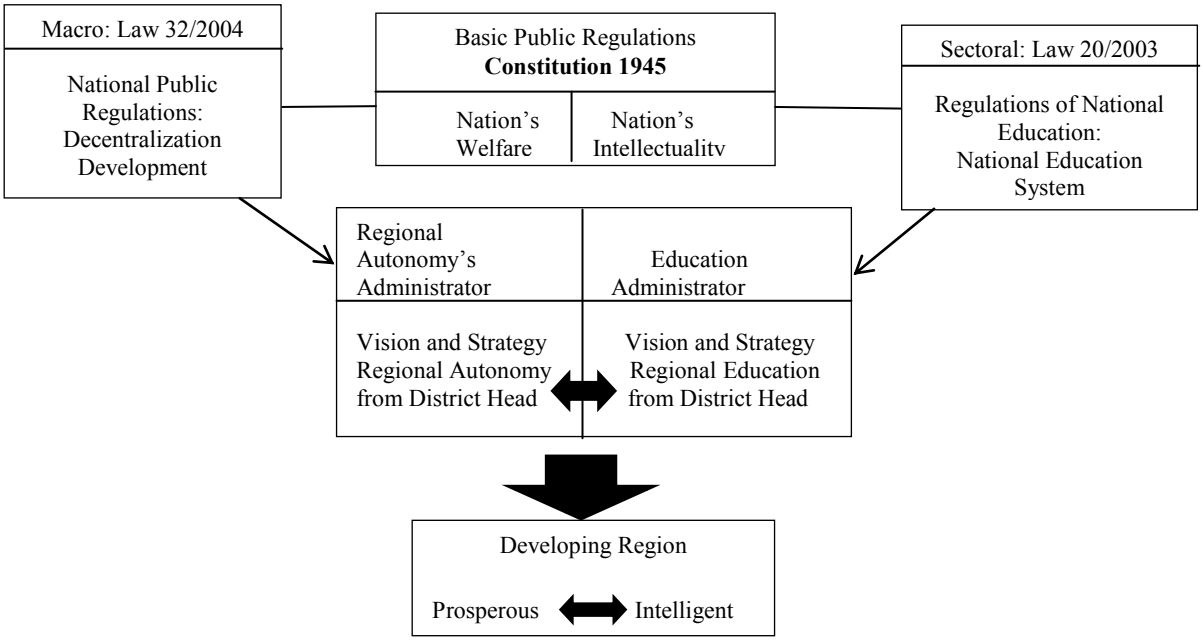

Figure 1. Factual Condition of National Public Regulation and Its Relation with Regional Public Regulations [6]

3.2 Review to Indonesia's Education Policy in the Past and Reformulating the People of Indonesia's Education Needs

Education has never been detached from politics, even though education also can never replace politics, but without education, political goals are hard to reach. Therefore the functions and role of education in a life of a nation is never being separated from the life of politics, also economics, laws, and cultures in general.

There are three parts of education policy based on historical approach. *First,* in the New Order era, politics are used as commander. Every activity was directed to various businesses to reach political aim, such as awaken nationalism, sense of national unity, raising the strength of the nation in the life of the cold war that time. The economical life which is too nationalistic affects the isolated economical life. The culture life is very showed the life of nationalism that leads to narrow nationalism and chauvinism. In culture sector, it showed form of national identity that tends to be excessive. Trends in political lifes, economics, and cultures at that time are penetrated into education world. Education praxis was directed to indoctrination process and reject every cultural aspect that comes from outside.

Automatically education is not used to increase the people's life standard. Methodology of education in indoctrination method entered education world from the lowest step to the highest. Education has already begun to direct to development with militarism attitude with militant based on cold war demand. Education for peace

has replaced with education for taking sides with world blocks that split between capitalism and communism. Everything was directed based on willingness ruler so that freedom of thought, alternative thought, and critical thought later is buried. Then the result is humans who don't have alternative except alternatives that were given by the government.

Second, it has been approved that there were so many achievement in New Order era. From one of the poorest nation to be in group of the nation who have middle income. However, the rapid development can be seen by its income per capita has sacrifice the human rights and freedom of individual. In political sector everything is directed to uniformity thought and action. As the result, middle class that slow and weak, not creative and productive, and directed to rigid bureaucrat have raised. In line with the political and social challenge which is very homogenic has killed democracy. And then born a "please guide me" and "please direct us sir" kinds of leadership so there wass no place for individual's initiative. Human rights are crushed for economical development. Lack of political communication, crisis of monetary has begun to create crisis of economic and ends to crisis of trust. Between education and culture there is interrelated relation. There is no culture without education and so there is no praxis education in vacuum but there is always in concrete culture scope. If we want to build back Indonesian community from crisis, therefore that task is the task of build back our own culture. Our education in the present time has been cast away from culture and become just a mere tool for a economic order or a tool for a ruler to create date quotation that not the same with the people's needs. Moreover, to change culture without the support from education praxis will affect many kind of useless reformation culture. A continuous reformation is a reformation that is supported by education process as a cultural process.

Third, entering the Reformation era, with the past experience that built society and Indonesian culture that now begin to crisis, the question is what is the function of the national education for facing the challenge of Reformation era? Firstly there must be a deal about the form of the new Indonesian community that we want to build. Society that we want is the society that fair and prosperous with the supremacy of law. That society is "Madani society". Madani society is the ideal form for democratic society. The form of society cannot be separated from the life of the people and the life of the nation. Therefore, madani society in Indonesia must start from our point of view abut society and Indonesian culture [7].

Indonesia stands before thousands of islands [8], 1.340 ethnic groups [9], and many different cultures. What it means by that, is education cannot just simply implemented without considering the needs of each community. Every child has rights to get education and teachings in order to personal developing in accordance with interest, talent, and intelligence [10]. It listed in Law No. 39 of 1999 and that regulation recognizes that interest, talent, and intelligence of each individual is different, so, uniformity to curriculum shouldn't be applied too thick to every regions in Indonesia. The people of Lampung have definitely different needs compared to the people of Papua, vice versa. Local Content that is regulated in Law No. 20 of 2003 is the main solution for that difference of needs and to conserve the many different cultures that Indonesia has.

4. CONCLUSION

Since education has a noble position, it must be there with human rights, together, not separated, because without well-educated people, a nation will not be able to become prosperous, and since a nation is prosperous, there is a good governance with successful national development.

The implementation of Local Content in national education system of Indonesia must be the axis on national developing. Besides, as noted earlier, Law No. 39 of 1999 has regulated that education have to suit every individual's interest, talent, and intelligence. Moreover, in Indonesia's geographical form, uniformity is almost impossible to be implemented. If the government stays on today's education system, then, as an official result from program for International Student Assessment (PISA), the Republic of Indonesia occupies the rank as one of 10 countries' worst education system.

REFERENCES

[1] Ki Hajar Dewantara, Article 1 point (1) Indonesian Law No. 20 of 2003 National Education System.
[2] http://karyatulis.artikel2.com/pengertian-pendidikan.htm [17/10/2016]
[3] Ki Hajar Dewantara and Law No. 20 of 2003, op.cit.
[4] Mukhrizal Arif, *Pendidikan Posmodernisme: Telaah Kritis Pemikiran Tokoh Pendidikan*. Ar-Ruzz Media, Yogyakarta: 2014.
[5] Riant Nugroho, *Kebijakan Pendidikan yang Unggul*. Pustaka Pelajar, Yogyakarta: 2008.
[6] H.A.R. Tilaar, Paradigma Baru Pendidikan Nasional. PT Rineka Cipta, Jakarta: 2004.
[7] ABRI's mapping and LIPI's research.
[8] BPS's census in 2010.
[9] Article 60 point (1) Indonesian Law No. 39 of 1999 Human Rights.
[10] *Ibid.*

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State's Responsibility on Saving and Filling Ex-Gafatar's Land Right after Eviction and Repatriation from Borneo

Hasanuddin Muhammad[*1], Muhammad Ridho[*2]
*STATE ISLAMIC COLLEGE OF JURAI SIWO METRO, LAMPUNG, INDONESIA

Abstract
The Purpose of the article is the extending view of law about infraction human right of ex-Gafatar because of eviction and repatriation forcibly from Borneo. Hopefully, the article will be able to solve solution to justice for ex-Gafatar. This article uses the legal-socio approach which will be exposure about set of problem law involved in socio science, economic, and politic until a conclusion which approaches value of substantial justice. The decision of The Indonesian Ulema Council for Gerakan Fajar Nusantara (Gafatar) "as organitation is deviate"causes eviction and repatriation forcibly by government from Borneo. Around 8000 members of Gafatar group was repatriated from west Borneo. They are from several regions in Indonesia like Jakarta, West Java, and Lampung. It is infraction human right. Government as responsibler should save and fill rights for ex-Gafatar because of the eviction. Members of ex-Gafatar get financial loss like material effects and immaterial effects. Government as responsibler on saving and filling human right should make policy for restoring ex-Gafatar's right. Especially it is change all of ex-Gafatar's asset at Borneo. Although organization of Gafatar was reputed as organization is deviate from The Indonesian Ulema Council, but justice based on constitution 1945th must be doing as shape responsibility state to it citizen

Keywords: Responsibility, State, Eviction Gafatar

1. TRAGEDY OF GAFATAR

Around the beginning of 2016, related news organization Gafatar a warm conversation in the media. Gafatar as an organization has been banned by the Indonesian Ulema Council (MUI) because it was considered heresy. Badrodin Haiti who was then serving as Chief of the Indonesian National Police said that Gafatar planned to set up its own state, even already have governmental structures.[1]

Indonesian Ulema Council (MUI) issued a fatwa of deviance for the organization Gafatar. MUI chairman KH Maa'ruf explained that the fatwa of apostasy mui contain Gafatar for the teaching of Ibrahim Millah that unites the teachings of Islam, Christianity and Judaism. Gafatar also a metamorphosis Al-Qiyadah Al-Islamiyah and make Ahmad Musadeq as its leader.[2]

The impact of the misguided notion that Gafatar are members Gafatar being targeted because it was considered dangerous and misleading. The climax occurs Gafatar forced repatriation of members of Borneo to their respective homelands. From the data obtained there are about 1,119 followers Gafatar were sent back to Java from West Kalimantan. While based on the data of the Ministry of Social Affairs, there are at least 1,484 ex Gafatar around refugee camps, 442 of whom were children.[3] One former Gafatar Yudhistira explained that there are at least 700 former members who become victims Gafatar burning of camp in Mempawah.[4] According to the Head of Sub Directorate of Social Cooperation of the Ministry of Social Social Disaster M. Nasution Safi'i there are about 8,000 members of Gafatar returned from West Kalimantan. They come from several regions in Indonesia, such as Jakarta, West Java, Banten and Lampung [5].

Sutinah one former member Gafatar repatriated, she said that he was sorry discharged, life there is already good. For the home is not rented and have got a job. There Sutinah feel the new atmosphere, he worked as a farmer and was given land area of 7 hectares. Besides Sutinah, there Ayu in her explanation said that the goal we want to farm there (Mempawah). There Ayu has given 10 hectares of land [6] of the ex-Gafatar recognition shows that members Gafatar in Kalimantan granted land to be managed as a livelihood in order to meet their basic needs. A similar statement delivered by one of the former members of Gafatar in Metro which says there are approximately 50 hectares of land they left in Borneo after the repatriation of the ex-Gafatar [7].

2. GAFATAR TRAGEDY AS A FORM OF HUMAN RIGHTS VIOLATIONS

Everyone on the principle of equal position before the law. It is based on the legal principle of equality before the law that all people are equal before the law. In Indonesia, these legal principles contained in the 1945 Constitution in article 28, paragraph D (1) that every person has the right to recognition, security, protection and legal certainty and be treated equally before the law. In Act No. 39 of 1999 on Human Rights, the principle of

[1] Corresponding Author. Phone Number: -, *E-Mail Address:* hasanuddinmuhammad18@yahoo.co.id
[2] Corresponding Co-Author. Phone Number: -, *E-Mail Address* : m.idhoey@gmail.com

equality before the law is contained in Article 4, namely that the right to life, freedom from torture, the right to personal freedom, freedom of thought and conscience, freedom of religion, freedom from enslavement, the right to be recognized as a person and equality before the law, and the right not to be prosecuted based on retroactive law is a human right that cannot be reduced under any circumstances and by whoever. Consequence of the principle that before the law all the same position, both civil society and public officials military.

Legal protection of land rights of ex Gafatar an effort to protect the rights of land ex Gafatar result of forcible repatriation by the government. Forcible repatriation to Gafatar members in Kalimantan is a form of deprivation of the right to life and the right to preserve life as where provided for in article 28 A of the 1945 Constitution is a clear form of violation of the constitution, in which the members are located in Kalimantan Gafatar live with independent business of farming and gardening. The former Gafatar located in Kalimantan are migrants originating from various regions in Indonesia. There are comes from Yogyakarta, Surabaya, Lampung, and several other region. Their number was up to thousands. At least according to data obtained there are about 8,000 ex Gafatar discharged from Kalimantan. As a country that adheres to and upholds Human Rights, the government should protect the former Gafatar in Kalimantan and not actually do the forcible expulsion and repatriation. Expulsion and repatriation of ex Gafatar of Borneo is a form of human rights violations, in which the government is actively participating in the repatriation of the ex Gafatar. The government also does not prevent the burning of passive and expulsion carried out by residents of the former Gafatar in Kalimantan. As a result, the former Gafatar suffered losses both material and immaterial.

State as responsible for the enforcement of human rights in Indonesia, as stated in the first paragraph of Article 28 (4), that the protection, promotion, enforcement and fulfillment of human rights is the responsibility of the state, especially the government. Therefore, the government is responsible in order to recover any loss of former Gafatar both the material and immaterial. The right of the former Gafatar is a form of legal protection granted by the state to its citizens in an effort to uphold the constitution. State must be present and can solve conflicts Gafataragar leaves no disappointment ex Gafatar. Traumatized being perceived as a cult group will lead to psychological pressure. It is not impossible it will make ex Gafatar as an exclusive group.

The provision of the 1945 Constitution and Article 28 paragraph (2) explains that every child has the right to live, grow and develop and has the right to protection from violence and discrimination. The state should be responsible for restoring the traumatized children of ex Gafatar, because if it is not recovered will be bad, especially about their trust in the state. These children will remember the events of expulsion, arson, and violence they experienced. There should be attempts to erase the memory of the conflict and restore their psychological condition.

Ex Gafatar losses on expulsion and repatriation of ex Gafatar experienced not only material but also immaterial losses. Loss of moving goods such as cars, motorcycles, and farm animals and immovable assets in the form of agricultural land, plantations and settlements Gafatar former members have harmed them. Whereas this asset is the result of the purchase and rental yields and the fund is a private fund that comes from the sale of land and homes of former Gafatar. Aziz for example, has sold all the assets such as houses and land in the city of Metro Lampung to go to Borneo with her family. However, only a few months in Borneo, Aziz and his family were forced to return to areas of origin namely Metro City. In Metro Aziz and families entrusted by the government to the orphanage.

Article 28 H 1945 (4) has been very clear that every person is entitled to have private property rights and property rights must not be taken over arbitrarily by anyone. The provision is reinforced in Article 36 of the Human Rights Law that every person is entitled to have belonged to, either alone or together with others for the sake of his own development, family, nation, and society in a way that does not violate the law. No one shall be deprived of his property arbitrarily and unlawfully. Perform of Gafatar who moved to Borneo hopes to transform life so much better, but now must live deprivation. Deprivation of possessions and a sense of security is a form of human rights violations that wounded sense of humanity. The government has separated the citizens of their substance.

Loss of feeling safe and comfortable as a citizen as a result of the stigma of being followers of cult also felt aziz. He explained that there are treatments that are difficult when getting public services. Aziz claimed that he had difficulty to obtain a I.d card and Id Family, he was asked to indicate the moving letter of Borneo. Sense of grievance was also felt Epi Widianto Gafatar origin South Lampung. Epi denied residents to return to their home villages considered heretical by the citizens. Epi just resigned when the rejection occurred to him to go back to my hometown. The loss of a sense of security is a violation of Tatas 1945 Article 28 G paragraph 1 explains that everyone is entitled to protection of self, family, honor, dignity, and property under his control, and has the right to feel secure and protected from the threat of fear to do or not to do something that is a human right.

Fighting for the sake of life collectively contributes to building the nation and state is the right of every citizen. In Article 28 C 1945 explained that every person has the right to advance himself in the fight for their rights collectively to build a society, nation and country. The purpose of ex Gafatar exodus to Borneo as part of

efforts to build the economic life of the people through agricultural programs. The program is implemented in an effort to build self-sufficiency of the nation of Indonesia. The arrival of the former Gafatar has brought a change in Kalimantan. This can be seen when the former Gafatar capable of and successfully manage agricultural land collectively and productive. Yields they earn not only for personal consumption but also sold as a commodity. This activity has involved the economy at the micro level. The former Gafatar can independently be able to meet the needs of life without having to rely on government assistance.

Everyone has the right to live physical and spiritual prosperity, reside, and get a good environment and healthy and the right to health.[8] Inner and outer wellbeing is a form of human rights which should be met country. Snapshot 1945 opening of the fourth paragraph is stated that the existence of the State of Indonesia to provide protection for the entire nation and the entire homeland of Indonesia and to promote the general welfare. Inner and outer wellbeing which should be enjoyed by the former Gafatar now torn by the tragedy of the expulsion. Their fate is now determined by the willingness of the government to seek justice and to restore their rights. Without the political will of the government, the fate of the former Gafatar will continue to be marginalized citizens in their own country. Post-repatriation to their respective areas of origin, place of residence as a comfortable dwelling gone. They must stay home relatives, or became residents of the orphanage as experienced Aziz.

3. RECOVERY EFFORTS GAFATAR LAND RIGHTS

Indonesia as a country of law as contained in Article 1 (3) of the 1945 Constitution should uphold the rule of law in all aspects of life. State law is a state system that is governed by the applicable law and justice are arranged in the constitution, in which every person in the country, both the governed and the governing, should be subject to the same laws, so that each is treated equally, regardless of distinction of skin color , race, gender, religion, region, and trust, and the government's authority is limited by a principle of power distribution, so that the government does not act arbitrarily and do not violate people's rights, therefore to give the public an appropriate role and its role in a democratic capabilities.[9] Frans Magnis Suseno said that the state must ensure all pre-conditions, conditions, pre means in order to live a fair and prosper.[10] Consequently the state should be supporting the creation of happiness for the people[11] by laws passed. The actions of government should always be directed to increase happiness as much as possible.[12] Raharjo Satjipto quoted the opinion that the law for man and not vice versa, then the law is actually used to serve and protect the people, to bring justice, prosperity and happiness.[13]

The responsibility of the state in the framework of the protection, promotion, enforcement and compliance is reinforced through Law No. 12 of 2005 on Ratification of the International Covenant On Civil And Political Rights (Covenant on Civil and Political Rights) Article 2 paragraph (3) that:

a. Ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation committed by persons acting in an official capacity;
b. To ensure that any person claiming such a remedy shall his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided by the legal system of the country, and to develop all possible efforts to resolve the judiciary;
c. To ensure that the competent authorities will carry out the settlement Thus, if granted.

Under the provisions of article 2, paragraph (3) point (a) above, any person whose rights are violated shall have an effective remedy. At point (b) explained that any person claiming such a remedy shall his right thereto determined by competent judicial, administrative or legislative authorities or institutions. From these provisions, the determination of remedies carried out by the judiciary, administrative or legislative bodies, or agencies authorized under applicable law.

Referring to the rules for redress as stipulated Law No. 12 of 2005 on Ratification of the International Covenant On Civil And Political Rights (Covenant on Civil Rights and Politics) article 2, paragraph (3) that any person claiming such a remedy shall be determined the rights it by the judiciary, the ex Gafatar can perform a civil lawsuit to the state to reclaim their rights. Lawsuit to recover the land rights of former Gafatar is a step that can be taken when the state to be responsible for the enforcement and fulfillment of human rights does not voluntarily take legal action to recover assets of ex Gafatar ground. An action may be carried out on the court in which the defendant resides. The lawsuit was filed on the basis of tort. Tort is an act committed by legal subjects resulted in losses on the part of other legal subjects. Tort in the case Gafatar is eviction and forcible repatriation by a group of people and by the government against the citizens of former Gafatar in Kalimantan and resulted in losses on the part of citizens of former Gafatar.

A civil lawsuit is an effort to demand the right to be corroborated by the evidence valid and convincing. Such evidence as stipulated in article 164 HIR i.e. documentary evidence, witnesses, suspicion, recognition and oath. This evidence must be presented during the process of evidence in the trial. In the verification process, the parties must present at least two items of evidence to support the arguments complaining. The nature of proof civil lawsuit refers to the written evidence in the form of correspondence which forms the basis of the

emergence of legal relations. To strengthen the argument of the letter, it is necessary to witnesses who saw and heard live events argued in the lawsuit. Written evidence is a key factor that must be met in order to attempt a civil suit to give success to the struggle of ex Gafatar demanding their rights to the state. In the absence of written evidence, struggle through the green table will be hard won.

Referring to the explanation of Article 9 of the Human Rights Court, the expulsion of the former Gafatar included in the category of human rights violations. This is consistent with the explanation of Article 9 point 4, namely the expulsion or forcible transfer of population. Then the eviction case against ex Gafatar of Borneo may be made to the Human Rights Court. Legal mechanisms to restore the victim's rights contained in the provisions of the Law of the Republic of Indonesia Number 31 Year 2014 regarding amendments to the Law No. 13 Year 2006 on Witness and Victim Protection Agency. In Article 7A point (1) victims of crime the right to obtain restitution for damages for the loss of wealth or income. Damages caused by the suffering associated directly as a result of criminal acts and or replacement costs of medical or psychological treatment. In point (2) of crime referred to in paragraph (1) shall be determined by the decision of the Witness and Victim Protection Agency. The application for restitution can be made before or after the court verdict which has permanent legal power through the Witness and Victim Protection Agency. If the application for restitution filed before the court ruling which has permanent legal power, the Witness and Victim Protection Agency may submit to the public prosecutor's Restitution published in demand. If the application for restitution filed after the decision court who has obtained permanent legal force, the Witness and Victim Protection Agency may file restitution to the court to get a confirmation. In terms of crime victims died restitution to the families of victims who are heirs of the victim.

Regulation Indonesia has given a legal loophole their redress for victims of human rights violations as to which is regulated in Law No. 26 In 2000, Law No. 31 Year 2014 and Government Regulation 3 Year 2002. However the issue of implementation of the restoration of the rights of victims of human rights violations has not been realized well. Especially about the government's political will to resolve cases of human rights violations that occurred in Indonesia. Mechanisms for implementing the Human Rights Court itself there are some weaknesses such as legal issues in the organization of the event used the Human Rights Court that is the Criminal Procedure Code. Yet evidence shows Book Civil Law difficult to use mainly related to problems of proving the element of systematic, widespread and known.[14] Compensation, restitution and rehabilitation can be carried out when listed in the Human Rights Court verdict which has permanent legal force. Agency as an institution that provides protection for witnesses and victims can implement compensation and restitution after first there is the submission of the victim, the family or their proxies to the Human Rights Court.

Efforts determination of restoration of the rights of victims through administrative institutions can be done by issuing legal umbrella of government regulation. Government regulations are the rules that make the provisions of a law could walk and enforced. A new government regulation can be established if the existing laws, but a rule of government can be formed even though the laws have not been firmly established in order to be further regulated in a government regulation.[15] Viewed from the perspective of function, then government regulation is a function organized two things. First, the setting further provisions in the legislation that expressly calls it, in this case the government regulation must implement all the provisions of a law which expressly asks to be regulated further by a government regulation. Second, more organized arrangement of other provisions in the legislation that governs although not expressly call. That is, if a problem in the legislation requires a further arrangement being in its provisions do not mention the explicit to be regulated by government regulations, the government can set further along it is a further implementation of the law.[16] Government regulations made by the President as the implementing regulations to execute laws

Until now there has been no government regulations are delegates of Law No. 12, 2005. To expedite the issuance of government regulation, need the encouragement of the community. For encouragement society is a form of non-parliamentary interventions are effective in forcing the government to issue government regulation in an effort to fight for justice for the former Gafatar. Government regulation should be set on how efforts to accommodate the interests of the victims of human rights violations. The publication government regulation became a great hope for the victims, because the effort is difficult to do justice. Commitment and integrity of the government to defend the interests of its people at stake when the government regulation is not being published. If the regime is more tends to cover up and obstruct the settlement of cases relating to violations of human rights, efforts to do next is bring cases of human rights violations to the International Court of Justice. Just as that happened at the time of the trial of cases of human rights violations in 1965-1966. Indonesia declared responsible for the acts of mass murder, and all criminal acts immoral on the events of 1965 and thereafter, and the failure to prevent or punish the perpetrators. The Indonesian government was asked to apologize for the 1965 event. The government was also asked to carry out rehabilitation for victims and survivors and to stop the chase (persecution) is still done by the authorities, or eliminating restrictions for the victims and survivors, so that they can fully enjoy human rights as guaranteed by the Indonesian law and international.[17]

REFERENCES

[1] Tempo, Kapolri: Gafatar Ingin Dirikan Negara Sendiri, https://m.tempo.co/read/news/2016/01/25/078739121/kapolri-gafatar-ingin-dirikan-negara-sendiri. accessed on 01-10-2016 at 10.30WIB
[2] BBC, Fatwa MUI Nyatakan Gafatar Sesat, http://www.bbc.com/indonesia/berita_indonesia/2016/02/160202_indonesia_mui_gafatar_sesat, accessed on 01-10-2016 at 12.17 WIB
[3] CNN Indonesia, *Pemerintah Pulangkan 1.119 Mantan Pengikut Gafatar*, http://www.cnnindonesia.com/nasional/20160122130848-20-106025/pemerintah-pulangkan-1119-mantan-pengikut-gafatar/. Accessed on 09-04-2016 at 23.20 WIB
[4] MetroTv New.Com, *Kamp Terbakar, Eks Petinggi Gafatar: Kerugian Rp4 Miliar* . http://jateng.metrotvnews.com/read/2016/01/20/472293/kamp-terbakar-eks-petinggi-gafatar-kerugian-rp4-miliar. diakses pada 09-04-2016 pukul 23.45 WIB.
[5] Tempo, 8.000 Anggota Gafatar Dipulangkan dari Kalimantan Barat, https://m.tempo.co/read/news/2016/01/27/078739843/8-000-anggota-gafatar-dipulangkan-dari-kalimantan-barat, accessed on 01-10-2016 at 10.35WIB
[6] Viva.Co.Id, *Disambut Pramuka, Eks Gafatar Tetap Menyesal Dipulangkan*, http://nasional.news.viva.co.id/news/read/728464-disambut-pramuka--eks-gafatar-tetap-menyesal-dipulangkan. diakses pada 09-04-2016 accessed at 23.53 wib.
[7] Interviewed with Former-Gafatar, at 27 Januari 2016
[8] Article 28 H paragraph (1) Constitution of 1945
[9] Munir Fuady, 2009, Teori Negara Hukum Modern (Rechtstaat), PT Refika Aditama, Bandung, hal. 3
[10] Franz Magnis Suseno, *Etika Politik, Prinsip-Prinsip Moral Dasar Kenegaraan Moderan*, (Jakarta : Gramedia, 1991), p. 316
[11] Bernard L. Tanya, dkk, *Teori Hukum Strategi Tertib Manusia Lintas Ruang Dan Generasi*, Yogyakarta : Genta Publising, 2010, p. 90
[12] Edi Suharto, Peta dan Dinamika Welfare State di Beberapa Negara: Pelajaran Apa Yang Bisa Dipetik Untuk Membangun Indonesia, Makalah Disampaikan Pada Seminar Mengkaji Ulang Relevansi Welfare State dan Terobosan Melalui Desentralisasi-Otonomi Di Indonesia, Institute For Research And Empowerment (IRE) Yogyakarta Dan Perkumpulan Prakarsa Jakarta, bertempat di Wiswa MM Universitas Gajah Mada, Yogyakarta, 25 juli 2006
[13] Satjipto Raharjo, *Hukum Progresif Sebuah Sintesa Hukum Indonesia*, (Yogyakarta : Genta Publising, 2009), p. 6
[14] R. Herlambang P. Wirataman, Akses Keadilan Bagi Korban Pelanggaran Hak Asasi Manusia Berat Pasca Putusan Mahkamah Konstitusi No. 006/PUU-IV/2006, Jurnal Rechts Vinding Vol.2. No. 2 Agustus 2013. p. 184
[15] Maria Farida Indrati S., S.H., M.H., *Ilmu Perundang Undanagan, Dasar-dasar dan Pembentukannya, (*Kanisius, Jakarta, 2002)
[16] *Ibid.,*
[17] BBC. http://www.bbc.com/indonesia/berita_indonesia/2016/07/160720_indonesia_putusan _ipt1965. Accessed on 23-10-2016 at 02.03 WIB

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