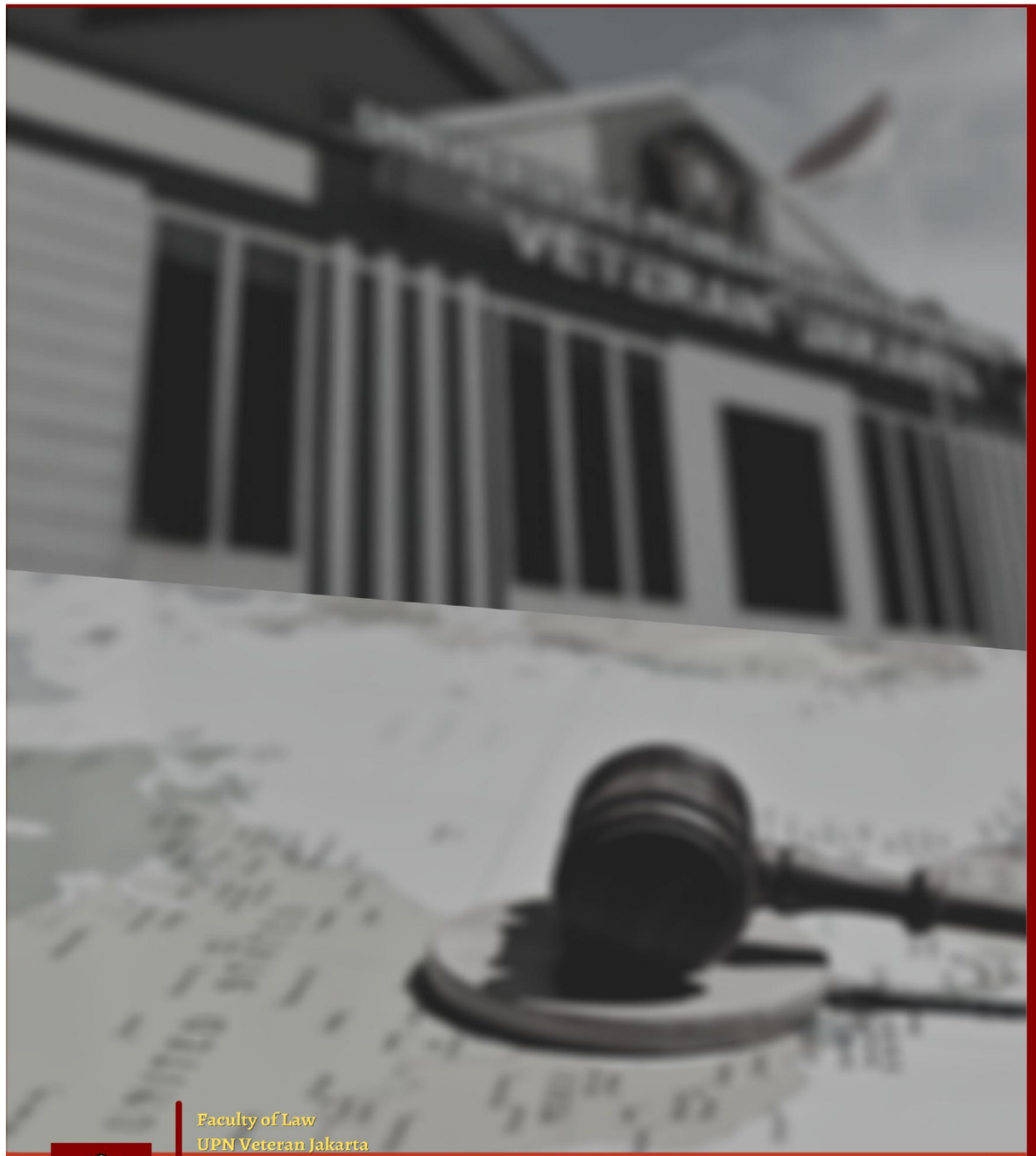

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1st INTERNATIONAL CONFERENCE ON LAW STUDIES

"LAW AND POLICY ON TRANSNATIONAL ISSUES"

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In collaboration with:

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PREFACE

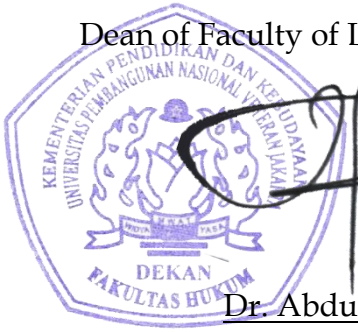
According to Global Initiative, transnational challenges can be easy to recognize but difficult to define. While some are driven by actors and facilitated by networks, such as cross-border crime and violent extremism, others are the result of social interactions or technological advancement, such as contagious diseases and cyber theft.

The general purpose of holding this international conference is to provide information related to policies and legal provisions on cross-border issues, besides this conference also aims to share ideas and experiences related to cross-border cases or issues. The specific objectives of carrying out this activity

1. As a medium for meetings and information exchange between resource persons and researchers/academics
2. As a means of socializing the level of understanding of the community / academics in dealing with cross-border problems.
3. Develop research networks and other collaborations in the field of law

The 1st International Conference on Law Studies (INCOLS) Seminar & Call Paper "Law & Policy on Transnational Issues" was organized by the Faculty of Law, Jakarta Veteran National Development University on November 19, 2020. This event was carried out thanks to the support and very cooperative cooperation between the committee. the event with the Faculty of Law, Jakarta Veteran National Development University as well as all participants and speakers who participated in the success of this event.

Dean of Faculty of Law UPN Veteran Jakarta



Dr. Abdul Halim, M.Ag
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Industry 5.0 and Legal Reasoning Reconstruction

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ABSTRACT

The main feature to be found in this study is a legal reasoning concept that is consistent with the 5.0 society that highly integrates cyberspace and physical space based on the princinple of Pancasila. The legal framework of positivism, in response to the legal vacuum and interactions of society 5.0, shows a lot of stagnation. This research used a case-based approach that examines the legal reasoning of judges for resolution of commercial disputes. Data used in this study were collected from secondary data, the Landmark decision of the Supreme Court in commercial disputes from 2017 to 2019 and academic studies of legal sciences. The findings of the study indicated fourth conclusions. First, The New legal paradigm in 5.0 society should break away from the conventional models where the legal structure plays a major role. Secondly, the value of the Pancasila judicial system requires a balance between deontic reasoning models and market-based models. Thirdly, on the capacity of legal subjects, the Supreme Court focused on the conventional governance with the concept of the deontic reasoning model. Fourthly, according to unfair business competition the Supreme Court used market-based approaches, this indicates that the 5.0 attributes have started to adopt in judicial reasoning system.

Keywords: *Industry 5.0, Legal Reasoning, Reconstruction*

1. Introduction

Society 5.0 is a response to the fundamental technological radical changes known today as Industry 4.0. Thus, Society 5.0 is the direct cause of a digital advancements that will greatly impact not only production but also all parts of today's life. Technological advances increase some fundamental philosophical and existential questions in legal system. (Základsník M., & Putnová, A, 2019). The members of the 5.0 society will also find their bodies, consciences, and routine experiences modified by the application of technological advances. One of the fundamental existential issues is the diversity of society 5.0, as it involves not only people from diverse cultures, but also cyber-physical people who are capable of entering into the social structure of the types of individuals previously unnamed in world society, such as autonomous automation and artificial intelligence. They are integrated into a coherent cyberspace "system" (Gladden M.E, 2019).

Members of 5.0 society are faced with dramatic changes from the digital revolution, existing governance models locating laws and regulations at the core face difficulties in keeping up with the speed of innovation. Consequentially, such governance models have caused problems where, on the one hand, regulation cannot control the new risks that innovation can bring about while, on the other hand, hindering the development of innovations. The G20 Member States supported this issue of awareness at the G20 summit in Osaka in June 2019. Besides, the G20 Ministerial Meeting on Trade and Digital Economy declared under the title "Governance Innovation" that member countries

would "strive for innovation-friendly policies and seek to remove barriers to innovation accordingly (Ministry of Economy, Trade and Industry of Japan, 2019).

These realities show that the legal framework model can no longer rely on the reasoning of legal positivism, as the legacy of the industrial 1.0 era has not focused on the relationship between humans and new legal entities, such as artificial intelligence and non-biological digital agents. (Compare with report from The European Economic and Social Committee, 2019). As a result, the artificial intelligence that pays attention to humanity will transform millions of data collected through the Internet into new wisdom in all areas of life if this transformation is directed at the importance of balancing economic achievement and solving social problems (Arief Budiman, 2019).

Pancasila as a philosophical basis for judicial reasoning contains many teachings about how human beings must interact with others, nature, and God in the life of society and the state. On the other hand, the process of modernization stimulates the development of science and technology and the phenomenon of the 5.0 society, so that dynamics and changes in society can take place quickly. In the context of practical guidance, the implementation of Pancasila should be adapted to the development of the national and cyberspace community. The Pancasila values should be continuously reconstructed to remain relevant as a problem solver and to be able to keep up with the times. The revitalization and reinterpretation of Pancasila as a judicial reasoning model should always be done in order not to become obsolete, so abandoned by its adherents (Mulyono, 2016).

Pancasila has to be an ideal paradigm of law because it is not only to be a filter but also to harmonize between global values and principles wisdom values which are believed to be the nation's way of life and ideology (Sunaryo, 2013). However, in the context of the discovery, the fifth industrial stage (5.0) calls for legal reasoning as a derivative of the Pancasila Legal Paradigm must be reconstructed within an appropriate space and time context. In other words, the solution of judicial problems in the industrial 5.0 era is no longer based on the relevant logic model of the industrial 1.0 era, because there is a new context that causes the existential transformation of worldview (Compare with Keraf and Dua, 2001: 154).

Focusing on the previous section-mentioned problems, the objectives of this research is to analyze whether the landmark decisions of the Supreme Court represent the characteristics of the 5.0 society. The findings will be followed up as information to rebuild the concept of industrial community-based 5.0 society. The research therefore focuses on two concerns: first, whether the landmark decisions of the Supreme Court reflect the scientific response to 5.0 society. Second, how to reconstruct the legal rationale based on the values of Pancasila in 5.0 society.

2. Methods

Doctrinal perspective is the framework used in this research. Theoretically, the objective of the doctrinal framework is to determine the basic philosophy of legal practice, which is the field of study on the decisions of the Supreme Court purposively. (Wingjosoebroto, 2020: 148). To analyze the data, the author uses a casuistic-conceptual approach as an effort to explore the purposively selected legal considerations of the Supreme Court for further conceptualization and generalization to forming a relevant case law address research issues. (Ani Purwati, 2020: 86).

Two landmark decisions are used as data to be reviewed based on the topic. First, the capital market dispute; second, the agreement of the members of the company (persero); third, unfair competition in the business sector. The two decision data will be analyzed using the theory of legal reasoning as the domain of applied theory to determine the suitability between the context of the discovery and the context of the justification of the legal considerations.

3. Results and Discussions

Whether or not we realize it, Indonesia has become part of Society 5.0. Therefore technological advancement on our country has a significant impact on the behavior of the Economic Community. As of March 2019, there were 30 million people in Indonesia who became actors in e-commerce, there are 13,485 e-commerce businesses, value of internet sales revenue was 17.21 trillion, with a total of 24.82 million online sales transactions. In the 5.0 community, the economic community 's behavior through e-commerce in Indonesia was very dominant because people expect ease to meet their needs (BPS-Statistics Indonesia, 2019: 15-17).

Exploratory, study in legal reasoning models investigates formal and information processing theories of how legal experts analyze problems, make justifications and discoveries or decisions. However, the view of most researchers that the essence of legal reasoning is its open-textured and indeterminate nature (C.D Hafner, 2001). On the other hand, the problem of the legal capacity to control new risks and hinder the development of innovation will be resolved through the contextualization of the law through legal reasoning. Legal contextualization through legal reasoning follows two aspects, namely discovery and justification.

Most traditional legal theories have problems dealing with reality, especially also in digitalization society. Formalists, like Hans Kelsen, are arguing for an autonomous position of law in the context of society. Legal realists challenge Kelsenian 's claim and deny the separate and autonomous position of law from its social and, in particular, political context, in example the law mirrors and reflects society (Husa & Husa, 2014).

The strength contest between the opposing systems referred to above will be evaluated on the basis of the characteristics of the findings and their respective justifications. Based on the explanation above, there is a need for a theoretical framework to respond to the problem statement in this research.

1. Shifting Paradigm of Law in 5.0 Society.

The reconstruction of the legal reasoning can not be separated from the context. This means the characteristics of the 5.0 society function as a guiding model as well as a test tool to determine whether the legal reasoning applied is consistent with the 5.0 industrial.

The relationship between the government, community and company can be seen in attempt to discover out all the characteristics of the 5.0 society. On general perspective, each governance process, such as rule making, monitoring and enforcement, ensures the active involvement of businesses that design and implement cyber-physical architectures, as well as the communities and individuals that use them (Ministry of Economy, Trade and Industry of Japan, 2019: 3).

Under this governance model, the roles of governments , businesses, communities and individuals are expected to change in the following ways. The government will act as a facilitator of multi-stakeholder governance rather than as the sole provider of rules. For

monitoring and enforcement purposes, the government will provide incentives for businesses, communities and individuals to participate proactively in these governance processes. (Japan Ministry of Economy , Trade and Industry, 2019: 4).

Businesses will become active designers of the rules through self-regulation and architecture rather than passive followers of the regulations. They are expected to play a leading role in ensuring trust in new technologies or business models through an external explanation of their rules and architecture. (Japan Ministry of Economy , Trade and Industry, 2019: 3). Communities and individuals can play an active role in bringing their values and assessments to society rather than being left with insufficient information as weak entities. These activities may be empowered by the appropriate design and enforcement of the rules on disclosure and competition. (Japan Ministry of Economy , Trade and Industry, 2019: 4).

2. Legal Reasoning of The Supreme Court Legal for the Settlement of Business Disputes

Landmark decisions are important decisions that constitute new problems as a reference to how well the legal reasoning of the Supreme Court reflects the legal findings of the 5.0 context of industrial society. Each full discussion will be presented as follows:

a. Settlement of Dispute: PT. Insight Invesment vs PT. Bank Global Internasional

This case is a civil lawsuit on the capital market between PT. Bank Global Internasional TBK (in liquidation) vs. PT. Investments Insight Settlement Decision of Dispute between PT. Insight Invesment vs PT. Bank Global Internasional, Tbk. In that case, PT. Insight Investments, et al (The Plaintiffs) contend that PT. Bank Global, Tbk, et al (Defendants) committed illegal acts because they contained false and misleading information about the material facts, shortly after the public offering of subordinated bonds PT. Bank Global tbk (Defendant) in 2003, causing losses to the Plaintiffs as buyers/bondholders.

The Central Jakarta District Court, which was upheld by the Jakarta High Court, granted the lawsuit and stated that the Defenders had committed an illegal act, and then sentenced the Defenders to pay some compensation to the Plaintiffs, ranging from 1 billion to 3 billion rupiah. The Supreme Court held that the judex facti decision was incorrect because, following the explanation of Article 51 (2), 1995 of the Capital Markets Act and the RUPOB, the parties had the right to act on behalf of and for the benefit of bondholders, including but not limited to the right to receive debt payments, the principal and the interest are the trustees both inside and outside the court (Mahkamah Agung R.I, 2017: 27-28).

Where the core reasoning of the Supreme Court Decision above linked to the characteristics of 5.0 society, it can be concluded that its discovery context refers to the capital market, and justification context refers to the capital market explanation of Article 51(2) of 1995. In terms of context, these considerations do not represent legal findings based on 5.0 society, referring to the main building in the 5.0 society which recognizes the parties in the capital market as the main actors.

In addition, the Supreme Court's considerations do not reflect the 5.0 society model of community legal reasoning for several reasons. *First*, the verdict is still based on rules that specify detailed behavioral responsibilities rather than goal-based regulation. When purchasing subordinated bonds, it can not be separated from the contents of the agreement between the two parties. Not only should the legislation, but also the agreement. Therefore, if the trustee is given the authority to act for and on behalf of

investors or creditors, the Supreme Court must consider it. *Second*, since the aggrieved party can not have access to their loss in real time, neglecting this fact is a weakness in this legal consideration. Third, dependency on the revision of the legislation has delayed the improvement of the structure and substance of the legislation.

Each two research findings are consistent with Pancasila's legal reasoning, which provides an equal and balanced opportunity for the parties to conclude the agreement in good faith. The legal character of Pancasila that stands out is Nurturing. Its implementation in the law order is characterized by its responsiveness to the development and aspirations of the expectations of the community. In other words, the aim of the law is to create humane social conditions, enabling social processes to take place naturally. Thus, in a fair world, every man has ample opportunity to develop all the potential (physical and spiritual) of humanity as a whole. By and with the law, individuals or communities can live a decent and dignified life (Yusuf, 2017).

b. Settlement of Dispute: KPPU (Commission is the only institution dealing with competition law in Indonesia) vs PT Hariara et.al

This case is an objection against the verdict of the Southern Jakarta District Court were rejected the decision of the KPPU. In essence, KPPU 's decision stated that the defendants had engaged in unfair competition in the form of a conspiracy in the tendering process (Article 22 of Law No. 5 of 1999 on the prohibition of monopoly and unfair competition in the business sector).

At the cassation level, the Supreme Court has stated that the application of the law is correct. The plaintiffs were shown to be conspiring vertically and horizontally. The evidence can be seen from the similarity in the bidding documents of three Plaintiffs I, all of whom upload documents from the same IP address. Where the Supreme Court legal considerations linked to the characteristics of society 5.0, discovery context is unfair competition and the justification context for Article 22 of Act No. 5 of 1999 on the prohibition of monopoly practices and unfair competition.

There are three aspects for the legal considerations referred to above. First of all, this decision reflects the self-regulation required by business actors to ensure that the management of fair competition data is properly managed and implemented. Self regulation contributes to the goal of discouraging conduct contrary to good faith or good practices in conjunction with codes of conduct that have been approved in the field related (Lopez, 2016). Second, the verdict of Supreme Court function to enforce laws in accordance with the social impacts of corporate conduct. There are three aspects to the analysis of the legal considerations referred to above. Third, the identification of IP addresses as a basis for proof is an acknowledgement of the factual information in 5.0 society.

3. Legal Reasoning Reconstruction

In the context of reason-based l\ogic, rules are treated as 'logic individuals' with a conditional structure, i.e. a condition part and a conclusion part. In principle, if the conditions of the rules are completely comfortable, their conclusions shall be drawn (Ana Dimiškovska, 2013). Therefore, the context of the discovery serves to explain the conditions that must be met and the context of the justification determines the suitability of the facts to the conditions required.

On the basis of the decisions of the Supreme Court referred to above, we can see a number of concepts as the basis for the reconstruction of legal reasoning in Indonesia,

where it, on the one hand, recognizes the characteristics of society 5.0 but, on the other hand, maintains the moral principles of Pancasila.

First, in the contex of legal interpretation, the Judges must be shift from rule-based reasoning to goal-based model that specify values to be achieved at the end, in order to overcome the problem of laws not being able to accommodate the speed and complexity of society. *Second*, Legal reasoning scope non only based on the conventional approach, because there are a number of unlawful behaviour that can be traced using digital tracks.

Secondly, the value of the Pancasila judicial system requires a balance between deontic reasoning models and market-based models. The legal character of Pancasila that stands out is Nurturing. Its implementation in the law order is characterized by its responsiveness to the development and aspirations of the expectations of the community.

Thirdly, Self regulation required by business actors to ensure that the management of fair competition data is properly managed and implemented. The verdict of Supreme Court function to enforce laws in accordance with the social impacts of corporate conduct. The identification of IP addresses as a basis for proof is an acknowledgement of the factual information in 5.0 society.

4. Conclusion

According to explanations referred to above, the conclusion in this research \indicated fourth conclusions. *First*, the New legal paradigm in 5.0 society should break away from the conventional models where the legal structure plays a major role. *Secondly*, the value of the Pancasila judicial system requires a balance between deontic reasoning models and market-based models. *Thirdly*, on the capacity of legal subjects, the Supreme Court focused on the conventional governance with the concept of the deontic reasoning model. *Fourthly*, according to unfair business competition the Supreme Court used market-based approaches, this indicates that the 5.0 attributes have started to adopt in judicial reasoning system.

References

Anderson, B. (1996). Legal Reasoning in A New Context. *"Discovery" in Legal Decision-Making Law and Philosophy Library,* 143-170. doi:10.1007/978-94-017-0554-7_8

Badan Pusat Statistik, (. (2019). *Statistik E-Commerce Indonesiat tahun 2019*. Jakarta, Indonesia: Badan Pusat Statistik R.I.

Budiman, A. (2019, February 11). Industri 4.0 vs Society 5.0. Retrieved November 10, 2020, from https://ft.ugm.ac.id/kolom-pakar-industri-4-0-vs-society-5-0/

Dimiškovska, A. (2013). (Dia)logical Reconstruction of Legal Justification. Retrieved November 12, 2020, from https://journals.openedition.org/revus/pdf/2463

Dimiškovska, A. (2013). (Dia)logical Reconstruction of Legal Justification. *Revus,* (19), 155-178. doi:10.4000/revus.2463.

The European Economic and Social Committee, (. (2019, May 07). Industry 5.0 will bring about a new paradigm of cooperation between humans and machines. Retrieved November 10, 2020, from https://www.eesc.europa.eu/en/news-

media/news/industry-50-will-bring-about-new-paradigm-cooperation-between-humans-and-machines.

Gladden, M. E. (2019). Who Will Be the Members of Society 5.0? Towards an Anthropology of Technologically Posthumanized Future Societies. *Social Sciences, 8*(5), 148. doi:10.3390/socsci8050148.

Hafner, C. (2001). Legal Reasoning. Retrieved November 11, 2020, from https://www.sciencedirect.com/topics/computer-science/legal-reasoning.

Hafner, C. (2001). Legal Reasoning. Retrieved November 12, 2020, from https://www.sciencedirect.com/topics/computer-science/legal-reasoning.

Husa, A., & Husa, J. (2014, September 2). Law and Context. Retrieved November 12, 2020, from http://paulscholten.eu/research/article/law-and-context/.

Keraf, A. S., & Dua, M. (2001). *Ilmu pengetahuan: Sebuah tinjauan filosofis*. Yogyakarta: Penerbit Kanisius.

Kordig, C. R. (1978). Discovery and Justification. *Philosophy of Science, 45*(1), 110-117. doi:10.1086/288782.

Lopez Jiménez, D. (2016). The Self-Regulation of Electronic Commerce: An Appraisal in Accordance to the Chilean Law of Unfair Competition. Retrieved November 12, 2020, from https://www.researchgate.net/publication/306147774_The_Self-Regulation_of_Electronic_Commerce_An_Appraisal_in_Accordance_to_the_Chilean_Law_of_Unfair_Competition.

Mahkamah Agung R.I, M. (2017). Landmark Decision 2017 - Mahkamah Agung. Retrieved November 12, 2020, from https://bldk.mahkamahagung.go.id/puslitbang-hukum-dan-peradilan/landmark-decisions/item/112-landmark-decision-2017.

Mahkamah Agung R.I, M. (2019). Landmark Decision 2019 Perdata EN - bldk.mahkamahagung.go.id. Retrieved November 12, 2020, from https://bldk.mahkamahagung.go.id/id/component/k2/item/128-landmark-decision-2019-perdata-en.

Medina-Borja Alexandra. (2017). Future Services & Societal Systems in Society 5.0. In *Future Services & Societal Systems in Society 5.0.* (pp. 39-235). Japan, Japan: Japan Science and Technology Agency.

Ministry of Economy, Trade and Industry of Japan, M. (2019). Summary of Givernance Innovation: Redesigning Law and Architecture for Society 5.0. Retrieved November 10, 2020, from https://www.meti.go.jp/english/press/2020/0713_001.html.

Mulyono, M. (2016). Pancasila Sebagai Orthodoksi Dan Orthopraksis Dalam Kehidupan Berbangsa Dan Bernegara. *Humanika, 23*, (2), 40-48. doi:. https://e-resources.perpusnas.go.id:2108/10.14710/humanika.v23i2.13644.

Scharffs, B. (2015, June 05). The Character of Legal Reasoning. Retrieved November 11, 2020, from https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2614136.

Sousa Santos, B. (2001). Economic Law. Retrieved November 12, 2020, from https://www.sciencedirect.com/topics/economics-econometrics-and-finance/economic-law.

Sunaryo, S. (2013). Globalisasi dan Pluralisme Hukum dalam Pembangunan Sistem Hukum Pancasila. Retrieved November 10, 2020, from https://ejournal.undip.ac.id/index.php/mmh/article/download/13131/9955.

Wingjosoebroto, S. (2010, August 18). Mengkaji dan Meneliti Hukum Dalam Konsepnya Sebagai Realitas Sosial. Retrieved November 11, 2020, from https://soetandyo.wordpress.com/2010/08/19/mengkaji-dan-meneliti-hukum-dalam-konsepnya-sebagai-realitas-sosial/.

Yusuf, A. W. (2017, November 20). The Legal Nature of Pancasila. Retrieved November 12, 2020, from https://unpar.ac.id/the-legal-nature-of-pancasila/?lang=en.

Základsník,, M., & Putnová, A. (2019, August 26). Digital Society – Opportunity Or Threat? Case Studies Retrieved November 10, 2020, from https://acta.mendelu.cz/media/pdf/actaun_2019067041085.pdf.

Force Majeur as a reason for default in the authentic deed during the covid 19 period

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ABSTRACT

Authentic Deed is an agreement that contains rights and obligations between the parties in the agreement where the agreement has perfect legal force and can be used as perfect evidence in court. During the Covid 19 pandemic, many people or business entities that made agreements in authentic deeds found it difficult to fulfill their obligations and were even unable to continue their obligations to other parties in authentic deeds. This raises the issue of default in the authentic deed caused by the Covid 19 epidemic. This study uses normative juridical analysis with qualitative data to answer questions to what extent Covid 19 is used as a reason for force majeure on the issue of default on authentic deeds. The results of this study found that the Covid 19 epidemic turned out to have a tremendous impact on the business and economy of the community and the country which had implications for not fulfilling agreements in authentic deeds. Force Majeure is a reason for protection for parties who are unable to perform but not absolutely because in some conditions the Covid pandemic cannot be used as an excuse for force majeure. The conclusion in this study needs clear proof whether the legal event in the business is an event that is really affected by the Covid 19 pandemic or not which is only used as an excuse to be released from civil cases due to default.

Keywords: *Force Majeure, Wanprestasi, Agreement Authentic, Pendemi Covid 19*

1. Introduction

Authentic Deed is a binding agreement between one party and another which is strong and can be used as perfect evidence in court. A business transaction requires an agreement to be binding between one party and another so that an agreement is used that the agreement can be made by a notary so that it is authentic and the strength of the agreement is not in doubt so that authentic deeds are often used in business agreements.

In recent months there has been a big change in business in Indonesia and globally in general due to the Covid 19 pandemic, where almost all business sectors have been affected by Covid 19. Covid 19 is a virus outbreak that originated in Wuhan, China, which has caused it to go home. millions of people have died in the world even though many have recovered from this disease. Various government policies in the world to prevent the development of victims from the Covid 19 epidemic, such as closing transportation access to and from abroad to the imposition of Lock Down and PSBB in Indonesia[1], Businesses concerning the agreements contained in the agreement are affected by the Covid 19 pandemic, including those that have been stated in an authentic agreement. An authentic agreement, which is an agreement that has perfect legal force based on law,

[1] Rachmat S.S. Soemadipradja. Penjelasan Hukum tentang Keadaan Memaksa. Gramedia Jakarta 2010. Hal. 32.

certainly cannot be canceled from only one party. During the Covid 19 pandemic, many business transactions contained in authentic deeds could not be continued due to the inability to continue the achievements in the agreement which resulted in default by one party to the other party in the agreement.

Force Majeure is the prima donna reason to be released from claims against parties who feel aggrieved because of the default on the authentic deed. Force Majeure is a situation beyond expectations because it cannot be predicted when, how and what happened so that it is unable to anticipate the occurrence of the event. The Force Majeur reason is a forgiving reason that can avoid demands from parties who feel disadvantaged as a result of the covid 19 pandemic. Legal events in the authentic agreement cannot take place or occur because of the Covid 19 pandemic.

Force Majeure is an excuse to avoid claims from the aggrieved party in an event of default in an agreement, especially an authentic agreement. Is the Covid 19 pandemic event an absolute or full event that causes default in the authentic deed due to Force Majeure or a national disaster that has been regulated in Presidential Decree No. 12 of 2020 concerning the determination of non-natural disasters for the spread of Corona Virus Disease 2019 (Covid19) as a national disaster.

2. Research Methods

This article uses a normative method with qualitative analysis.

3. Results and Discussion

A coercive condition is a condition that cannot be predicted in advance so that a legal event that has been previously agreed upon cannot or cannot be carried out properly. The term used to refer to force majeure / overmacht is a state of force even though legal experts and academics have made the terminology in a coercive state, in the discussion they still use the term overmacht.

The definition of overmacht in detail, not directly explained, but gives an understanding of overmacht, based on two teachings about overmacht, namely the old teaching called Overmacht Objective and a new teaching, namely Overmacht Subjective. The meaning of objective Overmacht is that it is absolutely impossible for everyone to fulfill the verbintenis (engagement). Kusumadi is referred to as Impossibility, while subjective Overmacht is the unfulfilled verbintenis due to "difficult" factors (which is the opposite of impossibility).

From the provisions regarding force majeure in the Civil Code, it can be seen that a force majeure or overmacht is a situation that is unexpected, unintentional, and cannot be accounted for to the debtor as well as forcing, in the sense that the debtor is forced to not keep his promise. Based on the causes of forcemajeure / Overmacht due to natural conditions, namely a forceful situation caused by a natural event that everyone cannot predict and avoid because it is natural without an element of intent, for example floods, landslides, earthquakes, storms, volcanoes, etc. Overmacht due to an emergency, namely a coercive situation caused by an unreasonable situation or condition, a special situation that is immediate and short-lived, unpredictable, for example wars, blockades, strikes,

epidemics, terrorism, explosions, mass riots, including in which there is damage to a tool which causes an engagement to not be fulfilled. ("Study of Force Majeure According to Article 1244 and Article 1245 Civil Law Book," 2016")

The non-fulfillment of the agreement can be due to 2 (two) things, namely default and force majeure. Both default and force majeure resulted in the agreement not being carried out as required.[2]. Default caused by a certain force majeure is different from default caused without force majeure. Default caused by force majeure can be released from sanctions or lawsuits for an act or action of not performing the achievement.

This can happen with an authentic deed that has perfect strength as evidence in court. Authentic deeds have stronger legal force than underhand agreements, warmerking and legalization. In the authentic deed, the parties make legal promises because of the nature of the agreement, a constitutive deed where the deed becomes law and becomes law for the parties therein.

Default caused by force majeure in an authentic deed must be ascertained in advance whether the person in the deed is a party or debtor and creditor or not in article 1244 of the Civil Code, the debtor has the right to be released from the creditor's lawsuit based on compelling circumstances must have good faith. The state of force is spread out in articles 1244 - 1245, namely: Article 1244[3] of the Civil Code states, the debtor must be punished to compensate costs, losses and interest if he cannot prove that the contract was not carried out or the timing of the agreement was not carried out due to an unexpected thing, which could not be borne by him even though there was no bad faith to him. Article 1245 of the Civil Code states, there is no compensation for costs, losses and interest if due to coercive circumstances or because of something that happens by chance, the debtor is prevented from giving or doing something that is required or doing something that is prohibited for him.

Based on these provisions, it can be concluded that the main factors causing force majeure are: There are unexpected events, obstacles that make an achievement impossible; the inability is caused by the debtor's error; The inability cannot impose a risk on the creditor. Judging from the legal consequences, there are two types of force majeure, namely: absolute force majeure and relative force majeure[4]. The state of imposing absolute or a condition that is still in nature is a condition where the obligation cannot be fully carried out, for example because objects are destroyed and due to natural disasters, while this relative force only suspends the parties' obligations to carry out achievements in an authentic deed, it can still be done if the covid pandemic condition 19 has been declared safe as stated from the place where the virus originated, namely that Wuhan is safe. Although in Indonesia it cannot be categorized as safe, it does not mean that in the future conditions in Indonesia will be safe from the Covid 19 epidemic.

There are at least 3 criteria to test for enforceable state clauses to be applied. First, the event must be beyond the control of the parties, the parties' ability to carry out contractual obligations is not fulfilled as a result of the event, the parties have taken all possible steps to avoid the consequences of the event. If the party in the authentic deed

[2] Sufiarina & Wahyuni, S. Force majeure dan notoir fiten atas kebijakan PSBB COVID 19. Jurnal hukum sasana
[3] Pasal 1244 KUHPerdata
[4] Subekti, Pokok Pokok hukum Perdata, hal 154

can prove that he or she has met the three elements of the criteria, the party can avoid a civil suit for default[5].

Certain legal events or conditions may not be categorized as force majeure if the elements in the force majeure are not met. The impact of the pandemic could have an impact and not have an impact on an obligation in achievement. Have the parties tried their best to avoid the consequences of the Covid 19 epidemic against the obligations in the authentic deed or not.

In the explanation above, given the condition of the Covid 19 epidemic in several countries such as the city of Wuhan, China is safe from the Covid 19 pandemic, this force majeure can be categorized as a relative force majeure. For this reason, this relative coercive situation only suspends the parties' obligations to carry out achievements or carry out contractual obligations that can still be done and if the forced circumstances no longer apply or conditions in Indonesia have disappeared from the Covid 19 virus outbreak, the obligations in the authentic deed must be carried out back.

Conclusion

For this reason, it is necessary to be careful in responding to incidents of coercion in an authentic deed whose contents have rights and obligations between the parties in the authentic deed. The parties must be kept away from bad ethics that always take advantage of the Covid 19 pandemic for reasons that are actually true, the parties can still fulfill the obligations of the contents of the authentic deed agreement.

Good faith is highly expected in this force majeure event considering that the Covid 19 pandemic is a relative force forward because the reason this pandemic event is not an eternal event considering the facts in other countries that are starting to clear of the Covid 19 virus cases. Thus the failure to fulfill these achievements is only temporary and to see when the Covid 19 epidemic ends so that the achievements in the authentic deed can be resumed in accordance with the contents of the agreement in the authentic deed as a form of fulfilling the achievements

References

Kitab Undang-Undang Hukum Perdata

Sufiarina, & Wahyuni, S. (2020). Force majeure dan notoir feiten atas kebijakan PSBB COVID-19. *Jurnal Hukum Sasana*.

Subekti, Pokok Pokok Hukum Perdata, hal 154

Bismar Nasution, www.bismarnasution.com , bencana nasional covid 19 (bukan) keadaan memaksa

[5] Bismar Nasution, www.bismarnasution.com, bencana nasional covid 19 (bukan) keadaan memaksa.

LEGAL DYNAMICS OF NOTARY PUBLIC APPOINTMENT IN INDONESIA

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ABSTRACT

The development of Notary Public appointments in Indonesia began with the enactment of Reglement op het Notarisambt in Indonesie 1860, Notary Position Law 2004, and Notary Position Law 2014. Notary Public as Openbare Ambtenaren get the trust from the public to make perfect evidence. Increasing the requirements to be appointed as a Notary Public is a form of guidance and supervision of this position of trust. This research examines the dynamics of the appointment of a Notary Public from time to time with legal issues: How the development of Notary Public appointment? and What is State responsibility in the appointment of a profesional notary public? The method used is a normative juridical research method that examines legal principles using secondary data. While the data analysis method used is qualitative methods and the data collection tool used is document study. The result of this research is that there is an increase in requirements and standard of Notary Public appointment that strictly and honestly. State responsibility is to appoint trusted public officials by conducting training, coaching, supervision, and enforcing law for Notary Public candidate and Notary Public Organization.
Keywords: *Notary Public, Appointment, Openbare Ambtenaren.*

1. Introduction

Notary as a public official (*openbare ambtenaren*) is a person who with certain conditions obtains the authority from the state attributively to carry out some of the public functions of the state, especially in the field of civil law to make authentic evidence(Selenggang, 2017). This authentic evidence is authentic deeds that has perfect proving power based on article 1868 of Indonesia Civil Code.

Notary is one of the oldest professions in the world. According to Fauzie Yusuf Hasibuan(Fauzie Yusuf Hasibuan, 2020), the existence of a notary in ancient times can be seen from the existence of a statue that was on the side of the king of pharaohs in Egypt sitting while writing. So the notary profession has existed since about 5000 years ago, long before the lawyer profession was born.

Notary as a profession in the legal field is similar to other legal professions, for example a lawyer who is an *officium nobile*. Notary is an honorable position because he is a public servant in the field of civilization and assets. Through the notary service, the public will get perfect evidence in meeting their business needs. This perfect evidence is an authentic deed that distinguishes a notary from other professions.

As special as a notary position is, someone who will be appointed as a Notary Public must meet certain requirements. The requirements for the appointment of public notaries from time to time experience dynamics and changes due to changes in regulations, changing times, changes in the political situation, and needs in the notary

field itself. Political policy cannot be separated from the appointment of a Notary because political policy plays an important role in enacting the applicable law in Indonesia as *Rechtstaat*. Considering the concept of Constitutional State, it must be a commander in all aspects of life.(Sari et al., 2020)

Indonesia as a rule of law as mandated by Article 1 paragraph (3) of the Constitution recognizes a hierarchy of statutory regulations. Legal policy in the field of notaries can't be separated from the existence of these laws and regulations. In addition, professional organizations also have the authority to determine the technical mechanism for the appointment of a notary as a professional organization as a forum and institution for guidance and supervision for a Notary Public. So that the appointment of notaries applies two types of law, namely state law and organizational law. Regulation of the Minister of Law and Human Rights (hereinafter referred to as Permenkumham) is also categorized as state law.

Each level of government as the maker of laws and regulations has different ratios and legal reasoning in determining the notary appointment policy. This is because among them are held by different people with different characters. Legislation should be harmonious and consistent, but sometimes it is not the case. Technical regulations sometimes do not comply with the regulations above.

From the explanation and background above, it is necessary to have a juridical study using the Statute Approach. The legal issues that will be analyzed in this research are the first, how is the development of the appointment of public notaries in Indonesia? Second, what is the state's responsibility in the appointment of a notary? So there needs to be a juridical study which takes the topic "LEGAL DYNAMICS OF NOTARY PUBLIC APPOINTMENT IN INDONESIA".

2. Materials and Methods

The form of this research is juridical normative, namely by examining written legal norms directly on the subject matter which is the subject of this research.(Soerjono Soekanto, 1986) The data used in this study, namely secondary data which is not obtained directly from the field but through the process of searching for library materials, and in the form of secondary legal material in the form of theories taken from various literature works, the 1945 Constitution of the Republic of Indonesia and statutory regulations.

Researchers used data collection tools in the form of document studies and theories and existing regulations. The data analysis method used in processing the data related to this research is a qualitative method because data processing is not done by measuring the secondary data related to it, but analyzing the data descriptively. In a qualitative approach, research procedures produce descriptive analytical data.

3. Results and Discussion

As a profession, the appointment of a Notary is not done carelessly and to easy. Appointment must be based on law which of course, considering that Indonesia is a *rechtstaat* mandated by the constitution. The appointment of Public Notaries from time to time has experienced changes and increasing difficulties. The requirements to be promoted as Notary are cumulative, which means that all the requirements must be met, if not fulfilled, then someone cannot be appointed as Notary Public.

The requirements for the appointment of a Notary who will determine not to stand alone because the Notary candidate is burdened with two things. First, he must first take care of the terms of appointment as dictated by laws and regulations of the minister of law and human rights. Secondly he must also be literate of appointment documents. The law recognizes the existence of the principle of *Lex specialis derogat legi generali*, which means that a special rule (*lex specialis*) will override general laws (*lex generalis*). In that, with the aspects of appointment, also, namely regulations based on the Minister of Law and Human Rights regulations will be implemented by policy taker as implementing regulations. The Ministerial Regulation contains the technical provisions and implementing provisions of the above regulations.

Staatsblad 1860 Number 3 concerning Regulation of Notary Position

Initially, the appointment of a Notary in Indonesia was regulated in *Reglement op Het Notary-Ambt in Indonesia* Staatsblad 1860 Number 3 concerning Regulation of Notary Position (hereinafter referred to as PJN 1860). According to Article 1 PJN 1860, the definition of a notary is as follows:(Tobing, 1983)

"*De Notarissen zijn openbare ambtenaren, uitsluitend bevoegd, om authentieke akten op te maken wegens alle handelingen, overeenkomsten en beschikkingen, waarvan eene algemeene verordening gebiedt of de belanghebbenden enerchlangen, dat bij authentiek geschekkingen daarvan grossen, afschrif akten en uittreksels uit te geven; All this can be done dier akten door and algemene verordening there and there is ambtenaren of opgedragen character from voorbehouden is*. "

Notary is a public official who is the only one who makes an authentic deed regarding all actions, agreements and stipulations required by a general rule or by an interested party to be stated in an authentic deed, guarantees the certainty of the date, keeps the deed and gives grosse, and all along making a general rule of law is not assigned or excluded to officials or other people.

From the regulation of Article 1 above, it appears that the Notary Public has a special character that is not owned by other positions. This special character is a notary, a public official who makes legal products in the form of authentic deeds. The term general official is not found in any position or profession. We see, for example, government officials, judges, prosecutors, police, and heads of services all bearing the title of civil servants. If these civil servants have the rank and position of an institution leader, they can be said to be state officials, not public officials.

Furthermore, the requirements for the appointment of a Notary based on Article 8 paragraph (1) of the Decree of the Minister of Justice and Human Rights Number M-01.HT.03.01 of 2003 concerning Notary are regulated as follows:

a. Indonesian citizens;
b. Believe in God Almighty;
c. Faithful to Pancasila and the 1945 Constitution;
d. A certificate of good behavior from the Indonesian National Police;
e. Graduated from specialist notarial education or notarial master degree held by state universities;
f. Has attended the minister of law and human rights technical training;
g. At least 25 (twenty) years old;
h. Physically and mentally healthy.

In the past, only a few campuses or universities opened notary programs so the requirement to be appointed as a Notary was someone with an M.Kn degree from a state

campus (*PTN* in Indonesian). Still under the same regulation, a Notary Candidate must attach the appointment documents, which are as follows:

a. copy of notarial specialist education certificate or notarial master degree;
b. copy of the certificate of having attended technical training approved by a notary;
c. copy of identity card;
d. copy of birth certificate;
e. copy of marriage certificate;
f. copy of taxpayer identification number;
g. copy of the certificate of passing the code of ethics examination;
h. copy of code of ethics examination certificate;
i. a statement that does not hold concurrent positions;
j. a statement from a notary that has participated in an internship at the notary's office for 2 (two) consecutive years after graduating from notary specialist education or master notary legalized by the local Notary professional organization;
k. certificate of good behavior from the local police;
l. health certificate from a government doctor;
m. stamped statement letter willing to be placed in all parts of Indonesia;
n. stamped statement letter willing to be appointed to accommodate other Notary protoko1;
o. self photo; and
p. Curriculum Vitae.

Law Number 30 of 2004 concerning the Position of Notary Public (hereinafter referred to as UUJN 2004)

The appointment of a notary in 2004 is subject to the provisions of Law Number 30 of 2004 concerning the Position of Notary Public. This law was passed on October 6th 2004 and revoked the validity of the provisions for the appointment of the old Notary as stipulated in the PJN 1860. So after approximately 59 years of independence for Indonesia, the original law made by the Indonesian nation was born. which regulates the Notary.

Based on Article 1 number 1 UUJN 2004, Notary is a public official who has the authority to make authentic deeds and other powers as referred to in this Law. The provisions of this Article indicate that the legislators still adopt one of the old definition elements contained in PJN 1860 with the term *openbare ambtenaren*.

The requirements for the appointment of a Notary according to Article 3 UUJN 2004 are as follows:

a. Indonesian citizens;
b. Believe in God Almighty;
c. at least 27 (twenty seven) years old;
d. physically and mentally healthy;
e. holds a bachelor law degree and has a master degree in notary;
f. has undergone an internship or has actually worked as a Notary employee within 12 (twelve) consecutive months at the Notary's office; and
g. not having the concurrent position.

UUJN 2004 mandates seven requirements to become a notary which according to the author, these conditions have two characteristics. First, the general requirements, namely letters a, b, and d, apply to general professions or the majority of jobs. Meanwhile, the other letter requirements, namely c, e, f, and g, are special requirements because they are attached and closely related to a notary public.

Another different provision is that a Notary is at least 27 years old and it is not determined that he or she comes from a public or private university. As long as the candidate notary public has obtained the M.Kn title, he / she has met the requirements letter e. This additional age is indeed a polemic, on the other hand, it is a progression for the world of notary.

2006

Based on Article 2 paragraph (1) Regulation of the Minister of Law and Human Rights of the Republic of Indonesia Number: M.01.HT.03.01 of 2006 concerning the Requirements and Procedures for the Appointment, Transfer and Dismissal of Notaries (hereinafter referred to as Permenkumham 2006), the requirements for the appointment of a Notary are as follows:

a. Indonesian citizens;
b. Believe in God Almighty;
c. loyal to Pancasila and the Constitution;
d. certificate of physical and mental health;
e. having a law degree and graduate from the bachelor's level notary or notarial Specialist education graduate;
f. be at least 27 (twenty seven) years old;
g. has attended technical training for notary candidates held by Menkumham;
h. has undergone an apprenticeship or worked for 12 (twelve) consecutive months at a Notary office;
i. certificate of never being involved in a crime from the Indonesian National Police;
j. apply for appointment as a Notary;
k. no concurrent positions.

Furthermore, in Article 2 paragraph (2) there are requirements for appointment documents that must be submitted by prospective notaries, namely:

a. Copy of Identity Card;
b. Copy of marriage book or marriage certificate;
c. Copy of certificate of law undergraduate education and Notarial Specialist education or a photocopy of certificate of law and master degree legalized by the issuing university;
d. A copy of the technical training certificate for the candidate Notary Public which is legalized by the Menkumham;
e. Copy of birth certificate;
f. Copy of code of conduct certificate;
g. Copy of certificate of internship or work in a notary office for 12 (twelve) months;
h. original certificate of local police record;
i. original certificate of physical and mental health;
j. original stamped statement does not hold concurrent positions;
k. original stamped statement of the applicant willing to be placed in all region of Indonesia;
l. original affidavit with duty stamp of agreeing to be the holder of another notary protocol;
m. photo;
n. original curriculum vitae;
o. correspondence address, telephone number / cell phone / facsimile of the applicant and e-mail (if any); and
p. postage stamps whose value corresponds to the cost of postage postage delivery

Law Number 2 of 2014 concerning Amendments to Law Number 30 of 2004 concerning the Position of Notary Public (hereinafter referred to as UUJN 2014)

During the validity period of the 2014 UUJN, there were various legal dynamics due to several regulatory changes. This change came about due to the issuance of a Regulation of the Minister of Law and Human Rights (hereinafter referred to as Permenkumham). In addition, there are also internal organizational regulations as in the regulations of the Indonesian Notary Association

The technical regulations of UUJN 2014 include the Regulation of the Minister of Law and Human Rights of the Republic of Indonesia Number 25 of 2014 which regulates the Terms and Procedures for the Appointment, Transfer, Dismissal, and Extension of the Office of Notary Public (hereinafter referred to as Permenkumham 2014). Requirements for the appointment of a Notary according to Article 2 paragraph (1) Permenkumham 2014, namely:

a. Indonesian citizens;
b. Believe in God Almighty;
c. at least 27 (twenty seven) years old;
d. physically and mentally healthy;
e. holds a law degree and has a bachelor's degree in notary;
f. has undergone an internship or worked in a notary office for a minimum of 24 (twenty four) months;
g. does not hold concurrent positions; and
h. has never been sentenced to prison.

Furthermore, candidate Notaries must attach supporting documents as regulated in Article 2 paragraph (2) Permenkumham 2014, namely:

a. copy of a certificate of law undergraduate education and notarial master education or notarial specialist education ;
b. original certificate of local police record;
c. original certificate of physical and mental health;
d. Copy of identity card;
e. original certificate of internship or work in a notary office for at least 24 (twenty four) months;
f. a statement letter that does not hold concurrent positions; and
g. proof of payment of non-tax state revenue.

Based on Article 2 paragraph (1) Permenkumham Number 62 of 2016 Regarding Amendments to Permenkumham Number 25 of 2014 concerning Terms and Procedures for the Appointment, Transfer, Dismissal, and Extension of the Office of Notary Public (hereinafter referred to as Permenkumham 2016), the requirements for the appointment of a Notary are as follows :

a. Indonesian citizens;
b. Believe in God Almighty;
c. at least 27 (twenty seven) years old;
d. physically and mentally healthy;
e. holds a law degree and has a bachelor's degree in notary;
f. has undergone an internship and worked in a notary office for at least 24 (twenty four) months;
g. does not hold concurrent positions; and
h. has never been sentenced to prison.

The appointment documents are regulated in Article 2 paragraph (2), namely as follows:

a. Copy of legalized legal undergraduate education and notary master education or notarial specialist education;
b. Copy of certificate of passing code of ethics held by Notary Public Organizations legalized by regional administrators, regional administrators, or central administrators;
c. original certificate of local police record;
d. original certificate of physical and spiritual health from the hospital doctor;
e. Copy of identity card;
f. original certificate of internship or work in a notary office for at least 24 (twenty four) months;
g. a statement letter that does not hold concurrent positions;
h. proof of payment of non-tax state revenue.
i. A copy of the mark of passing the Notary appointment exam;
j. Copy of Taxpayer Identification Number;
k. Copy of birth certificate; and
l. letter of willingness to hold the protocol.

As a complementary regulation of Permenkumham 2014 and Permenkumham 2016, the State technically regulates the implementation of the Notary Appointment Test in Permenkumham Number 25 of 2017 concerning Notary Appointment Examination (hereinafter referred to as Permenkumham 2017). To take the Notary Appointment Exam, candidate Notary Public must first fulfill several requirements, namely:

a. Indonesian citizens;
b. holds a bachelor of law degree and has a master degree in notary;
c. has carried out an apprenticeship program at the Notary's office for at least 2 (two) years at the Notary's office which has a minimum work period of 5 (five) years and has issued a minimum of 100 (one hundred) deeds;
d. in the internship program at the Notary's office has participated and his name has been stated on at least 20 (twenty) deeds;
e. not having the status of a suspect or defendant;
f. has passed the code of ethics exam; and
g. has determined the plan of the domicile area.

To apply for the examination, prospective notaries must attach examination documents, namely:

a. Copy of identity card;
b. photo;
c. bachelor of law and notarial master certificate or notarial specialist education program diploma;
d. an internship certificate / certificate from the Notary Organization;
e. code of ethics passing certificate;
f. certificate of participation and whose name is stated on at least 20 (twenty) deeds of a Notary office where the Prospective Notary is apprenticed; and
g. statement that the person concerned is not a suspect or defendant.

The existence of this examination arrangement is felt by some circles to be contrary to the conditions for notarial appointment in the UUJN. So that the basis for holding the notary appointment exam is challenged by interested parties by submitting a judicial review to the Supreme Court. The results of the examination of the Supreme Court can be traced in the Supreme Court Decision Number 50P / HUM / 2018 which was decided on September 20th 2018.

Supreme Court Decision Number 50P / HUM / 2018 granted the applicant's entire petition. The legal consequence of the decision of the Supreme Court is the Provisions regarding Notary Appointment Examination in Article 2 paragraph (2) letter j Permenkumham 2016 and Permenkumham 2017 do not have binding legal force and apply to the public and Menkumham are obliged to revoke the above provisions.

Permenkumham 2017 if examined from the point of view of the enforceability of a legal norm (*geltung*) is not consistent with the rules of the game in the formation of a statutory regulation. The Minister of Law and Human Rights is not authorized to issue the requirements for the Notary Appointment Examination because it is against the General Principles of Good Governance. Permenkumham 25/2017 gave birth to a new norm that contradicts Article 3 of the UUJN which regulates the requirements for the appointment of a Notary. This condition can qualify as a form of abuse of power.

One year after the cancellation of the Permenkumham 2016 and Permenkumham 2017 by the Supreme Court, Menkumham issued a new implementing regulation of UUJN, namely Pemenkumham Number 19 of 2019 concerning Requirements and Procedures for Appointment, Leave, Transfer, Dismissal, and Extension of Notary Term (hereinafter referred to as Permenkumham 2019) .

The requirements for the appointment of a notary based on the 2019 Permenkumham are as follows:

a. Indonesian citizens;
b. Believe in God Almighty;
c. be at least 27 (twenty seven) years old;
d. physically and mentally healthy;
e. holds a bachelor law degree and has a master degree in notary;
f. has undergone an apprenticeship or has actually worked as a Notary employee for a period of at least 24 (twenty four) consecutive months at the Notary's office on his own initiative or on the recommendation of the Notary Organization after passing the strata two notary;
g. not having the status of a civil servant, state official, advocate, or not currently holding another position which is prohibited by law to be concurrently held as a Notary; and
h. have never been sentenced to imprisonment based on a court decision that has obtained permanent legal force for committing a criminal offense punishable by imprisonment of 5 (five) years or more.

While the appointment documents are as follows:

a. copy of identity card;
b. copy of birth certificate;
c. original certificate of physical and mental health;
d. copy of a law degree education certificate and notarial master education or notarial specialist education;
e. original certificate of internship or work in a notary office known to the Notary Organization for a minimum of 24 (twenty four) months;
f. a statement letter that does not hold concurrent positions;
g. original certificate of local police record.
a. Copy of training certificate to improve the quality of the notary position;
b. Copy of code of conduct certificate;
c. original letter of willingness to hold the protocol; and
d. Copy of Taxpayer Identification Number.

There is an increase in the standard of appointment requirements from time to time, one of which is the result of the boom in notary program students in Indonesia. The boom in students was due to the mushrooming of the campus which opened a master program in notary. So that in 2018 the minister of law and human rights had a discourse to temporarily stop / moratorium on new student admissions for notarial master programs throughout Indonesia or to cancel new licenses for campuses that want to open notary master programs.(Elnizar, 2018)

From some of the above rules, if compiled, the appointment of a Notary can be made to someone if he meets the following requirements:

a. Indonesian citizens;
b. Believe in God Almighty;
c. be at least 27 (twenty seven) years old;
d. physically and mentally healthy;
e. holds a law degree and has a bachelor's degree in notary;
f. has undergone an apprenticeship or has actually worked as a Notary employee for a period of at least 24 (twenty four) consecutive months at the Notary's office on his own initiative or on the recommendation of the Notary Organization after passing the strata two notary;
g. not having the status of a civil servant, state official, advocate, or not currently holding another position which is prohibited by law to be concurrently held as a Notary; and
h. has never been sentenced to imprisonment based on a court decision that has obtained permanent legal force for committing a criminal offense punishable by imprisonment of 5 (five) years or more.

It is not easy for someone to be appointed as a Notary Public because they have to fulfill several agendas determined by UUJN, Regulation of the Minister of Law and Human Rights Number 19 of 2019 concerning Requirements and Procedures for Appointment, Leave, Transfer, Dismissal, and Extension of Notary Position (hereinafter referred to as Permenkumham 19/2019), and the Rules of INI Association. These agendas must be fulfilled by notary candidate after graduating from the Notary Masters, such as:(Arrizal, 2020)

1. Passed the Pre-ALB Examination (ALB Member);
2. Registration of ALB (ALB Members) in the INI Central Board;
3. Internships / Work at the Notary Office for 24 (twenty four) months;
4. 4 (four) times participating in the Joint Internship (Magang Bersama) organized by the INI Regional Management;
5. Received 18 (eighteen) participation points of seminar INI;
6. Passed the Notary Code of Ethics examination;
7. Pass the training to improve the quality of the notary position organized by the Ministry of Law and Human Rights;
8. Oath of Position of Notary;

4. Conclusion

There is an increase in requirements and standard of Notary Public appointment that strictly and honestly. State responsibility is to appoint trusted public officials by conducting training, coaching, supervision, and enforcing law for Notary Public candidate and Notary Public Organization.

Suggestions to the Government to always harmonize the laws and regulations issued and to carry out guidance and supervision from the center to the regions so that the Notary as a public official with quality, integrity and morals (trustworthy, honest, thorough, independent, impartial, and caring for interests party)

References

Arrizal, N. Z. (2020). *Legal Protection For Notary Candidate Who Are Interning / Working In A Notary Public Office*.

Elnizar, N. E. (2018). *Kemenkumham Pastikan Mulai 2018 Penerimaan M.Kn. Harus Dihentikan*. Www.Hukumonline.Com. https://www.hukumonline.com/berita/baca/lt5a6b21f72f5a8/kemenkumham-pastikan-mulai-2018-penerimaan-mkn-harus-dihentikan/

Fauzie Yusuf Hasibuan. (2020). *Raih Gelar DR Demi Wujudkan Perlindungan Hukum Bagi Notaris*. https://www.youtube.com/watch?v=oT_UZWcOxzo&list=LL&index=1&t=3797s

Sari, S. D., Handayani, G. A. K. R., & Pujiyono. (2020). *Legal Protection Model on Esthetic Beauty Clinics Patients: Between Fulfilling Constitutional Rights and Doing Business*. *121*(Inclar 2019), 178–184. https://doi.org/10.2991/aebmr.k.200226.037

Selenggang, C. S. (2017). *Lecturer of Notary Position Regulations*.

Soerjono Soekanto. (1986). *Introduction to Legal Research*. UI-Press.

Tobing, G. L. (1983). *No Title*. Erlangga.

Regulating Facial Recognition Technology under the Indonesian Privacy and Data Protection Frameworks: *The Pacing Problem?*

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ABSTRACT

The incentive behind artificial intelligence is to develop computers that can perform complex tasks that could only be performed by humans. One of the embodiments is facial recognition that is utilised in a commercial context to law enforcement. This technology could endanger the fundamental rights of an individual; the right to privacy and the right for personal data protection. The terms privacy and data protection should not be used interchangeably since privacy refers to what extent interferences against an individual can be justified, whereas data protection covers protection against unlawful processing of one's personal data. In Indonesia, the regulatory frameworks on privacy and data protection are still widely fragmented. European Convention on Human Rights (ECHR) and General Data Protection Regulation (GDPR) in the European Union have become prime examples for privacy and data protection frameworks. Therefore, this paper uses a doctrinal methodology to analyse the regulatory gaps in the current Indonesian privacy and data protection frameworks, by taking into account the ECHR and GDPR. It can be concluded that facial recognition highlights the pacing problem in Indonesia data governance. There should be exhaustive lists for limitations against interferences on privacy and newly unified regulation on data protection.

Keywords: *Artificial Intelligence, Facial Recognition Technology, Data Protection.*

1. Introduction

Facial recognition is one of the technology innovations in today's society. The embodiment can be seen from an application such as FaceApp or in public places such as an airport for security purposes. The technology has been deployed all around the world with China leading the advancement with its facial recognition database that can identify a person amongst more than two billion people in a few seconds.[6]

In Indonesia, the newest implementation can be seen from the installation of facial recognition technology in a commercial context. In Indonesia, one of the giant retail stores from China, JD.ID with the affiliation of JD.com recently opened the first unmanned store at a mall in North Jakarta.[7] The store utilizes facial recognition technology for the

[6] Sara M. Smyth, Biometrics, Surveillance and the Law: Societies of Restricted Access, Discipline and Control, Routledge, 2019.
[7] Christina Dewi, 'Taking a sneak peek of JD's first unmanned store in Indonesia', (*Techinasia*, 2018) <https://www.techinasia.com/talk/sneak-peek-jd-unmanned-store-indonesia> accessed 08 October 2020.

purpose of verification, tracking the consumers, and the payment.[8] The Indonesian government has also implemented the technology for various purposes such as to assist the citizens in social aid disbursement, in which facial recognition will serve as a verification system to claim the disbursement in subsidized household gas, staple food assistance and subsidized electricity.[9]

Undeniably, facial recognition may bring many benefits, for instance, law enforcement authorities may use it to identify criminals, hence it may result in deterring crimes. Moreover, based on the abovementioned implementation cases, the technology offers a quick, automatic, and seamless verification experience.[10] However, despite the advantages, there are some concerns due to the massive use of facial recognition technology.

The identification of an individual in facial recognition technology can be done by capturing key features from the central position of a facial image. Then, those features will be extracted while the system avoids superficial features such as expressions or hair.[11] Facial recognition works based on machine-learning algorithms, in which it requires a wide range of data sets to be able to identify a facial image. The technology is said to have two major problems: 1) the possibility of inaccuracy in which the trained algorithms are biased and result in few false positives, and 2) the individual may not have consented to the use of this technology. The latter highlights a deep underlying issue on the right to privacy and data protection.[12]

Undeniably, the current dynamics of information technology development have a high potential to violate the right to privacy and right to personal data protection. This threat is mainly due to the global development of information technology and the cross boundaries nature behind it. Each operating system is also increasingly able to exchange and process various forms of data and information. Current developments also allow the

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[8] *ibid.*,
[9] Eisya A. Eloksari, 'Government trials facial recognition system to improve social aid disbursement', (*The Jakarta Post, 2020*), <https://www.thejakartapost.com/news/2020/05/22/government-trials-facial-recognition-system-to-improve-social-aid-disbursement.html> accessed 08 October 2020.
[10] Bernard Marr, 'Facial Recognition Technology: Here Are The Important Pros And Cons', (*Forbes*, 2019) <https://www.forbes.com/sites/bernardmarr/2019/08/19/facial-recognition-technology-here-are-the-important-pros-and-cons/#e52097514d16>accessed 08 October 2020.
[11] John Vacca, *Biometric Technologies and Verification Systems*, Elsevier, 2007, p.13.
[12] Nicholas Fearn, How facial recognition technology threatens basic privacy rights, (*ComputerWeekly.com*, 2019),<https://www.bcl.com/wp-content/uploads/2019/07/Computer-Weekly-How-facial-recognition-technology-threatens-basic-privacy-rights-28.06.2019.pdf> accessed 08 October 2020.

transfer from one form of data to another.[13] This can result in a higher threat of privacy and data protection.

The right to privacy and the right to the protection of personal data are two rights that should be distinguished although both strive to protect similar values; the autonomy and human dignity of individuals, in which they are granted a personal sphere to develop their own personalities and opinions. [14] The right to privacy involves a general prohibition on interferences, by providing certain lists of exceptions that can justify interferences in special circumstances.[15] Samuel Warren and Louis Brandeis were the first to conceptualize the right to privacy as a legal right through their writing in Harvard Law Review in 1890 which titled "The Right to Privacy".[16] This writing itself arose when newspapers began printing pictures of people for the first time In this article, Warren and Brandeis simply define the right to privacy as the right to be let alone. Their definition is based on two aspects: (i) personal honor; and (ii) values such as individual dignity, autonomy, and personal independence.[17]

On one hand, the rationales behind the need to protect personal data is to ensure that personal integrity and privacy will not be infringed due to the processing of personal data. [18] Digitalisation and the amount of information being processed is growing exponentially by the day due to technological development. The constant growth in the amount of information that is being processed and stored by organisations leads to strong data protection regulations being enforced and become top priorities for the government around the world to ensure that those organisations

have real incentives to make sure our data remains protected.[19] To conclude, right to privacy concerns circumstances in which the private life of an individual has been interfered (e.g. surveillance by law enforcement agency), and right to personal data concerns every situation in which personal data of an individual has been processed.[20]

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[13] Privacy and Human Rights: *An International Survey of Privacy Laws and Practices, Privacy International*, P. 4
[14] European Union Agency for Fundamental Rights and Council of Europe, *Handbook on European Data Protection Law*, (2018), page 19.
[15] *ibid*., page 19.
[16] Samuel Warren dan Louis Brandeis, The Right to Privacy, dalam Harvard Law Review Vol. IV No. 5, 15 Desember 1890, di http://faculty.uml.edu/sgallagher/Brandeisprivacy.htm, accesed on 07 Nov. 2020.
[17] E. Bloustein, Privacy as An Aspect of Human Dignity: an Answer to Dean Prosser, on New York University Law Review Vol. 39 (1964).
[18] Peter Blume, 'The Citizens' Data Protection' (1998) 1 Journal of Information Law & Technology <https://warwick.ac.uk/fac/soc/law/elj/jilt/1998_1/blume/> accessed 08 October 2020, p.1.
[19] PWC, 'The global footprint of data protection regulations', <https://www.pwc.ch/en/publications/2019/The%20global%20footprint%20of%20data%20protection%20regulations_EN_V3-web.pdf>, page 3, accessed 11 November 2020.
[20] *ibid.,* n(9) page 20.

In Indonesia, there is a mandate for the protection of privacy and personal data under Article 28G (1) 1945 Constitution of the Republic of Indonesia that stipulates the individual's right for the "*protection of self, his family, honor, dignity, the property he owns and has the right to feel secure and to be protected against threats from fear to do or not to do something that is part of basic rights*".[21] However, that provision does not explicitly mention privacy, and in terms of data protection regulations, the regulations are still widely fragmented with data protection matters regulated under the different fields.

On the other hand, there are already 126 countries around the world that have implemented data protection regulations in their jurisdiction.[22] In the European Union (EU), European Convention on Human Rights (ECHR) and General Data Protection Regulation (GDPR) have become prime examples for privacy and data protection frameworks with many other countries having incorporated the concepts into their own regulations. This issue eventually highlights 'the pacing problem' in Indonesian data governance, in which the rapid technological innovations often outpace and challenge the adequacy of laws and regulations.[23]

Therefore, this paper aims to analyse the regulatory gaps in the current Indonesian privacy and data protection frameworks through the use of facial recognition technology. The analysis will take into account the implementation of ECHR and GDPR in the EU area to point out important concepts that should be incorporated in the Indonesian data governance.

2. Research Methods

Therefore, this paper uses a doctrinal methodology which consists of simple research aimed at finding a specific statement of the law, or legal analysis with more complex logic and depth.[24] There will be a brief description on the ECHR and GDPR to highlight the key concepts in the EU privacy and data protection frameworks. Then, the current regulations in the Indonesian privacy and data protection will be analysed and described to highlight the gaps in the Indonesian data governance related to the use of

[21] Article 28G (1) 1945 Constitution of the Republic of Indonesia
[22] Heru Andriyanto, 'Indonesia Expects to Adopt Data Protection Law Sooner' *Jakarta Globe* (2020) <https://jakartaglobe.id/tech/indonesia-expects-to-adopt-data-protection-law-sooner> accessed 08 October 2020.
[23] Adam Thierer, 'The Pacing Problem and The Future of Technology Regulation' (*Mercatus Center*, 2020) <https://www.mercatus.org/bridge/commentary/pacing-problem-and-future-technology-regulation> accessed08 October 2020.
[24] Salim Ibrahim Ali, et.al., 'Legal Research of Doctrinal and Non-Doctrinal' (2017) Volume 4 (1) International Journal of Trend in Research and Development, page 493, accessed 14 October 2020.

facial recognition technology.

3. Results and Discussion

1) Facial Recognition Technology under The European Union Frameworks on Privacy and Data Protection

a. Limitations on the right to privacy according to Article 8 (2) ECHR

The use of facial recognition technology by the government or law enforcement authorities should fall under the scope of the right to privacy due to the nature of infringement behind it. The right to privacy is one of the fundamental rights protected under the ECHR. The incentive behind the establishment of ECHR can be drawn back to the 1940's during the Second World War, to ensure that the governments will not be allowed to dehumanise and abuse people's rights with impunity.[25] The convention was then signed by 47 Member States of the Council of Europe (27 states which are the members of the European Union), and it strives as a legal commitment from the parties to abide by the certain principles to protect the fundamental rights of its citizens.[26]

Article 8 (1) of the ECHR acknowledges the right to privacy by stipulating that "*everyone has the right to respect for his private and family life, his home and his correspondence*".[27] However, in the second paragraph of the Article, there are several exceptions and justifications in which the right to privacy is allowed to be infringed by a public authority due to certain circumstances. Article 8 (2) ECHR stated as follows:

> "*there shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others*".

Therefore, there are three exhaustive lists to decide whether an interference of right to privacy can be justified: 1) the interference is in accordance with the law, 2) there is a legitimate aim for the interference, 3) the interference is necessary in a democratic society.

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[25] Amnesty International UK, 'What is the European Convention on Human Rights?', (*Amnesty International UK*, 2018), <https://www.amnesty.org.uk/what-is-the-european-convention-on-human-rights> accessed 03 November 2020.
[26] *ibid.,*
[27] Article 8 (1) ECHR

The first exception, interference is justified to the extent that it is in accordance with the law. In this context, it requires that the interferences should have some legal grounds in the domestic law and should be compatible with the rule of law.[28] The rule of law poses these questions to decide whether any interference can be deemed as legitimate: "1) is the legal provision accessible to the citizens?, 2) is the legal provision sufficiently foreseeable for the citizens to foresee the consequences which a given action may entail?, and lastly 3) does the law provide adequate safeguards against arbitrary interference with the respective substantive rights?".[29]

Accessibility refers to whether "the citizen is able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case"[30]. Domestic law must be sufficiently clear to indicate the scope and manner of exercise given to the public authorities, to provide the citizens with the minimum degree of protection to which they are entitled.[31] The second test requires a degree of foreseeability, in which the law should give the citizen an adequate indication to foresee the circumstances in which and the conditions on which the authorities are entitled to resort to measures affecting their rights under the Convention.[32] Lastly, "in accordance with the law" requires adequate safeguards to guarantee the protection of the right to privacy under Article 8 (1) ECHR. The safeguard may include a responsibility for the State to enact clear statutory provision to ensure adequate regard for Article 8 rights at the national level.[33]

The second exception is that the interference must pursue a legitimate aim. The lists of acceptable grounds of legitimate aim under Article 8 (2) ECHR namely: the interests of national security, public safety, the economic well-being of the country, the prevention of disorder or crime, the protection of health or morals, and the protection of the rights and freedoms of others.[34] Lastly, a State could justify its action of interference under the notion of 'necessary in a democratic society'. The last exception requires the

[28] Els J. Kindt, Privacy and Data Protection Issues of Biometric Applications: A Comparative Legal Analysis, (*Springer Netherland*, 2013), page 456
[29] Steven Greer, The exceptions to Articles 8 to 11 of the European Convention on Human Rights, (*Council of Europe Publishing*, 1997), <https://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-15(1997).pdf>, page 9, accessed 03 November 2020.
[30] Judgment of 26 April 1979, *Case of The Sunday Times v. The United Kingdom*, *Application no. 6538/74*, paragraph 49.
[31] European Court of Human Rights, Guide on Article 8 of the European Convention on Human Rights Right to respect for private and family life, home and correspondence, <https://www.echr.coe.int/documents/guide_art_8_eng.pdf>, page 10, accessed 03 November 2020.
[32] Judgment of 12 June 2014, *Case of Fernandez Martinez v. Spain*, *Application no. 56030/07*, paragraph 117.
[33] *ibid*., n(22), page 11.
[34] Juliane Kokott and Christoph Sobotta, 'The distinction between privacy and data protection in the jurisprudence of the CJEU and the ECtHR', International Data Privacy Law, 2013, Vol. 3, No. 4, <https://academic.oup.com/idpl/article/3/4/222/727206>, page 224, accessed 03 November 2020.

proportionality test, in which it involves balancing the rights of the individual and the interests of the State.[35] It requires that any interference must be supported by relevant and sufficient reasons and must be proportionate to the legitimate aim or aims pursued.[36]

The use of facial recognition by the law enforcement agencies has been challenged to the Court in the *Case of R (Bridges) v-Chief Constable of South Wales Police & Ors*, in which the plaintiff filed an appeal against the use of Automated Facial Recognition (AFR) by the police of South Wales, United Kingdom. The Court of Appeal stated that the use of AFR by the law enforcement was not in accordance with the law and incompatible with Article 8 (2) ECHR.[37] Initially, the AFR was used to monitor "wanted persons" in the database. However, the Court of Appeal found that the use of AFR involves two wide discretion: 1) the selection of those on watchlists, especially the "persons where intelligence is required" category, and 2) the locations where AFR may be deployed in which a large number of public will be monitored.[38]

b. Key concepts and takeaways on personal data protection from the GDPR

Adopted in 2016, GDPR is set to replace the Data Protection Directive and requires all the Member States in the European Union to comply with the standard of data protection. It has become a legal framework that requires business to protect the personal data of the EU citizens for transactions that occur within EU member states, and it covers all companies that conduct such personal data processing.[39] GDPR creates a consistency and legal certainty since it provides a uniform set of data protection rules across the EU.[40] There are several core concepts in the GDPR that will be described further.

1) Nature of data (including special categories of data)

In the abovementioned paragraph, it is said that the scope of GDPR is when the processing of data involves personal data of the EU citizens. Facial recognition technology

[35] Ursula Kilkelly, The right to respect for private and family life: A guide to the implementation of Article 8 of the European Convention on Human Rights, (*Council of Europe*, Human Rights Handbook) <https://rm.coe.int/168007ff47>, page 31, accessed 03 November 2020.
[36] *ibid*., n(25), page 225.
[37] Judgment of 11 August 2020, *Case of R (Bridges) v-Chief Constable of South Wales Police & Ors,* Case No: C1/2019/2670, paragraph 210.
[38] Judgment of 11 August 2020, *Case of R (Bridges) v-Chief Constable of South Wales Police & Ors,* Case No: C1/2019/2670, paragraph 152.
[39] Andrew Rossow, 'The Birth Of GDPR: What Is It And What You Need To Know', (*Forbes*, 25 May 2018), <https://www.forbes.com/sites/andrewrossow/2018/05/25/the-birth-of-gdpr-what-is-it-and-what-you-need-to-know/?sh=ce23c7755e5b>, accessed 04 November 2020.
[40] *ibid.,* n(8), page 31.

itself may lead to processing of personal data and even special categories of data. GDPR provides an added layer of protection of special categories of data, which is "personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, and the processing of genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation".[41] The collected data from facial recognition technology can be used to deduce special categories of data and infer other information to achieve a different purpose listed on Article 9 (1) GDPR.[42] Such processing of personal data is strictly prohibited and only allowed under certain conditions.

2) Data controller and processor

There are clear distinctions in GDPR related to the stakeholders who conduct personal data processing. There are two terms related to this in GDPR: data controller and data processor. Data controller means "the natural or legal person, public authority, agency or other body which, alone or jointly with others, determines the purposes and means of the processing of personal data"[43]. Whereas, a data processor means "a natural or legal person, public authority, agency or other body which processes personal data on behalf of the controller".[44]

3) Lawful grounds of personal data processing

Article 6 (1) GDPR stipulates 6 (six) lawful grounds for the processing of personal data which include consent, performance of a contract, compliance with legal obligation, vital interest of the data subject, public interest, and legitimate interest. This list of lawful grounds is exhaustive, and the collecting and processing of personal data shall fulfill at least one of those legal bases.[45] However, in case of facial recognition used to sensitive information under the notion of special categories of data, the collecting and processing of those data will have to apply one of the conditions listed in Article 9 (2) GDPR.

4) Accountability principle

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[41] Article 9 (1) GDPR.
[42] European Data Protection Board, Guidelines 3/2019 on processing of personal data through video devices, Adopted on 29 January 2020, paragraph 62-64.
[43] Article 4 (7) GDPR
[44] Article 4 (8) GDPR
[45] Bart Custers and Helena Ursic, 'Worker Privacy in a Digitalized World Under European Law', Comparative Labour Law & Policy Journal, January 2018, <https://ssrn.com/abstract=3179425>, page 333, accessed 05 November 2020.

The principle of accountability is crucial to ensure the enforcement of data protection across the EU. It requires data controllers to implement appropriate and effective measures to put into effect the principles and obligations for effective data protection.[46] Accountability principle is a proactive obligation and should not only come into play after a violation has occurred.[47] The measures include the appointment of Data Protection Officers (DPO), the keeping of records and documentations related to the processing, and the conduct of privacy impact assessment.[48]

The appointment of DPO in the utilisation of facial recognition technology is mandatory due to the activities of the processing which require regular and systematic monitoring of data subjects on a large scale, and/or the activities of the processing on a large scale which include special categories of data.[49] Therefore, there is an obligation of DPO to monitor compliance with GDPR and provide advice in regards to data protection impact assessment pursuant to Article 39 GDPR.

5) Data protection by design and by default

Pursuant to Article 25 (1) GDPR, there is an obligation for data controllers to impose appropriate technical and organisational measures which are designed to integrate the necessary safeguards into the processing to meet the requirements set in GDPR and to protect the rights of data subjects.[50] However, the measures referred to that provision embrace more than the design and operation of software or hardware, but encompass business strategies and other organisational and managerial practices to comply with the data protection standard.[51] It requires data controllers to develop a set of practical, actionable guidelines, which involve assessment of the risks posed by the data processing, and any measures to overcome it.[52] In regards to facial recognition, a thorough assessment of risks and safeguards will be needed before the technology can be implemented.

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[46] Article 29 Working Party, *Opinion 3/2010 on the Principle of Accountability*, Adopted on 13 July 2010, page 3.
[47] *ibid.,* n(8), page 174
[48] *ibid.,* n(8), page 174
[49] Article 37 (1) GDPR
[50] Article 25 (1) GDPR
[51] Lee A. Bygrave, 'Data Protection by Design and by Default: Deciphering the EU's Legislative Requirements', Oslo Law Review, Volume 4, No. 2-2017, <https://www.idunn.no/oslo_law_review/2017/02/data_protection_by_design_and_by_default_deciphering_the >, page 115, accessed 05 November 2020.
[52] Lydia F de La Torre, 'What does 'data protection by design and by default' mean under EU Data Protection Law?', (*Medium*, 2019), <https://medium.com/golden-data/what-does-data-protection-by-design-and-by-default-mean-under-eu-data-protection-law-fc40f585c0c5>, accessed 05 November 2020.

2) Facial Recognition Technology under The Indonesian Frameworks on Privacy and Data Protection

a. Derogation to the Right to Privacy under the current regulatory frameworks

It has been stated before that the Constitution has acknowledged the right to privacy as one of the fundamental rights that should be protected. Article 31 and Article 32 Law Number 39 Year 1999 on Human Rights also further emphasise this right by stating that "no one shall be subject to arbitrary interference with his home"[53], and that "no one shall be subject to arbitrary interference with his correspondence, including electronic communications, except upon the order of a court or other legitimate authority according to prevailing legislation".[54]

In regards to what extent any interferences to privacy could be justified is not yet clearly stipulated under the current regulations and laws. For example, the State Intelligence Agency is given the authority to "conduct wiretapping, examine flow of funds, and extract information on targets which are activities that threaten national interests and security; and any acts related to terrorism, separatism, espionage, and sabotage that threaten national safety, security, and sovereignty".[55] However, it is unclear whether the regulation actually provides categories of people who fall under the scope of the "watchlist". Further, it is stipulated that the wiretapping can be conducted for up to 6 (six) months and can be extended when it is necessary for targets who have the indication of conducting those acts listed in Article 31.[56]

Law Number 17 Year 2011 on State Intelligence has been challenged before to the Constitutional Court due to the vague and broadly-defined articles contained in it.[57] The plaintiff claimed that the law provides authorities a chance to classify public information as state intelligence and it evoked fears of surveillance.[58] The Court denied the judicial review and maintained that the law has "appropriately regulated intelligence practices in

[53] Article 31 Law Number 39 Year 1999 on Human Rights
[54] Article 32 Law Number 39 Year 1999 on Human Rights
[55] Article 31 Law Number 17 Year 2011 on State Intelligence
[56] Article 32 (2) Law Number 17 Year 2011 on State Intelligence
[57] Aliansi Jurnalis Independen/Alliance of Independent Journalists (AJI), 'State Intelligence Law Challenged in Court', 26 January 2012, <https://ifex.org/state-intelligence-law-challenged-in-court/>, accessed 05 November 2020.
[58] CitizenLab and Canada Centre for Global Security Studies, Island of Control Island of Resistance: Monitoring the 2013 Indonesian IGF, Number 29, January 20, (2014), <https://citizenlab.ca/briefs/29-igf-indonesia/29-igf-indonesia.pdf>, page 52, accessed 05 November 2020.

Indonesia".[59]

Further, Article 42 (2) Law Number 36 Year 1999 on Telecommunications provides a justification for the telecommunications services operator "to record the information transmitted or received by them for the purposes of criminal prosecution, on the basis of: a) a written request from the Attorney General and/or the Chief of Police of the Republic of Indonesia for certain criminal offenses; and b) the request of an investigator for certain criminal offenses- in accordance with prevailing laws".[60] The Directorate General of Post and Telecommunication which falls under the Ministry of Communication and Information Technology has the authority for licensing, legal compliance, and supervision of operators in regards to surveillance.[61] It should be noted that in regards to oversight, the function of this institution remains unclear.

The unclear limitation on derogation to the right to privacy also resulted in dualism views regarding information disclosure and the protection of privacy. It can be seen in the case of a public information request on the alleged embezzlement in the Indonesian Centre Police. Indonesia Corruption Watch (ICW) is a NGO who requested that the name of all the account holders who allegedly conduct the embezzlement be revealed to the public. However, the request was denied since the information was categorised as protected information under Article 10 (a) Law Number 25 Year 2003 on The Amendment to Law Number 15 Year 2002 on Money Laundering Crime *jo.* Article 17 Law Number 14 Year 2008 on Transparency in Public Information. This refusal resulted in a Central Information commission hearing and an order for the National Police to disclose the data submitted by ICW.[62] However, the National Police remained to refuse the disclosure and eventually being sued to the State Administrative Courts.[63]

Due to the development of technology, it is possible for the authorities in Indonesia to deploy facial recognition technology for purposes such as law enforcement. However, the oversight or checks and balances to prevent excessive monitoring and

[59] *ibid.*,
[60] Article 42 (2) Law Number 36 Year 1999 on Telecommunications
[61] Privacy International, 'State of Privacy Indonesia', 26 January 2019, <https://privacyinternational.org/state-privacy/1003/state-privacy-indonesia>, accessed 10 November 2020.
[62] ICW Ajukan Sengketa Rekening Gendut ke KIP, lihat http://nasional.tempo.co/read/news/2010/10/21/063286320/icw-ajukan-sengketa-informasi-rekening-gendutpolisi-ke-kip, accesed on 07 Nov. 2020
[63] Polri Tolak Buka INformasi 17 Rekening Gendut Perwira, Lihat http://www.republika.co.id/berita/breakingnews/hukum/11/02/08/163015-polri-tolak-buka-informasi-17-rekening-gendut-perwira, accesed on 07 Nov. 2020

abuse by the authorities are left unclear and inadequate.[64]

b. Key concepts on the right to personal data protection under the main regulations on data protection

Data protection regulations actually have an important role in responding to technological advances. It will balance the fundamental rights of the data subject, as well as become an incentive for investors to build a safe and trusted business environment, and to accommodate the interests of consumers, who will feel safe in conducting economic transactions.[65] In Indonesia, there are at least currently 30 (thirty) regulations that oversee the processing of personal data in various fields, such as telecommunications, defense and security, law enforcement, health, population, trade, and economy.[66] Therefore, the paper will focus on the main regulations in Indonesian data protection frameworks:

1. Law Number 19 Year 2016 on the Amendment to Law Number 11 Year 2008 on Electronic Information and Transactions ("Law 19/2016").
2. Government Regulation Number 71 Year 2019 regarding Provisions of Electronic Systems and Transactions ("GR 71/2019").
3. Minister of Communications and Informatics Regulation Number 20 Year 2016 concerning the Protection of Personal Data in an Electronic System ("MoCI 20/2016").

1) Consent and other lawful grounds for personal data processing

Article 26 (1) Law 19/2016 requires that "the use of any information through electronic media involving personal data must be done with the consent of that people unless stipulated otherwise by laws and regulations".[67] Further in the second paragraph, it is stipulated that the use of personal data without prior consent of the people concerned can become a legal ground to file a lawsuit.

In addition, Article 14 (4) GR 71/2019 requires that the processing of personal data should be based on the consent of the data subject, as well as fulfill the necessary purposes as follows:

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[64] *ibid.,* n(49), page 52.
[65] *ibid.,*
[66] Lintang Setianti, Urgensi Regulasi Perlindungan Data Pribadi, (ELSAM, Lembaga Studi dan Advokasi Masyarakat), <https://elsam.or.id/urgensi-regulasi-perlindungan-data-pribadi/> accessed 11 November 2020.
[67] Article 26 (1) Law Number 19 Year 2016 on the Amendment to Law Number 11 Year 2008 on Electronic Information and Transactions

a. fulfillment of contractual obligations in which the data subject is one of the parties, or to fulfill the request of the data subject.
b. fulfillment of legal obligations in accordance with the law.
c. protection of vital interest of the data subject.
d. execution of authority of data controller based on statutory provisions.
e. fulfillment of the performance of a task carried out for the public interest; and
f. fulfillment of legitimate interests of the data controller or data subject.

Therefore, the collecting and processing of personal data for the use of facial recognition technology should be based on a prior consent of the data subjects, as well as the necessary purposes listed in aforementioned provision.

2) Rights of the data subject

Article 26 MoCI 20/2016 recognises five different rights of the data subject as follows:

a. the right to the confidentiality of their personal data.
b. the right to file a complaint to the Minister for the purpose of dispute settlements due to the failure in the protection of the confidentiality of their personal data by the Electronic System Operators.
c. the right to access or rectify their personal data without disrupting the personal data management system.
d. the right to access the history if their personal data have been submitted to the Electronic System Operators as long as it is still in accordance with the applicable regulations; and
e. the right to erasure of their personal data unless specified otherwise in the Indonesian laws and regulations.

Therefore, Electronic System Operators who conduct the processing of personal data for facial recognition technology should ensure that they can provide facilities or access to accommodate these rights of the data subject.

3) Data retention

In regards to data retention, Article 15 MoCI 20/2016 requires that the data should only be stored when the accuracy has been verified and should be kept in the form of encryption. Moreover, in the third paragraph, it is required that the personal data: a)

is stored in accordance with the provision of laws and regulations regulating the obligation of personal data storage period with the respective Supervisory Agency and Sector Supervisory, and b) in case of the absence of such regulations, the shortest period of data retention is 5 (five) years.[68]

The newest established Government Regulation Number 80 Year 2019 on Trading through Electronic Systems ("GR 80/2019") provides a higher level of personal data protection. Article 59 (1) GR 80/2019 stipulates that personal data should be stored in accordance with data protection standards or customary business practices. In the explanation it is stated that data protection standards should refer to the European standard and/or APEC Privacy Frameworks. It can be concluded that the facial images data can be retained for at least 5 (five) years, while taking into account data protection standards or customary business practices.

4) Cross-border transfer of data

Transfer of personal data outside of the jurisdictions of Indonesia is allowed under certain circumstances below:

a. Article 21 (1) GR 71/2019 stipulates that sending and storing of personal data outside the jurisdiction of Indonesia is permitted by ensuring the effectiveness of supervision by the Ministry or Institution and law enforcement.
b. Article 59 (2) GR 80/2019 requires that sending and storing of personal data outside the jurisdiction of Indonesia is permitted if the country or region in which personal data will be transferred or stored is declared by the Minister to have the same standards of protection with Indonesia.
c. Article 22 MoCI 20/2016 stipulates that sending and storing of personal data outside the jurisdiction of Indonesia is permitted in coordination with the Minister or assigned officials/ institutions/authority related to this matter; and by implementing regulatory provisions laws regarding the exchange of personal data across national borders.

In regards to facial recognition technology, there is a possibility that foreign companies will invest or cooperate with the Indonesian government or companies to deploy this

[68] Article 15 (3) Minister of Communications and Informatics Regulation Number 20 Year 2016 concerning the Protection of Personal Data in an Electronic System

technology. Therefore, the three provisions above should be taken into account in case personal data of Indonesian citizens may be sent or stored outside of the jurisdiction of Indonesia.

3. Regulatory gaps in Indonesian data governance based on the comparison with the ECHR and the GDPR

Based on the prior explanation, we can conclude several problems that highlight the regulatory gaps in the current Indonesian privacy and data protection. These gaps become even more prominent when being compared to the ECHR and the GDPR. The explanation will be completed using a table below.

No.	Context	Issues/gaps in the current framework
1.	Privacy	**The absence of limitation to surveillance and oversight** ● Article 8 (2) ECHR provides 3 (three) exhaustive lists to decide whether an interference of right to privacy can be justified: 1) the interference is in accordance with the law, 2) there is a legitimate aim for the interference, 3) the interference is necessary in a democratic society. ● These exhaustive lists cannot be found in the current privacy frameworks in Indonesia. The State Intelligence is given wide authority to interfere privacy with conducting wiretapping, examine flow of funds, and extract information on targets under the purpose of law enforcement and crime prevention. It is unclear whether the framework actually provides categories of people who fall under the scope of the "watchlist". ● The oversight or checks and balances to prevent excessive monitoring and abuse by the authorities are left unclear and inadequate. ● In regards to facial recognition technology, the government will eventually have wide authority to conduct surveillance under the purpose of law enforcement. It has proven before that the deployment of this technology may result in bias or inaccuracy. Therefore, with the absence of limitation and oversight, the right to privacy may be jeopardised due to the excessive use of facial recognition technology by the government.

2.	Data protection	**Liability issues for which stakeholders reliable for any breaches in the processing of personal data** ● Unlike GDPR, the current Indonesian data protection framework does not acknowledge the difference between data controller and data processor. The term used in the regulations is Electronic System Operators. ● In case of data breaches, this will lead to liability issues when the data is being processed by two or more Electronic System Operators.
3.	Data protection	**The lack of oversight and supervisory authority** ● There is no requirement to appoint Data Protection Officers for organisations who conduct the processing of personal data. Data Protection Officers will ensure that there is adequate measurement implemented in protecting the rights of the data subject, as well as monitor compliance with the related laws and regulations. ● The current framework does not explicitly establish which institution or authority is responsible for data protection oversight. In case of breaches to the rights of data subject, the redress mechanism is also only provided in Article 26 (2) Law 19/2016.
4.	Data protection	**Lawful grounds for processing of personal data (misinterpretation of GDPR?)** ● Article 6 (1) GDPR provides legal bases for processing of personal data. Therefore, the collecting and processing of personal data shall fulfill at least one of those legal bases. ● The list of necessary purposes in Article 14 (4) GR 71/2019 is the exact like the list of legal bases in Article 6 (1) GDPR. ● However, GDPR only requires that the processing of personal data should fulfill at least one of those legal bases, whereas the list of legal bases in GR 71/2019 are exhaustive. It means that the collecting and processing of personal data should be based on consent as well as to fulfill the necessary purposes as listed. ● It will be difficult for the Electronic System Provider to have all the necessary purposes fulfilled so that the processing of personal data can become lawful. Therefore, it raises the question *whether there is an attempt to copy the provision in the GDPR and it resulted in misinterpretation?.*

6.	Data protection	**Overlapping requirement for cross-border transfer of data and the absence of related institutions for this matter** ● In the abovementioned explanation, we can see that there are three provisions regulating cross-border transfer of data: 1) Article 21 (1) GR 71/2019, 2) Article 59 (2) GR 80/2019, and 3) Article 22 MoCI 20/2016. ● The overlapping between those provisions raises a question whether all the conditions listed in each provision should be fulfilled before transfer of data outside of the jurisdiction of Indonesia can be done. ● Article 59 (2) GR 80/2019 stated that the "sending and storing of personal data outside the jurisdiction of Indonesia is permitted if the country or region in which personal data will be transferred or stored is declared by the Minister to have the same standards of protection with Indonesia". The mechanism of declaration and what standards are used to determine the level of protection are left unclear.

4. Conclusion

It can be concluded based on the prior research that the Indonesian privacy and data protection framework is still widely fragmented and the regulations are scattered in different fields. There are overlaps between the current regulations and it highlights the need for harmonisation and a unified regulation in Indonesian privacy and data protection framework. Moreover, the deployment of facial recognition technology for various purposes also highlights the gaps in the current regulatory framework.

On the perspective of privacy, there is an inadequate limitation to what extent interferences against the right to privacy can be justified. In case facial recognition technology is deployed by the government for law enforcement purposes, the government will have a wide authority since the categorisation of people that can have their facial images compared to the database remains unclear. The oversight or checks and balances to prevent excessive monitoring and abuse by the authorities are inadequate.

In regards to data protection, there are several regulatory gaps identified in the current framework: 1) liability issues for which stakeholders reliable for any breaches in the processing of personal data, 2) the lack of oversight and supervisory authority, 3)

lawful grounds for processing of personal data (misinterpretation of GDPR?), and lastly 4) overlapping requirements for cross-border transfer of data and the absence of related institutions for this matter. The main data protection frameworks are still in the form of Government Regulations and Ministerial Regulation. It is certainly inadequate with the current dynamics of technology advances. The threat of sanctions which is only in the form of administrative sanctions in the Ministerial Regulation is considered to have less binding power and force for Electronic System Operators.

Therefore, there is an urgency for an independent privacy and data protection regulation that can ensure the fundamental rights of the people regarding the use of facial recognition technology. A new unified privacy and data protection law is hoped to overcome the pacing problem in the current Indonesian privacy and data protection frameworks.

References

European Regulations

1. Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)
2. Convention for the Protection of Human Rights and Fundamental Freedoms

Indonesian Regulations

1. 1945 Constitution of the Republic of Indonesia
2. Law Number 36 Year 1999 on Telecommunications
3. Law Number 39 Year 1999 on Human Rights
4. Law Number 25 Year 2003 on The Amendment to Law Number 15 Year 2002 on Money Laundering Crime
5. Law Number 14 Year 2008 on Transparency in Public Information
6. Law Number 17 Year 2011 on State Intelligence
7. Law Number 19 Year 2016 on the Amendment to Law Number 11 Year 2008 on Electronic Information and Transactions

8. Government Regulation Number 71 Year 2019 regarding Provisions of Electronic Systems and Transactions
9. Minister of Communications and Informatics Regulation Number 20 Year 2016 concerning the Protection of Personal Data in an Electronic System

Official Documents

Adam Thierer, 'The Pacing Problem and The Future of Technology Regulation' (MercatusCenter,2020)<https://www.mercatus.org/bridge/commentary/pacing-problem-and-future-technology-regulation> accessed08 October 2020.

Aliansi Jurnalis Independen/Alliance of Independent Journalists (AJI), 'State Intelligence Law Challenged in Court', 26 January 2012, <https://ifex.org/state-intelligence-law-challenged-in-court/>, accessed 05 November 2020.

Amnesty International UK, 'What is the European Convention on Human Rights?', (Amnesty International UK, 2018), <https://www.amnesty.org.uk/what-is-the-european-convention-on-human-rights> accessed 03 November 2020.

Andrew Rossow, 'The Birth Of GDPR: What Is It And What You Need To Know', (Forbes, 25,May,2018),https://www.forbes.com/sites/andrewrossow/2018/05/25/the-birth-of-gdpr-what-is-it-and-what-you-need-to know/?sh=ce23c7755e5b , accessed 04 November 2020.

CitizenLab and Canada Centre for Global Security Studies, Island of Control Island of Resistance: Monitoring the 2013 Indonesian IGF, Number 29, January 20, (2014),<https://citizenlab.ca/briefs/29-igf-indonesia/29-igf-indonesia.pdf>, page 52, accessed 05 November 2020.

European Court of Human Rights, Guide on Article 8 of the European Convention on Human Rights Right to respect for private and family life, home and correspondence,<https://www.echr.coe.int/documents/guide_art_8_eng.pdf>, accessed 03 November 2020.

European Data Protection Board, Guidelines 3/2019 on processing of personal data through video devices, Adopted on 29 January 2020

Nicholas Fearn, How facial recognition technology threatens basic privacy rights,

(ComputerWeekly.com,2019),<https://www.bcl.com/wpcontent/uploads/2019/07/Computer-Weekly-How-facial-recognition-technology-threatens-basic-privacy-rights-28.06.2019.pdf> accessed 08 October 2020.

Privacy International, 'State of Privacy Indonesia', 26 January 2019, <https://privacyinternational.org/state-privacy/1003/state-privacy-indonesia>, accessed 10 November 2020.

PWC, 'The global footprint of data protection regulations', <https://www.pwc.ch/en/publications/2019/The%20global%20footprint%20of%20data%20protection%20regulations_EN_V3-web.pdf>, page 3, accessed 11 November 2020.

Steven Greer, The exceptions to Articles 8 to 11 of the European Convention on Human Rights, (Council of Europe Publishing, 1997), <https://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-15(1997).pdf>, page 9, accessed 03 November 2020.

Ursula Kilkelly, The right to respect for private and family life: A guide to the implementation of Article 8 of the European Convention on Human Rights, (Council of Europe, Human Rights Handbook) <https://rm.coe.int/168007ff47>, page 31, accessed 03 November 2020.

Books

Els J. Kindt, Privacy and Data Protection Issues of Biometric Applications: A Comparative Legal Analysis, (Springer Netherland, 2013),

European Union Agency for Fundamental Rights and Council of Europe, Handbook on European Data Protection Law, (2018),

Privacy and Human Rights: An International Survey of Privacy Laws and Practices, Privacy International

John Vacca, Biometric Technologies and Verification Systems, Elsevier, 2007,

Sara M. Smyth, Biometrics, Surveillance and the Law: Societies of Restricted Access, Discipline and Control, Routledge, 2019.

Journal Articles

Bart Custers and Helena Ursic, 'Worker Privacy in a Digitalized World Under European Law', Comparative Labour Law & Policy Journal, January 2018, <https://ssrn.com/abstract=3179425>, page 333, accessed 05 November 2020.

Bernard Marr, 'Facial Recognition Technology: Here Are The Important Pros And Cons', (Forbes,2019)https://www.forbes.com/sites/bernardmarr/2019/08/19/facial-recognition-technology-here-are-the-important-pros-and cons/#e52097514d16 accessed 08 October 2020.

E. Bloustein, Privacy as An Aspect of Human Dignity: an Answer to Dean Prosser, on New York University Law Review Vol. 39 (1964).

Samuel Warren dan Louis Brandeis, The Right to Privacy, dalam Harvard Law Review Vol. IV No. 5, 15 Desember 1890, di http://faculty.uml.edu/sgallagher/Brandeisprivacy.htm, accesed on 07 Nov. 2020.

Lee A. Bygrave, 'Data Protection by Design and by Default: Deciphering the EU's Legislative Requirements', Oslo Law Review, Volume 4, No. 2-2017, <https://www.idunn.no/oslo_law_review/2017/02/data_protection_by_design_and_by_default_deciphering_the_>, page 115, accessed 05 November 2020.

Juliane Kokott and Christoph Sobotta, 'The distinction between privacy and data protection in the jurisprudence of the CJEU and the ECtHR', International Data Privacy Law, 2013, Vol. 3, No. 4, <https://academic.oup.com/idpl/article/3/4/222/727206>, page 224, accessed 03 November 2020.

Peter Blume, 'The Citizens' Data Protection' (1998) 1 Journal of Information Law & Technology <https://warwick.ac.uk/fac/soc/law/elj/jilt/1998_1/blume/> accessed 08 October 2020

Salim Ibrahim Ali, et.al., 'Legal Research of Doctrinal and Non-Doctrinal' (2017) Volume 4 (1) International Journal of Trend in Research and Development, page 493, accessed 14 October 2020.

Websites

Christina Dewi, 'Taking a sneak peek of JD's first unmanned store in Indonesia', (Techinasia, 2018)<https://www.techinasia.com/talk/sneak-peek-jd-unmanned-store indonesia> accessed 08 October 2020.

Eisya A. Eloksari, 'Government trials facial recognition system to improve social aid disbursement', (The Jakarta Post, 2020),

Heru Andriyanto, 'Indonesia Expects to Adopt Data Protection Law Sooner' Jakarta Globe (2020) <https://jakartaglobe.id/tech/indonesia-expects-to-adopt-data-protection-law-sooner> accessed 08 October 2020.

ICW Ajukan Sengketa Rekening Gendut ke KIP, lihat http://nasional.tempo.co/read/news/2010/10/21/063286320/icw-ajukan-sengketa-informasi-rekening-gendutpolisi-ke-kip, accesed on 07 Nov. 202

Lintang Setianti, Urgensi Regulasi Perlindungan Data Pribadi, (ELSAM, Lembaga Studi dan Advokasi Masyarakat), <https://elsam.or.id/urgensi-regulasi-perlindungan-data-pribadi/> accessed 11 November 2020.

Lydia F de La Torre, 'What does 'data protection by design and by default' mean under EU Data Protection Law?', (Medium, 2019), <https://medium.com/golden-data/what-does-data-protection-by-design-and-by-default-mean-under-eu-data-protection-law-fc40f585c0c5>, accessed 05 November 2020.

Polri Tolak Buka INformasi 17 Rekening Gendut Perwira, Lihat http://www.republika.co.id/berita/breakingnews/hukum/11/02/08/163015-polri-tolak-buka-informasi-17-rekening-gendut-perwira, accesed on 07 Nov. 2020

https://www.thejakartapost.com/news/2020/05/22/government-trials-facial-recognition-system-to-improve-social-aid-disbursement.html>

Legal Protection for Customer Credit Card Fraud Cases in International Criminal Law

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ABSTRACT

Credit card fraud is one from of identity-related crime. Credit card fraud is a new transnational crimes have not received much special attention from the international community. From sufficient studies aspect, definitions and criminalization. The era of consumable technology, credit card number can be stolen from unsafe websites or could be obtained with identity theft scheme. Worsens, Indonesia became number two on the world is worst list for credit card fraud. This goes hand in hand with the fact that there is an open sale of the Indonesian identity in marketplace. The goal of research is to provide analysis of law enforcement to overcome credit card fraud as transnational crime. The methodology used in this study is normative juridical with a approach and literature. This research has conclude is that attempt to strive to encourage the mainstreaming of new transnational crimes through various international forums such as the maintenance of cyber security. International cooperation must be improved to eradicate this crime more comprehensive a major drawback occur, including of cooperation increased law enforcement capacity and exchange information.
Keywords: *Credit card fraud, Identity-related crime, Law enforcement.*

1. Introduction

The development and growth times were involved countries around the world seemed without limit (borderless) and connecting. It simplifies someone who wants to access an address in another country just type the uniform resource locater (URL) and input user account and password. Afterward, we have lots of facilities that provided. This easiness does not only contribute to increased well-being human progress and civilization, but also had a negative effect that making an effective tool for committed a crime. [69]

Cybercrime within the law is known as cyber law.[70] The result of cybercrime is greater than conventional crime, because the perpetrators are not limited by time and geography, wherefore region existed not only locally or nationally but also transnational and international.

One form of a new cyber law emerged ten years ago is identity-related crime, more specifically will be discussed in this paper are credit card fraud or carding. This crime has not received much special attention from the international community. This crime fall into a transnational crime category with a many Sades and form of modus operandi, with

[69] Hendrik, A., Lisanawati, G., & Wijaya, N. (2018). *The role of telecommucations service providers in efforts to prevent and tackle online fraud crime in the city of surabaya*. Surabaya University. h.3
[70] Kurniawan, N. A. (2014). *Prevention of carding as a Transnasional crime according to internal law*. Ministry of Education and Culture. Brawijaya University. h.2

a credit card number that can be taken from illegal sites or with an identity theft scheme and etc.

Cybercrime in the virtual world present evoke difficulties in the process of law enforcement: in determining the scene of the crime (locus delicti), to prove this crime because of the perpetrators are committed a crime by faceless, locations became difficult to determine when perpetrators stole foreign national data. Investigators are also having problem looking for of witnesses who saw or heard the incident, to gathers tools of evidence that require fees of having to use adequate technology and human domain experts for doing this. [71]

International organizations that look at of this issue are countries incorporated to the European Union (council of Europe) on November 23, 2001 in Budapest. The convention will effective once ratified by 3 the council of Europe. The convention substance covers a wide area. It even has criminal policies elevated levels a criminal policy intended to protect people for cybercrime, both through domestic and international law.

Credit card fraud is a transnational crime that will use extraterritorial jurisdiction to establish, implement and enforce the terms of the law that have been established by a state. International criminal law responds to this problem by using principle of the convention on cybercrime is "aut dedere aut judicare."

Based on the background description above, the author is interested for conducting research regarding legal protection of Credit Card Fraud Customers in International criminal. This article will answer the main problem with a discussion of the issues that will be divided into three parts : *first*, credit card fraud as a cybercrime and international crime, *second* types of credit card fraud and *third*, efforts to protect credit card fraud customers from a perspective. International criminal law.

For novelty, will be presented in this article which is international criminal law to face this problem regulation requires a model of international legal norms in the form of the adoption of cybercrime regulatory principles that is global in nature, and every country is obliged or needs to implement jurisdiction over the perpetrator, nonetheless the existence of an extradition treaty between these countries, the law of locus delicti and tempos must be elevated.

2. Methods

The research employed normative juridical methods of legal research on legal principles. [72] The legal references referred to in this research are drawn from various international and regional conventions, including Convention on Cybercrime, Book of penal law, republic of Indonesia regulation number 11 year 2008 on information and electronic transactions, Indonesia government regulation number 82 year 2012 on system and electronic. The study is legal research using a conceptual approach will study the principles of international law and statue approach were made to study the law

[71] Sitompul, J. (2012) *Cyberspace, Cybercrime, Cyberlaw: Review the Aspect of Criminal Law.* PT Tatanusa. h.103.
[72] Marzuki, P. M. (2016). *Legal Research*. Jakarta : Pranadamedia.

relating to credit card fraud prevention, namely the 2008 law on information and electronic transactions and the convention on cybercrime was the convention made by the council of Europe and was open to all. In addition, this research is a library research study, which uses both primary and secondary legal uses relevant academic references from books, journal articles, and reports to strengthen its arguments.

As a comparative study, the analysis in this research refers to important decisions in analyzing the nature of credit card fraud, then associating with principles that apply to international law. This analysis figured out for applicable international principles of law credit card fraud prevention.

3. Discussion

Cybercrime: credit card fraud as a transnational crime

An electronic transaction is legal acts that are carried out using computers or other electronic media. The new world is created because the internet offers a new reality in a virtual so that we can feel where we are and do things for real, especially in the world of transactions. The internet connect with the legal ability to keep the scope and development of the law. [73]Besides positive things there must be negative things. One form the problems that arise due to the development of information technology is the rise of crimes that are new, especially those that use the internet as a tool of assistance known as cybercrimes. [74] Internet makes it easier for people to commit crimes with computers / smartphones. Cyber Crime results in material and non-material loss. The consequences of cybercrime can be greater than conventional crime, because the perpetrators are not limited by time and geography. The nature of Cyber Crime is to cross national borders or known as transnational crime. Transnasional crime is an extension of the impact of globalization and experiencing differences. [75]

According to chapter 3 verse 2 of the United Nations Convention Against Transnational Organized Crime, a crime can be categorized as a transnational crime if:

1. It is committed in more than one State;

2. It is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State;

3. It is committed in one State but involves an organized criminal group that engages in criminal activities in more than one State; or

4. It is committed in one State but has substantial effects in another State.

The state and society are taking heavy losses in the emergence of new crimes. Cybercrimes that has been recently committed nowadays is credit card fraud. Along with

[73] Rumampuk, A. M. (2015). *The Crime of Fraud Through the Internet Based on the Laws in Force in Indonesia*. Lex Crimen Vol. IV No. 3, h.34
[74] Kurniawan, N. A. (2014). *Prevention of carding as a Transnasional crime according to internal law*. Ministry of Education and Culture. Brawijaya University. h.3
[75] Olii, M. I. (2005). *Narrow of the world, the extent of evil? A brief study of transnational crime*. Journal Indonesian Criminology. Vol. 4 No. 1, h.25

the increasing use of credit cards, credits rates are caused by lower levels of increased collection are sharp enough as credit card fraud with various modus operandi. [76]

Credit card fraud is one form of identity-related crime as a transnational crime. According to Wikedia the free encyclopedia:

Credit card fraud is an inclusive term for fraud committed using a payment card, such as a credit card or debit card. The purpose may be to obtain goods or services, or to make payment to another account which is controlled by a criminal. [77]

Credit card fraud is carried out with full calculation and uses the knowledge owned by the perpetrators, the perpetrators of these crimes generally consist of people or groups of people who have a high level of intelligence and are able to take advantage of technological advances. As a result, the modus operandi of criminal acts related to credit cards is increased in perfection and varied and often creates difficulties in investigations.

Credit card fraud can be committed in various modus operandi. From the simplest, such as creating a fake identity for credit card applications to creating a fake credit card using super sophisticated technology as used by publisher credit card. In the network system, the copying of data can be done easily without having to go through the permission of the data owner. Theft is no longer just the taking of tangible commodity / materials, but also illegal taking of data.[78]

Credit card fraud can be categorized as a transnational crime because:

1. Carder credit card theft can be conducted in several countries.
2. The Preparation, planning and supervision by the perpetrator of the carding crime is carried out in one country but the target of the crime is outside the country where the carder is on.
3. Carders can get credit card data assisted by friends abroad who work in retail outlets such as restaurants or shops that serve credit card payments. They can also get the data through carding forums using internet technology.
4. Carding crimes have targets in more than one country.[79]

Review by method, character and modus operandi, credit card fraud enters in category of cybercrime and accordance The Prevention of Crime and The Treatment of Offenders in Vienna April 10-17, 2000. Modus operandi within credit card fraud there are

[76] Utomo, B. S. R., Satria, D., & Wisudawati, L. M. (2012). *Improved Credit Card Security Using the Fingerprint Verification System in Indonesia*. Scientific seminar proceedings National Computer and Intelligence Systems . Vol. 7. h.72

[77] Credit Card fraud. (n.d.). In Encyclopedia online. Retrieved from http://www.en.wikipedia.org. (10 november 2020)

[78] Lalamentik, S. J. (2020). *Application of law for perpetrators of credit card fraud*, Lex Crimen Vol. IX/No.1/ Jan-Mar. H. 152

[79] Kurniawan, N. A. (2014). *Prevention of carding as a Transnasional crime according to internal law*. Ministry of Education and Culture. Brawijaya University. h.7

4 take, that is : located the internet, obtain credit card, order item and take order. Credit card fraud use phising methods, Shoulder, Scam Page and SQL Injection. [80]

Based on the description above, technological advances have created new crimes known as cybercrimes. One form of cybercrime is credit card fraud. These crimes fall into the category of transnational crimes. Credit card fraud is very detrimental to customers around the world, even the crime rate is increasing as technology advances.

Credit card fraud in Indonesia and other countries in the world

The modus operandi[81] of credit card crimes committed by carders has always shifted over time as along with developments in technology and information. In 2005, credit card crimes were only committed through credit card theft, then signatures was forged. The various types of credit card crimes committed by carders (credit card criminals) in society have brought damage to users and credit card owners.

The number of cases of credit card fraud increased recently shows that credit card holders as consumers have a weak position. Cardholders can only filing a claim to the bank without handling which is still unclear. In this crime known as carding, the bank and the credit card holder are victims, is due to the evil of a third person who has the ability in the field of information technology or someone who takes advantage of the negligence of the bank or the credit card holder.[82]

Figure 1. The crime rate on credit cards in Indonesia

Figure 1. Describing the number of credit card crime rates in Indonesia in 2007. There are many types of card crimes. The largest number of crime figures was in cases of lost cards with a total of 48,797. Since January 2011, reached 2,741 credit card fraud cases with a loss of Rp. 11.78 billion. The biggest fraud occurred in April 2011, reaching up to Rp3.42 billion.[83] In 2012, bank of Indonesia stated the credit card crimes reached 11,263 cases. In February 2017, Bareskrim Polri uncovered a suspected bank breach 834 billion. So, it also because of credit card fraud. In Experian Asia Pacific report, Indonesia

[80] Aru, M. (2018*). International Law Regulations against carding crimes(illegal use of credit cards as a form of cybercrime)*. (Essay). Retrieved from http://repositori.usu.ac.id
[81] The operation of person or group involved in cerrying out their evil plans. This word is often used in newspaper or television and is often abbreviated with M.O
[82] Lalamentik, S. J. (2020). *Application of law for perpetrators of credit card fraud*, Lex Crimen Vol. IX/No.1/ Jan-Mar. H.151
[83] Utomo, B. S. R., Satria, D., & Wisudawati, L. M. (2012). *Improved Credit Card Security Using the Fingerprint Verification System in Indonesia*. Scientific seminar proceedings National Computer and Intelligence Systems. Vol. 7. h. 73

occupation a number 4.6 on a scale of 1-5 (5 is the worst). Indonesia is now a bustling country with problems credit card fraud. [84]

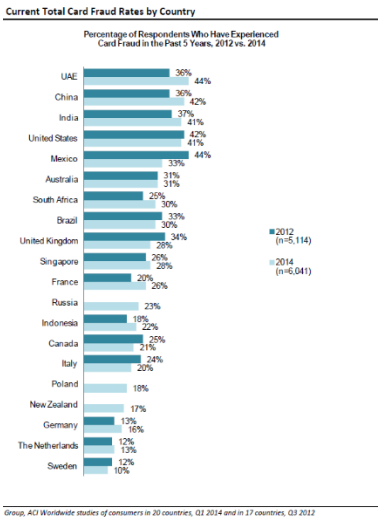

Figure 2. Percentage of Consumers card fraud 2012 vs. 2014

In 2012, percentage of respondent who have experienced card fraud in the past 5 years, 2012 v 2014, and Indonesia percentage increased about 4%. High five on Mexico, United States, India, China and UAE. There are several countries that in 2012 have not experienced fraud card but have in 2014. Among other, there was Russia, Poland and New Zealand. This proves that the percentage of card fraud increased significantly.

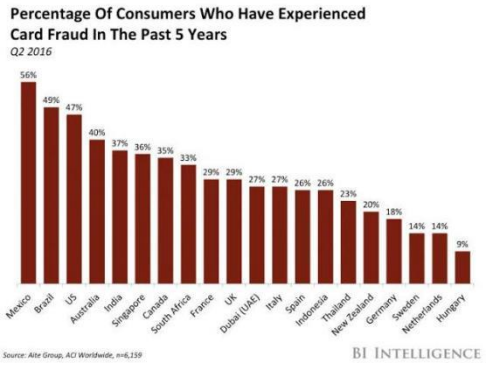

Figure 3. Percentage of Consumers card fraud 2016

In 2016, Indonesia percentage was on 26%. If we compared with figure 2, Indonesia increased by 4 %. That's a high number for a year. The highest rank still in Mexico with 56%. On figure 2, china in the highest number but in 2016, China was nowhere to be seen. Its shows that china was able to handle card fraud problem.

[84] Hafiz, M. P. A. (2020). *The rate of credit card fraud in Indonesia exceeds China?.*Retrieved from http://www.marketeers.com. (11 November 2020)

From all figure above, we can conclude that one of the factors that makes a percentage of credit card fraud increase is technological advances. Technological advances make it easier for perpetrator to carry out their action. But also, we know that are also useful for handling this problem.

Legal Protection for Customer Credit Card Fraud Case in Criminal International Law.

Credit card fraud is discharges customers around the world and threatens economics, business and individual. Indonesia ranks second as a country with the most cases of credit card fraud. In order to minimize the occurrence of credit card fraud, Bank of Indonesia issued several laws. The regulation also applies that every time a credit card user is going to make a transaction on the internet, a credit card user must provide his personal details as one of the transaction authorizations for both services and buy-sell of commodity that he accesses on the internet because it is often an opening for criminals to falsify the transaction notarization so that it seems the transaction will actually have been validly approved by the credit card owner.[85] The risk of transactions in cyberspace is very complex and credit card fraud is a criminal act with criminalized data.[86]

Credit card fraud is a transnational crime that uses extraterritorial jurisdiction to establish, implement and enforce legal provisions that have been established by a State. Jurisdiction is the legal power of the State over vital and central legal events that can change, create or end a relationship or legal obligation. Jurisdiction is also a reflection of the basic principles of state sovereignty, the principle of non-interference and equality of the state.

Several countries have used the principle of extraterritorial jurisdiction in their national laws. This extraterritorial principle is used when the impact arising from a violation affects many parties and when the area where the violation occurs does not regulate it but the consequences are still detrimental to other.[87]

International criminal law responds to this problem by using the principles contained in the provisions of the Convention on Cybercrime, namely the principle of "aut dedere aut judicare", listed in article 24 paragraph 3, which means:

"Every State has the obligation to prosecute and prosecute perpetrators of international crimes and has the obligation to prosecute and prosecute perpetrators of international crimes and is obliged to cooperate with other countries in arresting, detaining and prosecuting and prosecuting perpetrators of international crimes."

A country may not take an action that cross the boundaries of sovereignty in the territory of another country because it is in accordance with the general principle in

[85] Rusmini, A. (2017). *Criminal Offence of credit card use and Prevention of credit card fraud*. Al'Adl, (IX) 1. h.39

[87] Carolina, V. *Application of extraterritorial jurisdictional principles in the utilization of information technology and communication and Indonesia implementation according law number 11 year 2008 on information and electronic transactions*, Bandung, Padjadjaran University, h. 48

international law which states that each country has the highest sovereignty over whatever is in its territory.[88]

Indonesia already has a law to handle cybercrime cases, namely Law Number 11 of 2008 concerning Electronic Information and Transactions. In terms of material content, the law has been able to answer the issue of legal certainty regarding carding crimes accompanied by criminal sanctions and the application of the principle of extraterritorial jurisdiction but cannot be widely used because it requires recognition or ratification by a country.

Indonesia has made various efforts in dealing with credit card fraud as Cyber Crime across national borders, both externally and internally. Externally, through the Police, collaborating with the Australian Federal Police. Meanwhile, Indonesia's internal efforts include the issuance of the European Union Convention on Cybercrime Bill, Cyber Defense Competition, and Cyber Defense Development. Apart from that, it can also be done in 2 (two) ways, namely criminal law and preventive and repressive countermeasures.[89]

Credit card fraud prevention practice in Indonesia is still at a lower level. The bank and the police report on these crimes on penal dan non-penal devices.[90] Penal is a efforts to overcome a crime with criminal sanction, while non-penal is a preventive efforts and a strategic policy on overcoming a crime. [91]Deficiencies in the system should be identified taken to make it more consistent with credit card fraud prevention practices of other countries.[92] The common criminal law in Indonesia has not been effective, flagged by the existence of the latest modus operandi, including: totally counterfeit, white plastic card, internal compromise, and internet phishing. Then, in the matter of legal subject does not include individuals and corporation, it is necessary to formulate a new comprehensive criminal law. With the subject expansion, it is expected to reach all modus operandi, even for the modus operandi that will appear in the future. Then, it requires an expansion with renewal of sanctions. [93]

According to Mohammad Burhan Tsani, international agreements have several functions and one of their functions is as a means of developing peaceful international cooperation. [94] Based on this, international agreements are mandatory means of preventing transnational crimes, so that Indonesia joins the Convention on Cybercrime.

Given the nature of the internet that operates virtually and across borders, it is best for each country to improve the national computer network security system

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[88] Kurniawan, N. A. (2014). *Prevention of carding as a Transnasional crime according to internal law*. Ministry of Education and Culture. Brawijaya University. h.8
[89] Pernandha, G. G. (2016). *Criminological Judicial Review on the Crime of Credit Card in Connection with Law number 11 year 2008 concerning electronic information and transactions.* (Thesis Faculty of Law Unpas). (NPM. 121000405)
[90] Yuda, B. S. (2019). *Prevention Efforts against Crime Theft of Credit Card Personal Data (Carding) in Online Transactions*. (Thesis Faculty of law Lampung University). Retrieved from http://semanticscholar.org
[91] Wulandari, S. (2019).*Perlindungan Hukum Bagi Nasabah Perbankan Terhadap Kejahatan Kartu Kredit.* Hukum dan dinamika masyarakat. Vol. 17. No. 1. h.37
[92] Prabowo, H. Y.(2012). *A better credit card fraud prevention strategy for Indonesia*, Journal of money laundering control.
[93] Nugraha, E. (2016). *Legal perspective of perpetrator of credit card fraud*. (Dissertation Program doctor law Hasanuddin University. h. 7
[94] Kurniawan, N. A. (2014). *Prevention of carding as a Transnasional crime according to internal law*. Ministry of Education and Culture. Brawijaya University. h.9

according to international standards through cooperation between countries in efforts to deal with cybercrime, including through extradition agreements and mutual assistance treaties. [95]Because it must be done through cooperation between countries. Crime no longer stops at borders. However, along the way, cooperation between countries sometimes encounters difficulties because it is related to the sovereignty of a country, differences in culture, language and differences in the legal system.[96]

In preventing transnational credit card fraud, it is necessary to use international legal principles that can be applied in crime prevention and the need for joint responsibility between countries in the form of international cooperation. There is a need for regulation through a model of international legal norms in the form of the adoption of cybercrime regulatory principles that are global in nature, and each country is obliged or necessary to apply its jurisdiction to the perpetrator, even though there is an extradition agreement between these countries but the law of locus delicti and tempos must be elevated.

4. Conclusion

Based on the result and discussion, conclusion from this reasearch is that credit card fraud is a transnational crime because qualifying to be a transnational crime on United Nations Convention against Transnational Organized Crime. More and more cases of credit card fraud are being experienced as technological advances have become an opening for prepetrators to do their actions.

Research show that efforts to encourage cross-country crime of credit card fraud can be overcome with cyber security maintenance. International cooperation should be further enhanced in order to tackle this crime by being regulated in a more comprehensive manner considering the huge losses it has incurred, including by means of cooperation in order to increase the capacity of law enforcement and exchange of information. The legal principle that can prevent credit card fraud is the extraterritorial principle and is accompanied by the principle of international cooperation that is in the provisions of the Convention on Cybercrime.

In the formulation of legal norms that prevent credit card fraud, it refers to the provisions on Convention on Cybercrime. Previously, Indonesia had to ratify the convention. Indonesia needs to add adjusting several articles in Law Number 11 of 2008 about Electronic Information and Transactions in accordance with those stipulated in the convention and there is a need for implementing regulations of the Law.

International criminal law facing the problem of credit card fraud is by implementing regulations through a model or international legal norms form adopting global cybercrime regulatory principles. Regulations made must be ratified against the Convention on Cybercrime and every country in the world is obliged to exercise

[95] Romulo, R. (2008). *Criminal fraud and theft through the internet using other credit card.* (Thesis Tarumanegara University).
[96] Kurniawan, N. A. (2014). *Prevention of carding as a Transnasional crime according to internal law*. Ministry of Education and Culture. Brawijaya University. h.13

jurisdiction over the perpetrators, however there are extradition agreements between these countries. The tempo and the law of locus delicti must still be elevated.

This article not only for describe credit card fraud data but also serve as evaluation for countries around the world is constantly trying to handling this problem. So it created a country that is peaceful, prosperous, and safe.

In the future, jurisdiction should be integrated to review all laws and regulations against the constitution. Then, being expected to maintain its performance, the state should be encouraged to increase security for credit card customers and establish new regulations to face with the new modus operandi that will appear in the future.

References

Book & Journal

Carolina, V. *Application of extraterritorial jurisdictional principles in the utilization of information technology and communication and Indonesia implementation according law number 11 year 2008 on information and electronic transactions.* Bandung, Padjadjaran University.

Hendrik, A., Lisanawati, G., & Wijaya, N. (2018). *The role of telecommunications service providers in efforts to prevent and tackle online fraud crime in the city of Surabaya*. Law and enforcement. Surabaya University.

Kurniawan, N. A. (2014). *Prevention of Carding as a Transnational Crime According to International Law.* Ministry of Education and Culture *Brawijaya University*.

Marzuki, P. M. (2016). *Legal Research*. Jakarta: Pranadamedia.

Malika, A. (2018). *International Law Regulations against Carding Crime (Illegal Use of Credit Cards) As a Form of Cybercrime*

Olii, M. I. (2005). *Narrow of the world, the extent of evil? A brief study of transnational crime*. Journal Indonesian Criminology, 4(I), 14–27.

Prabowo, H. Y. (2012). *A better credit card fraud prevention strategy for Indonesia*, Journal Of money laundering control.

Rumampuk, A. M. (2015). *The Crime of Fraud through the Internet Based on the Laws in force in Indonesia*. Supervisor *: Tonny Rompis, SH, MH; Evie Sompie, SH, MH; Nixon S. Lowing, SH, MH*. Lex Crimen *IV* (3), 30–35.

Rusmini, A. (2017). *Criminal offence of Credit Card Use and Prevention of Credit Card fraud*. Al'Adl, (IX)1.

Sitompul, J. (2012) *Cyberspace, and Cybercrime, Cyber law:* Review the Aspects of Criminal Law. PT Tatanusa.

Utomo, B. S. R., Satria, D., & Wisudawati, L. M. (2012). *Improved Credit Card Security Using the Fingerprint Verification System in Indonesia*. Scientific Seminar Proceedings National Computer and Intelligence Systems. (7)

Wulandari, S. (2019). *Legal Protection for Banking Customers against Credit Card Crime*. Law and Community Dynamics, *17*(1), 29–38. https://doi.org/10.36356/hdm.v17i1.1276

Essay/Thesis

Aru, M. (2018). *International Law Regulations against Carding Crimes (Illegal Use of Credit Cards as a Form of Cybercrime*). (Essay). Retrieved from http://repositori.usu.ac.id

Lalamentik, S. J. (2020). *Application of law for perpetrators of credit card fraud*. Lex Crimen Vol. IX/No.1/ Jan-Mar.

Nugraha, E. (2016). *Legal perspective of perpetrator of credit card fraud*. (Dissertation Program doctor law Hasanuddin University.

Pernandha, G. G. (2016). *Criminological Judicial Review on the Crime of Credit Card in Connection with Law Number 11 of 2008 concerning Electronic Information and Transactions.* (Thesis Faculty of Law Unpas). (NPM. 121000405)

Romulo, R. (2008) *Criminal fraud and theft through the internet using other credit card.* (Thesis Tarumanegara University). Retrieved from http://

Yuda, B. S. (2019). *Prevention Efforts against Crime Theft of Credit Card Personal Data (Carding) in Online Transactions*. (Thesis Faculty of law Lampung University). Retrieved from http://semanticscholar.org

Law

Convention on Cybercrime

Regulation number 11 year 2008 on information and electronic transactions, Indonesia government

Regulation number 82 year 2012 on system and electronic

The Prevention of Crime and the Treatment of Offeders

Website

Credit Card fraud. (n.d.). In Encyclopedia online. Retrieved from http://www.en.wikipedia.org

Hafiz, M. P. A. (2020). *The rate of credit card fraud in Indonesia exceeds China?.* Retrieved from http://www.marketeers.com. (11 November 2020)

The Practice of Inbreeding in a Positive Legal Perspective of the Polahi Tribe, Boliyohuto District, Gorontalo Province

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ABSTRACT

The phenomenon of inbreeding that occurs in the Polahi Tribe, Gorontalo Province, is a taboo thing, because it will have a negative impact both in terms of religion, health and continuity of descent, this marriage is still commonly found, especially in remote areas where people are primitive. and the majority of their educational awareness levels are still relatively low.
Based on the things described above, the authors are interested in criticizing the inbreeding carried out by the Polahi tribe in Boliyohuto District. So the author raises the problem, namely How is the role of the Government in handling inbreeding carried out by the Polahi tribe in Boliyohuto District, Gorontalo Province.
This type of research used in this research is a type of normative legal research, namely a form of legal research carried out by examining legal materials of literature and / or secondary data. Polahi is one of the isolated tribes who still live in the interior of the forests of Sulawesi Island. around Mount Boliyohuto, Gorontalo Province. Their lives are far from the values of social ethics, education and religion, so that their descendants become citizens who are very marginalized and do not know the social order.
It takes a more role from the local government in handling the Polahi people, for example through a massive socialization movement.
Keywords: *Inbreeding, Positive Law, Socialization*

1. Introduction

Marriage is an important phase in human life that aims to form an eternal and eternal happy family based on the One Godhead. And when he married a servant, he perfected half of his religion. Through the marriage he will gain peace and quiet(Muhammad Makmun Abha, 2015, p. 14) and is also a legitimate way to obtain offspring. As He Says:

O people, fear your Lord, who created you from one self, and He created his partner from him. And of them He has bred many men and women. And fear Allah, with which you ask one another, and guard your kinship. Verily, Allah is ever watchful over you. (QS.An-Nisa ayat :1).

The essence is that marriage is an agreement between a man and a woman that is legally recognized by society, law and religion and contains a set of rights and obligations of the husband and wife in a commitment that he or she carries out, and aims to form a family.(Suparyanto, 2012)

Furthermore, in order to realize the purpose of marriage, the conditions and pillars must be fulfilled meaning that there is no prohibition that is a barrier to the practice of marriage aqad (Khafizoh, 2017, p. 62). As for the barrier to the implementation of

marriage, as affirmed in Law of the Republic of Indonesia No. 1 of 1974 on Marriage, Article 8,

a. blood in the lineage is straight down or upwards;
b. the blood in the sideways lineage that is between a brother, between one and a parent's brother and between one and his grandmother's brother;
c. related to semenda, namely in-laws, stepchildren-in-law and mother/stepfather;
d. related susuan, namely susuan parents, susuan children, susuan brothers and uncles;
e. having a brother with a wife or as an aunt or niece of a wife, in the case of a husband with more than one;
f. have a relationship that by its religion or other applicable regulations, is forbidden to marry.

A bloody marriage is one of the reasons for the annulled of a marriage. A blood marriage or incest is defined as a sexual relationship between each other in an upward or downward line, either due to a lawful or unauthorized birth, or because of a marriage; and in a deviant line, between brother and sister, valid or invalid.(Hilman Hadikusuma, 1990, p. 61)

The issue of marriage has already occurred to some married couples in the Polahi tribe. So it is not surprising that we find children who have been born with disabilities from infant to adult or have other congenital diseases. Then after being traced the cause it turned out that his parents had a blood connection (close relatives). This is based on public ignorance that marriage between close family members will have risks to health, because the public sees the marriage as legal.

Marriage between close family members has a positive side and also has a negative side. When it comes to the wedding, the marriage is returned to the prospective spouse and must be notified to all family members. In fact, a family should connect the silaturrahmi cord with the family of another person who is not from the family group itself. Thus, there is a broader and stronger social and societal relationship. Not only is it a matter of expanding social relationships, the negative side of the most concern in the implementation of marriages between close family members is that it can trigger hereditary diseases. Science modern states that inter kinship marriage will result in offspring that are deformed and susceptible to various diseases, decreasing the rate of sexual reproduction to infertility. And marriage between distant relatives will produce better offspring than their parents. (Muhammad Kamil Abdushsharmad, 2004.p.222).

The phenomenon of blood marriage that occurs in Polahi, Gorontalo Province, is taboo, because it will have a negative impact both in terms of religion, health and continuation of offspring, the marriage is still found especially in rural areas whose communities are primitive and the majority of the level of educational awareness is still relatively low. Based on the things described above, the author is interested in criticizing the blood marriage performed by polahi people in Boliyohuto sub-district. Sehigga the author raised the issue of how the government's role in handling blood marriages performed by polahi people in Boliyohuto Sub-district of Gorontalo Province.

2. Methods

A) Types and Research Approaches This type of research used in this thesis is normative law research whose data source is secondary dataprimary legal materials, secondary law (Soekanto, 2012, p. 9) and non-legal materials (Mukti Fajar Nur Dewata

dan Yulianto Achmad, 2013, p. 43), This study uses a type legal approach (statute approach) and conceptual approach.

B) Data Collection and Analysis Techniques Data collection techniques with observation and document study. The data analysis is qualitative data appearing in tangible words rather than sequences number or quantity (Soejono dan Abdurrahman, 2003, p. 52), then presented descriptively (Soekanto, 2012, p. 9)

3. Results and Discussions

The Government's Role in Handling Blood Marriages Performed by the Polahi People

In Law of the Republic of Indonesia No. 1 of 1974 on Marriage, as well as in the Compilation of Laws and Civil Code, it is forbidden that marriage is forbidden between two blood-related persons in a straight lineage down or upwards, and the blood relation in the sideways lineage is between a brother, between one and a parent's brother and between one and his grandmother's brother.

It is legal for marriage to be done according to the law of each religion and its beliefs. If religious law and belief govern that same-sex marriage is forbidden, then same-sex marriage is invalid. Article 2 Presidential Instruction No. 1/1991 on Dissemination of The Compilation of Islamic Law (KHI) affirms marriage, which is a very strong contract or miitsaaqan gholiidhan to obey the commandments of Allah and perform it is worship.

According to Thaba'thaba'i, in Tafsir al-Mizan, the practice of bloody marriage existed in the early days of human civilization, because at that time the human population was still very small and the rules of prohibition of incest marriage had not been regulated, inevitably marriage was done by fellow brothers, in order to maintain human survival, to be forged in that way. Ibn Katheer suggested in Qashah al-Anbiyaa that each time she conceived, Eve gave birth to two twins, a boy and a girl. "Adam was commanded to marry his son to the daughter of another twin son, and so on," This means God has instructed man to continue his descendants.(Nashrullah, 2020)

However, in the case of this Prophet Adam, all that is allowed is cross marriage, not with the twin brother he was born with. "So it is forbidden to marry his own twin brother."(Nashrullah, 2020). History has noted that in the past, the practice of bloody marriages has also occurred to Egyptian rulers and nobles in several other countries, this was done in order to maintain their status as pure blood.(Sartika, 2019). With the increasing number of people, the marriage of fellow brothers is not justified, even with siblings. At the time of the Prophet Muhammad SAW, the provisions of marrying blood brothers were abolished in absolute terms,(Nashrullah, 2020) much less is affirmed in QS. An Nisa verse 23 relating to the prohibition of blood marriage, which means:

It is forbidden for you to marry your mothers. your daughters; Your sisters, your father's sisters; your mother's sisters; daughters of your brothers; daughters of your sisters; your mothers who breastfeed you; sister of one; your wives' mothers(in-laws); daughters of your wives who are in your care from wives you have intervened with, but if you have not intervened with your wife, then it is not sinful for you to marry her. And it is forbidden to you that you will not be helped. And it is forbidden to gather two sisters except what has happened in the past. Verily, Allah is Forgiving, Merciful."

The prohibition of marriage is also found in Article 39 of article 39 (1) letter a KHI, which states that it is forbidden to have a marriage between a man and a woman because:

(1). Due to nasab's connection:

a. with a woman who gives birth or loses it or her offspring
b. with a woman of father or mother's offspring
c. with a sister woman who gave birth to

(2). Because of the relationship of relatives as good as:
a. with a woman who gave birth to his wife or his ex-wife
b. with a woman the ex-wife of the one who brought it down
c. With a woman descended from his wife or ex-wife, except for the breakup of the marriage with his ex-wife qabla ad dukhul
d. with a woman of her offspring's ex-wife

(3). Because of the relationship sesusuan:
a. with the woman who breastfeeds her and so on according to the straight line up
b. with a woman one way and so on according to a straight line down
c. with a sister's woman, and a niece and a sister down
d. with an aunt and auntie's grandmother on
e. with a child who was ususued by his wife and his descendants.

According to Islamic Law, marriages that are forbidden can be distinguished between those that are forbidden for good and for a while. What is forbidden for good is marriage which is done because of blood connection, semenda association, susan association, and the reason for adultery. Marriage is forbidden because of blood relations, because marriage between a man and his grandmother's mother (continues upwards), with his daughter, granddaughter (kept down), with sister, daughter of brother/woman (continues downwards), marriage with aunt i.e. sister of mother/father, brother of grandmother or grandfather (continues upwards).(Hilman Hadikusuma, 1990, pp. 65–66)

Vice Chairman of the Indonesian Ulama Council (MUI) KH Yunahar Ilyas asserted that same-sex marriage in Islam is illegal, and should be annulled, because there is no umbrella of the law that governs specifically, therefore if the marriage is not valid, even though there is already a marriage license, marriage is the same blood as adultery(Tim Okezone, 2020)

Legal Consequences of Bloody Marriage

As a result of the law, under Article 90 of the Civil Code it is determined that the annulment of all marriages that take place in violation of the provisions contained in Article 30, Article 31, Article 32, and Article 33, may be prosecuted (requested annulment) either by the husband and wife himself, either by their parents or blood families in an upward line, either by those concerned with the annulment, or by the Court.(Suparyanto, 2005, p. 111)

Lecturer at the Faculty of Law, University of Indonesia (FHUI), Wirdyaningsih, argues that the sanction for inbreeding is the annulment of the marriage. However, if the marriage is carried out under the hands or married in a siri, then automatically it will be null and void because it violates the Marriage Law and the Compilation of Islamic Law (for those who are Muslim). He added that the Marriage Law does not embrace criminal sanctions. Another consequence of matters prohibited in the Marriage Law is administrative. Therefore, if KUA officers violate the rules in the Marriage Law, they are subject to administration. However, he continued, if the party involved in the incestuous marriage process is proven to have deliberately falsified documents, then the act could be brought into the realm of crime.(Heriani, 2019)

In line with the Criminal Law Observer of Trisakti University, Abdul Fickar Hadjar, said that inbreeding is prohibited by Law Number 1 of 1974 concerning Marriage. This rule is contained in Article 8 letter b, which reads: "Marriage is prohibited between two people who are related by blood on either side of the line, namely between siblings, between one and a relative of the parent and between one and his grandmother". So the Marriage Law does not adopt criminal sanctions, but rather an administrative one. The perpetrator of an inbreeding can be subject to a marriage annulment sanction. Meanwhile, KUA officers who violate these regulations are subject to administrative sanctions. Criminal sanctions can be imposed if it is proven that there is falsification of documents and false witnesses. (Kompas. 2009)

That incest marriage can be annulled or processed through a religious court where the submission is made by the husband or wife, the family is straight up from the husband or wife, the authorities only as long as the marriage has not been decided if the wife of the incest marriage does not know they are siblings. However, in the event of an element of willfulness then the marriage violates Islamic sharia.(Maimunah, p25)

The Origin of Polahi

Based on historical facts, polahi people are a group of Gorontalo people who fled to the forest during the Dutch colonial period. Therefore they are called "Polahi" which means "escape".(Sulung Lahitani, 2015) The Polahi people are also one of the alienated tribes and still live in the forest interior of Sulawesi Island. around Mount Boliyohuto, Gorontalo Province. Their lives are far from the values of social ethics, education and religion, so the derivatives become very marginalized citizens and do not know the social system in general as well do not know the reading and make them a tribe that does not adhere to religion. A primitive habit that polahi still maintains is mating with fellow brothers. Because he does not know religion and education, and tends not to want to live socially with other citizens, the son of a Polahi can marry his father, the mother can marry his son, and the sister marries his brother. In addition to Paguyaman, polahi tribes can also be found in Suwawa and Sumalata areas. Everything is around Mount Boliyohuto, Gorontalo Province.(Kompas, 2013).

Therefore, it takes an approach from the government to get them to know religion and education requires proper study, for example by socialization or legal counseling so that the handling of their social life is targeted.(Kompas, 2013).

When one rule of law has been established, it is very important to accompany counseling or socialization activities in order for the rule of law to be truly effective. The socialization process aims to:(Ahmad Ali, 1998, pp. 195–196)

1. So that members of the public can know the presence of a law or regulation,
2. So that citizens can know the content of a law or regulation,
3. So that citizens can adjust (mindset and behavior) to the desired purpose by the law or the rule of law.

The Devastating Effects of Bloody Marriage

Medical experts say it's dangerous for a bloody marriage to happen.(Safitri, 2020)

a. Low immune system

Each person has 2 pairs of genes in his body, one from the father and one from the mother. The second version of the gene could be different. This is what determines whether a child will later be healthy or not, depending on the genetic condition of both parents. In short, a descendant of a bloody marriage would have a very similar genetic. The dna of the mother and father will be similar because it comes from a single family line. In other words, the child's blood marriage results will have less varied DNA. Lack of DNA variation can cause the body's immune system to weaken. The child will have a variety of genes or a small number of Major Histocompatibility Complex (MHC) allerel. MHC is a group of genes tasked with warding off disease. MHC can work well if the allerel in the body is diverse. The more diverse the allerel, the more the body will be more optimal against disease in the body. Because the body of the child from inbreeding has few alleles, it will be more difficult for the body to detect foreign substances that enter. As a result, these children tend to get sick easily.

b. The child is born with defects

Inbreeding from one family line can produce deformed offspring. According to a study involving 48 cases of incest in 2008, experts found that this illicit marriage can increase the risk of birth defects. Supported by research in Czechoslovakia, about 42% of children in inbreeding were born with severe birth defects and died at birth. While the other 11 percent have a risk of mental retardation.

c. Hemophilia

Inbreeding can also put offspring at high risk of developing hemophilia. However, it should be noted that hemophilia does not always occur due to inbreeding. Hemophilia is a genetic disorder in the blood due to lack of blood clotting factors. This condition occurs due to mutations in the X chromosome and can be passed along the mother's family line. Because women have two pairs of X chromosomes, girls must inherit two pairs of defective genes to develop hemophilia. On the other hand, men have one X chromosome and one Y chromosome. This causes men to develop hemophilia even if they only get 1 defective gene from their parents. Children resulting from incestuous offspring can inherit 2 copies of the defective gene at the same time that are passed down from their mother.

d. Autosomal recessive disease

Everyone generally carries a hereditary disease gene that is inherited by one parent. For example, your father has diabetes and your mother doesn't. So, your father will pass 50% of these "defective" genes to your body, while the remaining 50% of you are saved by healthy genes from your mother. Thus, you may not necessarily have diabetes as long as you maintain a healthy lifestyle. Unlike children from inbreeding, these children usually carry a larger genetic disease. This condition is known as autosomal recessive disease.

Autosomal recessive disease is a disease caused by a genetic disorder that is passed on by both parents. Examples of autosomal recessive diseases are albinism (albino), sickle cell anemia, cystic fibrosis, and so on. In the case of inbreeding, both the father and mother will pass similar genes to their children. Take, for example, your father has albinism. You and your partner (whether brother or sister) both carry a 50% chance of passing the defective gene to your child. If there is inbreeding, it is not impossible if the offspring will later carry the recessive albinism allele from the partner. This chance can be 25% to 100%.

Even though the results of inbreeding by the Polahi tribe, it does not affect their offspring, for example: physical disabilities, paralysis and idiots, but in order to avoid religious and legal prohibitions as well as medical prohibitions, efforts must still be made to give appreciation and insight to tribal people. Polahi, so as not to continue to the next generation.(Tilome, 2020, p. 132)

4. Conclusion

Based on the above research can be concluded that the incest marriage of close family practiced by the community in the Polahi tribe of Boliyohuto sub-district due to their isolation and ignorance about ethics, social, legal and religious and on health issues, makes them not know that incest is forbidden, and instead preserve it. There needs to be a role more than local government on the condition of its citizens, especially to the Polahi people to make them more familiar with religion and education with proper studies, for example by socialization or legal counseling so that the handling of their social life is targeted.

References

Ahmad Ali. (1998). *Menjelajahi Kajian Empiris terhadap Hukum. cetakan pertama*. PT. Yarsif Watampone.

Heriani, F. N. (2019). *Begini Hukum Perkawinan Sedarah di Indonesia*. Hukumonline.Com. https://www.hukumonline.com/berita/baca/lt5d1e1c41636ed/begini-hukum-perkawinan-sedarah-di-indonesia?page=2

Hilman Hadikusuma. (1990). *Hukum Perkawinan Indonesia Menurut Perundangan, Hukum Adat, Hukum Agama*. Mancar Maju.

Khafizoh, A. (2017). Perkawinan Sedarah dalam Perspektif Hukum Islam dan Genetika. *Syariati ; Studi Al-Qur'an Dan Hukum, III*(01), 62–76.

Kompas. (2013). *Polahi dan Cerita Mistis yang Melingkupinya...* Kompas.Com. https://regional.kompas.com/read/2013/05/07/11091556/polahi.dan.cerita.mistis.yang.melingkupinya

Muhammad Makmun Abha. (2015). *Benarkah Aisyah Menikah di Usia 9 Tahun?: Menggali fakta dan hikmah dari pernikahan Rasulullah saw dan Aisyah ra.* Media Pressindo.

Mukti Fajar Nur Dewata dan Yulianto Achmad. (2013). *Dualisme Penelitian Hukum Normatif dan Empiris*. Pustaka Pelajar.

Nashrullah, N. (2020). *Nikah Inses, Syariat yang Pernah Halal Masa Nabi Adam*. Republika.Co.Id. https://republika.co.id/berita/q9dlri320/nikah-inses-syariat-yang-pernah-halal-masa-nabi-adam

Safitri, A. M. (2020). *Alasan Dunia Medis Larang Pernikahan Sedarah, Ini Bahayanya*. Honestdocs. https://www.honestdocs.id/penyakit-akibat-pernikahan-sedarah-incest

Sartika, R. E. A. (2019). *"Sejarah Mencatat, 'Korban' Pernikahan Sedarah adalah Anak-anak",*. Kompas.Com. https://sains.kompas.com/read/2019/07/03/200000123/sejarah-mencatat-korban-pernikahan-sedarah-adalah-anak-anak?page=all.

Soejono dan Abdurrahman. (2003). *Metode PenelitianHukum*. Rineka Cipta.

Soekanto, S. (2012). *Pengantar Penelitian Hukum*. Ul-Press.

Sulung Lahitani. (2015). *Astaga, Suku di Gorontalo Ini Budayakan Kawin Sedarah*. Liputan6 Jakarta. https://www.liputan6.com/citizen6/read/2235198/astaga-suku-di-gorontalo-ini-budayakan-kawin-sedarah

Suparyanto. (2005). *Hukum Perkawinan Nasional*. Rineka Cipta.

Suparyanto. (2012). *Konsep Dasar Perkawinan*. http://dr-suparyanto.blogspot.com/2012/02/konsep-dasar-perkawinan.html#:~:text=Menurut UU No. 1 Tahun,Esa (Herawati%2C 2009).

Tilome, A. A. dan R. A. (2020). Makna Perkawinan Sedarah Bagi Warga Suku Polahi di Indonesia. *Jurnal.Ideaspublishing*, *6*(2), 123–133.

Tim Okezone. (2020). *Heboh Incest di Sragen, Begini Hukum Perkawinan Sedarah Menurut Islam*. Tribunstyle.ComOkezone. https://muslim.okezone.com/read/2020/06/19/330/2232749/heboh-incest-di-sragen-begini-hukum-perkawinan-sedarah-menurut-islam?page=1

Model of tackling Corruption as Transnational Crime with a fair and Civilized Humanity Paradigm

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ABSTRACT

It has declined to the urgency of transnational corruption crimes. Indonesia has ratified the UN convention on anti-corruption and is required by international cooperation in the fight against corruption in potential across national borders. The NPLS 'commitment to joint against corruption (UNCAC) and the g20 anti-working group (ACWG) show the need for reinforcement in the extradition agreement for corruption crimes which not only harm the state but also harm the very nature of joint cooperation in the eradication of corruption crimes. Criminal corruption has made policy against corruption different. The death penalty expected to provide absolution turned out to be inadequate to eliminate the crimes of corruption. A fair and civilized humanitarian outlook projected as a United States of inter-states action towards the elimination of crime by paying attention to the humanities, justice and justice, and by sanctions against transnational corruption crimes plus one third of the basic penalties, social work and the obligation to build public facilities for the state, and without alternative inability.
Keywords: *Corruption, United Nations Convention Against Corruption, Transnational, Country, Law.*

1. Introduction

The law and justice, like the two immeasurable sides of an unbreakable coin, were paralyzed by the law intended to bring about justice and justice. But to get justice, the seeker has to go through the most unfair procedures. So, the law became interested in several parties, not to please the people but to bring misery upon the people. Law cannot bring justice among the people, so much less law enforcement has been so high in voting that it makes a legal certainty impossible. A progressive idea of law, which was foisted by Satjipto Rahardjo is a long thought struggle for the application of Indonesian systems that are always statically, corrupt, and do not lend a structural to the laws that live in society. Indonesian law has lost its social base, a multicultural base, and is sensibly enforced in a building of a legal system, which laws are then coerced, and imposed with structural violence by law enforcement officials. Because of Indonesia's judiciary system and problematic law enforcement conditions, where such measures can also be seen in direct contrast when we try the corruption crimes that have been committed[97].

Corruption is an act by someone who usually ACTS as a public official and another role involved in such action that improperly abuses his power derived from public trust in them for a more one-sided advantage. The Latin - based corruption, that is, corruption, corruption, corruption, corruption, corruption, corruption, corruption, corruption, corruption. The euptus terms corrupt, corrups, lacertie, coriine, and corruption. In a

[97] Rahardjo, S. 2010. *Sosiologi Hukum : Esai – Esai Terpilih*. Yogyakarta: Genta Publishing. Hlm. 96-97

broad sense, corruption is defined as the abuse or perversion of official office by a public official for personal gain, and all forms of governments around the world are vulnerable to corruption in practice. In Indonesia, corruption has become an incurable, long-lasting, systemic disease. As a result of corruption that is sweeping the national economy and ruining the system of government, corruption has not only affected poverty and brought misery upon people's lives. Therefore, the rule of law-invitations has tasted corruption as an extraordinary crime (extraordinary crime).

Cross-country crime, also known as transnational crime, causes much harm to a country and region-specific areas within the country. The range of distortions that can take places, such as the widespread criminal corruption that has affected people, the infrastructure, and the world's environment. Problems have arisen - problems such as poverty and conflict have also resulted from transnational crime. With its nature that crosses borders - borders that also impact other countries, transnational crime becomes a threat to global security[98].

The resulting problem of numerous criminal corruptions has created the United Nations convention against bribery (UNCAC), which is spearheaded by the United Nations. The draft of the United Nations convention began in 2000, where the United Nations general assembly in his 55th congregation, through a resolution of 55/61 on December 6, 2000, saw the need to formulate a global instrument of international law against corruption. Such instruments would be essential to bridge different legal systems and promote effective eradication of criminal corruption. The United Nations convention against the challenge (UNCAC) was accepted by the United Nations general assembly on October 31, 2003, at the UN headquarters in New York in the United States, and the process of its signing of the convention was resumed on December 9 to 11, 2003, in Merida Mexico until September 19, 2005, at UN headquarters and 140 countries have signed the convention. The signing process corresponds to section 67, section 1 UNCAC. It has been ratified by 47 countries and Indonesia, which has become the 48th in line to ratify it[99].

2. Methods

This post is the result of an approach made by juridical normative observation through a legal approval (statue approach) and case approach (approach), the fabrications of materials using several articles on corruption, the law - laws involving the no.20 years of 2001 and the UNCAC (the United Nations convention against bribery) that involve international in reducing the crime rates, which ultimately creates an idea for criminal corruption.

3. Results and Discussions

In the second quarter of 2007, the company's net profit in the first quarter of 2007 fell to Rp775.1 trillion from Rp775.9 trillion in the same period last year. Corruption is not limited to mere officials, from the legislative domain as well as the executive. The

[98] Kemlu.go.id. 2016. Penanggulangan Kejahatan Lintas Negara Terorganisir. Retrieved February 5, 2016, from http://www.kemlu.go.id/id/kebijakan/isu-khusus/ Penanggulangan-Kejahatan-Lintas-Negara-Terorganisir.aspx, retrieved at 15.00 WIB

[99] Abdurofiq, A. 2016. Politik Hukum Ratifikasi Konvensi PBB Anti Korupsi di Indonesia. *Jurnal Cita Hukum*, *4*(2), hlm.187–208. https://doi.org/10.15408/jch.v4i2.4099

rupiah's exchange rate against Rp9,300 per dollar was recorded at Rp9,310/9,315 per dollar the day before, he said. Based on that amount, it is a huge sum compared with the total penalties imposed by the judges' council on rp 102,985,000,000, and Rp 625,080,425,649 as the understudy of corruption will be at a considerable cost to the state[100]. It is also discussed from an international perspective that corruption is primarily a crime in the white-collar crime and has a complex and consequential role to the international community. The 8th UN congress concerning "prevention of crime and treatment of inaction" which has validated the resolutions "mitigation government" in Havana in 1990 that defined the impact of corruption:

1. Corruption within the scope of the public official

    a. Can destroy potential effectiveness of any kind of government program;
    b. Victimize groups and groups;
    c. Can hinder development (evolutionary development);

2. There is a strong link between corruption and the various forms of economic crime, money laundering, and organized crime[101].

From a legal perspective in Indonesia, corruption is vividly explained in 13 chapters found in 1998's no. 31 acts turned into 2001 no. 20 the year 2001 law on the elimination of criminal corruption. Chapters - they explain in detail deeds that can be punishable by criminal corruption. Some forms of corruption crimes which can be essentially grouped as follows:

1. State financial losses
2. Bribery
3. Embezzlement in office
4. extortion
5. Foul play
6. Conflict of interest in the procurement
7. gratuity

And as of now, corruption is already entrenched in the country, until transnational corruption occurs. The possibility of INNOSPEC is the possibility of bribing the Tetraethyl Leads (TEL) of the Gasoline project in 2004-2005, which involved the British state, Singapore, and British virgin island and the gratified case of the former Director of the Indonesian Emirate Satar Garuda, as well as many other cases.[102]. we will have to reinforce international cooperation which is carried out through law enforcement networks around the world. The KPK is a country with a history of such things as Vietnam, Australia, Singapore, the USA, the United Kingdom, China, Japan, Germany, and many others. Having a network like this would be crucial to Indonesia to facilitate investigations and arrests, owing to the myriad of corruption operations that use foreign jurisdiction as a place to hide and save money generated by wire unimpeded money[103].

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[100] CNN Indonesia. 2020. Icw: Kerugian Negara Akibat Korupsi Rp39,2 T Di 2020. Retrieved November 10, 2020, from https://www.cnnindonesia.com/nasional/20200930124534-12-552660/icw-kerugian-negara-akibat-korupsi-rp392-t-di-2020, diakses jam 13.00 WIB

[101] Arief, B. N. 2007. *Masalah Penegakan Hukum dan Kebijakan hukum Pidana dalam Penanggulangan Kejahatan*. Jakarta: Kencana Prenada Media Group, hlm. 148.

[102] Indonesia Corruption Watch. 2017. Korupsi Transnasional. Retrieved November 10, 2020, from https://antikorupsi.org/index.php/id/article/korupsi-transnasional, retrieved at 19:00 WIB.

[103] Simandjuntak, M. E. 2013. Mutual Legal Assistance: Kerjasama Internasional Pemberantasan Korupsi. *Masalah-*

According to the Indonesian Survey Corruption Watch (ICW), there were 271 corruption cases in 2019 years, and a total of 580 suspects and state losses reached rp8.04 trillion. The case was handled by the KPK, prosecutor RI, and POLRI from January 1, 2019, to December 31, 2019. According to icw's pattern of corruption in Indonesia mostly bribery mode, a total of 2019 bribes of 51 crimes at a value of 169.5 billion. They will follow the same methods as mark up or inflating 1 case, the misuse of budget 39 cases, the embezzlement of 35 cases, the abuse of authority 30 cases, the fictitious 22 cases, the fictitious reports of 21 cases, the illegal taking of 11, the gratuity of 7 cases, the extortion of 7 cases, and the markdown 1 case[104].

4. Conclusion

There's still a lot of pro bono work to be done on this corruption crime. By creating ideas that could create rules that would eliminate the perpetrators of corruption and also narrow the motion to commit criminal corruption, as well as create rules that would make the perpetrator responsible for what he has done and a crime that would be a crime against corruption.

The writer proposes an idea for a measure of corruption by cracking down on the perpetrators of corruption. My idea, which is:

- In the first half of 2008, the company's foreign exchange reserves reached us $58.9 billion. Any relationship would be expected to provide easy access in and out of interest to the investigation. As listed in chapter 3 of UNCAC regarding actions that could be criminalized as crimes of corruption: Article 15 of the unsolicited of national public activism, article 16 of civil rights and civil conduct, article 17 of misintegration or other articles of property by a public official, article 18 of trading in moderation, article 19 of function, article 21 of cultivation in the private sector, Of some of the actions that are criminalized in uncac, there are glorify offences and there are also non-proliferation offences. Neither goes apart from the state agreements-the participants in the convention, if the action is questionable then there is an acceptance of all convention participants to set up the act in the legislation - the national law thus incurring the obligation of the state party and If a nonparticipant act meant that there was no agreement between covenant participants to declare the act criminally. Therefore, it is in anticipation that we should establish a joint extradition agreement with a country that does not appear on the convention side and make ita deal to deal with Indonesia in order to facilitate cooperation and investigations and arrests overseas[105].
- After that for corruption crimes in a major category, involving judicial, executive, legislative. Assets perpetrators have had to be seized by the state and are given only 1/3 of the assets seized as an extraordinary measure of responsibility and compensation for extraordinary crime. This corruption crime is detrimental and detrimental to society, and it is also impeding the development of the state. Therefore, by confiscating its assets, perpetrators of corruption will sense what it

Masalah Hukum, *42*(1), hlm. 131–138. https://doi.org/10.14710/mmh.42.1.2013.131-138

[104] Abdi, A. P. 2020. ICW: Penanganan Korupsi Selama 2019 Anjlok, Modus Suap Mendominasi. Retrieved November 10, 2020, from Tirto.id website: https://tirto.id/icw-penanganan-korupsi-selama-2019-anjlok-modus-suap-mendominasi-ezNs, retrieved at 19.00 WIB.

[105] Hiariej, E. O. S. 2019. United Nations Convention Against Corruption dalam Sistem Hukum Indonesia. *Mimbar Hukum - Fakultas Hukum Universitas Gadjah Mada*, *31*(1),hlm. 112. https://doi.org/10.22146/jmh.43968

is like to live among the lower levels who often victimize corrupt people while serving as state officials and thus have a deterrent.

- Criminals who commit criminal corruption should be punished without the benefit of the sentence cited in article 34 paragraph (3) the 2006 government rule no.28 regarding the release of remission after serving a third of the prison term. Since corruption is an extraordinary crime and human rights as outlined by the United Nations Convention Against Corruption (UNCAC)
- The next phase of the final sentence for criminals of corruption will have to perform unpaid jobs in the labor force to build tools and infrastructure and/or become a teaching force in a place of need.

In the face of transnational corruption, extradition cooperation between unpartnered countries is vital. Hence, governments and the united nations-nations (UN) play a vital role in tackling this criminal corruption, which will prevent more misery from being created by criminal corruption.

References

Abdi, A. P. (2020). ICW: Penanganan Korupsi Selama 2019 Anjlok, Modus Suap Mendominasi. Retrieved November 10, 2020, from Tirto.id website: https://tirto.id/icw-penanganan-korupsi-selama-2019-anjlok-modus-suap-mendominasi-ezNs

Abdurofiq, A. (2016). Politik Hukum Ratifikasi Konvensi PBB Anti Korupsi di Indonesia. *Jurnal Cita Hukum*, *4*(2), 187–208. https://doi.org/10.15408/ jch.v4i2.4099

Arief, B. N. (2007). *Masalah Penegakan Hukum dan Kebijakan hukum Pidana dalam Penanggulangan Kejahatan*. Jakarta: Kencana Prenada Media Group.

CNN Indonesia. (2020). Icw: Kerugian Negara Akibat Korupsi Rp39,2 T Di 2020. Retrieved November 10, 2020, from https:// www.cnnindonesia.com/nasional/20200930124534-12-552660/icw-kerugian-negara-akibat-korupsi-rp392-t-di-2020

Hiariej, E. O. S. (2019). United Nations Convention Against Corruption dalam Sistem Hukum Indonesia. *Mimbar Hukum - Fakultas Hukum Universitas Gadjah Mada*, *31*(1), 112. https://doi.org/10.22146/jmh.43968

Indonesia Corruption Watch. (2017). Korupsi Transnasional. Retrieved November 10, 2020, from https://antikorupsi.org/index.php/id/ article/korupsi-transnasional

Kemlu.go.id. (2016). Penanggulangan Kejahatan Lintas Negara Terorganisir. Retrieved February 5, 2016, from http://www.kemlu.go.id/id/ kebijakan/isu-khusus/Penanggulangan-Kejahatan-Lintas-Negara-Terorganisir.aspx

Rahardjo, S. (2010). *Sosiologi Hukum : Esai – Esai Terpilih*. Yogyakarta: Genta Publishing.

Simandjuntak, M. E. (2013). Mutual Legal Assistance: Kerjasama Internasional Pemberantasan Korupsi. *Masalah-Masalah Hukum*, *42*(1), 131–138. https://doi.org/10.14710/mmh.42.1.2013.131-138

Implementation of Indonesia's Mutual Legal Assistance Policy Regarding Asset Recovery of Corruption Crimes

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ABSTRACT

The Classification of Corruption Crime as a Transnational Crime caused by its difficulty to be traced and eradicated. All countries including Indonesia struggles with corruption including its effort to recover and return the proceeds of corruption hidden away in other states. International Community including the United Nations have developed various tools for recovering the proceeds of corruption crime such as the United Nations Convention against Transnational Organized Crime ("UNTOC") and United Nation Convention against Corruption ("UNCAC"). This Convention also includes a comprehensive set of the Mutual Legal Assistant Policy. Unfortunately, there have been only a small number of successful prosecutions to recover and return of the proceeds of corruption crime. The research problem raised discusses the implementation of international regulations and mutual legal assistance as a tool to restore and restore the results of criminal acts of corruption and the obstacles that Indonesia experiences in enforcing the provisions of these regulations. To analyze research problems above, this study uses a normative research method, with a prescriptive analysis type of research. The results show that the implementation of Mutual Legal Assistance has not been maximized, because not all provisions in UNCAC and UNTOC have been implemented in regulations, systematically and comprehensively.
Keywords: *Asset Recovery, Mutual Legal Assistance, Corruption*

1. Introduction

United Nations on Convention against Corruption (UNCAC)[1], describes the problem of corruption as a serious threat to the stability and security of the national and international community which has weakened institutions, democratic values and justice and endangers sustainable development and law enforcement. Furthermore, Dimitri Vlassis state that "International community in the developing or development country become increasingly frustrated at witnessing and suffering from the injustice and the deprivation that corruption brings.[2]

The challenge of eradicating Corruption from a global perspective really requires international cooperation, this is due to a gap in law enforcement processes because on

[1] Romli Atmasasmita, "Strategi dan Kebijakan Pemberantasan Korupsi Pasca Konvensi Menentang Korupsi tahun 2003: melawan Kejahatan Korporasi", Jakarta, 2006, p. 1 and Romli Atmasasmita, "Strategi dan Kebijakan Hukum dalam Pemberantasan Korupsi Melawan Kejahatan Korporasi di Indonesia: Membentuk Ius Constituendum Pasca Ratifikasi Konvensi PBB menentang Korupsi", Jakarta, 2003. p.1

[2] Dimitri Vlassis, The United Nations Convention Against Corruption, Overview of Its Contents and Future Action, Resource Material Series No. 66, 2002 p. 118.

the one hand the perpetrators and assets resulting from corruption can cross jurisdictional and geographic boundaries between countries. Various examples of cases prove that the handling of corruption is very related and depends on things that are outside the state boundaries such as suspects, evidence and / or assets of criminal acts of corruption outside the country. Saldi Isra revealed that efforts to recover state assets that were stolen through corruption are not easy to do, because the perpetrators of corruption have extraordinary and difficult to reach access in hiding or laundering money from the proceeds of corruption.[3]

Asset Recovery as an indicator of the success of strategies and efforts to eradicate corruption is reflected in the percentage of assets recovered from Corruption, this is very important for economic recovery as a result of the Corruption Crime. Particularly for the recovery of assets resulting from criminal acts of corruption, UNCAC has arranged for international cooperation that can be carried out through mutual legal assistance in criminal matters for tracing and recovering assets. Even the mechanism of confiscation of criminal assets is one of the norms regulated in UNCAC so that States parties maximize efforts to seize assets proceeds of crime without going through the criminal prosecution process.[4] In line with that, Indonesia has stipulated the Mutual Legal Assistance in Criminal Matter with Law Number 1 of 2006 concerning Mutual Legal Assistance and also Mutual Legal Assistance in Criminal Matters Treaty with Law Number 15 of 2008.[5]

Even so, ratifying UNCAC does not guarantee the returns and recovery of assets of the crime of corruption are running smoothly. This is due to the principle of "Protection of Sovereignty" which is the basic principle for UNCAC. Emphasis on State sovereignty in international cooperation (especially Mutual Legal Assistance in Criminal Matters) raises various problems because it is not uncommon for many countries to provide protection for perpetrators of criminal acts of corruption in that country.[6] For example, the case of Bank Indonesia Liquidation Assistance (BLBI) with the suspect Hendra Rahardja, who escaped and kept the assets of the proceeds of corruption amounting to 1.9 trillion Rupiah, took a long time before the assets were able to return to Indonesia. It is noted that Indonesia has bilateral and multilateral Mutual Legal Assistance agreements with several countries such as Australia, Hong Kong, China, ASEAN and most recently Switzerland. However, the implementation of Mutual Legal Assistance is not without results. Most recently, the Corruption Eradication Commission returned the proceeds of corruption in the amount of 200 thousand Singapore dollars after collaborating with the Corrupt Practices Investigation Bureau (CPIB).[7]

Apart from the several successes in returning the assets of the criminal act of corruption above, this is not yet comparable to the total assets of the proceeds of corruption that are suspected of being abroad and have not been successfully executed. Indonesian Corruption Watch (ICW) said there were still 36 suspects with total assets

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[3] Saldi Isra, "Asset Recovery Tindak Pidana Korupsi Melalui Kerjasama Internasional*",* Paper presented at the workshop on International Cooperation in Corruption Eradication*,* 2008*,* p. 1

[4] Refki Saputra, "Tantangan Penerapan Perampasan Aset tanpa Tuntutan Pidana (Non-Conviction Based Asset Forfeiture) dalam RUU Perampasan Aset di Indonesia", Jurnal Antikorupsi Integritas 3, No. 1, 2017. p. 118.

[5] 6th Meeting of the Senior Officials on the Treaty on Mutual Legal Assistance in Criminal Matters, November 5-7 2012, Bandung, Indonesia.

[6] Ahmad Rizki Mardhatillah Umar dan fanny Frikasari, "Kejahatan Bisnis dalam Perspektif Hukum Pidana Indonesia", Jurnal Ilmu hukum Litigasi, Vol. 6, No.2, Juni 2005. p. 202. See also Jamin Ginting, "Perjanjian Internasional dalam Pengembalian Aset Hasil Korupsi di Indonesia", Jurnal dinamika hukum*,* Vol. 11, No. 3, September 2011. p. 435-436.

[7] Ibnu Haryanto, "KPK Catatkan Sejarah Pemulihan Aset Hasil Korupsi dari Luar Negeri", <https://news.detik.com/berita/d-5109376/kpk-catatkan-sejarah-pemulihan-aset-hasil-korupsi-dari-luar-negeri> accessed November 8, 2020. 10:15

resulting from corruption of 53 trillion rupiah.[8] The methods that are usually used to hide proceeds of crime by perpetrators of corruption include: (a) Transfer of money proceeds from corruption through real estate / immovable assets; (b) Purchase of valuables; (c) domestic shares. [9]

2. Research Methods

For the purposes of writing this paper used a normative legal research focusing on documents and literature studies and the approach is used the statutory approach, include case and comparative approach.[10] The data collected from this study is secondary data, among others are statutory regulations, various legal documents, and other references that are relevant with mutual legal assistance in criminal matters.

3. Discussion

Regulation of Confiscation and Return of Corruption Proceeds of Assets through Mutual Legal Assistance International and Transnational Regulation on Asset Recovery of Corruption

Regulation of Asset Seizure of Corruption based on UNCAC, UNTOC and UNCAC Ratification

Implementation of Asset Recovery of Corruption is closely related to Law Number 7 of 2006 concerning the Ratification of the United Nations Convention against Corruption which in its explanation letter B Point A states the importance of UNCAC Convention Arrangements into Indonesian positive law to enhance international cooperation, especially in tracking, freeze, confiscate and return assets resulting from criminal acts of corruption that are placed outside the horror and increase international cooperation in the implementation of Mutual Legal Assistance.[11] The confiscation and / or return of the proceeds of corruption in the international world are contained in the International Mechanism of Mutual Legal Assistance as regulated in the United Nations Convention against Transnational Organized Crime (UNTOC) and the United Nation Convention against Corruption (UNCAC). [12] Mutual Legal Assistance is basically a reciprocal agreement related to criminal matters, the formation of which is motivated by the factual condition of inaction in the process of a crime due to differences in the legal system. MLA has also emerged as an effort to overcome and eradicate various transnational crimes.[13]

UNCAC regulated the Mutual Legal Assistance as stipulated in Article 46 state that:

> "State parties shall afford one another the widest measure of mutual legal assistance in investigations, prosecutions, and judicial proceedings in relation to

[8] Merdeka, "PPATK Endus Sejumlah Kepala Daerah Simpan Uang Rp50 Miliar di Kasino Luar Negeri", <https://www.merdeka.com/uang/ppatk-endus-kepala-daerah-simpan-uang-rp50-miliar-di-kasino-luar-negeri.html> accessed November 8 2020. 11:20

[9] Wahyudi Hafiludin sadeli, "Implikasi Perampasan Aset Terhadap Pihak Ketiga yang Terkait Dengan Tindak Pidana Korupsi", Tesis Fakultas Hukum: Universitas Indonesia, 2010.

[10] Peter Mahmud Marzuki, "Penelitian Hukum", Kencana: Jakarta, 2005 p. 93.

[11] Explanation Letter B, Undang-Undang No. 7 Tahun 2006 tentang Ratifikasi United Nations Convention against Corruption.

[12] The use of Mutual Assistance in UNCAC and UNTOC has a difference in that UNCAC obliges States parties to provide mutual legal assistance through mutual assistance while UNTOC regulates the use of reciprocal assistance only in the form of advice.

[13] Romli Atmasasmita qualifies transnational crime, namely crimes are qualified to meet the elements (a) actions that affect more than one country; (b) acts involving citizens of more than one country; and (c) using means and methods that go beyond territorial boundaries. See Romli Atmasasmita, "Tindak Pidana Narkotika Transnasional dalam Sistem Hukum Pidana Indonesia", Citra Adtya Bakti: Bandung, 1997, p. 47.

the offences covered by this Convention.[14] Mutual Legal Assistance to be afforded in accordance with this article may be requested for any of the following purposes: (a) taking evidence or statements from persons; (b) effecting service of judicial documents; (c) executing searches and seizures, and freezing; (d) Examining objects and sites; (e) Providing information's, evidentiary items and expert evaluations; (f) […] etc. up to point (j); (k) the recovery of assets, in accordance with the provisions of chapter V of this convention."[15]

UNCAC regulates the return of assets in Chapter V in article 51 to Article 58 concerning Asset Recovery and in CHAPTER VII on mechanisms the implementation. UNCAC has made major breakthroughs regarding Asset Recovery which includes a system for prevention and detection of criminal acts of corruption,[16] **a system for direct asset recovery, and international cooperation for the purpose of confiscation**.[17]

Furthermore, Article 18 paragraph (3) UNTOC directly states several matters related to MLA as follows:

"Mutual Legal Assistance to be afforded in accordance with this article may be requested for any of the following purpose:

a. Taking evidence or statements from persons;
b. Effecting service of judicial documents;
c. Executing searches and seizures, and freezing;
d. Examining objects and sites;
e. Providing information, evidentiary items and expert evacuations;
f. Providing originals or certified copies of relevant documents and record, including government, bank, financial, corporate or business records;
g. Identifying or tracing proceeds of crime, property, instrumentalities or other things for evidentiary purposes;
h. Facilitating the voluntary appearance of persons in the requesting State Party;
i. Any other type of assistance that is not contrary to the domestic law of the requested State Party.

Confiscation of Assets Proceeds from Corruption based on Law Number 7 of 2006 concerning Mutual Legal Assistance

Mutual Legal Assistance is a mandate from UNCAC where signatory countries are encouraged to have international cooperative relations to eradicate corruption[18] and make national legal rules governing Mutual Legal Assistance. Mutual legal assistance is developed from the so-called 'Letters Rogatory', a comity-based system of requests for assistance with the taking of evidence, but mainly treaty based on today practice and covers a wide range of measures.[19] To provide a legal basis for the Making and Implementation of Mutual Legal Assistance, Indonesia has regulated Mutual Legal Assistance through Law Number 1 of 2006 concerning Mutual Legal Assistance. Although it is not specifically aimed at handling corruption cases, this law is also the basis for

[14] Article 46 Par. (1), United Nation Convention against Corruption.
[15] Article 46 Par. (3), United Nation Convention against Corruption.
[16] Article 52, United Nations Conventions of Against Corruption.
[17] Article 55, United Nations Conventions of Against Corruption.
[18] Article 42 Par. (2), United Nations Conventions of Against Corruption.
[19] Robert Cryer, et.al. "An Introduction to International Criminal Law and Procedure", Cambridge University Press: New York, 2010. p. 102.

implementing reciprocal legal assistance for corruption cases in Indonesia. This law also regulates the executing the inquiry of search warrant and seizure; the forfeiture of proceeds of crime; the recovery of pecuniary penalties in respect to the crime; and restraining of dealings in property, freezing of property that may be recovered or confiscated, or that may be needed to satisfy pecuniary penalties imposed, in respect to the crime. [20]

During its development, Indonesia is recorded as having several Mutual Legal Assistance Agreements with several countries as follows:

a. The Indonesia-Australia Agreement was signed in 1995 through Law Number 1 of 1999 concerning Ratification of the Agreement between the Republic of Indonesia and Australia Concerning Mutual Legal Assistance in Criminal Matters.
b. Treaty on Extradition between Republic of Indonesia and the Republic of Korea by Law Number 42 Year 2007.
c. Agreement Between the Government of The Republic of Indonesia and The Government of The Hong Kong Special Administrative Region of The People's Republic of China Concerning Mutual Legal Assistance in Criminal Matters with Law Number 3 Year 2012.
d. The Agreement between Indonesia and the People's Republic of China regarding Mutual Assistance in Criminal Matters, July 24, 2000.
e. Indonesia's Multilateral Agreement with the Government of Brunei Darussalam, the Kingdom of Cambodia, the Government of the Lao People's Democratic Republic, the Government of Malaysia, the Government of the Philippines, the Government of the Republic of Singapore, and the Government of the Socialist Republic of Vietnam on Mutual Assistance dated 29 November 2004.
f. Treaty on Mutual Legal Assistance in Criminal Matters between the Republic of Indonesia and the Swiss Confederation with Law Number 5 Year 2020.

The principle or principle of reciprocal legal aid in criminal matters embraced in the MLA Law is regulated as follows:[21]

a. Mutual legal assistance in criminal matters can be carried out based on an agreement and if there is no agreement, then assistance can be provided on the basis of good relations.[22]
b. The law does not provide the power to carry out extradition, arrest or detention for the purpose of extradition, or handover of persons, transfer of prisoners, or transfer of cases.
c. The law provides in detail regarding requests for mutual assistance in criminal matters from the Government of the Republic of Indonesia to the requested State and vice versa.
d. The law provides a legal basis for the minister responsible in the field of law and human rights as an official in authority who acts as a coordinator in submitting requests for mutual assistance in criminal matters to foreign countries and in handling requests for mutual assistance in criminal matters from foreign countries.

[20] Article 3 Par. (2), Undang-Undang Nomor 1 Tahun 2006 tentang Bantuan Timbal Balik dalam Masalah Pidana.
[21] A.A. Oka Mahendra, "Kerjasama Bantuan Timbal Balik dalam Pengendalian Hasil Korupsi", papers submitted at the Seminar "Sinergi Pemberantasan Korupsi: Peranan PPATK dan Tantangan Asset Recovery" in the context of PPATK's 4th birthday, Jakarta, April 4 2006.
[22] Article 5, Undang-Undang Nomor 1 Tahun 2006 tentang Bantuan Timbal Balik dalam Masalah Pidana.

Based on the principles mentioned above, it can be seen that the main points of the MLA Law relating to confiscation and recovery of assets from criminal acts of corruption are as follows:

a. Carry out requests for searches and confiscation (Article 3 Par. 2 Point f);
b. Confiscation of proceeds from crime (Article 3 Par. 2 Point g);
c. Prohibit transactions of wealth, freeze assets that can be released or confiscated, or which may be required to fulfil the fine imposed, in connection with a criminal act (Article 3 Par. 2 Point i);
d. Seeking wealth that can be released, or which may be required to fulfil the fine sanction imposed in connection with a criminal act (Article 3 Par. 2 Point i);

Even so, the implementation of reciprocal legal aid cannot automatically be implemented, there are provisions that regulate the limitations of the implementation, including: (a) extradition or surrender of persons; (b) arrest or detention for the purpose of extradition or surrender of a person; (c) transfer of prisoners; (d) Case transfer.[23]

Stages and Procedures for Requesting Assistance for Confiscation of Proceeds of Crime through MLA

To ensure that the process of requesting assistance for confiscation of the proceeds of corruption must first be carried out in the stages of asset recovery, such as tracking, freezing or blocking, and confiscation. At the tracking stage, tracing and gathering relevant evidence is very important so that the results of criminal acts of corruption which are hidden or stored in other countries can be identified, calculated so that further blocking or freezing can be carried out. In the Academic Paper on the Asset Confiscation Bill, tracking or tracing is defined as a series of actions to seek, request, obtain, and analyse information to find out or reveal the origin and existence of assets of a criminal act.[24]

The next stage after the process of tracking and identifying assets resulting from criminal acts of corruption is blocking or freezing of assets. The MLA Law defines blocking as a temporary freezing of assets for the purposes of investigation, prosecution or trial in court with the aim of preventing them from being transferred or transferred so that certain or all people do not deal with assets obtained from criminal acts.[25]

After the assets from the proceeds of corruption are blocked and frozen, the next step is to confiscate the assets. For the blocking or freezing and confiscation stages, the MLA Law has regulated requests for blocking or freezing of assets and confiscation as regulated in Article 16 which states:

"The Minister may convey the request for Assistance to Foreign States to issue the following orders:[26]

a. freezing;
b. search warrant;
c. seizure; or
d. Other necessary orders in accordance with the provisions of laws and regulations in relation with criminal proceedings in Indonesia."

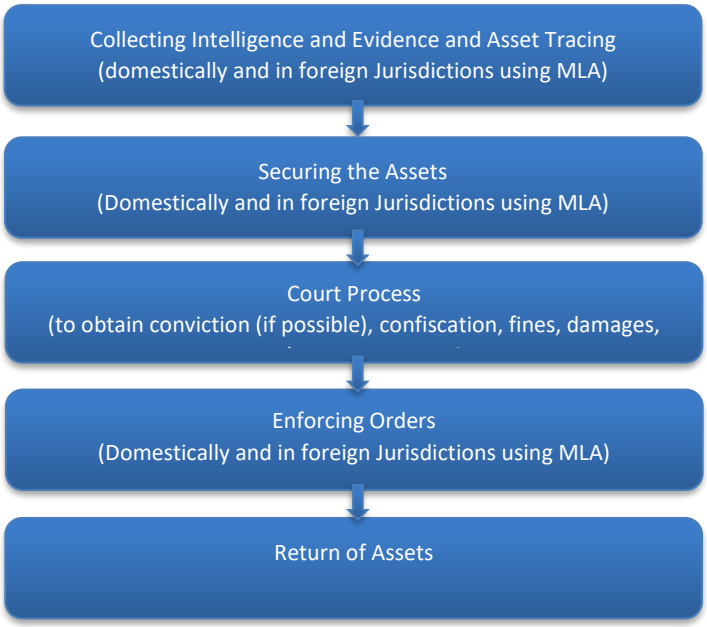
[23] Article 4, Undang-Undang Nomor 1 Tahun 2006 tentang Bantuan Timbal Balik dalam Masalah Pidana.
[24] See: Academic Paper of the Asset Confiscation Bill.
[25] Article 1, Undang-Undang Nomor 1 Tahun 2006 tentang Bantuan Timbal Balik dalam Masalah Pidana.
[26] Article 16, Undang-Undang Nomor 1 Tahun 2006 tentang Bantuan Timbal Balik dalam Masalah Pidana.

If the Assets from the proceeds of corruption have been traced, identified and have been blocked or frozen and confiscated, the next stage is the confiscation process. Furthermore, after a series of stages have been carried out, efforts to request assistance for confiscation and recovery of assets can be submitted by the Minister to the Requested State either directly or using diplomatic channels. Especially for assistance related to assets resulting from criminal acts of corruption, requests for assistance can be submitted by the Chairman of the Corruption Eradication Commission.[27] To apply for Mutual Legal assistance, there are requirements that must be fulfilled as follows:

a. identity of the requesting authority;
b. a description of subject matter and importance of the investigation, prosecution or examination before the court pursuant to said request, as well as the name and functions of a competent authority conducting investigation, prosecution and judicial process;
c. a summary of relevant facts except for the request for Assistance related with judicial documents;
d. provisions of relevant laws, contents of articles, and criminal sanctions;
e. a description of the Assistance requested and details of certain procedures applied for, including confidentiality;
f. purpose of the request for Assistance; and
g. Other requirements determined by the Requested State.

After the asset is confiscated, the next stage is the return of the asset, if the asset is outside the country, the repatriation of the asset is carried out based on the implementation of Mutual Legal Assistance between the countries concerned.

Flowchart 1.1
Process for Recovery of Stolen Assets[28]



Source: Asset Recovery Handbook: A guide for Practitioners

[27] Article 9, Undang-Undang Nomor 1 Tahun 2006 tentang Bantuan Timbal Balik dalam Masalah Pidana.
[28] Jean-Pierre Brun, et al. "Asset recovery Handbook: A Guide for Practitioners", World Bank, 2011. p. 6.

Obstacles of implementation Mutual Legal Assistance Agreement in Other Countries

Cooperation between countries regarding mutual legal assistance in criminal matters is not enough with just signing agreements, but also need to be implemented into national regulations. In countries that adopt dualistic system, where bilateral or multilateral agreements need to be converted into national legislation, this is because mutual legal assistance agreement often contains important requirements to carry out extradition requests or mutual legal assistance and also if the agreement is not implemented into national law, it can paralyze the international cooperation that has been agreed.[29] A legal basis is needed for the Government of the Republic of Indonesia as a guide in making agreements and implementing MLA from other countries.[30] The legal basis is generally in the form of legislation regulating principles or principles, requirements or procedures of MLA, and judicial proceedings.

- Indonesia and Australia

The signing of an extradition treaty between Indonesia and Australia which was adopted by Indonesia through Law No. 8/1994 became the root of the establishment of bilateral cooperative relations in the criminal sector. After the signing of the extradition agreement, Indonesia and Australia made another bilateral cooperation agreement in the criminal field, that is The Treaty between the Republic of Indonesia and Australia on Mutual Assistance in Criminal Matters, this agreement was signed on 27 October 1995, after four years, Indonesia just ratified the agreement. In 1999 through Law Number 1 of 1999 concerning the ratification of the Treaty between the Republic of Indonesia and Australia on Mutual Assistance in Criminal Matters. In the bilateral agreement, there are definitions regarding 35 violations of criminal law relating to crimes that fall within the jurisdiction of the treaty, these meanings are attached in the Treaty between the Republic of Indonesia and Australia on Mutual Assistance in Criminal Matters.

There is an important part in the bilateral agreement between the Republic of Indonesia and Australia regarding Mutual Legal Assistance in Criminal Matters, that is in article 4 regarding refusal of assistance, where in article 4 paragraph (1) Requested State shall refuse a request for assistance from the Requesting State if the request for assistance is related with prosecution or punishment of a person in connection with a case deemed by the Requesting State to be a crime of a political nature except for murder or attempted murder of the head of state or members of his family, or crimes under military law of the Requested State which do not constitute a violation of the usual criminal law of the Requested State, and if the request for assistance is related to the prosecution of a person for an offense for which the perpetrator has been acquitted or pardoned or has served a imposed sentence.

Furthermore, requests for assistance related to prosecuting or punishing a person for an offense that has been committed in the Requesting State can no longer be prosecuted for reasons of time lapse, death of the suspect, double jeopardy, or cannot be prosecuted again for other reasons, and if there are strong reasons to believe that a request for assistance has been made solely for the purpose of prosecuting or punishing the person because of the person's race, gender, religion, nationality or political opinion

[29] UNODC, "Practical Trends and Challenges in International Cooperation in Corruption Matters: Observations from the United Nations Convention against Corruption Implementation Review Mechanism", Review of the implementation of the United Nations Convention against Corruption, 2018. p.2
[30] Article 2 of Law No.6 of 2001 concerning the Law on Mutual Assistance in Criminal Matters

or that the person's position may be suspected of infringing on the basis of these reasons, and the Requested State is of the opinion that the request, if granted, will be detrimental to sovereignty, security, national interests or other essential interests.

On the other hand, the Requested State can also refuse an assistance proposed by The Requesting State[31] prejudice to the safety of any person or place an undue burden on the resources of the country or demands relating to prosecution or punishment of a person for an offense punishable by death. Before refusing to grant a request for assistance, the Requested State must consider whether an assistance can be provided subject to the conditions it deems necessary, if the requesting country is asked to fulfil certain conditions, then the requesting country must fulfil those requirements.[32] However, there is no article regarding dispute resolution between Indonesia and Australia in their Mutual Legal Assistance agreement.

There are several cases related to MLA between Indonesia and Australia, including the case of Adrian Kiki Ariawan, as the President Director of PT. Bank Surya who was sentenced to life imprisonment by the Central Jakarta High Court with *in absentia* decision No.71/PID/2003 /PT.DKI dated June 2, 2003. The imprisonment of life was the result of his conviction and proof that Adrian Kiki Ariawan had violated the provisions of Article 1 paragraph (1) sub a jo. Article 28 jo. Article 34 C Law Number 3 Year 1971 in conjunction with Article 55 paragraph (1) 1 e jo. Article 64 paragraph 1 of the Criminal Code jo. Law Number 31 Year 1999 jo. Law Number 20 of 2001 concerning Amendments to Law Number 31 of 1999 concerning Eradication of Corruption Crimes. Adrian Kiki Ariawan's actions have cost the state Rp. 1,500,000,000,000, 00 (one trillion five hundred billion rupiah). However, after the verdict was handed, Adrian Kiki Ariawan fled to Australia so that an extradition request was issued to Australia in September 2005 with letter number M.IL.01.02-02.

In November 2008, the Australian Federal Police succeeded arresting and detaining Adrian Kiki Ariawan, but the implementation of the extradition of Adrian Kiki Ariawan is still on hold pending due to the trial process regarding the extradition concerned in Australia, because Australia allows someone to file an objection to the local court for extradition treatment against him. In this case, Indonesia must respect the procedures and laws contained in the Requested State. Until finally in December 2013, the High Court of Australia granted the extradition of the Indonesian government to Adrian Kiki Ariawan. Adrian Kiki Ariawan's extradition process cannot be separated from the role of the Attorney General's Office, the Indonesian Ministry of Law and Human Rights and Interpol in coordinating with each other. In February 2014 Adrian Kiki Ariawan arrived in Indonesia and was immediately detained at the Cipinang Penitentiary. Looking at this case, it can be concluded that the Mutual Legal Assistance Treaty strengthens cooperation between countries in the criminal field but cannot speed up the punishment process because it is necessary to wait for the legal process to request extradition refusal by criminals carried out in the requested state.

- Indonesia and Hong Kong

[31] Article 4 paragraph (2) of the Bilateral Agreement between the Republic of Indonesia and Australia regarding Mutual Legal Assistance in Criminal Matters

[32] Article 4 paragraph (3) of the Bilateral Agreement between the Republic of Indonesia and Australia on Mutual Legal Assistance in Criminal Matters

The MLA agreement between Indonesia and Hong Kong was signed by Indonesia and Hong Kong on April 3, 2008. In the Mutual Legal Assistance agreement between Indonesia and Hong Kong, there are significant differences when compared to the Mutual Legal Assistance agreement between Indonesia and other countries. This difference is contained in Article 1 regarding the obligation to surrender stipulates that the parties agree to submit to each other subject to the conditions stipulated by this agreement, and every person who is within the jurisdiction of the country is requested by the requesting state to be prosecuted or for prosecution. or the imposition of penalties for offenses set forth in Article 2. Furthermore, Article 2 of the Mutual Legal Assistance agreement between Indonesia and Hong Kong contains 44 types of crime that fall within the jurisdiction of the agreement, could be concluded that the types of crime on Mutual Legal Assistance agreement between Indonesia and Hong Kong are more than the types of crime on Mutual Legal Assistance agreement between Indonesia and Australia which only contains 35 types of crime that included in its jurisdiction.

The condition of Century Bank which was still severe even though it had received assistance from Bank Indonesia, forced Bank Indonesia to help back Century Bank, this led to the discussion of Century Bank being held with a meeting of the financial sector stability committee (KSSK) in November 2008, the results of the meeting determined the Century Bank as a failed bank with systemic impacts on 18 commercial banks and 5 regional banks.[33] On this basis, rescue of Century Bank is urgently needed, The Deposit Insurance Corporation (LPS) is appointed to handle the failure of Century Bank, the implementation of handling by the LPS is carried out by providing a bailout in the form of Temporary Equity Participation of 6.76 trillion rupiah. However, there were unhealthy banking practices as well as violations that were detrimental to Century Bank itself which were committed by bank managers, shareholders, and bank related parties regarding the bailout that was submitted to Century Bank.

In the end, it was proven that the violation of the bailout was committed by the owner of Century Bank. The Temporary Equity Participation in the form of a bailout which was misused was intended to cover the capital adequacy ratio (CAR). In the Century bank case, shareholders Rafat Ali and Hesam Al Warraq were involved in causing a loss of 3,115.9 billion rupiah. Furthermore, Robert Tantular, the owner of Century Bank, causing 3,068.89-billion-rupiah loss. On the other hand, Robert Tantular committed another violation, namely embezzling customer funds worth 1.298 trillion rupiah, and PT Antaboga Delta Sekuritas' customer fund fraud worth 1.4 trillion rupiah. The proceeds from the criminal acts committed by shares of Rafat Ali and Hesam Al Warraq and Robert Tantular have been transferred abroad, including to Hong Kong and England.

The Indonesian government is trying to return Century Bank assets from Hong Kong to Indonesia, the effort is carried out in coordination between the Ministry of Law and Human Rights and the Attorney General's Office to ask the Hong Kong authorities to freeze the assets, this is based on the MLA agreement that has been signed by Hong Kong. and Indonesia. The freezing of Century Bank assets in Hong Kong was frozen in December 2010 through the Hong Kong High Court decision No. 2557/1010. Furthermore, the MLA agreement did not accelerate the process of disbursing Century Bank assets which had been frozen by the Hong Kong Government, and in 2012 the Hong Kong Department of Justice has permanently frozen Bank Century assets. The process of returning Century

[33] Herdi Sahrasad, "Century Gate: Refleksi Ekonomi-Politik Skandal Bank Century ", Freedom Foundation: Jakarta, 2009. p. 15

Bank assets in Hong Kong, namely the temporary freezing of Century Bank assets in the period 2010 to 2012, followed by a permanent freeze on Century Bank assets in 2014, however until now the assets owned by Century Bank in Hong Kong have not been returned to Indonesia.

- Indonesia with The People's Republic of China

In an effort to expedite the investigation of a criminal act abroad, Indonesia also entered into an MLA agreement with The People's Republic of China, this agreement was signed by Indonesia and The People's Republic of China on July 24, 2000 in Jakarta, and ratified by Indonesia with a Law Law 8/2006 on Treaty Between The Republic of Indonesia and The People's Republic of China on Mutual Legal Assistance in Criminal Matters. The MLA agreement does not contain a list of crimes as contained in Indonesia MLA agreement with Australia and Indonesia with Hong Kong, it only states that violations of criminal law are any acts or omissions which constitute crimes under the respective national laws of the parties. The Central Authority of The People's Republic of China is The Supreme People's Procuratorate in the context of dealing with corruption, and the Ministry of Justice in certain ordinary cases.[34]

- Indonesia and Switzerland

On February 4, 2019 in Bern, Switzerland then signed a mutual legal assistance agreement in Criminal Matters between the Government of the Republic of Indonesia and the Swiss Confederation that is Treaty on Mutual Legal Assistance in Criminal Matters Between The Republic of Indonesia and The Swiss Confederation by Yasonna H. Laoly (Minister of Law and Human Rights of the Republic of Indonesia) and Karin Keller-Sutter (Head of Justice and Swiss Federal Police), which was ratified by Indonesia through Law No.5/2020. The signing of the MLA agreement between Switzerland and Indonesia is a form of achievement, this is because Indonesia is the first Asian country to enter into an MLA agreement with Switzerland, and the signing is also an extraordinary achievement of mutual assistance in criminal matters as well as a history of successful diplomacy which is very important. This is based on the fact that Switzerland is the largest financial centre in Europe and Switzerland has long been known as a country whose banking system is very amicable. strict.[35]

In the MLA Agreement between Indonesia and Switzerland, there is a scope of assistance that is divided into three parts, namely assistance to accelerate the criminal legal process in the Requesting State, and requests for mutual legal assistance relating to acts or omissions made prior to the entry into force of this Agreement, as well as in matters of the broadest criminal sanction relating to a fiscal crime in accordance with the national law of each Party. In the MLA agreement between Switzerland and Indonesia, the assistance of the parties for the acceleration of the criminal legal process in the Requesting State consists of several stages, namely: taking testimony or other information on a criminal act, delivery of goods, documents, notes and proof of delivery of goods and assets. for the purpose of confiscation or return, provision of information, body and property searches, tracking and identification of people and property including

[34] Darmono, " Ekstradisi Terpidana Kasus Korupsi Dalam Rangka Penegakan Hukum Tindak Pidana Korupsi", Lex Jurnalica: Jurnal Universitas Esa Unggul, Volume 9, No. 3, 2012. p. 140

[35] Puteri Hikmawati, "Implikasi Penandatanganan Perjanjian Bantuan Timbal Balik Antara Indonesia Dan Swiss Terhadap Pemberantasan Tindak Pidana Korupsi Di Indonesia", Bidang Hukum Info Singkat Kajian Singkat Terhadap Isu Aktual dan Strategis: Pusat Penelitian Badan Keahlian DPR RI Vol. XI, No.5, 2019. p. 2

to inspect goods and places, search, freeze, confiscate and seize the proceeds and means of crime, convey documents, present detained persons to interrogate or confront related crimes, invite witnesses and experts to attend and give testimony in the Requesting State, and other assistance in accordance with the objectives of this agreement which is mutually agreed upon by the parties to the extent that it does not conflict with the laws of the Requested State.

Establishing MLA cooperation with Switzerland is very important, Switzerland is known as a tax haven country when Switzerland greatly increased its level of banking secrecy in 1934 by placing the obligation to keep this secret under the protection of criminal law, then, if there is an action that involves disclosing information to several authority regarding the customer's bank account information, that action is a criminal. On this basis, the MLA agreement between Switzerland and Indonesia regulates a reciprocal legal aid request mechanism, which includes regulating coercive measures, consisting of searches of bodies and property, confiscation of evidence including the means used to commit criminal acts, goods and assets that are the proceeds of the crime, any action aimed at disclosing secrets protected by the criminal laws of the Requested State, as well as other acts involving coercion in accordance with the procedural laws of the Requested State.

Money from corruption in Indonesia is often flown to Switzerland, as in the case of the Global bank which misused Bank Indonesia Liquidity Assistance (BLBI). Owner and President Director of Bank Global, Irawan Salim et al. are suspected of having committed a criminal act of corruption whose case is in the process of being investigated but Irawan Salim et al fled abroad before they were arrested and processed legally, until now, Irwan Salim is still in the search stage Interpol. The collaboration between the Indonesian government and Interpol resulted in the finding that Irwan Salim had a bank account in Switzerland. To pursue the results of the corruption of Irwan Salim who was in Switzerland, the Indonesian government submitted an application for the MLA agreement to the Swiss government to freeze the account containing 9.9 million USD owned by Irwan Salim.[36] However, the Swiss government does not recognize *in absentia* judgement in their court ruling, considering that the suspects are not certain when they can be arrested and tried in accordance with the applicable legal regulations in Indonesia. At that time, the Indonesian government was waiting for the results of the court decision on the money laundering committed by Irwan Salim, and if it had been decided, Indonesia would submit a request for an MLA agreement to seize Irawan Salim's money in his bank account in this case in Switzerland.

Another case of funds from corruption in Indonesia being rushed to Switzerland is the case of ECW Neloe as Director of Bank Mandiri who granted the loan application for five companies without going through the procedures and requirements according to the provisions made by Bank Mandiri which resulting in the non-repayment of the loan that is provided by Bank Mandiri of the five company according to the specified time. For this act, ECW Neloe is suspected of having misused his position to the detriment of state finances and is suspected of committing a criminal act of corruption in the provision of Bank Mandiri loans to five creditor companies. When the case was in legal proceedings at the South Jakarta District Court, it was discovered through the cooperation of the

[36] Ridwan Arifin, et.al, "Upaya Pengembalian Aset Korupsi Yang Berada Di Luar Negeri (Asset Recovery) Dalam Penegakan Hukum Pemberantasan Korupsi Di Indonesia", Indonesian Journal of Criminal Law Studies, Volume 1, No.1, 2016. p. 120

Financial Intelligence Unit that ICW Neloe had bank accounts in Singapore and Switzerland. Based on this information, the Government of Indonesia submitted an MLA request to the Swiss Government to pay E.C.W Neloe's bank account and requested information and documents held by the bank for the process of the Money Laundering case in Indonesia.

Based on this request, Neloe's account in Switzerland was frozen. However, the information and documents requested from the Swiss bank have not been fulfilled. The process of the ECW Neloe corruption case at the District Court level, through the decision number 2068/Pid B/2005/PN South Jakarta, ECW Neloe was found not guilty of causing losses to state finances. Then the attorney general made an appeal to the Supreme Court. The Supreme Court judged the case itself and decided through the Supreme Court decision number 1144/K/Pid/2006 that ECW Neloe had sufficient evidence of committing a criminal act of corruption.[37] For this decision ECW Neloe was sentenced to 10 years in prison and a fine of 500-million-rupiah subsidiary to six months. Based on the Supreme Court's decision, Indonesia, in this case the Attorney General's Office, submitted a second MLA request to Switzerland for the confiscation of Neloe's money in Switzerland which was alleged to have originated from the proceeds of corruption in Indonesia. However, until now the assets that ECW Neloe withdrew have not been able to be withdrawn to Indonesia.

- Indonesia and ASEAN

Treaty on Mutual Legal Assistance in Criminal Matters of Southeast Asian Countries is a mutual cooperation agreement in the handling and eradication of transnational crime between ASEAN member countries (Association of Southeast Asian Nations), which consists of Indonesia, Brunei Darussalam, Singapore, Thailand, Philippines, Malaysia, Vietnam, Laos, Myanmar and Cambodia. The multilateral MLA agreement is a cooperation between countries in combating transnational crimes, which are particularly related to corruption and money laundering crimes. However, the agreement still has legal loopholes that have the potential to make the agreement ineffective, namely that the return of assets resulting from criminal acts to the requesting country is not mandatory, The Requesting State is required to comply with the national laws of the Requested State and property confiscated or confiscated must comply with these terms and the conditions may be increased unless otherwise agreed in each specific case.

4. Conclusion

The main points of the MLA Law relating to confiscation and recovery of assets from criminal acts of corruption are to carry out requests for searches and confiscation, confiscation of proceeds from crime, prohibit transactions of wealth, freeze assets that can be released or confiscated, or which may be required to fulfil the fine imposed, in connection with a criminal act, seeking wealth that can be released, or which may be required to fulfil the fine sanction imposed in connection with a criminal act. Stages and Procedures for Requesting Assistance for Confiscation of Proceeds of Crime through MLA are collecting intelligence and evidence and Asset, securing the assets, court process), enforcing orders.

During its development, Indonesia is recorded as having several Mutual Legal Assistance Agreements with several countries. There are Australia, Republic of Korea,

[37] Rizki Agung F, "Konsep Kerugian Perekonomian Negara Dalam Undangundang Tindak Pidana Korupsi", Jurist-Diction, Vol. 3 No.2, 2020. p. 675

Hongkong, The People's Republic of China, ASEAN and Switzerland. Unfortunately, the implementation of reciprocal legal aid on MLA cannot automatically be implemented, there are provisions that regulate the limitations of the implementation, including extradition or surrender of persons, arrest or detention for the purpose of extradition or surrender of a person, transfer of prisoners, and Case transfer.

Cooperation between countries regarding mutual legal assistance in criminal matters is not enough with just signing agreements, but also need to be implemented into national regulations. These are some obstacles of implementation Mutual Legal Assistance Agreement between Indonesia and other countries. Such as, the Requesting State cannot ask to punish a person in regarding as a crime of a political nature, and the perpetrator of the crime who has served the sentence. The MLA does not contain comprehensive provisions in the prosecution of criminal acts. The agreement still has legal loopholes that have the potential to make the agreement ineffective.

We recommend to conduct deeper diplomacy between countries, plan and formulate a more comprehensive MLA so that regulation and enforcement of mutual assistance in handling corruption and asset recovery can be optimized.

References

Law:

Law Number 6 Year 2001 concerning the Law on Mutual Assistance in Criminal Matters

Law Number 1 Year 2006 Concerning Reciprocal Assistance in Criminal Matters.

The Bilateral Agreement between the Republic of Indonesia and Australia regarding Mutual Legal Assistance in Criminal Matters

The Bilateral Agreement between the Republic of Indonesia and Australia on Mutual Legal Assistance in Criminal Matters

United Nation Convention against Corruption.

Books:

Atmasasmita, R. (1997) Tindak Pidana Narkotika Transnasional dalam Sistem Hukum Pidana Indonesia. Citra Aditya Bakti: Bandung.

Brun, J, P. (2011). Asset recovery Handbook: A Guide for Practitioner. World Bank.

Marzuki, P, M. (2005) Penelitian Hukum. Jakarta: Kencana

Sahrasad, H. (2009) Century Gate Refleksi Ekonomi-Politik Skandal Bank Century. Jakarta: Freedom Foundation

Robert Cryer, et.al. (2010) An Introduction to International Criminal Law and Procedure. New York: Cambridge University Press.

Journals Articles:

Agung F, R. (2020). Konsep Kerugian Perekonomian Negara Dalam Undang-Undang Tindak Pidana Korupsi. *Jurist-Diction, Vol. 3 No.2*, p 669-686.

Arifin, R. et. al. (2016). Upaya Pengembalian Aset Korupsi Yang Berada Di Luar Negeri (Asset Recovery) Dalam Penegakan Hukum Pemberantasan Korupsi Di Indonesia. Indonesian Journal of Criminal Law Studies, Volume 1, No.1. p. 105-137

Darmono. (2012) Ekstradisi Terpidana Kasus Korupsi Dalam Rangka Penegakan Hukum Tindak Pidana Korupsi. Lex Jurnalica: Esa Unggul University Journal, Volume 9, No. 3. p. 135-141

Hikmawati, P. (2019). Implikasi Penandatanganan Perjanjian Bantuan Timbal Balik Antara Indonesia Dan Swiss Terhadap Pemberantasan Tindak Pidana Korupsi Di

Indonesia, Bidang Hukum Info Singkat Kajian Singkat Terhadap Isu Aktual dan Strategis: Pusat Penelitian Badan Keahlian DPR RI Vol. XI, No.5.

Ginting, J. (2011). Perjanjian Internasional dalam Pengembalian Aset Hasil Korupsi di Indonesia. Jurnal dinamika hukum: Fakultas Hukum Universitas Jenderal Soedirman. Vol. 11, No. 3. P. 435-436.

Saputra, R. (2017). Tantangan Penerapan Perampasan Aset tanpa Tuntutan Pidana (Non-Conviction Based Asset Forfeiture) dalam RUU Perampasan Aset di Indonesia. Jurnal Antikorupsi IntegritaS: Komisi Pemberantasan Korupsi. Volume 3, No.1. p. 115-130

Umar, A, R, M and Frikasari, F. (2005) Kejahatan bisnis dalam Perspektif Hukum Pidana Indonesia, Jurnal Ilmu hukum Litigasi: Universitas Pasundan. Vol. 6, No.2.

Chapters in edited books:

Atmasasmita, R. (2003). Jakarta. Strategi dan Kebijakan Hukum dalam Pemberantasan Korupsi Melawan Kejahatan Korporasi di Indonesia: Membentuk Ius Constituendum Pasca Ratifikasi Konvensi PBB menentang Korupsi.

Atmasasmita, R. (2006). Strategi dan Kebijakan Pemberantasan Korupsi Pasca Konvensi Menentang Korupsi tahun 2003: melawan Kejahatan Korporasi

Isra, Saldi. (2008). *Asset Recovery* tindak pidana korupsi melalui Kerjasama Internasional.

Mahendra, A, A, O. (2006). Jakarta: Kerjasama Bantuan Timbal Balik dalam Pengendalian Hasil Korupsi

Sadeli, W, H. (2010). Implikasi Perampasan Aset Terhadap Pihak Ketiga yang Terkait Dengan Tindak Pidana Korupsi. Tesis Fakultas Hukum Universitas Indonesia.

UNODC. (2018). Practical Trends and Challenges in International Cooperation in Corruption Matters: Observations from the United Nations Convention against Corruption Implementation Review Mechanism, Review of the implementation of the United Nations Convention against Corruption.

Vlassis, D. (2002) The United Nations Convention against Corruption, Overview of Its Contents and Future Action. Resource Material Series 126. No. 66.

Website Material:

Ibnu Haryanto, "KPK Catatkan Sejarah Pemulihan Aset Hasil Korupsi dari Luar Negeri", from https://news.detik.com/berita/d-5109376/kpk-catatkan-sejarah-pemulihan-aset-hasil-korupsi-dari-luar-negeri

Merdeka, "PPATK Endus Sejumlah Kepala Daerah Simpan Uang Rp50 Miliar di Kasino Luar Negeri", Retrieved November 8, from https://www.merdeka.com/uang/ppatk-endus-kepala-daerah-simpan-uang-rp50-miliar-di-kasino-luar-negeri.html

Reforming the Indonesian Penal System for Misdemeanor Cases

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ABSTRACT

Recently, many criminal cases experienced by the community have been brought to court and captured the attention of the general public. However, criminal acts such as theft may actually cause minimum harm to the victim when the objects of the crime have a low value. The perpetrators of these crimes did harm their victims, but in reality, the Indonesian criminal law system in its empirical aspect still lacks implementation of legal objectives namely; legal certainty, justice and benefit. Therefore, there is a need for the criminal system in Indonesia to no longer rely on criminal sanctions, but opt to administrative sanctions, civil sanctions, and restorative justice approaches (Restorative Justice) instead. The method used in this study is a qualitative socio-legal approach, based on literature data and cyber media. This paper use two approaches: the social approach and the normative juridical approach. This writing concludes that in current conditions, criminal law no longer reflects ultimum remedium, but rather primum remedium. Therefore, the legislative and executive institutions should consider administrative sanctions, civil sanctions, and restorative justice approaches in misdemeanor cases. This idea should also be incorporated in the Indonesian Criminal Code Bill.

Keywords: *criminal law, misdemeanor cases, legal objectives, restorative justice.*

1. Introduction

Indonesia is a constitutional state, this is stated in Article 3 of the 1945 Constitution of the Republic of Indonesia which reads "Indonesia is a state based on law". It is hoped that the law can serve as a guideline for running the country, and can also manipulate people's lives so that actions are prohibited and actions that are permitted. So Indonesia has the power to control people's actions to achieve positive values.

These legal rules are made so that no citizen can be taken over by other people or the state as the enforcer of the law. It is time for the law in Indonesia to change from imposing sanctions on imprisonment or imprisonment to administrative sanctions, fines, and social work (cleaning sewers, roads, public facilities, or places of worship).

Administrative sanctions, fines and social work cannot be applied to all criminal cases. There are several criminal acts that can cause great harm to individuals, legal entities, and the state. Such as killing or eliminating the life of another person intentionally, removing the assets of a legal entity so that it is difficult for the legal entity to operate, and treason against the state.

2. Research Methods

The method used is normative juridical, namely analyzing the Criminal Code, Law No.2 of 2002 concerning the Indonesian National Police, and Law Number 16 of 2004. So that administrative sanctions, fines, and social work can be applied to the Draft Criminal Code.

3. Formulation of the problem

To examine reform of the criminal system in Indonesia, 2 (two) problem formulations will be drawn.

1. How is the concept construction of punishment without imprisonment?
2. What is the legal framework for the application of non-prison sentences in criminal cases in Indonesia?

4. Writing purpose

The purpose of this paper, among others, is to analyze the conceptual model of a punishment without imprisonment. Besides, it also aims to analyze the legal framework for implementing non-prison sentences in Indonesia.

5. Results and Discussion

A. Construction of the Concept of a Prison-free Criminal System

Knowing the definition of confinement is the first step to exploring the object to be studied. Criminalization is explained as the imposition of punishment by the judge which is a concretization/ realization of the criminal provisions in the Law which are something abstract [1]. Criminalization is used as an instrument of punishment provided by government authorities and is the most common response to crimes and irregularities that occur in society[2]. The most common form of punishment was a prison.

Based on the definition of punishment above, it is explained that punishment is the application of punishment to the perpetrator of the crime. The position of punishment has a role in following up on lawbreakers. The applicable criminal system becomes an instrument of a threat to the community so that they do not commit the violated act. This means that punishment is not only repressive but also a preventive instrument. This is explained by Remelink that punishment as a criminal sanction is intended to protect legal norms, so that as long as legal norms have not been violated, criminal sanctions only have a preventive function, but when a violation occurs, the working power of criminal sanctions changes and at the same time becomes repressive.[3]

The very rapid dynamics of the law have resulted in criminalization needing to undergo reform. The punishment mechanism which is imprisonment needs a change to a more humane punishment. The views of Plato and Aristotle as ancient philosophers can be used as the basis for a more humane construction of punishment. Plato and Aristotle stated that the imposition of punishment was applied not on the basis of having committed evil, but in order not to commit a crime, this is fact that criminal law has a preventive or preventive nature so as not to commit crimes or violations.[4]

The essence of criminal imposition according to Plato and Aristotle is more directed not because of crime as the main source, but as a form of prevention. This is not in line

[1] Wirjono Prodjodikoro, Asas Asas Hukum Pidana di Indonesia, Refika Aditama, Jakarta, 2003, Hlm. 23
[2] Terance Miethe dan Hong Lu, Punishment: A Comparative Historical Perspective, Cambridge University Press, Cambridge, 2005, Hlm. 1
[3] J. Remmelink, *Pengantar Hukum Pidana Material 1*, Maharsa Publishing, Yogyakarta, 2014, Hlm. 7
[4] Plato and Aristoteles on Andi Hamzah, *Asas-Asas Hukum Pidana*, Rineka Cipta, Jakarta, 1994, hlm. 27

with the prison system which is identical to the system of retaliation. The application of prison is more to lock up, there is a very little process of coaching so that criminals are aware of their actions. the process of confinement to the room is considered less effective as prevention. So that the current criminal system must have the right role, especially in fostering criminals. The goal is that in the future it can act as a preventive instrument, namely to prevent criminals from making mistakes and to prevent other people from imitating crimes.

The imprisonment process in a criminal system that is no longer relevant needs reform. Prison in the sentence should be put on the choice of priority. This is closely related to the application of the ultimum remedium concept, namely punishment as a last resort. Namely, criminal law with harsh sanctions is said to have a subsidiary function, meaning that if other legal functions are lacking, then criminal law is used[5]. Based on this concept, the prison process is not implemented as the main step. Prison is only used as a last resort if the main effort in following the crime is ineffective. So that the author constructs a criminal system without prison as a reform of the criminal system.

The need for reform in punishment cannot be separated from the theory that has been developed. First, Absolute Criminal Theory (Vergeldings Theorien). Andeneas stated that absolute punishment is the primary goal of the crime. This conviction was carried out in order to satisfy demands for justice[6]. The basis of this theory is retaliation. According to this absolute theory, every crime must be followed by punishment - it cannot be - without bargaining. A person is convicted of having committed a crime, so that by doing so he cannot see any possible consequences arising from the imposition of the sentence.

Absolute retaliation that is retaliatory in the end there is a shift in the system. A system of retaliation that is considered less humane results in the emergence of relative punishment (Doel Theorien). The British philosopher Jeremy Bantham (1748-1832), is a figure whose opinion can be judged as the basis of this theory. According to Jeremy Bantham, humans are rational creatures who will consciously choose pleasure and avoid distress. Therefore a punishment must be assigned to each crime in such a way that the trouble will be heavier than the harm caused by the crime. So that the objectives of this relative punishment are[7]: (1) preventing all violations; (2) prevent the most sinister offenses; (3) suppress crime; (4) reduce losses/costs as little as possible.

Thus, in essence, punishment is the protection of society and retaliation for acts of violating the law. Apart from that, Roeslan Saleh also argued that crime contains other things, namely that punishment is expected as something that will bring harmony and punishment is an educational process to make people acceptable again in society.[8]

The problem with the combined punishment theory finally arises because there is no protection from crime victims. So that again appears a theory of Restorative Justice. This theory has a principle of punishment which also does not prioritize prison. Besides, this theory also has a follow-up process for victims as a form of protection.. Liebman defines restorative justice as follows: Restorative justice has become the term generally used for an approach to criminal justice (and other justice systems such as a school disciplinary system) that emphasizes restoring the victim and community rather than punishing the offender. Besides Bagir Manan also stated about Restorative justice. According to Manan,

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[5] Nur Ainiyah Rahmawati, *Hukum Pidana Indonesia: Ultimum Remedium Atau Primum Remedium*, Recidive Vol. 2, No. 1 Januari – April, Tahun 2013, Hlm. 40

[6] Johanes Andenaes dalam E. Utrecht, *Hukum Pidana* I, (Jakarta:Universitas Jakarta, 1958), hal. 157.

[7] Muladi and Barda Nawawi, Teori dan Kebijakan Pidana. (Bandung: Alumni, 1992) . Hlm. 30-31.

[8] *Ibid*, Hlm. 22

restorative justice is a rearrangement of the criminal system that is more just, both for the perpetrators, victims, and the community.[9]

Based on the definition of restorative justice above, it means that punishment cannot escape in protecting the victim. In the process of punishment, sometimes the fate of the victim is neglected. Many victims' losses were not resolved. Finally, through restorative justice, there is space that does not only enforce the law for the perpetrators of the crime but still has to protect the victim to recover both material and formal losses.

The explanation of the theory above is the basis for the outline of criminal reform from the nature of retaliation to the formation and protection of victims. The theoretical basis is the basis for the construction of punishment without imprisonment in this paper. Criminalization without imprisonment is carried out to protect people's rights and dignity as human beings so that they can learn from their mistakes through more humane actions.

One of the problems that arise from the imprisonment approach is the overcrowding condition. The number of people in prison has increased and has rendered many prisons overcapacity, unfit prisons, and even led to swelling of the state budget. This phenomenon occurs throughout the world, where over the past 15 years, its population is estimated to have increased by almost 25 to 30 percent. In Europe, in 2012, the average prison population was 125.6 prisoners per 100,000 population and in 2013 it increased to 133.5 prisoners per 100,000 population[10]. In the United States, from 1992 to 2007 the number of prisoners had steadily increased from 505 per 100,000 to approximately 756 per 100,000. 1 in 100 adults was imprisoned and approximately 2.2 billion children were arrested in 2007.87 Meanwhile Indonesia, in January 2017, the number of prisoners and prisoners in detention centers and prisons reached 206,878 people and increased to 42,595 people, which in August 2018, the number reached 249,473 people's.[11]

There are several options to be made in reforming the criminal system that does not prioritize prison, namely (1) Supervision Criminal; (2) Criminal Fines (3) Criminal Social Work. However, the prison must still exist as an option. However, it must be implemented as a last resort. This is based on the Ultimum medium. non-prison sanctions are the primary measures that need to be implemented. If these efforts are found to be ineffective in tackling the perpetrators of the crime, then imprisonment must be imposed. However, the prison must still prioritize the principle of restorative justice. The prison that was implemented was not only confined to a room. However, there must be a process of guidance as a form of recovery so that criminals can correct their mistakes so that in the future they can become good human beings and can contribute to people's lives.

B. Legal framework for the application of non-prison sentences in criminal cases in Indonesia

According to the language, the word criminal law is a translation of the Dutch term strafrecht which comes from a combination of the word straf which means punishment and the word recht which means law. Thus Strafrecht literally means the law of

[9] Bagir Manan dalam Albert Aries, 2006*, Penyelesaian Perkara Pencurian Ringan dan Keadilan Restoratif*, Majalah Varia Peradilan, Tahun XX. No. 247, (Penerbit Ikatan Hakim Indonesia, Juni 2006). Hlm. 3

[10] D.A Andrews dan James Bonta, Rehabilitating Criminal Justice Policy and Practice dalam Psychology, Public Policy, and Law, Vol 16 No. 1, 2010, Hlm. 4

[11] Giorgia Stefani, et.al., Reducing Prison Population Advanced Tools of Justice in Europe, Comunita Papa Giovani XXIII, Rimini, 2013, Hlm. 6

punishment.[12] Indonesian criminal law is a legacy from the Dutch colonial period in Indonesia, which at that time was still called the Dutch East Indies.

This criminal law applies based on Article II of the transitional rules of the 1945 Constitution before the amendment which reads "that all state institutions and legal regulations that existed at that time were still valid as long as they had not been replaced by new ones according to the 1945 Constitution itself. After the amendments to the Constitution which was carried out in 1999 to 2002, criminal law in Indonesia is still in effect due to the absence of new criminal law regulations made by the legislative and executive bodies.

The criminal law that is in the criminal law book also cannot accommodate the need for regulations needed by the state to regulate people's lives, so rules that regulate traffic, regional regulations, and many other regulations contain elements of imprisonment or imprisonment.

In the process of implementing criminal law, there are several policies or powers of state institutions such as the discretion which is owned by the National Police and which is owned by the Attorney General. Discretion is an authority given by law to law enforcement officials, in this case especially the police to act in special situations in accordance with the judgment and conscience of the agency or the officers themselves. Discretion is actually the completeness of the regulatory system by the law itself. Discretion in the Black Law Dictionary comes from the Dutch language "Discretionair" which means wisdom in deciding an action based on provisions of regulations, laws or applicable law but on the basis of wisdom, consideration or justice.[13]

Thomas J. Aaron defines discretion as: discretion is power authority conferred by law to action on the basic of judgment of conscience, and its use is more than idea of morals than law. Which can be interpreted as a power or authority exercised based on law based on considerations and beliefs and emphasizes moral considerations more than legal considerations.[14]

Discretion is needed because the scope of the rules does not cover comprehensively and in detail how each official can carry out his duties, powers and responsibilities in the field, so there is a need for subjective consideration and policies from the relevant public officials for the smooth running of his duties and the policy is taken with an attitude of caution.

In the framework of carrying out duties in the field of criminal proceedings, the POLRI has the authority to carry out other actions in the form of investigations and investigations which are carried out as follows:

a. not against a legal rule;
b. is in line with a legal obligation that requires the action to be carried out;
c. must be appropriate, reasonable, and included in the environment of his position;
d. reasonable consideration based on compelling circumstances; and
e. respect human rights.[15]

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[12] Bunyana Sholihin, *Supremasi Hukum Pidana di Indonesia*, UNISIA, Vol. XXXI No. 69. September 2008, hlm 3.

[13] Faal, M, *Penyaringan Perkara Pidana Oleh Polisi (Diskresi Kepolisian)*, Jakarta, Pradnya Paramita. 1991, hlm 91.

[14] Ibid. hlm 16.

[15] Iqbal Felisiano dan Amira Paripurna, Profesionalisme Polri dalam Penerapan Wewenang Diskresi Dalam Kasus Tindak Pidana Pencurian (Studi Kasus Pencurian Kakao, Pencurian Biji Kapuk, dan Pencurian Semangka), Yuridika Vol. 25 No. 3, September–Desember 2010. Hlm 249.

Discretionary rights are also contained in article 18 paragraph (1) and (2) Law No.2 of 2002 concerning the Indonesian National Police which states, in the public interest POLRI officials in carrying out their duties and powers can act according to their own judgment, which is carried out in the situation is very necessary with due observance of the laws and regulations, as well as the POLRI professional code of ethics.

Actually this is in accordance with the theory put forward by Morris. In fact, the criminal justice system is nothing but a crime containment system. It is hoped that not all want every violation to be processed through the criminal justice system. These things that are not serious in nature can be resolved outside the criminal justice system, for example minor offenses can be resolved with administrative fines or other cases of a very vague nature can be carried out by means of coaching, for example submitted to parents or given a strong warning, especially when the case is still at the investigation level.[16]

This opinion aims to provide efficiency in law enforcement in Indonesia, because it would be very ineffective if the courts were from the first level to the final court. As well as the police and the prosecutor's office are full and preoccupied with minor cases which should be resolved by an agreement with the parties without denying the rights of the injured parties.

It is used as the authority possessed by the Attorney General to set aside cases, and is regulated in Article 35 letter c of Law Number 16 of 2004 concerning the Republic of Indonesia Attorney which reads "Attorney General has the duty and authority to set aside cases in the public interest". Based on the explanation in this Article, it is stated that what is meant by public interest is the interest of the nation and state or the interests of the community. This provision is an implementation of the opportunity principle that can only be carried out by the Attorney General after taking into account the suggestions and opinions of state power agencies that have a relationship with the matter. Waiver of a case is based on the principle of opportunity, in other words, a case is put aside even though there is sufficient evidence.[17]

According to this principle, the public prosecutor is not obliged to sue someone who has committed an offense if according to his considerations it will harm the public interest. So the public interest of someone who commits an offense is not prosecuted. In this case, Lemaire said that today the principle of opportunity is commonly regarded as a principle that applies in this country, even though it is an applicable unwritten law.[18]

The practice of waiving criminal cases in Indonesia is currently explained by RM Surachman and Andi Hamzah as the power not to prosecute is justified in terms of terminating prosecution for technical reasons and terminating prosecution for policy reasons. In subsequent developments, only the Attorney General has the authority to implement this policy in order to prevent abuse of power.[19]

It can be stated that if there is sufficient evidence to convict a suspect, and the prosecutor feels that there will be more harm to the public interest if the prosecution is carried out, then the case will be put aside (principle of opportunity). The principle of opportunity is the prosecution discretion owned by the prosecutor's institution, which in its implementation only lies with the attorney general.

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[16] Ibid. hlm 249.

[17] Diska Kurnianto , Agna Susila , Yulia Kurniawati, Pelaksanaan Diponering Dalam Perspektif Asas Equality Before The Law, Vol 13 No. 1, Maret 2017. hlm 6.

[18] Andi Hamzah, *Hukum Acara Pidana,* Sinar Grafika, Jakarta, 2010. hlm 17.

[19] Surachman, Andi Hamzah, *Jaksa Diberbagai Negara Peranan dan Kedudukannya,* Sinar Grafika, Jakarta, 1995. hlm 36.

Only two policies in Indonesia, namely the discretion owned by the National Police and in the past that owned by the Attorney General, can override or stop the legal process that applies to suspected perpetrators of criminal acts so that they do not proceed to court. This is also based on the subjective opinion of the law enforcers.

So it is time for the state through the legislative and executive institutions to reform criminal law, especially when discussing the draft of criminal code. Misdemeanor are less harmful unlike other criminal acts such as taking someone's life, treason against the state, and stealing a large amount a lot so that it causes a person to be unable to continue his life or a legal entity whose business operation is disturbed. The imprisonment or imprisonment penalties can be shifted to administrative sanctions, fines, and social work.

Shifting imprisonment or imprisonment sanctions into administrative sanctions, fines, and social work can reduce the full quota amount in prisons in Indonesia. The state as a tool that carries out the legal process can save state budget expenditures from the process of investigations, trials, and financing prisoners in prisons. This also has the effect of reducing the gathering of criminal offenders in prisons to share knowledge about the new modus operandi of other crimes.

6. Conclusion

Therefore, based on the research conducted, the conclusions that can be drawn are as follows:

1. The current framework in Indonesian penal system is no longer reflects *ultimum remedium*, but rather *primum remedium*. Misdemeanor is actually less harmful than other criminal acts, hence there should be an option to consider imposing other sanctions rather than imprisonment. This will lead to the protection of the people's rights and dignity as human beings so that they can learn from their mistakes through more humane actions.
2. There are currently 2 (two) alternatives rather than imposing criminal sanctions for misdemeanor cases in Indonesia, namely the discretion by the Police and *depowering* by the Attorney General. However, due to the increasing numbers of crime cases that lead to an imprisonment, there should be a clear provision that provide an alternative sanctions such as administrative sanctions, civil sanctions, and/or restorative justice approaches instead. This can become a consideration for the legislative and executive institutions in the effort of reforming the Indonesian penal code.

References

Regulations

The 1945 Constitution of the Republic of Indonesia.
Republic of Indonesia Law Number 1 of 1946 concerning the Indonesian Criminal Code.
Republic of Indonesia Law Number 2 of 2002 concerning the Indonesian National Police.
Republic of Indonesia Law Number 16 of 2004 concerning the Republic of Indonesia Attorney.
The Indonesian Criminal Code Bill.

Books

Andi Hamzah, *Hukum Acara Pidana,* Sinar Grafika, Jakarta, 2010.
Faal, M, *Penyaringan Perkara Pidana oleh Polisi (Diskresi Kepolisian)*, Pradnya Paramita, Jakarta, 1991.

J. Remmelink, *Pengantar Hukum Pidana Material 1*, Maharsa Publishing, Yogyakarta, 2014.

Johanes Andenaes in E. Utrecht, *Hukum Pidana* I, Universitas Jakarta, Jakarta, 1958.

Muladi and Barda Nawawi, *Teori dan Kebijakan Pidana,* Alumni, Bandung, 1992.

Plato and Aristoteles on Andi Hamzah, *Asas-Asas Hukum Pidana*, Rineka Cipta, Jakarta, 1994.

Surachman and Andi Hamzah, *Jaksa Diberbagai Negara Peranan dan Kedudukannya,* Sinar Grafika, Jakarta, 1995.

Terance Miethe dan Hong Lu, Punishment: A Comparative Historical Perspective, Cambridge University Press, Cambridge, 2005.

Wirjono Prodjodikoro, Asas Asas Hukum Pidana di Indonesia, Refika Aditama, Jakarta, 2003.

Journal Articles

Bagir Manan in Albert Aries, 2006*, Penyelesaian Perkara Pencurian Ringan dan Keadilan Restoratif*, Majalah Varia Peradilan, Tahun XX. No. 247, (Penerbit Ikatan Hakim Indonesia, Juni 2006).

Bunyana Sholihin, *Supremasi Hukum Pidana di Indonesia*, UNISIA, Vol. XXXI No. 69. September 2008.

D.A Andrews dan James Bonta, Rehabilitating Criminal Justice Policy and Practice dalam Psychology, Public Policy, and Law, Vol 16 No. 1, 2010.

Diska Kurnianto, Agna Susila, Yulia Kurniawati, Pelaksanaan Deponeering Dalam Perspektif Asas Equality Before The Law, Vol 13 No. 1, Maret 2017.

Giorgia Stefani, et.al., Reducing Prison Population Advanced Tools of Justice in Europe, Comunita Papa Giovani XXIII, Rimini, 2013.

Iqbal Felisiano and Amira Paripurna, Profesionalisme Polri dalam Penerapan Wewenang Diskresi Dalam Kasus Tindak Pidana Pencurian (Studi Kasus Pencurian Kakao, Pencurian Biji Kapuk, dan Pencurian Semangka), Yuridika Vol. 25 No. 3, September–Desember 2010.

Nur Ainiyah Rahmawati, *Hukum Pidana Indonesia: Ultimum Remedium Atau Primum Remedium*, Recidive Vol. 2, No. 1 Januari – April, Tahun 2013.

Rethinking and Repositioning Community Paralegal as The Frontline of Access to Justice in The Pandemic

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ABSTRACT

The COVID-19 pandemic gives the full impact on legal services. Not only lawyers but the community paralegal also encountered obstacles at this time. Community paralegals are different from conventional paralegals—their primary role is not to assist lawyers but rather to work directly with the communities they serve. Through the empirical juridical method, the author will analyze the pandemic impacts on community paralegal duties and the forms of government policies that can be taken. There are three issues affecting community paralegal services, namely the digital gap, lack of understanding of cases, and loss of income. This condition requires the government to pay more attention to community paralegal. Through the National Law Development Agency of Indonesia (BPHN), the government can allocate a budget to increase the capacity and welfare of community paralegals.

1. Introduction

Billions of people have difficulty accessing justice. In communities throughout the world, people struggle with legal issues related to housing, family, debt, crime, property, and other matters that affect their well-being. Those who are poor, geographically isolated, or otherwise vulnerable often cannot obtain assistance in solving their justice problems. They may suffer under discriminatory laws or lack the legal means to enforce norms that should protect them.

Community-based paralegal programs can help communities that lack access to the legal system resolve their justice issues. Particularly in post-conflict or developing countries, lawyers—who are typically concentrated in population centers and commercial hubs—often cannot meet the demand for justice services. Community paralegals represent a paradigmatic shift in the delivery of legal services, similar to the proliferation of rural public health workers in response to the formal medical profession's inability to meet community health needs.[1]

Community paralegals are grassroots advocates who use their knowledge of the law to seek concrete solutions to instances of injustice. Based on the needs of a given case, they may employ such tools as mediation, community organizing, education, and

[1] The Open Society Justice Initiative, (2010), *Community-based Paralegals: A Practitioner's Guide,* Budapest: Open Society Justice Initiative, pp. 11-12.

advocacy before formal or customary authorities. These schemes build citizen power by helping communities develop the knowledge and capacity they need to speak up for themselves.[2]

Since at least the 1950s, when community paralegals in South Africa began helping people to navigate and resist apartheid, community paralegals have played a vital role in empowering communities around the world. Nowadays, community paralegal programs have evolved to be quite diverse. Some provide holistic services, while others focus on specific issues such as land or the rights of prisoners. Some paralegals are paid while others are volunteers. Some work with nongovernmental organizations—including legal NGOs, community-based organizations, and membership associations such as farmers' groups —while others are a part of government legal aid programs.[3]

Currently, Indonesia is in the midst of a Covid-19 pandemic. The pandemic that has been going on since mid-March 2020 has made many big changes in society. Changes that occur in various fields, namely economic, social, communication, interaction between communities, to law enforcement matters. In the aspect of law enforcement, there are some adjustment to the situation of the Covid-19 pandemic. In this paper, the author will analyse the pandemic impacts on community paralegal duties and the forms of government policies that can be taken.

2. Materials and Methods

The approach used in this paper is an empirical juridical approach. The juridical approach that is meant is law seen as a norm. Because in discussing the problems in this study using legal materials (both written law and unwritten law or both primary, secondary and tertiary legal materials. is to see law as a social, cultural or das sein reality because in this study the data used are primary data obtained directly from the research location. So, the empirical juridical approach meant in this study is that in analysing the problems that have been formulated, it is done by combining legal materials, both primary, secondary and tertiary (which are secondary data) with primary data obtained in the field, namely about the implementation of legal service by community paralegals.

3. Results and Discussion

A. The Role of Communities Paralegal

"Community paralegals," also known as "grassroots legal advocate," "barefoot lawyer," "community legal worker," or a host of other titles, provide a bridge between the law and real life. These paralegals are trained in basic law and in skills like mediation, organizing, education, and advocacy. They form a dynamic, creative frontline that can engage formal and traditional institutions alike.[4]

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[2] Emily Polack, (2014), *Citizen power: Sustaining paralegal programmes to put knowledge back into communities' hands*, retrieved November 12, 2020, from https://www.iied.org/citizen-power-sustaining-paralegal-programmes-put-knowledge-back-communities-hands

[3] Namati, (n.d.), *How to Develop a Community Paralegal Program,* retrieved November 12, 2020, from https://namati.org/resources/developing-a-community-paralegal-program/

[4] Namati, (n.d.), *What is a Community Paralegal?* retrieved November 12, 2020, from https://namati.org/wp-content/uploads/2015/02/What-is-a-Community-Paralegal-1.pdf

The term 'paralegal' may be somewhat misleading insofar as it suggests an assistant who performs ministerial legal tasks. Community paralegals in many developing country programmes are better thought of as community activists who not only have a substantial training in legal principles, but also familiarity with local community norms and practices and an ability to offer advice and advocacy services that go beyond narrow legal advice.[5]

Community paralegals and their clients typically address three kinds of problems: disputes among people, grievances by people against state institutions, and disputes between people and private firms. Sometimes these cases involve individuals seeking justice; often they involve groups or entire communities. Their aim to help people achieve practical remedies: a group of workers wins unpaid back wages from their employer; a fishing community secures environmental enforcement against a factory releasing illegal effluents into the sea; a mother receives support for her children from a derelict father.

Like community health workers – who have an established place in health care delivery systems around the world – community paralegals are close to the communities in which they work and deploy a flexible set of tools. Also, like community health workers, paralegals work in tandem with a strong, typically well-organized profession. While community health workers refer difficult cases to doctors and the formal medical system, community paralegals are typically connected to lawyers who can engage in litigation or high-level advocacy if the paralegals' frontline methods fail.[6]

It is important to bear in mind that a paralegal is not a lawyer. A paralegal cannot assist people in court and other tribunals until he or she acquires the relevant qualification and accreditation. However, paralegals also offer skills that lawyers rarely possess, and can extend the knowledge and expertise of the lawyers with whom they work. Paralegals can add complementary skills that are finely tuned to local contexts, such as speaking local languages, knowledge of local forms of justice, and community acceptance. [7]

Common activities of community-based paralegal programs include:[8]

1. Legal and general advice. Advise people on how to handle legal or administrative problems. Refer people to organizations that provide social and health services. The program will have a network of contacts with other paralegals, resources, and organizations that can help the community. Depending upon the local context, the paralegal might work with both formal and customary law institutions.
2. Counselling and mediation. Help community members solve problems through techniques that encourage resolution without going to court. Informal legal mechanisms can include personal counselling, alternative dispute resolution (negotiation and mediation), and arbitration.

[5] The Commission on Legal Empowerment of the Poor and United Nations Development Programme, (2008), *Making the Law Work for Everyone,* New York: The Commission on Legal Empowerment of the Poor and United Nations Development Programme, p. 92.
[6] V. Maru & V. Gauri, (2018), *Community Paralegals and the Pursuit of Justice,* New York: Cambridge University Press, p. 3.
[7] *Ibid.,* p. 18.
[8] The Open Society Justice Initiative, (2010), *Community-based Paralegals: A Practitioner's Guide,* Budapest: Open Society Justice Initiative, p. 17.

3. Community education. Hold workshops to raise public awareness and build the capacity of individuals and groups, including civil society organizations, civil servants, government officials, and community councils. Distribute educational pamphlets, booklets, and other resources. Community-based paralegal programming initially involves the training of paralegals and these same paralegals in turn can become involved in community education programming.
4. Litigation activities. Investigate cases, sometimes involving legal research and writing that are then passed on to lawyers, or work as a link between a community and lawyers. Paralegals can help with taking statements, interpreting, and following up on cases. In some jurisdictions, paralegals can appear in lower-level courts in relation to certain civil cases. If the paralegal organization has lawyers on staff, paralegals can help represent individuals or groups in cases before courts or administrative agencies on issues affecting the public interest. Paralegal organizations will often take a strategic approach to litigation, taking cases that affect not only the individual involved but also larger legal and social issues within a community or country.
5. Community organizing and advocacy. Help resolve widespread problems in a community and problems with authorities through negotiation and mediation. Assist in making contact with the press and publicizing events and problems. Some organizations take up cases that challenge existing laws while others draft and advocate for new legislation. Organizations may also provide analysis or opinions on legal instructions being considered.

Community paralegals are dedicated to legal empowerment: they help people to understand, use, and shape the law. Because these community paralegals help people to understand and use the law themselves, their work is often referred to as "legal empowerment." Paralegals can help empower members of their community to not only know their rights, but also to take action to enforce their rights.

Research has shown the value of community paralegals in the Philippines. A survey found, by comparing different provinces in the Philippines with and without paralegals, that communities with paralegals are able to act when their rights are violated and have the ability to translate knowledge into action.[9] A research project in Tanzania and Mozambique found that women were more likely to pursue legal claims after legal education on land rights, but that this alone was not sufficient to achieve change in agency. Women in villages where paralegals were connected to lawyers were most effective in bringing their case to court and in translating the claim into a remedy. [10]

Carl Cesar "Cocoi" Rebuta, a consultant of the Legal Rights and Natural Resources Centre (LRC) in the Philippines, explained how LRC built community paralegal teams that successfully challenged concessions granted to a mining company. In this case, LRC not only filed a legal case on behalf of their community – but also mobilised the local community to write thousands of letters reject ing the mining project, including many from children. Soon after this petition action, the mining company pulled out.[11]

[9] Jacinta Maloney, (2014), *I feel empowered, I know my rights,* Australia: The Victoria Law Foundation, p. 36.
[10] *Ibid.*
[11] Emily Polack, (2014), *Citizen power: Sustaining paralegal programmes to put knowledge back into communities' hands*, retrieved November 12, 2020, from https://www.iied.org/citizen-power-sustaining-paralegal-programmes-put-knowledge-back-communities-hands

Similarly, in Mozambique, local paralegals supported by Centro Terra Viva (CTV) tackled a natural gas project that was failing to comply with licencing procedures. The project's licensing process was delayed until the proper procedure was followed. CTV is now building a far-reaching paralegal programme to strengthen local capacities and reach communities in investment hotspots across Mozambique.[12]

The role of paralegals is also seen in Indonesia. For many months, the 98 families living in a low-income housing block in Bogor, Indonesia, had not received electricity. The state electricity company, PLN, stopped providing electricity after finding out the wires had been illegally connected. The company demanded the residents pay a fine of several thousand dollars in order to reconnect the lines. The residents, however, claimed the developer of the housing block was the party at fault. The developer was also unwilling to pay the fine.[13]

The residents approached a group of paralegals with their case. The paralegals assisted the community in staging rallies, writing letters to government agencies, and obtaining newspaper coverage of the issue. The paralegals also approached members of a local parliamentary commission and asked them to conduct two hearings on the case. The commission members accepted.[14]

During the hearings, the commission asked all parties—the electricity company, the developer, and the residents—to share their side of the story. Many community members attended the meetings and had the chance to speak publicly about their challenges. Following the second meeting, the commission issued a nonbinding statement in which they asked the developer to pay the fine. The electricity company initially still pressed the local residents for the money. After the paralegals threatened to take the case to court, the developer paid half of the fine and the company restored the electricity connection.[15]

Paralegal initiatives can make governments more responsive to local needs and more likely to respect and protect the rights of local communities. In reality, many government bodies, especially at local level, do not have access to legal advice themselves. For example, in Mozambique, CTV trained government officials, as well as community paralegals, in aspects of the law. A supportive response from government relies on trusting relationships, and these are not always present. In Mozambique, the government can be suspicious of NGOs despite their potential to offer support and advice. [16]

Local insights and local actions that gather analyses and build momentum for effective advocacy are crucial for legal reforms. Linking local to national, is the primacy of community paralegals that become the key to wider systemic change. One organisation in Mali helped identify gaps in the mining code through dialogue with villagers during a

[12] *Ibid.*
[13] Namati, (n.d.), *What is a Community Paralegal?* retrieved November 12, 2020, from https://namati.org/wp-content/uploads/2015/02/What-is-a-Community-Paralegal-1.pdf
[14] *Ibid.*
[15] *Ibid*.
[16] Emily Polack, (2014), *Citizen power: Sustaining paralegal programmes to put knowledge back into communities' hands*, retrieved November 12, 2020, from https://www.iied.org/citizen-power-sustaining-paralegal-programmes-put-knowledge-back-communities-hands

series of legal 'caravans'. Sharing this analysis with the Malian government resulted in a revised national mining code. In Liberia, action-research testing how paralegals could help communities protect land in turn helped develop and implement a new community land rights policy.[17]

Furthermore, community paralegals do not only focus on case handling and advocacy, but also focus on community development and empowerment through useful activities. Many people keep away from getting involved in legal matters. Sometimes lack of information and threats given by the accused compel them to leave the case before completion and their exploitation continues. So, it is necessary to convince the victim and extend complete support to fight injustice. Lawyers speak in legal language and are concerned only about the case not about the condition of the victim.[18] Therefore, the presence of community paralegal is needed for this context.

In Sukowilangun Village, there is a group of paralegals called "Singkong Jaya". The existence of this paralegal group not only provides protection to women, but is also able to empower women who are there. This community paralegal has several activities, one of which is the production of "tepung mocaf" made from cassava which is sold in several bakeries. Then, it processed into processed products in the form of brownies which are very useful and can be consumed by autistic children.[19]

B. The pandemic impacts on community paralegal duties

Community paralegal efforts cost money. Paralegals who work full time require a salary; those who serve their own village or their own membership association as volunteers require support from lawyers or more senior paralegals who earn a salary. There are also costs associated with training, office space, materials, transportation to reach clients and government offices, and litigation for a small percentage of cases

Despite relatively modest costs, paralegal groups in every country identified unstable funding as a key constraint. This is consistent with data from the Global Legal Empowerment Network. When asked "How sustainable is your funding situation for the coming year?" in a 2017 members survey, 63 percent of respondents said either "we have to make cuts but we will survive" or "we may not be able to operate next year due to lack of funds.[20]

The cost problem for community paralegals is exacerbated by the pandemic. LBH Yogyakarta conducted a survey on the impact of Covid-19 on 11 community paralegal organizations. In general, 11 paralegal communities experienced a decrease in economic income. Of course, this also makes the agenda and programs carried out by 12 paralegals

[17] *Ibid*.
[18] Centre for Social Justice, (2012), *We Can,* Ahmedabad: Centre for Social Justice, p. 6.
[19] Satukanal, (2020), *Tak Hanya Memberikan Perlindungan, Keberadaan Komunitas Paralegal Mampu Memberdayakan Perempuan*, retrieved November 12, 2020, from https://www.satukanal.com/tak-hanya-memberikan-perlindungan-keberadaan-komunitas-paralegal-mampu-memberdayakan-perempuan/
[20] V. Maru & V. Gauri, (2018), *Community Paralegals and the Pursuit of Justice,* New York: Cambridge University Press, p. 24.

in terms of expanding access to justice in the context of fighting for human rights to encounter significant obstacles.[21]

One of those affected is the Jonggrang Community located in Kalasan District. Members of this community are female sex workers. Community members are active to carry out advocacy activities, especially for friends who are arrested while working and also ensure the safety of community members from service users. The Jonggrang community has regular activities such as gathering 2 times a month. They meet each other to give an update and also serve as a means for education related to personal health and safety. The community also implements a security system with daily fees to be used as a holding fund if a member is caught.[22]

All respondents from the Jonggrang Community stated that they were severely affected by the pandemic. Almost all respondents experienced a decline in income as a result of the economic slowdown during the pandemic. The high risk of contracting Covid-19 through their work is also a fear in itself. This condition is exacerbated by an increase in the price of basic commodities in the area where they live. Not only that, Jonggrang community members are basically migrants who break contracts around the area. Most of them do not get assistance from the government because they are considered not to be local people. Even so, community members persist in these jobs while looking for alternative side jobs to meet their needs. One alternative to his job is selling food such as "angkringan" or street snacks.[23]

Community paralegals also face problems related to the use of technology. The implementation of online activities (be it legal consultations or public discussions) can only be attended by tech-literate participants. There are some groups in society (especially the lower middle economic class) who cannot be involved in participating in these activities, because they are neither technology literate nor have the technological infrastructure itself.

The electronic trial mechanism also brings challenges in the technicality of trial administration. For example, when the trial started, the parties did not know which application to use. When using the zoom application, because they don't use a premium account, it can only be used for about 30 minutes. After that, they have to use the creation of a new virtual meeting room in the zoom. In addition, the panel of judges and public prosecutors are not familiar with online trials and the use of technology-based applications. As a result, the trial takes a long time and is only technical.[24]

Technology gap also seen when legal aid seekers who will consult with community paralegals. Lembaga Bantuan Hukum Masyarakat (LBHM) said that delivery via the WhatsApp business account is highly dependent on the internet network and devices owned by legal aid seekers. During a pandemic, the need for quotas will become large and

[21] A.M. Akdom, A. Widhantara, & D.K. Awami, (2020), *Mandiri Di Tengah Pandemi: Laporan Survey Dampak Covid-19 Terhadap 11 Organisasi Paralegal Komunitas,* Yogyakarta: LBH Yogyakarta, p. 48.
[22] *Ibid.,* pp. 41-42.
[23] *Ibid.*
[24] W. Afriandy, S. Mazumah, L. Yuliana, D. Christian, M.R. Ridha, & A. Wahyudin, (2020), *Panduan Bantuan Hukum Selama Pandemi Covid-19,* Jakarta: Lembaga Bantuan Hukum Masyarakat, p. 22

burdensome legal aid seekers economically. Legal aid seekers who live in areas with minimal internet access are the most disadvantaged and affected.[25]

LBH Apik also experienced a similar story. Many women victims of domestic violence do not have smartphones so they cannot access services. Community paralegals ultimately have to provide direct legal assistance by implementing health protocols. They are equipped with personal protective equipment when providing legal assistance.[26]

Apart from the financial and technological aspects, community paralegals have also encountered various new cases. During the pandemic, two new cases that emerged were misappropriation of social assistance and lack of access to health. Many community paralegals do not have sufficient skills to assist in handling this case. Many aspects are involved in these two types of cases and it is not easy for community paralegals to receive training in handling these cases.[27]

C. Strategic Solution for Community Paralegal

Paralegal programs should seek to diversify funding sources and secure long-term commitments. Many existing paralegal programs raise the majority of their funds through international organizations, but there are a variety of viable models. Government justice institutions may finance legal aid efforts where paralegals are recognized, while other organizations raise funds through microfinance and social enterprises.[28]

Although many paralegal programs are based within an NGO, they may also be directly affiliated with government agencies or supported entirely by public funds. This can happen when the state recognizes that paralegals are helping them to provide promised legal aid services to citizens. It is important that any paralegal program set up under the auspices of the government have an independent oversight committee with a majority of members coming from civil society in order to ensure procedures of accountability and supervision of the paralegal work.

In Mongolia, a paralegal program was introduced within an existing governmental institution, the Ministry of Justice and Home Affairs, which employed 30 legal advisors in local governors' offices in the country's 21 provinces and the capital city of Ulaan Baatar. A report prepared by the Open Society Forum–Mongolia confirmed that rural populations had a high need for legal services and law-related education to address community problems. At the suggestion of the Open Society Forum–Mongolia, and with the support of the Open Society Justice Initiative, the Ministry of Justice agreed to pilot a new paralegal program through its own institutional structures in 10 pilot sites in 2006. [29]

The ministry changed the responsibilities of the legal advisors so that they would continue to spend half of their time advising government officials but the other half

[25] *Ibid.*
[26] *Ibid.,* hlm. 13
[27] Interview with Andi Komara, Public Defender at LBH Jakarta, 12th November 2020.
[28] Namati, (n.d.), *How to Develop a Community Paralegal Program,* retrieved November 12, 2020, from https://namati.org/resources/developing-a-community-paralegal-program/
[29] The Open Society Justice Initiative, (2010), *Community-based Paralegals: A Practitioner's Guide,* Budapest: Open Society Justice Initiative, pp. 24.

serving community members directly. The legal advisors now act as paralegals and their work is managed by newly established legal aid centers.

Despite the Mongolian example, it is unusual to have paralegals directly employed by the government. It is more common for paralegals to receive support from governments through in-kind contributions; in South Africa, some paralegals are based in government offices located near the tribal chiefs' courts. This arrangement not only reduces operational expenses but also gives paralegals greater access to clients who come into the building. In Hungary, the second phase of the Roma paralegal training program received support through a European Union structural fund. In some countries, it is possible that government funds earmarked for legal services could be used to support paralegal work. [30]

The Bar Association can also play a role in providing solutions for community paralegal. In America, the American Bar Association providing support specific to the needs of paralegals and paralegal students during the COVID-19 pandemic. As the need for remote legal services is likely to continue beyond the immediate crisis, these organizations are well-positioned to continue to support the evolving needs of the paralegal profession.[31]

4. Conclusion

From the explanation above, we can conclude that Community Paralegals are non-lawyers who use their knowledge of the law to provide legal advice and assistance to the community in which they live. A scarcity of lawyers willing to assist the poor and vulnerable has resulted in community paralegals emerging to bridge the gap. Community paralegals not only work directly with their communities to raise awareness of legal rights, they are translating knowledge into action, assessing and acting on legal problems. Community paralegals are vital links between their community, lawyers, and legal services.

There are three issues affecting community paralegal services, namely the digital gap, lack of understanding of cases, and loss of income. This condition requires the government to pay more attention to community paralegal. In the end, skilled and capable paralegals could succeed in helping people deal with an inaccessible and distrusted justice system and how, in the process, they could contribute to address social inequality in Indonesia.

References

Afriandy, W., Mazumah, S., Yuliana L., Christian, D., Ridha, M.R., & Wahyudin, A. (2020). *Panduan Bantuan Hukum Selama Pandemi Covid-19.* Jakarta: Lembaga Bantuan Hukum Masyarakat.

[30] *Ibid.*

[31] S. Dahlquist & A. L. Shelton, (2020), *The Effects of the COVID-19 Pandemic on Paralegal Employment and Education*, retrieved November 12, 2020, from https://www.americanbar.org/groups/paralegals/blog/blog_5/

Akdom, A.M., Widhantara, A., & Awami, D.K. (2020). *Mandiri Di Tengah Pandemi: Laporan Survey Dampak Covid-19 Terhadap 11 Organisasi Paralegal Komunitas.* Yogyakarta: LBH Yogyakarta.

Centre for Social Justice. (2012). *We Can,* Ahmedabad: Centre for Social Justice.

Dahlquist, S., & Shelton, A. L. (2020). *The Effects of the COVID-19 Pandemic on Paralegal Employment and Education*. Retrieved November 12, 2020, from https://www.americanbar.org/groups/paralegals/blog/blog_5/

M, Jacinta. (2014). *I feel empowered, I know my rights.* Australia: The Victoria Law Foundation.

Maru, V., & Gauri, V. (2018). *Community Paralegals and the Pursuit of Justice.* New York: Cambridge University Press.

Namati. (n.d.). *How to Develop a Community Paralegal Program.* Retrieved November 12, 2020, from https://namati.org/resources/developing-a-community-paralegal-program/

Namati. (n.d.). *What is a Community Paralegal?* Retrieved November 12, 2020, from https://namati.org/wp-content/uploads/2015/02/What-is-a-Community-Paralegal-1.pdf

Polack, E. (2014). *Citizen power: Sustaining paralegal programmes to put knowledge back into communities' hands*. Retrieved November 12, 2020, from https://www.iied.org/citizen-power-sustaining-paralegal-programmes-put-knowledge-back-communities-hands.

Satukanal. (2020). *Tak Hanya Memberikan Perlindungan, Keberadaan Komunitas Paralegal Mampu Memberdayakan Perempuan*. Retrieved November 12, 2020, from https://www.satukanal.com/tak-hanya-memberikan-perlindungan-keberadaan-komunitas-paralegal-mampu-memberdayakan-perempuan/

The Commission on Legal Empowerment of the Poor and United Nations Development Programme. (2008). *Making the Law Work for Everyone.* New York: The Commission on Legal Empowerment of the Poor and United Nations Development Programme.

The Open Society Justice Initiative. (2010). *Community-based Paralegals: A Practitioner's Guide.* Budapest: Open Society Justice Initiative.

Nurses Criminal Responsibility in Conducting Medical Action the Wording Doctors

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ABSTRACT

This study aims to analyze the criminal responsibility of nurses in carrying out medical actions wording the doctor's delegation of authority. By using the juridical normative approach, namely using the statutory approach (Statute Approach), and the conceptual approach (conceptual approach), namely an approach using statutory regulations as the initial basis for conducting an article.
The results showed that criminal liability can only be carried out against someone who commits a criminal act. Whereas the nurse's responsibility in carrying out medical actions the wording an abundance of doctors is based on Article 51 paragraph (1) of the Criminal Code that "Whoever commits an act to carry out a position order given by the competent authority, is not punished", because what a nurse does is on the doctor's order. and Article 55 of the Criminal Code "nurses in carrying out medical actions only as" manus ministra "(people who are ordered to) are deemed to have no mistakes, nurses are only used as tools that are blamed for the work of doctors", so the one who can be held accountable is a doctor.
Keywords: *Accountability, Criminal, Nurse, Medical action.*

1. Introduction

The development of health law and the field of law cannot be separated from the legal system adopted by a country or society. Health law develops according to human development. Health law regulates the rights and obligations of individuals, groups, communities in health services.

Health is a state program that aims to phrase social protection and welfare for all people as mandated in the 1945 Constitution of the Republic of Indonesia Article 28H paragraph (1) states that "everyone has the right to live physically and mentally prosperous, have a place to live, and have the environment. good and healthy and entitled to health services ".

Health services are expected to provide benefits to all Indonesian people, which are inseparable from human values. This is inseparable from a sense of humanity in providing health services carried out by medical personnel and other health workers. The guidelines for the administration of health positive in Law Number 36 of 2009 concerning Health and Law Number 29 of 2004 concerning Medical Practice and Permenkes Number 512 / Menkes / Per / IV / 2007 which are a reference in legal protection for health workers, especially doctors. and dentists in providing health services to patients in particular and the general public. Doctors and nurses have a big role and responsibility regarding public health issues, without discrimination or differentiation of services to patients. Health services must be provided by competent health workers, both in terms of education and licensing the

wording of the provisions of the applicable laws.

The legal relationship between doctors and nurses can be in the form of delegation of authority or mandates. To perform medical action, the nurse cannot decide on her own without a doctor's delegation or according to what is instructed and under the supervision of a doctor.

In hospitals and health centers we can see that doctors do not fully provide basic services to the community, many of the doctors' duties and authorities have been carried out by nurses, namely carrying out medical actions, such as injection, infusion, it with of different one of Nasogastric Tube (NGT) tubes or what is commonly called. with hose sonde and others. The doctor's workload, which should be their responsibility and duty, should be done by nurses. In remote areas that are far from being reached, this situation makes it imperative for nurses to take actions that are not in their authority, the wording the community in an emergency without any delegation from doctors.

The duties and authorities of nurses are regulated in Law Number 38 of 2014 concerning Nursing, Article 29 paragraph (1) which reads: "In carrying out nursing practice, nurses serve it: a. Nursing Provider; b. Clients and client counselors; c. Nursing Service Manager;
d. Nursing Researcher; e. Implementing tasks based on the delegation of authority; the extra spaces; f. Performing tasks in certain limitations. So, it is clearly stated in Article 29 paragraph 1 letter e, the duties and authorities of nurses are to serve as executors of tasks based on the delegation of authority.

Based on research conducted by Hudi Punawan at the Cempaka Mulia Community Health Center, East Waringin City, average patient visits are 50 the extra space. Medical actions taken by doctors are 20% and those taken by medical action nurses, including providing diagnoses and prescribing drugs to 80% of patients, (Purnawan, 2017), even in New Zealand professional nurses are directed to make prescriptions within the boundaries of the health team, which is a competency development (Anecita Gigilim, 2017).

Nurses are health workers whose quantity is more than medical it and intend to deal directly with patients, nurses are most vulnerable to risks arising from the results of actions taken, in carrying out health services and nursing actions as well as the task of delegating authority from doctors which is a medical action is invasive (Praptianingsih, 2006), therefore nurses in medical action are only limited to helping doctors, so that is done according to the doctor's orders and instructions. With the current weakness that the delegation of authority in medical action is carried out not based on clear procedures, so there is no legal protection for nurses who take medical action in providing health services. The wording of the application of authority between doctors and nurses, several things that become the authority of doctors are carried out by nurses.

This is a dilemma faced by the nursing profession. Actions were taken with the presence or absence of delegation of authority. The delegation of authority from doctors to nurses must be in writing in the wording applicable because it is very risky and can harm nurses, if there is a negligence of responsibility it is borne unilaterally which harms the nurse for the risks that occur.

Based on the above considerations, it is necessary to discuss the "Criminal Liability of Nurses in Performing Medical Actions the wording an abundance of doctors".

2. Research Methods

The research method used in this paper is the Normative Juridical research method, using the Statute Approach, and the Conceptual Approach, which is an approach using statutory regulations as the initial basis for conducting an analysis.

3. Results and Discussion

3.1 Regulating the authority of nurses in health service efforts.

Authority is the right and autonomy to carry out nursing care based on ability and level of education. A nurse has it in carrying out nursing care the word in a responsible and accountable manner. In providing nursing care, nurses as a profession are responsible for themselves and it.

The authority of nurses is clearly stated in Article 15 of the Regulation of the Minister of Health of the Republic of Indonesia Number 1239 / Menkes / SK / XI / 2001 concerning Registration and Practice of Nurses, which states that nurses in carrying out nursing practices are authorized to:

a. Implementing nursing care which includes assessment, determination of nursing diagnoses, planning, implementing nursing actions, nursing evaluation;
b. Nursing actions as in point it: nursing interventions, nursing observations, health education, counseling;
c. In implementing nursing care as referred to in letters a and b, it must comply with the nursing care standards set by professional organizations;
d. Medical treatment services can only be done based on a written request from a doctor.

Based on Article 15, there are exceptions to the duties and authorities of nurses, we can see the exception provisions in Article 20 of the Regulation of the Minister of Health of the Republic of Indonesia Number 1239 / Menkes / SK / XI / 2001, that:

1) In an emergency that threatens the life of a patient, the nurse has the authority to provide Health services outside the authority as referred to in Article 15.
2) Service in an emergency redundancy as referred to in paragraph (1) is aimed at saving lives.

The authority of nurses in making health service efforts can also be seen in Article 30 of Law Number 38 of 2014 concerning Nursing, that in carrying out their duties as providers of nursing care, namely:

1) In carrying out the task of providing nursing care in the field of individual health efforts, the nurse is authorized:
   a. carry out holistic nursing assessments;
   b. establish a nursing diagnosis;
   c. planning nursing actions;
   d. carry out nursing actions;
   e. evaluate the results of nursing actions;
   f. make referrals;

g. provide action in emergency situations according to competence;
h. provide nursing consultations and collaborate with doctors;
i. conduct health education and counseling; and
j. managing the administration of drugs to clients in the wording the prescription of medical personnel or free drugs and limited free drugs.

2) In carrying out their duties as nursing care providers in the field of public health efforts, the nurse is authorized:
   a. conduct community health nursing assessments at the family and community group levels;
   b. determine public health nursing problems;
   c. assist with disease case finding;
   d. planning public health nursing actions;
   e. carry out public health nursing actions;
   f. make case referrals;
   g. evaluate the results of public health nursing actions;
   h. conduct community empowerment;
   i. carry out advocacy in public health care;
   j. forging partnerships in public health care;
   k. conduct health education and counseling;
   l. managing cases; and
   m. perform complementary and alternative nursing management.

Based on Article 30, it is clearly stated that the authority of nurses in health service efforts is to provide nursing care.

Health service efforts provided by nurses in hospitals or health centers to the community cannot be separated from medical actions, medical actions which are medical practices, cannot be fully carried out by doctors or dentists but involve other health workers such as nurses. For this reason, it is necessary to delegate authority for medical actions from doctors to nurses.

Law Number 38 of 2014 concerning Nursing, article 29 paragraph (1) states that "the duty and function of nurses are to carry out nursing practice". In carrying out her profession, nurses cannot be separated from the authority they have, this is related to the legal responsibility of nurses in the authority to take medical action.

Carrying out medical action is not the authority and competence of nurses; nurses can take medical actions as a collaborative function of nurses with doctors and other health workers and the mandate delegation of authority from doctors.

Based on the theory of authority put forward by Philipus M, Hadjon in Sukindar, that authority is obtained through three sources, namely attribution, delegation, mandate. Attribution authority is usually outlined through the division of state power by the constitution, while delegation and mandate authority are the authority that comes from a delegation. Meanwhile, the mandate is not the delegation of authority as is the case with delegation. The mandate does not completely transfer the hand of authority (Sukindar, 2017).

The wording Article 32 of Law Number 38 for 2014 concerning Nursing, the implementation of tasks based on the delegation of authority in

medical action can be carried out by delegation or mandate.

a. Delegative delegation of authority means that the delegation of responsibility lies with the nurse who carries out the task.
b. Mandate delegation of authority means that nurses perform medical actions under the supervision of doctors.

The delegation of authority from doctors to nurses in juridical and moral medical actions will result in a burden of responsibility on the doctor who gives the overflow, and the nurse as an overflow recipient, if the action taken by the nurse is not the wording what the doctor instructed.

Medical actions performed by nurses based on delegation from doctors can be mandated and delegated. The responsibility for the delegation of authority lies with the nurse, while the responsibility for the delegation of authority rests with the doctor. In practice, there is only a delegation of authority from doctors to nurses in mandatory medical treatment, not delegation.

3.2 Nurse's criminal responsibility in carrying out medical action on the overflow of doctors.

Nurses can be held liable for the criminal if they take medical actions and treatments that are not the wording standards, which can cause damage loss (*damage*) caused by the action. Because basically, medical action is the competence and authority of medical personnel (doctors), not the authority of nurses as nursing personnel.

The concept of criminal responsibility is an error. A person can be sentenced if two conditions are fulfilled, namely, the existence of a criminal act (*actus reus*) and the existence of an evil mental attitude (*man's rea*) (Muntaha, 216: 2017). Thus, a person who commits a criminal act can only be punished if there is an error in committing the act. Because criminal responsibility is the responsibility of a person for the criminal act he has committed.

In carrying out nursing practice, nurses must know their functions, there are three functions of nurses, namely, independent, interdependent, dependent functions. In independent function (independent) is the function of nurses in providing nursing care that can be accounted for by nurses independently. Meanwhile, the dependent function is the role of nurses in implementing health programs where responsibility is held by doctors, for example, the role in administering drugs. And in an interdependent function where nurses solve problems in teamwork with the health team (Priharjo, 1995, page.58).

By looking at the functions and roles of nurses above, it can be concluded that only the dependent function of nurses can be held accountable to the doctor because nurses work the wording doctor's orders, then when the doctor's orders have been carried out by the nurse properly and well, it turns out that they have failed in medical services. that, then this failure can be accounted to the doctor, the transfer of this responsibility is called the doctrine of vicarious liability or respondent superior. Meanwhile, criminal liability, it can only be done by a person who has committed a criminal act.

Aspects of criminal law in health care efforts by nurses are related to

the responsibilities of nurses in health service efforts in hospitals. The ability to be responsible is closely related to criminal acts. A criminal act is a human act that is included in the environment of offense, is against the law and, can be reproached. Based on the principle of legality "no action can be punished, except based on the provisions of the existing criminal legislation". Every act of a nurse that causes a loss in health care efforts both in carrying out doctor's orders, carrying out collaborative and independent functions, nurses can only be convicted if this has been regulated in law.

Based on the Criminal Code (KUHP), a person who is considered capable of being responsible for an act he has committed, if:

1. Not mentally disturbed or disabled (Article 44 of the Criminal Code).
2. At the time the act is an adult (Article 45 of the Criminal Code).
3. Not because of the influence of coercion (Article 48 of the Criminal Code).
4. Not because of forced defense (Article 49 KUHP).
5. Not to implement the provisions of the law (Article 50 of the Criminal Code).
6. Not because of an office order (Article 51 of the Criminal Code).

Liability in criminal law is known as participation in committing a criminal act. Kertanegara states that participation occurs when a delict (criminal act) involves several or more of the actors (Afandi, 2006, page 77). Inclusion according to the Indonesian Criminal Code is:

a. Maker / *dader* (Article 55) which consists of:
    1) Perpetrator (*pleger*)
    2) Who ordered to do (*doenpleger*)
    3) Participating (*medepleger*)
    4) Advocate (*uitlokker*)
b. Assistant / *mendeplichtige* (Article 56) which consists of:
    1) Helper at the time the crime was committed
    2) Helper before the crime was committed (Arif, 2019, p. 45).

Referring to Article 51 paragraph (1) of the Criminal Code, it is stated that "whoever commits an act to carry out an order of office given by the competent authority, shall not be punished". Here the nurse is only the recipient of the task of the doctor's delegation, and carries out medical actions under the doctor's supervision, so it is clear that the nurse cannot be held accountable.

Article 55 of the Criminal Code reads that:

> "(1) Convicted as an offender: Those who commit, who order to do, and who participate in the act; and Those who by giving or promising something, by abusing power or dignity, by means of violence, threats or misdirection, or by giving opportunities, means or information, deliberately encourage others to do something. (2) With regard to proponents, only acts which are deliberately recommended are taken into account, along with the consequences".

Based on Article 55 of the Criminal Code, nurses in practice perform medical actions only based on mandated delegations. In theory, told to do.

The nurse is placed as a means of acting for a doctor. So that the position (nurse) in carrying out medical actions as a "*manus minestra*" (person who is ordered) is considered to have no faults, she (nurse) is only a tool that is blamed for the work of doctors.

5. Closing

5.1 Regulating the authority of nurses in health service efforts.

The authority of nurses in health service efforts is regulated in the Regulation of the Minister of Health of the Republic of Indonesia Number 1239 / Menkes / SK / XI / 2001 concerning Registration and Practice of Nurses, and Law Number 38 of 2014, namely providing nursing care. In making health service efforts, the authority of nurses in carrying out medical actions is obtained based on the delegation of authority from doctors to nurses, which is regulated in Article 32 of Law Number 38 of 2014 concerning Nursing, that the implementation of tasks based on the delegation of authority in medical action can be carried out negatively or mandated.

5.2 Nurse's criminal responsibility in carrying out medical action on the overflow of doctors.

Nurses can only be held criminally liable if the act is a criminal offense. Based on Article 51 of the Criminal Code "whoever commits an act to carry out an order of office given by the competent authority, is not punished". Nurses perform medical actions on the overflow of doctors. And it is emphasized again in Article 55 of the Criminal Code that nurses in practice carry out medical actions only based on mandated delegation so that the position of nurses in carrying out medical actions is only as "*manus ministra*" (people who are ordered) to be considered no mistakes, nurses are only as tools to blame for work. doctor, so it can't be accounted for.

References

Republic of Indonesia Law Number 38 Year 2014 concerning of the Nursing Law.

Ameln, F. (1991). *Kapita Selekta Hukum Kedokteran.* Jakarta: PT Grafikatama Jaya.

Anecita Gigilim, N. N. (2017). Navigating Profesional and Prescribing Boundaries Implementing Nurse Prescribing in New Zealand. *homepage:www.elsevier.com/nepr.*

Arif, B. N. (2019). *Hukum Pidana Lanjut.* Semarang: Universitas Diponegoro.

Jaya, N. S. (2017). *Pembaharuan Hukum Pidana.* Semarang: PT Rizki putra.

Muntaha. (2017). *Hukum Pidana Malpraktik Pertanggungjawaban dan Penghapusan Pidana.* Jakarta: Sinar Grafika.

Praptianingsih. (2006). *Kedudukan Hukum Perawat Dalam Upaya Pelayanan Kesehatan di Rumah Sakit.* Jakarta: PT Raja Grafindo Persada.

Priharjo, R. (1995). *Etika Keperawatan.* Yogyakarta: Kanisius.

Purnawan, H. (2017). Diskresi Pelimpahan Wewenang Tindakan Medik dari Dokter Keperawatan di Kota Waringin Timur.

Sukindar. (2017). Perlindungan Hukum Terhadap Perawat Dalam Melakukan Tindakan Medis. *Jurnal Legalitas Volume 2 Nomor 1*.

Mothers Mental Health at COVID-19 Era

Consequences at Child Protection and Family Wellbeing

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ABSTRACT

Due of COVID-19 19, we face a lot of challenges. One of them is Mother Mental Health. We know it for sure, every mother constructs a pillar that supports her family. However, what will happen when the pillar itself collapses? This will cause a lot of troubles, not only for the mother herself but also for both her child and her family. However, due to the uncertainty behavior of this event, it is challenging to predict the outcome from the combination of established policy, recently published policy and the situation itself. In making the policy, mental health for mothers should have been taken into consideration. Recently, some domestic violence that occurs due to the implementation of the new policy has been reported. Moreover, there is a case where a mother murdered her daughter because she could not control her emotion when she taught her daughter. One of the factors might be the consequences of not applying mental health when creating the policy. This paper aims to explore the importance of mental health into public policy. Firstly, this paper presents the definition of mother mental health, law and human rights. Secondly, this paper discusses the connection between mental health, law and human rights. Based on the discussion, it is necessary to incorporate the mental health aspects into public policy especially during special events such as pandemic.

Keywords: *Mother Mental Health, COVID-19, Child Protection, Family Wellbeing, Human Right*

1. Introduction

The COVID-19 pandemic has had tremendous effects for sosial, economic, psychological and law on national and peoples worldwide. The uncertainty, fear and health anxiety that individuals have experienced in the wake of this pandemic have contributed to their daily distress and exacerbated mental health issues in those who already struggle with them (Rajkumar 2020). This sudden change resulted in chaos. Many parties didn't expect this to happen, but it was happening. This condition might also increase the risk of domestic violence. According to the United Nations Women Policy brief, a significant increase in violence against women and children (VAWC) cases has been reported in several countries since the COVID-19 induced lockdown and physical distancing measures have been implemented (Women 2020).

2. Methods

In this paper, I used literature review to describe, combine, learn and make conclusions about mother mental health and consequences that happen with family wellbeing and

protection. The first question is, what is a mother's mental health, law and human right? and the second question is, what is the connection between mother mental health and human rights? Those questions try to describe the phenomena when COVID-19 happened and how the government helps with making rules that provide security for mothers. Not only donations but also regulation policy for mother mental health. Why does it matters? Because mother mental health can create better family wellbeing. And when we get a healthy family we can create a better future. Our constitution and human rights provide the best experience of living, and it can be achieved if the government starts to talk, discuss and create policy about mental health especially mother mental health.

3. Discussion

Mother Mental Health

Mental Health is an individual and personal matter (Johada 1958). It involves a living human organism or more precisely, the condition of an individual human mind. A social environment or culture may be conducive either to sickness or health. Mental health is one of the human values created by time, place, culture and expectations of the social group. The experience of motherhood offers both great rewards and challenges. It is an experience that is shaped by women's intersecting identities (e.g. gender, race, social class) and the societal contexts in which is enacted (e.g. family, work, neighbourhoods), as well as broader societal structures and policies (e.g gender, equality, policies, income distribution, role burden, peace and security) within countries (Nazilla Kholou. 2015). The mental health of a mother is particularly important to consider because it will affect the health and well-being of children.

When a parent, especially mother, becomes mentally unwell, it can be difficult for them to explain to their child what is happening and for the child to make sense of their parent's behaviour. Many parents feel under pressure to balance their parenting role. Many parents feel under pressure to balance their parenting role with their other roles as partners or workers. Parents with mental health problems may find this particularly difficult and may also struggle to manage their parenting role. In addition, if a parent has to be admitted to hospital, this may disrupt the stability of their children's lives and change the balance of their relationship with their children. Putting their children's needs first can mean parents avoid hospital stays or stop taking medication that makes them tired or getting worse. Mother like I discussed before, having multiple role at family and the main structure, keep the member of family health mentaly, physical and spiritually. Therefore, keeping eyes on mother mental health is something important especially in predictable event like today.

Urgency for Domestic Violence

We know for sure, COVID-19 is a major worldwide health threat. There is another public health emergency that is becoming a growing challenge. Domestic violence is a public health and human right issue that primarily affects women and children worldwide. Honestly speaking, several countries have reported a significant increase in domestic violence cases since the COVID-19. The COVID-19 health crisis is exacerbating another pre-existing public health problem by increasing the severity and frequency of domestic violence,

thus demonstrating the need to adopt significant and long term measures and put them together for making regulation policy.

Increased risk due to pandemic related stressors and forced proximity. Due to the implementation of confinement measurement the usual daily occupations of most people have changed. Spending more time in the same environment with close others might increase the risk of conflicts between family members and could be a triggering factor for violence behaviours (Deniz Ertan 2020). Several studies have shown that unemployment and poverty could increase the likelihood of perpetrating partner violence (Capalci 2012). A recent systematic review revealed the negative psychological impacts of quarantine, such as posttraumatic stress symptoms, confusion and anger (Brooks. 2020). The COVID-19 pandemic has led greater levels of financial insurity, fear and social pressure (Affairs 2020).

Difficulty in accessing protective resources. Victims of domestic violence might have an abusive partner and are disconnected from their usual support system, which makes it very difficult or impossible to ask for help and to escape from the abusive relationship. In this unique context, difficulties in leaving home and accessing the internet could limit a victim's opportunities to seek help without alerting the abuser (Deniz Ertan 2020). Domestic violence victims might suffer direct consequences such as injuries, but victims might also suffer from several important indirect and long term health problems because of the violence.

Table 1 : Country prevention measures during COVID-19 outbreak

Australia	1. Creation of COVID-19 Family and Domestic Violence Task Force 2. Continuation of Justice System
Canada	1. Emergency financial help package 2. Communication via text, online, messaging apps 3. Free legal support
China	1. Published special manuals for survivors, explaining how to protects themselves and directing them to online legal aid 2. Live stream workshop on what witness of domestic violence can do

France	1. Accessible online internet platforms for 24/7 to alert a domestic violence 2. Free and anonymous helplines 3. Emergency shelters provision and converting hotels to safe house 4. Coding messaging system (Mask 19) in pharmacies to seek help 5. Pop up counselling centers outside the grocery shops 6. Counselling helpline services
India	1. New domestic violence helpline have launched and assured that a female officer would handle the case
Italy	1. Converting the existing structure into new shelter with online and additional online booking option services 2. Ensure that all domestic violence shelters and communication channels remain open
Lebanon	1. Statement of internasional security forces addressing to victims of domestic violence 2. Set up domestic violence hotline 3. Website for report online complaints file
Netherland	1. Coding messaging system (masker 19) in pharmacies to seek help 2. Launching information campaign urging victims to contact with police or domestic violence prevention organization (veilig thuis)
Spain	1. Coding messaging system (Mask 19) in pharmacies to seek help 2. Chat services with geolocation technology to contact with the policy

UK	1. Free and 24/7 accessible National Domestic Abuse Helpline services 2. Emergency financial package for domestic abuse support system.

(Deniz Ertan 2020)

Put Mental Health to Regulation Policy

COVID-19 has demonstrated the value of being aware or sensitive to a wide range of concern within society. COVID-19 has challenged societies not just in terms of what they know but how also in terms of how we collectively think and decide. Political actors have in this pandemic stressed the value of empirical evidence but there are decision problems that must be solved in the absence of full information. Furthermore, when collective decisions must be made under conditions of ambiguity, there are likely to be blind spots which reflect less on skill possessed and more on areas of expertise not considered. It is noticeable that countries have varied considerably in how they have defined what knowledge is considered scientific and relevant.

Government, as the ultimate stewards of mental health, need to set policy within the context of the general health system and financing arrangement, that will protect and improve the mental health of the population (WHO 2001). One critical role in steward-ship is to develop and implement policy. Policy identifies the major issue and objectives, defines the respective roles of the public and private sectors in financing and provision, identifies policy instruments and organisation arrangements required in the public and possibly in the private sectors to meet the mental health objectives, set the agenda for capacity building and organizational development and provides guidance for prioritizing expenditure thus linking analysis of problems to decisions about resource allocation.

An important step in the development of a mental health policy is the identification, by the government, of those responsible for its formulation. The process of policy development must include the views of a wide array of stakeholders. The policy should set priorities and outline approaches, based on identified needs and taking into account available resources. The formulation of policy must be based upon up to date and reliable information concerning the community, mental health indicators, effective treatments, prevention and promotion strategies and mental health resources. The policy will need to be reviewed periodically to allow for the modification or updating of programs.

Policies should ensure and respect human rights and take account of the need of vulnerable groups. Mental health polices and programmes should promote the following rights: equality and non discrimination, the right to privacy, individual autonomy, physical integrity, the right to information and participation and fredom of religion, assembly and movement. Human rights instruments also demand that any planning and development of mental health policies or programmes should involve vulnerable groups (such as indigenous

and tribal population and stateless people, children and adolescent, and eldery people) in the planning and development of mental health policies and programmes.

Beyond the legally binding International Covenant on Civil and Political Rights and theInternational Covenant on Economic, Social and Cultural Rights, which are applicable to the human rights of those suffering from mental and behavioural disorders, the most significant and serious international effort to protect the rights of the mentally ill is the United. Nations General Assembly Resolution 46/119 on the Protection of Persons with Mental Illness and the Improvement of Mental Health Care, adopted in 1991 (UN 1991). Although not legally binding, the resolution brings together a set of basic rights which the international com- munity regards as inviolable either in the community or when mentally ill persons receive treatment from the health care system. There are 25 principles which fall into two general categories: civil rights and procedures, and access to and quality of care. Principles include statements of the fundamental freedoms and basic rights of mentally ill persons, criteria for the determination of mental illness, protection of confidentiality, standards of care and treatment including involuntary admission and consent to treatment, rights of mentally ill persons in mental health facilities, provision of resources for mental health facilities, provi- sion of review mechanisms, providing for protection of the rights of mentally ill offenders, and procedural safeguards to protect the rights of mentally ill persons. The United Nations Convention on the Rights of the Child (1989) provides guidance for policy development specifically relevant to children and adolescents. It covers protection from all forms of physical and mental abuse; non-discrimination; the right to life, survival and development; the best interests of the child; and respect for the views of the child.

4. Conclusion

The COVID-19 pandemic has highlighted the importance of preventive measures and action plans to combat domestic violence. Both short and long term responses as well as a multidisciplinary approach are required. First, it is important to have clear prevention strategies and application plans at the government level. Something that we have to consider closely is the importance of women's presence in decision making processes. It is essential to find new and innovative ways to provide support to victims through multiple platforms during the COVID-19 pandemic.

Guaranteeing the economic safety and strengthening social support are also necessary. It is important to help victims gain economic stability, secure housing and assistance services. In the case of immediate need, direct help in the form of cash or food mask be provided. Another key measure for combating domestic violence is to ensure that the justice system is still working and able to respond to cases during lockdown periode.

Public awareness campaigns via multiple platforms (e.g, mass media, television, radio, newspaper, social media) are necessary to raise the visibility of the crisis and to urge authorities to take action. For the final conclusion, puting the mental health and mother mental health it is necessary into public policy especially during special events such as pandemic.

References

Affairs, United Nations Department of Economic and Social. *Monthly briefing COVID-19 disrupting lives economic and societies.* 2020. http://www.un.org/development/desa/dpad/publication/world-econimic-situatuion-and-prospects-april-2020-briefing-no-136/.

Brooks., Webster, Woodland, Wessely, Greenberg, Rubin. "The psychological impact of quarantine and how to reduce it: Rapid review of the evidence." *The Lancet*, 2020.

Capalci, Knoble., Shortt & Kim. "A systematic review of risk factors for intimate partner violence." *Partner Abuse*, 2012.

Deniz Ertan, Wissam El Hage, Sarah Trierre, Herve Javelot & Caraline Hingray. "COVID-19: Urgency for distancing form domestic violence." *European Journal of Psychotraumatology*, 2020.

Johada, M. *Joint Commission on Mental Health and Illness Monograph Series 1. Current Concepts of Positive Mental.* Basic Book, 1958.

Nazilla Kholou., F. Beryl Pilkington. *Women's Mental Health.* Springer International Publishing , 2015.Rajkumar, R.P. "COVID and Mental Health: A review of the existing literature." *Asian Journal of Psychiatry*, 2020.

WHO. *Mental Health: New Understanding, New Hope.* World Health Report, 2001. Women, UN. *Issue Brief: COVID-19 and Ending Violence Against Women and Girls.* 2020.

LAND ACQUISITION REGULATION FOR INFRASTRUCTURE DEVELOPMENT IN INDONESIA: THE PERFORMANCE EFFICIENCY ISSUES

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ABSTRACT

The purpose of this article is to investigate the problem of ineffeciency of Land Acquisition performance. The scope of this research is concerning to land acquisition for public purposes like developing of infrastructures in Indonesia, especially toll road infrastructure development. The methods used in this research is qualitative by collecting data from the source, there are: journals, report, conference, seminars, scripts of thesis and dissertation concerning this topic. The result of this research, the local government set up the committee for land acquisition both for province level or district level. In its realization, such as toll road infrastructure development, in addition to setting up such P2T, the central government through ministry of public works and people housing development (PUPR) also setting up the land acquisition team (TPT) in order to assist P2T. Of which, there are many constraints such as inefficiency and ineffectiveness in performing of land acquisition both upon the institution or the procedure, and also arising the risk of the government budget usage.

***Keywords**:* land acquisition, regulator, infrastructure, public purpose.

1. Introduction

In 2019, a lot of mainstream media exposed the construction of the infrastructure in Indonesia such as hardboard, airport, toll road, railway, tourism location, power plants, dams and hydro-power plants, mass rapid transportation, new oil refineries, etc. There are 32 National Strategic Projects completed between 2016-2018 (Darmin Nasution, 9th October 2018). As a major infrastructure development plan, National Strategic Project (PSN) also come with major funding requirement, with majority expected to be coming from private sector of which the estimated investment value for 223 Projects and 3 Programs of PSN are USD 307.4 Billion (State: USD 31.7 Billion, SOE: 94.3 Billion and Private: 181.4 Billion). From December 2017 to June 2018, funding related issues in PSN reported to (Committee for Acceleration of Priority Infrastructure Delivery) KPPIP per June 2018 based on 327 issues reported on 223 Projects and 3 Programs noted that Planning and Preparation Issues: 38%, Land Acquisition: 36%, Construction Issues: 12%, Funding Issues: 8% and Permit Issues: 6% (Committee for Acceleration of Priority Infrastructure Delivery, 9th October 2018).

Previously the Government had launched policies to accelerate development in all fields, including the acceleration of development of toll road infrastructure. In the accelerated development, the Government has formed a Committee for the Acceleration of Priority Infrastructure Provision (KPPIP) based on the President's policy (Presidential Regulation No. 75 of 2014). The Government issued a policy on the Master Plan for the Acceleration and

Expansion of Indonesian Economic Development (MP3EI) (Presidential Regulation No. 32 of 2011). MP3EI was born from a big idea to encourage equitable development in the entire territory of the country in order to create prosperity for all the people of Indonesia (sustainable development) (https://ekon.go.id/berita/view/konsep-sustainable.5.html, accessed on 18 May 2019, at 07:44 a.m.).

KPPIP was formed by the President in order to revitalize the previously established Committee on the Policy for Accelerating Infrastructure Provision which was considered ineffective for several reasons, namely weak decision-making authority, limited role of KKPPI in the entire project stages from planning to the start of development, lack of flexibility to provide incentives and disincentives to accelerate the project, also the Committee structure is too large so that decision making is often ineffective so the President needs to take new policies. The committee consists of the Coordinating Minister for Economic Affairs as Chair with members of the Minister of Finance, Minister of PPN/Head of Bapennas, and Minister of Agrarian and Spatial Planning (https://kppip.go.id/tentang-kppip/, accessed on 18 May 2019, at 08:20 a.m.).

In general, the constraints in infrastructure development in Indonesia are the lack of effective coordination between stakeholders both from the Government (ministries, institutions, regional governments, state owned enterprise-BUMN and BUMD) and also the private sector. The diversity of goals and responsibilities of each stakeholder has affected the delay in the extension of infrastructure projects. Based on these constraints, the President forms KPPIP which works across institutions and ministries and will assist Project Owners in preparing and carrying out project development. KPPIP was also formed with the main objective as a coordination unit in making decisions to encourage the resolution of problems that arise due to lack of effective coordination between stakeholders. Thus KPPIP is expected to be a "point of contact" in implementing coordination of strategic and priority national projects that face the problem of "debottlenecking".

In the construction of toll road infrastructure, the Government has established a Regulatory Body ("Regulator"), namely the Toll Road Regulatory Agency (BPJT) (Article 45 paragraph (3) Republic of Indonesia Law No. 38 of 2004 concerning Roads). The BPJT was formed on June 29, 2005 in a phase where the toll road construction process re-entered the accelerated era starting in 2005. A phase in which 19 toll road projects have been delayed since 1997. In the BPJT phase, the Government will fund the construction of roads using three financing approaches, namely, full financing by the private sector, public private partnership program and development financing by the Government with maintenance operations by the private sector (http://bpjt.pu.go.id/konten/jalan-tol/sejarah, accessed on 18 May 2019 at 08:37 a.m.). The BPJT is a non-structural body formed by and under and responsible to the Minister (Article 72 Republic of Indonesia Government Regulation No. 15 of 2015 concerning Toll Roads.).

The implementation of the accelerated development policy especially in the construction of toll road infrastructure still faces several obstacles. One of them is the obstacle of land acquisition for development in the public interest. In the report "Toll Road Land Procurement" by the Ministry of Public Works and Public Housing, the status and issues of "Toll Road Land Procurement" are mentioned, namely (Ministry of Public Works and

Public Housing, Directorate General of Highways, Directorate of Freeways, Urban and Regional Road Facilities, "Toll Road Land Procurement Report" on 28 September 2015): (1) The process of replacing Village Cash Land (TKD) is constrained by the location of replacement land in the same village, (2) The licensing process of "waqaf" land, (3) Establishment of P2T (a team of land acquisition established by government) and the validation process have not been determined in terms of regulations, (4) The process of toll road land acquisition involves many relevant agencies to accelerate land acquisition and problem solving requires good coordination, and (5) There is no integrated land acquisition monitoring system.

Adequate human resource, budget and authority factors, clear and consistent communication, as well as positive support for policy implementation, bureaucratic efficiency that works according to each task as well as limited equipment resources, especially equipment measuring the area to be freed, are inhibiting factors for the implementation of land acquisition, especially in the construction of toll road infrastructure (Thesis Dian Ayu Novianty, Yogyakarta State University, 2014). Factors of understanding and coordination among agencies related to land acquisition such as: P2T, TPT (a team to assist P2T established by the Ministry of Public Works and Public Housing), financial / financing authorities, business entities, and owners are very important in realizing common perceptions for implementation in the field. The land acquisition regulation is also a part of the land law system, so it is necessary to find a solution to the existing problem solving, coordinate with the authorized institutions, both related agencies and law enforcement. The active role of PT. Jasa Marga (Persero) Tbk, together with its subsidiaries through coordination and facilitation with P2T, TPT, related institutions and communities in accordance with their respective competencies is very important for the successful implementation of land acquisition for toll road construction (Agus Yafli Tawas, see Unsrat Journal of Law Vol. I / No.6 / October-December / 2013).

2. METHOD

In this conceptual research, the author uses the normative juridical writing method. This method is used by collecting the working papers, related books and journals, report, seminars and conference, scripts of thesis and dissertation as well as regulations and officially website. Such documents had been scrutinized and analyzed properly by refer to the legal theory. All data then organized in this paper in order to get the problem and conclusion.

In this circumstances, the question arising that, do the institutions related to land acquisition activity for public purpose could run effective and efficiency, and how government regulate it so that giving the effective and efficiency of its performance. Regulations on the factors of human resources and equipment, fiscal and financing resources, institutions and bureaucracy in accelerating the provision and development of infrastructure are important. Establishing a regulator that can accommodate regulations on these factors also becomes important. In the view of economic lawyers (economic analysis of law) especially in the "Fundamental Building Blocks of the Chicago Approach", mentioning that regulations (legal rules) in an economic activity will produce efficiency. In the legal and

economic approach (the Chicago Approach) mentioned (Nicholas Mercuro and Steven G. Medem, 1997: 57):

"The defining characteristic of the Chicago approach is the straightforward application of micro-economic (or price-theoretic) analysis to the law. As such, this approach embodies the following premises: (1) individuals are rational maximizers of their satisfactions in their non-market as well as their market behavior, (2 individuals respond to price incentives in non-market as well as market behavior, and (3) legal rules and outcomes can be assessed on the basis of their efficiency properties, along with which comes to the normative prescription that legal decision making should promote efficiency …".

The "rational" individual of economics contrasts, of course, with the "reasonable" individual of traditional legal theory – an individual who is socialized into the norms ad conventions of a community, and whose behavior corresponds to these norms. The law is said to reflect these norms and conventions, and thus is obeyed by reasonable individuals. Those who engage in "illegal" activities are seen as unreasonable in that they have violated these norms and conventions. In contrast, the economic approach says that behavior can be (and usually is) rational even when it conflicts with these social norms. The third defining characteristic of the Chicago approach to law and economics is that legal decision making and the evaluation of legal rules should be analyzed from the perpective of economic efficiency. One criterion employed is Pareto efficiency that a situation is efficiency enhancing if at least one person can be made better off without making anyone else worse off.

Regulators that will be formed to accommodate the implementation of regulations on the factors of human resources and equipment, fiscal and financing resources, institutions and bureaucracy must run well and be responsible according to their functions and authorities. The regulator must refer to the principles of good governance or general principles of good governance. In Article 3 of Law Number 28 of 1999 concerning the Organization of a Country that Is Clean of Corruption, Collusion and Nepotism (Law-AUPB) these principles have been written in writing, namely: (1) Principle of legal certainty, (2) Orderly principles of administration State, (3) Principle of public interest, (4) Principle of openness, (5) Principle of proportionality, (6) Principle of professionalism, and (7) Principle of accountability (Law No. 28 of 1999). As a body that administers government administration, the Regulator performs its functions based on: the principle of legality, the principle of protection of human rights (HAM), and AUPB (Article 5 of Republic of Indonesia Law Number 30 Year 2014). So that with these principles government objectives will be achieved, namely: creating orderly administration of government administration, creating legal certainty, preventing abuse of authority, guaranteeing accountability of bodies and / or government officials, providing legal protection to citizens and government officials, implementing regulatory provisions legislation and implementing AUPB, as well as providing the best service to citizens.

Prof. Kuntjoro Purbopranoto said that there are 13 principles of good governance, namely: (1) principle of legal security, (2) principle of proportionality, (3) principle of equality, (4) principle of carefulness, (5) principle of motivation, (6) principle of non-misuse of competence, (7) principle of fair play, (8) principle of reasonableness or prohibition or arbitrariness, (9) principle of meeting raised expectation, (10) principle of undoing the

consequences of an annulled decision, (11) principle of protection of the personal way of life, (12) principle of sapientia, and (13) principle of public service (Philipus M. Hadjon, at al., 2002: 279).

3. RESULTS

From the problem of the many institutions and institutions as well as regulations and bureaucracy in the acceleration of infrastructure development, it looks very complicated. Coupled with the issue of land acquisition for the public interest, which is applied to all land acquisition processes for all infrastructure development both carried out by central and regional governments, the question is whether all technical, juridical and financial issues can be regulated in one door in a regulatory body (Regulators) and Regulators like what can provide a more efficient solution. To carry out the principle of good governance (AUPB) as Article 3 of the Law-AUPB, it is necessary to establish a Centralistic and Single (General) Regulator for the development of all infrastructure fields both at the central and regional levels. It is hoped that this can help the Government's goals in Sustainable Development Goals that have global goals and targets for 2016 to 2030 (Article 1 of the Republic of Indonesia Presidential Regulation Number 59 of 2017).

4. DISCUSSION

4.1 Land Acquisition in Infrastructure Development

4.1.1The Problem of Land Acquisition in Infrastructure Development

One of the problems of land acquisition in the construction of toll road infrastructure is the process of toll road land acquisition involving many related agencies (Ministry of Public Works and Public Housing, Directorate General of Highways, Directorate of Freeways, Urban and Regional Road Facilities, "Toll Road Land Procurement Report" on 28 September 2015). For example, in the case of the issuance of a Decision Letter on Land Procurement Implementation by the Head of the Regency / City Land Office, coordination of public facilities, social facilities and utilities with the Regional Government, release of village cash land (TKD) from the Village Head which needs approval from the Village Consultative Body (BPD), approval of the compensation price by the Governor. In this case the Government needs to accelerate land acquisition and problem solving requires good coordination.

In the construction of toll road infrastructure, in general the problem of land acquisition is related to the problem (Iwan Erar Joesoef, 2015: 296-297): (a) a jump in the land value of the toll road where the cost of procuring land acquisition under the law on roads is part of the investment of toll road business entities (Law Number 38 of 2004). The increase in land value can be caused by significant differences in the value of land agreed in the tender documents for toll road procurement and the reality of land acquisition after the signing of the toll road agreement by investors, (b) the problem of land acquisition can also be caused by the slow issuance of Decree Development Location (SP2LP) and the establishment of P2T, (c) the slow performance of P2T in the land acquisition process, (d) it could also be due to land disputes resulting in trace changes in the toll road section.

The delay in issuing SP2LP can be seen from the case at PT. Citra Margatama Surabaya in the construction of the toll road "Simpang Susun Waru-Tanjung Perak Surabaya (Report

of PT. Citra Margatama Surabaya - Construction Project for the Simpang Susun Waru - Tanjung Perak Toll Road, June 2012). In this case, it can be seen that the SP2LP application at the request of the President Director of PT. Jasa Marga, based on a letter dated February 14, 1997, to the Director General of Highways, Ministry of Public Works, was only issued by the Governor of East Java on January 13, 1998. In this case it was seen that the issuance of SP2LP was processed in approximately 1 (one) year.

Another problem in land acquisition, especially in developing toll road infrastructure, is the dispute resolution mechanism. The land acquisition regulation has stipulated that the settlement of land acquisition disputes with holders of land rights is first carried out by means of deliberation. The meeting has been set for a period of time, which is 120 days (one hundred and twenty days). If there is no agreement, P2T entrusts compensation (consignment) to the District Court whose jurisdiction covers the location of the land concerned (Presidential Regulation Number 65 of 2006).

Particularly for land disputes using the revocation of rights under the revocation of rights law, coordination is needed between the ministries of Law and Human Rights, the President and the National Land Agency. If the holder of land rights is still unwilling to accept compensation determined in the Presidential Decree, an appeal can be made to the High Court (Regulation Number 39 of 1973). The delay in the land acquisition process, especially in the construction of toll road infrastructure, can be seen from the BPJT data. Land procurement progress for 37 toll road sections within 1 (one) year (2014-2015) for Trans Java (Jabodetabek, Sumatra and Kalimantan) sections was 63% (in 2014) and only reached 69% (in 2015). Whereas for the Java Non-Trans segment, it was 29% (in 2014) and reached 31% (in 2015) (Monitoring Report on Toll Road Regulatory Agency, Ministry of Public Works and Public Housing, Toll Road Concession Program in Indonesia, Jakarta 6 February 2016).

The slow process of land acquisition has led to policy initiatives from the Minister of Public Works and Public Housing (PUPR) to take a policy of implementing construction in parallel with land acquisition. This is to achieve the target of completion of toll road construction to operate in 2018. This case can be seen in the case of the Pemalang-Batang and Batang-Semarang toll road construction plan carried out by President Joko Widodo in Batang, Central Java on June 17, 2016 with a total investment of Rp. 15, 85 Trillion for each Pemalang-Batang (39.2 Km) and Batang-Semarang toll road segments (75 Km). At that time the progress in procuring land for the Pemalang-Batang toll road reached around 12% and the Batang-Semarang toll road section reached around 20%(http://bpjt.pu.go.id/berita/presiden-lakukan-pencanangan-pembangunan-tol-pemalang-batang-dan-batang-semarang, accessed on 18 May 2019 at 14:33 p.m.). To procure land for development in the public interest the Government has issued regulations in the form of laws (Law Number 2 of 2012). The regulation has undergone several changes related to the issue of involvement of the private sector in infrastructure development in the form of Public Private Partnership (PPP). To procure infrastructure itself, the Government has issued regulations which are related to the acceleration of the implementation of national strategic projects (Presidential Regulation Number 3 of 2016), as well as regulation of cooperation between the Government and Business Entities in providing infrastructure (President Regulation No. 38 of 2015). While the tariff regulation is still determined by the ministry on the proposed regulatory body such as in the construction of toll road

infrastructure (Article 75 paragraph 1 (a) Government Regulation Number 15 of 2005 concerning Toll Roads). Other things such as resolving binding disputes are not specifically regulated. All regulations are sectoral and separate. Besides that the authority of the Central Government and the Regional Government in bureaucracy will have an impact on the implementation of land acquisition for development in the public interest (Law Number 23 Year 2014).

A lesson from Ethiopian experience, the study concluded that to provide extensive agricultural land to large-scale agricultural investors requires integrated land use planning, land valuation and governance, monitoring systems, and the capacity to implement various social and environmental laws in coordination with other sectors. Improving rural infrastructure, especially roads, is also very necessary to increase the level of performance of commercial agriculture. Finally, but most importantly, customary rights to community land must be respected and institutionally recognized (Dereje Teklemariam, Hossein Azadi, Jan Nyssen, Mitiku Haile and Frank Witlox, "How Sustainable Is Transnational Farmland Acquisition in Ethiopia? Lessons Learned from the Benishangul-Gumuz Region", Sustainability, 2016, 213; doi:10.3390/su8030213 – www.mdpi.com/journal/sustainability). As mentioned above, Ethiopia adapts the Integrated and Responsible Land Use Management Agricultural Investment Framework to describe key institutional and governance related land frameworks and to examine the effectiveness of land leasing processes in terms of economic, social, and environmental expectations of agricultural outsourcing in Ethiopia.

Lessons from India in terms of Highway Urbanization and Land Conflicts, the tendency of emerging urbanization of roads has major implications for the theory and practice of decentralization, namely: (1) when cities in developing countries develop into large cities, there is a reversed tendency in politics with decentralization of decision-making to city and village governments, (2) urbanization along highways opposed the binary classification of human settlements into urban and rural areas, however, decentralization changed the urban-rural dichotomy through submission of decisions to urban and rural governments, and (3) at present, regional planning tends to refer almost entirely to metropolitan planning. These findings challenge our conventional assumptions about decentralization, as delegating one direction of decision making from the higher to the lower levels of government. This is referred to as the term "negotiated decentralization" to reflect the actual alternating war between local and regional actors in managing trans-local geography such as urbanization of highways (Sai Balakrishnan, "Highway Urbanization and Land Conflicts: The Challenges to Decentralization in India, Pacific Affairs: Volume 86, No. 4, December 2013.).

4.1.2 Infrastructure Development: Institution and Regulation

Land procurement regulations cannot be separated from the regulation of accelerating infrastructure development. Based on economic growth in 2015, which amounted to 4.73%, the Indonesian Government made numbers of efforts to encourage investment in various sectors related to infrastructure such as improvements in regulations, fiscal and institutional. The slow provision of infrastructure in Indonesia is due to constraints at various stages of the project, from preparation to implementation. Weak coordination

between stakeholders as a whole often results in the withdrawal of decision making. At the preparation stage there are problems due to the poor quality of project preparation and the limited funding allocation. Then, the project is often constrained by land acquisition problems which results in delays in achieving financial close. For this reason, the Government has formed KPPIP which is a form of Committee (http://kppip.go.id/tentang-kppip/perkembangan-pembangunan-infrastruktur-di-indonesia/ accessed on 21 May 2019, at 08:37 a.m.).

Even though Law No. 2 of 2012 concerning Land Acquisition for Public Purpose has been issued, land acquisition remains the biggest problem that slows down infrastructure projects. Identified constraints include: (1) information gap between the person in charge of the project and the Ministry of Agrarian and Spatial Planning regarding the location and plan of land acquisition, (2) lack of coordination among stakeholders if there are obstacles in land acquisition, and (3) absence monitoring and synchronizing the transfer of government / BUMN / BUMD land in the public interest. For this reason, KPPIP intends to form a Land Acceleration team to resolve these obstacles and provide increased capacity needed for acceleration (https://kppip.go.id/tentang-kppip/perkembangan-pembangunan-infrastruktur-di-indonesia/ accessed on 21 May 2019, at 8:54 a.m.).

In 2015, KPPIP completed various preparations for the purpose of operationalizing and establishing the Committee's image, including (http://kppip.go.id/tentang-kppip/, accessed on 21 May 2016, at 23:49 a.m.):

1) Establishment and operation of various Work Teams and Project Management Office (PMO);
2) Determination of the List of Priority Projects for 2015 - 2019 stipulated in the Regulation of the Coordinating Minister for Economy No. 12 of 2015;
3) Provision of facilities for preparing Pre-Feasibility Study of Value for Money, and AMDAL Review for selected Priority Projects;
4) Preparation and determination of Organizational Governance (SOP) and monitoring and debottlenecking mechanisms;
5) Implementation of accelerated priority projects;
6) Mapping regulatory improvements in the infrastructure sector;
7) Development of an Information Technology system for project management and improving the quality of decision making.

In terms of providing infrastructure requires land, there are several institutions involved in implementing land acquisition, namely (Regulation of the Head of the Indonesian National Land Agency No. 3 of 2007): The first is the P2T institution for the Regency / City level land acquisition committee, which consists of a maximum of 9 people.[1] Second is the Land Price

[1] The nine P2T members are: (1) Regional Secretary as Chair and Member, (2) Officials from echelon II level regional apparatus as Deputy Chair and Member, (3) Head of Regency / City Land Office or official appointed as Secretary concurrently Members, and (4) Heads of Offices / Offices / Agencies in Districts / Cities related to the implementation

Appraisal Agency that has been determined by the Regent/Walikota or Governor for the territory of the Special Capital Region of Jakarta to assess land prices. This Land Price Institution is an institution that has obtained a license from the National Land Agency. Third is the Land Price Appraisal Team, which is a team formed by the Decree of Regents / Mayors or Governors for the Special Capital Region of Jakarta to assess land prices, if there is no Land Price Appraisal Institution in the Regency/ City concerned or near by. Third is the Land Procurement Team (TPT) formed by the Minister of Public Works on behalf of the Government as a toll road land procurement team with guidance from the Directorate General of Highways (Minister of Public Works Regulation No: 10/PRT/M/2006).[2] Fifth, specifically in terms of providing toll road infrastructure, there is a BPJT institution.[3]

Until now, Government functions were carried out in a ministry, but at the beginning of the 19th century, the pattern of administration, as we see now, public functions was often carried out by a body, which worked outside the boundaries of ministry ties. Then at the end of the 19th century there was a deterioration of these institutions and the emergence of ministry responsibilities with public services. The agency emphasizes the need for efficiency improvements in traditional ministries, with structures where there are different units with

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of land acquisition or officials appointed as Members. The committee is in charge of: (a) providing explanations or counseling to the community, (b) conducting research and inventory of land, buildings, plants and other objects related to land, whose rights will be released or submitted, (c) conducting research regarding the legal status of land parcels whose rights will be released or surrendered and documents that support them, (d) announce the results of the research and inventory, (e) accept the results of the valuation of land and / or buildings and / or other objects related to land from Institutions or Land Price Appraisal Teams and officials responsible for assessing buildings and / or plants and / or other objects related to land, (f) holding deliberations with owners and Government agencies that need land in order to establish forms and / or the amount of compensation, (g) determine the amount of compensation for land whose rights will be released or surrendered, (h) witness the delivery of compensation to owners, (i) making minutes of release or surrender of rights, (j) administering and documenting all land acquisition files and submitting them to Government agencies that require land and District / City Land Offices, and (k) conveying problems accompanied by consideration of the settlement of land acquisition to the Regent / Mayor or Governor for the Jakarta Capital Region if the agreement does not reach an agreement for decision making. The composition and tasks of this P2T are different for each level of the Provincial and National regions.

[2] The task of this institution is: (a) to help P2T conduct counseling and outreach, (b) conduct deliberations on the form and amount of compensation with holders of land rights, (c) based on inventory lists and pricing decisions from authorized officials, register nominative signed by P2T and TPT as the basis for compensation payments, (d) carrying out compensation payments for land, buildings, plants and other objects related to land, (e) applying for land rights and the process of applying for land certification on behalf of the Ministry of Public Works, (f) carrying out physical safeguards (installation of stake markers, ownership nameplate), documents on ownership of land rights (certificates), maps / images of farm conditions and land acquisition documents, (g) monitoring related tax payments by binding to a third party contract relating to land acquisition, (h) reporting the settlement of land acquisition and submitting documents relating to land ownership to the Directorate General of Highways, (i) in carrying out their duties, TPT is responsible to the Director General of Highways.

[3] 4BPJT in terms of land acquisition for toll road construction has the duty: (a) to deliver toll roads that have already begun to be procured to the Directorate General of Highways, (b) to ensure the availability of Land Procurement Funds that must be provided by the Business Entity based on the Funding Agreement Toll Roads (PPJT) and / or agreed Budget Usage Plans, (c) ensure that funds allocated by the Land Acquisition Business Entity are not used in addition to the interests of Land Procurement, (d) monitor the disbursement of funds issued by the Business Entity based on Request for Payment (SPP), (e) carry out the handover of land acquired to the Business Entity.

clear authority so that they can be held accountable (Paul Craig, 2008: 93-94). These bodies are regulatory entities that can provide advice. Common reasons for forming these bodies:

"First, there is the 'buffer' theory which sees them as a way of protecting certain activities from political interference. Second, there is the 'escape' theory which sees them as escaping known weaknesses of traditional government departments. Third, the 'corson' theory, following Mr. John Corson sees them as used to 'put the activity where the talent was,' which might be outside government departments. Fourth, there is the participation or 'pluralistic' theory which thinks it desirable to spread power. Fifth, there is the 'back double' theory. This is based on the analogy with taxi-driver who finds the main streets too busy and therefor uses back streets what are known to taxi-driver as 'back doubles.' The back double theory is that if governments, local authorities or other bodies find that they cannot do the things they want within the existing structure, they set up new organizations which make it possible to do them. Sixth, the 'too many bureaucrats' view, mainly an American one, suggest that if the public thinks a country has too many civil servants it can set up quasi-non-governmental organizations whose employees are not classified as civil servants".

In infrastructure development in Indonesia, there are many bodies that are not regulatory in terms of the implementation of physical infrastructure development and land acquisition for the purpose of physical infrastructure development. This condition is certainly a factor that has accelerated the acceleration of infrastructure development itself. So many government agencies both from ministry and non-ministry institutions will certainly make it difficult to coordinate both vertically and horizontally.

In addition to institutional factors, regulatory factors are very important related to efficient use of resources and investment productivity in infrastructure development. The legal framework is expected to create a stable environment and atmosphere so that economic actors in carrying out their business activities have no interference in political arbitrariness. To achieve a stable environment and atmosphere, the legal framework requires five requirements (Julio Faundez (Ed.), 1997: 8-9):

"(a) There is a set of rules known in advance, (b) the rules are actually in force, (c) there are mechanisms ensuring application of the rules, (d) conflicts are decided through binding decisions of an independent body, and (e) there are procedures for amending the rules when they no longer serve their purpose".

Seeing the problem of the complexity of infrastructure development, especially in terms of regulation, it is necessary to pay attention to matters that provide regulatory impact analysis, namely (Mitsuhiro Kagami and Masatsugu Tsuji (Ed.), 2000: 48.):*"(a) the necessity of a new regulation or the strengthening of an existing one, (b) whether its objective would be feasible or not, (c) whether it could be substituted for non-regulatory measures, (d) the regulatory cost-benefit analysis (numerically measured if possible), (e) whether it includes anti-competitive factors, (f) whether it maintains objectivity and lucidity, (g) whether it requires additional budget and government employees".*

4.2 Regulation of Land Acquisition for Public Purpose.

4.2.1 Centralization of Land Acquisition for Public Purpose.

The implementation of land acquisition for interests not only involves several government agencies and institutions, but also involves the Central Government and Regional Government. In the planning stage, the process of land acquisition for development for public purpose has involved Government agencies related to the Regional Spatial Plan. For this matter, it certainly involves the Central and Regional Governments because they are related to the National Regional Spatial Plan, Provincial Spatial Planning and/ or Regency/ City Spatial Planning (Presidential Regulation Number 71 of 2012). In the preparation stage, the process of land acquisition for development for the public purpose, the Regional Government which in this case the Governor forms a Preparation Team consisting of Regents / Mayors, related Provincial Work Units, Agencies that need land and related agencies.[4] Finally, for public objections to the value of compensation, regulations provide a means of resolving disputes through the local District Court.[5] Then for regulations related to Land Procurement for Development in the Public Interest, mention in detail what infrastructure can be done with the regulation (Law Number 2 of 2012).[6]

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[4] The Governor also established the Office of the Land Procurement Secretariat which is located in the provincial secretariat. The Preparation Team is tasked with: (a) carrying out the notification of the development plan, carrying out the initial data collection on the location of the development plan, (c) carrying out the Public Consultation on the development plan, (d) preparing the Location of Development, (e) announcing the Location of Development for Public Interest, and f) carry out other duties related to the preparation of Land Procurement for Development in the Public Interest. When public consultations have objections from the public, the Governor establishes an Objection Study Team on the objection to the location of the development plan by the community. The study team consists of a Provincial Regional Secretary or an official appointed as chairman concurrently a member, the Head of the Regional Office of BPN as Secretary concurrently a member, an Agency that handles government affairs in the area of regional development planning as a member, Head of Regional Office of the Ministry of Law and Human Rights as a member, Regents / Mayors or officials appointed as members, and Academics as members. The Chair of the Objection Study Team can establish a Secretariat office. Then the Governor issued a Determination of the Location of Construction with the attached Location Development Map. The Governor can delegate the authority to carry out the preparation of Land Procurement for Development in the Public Interest to the Regent / Mayor based on consideration of efficiency, effectiveness, geographical conditions, human resources and other considerations. The implementation of the Procurement of Land itself is carried out by the National Land Agency carried out by the Head of the Regional Office of the National Land Agency as the Chairperson of Land Procurement. The membership composition of land acquisition is determined by the Chairperson of Land Procurement Executing consisting of: (a) officials in charge of land procurement affairs within the BPN Regional office, (b) Head of the local Land Office at the Land Acquisition location, (c) officials of the provincial work unit who is in charge of land affairs, the local sub-district head in the land acquisition location, and (e) village head / village head or another name at the land acquisition location. The Chairperson of Land Procurement Executives can form a Task Force in charge of inventorying and identifying physical and juridical data. As for the determination of the amount of compensation for land acquisition, the Chairperson of the Land Procurement Executor shall determine Public Appraisal or Appraisal Services.

[5] In this case, legal certainty has been given, namely the existence of a time limit of no longer than 14 (fourteen) working days after the Minutes of Meeting are signed. The District Court then decides on the form and / or amount of compensation within a maximum of 30 (thirty) working days from the receipt of the objection. Then if there is an objection to the decision of the District Court then within a maximum of 14 (fourteen) working days it can submit an

[6] The regulation does not mention in general but based on list (list), namely in development: (a) national defense and security; (b) public roads, toll roads, tunnels, railway lines, train stations, and railroad facilities; (c) reservoirs, dams, weirs, irrigation, drinking water channels, water and sanitation sewers, and other irrigation structures; (d) ports, airports and terminals; (e) oil, gas and geothermal infrastructure; (f) electricity generation, transmission, substation, network and distribution; (g) Government telecommunications and informatics networks; (h) waste

Land Acquisition for Development in the Public Purpose can be carried out by the Land Acquisition Committee established by the Government, either the Central Government or the Regional Government, based on regulations on land acquisition for development for public purpose, it can also be carried out by agencies requiring the land without going through the Land Acquisition Committee. This can be seen from the regulation of the oil and gas sector, where a business entity that will use land rights or State land uses deliberation and consensus by means of: buying and selling, exchanging, proper compensation, recognition or other forms of compensation to right-holders or users of land on State land (Law Number 22 Year 2001).

The regulation of land acquisition in Indonesia was seen by involving many agencies and government institutions both central and regional. In addition there are certain sectors that allow not to use the land acquisition regulation facilities through P2T but are carried out independently such as the oil and gas sector. The conditions certainly cause inefficiency and ineffectiveness in the implementation of land acquisition for development in the public purpose, both related to human resource issues, technical equipment, and bureaucracy. This certainly has the effect of delaying the process of land acquisition for development in the public purpose.

4.2.2 The Need for the Centralistic Regulatory as Single Agency (General).

The large number of involvement of agencies and government institutions both central and regional based on the final bureaucratic problem has an impact on the inefficiency and ineffectiveness of land acquisition for development in the public purpose. For this reason, it is necessary to regulate a regulatory body that not only regulates regulations, tariffs, utilization of human resources and equipment, but also to assist the process of land acquisition for development in the public interest for all infrastructure sectors. So that it will be expected to get efficiency and effectiveness in terms of the land acquisition process and of course also the tariff calculation policy for infrastructure that sets tariffs in managing its business.

There are several forms of Regulatory Bodies that can be applied in this case, namely the Regulatory Body that is decentralized and that is centralized, then the Regulatory Body that is Single (General) and Separate (Specific). The application of the Regulatory Body will be related to issues of legitimacy and how they allocate risks and rewards, all related to public trust. Therefore regulatory procedures must be *predictable*, *accountable*, and *transparent*, and the Regulatory Bodies should be (Ioannis N. Kessides, 2004:18):[7] *(a) have*

disposal and processing sites; (i) Government / Regional Government hospitals; (j) public safety facilities; (k) Government / Regional Government public burial sites; (l) social facilities, public facilities, and public green open spaces; (m) nature reserves and cultural reserves; (n) Government / Regional / village Government offices; (o) structuring urban slum settlements and / or land consolidation, as well as housing for low income communities with rental status; (p) Government 7Regional Government education or school infrastructure; (q) sports infrastructure of the Government / Regional Government; and (r) public markets and public parking lots.

[7] In World Bank research, many developing countries and transition economies are not good in effective regulatory institutional requirements. The prerequisite for an institution (Regulatory institutional requirements. The prerequisite for an institution (Regulatory Body) for effective regulation is: (a) separation of powers, especially between the executive and the judiciary, (b) well-functioning, credible political and economic institutions – and an independent judiciary, (c) a legal system that safeguards private property from state or regulatory seizure without fair compensation and rellies on

competent, non-political, professional staff-expert in relevant economic, accounting, engineering, and legal principles and familiar with good regulatory practices, (b) operate in a statutory framework that fosters competition and market-like regulatory practices, (c) be subject to substantive and procedural requirements that ensure integrity, independence, transparency, and accountability.

A Regulatory Body that has political bargaining (trade-offs), namely an alternative Regulatory Agency that is decentralized or centralized and which is single (general) or separate (specific). In the context of the efficiency and effectiveness of land acquisition for development in the public purpose in Indonesia, a single (General) Regulatory Agency is needed. In this circumstances, the Single (General) Regulatory Agency has many benefits for various infrastructure sectors that are diverse such as sharing for fixed costs, sharing of scarce talent, and sharing other resources. In addition, it can also develop expertise to develop regulations that do not overlap or conflict, administer tariff adjustment rules, introduce business competition in monopolistic industries, and regulate relationships with stakeholders.

Centralized Regulatory Bodies have many benefits, as well as: (a) the national regulatory structure makes the best use of rare expertise such as expertise in technical and juridical aspects of land acquisition, then also tariff calculation expertise, then can minimize regulatory costs as in maintaining regional offices, (b) centralization also reduces risks of issuing lower-level regulations when competing areas for investment with high financial risk or lower environmental standards, (c) centralization can be needed if the regional level too small to support the efficiency scale or scope of operations for certain industries.

5. CONCLUSION.

The process of land acquisition for development in the public interest is carried out for various infrastructure sectors which are diverse both from technical, economic and juridical aspects. The implementation of land acquisition for development in the public interest also involves various agencies and government institutions both central and regional. In this case, then to obtain the effectiveness and efficiency of the process of land acquisition for development for the public interest, a Regulatory Body is needed.

In Indonesia, a Centralistic Single (General) Regulatory Body is needed which not only can accommodate the process of land acquisition, tariff calculation and stipulate regulations, through the effectiveness and efficiency of human resources related to rare expertise for various infrastructure sectors which can be used together but also savings on fixed-costs related to the establishment of an office or secretariat. The Central (Single) Regulatory Body that is Centralistic needs to be regulated in a regulation at the level of law.

judicial review to protect against regulatory abuse of basic principles of fairness, (d) norms and laws – supported by institutions – that delegate authority to a bureaucracy and enable it to act relatively independently, (e) strong contract laws and mechanism for resolving contract disputes, (f)sound administrative procedures that provide broad access to the regulatory process and make it transparent, (f) sufficient professional satff trained in relevant economic, accounting, and legal principles.

Referrences:

Regulations

Republic of Indonesia Law No.28 of 1999 concerning the Organization of Countries that Are Clean and Free of Corruption, Collusion and Nepotism.

Republic of Indonesia Law Number 22 Year 2001 concerning Oil and Gas.

Republic of Indonesia Law No. 38 of 2004 concerning Roads.

Republic of Indonesia Law Number 2 of 2012 concerning Land Procurement for Development in the Public Purpose.

Republic of Indonesia Law Number 23 Year 2014 concerning Regional Government.

Republic of Indonesia Law Number 30 Year 2014 concerning State Administration.

Republic of Indonesia Government Regulation Number 39 of 1973 concerning Events of Determination of Compensation by the High Court.

Republic of Indonesia Government Regulation Number 15 of 2005 concerning Toll Roads.

Republic of Indonesia Presidential Regulation Number 65 of 2006 concerning Land Procurement for the Implementation of Development in the Public Interest.

Republic of Indonesia Government Regulation No. 15 of 2015 concerning Toll Roads.

Republic of Indonesia Presidential Regulation Number 71 of 2012 concerning the Implementation of Land Procurement for Development in the Public Purpose.

Republic of Indonesia Presidential Regulation No. 75 of 2014 concerning Accelerating Provision of Priority Infrastructure.

Republic of Indonesia President Regulation No. 38 of 2015 concerning the Cooperation between the Government and Business Entities in the Provision of Infrastructure.

Republic of Indonesia Presidential Regulation Number 3 of 2016 concerning Acceleration of the Implementation of National Strategic Projects.

Republic of Indonesia Presidential Regulation Number 59 of 2017 concerning Implementation of Achievement of Sustainable Development Goals, set for July 4, 2017.

Minister of Public Works Regulation No .: 10 / PRT / M / 2006 concerning Procedures for Use of Business Entity Funds for Toll Road Procurement.

Regulation of the Head of the Indonesian National Land Agency No. 3 of 2007 concerning Provisions for the Implementation of Presidential Regulation No. 36 of 2005 concerning Land Procurement for the Implementation of Development in the Public Interest

Books

Craig, Paul. (2008). *Administrative Law.* London: Sweet & Maxwell Limited.

Faundez, Julio (Ed.). (1997). *Good Government and Law, Legal and Institutional Reform in Developing Countries.* London: Macmillan Press Ltd.

Hadjon, Philipus M. at al. (2002). *Pengantar Hukum Administrasi Indonesia.* Yogyakarta: Gajah Mada University Press.

Joesoef, Iwan Erar. (2015). *Hukum Perjanjian Dalam Pembangunan Infrastruktur.* Jakarta: FHUP Press.

Kagami, Mitsuhiro & Tsuji Masatsugu (Ed.). (2000). *Privatization, Deregulation and Economic Efficiency, A Comparative Analysis of Asia, Europe and the Americas.* Massachusetts: Edward Elgar Publishing, Inc.

Mercuro, Nicholas & Medema, Steven G. (1997). *Economic and The Law, From Posner to Post-Modernism.* Princeton, New Jersey: Princeton University Press.

Journal/ Report/ Conferrence/ Seminar/ Script/ Thesis/ Dissertation:

Balakrishnan, Sai. (2013). Highway Urbanization and Land Conflicts: The Challenges to Decentralization in India. *Pacific Affairs.* Volume 86, No. 4. December 2013.

Committee for Acceleration of Priority Infrastructure Delivery. (2018). "Accelerating, Debottlenecking, and Progress of National Strategic Infrastructure Projects". Bali: Prepared for Parallel Event of World Bank-IMF Annual Meeting 2018.

Kessides, Ioannis N. (2004). *Reforming Infrastructure, Privatization, Regulation, and Competition*, "A World Bank Policy Research Report". Washington: A co-publication of the World Bank and Oxford University Press.

Ministry of Public Works and Public Housing, Directorate General of Highways, Directorate of Freeways, Urban and Regional Road Facilities, "Toll Road Land Procurement Report" on 28 September 2015.

Ministry of Public Works and Public Housing, Directorate General of Highways, Directorate of Freeways, Urban and Regional Road Facilities, "Toll Road Land Procurement Report" on 28 September 2015.

Monitoring Report on Toll Road Regulatory Agency, Ministry of Public Works and Public Housing. (2016). Jakarta: Toll Road Concession Program in Indonesia.

Nasution, Darmin. (2018). A New Paradigm in Infrastructure Financing. Bali: Indonesia Investment Forum 2018.

Novianty, Dian Ayu. (2014). Implementasi Kebijakan Pengadaan Tanah Dalam Pembangunan Tol Semarang–Solo (Ruas Jalan Bawen–Salatiga). Jurusan Ilmu Administrasi Negara, Fakultas Ilmu Sosial, Universitas Negeri Yogyakarta, 2014.

Report of PT. Citra Margatama. (2012). Construction Project for the Waru-Tanjung Perak Interchange Toll Road. Surabaya.

Tawas, Agus Yafli. (2013). Pengadaan Tanah Untuk Kepentingan Umum (Studi Kasus Pelebaran Jalan Martadinata Paal Dua Di kota Manado). *Jurnal Hukum Unsrat*. Vol. I No. 6. Edisi Khusus, pp. 64-76.

Teklemariam, Dereje et. Al. (2016). How Sustainable Is Transnational Farmland Acquisition in Ethiopia? Lessons Learned from the Benishangul-Gumuz Region. Sustainability, 2016, 213; Retrieved from doi:10.3390/su8030213

Website

Wikipedia. (2020). *Masterplan Percepatan dan Perluasan Pembangunan Ekonomi Indonesia*. Retrieved from https://id.wikipedia.org/w/index.php?title=Masterplan_Percepatan_dan_Perluasan_Pembangunan_Ekonomi_Indonesia&oldid=17203545

Konsep Sustainable Development Paling Ditekankan Dalam Pembangunan MP3EI. (2013). Retrieved from https://ekon.go.id/berita/view/konsep-sustainable.5.html.

https://kppip.go.id/tentang-kppip/.

http://bpjt.pu.go.id/konten/jalan-tol/sejarah.

http://bpjt.pu.go.id/berita/presiden-lakukan-pencanangan-pembangunan-tol-pemalang-batang-

dan-batang-semarang.

http://kppip.go.id/tentang-kppip/perkembangan-pembangunan-infrastruktur-di-indonesia/.

https://kppip.go.id/tentang-kppip/perkembangan-pembangunan-infrastruktur-di-indonesia/.

http://kppip.go.id/tentang-kppip/.

OPTIMIZATION OF RENEWABLE ENERGY AS RESOURCES FOR ENVIRONMENTALLY FRIENDLY NATIONAL ENERGY SECURITY

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ABSTRACT

Carbon gas emissions that come from the use of non-renewable energy have a bad impact for the environmental. Comes the idea of transforming Renewable Energy as the main energy source because it is more environmentally friendly. This is a challenge for Indonesian, because Indonesia has the potential for Renewable Energy which can be utilized as the main source of national energy security. For the proposal to be successful, it must be accompanied by qualified regulations. However, the problem today that Indonesia does not have specific independent rules regulating Renewable Energy. The purpose of this paper is to analyze the potentials of Indonesian's Renewable Energy as an alternative to the main source of national energy security. Besides, it is also to analyze legal support so that the environmentally friendly Renewable Energy optimization program has the right legal basis. The research method in this paper uses normative research methods. The research approach of this paper uses a conceptual approach related to Renewable Energy. The results show that Indonesia had big potential of Renewable Energy as the main source of national energy security. The environment-friendly Renewable Energy will be realized as a source of national energy security.

Keywords: *Renewable Energy, Environmentally Friendly, Regulatory Framework*

1. Introduction

The role of energy in the modern era today has a position that cannot be separated from all community activities. Because the position of energy is very important, there is a national energy security policy. So that energy needs in the community are still fulfilled. This is a source of the smooth operation of all community activities from the fields of education, socio-culture, and economy.

National energy demand is currently dominated by non-renewable energy as a source of energy security. The energy sources consist of oil: 52.50%; Gas: 19.04%; Coal: 21.52%; and the rest is renewable energy[1]. This data shows that national energy needs still depend on non-renewable energy sources. And the utilization of renewable energy potential in Indonesia is very minimal which should be an alternative source of energy security. Dependence on non-renewable energy has complex problems for the country. It is undeniable that currently, oil production is decreasing. Data from the Ministry of Energy and Mineral Resources of the Republic of Indonesia states that the amount of oil

[1] National energy security source data in Imam Kholiq. (2015). Pemanfaatan Energi Alternatif Sebagai Energi Terbarukan Untuk Mendukung Subtitusi BBM (P. 76). *Jurnal IPTEK*. Vol. 19, No. 2.

reserves is only sufficient for about 10 years. Followed by sufficient gas reserves in about 20 (twenty) years[2]. And the national coal supply which is also expected to run out in 2035[3]. If there is no progressive action, it is undeniable that in the future energy demand in Indonesia will be scarce. Not to mention the threat of environmental damage due to exploitation activities which have not yet been maximally resolved.

It is time to optimize new and renewable energy as an alternative to the main source of energy security to prevent problems in the energy sector. Moreover currently, Indonesia is in the 6th (six) position of the largest contributor to carbon emissions in the world[4]. This problem can be one of the problems that can be solved by optimizing renewable energy. Environmentally friendly energy will be part of sustainable development[5]. If it is done optimally, it cannot be denied that the position of the top 6 (six) Indonesia as a contributor to carbon gas emissions will soon be the biggest. This can happen through the transformation of renewable and environmentally friendly sources of energy security.

In act. No. 30 of 2007 concerning Energy, renewable energy is one of the parts regulated in this regulation. In act. No. 30 of 2007 concerning Energy, renewable energy is one of the parts regulated in this regulation. The regulation of renewable energy in the law does not make this energy a priority directly. In fact, Indonesia's renewable energy potential is very large, starting from geothermal, wind, water, solar, bio-energy, and others. However, in fact, this legal umbrella does not automatically become a basis for exploring renewable energy sources.

One of the factors affecting the smoothness of state policy is legal factors which are made with aspirational, proactive, and credible principles[6]. Especially for the use of renewable energy, all lines of legal regulations are needed to be able to succeed in this program offers. That currently it must be admitted that the Energy Law has not been able to become a legal umbrella for the use of renewable energy as a priority. So more specific rules are needed to be able to regulate the exploration of renewable energy as an alternative source of energy security while remaining in synergy with the environment. So that from these problems 2 (two) problem formulations are taken (1) What is the potential for new and renewable energy in Indonesia as an alternative source of environmentally friendly national Energy Security? (2) How is the right legal support to succeed in optimizing new and renewable energy that is environmentally friendly in Indonesia?

The purpose of this paper is to solve all the problems that are the object of the study. First, to find out, understand and analyze all potential renewable energy content in Indonesia as an alternative source of national energy security. Second, to find out, understand, and analyze appropriate legal support to succeed in optimizing environmentally friendly renewable energy in Indonesia.

2. Research Methods

[2] National oil and gas reserve data in Liputan 6. (2020). *Cadangan Minyak Hanya Cukup untuk 9 Tahun lagi. Retrieved October 14 2020, 09.58 WIB, from* https://www.liputan6.com/bisnis/read/4155492/cadangan-minyak-indonesia-hanya-cukup-untuk-9-tahun-lagi

[3] Simatupang, Arthur. (2016). Ketua Harian Asosiasi Produsen Listrik Swasta Indonesia (APLSI). Investor Daily.

[4] World Resource Institute data presented by Suwignyo, *Mempercepat Gerak Pengembangan Energi Baru dan Terbarukan Untuk Mendukung Indonesia Maju,* Presented in Webinar DPR RI. Optimalisasi Pengembangan Energi Baru dan Terbarukan Menuju Ketahanan Energi Berkelanjutan, on October 12, 2020.

[5] Jaelani, Aan. (2017). Renewable Energy Policy in Indonesia: The Qur'anic Scientific Signals in Islamic Economics Perspective (P. 193.). *International Journal Of Energy Economic and Policy*. Vol. 7, No. 4.

[6] Atmasasmita, Romli. (2001). *Reformasi Hukum, Hak Asasi Manusia dan Penegakan Hukum* (P. 56). Bandung: Mandar Maju.

This type of research in writing uses normative legal research methods. This research is focused on studying the application of the rules or norms in positive law. The research approach of this paper uses a statutory approach that is related to energy. Then this writing also uses a conceptual research approach that has been selected and becomes a reference for discussion.

Sources of research data using primary and secondary data. Primary data consists of laws and regulations. Then the secondary data consists of legal papers (books, journals, articles, etc.). The data collection technique used in this paper is a literature study. A literature study is carried out by reading, studying, taking notes, making reviews of library materials that are related to the rules and concepts of new and renewable energy. In normative legal research, data processing is carried out by systematically applying written legal materials. Systematic means making a classification of these legal materials to facilitate analysis and construction work. Especially the analysis provides the construction of a proposed regulation that can act as a legal basis for optimizing the use of new and renewable energy which is environmentally friendly in Indonesia.

3. Results

3.1 The Potential of New and Renewable Energy in Indonesia as an Alternative Source of Environmentally Friendly National Energy Security

Energy is a strategic commodity that affects the sustainability of development, which in its management requires care and wisdom. If the energy supply decreases, it will cause an increase in energy prices which will result in a decrease in energy purchasing power. This will have an impact on the collapse of economic activities and are destructive to production and consumption activities. Thus the supply of energy plays a very important role, because the demand for energy as a primary commodity tends to always increase. Meanwhile, the use of energy itself in Indonesia is still dominated by the use of non-renewable energy derived from fossils, particularly oil and coal. However, over time, the availability of fossil energy is decreasing and to anticipate this new renewable energy (EBT) is the best alternative. The use of new and renewable energy must be the main concern of the Indonesian government not only as an effort to reduce the use of fossil energy but also to realize clean or environmentally friendly energy.

In order for the increased energy needs to be met, while the fossil-based energy reserves will certainly decrease, it is necessary to have a strategy of substitution to renewable energy sources with enormous potential in Indonesia. The ideal condition that should be fulfilled is when the use of fossil energy occurs, it can be replaced by the discovery of new fossil energy reserves or replaced by oil from alternative energy sources. So that Indonesia will have energy independence in the future with stable economic growth and development without dependence on non-renewable fossil energy. In Indonesia, nature has actually provided an abundant and free source of energy to be utilized by all living things, especially for the Indonesian people themselves. However, to support the activities of human life on earth, humans also need to manage and develop the energies that are already available in nature to meet their daily needs.

According to Law Number 30 of 2007 concerning Energy, the meaning of New Energy is contained in article 1 paragraph (5), namely energy originating from new energy sources. Meanwhile, new energy sources are energy sources that can be produced by new technology, both from renewable energy sources and non-renewable energy

sources, including nuclear, hydrogen, coal bed methane, and liquified coal, and gasified coal.

New energy is energy developed from the results of research and technology and technology development that cannot be included in the fossil energy or renewable energy group, for example nuclear energy, plasma energy (magneto hydro dynamics), or fuel cell energy. New energy is a type of energy whose development is driven by technological interventions. Meanwhile, the definition of renewable energy is energy that comes from renewable energy sources. Renewable energy sources are energy sources that can be used indefinitely and will never run out because they can be recovered in a relatively short time.

Renewable energy sources are energy sources that are very environmentally friendly, because they do not produce environmental pollution and are not one of the causes of climate change and global warming, because the energy produced comes from sustainable natural processes such as wind, water, sunlight, geothermal, and bio-fuels. This is also contained in Law Number 30 of the Year concerning Energy, the definition of renewable energy is stated in Article 1 paragraph (6), namely "energy sources produced from sustainable energy resources if managed properly, including geothermal, wind, bio-energy, sunlight, water flow and waterfall, as well as the movement and temperature differences of the ocean layers.

Indonesia is one of the countries that has a very large number of potential sources of renewable energy due to the astronomical and geographic influence of the Indonesian state. Potential renewable energy sources contained in Indonesia such as geothermal energy, solar, water, sea/ocean, bio-energy. The following is an explanation along with data related to the potential for renewable energy sources that the authors have successfully compiled:

a. Geothermal Energi

Indonesia is a country that is also rich in geothermal potential, because it is included in volcanic areas. This is due to the geographical conditions of Indonesia which are passed by the Ring of Fire, which is a volcanic route that stretches across Indonesia from the tip of Sumatra Island along the islands of Java, Bali, NTT, NTB to the Banda Islands, Halmahera and Sulawesi Island. The survey shows that there are 70 geothermal locations with high temperature with a total capacity of 19,658 MW. Most of these locations have not been exploited intensively. According to the latest records from the Geological Agency, the geothermal potential in Indonesia is 23.9 Giga Watt (GW) until December 2019. Based on data from the Geothermal Directorate, this potential has only been exploited for 8.9% or 2,130.6 MW, much of which has yet to be utilized. . Regarding this, the Government is targeting an increase in geothermal utilization to 7,241.5 MW or 16.8% in 2025.

b. Solar energi

Indonesia is located on the equator which causes Indonesia to have a tropical climate, the majority of areas in Indonesia are always exposed to the hot sun. Based on solar radiation data collected from 18 locations in Indonesia, it shows that solar radiation in Indonesia can be classified as follows: for the western and eastern regions of Indonesia with the distribution of radiation in the Western Region of Indonesia around 4.5 kWh / m2.day with a monthly variation of around 10% and Eastern Indonesia around 5.1 kWh / m2.day with a monthly variation of around 9%, thus the potential for solar radiation in Indonesia averages around 4.8 kWh / m2.day with a monthly variation of around 9%. but, the latest updated data

Indonesia has the potential for solar radiation of 207.8 GWp, which is only realized by PLTS of 0.15 GWp (0.07%) of the total solar potential in Indonesia.

c. Water

Indonesia has great potential for the development of hydropower plants, because there are abundant hydropower sources in Indonesia. This potential is due to Indonesia's mountainous and hilly topography and is fed by many rivers and certain areas have lakes / reservoirs that are quite potential as a source of water energy. And also based on the potential data for PLTA and also PLTMH of 75 GW and 19.3 GW, but what can only be realized for PLTA is only 5.18 GW (6.75%) and for PLTMH only 0.24 GW (1.23%) this is very unfortunate because it should be able to benefit as well as possible.

d. Ocean/Ocean currents

Based on the data, the potential for PLTAL is 17.9 GW. But, the realization is still not there, because the utilization of ocean / ocean currents is still in the research stage and cannot be used. The potential is huge for ocean/ocean currents because basically Indonesia itself is an archipelago that has more waters than land. The area of the Indonesian sea is 65% of the total area of Indonesia, namely 3,544,743.9 km^2, with a coastline that stretches along 81,000 km, consisting of deep seas and shallow seas. By looking at the vast area of the seas and oceans of the state of Indonesia, it can be estimated that Indonesia has abundant marine / oceanic energy sources.

e. Wind

In general, Indonesia is categorized as a windless country, given that the minimum average wind speed that can be economically developed as an energy service provider is 4m/s. But, several regions in Indonesia have the potential for wind energy sources. These areas are located, among others, in eastern Indonesia such as East Nusa Tenggara (NTT), West Nusa Tenggara (NTB), South Sulawesi and Southeast. This is supported by the data obtained regarding the potential of PLTB to use wind of 60.6 GW and only 0.076 GW (0.13%) that can be realized.

f. Bio-energi

Indonesia as an agricultural country has a relatively large potential for biomass from agricultural, plantation, forestry, livestock waste and municipal waste (garbage). Data from PLT Bio Potential in Indonesia is 32.6 GW and only 1.859 GW (0.42%) can be realized. The six of New and Renewable Energy (EBT), according to the author, it can maximize its use and is classified as clean and low-carbon energy, besides that EBT also has other impacts besides being environmentally friendly, it can also:

1) Reducing the cost of the National Electricity Production (BPP), the allocation of which can be used for more important sectors;
2) Lowering electricity tariffs at affordable prices, this will automatically happen because the National Electricity Production Cost of the Nation is Decreased;
3) Increase Installed Capacity and GDP per capita;
4) Supporting the revival of the manufacturing industry and the electrification ratio;
5) Supporting the Energy Sector Commitment to the Paris Agreement;
6) And the last one is to keep the Republic of Indonesia as an archipelagic country because it suppresses global warming which causes sea levels to rise;

3.2 Legal Support for the Success of Optimizing Environmentally Friendly New and Renewable Energy in Indonesia

3.2.1 The Urgency of the Law as the basis for the policy to optimize the Use of Renewable Energy in Indonesia

The function of law in this modern era does not only regulate human behavior but also enter the realm of public policy. This is in line with the opinion of Satjipto Rahardjo who explains the dynamic position of law. That the law is not just re-recording patterns of human behavior in society. Instead, the law is attempted to be a means of channeling policies to be able to create new conditions or change something that already exists[7]. To optimize the use of new and renewable energy in Indonesia, legal factors are one that can have an effect. This cannot be separated from Indonesia's position as a constitutional state as regulated in Article 1 paragraph (3) of the 1945 Constitution. So as a rule of law, if you want to use renewable energy, you must have a legal basis. The legal basis will be a form of certainty in maintaining the country's political will commitment to be able to carry out the mandate of the regulation, in this case, the proposal is to optimize new and renewable energy.

The urgency of new and renewable energy in the constitution also plays an important role in the management of natural resources. explicitly explained in Article 33 paragraph (3) of the 1945 Constitution contains 3 (three) important elements, namely : (1) Subtance (natural resources); (2) Status (controlled by the state); (3) Aim (for the greatest prosperity of the people)[8]. Based on the constitution, the existence of control and exploitation of natural resources which are fundamental to the life of the nation and state is carried out by the state[9].

Based on the constitution, that the use of renewable energy is carried out to meet the needs of natural resources for the life of the nation and state. When viewed from the perspective of Article 33 paragraph (3) of the 1945 Constitution, the use of renewable energy has concrete objectives for the wider community. First the substance, that renewable energy is part of natural resources. So it needs to be regulated as part of natural resources that can be utilized. The second status is that renewable energy in Indonesia is automatically controlled by the Government. So the government must be able to manage these resources so that they are not misused. The third objective is that renewable energy is part of natural resources and controlled by the state, so its management objective is for the greatest welfare of the people.

3.2.2 New and Renewable Energy in Indonesia's Positive Law

One of Indonesia's commitments to optimize the use of new and renewable energy is to ratify the Agreement To The United Nations Framework Convention on Climate Change in Act No. 16, 2016. The Countries that have ratified the Paris Agreement are none other than participating in limiting global temperature increases below 2 degrees C from the pre-industrial level and making efforts to limit them to below 1.5 degrees C (Article 2). To maintain global temperature stability, one of the efforts made is to reduce the increase in carbon emission gases. To achieve this goal, the member countries will make efforts to reduce greenhouse gas emissions as soon as possible through mitigation actions (Article 4). This means that the state should make policies to prevent an increase in

[7] Rahadrjo, Satjipto. (1979). *Hukum dan Perubahan Sosial (P. 23).* Bandung: Alumni.
[8] Purba, Zen Umar. (2017). Kepentingan Negara dalam Industri Perminyakan Indonesia, Hukum Internasional, Konstitusi dan Globalisasi (P. 193). *Jurnal Hukum Internasional.* Volume 4.
[9] Redi, Ahmad. (2014). *Hukum Pertambangan Indonesia* (P. 3). Jakarta: Gramata Publishing.

carbon emission gases which can affect environmental stability. So from that commitment, it is the space for Indonesia to immediately be able to take advantage of new and renewable energy. In general, energy optimization is the main option considering that energy is very environmentally friendly. The impact is that it will be able to immediately suppress the increase in gas emissions, which at that time emerged from industrialization activities based on non-renewable energy. The ratification of the Paris Agreement is one of Indonesia's ammunition in pursuing the target of utilizing new and renewable energy. Currently, the use of renewable energy is still very minimal, which is only 8 (eight)%. Meanwhile, based on PP. 79 of 2014 concerning the National Energy Policy that the target in 2025 is 23%. This accelerated transition requires all components to work together to realize the plan. Especially in the PP then in 2050, Indonesia's target in utilizing renewable energy is 31%. This target will shift the position of renewable energy, which until now has become the main energy source. If it is not accompanied by action, the target will only be wishful thinking.

Before the ratification of the Paris Agreement, renewable energy was regulated in advance in the Act No. 30 of 2007 concerning Energy. In that Act, new energy sources are energy sources that can be produced by new technology, both from renewable energy sources and non-renewable energy sources (Article 1 point 4), including nuclear, hydrogen, methane gas, coal, coal. liquefied and grazed coal. Article 1 point 5 states that new energy is an energy that comes from new energy sources. Then in article 1 point 6 explains that renewable energy sources are energy sources that are produced from renewable and sustainable energy sources. And in article 1 number 7 is strictly regulated regarding the position of new and renewable energy contained in the Energy Act.

Renewable energy is further regulated in the Regulation of the Minister of Energy and Mineral Resources No. 4 of 2020 on the amendment of Regulation of the Minister of Energy and Mineral Resources No. 50 of 2017 on the Utilization of New and Renewable Energy. There are several important points in the rules regarding the regulation of renewable energy. That the Ministerial Regulation has regulated a scheme for utilizing renewable energy as additional energy, such as additional electricity generation by the State Electricity Company (PLN).

3.2.3 Need an Independent Regulation Specifically Regulating the Use of New and Renewable Energy as the Main Source of Energy Security

The legal issue regarding new and renewable energy lies in the problem that there are no independent legal rules that specifically regulate this energy. Whereas in the existing regulations, the position of renewable energy is only regulated in a more general manner. Renewable energy regulations are specifically regulated only in a Ministerial Regulation. However, the regulation also only regulates the technical use of renewable energy as additional energy.

For a policy to use renewable energy as a priority strategic policy, there needs to be support for legal certainty. Due to the absence of provisions on the use of renewable energy as a priority policy, the legal basis for the use of renewable energy is still unclear. This means that there is still a gap for the Government not to use this energy as a source of energy security.

The Indonesian House Of Representative (DPR RI) is currently in the process of drafting a Bill on New and Renewable Energy. The bill is hope for realizing a form of legal certainty to optimize the use of renewable energy as the main source of National Energy Security. The bill regulates the plan for gradual energy transformation to become renewable energy as the main energy source (Article 3). Besides, the scope of the bill

regulates control, new and renewable energy sources, permits for the use of renewable energy, environmental management, research and development, and others.

The problem in the Renewable Energy Bill does not regulate the portion of the utilization of all lines of renewable energy sources. This becomes a problem as if the direction of this bill only regulates the use of renewable energy based on the available options. Even though the potential for renewable energy sources in Indonesia is very varied. Starting from nuclear, solar, water, wind, hydrogen, methane gas, coal, liquefied coal, and coal. The bill of regulating should accommodate all renewable energy sources to become the main source that can be utilized. Because if there is no provision regarding the portion of energy use, then optimizing energy use can focus on one energy source. As a result, the potential for other renewable energy sources is not used optimally. This can be futile because other potential energy sources are not utilized optimally. Every potential source of new and renewable energy has extraordinary energy reserves. If used optimally, it can become a unit to form a strong renewable energy source to meet the needs of national energy security.

The Bill on New and Renewable Energy must be able to regulate all existing new energy sources. The goal is that the basis for energy utilization is not driven by just one energy. The independent rules that regulate renewable energy will become concrete guidelines for state policies in the realm of energy security. This regulatory position will become the legal basis for the exploration of new and renewable energy. If there is legal support that regulates the use of renewable energy in a priority manner, then the legal basis is certain to be able to transform sources of energy security.

3.2.4 Optimizing the Use of Environmentally Friendly Renewable Energy Based on Indonesia's Positive Law

One of the parameters of the idea of optimizing the use of new and renewable energy which is environmentally friendly in Indonesia is Act No. 32 of 2009 concerning Management and Protection of the Environment. Although basically, renewable energy is environmentally friendly, it is mandatory to have a legal direction to direct environmental law policies. The goal is that all environmental protection principles contained in the regulation can still be implemented.

When using the parameters of the Law on Environmental Management and Protection, the implementation of this energy policy must be based on the principles contained in the law. The principles of the Law on Environmental Management and Protection which will be the parameters for the new and renewable energy policy that are environmentally friendly will be explained below :

1) **Principle of Sustainability**

   This principle has a mandate about everything, both the government and society are obliged to protect the environment for the fate of future generations. This responsibility is to continue to manage a good environment so that it remains sustainable and sustainable so that it remains feasible for the future. In realizing these goals, the options for optimizing new and renewable energy are the main options that can be applied. Environmentally-friendly renewable energy will not be a threat to the environment. Environmentally friendly energy management will keep the environment sustainable. Then the nature of renewable energy, which can be renewed, will become an infinite energy base in the future.

2) **Principle of Biodiversity**

   This principle has a mandate that environmental management must continue to provide synergy to the surrounding ecosystem. Environmental management must

be carried out in an integrated manner to maintain existence, diversity, and sustainability. Living natural resources consisting of natural-vegetable resources and animal resources that live around the need to be protected. The use of renewable energy supports the implementation of this principle. Renewable energy is an alternative policy that is environmentally friendly. There will be no exploitation of the environment on a large scale. So that it will not threaten all ecosystems that will maintain their existence.

3) Principle of Eco-region

This principle means that environmental management must maintain the characteristics of natural resources, ecosystems, geographical conditions, local culture, and existing local wisdom. Environmentally friendly and renewable characteristics in the study of renewable energy will be components that still pay attention to all existing ecosystems. So that the circulation of life in the components of the ecosystem synergizes well.

4) Principle of Usefulness

This principle means that environmental management in development is carried out based on the potential of natural resources and the environmental. The goal is that the potential used as an improvement in community welfare in harmony with the environment. Renewable energy management will use natural potentials that remain in synergy so that the benefits of these potentials natural resource utilized in the community.

5) Principle of Justice

This principle is a fundamental principle of law that cannot be separate from environmental management. These means that environmental management must be proportional to every citizen, both across regions, across generations, and genders. Utilization of the great potential of renewable energy will create a component of energy sources that will strengthen national energy security for the Indonesian people's.

4. Conclusion

a. The Renewable energy sources are energy sources that are very environmentally friendly, while the energy produced comes from sustainable natural processes such as wind, water, sunlight, geothermal, and biofuels. This is also contained in Law Number 30 of the Year concerning Energy, the definition of renewable energy is stated in Article 1 paragraph (6), namely "energy sources produced from sustainable energy resources if managed properly, including geothermal, wind, bioenergy, sunlight, water flow and waterfall, as well as the movement and temperature differences of the ocean layers. If this renewable energy is implemented in Indonesia, it is very possible. This is because Indonesia is located on the equator, and makes this country have supporting factors such as wind, geothermal (geothermal), sunlight, and water.

b. Legal support in the context of optimizing the use of environmentally friendly renewable energy is one of the factors that can make this energy transformation bid plan successful. That the ratification of the Paris Agreement by Indonesia is one of the commitments to reduce carbon emission gases. One of the efforts made could be through the optimization of environmentally friendly renewable energy which will avoid excessive carbon gas production. However, Indonesia needs to formulate special rules that regulate renewable energy independently. The goal is to form a clear legal basis as a commitment to shift renewable energy into the main source of national energy security. For the optimization of renewable energy to

continue to ensure environmental stability, this policy needs to be accompanied by the basic parameters in Law no. 32 of 2009 concerning Management and Protection of the Environment. The principles are the principles of sustainability and sustainability, Biodiversity, Ecoregion, Benefit, and Justice.

REFERENCES:

Books:
Abdulkadir, Ariono. (2011). *Seri Ketenagalistrikan Jilid 2: Energi Baru, Terbarukan dan Konservasi Energi*. Bandung: ITB.

Redi, Ahmad. (2014). *Hukum Pertambangan Indonesia*. Jakarta: Gramata Publishing.

Daryanto. (2007). *Energi: Masalah dan Pemanfaatannya Bagi Kehidupan Manusia*. Yogyakarta: Pustaka Widyatama.

Atmasasmita, Romli. (2001). *Reformasi Hukum, Hak Asasi Manusia dan Penegakan Hukum*. Bandung: Mandar Maju.

Rahadrjo, Satjipto. (1979). *Hukum dan Perubahan Sosial*. Bandung: Alumni.

Journal Articles
Jaelani, Aan. (2017). Renewable Energy Policy in Indonesia: The Qur'anic Scientific Signals in Islamic Economics Perspective. *International Journal Of Energy Economic and Policy.* Vol. 7 No. 4.

Lubis, Abubakar. (2007). Energi Terbarukan dalam Pembangunan Berkelanjutan. *Jurnal Teknik Lingkungan.* Vol. 8 No. 2.

Biro Komunikasi. (2016). Layanan Informasi Publik dan Kerja Sama Kementerian Energi dan Sumber Daya Mineral. *Jurnal Energi: Program Strategis EBTKE dan Ketenagalistrikan.* Edisi 2

Kholiq, Imam. (2015). Pemanfaatan Energi Alternatif Sebagai Energi Terbarukan Untuk Mendukung Subtitusi BBM. *Jurnal IPTEK.* Vol. 19 No. 2.

Purba, Zen Umar. (2017). Kepentigan Negara dalam Industri Perminyakan Indonesia, Hukum Internasional, Konstitusi dan Globalisasi. *Jurnal Hukum Internasional*. Vol. 4.

Website Materials:
Arthur Simatupang, Ketua Harian Asosiasi Produsen Listrik Swasta Indonesia (APLSI), Investor Daily 15/08/2016.

National oil and gas reserve data in Liputan 6. (2020). Cadangan Minyak Hanya Cukup untuk 9 Tahun lagi. Retrieved October 14 2020, 09.58 WIB, from https://www.liputan6.com/bisnis/read/4155492/cadangan-minyak-indonesia-hanya-cukup-untuk-9-tahun-lagi

Kementerian Energi dan Sumber Daya Mineral. (2018). Lomba Foto Energi Berkeadilan. Retrieved October 14, 2020, 18.09 WIB from www.esdm.go.id/id/page/lomba-foto-energi-berkeadilan-2018

http://ebtke.esdm.go.id/post/2020/03/27/2518/potensi.besar.belum.termanfaatkan.46.proyek.panas.bumi.siap.dijalankan. diakses pada 14 Oktober 2020, pukul 20.00 WIB.

Webinar session:

World Resource Institute data presented by Suwignyo, Mempercepat Gerak Pengembangan Energi Baru dan Terbarukan Untuk Mendukung Indonesia Maju, disampaikan pada Webinar DPR RI. Optimalisasi Pengembangan Energi Baru dan Terbarukan Menuju Ketahanan Energi Berkelanjutan, on October 12, 2020.
.
Hendri Firman Windarto. Optimalisasi Pengembangan EBT Menuju Ketahanan Energi Berkelanjutan. Jakarta, October 12, 2020.
Muhammad Azhar, The New Renewable Energy Consumption Policy of Rare Earth Metals to Build Indonesia's National Energy Security, Conference Guidelines The 1st Sriwijaya Internasional Conference on Environmental Issues, di Hotel Horison Ultima, Palembang, Indonesia, 26 – 27 September 201

HARMONIZATION OF LEGAL PROTECTION IN PUBLIC FUNERAL SERVICES THROUGH LOCAL REGULATIONS

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ABSTRACT

The funeral services are one of the safeguards for human dignity that was obtained the last time for a human died. Public Burial Places has territory separately based on the religion of people who died, whereas in every countries there are no distinction based on one's religion. The number of Believers at least 3.14 percent of the Indonesian population are protected by the Joint Regulation of the Minister of Home Affairs and the Minister of Culture and Tourism Number 43 and 41 Year 2009 concerning Guidelines of Service to the Believers in God Almighty. However, there is no single local regulation that regulates public cemeteries which are in line with it. This paper is a legal research that examines the harmonization between several local regulations in each province where there are the Believers. The paper to analyze based on cases that have occurred related to funeral services for them by the local government. The urgency of harmonization the regulations to provide legal protection them and emphasize that service is not just an appeal but a necessity through the obligatory along with the imposition of sanctions for officials who violate these provisions.

***Keyword**: Harmonization, legal protection, public funeral service, Believers, local regulations*

1. Introduction

The Believer in the One God is everyone who recognizes and believes in the values of the delusion of belief in the One God Almighty (Article 1 number 3 of the Joint Regulation of the Minister of Home Affairs and Minister of Culture and Tourism Number 43 and 41 of 2009 on the Guidelines for Service to The Imaginary of Belief in the Almighty God/ Joint Regulation of the Minister of Home Affairs and Minister of Culture and Tourism 43 and 41/2009) is estimated at 12 million people by the Ministry of Home Affairs.[1] For example in early December 2014, one of Sapto Darmo Believers in Brebes Regency died, but the village device did not give permission for burial of the remains in the village's tomb causing the body to be abandoned and eventually buried in the home. It is one of the discriminations of a person in relation to the service of a public burial place on the basis of one's belief in the One God.[2] Death for the principle is one of the important events or events experienced by a person, in which there are a sequence of rituals performed by the family that he or she has left behind (Article 1 number 17 Act Number

[1] Akhmad, Hartiz Tryan. (2017). Kemendagri: Ada 12 Juta Penganut Penghayat Kepercayaan di Indonesia. Retrieved November 11, 2020, from https://nasional.okezone.com/read/2017/11/14/337/1813772/kemendagri-ada-12-juta-penganut-penghayat-kepercayaan-di-indonesia

[2] Sucahyo, Nurhadi. (2018). Penghayat Kepercayaan: Setelah Putusan MK dan Kolom KTP. Retrieved October 29, 2020, from https://www.voaindonesia.com/amp/penghayat-kepercayaan-setelah-putusan-mk-dan-kolom-ktp/4340417.html.

23 of 2006 concerning the Population Administration that amended by Act Number 24 of 2013). The event as an example of human rights violation of the belief in the One God Almighty in accordance with conscience as guaranteed by Article 28E paragraph (2) of the Constitution of the Republic of Indonesia in 1945 (the 1945 Constitution).

The sequence of rituals based on the Belief in God Almighty in each community becomes a culture in each community to relieve pain, for example the culture of gathering the funeral system along the river Ganges of Hindu's in India, receiving condolences at home during the mourning period for seven days of the Jews, and management dead bodies is ensuring the dignity and respect of the dead as well as for their living relatives of the Islamic law.[3] For traditional Indigenous peoples in Australia, death often involves a complicated set of rituals. According to Indigenous Australian beliefs, the body must be reunited with the land from which it came from, so burial places are of great importance. Many traditional indigenous communities have their own burial rituals. In some cases the ritual is very different from Western culture, where some indigenous communities of corpses are not buried and left in the bushes. Such differences can conflict with written legislation primarily to accommodate Western burial customs and traditions. The matter was reduced to some degree with the exception of the relevant state and Territory Act permitting the burial outside the cemetery with the approval of the Minister. The provision has been used to accommodate traditional beliefs.[4] Thus, the handling and burial of corpses in most religious groups there are special customs according to their beliefs.

The regional human rights system provides an important layer of protection and is closely related to regional political development and integration. It has the potential to be more attractive to the United Nations system for increased references to jurisprudence and contributions to enriching the law in the field of international human rights. Efforts to encourage regional political integration reinforce human rights as essential at all levels as a marker of the system's ability to provide a stable order based on legal supremacy and the protection of fundamental rights. Regional political support for the human rights system varies greatly, which can affect the effectiveness of the human rights system.[5] For example, Article 27 International Covenant on Civil and Political Rights (ICCPR) says *"In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of their group, to profess and practise their own religion, or to use their own language".* Article 9 the European Convention on Human Rights (ECHR) provides that:

(1) Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

(2) Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law, necessary in a democratic society in the interests of public safety, for

[3] Al-Dawoody, Ahmed & Finegan, Oran. (2020). Covid-19 and Islamic Burial Laws: Safeguarding Dignity of the Dead. Retrieved November 11, 2020, from https://blogs.icrc.org/law-and-policy/2020/04/30/covid-19-islamic-burial-laws/

[4] Human Rights and Equal Opportunity Commission. (1998). *Article 18 Freedom of Religion and Belief* (p. 43-45). Sydney: J.S. McMillan Pty Ltd.

[5] Bantekas, Ilias & Oette, Lutz. (2018). Regional Human Rights Treaty. Retrieved November 11, 2020. from https://www.cambridge.org/core/books/international-human-rights-law-and-practice/regional-human-rights-treaty-systems/A275184F9D08DB30DD6D383DB4104556.

the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

Given that the country's boundaries are unclear at this time, the existence of written law (*ius scriptum*) i.e. legislation has become one of the basic needs in an effort to uphold justice, peaceful, and legal certainty. This is because the latest inter-human relations have been governed by modern laws, including public burial services by the government. Modern law has the characteristics of written, rational, planned, universal and responsive legal norms in adapting societal development and ensuring legal certainty.[6] The area of human rights guarded by the world is becoming very wide. Human rights that include the freedom of citizens as a free space must be guaranteed by every government to any individual by not intervening in a particular personal space, for example the right to live and feel safe, to be alone, to live in a family, to have a private property, to express an opinion freely, to exercise religion, and to gather peacefully. The freedom of the citizens of that state includes the obligation of the state to lay out its order to ensure minimum respect for the person.[7]

The characteristics of state conception are based on the rule of law, namely the principle of legality of juridical (*supremacy of law*), free, independent judiciary, and recognition and protection of human rights.[8] Guarantees of protection of human rights must be guaranteed in the actualization of the legal state. There are 8 (eight) requirements of the rule of law as stated by Lon Fuller covering there must be rules, must apply forward (prospective) rather than back (retrospective), must be announced, must be intelligible, must not be mutually contradictory, should be possible to follow, must not change constantly, and there must be congruence between the written rules and those applied by law enforcement.[9] In order to realize Indonesia as a country based on the law, the recognition and protection of human rights becomes very important done by the state through recognition in the laws and regulations to provide protection for its citizens through the conformity of the law with the above regulations.

The existence of belief has been around for a long time, including Sunda Wiwitan on baduy ethnicity in Kanekes (Banten), Sunda Wiwitan Madrais in Kuningan, Kejawen in Central Java and East Java, Parmalim in North Sumatra.[10] There are approximately 6 million Believer from 61 organizations or 1 percent or 60 thousand people listed as Believer in the Identity Card. For the city of Madiun there are nine Believer's organizations.[11] The number of Believer is expected to continue to increase by 3.14 percent after they register as Believer in the Identity Card.[12]

The article on legal protection for Believer in the field of Public Funeral Services have been done before, namely Oki Wahyu Budijanto, "Respect for Human Rights for Believer in Bandung," Journal of Human Rights, Vol. 7 Number 1 July 2016, p. 43. The author analyzed about Bandung's Local Regulation. Believers have no problem obtaining

[6] Astawa, I Gde Pantja & Na'a, Suprin. (2008). *Dinamika dan Ilmu Perundang-undangan di Indonesia* (p. 1). Bandung: PT. Alumni.
[7] Cassese, Antonio (Translator by A. Rahman Zainuddin). (2005). *Hak Asasi Manusia di dunia Yang Berubah* (p. xxi). Jakarta: Yayasan Obor Indonesia.
[8] Suteki. (2013). *Desain Hukum di Ruang Sosial* (p. 182-183). Yogyakarta: Thafa Media. In Junaidi, Muhammad. (2018). *Hukum Konstitusi Pandangan dan Gagasan Modernisasi Negara Hukum* (p. 208). Depok: Rajawali Pers.
[9] Ibid., (p. 208-209).
[10] Yudianita, Feby. (2015). Tinjauan Yuridis Terhadap Aliran Kepercayaan Dihubungkan Dengan Pasal 29 ayat 2 UUD 1945. J*OM Fakultas Hukum.* Vol. 2 Number 2 (p. 3).
[11] Susanto, Bruriy (Ed.). (2020). 60 ribu Warga Jawa Timur Kantongi KTP Penghayat Kepercayaan. Retrieved November 10, 2020, from https://jatimnet.com/60-ribu-warga-jawa-timur-kantongi-ktp-penghayat-kepercayaan.
[12] Rakhmatulloh. (2017). Jumlah Penghayat Kepercayaan di Indonesia Capai Ratusan Ribu Orang. Retrieved November 11, 2020, from https://nasional.sindonews.com/berita/1256823/15/jumlah-penghayat-kepercayaan-di-indonesia-capai-ratusan-ribu-orang.

population services and civil records, but the general public's rejection of funerals for Believer in public cemeteries still occurs. Article 7 paragraph (1) of Bandung City Regional Regulation Number 19 of 2011 on The Provisions of Public Funeral Services and Burial of Corpses, and the Retribution of Funeral Services and Burial of Corpses reads *"In an effort to improve the effectiveness and efficiency of Public Funeral Place land, the Local Government provides an Integrated Public Funeral Place in accordance with all religious beliefs in accordance with the laws and regulations".* It does not mention religion and/or belief as a limitation or scope of religion. The regional regulation also does not recall the Joint Regulation of the Minister of Home Affairs and the Minister of Culture and Tourism 43 and 41/2009. It is highly likely that the civil rights of the Believer will be respected in terms of funerals.

This article to analyze legal issues related to Public Funeral Public for the Believers through four Local Regulations given the existence of Believers in Indonesia is considerable, but the legal protection is inadequate due to disharmony between the Local Regulations and the regulations above namely the Joint Regulation of the Minister of Home Affairs and Minister of Culture and Tourism 43 and 41/2009. This is very important and interesting because the freedom to believe beliefs in accordance with his conscience was stipulated in the 1945 Constitution, but some of the regulations under him did not consider the basis of the law to cause disharmony of the legislation. So, the problems in this article. First, what is the legal issue in Public Funeral Services for the Believers through Local Regulations? Secondly, how is the legal protection in Public Funeral Services for the Believers through Local Regulations?

Death is one of the important events in human life, so the state must recognize and protect the human rights as an important thing that must be done by the state given the recognition of the existence of the Belief Deed in the 1945 Constitution and the laws and regulations under it. Believer should be entitled to services to public burial sites by the government or local government, without exception.

Each province in the territory of Indonesia has a belief in accordance with its regional characteristics that each death in the Believer has its own ritual of worship and meaning for the Believer. Human dignity was last obtained through a proper burial place. Therefore, the state is obliged to guarantee the service of the burial place equally regardless of difference (discrimination) on the basis of belief in the One God Almighty. It is also set out in every principle in the Local Regulations in each province, but there is no arrangement to comply with the Joint Regulation of the Minister of Home Affairs and Minister of Culture and Tourism 43 and 41/2009.

2. Materials and Methods

This article is a legal research that relate with the latest issue and provides a systematic explanation on the law related to public funeral services for the Believers, analyzes the connection between Joint Regulation of the Minister and Local Regulations for trying to harmonize the future of regulation.[13] The research is analyzing about harmonization of legal protection in public funeral services for the Believers through Local Regulations that effective after Joint Regulation of the Minister of Home Affairs and Minister of Culture and Tourism 43 and 41/2009 in accordance with the mandate of the 1945 Constitution. This research analyzes and compares best practices on legal

[13] Tamanaha, Brian Z. (2004). *Rule of Law in the United States*, and Peerenboom & Randall. (2004). *Asian Discourses of Rule of Law* (p. 56-57). London: RoutledgeCurzon. In Harijanti, Susi Dwi. (2011). *Negara Hukum dalam Undang-Undang Dasar 1945, Negara Hukum Yang Berkeadilan: Kumpulan Pemikiran Dalam Rangka Purnabakti Prof. Dr. H. Bagir Manan, S.H., M.CL.* (p. 88). Bandung: PSKN FH UNPAD.

protection in Public Funeral Services and its legal implementation in some region in Indonesia. The result of this paper is to explain the legal problems in Public Funeral Services for the Believers through Local Regulations and legal protection in Public Funeral Services for the Believers through Local Regulations for giving Public Funeral Services for the Believer without discrimination on the basis of religion or belief to be governed by the law for the future.

3. Results and Discussion

Harmonization of legal protection in Public Funeral Services for the Believers through Local Regulations is very important to be implemented by the government in order to meet the legal needs of every community in every region of Indonesia without discrimination on the basis of one's belief in the One God Almighty.

3.1 The legal issue in Public Funeral Services for the Believers through Local Regulations

There are several Local Regulations related to Public Funeral Services for example:

a. Article 7 paragraph (1) of Bandung City Regional Regulation Number 19 of 2011 on The Provisions of Public Funeral Services and Burial of Corpses, and the Retribution of Funeral Services and Burial of Corpses reads *"In an effort to improve the effectiveness and efficiency of* Public Funeral Services *land, then the Local Government provides integrated* Public Funeral Services *for all religious people in accordance with the laws and regulations".* It does not mention religion and/or belief as a limitation or scope of religion. The regional regulation also does not recall the Joint Regulation of the Minister of Home Affairs and the Minister of Culture and Tourism Number 43 and 41 of 2009 on the Guidelines for Service to The Delusion of Believer in the One God Almighty. It is highly likely that the civil rights of the Believer will be respected in terms of funerals;[14]
b. Kebumen District Regulation Number 5 of 2019 on the Management of Public Burial Places. Article 1 number 7 Regional Regulation of Kebumen Regency says about definition about Public Funeral Services is land area provided for funeral purposes for each person without distinguishing religion and class, whose management is carried out by the Local Government or Village Government. In Provision of Burial Place on Article 4 paragraph (1) Local Government of Kebumen 5/2019 that the Local Government is obliged to provide land for the purposes of Public Funeral Services managed by the Local Government, but the rule does not base on Joint Regulation of the Minister of Home Affairs and Minister of Culture and Tourism 43 and 41/2009. The Local Regulation does not govern at all the regulation of Public Funeral Services for Believer by Local Government, but imposes for any heirs or family parties or persons responsible for the deceased in the area through the word "must" to bury the remains in the burial place in accordance with the provisions of the religion or beliefs adopted by the deceased (Article 11 paragraph (1) Local Government of Kebumen 5/2019);
c. Regulation of the Regent of Penajam Paser Utara Number 60 of 2017 on the Management of Integrated Public Burial Sites in Penajam Paser Utara Regency. In the section considering the numbers 1 to the number 5 there is no Joint Regulation of the Minister of Home Affairs and Minister of Culture and Tourism 43 and 41/2009, but the provision stipulated the Decree of the Minister of Home Affairs

[14] Budijanto, Oki Wahyu. (2016). Penghormatan Hak Asasi Manusia Bagi Penghayat Kepercayaan di Kota Bandung. *Jurnal Hak Asasi Manusia.* Vol. 7 Number 1 (p. 43).

Number 26 of 1989 on Government Regulation Number 9 of 1987 on the Provision and Use of Land for Burial Place Purposes whose existence was long before the existence of the Joint Regulation of the Minister of Home Affairs and Minister of Culture and Tourism 43 and 41/2009. The burial place according to Article 1 number 9 is the land area provided for the Funeral Place of the corpse/Skeleton of the Corpse for each person without distinguishing religion and class which is the wealth of the Region. Article 1 number 10 Public Funeral Place/Integrated is a land area provided for the burial place of the corpse/skeleton for each person regardless of religion and class which is the wealth of the area and its management is carried out by the Local Government. Article 1 number 11 of the Block of Public Burial Places is the division of parts of the Integrated Public Burial Place based on religion and class. Then, Article 3 that Integrated Public Cemetery Management Arrangements aim to:

1) use natural resources in the form of land for grave purposes.
2) control the use of land for the purposes of the tomb in accordance with the provisions of spatial, social, cultural and religious aspects.
3) make the burial place as a place of burial that is cool, safe, comfortable, orderly, neat and beautiful.

About funeral of the corpse regulated on Article 12 that everyone who dies in the Regional Area buried in the Integrated Public Cemetery is buried in accordance with the provisions of religion and beliefs. Public Funeral Place is designated as many as 6 (six) blocks, including Muslim Public Cemetery Block, Christian Public Cemetery Block, Block of Catholic Public Cemeteries, Protestant Public Cemetery Block, Buddhist Public Cemetery Block, Block of Hindu Public Cemeteries; and Konghuchu Public Cemetery Block (Article 8 paragraph (1)). The provisions of the Blocks of Public Burial Places as referred to are further regulated by the Head of Office according to the percentage of the population based on their religion and beliefs (Article 8 paragraph (2)); and Banyuwangi Regent Regulation Number 42 of 2017 on Change of Regent of Banyuwangi Number 11 of 2014 on The Provision of Public Funeral Places for Housing and Settlements in the Considering number 1 to number 11 section there is no legal basis for the Joint Decree of the Minister. The Local Regulations also do not regulate Public Funeral Services for Believer.

Legal protection when associated with legal politics as Moh. Mahfud MD thought that the law must provide social justice i.e. the law must be able to provide special protection against the weak in dealing with the powerful, i.e. when dealing with the government and religious leaders as a strong group. Pancasila's legal system installed signs and gave birth to guiding rules in national legal politics. The signs are reinforced by four guiding rules, including the Belief that the law must guarantee religious freedom with tolerance among its people.[15] The protection of the law when it comes to justice as John Rawls that equality can lay out the principles of justice that the law must be a guide in order for a person to take a fair position while paying attention to the interests of his individual, and act proportionately in accordance with his rights and not violate the prevailing law.[16]

Satjipto Rahardjo argues that the law is not an absolute and final institution, because the law lies in the process to continue to be (*law as process, law in making*). When the law is

[15] MD., Moh. Mahfud. (2010). Perdebatan Hukum Tatanegara Pasca Amandemen Konstitusi. Jakarta: Rajawali Pers. In Sukirno. (2019). Politik Hukum Pengakuan Hak atas Administrasi Kependudukan Bagi Penganut Penghayat Kepercayaan. *Administrative Law & Governance Journal.* Vol. 2 Issue 2 (p. 279).

[16] Rawls, John. (1973). *A Theory of Justice* (p. 50-57). London: Oxford University. In Suteki & Taufani, Galang. (2018). Metodologi Penelitian Hukum (Filsafat, Teori dan Praktik) (p. 101). Depok: PT. Raja Grafindo.

not able as to achieve guarantees and maintain various human needs, then the arrangement and reordering of the law becomes important.[17]

Harmonization of existing laws and regulations and the position of Local Laws and Regulations vertically and horizontally in an effort to avoid overlapping arrangements as material for the input of the preparation of philosophical and juridical foundations of provincial, district/city regulations to be established.[18] Harmonization as one of the path towards the national legal system as stated in Article 17 of Act 12/2011 is a legal system that applies in Indonesia with all its elements and supports each other in order to anticipate and overcome problems arising in the lives of national, state, and community based on Pancasila and the 1945 Constitution of the Republic of Indonesia.

The law is the observance of hierarchically regulated legal principles. This can be understood from hans nawiasky's theory of the law. The legal norms of any country are always multilayered and tiered. The norms below are sourced and based on higher norms, higher norms apply sourced and based on even higher norms to the highest norms called Basic Norms. The composition of the hierarchy of legislation becomes one of the important principles in the process and technical preparation of legislation. The types and hierarchy of legislation consist of:

a. Constitution of the Republic of Indonesia year 1945;
b. Provisions of the People's Assembly;
c. Replacement Government Laws/Regulations;
d. Government Regulations;
e. Presidential Regulations;
f. Provincial Regulations; and
g. District/City Regulations.[19]

Vertical harmonization of various regional regulations that do not weigh the Minister's Joint Decision in its provisions aims not to conflict with the provisions above (vertical) especially not contrary to Article 28E paragraph (2) of the 1945 Constitution as a legal protection for Believer in Public Funeral Services. The harmonization is to consider the Joint Regulation of the Minister of Home Affairs and Minister of Culture and Tourism 43 and 41/2009, and to elaborate the provision stipulated to be an obligation for the central government and the local government to be the residence (domicile) of the Believer to provide public burial services for the Believers. It aims to eliminate discrimination on the basis of one's belief in the One God Almighty as mandate of the 1945 Constitution.

The legal issue in Public Funeral Services for the Believers through Local Regulations is the disharmony between the Local Regulations regarding public burial services and the Joint Regulation that the Local Regulations, for example Bandung, Kebumen, Penajam Paser, and Banyuwangi. None of the Local Regulations take into account the legal basis of the Joint Regulation, so implementation for legal protection for Believers will run into problems. Therefore, the local government needs to restructure the Regional Regulations of both provinces and districts/cities that consider the Joint Regulation of the Minister for harmony of legislation through vertical harmonization in accordance with the mandate of Article 28E paragraph (2) of the 1945 Constitution to believe in the Belief in the One God Almighty in accordance with his conscience. For the future, Public Funeral Services should its management be integrated as regulation of The

[17] Rahardjo, Satjipto. (2008). *Membedah Hukum Progresif* (p. 265). Jakarta: Buku Kompas. In Badriyah, Siti Malikhatun. (2016). *Sistem Penemuan Hukum Dalam Masyarakat Prismatik* (p. 2-3). Jakarta: Sinar Grafika.
[18] Appendix I Act Number 12 of 2011 concerning the Formation of Regulation (Act 12/2011).
[19] Fitryantica, Agnes. (2019). Harmonisasi Peraturan Perundang-undangan Indonesia Melalui Konsep Omnibus Law. *Jurnal Gema Keadilan*. Vol. 6 Edition III (p. 306-307).

Regent of Penajam Paser Utara 60/2017 so that there is no discrimination between citizens who have died based on their religion or beliefs.

3.2 Legal protection in Public Funeral Services for the Believers through Local Regulations

Public Funeral Services for Believer should be provided by the government and local government to provide legal protection for the deceased Believers in order to obtain assurance of safety and comfort in believing the Belief in One God Almighty while the Believer are still alive according to their conscience. The protection of the law on human rights is stipulated in Article 28E paragraph (2) of the 1945 Constitution that everyone has the right to believe in belief in accordance with their conscience.

Based on Article 2 paragraph (1) and paragraph (2) in the Joint Regulation of the Minister of Home Affairs and Minister of Culture and Tourism 41 and 43/2009 that the Local Government provides services to the Believer. The services include:

a. administration of the Believer's organization;
b. funeral; and
c. the place of worship or other designations.

Based on Article 8 paragraph (1) Joint Regulation of the Minister of Home Affairs and Minister of Culture and Tourism 43 and 41/2009 that the deceased Believer are buried in a public cemetery. Then in the Article paragraph (2) that in the case that the Burial of the Believer is rejected in public cemeteries originating from *waqf*, the local government provides public burials. The absence of arrangements for the local government to provide public burial places through the word "mandatory" caused legal problems for the Believer that the remains of Believer who were rejected at public burial sites originating from *waqf* would be displaced as was the case in Kebumen Regency.

Article 3 Joint Regulation of the Minister of Home Affairs and Minister of Culture and Tourism 43 and 41/2009 that in providing services to the Believer, the provincial government is obliged to:

a. maintain peace and order including facilitating the realization of community harmony;
b. develop harmony, mutual understanding, mutual respect, and mutual trust between the Believer and the community; and
c. coordinate the activities of vertical agencies and regional devices in the province in the maintenance of harmony between the Believer and the community.

Article 4 that in providing services to the Believer, the district/city government is obliged to:

a. maintain peace and order including facilitating the realization of harmony between the Believer and the community;
b. develop harmony, mutual understanding, mutual respect, and mutual trust between the Believer and the community;
c. coordinate the activities of vertical agencies and regional devices in districts/ cities in service to Believer; and
d. facilities of the Believer cemetery at public burial sites.

Article 3 and Article 4 in the Joint Regulation of the Minister of Home Affairs and Minister of Culture and Tourism 43 and 41/2009 requiring the provincial government and the district/city government to facilitate the burial of the Believer in Public Funeral Places, it is certainly contrary to Article 8 paragraph (2) in the Joint Regulation of the Minister of Home Affairs and Minister of Culture and Tourism 43 and 41/2009 which does not

provide an obligation for the local government to provide a public burial place when the body of the Believer is rejected at a public burial place originating from the *waqf*.

The importance of the arrangement of obligations in the Joint Regulation of the Minister of Home Affairs and Minister of Culture and Tourism 43 and 41/2009 as a statement of the provision of an obligation has been established and if the obligation is not fulfilled the concerned is penalized (Appendix II Number 268 Act 12/2011) to be in line with the Article 28E paragraph (2) of the 1945 Constitution. Based on 20 articles in the Joint Regulation of the Minister of Home Affairs and Minister of Culture and Tourism 43 and 41/2009, there is no provision at all regarding the lifting of sanctions for local government obligations related to services. Therefore, the absence of an obligation arrangement for the central and local governments to provide public burial places and sanctions arrangements led to the disharmonize of the above regulations, namely the 1945 Constitution which affects discrimination of citizens based on a person's beliefs against to One God Almighty.

Discrimination is affirmed in Article 26 of the International Covenant on Civil and Political Rights (Covenant on Human Rights): *"All people are equal before the law and are entitled to equal legal protection, without any discrimination. On this basis, the law prohibits all discrimination and guarantees everyone equal and effective protection against discrimination on any basis such as tribalism, color, gender, language, religion, political views and others, national or social origin, wealth, birth, or other status.".* Discrimination under Article 1 number 3 Act Number 39 of 1999 concerning Human Rights (Act 39/1999) that any restrictions, harassment, or exclusion directly or indirectly is based on human discrimination on the basis of religion, ethnicity, race, ethnicity, group, class, social status, economic status, gender, language, political beliefs, resulting in the reduction, deviation or elimination of recognition, exercise or use of human rights and basic freedoms in the lives of both individuals and collectives in the fields of politics, economics, law, social, culture, and other aspects of life. Based on Constitutional Court Decision Number 070/PUU-II/2004 dated April 12, 2005, the Court states that new discrimination can be said to exist if there are different treatment without reasonable ground reason to make that difference. Precisely if the actual different things are treated uniformly it will lead to injustice. Then, Constitutional Court Decision Number 27/PUU-V/2007, dated February 22, 2008, the Court stated that discrimination is treating differently against the same thing. On the contrary, it is not discrimination to treat differently.[20]

Legal protection in Public Funeral Services for the Believers is manifested in strict rules through the inclusion of the word "mandatory" in the Joint Regulation of the Minister of Home Affairs and Minister of Culture and Tourism 43 and 41/2009 in order to bind central and local governments to provide legal protection for Believers. Therefore, it is necessary to change the Joint Regulation of the Minister immediately which is followed by changes to various Local Regulations related to public burial services for The Person of Faith without any discrimination on the basis of one's belief in the One God Almighty.

[20] Constitutional Court Decision Number 97/PUU-XIV/2016 concerning Judicial Review of Act Number 23 of 2006 concerning Population Administration as amended by Act Number 24 of 2013 concerning Amendment to Act Number 23 of 006 concerning Residency Administration to the Constitution of the Republic of Indonesia Year 1945 (p. 146).

4. Conclusion

The legal issue in Public Funeral Services for the Believers through Local Regulations is the disharmony between the Local Regulations regarding public burial services and the Joint Regulation that the Local Regulations, for example Bandung, Kebumen, Penajam Paser, and Banyuwangi. None of the Local Regulations take into account the legal basis of the Joint Regulation, so implementation for legal protection for Believers will run into problems. Therefore, the local government needs to restructure the Regional Regulations of both provinces and districts/cities that consider the Joint Regulation of the Minister for harmony of legislation through vertical harmonization in accordance with the mandate of Article 28E paragraph (2) of the 1945 Constitution to believe in the Belief in the One God Almighty in accordance with his conscience.

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References

Regulations:

Appendix I Act Number 12 of 2011 concerning the Formation of Regulation (Act 12/2011).

Constitutional Court Decision Number 97/PUU-XIV/2016 concerning Judicial Review of Act Number 23 of 2006 concerning Population Administration as amended by Act Number 24 of 2013 concerning Amendment to Act Number 23 of 006 concerning Residency Administration to the Constitution of the Republic of Indonesia Year 1945.

Books:

Astawa, I Gde Pantja & Na'a, Suprin. (2008). *Dinamika dan Ilmu Perundang-undangan di Indonesia*. Bandung: PT. Alumni.

Human Rights and Equal Opportunity Commission. (1998). *Article 18 Freedom of Religion and Belief*. Sydney: J.S. McMillan Pty Ltd.

Cassese, Antonio (Translator by A. Rahman Zainuddin). (2005). *Hak Asasi Manusia di dunia Yang Berubah*. Jakarta: Yayasan Obor Indonesia.

Suteki. (2013). *Desain Hukum di Ruang Sosial.* Yogyakarta: Thafa Media. In Junaidi, Muhammad. (2018). *Hukum Konstitusi Pandangan dan Gagasan Modernisasi Negara Hukum*. Depok: Rajawali Pers.

Tamanaha, Brian Z. (2004). *Rule of Law in the United States*, and Peerenboom & Randall. (2004). *Asian Discourses of Rule of Law*. London: RoutledgeCurzon. In Harijanti, Susi Dwi. (2011). *Negara Hukum dalam Undang-Undang Dasar 1945, Negara Hukum Yang Berkeadilan: Kumpulan Pemikiran Dalam Rangka Purnabakti Prof. Dr. H. Bagir Manan, S.H., M.CL.* Bandung: PSKN FH UNPAD.

Rawls, John. (1973). *A Theory of Justice*. London: Oxford University. In Suteki & Taufani, Galang. (2018). *Metodologi Penelitian Hukum (Filsafat, Teori dan Praktik)*. Depok: PT. Raja Grafindo.

MD., Moh. Mahfud. (2010). Perdebatan Hukum Tatanegara Pasca Amandemen Konstitusi. Jakarta: Rajawali Pers. In Sukirno. (2019). Politik Hukum Pengakuan Hak atas

Administrasi Kependudukan Bagi Penganut Penghayat Kepercayaan. Administrative Law & Governance Journal. Vol. 2 Issue 2.

Rahardjo, Satjipto. (2008). *Membedah Hukum Progresif*. Jakarta: Buku Kompas. In Badriyah, Siti Malikhatun. (2016). *Sistem Penemuan Hukum Dalam Masyarakat Prismatik*. Jakarta: Sinar Grafika.

Journal Articles:

Yudianita, Feby. (2015). Tinjauan Yuridis Terhadap Aliran Kepercayaan Dihubungkan Dengan Pasal 29 ayat 2 UUD 1945. *JOM Fakultas Hukum.* Vol. 2 Number 2.

Budijanto, Oki Wahyu. (2016). Penghormatan Hak Asasi Manusia Bagi Penghayat Kepercayaan di Kota Bandung. *Jurnal Hak Asasi Manusia*. Vol. 7 Number 1.

Fitryantica, Agnes. (2019). Harmonisasi Peraturan Perundang-undangan Indonesia Melalui Konsep Omnibus Law. *Jurnal Gema Keadilan*. Vol. 6 Edition III..

Website Material:

Akhmad, Hartiz Tryan. (2017). *Kemendagri: Ada 12 Juta Penganut Penghayat Kepercayaan di Indonesia*. Retrieved November 11, 2020, from https://nasional.okezone.com/read/2017/11/14/337/1813772/kemendagri-ada-12-juta-penganut-penghayat-kepercayaan-di-indonesia

Sucahyo, Nurhadi. (2018). *Penghayat Kepercayaan: Setelah Putusan MK dan Kolom KTP*. Retrieved October 29, 2020, from https://www.voaindonesia.com/amp/penghayat-kepercayaan-setelah-putusan-mk-dan-kolom-ktp/4340417.html.

Al-Dawoody, Ahmed & Finegan, Oran. (2020). *Covid-19 and Islamic Burial Laws: Safeguarding Dignity of the Dead.* Retrieved November 11, 2020, from https://blogs.icrc.org/law-and-policy/2020/04/30/covid-19-islamic-burial-laws/

Bantekas, Ilias & Oette, Lutz. (2018). *Regional Human Rights Treaty.* Retrieved November 11, 2020. from https://www.cambridge.org/core/books/international-human-rights-law-and-practice/regional-human-rights-treaty-systems/A275184F9D08DB30DD6D383DB4104556.

Susanto, Bruriy (Ed.). (2020). *60 ribu Warga Jawa Timur Kantongi KTP Penghayat Kepercayaan*. Retrieved November 10, 2020, from https://jatimnet.com/60-ribu-warga-jawa-timur-kantongi-ktp-penghayat-kepercayaan.

Rakhmatulloh. (2017). *Jumlah Penghayat Kepercayaan di Indonesia Capai Ratusan Ribu Orang.* Retrieved November 11, 2020, from https://nasional.sindonews.com/berita/1256823/15/jumlah-penghayat-kepercayaan-di-indonesia-capai-ratusan-ribu-orang.

INMATES ASSIMILATION IN INDONESIA DUE TO COVID-19 AND OTHER COUNTRY'S POLICIES

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ABSTRACT

The policy of the Ministry of Law and Human Rights that frees prisoners from prisons to limit the spread of COVID-19 is a policy that has been taken correctly. However, This policy still has several problems, including in increasing recidivists and also the criminal justice system in Indonesia which still prioritizes retributive justice rather than restorative justice. These problems hamper the effectiveness of the assimilation of prisoners to reduce the spread of COVID-19 in prisons. The main objective of this research is to find out what is the ideal concept to reduce the prisoner population in prisons in terms of limiting the spread of COVID-19. The research method used in this paper is normative juridical, secondary data being the main data. The results showed that law enforcement policies on the status quo were very out of sync, therefore the author initiated two modern concepts that have been known for a while, namely the RNR-Concept and the concept of restorative justice to reduce prisoners in prisons in order to limit the spread of COVID-19 without worrying about recidivists.

***Keyword**: COVID-19, Prison, Prisoners, Policy.*

1. Introduction

Indonesia is one of the 188 countries in the world that cannot be separated from the grip of the corona virus disease-2019 ("COVID-19") pandemic. The first case of COVID-19 in Indonesia was reported on March 1, 2020, and the first death due to COVID-19 infection was recorded on March 11, 2020. Until the end of March, the number of positive patients with COVID-19 was recorded at 1,528 people. At the end of April, there were 10,118 positive patients with COVID-19 and 792 people died. The latest COVID-19 case update from the website of the Indonesian COVID-19 handling task force, namely on August 7, 2020, with 121,226 positive COVID-19 patients and more than 5,500 people died due to COVID-19 infection.

COVID-19 infection that continues to spread forces the government to make policies to deal with this virus. Various policies ranging from economic policies, health policies, social policies, and including legal policies continue to be issued. One of the legal policies issued by the government that attracted enough attention was the policy of assimilation or freeing prisoners in prisons during the COVID-19 period. This policy considers that the condition of prisons which is already overcapacity as of March 7, 2020, was recorded by the Directorate General of Corrections at 104% (Risyal Hardiyanto Hidayat, 2020). This condition is prone to the spread of COVID-19 because it is difficult to carry out physical distancing in prisons, plus the quality of poor hygiene and sanitation is commonplace in prisons.

In this context, the spread of COVID-19 into prisons has been noted by the Director-General of Corrections at the Ministry of Law and Human Rights. Reports of COVID-19 infection in prisoners until the end of June recorded more than 100 prisoners infected with COVID-19. 106 positive people came from the Class II-A Women's Prison in Sungguminasa, South Sulawesi, there were also 35 positive people for COVID-19 at the Pondok Bambu detention center in East Jakarta (Padmasari, 2020).

The spread of COVID-19 inside the prisons should not be a surprise anymore. This is because in 1918 there was also a Spanish Flu virus infection in the San Quentin Prison, California, this virus infection began with the transfer of a sick prisoner from a prison in Los Angeles and eventually resulted in the spread of the virus infection to half of the total prison population in San Quentin Prison California. Hawk in his article published in JAMA Internal Medicine explains that the only way to avoid the current outbreak is to drastically reduce the population in prison, including reducing unnecessary administration and speeding up the release of prisoners (Laura Hawks, Steffie Woolhandler, 2020). This policy seems to be imitated and implemented by several countries infected with COVID-19, including Indonesia. The assimilation policy of prisoners during the COVID-19 pandemic was issued by the Ministry of Law and Human Rights of the Republic of Indonesia ("Kemenkumham") in several policies, namely:

a. Regulation of the Minister of Law and Human Rights of the Republic of Indonesia Number 10 of 2020 concerning Conditions for Providing Assimilation and Integration Rights for Prisoners and Children in the Context of Preventing and Combating the Spread of COVID-19;
b. Decree of the Minister of Law and Human Rights of the Republic of Indonesia Number M.HH-19.PK.01.04.04 of 2020 concerning the Release and Release of Prisoners and Children through Assimilation and Integration in the Context of Preventing and Combating the Spread of COVID-19; and
c. Circular PAS-497.PK.01.04.04 of 2020 concerning the Release and Release of Prisoners and Children through Assimilation and Integration in the Context of Prevention and Combating the Spread of COVID-19.

However, the main concern is that the assimilation policy of prisoners when analyzed is very contradictory to the policy issued by the Supreme Court of the Republic of Indonesia ("MARI") regarding the acceleration of criminal proceedings via teleconference. This policy was issued by MARI through the Letter of the Director-General of the General Courts Number: 379 / DJU / PS.00 / 3/2020 of 2020 concerning Criminal Case Trials by Teleconference. This policy, when viewed from a legal aspect, is actually not wrong, but in practice in court, teleconference hearings are actually carried out more for minor criminal proceedings, where law enforcement can be resolved by non-litigation without having to prioritize retributive justice. Thus, these two law enforcement policies are contradictory because, on the one hand, the Ministry of Law and Human Rights seeks to inhibit the spread by releasing prisoners who are still in prisons, but on the other hand, there are MARI efforts to increase the population of prisoners in prisons by speeding up criminal trials by teleconference.

Data from the Attorney General's Office of the Republic of Indonesia notes that general criminal trials conducted by teleconference from March 30 to July 6 2020 recorded at least 176,912 online trials (Handoyo, 2020). Given that the crime rate in Indonesia during the COVID-19 pandemic, which increased by 11.8%, was due to high unemployment and difficulty finding work (Yas, 2020). Thus, the policy of freeing

prisoners and the policy of accelerating criminal proceedings via teleconference is very out of sync and can be said to have not been maximized to be able to help limit the spread of the COVID-19 pandemic in prisons.

This crucial point is then interesting for the author to discuss, the main problem of this research is how to reduce the population of prisoners in correctional institutions in Indonesia. To study more deeply, the author will discuss how policies carried out by countries other than Indonesia in reducing prisoners during the COVID-19 pandemic? Then what is the ideal concept to reduce prisoners in prisons during the COVID-19 pandemic in Indonesia?

2. Methods

The type of research used is literature research or literature review, using two approaches, namely the conceptual approach and the statute approach. The analysis technique used on the materials that have been collected to solve the problems raised in this research is to use descriptive techniques and qualitative interpretation.

3. Results and Discussion

3.1 How Countries Around The World Reducing Prisoners Due To COVID-19

High Commissioner for Human Rights for the United Nations ("UN") Michelle Bachelet in a press release on March 25 2020, stated that the State must protect people who are in detention from the COVID-19 pandemic by releasing prisoners who are vulnerable to Covid. -19 (Nicholson, 2020). The UN Subcommittee on the Prevention of Torture also calls on governments to reduce the prison population and other populations of places of detention where possible, by making use of the early release or temporary release of prisoners where possible (Murphy, 2020). Non-governmental organizations Human Rights Watch recommends that governments around the world act quickly to reduce the prison population in prisons, by prioritizing release to (Murphy, 2020):

a. Prisoners who were convicted of minor crimes
b. A prisoner whose sentence is running out
c. Child prisoners, the elderly, and people susceptible to disease.
d. A prisoner whose sentence has not been decided by a court, except for a person who has committed a serious crime that could endanger the life of others.

The United States and its states have implemented a policy of releasing prisoners from prison due to COVID-19. At least, more than 86,000 prisoners across the states of the United States have been infected with COVID-19, 805 of whom have died (Solomon, 2020). Therefore, the United States government took a policy to release more than 100,000 people in all prisons in the states in the United States around the middle of March to the end of July (King, 2020). Meanwhile, for criminal proceedings, several states such as California, Delaware, Idaho, North Carolina, and others have stopped and postponed criminal cases whose trials have not started at all (Gershman, 2020).

Countries in the Asian Continent have also done the same thing, with a high population density, the prisons in countries in the Asian continent are prisons with the highest level of Overcapacity Prisons after countries in South America. Thus, forcing governments in the countries of the Asian Continent to take action to free prisoners who are in prison to limit the spread of COVID-19. These policies are taken by the following countries:(Ann, 2020)

Table 1: The Release of Prisoners in Countries Around the Asian Continent

No.	Country Name	Amount of Prisoners Released	Release Methods
1.	Afghanistan	22.399	Early Release
2.	India	± 17.000	Bail and/or Parole
3.	Iran	85.000	Early Release
4.	Myanmar	24.896	Amnesty
5.	Filipina	9.731	Early Release
6.	Saudi Arabia	250	Early Release
7.	Thailand	8.000	Temporary Release

After the Asian Continent, countries around the African Continent on average have implemented policies to fight the spread of COVID-19 by releasing prisoners in prison, including (Ann, 2020):

Table 2: The Release of Prisoners in Countries Around the African Continent

No.	Country Name	Amount of Prisoners Released	Release Methods
1.	**Algeria**	**5.037**	**Amnesty**
2.	**Kamerun**	**1.000**	**Unavailable**
3.	**Congo**	**2.000**	**Release**
4.	**Etiopia**	**4.011**	**Pardons or Reprieves**
5.	**Mesir**	**4.001**	**Pardons or Reprieves**
6.	**Ghana**	**808**	**Amnesty**
7.	**Yordania**	**1.500**	**Early Release**
8.	**Kenya**	**4.800**	**Early Release**
9.	**Libya**	**466**	**Early Release**
10.	**Mali**	**1.200**	**Pardons or Reprieves**
11.	**Maroko**	**5.654**	**Pardons or Reprieves**
12.	**Mozambik**	**5.032**	**Amnesty**

14.	**Nigeria**	**± 50.000**	**Early Release**
15.	**Senegal**	**1.846**	**Pardons or Reprieves**
16.	**Sudan**	**4.217**	**Early Release**
17.	**Tunisia**	**1.420**	**Amnesty**
18.	**Uganda**	**2.000**	**Pardons or Reprieves**
19.	**Zimbabwe**	**1.680**	**Pardons or Reprieves**

Meanwhile, for countries on the European Continent, some of them have also reduced their prisoner populations to limit the spread of COVID-19, such as (Ann, 2020):

Table 3: The Release of Prisoners in Countries Around the European Continent

No.	Country Name	Amount of Prisoners Released	Release Methods
1.	**England Wales**	**± 4.000**	**Early Release**
2.	**French**	**5.000-6.000**	**Early Release**
3.	**Ireland**	**± 300**	**Temporary Release**
4.	**Italy**	**± 200**	**Temporary Release**
5.	**Germany**	**1.000**	**Early Release**
6.	**Norway**	**194**	**Early Release**
7.	**Turkey**	**90.000 – 100.000**	**Early Release or House**
8.	**Poland**	**9.000 – 12.000**	**Emergency Release under**

From the countries of the European Continent mentioned above, there is one country that has implemented quite an interesting policy to limit the population of prisoners in correctional institutions, namely Germany. The German Ministry of Justice has ordered the German Prosecutor's Office to be able to select criminal cases which can be cleared without requiring a trial and which criminal cases should be tried. Whereas for criminal cases that can be released without trial, only apply to cases with the type of minor crime. The release was followed by a penalty or fine which the perpetrator had to pay through the post office. If the perpetrator objects to the amount of the fine given, he can file an objection to the court (Travers , Daniel, 2020).

3.2 The Need to Reduce the Population of Prisoners in Prisons during the COVID-19 Outbreak

According to data from the World Prison Population, the number of prisoners worldwide has increased by 25-30%. In 2018, World Prison Population data recorded that more than 10 million people worldwide became prisoners. These data indicate that the prisoner population worldwide is always increasing. In Indonesia, the population of prisoners is always increasing rapidly every year, but the capacity of prisons to accommodate prisoners tends to be static. This is what causes the overcapacity of prisons

to never be resolved, the data shows that each year the percentage of overcapacity in prisons always increases, this can be seen from the following table (Zulfikri, 2020):

Table 4: Overcapacity of Correctional Institutions in Indonesia

No	Year	Prisoners	Capacity	Percentage
1.	2015	176.754	119.797	147%
2.	2016	204.551	119.797	170%
3.	2017	232.081	123.481	188%
4.	2018	256.273	126.273	202%
5	2019	269.846	130.512	206%

Prisons with overcapacity are very susceptible to the spread of disease, this is due to the imbalance between the capacity of the correctional facilities and prisoners. As a result, the room became full of inmates and increased the prisoner's vulnerability to diseases, especially infectious diseases. In fact, there are quite a several prisoners in correctional institutions whose health conditions are very poor and suffer from diseases, such as high blood pressure, asthma, cancer, tuberculosis (TBC), hepatitis C, and HIV, making them very vulnerable to infectious diseases (Kathryn Nowotny, Zinzi Bailer, Marisa Omori, 2020).

At the time of the 1918 Spanish Flu infection, officers at the San Quentin Prison in California said that the task of stopping the spread of the Spanish Flu virus in prisons was a suicide task. Three waves of the spread of Spanish Flu hit the prison, and taught officials that the infectious disease is transmitted through close physical contact. The inmates were given masks, but soon they threw away the masks. Several other methods were carried out to limit the spread of Spanish Flu in the San Quentin prison, but in the end the prison became an incubator or a place to spread the Spanish Flu virus (Brenda Rose, Francis T. Cullen, 2020).

The same thing will also happen to prisons in Indonesia if during the COVID-19 pandemic the Indonesian government does not reduce the population of prisoners in prisons. Prison overcapacity can reach to 300% or even 500%, for example in the Banjarmasin Prison with a room capacity that can be occupied by 366 inmates, 2,688 inmates (overcapacity level of 644%), Tarakan Prison with a room capacity that can be occupied by 155 inmates but instead inhabited by 996 inmates (overcapacity level of 650%), the Labuan Ruku Prison with a room capacity that can be occupied by 300 inmates but instead is inhabited by 1,770 inmates (overcapacity level of 640%), the Bagan Siapi Api Prison with a room capacity that can be occupied by 98 prisoners but instead inhabited by 810 inmates (overcapacity level of 836%) (Zulfikri, 2020).

With an overcapacity level of more than 300%, various prisons throughout Indonesia will become a new cluster for the spread of COVID-19. Fortunately, the Indonesian government through the Ministry of Law and Human Rights has issued a policy to release prisoners who can meet the conditions for release. Even so, law enforcers still include new convicts but on the one hand also release prisoners who are currently serving sentences in prisons. Thus, the prisoner population has only decreased

slightly or not at all, given the increase in the number of criminal acts during the COVID-19 pandemic. Therefore, an emergency policy is needed in the context of the release of prisoners and the context of new convictions during the spread of the COVID-19 pandemic.

3.3 Ideal Concept To Reduce Prisoners During COVID-19a. Policy of Reducing Prisoners from Penitentiary Law Point of View

Release of prisoners or assimilation in prisons is basically a part of the penitentiary law study. Penitentiary law literally has the meaning of all positive regulations regarding the punishment system (strafstelsel) and the system of action (matregelstelsel). According to E. Utrecht, penitentiary law is part of a positive criminal sentence, namely the part that determines (Remmelink, 2017):

a. Types of sanctions for violations, in this case against the Criminal Code and other sources of criminal law (Criminal law containing criminal sanctions and non-criminal laws containing criminal sanctions);
b. The severity of the sanction;
c. The length of time the sanction will be served;
d. How the sanctions are implemented, and
e. Where the sanction is exercised.

The subject matter that is discussed in penitentiary law is dealing with convictions, the criminal process and the convict. Most of the penitentiary studies locus are in the correctional institutions. History records that exactly 27 April 2020, 56 years of age of the Indonesian Penitentiary will be completed. Social reintegration is defined as the goal of correctional facilities, which is then confirmed in Law Number 12 of 1995 concerning Corrections. At the age of 56 this year, the Corrections still face various weaknesses. The public also does not understand well what is being done and what is the purpose of the Corrections. The biggest thing that still holds up is the strong sentiment of punishing and the desire to make them suffer (Utang Rosidin, Abdurrahman, Irsan Nasution, 2020).

The existence of the Correctional Law is actually the existence of normative law of penitentiary law. Where the penitentiary law provides regulations regarding the implementation of crimes and provides a basis in determining what types of sanctions should be given for a criminal act committed, how heavy the sanctions are, and how long the sanctions must be suffered by the perpetrator, or talking about how and where the sanctions are carried out.

Basically, the process of treating prisoners in the correctional system includes (Utang Rosidin, Abdurrahman, Irsan Nasution, 2020):

a. Guidance in the form of direct kinship interaction between the coach and the fostered;
b. Persuasive coaching, namely by trying to change the behavior of prisoners by exemplary;
c. Coaching in a planned, continuous and systematic manner;
d. Personality development in the form of increasing awareness of religion, nation and state, intellectual, intellectual, legal awareness, skills, mental and spiritual aspects.

Based on the Circular of the Head of the Correctional Directorate Number K.P10.13 / 3/1 dated February 8, 1965 concerning Corrections as a Process in Indonesia, the method used in the correctional process involves 4 (four) stages, which is an integrated process, namely (Priyanto, 2006):

a. Orientation/Introduction Stage

For residents of a correctional facility who enter the prison, they are first examined to find out everything about the prisoner, the factors or motives for committing a crime, where is the address, what is his economic situation, the aspect of education he received, and so on.

b. The Assimilation Stage in a Narrow Meaning

In this stage of assimilation, inmates have carried out guidance that runs less than 1/3 of the length of the sentence. In this phase, it is carried out by placing prisoners in open prisons, so that the prisoners can move freely with minimum safety standards. Through this program, prisoners have begun to be burdened with responsibility for the community. Apart from that, in this process, a sense of respect for both oneself and for others has begun to be instilled, manners, to regain people's trust and change their attitude towards prisoners. The frequency of interaction with the public is further enhanced, for example using a social community service program for the general public. At this stage, activities are held that involve various elements of society. This process lasts up to 1/2 of the length of the sentence the prisoner actually has to accept.

c. The Assimilation Stage in a Broad Meaning

This phase begins when the prisoners have undergone less than half of their criminal period, after which the training process is expanded to begin assimilating prisoners into the life of the outside community, such as participating in schools, carrying out work in institutions both public and private institutions, freeing to carry out worship activities and exercise with the community and others. At that time, the ongoing activities were still under the supervision and guidance of prison officials. At this level, the level of security that is applied is minimal, while the period of detention that prisoners have served is 2/3.

d. Integration Phase to the Community

This phase is the final phase of the coaching implementation process known as integration. If this process from observation to integration runs smoothly and well and the effective detention period is 2/3 or at least 9 months, then the prisoners can get "parole" or "conditional leave" at this stage the coaching process is carried out in the form of a larger community while less and less surveillance so that prisoners can eventually live with the community. Thus it is clear that assimilation in the implementation of punishment or penitentiary law is a stage of the correctional process.

3.4 Reducing Prisoners with the RNR (Risk Need Responsivity) approach

The theoretical and empirical concept of Risk-Need-Responsivity (RNR) is the approach taken to prisoners. This model requires trained practitioners to use validated assessment instruments to identify the risks and needs of prisoners to be released. In this case, risk refers to the level of supervision and service to be provided to prisoners as well as the possibility of recidivism (repetition of a crime) by the prisoner. Based on this, prisoners identified as high risk will be closely accompanied and will receive the most

medical services. In contrast, prisoners who are identified as being at low risk will receive less monitoring and treatment services (Brenda Rose, Francis T. Cullen, 2020). This answers problems and questions in society who doubt the policy of releasing prisoners, who think that releasing prisoners will actually increase the percentage of crime.

Concerning determining the type of risk of a prisoner, the instruments that become the assessment are the criminal activity of the prisoner, for example, criminal history, education/work, use of illegal drugs, attitudes of prisoners in society, personality, activities while in prison, and problems. family and/or marriage (Wormith, 2011). The RNR concept considers the risks and needs of offenders and then matches them with treatment services designed to target the reduction of criminogenic (the likelihood of a repeat offense) and reducing the prisoner's risk level (Wormith, 2011).

Beside that, there are also two important considerations for assessing prisoner risk. First, the type of crime does not always reflect the level of risk of a prisoner. Although the criminal-record of a prisoner is considered important, it does not fully determine the threat of a prisoner to public safety (Wormith, 2011). Second, the level of prisoner risk is dynamic, not static. That is, the risk of prisoners being imprisoned in society can change at any time. Prisoners who went to prison years and even months ago may not have the same likelihood of committing a repeat offense. This is what makes the use of two-sided judgments important. In fact, carrying out a risk assessment while inmates are in prison can provide actual information about which prisoners belong to a low-risk group of prisoners and which are high-risk (Wormith, 2011).

In the context of COVID-19, the use of the RNR concept with a risk assessment to identify which prisoners are targeted for release is very relevant to be applied in Indonesia, as the Indonesian state seeks to slow the spread of COVID-19 by releasing prisoners while reducing the risk of released prisoners repeating criminal act.

The challenge for the Ministry of Law and Human Rights is how to determine the prisoners who will be released into the community without endangering the community itself. Low-risk prisoners are prisoners who are priority candidates for release, whereas high-risk prisoners are certainly not a priority. Even so, it is necessary to synchronize the policies that have been issued by the Ministry of Law and Human Rights, whereby convicts of terrorism, narcotics, and precursors of narcotics, psychotropic drugs, corruption, crimes against state security and serious human rights crimes, as well as transnational organized crimes and foreign nationals are excluded. to be released.

The release of prisoners will certainly reduce the population in prisons that are overcapacity and will allow prison officials to be able to implement social restrictions, use COVID-19 hygiene protocols, and modify other practices to limit the spread of COVID-19 in prisons.

3.5 Restorative Justice as the Answer

The Ministry of Law and Human Rights Policy as a law enforcer that reduces the prisoner population by releasing prisoners from prisons is an appropriate policy to limit the spread of COVID-19 in prisons. However, this policy becomes useless if law enforcers such as police, prosecutors, and judges are still conducting criminal proceedings via teleconference, again if the criminal trial is for criminal cases that can actually be resolved by promoting a sense of justice.

Some criminal cases can be resolved without criminal proceedings in court, for example, the case of Grandpa Urip who stole a bicycle in Surabaya because he did not have money to eat (Santoso, 2020). The case has been decided by the Surabaya District Court in decision number: 813/Pid.B/2020/PN.Sby. As a result, Grandpa Urip was sentenced to 5 months in prison, even though in fact Grandpa Urip's case could be resolved by way of restorative justice by returning the stolen goods to the victim. However, law enforcers (police, prosecutors, and judges) continue to delegate the case to the court by conducting criminal teleconference hearings. The next example is Grandpa Sujarwo, who stole Rp. 7,000 (seven thousand rupiah) to buy food. The law enforcer continued the case to court and made Grandpa Sujarwo detained because of the case (Iswara, 2020).

In fact, law enforcers do not need cases to be prosecuted to court. Because basically, these cases are only small cases whose solutions can be done through the concept of restorative justice. The background of the thought regarding the concept of restorative justice or better known as restorative justice arises from the reactions given by criminal law experts regarding the negative impact of the current criminal law enforcement which tends to be retributive (prioritizing retaliation). In addition, the use of a retributive paradigm has not been able to recover the losses and sufferings experienced by victims, even though victims are the most disadvantaged as a result of a crime.

The restorative justice approach seeks to return the conflict (the result of the crime) to those most affected (victims, perpetrators, and 'their communities') and give priority to their interests. The restorative justice approach seeks to restore victim security, personal respect, dignity, and more importantly a sense of control (Waluyo, 2017). By adopting the paradigm of restorative justice, it is hoped that the losses and suffering suffered by victims and their families can be healed and the burden of guilt for the perpetrators of crime can be reduced because they have received forgiveness from the victim or their family. In addition, it is also hoped that it can bring peace to the community of each party so that it does not cause prolonged revenge in the future, both between the victim and the perpetrator and between each community (Waluyo, 2017).

The concept of restorative justice is dynamic, meaning that restorative justice can be applied to all law enforcement stakeholders such as police, prosecutors, and judges. The application of the concept of restorative justice starting from the investigation (Police), prosecution (Attorney), and trial examination (Judge) takes the following forms:

a. Restorative justice in the context of investigation (Police)

The police are the gatekeepers of the criminal justice system. Its role as a criminal investigator places the police in contact with most criminal acts. Thus, the role of the police greatly determines whether a crime will be continued through the litigation or non-litigation channels with the concept of restorative justice. The application of restorative justice by the police can be carried out through discretionary action. Discretion itself is a policy taken by the government to solve a concrete problem at hand. The discretion for the police has a legal basis, namely in Article 18 of Law Number 2 of 2002 concerning the Indonesian National Police. The regulation on police discretion in Article 18 of Law Number 2 Year 2002 has actually provided a juridical basis for the police as investigators to apply the concept of restorative justice in handling criminal cases. With the discretion of the National Police investigator being able to choose various

actions in resolving criminal cases being handled, one of the actions that can be taken in the application of restorative justice is to place the victim at a central point in resolving criminal cases and moving away from imprisonment, but the perpetrator is still held accountable. The output from the application of restorative justice at the investigation stage itself is in the form of a Peace of the Parties and an Order to Stop Investigation (SP3).

b. Restorative justice in the context of prosecution (Attorney)

Prosecution as a subsystem of the criminal justice system also has a strategic position in realizing the concept of restorative justice. In general, restorative justice can relate to every stage of the exercise of the prosecutor's authority, starting from detention, pre-prosecution, preparation of charges, and criminal charges in court. The most extreme condition for the role that the prosecutor can play in the application of restorative justice is diverting/diversifying prosecutions to reach out-of-court case resolution in cases of minor criminal acts. Diversion or diversion of prosecution can take the form of parole, simplification of procedures, and decriminalization of certain behaviors.

c. Restorative justice in the context of court hearings (Judges)

Court hearings in criminal cases in Indonesia based on the Criminal Procedure Code (KUHAP) are basically not designed to resolve cases interpersonal (mediation of the parties). The design is built in the criminal justice system in Indonesia, namely the court functions to determine whether the criminal law has been violated and if it is violated, the perpetrator is sentenced to crime, or if not violated, the defendant is released or released from all charges. The traditional role of the court is clearly different, even contrary to the concept of restorative justice, which aims to restore balance in social relations as well as the outcome of the judicial process, namely a mutually acceptable compromise between the victim, the community, and the perpetrator of a crime or crime. In other words, traditionally having an "adjudicative" character, the concept of restorative justice offers a "negotiation" model (Purba, 2017).

Restorative justice which adheres to a different principle from court hearing is the most obvious problem at this level. In the context of the Indonesian criminal justice system, the provisions regarding "openness" have been very firmly and clearly regulated in the Criminal Procedure Code, which is derived from the principle of "open court hearing to the public". Meanwhile, the meeting model from the concept of restorative justice is usually compiled privately and only with interested parties, so the problem is how judges and legal advisors judge that the interests of each party are respected (Purba, 2017).

More broadly, this relates to the judge's ability to design a model for meetings between parties in a forum that is not a "trial hearing" for criminal cases. Thus, judges are required to use strategies or manage the settlement of criminal cases by selecting and offering suitable alternative models (Purba, 2017).

Based on the results of research conducted by Eva Achjani Zulfa, as many as 82% of respondents stated that peaceful efforts were the main choice in resolving problems arising from criminal acts that occurred. The peace initiative came from relatives (43%), security forces (35%), and the rest came from friends or opponents. The peace efforts were not only in the form of compensation but mostly through direct apologies (Zulfa, 2012).

The settlement of criminal cases by law enforcers outside the court using a restorative justice approach during the COVID-19 pandemic will have the implication of a reduction in potential prisoners in prisons and detention centers. With the reduction in prison residents, it means that the settlement of criminal cases out of court using restorative justice plays a role in overcoming the problem of the spread of the COVID-19 pandemic in overcapacity prisons. Also, with the settlement of cases out of court, this can not only solve the problem of the spread of COVID-19 in prisons but also save the state budget.

Based on the descriptions above, it is clear that the settlement of criminal cases through the restorative justice approach during the COVID-19 pandemic has an advantage over the settlement of a conventional criminal justice process. A complete comparison of the mechanism for solving cases through conventional criminal justice processes and restorative justice can be seen in the following table:

Table 5: Comparison of Criminal Case Settlement through Conventional Criminal Justice and Criminal Case Settlement through a restorative justice approach

Aspect	Mechanism of Case Settlement	
	Criminal Court	**Restorative Justice**
Purpose	Tackling and Controlling Crime	To seek resolution
Process	Proving fault and punish perpretator	To seek mutual agreement between the parties
Barometer of Success	The number of cases processed and the penalties that were given.	If both parties agreed
Compatibility of the Sense of Justice	Longer time, More complicated and High-priced	Faster time, simple mechanism, and lower priced
Characteristics of Settlement	Retaliation, Compulsion and Perpretator need to suffer	Forgiveness, Volunteer and To fix all parties
Form of Settlement	Win-Lost solution	Win-Win solution
Main Purpose	Integrate perpretators back society to become good citizens	Restoring social relations between stakeholders

Thus, the implementation of the RNR-Concept idea of reducing prisoners in prisons and at the same time applying the concept of restorative justice as an alternative to solving

criminal cases, according to the author, can be of benefit to limit overcapacity in prisons which can lead to the rapid spread of the COVID-19 pandemic. On the one hand, releasing prisoners with the RNR-Concept can prevent the possibility of recidivism (repetition of criminal acts) and reduce the level of community risk. On the other hand, the criminal settlement with restorative justice can reduce the number of prisoners who will live in prisons. Therefore, these two concepts are more synchronous and in line with law enforcement policies that continue to release prisoners but continue to accelerate criminal proceedings through teleconferences and continue to print new prisoners to be admitted to correctional institutions.

4. Conclusion

Conflicting law enforcement policies in limiting the spread of the COVID-19 pandemic in prisons make these policies out of sync and the results are ineffective. Therefore, the author initiated the RNR-Concept to free prisoners and the concept of restorative justice as an alternative to criminal settlement through criminal proceedings to reduce the number of prisoners. The idea of releasing prisoners with the RNR-Concept basically measures the risk of the prisoner before he is released, this risk is based on the criminal activity of the prisoner and his criminogenic level. Meanwhile, the concept of restorative justice serves as a substitute for the criminal trial process through teleconference, this concept puts forward non-litigation resolution without criminal retribution and of course, still takes into account the rights of the victim. Thus, the concept of restorative justice implies a reduction in prisoner candidates in correctional institutions.

References:

Books:

Priyanto, D. (2006). Sistem Pelaksanaan Pidana Penjara di Indonesia.

Purba, J. (2017). Penegakan Hukum Terhadap Tindak Pidana Bermotif Ringan Dengan Restorative Justice.

Remmelink, J. (2017). Pengantar Hukum Pidana Material 3: Hukum Penitensier.

Waluyo, B. (2017). Desain Fungsi Kejaksaan Pada Restorative Justice.

Journal articles:

Brenda Rose, Francis T. Cullen, H. L. (2020). Targeted Release in the Covid-10 Correctional Crisis: Using the RNR Model to Save Lives. *American Journal of Criminal Justice*, *4*, 769.

Kathryn Nowotny, Zinzi Bailer, Marisa Omori, L. B.-R. (2020). COVID-19 Exposes Need for Progressive Criminal Justice Reform. American Journal of Public Health, 9, 939.

Hawks L, Woolhandler S, McCormick D. (2020). COVID-19 in Prisons and Jails in the United States. JAMA Intern Med.;180(8):1041–1042.

Risyal Hardiyanto Hidayat. (2020). Langkah-langkah Strategis Untuk Mencegah Pandemi COVID-19 di Lembaga Pemasyarakatan Indonesia. Jurnal Pendidikan Kesehatan, 9, 43.

Utang Rosidin, Abdurrahman, Irsan Nasution, and D. R. G. (2020). Kebijakan Asimilasi dan Hak Integrasi Narapidana di Tengah Pandemi COVID-19 Perspefktif Hukum Penitensier.

Wormith, D. . A. and J. B. and J. S. (2011). The Risk-Need-Responsivity (RNR) Model: Does Adding the Good Lives Model Contribute to Effective Crime Prevention? Criminal Justice and Behaviour, 38, 735.

Zulfa, E. A. (2012). Keadilan Restoratif di Indonesia: Studi Tentang Kemungkinan Penerapan Pendekatan Keadilan Restoratif Dalam Praktek Penegakan Hukum Pidana.

Zulfikri, E. I. (2020). Prevention Strategy of COVID-19 in Indonesian Prisons. International Journal of Engineering Applied Sciences and Technology, 5.2, 37.

Website material:

Ann, M. (2020). Prisoner releases by country/ jurisdiction - Transform Drug Policy Foundation. Retrieved October 27, 2020, from https://transformdrugs.org/prisoner-releases-by-country-jurisdiction/

Gershman, J. (2020). Coronavirus Disrupts U.S. Court System - WSJ. Retrieved October 27, 2020, from https://www.wsj.com/articles/coronavirus-disrupts-u-s-court-system-11584445222

Handoyo. (2020). *Kejagung sebut ada 176.912 sidang online tindak pidana umum selama pandemi COVID-19*. Retrieved from https://nasional.kontan.co.id/news/kejagung-sebut-ada-176912-sidang-online-tindak-pidana-umum-selama-pandemi-COVID-19

Iswara, N. (2020). Kakek Curi Uang Infak Rp 7000, Ngaku untuk Beli Makan, Divonis Salah oleh Pengadilan, Ini Faktanya - Tribunnewsmaker.com. Retrieved October 27, 2020, from https://newsmaker.tribunnews.com/2020/07/10/kakek-curi -uang-infak-rp-7000-ngaku-untuk-beli-makan-divonis-salah-oleh-pengadilan-ini-faktanya

King, J. (2020). Coronavirus US: 18,000 inmates could be released early | Daily Mail Online. Retrieved October 27, 2020, from https://www.dailymail.co.uk/news/article-8604793/Nearly-18-000-California-inmates-including-murderers-released-early-coronavirus.html

Murphy, J. (2020). COVID-19 Prisoner Releases Too Few, Too Slow | Human Rights Watch. Retrieved October 27, 2020, from https://www.hrw.org/news/2020/05/27/COVID-19-prisoner-releases-too-few-too-slow

Nicholson, C. (2020). UN urges prisoner releases to stem spread of coronavirus. Retrieved October 27, 2020, from https://www.france24.com/en/20200325-un-urges-prisoner-releases-to-stem-spread-of-coronavirus

Padmasari, S. I. (2020). *110 Warga Binaan Positif COVID-19, Lapas Perempuan di Gowa Tak Terima Narapidana | merdeka.com*. Retrieved from https://www.merdeka.com/peristiwa/110-warga-binaan-positif-COVID-19-lapas-perempuan-di-gowa-tak-terima-narapidana.html

Santoso, B. (2020). Tak Ada Duit untuk Belanja, Kakek Urip Nekat Curi Sepeda Milik Tuliyem-Suara Jatim. Retrieved October 27, 2020, from https://jatim.suara.com/read/2020/05/05/074106/tak-ada-duit-untuk-belanja-kakek-urip-nekat-curi-sepeda-milik-tuliyem

Solomon, A. (2020). A State-by-State Look at Coronavirus in Prisons | The Marshall Project. Retrieved October 27, 2020, from

https://www.themarshallproject.org/2020/05/01/a-state-by-state-look-at-coronavirus-in-prisons

Travers , Daniel, and M. S. (2020). Criminal proceedings in Germany during the COVID-19 pandemic - Lexology. Retrieved October 27, 2020, from https://www.lexology.com/library/detail.aspx?g=92acbf34-58bb-4d42-a157-2a0fe584e950

Yas. (2020). Layoffs, crimes on the rise in Indonesia as large-scale social distancing measures take effect - The Online Citizen. Retrieved October 27, 2020, from https://www.onlinecitizenasia.com/2020/04/24/layoffs-crimes-on-the-rise-in-indonesia-as-large-scale-social-distancing-measures-take-effect/

ANALYSIS OF THE U.S.A REFUGEE POLICY FROM INTERNATIONAL REFUGEES LAW PERSPECTIVE

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ABSTRACT

Under Trump's administration, U.S.A undergoes a drastic and radical change in immigration and refugee policy to make it harder for immigrants, asylum seekers, and refugees to enter the country. One of his many controversial moves was the signing of an Executive Order that bans the entry of citizens from 7 countries with predominantly a large Muslim population. The most controversial policy in regards to immigration and refugees is the dreadful condition of the Federal Immigration Detention Center which houses a large number of immigrants including children. Children detained in the Detention Center didn't have adequate health and sanitary access and facilities including no vaccination, no soap, no toothbrush, and no mattress to sleep. This article aims to answer the question about the "inhumanity" of Trump's policies from international law perspective and to determine whether the so-called "voluntary return" violates international treaties especially the UDHR, the ICCPR, and the Refugee Convention. This article will use the statute and case approach along with the library research method to collect all data necessary to address the issue. The collected data is analyzed further using the deductive syllogism method.

Keyword: Asylum Seekers, International Law, Refugees, Trump's Policy

1. INTRODUCTION

Since Trump took office as the 45th President of the United States of America replacing former President Obama, Trump and members of his administration have often issued controversial policies in various fields including immigration and asylum. One such policy that caused controversy was the signing of the Executive Order on January 27, 2017, which regulated a travel ban for citizens of 7 countries, which are predominantly Muslim. This Executive Order didn't only ban the individual from the seven countries from entering the US for 90 days but also ban individuals from entering the country as refugees for 120 days (Daugirdas & Mortenson, 2017). Apart from being criticized by the United States public, especially from the opposition and human rights activist, this policy also received a less positive response from many world leaders. Trump also issued various immigration policies that tightened and made it difficult for asylum seekers who came from Latin America through a policy called "Migration Protection Protocols" or popular as "Remain in Mexico Policy". The policy, which has been in effect since January 2019, has resulted in more than 50,000 asylum seekers from Latin

America having to return to Mexico with uncertain time limits while awaiting a decision on their asylum request.

Besides, Trump has been widely criticized because, under his administration, asylum seekers who are on the southern border are treated like criminals. The asylum seekers are being placed in holding facilities that the media and senators say are "more like a prison than a detention center" (Brustin, 2019). In September 2020, a nurse who worked at the Federal Immigration Detention Center in Irwin, Georgia, filed a whistle-blower complaint, which detailed the circumstances of the asylum seekers and refugees who were held there (Barbato, 2020). She said, in her statement, that the adult women detained in the detention center were subject to hysterectomy and gynecological examination without her request or consent.

There are also problems regarding children who seek asylum being separated from their parents for administrative reasons (Wood, 2018). It should be noted that the number of unaccompanied children seeking asylum in the US reached more than 50,000 people in just between October 2017 and September 2018 (Kandel, 2019). In US immigration policy, these children, whether they come with a companion or not, must take legal proceedings to the Immigration Court which is under the supervision of the U.S. Department of Justice Executive Office for Immigration Policy (EOIR). However, while waiting for their asylum request to be processed by EOIR, the children are placed in an Immigration Detention Center managed by U.S. Custom and Border Protection. The condition of the Immigration Detention Center for children is not much different from the Detention Center for adults. Children, who are detained there, do not get the facilities they should get, such as toothbrushes, soap, and blankets. According to the Department of Justice lawyer statement made during the hearing to the Appeal Chamber of the 9th Circuit Court, the children could not be provided with such sanitary necessity because their detention period is short. However, the horror of the Detention Center didn't stop there. Apart from the absence of safe and sanitary facilities, children also didn't receive vaccines to prevent the spread of infectious diseases such as flu. The absence of vaccination has killed at least 6 children and this is the first time in the last 10 years where child asylum seekers die while being detained.

Problems as explained above are very contrary to the values and principles contained in International Refugee Law. The method of immigration law enforcement currently used in the US can be categorized as inhuman treatment stipulated in The Convention Against Torture or Other Cruel, Inhuman, or Degrading Treatment or Punishment (UNCAT) where the U.S. is a State Party to the Convention. Besides, it should be noted that the U.S. was actively involved in the negotiation and drafting process of the 1989 Child Convention, although it only recently became signatories to the convention and has yet to ratify it. However, the U.S. has ratified 2 Optional Protocols to the 1989 Child Convention which is the Optional Protocols on the Involvement of Children in Armed Conflict (OPAC) and the Optional Protocols on the Sale of Children, Child Prostitution, and Child Pornography (OPSC). The policy of separating child asylum seekers from their companions, according to the statement made by the U.S. Government, is carried out to ensure that these children are not victims of human trafficking that violate the OPSC provisions.

This policy, aside from being contradictory to the provisions, value, and principles of UNCAT, the Child Convention, OPAC, and OPSC, also contradicts the principles and moral value of international refugee law enshrined in various international treaties.

Refugees, as humans, have the same basic right as other humans guaranteed in the Universal Declaration of Human Rights (UDHR). Everyone, as stated in Article 14 paragraph 1 of the UDHR, has the right to seek and to enjoy in other countries asylum from persecution. This article emphasizes that everyone who experiences persecution or fearing such an act to happen to themselves caused by a political reason has the right to seek and to enjoy asylum in other countries no matter what's your race, religion, color, etc. Not only do they have the right to seek and to enjoy asylum, but refugees also have the right to freedom of movement within the borders of each State and also the right to leave any country, including his own, and to return to his country. The same rights are also stipulated in Article 12 of the International Covenant on Civil and Political Rights (ICCPR). However, this right, in ICCPR, has an additional provision stating that "this right shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order, public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant". Refugees also have specific rights, apart from rights stated in UDHR and ICCPR, guaranteed in the 1951 Geneva Convention Relating to the Status of Refugees such as the right to access to courts and the right to retain their status along with the right acquired previously. Their rights, as refugees, also include the right "to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing, and medical care and necessary social services". The right for adequate health service is also guaranteed in the International Convention on the Elimination of All Forms of racial Discrimination and the International Covenant on Economic, Social, and Cultural Rights.

Based on international provisions governing human rights, especially the rights of asylum seekers and refugees, mentioned above, the immigration and asylum policies created and implemented by Trump's administration are a violation of these provisions. However, the U.S. wasn't a State Party to several international treaties regulating asylum seekers and refugees, although it has sent a delegation in the process of discussing the contents of the agreement. This is something that deserves to be studied further because even though the U.S. is not a State Party if the provisions of the international treaties have reached at least an international customary level, the U.S. can be pressured to implement the provisions.

2. MATERIALS AND METHODS

This research is normative legal research conducted to answer questions related to Trump's administration policy on immigration and refugees especially the case where child asylum children get 'inhuman treatment' during their detention period and the so-called 'voluntary return' policy from an International Law perspective. To address this issue, we statute and case approach. Different from the statute approach method used to address domestic law issues that used national legislation, the statute approach used in this research will be using international treaties as primary sources as well as books, research articles, commentaries on international treaties, and the jurisprudence from international court judges in form of *opinio juris* as our secondary sources. Apart from using a legal-based source, we also utilize several sources from the field of politics, economy, and social to strengthen our legal based arguments.

Treaties used for this paper research may include but not limited to: (1) The United Nations Convention on the Rights of the Child and its Optional Protocol; (2) The Convention Against Torture or Other Cruel, Inhuman, or Degrading Treatment or

Punishment; (3) International Convention on the Elimination of All Forms of Racial Discrimination; (4) International Covenant on Economic, Social, and Cultural Rights; (5) International Covenant on Civil and Political Rights; (6) The Geneva Convention Relating to the Status of Refugees and its Additional Protocol; and (7) The Universal Declaration of Human Rights.

The data from the sources will be collected using library research method which requires us to read, study, review, and analyze the related legal materials to gain a comprehensive view and possible solution to address the issues. The collected data then would be analyzed further using the deductive syllogism method which starts with the submission of the major premise followed with the minor premise and ends with the conclusion of the two premises.

3. RESULTS AND DISCUSSION

3.1 REFUGEE RIGHTS AND STATE RESPONSIBILITY

However, in practice, there is a problem with the fulfillment of the asylum-seekers or refugee basic human rights in many countries' national policy which derive from their unwillingness to share the same burden with other countries as stipulated in international law. It should be admitted, however, that States have indeed a right to decide which person to be granted asylum or accepted as refugees. However, in practice, the States will face limitations when exercising this right. Those limitations including but not limited to: *first,* whether the asylum-seekers are those who are persecuted because they belong to a particular social group; *second*, there is no definite requirement to be classified as a socially abused group; and *third*, what is meant by certain social groups must be read evolutionarily, namely asylum-seekers (Grover, 2018). This limitation is in line with the UNHCR's own policies and according to the UNHCR, a State would be categorized as "the first country of asylum" if they have an effective system to provide protection to be enjoyed for those individuals (The United Nations High Commissioner for Refugees, 2017a).

The United Nations High Commissioner for Refugees (UNHCR), based on the 1951 Geneva Convention and its 1967 Additional Protocol, has set the basic rights which the asylum-seekers or refugees shall enjoy as part of their human rights. That rights also include the protection from refoulement action taken by States which could jeopardize their safety and lives as upheld in Article 33 paragraph 1 of the 1951 Geneva Convention. Refugee, according to Article 3 and Article 4 of the 1951 Geneva Convention, shall be protected from discriminatory action based on race, religion, country of origin, or their social group. In regards to refugees' status, the State has the responsibility to respect the law from their country of domicile or if they don't have any domicile by the law from their country of residence which governs their status. Refugees' rights to moveable and immovable property along with the right to artistic rights and industrial property are also protected under Article 13 and Article 14 of the 1951 Geneva Convention. Other basic rights such as the right of association, the right to wage-earning employment, self-employment, liberal professions, and public education that was already being accepted under different international provision also being upheld by the 1951 Geneva Convention.

Many child asylum-seekers or refugees who flee their country of origin sometimes didn't come with their parent or adult companion which raises a question on how States shall fulfill their rights. In the 1951 Geneva Convention, there's no distinction of

treatment received by an adult refugee and child refugee. However, the physical and psychological conditions of children are very different from adults and because of that, they need to be provided with better treatment from their host or transit countries. Therefore, the UNHCR in its own guidelines always emphasizes that the treatment received by the child shall be "in the best interest of the child". Therefore it could be interpreted as an obligation for States to provide the children asylum-seekers or refugees a more preferable treatment than those adult asylum-seekers or refugees received. This treatment wasn't based solely on the standard made by the UNHCR, but also derived from the provision on the 1989 Convention on the Right of Child (Child Convention or CRC). The establishment of the Child Convention bring a tremendous change on how the world sees children and their rights. There's a debate on how children rights should be addressed when they, in many countries domestic law, are viewed as a non-bearer of rights. This view is changed since the establishment of the Child Convention which recognizes the child as the bearer of rights entrenched in a binding international instrument, comprising various categories of rights including protection and participation rights (Rena, 2007). Among many provision in the Child Convention, there are 4 distinguished provision accepted of being the general principle which include the non-discrimination principle (Article 2 paragraph 1), the best interest of the children (Article 3 paragraph 1), the right to survival and development (Article 6 paragraph 2), and the views of the child principle (Article 12 paragraph 1) (The United Nations High Commissioner for Refugees, 2009).

The Child Convention didn't only set and regulate the rights of children in a time of peace but also set and regulate their rights in a time of turmoil and conflict. In regards to the child fleeing their home country because of conflict or disaster, the country hosting those fleeing children shall, under the provision of Article 22 paragraph 1: *first*, take appropriate measures to ensure those children receive appropriate protection and humanitarian assistance; and *second*, enjoy the applicable rights set in the Child Convention and other international human rights or humanitarian instrument. In the cases of children being separated from their parents, family, or companion, the host country are to assist such a child in tracing their parents or other members of their family for family reunification. If the host country can't find the child's parents or other family members, they shall be entitled to the same protection as any other child permanently or temporarily deprived of his or her family. All these things must be done in a friendly and professional manner per applicable law.

3.2 U.S.A "INHUMANE TREATMENT" OF CHILD ASYLUM SEEKERS AND REFUGEES

U.S.A Immigration and Customs Enforcement have at least 54,000 people who are refugees, asylum-seekers, and migrants under custody and held in ICE-run detention center until today (Sukin, 2019). However the number is still not final because other government bodies and law enforcement agencies also detain refugees, asylum-seekers, and migrants. For example, U.S. Customs and Border Protection held approximately 20,000 people in their custody with 11,000 more was held in the custody of the U.S. Department of Health and Human Services (Sukin, 2019). With this high number of refugees, asylum-seekers, and migrants being detained, the U.S. government is ought to give them adequate treatment that is in line with the guidelines provided by the United Nations High Commissioner for Refugees (UNHCR). However, the actual condition of the detention center or the treatment or facilities provided for the detainee is far from the bare minimum set by the guidelines. Michelle Bachelet, the U.N. High Commissioner for

Human Rights, in one of her statement made in July 2019 said she "is deeply shocked that children are forced to sleep on the floor in overcrowded facilities [and] without access to adequate healthcare or food and with poor sanitation conditions' (UN News, 2019). She also stated that the U.S. policy to detaining children in such condition, according to several UN human rights bodies, may constitute cruel, inhuman, or degrading treatment that is prohibited under international law especially the 1987 Convention Against Torture or Other Cruel, Inhuman, or Degrading Treatment or Punishment or known as Convention Against Torture (CAT) (UN News, 2019).

The prohibition of cruel, inhuman, or degrading treatment didn't stand only as a treaties provision that only binding the parties to the treaties, it's already recognized and accepted as a peremptory norm of international law that trumps even treaty obligations; hence all countries must uphold this provision irrespective of their consent (Weissbrodt & Heilman, 2011). The U.S. as part of the international community has been outlawed cruel, inhuman, or degrading treatment in its domestic law. In regards to an individual that was being detained or in the custody of the U.S. government, they are guaranteed by the Detainee Treatment Act of 2005 "… not to be subject to cruel, inhuman, or degrading treatment." However, looking at the condition of the U.S. Immigration Detention Center run by various U.S. bodies and law enforcement agencies, it could be said that the refugees, asylum-seekers, and immigrants detained there were being subjected to cruel, inhuman, or degrading treatment.

First of all, the right to health is an inclusive right and part of basic human rights with the purpose to lead a person to a healthy life. This right was first recognized under international law in Article 25 of the Universal Declaration of Human Rights. Article 25 stated that "everyone has the right to a standard of living adequate for the health and well-being of himself and of his family". This article also specifies the item needed to achieve what's called adequate health and well-being, which include food, clothing, housing, and medical care and necessary social services. Furthermore, Article 25 also stated that the right to health also includes the right to security in the event of unemployment, sickness, disability, widowhood, old age, or other lack of livelihood in circumstances beyond his or her control. The importance of the right to health was then reaffirmed in Article 12 of the International Covenant on Economic, Social, and Cultural Rights (ICESCR). Article 12 of the ICESCR did not only recognize that every people has the right "to the enjoyment of the highest attainable standard of physical and mental health" but it also takes it to another level by specifying the steps needed to attain the full realization of this right. Furthermore, the Committee on Economic, Social, and Cultural Rights, the body tasked to monitor the implementation of the ICESCR provision, use several elements as "underlying determinants of health" including adequate sanitation, adequate housing, and healthy environmental conditions among other elements (OHCHR & WHO, 2008).

According to the U.S. Commission on Civil Rights 2019 reports titled *Trauma at the Border: the Human Cost of Inhumane Immigration Policies*, thousands of children detained by the Department of Homeland Security are being placed in cages in former warehouses or in building with little if any natural light and must sleep on a cement floor in cold temperatures using only aluminum blankets to cover their body (The United States Commission on Civil Rights, 2019). This condition didn't only befall those who are being detained by the Department of Homeland Security but also those transferred from the Department of Homeland Security to other facilities run by other U.S. government

bodies and law enforcement agencies. This condition was contrary to the standard of care for children in the immigration detention system that derived from the *Flores* Agreement where it mandated all detention facilities that house children must be, safe and sanitary, complete with suitable toilets, sinks, drinking water, food, medical assistance for emergencies, and other necessary elements to make it safe and sanitary (The United States Commission on Civil Rights, 2019). However the most important provision ruled in this agreement is that the Department of Homeland Security to, quote, "treat each child with dignity, respect, and with special concern for their particular vulnerabilities as children".

Not only the current condition was contrary or in violation of the provision from the *Flores* Agreement, but it also undermines the ICE's (Immigration and Customs Enforcement) own standard in its guideline titled "*Performance-Based National Detention Standards 2011*". It is written in Chapter 5 on the Personal Hygiene section that each detainee must be provided with clothing, special uniforms and protective equipment, personal hygiene items, and many items that are needed to make the condition of the detention center "safe and sanitary" (The U.S. Immigration and Customs Enforcement, 2016). Department of Justice in their argument during an appeal inquiry at the 9th Circuit Court in 2019 stated that the interpretation of what qualifies as "safe and sanitary" doesn't need to include item such as a blanket, soap, and toothbrush to qualify a detention center condition as "safe and sanitary" given the time they are being detained is short. This statement was rebuked by Judge A. Wallace Tashima who stated, "If you don't have a blanket, soap, or toothbrush it was in a common understanding that it's not safe and sanitary" (The United States Commission on Civil Rights, 2019). Judge Tashima was right to rebuke the Department of Justice statement because ICE's own standard required each detained to receive personal hygiene items including soap, comb, toothpaste, toothbrush, shampoo, and skin lotion (The U.S. Immigration and Customs Enforcement, 2016).

The impact of this administration detention policies on refugees, asylum-seekers, or immigrants including children has a very big price to pay. Never in the past have had few decades had children died while being detained in immigration detention centers (The United States Commission on Civil Rights, 2019). The 2019 report of the U.S. Commission on Civil Rights writes down the name of the children who died while in U.S. custody along with the condition they faced leading up to their death. Those cases have many similarities which are that the children who die in U.S. custody die from illness or related health issues during their detention period. It is believed, according to this record, that those children didn't detain with adequate health facilities to meet the requirement of "safe and sanitary" as described in the ICE's standard. The lack of adequate health facilities inside or around the detention center did contribute to the decline of the child's health condition which ultimately leads to their death. There are many cases to prove the claim in the previous statement, such as the death of a sixteen-year-old Guatemalan boy named Juan de Leon Guiterrez after being transferred to a medical facility 160 miles away from his migrant shelter only after officials at his migrant shelter realize that he was sick or the death of Carlos Gregorio Hernandez, a sixteen-year-old boy who died after being detained twice as long as federal law allows, diagnosed with flu, and prescribed with Tamiflu but never hospitalized (The United States Commission on Civil Rights, 2019).

All of the information mentioned above shows how the current administration treatment refugees, asylum-seekers, or migrants, regardless of race, age, or gender. Although the previous administration has set a basic detention standard as a guideline

that is in line with the detention guidelines made by the UNHCR to preserve the right of refugees, asylum-seekers, or immigrants that being detained, the reality is different. The evidence mentioned above is more than enough to prove how Trump's administration undermining the detention standard used for so long by the U.S. government and law enforcement bodies which originated from the *Flores* Agreement and then manifested in any form of U.S. law. The evidence also proves that the minimum condition of "safe and sanitary" for children detained in an immigration detention center hasn't been met. Basic elements such as a blanket, soap, adequate housing, toothbrush, or adequate health service and facilities are absent resulting in the death of children. This can't be let to continue, the administration must reform its approach and conduct before these present practices claim another life or put other children in this abhorrent condition in the land where one's rights must be upheld.

3.3 "VOLUNTARY RETURN" POLICY AS THREAT TO REFUGEES RIGHTS

The term Voluntary Return policy, also known as Administrative Voluntary Departure was developed for non-citizen accepts removal from the United States without a formal removal order. This is not to be confused with the form of voluntary departure that granted by an immigration judge during or after a formal hearing. Instead, a voluntary return is issued by an immigration officer and bypasses the immigration court system completely. According to statistics from the Department of Homeland Security, U.S. Immigration and Customs Enforcement ICE, that 23,455 voluntary returns took place in 2013 (The United States Immigration and Customs Enforcement, 2013).

Under The Administrative Voluntary Departure Statute, an individual who accepts voluntary return has up to 120 days to leave the United States. The actual amount of time allotted may vary, as the implementing federal regulations permit an "authorized officer" to set the time frame for departure, so long as it is within 120 days of the non-citizens, having some period of time to arrange their affairs in the United States. Currently, voluntary return, which is reserved for non-citizens with a limited or no criminal history, is often considered to be an immigration "benefit" because the recipient does not receive a formal removal order. That does not mean there are no consequences that accompany voluntary departure. For instance, a person who has been unlawfully present in the United States for one year or more and take voluntary departure thereafter "inadmissible" for a period of ten years. A person unlawfully present for over 180 days but less than one year is inadmissible for a period of three years if he or she takes voluntary departure. Some individuals get a waiver of this inadmissibility bar, but such waivers are entirely discretionary and available only to individuals who can demonstrate "extreme hardship" to U.S citizen or lawful permanent resident spouse or parent. If the waiver is denied, there is no way to appeal or have that denial reviewed. A person who reenters the United States before the time bar has run will be subject to an even more severe ground of inadmissibility and will be disqualified from most forms of relief from deportation (American Civil Liberties Union, 2014).

The relative informality of voluntary return has led to a common misconception that there are no penalties for reentry. Similarly, the lack of formal process in expedited removal leads many immigrants to assume they have been granted voluntary departure when, in fact, they have an expedited removal order. The Voluntary return may act as a benefit for some individuals, but for immigrants with strong claims to relief from removal, voluntary departure is not a rights-protective process. As in other forms of summary proceedings that bypass the courtroom, voluntary return denies an individual the opportunity to apply for relief from deportation, by means the ways to remain in the

United States. For instance, a person who takes voluntary return cannot apply for cancellation of removal, and once he or she has been returned to Mexico cannot apply for programs like Deferred Action for Childhood Arrivals (DACA) that require an individual be in the United States at the time of the application.

Unlike expedited removal, voluntary departure is not confined to the border zone, nor is it applied only to recent border crossers. Moreover, advocates interviewed for this report expressed concern that people eligible for relief from removal and/or eligible to adjust status and remain in the United States are instead being coerced to take voluntary return by immigration officers without knowing the rights they are waiving or penalties they will incur. As immigration enforcement officers are generally not trained to screen for and evaluate a person's immigration claims which often requires sophisticated legal analysis they are not in a position (nor should they be) to advise immigrants whether a voluntary departure is a benefit. Given the speed of this process and the fact that most people are not represented by or even able to contact an attorney and by default rely on the arresting or interrogating officer to explain their rights, there is a significant risk that individuals with strong claims to remain in the United States will and have been coerced to give those rights up. The administrative voluntary departure process is supposed to include procedural protections to ensure that the person who agrees to voluntary departure and waives the right to go to court and defend their claims is making a truly voluntary decision and authorize a grant of voluntary departure only when the non-citizen has requested it and accepted its terms (Ataiants et al., 2018). In practice, however, these procedural requirements are not always fulfilled and, indeed, this form is not even used.

Recently, under the Trump administration, the Border Patrol reported apprehending almost 60,000 unaccompanied children during 2012-2016 and considered the second-highest number of apprehensions (The United States Customs and Border Protection, 2016). Also, more than 50,000 unaccompanied children seeking asylum during 2017-2018 (Kandel, 2019). As we knew the number of unaccompanied children was escalated along the years during the Obama administration until it gets worsen during the Trump administration. The same question that all of us have been thought about it for a while is, what is the reason for the apprehension? And what is the relation towards voluntary return Policy? The unaccompanied children who are apprehended without family or caregivers are the responsibility of the United States government. Therefore, the United States government establish legal provisions set by the Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA). However, Report by United Nations High Commissioner for Refugees (UNHCR) found that the Department of Homeland Security, U.S. Customs and Border Protection (CBP) is unable to complete this mandate, as most agents appear unfamiliar with many of the issues they are screening that analyze the risk of trafficking, asylum claims, and ability or inability to consent to voluntary return. The mandatory screening forms, the UNHCR found, were not only inscrutable to the children, but also to the officers doing the questioning, often in public settings and sometimes without an interpreter. Overall, the investigation concluded, "The majority of the interviews observed by UNHCR involved what was merely perfunctory questioning of potentially extremely painful and sensitive experiences for the children. And in the remainder, the questioning, or lack of questioning, was poorly executed" (The United Nations High Commissioner for Refugees Regional Office Washington D.C. for the United States and the Caribbean, 2014).

The "virtual automatic voluntary return" of Mexican unaccompanied children, the UNHCR found, was not due to officer callousness but a lack of education and systematic

failures to understand and implement the TVPRA screening. According to the UNHCR report, CBP officers failed to ask several of the required screening questions; sometimes conducted an interview without an interpreter; by default, interviewed children in public places about sensitive issues; had no training in child-sensitive interviewing techniques, and did not understand the legal background and rationale for the screening activities. In some cases, children were told to sign forms that had already been filled out (The United Nations High Commissioner for Refugees Regional Office Washington D.C. for the United States and the Caribbean, 2014). Perhaps most disturbingly, the investigation found that CBP officers do not understand what human trafficking means and are unable to identify child victims of human trafficking, which includes recruitment and coerced participation in the human trafficking industry. Although the U.S. Department of State recognized Mexico as one of the top countries of origin for victims of human trafficking in FY 2012, according to the UNHCR, "None of the agents or officers interviewed said they had ever identified a child trafficking victim or one at risk of trafficking." Rather, the UNHCR found, some officers expressed concern that they could not refer these children, who may have been coerced by gangs to participate as guides in the human trafficking industry, for criminal prosecution (American Civil Liberties Union, 2014).

Human rights law recognizes the vulnerability of child migrants, particularly those traveling alone. Under the U.N. Convention on the Rights of the Child, which the United States has signed but not ratified, states are obliged to provide protection and care for unaccompanied children and to take into account a child's best interests in every action affecting the child (The United Nations High Commissioner for Refugees Regional Office Washington D.C. for the United States and the Caribbean, 2014). The decision to return a child to his or her country of origin, under international law, must take into account the child's best interests, including his or her safety and security upon return, socio-economic conditions, and the views of the child. If a child's return to their country of origin is not possible or not in the child's best interests, under human rights law states must facilitate the child's integration into the host country through refugee status or other forms of protection (The United Nations Committee on the Rights of the Child, 2005).

While human rights law, in general, limits the use of detention for immigration violations, the U.N. High Commission for Refugees has specifically advised that unaccompanied children "should not be detained" (The United Nations High Commissioner for Refugees Regional Office Washington D.C. for the United States and the Caribbean, 2012). In exceptional circumstances where children are in detention, detention must be used only as a last resort, for the shortest appropriate time, and with additional safeguards to ensure a child's safety and welfare (MacPherson, 1989). To ensure that unaccompanied children can seek asylum, human rights law recognizes that states must provide a meaningful way for children to seek protection and that children must be screened by officers with particular training. Examining Portugal's treatment of unaccompanied minors, the U.N. Committee on the Rights of the Child specifically expressed concern that unaccompanied children face "lengthy and inadequate procedures" conducted by persons without adequate training to address the specialized needs of unaccompanied minors (The United Nations Committee on the Rights of the Child, 2014). The Committee has also raised concerns where unaccompanied children with possible international protection needs are automatically turned away as "economic migrants" based on national origin and without assessment of the risks they may face thus potentially violating non-refoulement obligations (The United Nations Committee on the Rights of the Child, 2014).

For Mexican children who are summarily repatriated without a hearing, the right to be free from discrimination based on national origin should ensure those children have an equal opportunity to claim protection in the United States and are not unfairly expelled based on national origin. This issue of unfair treatment in access to immigration relief, based on national origin, has previously been considered by the Inter-American Commission for Human Rights (IACHR). Evaluating the interdiction and summary return of Haitians by U.S. authorities, the IACHR held that the United States had violated their right to freedom from discrimination, as a significantly more favorable policy was applied to Cubans and Nicaraguans (Atkinson et al., 2016). For children who are able to get an immigration hearing, U.S. law provides insufficient safeguards to ensure they can actually present their case and defend against deportation, although U.S. constitutional law acknowledges that children need additional assistance and protections when interacting with the legal system. As the U.S. Supreme Court has stated, in addressing the right to appointed counsel in juvenile delinquency proceedings, a child "needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it. The child 'requires the guiding hand of counsel at every step in the proceedings against him' (Sterling, 2013). Although international human rights law requires that unaccompanied children be provided with legal assistance (The United Nations Committee on the Rights of the Child, 2005), in U.S. immigration proceedings there is no right to appointed counsel under domestic law. As a result, many children are alone, without representation, while facing incredibly complex legal proceedings. Without legal assistance, even children who have strong asylum claims may be unjustly deported and unlawfully returned to danger if they cannot express and defend their claims in court.

3.4 POSSIBLE SOLUTIONS

Seeing how the Trump's administration has undermined various treaties provision as well as international values, norms, and principle when it comes to the treatment of children seeking asylum or refuge, the international community must stand up to remind and demand the U.S. government to uphold and fulfill its obligation to provide a better treatment towards refugee, especially children. As mention before, the policy of placing children seeking asylum or refuge in the detention center has been proven not beneficial to the child but rather put them in a condition that can cause trauma. Detention also didn't have any research that proves it as successful immigration control strategies (Wood, 2018). By not giving an adequate health service and facilities for the detained children, the Trump administration has ignored and neglected their obligation under international law to give and provide refugees, asylum-seekers, or immigrants the same treatment its citizens receive including the fulfillment of the right to health. The right to health didn't only stand as part of basic human rights upheld in various international treaties, it also being upheld by U.S. own domestic law. The *Flores* Agreement has set a strict regulation and standard regarding the detention and treatment of children in federal custody including the need for detention centers to have and provide adequate health facilities and services for the detainee to fulfill the requirement of a "safe and sanitary" environment. The same standard also being upheld and enforced in ICE's detention guidelines that make it very clear that every detention center detaining a child must provide them with "a safe and sanitary" environment.

There are several steps that the international community can take to ensure the U.S. government fulfillment and compliance with international laws especially when it comes

to the treatment receive by child detain in immigration detention children. We need to remember how international law works was very different from how domestic law works and enforces. Domestic law operates with a chain of command, with a top-bottom approach, whereas international law depends on the cooperation between each subject. International law provision has a very different character than domestic law, where international law provision takes a really long time and patience to be accepted, recognized, implemented, and reinforced while a domestic law provision can be or must be implemented right after it was recognized as a law. In other words, the international community needs to keep advocating for the country's obligation to provide refugees, asylum-seekers, or immigrants with the same or better treatment than its citizen get especially the detained child. The international community also need to continue its works and efforts on campaigning that even in the event of child detention, the detention standard must take the best interest of the child as the primary consideration as affirmed by Article 3 of the Convention on the Rights of the Child (The United Nations High Commissioner for Refugees, 2017b). UN bodies such as UNHCR and UNICEF must try to approach the U.S. government to find an alternative to child detention measures. Such alternative measures can be made by using family-based alternative care options or other suitable alternative care arrangements made while bearing the child's best interest in mind (The United Nations High Commissioner for Refugees, 2017b).

While trying to approach the U.S. government to request a reform for their detention practices, the international community could also begin to develop and strengthening the current international guideline, framework, and treaties related to the protection of refugees. It can't be denied that the current Refugee Convention, the 1951 Geneva Convention, and its Protocol can't use its provision to the fullest when addressing the fast-changing global refugee problem. Although some of its provision has been enshrined and accepted as international customary law or even *Jus Cogens*, there are still some loopholes in the Convention especially its relation with refugee's detention. To cover for these loopholes, there's a need for further development of the international refugee law through the restatement of existing rules or through the formulation of new rules (The United Nations & The United Nations Office of Legal Affairs, 2012). Such a move wasn't new to the international community since Jeremy Bentham have proposed such an idea in the last quarter of the eighteenth century (The United Nations & The United Nations Office of Legal Affairs, 2012). This idea outlived Bentham and was finally culminated in the establishment of the International Law Commission (ILC) since the adoption of General Assembly Resolution A/RES/174 (II) which establish the ILC along with the approval of its Statute. As the promotion of the progressive development of international law was the mandate of the ILC as set in Article 1 paragraph 1 of the Statute of the ILC, the Member State of the United Nations can submit proposals or draft of multilateral conventions for the purpose of the progressive development of international refugee law either through the General Assembly or other principles organs of the United Nations pursuant to Article 16 and Article 17 of the Statute of the ILC. The submitted proposal or draft shall be focused on setting a holistic and comprehensive standard of refugee rights protection either by adding another Additional Protocol to the 1951 Geneva Convention or by adopting a guideline or framework as an additional Annex to the Convention.

In regards to the U.S. so- called "voluntary return" policy for detained asylum-seekers, refugees, or immigrant, although it is the U.S. government obligation to respect their will to choose the U.S. as their destination country after fleeing their country of

origin. The administrative voluntary departure process is supposed to include procedural protections to ensure that the person who agrees to voluntary departure and waives the right to go to court and defend their claims is making a truly voluntary decision. For example, federal regulations governing voluntary departure require that "every decision regarding voluntary departure shall be communicated in writing on Form that will result from Notice of Action voluntary departure" and authorize a grant of voluntary departure only when the non-citizen has requested it and accepted its terms.

4. CONCLUSION

As mentioned and discussed above, the current U.S. policy on asylum and refugee under the Trump administration was, from a law and human rights perspective, indeed in violation not only the U.S. domestic law but also the values and principles of international law. The policy of so-called "voluntary return" and immigrant detention, among others policy, was the most controversial one since in the field this policy is not being carried out under the international law principles of non-refoulement, same and humane treatment, and best interest of the child. These principles were generally accepted by the international community and have overcome the boundaries of just being a treaties-binding provision. Many rights are entitled to refugees, asylum-seekers, or immigrants derived from these principles and, because of that, must be fulfilled by all countries regardless of the age, gender, race, or religion of the bearer. The aggressive yet discriminative character of the Trump administration policy doesn't reflect the soul of America that the U.S. was always proud of which is freedom. By barring and made it harder for the entry of thousands of refugees, asylum-seekers, or immigrants in their Southern border or any entry point to the U.S., the U.S. government has violated the right to flee fearing oppression or persecution based on race, politics, or religion. Not to mention that after crossing the border refugees, asylum-seekers, or immigrants would be forced to be separated from their family and put in a detention center with inadequate or non-existence facilities to keep them "safe and sanitary". This horrible condition happens in almost all of the U.S. detention centers including those used to detain children. Many countries including the U.S. always emphasizes the importance of providing children with adequate facilities and service to support the children growth and development. However, when it comes to the child detained in the detention center because of their status as refugees, asylum-seekers, or immigrants, those facilities and services weren't provided although they are entitled to receive the same treatment from their host country.

Practices and policies such as mentioned above need to be stopped and the international community needs to act for it. Other than keeping urging the U.S. government to fulfill its obligation to the refugees, asylum-seekers, or immigrants coming to its territory, the international community can try to develop a more comprehensive and holistic treaty or amend the existing one by proposing it to the International Law Commission or the United Nations 6th Committee to know if such proposal is possible and acceptable. The current legal framework or guidelines for the protection of refugees and asylum-seekers are made and written separately with the related treaties. It would be better if such a legal framework or guidelines to be written along with the drafting of the treaties and adopted as annex so it would be binding to the State Parties. The lack of binding power of the current legal framework or guidelines was due to this particular reason and to adopt it as an annex to the related treaties would give it more binding power and at some point can be used to urge any State Parties to fulfill its obligation. On

the domestic level, persons such as NGOs, activists, or individuals should try to build pressure on the U.S. government. This pressure is important as it will show that the people want to see reform on U.S. refugee and asylum policy.

REFERENCES

Books:

The United Nations, & The United Nations Office of Legal Affairs. (2012). *The Work of the International Law Commission* (8th ed., Vol. 1). New York: The United Nations.

Journal Articles:

Ataiants, J., Cohen, C., Riley, A. H., Lieberman, J. T., Reidy, M. C., & Chilton, M. (2018). Unaccompanied Children at the United States Border, a Human Rights Crisis that can be Addressed with Policy Change. Journal of Immigrant and Minority Health, 20(4), 1000–1010. https://doi.org/10.1007/s10903-017-0577-5

Daugirdas, K., & Mortenson, J. D. (2017). International human rights and humanitarian law: President trump issues executive orders suspending refugee program and barring entry by individuals from specified countries. American Journal of International Law, 111(3), 764–776. https://doi.org/10.1017/ajil.2017.55

Grover, S. C. (2018). Child Refugee Asylum as a Basic Human Right. Springer International Publishing AG. https://doi.org/10.1007/978-3-319-78013-9

MacPherson, S. (1989). The Convention on the Rights of the Child. Social Policy & Administration, 23(1). https://doi.org/https://doi.org/10.1111/j.1467-9515.1989.tb00500.x

OHCHR & WHO. (2008). The Right to Health: Fact Sheet (Vol. 31). Geneva.

Rena, R. (2007). Child Rights' Convention and Its Implementation. Indian Ocean Digest, 22(1&2), 1–11.

Refugees from Greece to Turkey as Part of the EU–Turkey Cooperation in Tackling the Migration Crisis under the Safe Third Country and First Country of Asylum Concept. International Journal of Refugee Law, 29(3), 498–508. https://doi.org/https://doi.org/10.1093/ijrl/eex035

Website Material:

American Civil Liberties Union. (2014). *American Exile: Rapid Deportations That Bypass the Courtroom*. New York. Retrieved from https://www.aclu.org/sites/default/files/field_document/120214-expeditedremoval_0.pdf

Atkinson, J., Mendez, M., Baluarte, D., Burrola, A., Harris, L. M., Owings, S., … Bookey, B. (2016). *Before the Inter-American Commission on Human Rights: A Special Interest Hearing on the Human Rights of Asylum Seekers in the United States*. Washington D.C. Retrieved from https://cgrs.uchastings.edu/sites/default/files/Human Rights of Asylum Seekers in US %5BPetitioners%5D_1.pdf

Barbato, E. M. (2020, October 9). Erin M. Barbato: Immigrant detention today relies on systemic racism and life-threatening policies. It must end. Retrieved October 15, 2020, from The Cap Times website: https://madison.com/ct/opinion/column/erin-m-

barbato-immigrant-detention-today-relies-on-systemic-racism-and-life-threatening-policies-it/article_0b8a6c14-99bf-5aa4-bd81-30b7923d9c54.html

Brustin, S. (2019, May 16). I toured an immigration detention center. The prison-like atmosphere was mind-numbing. Retrieved October 15, 2020, from USA Today website: https://www.usatoday.com/story/opinion/voices/2019/05/16/ice-immigration-detention-center-like-prison-otero-column/1190633001/

Kandel, W. A. (2019). Unaccompanied alien children: An overview. In *Congressional Research Center*. Retrieved from https://fas.org/sgp/crs/homesec/R43599.pdf

Sterling, R. W. (2013). Fundamental Unfairness: In re Gault and the Road Not Taken. *Maryland Law Review*, *72*(3).

Sukin, L. (2019). The United States Treats Migrants Worse Than Prisoners of War. Retrieved October 28, 2020, from Foreign Policy website: https://foreignpolicy.com/2019/07/26/the-united-states-treats-migrants-worse-than-prisoners-of-war/

The U.S. Immigration and Customs Enforcement. (2016). *Performance-Based National Detention Standards 2011*. Retrieved from https://www.ice.gov/doclib/detention-standards/2011/pbnds2011r2016.pdf

The United Nations Committee on the Rights of the Child. (2005). *General comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*. Geneva. Retrieved from https://www.refworld.org/docid/42dd174b4.html

The United Nations Committee on the Rights of the Child. (2014). *Concluding Observations on the Third and Fourth Periodic Reports of Portugal*. Geneva. Retrieved from https://www.refworld.org/docid/52f89eb84.html

The United Nations High Commissioner for Refugees. (2009). *GUIDELINES ON INTERNATIONAL PROTECTION: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*. Retrieved from https://www.unhcr.org/publications/legal/50ae46309/guidelines-international-protection-8-child-asylum-claims-under-articles.html

The United Nations High Commissioner for Refugees. (2017a). Legal Considerations on the Return of Asylum Seekers, and The United Nations High Commissioner for Refugees. (2017b). *UNHCR's position regarding the detention of refugee and migrant children in the migration context*.

The United Nations High Commissioner for Refugees Regional Office Washington D.C. for the United States and the Caribbean. (2012). *Detention Guidelines: Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*. Retrieved from http://www.unhcr.org/505b10ee9.html

The United Nations High Commissioner for Refugees Regional Office Washington D.C. for the United States and the Caribbean. (2014). *Findings and Recommendations Relating to the 2012-2013 Missions to Monitor the Protection Screening of Mexican Unaccompanied Children Along the U.S.-Mexico Border*. Washington D.C.

The United States Commission on Civil Rights. (2019). *Trauma at the Border: The Human Cost of Inhumane Immigration Policies*. Washington D.C.

The United States Customs and Border Protection. (2016). United States Border Patrol Southwest Family Unit Subject and Unaccompanied Alien Children Apprehensions Fiscal Year 2016: Statement by Secretary Johnson on Southwest Border Security. Retrieved November 1, 2020, from The United States Customs and Border Protection website: https://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children/fy-2016

The United States Immigration and Customs Enforcement. (2013). ICE Announces FY 2013 Removal Numbers. Retrieved November 1, 2020, from The United States Immigration and Customs Enforcement website: https://www.ice.gov/news/releases/ice-announces-fy-2013-removal-numbers

UN News. (2019). UN rights chief 'appalled' by US border detention conditions, says holding migrant children may violate international law. Retrieved October 28, 2020, from UN News website: https://news.un.org/en/story/2019/07/1041991

Weissbrodt, D., & Heilman, C. (2011). Defining Torture and Cruel, Inhuman, and Degrading Treatment. *Law & Ineq.*, *29*, 343. Retrieved from https://scholarship.law.umn.edu/faculty_articlesathttps://scholarship.law.umn.edu/faculty_articles/366.%0Ahttp://heinonlinebackup.com/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/lieq29&section=16

Wood, L. C. N. (2018). Impact of Punitive Immigration Policies, Parent-Child Separation and Child Detention on the Mental Health and Development of Children. *BMJ Paediatric Open*, *2*(1). https://doi.org/10.1136/bmjpo-2018-000338