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“Harmonization of Asean Law to Actualize The Asean Economic Community”
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INTRODUCTION

This book contains the proceedings of International Conference on Law, Environment, Culture, and Globalization which was held in Bengkulu, 11th-12th October 2018.1st.

The main objective of this conference is to bring together academics, researchers, practitioners, students, and other groups whose interests are in the issues of Environment, Culture and Globalization within the framework of law to share their work and experiences in relation to the topics. In addition to circulate thinking and study findings, this conference is also intended to strengthen networking and collaboration among participants.

The conference had 4 invited speakers coming from Thailand, Malaysia and Indonesia who spoke different issues challenging ASEAN in near future. Dr. Zainal Amin from Faculty of Law University of Utara Malaysia discussed about Harmonization of ASEAN Laws on Protection of Migrant Workers Against Human Trafficking. Prof. Amnat Wongbandit from Faculty of Law Thamassat Thailand discussed about Harmonization of ASEAN Law in Solving Environmental Issues focusing on Environmental Impact Assessment Law In Thailand. Dr. Ukrisdh Musicpunth from Faculty of Law Thaksin University, Thailand discussed about Harmonization of ASEAN Investment Laws: Any Possibility Toward Recognition and Enforcement of Foreign Judgments in ASEAN Member States. Dr. Candra Irawan, S.H., M.Hum from Faculty of Law University of Bengkulu, Indonesia discussed about Legal Harmonization in ASEAN Economic Communities (Looking for the best legal harmonization model).

There were totally 40 papers selected for oral presentation from 55 papers received. Every submitted paper went through a blind review process. And after being reviewed the papers were sent back to the authors and they had to give feedback to the reviews before they presented their papers.

On the conference day, the committee categorized the presenters into 8 chambers based on topics of the papers. They were Criminal Law, Environment Law, Private Law, Customary Law, Globalization, Constitutional Law, and Administration Law. Each chamber was led by a chair person.

After the conference, the committee still give chances to the authors to revise their papers based on views or ideas they recorded during discussion before the papers finally published in this book.

As the organizer, we would like to thank all parties involved in ICLECG for every contributions and willingness to make this conference run well and well organized.

Dean,

Prof. Dr. Herawan S, SH., M.S
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On Opening Ceremony of The International Conference on Law, Environment, Culture and Globalization.

Honorable Governor of Bengkulu, Mr. Rohidin Mesyrah
Honorable Rector of University of Bengkulu, represented by Vice Rector on Academic Affairs.
Honorable Deans of Faculties of Universities of Bengkulu
Honorable Deans of Faculty of Law of Universities in Bengkulu
Dears Invited speakers, Respected guesses of the conference.

First of all, I’d like to thank to all of parties, that have helped and have been working till today, so that this agenda is smoothly landed here, now. It’s all as we can’t separate God from our life, graces us and sends uncountable happiness everyday and every minutes in this beautiful earth.

Ladies and gentlemen, this conference is organized as a real support to University of Bengkulu Vision to be Wolrd Class University in 2025. We are trying to develop ourselves, looking for partners, so that fields of teaching learning, research and community service can enhance gradually. So far, Faculty of Law has already have cooperation to Thaksin University, Thammasat University, Maastricht University – we hope that in near future we can add University Utara Malaysia too, to be our partner. I am also so proud that in this conference, we can present invited speakers from Thaksin University – Dr. Jom. From Thammasat University – Prof. Amnat. From Universiti Utara Malaysia – Prof Madya Dr. Zainal and From our side Dr. Candra. I want to extend my gratitude to them who already specialized their time to put down their idea in the form of article and shere them with us today. With us today, there are also 40 presenters and nearly 50 participants that will share their idea.

Ladies and gentlemen, we are well realized that we can’t go alone to reach our vision, without supports from may parties, as the lackness in many fields. That’s why we try to develop mutual cooperation to many parties. As the organizer, there may be found things that is not accepted, for that, on behalf of Faculty of Law, I apologize for the inconvenience that all of you may feel during the conference.

Last, during you are here, enjoy the conference, build a broad networking, and leave your heart in Bengkulu as Pulau Tikus will take your heart away.
Again, thank you very much ladies and gentlemen. Next, we will have Governor on the stage to give honorable welcome speech and open this conference officially. Please welcome Bapak Dr. Rohidin Mersyah. Please open this conference officially. Points to be delivered in Opening Ceremony of International Conference on Law, Environment, Culture and Globalization. Thursday, 11 October 2018.
THE HONORABLE RECTOR OF UNIVERSITY OF BENGKULU AND VICE RECTORS,

THE HONORABLE DEAN OF FACULTY OF LAW ALL AROUND BENGKULU CITY,

THE HONORABLE KEYNOTE SPEAKERS OF INTERNATIONAL CONFERENCE IN FACULTY
OF LAW UNIVERSITY OF BENGKULU,

THE HONORABLE PARTICIPANTS OF INTERNATIONAL CONFERENCE IN FACULTY
OF LAW UNIVERSITY OF BENGKULU, AND THE HONORABLE PARTIES ENVOLVED IN
INTERNATIONAL CONFERENCE IN FACULTY OF LAW UNIVERSITY OF BENGKULU,

ASSALLAMUALAIKUM WARAHMATULLAH WABARAKATUH, MAY PEACE IS WITHIN
ALL OF US,

I WOULD LIKE TO EXPRESS MY GRATITUDE TO ALLAH SUBHANAHU TA’ALAH. BECAUSE
OF HIS BLESSING AND GRACE, WE ARE STILL ABLE TO GATHER WITH GOOD HEALTH
ON US TO PARTICIPATE IN WELCOMING SESSION OF INTERNATIONAL CONFERENCE
CONDUCTED BY FACULTY OF LAW UNIVERSITY OF BENGKULU.

LADIES AND GENTLEMEN,

FIRST OF ALL, ON BEHALF OF GOVERNMENT OF BENGKULU PROVINCE, LET ME
THANK EACH OF YOU AND GIVE A SINCERE APPRECIATION FOR YOUR ATTENDACE
TO INTERNATIONAL CONFERENCE ON LAW, ENVIRONMENT, CULTURE, AND
GLOBALIZATION FACULTY OF LAW UNIVERSITY OF BENGKULU, INDONESIA.

AT THIS OPPURTUNITY, WE LOOK FORWARD FOR ALL ACTIVITIES IN THIS 2018
INTERNATIONAL CONFERENCE COULD RUN SMOOTH, SAFE, AND SUCCESSFUL AS
WELL AS CREATING EITHER FURTHER RECIPROCAL RELATIONSHIPS AMONG
COUNTRIES OR AMONG PROVINCES, SUCH AS WHAT HAS MENTIONED IN THREE
PILLARS OF HIGHER EDUCATION COMPRISING EDUCATION, RESEARCH AND
COMMUNITY SERVICE.

LADIES AND GENTLEMEN,

WELCOME TO BENGKULU CITY, WHICH IS ALSO WELL-KNOWN AS LAND OF
RAFLESSIA. BENGKULU PROVINCE HAS 10 REGENCIES AND CITIES. BENGKULU HAS
ATTRACTIVE AND TOURISTIC PLACES TO VISIT, FROM NATURAL TO HISTORICAL
TOURISM. IT IS BECAUSE BENGKULU HAS ITS GEOGRAPHICAL FEATURES
SURROUNDED BY THE SEA AND MOUNTAINS.
BENGKULU HAS PANJANG BEACH (LONG BEACH), JAKAT BEACH, SUNGAI SUCI (HOLY RIVER), WATERFALLS IN EVERY REGENCY, AND SO ON. FURTHERMORE, SOME HISTORICAL PLACES IN BENGKULU CITY ARE FORT MALBROUGH, BUNG KARNO HOUSE, THOMAS PARR MOUNMENT, AND MANY MORE.

LADIES AND GENTLEMEN,

WITH THIS INTERNATIONAL CONFERENCE, LET US TOGETHER DISCUSSING ABOUT PROBLEMS OF GLOBALIZATION, ENVIRONMENT, ECONOMY, CULTURE, IN WHICH THESE ARE VERY IMPORTANT TO GET ATTENTION FROM ASEAN COUNTRIES TOWARD ASEAN ECONOMIC COMMUNITY THAT IS VERY INTEGRATIVE AND COHESIVE AS WELL AS SUPPORTING ECONOMIC GROWTH BY INCREASING TRADE, INVESTMENT, AND CREATION OF JOB FIELDS.

LADIES AND GENTLEMEN,

WE ALL KNOW THAT ASEAN IS ONE OF REGIONS WHICH HAS VARIOUS RESOURCES, ENVIRONMENTS, AND CULTURES. BECAUSE OF THAT, WE CAN STRENGTHEN THE UNITY, CHARACTERISTIC, AND BECOME A POWER OF THE MAIN MOVEMENT IN FORMING THE DEVELOPING ARCHITECTURE AREAS.

LADIES AND GENTLEMEN,

REMAINING THE IMPORTANCE OF THE AIM AND GOAL OF THE INTERNATIONAL CONFERENCE THROUGH THIS DELIGHTFUL OPPORTUNITY, SO WE, ON BEHALF OF GOVERNMENT OF BENGKULU PROVINCE, ARE EXPECTING YOUR ATTENTION AND FEEDBACK FROM THE CONFERENCE RESULTS IN ORDER TO MAKE GOOD COOPERATIONS AMONG COUNTRIES.

THIS IS WHAT I CAN DELIVER TO YOU. SORRY FOR THE LACKNESS. AND BEFORE I END UP THIS WELCOMING SPEECH,

I WOULD LIKE TO SAY BISMILLAHIRRAHMANIRRAHIM, THE INTERNATIONAL CONFERENCE ON LAW, ENVIRONMENT, CULTURE, AND GLOBALIZATION FACULTY OF LAW UNIVERSITY OF BENGKULU, INDONESIA 2018 OFFICALLY OPENS.

THAT’S IT. WASSALAMUA’ALAIKUM WARAHMATULLAHI WABARAKATUH

EXECUTOR OF BENGKULU GOVERNOR,

Dr. H. ROHIDIN MERSYAH, MMA
Harmonization of ASEAN Laws on Protection of Migrant Workers Against Human Trafficking

Zainal Amin Ayub¹
Zuryati Mohammed Yusoof²
Faculty of Law, University of North Malaysia, Malaysia
¹E-mail: z.amin@uum.edu.my
²E-mail: Zuryati@umm.edu.my

Abstract

The realization of ASEAN Community 2015 opens a hope of a new era for migrant workers amongst its member countries. The hope is on the comprehensive legal protection for migrant workers against injustice as well as trafficking in the ASEAN Communities. This article aims to looks into the legal framework within few ASEAN countries that provides protection for migrant workers against injustice and human trafficking, and the available recourse to justice for them in case they become the victim of human trafficking. Malaysia becomes the case study as lesson learnt. Doctrinal methodology is adopted in this article. It is found that, in regards to protection of migrant workers, despite the establishment of ASEAN Community 2015, the laws on this regard are scattered. A few members of ASEAN Community are reluctant to embed the protection of migrant workers into their national laws. Also, it is found that ASEAN country like Malaysia has the laws at national level to curb human trafficking of migrant workers. However, though the laws seem to be comprehensive, the effectiveness of its implementation and enforcement of the laws are yet to be seen. It is suggested that the laws on protection of migrant workers to be harmonized and standardised between members of ASEAN Community and the cooperation within members of ASEAN should be enhanced at every level.

Keywords: ASEAN, Migrant workers, Human Trafficking, Illegal Immigrants, Smuggling Migrant.

Introduction

There are always intensive global campaigns seek to demand the protection of refugees’ human rights, dignity of migrants, to stop trafficking in persons held at regional, inter-regional and international bodies and governments. The least of the pressure is that countries to recognise, become signatories or ratify international instruments on human rights and implement them at national level.¹ The south-east Asian countries under the auspicious of Association of Southeast Asian

Nations or ASEAN applauds the international commitment for human rights and freedoms as set out in the Vienna Declaration. The ASEAN member countries also have taken efforts to protect the rights and welfare of women, children, and migrant workers. This can be seen when ASEAN member countries also support the 2000 Palermo Protocol Against Trafficking. It was estimated that 800,000-900,000 people are trafficked across international borders and held captive in slave-like situations of forced labour or sexual slavery yearly. The 2000 Palermo Protocol against Trafficking i.e. Article 3(a) of the 2000 Protocol to Prevent, Suppress and Punish Trafficking in Person, defines trafficking as “the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs”.

However, it is noted that there are lacked of comprehensive legislation among the ASEAN member countries in protecting indigenous peoples, lack of a clear provision on the protection of children as well as migrant workers against human trafficking despite the fact that the crime of human trafficking remains the third most profitable transnational criminal activity, after drug smuggling and illegal trading in firearms. The ASEAN countries are claimed to be inadequately addressing the problem of human trafficking as the laws in the respective countries of ASEAN penalize the traffickers but fail to

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protect the victim, for instance, trafficked victims are regarded as illegal immigrants.4

As such, this article seeks to examine briefly the legal framework within few receiving country members of ASEAN, where Malaysia becomes the main focus as “lesson learnt”. The Malaysia main statute governing the matters related to human trafficking and migrant workers i.e. Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 is discussed. Then, few suggestions are highlighted based on the discussion made.

Method

The doctrinal research is adopted in this article which is mainly a library research. Primary data source from the legislation or statutes and reported cases. Meanwhile, secondary data is collected from journal articles, reports, books and online materials.

Analysis and Discussion

It is estimated that about 21.3 million ASEAN nationals live outside of their country to be migrants. Out of that number, approximately around 6.8 million individuals are migrants workers who move within ASEAN member countries and also known as intra-regional migrants. Myanmar is on the top of the list as source countries at 2.02 millions, followed by Indonesia (1.2 million), Malaysia (1.0 million), Lao PDR (0.9 million), and Cambodia (0.8 million).5 However, migrant workers suffer human right violations either by way of injustice treatment or human trafficking activities. Indonesia as one of the biggest source country of migrant workers within ASEAN, claims that out of 6.5 million Indonesian migrant workers working abroad (within ASEAN countries), about 1.5 million suffered human rights violations.6

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6 Wicaksono, S. (2017). Improving ASEAN and its member countries role in migrant
As such, how do ASEAN goes about protection of migrant workers against human trafficking? In 1997, ASEAN agreed to a declaration namely ASEAN Declaration on Transnational Crime, which amongst others, pledges to ‘expand the scope of Member Countries’ efforts against transnational crime such as terrorism, illicit drug trafficking, arms smuggling, money laundering, traffic in persons and piracy. Later, in 2011, the ASEAN Ministerial Meeting on Transnational Crime agreed to explore the possibility of developing an ASEAN Convention on Trafficking in Persons. This is by way of strengthening regional cooperation, enhancing law-enforcement agencies, promoting a victim-centered approach, distinguishing victims of trafficking in persons from the perpetrators, and to ensure the victims are treated humanely and provides appropriate assistance to the victims. On top of that, it was agreed that an ASEAN Convention on Trafficking in Persons should be introduced.

Later, ASEAN agreed to another declaration known as the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers. This Declaration was agreed on January 13th, 2007 in Cebu, Philippine. The general principles under Article 1 of the Declaration provides that member countries, either as the receiving states or sending states, shall promote freedom, equity, and stability of migrant workers in accordance with the national laws and policies of respective ASEAN Member Countries. Also the receiving and the sending have to take steps in ensuring the fundamental rights and dignity of migrant workers and their family members. The 2007 Declaration also emphasis in curbing the problem of human trafficking and provides that measure have to be taken to prevent the smuggling and trafficking

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workers protection in ASEAN community. USU Journal of Legal Studies, 1(1), 107-130.
10 Ibid, article 3.
Then, on 21st November 2015, the introduction of ASEAN Convention Against Trafficking in Persons Especially Women and Children was agreed by ASEAN member countries in Kuala Lumpur, Malaysia. The ASEAN Convention Against Trafficking in Persons, Especially Women and Children among others provides for criminalisation, prevention, protection and repatriation and return of victims of trafficking in persons. The member countries of ASEAN that ratified the ASEAN Convention Against Trafficking in Persons, Especially Women and Children are Singapore (on January 25, 2016), Thailand (July 24, 2016), Vietnam (January 5, 2017), Myanmar (January 16, 2017), Philippines (February 6, 2017), Lao PDR (May 16, 2017), Malaysia (September 7, 2017) and Indonesia (November 27, 2017). However, Cambodia is yet to ratify the Convention. It is also interesting to note that among the 10 ASEAN Member States, only the Philippines has ratified the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. Cambodia and Indonesia have signed but not yet ratified it. It is an added significance to have an ASEAN instrument for the protection of the rights of migrant workers and members of their family. As far as the right of workers in Malaysia are concerned, there are various laws that address the protection of their rights, either for local or migrant workers such as Employment Act 1955, Industrial Relation Act 1967, Minimum Wages Consultative Council 2011 and Minimum Wages Order 2012 and 2013.

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11 Ibid, article 17.
12 Ibid, p15.
13 ASEAN Convention Against Trafficking in Persons, Especially Women and Children 2015, article 5.
14 Ibid, article 11.
15 Ibid, article 14.
16 Ibid, article 15.
It is worth to note that Malaysia is a signatory to the UN Convention on Elimination of Discrimination Against Women (CEDAW), the UN Convention on the Rights of the Child (CRC), and has ratified five of the eight core ILO Conventions.\textsuperscript{20} While Malaysia has ratified the ASEAN Convention against Trafficking in Persons, Especially Women and Children, it is claimed that migrant workers from Indonesia suffers the plight of human trafficking and violations of human rights involving Malaysia.\textsuperscript{21} It is not the aim of this article to verify the truth of the incidents, but to highlight the legal measures that have been taken by Malaysia to overcome the problems of migrant workers and human trafficking.

**Malaysia Legal Initiatives on Migrant Workers and Human Trafficking**

Malaysia is a signatory to the ASEAN Declaration on Transnational Crime in 1997, the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers in 2007 and the ASEAN Convention Against Trafficking in Persons, Especially Women and Children. Being the signatories to the 1997 and 2007 Declarations, as well after the ratification of the 2015 Convention, Malaysia has taken few legal initiatives in complying the Declarations and the Convention, namely, the enactment of Anti-Trafficking in Persons Act 2007 which came into force in 2008. Afterwards, the Anti-Trafficking in Persons Act 2007 was amended in 2010 and currently known as Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 (ATIPSOM).\textsuperscript{22} With the amendment, ATIPSOM broadened the definition of trafficking to include all actions involved in acquiring or maintaining the labour or services of a person through coercion.\textsuperscript{23}

\textsuperscript{22} Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007, section 1(1).
ATIPSOM is an act that can be regarded as the most significant Malaysia’s response to the ASEAN Declarations and Convention. The preamble of ATIPSOM provides that it is an Act to prevent and combat trafficking in persons and smuggling of migrants and other related matters. Now, we look into the provisions in the Act that reflect the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers in 2007 and the ASEAN Convention against Trafficking in Persons, Especially Women and Children.

The ATIPSOM defines “trafficking in persons” as “all actions involved in acquiring or maintaining the labour or services of a person through coercion, and includes the act of recruiting, conveying, transferring, harbouring, providing or receiving a person for the purposes of this Act”, while “smuggling of migrants” is defines as “arranging, facilitating or organizing, directly or indirectly, a person’s unlawful entry into or through, or unlawful exit from, any country of which the person is not a citizen or permanent resident either knowing or having reason to believe that the person’s entry or exit is unlawful; and recruiting, conveying, transferring, concealing, harbouring or providing any other assistance or service for the purpose of carrying out the acts of smuggling person referred to in the previous paragraph.”

The ATIPSOM then further provides for the offence of trafficking in persons and aggravated offence of trafficking using threat, deception, abuse of power or force. The Act gives a special protection for children by providing special provision for the offence of trafficking in children.

The ATIPSOM also criminalises the acts in relation to human trafficking, namely profiting from trafficked person, makes, obtains, gives, sells or “possesses fraudulent travel or identity document” for the purpose of facilitating an act of trafficking in persons and providing

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24 Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007, section 2.
25 Ibid., section 12.
26 Ibid., section 13.
27 Ibid., section 14.
28 Ibid., section 15.
29 Ibid., section 18.
facilities in support\textsuperscript{30} or services for the purposes of trafficking in persons.\textsuperscript{31}

Evidence-wise, to prove the \textit{mens rea} of the human trafficking act, the ATIPSOM clearly states that the consent of trafficked person is irrelevant and is not a defence.\textsuperscript{32} Also, previous sexual behaviour,\textsuperscript{33} movement or conveyance of trafficked person is irrelevant.\textsuperscript{34}

Part IIIA of the Act is newly added by virtue of the 2010 amendment, governing the offence of smuggling of migrants.\textsuperscript{35} The preceding provisions under Part IIIA are governing the offences related to smuggling of migrants. Section 26B criminalises the aggravated offence of migrant smuggling, smuggling migrant in transit,\textsuperscript{36} profiting from smuggling activities,\textsuperscript{37} makes, obtains, gives, sells or “possesses fraudulent travel or identity document”,\textsuperscript{38} providing facilities\textsuperscript{39} or services to smuggle migrant.\textsuperscript{40}

Furthermore, Part V of ATIPSOM stipulates the care and protection of trafficked persons. It states clearly that Part V is not applicable to smuggled migrants unless the smuggled migrant is a trafficked person as defined by the Act.\textsuperscript{41} Section 42 of the Act empower the Minister to declare any places or building to be the place of refuge for the trafficked person, and the appointment of officers to take care the trafficked persons is provided under section 43. The trafficked persons who is under the custody at the refuge centre, may get the permission from the Minister to move freely or to work with certain conditions set out by the Minister.\textsuperscript{42} As provided under section 66 of ATIPSOM, the Minister may make orders or regulation to prescribe the

\begin{footnotesize}
\begin{enumerate}
\item Ibid., section 20.
\item Ibid., section 21.
\item Ibid., section 16.
\item Ibid., section 17.
\item Ibid., section 17A.
\item Ibid., section 26A.
\item Ibid., section 26B.
\item Ibid., section 26C.
\item Ibid., section 26D.
\item Ibid., section 26E.
\item Ibid., section 26F.
\item Ibid., section 27G.
\item Ibid., section 41A.
\item Ibid., section 51A.
\end{enumerate}
\end{footnotesize}
qualifications, conditions, procedures or any other matters relating to the granting of permission to move freely and to work under section 51A.\(^{43}\) The welfare of the trafficked person further protected when the Act stipulates the power of the court to order payment of compensation to be paid by the convicted person.\(^{44}\) Besides, the payment of the compensation to the victim upon conviction of the offender shall not prevent any civil proceeding instituted by the victim.\(^{45}\) even in the case of acquittal of the accused, the court has the power to make an order for the payment of wages in arrears to the alleged trafficked person.\(^{46}\)

Based on the discussion above, it is clear that Malaysia has put into place comprehensive legal framework to encounter the problems of migrant workers and human trafficking. Despite the legal measures taken by Malaysia, the authors will examine the “compliance” of the ATIPSOM with the ASEAN Convention Against Trafficking in Persons, Especially Women and Children that was introduced in 2015 and has been ratified by Malaysia in 2017. In general, all of the articles under the ASEAN Convention have been followed by Malaysia under ATIPSOM such as the definition of “trafficking in person” under Article 2(a) of the Convention, irrelevancy of victim’s consent as defence,\(^{47}\) criminalisation of trafficking in persons and related activities as well as laundering the proceeds of the crimes.\(^{48}\)

However, few areas maybe taken into account by Malaysia to enhance the protection for the victims of human trafficking and workers’ smuggling, to be in conformity with the ASEAN Convention and Declarations. Firstly, on the inclusion of protection of the family of undocumented workers. It was asserted that Malaysia and Singapore played an active role to influence that families of migrant workers, are

\(^{43}\) Ibid., section 66(2)(aa).
\(^{44}\) Ibid., section 66A(1).
\(^{45}\) Ibid., section 66A(4).
\(^{46}\) Ibid., section 66B(1).
\(^{47}\) The ASEAN, article 2(b)
\(^{48}\) Ibid., article 5, 6 and 7.
not included in the Declaration’s coverage,\textsuperscript{49} even though it was later included under article 8 of the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers,\textsuperscript{50} the statute like ATIPSOM does not reflect the article’s of the Declaration requirement. Secondly, on the implementation of ATIPSOM, it is claimed that the implementation of the law in relation to human trafficking and smuggling only focus primarily on cases of trafficking for sexual exploitation.\textsuperscript{51} Nevertheless, the former Attorney General of Malaysia states that the number of cases brought to court under ATIPSOM rose significantly with 253 cases up to Nov 24 in 2016 compared to 38 during the same period in 2015. the Attorney General also mentioned that from the 91 convictions, 71 cases involved human trafficking under Sections 12, 13, and 14 of the ATIPSOM.\textsuperscript{52} Thirdly, despite the fact that the victim may now get compensation as awarded by the court (e.g. under section 66A(1) of ATIPSOM) upon conviction of the accused person, however, the payment of the compensation is ordered to the accused person. It is suggested that the ASEAN member countries to set up a fund to compensate the victim in case where the criminals are proven to have no money to compensate the victim.

Last but not least, a coherent transnational policy and laws on human trafficking and migrant workers should be enhanced amongst ASEAN countries. While Malaysia, Brunei Darussalam, Singapore and Thailand strengthening the law laws as receiving countries, it is noted that Indonesia, Philippine, Myanmar, Cambodia, Vietnam and Lao PDR are focusing their policy and laws as sending countries. For examples, in Thailand as receiving countries, introduced various laws on migrant workers and human trafficking, but one of the reason on the failure of the government in regularizing “irregular” migrant workers are due to

\textsuperscript{51} Ibid.
the high costs and the complexity involved in the registration and work permit application process apart from the lack of law enforcement and lack of transparency.\textsuperscript{53} the policy in protecting migrant workers has not been a priority for Philippines and Indonesia at the regional level.\textsuperscript{54} As mentioned at the above, this is due to the fact that they are as sending countries rather than receiving countries. In Indonesia as one of the main sending countries in ASEAN, it is highlighted that the current national laws and policies mainly address the management of outflowing of domestic workers abroad, reducing local unemployment and hence, less focus on protecting the migrants.\textsuperscript{55}

\textbf{Conclusion}

In conclusion, the ASEAN member countries should first ratify the ASEAN Convention Against Trafficking in Persons, Especially Women and Children and embed the articles into their national laws. The laws of ASEAN member countries on human trafficking, migrant smuggling, migrant workers and employment, mutual assistance in criminal matters etc should be harmonious with each other among ASEAN countries. The different focus on the national laws due to status of mainly as ‘receiving’ or ‘sending’ country status should be avoided. Setting up a fund for the compensation and welfare for the victims of human trafficking is also a move that should be considered by ASEAN countries.

While Malaysia may seems to have comprehensive legislation on human trafficking and migrant workers, however, it is suggested that the protection of migrant workers and victim of human trafficking should be extended to their families. Transparent and efficient enforcement of the laws like ATIPSOM, Employment Law 1955,

\textsuperscript{53} Rukumnuaykit, P. (2009). \textit{A synthesis report on labour migration policies, management and immigration pressure in Thailand}, Bangkok: ILO.
Industrial Relation Act 1967, Mutual Assistance in Criminal Matters Act, Penal Code and other related laws should be the main concern of Malaysian government. The measures and initiatives of Malaysian government in recognising, approving and ratifying the international and ASEAN Declarations and Conventions on these matter is highly praised.

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Harmonization of ASEAN Law in Solving Environmental Issues Focusing on Environmental Impact Assessment Law in Thailand

Amnat Wongbandit  
Faculty of Law, Thammasat University, Thailand  
E-mail: wongban@tu.ac.th

Abstract

As the ASEAN Economic Community was formed, in principle there should be a free flow of economic activities, capital, labor and other things across borders within this community for the benefit of all in the region but in reality, there are still some legal impediments to the achievement of this goal. Harmonization of law of ASEAN countries would help to ease this problem. The same is also applicable to the problems of environmental protection as different laws in different jurisdictions could lead to the situation that polluters would certainly try to stay away from a country with strict environmental law and move their business to where the law is not that strict, or law enforcement is quite weak. Environmental impact assessment has played a very important role in environmental protection because it can be used as a method to predict what would be an environmental consequence of carrying out particular project or activity and offer how negative impacts could be prevented or mitigated. This article therefore would like to present the environmental impact assessment law in Thailand which consists of several interesting issues that could be the subjects of debate as to whether it would be possible or practical to harmonize ASEAN laws on such issues.

Keywords: ASEAN Economic Community, ASEAN laws, Environmental impact assessment in Thailand

Introduction

Environmental Impact Assessment Law

The Enhancement and Conservation of National Environmental Quality Act, 1992, amended in 2018 (ECNEQA), is the key legislation governing environmental impact assessment in Thailand. It contains only main legal principles such as who has power to specify activities or projects that need to conduct an environmental impact assessment before activity or project implementation, and what steps should be taken in preparing, submitting and reviewing an environmental impact

1 Government Gazette, Volume 107, Chapter 37, page 1, April 4, 1992.  
assessment report. The details on these matters are usually elaborated by subordinate law.

It should be noted that the ECNEQA does not govern strategic environmental assessment (SEA) but it focuses only on environmental impact assessment (EIA). However its Section 47 states that if SEA has already been conducted in accordance to any other laws or regulations\(^3\), such SEA shall also be taken into consideration in preparing an EIA report. As a result, this article would mention only EIA.

**Analysis and Discussion**

1. **Projects That Need to Conduct Environmental Impact Assessment**

   According to Section 48 of the ECNEQA, the Minister of Natural Resources and Environment, subject to the approval of the National Environment Board, has power to make a notification that projects, activities or operations of the government or that need permission from the government must prepare an environmental impact assessment report before their implementation if it causes environmental impacts or is likely to cause severe adverse effects upon natural resources, environmental quality, health, amenity, quality of life or any important interest of people, community or environment. Projects, activities or operations that need to comply with this provision could be carried out by government agencies or the private sector, which needs to obtain permission from government agencies.

   The projects, activities or operations listed by the ministerial notifications can be divided into two categories; the first group consisting of projects that cause regular environmental impacts, and

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3 Despite the fact that the Office of National Economic and Social Development Board has been trying to propose a set of rules concerning SEA, there has been no law directly addressing what policy, plan or program needs to have SEA and how to prepare, submit and review an SEA report.
the second group consisting of projects that are likely to cause severe impacts upon natural resources, environment, health, amenity and communities. The first group of projects, activities or operations is as follows:

1. Mining under the mineral law;
2. Petroleum industry;
3. Petroleum and fuel pipeline system project;
4. Industrial estates according to the law concerning industrial estates or projects similar to industrial estates or industrial land allocation projects;
5. Petrochemical industry using a chemical process in production;
6. Petroleum refinery industry;
7. Natural gas separation or reforming industry;
8. Chlor-alkaline industry using Sodium Chloride as raw material to produce Sodium Carbonate, Sodium Hydroxide, Hydrochloric Acid, Chlorine, Sodium Hypo-Chloride and Bleaching powder;
9. Cement industry;
10. Pulp industry;
11. Industry using a chemical process in producing an active substance or pesticides;
12. Chemical fertilizer industry using a chemical process;
13. Sugar industry;
14. Iron or steel industry;
15. Mineral smelting or dressing industry, or metal melting industry, which are not iron or steel industry;
16. Liquor and alcohol industry including beer and wine;
17. Waste treatment plants according to law concerning factories;
18. All thermal power plants except that using garbage as fuel;
19. Expressway according to the law concerning Expressway and Rapid Transit Authority of Thailand or similar projects;
(20) Highways or roads according to the law concerning highways, which pass through certain areas such as wildlife sanctuaries and national parks;
(21) A public transit system on rail;
(22) Wharf;
(23) Marinas;
(24) Coastal land reclamation;
(25) Construction or the expansion of structure in the sea such as groins, jetties or offshore breakwaters;
(26) Air transportation projects; construction or expansion of commercial airports or runways or water airports;
(27) Buildings located adjacent to rivers, coastlines, lakes or beach, or near or in national parks or historic parks, which is likely to cause adverse impacts upon environmental quality. It also includes buildings for retail and wholesale business, and private office buildings;
(28) Residential or commercial land allocation according to the law concerning land allocation;
(29) Hospitals or nursing homes according to the law concerning medical services;
(30) Hotels or resorts according to the law concerning hotels;
(31) Buildings with separate living units according to the law concerning building control;
(32) An irrigation area of at least 12,800 hectares;
(33) All projects located in areas specified by the Cabinet resolution as Class 1 Watershed;
(34) Inter-diversions between main river basins and between international rivers;
(35) Watergates in main rivers

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4 Ministry of Natural Resources and Environment’s Notification on Types and Sizes of Projects or Activities Which are Required to Prepare an Environmental Impact Assessment Report, and Criteria, Methods, Practice and Guidelines for Preparing an
It should be noted that not all the projects, activities or operations mentioned in the previous paragraph need to prepare an EIA report but their sizes or production capacity specified by the ministerial notification must be taken into consideration.\footnote{The Environmental Impact Assessment Report, Government Gazette, Volume 129, Special Chapter 97 Ngor, page 1, June 20, 2012. It has been amended by the Ministerial Notifications, dated 20 July 2012, 6 February 2013, 11 November 2013, 27 October 2014, 19 August 2015, 17 November 2015, and 22 November 2016.}

The second group of project, activities or operations is as follows;

(1) Coastal and lake land reclamation off the shoreline except for beach rehabilitation;

(2) Following mining according to the law on minerals;
   2.1 Underground mining the structure of which is designed to be self-destructive after stopping operation without supporting structure to prevent a tunnel collapse
   2.2 Lead, zinc and other metals mines using cyanide, mercury or lead nitrate in a production process, or mining of other metals having arsenopyrite as associated mineral
   2.3 Coal mines from which coal is taken out by vehicles
   2.4 Sea mining

(3) Industrial estates under the law on industrial estates or projects similar to industrial estates;

(4) Upstream and intermediate petrochemical industry;

(5) Ore smelting or metal melting industry, especially iron, copper, gold, zinc and lead smelting industry;

(6) Production, disposal and modification of radioactive substance;

(7) Central waste treatment plants or factories that bury garbage or unused materials under the law concerning factories, which burn or bury hazardous waste except burning in a cement oven that uses hazardous waste as substituted fuel or additional fuel;

(8) Air transport projects with the construction or expansion of runway of at least 3,000 meters;
(9) Wharf;
(10) Dams or reservoirs;
(11) Thermal power plants using coal, biomass or natural gas as fuel and nuclear power plants;
(12) Coke production industry

Although some projects or activities in the second group may also appear in the first group, those in the former are usually larger in size or higher in production capacity than their counterparts in the latter.

2. Who are Eligible to Prepare an EIA Report?

After a particular project is required to have an environmental impact assessment, who is eligible to prepare an EIA report for that project? Section 51/4 of the ECNEQA states that the Minister of Natural Resources and Environment, subject to the approval of the National Environment Board, may require that an EIA report be prepared or certified by a person holding a license for preparing the EIA report. It is the discretion of the Minister as to whether or not to set up that requirement but in practice the Minister exercised his power by issuing the Ministerial Notification on Determining the Types and Sizes of Projects or Activities that Need to Prepare an Environmental Impact Assessment Report, and Criteria, Methods, Practices and Guidelines for Preparing the Report, dated April 24, 2012.

Its Article 4, paragraph 2, states that the preparation of an EIA report shall be done by a person having a license as an expert in environmental impact assessment. It means that if a project

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6 Ministry of Natural Resources and Environment’s Notification on Types, Sizes and Practice of Projects or Activities likely to Cause Severe Impacts upon Communities in terms of Environmental Quality, Natural Resources and Health, which the Government Agencies, State Enterprises or Private Sector concerned have to Prepare an Environmental Impact Assessment, Government Gazette, Volume 127, Special Chapter 104 Ngor, page 34, August 31, 2010. It has been amended by some ministerial notifications on 19 November 2010, 5 November 2015 and 25 March 2016.

7 Supra note 4, id.
proponent wants to prepare the report by itself, it must have a license for this purpose but in practice most project proponents hire a firm with license to prepare the reports.

According to paragraph 2 of Section 51/4 of the ECNEQA, the details of how to apply for a license to prepare an EIA report, criteria for license issuing, qualifications of applicant, license renewal, the replacement of original license, and the suspension and revocation of license shall be prescribed by ministerial regulation. Although no regulation on such matters has been issued under the ECNEQA, the old Ministerial Regulation No.2, 1984, issued by the former Ministry of Science, Technology and Energy under the already repealed Enhancement and Conservation of National Environmental Quality Act, 1975, is still effective. According to this Regulation, Article 1, the following persons are eligible to apply for a license as an expert in environmental impact assessment.

(1) Higher education institutions or research institutes having legal personality under Thai law

(2) Juristic persons registered under Thai law;
   a. Registered partnerships, all partners of which have Thai nationality;
   b. Limited partnerships, all partners with unlimited liability of which have Thai nationality and at least 51% of capital of which belongs to natural persons having Thai nationality;
   c. Companies, at least half of directors of which has Thai nationality, and at least 51% of capital of which belongs to natural persons having Thai nationality.

(3) Juristic persons registered under international law provided that their EIA reports are jointly prepared by juristic persons under (1) and (2), which hold a license for preparing such reports

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8 Government Gazette, Volume 101, Chapter 184, Special Issue, page 1, December 12, 1984

9 This power now belongs to the Ministry of Natural Resources and Environment.
(4) State enterprises established by law are eligible to apply for a license to prepare EIA reports for their business only.

(5) Mining Industry Council under the law concerning mining industry council

It should be noted that applicants in (1) and (2) must have their headquarters or business offices in Thailand. Regarding to applicants in (2) and (3), their objects must include research business and consulting services. According to Article 4 of the Ministerial Regulation No.2, 1984, a person holding a license shall employ the following persons throughout the duration of the license;

(1) At least one full-time expert with following qualifications;
   a. Obtaining at least bachelor degree or equivalence in one of the following areas;
      1. Environment, ecology or sanitation;
      2. Environmental or sanitary engineering;
      3. Environmental economics.
   b. Having experience in enhancing and conserving environmental quality determined by the National Environment Board;
   c. Never having part in preparing a false EIA report unless it was done three years or more after a license holder that prepared the false report was deprived of his license.

(2) At least three full-time employees helping to prepare the report and they must have the following qualifications;
   a. Obtaining at least bachelor degree or equivalence in natural science, engineering or social science;
   b. Never having part in preparing a false EIA report unless it already passes three years or more from the date that a license holder preparing the false report was deprived of his license.

The license is valid for five years from the date of issuance.
3. Contents of an EIA Report

In preparing an EIA report, a project proponent must comply with guidelines issued by the Minister of Natural Resources and Environment. The contents of the report are slightly different between projects having environmental impacts and those likely to cause severe adverse effects upon natural resources, environmental quality, health, amenity, quality of life, or any important interest of people, community or environment.

3.1 Projects Having Environmental Impacts

The Minister issued the Notification on Types and Sizes of Projects or Activities, Which are Required to Prepare an Environmental Impact Assessment Report, and Criteria, Methods, Practice and Guidelines for Preparing an Environmental Impact Assessment Report, dated April 24, 2012, which states that an EIA report consists of two parts; summary report and main report.

3.1.1 Summary Report

The summary report on environmental impact assessment must include the following data and information;

(1) Type and size of project and relevant activities
(2) Project site with pictures and location maps including maps displaying environment compositions in the potentially affected area at the scale of 1:50,000 or at a proper scale.
(3) Options for a project site selection, method of implementation as well as reasons and factors to be taken into consideration
(4) Display of major environmental impacts, preventive, remedial and monitoring measures according to the format below.

| Environment Compositions and Various | Major Environmental Impacts | Preventive and Remedial Measures for Environmental Monitoring Measures for Environmental |

10 Supra note 4, id.
11 Id.
Values | Solving Environmental Impacts | Impacts
---|---|---
Physical environmental resources |  |  
Biological environmental resources |  |  
Use value |  |  
Values for quality of life |  |  

### 3.1.2 Main Report

The main report for environmental impact assessment shall contain the following essential elements:

1. **Introduction**: it should include the rationale and objectives of the project, the objectives and scope the report as well as methodology of study.

2. **Project site**: there must be pictures and location maps including maps displaying environment compositions in the potentially affected area at the scale of 1:50,000 or at a proper scale.

3. **Details of the project**: it includes the details capable of demonstrating a clear overall picture of the project such as the project type and size, a project operation method or relevant activities as well as a land use plan in the project by indicating proper directions and scale.

4. **Present environment**: it shall display the details with pictures of natural resources and physical and biological environment by classifying them into recoverable and non-recoverable resources,
values for quality of life, current problems of the project site with maps of the project environment, and land use around the project site as well as within areas probably affected by the project operation both in long-term and short-term.

(5) Assessment of options and potential impacts probably arising from the project.

(5.1) Selection of options: the report shall offer all possible project sites and methods of implementation compatible with the project objectives, how to achieve the objectives, the necessity of having or not having the project, options for preventive and remedial measures, and the most suitable option for project implementation with attached reasons and necessity.

(5.2) Environmental impact assessment: the assessment shall include both direct and indirect impacts possibly caused by the project upon natural resources and environment as well as values in (4) by classifying them into recoverable and non-recoverable resources. It shall also compare impacts probably caused by all the options.

(6) Preventive and mitigation measures and compensation: it shall provide details on measures for preventing and mitigating impacts arising in (5), and compensation plan if damage inevitably occurs.

(7) Monitoring measures: it shall provide proper measures and plans for monitoring environmental impacts, which would also be used for monitoring after the operation of the project.

(8) Table summarizing major environmental impacts with preventive and mitigating measures

3.2 Projects Likely to Cause Severe Adverse Impacts

The contents of an EIA report for projects likely to cause severe adverse effects is prescribed by the Ministry of Natural Resources

12 Id.
and Environment’s Notification on Criteria, Methods, Practice and Guidelines for Preparing an Environmental Impact Assessment Report for Projects or Activities likely to Cause Severe Impacts upon Communities in terms of Environmental Quality, Natural Resources and Health, August 22, 2017,\(^{13}\) which stipulates that the report consists of a summary and main report.

### 3.2.1 Summary Report

The summary report consists of the followings data and information;

1. Details of the project and relevant activities
2. Project site with pictures and location maps including maps displaying environmental compositions in the potentially affected area at the scale of 1:50,000 or at a proper scale.
3. Options for a project site selection, method of implementation as well as reasons and factors to be taken into consideration.
4. Display of major environmental impacts, preventive, remedial and monitoring measures according to the format below.

<table>
<thead>
<tr>
<th>Environment Compositions and Various Values</th>
<th>Major Environmental Impacts</th>
<th>Preventive and Remedial Measures for Solving Environmental Impacts</th>
<th>Monitoring Measures for Environmental Impacts</th>
</tr>
</thead>
<tbody>
<tr>
<td>Physical environmental resources</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

\(^{13}\) Government Gazette, Volume 134, Special Chapter 228 Ngor, page 5, September 18, 2017
<table>
<thead>
<tr>
<th>Biological environmental resources</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Ecosystem</td>
<td></td>
</tr>
<tr>
<td>Use value for human being</td>
<td></td>
</tr>
<tr>
<td>Values for quality of life</td>
<td></td>
</tr>
</tbody>
</table>

(5) Summary of severe adverse impacts upon communities in terms of environmental quality, natural resources and health with supporting reasons and criteria\(^{14}\)

### 3.2.2 Main Report

The contents of the main EIA report of projects likely to cause severe adverse impacts upon communities under 4.2 are quite similar to that of projects having environmental impacts under 4.1 but there are some slight differences. With respect to the topic “present environment,” the main report of the projects under 4.2 needs to add information on social conditions and health of those likely to be affected by the projects. In assessing all available options for selecting the project, the report shall additionally take into consideration data on the social conditions and health of people likely to be affected by the projects. Moreover, in assessing environmental impacts, the report shall also include the assessment of the health of such people, and public hearings on the report must be organized in accordance with what is prescribed in the 2017 Ministerial Notification.\(^{15}\)

\(^{14}\) Id.

\(^{15}\) Id.
Another important point in the report is to elaborate what would be severe adverse impacts possibly arising from the projects. Regarding preventive and mitigation measures, compensation and monitoring, the report must add measures to prevent, mitigate and monitor relevant social and health problems.

4. Public Participation

Similar to what has been practiced in many countries, the environmental impact assessment process in Thailand needs public participation so that it would be carried out with transparency and opportunities to listen to all stakeholders. Section 48 of the ECNEQA states clearly that such a process shall be conducted with public participation to be prescribed by the Minister of Natural Resources and Environment with the approval of the National Environment Board.

Regarding the preparation of an EIA report of a project or activity having environmental adverse impacts, the Ministry of Natural Resources and Environment issued the Notification on Types and Sizes of Projects or Activities, Which are Required to Prepare an Environmental Impact Assessment Report, and Criteria, Methods, Practice and Guidelines for Preparing an Environmental Impact Assessment Report, dated April 24, 2012, which states, among other things, that the report must be prepared with public participation but the Notification fails to elaborate how the public could participate in this process. In practice a project proponent would have to find out what should be a proper means for the public participate in an environmental impact assessment process. Since in theory there are so many methods for public participation, it sometime could lead to a dispute in court as to whether the proponent of a particular project allowed proper public participation in preparing an EIA report. For

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16 Supra note 4, id.
instance the project proponent may claim that a public hearing was already organized in a city center for the public to voice their concerns on the proposed project but some local people might argue that the public hearing should have been held within their community or every person possibly affected by the project should have been interviewed.

When an environmental impact assessment for a project likely to cause severe impacts upon health, communities, natural resources or environment is examined, it must comply with the Ministerial Notification on Criteria, Methods, Practice and Guidelines for Preparing an Environmental Impact Assessment Report for Projects or Activities likely to Cause Severe Impacts upon Communities in terms of Environmental Quality, Natural Resources and Health, August 22, 2017, which states that public participation shall be organized in a way prescribed by the Notification.

According to the Notification, public participation would happen in three stages; scoping, report preparation and report review.

a. Scoping

Before conducting an environmental impact assessment, “scoping” is a very crucial step to decide the scope of assessment or what issues to be included in the assessment as there is limited time and resources for each project which makes it impossible to study all minor and significant issues. Participation from local or potentially affected people would effectively help to identify which issues are important to them and should be addressed by the assessment report.

The Notification requires a project proponent to hold a public hearing for determining the scope of environmental impact assessment. The Office of Natural Resources and Environmental Policy and Planning (ONREPP), the National Health Commission

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17 Supra note 13, id.
Office (NHCO) and the public must be informed at least one month in advance. The project documents containing the rationale, necessity, funding sources and operation of project must be disclosed to the public for considering at least 15 days. The disclosure also includes preliminary data concerning factors likely to cause impacts upon the environment and health, and the proposed draft of the scope of the assessment. A proper registering system must be arranged in advance for those who would like to come to the venue and comment on the proposed scope and guidelines for environmental impact assessment.

The public hearing must be organized when is convenient to the persons concerned and public to express their views. They must have at least two hours in voicing their concerns and that period must not be less than half of the entire time spent in the hearing. After that the project proponent must allow the public to express their views not fewer than 15 days and by at least two channels in communication. Finally the project proponent would have to summarize all the opinions and answers and submit them with scope and guidelines for environmental and health impact assessment to the ONREPP for acknowledgement and NHCO for further public distribution.18

b. Report Preparation

Prior to writing an EIA report, some data must be collected and then used in environmental and health impact assessment. The Notification specifies how public participation would be taken into this assessment process. In surveying or listening to the opinions of the public or stakeholders, the project proponent must disclose the details of the projects such as the type, size and production capacity of the project, pollution possibly caused by project operation, water and land receiving waste from the

18 Id.
project, factors affecting health, guidelines for environmental and health impact assessment, measures for preventing and mitigating adverse effects, expected date of project operation, time, date and venue for public hearing and issues to be discussed.

In collecting views or data from the people or stakeholders, one or more of the followings methods could be used;

1) Personal interview;
2) Views delivered through mail, telephone, facsimile, data networks and others;
3) People and stakeholders can acquire data and information concerning the project from and voice their concerns to responsible government agencies;
4) Focus group meeting;
5) Workshop; and
6) Meeting of representatives of relevant people or stakeholders.

After the collection of views mentioned earlier is completed, the project proponent is obliged to summarize all positive and negative opinions within 15 day. Such a summary and the draft EIA report shall be displayed for at least 15 days at the Provincial Office of Natural Resources and Environment, Provincial Public Health Office, District Office, District Public Health Office, local administration office, sub-district office, village head office, and government health service center in the area where the project is located, or at any other locations easily accessed or seen by people.  

**c. Report Review**

When the draft EIA report is completed, it should be reviewed by the public and stakeholders to ensure that potential adverse effects could be prevented or mitigated. This process is addressed

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19 *Id.*
by the Notification which requires the project proponent to hold a public hearing. The project proponent must inform the ONREPP, NHCO and public of the hearing at least one month in advance. The final draft of the report must be disclosed to the public at least 15 days before the date of hearing. The timing of hearing must be convenient to stakeholders and the public to come to express their views and they must have at least 3 hours in voicing their concerns which must account for not less than half of the entire time of the hearing.\textsuperscript{20}

After the public hearing, the project proponent has duty to summarize all views expressed by the public and stakeholders as well as opinions or responses from the project proponent and relevant government agencies, and then submit them to the ONREPP for acknowledgement and the NHCO for further public distribution.\textsuperscript{21}

5. Steps to Submit and Review an EIA Report

Steps to submit and review an EIA report will be presented into two scenarios; one for a project that needs the Cabinet’s approval, and the other for a project that needs permission for implementation.

5.1 A Project that Needs the Cabinet’s Approval

If a project initiated by a government agency or state enterprise or jointly proposed by a government agency or state enterprise and a private investor is required by rule or regulation to obtain an approval from the Cabinet for its implementation, the submittal and review of its EIA report must comply with steps in Section 49 of the ECNEQA. First the project proponent (or a consultant hired by it) would have to prepare the report at the same time as the preparation of the feasibility study of the project. Secondly the EIA report would be submitted to the National

\textsuperscript{20} Id.
\textsuperscript{21} Id.
Environment Board for consideration. To assist the Board in making a proper decision, it would appoint a committee of expert to read the report and forward its comments to the Board. The law does not state that the report must get an approval from the Board but instead the Board is required to make comments on the report. Thirdly the Board would submit the report with its comments to the Cabinet for consideration. Before rendering its approval or disapproval, the Cabinet may, if necessary, request a person or institute specializing in environmental impact assessment to study or prepare a report or make comments on this matter.

It should be noted that the EIA report accompanied by the National Environment Board could be used for five years in obtaining the Cabinet’s approval. Another interesting point is that the ECNEQA does not provide timeframe for the Board and the Cabinet to make their decisions. As a result the Board and the Cabinet can spend time as much as they want. The reason why there is no timeframe, in the writer’s view, seems to be that since projects in this group are usually large in size and need high investment, their implementation depends on the policy of the Cabinet, which must take several factors into account including political atmosphere.

5.2 A Project that Needs Permission for Implementation

In submitting an EIA report for a project that needs permission from or must notify a government agency before implementation, the project proponent would have to comply with steps prescribed by Section 50 of the ECNEQA. First, prior to the construction or operation of the project, the project proponent must submit the EIA report to both the competent authority vested with power to issue permission and the ONREPP, which also includes any other government agency designated by the National Environment Board. Pending the EIA report process, such a competent authority still cannot make a decision as to whether or not permission would be given to the implementation of the project.
Secondly after receiving the EIA report from the project proponent, the ONREPP would examine the completeness of the report and its attached documents within 15 days. If the application is not completed, it would be returned to the project proponent. If all the problems are rectified and the application is resubmitted, the ONREPP would read the contents of the report and make preliminary comments on it within 30 days. Then the report and the comments would be forwarded to the Committee of Experts appointed by the National Environmental Board.

Thirdly after receiving the EIA report from the ONREPP, the Committee of Experts has 45 days to read the report and make a decision as to whether or not the report would be approved. If the decision is not made within the timeframe, it is deemed by law that the report is approved by the Committee. This legal assumption would certainly prompt the Committee to work fast and protect the interests of the project proponent not to be affected by the unnecessary delay process. If the Committee refuses to give an approval to the report, the project proponent would have 180 days to revise it in accordance with the Committee’s instructions. In case that the project proponent does not revise the report within the deadline, he is deemed to terminate his application for the EIA report approval. However he is still entitled to reapply for such an approval. If he decides to revise the report and resubmit it within the timeframe, the Committee would have 30 days to decide to approve or not to approve the revised report. If the Committee fails to make a decision within timeframe, the revised report is deemed to be approved by the Committee. When the Committee refuses to give its approval to the revised report, the EIA process ends but the project proponent is still entitled to reapply for the EIA report approval.

Finally, when the Committee gives an approval to the EIA report, the ONREPP would inform the project proponent and the
competent authority having power to issue permission to the project. After that the competent authority can make a decision as to whether to issue the permission. In case of issuing the permission, the conditions set up by the Committee in giving the approval to the EIA report would be incorporated into such permission, and the competent authority is obliged to enforce it as if it were issued under the competent authority’s law.

It should be noted that once the Committee gives its approval to an EIA report, it would be valid for 5 years.

6. Monitoring and Compliance

As mentioned earlier, the conditions in the EIA reported approved by the Committee is deemed to be conditions under the law enforced by the government agency which gives permission to a project proponent. When the operation of the project begins, the project proponent must comply with such conditions. The ECNEQA stipulates that a project proponent has duty to prepare a report on compliance with what has been contained in the EIA report. The details of the report and how it should be prepared would be prescribed by the Ministry of Natural Resources and Environment with the approval of the National Environment Board. This report of compliance shall be submitted to the government agency which gives permission to such a project at least once a year.

Within 60 days after receiving the report of compliance in the previous paragraph, the government agency concerned must submit the report to the Provincial Office of Natural Resources and Environment in the area where the project is situated, or the ONREPP for projects in Bangkok. The ONREPP then would examine all the reports received, prepare another report of compliance which also includes comments and recommendations, and submit it to the National Environment Board at least once a year.

If it is found that a project proponent does not comply with the conditions set up by the Committee in the EIA report, the government
agency giving permission to the project has duty to enforce such conditions under its law. The ONREPP has power to give instructions to such an agency to enforce its law. After receiving instruction from the ONREPP, the agency concerned must ensure compliance and report its actions to the ONREPP. However, the ONREPP has no power to force the project proponent to comply with the law.

The requirement of the preparation and submittal of the report of compliance would help to develop an environmental impact assessment process in Thailand since it would compile and analyze all the data and information concerning environment impact assessment across country. This would make the government understand what the problems in the environmental impact assessment are, and how to solve the problems.

7. Possibility of Harmonizing ASEAN Environmental Impact Assessment Law

After the official formation of ASEAN as an international organization in 2007 with the existence of ASEAN Community Blueprints, people in the region become closer together than before. The ASEAN Economic Community Blueprint aims to bring economic prosperity to the people by encouraging the formation of a single market and production base with free flow of goods, services, investment, capital, skilled labor. At the same time the ASEAN Socio-Cultural Community Blueprint would like to ensure, among other things, that the development must be sustainable and it does not cause environmental problems within and cross political

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22 ASEAN stands for the Association of Southeast Asian Nations.
23 The ASEAN Community Blueprints consist of the Economic Community Blueprint, Socio-Cultural Community Blueprint and Political-Security Community Blueprint.
boundaries. This is the reason why the harmonization of environmental policies and database is encouraged.\footnote{Association of Southeast Asian Nations, \textit{ASEAN Socio-Cultural Community Blueprint}, 2009.}

The harmonization of environmental policies also includes, in this writer’s view, the harmonization of environmental law as the law often contains policies and it can be used as a tool to implement the policies. The ASEAN harmonization of environmental law, especially law on environmental impact assessment, would have some advantages. First, it is supportive to the goals of the ASEAN Socio-Cultural Community Blueprint. Second, it would prevent the problem that investors tend to move away from countries with stringent environmental regulations to those having lax rules, which could lead to economic problems in the former countries and environmental injustice to people in the latter. Finally it would accommodate the free flow of service and investment since investors and those rendering service would face with similar law and regulations wherever they do business in the region.

At the same time the harmonization of environmental law would encounter some difficulties. First of all, some countries in the regions have far more advanced economic development than others which would to a certain extent lead to different goals and objectives of development usually reflected in their respective policies. Secondly due to economic disparity and cultural, social and political differences in the region, the law on environmental protection and relevant regulations in each country are usually different from one another, let alone law enforcement.

However, the harmonization of environmental impact assessment law in this region might be possible since almost all the members of ASEAN have law on this matter. Such law in each country may be different in details of, for example, what size of project that needs an environmental impact assessment, what
authority is responsible for giving an approval to an EIA report, or who is entitled to prepare an EIA report. However, this writer believes that some issues could be harmonized, particularly the issues that are quite universal. For instance, what data and information are essential to environmental impact assessment tend to be subject to relatively universal principles. With respect to issues that are less universal, the scope or framework of each issue could be discussed for harmonization and allow each state to develop its own law and regulation to govern the details of each issue. For example, the relevant ministries of ASEAN members may arrange a meet to discuss the scope of main issues to be harmonized such as the types and sizes of projects, the contents of an EIA report, who is entitled to prepare an EIA report, how compliance with an EIA report could be properly monitored and assessed and how the public and stakeholders could participate in an environmental impact assessment process.

Conclusion

The creation of ASEAN and the conclusion of its Community Blueprints is intended to bring peace, unity, economic prosperity and healthy environment to the region. In principle, there should be no political border for people and investors to render their services or do business within this area. However in practice each member of ASEAN has its own law to regulate business and protect the environment, which could be an impediment to achieve the goal of being a single market and production base as well as common environmental policies.

This article uses an environmental impact assessment law in Thailand as an example of how this country applies its legal mechanism to predict potential adverse impacts from implementing a project and provide preventive and mitigation measures for such impacts. Under
the relevant law, the Minister of Natural Resources and Environment has power to issue a ministerial notification prescribing what projects or activities to prepare an EIA report and obtain an approval from the authority concerned before its implementation. The ministerial notification also lays down principles and criteria for carrying out an environmental impact assessment, organizing public hearings and writing an EIA report. In addition, it contains provisions on how compliance with the law would be monitored and assessed by project operators.

The environmental impact assessment law in Thailand certainly shares some similarities and differences with that in other ASEAN countries but it is possible to expand their similarities and reduce their differences to achieve the common goals and objectives of ASEAN. This could be done by the joint meeting and discussions of the Ministers concerned in the region, which hopefully could lead to the harmonization of ASEAN environmental law and environmental impact assessment.

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Harmonization of ASEAN Investment Laws: any Possibility toward Recognition and Enforcement of Foreign Judgments in ASEAN Member States

Dr. U-Krisdh Musicpunth
Faculty of Law, Thaksin University, Thailand
E-mail: ukrisdh@gmail.com

Abstract

In having ASEAN investment related agreements responded to economic activities seeking by investor and service providers or suppliers practically, harmonization of investment related laws among AMS is from time to time reiterated “necessarily needed in various aspects”. Since establishment to operation and dispute settlement are under the concept of ASEAN free movement, the host country normally shapes up all processes of doing business by its domestic laws and regulations. Of course, they are depended on each member state’s regime and jurisdiction which always different from each other and in principle not apply cross borders. The ten members we already have with sovereignty issue in addition, these make the need of integrity of laws moved even harder. Recommended by the authors as an optional choice, recognition and enforcement of foreign judgments, inter-alia, can play its role as a supportive mechanism under “harmonization of investment laws. The legal relationship between investors and investors, investors and states or between states and states in AMS then will be undertaken regionally and seamlessly.

Keywords: Harmonization, ASEAN, Investment, Foreign judgments.

Introduction

Since formation of former investment agreements, namely the ASEAN Agreement for the Promotion and Protection of Investments or ASEAN Investment Guarantee Agreement (AIGA) and the Framework Agreement on the ASEAN Investment Area (AIA), done in 1987 and 1998 respectively to the conclusion of prevailed investment based agreements applied presently, the ASEAN Framework Agreement on Services (AFAS) in 1995 and the ASEAN Comprehensive Investment Agreement (ACIA) in 2009, ASEAN member states (AMS) have kept highlighting and repeating the important of economic co-operation and integrity in this region. The expression of this concept also obviously found along the way in the ASEAN Charter and the ASEAN Economic

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1 Preamble, AIGA; Preamble of AIA; Preamble of ACIA and Preamble of AFAS.
Community Blueprint. The Charter, designed as an ASEAN constitution, grounds the fundamental principles to drive the move of ASEAN in a single character. The legal basis of the single market is inscribed thereof whereas the Blueprint has an important function as the master and action plan for establishment of ASEAN Economic Community (AEC) with the aim to have them followed and implemented by all ASEAN Member States (AMS).

In order to implement economic integration in ASEAN region practically, suggested by Lawan Thanadsillapakul, the regional laws and institutions to supporting and strengthening are needed. Again, her suggestion recently mentioned in an academic article by Huda, Nugraheni, and Kamarudin. In terms of laws, Rajagukguk recognized the relation between effective legal framework and economic development and the harmonization of laws in economic circle is possible. Said, a solid legal framework is a basic element to economic integration. The issues of laws in need are both domestic and international to reflex the cross-borders trade and investment. Namely, the law of contract, law of corporation, law of finance, law of intellectual and property right, law of arbitration and so on are for domestic dimension whereas the law of tariff, protection of investment and investor, dispute settlement and ISDS, etc. for international aspect. He also proposed that a further need is apparatus to implement those laws and regulation. It is a role of court. The court can serve its important role in dispute settlement and arbitration processes.

2 Para 2 (Introduction), para 5 (Characteristics and Element of AEC) for example.
3 Article 1.5, ASEAN Charter.
4 Art. 2, ASEAN Charter.
7 Erman Rajagukguk, Harmonization of Law in ASEAN Countries towards Economic integration 9 Indonesian J. Intl L. 529 (2011-2012), p. 530, 531, 532, 537; in his view, the legal framework must be with quality of stability, predictability and fairness,
However, issues of concern in came across in conduction of literature review. The different of regimes belong to each AMS. The common law system of three AMS (Malaysia, Singapore and Brunei) and other four are under the civil law system. They are convergent but divergent in a while.\(^8\) Recourse of approaches, conditions, and efforts required for a single country may be different from other ones even for the same goal.\(^9\) Unlike the practices done by European Union (EU) members, AMS typically have reserved their sovereignty right and hardly share with any institution.\(^10\) Harmonization in AEC framework, there are no legal provisions with international binding all AMS\(^11\), not even a model law provided to guide or shape them up all along the line.

Further, the Charter and other investment related agreements mentioned above have not established any supra-national authorities to govern the member states. In ASEAN, we do not have the ASEAN Parliament, ASEAN Court and ASEAN Commission as yet existed in European Union (EU). We also do not have any strong tradition of judicial cooperation to gear up and drive our harmonization process as pointed out by Peerapan Tungsuwane.\(^12\) Moreover, as seen through a free trade agreement concluded with non-ASEAN country, each AMS normally focus mainly on her own instead of a single benefit as a whole.\(^13\)

In this paper, Arnon and I would like to express our idea on the recognition and enforcement of one AMS judgment in other AMS

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\(^8\) Ibid, p. 532.


\(^11\) Ibid. p. 1.
\(^12\) Ibid. p. 3.
\(^13\) Ibid. p. 4.
territories. We do propose this idea as an alternative option working in parallel path or initial proposal for a further research deeply in the issue.

In our understanding, we believe that movement of judgments among AMS will underpin, at least, a basic structure of ASEAN legal harmonization along with any other mechanisms proposed. Our narration of contents, based on revision of Arnon’s articles introduced recently, his summary ideas divided into the three main parts. The first part touches upon the current form of recognition and enforcement of foreign judgments in AMS, following by the rules and methods of AMS in doing so, and ends up with the obstacles and difficulties of those to implement among them.

**Analysis and Discussion**

1. **Form of recognition and enforcement of foreign judgments in AMS**

   A state, in former time, had enjoyed its sovereignty right in ways of legislation, administration and judiciary which is that enjoyment not subject to any other sovereignty. Namely, enjoyment of one’s sovereignty cannot be harmful to other one’s or *par in parem imperium non habet*. Anyway, the development of economic transactions where goods, services and investment moving across ones territories has brought those rigid rights declined. From the principle of territorial sovereignty that judgments can only be enforced within its jurisdiction, there a tendency of judgments movement recognized and effected outside their own lands.

   The recognition and enforcement of foreign judgments has paid important role as to serve the change and expansion of economic activities. In modern world, the relationship between state to state, state to individual and individual to individual is not limited within a single

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14 อานนทศรบุญโรจน์, การรับรองและการบังคับตามคำพิพากษาศาลต่างประเทศในกลมประเทศไทย, วารสารบณฑตศึกษาศาสตร์, ปท : 4 ฉบับ :3 เล่มหนา 238-245 ปี พ.ศ. : 2554 (available only in Thai version).
country. The cross borders based relation is obviously seen in almost forms of business, trades and investments, particularly in areas where free trade is established.

In ASEAN economic context, recognition and enforcement of foreign judgments, according to Vitit Muntarporn, it move rather slowly\(^\text{15}\) even though the regional legal consistency was mentioned since the foundation of its Association in 1967.

### 1.1 Justice co-operation between AMS in civil and commercial laws

Based on the 1967 Bangkok Declaration and the 1976 Declaration of ASEAN Concord, the legal consistency was first introduced in 1984 and led to the AMS Laws co-operation forum. They also have common view to develop and improve the harmonization of regional laws along the line. In 1967 Declaration, clearly stated that\(^\text{16}\)

“...the aims and purposes of the Association shall be...To promote regional peace and stability through abiding respect for justice and the rule of law in the relationship among countries of the region and adherence to the principles of the United Nations Charter...”

In 1986, ASEAN declared the legal co-operation between members in ASEAN Ministerial Understanding on The Organizational Arrangement for Cooperation in the Legal Field focusing on exchange of legal information and document, judiciary co-operation, and legal research. Nothing in regional level touched upon recognition of members’ judgments ever since. The co-operation, however, was concluded among few members.

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whose historical backgrounds were shared.\textsuperscript{17} Under the Reciprocal Enforcement of Commonwealth Judgments Act\textsuperscript{18} of Singapore where the judgments issued by the British Superior Court and registered in Singapore are enforceable.\textsuperscript{19} The law also extends onto the judgments of Superior Court of any other countries, including Malaysia and Brunei, based on treatment of reciprocity.\textsuperscript{20}

1.2 Source of laws on recognition and enforcement of foreign judgments in AMS

According to his article, Arnon divided the origin of laws in ASEAN states on this matter into 2 main sources; written and non-written law.

The written law on recognition and enforcement of foreign judgments is widespread and promulgated in many member states’ domestic regime excepted Thailand and Indonesia. Some - the Philippines and CLMV members - specify it in the law of procedure and others - Malaysia, Singapore and Brunei - place it in a specific law (\textit{lex specialis}). The law in a form of treaty, on the other hand, is not under their attention regardless of how long the arrangement of relevant convention has been proposed.\textsuperscript{21}

The non-written law, the recognition and enforcement of foreign judgments in some AMS can be created by judgments of domestic

\textsuperscript{17} Supra note, วต. มนตตาภรณ, ผ. 91-92. Referred to Malaysia, Singapore and Brunei who were colonized by the British.
\textsuperscript{19} Title 3.1, the Reciprocal Enforcement of Commonwealth Judgments Act.
\textsuperscript{20} Title 5.1, the Reciprocal Enforcement of Commonwealth Judgments Act, and please see also จนตร.สนศภฤกษ., “กรณ.ยอมรับและบังคับตามคาพพากษาศาลต่างประเทศ,” (บทบาทพระยาบรมราชินูปถัมภ์, 2531), p. 175. (available only in Thai version) cited in สมศรภ., ”การรับรองและการบังคับตามคาพพากษาศาลต่างประเทศในกลุ่มประเทศอาเซียน, พระนครศรีอยุธยา: สำนักงานกฎหมายการค้า, ปี 2532, เล่ม 1:3 เลขที่ 1141-125 ปี พ.ศ. 2554.
courts, particularly in Malaysia, Singapore and Brunei that British Common Law has direct impact upon.

2. Rules and Methods of AMS in recognition and enforcement of foreign judgments

Apart from the principle of reciprocity, some AMS – Malaysia, Singapore and Brunei – also have adopted the principle of obligation theory. When judgments issued by a country with statutory system requested, the reciprocity will serve. The obligation theory will apply in case the judgments made under Common Law system.

In the case of Indonesia, the principle of territorial sovereignty is strictly observed. The Philippines also embraces this principle but leaves more rooms to play. For Thailand, the recognition and enforcement of foreign judgments is on the comity of nations basis.

2.1 Approaches of recognition and enforcement of foreign judgments

Some AMS, both civil or common laws backgrounds, have foreign judgments adopted into their jurisdiction via a domestic litigation process. The foreign judgments will be used as an evidence or ground for examination process.

For AMS with common law background, they have more flexible room to import those judgments as mentioned earlier. Through the domestic litigation process for a judgment from any common law country and the registration process for one from statutory system. The latter case, a foreign judgment will be effectively enforced in equivalent to an in-house one.

In the case of Indonesia and Thailand, a foreign judgment is recognized just as prima facie evidence. The enforcement, consequently, can be settled with recourse to “trial de novo” a new litigation.
2.2 Court jurisdiction and authority of court

It is common understanding, the only issue perhaps, among all AMS that a foreign judgment must be issued by a competent court of rendering and carried out by a competent court of enforcing. Some AMS adopt a foreign judgment without any reservation of \textit{revision au fond} authority; an enforcing court can never make any changes of that judgment. Unlike the Philippines, the court has right to form a hearing procedure and to have the merit of judgment revised in the case any errors of factual or legal question found.

2.3 Finality of foreign judgments

The finality of judgment is, inter alia, a controversial issue among member states. Some, common and civil laws states, have agreed that only judgment with the finality and conclusiveness is permissible. However, some civil law states have shared their views on the finality status only if it became final and sanction from any higher court impermissible. While the common law states have a different view, a foreign judgment issued by a competent court is final and enforceable and regardless of any further process – right to appeal for example - if there are.

3. Obstacles and difficulties of implementation

Refer to his survey on this issue, Arnon has found some barriers in implementing of recognition and enforcement of foreign judgments in ASEAN umbrella. His article gives readers informative view into two points as I could summarize as follows;

3.1 Concept of sovereignty

The sovereignty, in one way or another, plays a crucial role and becomes a protective wall against the idea of recognition and enforcement of foreign judgments among AMS. In one understanding, permission of foreign judgment enforced inbound is integrity loss of its sovereignty. Further, the normative practice of
ASEAN, their priority approach is non-intervention and non-interference.\textsuperscript{22}

### 3.2 Regime of laws

As mentioned above, there are different legal systems and regimes in member states of ASEAN. This brought the inconsistency of legal system and barred the co-operation of AMS to have an idea of recognition and enforcement of foreign judgments implemented cross the board effectively.

**Conclusion**

Harmonization of investment related laws in ASEAN region needs the serious attention of AMS. The laws of region to contribute and accelerate investment and any other trade issues require new legislation, new mechanisms and changes. Yes, the regional harmonization of law itself may be a right answer to this matter. Anyway, there are several limitations to break through. The multi speeds of economic development, differences of regime, proper governing and monitoring mechanism and so on including national based benefits are for example. The critical question thereof for them is “what the most appropriate methodology for ASEAN to drive the legal harmonization implemented practically?”.

On the back door approach, the idea of recognition and enforcement of foreign judgments between one AMS to another AMS is suggested. It might not be the direct way to create harmonization *per se*. the co-operation of AMS courts and free movement of their judgments with ASEAN territory could help forming a basis of legal integration. It is an optional method proposed that should be taken into account and carried out side by side with the direct harmonization.

However, the strong and rigid concept of sovereignty in economic world, together with different legal regimes, can be one of prominent

\textsuperscript{22} Supra note, Tungsuwane, Peerapan, p. 3.
obstacles to move forward the ASEAN vision on economic goal. The concept of free trade and single market of ASEAN and its prosperity is depended on AMS to make the right decision for their own future.

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Legal Harmonization In Asean Economic Communities (Looking For The Best Legal Harmonization Model)

Candra Irawan  
Faculty of Law University of Bengkulu, Indonesia  
E-mail : candrawan73@gmail.com

Abstract

ASEAN countries need to be encouraged to make responsive, effective, efficient, non-discriminatory, and pro-competition regulations that are adjusted AEC Blueprint 2025. This means that each ASEAN country needs to harmonize regulations so that the rules that apply in each national territory do not conflict with each other and in line with AEC Blueprint 2025. There is no clear regulation system in force in ASEAN, nor is the legal harmonization mechanism and binding power of the AEC. Questions that should be asked, is the legal basis for the implementation of AEC Blueprint 2025 deliberately based on international agreements only (intergovernmental, soft law) and not upgraded to legal force (primacy principles, hard law)? The most important thing is that there is a shared awareness to build the ASEAN region’s economy more productive, advanced and shared prosperity. The commitment is not enough just to use soft law approach, but must be followed by hard law approach (primacy principles). ASEAN leaders should hold talks and seek agreement to implement the principle of supranational (primacy principles) that the implementation of the AEC Blueprint 2025 be adhered to by all member states.

Keywords: Legal harmonization, Model, ASEAN, Economic Community

Introduction

The ASEAN Economic Community (AEC) agreed upon by ASEAN member countries on 31 December 2015 aims to create ASEAN economic integration. The agreement will be implemented following the AEC Blueprint 2025, signed by ASEAN Leaders at the 27th ASEAN Summit, November 22, 2015 in Kuala Lumpur, Malaysia. AEC is based on four pillars, namely: single market and unity of production base, competitive, innovative and dynamic economic region, equitable economic growth and ASEAN that is integrated in the global economy. The guarantee for the implementation of this matter has also been

agreed that each ASEAN country may not withdraw the agreed commitment (no back loading of commitments) and the flexibility of some things that should be asked at the beginning of negotiations and must be approved together.\textsuperscript{2} ASEAN member countries are required to ratify AEC Blueprint 2025 within 6 months.\textsuperscript{3}

AEC Blueprint 2025 should be supported by legal regulations. Therefore, ASEAN countries need to be encouraged to make responsive, effective, efficient, non-discriminatory, and pro-competition regulations that are adjusted AEC Blueprint 2025. This means that each ASEAN country needs to harmonize regulations so that the rules that apply in each national territory do not conflict with each other and in line with AEC Blueprint 2025. There is no clear regulation system in force in ASEAN, nor is the legal harmonization mechanism and binding power of the AEC. Looks still very soft, given the freedom to ASEAN member countries to harmonize the regulations according to the needs of the level of economic development. This condition causes the implementation of AEC Blueprint 2025 to be slower.

Questions that should be asked, is the legal basis for the implementation of AEC Blueprint 2025 deliberately based on international agreements only (intergovernmental, soft law) and not upgraded to legal force (primacy principles, hard law)?\textsuperscript{4}

The establishment of the EU began with a presentation from Robert Schuman (Minister of Foreign Affairs of France) regarding the importance of cooperation in the use of the European Coal and Steel


\textsuperscript{3} ASEAN Secretariat, ASEAN Economic Community Blueprint 2025, The ASEAN Secretariat Public Outreach and Civil Society Division, Jakarta, 2015, Article 82 ix.

\textsuperscript{4} The term soft law first appeared in diplomatic language in the 1980s, and was widely used in the context of international relations and international law. Soft law refers to a quasi-law instrument that does not have a legally perfect binding force, its binding power is weaker than the power of positive law. See Bryan H. Druzin, Why does Soft Law Have any Power Anyway?, Asian Journal of International Law, 7 (2017), https://www.cambridge.org/core/terms. https://doi.org/10.1017/S2044251316000229, p. 361.
Community (ECSC) on 9 May 1950. France is also ready to give part of its sovereignty to a supranational institution who manages ECSC, then European countries agree to join the European Economic Community (EEC) based on the Rome Agreement 1957. Carrying the principle of free movement of persons, goods, services and capital.\(^5\)

Now, there are 28 member countries in EU. The EU organizational structure consists of the European Parliament, the Council of Ministers, the European Commission, the European Court and the European Audit European Audit Agency. Applicable law in the EU is divided into two, namely the primary law which is the basic rule of all EU actions and secondary law includes regulations, directives and decisions based on the principles and objectives of the establishment of the EU. Legal issues that can hinder the achievement of EU objectives are overcome through the application of the primacy principle, community law has the primacy of national law.\(^6\) EU law has a higher position than the national law of member states. When there is a conflict between EU law and the national law of member countries, then EU law applies.\(^7\)

NAFTA is an organization of countries of North America was founded in 1994 by the United States, Canada and Mexico. The goal is to eliminate trade barriers and facilitate cross-border movement of goods and services, creating fair competition, increase investment opportunities substantially in the member states, the protection and enforcement of intellectual property rights, create effective procedures for the implementation of the agreement, the administration of joint and settlement disputes, as well as establishing a trilateral, regional and multilateral cooperation framework.\(^8\) Although in its founding charter

\(^6\)M. Budiarto, Basics of Economic Integration and Harmonization of European Community Law, CV. Akademika Pressindo, Jakarta, 1991, p. 46.
led to the application of principles of primacy of Community law but in fact not the case. Even now NAFTA is headed for dissolution, the United States has stated that it is no longer interested in continuing economic cooperation through NAFTA. Such conditions show that in fact NAFTA countries did not make efforts to harmonize national law and NAFTA provisions, but to survive the national law and the national interests of each member country. Another fact, it actually resulted in a decrease NAFTA Mexico’s economic growth (1.8%) whereas before growing 3.2%. The impact caused poverty for farmers in Mexico.9 This confirms that actually NAFTA has ended, failed.

Countries in Asia including ASEAN are the new hemispheres of the world, and there is a shift in global power from west to east. This is inevitable, especially in the economic sector driven by China and India.10 ASEAN strongly of potential to contribute greatly and benefited from the economic strength of Asia. ASEAN (AEC) is strong will be a tough competitor China, India, USA and EU

The establishment of AEC, potentially generate US $ 280 billion to $ 615 billion (equivalent to 5 to 12% of the projected ASEAN GDP) in economic value annually in 2030. ASEAN would be the seventh largest economy in the world and is projected to rank the fourth largest economy in 2050. The attractiveness of the ASEAN region includes a population of 620 million (9% of the world’s population), the third largest workforce in the world (after China and India), and an average economic growth rate of around 5.4% per year.11 Between 2007 and 2014, ASEAN trade increased by a value of nearly $1 trillion. Most of that (24%) was trade within the region, followed by trade with China (14%), Europe (10%), Japan (9%) and the United States (8%). During the same period, foreign direct investment (FDI) rose from $85 billion to

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$136 billion, and in share to the world from 5% to 11%. With 622 million people ASEAN is the world’s third largest market, which behind China and India has the third largest labour force.\textsuperscript{12}

Predictions, projections and the potential for a positive impact on economic progress and prosperity for the people of ASEAN when countries have a shared commitment comply AEC Blueprint 2025. Some potential issues become an obstacle to the harmonization of laws on the AEC, namely:

1. The existence of different economic interests among ASEAN member countries. There is a problem of economic divergence in ASEAN countries. The economic divergence consists of four groups, namely: first group (Singapore), (2) second group (Thailand and Malaysia), third group (Indonesia, Philippines and Brunei), fourth group (Cambodia, Laos, Myanmar and Vietnam).\textsuperscript{13}

2. Strengthening of protectionism against national economic interests. Actually, not all economic activities are global. International trade, although it has been echoed as having embraced global trade, turns out that the reality is largely regional, EU countries trade with their members, and trade less with other countries.\textsuperscript{14} Economic globalization is most evident in international financial markets.\textsuperscript{15} Currently, the WTO suffered a severe test by the emergence of the US president’s policies, Donald Trump (Trump Policy) that carries the highly protectionist and threatens in the free trade in the world. For example, the policy plan for the implementation of trade tariffs is higher for China, EU, Mexico and Canada.\textsuperscript{16} The United States Government on September 24, 2018 implemented an import tariff of 10% on 5745 imported products from China valued at USD 200

\begin{footnotesize}
\textsuperscript{14}Anthony Giddens, \textit{The Third Way} (Third Way of Social Democracy Renewal), PT. Gramedia Main Library, Jakarta, 2000, p. 33.
\textsuperscript{15}\textit{Ibid}, p. 35.
\end{footnotesize}
billion. The action was immediately repaid by China by applying import tariffs on 5207 imported products from the United States at a rate of 5% -10% equivalent to USD 60 billion.\(^{17}\) For Indonesian products, it is also planned to be subject to higher import duties for 124 Indonesian products.\(^{18}\) However, concerns about the Trump Policy effect are contagious to AEC member countries. Foreign Ministers of ASEAN countries declared their opposition to economic protectionism.\(^{19}\)

3. Increased escalation of economic competition and depletion of shared commitments. Reflecting on the case of British (Brexit) in the EU and the failure of NAFTA, it turns out that joining an economic community does not eliminate competition between member countries, and because the national economic interests of certain countries are threatened, the shared commitment to advance the economic community is diminishing. As a result there is an economic conflict. The best solution is cooperation and trying to minimize the gap between member countries. The problem of the economic community is not able to be solved only by the government but it is important to invite actors outside the country (economic actors, investors, employers' associations, non-government institutions).\(^{20}\)

4. Unclear legal harmonization model of AEC (soft law approach). Studying the ASEAN establishment charter to AEC 2015, the approach used is the intergovernmental approach. All the problems arising from the implementation of the AEC disconnected in meetings and negotiations between the government, there is no body set up as an official body of dispute resolution. The ASEAN Secretariat does not

17 Editor, Real Trade War, Kompas, Tuesday, 09/25/2018.
20 T. May Rudi, Contemporary International Relations and Global Problems, PT. Refika Aditama, Bandung, 2003, p. 3.
have this authority. The ASEAN structure consists of: ASEAN Summit, Organizational Structure, ASEAN Coordinating Council, ASEAN Community Councils, ASEAN Sectoral Ministerial Bodies, Committee of Permanent Representatives, National Secretariats, ASEAN Committees in Third Countries and International Organizations (ACTCs). The difference is in the supranational authority of the EU.

The most crucial issue in the process of legal harmonization in the international economic community such as the AEC, even faced by the United Nations (UN) is that national laws are often different or contradictory to the national laws of other member countries. Differences or contradictions originating from national law can lead to disputes and become obstacles to the AEC agenda. There are at least three ways that can be done, namely: (1) ASEAN member countries (AEC) agree not to apply their national laws, and declare that they are subject to the AEC rules, (2) use their respective national laws and in the event of a dispute agree to apply the choice of law principle, and (3) carry out unification and harmonization substantive rules related to economic activities. So far, at a meeting of ASEAN leaders (AEC) has never been discussed seriously in the implementation of the AEC the desire to change the way of intergovernmental negotiation approaches towards a supranational approach. ASEAN countries do not want to hand over some of the sovereignty in the economic field to the AEC institution. So it is natural, if the achievement of the AEC 2025 Blueprint takes place slowly and is difficult to be fully realized by 2025. Many agreements are made by ASEAN, but there is no special institution that can supervise and enforce the compliance of member countries to the implementation of the agreement. ASEAN does not have an institution that can call on member countries that are not compliant.

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with the agreement. There is no credible mechanism in resolving disputes objectively and is strongly binding.\textsuperscript{23}

In fact, the harmonization of law in international relations has been carried out, including: by the United Nations (UN) through the United Nations Conference on Trade and Development (UNCTAD), the International Center for Trade and Sustainable Development (ICTSD) and the United Nation Conference on International Trade and Law (UNCITRAL). Various international conventions produced by these bodies are widely adopted by countries in the world into positive law,\textsuperscript{24} by the World Trade Organization (WTO) is based on the principle of complete submission, to the offense may be filed a lawsuit to the WTO Dispute Settlement Body, and if found guilty, sentenced to fines. The problem is on the existence of differences in the legal system and the substance of the national laws of member countries, the legal requirements for member states are not the same.\textsuperscript{25}

According to the author's thoughts, reflect on the case of the EU and NAFTA, the model law harmonization is right for the AEC is to integrate the construction model EU law (hard law) and to areas of the economy that are sensitive approach over (soft law) through negotiation on an ongoing basis to ASEAN member countries is ready and agreed to be jointly subject to hard law rules. The construction model of EU (hard law) law can be used for certain economic fields where all AEC countries are ready. For example, investment and trade licensing standards, recognition of certain expertise certifications issued by the AEC state certification agency, labor law protection standards, quality standards for goods and services products, tariff reductions and elimination of tariffs on goods produced by AEC countries.


\textsuperscript{24}Kusnu Goesniadhie, Harmonization of Law in the Perspective of Regulations (Lex Specialist, A Problem), JP Books, Surabaya, 2006, p 106.

\textsuperscript{25}Candra Irawan, Political Law of intellectual property rights, CV. Mandar Maju, Bandung, 2012, p. 94.
Conclusion

The most important thing is that there is a shared awareness to build the ASEAN region's economy more productive, advanced and shared prosperity. The commitment is not enough just to use soft law approach, but must be followed by hard law approach (primacy principles). ASEAN leaders should hold talks and seek agreement to implement the principle of supranational (primacy principles) that the implementation of the AEC Blueprint 2025 be adhered to by all member states.

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Peatland Restoration and Transboundary Haze Pollution: Law and Institutional Change in Indonesia

Myrna A. Safitri
Faculty of Law, Pancasila University, Indonesia.
E-mail: myrnasafitri69@gmail.com

Abstract

The 2015 haze in Southeast Asia became an obstacle in the implementation of ASEAN Haze Treaty. Signed since 2002, the treaty is expected to reduce transboundary haze. Nevertheless, forest and land fires burned 2.6 million hectares of Indonesian land in 2015 showed difficulties to reduce that disaster. How Indonesian government could deliver its obligations as mandated in the Haze Treaty was a question. In 2016, the Government of Indonesia then stated their commitment of combating the haze. President Joko Widodo established an ad hoc institution, Peatland Restoration Agency, that is tasked with coordinating and facilitating the restoration in seven major peat provinces in Indonesia. Two years after the launched of that peatland policy, there has been a significant peat fires reduction. The effectiveness of peatland restoration is obvious. Questions that remain valid are what legal and institutional factors that play a role in determining this success? Are there obstacles in terms of legal and institutional framework that should be anticipated? This paper answers these problems based on socio-legal research that combines a statutory approach and a participant observation. The preliminary findings indicate that the haze reduction is largely influenced by strict law enforcement and government guided coordination. However, legal disharmony and various interpretations of peatland law are among the factors that hinder the restoration. An ad hoc institution with limited authority is another constraint. This paper is divided into three sections. The first part explains peatland law and institutions. The second focuses on the policy of peatland restoration. The last part discusses legal and institutional opportunity and constraints.

Keywords: ASEAN, Treaty, forest, land fire, peatland restoration, transboundary haze

Introduction

Global peatlands are equivalent to 3% of the Earth’s land cover. Peatlands are found in 180 countries covering the areas of 400 million hectares. Around 60% of tropical peatlands are in Southeast Asia. There are 25 million hectares of peatlands in this region. Indonesia has 15 to 20 million hectares of peatlands making it the largest tropical peatland country; 50% of tropical peatlands are found in Indonesia.

One of the functions of peatland ecosystem is its ability to store carbon. Indonesian peatlands store 46 Gt of carbon or 8-14 % of world carbon reservoir. Peatland serves local communities as water storage and providers of some endemic plants and animals. In short, peatlands have provided food, energy, construction material, livestock bedding, instead of

Unresponsible management of peatlands, however, have been practiced by draining and burning. The conversion of peatlands make it change from carbon reservoirs to sources of greenhouse gases (GHG) emissions.

Forest and land fires hit Indonesia in 2015 burned some 2.6 million hectares of land; around 800 thousand of burned lands were peatland. This was less than the similar fires occurred in 1997-1998 that burned some 8 million hectares of land. A report released by the World Bank states that the economic losses due to those fires reached USD16.1 million, equivalent to 1.9% of Indonesia’s GDP. Meanwhile, other losses cannot be calculated in terms of health and education. Greenhouse gas emissions from burning peatlands are also very huge. Citing data from the Global Fire Emission Database, the World Bank stated that Indonesian fires contributed roughly 1,750 million metric tons of carbon dioxide equivalent (mtCO2e) to global emissions in the same year.

Indonesia’s 2015 peat fires hindered this country to implement ASEAN Transboundary Haze Pollution Agreement (ASEAN Haze Treaty). Indonesia did a very late ratification of the Treaty. Law 26/2014 finally adopted the Treaty after years of domestic debate. Criticism was addressed to Indonesia due to this late response. In 2016, however, the Government of Indonesia stated their commitment of combating the haze by enacting peatland restoration policy. President Joko Widodo established an ad hoc institution, Peatland Restoration Agency, that is tasked with coordinating and facilitating the restoration in seven major peat provinces in Indonesia.

Two years after the launched of that peatland policy, there has been a significant peat fires reduction. Indonesian Ministry of Forestry reported a significant fire and haze reduction after 2015. As mentioned earlier, the burned forest and land in 2015 was 2.6 million hectares. Nevertheless, in 2016 it was 430 thousand hectares and became only 124,743 hectares in 2017.

The effectiveness of peatland restoration is obvious. Questions that remain valid however are what legal and institutional factors that play a role in determining this success? Are there obstacles in terms of legal and

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institutional framework that should be anticipated? This paper answers these problems based on socio-legal research that combines a statutory approach and a participant observation. The first part of this article explains peatland law and institutions in Indonesia. The second one focuses on the policy of peatland restoration and some achievements. The last part discusses legal and institutional opportunity and constraints to reach peatland protection and its relevance with the state obligations of transboundary haze reduction.

Analysis and Discussion

1. National Law and Institution on Peatland Protection

In 2012, for the first time Indonesia had a National Strategy of Peatlands Management. A regulation regarding the protection of peatland ecosystem actually began in 1990. A Presidential Decree concerning the management of protected areas (Decree No. 32 of 1990) places peatlands as one of protected areas. Spatial Planning Law (Law No. 26 of 2007) and Government Regulation (GR) No. 26 of 2008 concerning the National Spatial Plan include peatlands also as national protected areas. The protected peatland is that with peat layer of 3 meters or more and is located in the upper reaches of a river or swamp. In addition to being regulated with Spatial Planning Laws, peatland regulations in Indonesia are part of soil and water conservation aspects and environmental protection in general.

The Indonesian Environmental Law (Law No. 32 of 2009 concerning Environmental Protection and Management) requires the Government and regional governments to make Environmental Protection and Management Plans (Rencana Perlindungan dan Pengelolaan Lingkungan Hidup, RPPLH). The plan includes various forms of ecosystems; one of which is the peat ecosystem. Government Regulation No. 71 of 2014 as amended by GR No. 57 of 2016 (hereinafter referred to as Peat GR) is a special regulation governing the protection and management of peat ecosystems. Below are some key provisions in that Peat GR.

a. Planning and Utilization

Planning for the protection and management of peat ecosystems is carried out through peat inventory, the enactment of peat ecosystem functions, and the plan of peat protection and management. Both the inventory and enactment of the peat functions have been finalized but the plan for the protection and management of the peat ecosystem at
the national level has not yet been established. A new regional level Plan was formed in West Kalimantan.\textsuperscript{10}

The peat inventory is based on an indicative map of peat ecosystem distribution. On the basis of this map, by using satellite imagery, aerial photographs and field surveys, peat hydrological unit maps are determined. Peat Hydrological Units, hereinafter abbreviated as PHU, are peat ecosystem landscapes used as the basis for peat protection and management. In 2017 the Ministry of Environment and Forestry launched a national PHU map\textsuperscript{11} and in the same year enacted the functions of peat ecosystem that cover protected peat ecosystem and peat ecosystem for cultivation.\textsuperscript{12}

The determination of the peat function is very important in the planning of peat protection and management. A peatland management model will be determined by the peat function. For peat ecosystems with protected functions, their use is only allowed for research, science, education and/or environmental services. Meanwhile, for peat ecosystems with a cultivation function, other uses can be made as long as the hydrological function of peat can be properly maintained.

Previously stated, these functions include protection and cultivation areas. At locations that are one or more peat domes and cover an area of at least 30\% of the entire PHU area, it is designated as a protected peat ecosystem. The Government also expands the protected functions in locations with peat layers of 3 meters or more; with specific and/or endemic germplasm; and/or protected species. In addition, the Peat Ecosystem that has been previously determined as a protected area is also designated as a protected peat ecosystem.

b. The Peatland Damage Control

To measure the damage of peatland ecosystem, the Government of Indonesia has set up standard criteria of damage. For protected peatland the criteria are: (i) the existence of man-made drainage; (ii) exposed pyrite sediments and/or quartz under the Peat layer; and or (iii) the reduction of area and volume of land cover. Meanwhile for the peat ecosystem with cultivation function, the standard of damage is measured if: (i) the ground water level on the Peat land is more than 0.4

\textsuperscript{10} Decree of West Kalimantan Governor No. 131 of 2016 on A Model for Peatland Protection and Management Plan 2016.
\textsuperscript{11} Decree of Minister of Environment and Forestry No. SK.129/Menlhk/Setjen/PKL.0/2/2017 on The Enactment of the National Map of Peatland Hydrological Unit.
\textsuperscript{12} Decree of Minister of Environment and Forestry No. SK.130/Menlhk/Setjen/PKL.0/2/2017 on the Enactment of the National Map of Peatland Ecosystem Functions.
meter below the Peat surface at a compliance point\(^\text{13}\); and/or (ii) exposure to pyrite sediments and/or quartz under the Peat layer. In addition to these, there are several prohibitions stated in Peat Regulation, such as new opening ban on peatlands, creating drainage canals that will result in drying peat, a ban on peat burning and prohibition of taking no action on peat fires.

In addition to the mitigation of damaged peat ecosystem, peat recovery is also carried out by natural succession, rehabilitation and restoration. The obligation to recover lies on the person in charge of business or activity that causes the peat damage. Outside the area managed by that person, the peat recovery is carried out by the Government and the regional government.

If within 30 days of knowing that there has been no damage mitigation done, recovery will be carried out by a third party with a cost borne by the person in charge of the business or activity. Specifically, regarding recovery from peat fires, the Peat Regulation states that if no recovery activities are carried out within 30 days after the peat fire discovered, the environmental recovery is carried out by the Government at the expense of the license holders of peatland. With regard to fires that occur inside the permit area, the Government takes relevant actions to save and temporarily take over the burned area. The takeover aims to verify whether the person in charge of the business/activity is allowed to continue the peat utilization or the Government must reduce the area of the permit.

c. The Preservation of Peat Ecosystem

Indonesian Peat Regulation determines four types of peat ecosystems that can be reserved. The first is protected peat ecosystem that is less than 30\% of the total area of PHU in certain province/district. The second reserved areas are applied if 50\% of cultivated peat ecosystem is utilized for activities that is known to have exceeded the standard criteria for peat damage. The third is for Peat Ecosystem that is stipulated for moratorium on utilization based on laws and regulations. Since 2011, the Government of Indonesia has implemented a moratorium policy on granting new licenses to natural forests and peatlands. Every year, the policy is changed. The last is through Presidential Instruction No. 6 of 2017. The last one is for Peat

\(^\text{13}\) The compliance point refers to Minister of Environment and Forestry Regulation No. P.15/MENLHK/SETJEN/KUM.1/2/2017 on the Procedure of Measuring Ground Water Level on Compliance Point of Peatland Ecosystem.
Ecosystem with a cultivation function that has been determined to change its function into a protection peat.

Peat Ecosystem Reserves must be included in the Peat Ecosystem Protection and Management Plan at the national or regional level. In practice, reserves only apply to the moratorium on utilization as stipulated in Presidential Instruction on License Granting Moratorium. Reserves for other purposes cannot yet be done given the absence of Peat Plan.

d. Supervision and Law Enforcement

Supervision of the peat ecosystem carried out by the Ministry of Environment and Forestry and the local government. These officials have the task of monitoring and investigating alleged violations of the law and stopping certain violations leading to peat damage.

Law enforcement in terms of protecting peat ecosystems uses more administrative law enforcement. Violations in the use of peat ecosystems such as land clearing, burning and making drainage canals that cause peat drought are subject to a number of administrative sanctions. The sanctions include written reprimand, coercion, suspension of licenses and revocation of permits. Coercion by the Government includes temporary suspension of activities, transfer of activity facilities, closure of drainage canals, demolition and confiscation of goods or tools that have the potential to cause violations.

As mentioned earlier, regulation on peatland in Indonesia is spread at least in three legal regimes: spatial planning, soil and water conservation and environmental laws. In line with this regulation, the institutions related to peat ecosystems also vary. At the national level there are at least six ministries and state institutions that are closely related to peat affairs. They are the Ministry of Environment and Forestry, Ministry of Agrarian Affairs and Spatial Planning, Ministry of Agriculture, Ministry of Public Works, Geospatial Information Agency and Peatland Restoration Agency. The following part explains the authority of each institution.

We start from the peat map as an important part in peat protection planning. In section 3.a we have discussed the Map of Peat Hydrological Units (PHU). This map was created by the Ministry of Environment and Forestry. The basis for making the PHU map is a peatland map made by the Center for Research and Development of Agricultural Land Resources under the Ministry of Agriculture. The Geospatial Information Agency is authorized to coordinate the management of all
geospatial information including thematic maps produced by government agencies.

In addition to maps, other important matters are about spatial planning in the peat ecosystem. Authority regarding spatial planning is in the Ministry of Agrarian Affairs and Spatial Planning. Spatial planning is also the authority of the provincial and district governments. Ideally, the function of the peat ecosystem is in line with the functions of land and resource utilization in each spatial document. But there is still a gap between the peat functions as enacted by the Ministry of Environment and Forestry and the functions in Regional Spatial Planning. One of the causes is the determination of the peat ecosystem function was in 2017, while the spatial layout of the peatlands has existed before.

Another thing that also influences the protection of peat ecosystems is the arrangement of the water and hydrology in each PHU landscape. In this case, the conservation aspects of soil and water, swamps, irrigation development and other water structures are important parts that must be considered. The authority regarding this matter is with the Ministry of Public Works.

The last is regarding the existence of permits for either forestry permits or plantations within the peat ecosystem. Although since 2011, the Government of Indonesia has implemented a moratorium on the issuance of new permits on peatlands and in 2018 the Presidential Instruction has just postponed new permits for oil palm plantations, in practice most of the peatlands have been granted with permits. The authority related to this permit is with the Ministry of Environment and Forestry for forestry permits, the Ministry of Agrarian Affairs and Spatial Planning/National Land Agency for land rights for plantation permits, the Ministry of Agriculture and the regional government for plantation business permits.

The existence of legally valid permits needs to be addressed when peat protection policies are implemented. To respond, Peat Regulation has established a number of transitional provisions in the application of peat protection rules.

It is stated in that Regulation that the license for utilizing protected peat ecosystem that had been issued before the Peat Regulation enacted (2014) and the operation had been carried out, so the license is still valid until the period expired. The average forestry permit is 60 years and can be extended to 35 years. As for plantation permits that
already have land right is 35 years and can be extended for 25 years. After that they can apply for a new right on the same land.

For permits that have been issued before Peat Regulation but have not yet performed operations, they are valid and activities in protected areas can be carried out with the obligation to maintain the hydrological function of peat. If this obligation is not implemented for two years, the permits are revoked by the Government or regional government.

Given this provision, licensing evaluations and audits are required. Peat Regulation has given authority to the Ministry of Environment and Forestry to do so as part of their task of preventing damage to the peat ecosystem.

2. Peatland Restoration Policy

Peat damage causes the potential for fire. As such, the recovery of degraded peat ecosystem is central in Indonesia’s peatland protection policy. In early 2016, the Government of Indonesia launched a special policy on peatland restoration. This policy aims to accelerate the recovery and restoration of peat hydrological functions due to forest and land fires, especially in 2015. An ad hoc institution called the Peatland Restoration Agency (Badan Restorasi Gambut, BRG) was established by President Joko Widodo in early 2016. Presidential Regulation No. 1 of 2016 is the legal basis for this institution. The task of BRG is to coordinate and facilitate peatland restoration in seven provinces that have extensive peat ecosystems. They include Riau, Jambi, South Sumatra, West Kalimantan, Central Kalimantan, South Kalimantan and Papua.

BRG has a specific task to: (i) implement coordination and strengthen policies for implementing peat restoration; (ii) planning, control and set up cooperation in the implementation of peatland restoration; (iii) mapping of peat hydrological units; (iv) determination of the zoning of protection and cultivation functions; (v) implementation of infrastructure construction of rewetting of peatland and all its facilities; (vi) restructuring the management of burning peatlands; (vii) implementation of peatland restoration socialization and education; and (viii) conducting supervision in the construction, operation and maintenance of infrastructure on concession land.

BRG worked for 5 years from 2016 to 2020 with the aim of developing plans and implementing peat restoration in the degraded
peat area of approximately 2.49 million hectares. Of that target, 1.4 million hectares are located in forestry and plantation concession areas, 680 thousand hectares are in protected areas and 400 thousand hectares are located in areas with cultivated cultivation that have not been permitted.

Peatland Restoration is carried out through three approaches, namely rewetting, revegetation, especially in burned areas in 2015 and livelihood revitalization. In the rewetting activities, canal blockings, canal back fillings and drilling well construction are carried out. At the end of 2017, BRG reported that it had drained 200 thousand hectares damaged peatland. They also installed peatland moisture monitoring instruments. This tool provides early detection if there is a decrease in ground water level.

In line with the principle of polluters pay principle, each person in charge of a business/activity that carries out activities causing peatland damage must restore their areas. The government through BRG supervises the company to carry out this restoration. Meanwhile, in the area outside the concession areas, the implementation of restoration was coordinated by BRG by involving the local government and agency responsible for the conservation areas.

BRG facilitated local communities to carry out restoration in their village areas. There are 1205 villages in the area that are targeted for BRG restoration. Through the Peat Care Village program, the village community is facilitated by strengthening social institutions and economic resilience. Farmer field schools to practice agriculture on peatland without burning are one of the activities carried out in this program. Since 2017, BRG and its partners have facilitated 251 villages. Education and socio-economic empowerment to the community added to the success of reducing hot spots in peat villages. Since 2015, there has been a reduction of hotspots in the villages by 97%. This is a result of collaborative actions of all government agencies, strong policies of fires prevention, effective law enforcement and empowerment of fire-concerned community groups.

3. Opportunity and Constraints for Haze Reduction in Peatland Ecosystem

The ASEAN Haze Treaty has given a number of obligations to states parties to mitigate and prevent forest and land fires that can cause

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14 Decree of the Head of Peatland Restoration Agency No. SK.05/BRG/Kpts/2016 on the Indicative Map of Peatland Restoration.
transnational haze.\textsuperscript{16} Article 9 of the Treaty states that the obligations include developing and implementing laws and policies and monitoring the potential for fires. It is also required to increase community participation, including indigenous peoples, as well as to conduct wider public education and awareness building.

The peat restoration policy in Indonesia is basically an effort to prevent peat fires. As explained in sections 3 and 4 of this article, efforts to prevent peat damage that could potentially cause fire and haze have been systematically carried out by the Government of Indonesia. Not only through the issuance of regulations but also with the establishment of institutions that specifically deal with peat restoration.

The reduction of forest and land fires in Indonesia in the past two years is influenced by several factors. The first is strong and consistent leadership from President Joko Widodo. This provides significant political support for the efforts of the government and local governments to overcome and prevent fires. The second is guided coordination in the prevention of forest and land fires. Coordination meetings for forest and land fire affairs are regularly conducted, led by the President and senior ministers. At the provincial level similar coordination is carried out through the Task Force of Forest and Land Fire Prevention led by governors.

The third factor is a more complete legal and policy instrument. As explained in section 3, more peat protection regulations were made in the 2014-2017 period. The Presidential Decrees postponing the issuance of permits in natural forests and peatlands as well as moratorium in oil palm plantation licenses are aimed to improve peat governance. The fourth is a special institution established to coordinate peatland restoration as a preventive action of peat fires.

The strength of civil society is the fifth factor that determines this success. Legal advocacy including that of judicial proceedings encouraged law enforcement in cases of forest and land fires. One of them is a law suit to the Government related to catastrophic smoke from forest and land fires in Central Kalimantan. Finally, law enforcement began to be tighter than before. The Ministry of

\textsuperscript{16}Further analysis about the legal contents of this Treaty see Heilmann, Daniel, 2015, After Indonesia’s Ratification: The ASEAN Agreement on Transboundary Haze Pollution and Its Effectiveness As a Regional Environmental Governance Tool, in: Journal of Current Southeast Asian Affairs, 34, 3, 95–121.
Environment and Forestry reported that by 2017 there were 510 companies that had administrative sanctions.

Although there has been a lot of progress made in the prevention of forest and land fires, especially on peatlands, a number of legal and institutional obstacles remains exist. The issue of the accuracy of peat-related maps is one of the obstacles that hinder the proper implementation of peat restoration. Indonesia is implementing a one map policy. This will help overcome the problem of map. Different regulations also become the next harmonization agenda. The variety of authority related to peat ecosystems is not easy to be harmonized. The short working period of the Peatland Restoration Agency is not in line with the area that must be restored. With this limitation, the ad hoc Agency is only able to establish the initial milestone in peat restoration which needs to be continued by other government agencies and local governments.

**Conclusion**

Facing obstacles to implement the Asean Haze Treaty in 2015, Indonesia has now shown a lot of progress in reducing transboundary haze. The decline of forest and land fires up to 85% of the events in 2015 is the result of various legal, policy and institutional changes.

This article proves that Indonesia’s Peat Regulations are more complete and implemented more consistently than in the past. This has made an important contribution in the mitigation of peat fires. Law enforcement is running stricter than before, although it still does not reach all aspects of crimes in environmental destruction and pollution due to forest and land fires. Strong national leadership is the main determining factor in this matter. Nevertheless, the role of civil society groups and the legal advocacy they did cannot be neglected.

Indonesia still faces hindrances, however, to increasing this peat fires mitigation. Different maps and data is one of them. The absence of a plan for the protection and management of peat at the national level and in all regions makes it difficult to implement targeted protection. The extent of the damaged peatland also requires more powerful and coordinated institutions and personnel to restore it. This all becomes an important agenda to be considered in subsequent national and regional policies.
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The Active Role of The Community Active Role in Integrated Watershed Management Based on Law Number 32 of 2009 Concerning Environmental Protection And Management

AL Sentot Sudarwanto¹
Yohanes Suhardin²
¹Faculty of Law, Sebelas Maret State University, Surakarta, Indonesia
²Faculty of Law, Catholic University of St. Thomas, Medan, Indonesia
E-mail : johnsuhardin@gmail.com

Abstract

Watershed Management is in addition to the responsibility of the state which in this case is the Government, especially the Regional Government as well as the community, namely land bounded by topography which functions to capture, hold and drain water through tributaries to the sea. This as stated in one of the principles of the implementation of Law Number 32 of 2009 concerning Environmental Protection and Management is a participatory principle which means that every member of the community is encouraged to play an active role in the decision-making process and the implementation of environmental protection and management both directly and indirectly. Watershed management is a very important effort as a result of a decline in the quality of the watershed environment in Indonesia which is caused by management of natural resources that are not environmentally friendly and increased potential for ego-sectoral and ego-territorial, because the use and use of natural resources in the watershed involves a variety of interests sector, administrative area and disciplines. Therefore, watershed management is carried out through implementation planning, community participation and empowerment, funding, monitoring and evaluation of guidance and supervision as well as enrichment of watershed management information systems.

Keywords: Active role of community, environmental, protection, management, watershed.

Introduction

Watersheds are generally defined as a stretch of area / area that is limited by a topographic barrier (ridge) that receives, collects rainwater, sediment and nutrients and flows it through tributaries and out on the main river to the sea or lake. Watershed Management is a form of regional development that places the Watershed as a natural resource management unit by efforts to reduce damage to the Watershed.
Watershed Management is a human effort in controlling the interrelationships between natural and human resources with all its activities in the Watershed, which aims to foster the sustainability and harmony of ecosystems and increase the utilization of natural resources for humans in a sustainable manner.

Watershed Management is an activity carried out by the community and the government to improve the condition of land and the availability of water in an integrated manner in a watershed. Watershed Management must be implemented in a holistic, planned and sustainable manner that is carried out in a decentralized manner, based on the principle of participation and community consultation to obtain joint commitment by encouraging community participation in the management of the Watershed.

The community-based integrated watershed management approach is an approach with the linkages between social / economic / cultural elements with elements related to ecosystems and other technologies involved in management. The integrated meaning is not only integrated between sectors, between regions and between parties, but also integrated in the context of one unified whole by taking into account economic, political, social, cultural and environmental conditions. To be able to carry out integrated watershed management, the watershed management plan must be made by the government or local government at every level by taking into account and involving the participation of the community both individuals / individuals and watershed management coordination forums and implemented by the government together with the community by prioritizing the principles of by and for the community through a strategy of empowering communities and villages.

Increasing the capacity of the community to participate in the management of the Watershed needs to be carried out periodically and sustainably in order to support the efforts to implement rural development to improve the welfare of rural communities. Law-based
Watershed Management Number 32 of 2009 concerning Environmental Protection and Management, Government Regulation Number 37 of 2012 concerning Watershed Management and Letters of the Minister of the Interior Governors and Regents / Mayors throughout Indonesia to manage Watersheds from level planning Villages through a bottom up system, which means the community can actively play a role in planning and overseeing the implementation.

**Analysis and Discussion**

In accordance with the title of this paper namely the Active Role of the Community in Integrated Watershed Management Based on Law Number 32 of 2009 concerning Environmental Protection and Management, it will describe the active role of the community in the management of the watershed based on the law and its implementing regulations and other related regulations after the enactment of the law.

In Law Number 32 of 2009 concerning Environmental Protection and Management, it is regulated on the determination of Ecological Space (Ecoregion) in relation to the management of Watersheds. Ecoregions are geographic areas that have similar climate features, soil, water, native flora and fauna, and patterns of human and natural interactions that describe the integrity of natural systems and the environment. The principle of ecoregion is the principle of environmental management which is affirmed in Law Number 32 of 2009 concerning Environmental Protection and Management. The principle of ecoregion according to the explanation of Article 2 letter h of Law Number 32 of 2009 concerning Protection and management of the Environment, must pay attention to the characteristics of natural resources, ecosystems, geographical conditions, local culture and local wisdom.

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1Pasal 1 angka 29 Undang-Undang Nomor 32 Tahun 2009 tentang Perlindungan dan Pengelolaan Lingkungan Hidup.
Based on the foregoing, environmental management cannot be strictly limited by regional administrative approaches, because it has ecological characteristics that transcend the administrative boundaries (beyond the administrative boundary).\textsuperscript{2} To implement the principle of ecoregion, then in Article 5 of Law Number 32 of 2009 concerning Environmental Protection and Management that one of the instruments for environmental protection and management planning is the determination of the ecoregion region. Determination of the ecoregion area is one of the legal instruments of planning in the protection and management of the environment.

The determination of this ecoregion area is very important in environmental management, especially to prevent the emergence of the regional autonomy ego. The similarity of ecological characteristics as the basis for determining the ecoregion area referred to in Article 7 paragraph (2) of Law Number 32 of 2009 concerning Environmental Protection and Management includes: first, the characteristics of the landscape; second, the watershed; third, climate; fourth, flora and fauna; fifth, social culture; sixth, economy; seventh, community institutions; and eighth, results of environmental inventory.

This is in line with Hariadi Kartohadiprodjo opinion that there are five characteristics and urgency of the bioregion approach in environmental management. First, because it has a diversity of systems but has a dependency on one another. In this connection, by using the concept of bioregion, it is possible to integrate various ecosystems that now tend to be managed separately. Second, to unite the natural ecosystem with the community, so as to ensure integrity, resilience and productivity. The bioregion approach always gives space for the growth of local law in accordance with regional characteristics. Third, it is not limited by administration and ethnicity. Because of this, certain authorities within an administrative boundary must adjust to the

limitations in planning the areas that have been designated in a bioregion. Fourth, requires research, knowledge, and local knowledge. Fifth, a cooperative and adaptive approach, meaning that every authority that exists (government, private, community) needs cooperation in formulating development plans and implementing them.\(^3\)

In addition to the aforementioned law, the law which is also related to the management of watersheds is Law Number 23 of 2014 concerning Regional Government. In the Law on Regional Government, it is stated that the management of the Watershed includes concurrent Government affairs in the forestry sector. This is stated in the attachment to Law Number 23 of 2014 concerning Regional Government. The Regional Government states that the Implementation of Watershed Management is carried out by the Central Government and Implementation of Inter-Regency / City Watershed Management and in the District / City Region in 1 (one) provincial Region carried out by the Provincial Government, as stipulated in Article 14 paragraph (1), stated that the implementation of government affairs in the forestry sector is divided between the Central and Provincial Governments.

Watershed Management is one of the regional development plans, which is a manifestation of the implementation of government affairs that have been handed over in the regions as an integral part of national development. Article 258 paragraph (3) states that the Ministry or non-ministerial institution synchronizes and harmonizes with the Regions to achieve national development targets. To achieve the national development target, technical coordination must be carried out between ministries or non-ministerial and regional institutions.

Furthermore, in Article 260, the Region in accordance with its authority prepares the Regional development plan as a unit in the national development planning system which is coordinated, synergized

and harmonized by the Regional Apparatus in charge of Regional
development planning.

Another law which also mentions the management of watersheds is
Law Number 6 of 2014 concerning Villages. The village has developed in
various forms, so it needs to be protected and empowered to be strong,
advanced, independent and democratic, so as to create a strong
foundation in implementing governance and development towards a
just, prosperous and prosperous society. Article 18 of Law Number 6 of
2014 concerning Villages, states that the Village Authority includes the
authority in the administration of the Village Government, the
implementation of Village Development, village community development,
and the empowerment of the Village community based on community
initiatives, rights of origin, and village customs. Village Development is
an effort to improve the quality of life and life for the greatest welfare of
the village community, one of the efforts to improve the welfare of rural
communities is by managing the Watershed.

Relevant to this, in Article 54 Paragraph (1) of the Village Law, it is
stated that the Village deliberation is a deliberative forum followed by
the Village Consultative Body, the Village Government, and the
elements of the Village community to deliberate on strategic matters in
the administration of the Village Government. Furthermore, in Article
80 Paragraph (1) of the Village Law, mention Village Development
Planning is organized by involving the Village community. Thus, the
village community participates in the management of the Watershed by
establishing village planning through village meetings. Paragraph (3),
the Village Development Planning Consultation determines the
priorities, programs, activities, and needs of the Village Development
that are funded by the Village Expenditure Budget, Village Self-help,
and / or District and City Regional Revenues and Expenditures.

In the village meeting, discussions and preparation of the
Watershed Management plan were carried out, namely: first, compile a
participatory village map; second, identify potential and problems of
land management in the watershed area; third, compile a proposed plan for watershed management activities at the village scale and scale between villages based on identification of potential and existing problems; fourth, encouraging planned activities to be submitted to the Inter-Village Consultation Forum.

In fact, the government specifically stipulates Government Regulation No. 37 of 2012 concerning Watershed Management, this shows the seriousness of the government in managing the Watershed. Government Regulation Number 37 of 2012 concerning Watershed Management, which subsequently, is an implementing regulation related to the Watershed that was established on March 1, 2012. The Government Regulation is expected to be a mediator between ministries, institutions and administrative regions in order to manage the Flow Area. The river is rational and sustainable and is one of the references or basis in developing integrated watershed management plans in all parts of Indonesia.

Some of the matters regulated in this regulation are as follows: first, Article 2 Paragraph (1) This Government Regulation regulates the Management of Watersheds from upstream to downstream as a whole, secondly, the Management of Watersheds in full as referred to in paragraph (1) is carried out through the stages of planning, implementation, monitoring and evaluation, and guidance and supervision. Furthermore, in Article 2 Paragraph (3) the management as referred to in paragraph (1) and paragraph (2) is carried out in accordance with the spatial plan and management pattern of water resources in accordance with the provisions of legislation in the field of spatial planning and water resources. Paragraph (4) in the management of the Watershed Area is carried out in a coordinated manner by involving relevant agencies across the administrative area as well as community participation.

Observing the provisions of Article 2 of Government Regulation Number 37 of 2012 above is in accordance with the sociological
jurisprudence theory of Roscoe Pound which states that legal science that uses a sociological approach, is also intended to provide the ability for legal institutions to more thoroughly and intelligently consider social facts there the law proceeded and was applied. Roscoe Pound’s theory of social interests is a more explicit effort to develop a responsive legal model. In this perspective, good law should offer something more than procedural justice. Good law must be competent and fair; this kind of law should be able to recognize public desires and have a commitment to achieving substantial justice.

The law that is able to respond to a very complex social life can only be realized if it has arrived at the stage of autonomous law as said by Philippe Nonet and Philip Selznick, namely that in a nation that can provide a place in its law and no longer merely the use of power by the authorities. Due to the autonomy status, the law can also develop into an absolute power by law and back to its social context. The next stage is the emergence of a law that is more sensitive to the community called responsive law.

The existence of a responsive legal theory is very suitable in helping to solve community problems including issues related to watershed management. With the responsive law the laws and regulations that are stipulated and in particular the Regional Regulations that have been determined have the spirit of accommodating the interests of the community. The reason is, the position of the Regional Regulation is closer to the community because it will answer the problems of the community in the area of the Regional Regulation.

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This Government Regulation is intended to coordinate, integrate, synchronize, and synergize Watershed Management in order to increase the carrying capacity of the Watershed, it is expected to bind between ministries or institutions and inter-administrative regions so that rational and sustainable watershed management can be carried out.

Article 22 Paragraph (2) confirms that the preparation of a watershed management plan is carried out by the first, the Minister for cross-country watersheds and cross-provincial watersheds; second, the Governor is in accordance with his authority for watersheds in provinces and / or across districts and cities; third, regents and mayors are in accordance with their authority for watersheds in districts and cities. Related to this, the author argues that to be able to carry out integrated watershed management, the watershed management plan must be made by the government or local government at each level by paying attention to and involving the participation of the community either individually or privately as well as coordination forum for managing the Watershed and implemented by the government together with the community.

Strictly speaking, the government regulation in Article 57 Paragraph (1) regulates the participation of the community in the management of the Watershed Area, as the community can participate in the management of the Watershed; Paragraph (2) Community participation as referred to in paragraph (1) can be carried out either individually or through coordination forums for managing the Watershed. The term community "can" participate in the management of the Watershed has an unequivocal interpretation because the use of the word 'can' in the article can have meaning 'can be done' or 'not done' by the community, which in this case is the Watershed. The use of the word 'community can' according to the author will be more assertive and appropriate when using the word 'community is obliged'. The reason for choosing the word 'obligation' in this context is based on the general explanation of Government Regulation No. 37 of 2012 that
the watershed management objectives are to realize awareness, ability and active participation of relevant agencies and communities in better management of watersheds. In addition to the basics above, the results of the study indicate that the community always interacts directly with the watershed in fulfilling their lives.\(^7\)

Community participation in watershed management is closely related to community empowerment. Article 61 states that community empowerment aims to increase capacity and capability, care and community participation in the management of watersheds. Furthermore, Regulation of the Minister of Forestry of the Republic of Indonesia Number: P.17 / Menhut-II / 2014 concerning Procedures for Community Empowerment in Watershed Management Activities.

Community empowerment is an effort to develop the community through the creation of conditions that enable the community to be able to develop themselves and their environment independently through the provision of resources, opportunities in decision making, and the improvement of community knowledge and skills.

Article 3 Forestry Minister's Regulation Number P.17 / Menhut-II / 2014 states that community empowerment in watershed management activities is to provide a reference in the implementation of community empowerment in watershed management and a common understanding, so that community empowerment in managing the Watershed can be held synergistically and continuously. Subsequently Article 4 Paragraph (1), The principle of community empowerment in watershed management activities aims to increase capacity and capability, care and community participation in the management of the Watershed.

Community empowerment in watershed management activities according to Article 12 consists of planning aspects, implementation of activities by related sectors, as well as monitoring and evaluation.

involving various stakeholders, both government, private and community elements. Planning as referred to in Article 12 refers to the Watershed Management Plan that has been compiled and approved by the government in accordance with its authority. Subsequently Article 13, planning preparation "can" involve a team consisting of stakeholders or the Watershed Management Coordination Forum. Preparation of planning is carried out through a process of formulating a plan that covers issues and problems, a logical framework for problem solving, formulation of objectives, formulation of policies, programs and activities, implementation of activities, and monitoring and evaluation plans.

Regarding community empowerment, the Forestry Minister's Regulation Number P17 / Menhut-II / 2014 concerning the Procedures for Community Empowerment in Watershed Management Activities, lacks technical and operational guidance. Likewise the word can, does not provide mandatory legal consequences (can it or not) to involve stakeholder institutions. Republic of Indonesia Minister of Forestry Regulation Number P.61 / Menhut-II / 2013 concerning Watershed Management Coordination Forum. In Article 1 (3) it is stated that the Watershed Management Coordination Forum, hereinafter referred to as the forum, is a forum for coordination between agencies managing the Watershed. The forum aims to provide effective direction as part of institutional development in the management of watersheds from upstream to downstream as a whole.

The duties, functions and authority of the forum according to Articles 10, 11 and 12 of the Minister of Forestry Regulation No. P.61/Menhut-II/2013 are as follows. The task of the forum is first, to study the policies, planning, implementation of activities and the impact of watershed management activities as input to decision makers both to the executive and legislative at the central and regional levels; second, carrying out coordination and consultation to harmonize inter-sector, inter-regional and inter-stakeholder interests in integrated watershed
management both at the provincial and district and city levels; third, helping to provide input in the drafting of watershed management policies for the relevant authorities; integrating and harmonizing inter-sector, inter-regional and inter-stakeholder interests related to watershed management; fourth, prepare a work plan for the Watershed Management Coordination Forum on an annual or five-year basis and report to decision makers at the provincial and district and city levels; fifth, reviewing, reviewing and giving input to the Governor or Regent and the Mayor regarding policies that need to be implemented in the management of the Watershed; coordinate the parties in the watershed management at the Provincial, District and City, Cross-Regency, Provincial and Cross-Regional Levels and assist Governors, Regents, Mayors in drafting Watershed Management Plans, community development and empowerment and management of watershed management.

Then the Forum function (Article 11) is as follows. First, accommodating and channeling community aspirations related to watershed management; second, contributing ideas in the management of the Watershed; third, to foster and develop the role of community supervision in the management of the River Alira Region; fourth, to help resolve conflicts that occur in the management of the Watershed.

Furthermore, in Article 12 Paragraph (1), the authority of the forum is as follows. First, invite and hold routine and incidental meetings in order to resolve conflicts between institutional interests, community groups and between regions; secondly, giving advice on the priority of the use and utilization of the watershed area for in-situ and ex-situ security and community welfare; third, provide advice and input in the construction of land and water conservation buildings in the watershed and the construction of buildings to safeguard water flows to protect watersheds and vital investments that exist and to anticipate the dangers of floods, erosion, sedimentation and drought; fourth, provide advice and input to the Minister, Governor, Regent and Mayor.
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regarding potential problems that may arise due to the use and utilization of watershed areas and conflicts that occur between technical agencies or units, groups and regions; *fifth*, provide advice or consideration to the Minister, Governor, Regent, and Mayor in determining watershed management policies; *sixth*, submit a report on the progress of the implementation of watershed management policies to the Minister, Governor, Regent, and Mayor.

In accordance with Article 61 of the Minister of Forestry Regulation, the function of the Watershed Management coordination forum is very important and strategic in providing enlightenment to the community and providing policy input to stakeholders in aligning interests between sectors, between administrative regions and among stakeholders in the management of the Watershed integrated. Based on the study of the juridical footing of watershed management, arrangements related to watershed management have been regulated, but there are inconsistencies between the laws of one another, for example related to authority in the forestry sector (while the management of watersheds is included), namely the enactment of Law Number 23 of 2014 concerning Regional Government, the authority of forestry management in regencies and cities is drawn into provincial authority. While the Watershed is part of the environment where it has been mandated in Law Number 32 of 2009 concerning Environmental Protection and Management, the central government and regional governments have the authority to manage.

**Conclusion**

Formally, the active role of the community in the management of integrated watersheds has been based on Law Number 32 of 2009 concerning Environmental Protection and Management, supported by Government Regulation Number 37 of 2012 concerning Watershed Management, Forestry Minister's Regulation Number 17 of 2014 and the Letter of the Minister of Home Affairs No. 413.2 / 8162 / PMD has
regulated the active role of the community. Watershed Management is carried out in a planned and integrated manner by involving the participation of various elements of the community together with the Regency and City governments in this case the Head of the Community and Government Empowerment Agency and the private sector supported by the District and City Watershed Management Coordination Forum. However, what must be considered is strict coordination and synchronization in the laws and regulations related to watershed management authority.

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Undang-Undang Nomor 6 Tahun 2014 tentang Desa.
Peraturan Pemerintah Republik Indonesia Nomor 37 Tahun 2012 tentang Pengelolaan Daerah Aliran Sungai.
Study of The Government Legal Action in the Procurement of Land for General Interest Development

Shinta Anggraini, S.H., M.H
Dr. Emelia Kontesa, S.H., M.Hum

Faculty of Law, University of Bengkulu, Indonesia

1Email: emelia1764@gmail.com

Abstract

Land in human life has a dual function, namely as a social asset (as a means of binding the social unity of Indonesian people in living in a society, nation and state), and as a capital asset (capital factor in development). The increasing need for land encourages the government to immediately reserve land in order to fulfill the need for development while at the same time encouraging more and more legal actions by the government in the public sector. In the procurement of land for the construction of a new unit of the TNI Combat Engineer (Denzipur) in Karang Tengah Village, Tabapenanjung District, by the Government of Bengkulu Tengah Regency, Province of Bengkulu, on the initiative of the Bengkulu Regency Government, the community land acquisition. The problem is First: is the legal action of the Bengkulu Tengah District Government in carrying out the development of the TNI Denzipur fulfilling the legal requirements? and what is the legal status of land rights used for other agencies? Based on the results of the study can be stated: First; The legal action of the Central Bengkulu Regency Government does not fulfill the legality requirement because every government action is required to rely on legitimate authority obtained by attribution, delegation and mandate. If examined from the point of view of authority based on Law Number 2 Year 2012 to be precise Article 10, defense and security is in the category of public interest but based on delegation of authority from the central government to regional government the defense and security sector is not included in the authority of the Regional Government. Second, the legal status of land rights used by other agencies must go through the right mechanism because the land that has been released has become the asset of Bengkulu Tengah District Government, meaning that if the land is to be handed over through a grant mechanism to the TNI, the land must be removed from the list Bengkulu Tengah, if it will be given with the right to use public, means that the land remains its status as an asset of the Bengkulu Tengah Regency Government.

Keywords: Government Legal Action, Land, Public Interest
INTRODUCTION

Land has an important meaning in the implementation of national development, therefore its use must be planned and managed and utilized for the greatest prosperity of the people. Procurement of land for development in the public interest is a consequence of the responsibility of the state to advance public welfare and social justice. Land acquisition activities for development purposes are carried out based on the authority of the state as a State Ownership Right holder of land. The increasing need for land has encouraged the government to immediately reserve land to fulfill the need for development while at the same time encouraging more and more legal actions by the government in the public sector. The legal actions of local government in the aspect of public law (publiekrechtelijk) should be subject to legal provisions in the field of public law. According to Belinfante as quoted by Supriyadi that:¹ Theoretically the relationship of public law (publiekrechtbetrekking) is always one-sided or one-sided (administratiefrechtelijkerechtshandelingen). Legal actions in land acquisition for development at the initiative of the Central Bengkulu Regency Government by providing 40 hectares of land, for the construction of the Combat Detachment of the Military Command II / Sriwijaya Military Command 041 / Garuda Emas Resort Command (Denzipur TNI). These legal actions must adhere to the general principles of good governance (AUPB) in accordance with the mandate of Law Number 30 Year 2014 concerning Government Administration. Land acquisition for (Denzipur TNI), including the development of public interests based on Number Law 2 of 2012 concerning Land Procurement for Development in the Public Interest.

¹Supriyadi, Legal Aspects of Regional Asset Land Finding Justice, Benefit, and Certainty over the Existence of Regional Asset Land, Jakarta, Publisher Library Achievement, 2010, pp. 138
Land acquisition for the construction of the New Combat Engineer Detachment Unit (Denzipur TNI) in Central Bengkulu Regency by the Central Bengkulu Regency Regional Government begins with a letter from the Danrem 041 / Gamas Number: B / 547 / IV / 2016 dated 28 April 2016 concerning the application for preparation land for the construction of a new Combat Engineer Detachment Unit, in accordance with the telegram letter of the Military Commander II / Sriwijaya Number: ST / 502/2015 concerning the arrangement of the Unit and the formation of a new Denzipur unit in the Bengkulu region. Korem 041 / Gamas submitted a proposal for the proposed land acquisition plan to the Regional Government of Bengkulu Tengah Regency. Based on the proposal, the Bengkulu Tengah Regency has released 40 (forty) hectares of community land. Community members who originally owned land in the form of agricultural land had received compensation for land rights. The budget for the exemption is entirely borne by the Regional Budget (APBD) Bengkulu Tengah Regency. Formulation of Problems: Can the legal action of the Regional Government of Bengkulu Tengah Regency fulfill the legal requirements? What is the legal status of land rights used for other agencies?

Research Methods

The typology of research that is used in accordance with the subject matter is the problem based on its nature is explanatory research which explains or further illustrates the legal actions of the Central Bengkulu Regency government in the procurement of land for the new TNI Combat Engine Detachment. The type of secondary data used in this study is primary legal material, secondary and tertiary law.

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Analysis and Discussion

The Republican State is a legal state, the main pillar of the rule of law, namely the principle of legality (*legaliteitsbeginselen* or *wetmatigheid van bestuur*), on the basis of this principle that the authority of the government comes from legislation.

The act of government law is often called an action (or based on a law called a government administrative action) is an act / act of Government administration, an act of a Government Official or other state organizer to carry out and / or not carry out concrete actions in the context of government administration.\(^3\) Government in a broad sense is defined as a form of organization that works with the task of running a system in a narrow sense is a collection agency that has its own policies to manage, regulate, and regulate the course of a government system.\(^4\)

As a legal subject, the government carries out various actions or actions, one of which is an act or an administrative action. According to Romeijn, which was quoted by HarsantoNursadi; that administrative legal action is a statement of will that arises from an administrative organ in special circumstances, intended to cause legal consequences in the field of State Administrative Law. The resulting consequences have relevance to law, such as the creation of new legal relationships, changes or termination of existing legal relations.\(^5\)

In order to find out whether the legal action of the Central Bengkulu Regency Government in building the Combat Engineer Detachment (Denzipur) of the TNI fulfilled the legality requirements, it will be examined from 3 (three aspects): aspects of authority, procedures and substance.

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\(^3\)Law Number 30 Year 2014 concerning Government Administration Article 1 General provisions Number 8.
\(^4\)http://imhabilqish.blogspot.com/2016/05/asas-asas-umum-pemerintah-yang-baik.html accessed 03-10-2018 at 10:15 a.m.
According to Philipus M. Hadjonas quoted by Iskandar stated that: The scope of validity includes: aspects of authority, procedures and substance. Every act of government is required to be based on legitimate authority obtained by attribution, delegation and mandate, and limited by content (material), territory (locus) and time (temporis). Procedures based on the principle of the rule of law, namely in the form of legal protection for the community; the principle of democracy is that the government must be open. The substance is regulating and controlling what (arbitrary / external legality) and for what (abuse of authority, violating internal law / legality).

Table 1
Review of the legal actions of the Central Bengkulu Regency Government in building the TNI Combat Engineer (Denzipur) Detachment in terms of the Authority aspect originating from Attribution and Delegation

<table>
<thead>
<tr>
<th>Attribution</th>
<th>Note</th>
</tr>
</thead>
<tbody>
<tr>
<td>Law Number 23 Year 2014 concerning Regional Government. The Regional Government carries out business that becomes its authority; Article 10 (1) Absolute Government Affairs as referred to in Article 9 paragraph (2) includes:</td>
<td>In carrying out regional government affairs, they carry out the broadest autonomy to organize and manage their own government affairs based on the principle of autonomy and co-administration. Defense and security are the authority of the Central</td>
</tr>
</tbody>
</table>

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6Iskandar, Legality of Government Actions (Juridical Analysis of Bengkulu Governor's Decree No. W.421.XXV in 2011 concerning Approval of Production Operation Mining Business Permit to PT InmasAbadi and Bengkulu Governor Decree No. V.61.XXV in 2012 Regarding Revocation / Cancellation The decision of the Governor of Bengkulu Number: W.421.XXV in 2011 Regional Code 96MR0244 concerning the Approval of Business Licenses for Mining Production Operations to PT InmasAbadi), accessed on 6 October 2018, at 2:00 p.m.
<table>
<thead>
<tr>
<th>Government</th>
<th>APBD is used in the function of government functions that are a source of regional finance. Land acquisition for the construction of the Denzipur Unit should have been through the RKKL (Institution Ministry Work Plan) at the end of 2015 before the issuance of the DIPA in 2016, so that the budget for the construction of the Denzipur New Unit does not use the Bengkulu Tengah District Government budget.</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Law of the Republic of Indonesia Number 33 Year 2004 concerning Financial Balance Between Central Government and Regional Government.</strong> Article 4 Paragraph (1) Implementation of Regional Government affairs in the context of implementing Decentralization shall be funded by the Regional Budget. Article 66 General principle paragraph: A. APBD, Amendments to APBD, and accountability for implementation. The annual budget is set by Local regulation. B. APBD has an authorization function, planning, supervision, allocation and distribution. C. All Regional Revenues and Expenditures in the fiscal</td>
<td></td>
</tr>
</tbody>
</table>
year concerned must be entered in the APBD. Government Regulation Number 38 of 2007 concerning Distribution of governmental affairs between the government, Provincial Government, Regency / City Regional Government APBD.

<table>
<thead>
<tr>
<th>laws of the republic Indonesia Number 30 of 2014 concerning Government Administration Article 10 (1) AUPB referred to in this Act covers the principle: a. legal certainty; b. expediency; c. impartiality; d. accuracy;</th>
<th>The Bengkulu Tengah Regency government does not side with the community and is not careful in land acquisition because it has provided land for the benefit of other institutions through freeing community land.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Regulation of the Minister of Internal Affairs of the Republic of Indonesia Number 14 of 2016 concerning the Second Amendment to the Regulation of the Minister of Internal Affairs of the Republic of Indonesia Number 32 of 2011 concerning Guidelines for Granting Grants and Social Assistance Sourced from the Regional Revenue and Expenditure Budget.</td>
<td>that the Regional Government can grant grants to the government aimed at supporting the achievement of program objectives and activities of the regional government in accordance with the urgency and interests of the regions in supporting the implementation of government functions. The grant must also be made</td>
</tr>
</tbody>
</table>
when the land acquisition is finished until the certificate of use rights is used and the assets have been recorded in the application SIMAK BMN / BMD The Central Bengkulu Regency Regional Government does not necessarily mean that the TNI needs land as land.

2. Delegation

Delegates are delegations of authority from the Agency and / or officialsHigher government to the Agency and / or lower Government Officers with responsibility and accountability is fully transferred to the recipient of the delegation.

Bengkulu Governor's Decree Number: P.345.I. In 2016 concerning the Delegation of Authority for the Implementation of Land Procurement Preparation Stages for the Construction of the Denzipur Unit in Bengkulu Tengah Regency, on October 3, 2016. it was not included in the authority of the Bengkulu Tengah area government.

<table>
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<th>Table 2</th>
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<tbody>
<tr>
<td>Review of the legal actions of the Central Bengkulu Regency Government in building the TNI Combat Engineer (Denzipur) Detachment in terms of aspects of Procedure and Substance</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>1. Procedure aspects</th>
<th>Note</th>
</tr>
</thead>
<tbody>
<tr>
<td>The general principle of procedure</td>
<td>Not budgeted in the 2016 APBD</td>
</tr>
</tbody>
</table>
rests on the three main foundations of administrative law, namely: the principle of the rule of law, the principle of democracy and the instrumental principle. Law of the Republic of Indonesia Number 33 Year 2004 concerning Financial Balance Between Central Government and Regional Government. Article 66 General principle paragraph:

(2) APBD, Amendments to APBD, and accountability for implementation. The annual budget is set with Regional Regulations.

(3) APBD has an authorization function, planning, supervision, allocation and distribution.

The principle of state law in its main procedures relates to the protection of basic rights. The principle of democracy in procedures concerns the principle of openness in the administration of government. transparent, effective and efficient.

and not proposed in the Central Bengkulu District Government Work Plan in 2016. The unemployment was only carried out in August 2016 on the APBDP (Regional Revenue Expenditure Budget). The budget for land acquisition activities for the construction of the new Denzipur unit in Bengkulu Tengah comes from DPA from the OPD (Local Government Organization).

The implementation of land acquisition was at the end of 2016 and because the land area was more than 5 hectares based on Presidential Regulation Number 148 of 2015 concerning Amendment to Presidential Regulation Number 71 of 2012 concerning the Implementation of Land Procurement for Development in the Public Interest, that land acquisition for development was in the public interest with an area of more than 5 hectares through a location permit mechanism from the Governor and must go through the Auction process, because it is already at the end of the year it is no longer possible to conduct an auction, so in 2017 through a direct appointment mechanism.

In addition there is a change in the new Nomenclature, which
initially in 2016 procurement problems were handled by the land department under Assistant I, but in 2017 a new Service was formed, namely the Housing Agency, Settlement and Land Area, then the land procurement budget for the construction of the new Denzipur unit in Bengkulu Regency Middle budgeted again. In 2015 it has not been budgeted in the APBD.

| Law No. 2 of 2012 concerning Land Procurement for Development in the Public Interest, Agencies that carry out land procurement must be in accordance with the work plan of each agency that needs land (Article 7: 1 letter d,) | Agencies that carry out land procurement are not agencies that require direct land. In this case, the Bengkulu Tengah Regency government holds land for the interests of the TNI which is not directly related to the task of the regional government function. |
|---|

2. Substance Aspect

<table>
<thead>
<tr>
<th>Bengkulu Governor's Decree Number: P.345.I. In 2016 concerning the Delegation of the Authority for the Implementation of the Phase of Land Acquisition Preparation for the Construction of the Denzipur Unit in Bengkulu Tengah Regency, on October 3, 2016.</th>
<th>Based on the decree, the Governor delegated his authority to the Central Bengkulu Regency Regent with consideration of efficiency, effectiveness, land acquisition activities for the public interest which were deemed erroneous because of the development of TNI combat zones outside the Regent of Bengkulu Central Authority. Because of Defense and Security, including the central authority, the budget should also be obtained from the National Budget, not from the Regional Budget. Because the Regional Budget is related to the task of the</th>
</tr>
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</table>
The land prepared for the construction of the Denzipur TNI new unit in Bengkulu Tengah Regency based on Article 13 of Act Number 2 of 2012 concerning Land Procurement for Development in the Public Interest, has been carried out through 4 (four) stages, namely: Planning; Preparation; Implementation; and submission of results. In the land acquisition planning document for the construction of the Denzipur TNI new unit, the estimated compensation value is calculated taking into account the price of land and plant growth, in general the average value of community land is around Rp. 61,000 - (Sixty one) per meter of garden land. With this average value, the estimated value of compensation for community-owned land is ± 40,000 M2 estimated at Rp. 2,440,000,000 (two billion four hundred and forty million rupiahs). However, in the implementation, the calculation process of the estimated land value will be carried out by the Public Appraisal Services Office (KJPP) by taking into account the applicable provisions and available regional financial capabilities.

The focus of implementing regional autonomy is at the District and City levels. Therefore, the Bengkulu Tengah Regency Government, facing the implementation of regional autonomy must be prepared carefully. Such as the implementation of land acquisition is fully charged to the Central Bengkulu Regency Government agency. Even though the agency that needs land is a TNI agency that should be the responsibility of vertical
agencies, namely the Central Government. If the Bengkulu Tengah Regency Government will prepare land for other purposes, including the TNI Denzipur Development, the land used is free state land that is available for it, so that it does not use the Regional Budget to free people’s land. This is an implementation of the principle of effective and efficient public.

Legally the stages have been passed, the landowners have received compensation in accordance with the agreement between the land owner and the Central Bengkulu Regency Government. Furthermore, the land will become an asset of the Bengkulu Tengah Regency Government, area. In the opinion of Supriyadi:7

These lands are not necessarily regional assets because they do not have economic benefits for the region and are not assets in the regional balance sheet. Likewise, if included in the criteria of the land as stipulated in Law Number 71 of 2010 concerning Government Accounting Standards, there are briefly 3 (three) important matters, namely: (1) obtained to be used in government operational activities and in a condition ready for use, (2) the existence of evidence of legal mastery, for example a certificate of Right of Use or Management Right on behalf of the region; (3) the existence of proof of payment and mastery and certificate of land on behalf of the previous owner.

Legally, the land acquired becomes land controlled by the Bengkulu Tengah Regency government, then it still has to go through the administrative stages in accordance with the prevailing laws and regulations in the field of Land and regional assets. If the procedure has been carried out until the issuance of the basis of rights with Right to Use. The next stage is entered and recorded in the SIMAK BMN / BMD application of the Central Bengkulu Regency Regional Government. After

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being registered as the asset of the Bengkulu Tengah Regency government, the Government can provide the land with the TNI on the Land Status of the Public Use Rights, so that the position of land remains as the asset of the Bengkulu Tengah Regency government.

It becomes a problem if the land will be donated to the TNI because based on the Republic of Indonesia Minister of Home Affairs Regulation Number 14 Year 2016 concerning the Second Amendment to the Republic of Indonesia Minister of Home Affairs Regulation 32/2009 concerning Guidelines for Granting and Social Assistance sourced from Regional Revenues and Expenditures that grants to the government are intended to support the achievement of program objectives and activities of regional governments in accordance with the urgency and interests of the regions in supporting the implementation of government functions. Grants must also be made when land administration has been completed until the certificate of use rights and assets have been recorded in the SIMAK BMN / BMD application of the Central Bengkulu Regency Government.

**Conclusion**

Ending this paper there are 2 important points that can be put forward: The legal actions of the Bengkulu Tengah Regency Government did not fulfill the legality requirements because the failure to fulfill the legality principle resulted in juridical defects in an act of government. Juridical disability concerns authority, procedure and substance. Every act of government is required to be based on legitimate authority obtained by attribution, delegation. Land Acquisition for Denzenipur TNI is in the category of public interest, but based on delegation of authority is not directly related to the task of the regional government function and is not included in the authority of the Regional Government of the Bengkulu
Tengah Regency Government. Likewise, the budget for land acquisition activities should not be charged.

Legally, the land acquired becomes land controlled by the Bengkulu Tengah Regency Government, then it still has to go through the administrative stages in accordance with the applicable laws and regulations in the field of Land and regional assets. If the procedure has been carried out until the issuance of the basis of rights with the Right to Use. The next stage is entered and recorded in the SIMAK BMN / BMD application of the Bengkulu Tengah Regency Government. After being registered as the assets of the Fortress Regency Government, the Government can provide the land with the TNI on the Land Status of the Right to Use Public, so that the position of the land remains as an asset of the Bengkulu Tengah Regional Government.

Suggestion: Land acquisition for the public interest in developing the Denzipur TNI by the Bengkulu Tengah Regency Government has been completed, although there are defects in authority here, then the next step if the land administration process is completed, should the TNI really have to use land effectively efficiently.

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Implementation of Mandatory Labor Report Policy in District/Cities in Central Java

Endah Pujiastuti¹
A. Heru Nuswanto²
Faculty of Law, University of Semarang, Indonesia
¹E-mail: endah.pujiastuti@usm.ac.id
²E-mail: heru.nuswanto@usm.ac.id

Abstract

Policy implementation is one important step deep entire public policy process. Good policy righteously gets implementation and gives benefit for society. Despitefully public policy shall also see and follows society developing. Labour’s report’s policy at corporate constitute policy that adequately long time, but until now in its implementation is still also there is interference. Necessary that policy innovation that interference get shortly be settled, so labour’s reporting policy that give more benefit maximal.

Key word: Corporate, Labour’s reports, Policy

Introduction

The employment data or labor condition data is the important data for the development of the employment sector. Complete and comprehensive employment data will be able to provide an overall picture of increasingly complex labor conditions so that in the end it will facilitate the handling of labor issues, on a preventive and repressive. Employment data is needed from all companies that cover all sectors to meet these needs. In this context, the Government issued a policy regarding the obligation of companies to report labor conditions in their respective companies as mandated by the Law of the Republic of Indonesia Number 7 of 1981 concerning Compulsory Manpower Reporting. This Act supersedes the Republic of Indonesia Law Number 23 of 1953 concerning the Obligation to Report a Company which is felt to be no longer in line with labor conditions at that time.

The substance of regulation of the Republic of Indonesia Law Number 7 of 1981 concerning Compulsory Reporting on Manpower in general covers:

a. The obligation to report employment conditions for all companies;
b. The obligation to report is not done only once but is carried out periodically or annually, so that data can be obtained continuously on the state of the workforce;

c. Data that must be reported that is more expanded include corporate identity, labor relations, protection of labor and employment opportunities;

d. Increased criminal sanctions on a quantitatively, namely the number of fines and qualitative, namely the application of imprisonment.

With this regulation, it is expected that data will be obtained in accordance with the development of the employment situation in each company that can be used as information material for the Government, and then processed as material for establishing policies in the labor field.

The implementation of the Law of the Republic of Indonesia Number 7 of 1981 concerning Compulsory Labor Reporting is an important thing to attend. The indicator of implementation of public policy is that public policy must be able to implemented properly and can achieve the desired results.\(^1\) If it is linked between the time of ratification of the law and the current conditions, the situation of employment has differed considerably from the conditions at the time of its ratification, in addition to the problem of the employment sector is very dynamic, so it needs to be addressed immediately so as not to cause other problems.

Linking these two things, actually in the context of regional autonomy, the Regional Government has the authority to make policies in accordance with their local needs without ignoring the principles of the legislation in force. The implementation of the policy of compulsory labor reporting in the company as stipulated in the Law of the Republic

of Indonesia Number 7 of 1981 concerning Compulsory Labor Reporting is the regional government, in this case, the institution government responsible in the manpower sector at the district/city level.

Based on these conditions, in this research problems were formulated regarding how district/city governments in the Central Java Province implement mandatory labor reporting policies in their respective regions and the obstacles faced in implementing the policy.

**Methods**

Method of the approach used in this research is a sociological juridical approach. This approach is chosen considering that in order to achieve research objectives/research targets not only rests on legal provisions, but there are sociological factors that are also considered, such as labor conditions in each district and city, industry, and society. This research was conducted in the Central Java Province precisely in six district/city locations, namely Semarang City, Kudus Regency, Banjarnegara Regency, Pekalongan City, Tegal City, and Magelang City. The selection of six research locations as samples is based on the method of determining purposive sampling, namely the selection of samples for the purpose of certain considerations.

Data collection is done through interviews and literature studies. Data collected includes primary data and secondary data. The results of the research data on a primary data and secondary data were qualitative analysis.

**Results and Discussion**

Since the Law of the Republic of Indonesia Number 7 of 1981 concerning Compulsory Manpower Reporting was ratified and implemented, until now there has been no change in the substance of the law. It has been running for almost 37 (thirty-seven) years of the implementation of the Law of the Republic of Indonesia Number 7 of 1981 concerning Compulsory Labor Reporting, but there are still companies that tend to ignore.
The attention arises when the substance of the regulation in the Law of the Republic of Indonesia Number 7 of 1981 concerning Compulsory Labor Reporting is a prerequisite for the submission of several licenses, such as the requirement to apply for an extension of operational license for the outsourcing company. As it is known that outsourcing company that will extend its operating license must include a labor report compulsory document as one of the conditions for submitting an operational permit extension.\(^2\)

Even the local government initially found it difficult to collect data optimally, or in other words, lack of attention with the implementation of the Law of the Republic of Indonesia Number 7 of 1981 concerning Compulsory Labor Reporting, is now becoming more intensive in seeking employment data.

The compulsory labor reporting mechanism as implemented in the six districts/cities sampled in this research refers to the Republic of Indonesia Law Number 7 of 1981 concerning Compulsory Labor Reporting. That is, the Local Government, (ie the Semarang City Government, Kudus Regency, Banjarnegara Regency, Pekalongan City, Tegal City, and Magelang City) did not issue policies at the local level in order to implement the law.

Broadly speaking, the mechanism for compulsory labor reporting is as follows:

a. Manpower authorities in the district/city prepare the labor report form.

b. The company takes the form that has been provided and filled in completely.

c. The completed form is signed and affixed with a company stamp.

d. Forms that have been filled out and signed by the company/company management are returned to the authorized institution.

e. The institution authorized to check data entries. If the data is complete and correct, then the authorized institution gives approval. If the contents of the company are not complete, the form will be returned to the company to be completed immediately.

If we look at the policy, it can still be detailed further to get more optimal results. There are several things that need to be anticipated along with the development of employment conditions/problems as well as the progress of information technology at this time, which of course will also require a clearer and clearer explanation or arrangement.

The things described above can actually be anticipated by issuing policies in accordance with the conditions of each region by the district/city Regional Government. As it is known that the authority in the field of employment is one of the authorities submitted by the central government to regional governments within the framework of regional autonomy. Basically, in the process of implementing public policy, it requires a legal presence as a basis for juridical legitimacy, as well as a benchmark in every stage in the process of implementing public policy. The implementation of public policy cannot run well if in the implementation of public policy implementation it is not based on strong legal bases, especially the quality of the substance of existing legal products or regulations. Based on this conception and in line with regional autonomy, a legal product in the implementation process requires more detailed arrangements related to the technical implementation in accordance with community needs and technological developments. Therefore, policies are needed at the local level (read: regional) to perfect or complement policy products at the central level in

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accordance with the portion of regional authority by not violating or ignoring the principles of legislation.

In this context, broad autonomy authority has not yet led to the formation of policies, both in the form of regional regulations, mayor regulations, and other laws and regulations that are the authority of regional governments to supplement the needs in the field by following / adjusting local needs in the framework of implementing mandatory labor reporting policies in regional level.

The obligation to provide employment reports in the company is borne by the employer or the management of each company to establish, stop, rerun, transfer or dissolve the company. If a company has a branch office or a stand-alone section, then each branch office or stand-alone section is obliged to provide an employment report at the branch office or their respective departments.

The obligation of the employer or management to report is done no later than in within 30 (thirty) days after establishing, re-running or moving the company, then this employment report must be carried out every year. The report referred to must contain information on company identity, labor relations, protection of labor, and employment opportunities, as well as for employers/managers of companies that move, stop, or dissolve the company, then he is obliged to report no later than 30 (thirty ) days before moving, stopping or dissolving the company.4

The employment report referred to contains information on the name and address of the company or part of the company; name and address of the entrepreneur; name and address of company management; the date of moving, stopping or dissolving the company; reasons for the transfer, termination or dissolution of the company; and obligations that have been and will be carried out against the workers,

in accordance with the applicable laws and regulations, employment agreements, labor agreements and local customs; the amount of workers who will be dismissed. In detail, the data in the employment report includes:

a. Code of the company.
The description that contains numbering of company types/classifications.

b. Company condition.
Descriptions in this sub, include (1) names, addresses, zip codes, and telephone / fax numbers; (2) Type of Business; (3) Name, address of company owner and company manager; (4) Establishment / transfer of companies; (5) Company status; (6) Ownership status.

c. Employment situation.
The contents of the employment situation include data: (1) General; (2) Working time; (3) Use of tools and materials; (4) Production waste; (5) Wages; (6) Religious THR; (7) Bonuses / gratuities; (8) Company facilities; (9) Social security of workers; (10) Pension program; (11) Industrial relations equipment; (12) Worker plans needed in the next 12 months; (13) Workers in the last 12 months; (14) The total of workers receiving for the last 12 months and the total of workers who have dismissed within 12 months; (15) Training program; (16) Planning for training needs for workers.

d. Ratification
Sub-ratification includes. (1) signature of the management/owner of the company and stamp; (2) Numbering registration; and (3) Signatures of authorization from authorized institutions (local Manpower and Transmigration Institution).

Based on the applicable regulations, this reporting process is free of charge. This is reaffirmed through the Circular of the Minister of
Manpower and Transmigration of the Republic of Indonesia Number: SE.3 / Men / III / 2014 concerning Compulsory Implementation of Manpower Reporting in the Company. The circular also states that the time limit for the process of registering the compulsory labor report registration in a company is 1 (one) working day after receiving the registration file for compulsory labor reporting in the company which has been completed and signed with a company stamp. It’s just, de facto, period rank in the Circular of the Minister of Manpower and Transmigration of the Republic of Indonesia Number: SE.3 / Men / III / 2014 concerning Compulsory Implementation of Reporting on Employment in the Company has not been implemented. This condition occurs generally because functionary who is authorized to validate is not in place.

The absence of functionary authorized to authorize labor reporting documents when viewed from the aspect of administrative law, this can actually be overcome without neglecting the juridical authority of the functionary concerned. A breakthrough that can be done, namely by giving the mandate of the authority of the functionary concerned to the functionary subordinate directly. Citing the opinion of HD van Wijk / Willem Konijnenbelt, mandaat: een bestuursorgaan laat zijn bevoegheid namens hem uitoefenen door een ander, (the mandate occurs when the organ of government allows its authority to be exercised by other organs in its name). In this mandate, the authority remains in the hands of the mandating authority so that at any time he can take and carry out his own authority. In the event of a mandate, the responsibility remains in the hands of the creditor.

From the aspect of data administration, the authorized institution in the manpower sector in the regency/city in the Central Java Province, which was sampled in this research, has provided the data form required to report labor in accordance contained in the Law of the

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Republic of Indonesia Number 7 Year 1981 concerning Mandatory Manpower Reporting. All data in the labor report compulsory document is filled manually by the company on the form provided. From this content, the institution responsible in the field of manpower in each district/city enter data into the master book.

In line with the enactment of the Minister of Manpower Regulation of the Republic of Indonesia Number 18 Year 2017 concerning Procedures for the Requirement of Employment Report in Companies in the Network, the absence of the authorized official is expected to be no longer a problem. Likewise, with the form that is still manual, with a reporting system in the network, it makes it easier for companies and agencies that are authorized in the field of labor to carry out activities related to the mandatory report on employment in the company.

From the results of the research, it was found that the implementation of the labor reporting obligation in Semarang City, Magelang City, Tegal City, Pekalongan City, Kudus Regency, and Banjarnegara Regency showed a movement. The movement was due to several things, including the presence of new companies, also because there were companies that did not report labor conditions in their respective companies or the companies closed. The closure of this company is difficult to know early by the local government.

According to Article 10 of the Law of the Republic of Indonesia Number 7 of 1981 concerning Obligatory Report on Employment in the Company, companies that do not report can be subject to sanctions in the form of criminal sanctions, namely the threat of imprisonment for a maximum of 3 (three) years, or a maximum fine of Rp. 1,000,000, - (one million rupiah). Law enforcement in this context, namely the application of criminal sanctions based on the non-obligation to report labor conditions in the company. In relation to the contents of the report on the labor report compulsory document, the enforcement is carried out by the supervisory staff at the functionary responsible for the manpower sector in each district/city.
With regard to supervisory staff, a comparison of the total of supervisory staff with the total of companies fulfilling. From the results of the study, it was found that the total of companies in the city of Semarang showed the highest amount compared to other regions. If we look at the position of the city of Semarang as the capital of Central Java Province, this is considered normal, but when compared with the total of labor inspectors, comparison figure is still quite large, that is 1:354.6. For the other five regions, the comparison is 1:227.6 for Banjarnegara Regency, 1:223 for Kudus Regency, 1:33.6 for Pekalongan City, 1:45 for Tegal City, and 1:93.3 for Magelang City. Ideally, the comparison is 1:60.

In the implementation of the compulsory labor report policy as stipulated in the Law of the Republic of Indonesia Number 7 of 1981, there are factors that hinder the implementation of the policy in the District / City Government in the Central Java Province. These obstacles vary in each district/city. These obstacles can be sorted in internal and external barriers. Internal barriers, generally related to limited infrastructure, supervisory staff, and funding. External barriers are related to the company that is required to report. If you look at the age of this policy that can no longer be considered new, the obstacles that seem classic are irony with the spirit of bureaucratic reform and the realization of good governance. Moreover, the implementation of this policy is basically a routine and continuous activity, so it is appropriate that these obstacles be overcome in stages, sustainable, and anticipatory.

**Conclusions**

Based on the results of the research as described in sub Result and Discussion, it can be concluded that the implementation of the mandatory labor reporting policy is carried out by six institutions in charge of manpower in Semarang City, Magelang City, Pekalongan City, Tegal City, Kudus Regency, and Banjarnegara Regency refer to the provisions of the Republic of Indonesia Law Number 7 of 1981
concerning Compulsory Labor Reporting and the Minister of Manpower Regulation of the Republic of Indonesia Number 18 Year 2017 concerning Procedures for the Requirement of Employment Report in Companies in the Network. From a policy aspect, the regional government did not make a legal breakthrough to optimize the implementation of the law. From the aspect of administrative law, there are still weaknesses related to its approval by the competent authority and the total of supervisory staff. As for data administration aspects, the advancement of information technology has not been maximally utilized by district/city regional governments in order to implement the Law of the Republic of Indonesia Number 7 of 1981 concerning Compulsory Labor Reporting.

**Reference**


The Role of the Community and Bengkulu Provincial National Narcotics Agency in the Rehabilitation of Drug Addicts in the City of Bengkulu

Antroy Royan Adyan
Faculty of Law, University of Bengkulu, Indonesia

Abstract

The role of the people in the implementation of the rehabilitation for drug addicts in the city Bengkulu not had a role actively maximally in helping drug addict. While national narcotic agency the province Bengkulu in the implementation of the rehabilitation for drug addicts in the city Bengkulu taken part by conducting raid or efforts force, with assess the addict drugs through integrated assessment team. Obstacles in the implementation of the rehabilitation for drug addicts in the city Bengkulu is a mistake and addicts not showing a desire to recover, the community (family not want to reported family members that is engaged as a drug addict and cannot get involved in the process of rehabilitation, lack of coordination between bnnpBengkulu by law enforcement officials, the result of tat (team assessment integrated) recommend addict for rehabilitation but judicial decisions inflicted is decisions punishment and there is no oversight after rehabilitation.

Keywords: drug addicts, the community, narcotics national provincial

Introducion

The spread of narcotics is almost could not prevented. Remember almost all the inhabitants of the world can be easily get narcotic of unscrupulous and irresponsible people. In addition narcotics this has been in open such as of airport drugs thrilled to find prey at work, with, place prostitution, and places genkassembly. Distribution dark narcotic also and drugs dangerous or drugs in the past year progress very fast and extends. Courses even in the city and in the countryside until to students elementary schools (SD). But eradication narcotics is very difficult because of their network very broad, ranged, even the police can involved in the tissues drugs. Recently, the case drugs in Indonesia increased is very significant and the evidence that since Indonesia not only of being a state transit but has changed of being a state consumer. Producers even exporters of drugs.
National narcotic agency estimated the amount of drug users in Indonesia will continue to increase 2015, it is predicted the prevalence of drug users of 5.1 million people. Sadly 75 percent of them are students and workers. The rest 25 percent unemployment\(^1\). According to Jeanne mandagi, that drugs abuse today has reached situation alarming so as to be problems the state. It is very poor because drugs abuse victims in Indonesia recently tends to be increased and covers is not limited to community groups capable of but also expanded to the community poor and involved children or teenage flipping, a things got a little worried about considering they actually are the to the expectations of us to continue survival the nation as honorable\(^2\).

Head of national narcotic agency (BNN) of commissioners general Budi Waseso the police, Indonesia today in the emergency and have to a war against narcotic. Where an estimated 5.9 million people positive users. The country has been in emergency category drugs and must be declared war. Because, within the past year at least 2,6 tons of drugs sabu-sabu, he said he whose popularly known buwas this told reporters on the field, tuesday 10 november 2015\(^3\).

Narcotics is the critical and complicated that cannot be solved by only one side. Because drugs not just about individual but trouble everyone. Considering this narcotics mass murderer, then impact of from its use absolutely fatal because the damage he was doing permanent. Especially in Indonesia category most using narcotics now starting from the junior high school ( ) junior high school senior high school. But early adolescence like this is very fragile age. In addition the younger generation is very will be expected to build country, so should

\(^1\)http: // people daily bengkulu.com / ver3 / 2015 / 05 / 12 / drug users 45 million people, July 28 2015, hours 07.50 pm
\(^2\)Jeanne mandagi, 1995, the narcotics and penanggulangannya, jakarta, scouts saka bhayangkara, page 11
\(^3\)Http: / / nasional.sindonews.com / read / 1060496 / 13 / komjen buwas indonesia drug emergency 1447165042 downloaded february 22 2016, hours 8 pm. 20.00.
teenager are drug addicts and misapplication narcotics it is not given criminal sanctions in prison , because what they need is rehabilitation.

Abuses narcotics or also drug addicts is the sick . Abuses narcotics to seek treatment by putting into the nation rehabilitation . Consideration is based on the fact that the majority of cases narcotics investors were category to the financial and the narcotic indirectly was the hospital . On assignment addict and the abuses narcotics into rehabilitation institution is in line with the aim of constitution number 35 years 2009 about drugs the article 4 letter d that efforts to ensure the medical rehabilitation and for social abuses and drug addicts. In addition of rehabilitation set in article 54 law no.35 year 2009.

Article 54 law No.35 year 2009 : Drug addicts and drugs abuse victims must undergo medical rehabilitation and social rehabilitation

Rehabilitation drug addicts is already exists government regulation staged it , the government the 25 years 2011 on the implementation of the must report drug addicts . Where out in article 1 the numbers 1 set about must report for drug addicts , so that addict narcotic they could get rehabilitation . As for article 1 the numbers 1 the read :

Must report is the report done by drug addicts old enough or his family , and / or parents or guardian of drug addicts who does not age to institutions recipients must report to get medical treatment and / or care through medical rehabilitation and social rehabilitation .

Although the provisions of the legislation has orders the to treat junkie and the abused narcotic in a more human , with seek they undergo medical rehabilitation and or social rehabilitation but in handling who has been admitted in the domain of law needs to be done in a more careful and carefully through a process integrally by involving representatives of associated elements to know the extent of the level addicted to and their role in narcotic crime is so that can be determined suitable or not a junkie and victim abused narcotic determined
suspects or defendant to be placed into rehabilitation institution medical and or social rehabilitation.

Addicts narkotiba should have been placed in rehabilitation institution is not placed in correctional institution. And so here was supposed to the old or society and the national narcotic agency active in to facilitate addict drugs were to undergo medical rehabilitation and or rehabilitation. Accords the breakdown, who became the question is how society role and narcotics national Provincial Bengkulu in the rehabilitation for drug addicts in the City Bengkulu and constraints in the rehabilitation for drug addicts in the City Bengkulu?

**Analysis and Discussion**

Drugs abuse in Indonesia today has reached situation alarming so as to be problems the state. It is very poor because drugs abuse victims in Indonesia recently tends to be increased and covers is not limited to community groups that economic capable of but also expanded to the community poor. In addition distribution narkoika involving drugs abuse victims that not only of age but also age or teenage children but was will be the next generation Indonesia in the future.

Abuse narcotics or also drug addicts besides becoming an offender, they are a sick person, who is obliged to undergo treatment by putting them into social rehabilitation institutions. Regarding the deployment of junkie and the victim abuse narcotics into rehabilitation institutions this is consistent with the objectives of the law number 35 years 2009 on narcotics namely article 4 letter d that mentioned in order to ensure the arrangement efforts as medical and social rehabilitation for abused drug addicts.

Addict narcotics should have been placed in rehabilitation institution is not placed in a correctional institution. This has already been should be supported by all parties especially law enforcement officials that process addict (abuse of narcotics) to in the domain of law. In addition, was supposed to parents or the community and
institutions such as the national narcotic agency active in the to facilitate addict the drugs were to undergo medical rehabilitation and or social rehabilitation.

The Province Bengkulu having a level abused a narcotic that high. A verdict or the judges decision are still many who gives criminal sanctions prison to addict or abuses the narcotic. In addition family supposed to do must report of the existence of a member of family who is a votary or abuses narcotic is rarely made to the report.

Placement junkie and the abuse narcotic into rehabilitation institution consistent with the objectives of the act of no. 35 years 2009 on narcotics namely article 4 the letters d which states to ensure arrangement efforts as medical and social rehabilitation for penyalahguna and drug addicts. In addition article 127 by taking into account article 54, 55, and 103 can be used as a guide to drop the award rehabilitation to junkie abuses narcotic.

Specifically placement rehabilitation for junkie and the abuse narcotic that is undergoing legal proceedings also mentioned in government regulation No. 25 years 2011 on the implementation of the report drug addicts, circulars Supreme Court letter the number: 07 2009 about putting drug users into therapy and rehabilitation, and also joint ordinance head of great Supreme Court letter of the Republic of Indonesia, the minister of justice and human rights of the Republic of Indonesia, health minister repbulik Indonesia, social affairs minister of the Republic of Indonesia, attorney general of the Republic of Indonesia, the Indonesian police chief, head of national narcotic of the Republic of Indonesia number: 01 / PB / MA / III / 2014, number: 03 2014, number: 11 / 2014, number: 03 2014, number: PER-005 / A / JA / 03 / 2014, number: 1 2014, number: PERBER 1 / III / 2014 / BNN on the
Regulates which rehabiltasi suspects and / or the defendant in the judicial process of them the minister of health of the Republic of Indonesia number 80 year 2014 about guidance the technical implementation of medical rehabilitation for addicts , user, and drugs abuse victims which is in the process investigation , the prosecution, and trial or have gained / the determination of judicial decisions , and police also released a letter a telegram chief of INP number: STR / 701 / VIII / 2014 22 august 2014 on guidelines for the implementation of rehabilitation works in the level of investigation, as well as the state narcotics board ( BNN ) issued a regulation the head of the national narcotics agency number 11 year 2014 on the procedures for the handling of suspects and / or the defendant drug addicts and drugs abuse victims into rehabilitation institutions .

The provisions of the legislation above have orders the to treat junkie and the used narcotic in humanis, but in handling who has been admitted in the domain of law needs to be done in a more careful and carefully through a process assesmen integrally by involving representatives of associated elements to know the extent of the level addicted to and their role in narcotic crime so that can be determined suitable or not a junkie and drugs abuse victims determined suspects and / or a defendant for placed into rehabilitation institution medical and or social .

According to Bina Ampera of a hill from the national narcotics agency the province Bengkulu , on 16th september 2016 currently the number of drug addicts who renovated re getting, it means a verdict of criminal prison already started to be dropped again by a judge .The amount is composed of different sorts the age data of year 2015 drug

4the http: / / www.fianhar.com / 2015 / 02 / assesmen integrated and .html ~ against addicts downloaded september .23 2016, hours 08.55 pm
addicts who renovated based on age were 303 people. Consisting of the age of 10 s / d 15 years, about three people (from 0.51 %), usia 16 year s / d 21 years, eighty-three people (27.39 %), 22 years old s / d 27 years, as many as 115 people (37.95 %), age 28 tahuns / d 33 years, as much as 60 people (19.81 %), age 34 s / d 39 years old, as many as 32 people (10.56 %), the age of 40 years s / d 45 years, as many as 4 people (1.32 %), age above 45 years, as many as 6 people (1.98 %).

The data can see that drug addicts did not look age, start from the kid to the age of adult, visible drug addicts starting from of age 10 years to above 45 years have known drugs. This shows age does not guarantee that people do not use drugs. Age most sensitive of drug users s ages between 27 years to 45 years reached. That age s ages the most productive forwarding development programs. Here the role of the family is central for though social environment have an important role in the formation of son manners, the point located on education in family. Education pattern that is carried out by parents has a role to play the main produce little submissive or oppose. Meanwhile the research results show that the person with the condition family that is not good have risk relatively to misapply drugs than he with the conditions a good family.

Education pattern that is carried out by parents has a role to play the main produce little submissive or oppose. Meanwhile the research results show that the person with the condition family that is not good have risk relatively to apply drugs than he with the conditions a good family. This figure on the other hand can explain that of parent children start getting to know social life with various the possibility Of famlily good or bad son manners indeed began. The number of drug addicts who renovated is spread to two types of rehabilitation, namely rehabilitation of outpatient and rehabilitation of in-patient.
According to Bina Ampera of a hill from the national narcotics agency the Province Bengkulu on the 17th september 2016, from the data who runs in-patient as many as 66 people as resident, implementated filing rehabilitasinya carried out by the family to BNN the province. While outpatient as many as 303 people as resident .Resident is a term used for a drug addict who is running rehabilitation according to Sawal Alam⁵, from the hospital lives and drug dependence (RSJKO) Bengkulu. Resident because done capture by law enforcement officials. Total resident outpatient entirely 369, consisting of some 226 men and women , as may as 77 people. And for innap entirely 66 people boy. Place implementated rehabilitation for resident , as many as 369 consist of : outpatient in BNNP Bengkulu, as many as 303 people, in-patient a correctional institution, as many as 49 employees, for referred to lido, as many as five people, in a psychiatrichospital and drug dependence.

According to Faisal⁶ from the hospital lives and drug dependence (RSJKO), to for inpatient or outpatient treatment for drug addict done through team assessments integrated the central level after making the coordinates with ministry of health, police, prosecutors Indonesian, and ministry law and human rights (through hall correctional) related cases of children. National narcotic agency the province (BNNP) determined team integrated assessments after coordinating with provincial health department / districts, regional police / police resorts, prosecutors high / land , and the office law and human rights (by the porch or vestibule correctional institution or jail ), the number of team assessments integrated formed at least 2 (two) or more teams with members of a different team, hanging from many cases and work load.

Aidil⁷ from the asylum and drug dependence (RSJKO) Bengkulu, assessments integrated team consisting of a team of doctors.

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⁵Interviews with Sawal Alam, dated 17 september 2016  
⁶Interviews with Faisal, dated 17 september 2016  
⁷Interviews with Aidil, dated 17 september 2016
and tim law. A team of doctors consisting of general practitioner or medical specialist Psychiatric health medicine or forensic specialist doctors and / or psychologist, made up of members of at least 2 ( two ) persons recipient of an institution obliged to report ( IPWl ) that have been certified by health ministry with the recommendation from the ministry of health for the team assessments the central level, the head provincial health department/districts for the team assessments ranked /province regency/city. While legal team made up of members of each one person comprising of the police the Republic of Indonesia or police (appointed by director iv of the narcotic, director drugs local police, or head of the drug the unit resorts ) police, a body of a narcotic element of national other investigators appointed by the deputy / eradication the head of the province of a narcotic national, a body of a narcotic national city or regency), attorney office element (prosecutor who appointed), and The ministry of law and human rights (by the porch or vestibule correctional) when suspects children.

According to she from the national the province a narcotic ( BNNP ) Bengkulu, the implementation mechanism assessments integrated, regulated as follows:

1. Team integrated assessments do assessments based on written by investigators. Investigators submit a request for a maximum 1x24 hours after an arrest, with a copy to head BNN local in accordance with its well-lit crime scene.
2. Team integrated assessments do assessments maximum 2x 24 hours , next the results of assessments of a team of doctors and the team law concluded a maximum the third day .
3. The results of assessments from each team assessments discussed at a meeting discussion cases ( case conference on the day fourth to set forth as recommendations team integrated assessments .
Delivered by she, recommendations assessments team integrated containing description on the role of suspects and/or defendant in crimes, the reliance penyalahguna narcotics, recommendations the process of law and a rehabilitation and a long time. Recommendations team assesmen integrated signed handle by chairwoman of the team integrated assessments. In the interest of the recommendations and judicial team integrated assessments be attached in docket suspects must original. Drug addicts arrested law enforcement officials to be treated psychiatric hospital and drug dependence (RSJKO) must be based on a recommendation team assesmen integrated and ditanda handle by chairwoman of the team integrated assessments, while drug addicts reported by the community (family, ngos fan/addict).

Based on the data from medical of being admitted to a psychiatric hospital and drug dependence (RSJKO) that Recommendation by assessment team (integrated health), as many as 12 people, based on medical rehabilitation for the suspect / the defendant, includes: (a) medical rehabilitation suspects / the defendant done by means of outpatient or inpatient as requested by written the police or body of a narcotic national / the province attorney who recommended plan rehabilitation therapy of the team integrated assessments, for a period of three months, (b) suspect / the defendant eventually get through inpatient rehabilitation: (b.1) have to follow a course that is determined by medical rehabilitation facilities, (b.2) not takes means of communication, (b.3) communication with the family / the other hand have to go through medical personnel conduct rehabilitation, (c) based on the data table outpatient as many as prefect 303, as a suspect / the defendant to follow the process in rehabilitation lies in investigators or the public prosecutor, (d) a party rehabili facilities.

Governance medical rehabilitation for convict for undergo medical rehabilitation, convict should not hold communication, either directly or indirectly with the family for the first month. After performing
the program is from one months, communication with the family can be done as applicable in the rehab facility. In respect to the interests of relating to the law, convict can do communication with other parties out family, for permits family for undergo rehabilitation. Convict must undergo 3 stage care, namely the program in-patient early, ancontinued program and treated post program treated. Convict who under went medical rehabilitation, namely:

a. therapeutic community (tc is a group of people who have the same problems, they gathered for help each other in overcoming the problems faced by, in other words man helping man to help himself, namely someone who help others to help themselves

b. narcotic anonymous (na is a group of people who on the 12 step to reach the restoration of disease addicted to, na convinced that we can help each other and the self to endure clean by using a guide 12 the steps and 12 tradition

c. the house of hope is a therapy based program therapeutic community and combined with of 12 step, to achieve a purpose together in recovery. Approach program combined referred to in order to obtain with therapy through trimming behavior and approach spiritual.

Resident for take care treatment involved in the program Psychiatrichospital and drug dependence (RSJKO) provincial Bengkulu recommended hospitalized Psychiatrichospital and relying (RSJKO) Bengkulu based on the results of study team assessments user narcotic medical examination, Psychiatricehealth and phisikologis agency a narcotic national the province (BNNP) Bengkulu, Covering: The name resident SA , based on judicial decisions no.220 / pid.sus / 2016 / pn.bgl , july 20, 2016 , being treated in Psychiatrichospital and relying (RSJKO)Bengkulu , for seven months; The name resident SR , based on judicial decisions no.326 / pid.sus / 2016 / pn.bgl , july 20, 2016 , treated home Psychiatrichospital and relying (RSJKO) Bengkulu , for six
months: The name resident KH, based on judicial decisions no.90 / pid.sus / 2016 / pn.bgl, date 01 july 2016, treated home psychiatric hospital and relying (RSJKO) Bengkulu, for five months.

In-patient program preliminary to to three resident, the convict must undergo rehabilitation in-patient according to a plan therapy. After passing in-patient program early. The convict can live in-patient program advanced or outpatient, depending on degrees severity addicted in line with the advanced assessments. An continued program in-patient given to the criminal they patients) with one or more conditions: (a) pattern used dependence, (b) has not shown stability in psychiatricemotional in-patient early, (c) having obstructed physical and/or psychiatric, (d) never have the acts of therapy rehabilitation several times before, (e) a cumulative time in-patient the beginning and further the old six months.

An continued program outpatient, given in patients with the condition: (a) have a pattern the use of rekreasional in nature, (b) a substance chief one used is weed or amphetamines, (c) a substance main used is opioda, but concerned has been in healing before caught crimes or actively undergo program therapy before, (d) was 1 year, (f) not having obstructed physical and/or psychiatric.

Resident who joined the program advanced outpatient have to checking yourself back up in units of outpatient facilities medical rehabilitation there what he called frequency minimally 2 times a week, depending on the development of the patient condition to obtain intervention service, prevention and therapeutic medical in accordance with the need, and had a urine periodically or at any time. Post program treated, given to addict, narcotic which has already implemented medical rehabilitation entitled to undergo social rehabilitation and programs return to the community.

By following program mentioned above at first is junkies will suffer short when they do not use drugs when starting follow recovery
programs from in central rehabilitation. But gradually along with life of time so desire taking drugs declining because in the rehabilitas the former drug users gets care nursing and treatment professional.

Based on medical rehabilitation walk simultaneous in line with social rehabilitation. The first month users get a bit used to do not use drugs, in the sense of their health conditions start gradually will recover so social rehabilitation have started to they will. Social rehabilitation nothing is meant to make the resident gets high skill later would have confidence so when they have finished in the process of rehabilitation to undergo social life as other citizens.

Data resident outpatient 2015 based on delivery a number of 303 drug users, covering that arrested agency a narcotic national the province (BNNP) Bengkulu, 203, instusi addict must report 96 people. Police resorts kepahiang, four people. Drug users or resident undergo rehabilitation on the basis of must report who reported about drug addicts. The results of interviews with SR, SA, KH resident drugs that is undergoing rehabilitation in a psychiatrichospital and addict a drug (RSJKO) Bengkulu, they undergo rehabilitation because the law that recommends them to executing drug rehabilitation in a psychiatrichospital and addict a drug (RSJKO) Bengkulu. It is also was supported by AY, BP and ab as the family of SR, SA, KH resident drugs that is undergoing rehabilitation in a psychiatrichospital and addict a drug (RSJKO), who say that they as family follow the law process, so that when members of a family (drug addicts).

Based on the data from a psychiatric hospital and drug dependence, prefect delivery starting in 2013 until 2016, addict who take care in a psychiatric hospital and drug dependence (RSJKO) the Province of Bengkulu the total number of 65, which has been passed through families, non-governmental organizations, on its owner initiative, in 2013, about 20 people, year 2014, 21 people, the year 2015, as many as 18 people, 2016 mounth february, as many as 6
people. Delivery starting in 2013 until 2016, addict who take care in a Psychiatric hospital and drug dependence (RSJKO) the Province of Bengkulu the total number of with 118 people, which has been passed police resorts, regional police, a narcotic national board the province, in 2013, as many as 45 people, year 2014, to as many as 37 people year 2015, 51 people, 2016 month February, as many as 13 people.

The role of parents or society recommended drug addict placed in a psychiatric hospital and drug dependence (RSJKO), 65 .The 65 reseiden showed people not maximally in helping cover enclose rehabiltation for resident, compared by a team asasetment integrated (TAT) that recommends drug addict placed in a psychiatric hospital and drug dependence (RSJKO) as 118 people. Procedures addict who is undergoing the process investigation, prosecution and determination of judicial decisions:

1. Procedure the suspects or defendant into medical rehabilitation, covering; (a) peneyerahan done by investigators or public prosecutor accompanied by family and the agency a narcotic nasioban the province (bnnp), (b) the transfer of done during work hours, (c) the handover of suspects or defendant appointed should be accompanied by the provision of informed consent of suspects/the defendant, witnessed by investigators/public prosecution and the family.

2. Procedure the convict into rehabilitssi medical, covering; (a) the transfer of carried out by the prosecutors to facilities medical rehabilitation appointed and accompanied the report the determination of judicial decisions that signed by the officers prosecutors and paramedics who patients, by attaching; (a.1) A copy of / the passage the determination of / decisions which the court has already binding, (a.2). A letter of intent much as of convict to undergo medical rehabilitation in accordance with the plan therapy medical set by team asesment integrated, (b). The
done during work hours with a mandatory program report was expected to a little used drugs undergo imprisonment.

As for procedures the determinated of service procedure have facilities medical rehabilitation, namely: (1) Filling out a assessment must report and medical rehabilitation, (2) Urine test to mendekteksi existing or not drugs in the body addict, (3) Providing counseling basic addicted clean, to examined understanding patients over disease and the understanding of recovery, (4) Drug addicts who having the acts of the use of a narcotic, phsikotropika and astringent adaptive (clean), for granted counseling pre-test and offered have a disease human immuno deficiency (HIV), (5) Examination other supporting, (6) Therapy drafted plan includes plans medical rehabilitation and/or social, (7) Medical rehabilitation can be outpatient or in-patient.

A program of rehabilitation is facility for the treatment for drug abusers (resident) conducted by Psychiatric hospital and drug dependence (RSJKO) Bengkulu. Prefect who has been carrying out medical rehabilitation entitled undergo rehabiltasi social and repayment program into the community.

Education resident based on data outpatient 2015 narcotic years of drugs province, 303 the overall, covering; not from elementary school the 5, from elementary school 23 people, completed high school 71 the first, graduate from high school 176 the top level, 7 the diploma, scholar 19 people, graduate people of 2 terms of education addict treated road, 176 most people were completed secondary school education.

Finished secondary school is the transtited to find identity, so influence against for youth who secondary school graduates, know addictive substances drugs because of curiosity by means of: tried, happiness, using when certain circumstances, drug users to dependence.
Residen outpatient based on data work 2015 agency a narcotic drugs the province, in total 303 used drugs years, covering; unemployment 20 people, private 150 people, entrepreneurs 21 people, state-owned one, civil servants 6 people, police or the national army of Indonesia 28 people, students 38 people, students 30 people users most based on work user drugs outpatient is private employees as many as 150 people, because rekrument private employees not obliged requirements urine test as private employees, it is one way to break chain staff drugs that is engaged as addict drugs.

A user types a substance used resident outpatient in total 303 based on includes: shabu 185 people, marijuana 94 people, ecstasy 6 people, multiple 18 people. The addictive substances the most widely used by the prefect is the type of shabu as much as 185 people. It turns out that eliminated the dependency of the addictive substances is very difficult for resident. The difficulty of a victim user drugs in order to break away from addiction. The use of continuous and continuing will lead to dependency or dependencies, called addicted to ( dependent).

The impact of drug users, if drugs used is constantly being or surpass measure that it is his will to result in dependence, then required several parties who care about the fate of the future generations the young. Especially the role of parents movement rehabilitate victims used to narcotic in support the program narcotic agency national the province (BNNP) as bureaucracy who are legal authority to heads the movement eradicate, prevent and rehabilitate victims used to drugs.

**Conclusion**

The role of the people in the implemented of the rehabilitation for drug addicts in the city Bengkulu not had a role actively and a maximum in helping drug addict, where of 303 drug addicts, were delivered by the family and worn must report just as much 96 people addicted drugs. While national narcotic agency the Province Bengkulu
taken part, where as many as 207 by means of get or attempts to force by the agency a narcotic national the Province or police for drug addicts in the implementated of the rehabilitation in the City Bengkulu.

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Implementation On Settlement Of Commercial Disputes In Indonesia And Asean Countries

Jafar Sidiq¹
Bambang Hariyanto²

¹ Faculty of Law, University of Langlangbuana, Indonesia
E-mail: jafarlawcenter@gmail.com
² Faculty of Law, BHP Institute, Palembang, Indonesia
E-mail: bambang.arbiter@gmail.com

Abstract

Nowadays, in business community among ASEAN Countries, especially in commercial transaction choose arbitration as a mechanism of settling commercial disputes outside the general courts based upon an arbitration agreement entered into in writing by disputing Parties. RI Law No.30 of 1999 concerning Arbitration and Alternative Dispute Resolution stated in Article 1 (9) International Arbitration Awards shall mean awards handed down by an arbitration institution or individual arbitrator(s) outside the jurisdiction of the Republic of Indonesia, or an award by an arbitration institution of individual arbitrators (which) under the provisions of Indonesia law are deemed to be international arbitration awards. Research Methods is descriptive qualitative approach and normative juridical analyses on Indonesian Laws and Law of ASEAN Countries. This Paper describes problems and issues on the implementation and the possibility of harmonization on settlement of commercial disputes in Indonesia and ASEAN Countries based on Literature Studies and Comparative Law Studies. It is discovered that there is various implementation of arbitration among ASEAN countries because of different legal system and need harmonization of the provision of arbitration. ASEAN Countries need to play their role to cooperate enhancing international arbitration.

Keywords: Arbitration, Commercial Disputes, ASEAN Countries

Introduction

The Association of Southeast Asian Nations, or ASEAN, was established on 8 August 1967 in Bangkok, Thailand, with the signing of the ASEAN Declaration (Bangkok Declaration) by the Founding Fathers of ASEAN, namely Indonesia, Malaysia, Philippines, Singapore and Thailand.¹ Brunei Darussalam then joined on 7 January 1984, Viet Nam on 28 July 1995, Lao PDR and Myanmar on 23 July 1997, and Cambodia on 30 April 1999, making up what is today the ten Member States of ASEAN. As set out in the ASEAN Declaration, the aims and purposes of ASEAN are: To accelerate the economic growth, social

¹ See for more detail at https://asean.org/asean/about-asean/
progress and cultural development in the region through joint endeavors in the spirit of equality and partnership in order to strengthen the foundation for a prosperous and peaceful community of Southeast Asian Nations; To promote regional peace and stability through abiding respect for justice and the rule of law in the relationship among countries of the region and adherence to the principles of the United Nations Charter; To promote active collaboration and mutual assistance on matters of common interest in the economic, social, cultural, technical, scientific and administrative fields; To provide assistance to each other in the form of training and research facilities in the educational, professional, technical and administrative spheres; To collaborate more effectively for the greater utilization of their agriculture and industries, the expansion of their trade, including the study of the problems of international commodity trade, the improvement of their transportation and communications facilities and the raising of the living standards of their peoples; To promote Southeast Asian studies; and To maintain close and beneficial cooperation with existing international and regional organizations with similar aims and purposes, and explore all avenues for even closer cooperation among themselves: (1) In their relations with one another, the ASEAN Member States have adopted the following fundamental principles, as contained in the Treaty of Amity and Cooperation in Southeast Asia (TAC) of 1976: (2) Mutual respect for the independence, sovereignty, equality, territorial integrity, and national identity of all nations; (3) The right of every State to lead its national existence free from external interference, subversion or coercion; (4) Non-interference in the internal affairs of one another; (5) Settlement of differences or disputes by peaceful manner; (6) Renunciation of the threat or use of force; and Effective cooperation among themselves. The ASEAN Vision 2020, adopted by the ASEAN Leaders on the 30th Anniversary of ASEAN, agreed on a shared vision of ASEAN as a concert of Southeast Asian nations, outward looking, living in peace, stability and prosperity,
bonded together in partnership in dynamic development and in a community of caring societies. At the 9th ASEAN Summit in 2003, the ASEAN Leaders resolved that an ASEAN Community shall be established. At the 12th ASEAN Summit in January 2007, the Leaders affirmed their strong commitment to accelerate the establishment of an ASEAN Community by 2015 and signed the Cebu Declaration on the Acceleration of the Establishment of an ASEAN Community by 2015. The ASEAN Community is comprised of three pillars, namely the ASEAN Political-Security Community, ASEAN Economic Community and ASEAN Socio-Cultural Community. Each pillar has its own Blueprint, and, together with the Initiative for ASEAN Integration (IAI) Strategic Framework and IAI Work Plan Phase II (2009-2015), they form the Roadmap for an ASEAN Community 2009-2015. The ASEAN Charter serves as a firm foundation in achieving the ASEAN Community by providing legal status and institutional framework for ASEAN. It also codifies ASEAN norms, rules and values; sets clear targets for ASEAN; and presents accountability and compliance.

The ASEAN Charter entered into force on 15 December 2008. A gathering of the ASEAN Foreign Ministers was held at the ASEAN Secretariat in Jakarta to mark this very historic occasion for ASEAN. With the entry into force of the ASEAN Charter, ASEAN will henceforth operate under a new legal framework and establish a number of new organs to boost its community-building process. In effect, the ASEAN Charter has become a legally binding agreement among the 10 ASEAN Member States.

Analysis and Discussion

1. Settlement of Commercial Disputes in Asean Member States

a. Indonesia Practice.

Definition of Arbitration and ADR. Stanford M. Altschul in his book “The Most Important Legal Term You’ll Ever Need to Know” states that “Arbitration. An alternative dispute resolution system
that is agreed to by all parties to a dispute. This system provides for private resolution of disputes in a speedy fashion”. Subekti in his book “Arbitration in Indonesia” states that (Arbitration shall mean a settlement of dispute by a referee or more referee (an arbitrator or arbitrators) was appointed together by disputing parties and conducted outside the General Courts). Priyatna Abdurrahman in his book “Introduction to Arbitration and Alternative Dispute Resolution (ADR)” states that (Arbitration shall mean a mechanism of alternative dispute resolution – ADR, the legal action that is recognized by law where one or more parties submit the disputes – disagreement – with other party or parties to an arbitrator or arbitrators panel professional expert, as a judge / private courts with apply the peaceful means agreed together by prior the parties reaching the final and binding award. Therefore, arbitration shall mean law of procedure and law of the parties. Beside final and binding award it is also known as binding opinion).

Definition of Arbitration and ADR according to RI Law No.30 / 1999 states that, “Arbitration shall mean a mechanism of settling civil disputes outside the general courts based upon an arbitration agreement entered into in writing by the disputing Parties” (Article 1 (1) RI Law No.30/1999). Whereas, Alternative Dispute Resolution (or ADR) shall mean a mechanism for the resolution of the disputes or differences of opinion through procedures agreed upon by the parties, i.e. resolution outside the courts by consultation, negotiation, mediation, conciliation, or expert assessment (Article 1 (10), RI Law No.30/1999).

The Source of Law on Arbitration in Indonesia, underlying of Arbitration in Indonesia, such as : RI Law No.30 of 1999, RI Law No.49 of 2009, RI Law related to Arbitration, Arbitration Clause or Arbitration Agreement, Reputation Doctrines of Arbitration, and The Court Awards related to Arbitration. Refer to Article 5 (1) and
Article 5 (2) RI Law No.30 / 1999 provide “only dispute of commercial nature, or those concerning rights which, under the law and regulations fall within the full legal authority of the disputing parties, may be settled through arbitration”. “Disputes which may not be resolved by arbitration are disputes where according to regulations having the force of law no amicable settlement is possible”. The scope of commercial law means activities nature including, such as: Commercial, Banking, Financing, Capital Investment, Industrial and Property Rights.  

Practically, the Scope Settlement of Disputes was submitted to BANI Arbitration Center, Jakarta, as per Year 2016, such as below:

![Figure 1: Cases were submitted to BANI as per Year 2016.](image)

RI Law No.30/1999 provides there are two kind of arbitration: Ad-Hoc Arbitration; and Institutional Arbitration. Ad-Hoc Arbitration (“Arbitration Volunteer”) means certain arbitration for one occasion. Arbitrator (s) is appointed by disputing parties. In the event the parties cannot reach agreement on the choice of arbitrators or no terms have been set concerning the appointment of arbitrator, the Chief Judge of the District court shall be authorized to appoint the arbitrator or arbitration tribunal. In an ad-hoc arbitration, where there is any disagreement between the parties with regard to the appointment of one or more arbitrators, the parties may request the Chief Judge of the District Court to

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2 Vide Article 5 (1) jo Explanation Article 66 (b) RI Law No.30 / 1999.
appoint one or more arbitrators for resolution of such dispute.\(^4\) An institutional arbitration is one which is administered by one of the many specialist arbitral institution under its own rules of arbitration institutional arbitration in Indonesia, such as: BANI Arbitration Center, BAORI / BAKI, BAPMI, BAKTI, BASYARNAS, BAMHKI, Etc.

Whereas, International Arbitration Board of Arbitration, such as: ICC (The Court of Arbitration of the International Chamber of Commerce, Paris), The London Court of International Arbitration, London U.K.).\(^5\)

Practically, the Foreign Company Settlement of Disputes was submitted to BANI Arbitration Center, Jakarta, as per Year 2016, such as below:

![Figure 2: Foreign Company Disputes were submitted to BANI as per Year 2016.](image)

RI Law No.30 / 1999 in Article 1 (3) stated that “Arbitration agreement shall means a written agreement in the form of an arbitration clause entered into by the parties before a dispute arises, or a separate written arbitration agreement made by the parties after a dispute arises”. According to BANI Rules & Procedures, The BANI recommends all parties wishing to make reference to BANI Arbitration, to use the following standard clause in their contract:

\(^4\) Vide Article 13 RI Law No.30/1999.

“All disputes arising from this contract shall be binding and be finally settled under the administrative and procedural Rules of Arbitration of Badan Arbitrase Nasional Indonesia (BANI) by arbitrators appointed in accordance with said rules”.

RI Law No.30 / 1999 in Article 9 (1) and (3) stated that “In the event the parties choose resolution of the dispute by arbitration after a dispute has arisen, The written agreement contemplated must contain: The subject matter of the dispute, The full name and address of residence of the parties, The full name and place of the residence of residence of the arbitrator or arbitrators, The place the arbitrator or arbitration panel will make their decision, The full name of the secretary, The period for in which the dispute shall be resolved, A statement of willingness by the arbitrator (s) and A statement of willingness of the disputing parties that they will bear all costs necessary for the resolution or the dispute through arbitration.

In Indonesia, Institutional Arbitration i.e. BANI has cooperation agreement, with arbitration association and centers in other countries for the purpose of promoting international commercial arbitration and other forms of ADR amongst companies, business persons and other parties in those countries. These other arbitration associations and centers include the following institutions: The Japan Commercial Arbitration Association; The Netherlands Arbitration Institute; The Korean Commercial Arbitration Board; Australian Centre for International Commercial Arbitration; The Philippines Dispute Resolution Centre; Hong Kong International Arbitration Centre; The Foundation for International Commercial Arbitration and Alternative Dispute Resolution (SICA-FICA); Singapore Institute of Arbitrators. Furthermore, BANI is

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6Vide Article 9 (4) RI Law No.30 / 1999 that “A written agreement not contain the matters specified in paragraph (3) will be null and void”.
7BANI Rules and Procedures, page.7.
one of the founder and member of Asia Pacific Regional Arbitration Group (APRAG) and Host of Regional Arbitral International Forum (RAIF).

2. ASEAN MEMBER STATES ARBITRATION PRACTICE.

a. Thailand Practice.  

Sorawit Limparangsri said that Arbitration has been a part of the Civil Procedure Code since 1934. The code has provided for two kinds of arbitration, i.e., court-annexed and out-of-court arbitration. In 1987, Thailand enacted the Arbitration Act of 1987 which separately prescribes the laws on out-of-court arbitration, while court-annexed arbitration is still governed by the Civil Procedure Code. The act helps instigate the practice of arbitration in Thailand due to its arbitration-friendly approach. In 2002, the new Arbitration Act has been promulgated. The Arbitration Act of 2002 is based mainly on the UNCITRAL Model Law on International Commercial Arbitration.

The Act applies to both domestic and international commercial arbitration alike. The main reason causing Thailand to adopt a single framework for both types of arbitration is the increasingly intermingled nature of trade and investment transactions in today business community renders it practically complicated to differentiate between domestic disputes and those with international character. Having different laws for different kinds of arbitration will trigger more arguments and controversies as to the applicable law.

The Act, in essence, replicates all vital principles of the UNCITRAL Model Law. It gives the parties the autonomy to frame arbitral proceedings according to what they deem the most efficient way for carrying out their arbitral proceedings. The Act also

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provides protection for all parties to ensure that the arbitral proceedings offer the parties a reasonable opportunity to be heard and present their claims and arguments.

On December 21, 1959, Thailand accessed to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards or the New York Convention 1958. On March 20, 1960, Thailand ratified the convention without making any reservation. Since then, enforcement of foreign arbitral awards has become part of the Thai arbitration regime. Many foreign arbitral awards have been constantly enforced by the Thai courts without any undue difficulty. The current Arbitration Act 2002 also explicitly provides for enforcement of arbitral awards, regardless of the place where the awards were made. The grounds for refusal of enforcement of foreign arbitral awards are the same as those of domestic awards. The act adopts the grounds for refusal of enforcement from the New York Convention 1958 almost verbatim. The criteria, in general, have been strictly applied and construed.

The first organization to start the wave of attention toward arbitration under the Arbitration Act of 1987 is the Thai Arbitration Institute (TAI). The Institute is first established under the umbrella of the Ministry of Justice which, at that time, was responsible for the administration of the courts of justice in Thailand. The reason that this Institute was established within the framework of the Ministry of Justice was to lend the credibility of the courts that have long been recognized by the general Thai public to (1) The recognition or enforcement of the award is contrary to public policy; (2) The order or judgment is contrary to the provisions of law concerning public policy; (3) The order or judgment is not in accordance with the arbitral award; (4) The judge who sat in the case gave a dissenting opinion; or (5) The order is an order concerning provisional order measures for
protection under Section 16. The appeal against the court’s order or judgment under this Act shall be filed with the Supreme Court or the Supreme Administrative Court, as the case may be.” 21 the newly established organization the work of which was virtually unknown to the business community and the legal profession at that time. When there was a separation between the Court of Justice and the Ministry of Justice in 2000, the Institute was assigned to be under supervision of the Court of Justice ever since.

Since its inception, the Institute has promoted arbitration to the business community and legal profession through publications, seminars and training programs. This campaign aimed at resolving the root cause of unpopularity of arbitration in the past, i.e., the lack of knowledge and understanding of arbitration laws and arbitral proceedings to the extent that the parties and their lawyers can comfortably participate in the proceedings. Over the years, these courses and programs have significantly increased the number of arbitration practitioners as well as the number of contracts stipulating arbitration clauses.

b. Malaysia Practice.9

Arbitration is a form of alternative dispute resolution to resolve legal disputes outside the traditional court system. It aims to provide fair and unbiased resolution to disputes. Nowadays, arbitration clauses are found in many different agreements or contracts.

In Malaysia, arbitration is governed by the Arbitration Act 2005 (Amended 2011), which is based substantially on the United

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There is a marked increase in the number of arbitration cases in Asian countries over the past 10 years. Total arbitration cases from 2003-2012 are 39,280 (as extracted from published data from major arbitral institutions). Kuala Lumpur Regional Centre for Arbitration (KLRCA) has seen a rise in the number of arbitration cases referred to it since 2010. Prior to 2010, the number of cases registered with KLRCA were between 10 and 20 cases per year. Currently, the numbers have increased to 100 cases with the value of disputed amounts adding up to about RM4bil.

Malaysia is a signatory to the 1958 New York Convention which presently has 148 signatories. Arbitral awards made in Malaysia can be enforced in these countries and vice versa. Arbitrations are private and confidential, whereas court cases are open to the public and sometimes aired in the media. Most commercial entities prefer to keep their business arrangements away from the glare of publicity. Disputing parties are also able to select their arbitrator from a pool of experts who specialize in particular fields. They ensure a fair resolution of dispute based on deep knowledge of the disputed subject. KLRCA is set up under the auspices of the Asian African Legal Consultative Organization (AALCO) which is an inter-governmental Organization established in 1956. AALCO adopted the “Integrated Scheme for Settlement of Disputes in 1978. As a result of the scheme, five Regional Centre for Arbitration were established, the first one being KLRCA for the Asia Pacific region. Each of the Centre runs independently and receives special privileges and immunity to conduct its functions.

KLRCA has experienced a revitalization driven by the government of Malaysia’s continued vision for arbitration in Malaysia. With the appointment of Datuk Sundra Rajoo as Director of KLRCA, the organization has seen rapid development. KLRCA’s
growth has been supported by legislative reform and continuous upgrading of its Arbitration Rules. The Arbitration Act 2005 (Amended 2011) is Model Law compliant. The KLRCA aims to arbitrate 250 cases per year by 2016, from 100 cases last year. KLRCA is also improving its infrastructure and services. As part of this, it will move into new state of the art premises at Bangunan Sulaiman next year. We have assurances of the Ministry of Works that the project will be completed in February 2014.

The Director of KLRCA has the statutory authority and independence to appoint arbitrators. KLRCA has a panel of over 700 experienced domestic and international arbitrators from diverse fields of expertise. Foreign lawyers are allowed to appear in arbitral proceedings. There is no withholding tax imposed on the fees of foreign arbitrators. KLRCA’s fee structure is about 20% less than other established international arbitration Centre. KLRCA has developed new rules to cater to the growing demands of the global business community such as the KLRCA i-Arbitration Rules, the KLRCA Fast Track Rules as well as the Mediation and Conciliation Rules. There has been a tremendous interest in the i-Arbitration Rules and this is evident with KLRCA winning the prestigious Global Arbitration Review Award for ‘innovation by an individual or organization in 2012’. The i-Arbitration Rules is the first of its kind to adopt the UNCITRAL Arbitration Rules with provisions catering for Shariah-compliant commercial transactions. In disputes involving such transactions, Shariah related issues arising in an arbitration are to be referred to a Shariah Advisory Council or Shariah Expert. Malaysia has strong legal and regulatory background in Islamic finance and banking so it was only natural that KLRCA has leveraged on it.

Malaysia’s Amended Arbitration Act enters into force. On 8 May 2018, the Arbitration Amendment (No. 2) Act 2018 (the Amendment Act) comes into force, bringing Malaysian arbitration
framework in line with the latest revision of the UNCITRAL Model Law and arbitration laws of leading jurisdictions. Datuk Professor Sundra Rajoo, Director of the Asian International Arbitration Centre (AIAC) discusses the changes and what they may mean for the country.10

The background to the Amendment Act, The Malaysian Government has always been committed to establishing Malaysia as a global hub for arbitration, mediation, adjudication and other methods of alternative dispute resolution. The adoption of the Amendment Act is the second step towards reinforcement of Malaysia as the leading countries in dispute resolution in the region following the rebranding of the Kuala Lumpur Regional Centre for AIAC and signing of the supplementary agreement with the Asian-African Legal Consultative Organization earlier this year. The changes are introduced by the Amendment Act. According to the Amendment Act, the Arbitration Act 2005 (the Act) was amended to extend and expand the definition of arbitral tribunal by including “emergency arbitrator” in the definition. This guarantees that decisions by emergency arbitrators are recognized. Another expansion of a definition in the Act is that of ‘arbitration agreement.’ Following the UNCITRAL Model Law 2006, the Act now recognizes validity of arbitration agreements concluded by form of email, fax, etc. Both amendments take into account the changes in economic and arbitration realities, with emergency arbitrations having become regular and arbitration agreements often executed electronically. The provisions of interim measures were completely overhauled and are now fully in line with the UNCITRAL Model Law 2006: arbitral tribunals now can issue those interim measures, which are also available to the Malaysian courts. In line with the

goal of making Malaysia a true UNCITRAL Model Law country, the new provisions on interim measures now also deal with the issue of recognition and enforcement of interim measures and provide for safeguards for parties against whom such measures are sought. This brings much greater clarity in the enforcement process of interim measures. The Act also aligns the provisions on interest with global standards and now provides for the same rules as the Singapore and Hong Kong, as well as the UK: arbitral tribunals are now explicitly allowed to award simple or compound interest and at a rate considered appropriate by the arbitral tribunal. This applies to (i) sums awarded by the arbitral tribunal; (ii) sums in issue in the arbitration proceedings, which are, however, paid before the date of the award; and (iii) costs. Allowing for full party autonomy, the provision on interest is opt-out.

Also, fully in line with the arbitration acts of many other countries as well as the arbitration rules of many arbitral institutions, the Act now makes it clear that unless there is another agreement by the parties, all arbitration proceedings are confidential. The publication, disclosure or communication of information related to the arbitral proceedings or the arbitral award may only be made if it is made (i) to protect or pursue a party’s legal right or interest; or (ii) the enforce or challenge the arbitral award. The disclosure must be made in legal proceedings before a court or judicial body in Malaysia or elsewhere.

Furthermore, such publication, disclosure or communication of information may be made if it is made to any government body, regulatory body, court or tribunal and the party is obliged by law to make the publication, etc. or if it is made to a professional or any other advisor of a party. Finally, all court proceedings under the Act are in principle to be heard in closed court. This ensures that even when there are court proceedings related to the arbitration proceedings, which you usually be heard in open court, the
confidentiality of the parties and the dispute is preserved. This provision served the purpose of addressing one of the criticisms that arbitration is often faced with, the fact that when there are arbitration-related court proceedings, the often-cited advantage confidentiality does not hold true any longer. It is one of the prime examples of why Malaysia is a truly safe seat. Before the changes to the Act, the Malaysian courts, upon referral by a party, were allowed a substantive review or arbitral awards insofar as it came to ‘questions of law’. When the court was satisfied that the question of law substantially affected the right of one or more of the parties and that the arbitral tribunal had erred, the court was equipped with vast powers, including the varying of the award, the remission of the award or parts thereof to the arbitral tribunal for reconsideration, or the setting aside of the award. Although there were safeguards in place which made sure that no frivolous referrals to the court were possible – the court could order the applicant to provide security for costs or order that any money payable under the award would have to be secured – this provision was obviously seen as a potential risk, especially by foreign parties.

In order to make Malaysia a safe seat and to put the Act in line with other arbitration acts worldwide, the referral to a court is not possible any longer as the entire provision, and a related additional provision, was removed. Now, the only recourse against an arbitral award is a setting-aside action.

Asia has been the world’s motor of economic growth for the last decade. The growth rates achieved in the region are unprecedented – and although China’s economic growth has recently slowed down (while still achieving growth rates the so-called ‘Western World’ dreams of), many other countries in the region have been going and are predicted to continue going from strength to strength.

Malaysia is located at the heart of the Asia-Pacific Region. Australia in the South and Japan and Korea in the North can all be
reached within a day’s trip – and without any jet lag due to the same time zones. Neighbouring Singapore, Malaysia offers all the amenities its Singapore offers with respect to facilities, at a fraction of the costs there.

Being one of only two countries having access to the Strait of Malacca, one of the most important shipping lanes in the world, Malaysia is also one of the key countries geographically when it comes to the Belt and Road Initiative, which will see hundreds of billions of dollars of infrastructure investment in East Asia and Africa and a surge in trade across continents. All of the above, including the revision of the Act, now make Malaysia a serious contender for the number one spot of the best arbitral seat in Asia.

AIAC formerly known as the Kuala Lumpur Regional Arbitration Centre (KLRCA) was established in 1978 under the auspices of the Asian-African Legal Consultative Organization and was revitalized in 2010 under Datuk Professor Sundra Rajoo directorship. AIAC is a neutral, international non-governmental organization involved in administration of arbitration, mediation and adjudication and other alternative dispute resolution proceedings and promotion of the ADR in the region and globally. Since 2010, AIAC administered more than 1600 cases spanning across construction, oil & gas, aviation, maritime, energy and other industries. AIAC is considered to be the most time and cost-efficient institution in the region, offering the parties with award-winning hearing facilities that have been dubbed to have the potential to be the best outside the Peace Palace. On 9 March 2018, AIAC released its revamped sets of rules. The changes were introduced to the AIAC Arbitration Rules, its GAR award winning i-Arbitration Rules, Fast Track Arbitration Rules and Mediation Rules. AIAC also announced recently full digitalization of the case management process.
**c. Singapore Practice.**¹¹

Arbitration is a dispute resolution method whereby parties agree in writing to refer existing or future disputes between them to be heard by a third party. The third party is appointed by the consent of both parties. Unlike litigation, arbitration is conducted outside the publicity and formality of the courts of law and increasingly, arbitration is becoming popular as an alternative to litigation in resolving commercial disputes.

As a regional and financial hub, that serves as a gateway between East and West and which houses the regional headquarters of many multinational corporations, Singapore is also a significant regional arbitration Centre. The growth of its reputation and influence has been immeasurably aided by the establishment of the Singapore International Arbitration Centre (‘SIAC’) in July 1991 and the enactment of the International Arbitration Act (Cap 143A) (‘IAA’) in 1994 incorporating the UNCITRAL Model Law on Commercial Arbitration.

Types of Arbitration. International and domestic arbitrations. The first distinction to be made is between international and domestic arbitrations. Generally, an arbitration is 'international' if the parties to the arbitration are of different nationalities or the subject matter of the dispute involves a state other than the state in which the parties are nationals. An international arbitration usually has no connection with the state in which the arbitration is being held, other than the fact that it is taking place on its territory. The parties to an international dispute are usually corporations or state entities, rather than private individuals, while domestic arbitrations involve small claims by individuals. Many states, recognizing that different considerations apply to international commercial arbitrations, have provided for a separate

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legal regime to govern arbitrations that are international in nature, such that there is less judicial intervention in the arbitration by the courts of the state in which the arbitration takes place.

Another difference between international and domestic arbitrations is that international arbitration awards have very wide enforceability in many countries. This is largely attributable to the acceptance of international treaties such as the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which allows for the enforcement of arbitration awards in many major countries, provided that the arbitration is international.

Institutional and ad hoc arbitrations. Arbitrations can also be classified as ad hoc or institutional. An ad hoc arbitration is one in which parties, when agreeing to submit their dispute for arbitration, do not stipulate for procedural rules of any particular arbitration body to govern the conduct of their arbitration. Procedures in ad hoc arbitrations will either be drawn up specifically by the parties or left to be decided by the arbitrator when appointed. As ad hoc arbitrations do not involve recourse to a specified arbitration body, there are potential savings in fees for the services of the external arbitration body. This makes ad hoc arbitrations cheaper than institutional arbitrations. However, the drawback of an ad hoc arbitration is that, in the event that the parties cannot agree on the procedure governing the arbitration, in particular, over the appointment of a choice of an arbitrator, a deadlock will result as no third party is able to provide guidance as to the next step. In this sense, an ad hoc arbitration is susceptible to sabotage and delay tactics by an un-cooperative party. Such deadlocks will not occur in institutional arbitrations as the rules of the appointed arbitration body will apply, directing the manner in which the arbitration is to proceed, notwithstanding a refusal or
delay on the part of one party to perform its obligations to bring about the arbitration process.

Arbitration Regimes Used Internationally. Institutional arbitration rules. Prominent bodies which administer arbitrations include the International Chamber of Commerce's (ICC's) International Court of Arbitration in Paris, the London Court of International Arbitration ('LCIA') and the American Arbitration Association ('AAA'). Each of these institutions has formulated its own arbitration rules, namely, the ICC Rules of Arbitration, the LCIA Rules and the AAA International Arbitration Rules. Except for the AAA, which provides that its International Arbitration Rules apply only in the absence of any designated rules, the other two institutional rules will be applied to the arbitrations administered by the arbitration bodies.

All the institutional rules govern the commencement of the arbitration, exchange of arbitration pleadings, appointment and removal of arbitrators, hearing and interim measures of protection, among other rules. If parties have not agreed on the number of arbitrators, one arbitrator will be appointed, although the arbitration institution may appoint three arbitrators if it appears that the dispute warrants it.

In terms of the choice of arbitrator, the LCIA Rules provide that it, alone, is empowered to appoint arbitrators, although arbitrators will be appointed with due regard to any criteria for selection agreed by parties in writing. The ICC Rules of Arbitration allow parties to nominate, by agreement, an arbitrator for the Court's confirmation; while the AAA International Arbitration Rules only require that parties notify it of any designation of an arbitrator.

Where the forum of the arbitration has not been agreed, the institution generally determines it according to the parties' contentions and the circumstances of the arbitration. However, the LCIA Rules provide that in such situations, the seat of the
arbitration will be London, unless on the basis of the parties’ written comments, the LCIA Court deems another seat more appropriate in view of the circumstances.

Under the ICC Rules of Arbitration, a document known as the Terms of Reference - containing a summary of the parties’ claims, list of issues to be determined and applicable procedural rules - must be drawn up. Although time consuming, discussion of agreed issues has resulted in settlement. Also, arbitration awards must be submitted to the ICC Court for approval. There are no similar requirements under the LCIA Rules and the AAA International Arbitration Rules.

Ad hoc arbitration rules. As mentioned earlier, when discussing the distinction between ad hoc and institutional arbitrations, rules such as the United Nations Commission on International Trade Law (‘UNCITRAL’) Arbitration Rules serve to bridge the gap for parties who are unwilling to fork out additional expense to use the services of an arbitration body, but who do not wish to spend time agreeing to the details of a procedure to govern their arbitration. Apart from the fact that UNCITRAL Rules do not require institutional support to administer the arbitration, the UNCITRAL Rules are largely similar to the institution rules in content.

The Singapore International Arbitration Centre. The SIAC was set up to promote arbitration as a viable alternative to litigation for the settlement of commercial disputes. As the only arbitral institution in Singapore, it provides a comprehensive range of services and facilities for international and domestic arbitration. These include the provision of support and administrative services such as providing a venue for arbitration hearings and acting as the registry/depository of arbitral pleadings and documents.

The SIAC is also the statutory appointing authority for arbitrators under the IAA, and maintains a panel of accredited arbitrators of local and international experts from which
appointments can be made. The panel includes prolific members of the Singapore bar and former judges of the Supreme Court. Many of the arbitrators on the panel are members of the Singapore Institute of Arbitrators or the Chartered Institute of Arbitrators, London, and are professionals in their specialized fields.

The SIAC administers the cases before it under its own Rules of Arbitration ('SIAC Rules') but is also able to administer arbitrations under any other rules agreed to by the parties such as the UNCITRAL Arbitration Rules 1976. The Governing Law. The Arbitration Act (Cap 10) ('AA') and the IAA are the two relevant statutes which govern the conduct of arbitration in Singapore. Broadly speaking, the AA applies to domestic arbitrations, and the IAA applies to international arbitrations. This distinction is an important one, as which Act applies will determine the rules by which the arbitration will be conducted (unless the arbitration agreement itself stipulates a set of rules different from that imposed under either Act, in which case, it is the contractually agreed rules that apply). This is because each Act applies a different arbitration regime that will govern the arbitration proceedings. It is sufficient to note that the regime adopted by the IAA is the UNCITRAL Model Law on Commercial Arbitration (the 'Model Law'), while the AA is modelled after the English Arbitration Act and its regime is generally not as extensive or as comprehensive as that of the IAA. These two regimes have some significant differences which, depending on the issues that arise during any specific arbitration, can be critical to its conduct and result.

The IAA governs international arbitrations, and under the IAA, whether any particular arbitration is to be regarded as international will depend on whether it meets any one of the following criteria: (1) at least one of the parties to the arbitration agreement has its place of business in a country other than
Singapore; (2) the place of arbitration, as determined pursuant to the arbitration agreement, is in a country which is neither party's place of business; (3) the country, in which a substantial part of the obligations of the commercial relationship is to be performed, is a country which is neither party's place of business; (4) the country in which the subject matter of the dispute is most closely connected is a country which is neither party's place of business; or (5) the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country.

Unlike the IAA, the AA does not provide any guidelines or rules as to whether it applies to a particular arbitration. It applies to all arbitrations that come under Singapore law, unless that arbitration is one that comes under the ambit of the IAA. In other words, it is, in a sense, the default law applicable to an arbitration that comes under Singapore law. An arbitration in Singapore where the parties both have their place of business in Singapore and the obligations under the commercial relationship are to be performed in Singapore is the quintessential example of an arbitration coming within the ambit of the AA, and which will thus be subject to its arbitration regime.

The IAA does allow parties to 'opt out' of the arbitration regime which it provides, by stating that if parties to an arbitration agreement have agreed that any dispute that has arisen or may arise between them is to be settled or resolved otherwise than in accordance with Part II of the IAA or the Model Law, Part II and the Model Law will not apply in relation to the settlement or resolution of the dispute. Conversely, the IAA allows parties in a domestic arbitration to 'opt in' to the IAA regime by stipulating that the IAA shall apply.

Parties cannot 'opt out' of the AA as such. The arbitration rules stipulated by the AA are regarded as being implied into an arbitration agreement and where parties expressly provide for their
own rules to govern the proceedings of an arbitration, these will apply in place of the implied rules stipulated by the AA.

Enforcement of Local Awards in Singapore. Awards made in Singapore, either in respect of a domestic or international arbitration are binding and enforceable. In order to enforce an arbitration award made in Singapore by way of execution proceedings, the following steps must be taken: (1) An ex-parte application must be made to the High Court for leave to enforce the award; (2) The order must be served on the opposing party (the 'debtor') who has 14 days to make an application to set aside the order of court; (3) If an application to set aside the order is made by the debtor, the award shall not be enforced until the application is heard and finally disposed of.

Enforcement of Foreign Arbitral Awards in Singapore. Awards from New York Convention countries. Singapore acceded to the New York Convention of 1958 (the 'Convention') on 21 August 1986 and subsequently re-enacted most of its provisions in Part III of the IAA. By acceding to this Convention, Singapore is bound to recognize awards made in any other country which is a signatory to the Convention. Such foreign awards may be enforced by way of a separate action or in the same manner as an award of an arbitrator made in Singapore. Under section 29 (2) of the IAA, parties may also rely on such an award as a defense, set off or otherwise in any legal proceedings in Singapore.

In order to enforce a foreign award made in any of the Convention countries, the following steps must be taken: (1) An application must be made to the High Court for leave. Section 6 of the Limitation Act (Cap 163) states that this application must be made within six years after the award was made. (2) An affidavit must be filed to exhibit the arbitration agreement and the duly authenticated original award or a copy thereof. If the award is not in English, a certified translation of it in English must be provided.
as well. Additionally, the affidavit must state the name and usual or last known place of abode or business of the applicant and the person against whom enforcement is sought.

The court hearing the application for enforcement of the foreign award cannot review the case on its merits and can only refuse to grant leave to enforce the award on the grounds stated in section 31(2) and 31(4) of the IAA.

The court hearing the application will grant leave on an ex parte basis only in urgent cases, in which event the order must be served on the debtor forthwith. For parties seeking to arbitrate in Singapore, it may be of comfort to know that if the counterparty is from a Convention country, any award obtained in Singapore against the counterparty should conversely be enforceable in its country. Commonwealth awards. Singapore is a member of the Commonwealth of Nations and, under the Reciprocal Enforcement of Commonwealth Judgments Act (the 'RECJA'), recognizes judgments made in the United Kingdom, as well as jurisdictions that are part of the Commonwealth and which Singapore has reciprocal arrangements with for the recognition and enforcement of judgments. The Act lists the countries with which such arrangements exist, and of the 54 countries that are members of the Commonwealth, nine have been listed.

An arbitration award from each of these countries is, generally speaking, enforceable in Singapore under the RECJA, as the Act defines a 'judgment' for its purposes as including an award in proceedings on an arbitration. However, the RECJA does stipulate that this is provided the award has become enforceable in that country in the same manner as a judgment given in its courts. It bears noting that a party wishing to enforce an award under the RECJA has a more onerous procedure to adhere to as compared to the Convention. For instance, the registration of the judgment to aid enforcement must be done within 12 months as compared to
the six-year limitation under the Convention. Furthermore, the court hearing the application to register the award will allow registration of the award only where it is just and convenient to do so. This involves an exercise of discretion on the part of the court.

From a practical point of view, as a result of the extensive ratification of the Convention, the procedure relating to enforcement of judgments under the RECJA has become less important. The RECJA, however, would still be relevant for non-Convention countries such as Pakistan and Brunei Darussalam. In disputes where no international element is involved, the debate whether to arbitrate or litigate may be finely balanced, depending on the circumstances of each case and the reputation and procedures of the local courts. Parties who are looking for a binding decision on a dispute will usually have an effective choice between a national court and domestic arbitration. It is advisable that in international disputes involving large commercial bodies, arbitration may be preferable. The advantages of arbitration such as flexibility, privacy of proceedings, ability to choose an arbitration tribunal to hear all disputes arising from a particular transaction and wide enforceability of award are likely to suit large multinational entities; while drawbacks such as higher cost and longer period of resolution are less likely to be vital considerations.

In choosing to arbitrate, parties will have a choice whether to pursue an institutional arbitration or an ad hoc one. If an ad hoc arbitration is chosen, there is again a choice of whether to specifically draft the procedural rules governing the arbitration from scratch or to adopt an existing set of rules like the UNCITRAL Rules.

Whatever the decision may be, it should be borne in mind, when considering whether to arbitrate, that a dispute can only be arbitrated if both parties agree in writing, in advance or after the dispute has arisen, that the dispute is to be resolved by arbitration.
and not in court. Arbitration, as a method of dispute resolution, is increasingly gaining favor, and for parties seeking a jurisdiction in which to conduct arbitration in Asia, Singapore affords many advantages, not least of which is the comprehensive legal framework with regards to arbitration, based on internationally accepted practice.

d. Brunei Darussalam Practice.¹²

The Brunei Darussalam Arbitration Centre (“BDAC”) was established in December 2014 and has been operating since 9 May 2016. Arbitration as an alternative dispute resolution provides advantages in the form of privacy, lower costs and promptness of proceedings as compared to the court system. The arbitration process is particularly important to Brunei Darussalam because under the Constitution of Brunei Darussalam, the government may not be accountable to the Brunei courts and the only means to resolve disputes with a government party is by way of arbitration. As most of the industries in Brunei Darussalam are controlled by the government, this means that most of the high value commercial disputes taking place in Brunei have to be resolved through arbitration. Under the Arbitration Order 2009 and the International Arbitration Order 2009, the default statutory appointing authority is the Arbitration Association Brunei Darussalam (“AABD”). The AABD sits at the pinnacle of the arbitration system in Brunei Darussalam and is tasked with making all default appointments of arbitrators and deciding on all challenges made by parties against arbitrators.

When Brunei Darussalam implemented the International Arbitration Order in 2009, it became the first country in the Asia-Pacific to adopt the recommendations of the changes made to the

¹²S. Rozaimarleny Abdul Rahman or the ZICO Law partner
UNCITRAL Model Law 2006. The Arbitration Centre. The BDAC is a company that is wholly owned by the Government of Brunei Darussalam and all members of the board of directors are appointed by the Permanent Secretary of the Prime Minister’s Office.

The BDAC aims to host Alternative Dispute Resolution (“ADR”) services, which include both arbitration and mediation. The main aim of ADR is to allow commercial parties to bypass the tedious litigious process often associated with the court system. The BDAC is also capable of hosting both domestic and international disputes.

The parties have alternative avenues to resolve disputes through a mediation or arbitration process. Mediation is similar to negotiations. The difference is that a mediator is present to moderate the parties’ negotiations. Mediators take a neutral and objective third party role with the aim of guiding disputing parties to reach an amicable settlement. The end-goal behind a mediation process nevertheless rests in the hands of the parties. Although mediation itself is a non-binding process, once a decision is reached, the parties may choose to draft out a settlement agreement to bind one another to the decision. On the other hand, decisions made through arbitration are final and binding. An arbitrator or panel of 3 arbitrators will be present to adjudge over the proceedings between the parties.

The main differences between arbitration and the court system are as follows: (1) Control of proceedings. Parties have more control and flexibility over the procedures of an arbitration. This includes decisions regarding the venue, appeal system, jurisdiction, language used, seat of arbitration, number of arbitrators as well as the arbitrators themselves. These matters may be decided by the parties at the point of drafting their commercial agreement, or, in some cases, at the point where a dispute arises. On the other
hand, court proceedings tend to be more rigid. Parties would have no choice but to go with the assignments given; (2) Privacy and Confidentiality. Unlike court proceedings where matters may be discussed in open court, arbitration proceedings afford more privacy to the disputing parties. As parties have control over the arbitration procedure, they may opt for a venue which they feel would best serve their privacy; (3) Costs. Arbitrations may be costly if not proceeded with wisely. The costs are not fixed and parties would have to personally pay for items such as venue of the arbitration and fees of the arbitrator. Costs may further increase should the parties choose to be presided over by 3 arbitrators instead of 1, or if they prefer for the arbitrator to be an expert in the subject matter of their dispute. Further, note that there is only one level of arbitration proceedings as opposed to potentially 3 stages for a court litigation (which may include appeals to the Privy Council in London). Therefore, the costs of arbitration often work out to be lower than that of a court proceeding; (4) In court proceedings, parties would not have to pay for the case to be heard in court nor will they have to pay the individual judges to hear their cases. Rather, these matters are provided for by the State. Parties only have to pay for the legal fees of their respective counsels; (5) Powers. In many aspects, arbitrators have similar powers in granting remedies as High Court judges. They are however not authorized to deal with any matters that are non-arbitrable such as family law issues; criminal law issues and land law issues; (6) On the other hand, judges can grant remedies which are legal or equitable, which is part and parcel of their discretionary powers. Equitable remedies that judges can grant include, among others, interlocutory injunction, specific performance and rescission.

It should be highlighted that mediation is available to all parties at any stage of dispute, regardless of whether the issue is
still under negotiations or whether the matter has proceeded to litigation. On the other hand, arbitration requires the consent of all parties and the standard practice to enable this is to include an arbitration clause inside an agreement.

e. Philippines Practice.\textsuperscript{13}

Arbitration, as an alternative mode of dispute resolution, has long been recognized and accepted in the Philippines. In 1921, the Philippine Supreme Court, applying common law, noted that: the settlement of controversies by arbitration is an ancient practice at common law. In its broad sense, it is a substitution, by consent of the parties, of another tribunal for the tribunals provided by the ordinary processes of law. Its object is the final disposition, in a speedy and inexpensive way, of the matters involved, so that they may not become the subject of future litigation between the parties.

Early jurisprudence in the Philippines, however, was not supportive of arbitration. Despite the recognition accorded to arbitration by tradition and by provisions of the Civil Code, the use of arbitration as a mode of dispute resolution was discouraged by the tendency of some courts to nullify arbitration clauses on the ground that the clauses ousted the judiciary of its jurisdiction. Propitiously, in the early 1920’s, the Philippine Supreme Court began to lay the basis for the recognition and acceptance of arbitration as a mode of settling disputes in the following ruling. In the Philippines fortunately, the attitude of the courts toward arbitration agreements is slowly crystallizing into definite and workable form. The rule now is that unless the agreement is such as to absolutely close the doors of the courts against the parties, which agreement would be void, the courts will look with favor upon such amicable agreements and will only with great reluctance

\textsuperscript{13} Victor P. Lazatin And Patricia Ann T. Prodigalidad Arbitration In The Philippines. \url{https://www.aseanlawassociation.org/9gadocs/W4_Philippines.Pdf}. 
interfere to anticipate or nullify the action of the arbitrator. With this blessing bestowed by the courts, arbitration became a viable alternative to costly and prolonged litigation. In turn, the growing frequency of arbitration led to pressures for a regulatory law. In 1953, the Philippine Congress enacted Republic Act No. 876, otherwise known as the Arbitration Law, thereby adopting "the modern view that arbitration as an inexpensive, speedy and amicable method of settling disputes and as a means of avoiding litigation should receive every encouragement from the courts."

In 10 June 1958, the Philippines became a signatory to the United Nations Convention on the Recognition and the Enforcement of Foreign Arbitral Awards of 1958 (the "New York Convention"). On 6 July 1967, the said Convention was ratified. Fifty years after the enactment of the Philippine Arbitration Law, the Philippine Congress enacted, Republic Act No. 9285, otherwise known as the Alternative Dispute Resolution Act of 2004. The enactment of Republic Act No. 9285 was the Philippines' solution to making arbitration an efficient and effective method in dispute resolution specially for international arbitration.

Prior to the enactment of Republic Act No. 9285, there were no laws prescribing the mechanics for the conduct of international arbitration. Instead, when dealing with disputes regarding international contracts, Philippine entities, including the Government, are often required to agree to dispute settlement by arbitration in the foreign country under the rules of foreign arbitral institutions. Worse, notwithstanding the Philippines’ adherence to the New York Convention, no legislation has been passed providing a specific procedure for the enforcement of foreign arbitral awards. Thus, there have been instances in which international arbitral awards have been treated by Philippine courts as akin to foreign judgments for lack of specific invocation of the New York Convention. As a consequence, foreign arbitral awards have
sometimes been deemed only presumptively valid, rather than conclusively valid, as required by the New York Convention.

Under Republic Act No. 9285, the Philippines unequivocally declared that it is its policy “to actively promote party autonomy in the resolution of disputes or the freedom of the parties to make their own arrangements to resolve their disputes” and “encourage and actively promote the use of Alternative Dispute Resolution (ADR) as an important means to achieve speedy and impartial justice and declog court dockets.”

United Nations Commission in International Trade Law (“UNCITRAL”) Model Law Bill, Explanatory Note.6 New York Convention, Art. III (“Each contracting state shall recognize arbitral awards as binding...”). Republic Act No. 9285, Sec.2. To keep pace with the developments in international trade, Republic Act No. 9285 also ensured that international commercial arbitration would be governed by the United Nations Commission in International Trade (“UNCITRAL”) Model Law on International Arbitration adopted by the United Nations Commission on International Trade Law on June 21, 1985. Republic Act No. 9285 also fortified the use and purpose of the New York Convention by specifically mandating that it shall govern the recognition and enforcement of arbitral awards covered by the said convention, while foreign arbitral awards not covered by the New York Convention shall be recognized and enforced in accordance with the procedural rules to be promulgated by the Supreme Court. Moreover, Republic Act No. 9285 updated the rather antiquated Philippine Arbitration Law or Republic Act No. 876. Presently, the Congressional Oversight Committee is reviewing the draft of the Implementing Rules and Regulations of Republic Act No. 9285. At the same time, the Supreme Court of the Philippines is formulating the Special Rules of Court on Alternative Dispute Resolution, which will govern the procedure to be followed when recourse is made to the courts on
any matter, which is subject of arbitration or other forms of alternative dispute resolution.

The Practice of Arbitration in the Philippines Today. At present, arbitration practice in the Philippines is either ad hoc, institutionalized or specialized. For ad hoc arbitration, Philippine law grants the parties the right to select an arbitrator or arbitrators and to choose procedures to govern the proceedings, including rules of arbitration institutions. So long as the main requirement for arbitration, namely consent, is present, the State allows the parties to conduct the arbitration in any manner they stipulate, provided that the arbitration process is not "contrary to law, morals, good customs, public order or public policy."

Institutionalized arbitration is conducted through organized bodies such as courts of arbitration, trade associations, and arbitration centers and institutes, each prescribing its own different arbitration procedure. Foremost among these institutions in the Philippines is the Philippine Dispute Resolution Center Inc. ("PDRCI"). These institutions do not actually participate in settling the dispute but help administer the arbitration and provide a set of rules to govern the proceedings. For international arbitration, the popular institutional rules referred to are those of the International Chamber of Commerce ("ICC"), the Hongkong International Arbitration Centre ("HKIAC") and the Singapore International Arbitration Centre ("SIAC").

Nevertheless, the rules of most arbitral institutions, including those of the PDRCI, do not purport to cover in detail many essential elements of procedure. Instead, these institutionalized rules cover such matters as the commencement of arbitral proceedings, the presentation of the answer and counterclaim, the appointment of arbitrators, the right to be represented by counsel, and the assignment of costs and fees. Accordingly, in the absence of agreement by the parties, specific procedural matters are left to the
discretion of the arbitral institution or the arbitrator(s). Furthermore, the institutional rules tend to apply across the board to all arbitrations and make no distinction between those involving relatively simple issues and those that present complex questions of law or require extensive fact-finding. Of course, good arbitrators and good lawyers can—and frequently do—fill in the interstices of general rules as they go along. Thus, even in institutional arbitration, the procedural rules actually followed may vary from case to case.

**f. Laos Practice.**¹⁴

Laos is in the midst of relatively rapid economic growth and development. The economic growth generates various problems in the term of economic sector and in another areas therefore it is needed to look for significant methods to resolve the disputes effectively. These are the key issues that country has been facing; in particular, the disputes between parties in their business operation is considered to be a serious issue for their business. Laos, in common with most other countries, does have an alternative dispute resolution includes dispute resolution processes and proceeding that act as a means for disagreeing parties to combat each other to reach an agreement without disagreement on the basic of justice for both party. Alternative dispute resolution is the best ways that parties can settle their disputes. There are significant common elements which justify a main resolution and each country or region’s difference; however Alternative Dispute Resolution of Laos. First, methods for resolving disputes outside of the official judicial mechanisms. Second, informal methods attached to official judicial mechanisms. Salient features of the Alternative dispute resolution settle disputes without resorting to the court which is

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generally classified into three main types: Negotiations; Mediation; Arbitration.

Solving disagreements through negotiation is first step for Lao people who disagree to discuss the problem and reach a mutually satisfactory agreement. Negotiation is the cheapest mean for solving a dispute and usually offers the opportunity to work out a solution meeting the needs and interests of both parties. The most negotiations focus on accusing and blaming each other rather than generating options and creating satisfaction. Such negotiation often leads to a deadlock where parties are unable to reach an agreement. When negotiation is not sufficient to resolve a dispute, the parties concerned will be offered the option to ask for a mediator.

Mediation is a procedure performed by an independent third party where the objective is to facilitate the parties resolving their dispute. The mediator’s role is not to make the final decision; but to assist the parties who alone are responsible for the resolution of the dispute. It is a form of alternative dispute resolution which helps the parties attain a decision more swiftly and it has a high settlement. Members involved in a dispute may ask a mediator, an unbiased and impartial person, to assist them in their negotiations. The goal of mediation is for the parties to reach an agreement to settle. Parties have an equal say in the process and decide settlement terms, not the mediator. There is no determination of guilt or innocence in the process. Where negotiation has not been successful, the mediator can often help to ease tension, encourage discussion between the parties and recommend solutions. Mediation is a voluntary dispute resolution process; all parties must consent to participate in good faith and work toward a mutually agreeable resolution. Mediating parties are not bound to resolve their dispute (although mediated settlements, once reached, can be made binding if the parties decide to draft a contract called a Settlement Agreement). Mediation does not "decide" in favor of one
party or another; however, the mediator may counsel parties on the strengths and weaknesses of their case and gauge each party's likelihood of success if the dispute proceeds to arbitration or litigation.

Actually Alternative Dispute Resolution in Laos includes informal tribunals, informal meditative processes, formal tribunals and formal meditative processes. The classic formal tribunal forms of Alternative Dispute Resolution are arbitration and private judges. The classic formal meditative process is referral for mediation before a court appointed mediator or mediation panel. Classic informal methods include social processes, referrals to nonformal authorities (such as a respected member of a trade or social group) and intercession.

When members cannot resolve the dispute themselves, either through negotiation or with the assistance of a mediator, they can agree to refer the matter to arbitration. In arbitration, a neutral person or panel of neutral people hears the facts and makes decision. Usually one arbitrator hears a small case. A panel of three arbitrators may be appointed to hear a large, complex case, if the parties so desire. The ability to select the arbitrator is a critical advantage in arbitration over litigation. It enables the parties to select individuals who are uniquely qualified, based on their education and experience in the subject area. The usual result is a decision with which the parties are more Satisfied Arbitration, unlike litigation, is consensual; both parties must agree to resolve the dispute through arbitration, as opposed to depending on the court. Technical disputes can be efficiently resolved through arbitration as a tribunal with the required technical expertise can be chosen. Arbitration is a private sector substitute to litigation, whereby a neutral third party resolves a dispute with a binding decision. However, Arbitration is usually no more and no less than litigation in the private sector.
Laos Legislation. The Constitution 2003 said "All organizations and citizens must conduct their activities based on laws and regulations. The Lao Government has made substantial progress towards developing policies, strategies and legal frameworks to protect the rights and freedom of people. The principal legal instrument covering several matters including resolving various disputes in the economic sector and society. The law on dispute resolution specifies necessary principles, rules and measures for protecting as well as promoting justice for Lao people and foreigners in order to ensure the sustainable socioeconomic development of the nation. Some key legislation and Prime Ministerial decrees that cover the dispute resolution include: The Penal Law 2005; The Civil Law 2005 and The Decree on the economic dispute resolution. Lao PDR has several specialist law enforcement bodies responsible for the enforcement of laws. Even though, The Supreme Court does not have a specific unit that is devoted to the prosecution of Alternative dispute resolution. The investigations into the cases according to the allocation of individual cases is determined by the penalty that the matter attracts. If the dispute carries on between parties it is dealt with at the unit of economic dispute resolution. Individual law enforcement authority will be mainly responsible for making decision on the case. Only the most serious matters are dealt by the Supreme Court.

International Arbitration. Laos is a member of the United Nations Convention on International Trade Law (UNCITRAL Model Law) abiding by their rules on ad hoc International Arbitration. There is no clear information on Lao government recognition or arbitration of international arbitral awards.\footnote{https://www.export.gov/article?id=Lao-Dispute-Settlement}
**g. Cambodia Practice.**¹⁶

The recent developments by Cambodia’s National Commercial Arbitration Centre (“NCAC”), the newly-adopted arbitration rules of the NCAC, and enforcement of foreign arbitral awards in Cambodia, providing increased confidence for protection of commercial investments. 2014 has witnessed a number of significant positive developments in commercial arbitration in Cambodia. It has seen the first Cambodian final appellate court decision enforcing a foreign arbitral award and the adoption of arbitration rules by the Cambodian National Commercial Arbitration Center (NCAC). These developments have the potential to transform Cambodia rapidly into a jurisdiction where commercial disputes can be resolved efficiently and with a maximum of transparency. They may catapult Cambodia ahead of some other ASEAN jurisdictions which, by comparison, are lagging in the area of commercial dispute resolution. Cambodia has long been considered an attractive destination for foreign investment, offering investment incentives in the form of certain tax holidays for qualifying projects, rapidly improving infrastructure and low-cost labour, among other factors. Coupling such advantages with a dedicated arbitration body, focused solely on resolving commercial disputes, and a demonstrated ability to enforce foreign arbitral awards, will provide investors with a considerable degree of comfort in knowing that their commercial endeavors in Cambodia are protected.

Development of a commercial arbitration Centre in Cambodia. The NCAC is the product of Cambodia’s Commercial Arbitration Law (2006) and the related Sub-Decree on Organization and Functioning of the National Commercial Arbitration Center (2009) (the Sub-

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Decree). Initial funding and assistance for the establishment of the NCAC were provided by the Asian Development Bank and the International Finance Corporation (IFC), a member of the World Bank Group. Cambodia also enacted a revised Code of Civil Procedure (CCP) in 2006. This includes key provisions on the execution of arbitration decisions, both foreign and local, as well as provisions permitting courts to issue interim or injunctive relief in relation to matters that are subject to arbitration proceedings. In accordance with the Commercial Arbitration Law and the Sub-Decree, the Cambodian Ministry of Commerce established a commission which, in turn, appointed the initial members of the NCAC. Those members underwent training by internationally-renowned arbitration experts associated with the Singapore International Arbitration Centre. In addition to the initial members, certain entities, such as chambers of commerce and business associations, have been appointed as representatives with voting rights in the General Assembly of the NCAC.

In accordance with art 54 of the Sub-Decree, the NCAC has become a self-governing institution and is expected to complement the country’s already successful Arbitration Council, which hears collective labour disputes. In organizing itself as an institution, the NCAC established working groups which developed (inter alia) its Arbitration Rules and its Internal Rules.

h. Vietnam Practice. ¹⁷

Arbitration in Vietnam (both domestic and international arbitration) is mainly governed by Law on Commercial Arbitration (‘LCA’) which was approved by the National Assembly in 2010 and took effect on 1st January 2011. In order to improve the effectiveness and feasibility of the LCA, the Supreme People’s Court

¹⁷file:///C:/Users/User/AppData/Local/Temp/Vietnam-IBAArbitrationGuide.pdf. See also : http://eng.viac.vn/
of Vietnam issued Resolution No.01/2014/NQ-HDTP Guiding the Implementation of Certain Provisions of the LCA (‘Resolution No.01’).

The LCA is fundamentally based on the UNCITRAL Model Law on Commercial Arbitration 2006 with some local adaption. Besides, the enforcement of arbitral awards is regulated by Law on Enforcement of Civil Judgments 2008, as amended in 2014 (‘LECJ’). The recognition and enforcement of foreign awards in Vietnam is regulated by Part Seventh (VII) of Civil Procedure Code 2015 (‘CPC’) which came into force on 1st July 2016. Vietnam International Arbitration Centre (VIAC) is an independent and non-profit organization. The objective of VIAC is to promote the dispute resolution method of arbitration or alternative dispute resolutions (ADR). VIAC has a strong desire of building up an objective, impartial and reliable method of dispute resolution which also ensures the effectiveness and convenience. VIAC has been considering as a reputable arbitration institute in Vietnam and gains much of reliance of domestic and international business communities.

i. Myanmar Practice.\textsuperscript{18}

Myanmar acceded to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards on 6 April 2013. Myanmar is also a party to the 2009 ASEAN Comprehensive Investment Agreement (ACIA). Among other things, the ACIA governs the international investment regime among member states (ASEAN countries). The primary domestic source of law relating to arbitration in Myanmar is the Burmese version of the Arbitration Act 2016 (the AA). The AA governs both domestic and international arbitration and the recognition and enforcement of awards. Under the AA, arbitration will be considered international where: (1) the parties to the arbitration agreement have, at the time of concluding

\textsuperscript{18} https://gettingthedealthrough.com/area/3/jurisdiction/132/arbitration-myanmar/
the agreement, their place of business in different countries; (2) the place of arbitration pursuant to the arbitration agreement is different from the place of business of the parties; (3) a substantial part of the obligations of the commercial relationship or the subject matter of the dispute is most closely connected to a different place from the business of the parties; or (4) the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country.

In addition, arbitrations that are not international are considered domestic arbitrations. The provisions of the AA generally mirror those of the UNICTRAL Model Law. However, there are some differences. Under the AA: (1) where the parties fail to determine the number of arbitrators, the default is one arbitrator, as opposed to three under the Model Law; (2) unless otherwise agreed by the parties, the arbitral tribunal shall specify the party entitled to costs, the party that shall pay the costs, the amount of costs or the method of determining costs and the manner in which costs shall be paid. Under the Model Law, there are no express requirements for the tribunal to specify costs; and (3) the courts are expressly permitted to determine costs in instances where the award contains no provisions.

Generally, the parties are free to agree on the procedure of the arbitration. Mandatory provisions include the following: (1) the parties shall be treated with equality and each party shall be given a full opportunity to present its case; (2) when a person is approached in connection with his or her possible appointment as an arbitrator, he or she shall disclose in writing any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence; and (3) an arbitrator, from the time of his or her appointment and throughout the arbitral proceedings, shall, without delay, disclose to the parties in writing any circumstances likely to
give rise to justifiable doubts as to his or her impartiality or independence.

For domestic arbitrations, the dispute shall be decided in accordance with the substantive law of Myanmar. For international arbitrations, the dispute shall be decided in accordance with the substantive law agreed to by the parties or, failing such agreement, the substantive law that the arbitral tribunal considers applicable. There are no formal institutions that administer arbitrations in Myanmar. However, there are plans for the Union of Myanmar Federation of Chamber of Commerce and Industry (UMFCCI) to administer and set up arbitrations in Myanmar. Currently, the UMFCCI settles disputes between UMFCCI members, typically on an ad hoc basis.

Generally, commercial disputes are arbitrable under the AA. However, other Myanmar laws provide that the Myanmar courts have exclusive jurisdiction for certain matters: (1) determination of insolvency: the Burma Insolvency Act 1920; (2) winding-up of a company: the Myanmar Companies Act 1914; and (3) appointment of a guardian: the Guardian and Wards Act 1890.

In practice, some restrictions are placed on a party’s ability to choose its dispute resolution mechanism. Export Rules and Regulations provide that any dispute arising from trade disputes under sale contracts must be governed by arbitration in Myanmar. As a rule, the Myanmar government requires contracts between its state-owned enterprises and foreign companies to provide that disputes will be settled by arbitration under the AA. Generally, the standard term in production sharing contracts for oil and gas sectors provides for arbitration pursuant to the UNCITRAL Arbitration Rules. Given the recent passing of the AA, this requirement may now have little relevance. Under the AA, an arbitration agreement is a written agreement between the parties to arbitrate their disputes. An arbitration agreement shall be deemed
as written when: (1) the parties have signed the agreement; (2) the parties have concluded the agreement via correspondence whether electronically or otherwise; or (3) a party claims the existence of an agreement to arbitrate in a claim to a dispute and the other party does not deny the same in its defense. (4) An arbitration agreement contained in a contract will continue to be enforceable even if the arbitral tribunal determines that the said contract is null and void. (5) An arbitration agreement shall not be discharged by the death of any party and, in such event, shall be enforceable by or against the legal representative of the deceased. A legal representative is a person who in law represents the estate of the deceased.

The enactment of a new Arbitration Law represented a significant step forward for fostering foreign investment by creating a basic legal framework for dispute resolution that takes into account domestic and foreign Arbitration in Myanmar. This new law gives effect to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), which Myanmar acceded to in 2013. It replaces the Myanmar Arbitration Act of 1944 and is based on the UNCITRAL Model Law on International Commercial Arbitration, which has been adopted and implemented in many countries. 19

Conclusion

Implementation of the ASEAN Member States have adopted the following fundamental principles that settlement of differences or disputes by peaceful manner. Similar to UN Charter Article 33 concerning settlement of disputes, international doctrine of arbitration and the philosophy of arbitration is peaceful settlement of disputes. Likely, ASEAN Member States, Indonesia has to adopt UNCITRAL

International Commercial Arbitration Rules or Model Law and amendment to RI Law No.30 / 1999 adjust to international arbitration.

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RI Law No.30 / 1999 concerning Arbitration and Alternative Dispute Resolution.

RI Law No.48 / 2009 concerning Power of Justice


The Indonesia Contemporary Corruption Prevention Policy in the Procurement of Goods and Services

Herlambang
Faculty of Law, University of Bengkulu, Indonesia

Abstract

Malignancy in corruption eradication activities in Indonesia currently creates widespread misunderstandings among ordinary people and in particular among policy implementators who are concerned with State finances. In its development many changes to the provisions of statute and the provisions relating to the criminal procedure act related to the corruption. The amendment was made not only by legislature but also by court decision and government policy. This Article is important to clarify the confusion and misunderstanding in the eradication of corruption in Indonesia. If left soluble then the consequence is disobedience and ridicule to law enforcement officers and the collapse of law authority itself, especially in relation to the eradication of corruption.

Conclusion is : currently the enforcement of criminal law is done as ultimum remedium as long as the administrative law approach can not solve state losses arising from the procurement of goods and services; Corruption handling in the procurement sector is currently being selectively carried out with a series of rigorous procedures; Criminal law enforcement is done after the findings of State losses from the State Audit Board which must then be settled administratively to restore the State’s finances. If the expiry of the time period of the law (60 days) of the state financial loss is not returned to the State then the enforcement of criminal law

Keywords : Corruption, eradication, procurement, services, goods

Introduction

Malignancy in corruption eradication activities in Indonesia currently creates widespread misunderstandings among ordinary people and in particular among policy implementators who are concerned with State finances. In its development many changes to the provisions of statute and the provisions relating to the criminal procedure act related to the corruption. The amendment was made not only by legislature but also by court decision and government policy.
The basic issue in upholding the current Corruption Act is that there is a difference perspective between state policy implementators especially those related to State finance and Internal Audit as well as External audits with Law Enforcement Officials (Police, Prosecutors, Anti Corruption Commission). For the executor of State policy some of their actions are included in the category of administrative law so that it must be settled in accordance with the procedure of the State Administration Law. On the other hand law enforcement officials assume that the actions of the State apparatus that harms the State's finances constitute a criminal act of corruption so that it must be settled under criminal justice procedures.

The difference in perception raises fears among the State Apparatus in carrying out their duties and authorities. This resulted in the non-implementation of activities that use the State's finances, which resulted in not improving the welfare of society which is one of the goals of the Indonesian nation to establish this Unitary State of republic Indonesia.

Vice President Jusuf Kalla hopes that efforts to eradicate corruption does not make officials afraid to make decisions. If officials are afraid of making policies, economic growth will slow which lead to the increase of poverty rate in this country. This is confirmed by Vice President since assessing the current situation there are several officials who are still anxious to make decisions for fear of legal entangled. To overcome this condition, Jusuf Kalla asked for an appropriate solution. "Discretion of government policy should not be part of a lawsuit. If this becomes part of the material demands, it is difficult for officials to make decisions. There should be a combination that officials remain courageous in decision making process, but not corruption," as stated by Jusuf Kalla when open the National Anti-Corruption Conference on"
Improving Transparency and Public Participation in the Prevention of Corruption¹.

Determination of the status of the suspects of the government apparatus on the alleged corruption crime, especially in the procurement of government goods and services lately often become a trending topic media coverage. Too much information in mass media and electronic media, dominated by sometimes controversial law enforcement. As time goes by, the rhythm of law enforcement begins to run, the 'victims' fall. Some of the bureaucrats, are forced to feel the chill of a prodeo hotel. Not a few also from among businessmen who have to participate in grace iron bars. Suspects of corruption are also pinned to those who because of his policy allegedly caused the state losses. Government administration apparatus precisely interpret this as a frightening specter. This issue certainly not only affects the disruption of the governance process but also the potential for stagnation of governmental administration.

Fear of procurement project manager responded by President Joko Widodo, "We've been scrambling to make breakthroughs, either in the form of economic deregulation, which already established for 12 times. Then a breakthrough with regard to the tax amnesty also has been issued. We've done various methods, but if it is not supported, there is no support from local area, both from the local government, both in the ranks of the State Prosecutor's Office, Police, then it cannot be run well. Again, everything must be in line, everything must be in tune so the orchestra can produce good voice".² The Corruption criminalize the state’s policy country in implementing development. Thus, the absorption of the budget for development can run optimally.³

¹ Do not Be Afraid of Making Decisions. downloaded from https://www.kpk.go.id/id/berita. On hursday, March 9th, 2017 at 11:04 am
³ Corruption Eradication ommission Agrees Not criminalized Policy, https://www.kpk.go.id. Downloaded on Tuesday, February 28th, 2016 at 01:55 pm
The confusion and misunderstanding in the eradication of corruption crime is also caused by the number of agencies or bodies and teams authorized to authorize the eradication of the Criminal Act of Corruption. Police other than as investigators of corruption have a directorate of Special Investigation and Crime, also formed SABER PUNGLI Team. The Public Prosecution Service also has a special division in handling the criminal act of Corruption, namely the Division of Crime (Special Criminal), besides that the Public Prosecution Service also establishes a special TIM that is the Regional Development Guard Team.

Differences of opinion also occur internally between law enforcement officers in the eradication of Criminal Acts of Corruption. There is often a conflict between the police and prosecutors as well as with the KPK and the Court. The final case which sharpens the contradiction is the authority of the Judge in determining the suspect as mentioned in the Pre-Judicial Decision decided by the South Jakarta Court namely Decision Number; 24 / Pid / Pre / 2018 / PN.Jkt.Sel, the Verdict reads; To grant the Petitioner’s Pre-Trial application in part; Order the Respondent to proceed to the Legal proceedings in accordance with the provisions of the law and the prevailing laws and regulations on the alleged corruption crime of the Century Bank in the form of conducting an investigation and appointing suspects against Boediono. Muliaman D. Hadad. Raden Pardede.Dkk (as contained in the indictment on behalf of the defendant Budi Mulya) or delegate it to the police and / or the Prosecutor's Office to proceed with investigation, investigation and prosecution in the Trial process at the Central Jakarta Corruption Court.; Refusing the Petition of the Pretrial Applicant For other than and beyond; Charging the Case Cost to the petition, amounting to nilil.

The issue that arises is the jurisdiction of the court in determining the unknown suspect in the Indonesian Criminal Law. In addition to the provisions of Pre-Court Justice also not known the authority of the
judge of justice to hear the principal case and set a person as a suspect. The difference of perception between the State apparatus especially the government apparatus in this case is Budiono (manatan Vice President republic Indonesia) as Governor of Bank Indonesia in neglecting the policy of saving Indonesian economy, especially to save Century is an act that belongs to the administrative law or constitutes a criminal act. In the view of the State apparatus this is a criminalization of State policy.

The issue of appraisal of the apparatus policy officer examined from the perspective of criminal law and State administrative law. "Overheidsbeleid" is defined as the State Apparatus Policy. Implementation of the authority included in the definition of this policy is now often tested material as the scope of the Law of State Administration (HAN) or the Criminal Law. State apparatus officials and State-Owned Officials experience the obscure meaningful direction when in performing their duties, functions and authority collide with problems between aspects of Criminal Law that have correlation with administrative functions (or civil functions), so that law enforcement often understands misperception of functions, duties and the authority of the state apparatus officials and the SOE officials as a crime, although sometimes the meaning of the Criminal Law area is inseparable from the problem of implementation of the function.

The policy aspect when viewed from the science of law can use the review of the Law of State Administration (HAN). Theoretically in State Administration Law, governmental action in running the government (bestuurhandeling) can be separated between real action (feitelijke handelingen) and legal action (rechts handelingen). Actions in the field of law can be divided into actions in the field of public law and in the field of private law. Actions in public law mean legal action taken under public law. While the act of private law means acts committed under private law.
This Article is important to clarify the confusion and misunderstanding in the eradication of corruption in Indonesia. If left soluble then the consequence is disobedience and ridicule to law enforcement officers and the collapse of law authority itself, especially in relation to the eradication of corruption.

The writing of this article is based on research conducted by using the method of normative research, which examines the data that originates both from the primary legal materials and secondary law source, in the form of legislation, court decisions and report the research results related to the efforts made to prevent the criminalization of the government apparatus in procurement of goods and services. The obtained legal sources then edited and grouped to answer the problems for later analysed by using the technique of legal interpretation, to be concluded deductively.

**Analysis and Discussion**

Policymakers are always faced with difficult choices and often have to face the dilemma of taking action or not. Sometimes an official needs to take a discretion to solve a problem. According to Dworkin, discretion is a relative concept that takes the meaning from the context of the rules or standards, and exist as 'as an area left open by a surrounding belt of restriction'. In the event of a deadlock in decision-making foundation in the governance process, an administration official actually protected by the principle freies  ermessen/ discretion. Freies ermessen comes from the word frei that means free, independent, unattached. Freis word means free man, while the word ermessen means consider, assess, suspect, assessment, judgment.

There are three reasons or conditions that make the government does discretion or action on its own initiative. First, it has not been

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5 Ibid. P.28
regulated in the laws and regulations governing the in concerto settlement of a problem, whereas the matter requires an immediate settlement. Secondly, the laws and regulations that form the basis of the actions of the government apparatus have granted complete freedom. Third, the existence of legislative delegation, namely the granting of power to self-govern to the government that this power is actually owned by a higher level of apparatus.\(^7\)

In addition it has become common knowledge that in principle mistakes in making policy or decisions cannot be criminalized. In the law of state administration it is unknown criminal sanctions. The sanctions known in the law of state administration, among others, are reprimands both oral and written, relegation, demotion and exemption from the position, even dismissed with disrespect from the position.\(^8\)

The activity of running the government for a government official is actually a personification of the state because in it is embedded "position" as a source of legitimate state representation authority. E. Utrech disclosed that "position" is the proponent of rights and duties, as a legal subject (persoon) authorized to perform legal acts (rechtshandelingen) both under public and private law.\(^9\) For the government, the basis for public legal action is the existence of authority (bevoegdheids). Through the authority sourced from the legislation, the government takes legal action. Authority is a right owned by the Agency and / or Government Officials or other state organizers to take decisions and / or actions in the administration of the government.\(^10\)

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\(^8\) Indonesia Corruption Wacht.Ihwal Policy Criminal. Retrieved from http://www.antikorupsi.org, on Wednesday, 1\(^{st}\) of March 2017. at 11.48
\(^9\) Bagir Manan, The Rule of Policy,The journal was presented on lecturer upgrading of Law Faculty of All Sumatera, Law Faculty of Universitas Andalas, 5\(^{th}\) of April 1994, p.15.
\(^10\) Article 1 Number 5 Law No. 30 of 2014
The granting of such powers shall be expressly stated in the laws and regulations. In the Law of the State Administration, which is attached with the authority or person with the rights and obligations of public law is the position.\footnote{Fahtudin Op.cit} As an officer, an official shall establish a technical policy in accordance with his or her authority under the prevailing laws and regulations, then the concerned shall exercise the policy of state apparatus (\textit{overheidbeleids}) which is the scope of state administrative law.\footnote{Ibid}

Conversely, if a decision is issued by an unofficial authority (\textit{onvoegdheid}) then it is referred to as a defective decision regarding the authority (\textit{bevoegdheidsgebreken}) which includes: \textit{Onbevoegdheid ratione materiae}, if a decision is not found in the legislation or issued by an unauthorized person; \textit{Onbevoegdheid ratione loci}, decisions taken by officials outside geographically; \textit{Onbevoegdheid ratione temporis}, if the decision is made by an unauthorized official or not authorized to issue a decision.\footnote{Ibid}

In general, an official in running his / her authority is bound to the principle of good governmental principle. The principle of good governance (\textit{AUPB}) in the practice of dispute resolution in case of objection to the actions of an official, then \textit{AUPB} also becomes the basis for judges in assessing whether an official's acts can be exhausted or not. The General Principle of Good State Government is a principle that upholds the norms of decency, propriety and legal norms, to realize a clean countrymen and free from corruption, collusion and nepotism.\footnote{General Rule Article 1 Number 6 Law No 28 of 1999} Explicitly Law Number 28 of 1999 stipulates the general principle of government organizers, as set forth in article 3, namely;\textit{Principle of Legal Certainty}; \textit{Principle of Orderly State Administration}; \textit{Principles of General Interest}; \textit{Principle of Openness}; \textit{Principle of Proportionality}; \textit{Principle of Professionalism}; and \textit{Principles of Accountability}.
The principle of good governmental management is also regulated in Law no. 37 of 2008 on Ombudsman of Republic of Indonesia, negatively is "Maladministration is a behavior or act against the law, transcending authority, exercising authority for other purposes of the purpose of such authority, including negligence or neglect of legal obligations in the provision of public services performed by State organizers and governments that cause material and / or immaterial damages to the community and to individuals"\textsuperscript{15}.

The principle of good governance is also regulated in Law no. 5 of 2014 Concerning State Civil Apparatus, especially in chapter 2, ie Organization of Policies and Management of ASN is based on the following principles: Legal certainty; Professionalism; Proportionality; Alignment; Delegation; Neutrality; Accountability; Effective and efficient; Openness; Non-discriminatory; Unity and entity; Justice and equality; and Welfare.

Good governance arrangements can also be found in Law no. 25 of 2009 on Public Service, in particular in Article 4, which states that; Public service performance is based on: Public interest; Legal certainty; Equality of rights; Balance of rights and obligations; Professionalism; Participative; Equation of treatment / non-discriminatory; Openness; Accountability; Facilities and special treatment for vulnerable groups; Punctuality; and speed, convenience, and affordability.

Law no. 23 of 2014 Regarding Regional Governments also regulates the principles of good governance, as set forth in Article 58, namely; The Provider of the Regional Government, as referred in Article 57, in carrying out the Regional Government shall be guided by the principle of the administration of the state government consisting of: legal certainty; orderly state organizers; public interest; openness; proportionality; professionalism; accountability; efficiency; effectiveness; and justice.

\textsuperscript{15} Article 1 Number 3 Law no 37 of 2008
The study conducted showed that 7 (seven) laws, legal doctrines, and jurisprudence of State Administration (TUN) case, can be concluded: The position of AUPB (The general principle of good governance) as a norm of positive law has placed AUPB as a strong binding principle; AUPB has largely become the norm of written law and the other part is an unwritten principle; AUPB has a position as a basis or a reason for the Plaintiff to postulate the lawsuit in the State Administration case in court; AUPB is a test instrument for State Administration judges to test the validity or cancellation of State Administration Decision, so that, consequently, a violation of AUPB may be expressly stated by the judge in the ruling; AUPB can be used as a basis for judges in interpreting legal obscurity in the field of State Administration Law, provided that it is based on precise and accurate considerations, with clear indicators, and supported by legal facts revealed in the hearing.\(^{16}\)

The principle of AUPB which is most widely used by the Judge as the basis for deciding the State Administration case is the principle of legal certainty, the principle of accuracy, the principle of not misusing authority, the orderly principle of government administration.\(^{17}\) The jurisprudence of the Supreme Court which provides clear guidance in the application of the principle of material legal certainty can be seen in Decision of Supreme Court RI No. 505 K/TUN/2012 and Supreme Court Decision No. RI. 99/PK/2010. The Supreme Court gives the meaning that the principle of legal certainty requires the Agency or Official of State Administration, in issuing the State Administration Decision, shall prioritize the legal basis based on decency and justice.\(^{18}\)

The principle of not abusing authority is AUPB that is the most commonly used. Some jurisprudence which provides clear direction in the application of this principle is reflected in the Supreme Court

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\(^{16}\) Ibid
\(^{17}\) Ibid
\(^{18}\) Ibid
Decision No. RI. 10 K/TUN/1992, Supreme Court Decision No. RI. 10 K/TUN/1992, Supreme Court Decision No. RI. 34 K/TUN/1992, and Supreme Court Decision No. RI. 150 K/TUN/2001. The Supreme Court Justices in these decisions provide that the Government Body or Officials in exercising their powers shall not be for any other purpose than the purpose of granting such authority (vide Article 53 verse (2) letter b). The authority granted by the State Administration official shall be used in accordance with the intent of granting such authority. Otherwise, the act of the State Administration Official is a violation of the AUPB, in particular the principle of non-abuse of authority. Thus the principle which is similar to the principle of not abusing authority, is the principle of prohibition of confusing authority, as referred in Decision Letter no. 0/G/1999/PTUN MDN jo. Supreme Court Decision No. RI. 266 K/TUN/2001 Body or officials of State Administration shall exercise its authority for legal action in accordance with the conditions set forth in the legislation (in terms of material, territory, time). Preliminary authority is an example of violation of this principle. That State Administration Decision made by officials who do not have the authority or officer who exercises authority beyond the given authority is an indicator for violation of the principle that does not confuse authority. Furthermore, the jurisprudence of the Supreme Court on the implementation of the principle of orderly governance is reflected in the Supreme Court Decision No. RI. 385 K/TUN/2012 and Supreme Court Decision No. RI. 55 K/TUN/1992. In its legal considerations, the Panel of Judges states that “for the sake of ordering of the government administration, the term of office which is limitatively determined by the laws and regulations shall not be disregarded unless there are strong reasons. The jurisprudence of the Supreme Court which provides clear guidance in the application of the precision principle is contained in the Supreme Court Decision No. RI. 150 K/TUN/1992, Supreme Court Decision No. RI. 213 K/TUN/2007, Supreme Court Decision No. RI. 101 K/TUN/2014, and Decision No. 02/G/2013/PTUN-JKT. The precise
principle indicator is that the Body or Officer of State Administration always acts carefully, to carefully consider when making the State Administration Decision, by first seeking a clear picture of all relevant legal facts, as well as the underlying legislation and taking into account the interests of the third parties, so as not to cause harm to citizens.  

Supreme Court Decision No. 81 K/TUN/2006 shows an indication of a violation of the principle of proportionality, i.e., requiring that the State Administration Decision issued by the State Administration official should pay attention to the procedural aspect with no contradiction to the laws and regulations. The application of the principle of proportionality also appears in the Supreme Court Decision No. RI. 81 K/TUN/2006 and Decision Number MA RI No. 31 K/TUN/2014. Thus, this principle is interpreted similar to the principle of legal certainty and the principle of precision.

The principle of decent play, in Decision No. 30/G/TUN/1998/PTUN. Smg, the Panel of Judges is of the opinion that the Official of State Administration violated the principle of decent game with the indicator that the defendant (Head of Land Office) did not initially implement the procedure of issuing certificates carefully, and did not provide the widest information to the public especially those who objected to the issuance of the certificate (openness). Supreme Court Decision No. RI. 103 K/TUN/2010 is an example of the application of the principle of openness, in which the Supreme Court Justices establishes a legal rule that the amendment of Building Permit (IMB) which is not based on AMDAL (Environmental Impact Assessment) permits and moreover ignores the aspirations of the local community opposed to the principle of openness. Based on the principle of transparency, the Government or the State Administration Official shall be obliged to "give the public the opportunity to exercise their right to submit a response or assessment". The application of the principle of openness in Supreme Court Decision No. RI. 103 K/TUN/2010 supports the interpretation of the public's right to be informed of the State Administration Decision.

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19 Ibid
20 Ibid
openness can also be found in Decision No. 14/G.TUN/2007/PTUN.Dps, of State Administration regarding the mutation, it does not review and use the preliminary stages in conducting the evaluation, thus it is stated that violate the principle of openness. In practice, this principle of openness is often used in conjunction with the principle of legal certainty and the principle of precision.21

Administratively the existing benchmark is sufficient to assess whether an official’s actions are in accordance with his authority or misuse his authority. The appropriate official’s action or according to the authority given to him certainly cannot be the object of an act against the penalty. Only the actions of officials who misuse their authority can be objects in the criminal law, provided that abuse of authority is accompanied by bad intents. (mens rea).

According Soerjono Soekanto, criminalizing is an act or determination of the authorities concerning certain actions by public or classes of society regarded as acts that may be liable to be a criminal act,22 or make an act becomes a criminal act and therefore can be imprisoned by the government on behalf of law.23 Edwin H. Sutherland and Donald R. Cressey define criminology as: “... the body of knowledge regarding delinquency and crime as a social phenomenon. It includes within its scope the process of making law, the breaking of laws, and reacting to word the breaking of laws ...24”.

The development of the meaning of criminalization also due to the tendency of society to give priority to criminal law as an option in

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21 Ibid
solving various problems in society. Criminal law should not be placed as the first instrument (premium remedium) to organize the life of society, but as the last instrument (ultimum remedium) to control the behaviour of individuals in a common life.

Theoretically, policy’s option to do criminalization was done to answer some basic questions, namely: "Given a natural understanding of criminalization, the theory offers plausible answers to the three questions as to why we ought to criminalize, what we ought to criminalize, and how we ought to criminalize"25, moreover we also must consider some respects, at least there are some principles that should be considered to criminalize an act, namely; the principle of extended criminalization, which includes the creation of new criminal offenses (crimes new creation); Actualization or affirmation of some provisions of the existing criminal acts; Expansion of the scope of application of the criminal law26. Other principles which must be considered are; non-discriminatory basis; complementary principle between the jurisdiction of national laws ratione materiae and jurisdiction ratione materiae in another state law27.

Criminalization of an act must be based also on the ability to enforce it. Criminalization must be selective and made to avoid over-criminalization. I argue that over-criminalization is objectionable mainly because it produces too much punishment. The central problem with punishment is analogous to the central problem with the criminal law: We have too much of it. I say that we inflict too much punishment because many of these Punishments are unjust28. Reviewed from political perspective of the criminal, the criminalization should be a solution for

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27 Ibid.

crime prevention efforts, not vice versa in which it becomes criminogenic factor. *An adequate theory of criminalization should include a principle of proportionality, according to which the severity of the sentence should be a function of the seriousness of the crime. Injustice occurs when punishments are disproportionate, exceeding what the offender deserves.*\(^{29}\)

Abuse of authority was made one of the crimes of corruption under the law number 31 of 1999 jo Law No. 20 of 2001 on Corruption, especially formulated in Article 2 of Law Number 31 Year 1999, namely; Any person who, for the purpose of profiting himself or others or a corporation, misuses the authority, opportunity or means available to him because of a position or position which could be detrimental to the state's finances or the economy of the state, is liable to a life imprisonment or a maximum imprisonment of 1 one) year and a maximum of 20 (twenty) years and or a minimum fine of Rp. 50.000.000.00 (fifty million rupiah) and at most Rp. 1.000.000.000.00 (one billion rupiah) ",", dalam penerapannya makna pemnyalahgunaan ini ditafsirkan sebagaimana penafsiran dalam Hukum admistrasi Negara. According to Prof. Jean Rivero and Prof. Waline, the definition of authority abuse in Administrative Law can be interpreted in 3 forms, namely: Misuse of authority to perform acts contrary to the public interest or to benefit private, group or group interests; Misuse of authority in the sense that the official's actions are rightly intended for the public interest, but deviate from what purpose the authority is granted by law or other regulations; Misuse of authority in the sense of misusing procedures that should be used to achieve certain objectives, but having used other procedures to be implemented;\(^{30}\)

According to the provision of Article 17 of Law Number 30 of 2014, the Prohibition on Abuse of Authority as referred in verse (1) covers:

\(^{29}\) Ibid, P.14

\(^{30}\) The meaning of authority abuse in corruption case. [http://www.hukumonline.com](http://www.hukumonline.com). Retrieved on Friday, December 2\(^{nd}\), 2016 at 13.19
prohibition beyond Authority; prohibition of confusing Authority; and / or prohibition of acting arbitrarily.

Interpretation of authority abuse is also mentioned in the Supreme Court Decision Number 977 K/PID/2004. In the verdict it is said that the notion of “authority misuse " is not found in its explicit in the Criminal Law, the Criminal Law may use the same meaning and word that exist or derive from other branches of law. It departs from the criminal law having the autonomy to give a different understanding to the understanding contained in other branches of jurisprudence, but if the Criminal Law does not specify otherwise, it is used of the meaning contained in another branch of law (De Autonomie van bet Materiele Strafrecht). Still derived from the same verdict, this teaching was accepted by the District Court of Jakarta Utara which was further strengthened by the Supreme Court Decision. No.1340 K/Pid/1992 on February 17th, 1992 ("Supreme Court") during the corruption case known as the "Sertifikat Eksport (Export Certificate)" case. The Supreme Court of the Republic of Indonesia took over the definition of "misusing authority" in Article 53 verse (2) letter b of Law Number 5 of 1986 regarding State Administrative Court ("Law of Decision of State Administrative") which has used its authority for other purposes than the purpose of granting authority or otherwise known as "Detournement de pouvoir".

Based on research conducted by Dian Puji N Simatupang, it revealed, she has done research on 150 corruption criminal cases throughout Indonesia. From the results of her research revealed that 73 percent of them are wrong guess, which should not be punished. “73 percent of the 150 corruption cases I studied since the 1999-2009 reform era turned out to be the wrong judges in deciding the case, and they should not be punished for administrative errors," she said. Administrative error according to Dr Dian, are fine or dismissed from

32 Ibid
his post. The legal case that occurs concerning public policy is actually *dwaling*, (wrongly suppose). The *dwaling* may be erroneous on the intent of the regulators (*zelfstandingheid der zaak*); misrepresentation of the right of another person or legal entity (*dwaling in een subjetieve recht*); misunderstanding of the meaning of a provision (in het een objectieve recht), and misunderstanding of self-authority (*dwaling in eigen bevoegheid*). According to Dian, to the problem of *dwaling*, the settlement is not through criminal sanction but must be through administrative law. Dian also believes that not all policy makers cannot be convicted of the policies it takes. Policy makers may still be punished if the policy takes into account the elements of bribery, threats and deceit. As long as the element can be proven during the decision process, policy makers may be subject to criminal sanctions.

Efforts to overcome misunderstandings in interpreting elements of abuse of authority Based on the means of legislation Policy Act No. 30 of 2014. One attempt to resolve misunderstandings in interpreting Elements of abuse of authority and protecting State apparatus, the Law No. 30 of 2014 on Administration of government was issued.

That in the framework of improving the quality of government administration, governmental bodies and / or officials in the use of authority shall refer to the general principles of good governance and in accordance with the provisions of laws and regulations. That to solve the problems in the administration, the administration of governance is expected to be a solution in providing legal protection for both citizens and government officials.34

Law Number 30 of 2014 on Government Administration affirms that the state administrative court is a judicial institution with absolute competence to examine the presence or absence of suspected misuse of

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34 Consideration of Law No. 30 of 2014
authority. If an officer has been declared a suspect of corruption, he will be directly examined in the TIPIKOR (Criminal Act) court. Now, with the regime of this law, an official may file an application to the State Administrative Court first to check and ascertain the presence or absence of an element of abuse of authority in the decision and / or actions that have been taken. The provision is contained in Article 21 of Law Number 30 of 2014 on Government Administration.\textsuperscript{35} Article 21 states that; The Court has the authority to accept, examine, and decide on the presence or absence of any element of abuse of Authority exercised by the Government Official; The Agency and / or Government Official may file an application to the Court to assess whether or not there is an element of misuse of Authority in Decision and / or Action. The court must decide upon the application as referred to in verse (2) no later than 21 (twenty one) working days after the application is filed. The decision of the Court as referred to in verse (3) may be appealed to the State Administrative High Court. The State Administrative High Court shall decide upon the appeal as referred to in verse (4) no later than 21 (twenty one) working days after the appeal is filed. The decision of the State Administrative High Court as referred to in verse (5) shall be final and binding.

Supervision over the execution of officials’ authority shall be conducted based on the mechanism set forth in article 20, including where there is a misuse of authority that causes the state losses; (1) Supervision of the prohibition of abuse of authority as referred to in Article 17 and Article 18 shall be conducted by the government internal control apparatus; (2) The results of supervision of the government internal control apparatus as referred to in verse (1) shall be in the form of: (a) No errors; (b) There are administrative errors; or (c) There are administrative errors that cause the state financial losses. (3) If the result of supervision by the internal government apparatus in the form

\textsuperscript{35} Ibid
of administrative error as referred to in verse (2) letter b, follow-up in the form of administrative improvement in accordance with the provisions of legislation. (4) If the result of internal government apparatus supervision is in the form of an administrative error causing the state financial loss as referred to in verse (2) letter c, the state financial loss should be paid no later than 10 (ten) working days after the decision is made and the result of the supervision is issued. (5) The state losses referred to in paragraph (4) shall be borne by the Governing Body, if the administrative error as referred to in paragraph (2) letter c occurs not because of the element of abuse of Authority; (6) The state losses as referred to in paragraph (4) shall be borne by Government Officials, if the administrative error as referred to in verse (2) letter c occurs because of the element of abuse of Authority.

In the event, an authority is not clearly regulated and a momentary condition that requires an official to make a decision, then it is possible to do discretion. Regime of law number 30 of 2014 About Government Administration has given general guidance in running discretion and embrace expansion of meaning of discretion. Discretion is a Decision and / or Action established and / or implemented by a Government Official to address the concrete concerns faced in the administration of government in terms of choice, non-regulating, incomplete or unclear legislation and / or government stagnation.36

Discretionary provisions are set forth in articles 22 to 25. Such provisions provide clearer legal certainty concerning the procedures for the use of discretion37

36 Article 1 Number 9 of Law No. 30 of 2014
37 Ibid. Article 22

1) Discretion may only be performed by a competent Government Authority.
2) Any use of Government Officials Dispatch aims to:
   a. launch governance;
   b. fills a legal vacuum;
   c. providing legal certainty; and
   d. overcome the stagnation of government in certain circumstances in order to benefit and the public interest.
(3) The report referred to in paragraph (2) shall be submitted not later than 5 (five) working days since the use of Discretion.
This Act regulates the need for coordination between the Government Internal Supervisory Apparatus and the law enforcement apparatus in the event of a public complaint about the alleged corruption. In Chapter XX Legal Actions Against State Civil Apparatus in Local Government Institutions;

Article 384 (1) The investigator notifies the regional head prior to conducting an investigation of the state's civil apparatus in the regional agency suspected of violating the law in the performance of duties. (2) The provisions of notification of investigation as referred to in paragraph (1) shall not apply if: a. caught red-handed doing something criminal; b. alleged to have committed a criminal offense punishable by imprisonment of 5 (five) years or more; and / or suspected of having committed a criminal offense against state security. (3) The investigation as referred to in paragraph (2) shall be notified to the regional head for a maximum period of 2 (two) times 24 (twenty four) hours.

Article 385 (1) The public may submit complaints on alleged irregularities committed by the state civil apparatus in the Regional Authority to the Government Internal Supervisory Officers and / or law enforcement apparatus. (2) The Government Internal Supervisory Apparatus shall be required to examine alleged irregularities that are complained by the community as referred to in paragraph (1). (3) Law enforcement officers shall examine complaints submitted by the community as referred to in paragraph (1), after first coordinating with the Government's Internal Supervisory Apparatus or non-ministerial government institution in charge of supervision. (4) If the result of inspection as referred to in paragraph (3) is found to be evidence of administrative deviations, further process shall be submitted to the Government Internal Supervisory Officer. (5) If based on result of inspection as referred to in paragraph (3) found evidence of criminal
deviation, further process shall be submitted to law enforcement apparatus according to rule of law.

The Republic Indonesia Act Number 15 of 2004 About the State Audit Board, Regarding to the deadline for repayment of state losses have been calculated by the Financial Audit Board (BPK), it is governed by Article 20 of Law No. 15 of 2004 on the Management and the financial responsibility of the State. (1) Officials are required to follow the recommendations in the report of examination results; (2) Officials are required to provide an answer or explanation to the BPK on the follow-up on recommendation in the examination report; (3) response or explanation as referred in paragraph (2) shall be submitted to the BPK no later than sixty (60) days after the examination report is received. (4) the BPK monitors the implementation of the follow-up results of the examination referred in paragraph (1). (5) The official, who is known not implement the obligations as referred in paragraph (1) may have administrative sanctions in accordance with the provisions of the legislation in the staffing field. (6) BPK notices the monitoring results of the follow notify the BPK as referred in paragraph (4) to the representative institutions in the semester examination results.

Based on these provisions it can be concluded that the results of BPK examination and authority to monitor the follow-up examination in principle fall within the law of the State administration (administrative), so that as long as all the recommendation to the results of the examination have been followed up by the authorities concerned, it means the obligation of administrative of management finances, for BPK has been completed. Thus the state loss of return by the parties as defined in the BPK recommendations had recovered the state/regions losses that have been found.

The authority of BPK is reinforced by the Supreme Court Circular Letter (SEMA) No. 14 of 2016. Particularly, in number 6, which states that “The authority agencies whether or not stated the a financial loss is BPK which has the constitutional authority while other institutions-5-
such as State Development Audit Agency / inspectorate / Regional Work Unit still have authorities in doing examination and audit of the financial management of State but was not authorized to declare the financial state loss. In a certain way, judge based on the fact the trial can judge the losses and the amount state loss.

Presidential Instruction No. I of 2016 on the acceleration of national strategic project, which instruct the Attorney General and Indonesian National Police in conducting an investigation (investigation and prosecution) in order; the SIXTH: Attorney General of the Republic of Indonesia (Jaksa Agung) and the chairman of Indonesian National Police Chief (Kapolri): (1) Put the process of governmental administration according to Law No. 30 of 2014 on Government Administration before conducting an investigating on the public reports concerning abuses of authority in the implementation of the National Strategic Projects; (2) Forward / conveying public complaints received by the Attorney General of the Republic of Indonesia or the Indonesian National Police regarding abuses of authority in the implementation of the Strategic Project of the National to the head of Ministry / agency or Local Government for examination and follow-up settlement of the public reports, including the necessary inspections by the Government Internal Supervisory Apparatus. (3) To examine the results of Government Internal Supervisory Apparatus audit’s findings related the non criminal offenses administrative that submitted by the chairman of the ministry / agency or local government pursuant to the provisions of the legislation; (4) To examine the audit results of Government Internal Supervisory Apparatus as mentioned in point 3, based on: (a) General Principles of Good Governance; (b) objective reasons; (c) do not give rise to a conflict of interest; and (d) carried out in good faith.

Does not publish the comprehensive inspection to the public before the investigation stage. Using opinions and / or explanation / statement of experts from ministries / agencies authorized as an official interpretation of the relevant legislation. Draw up internal rules
concerning the procedure (and the Standard Operating Procedure / *SOP*) for handling the public complaints regarding abuses of authority in the implementation of the National Strategic Projects as the basis for implementation of tasks in each of vertical institutional unit.

Providing assistance/legal considerations required in the accelerated implementation of the national strategic project. To provide guidance and oversight of the lineup below and provide action if there are irregularities and violations.

Efforts addressed to prevent the criminalization for authority person to execute a special authority in the implementation budget of *APBN(state Budget)* by implement the presidential directive to the Attorney General and the entire of Indonesia of Attorney General’s Office together with Indonesia National Police Chief (*KAPOLRI*) and Province Chief of Police (*KAPOLDA*) on 19th of July, 2016 at State palace. There are five things, years ago that Presiden Republik Indonesia speech. Concerned, the first is that the policy, that discretion can not be criminalized, do not be criminalized. Secondly, action is the same administration. Please distinguish where the intention of stealings, and where the actions of the administration. I think the rules in the State Audit Agency was obvious, which returns, which are not. The third, the *BPK* that stated the losses were still given the opportunity 60 days. It also should be given a note. The fourth, the state's loss should be concrete, it must be concrete, not making it up. Fithly, it is not exposed to excessive media before we have prosecute. Yes, if one's right, if I'm not mistaken?.

Other efforts made by the government, particularly the Attorney General of the Republic of Indonesia to prevent the criminalization of government officials, especially in the provider of goods and services is the issuance of the Decree Attorney General No. KEP-152 / A / JA / 10/2015 concerning the establishment of the Guards and Security for Development and the Central Government and Regional Prosecutor Republik Indonesia. Tert team as *TP4D* has the task, among others;
Conduct information and legal information on the implementation of the provisions of the legislation, especially concerning the implementation of development projects and the management of state finances. (a) Conduct judicial assistance in the form of assistance and legal considerations under the provisions applicable to the Regional Government of North Sulawesi province, state / state-owned enterprises and other State institutions. (b) To increase the coordination and cooperation relations with the government’s internal control apparatus (APIP) in the face and resolve any issues or findings (cases) in the framework of the completion of the construction project

Presidential Regulation Number 87 Year 2016 About Clean Duty Task Unit Unconditional Fee. Illegal Levy is the imposition of fees or charges in a place where there should be no fee charged or picked up at the site or on the occasion. So it can be interpreted as an activity to charge or force money by someone to another party and it is a crime or criminal practice. Tasks of Clean Sweep Duty Tasks Illegal charges are; Implement the eradication of illegal levies effectively and efficiently by optimizing the utilization of personnel and facilities and infrastructure both in the ministry / institution and local government. The task force have a authority to;(1) Build a system to prevent and eradicate illegal levies; (b) Conduct collection of data and information from ministries of agencies and other parties related to Using Information Technology; (c) Coordinate, plan and implement eradication illegal; Doing hand-catch operation (d) Provide recommendations to the heads of ministries / agencies and heads of local governments to Provide sanctions to perpetrators illegal in accordance with legislation.

Provide recommendations on the establishment and execution of the tasks of the saber unit of pungli in every institution of the provision of public services to the heads of ministries / agencies and heads of regional governments. Evaluate illegal pest control activities.

Supreme Court Letter (SEMA) No. 14 of 2016. Particularly, in number 6, which states that "The authority agencies whether or not
stated the a financial loss is BPK which has the constitutional authority while other institutions-5- such as State Development Audit Agency/inspectorate /Regional Work Unit still have authorities in doing examination and audit of the financial management of State but was not authorized to declare the financial state loss. In a certain way, judge based on the fact the trial can judge the losses and the amount state loss.

Pre Trial Decission of Souht Jakarta district Court Number 04/Pid.Práp/2015/PN.Jkt.Sel. This Pre Court ruling granted Budi Gunawan (Deputy Chief of Police of the Republic of Indonesia) request to cancel the status of the suspect set by the Corruption Eradication Commission. South Jakarta District Court gave the Decision as follows; in exception, Refusing the Respondent's Exception for all; in the case: To grant the Petitioners of the Pretrial Petitioners in part; To declare an Investigation Order Number: Sprin.Dik 03/01/01/2015 dated January 12, 2015 which stipulates the Petitioner as a Suspect by the Respondent related to a criminal event as referred to in Article 12 letter a or b, Article 5 paragraph (2) Article 11 or 12 B of Law Number 31 Year 1999 concerning the Eradication of Corruption jo. Law Number 20 Year 2001 regarding Amendment to Law Number 31 Year 1999 concerning the Eradication of Corruption jo. Article 55 Paragraph (1) of the Criminal Code is invalid and unlawful, and therefore aquo Stipulation has no binding power.

To declare the investigation carried out by the Respondent regarding the criminal case as referred to in the Stipulation of Suspect against the Petitioner as referred to in Article 12 letter a or b, Article 5 paragraph (2), Article 11 or 12 B of Law Number 20 Year 2001 concerning the Amendment of Law Number 31 Year 1999 concerning the Eradication of Corruption jo. Article 55 paragraph 1 of the Criminal Code is invalid and unlawful, and therefore aquo Investigation has no binding power; To declare that the Suspect’s determination of the Petitioners’ conduct by the Respondent is invalid; To declare any
invalidity of any decision or determination issued by the Respondent related to the Suspect of the Defendant against the Petitioner by the Respondent; To charge state fees to zero amount; Refusing the Petitioners of the Pretrial Petitioners other than and beyond.

Pre Trial Decision of South Jakarta district Court Number 24/Pid/Pra/2018/PN Jkt. Sel. The final case which sharpens the contradiction is the authority of the Judge in determining the suspect as mentioned in the Pre-Judicial Decision decided by the South Jakarta Court namely Decision Number; 24 / Pid / Pre / 2018 / PN.Jkt.Sel, the Verdict reads; (1) To grant the Petitioner's Pre-Trial application in part; (2) Order the Respondent to proceed to the Legal proceedings in accordance with the provisions of the law and the prevailing laws and regulations on the alleged corruption crime of the Century Bank in the form of conducting an investigation and appointing suspects against Boediono. Muliaman D. Hadad. Raden Pardede.Dkk (as contained in the indictment on behalf of the defendant Budi Mulya) or delegate it to the police and/or the Prosecutor's Office to proceed with investigation, investigation and prosecution in the Trial process at the Central Jakarta Corruption Court. Refusing the Petition of the Pretrial Applicant For other than and beyond Charging the Case Cost to the petition, amounting to nihil.

Decision of the Constitutional Court Constitutional Court Decision Number 003 / PUU-IV / 2006 Concerning the Elimination of Unlawfulness against the Constitutional Law in Article 2 Law Number 31 Year 1999 About Corruption Crime. On July 24, 2006 the Constitutional Court through its decision number 003 / PUU-IV / 2006 has decided to declare a sentence in the Elucidation of Article 2 Paragraph (1) of Corruption Law (31/99) contrary to the constitution. The sentence reads: "What is meant by" unlawfully "in this Article includes acts unlawful in the formal sense or in the material sense, that is, although the act is not stipulated in legislation, but if the act is
deemed disgraceful because it is incompatible with sense of justice or norms of social life in society, then the act can be punished.

The explanation of this lawmaker does not only explain Article 2 verse (1) about unlawful elements, but has created new norms, which contain the use of legally written measures in the law to determine criminal acts. Such an explanation has caused the criterion of unlawful acts (Article 1365 Civil Code) known in civil law developed as a jurisprudence concerning unlawful acts (onrechtmatigedaad), as if it had been accepted into one measure against the law in criminal law (wederrechtelijkheid). Therefore, what qualifies and qualifies the morality and sense of justice recognized in society, varying from region to region, will result in what in one area is illegal, in another is not an unlawful act.

The Constitutional Court's verdict has indeed been dropped almost 10 years ago, but the issue surrounding this "unlawful" element has always been an interesting issue. Especially after the Court's decision the Supreme Court also often ignore the verdict, although sometimes also still mengedomaninya, depending on who the supreme judge. In the Supreme Court Decision Number Year of Decision of Supreme Court of the Republic of Indonesia No.2065 K / Pid / 2006 and Supreme Court Decision Number No.2257 K / Pid / 2006 dated December 5, 2006, the Supreme Judge Board concurred with the Decision of the Constitutional Court. On the contrary, in Decision No. 2214 K / Pid / 2006, the Judge disagrees with the Decision of the Constitutional Court, which is to remain unlawfully interlocuted by means of twisting through doctrine and jurisprudence. That is, the court can still interpret the law against the law by using doctrine and jurisprudence.

Decision of the Constitutional Court Number 25 / PUU_XIV / 2016 on the abolition of words may be in the explanation of Article 2 Act Number 31. 1999 Concerning Anti Corruption”. Article 2 Paragraph (1) and Article 3 of Law Number 31 Year 1999 in conjunction with Law Number 20 Year 2001 concerning the Criminal Act of Corruption cause
that action which can be prosecuted before the court not only will the action harm the state finance or state's economy " can "harm State Finance as a possibility or" potential Loss ", if the element of corruption corruption has been terpenuhi already can be filed before the court. Based on the decision of this Constitutional Court, the element of harm to the state finance or the economy of the new country can be fulfilled if the losses of the state or the economy of the country have been realized.

**Conclusion**

Currently the enforcement of criminal law is done as ultimum remedium as long as the administrative law approach can not solve state losses arising from the procurement of goods and services. Corruption handling in the procurement sector is currently being selectively carried out with a series of rigorous procedures. Criminal law enforcement is done after the findings of State losses from the State Audit Board which must then be settled administratively to restore the State's finances. If the expiry of the time period of the law (60 days) of the state financial loss is not returned to the State then the enforcement of criminal law.
Application of Islamic Law in Handling LGBT (ASEAN Religious Social Harmonization)

Murry Darmoko
Faculty of Law, Bhayangkara University of Surabaya, Indonesia
E-mail: murry@ubhara.ac.id

Abstract

This paper reviews LGBT in ASEAN and handles it through the application of Islamic law and communication approaches. This study uses IMRAD Structure. Background research is that Islamic law in ASEAN is still considered as an alternative law in solving religious social problems, especially in LGBT issues. Human rights issues become LGBT bastions in their activities so that appropriate communication approaches are needed in overcoming LGBT problems. There are two research questions, first, how can Islamic law be accepted and applied across ASEAN countries in handling of LGBT? Second, how is the pattern of good communication approach so that it can handle issues related to LGBT and Human Rights?. The purposes of the research is to find the answers of two research questions with qualitative methods derived from documents that are directly related with two approaches of sociology of law and science of communication. Results, first, Islamic law can be applied in ASEAN through procedures for the establishment of legislation regulated in ASEAN by taking fatwas related to LGBT. Second, the Role of Communication plus Solutions on LGBT issues with various patterns and techniques can provide a win-win solution in the religious social harmonization. Discussions, the pro-implementation of Islamic law states that Islamic law not only talks to Muslims but more priority to the concept of Rahmatan Lil'alamin (benefit for all mankind), the counter party stated that Islamic law is cruel in treating humans. In conclusions, first, the application of Islamic law can be exercised on LGBT through level-level and second level with balanced communication patterns about LGBT, religious issues can be solved well.

Keyword: LGBT, Islamic Law, Communication, ASEAN, Social-Religion.

Introduction

LGBT stands for Gay Lesbian Bi-Sexual Transgender is a social phenomenon that is present in every country and brings social impact and religious impact. Each country has its own way of dealing with LGBT problems. There is no uniform law in determining the fate of LGBT in the United Nations. At the ASEAN level, ASEAN member countries also differ in addressing LGBT.

Thailand for example, the kingdom gives more freedom to its people in appreciating the LGBT community. Indonesia faces LGBT with a variety of appreciation, in accordance with the diversity of social expressions in each region, even in Indonesian customs, there are three
customs that seem to respond to LGBT, such as the Male House in Papua, Reog in Java and the Fifth Sex in Sulawesi. But not the least, LGBT Indonesia is tortured and isolated in a social environment with religious arguments and health factors that cause HIV-AIDS. Also with legal uncertainty - such as the recognition of the third sex in identity - about LGBT is one of the important issues that continue to be talked about by countries that are against LGBT or allow it to determine the future.

However, for Pro LGBT countries, twenty-three countries in the world, which legally allow LGBT people to be able to conduct same-sex marriages, starting from the Netherlands in 2001 to the United States in 2015. Based on Human Rights, LGBT for them is part of a mistake that must be understood from the history of human life.

With my previous background, I studied a thought about alternative law that could be applied in overcoming LGBT problems, namely Islamic Law. Islamic law referred to here is the MUI fatwa number 57 of 2014 which deals with Sodomi and Sexual Behavior which is prohibited in Islam. The problem does not only stop at how Islamic law is applied, but also the communication patterns built in utilizing Islamic law can be applied within ASEAN.

**Methods**

Material sources in this study were taken from various sources. The main source is MUI Fatwa number 57 in 2014 as Islamic law which will be applied in dealing with LGBT issues in ASEAN. Secondary sources are taken from news media related to the application of Islamic Law and communication patterns that can be applied in combining the application of Islamic law and still being able to protect human rights towards LGBT.

First, MUI Fatwa Number 57 of 2014 which contains three elements, namely: general provisions, legal provisions and recommendations.
FATWA MUI NOMOR 57 TAHUN 2014
MEMUTUSKAN
MENETAPKAN:
FATWA TENTANG LESBI, GAY, SODOMI, DAN PENCABULAN

Pertama : Ketentuan Umum
Di dalam fatwa ini yang dimaksud dengan :

1. Homoseks adalah aktifitas seksual seseorang yang dilakukan terhadap seseorang yang memiliki jenis kelamin yang sama, baik laki-laki maupun perempuan.
2. Lesbi adalah istilah untuk aktifitas seksual yang dilakukan antara perempuan dengan perempuan.
3. Gay adalah istilah untuk aktifitas seksual yang dilakukan antara laki-laki dengan laki-laki
4. Sodomi adalah istilah untuk aktifitas seksual secara melawan hukum syar'i dengan cara senggama melalui dubur/anus atau dikenal dengan liwath.
5. Pencabulan adalah istilah untuk aktifitas seksual yang dilakukan terhadap seseorang yang tidak memiliki ikatan suami istri seperti meraba, meremas, mencumbu, dan aktifitas lainnya, baik dilakukan kepada lain jenis maupun sesama jenis, kepada dewasa maupun anak, yang tidak dibenarkan secara syar'i.
6. Hadd adalah jenis hukuman atas tindak pidana yang bentuk dan kadarnya telah ditetapkan oleh nash.
7. Ta'zir adalah jenis hukuman atas tindak pidana yang bentuk dan kadarnya diserahkan kepada ulil amri (pihak yang berwenang menetapkan hukuman).

FATWA MUI NUMBER 57 YEAR 2014
HAS DECIDED
SET:
FATWA ABOUT LESBIAN, GAY, SODOM, AND FORNICATION

First: General Provisions
In this fatwa what is meant by:

1. Homo-sex are sexual activities of a person committed against a person who has the same sex, both male and female.
2. Lesbian is a term for sexual activity conducted between women and women.
3. Gay is a term for sexual activity conducted between men and men
4. Sodomy is a term for sexual activity unlawfully syar'i by way of intercourse through rectum / anus or known with liwath.
5. Abuse is a term for sexual activity committed against a person who does not have a husband and wife bond such as touching, kneading, fondling, and other activities, whether done to other types or same sex, to adults and children, which is not justified by syar'i.
6. *Hadd* is a type of punishment for a criminal offense whose form and level has been set by the texts.

7. *Ta’zir* is a type of punishment for a crime whose form and measure is submitted to *ulil amri* (the party authorized to impose a penalty).

**Kedua : Ketentuan Hukum**

1. Hubungan seksual hanya dibolehkan bagi seseorang yang memiliki hubungan suami isteri, yaitu pasangan lelaki dan wanita berdasarkan nikah yang sah secara syar’i.

2. Orientasi seksual terhadap sesama jenis adalah kelainan yang harus disemuhkan serta penyimpangan yang harus diluruskan.

3. Homoseksual, baik lesbian maupun gay hukumnya haram, dan merupakan bentuk kejahatan (jarimah).

4. Pelaku homoseksual, baik lesbian maupun gay, termasuk biseksual dikenakan hukuman hadd dan/atau ta’zir oleh pihak yang berwenang.

5. Sodomi hukumnya haram dan merupakan perbuatan keji yang mendatangkan dosa besar (fahisyah).

6. Pelaku sodomi dikenakan hukuman ta’zir yang tingkat hukumannya maksimal hukuman mati.

7. Aktifitas homoseksual selain dengan cara sodomi (liwath) hukumnya haram dan pelakunya dikenakan hukuman ta’zir.

8. Aktifitas pencabulan, yakni pelampiasan nasfu seksual seperti meraba, meremas, dan aktifitas lainnya tanpa ikatan pernikahan yang sah, yang dilakukan oleh seseorang, baik dilakukan kepada lain jenis maupun sesama jenis, kepada dewasa maupun anak hukumnya haram.


10. Dalam hal korban dari kejahatan (jarimah) homoseksual, sodomi, dan pencabulan adalah anak-anak, pelakunya dikenakan pemberatan hukuman hingga hukuman mati.

11. Melegalkan aktifitas seksual sesama jenis dan orientasi seksual menyimpang lainnya adalah haram.

**Second: Legal Provisions**

1. Sexual intercourse is only permitted for a person who has a husband and wife relationship, male and female partners based on legitimate marriage in *syar’i*.

2. Orient sexual orientation is a disorder that must be cured and irregularities that must be straightened out.

3. Homosexual, both lesbian and gay law is *haram*, and is a form of crime (jarimah).

4. Homosexual perpetrators, both lesbian and gay, including bisexual are subject to *hadd* and / or *ta’zir* penalties by the authorities.
5. Sodomy of the law is *haram* and is a cruel act that brings great sin (*fahisyah*).
6. Sodomy applicants are subject to a *ta’zir* punishment whose maximum sentence is death penalty.
7. The homosexual activity other than by sodomy (*liwath*) the law is *haram* and the perpetrator is subjected to *ta’zir* punishment.
8. The activities of sexual abuse such as palpation, squeezing, and other activities without legitimate marriage bonds, performed by a person, whether committed to other types or same-sex, to adults and children are *haram*.
9. The perpetrators of obscenity as referred to in number 8 shall be subjected to *ta’zir* punishment.
10. In the case of the victim of a homosexual crime (finger), sodomy, and immorality are children, the perpetrator is subjected to a penalty of punishment to the death penalty.
11. Legalizing same-sex sexual activity and other deviant sexual orientations is *haram*.

**Ketiga : Rekomendasi**

1. DPR-RI dan Pemerintah diminta untuk segera menyusun peraturan perundang-undangan yang mengatur:
   a. tidak melegalkan keberadaan kamunitas homoseksual, baik lebi maupun gay, serta komunitas lain yang memiliki orientasi seksual menyimpang;
   b. hukuman berat terhadap pelaku sodomi, lesbi, gay, serta aktifitas seks menyimpang lainnya yang dapat berfungsi sebagai zawajir dan mawani’ (membuat pelaku menjadi jera dan orang yang belum melakukan menjadi takut untuk melakukannya);
   c. memasukkan aktifitas seksual menyimpang sebagai delik umum dan merupakan kejahatan yang menodai martabat luhur manusia.
   d. Melakukan pencegahan terhadap berkembangnya aktifitas seksual menyimpang di tengah masyarakat dengan sosialisasi dan rehabilitasi.
2. Pemerintah wajib mencegah meluasnya kemenyimpangan orientasi seksual di masyarakat dengan melakukan layanan rehabilitasi bagi pelaku dan disertai dengan penegakan hukum yang keras dan tegas.
3. Pemerintah tidak boleh mengakui pernikahan sesama jenis.
4. Pemerintah dan masyarakat agar tidak membiarkan keberadaan aktifitas homoseksual, sodomi, pencabulan dan orientasi seksual menyimpang lainnya hidup dan tumbuh di tengah masyarakat.

**Third: Recommendations**
a) DPR-RI and the Government are required to immediately establish legislation regulating:

1. Does not legalize the existence of homosexual, gay or other gay, and other communities with aberrant sexual orientation;
2. Severe penalties for sodomy, lesbians, gays, and other deviant sexual activities that can serve as zawajir and mawani’ (making the offender a deterrent and the unbeliever becoming afraid to do so);
3. Incorporating sexual activity deviates as a general offense and is a crime that tarnished the dignity of the human person.
4. Carry out prevention of the development of deviant sexual activity in the community with socialization and rehabilitation.

b) The government shall prevent the widespread deviation of sexual orientation in the community by conducting rehabilitation services for the perpetrators and accompanied by harsh and firm law enforcement.

c) The government shall not recognize same-sex marriage.

d) The government and society to not allow the existence of homosexual activity, sodomy, obscenity and other deviant sexual orientation live and grow in society.

Second, the source of secondary research is the news media about the application of Islamic Law to LGBT in ASEAN. There were two cases examined about how the application of the law from both the Royal Kingdom of Thailand and Islamic Law was implemented in Aceh Indonesia on cases related to LGBT. Both are very contrasting, because on the one hand, Thailand, provides a special space for LGBT.

Thailand itself is known as a country that is easy for someone to be able to change sex and express LGBT identity expression. Thai tourism cannot be separated from Lady Boy or Kathoeys, a type of LGBT. In legislation, Kathoeys gets protection for their life activities. This can be

2http://globalasiablog.com/2016/03/18/the-social-acceptance-of-kathoey-in-thailand/
3https://theculturetrip.com/asia/thailand/articles/a-brief-history-of-thailands-transgender-community/
seen from the history of Kathoeys itself which can be summarized as follows:

a) Since 1956 legal sodomy for adult men.
b) Since 2002 the ministry of health abolished homosexuality as a mental illness or psychiatric disorder.
c) Since 2005 the Thai military lifted a ban on LGBT people to serve in the military.
d) In 2009 Red Cross has banned MSM (Male Sex Male) providing blood donation, but there are campaigns to allow.
e) Since 2015, anti discrimination laws in employment.

In Indonesia, in particular there are LGBT cases that are treated as a sin, so they are no longer fostered but caning is imposed for those who commit Liwath's actions with caning as in Aceh, for those who are same-sex two and two. Other cases are not whipped like The case of Gay Kelapa Gading, Gay Wedding in Bali, And Gay Party Oval Hotel because the location is outside Aceh, but still gets ridiculed and curses from netizens. In general, the law in the form of legislation in Indonesia still silences LGBT, the visible impression is, LGBT is not prohibited in certain matters such as comedy and film and also is not

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5http://aceh.tribunnews.com/2018/07/14/pasangan-homo-dicambuk


8September 2015, same-sex marriage was witnessed by one of the stakeholders (the leader of a Hindu religious ceremony). Bali Governor Made Mangku Pasyika stated, "same-sex marriage is forbidden in Hinduism". But this event took place in a hotel in Bali. Loading News.com.au Australia


10April 30, 2017, Police arrested 14 allegedly gay men in two rooms at Oval Hotel Surabaya. Five of them are HIV positive. Posted on French AVP news media.

permissible such as disturbing road order and the community and holding transvestite and LGBT contests.

Qualitative methods are used in this study with the approach of legal sociology and communication science. The legal sociology approach is used to answer the formulation of the first problem in measuring between domination, influence and legal dependence on LGBT behavior. Legal domination of LGBT or vice versa, or laws that affect LGBT or vice versa, or the law has dependence on LGBT or vice versa. Three key words: domination, influence and dependence on sociology determine the solution. MUI fatwa number 57 in 2014 which is a product of Islamic law as an alternative law, for example, can it be said that it dominates and influences LGBT and determines weak or strong dependence both at the individual, group and society level and even the state on the enactment of the law.

The communication science approach is used in answering the formulation of the second problem, namely how to find communication patterns that are beneficial to all parties, both those carrying the MUI fatwa with various models of punishment that will be applied to LGBT with human rights activists in defending LGBT, as the right to enjoy life as a new sex apart from male and female. The communication pattern that the researchers mean here is the pattern of communication that provides solutions to solutions, such as what was done by Risma, the mayor of Surabaya when dissolving Dolly, the largest prostitution base in ASEAN at that time. The communication pattern that Risma runs is not like the da'is who prioritize the arguments of religion with the background of hell heaven. Risma carries out a ‘change in profit’ communication pattern, from illness to health, from being insulted to noble dignity. Risma's communication pattern was successful by communicating solutions and solutions in the form of guidance and continuous participation both in the field of work and health supervision. Risma's communication pattern can be replicated in the
pattern of how to deal with LGBT at the ASEAN level, because it is not repressive but is educationally preventive.

**Analysis and Discussion**

There are two problems in the research formulation, first, how can Islamic Law (MUI Fatwa number 57 in 2014) be accepted as alternative law and can be applied in ASEAN member countries? Second, what is the pattern of communication that can combine Islamic Law (MUI Fatwa in 2014) and Human Rights to LGBT in a mutually beneficial governance? The aim of the research is to answer the two formulations of the above problems, first, namely to explain the study and the results of Islamic Law (Fatwa MUI in 2014) about LGBT can be accepted as an alternative law and can be applied in ASEAN countries. Secondly, the pattern of communication that can combine Islamic Law (Fatwa MUI in 2014) with human rights towards LGBT well and produce win-win solutions.

The results of the study consisted of two: first, MUI Fatwa number 57 in 2014 could be carried out for those who bind themselves to this regulation. Law is a collective agreement and cannot be imposed. The articles in the MUI Fatwa relating to LGBT do not dominate and do not have a broad influence on DPR-RI members in Indonesia, especially and to ASEAN member countries in general. The dominance of Islamic Law in ASEAN is a long history of each ASEAN country's journey. Second, the communication patterns that can be applied in implementing laws relating to LGBT are more practical and pragmatic, not dogmatic. Heaven and hell and the doom of God no longer give fear to LGBT, but in this case, humanity and health factors can change perceptions of the worldview.

Discussions on LGBT and MUI fatwa applications in ASEAN countries are divided into pros and cons. For those who are pro-MUI fatwa applications in ASEAN, state that the punishment for LGBT people from the lightest to the death penalty is a must. Their rationale
is the arguments that state that social sinners are obliged in law according to the lightness and severity of the punishment that comes from God through the scriptures, and the penance for LGBT or Liwath is by caning to death. Obey God’s arguments are reward and proof of loyalty.

For the supporters who contradict the application of the MUI fatwa in ASEAN, they believe that God created everything with wisdom. LGBT is a problem that must be solved in a good way. Not in a cruel way, even to the point of losing lives. LGBT is God’s temptation that can be solved by humanitarian means, especially by giving away their human rights as well as other human rights.

**Conclusion**

The conclusions of this study are: first, the application of MUI number 57 of fatwa in ASEAN cannot be realized because every ASEAN member country has a different legal and social perspective on LGBT. Second, the communication pattern of the Risma Solution practiced in Dolly’s case can be applied in the LGBT case. The contribution of this research is expected to be implemented by ASEAN countries in the face of LGBT. The suggestion for other researchers is to keep looking for communication patterns that are more practical and pragmatic solutions in other extra ordinary cases.

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Legal Protection towards Indonesian Traditional Foods and Drinks

Endang Purwaningsih
Muslikh
Nelly Ulfah
Nurul Fajri
Faculty of Law, YARSI University, Indonesia
1E-mail : e.purwaningsih@yarsi.ac.id

Abstract

Traditional knowledge like traditional food and drinks are kind of traditional work in the scope of traditional knowledge that has been owned communally, hereditary guarded preserved and unknown original individual maker. The development of products and recipes is also essentially an enrichment of its human resources. Legal awareness to protect it, closely related to human intellect, producer orientation towards the commercialization of competitive food products in the Globalization era to be empowered, developed so as to create an innovative culture and not exploited by outsiders who want to use it illegally. There must be an effort to protect the traditional knowledge optimally. Traditional foods and drinks maker and others should be empowered and their products should be protected. Indigenous people have to take a part to promote it, supported by coordination National Government, Directorate General of Intellectual Property Rights Ministry of Law and Human Rights, Ministry of Industry, Ministry of Commerce, Ministry of Cooperative and SME’s, Ministry of Tourism and Creative Economy, Local Government, Banking, Local and National board of Industry (called DEKRANAS/DA), University, IPR Consultant and Non Government Organization (NGO). In the law of traditional knowledge, people will be supposed as a subject that has an active role in legal protection and traditional foods and drinks preservation activities.

Keywords: Empowerment model, Legal protection, Traditional foods and drinks,

Introduction

Traditional knowledge like traditional food and drinks are kind of traditional work in the scope of traditional knowledge that has been owned communally, hereditary guarded preserved and unknown original individual maker. The development of products and recipes is also essentially an enrichment of its human resources. Legal awareness to protect it, closely related to human intellect, producer orientation towards the commercialization of competitive food products in the Globalization era to be empowered, developed so as to create an innovative culture and not exploited by outsiders who want to use it
illegally. It has been identified several things that need to be immediately pursued further handling and is expected to accelerate the realization of widespread public expectations for the utilization of genetic resources, traditional knowledge can be done optimally. Most traditional food producers are small and medium enterprises starting from the home industry, increasingly becoming business entities and becoming legal entities. Currently SMEs can be used as the motor of the economy of the country, which is not easily destroyed by the impact of world recession, even with the declaration of creative economy, can trigger the economic arousal that collapsed. SMEs crawl from the home industry to a larger scale, and not a little later turned into a legal entity.

To facing the globalization era and synergy with TRIPs-TRIMs WTO, also the focus of attention is the increasing awareness of the community in efforts to protect natural resources, especially the diversity of traditional food and herbs spread in Indonesia. Given the protection of traditional knowledge as well as folklorehrough copyright is very difficult because it must be originality and individuality, also through patents are very complicated because non patentable, while waiting sui generic regulation until now has not been done, it needs to find legal solution, with using trademark protection and geographical indications. Also consider building efforts by utilizing local wisdom in the production process and fostering motivation in the commercialization of quality products with brandmark to product competitiveness.

According to Peter & Olson (2010), “...because consumers cannot buy a brand unless they are aware of it, brand awareness is general communication goal for all promotion strategies. A company’s brand awareness strategy depends on how wellknown the brand is. Publicity and sales promotions also can have reminder effects. Managers of less familiar brands have a more difficult task and may have to spend heavily to create brand awareness.”
The indigenous people empowerment model in the protection of traditional knowledge (Purwaningsih, 2013) emphasizes the active participation of the community, helping the government and campus to empower the community of traditional knowledge owners by promoting and protecting. Efforts to develop products to be more competitive in this globalization era need to get serious attention, offset by product branding to promote traditional food or herbs, or through geographical indication considering the existence of communal ownership of traditional foods that are still original in the community. For that it needs to be facilitated for the community to become more empowered, to better understand its needs both from the side of law, economic side and also technology that may be needed.

SMEs studied are craftsmen in home industry scale and traditional food or herbs small industry/traditional medium enterprises which produce traditional knowledge of food or herbs, which number hundreds and spread in research area with various problems from continuity of production, marketing, technological tools & access, human resources, legal issues concerning companies/business entities, standards of distribution permit, competition, marketing, brand, transaction and legal protection. Research is limited to intellectual property protection (trademark) and empowerment in the branding effort that may be provided or obtained by these SMEs. The problem under study is limited as follows. (1) producer motivation towards traditional food protection through trademark registration and/or geographical indication; (2) Profile of traditional food and herbs owner producer and their needs related to potential and competitive product development strategy; (3) Models of protection and development of traditional food and herbs products; and (4) the drafting of trademark and geographical indications in accordance with the aspirations of the people.
Method

This research is empirical juridical, with qualitative descriptive research approach to describe and analyze potential and prospect, as well as direction of protection of traditional food in selected area, participatory research approach (PRA), and sociological juridical approach to achieve empowerment goal that promote and protect. The subjects of research both at first and second phase are traditional food and herbs producers in selected areas in Indonesia, taking samples of Padang, Palembang, Bangka Belitung, Mataram, Central Java (Solo, Semarang, Purworejo, Batang), East Java (Surabaya, Madiun) and Yogyakarta, then model applied only at Yogyakarta, Central Java ad East Java (2018).

Analysis and Discussion

Government in this case related agency in the management of traditional knowledge is responsible for all forms of exploitation of traditional knowledge and folklore. This is because so far there has been no specific form of protection to accommodate this problem and strict legal sanctions for foreigners/outsiders who utilize this intellectual property without the permission of the traditional community of its owners (Purwaningsih, 2005). So far there is no proper legal protection regarding this traditional knowledge and folklore. Most manufacturers are SMEs and still use traditional family management, done manually with the help of simple equipment.

The current direction of traditional knowledge goes to a separate form of IPR protection system, which sui generis tries to maintain traditional knowledge through preservation, protection and promotion. This path is pursued according to Twarog (2006) in order to approach to the management of traditional knowledge can be done holistic approach, directed and integrated and able to realize the traditional knowledge as an asset in economic development. WIPO sub Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore stated that the traditional knowledge (TK), and how to preserve, protect
and equitably make use of it, has recently been under increasing
attention in a range of policy discussions, on matters as diverse as food
and agriculture, the environment (notably the conservation of biological
diversity), health (including traditional medicines/herbs), human rights
and Indigenous issues, cultural policy, and aspects of trade and
economic development.

Conceptually, community empowerment with participatory
approach (Soenyono, 2007) can be explained: (1) mapping of area
potential, covering potential of natural resources (NR), human resources
(HR), socio-cultural conditions, (3) feasibility analysis of the various
business options that have been established as the basis for
determining the business that will be the focus (core business),
business support, business related, Upstream and downstream
businesses as well as institutions that will support the business
development, (4) expected outputs with this concept are labor
absorption, regional economic growth, investment growth and poverty
reduction. The main characteristic of empowering the community is to
focus on "indigenous development" policy using local, local and local
human resources, institutions and physical potentials. Thus,
empowering communities can be done by integrating the mobilization of
actors, organizing resources, optimizing existing institutions and
establishing new institutions and selecting strategic activities in
support of regional development.

Likewise a company should develop R & D in addition to knowing
the market and possible new products, the development of regulatory
and political applications related to factors of production, as well as to
plan the development of enterprises based on SWOT analysis. This is
similar to the opinion that Business research is undertaken to reduce
uncertainty and focus decision making (Zikmund, Babin, Carr, Griffin,
2013).

In addition to the importance of professional organizations, as
well as corporate strategy to dominate the market needs to be
considered. In the marketing strategy is known brand development. The trick can (1) give free samples, 2) make public relations like war, 3) use the internet and 4) make funny (Peter and Olson, 2013). In marketing other than innovation it is also necessary to pay attention to the sense of mission marketing (Kotler and Armstrong, 2014) namely a principle of sustainable marketing holding that a company should define its mission in terms of broach social terms rather than narrow product terms. Company should define it. Purwaningsih (2015) also stated that the business actor is responsible for its products to the consumers. So far, the management of traditional food has been done for generations, even to this day there are still many hawkers hoisting in Central Java, Yogyakarta and East Java. The issue of exploitation of the nation's heritage, both traditional knowledge and traditional cultural expression, originated from the utilization of foreign genetic resources of knowledge and folklore by foreign countries over drugs whose raw materials come from genetic resources of developing countries including Indonesia. From the point of view of the economic interest of developing countries including Indonesia, it is very unfair if the raw materials from Indonesia are taken advantage of and patented and branded abroad and sold and bought expensive by the people of Indonesia.

Applied to traditional producer society, it needs continuous empowerment and facilitation in terms of economic, technological and legal interests. Need education, socialization, deep mindset change in this producer society. Unfavorable market conditions and investment climate could be a decisive factor that might make production jammed. Subramanian (2016) states that in order to mitigate the information asymmetry problems and the valuable management problems,

Traditional food products are a reflection of the work of traditional society that should be protected and promoted vigorously. Whether in the face of the MEA or the free market era, it is imperative to branding the product and the introduction in the market, by ensuring the quality of the product. The need for a brand on a product or with a
geographical indication strongly supports the promotion and reputation building, which is based on brand branding. Branding rights are exclusive rights granted by the state to registered trademark owners for a period of 10 years using their own brands or licensing to others.

According to Rizqi (2012), the brand is only a sign attached to a good that serves as a distinguishing force in the trade of goods and services. This level of power difference affects the level of protection of a brand. Brands with high distinguishing power will have strong protection and vice versa. This protection is a relationship to the differentiating power capabilities of the brand in relation to the assessment of the presence or absence of the equation in essence with other brands. (Kurniasih, 2009). The application for registration of a mark to the Directorate General of Customs and Excise may be based on absolute and relative reasons. Absolute denial is due to its universal nature and for objective reasons in that it must be known and examined by the brand examiner and may also be because it is contained in every brand legislation in many countries although arranged in a different order. (Kurniasih, 2009) Meanwhile relative rejection is due to reasons that are subjective or depend on the ability and knowledge of the brand examiner and also because not all countries include the rule.

Tushnet (2017) states at the heart of modern trademark law, we regularly dispense with concerns over confusion in order to serve other aims. We also engage cases by cases in the trademark system. The registration systems are, and we should recognize it as such. It should not be left to collapse under its own contradictions.

The many types of traditional knowledge, especially in the form of traditional food spread throughout the Indonesian archipelago, not yet registered brand, in the form of indigenous community communal ownership, require more serious handling of joint ownership. For communal ownership protection is required geographical indications, while for individual ownership is required innovation or improvement in
order to have differentiating power to the original. Manufacturers must study the market forces and innovations it is important to create new products that are completely different from communal products (which can be protected with geographical indications) in order to register the brand. This innovation is also important to improve competitiveness in order to dominate the market.

According to Cravens & Piercy (2009), “Types of Innovations: (1) Transformational innovation, that are radically new and the value created is substantial. Examples include CNN news channel, automatic teller machines, and digital cameras; (2) substantial innovation, products that are significantly new and create important value for customers. Examples include Kimberly Clark Huggied/Nappies and Dier Coke; (3) Incremental innovations, new products that provide improved performance or greater perceived value (or lower cost), include new flavor coca cola. New product initiatives are guided by customer need analysisi. Even transformational innovation should have some relationship to needs that are being met by existing products. However potential customers may not good sounding boards for radically new innovation. Importantly, these transformational innovation may have a disruptive impact on existing products.”

Interview with Andi Department of Micro, Small and Medium Enterprises and Cooperatives Purworejo District, April 3, 2017, stated that our Section is more human resources development and assistance in finding funding, while promotion in Dinas Perindustrian dan Perdagangan (Disperindag) and no coordination due to different institutions. There is no official association of SMEs, still a group, there is no unification of agencies. Local food is plenty but there is no complete data (pastry cake, clorot, gebleg, dawet ireng, creampying, etc) facilities every year, and we only rely on it, the budget that government grants to our agency. Enterprises promote during this through exhibition of cast and only a little through the media online.
MSME of Batang Regency interview April 28, 2017, if necessary MoU then it should be to the Office of Industry and Trade of UKM in which there are: 1) Industry Sector, 2) Trade, 3) Cooperatives and SMEs as well as, 4) Markets.

Jamal interview April 28, 2017 Department of communication and informatics Batang District stated that e-commerce training is needed in Batang Regency, especially for today because of many electronic transactions. Interview with Head of Office of SMEs Cooperative and Industry of Bantul District, June 23, 2017, Maryadi, stated that the socialization of intellectual property trademark against 60 SMEs and 30 of them have been enrolled free, but until now there has been no certificate (5 years running). Halal certification has also been socialized and socialization participants have been fulfilled. Meeting between SMEs and office service done once a month can even a month twice, if there is a need. There are also whatsapp (WA) groups that facilitate office service and craftsmen.

Guidance and assistance continues to be undertaken by the agency and the role of service is to facilitate the brand, may be eaten (as halal) label and provide creative home Bantul, in addition there Regional National Craft Council. The obstacle is the need for a notaries deed for the association, so that any development and training project can be followed well. The superior food representing Bantul is ‘geplak’. Constraints on ‘tamerodok’ have not created a producer organization and has not been touched by marketing and management. Constraints on ‘geplak Bantul’, need more serious cooperation with relevant agencies and producers, there has been no significant role of the organization. Other areas still need community empowerment and the attention and partisanship of local government as well as Purworejo and Bangka.
Based on the results of the research note that most of the producers of traditional food & beverages in the area in the form of PIRT, not protected with registered brands, especially with halal label and manufacture and marketing is still very conventional. Of the thousands of SMEs, from Purworejo region want to favor 'clorot' as traditional Purworejo food that can be lifted with protection of geographical indication, and Bantul region with 'geplak'. The Batang area wants to lift 'Grinsing honey', but it is not possible because the material of honey and the process of bees take the essence of honey, not from the stems only. Bangka wants to increase ‘terasi’ as its superior.

It needs empowerment of SMEs to build legal awareness in order to synergy with legal protection effort to SMEs products. There are constraints in addition to factors of production, distribution permit, brand and marketing, so the need for help from various parties, as well
as the government’s alignment to promote and protect the product of food and herbs/herbal SMEs Indonesia.

Legal protection that need to be given to food and herbs/Herbal Products of SMEs in the form of contract law, IPR and business competition, especially in IP field, SMEs need assistance of brand registration assistance and branding strategy and other IPR possible. Clear regulations and policies to raise SMEs need to be upheld for legal certainty to protect SMEs products in order to be competitive, while empowering resources that support local wisdom as optimally as possible.

So far in the second year, we have managed to have our 8 SME brands registered, while 2 up to 5 more are in progress. In line with this, we have also held trainings and assistance programs in terms of legal entity, marketing, and branding strategies. In addition, in the first year, we earned copyright for our model on traditional food protection, and we are still working on the copyright for its implementation.

An interview with Purwono and Ismi of Brebes Industrial Service, and Notowaluyo and Imel of Brebes Cooperatives and SME Service was conducted on Thursday, April 19 2017 at Brebes Industrial Service office to discuss its roles in promoting and protecting food products from SMEs in the area. Ismi explains that the office holds promotion series for SME products through trade expo on the annual basis in such area as TMII, Jawa Tengah Fair, and Brebes local trade fair. These run at least four times a year. Another interview with Subandi and Handayani on April 14 2018 in Yogyakarta reveals that the office does more intensively by holding a bazaar on the weekly basis to accommodate local producers. This is supported by Lurah (sub-district heads), Camat (district heads), and Bupati (regents), as well as by related services. Another interview with Minarni (in East Java) through Wassap application on July 3 2018 reveals that a number of PTs (Perusahaan Terbatas, limited liability company) are now eager to have their brands registered for marketing and reputation purposes, while
the other form of company, CV (*Commoditaire Vennontschap*, a Dutch term for commendatory business), seems reluctant to move forward. The latter does not see the importance of this legal recognition and therefore expects that all—the preparation, financing, and the entire bureaucracy fulfillment—comes to them without having to work on it. Hindered mainly by financial issue, CVs are oriented to merely keep their business going.

Notowaluyo of Cooperatives and SME Services of Brebes office, in an interview on Thursday, April 19 2018, says that the office runs series of programs to motivate SMEs by providing halal trainings at provincial level in Semarang to facilitate the certification process. In 2017, three brands—salt producer Libra, *sanggul* maker, and sale pisang (dried banana fritters)—managed to earn a certificate for their products. In 2018, eight more brands of food products submitted the required documents to get the certificate. The plan is that this will be financed by the local government budget with the following arrangement: 4 files by the district budget, and the other 4 by the provincial budget.

Another interview in Yogyakarta on April 14 2018 with Handayani, a traditional drink producer who makes *wedang owoh* (with the brand *Den Bagus*), reveals that the Cooperatives service annually opens the opportunity for 10 brands to get assisted in attaining halal label. This, however, is still below par so that academic people and those concerned should join forces to address this issue.

**Conclusion**

Needs to empower the producer community in order to protect the producers and their products, the government's side and the helping hand of related institutions, the Department of Cooperatives of UKM, the Department of Industry and Trade, the Department of Food, the Regional Government, the Directorate General of the University of Indonesia and the campus.
Based on the results of assessment and interviews, the superior product to be registered as a geographical indication of Purworejo Central Java is clorot, Bantul Yogyakarta is ‘geplak’, Bangka is ‘terasi’, Bukittinggi area is ‘sanjai’, ‘kurai core’, coffee fire hill and Lombok area is ‘tamerodok’. Potential areas for assisted IG assistance based on data and attention of relevant agencies and producers are ‘tamerodok Mataram’ and ‘geplak Bantul’ Yogyakarta. Constraints on ‘tamerodok’ have not created a producer organization and has not been touched by marketing and management. Constraints on ‘geplak Bantul’, need more serious cooperation with relevant agencies and producers, there has been no significant role of the organization. Other areas still need community empowerment and the attention and partisanship of local government as well as Purworejo and Bangka.

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Access Control and Involvement of Women in Dispute Settlement by the Customary Court in Aceh

Sri Walny Rahayu
Faculty of Law, Syiah Kuala University, Indonesia
E-mail: ayoe_armans@unsyiah.ac.id

Abstract

Settlement of customary disputes by customary courts in Aceh is regulated in Law Number 11 of 2006 concerning the Government of Aceh and various other regulations under the law. But the role and involvement and authority of women in solving problems that occur in society through customary justice is not optimal in terms of access, roles and control. The reality is that the role of women in the customary law system is still in a subordinated, marginalized position, bound to patriarchal culture, even though legal development has equal access dimensions in the rights and obligations between women and men which are regulated in the basic constitution of the 1945 Constitution. These objectives are to explain, what is the role of customary justice in Aceh, how access, role and control of women in legal development in Aceh, the extent to which adat court decisions are obeyed and have benefits in communities in Aceh Province. This writing uses a type of normative juridical research, The approach used through historical approaches, and conceptual approaches. The specification of descriptive analytical research is then analyzed based on qualitative juridical, and presented in the form of description. Women must be legal subjects who have the same rights and obligations that are actively involved in resolving disputes in adat courts. This effort is important because it facilitates the communication process, is very helpful and necessary especially for women as victims. Community compliance with judicial decisions is due to the influence of authority, position, social status, religion of customary judges.

Keywords: Access control and involvement of Women, Aceh, Customary Court, Dispute Settlement

Introduction

Legal development cannot be separated from the history of a nation, has a sustainable concept and never stops. Law development and enforcement does not only matter of law enforcement officers (police, prosecutors, or lawyers) but the last related institution also relies on its own justice seekers. For this reason, it is necessary to increase awareness that litigation is to uphold law and justice, not solely to win cases.

Legal development must be understood and developed as a single system, where there are elements, institutions, elements of legal material and elements of legal culture. National law is a unity of law,
which is built to achieve the goals of the State, which is derived from the philosophy and constitution of the State. Thus according to Ahmad Ramli (2008: 2), in the unity of the law contains the basic objectives of the State, and the legal aspirations of the State of Indonesia. All discourses about national law to be built must refer to both. Legal reform efforts depend heavily on constitutional reform.

The 1945 Constitution Amendment was conducted four times from 1999-2002. This change is a major responsibility for the development of national law towards the ideals of rule of law, which is regulated by Article 1 paragraph (3) of the 1945 Constitution, states that Indonesia is a country based on law. The second Amendment of the 1945 Constitution conducted in 2000 brought important changes in the development of national law. Especially with regard to the authority of Customary Court in Aceh.

The basis of the privileges and specificities of Aceh as a Province, refers to Article 18B paragraph (1) of the 1945 Constitution, which is stated, the state recognizes and respects specific/special government units, which must be determined by constitution. Article 18B paragraph (1) of the 1945 Constitution constitutes the basis for the birth of Law Number 44 of 1999 concerning the Implementation of the Privileges of the Aceh Special Region Province (Privileged Law of the Special Region of Aceh Province). The consequence of the Special Privileges Act of the Aceh Special Region Province, led to the enactment of legal pluralism in Aceh, namely the state law system (state law) which was enacted by unification in Indonesia. Islamic Law and Customary Law. The application of these three legal systems is practiced simultaneously. (Sri Walny Rahayu, 2016: 82, and Sri Walny Rahayu, 2018: 476).

Other important changes with regard to the development of customary law, contained in Article 18B paragraph (2) and Article 28I paragraph (3) of the 1945 Constitution, stated, the State recognizes and respects Customary Law community units and their traditional rights as long as they are alive and in accordance with the development of
society and the principle of the Republic of Indonesia, in line with the development of times and civilizations. But according to (Sri Walny Rahayu, 2014: 111-114), it must be recognized and respected, not only for indigenous people and their traditional rights. The state must also recognize and respect the power to prosecute indigenous peoples in the form of customary courts. Unfortunately, customary courts in Indonesia have not been regulated in Indonesia’s national legal system.

Customary Court is also not regulated in Law No. 48 of 2009 concerning Judicial Power. However, Article 24 paragraph (3) of the 1945 Constitution, stated "other bodies whose functions are related to judicial power are regulated in law." If analyzed and scrutinized, in fact implicitly the authority to adjudicate customary courts outside the state court, is opened by the regulation room by Article 24 paragraph (3) of the 1945 Constitution, which must be regulated by law.

Based on the provisions of Article 18B paragraph (1) and Article 24 paragraph (3) of the 1945 Constitution, Aceh Province determines, Customary Institutions in Aceh, can function and have the authority as Customary Courts. This is regulated by Article 98 of Law Number 11 of 2006 (Law on the Government of Aceh). The implementation provisions of Article 98 of the Law on the Governing of Aceh are regulated by Qanun Number 9 of 2008 concerning the Development of Indigenous Life and Indigenous Culture. Qanun Number 10 of 2008 concerning Customary Institutions. Governor Regulation Number 60 of 2013 concerning Implementation of Dispute Settlement/Indigenous Disputes. Customary Courts in Aceh Province have the authority to complete 18 types of petty crimes.

Article 24 paragraph (3) of the 1945 Constitution is elaborated through Article 5 paragraph (1) and Article 50 paragraph (1) of Law Number 48 of 2009. Related to the context of life values that develop in the community, it is stated that constitutional judges and judges must explore, follow, and understand the legal values and sense of justice that lives in society (Article 5 paragraph (1) of Law No. 48 of 2009).
Therefore Article 5 paragraph (1) and Article 50 paragraph (1) of Law No. 48 of 2009, is the basis for a judge's decision, when making a decision, it is mandatory to explore and understand the legal value contained in the community in Indonesia. A living source of law is one source that can be used as a basis for assessing the judge when issuing his decision.

Norms and patterns of dispute resolution through customary courts in Aceh, come from rules that live in society such as life views, philosophy, experience and character and culture. In Aceh, patterns of social behavior are described as "Adat ngon agama lagee zat ngon sifeut". This means that the reflection of Islamic religion is reflected in the culture of Acehnese in their social life. Based on Islam, as a monotheistic religion, asserting that power, strength and greatness belong only to God. God is the absolute authority over all the existence of the universe. Based on this theological view, Islam denies human superiority over other human beings on the basis of any cultural identity.

Aceh Province has a customary institution, which functions as a customary court, has the authority to prosecute petty crimes, as part of restorative justice that can be done in Indonesia, (Sri Walny Rahayu, 2016: 88). However, the fast-moving legal developments in Aceh Province still need to be tested for access to women's involvement in the constitutional aspects as regulated by the Aceh Governance Law.

The above phenomenon becomes a perspective, in a context that moves from social facts that occur in Aceh Province. Women, still being sexually subordinated, marginalized. Patriarchal culture, still in progress today in Indonesia, including in Aceh Province. When the inclusion of legal instruments promotes women's human rights and gender justice into the social arena of people's lives and into the regulations in Indonesia, various perspectives meet, with various rules that have existed before, which also have their own rules and sanctions. Rules and sanctions come from religion, habits, habits or influences.
from global developments. Including the involvement of women in customary courts in Aceh. The purpose of writing a paper is to explain how the role of the community includes access, roles and control of women in legal development in Aceh. How is the authority of women in customary institutions and customary courts, as well as the extent to which customary court decisions are obeyed and beneficial for the people of Aceh.

**Method**

This writing uses a type of normative juridical research, namely the main data comes from secondary data, which comes from the primary legal materials of legislation relating to the writing studied, secondary legal materials in the form of books, journals, articles and tertiary legal materials originating from website sources and dictionaries. The approach used through historical approaches, and conceptual approaches. The specification of descriptive analytical research is then analyzed based on qualitative juridical, and presented in the form of description.

**Analysis and Discussion**

**Study Literature**

1. **Norms for Dispute Settlement through Customary Courts**

   Norms are models or standards, that can be accepted by the community. The standard believed by the public is a measure of good or bad value. Bryan A. Garner, in Black Law (1161-1162) limits the norms of norms as follows, “A model or standard accepted (voluntarily or involuntarily) by society or other large group against which society judges someone or something. An example of norm is the standard for right or wrong behavior: an actual or set standard determined by the typical or most behavior of a group”.

   Norms for resolving customary law community disputes based on the philosophy of life adopted by the community. Customary law as a legal system, has a pattern of dispute resolution that was born,
composed and built on values, rules and norms agreed upon and believed to be true by the community. The norms and rules that develop are existence and, cannot be separated from the community.

2. Customary Dispute Settlement Pattern

The pattern of dispute resolution in the Customary Court, has strong relevance to the character, values, and dynamics that develop within indigenous peoples. (Syahrizal, 2009: 235). The pattern of indigenous peoples' settlements is based on the life view of the philosophy of human existence. Humans are creatures who always live together as their nature. In the customary view, humans are not seen as individual beings, but as communal beings. Human existence cannot be separated from groups where the parties together carry out their lives. (Moh. Koesnoe, 1976: 61-62). This view of life is called a communal view that is contrary to the views of individuals.

In the modern era, the individualization process influences customary law communities, so that the modernization that must occur remains based on the collective soul and the spirit of cooperation. Customary Law Society translates "disputes" not only for civil cases, which focus on individual interests, but disputes are also used for criminal acts or crimes or violations. The meaning of disputes for indigenous peoples is aimed at social imbalances. That is, if there are disputes that occur in the community, there will be an imbalance in the life of indigenous peoples. Therefore, the community resolves disputes through the mechanism of Customary Law. (Bushar Muhammad, 2002: 62-63). The tradition of resolving disputes within the Customary Law community tends to use traditional patterns or also called family patterns. This pattern is applied not only to civil but also criminal disputes. This is because customary law does not separate the scope of public law from private law.

Hilman Hadikusuma (2001: 176-177), stated that the settlement of business disputes between each party in Customary Law was resolved by the disputing parties themselves. Other parties who provide
assistance such as, relatives, neighbors are considered as liaisons and someone appointed as mediator in resolving disputes. Places and ways to solve them can be done anywhere agreed by both parties. Places and methods of settlement are not bound by cultural customs rules, the importance of consensus is fair and peaceful.

Settlement of disputes with traditional patterns does not mean that there is no compensation or punishment for violators of customary law. Penalties are still applied both in the form of physical punishment and property compensation. The application of punishment depends largely on the type and severity of the dispute that occurs between the parties. The essence of resolving disputes in Customary Law is, to realize peace in a comprehensive sense, not only for parties or perpetrators and victims, but for peace for the community as a whole. Therefore, the approach used is a persuasive approach to resolve disputes, using indigenous and religious languages, so that there is awareness from the parties that there is no meaning in life in the world, if there are disputes and actions that harm others. The purpose of resolving disputes in Customary Law is the realization of permanent peace.

Settlement based on the values, nature, characteristics and characteristics of the community. This philosophy is very important, to understand decisions that are considered by indigenous holders in their disputes. Philosophical considerations carried out are very important, can measure the level of justice, peace, sacrifice and welfare that will be felt by indigenous peoples. (Hilman Hadi Kesuma, 2001: 242-243). Suyud Margono further explained that, disputes through consensus agreements, resolving certain disputes also build, protect and support indigenous peoples so that they last forever or continuously. (Suyud Margono, 2010: 2).

Settlement of disputes through the mechanism of Customary Court, can be done through deliberations that take the form of mediation, negotiation, facilitation, and arbitration. The Four of theses models of dispute resolution are often practiced, by indigenous peoples
in resolving their disputes. Traditional leaders carry out their functions as mediators, facilitators, negotiators and arbitrators. In practice, traditional leaders in general use this approach together, especially in resolving personal and public disputes.

**Discussion**

1. **The term customary law and custom**

   The history of legislation in Indonesia distinguishes between customary law and customs. That is, Customary Law is not the same as habit. Customs are recognized in constitutional law in Indonesia. Customary law is outside constitutional, but the spirit of law formation in Indonesia must be based on Customary Law. The term customary law has long been known in Indonesia. For example, the power of Sultan Iskandar Muda (1607-1636) Aceh Darussalam who ordered the creation of the Meukuta Alam Law, the term Customary Law was used. (Sri Walny Rahayu: 2014).

   The term customary law is clearly written in the Book of the Law of Safinatul Hukkam fi Takhlisil Khassam (the Ark of Judges in resolving all cruel people) written by Jalaluddin bin Syech Muhammad Kamaluddin Kadhi son of the Trussan Khatib State in the orders of Sultan Alaidin Johan Syah (1781-1795). In the opening of the procedural law, the judge examined the case, must pay attention to *Syarak* Law, Customary Law, Customary and *Reusam*. In the 17th century in Aceh, customary law was used, when the main law, which are used by the people of Aceh, namely Islamic law (derived from the Al-Quran, al-Hadith, *ijma’* and *qiyash*), did not clearly set the disputed norms. theoretical custom (adah, urf) has never been an official source of Islamic Law. In practice, customs are often included in one of the legal references. Customs in Aceh, must not conflict with the spirit of Islam, which is contained in the Al-Qur’an and al-Hadith, (Amirul Hadi, 2010: 173).

   Customs that have legal character in Aceh include royal and written laws. The written form of the regulation called sarakata (royal
decree) is the main form of royal customs (royal customs). The term adat is used in sarakata or more popularly referred to as the Meukuta Alam Adat, which is a royal rule made by Sultan Iskandar Muda. At that time adat played an important role in the practice of customary justice. Adat is meaningful in traditional practices of customary justice and is a custom of the royal custom both in written form (sarakata) and not. Therefore, the sultan in Aceh, besides the ruler who was the central figure of the kingdom, was also considered the lawmaker and the highest judge who applied the customs of the kingdom (royal custom), in Amirul Hadi, (2010: 174-190).

Snouck Hurgronje first conducted a systematic study that used the adatrecht term for Customary Law when conducting research in Aceh (1891-1892). Snouck Hurgronje understood customs as custom (custom) and customary law, with customary emphasis being more used than shari'ah which is known as law. Customary forms that have legal consequences are referred to as Customary Law.

2. Customary Law in Aceh in Indonesia Legal System

Customary law in Indonesia until the 14th century grew in the atmosphere of their respective Customary Law systems. For example, the people of Aceh, have their own customary law system with principles that are considered right in the area. The same thing happened to Minangkabau, Batak, South Sulawesi, Java and others. The similarity of the customary law system for indigenous peoples is the communality and unwritten nature.

a. Aceh Darussalam Kingdom

Islam entered the archipelago at the end of the 12th century, beginning in Aceh, brought by Arab and Indian traders where people had embraced Hinduism, Buddhism and other beliefs. Islam becomes a religion that influences the system of Customary Law in Aceh as an alternative solution to problems in everyday community relations (Hilman Hadikusuma, 2003: 53-68, and Otje Salman Soemadiningrat, 2002: 67-70). The history of customary law in Indonesia cannot be
separated from the role of Islamic law. Indonesia has the largest adherents of Islam in the world. Thus, customary law in Indonesia absorbs elements of Islamic teachings. Customary Law Configuration is influenced by Islamic teachings, because of 2 (two) factors, namely:

1) Islam enters the coast of Sumatra, which is a strategic place to connect with the outside world. Coastal communities at that time tended to join in every social tradition that developed in their territory, so it was not difficult for preachers / scholars to teach Islamic teachings. The Ulama eliminates social stratification, which is taught by Hinduism, and applies in the community at that time;

2) Islam is able to accommodate all other belief systems that develop in coastal communities. Islam enters through the Indian state, the majority of them are Hindus, so the accommodative possibilities of Hinduism teachings are unavoidable. Thus, it is not too difficult for Sufis to internalize the values of Islamic teachings to local people who have other beliefs.

Century XII stood 2 (two) small kingdoms in Aceh, Peureulak (read: Perlak) and Pasai. The Peureulak Sultanate was located to the east of Samudera Pasai, which was founded by an Arab trader, who married the daughter of Meurah Peureulak and gave birth to the first Sultan of Peureulak, namely Sayid Abdul Aziz with the title Sultan Alaiddin Syah (1161-1186). The government system in Peureulak is based on the teachings of Islam. The previous Peureulak kingdom was a Hindu kingdom. After King Peureulak was led by Said Abdul Aziz, because of his father's marriage to one of King Peureulak's daughters, "Meurah Peureulak", the Peurelak kingdom was an Islamic kingdom. (Slamet Muljana, 1968: 134). Peureulak Sultanate stood for 83 years. In 1243, the Peureulak Sultanate joined the Samudra Pasai Sultanate, ruled by Malikul Zahir. The merger of the Sultanate of Peraulak and the Pasai Kingdom, caused the Kingdom of Aceh Darussalam to implement a system of government based on Islamic teachings.
b. Islamic Teachings adopted by the Customary Law System in Aceh

The Aceh Darussalam Government has known the smallest territorial form, namely Gampong (village), which has a place of worship called Meunasah, which is led by Keuchik or Geuchik. In his daily activities the Keuchik was assisted by a spiritual advisor (Qadhi) commonly called Teungku Meunasah and the village elders (Ureung Tuha). Gampong unity under Mukim is led by an Imeum Mukim, serving as a leader (imam) in a mosque. The mukim-mukim unit is under the Nanggroe (state) led by a Uleebalang. The title of Ulebalang was originally a blessing from the Sultan to the appointed local ruler. Authorities were given mandate as military leaders in their respective jurisdictions (Hurgronje Snouck, C, 1985: 4).

During the reign of Nakiatuddin Syah (1675-21678), government activities were concentrated in the royal capital, which supervised three sagi (Lhee Sagoe), namely sagi 22, sagi 25 and Sagi 26. Each sagi was led by Ulebalang (Teuku or Chik) who had the authority to arrange some mukim and gampong. Islamic influence in the legal system of the government of Sultan Iskandar Muda (1607-1636), among others, is as follows:

1) The implementation of government administration uses Arabic and Arabic-Malay writing, with a sultanate stamp;
2) Foreign vessels and ships from neighbouring countries entering the port of Aceh must comply with the rules of migration, customs, and security that have been determined. Any violations that occur are carried out in accordance with the law in Aceh;
3) Legal regulations based on Islamic Law and Customary Law, with the threat of fine, imprisonment, hand-cutting law, exile law and death penalty;
4) The existence of a customary law book, which contains Islamic teachings called "The Book of Meukuta Alam". This Book of Law,
applies not only in the territory of the Kingdom of Aceh, but also used by the Sultanate of Brunei in North Kalimantan;

5) The existence of financial economic rules and business activities, such as customs regulations, domestic and foreign trade traffic, industrial company regulations, handicrafts (weaving, gold, silver, copper) mining large shipyard companies, barges and various types of weapons (rifles and cannons);

6) The presence of army troops consisting of male soldiers and female army divisions called "Keumala Cahaya".

Iskandar Muda died, the Aceh sultanate was ruled by Sultan Alaiddin Muhammad Johansyah (1781-1795). This Sultan ordered Jalaluddin ben Syech Muhammad Lizard Muhammad Kamaluddin Putra to Khatib in the land of Trussan in 1533 AH, to write a legal book called "Safinatul Hukkam fi Takhlisul Khassam" (ark for all Judges in resolving cases). This book regulates formal procedural law for Judges, to resolve criminal or civil cases in Aceh Darussalam.

The Book of Safinatul Hukkam fi Takhlisul Khassam consists of an Introduction, called: Mukaddimah, which is a source of law. Mukaddimah consists of Syarak Law, Customary Law, Custom and Reusam. The Mukaddimah also regulates the position and duties of judges, kings and kingdoms, the relationship between the king and the people, the judiciary, the court case, the prosecutor and the defendant, the plaintiff and the defendant, witnesses and evidence. The Mukaddimah systematics consists of Chapter I, describes the law of commerce and the settlement of commercial cases. Chapter II describes family law, marriage and divorce. Chapter III explains criminal law, threat of punishment, and inheritance law.

Islam entered Indonesia, causing consequences in several regions in Indonesia. this condition is evidenced by the acceptance of Islamic teachings into their customs and customary law. this happened in areas such as Aceh, Banten, South Sulawesi. The regions that continue to maintain the authenticity of their customs, without being influenced
by Islamic teachings such as Nias, Mentawai, Toraja, Asmat. Areas that maintain the original nature of Hinduism are found in Balinese indigenous communities.

due to Portuguese and Dutch colonization, customary law in several regions in Indonesia was influenced by the teachings of the colonial religion. This happened to the original Batak tribe, also found in North Sulawesi, Maluku, Flores. The area, initially the customary law was influenced by Hinduism and Islam. However, due to colonialism, the teachings of Christianity and Catholicism, entering and influencing into Customary Law is the area.

3. Structure of the Aceh Society, the Source of Customary Law and Customary Institutional Relations

Acehnese indigenous people have kinship including differences in gender, age, and status in the family which reflect the behavior of interaction between family members. The community structure is as follows:

a. Ordinary People, which in Acehnese terms are called Ureung Le (ordinary people). This group is the majority group that does not have social status.

b. People who have a lot of assets are hard workers who develop their economies so they are rich and have their own groups in the structure of society in Aceh. This group often acts as a contributor to funds for social problems, religion;

c. Ulama, who are knowledgeable and educated in the field of Islamic religion and recognized by the community, are called Teungku. Teungku has the role of teaching and fostering aqidah and morals;

d. The nobles, including the descendants of the Sultan of Aceh who had the title "Tuanku" came from "Uleebalang" with the title "Teuku" (for men) and "Cut" (for women).

The ethnicity of the Acehnese community consists of several tribes. Each tribe has their own culture, language and mindset as follows:
a. Majority of Aceh’s population, almost in all Kab / Kota in Aceh Province, especially in Aceh Besar District, Banda Aceh City, and Pidie District. The language used is Aceh Language;
b. The aneuk jamee tribe is in the Regencies of Aceh Barat Daya and Aceh Selatan. Language used by Aneuk Jamee Language:
c. The Alas tribe is part of the Southeast Aceh District. Language used in Alas;
d. The Gayo tribe is in Central Aceh District, Bener Meriah District, some in Southeast Aceh District. The language used by the Gayo language;
e. Tamiang tribes are in Aceh Tamiang District and East Aceh. The language used by Tamiang;
f. Kluet tribe is in South Aceh Regency. Language used by Kluet Language;
g. The Singkil tribe, located in Aceh Singkil District. The language used is Julu, Haloban, Pak-pak, sialut or Nias Language.
h. The Semeulu tribe is in Semeulu Regency. Language used by Lekon, Sigulai, Devayan.

Customary Classification and Customary Law in Aceh refers to 3 (three) sources, namely:
a. *Adatullah*, namely Customary Law which is sourced almost entirely (absolutely) on rules based on Al-Quran and Al-hadith;
b. *Adat Tunnah*, which is custom as a manifestation of *Qanun* and *Reusam* that regulates the lives of people in Aceh;
c. *Muhakamah* customary, namely Customary Law which is manifested in the principle of deliberation and consensus.

The existence of the Law on the Government of Aceh in 2006, has the consequences of the form of customary law which is largely unwritten, formalized into law. The general regulation concerning Adat and the source is detailed by Article 1 number 8, Qanun concerning Wali Nanggroe 2012. Adat is the practice of human life habits carried
out from generation to generation which binds cause and effect and is not written which consists of:

a. Adat syar’i (governing the country);
b. Adat aridh (custom that adopts customs from outside);
c. Adat Daruri (important habits);
d. Nafsi nafsu (custom itself);
e. Adat Nazari (derived from thought);
f. Adat ‘uruf (habit);
g. Ma’ruf custom (custom that has become a habit that has been accepted),
h. Muqaballah Habits (reciprocal habits);
i. Muamalah Habits (daily social habits);
j. The customary court of ijma ‘jam‘iyah (custom approved by the DPRA with the Government of Aceh).

Relations between Customary Institutions in Aceh are illustrated in diagram I:

Diagram I above shows the relationship between adat institutions in Aceh coordinated under the Wali Nanggroe and MAA, but the Adat Institute still has the authority as an adat court in accordance with
their respective functions. This is regulated by Article 98 of the Law on the Governing of Aceh 2006 and the Qanun concerning the Development of Indigenous Peoples' Life in 2008 and the Qanun on Customary Institutions in 2008, (Sri Walny Rahayu, 2014)

4. Aceh Community Ecosystem Structure

Religion and Islamic culture have an important role and greatly affect the daily lives of the Acehnese people. Therefore Aceh was known as the "Veranda of Mecca" - Seuramo Mecca, (A. Hasjmy, 1981: 193-196). The name of the Veranda of Mecca for Aceh because based on history, the first entry of Islam to Indonesia from Mecca through Aceh. The first Islamic kingdom in Indonesia was in Aceh and other Muslims in the archipelago at the time, who wanted to make the pilgrimage to Mecca, through Aceh. Aceh is a transit place when going and going home for those who perform Hajj. (Dervish, A. Soelaiman, 1989: 20-21).

The position of adat and the teachings of Islam are described Adat bak Poteumereuhom, Hukôm bak Syiah Kuala, Qanun bak Putro Phang, Reusam bak Laksamana, Hukôm ngon Adat lagee Zat ngon Sifeut”. This means that the holders of customary / political power are sultans / kings. The holder of legal / Islamic power is the justice of ulama / qadhi malikul, legislator / Qanun is the People’s Legislative Assembly symbolized by Putri Pahang (Putroe Phang). The holder of the reusam / protocol power is the admiral / defense minister.

The meaning of “Hukôm ngon Adat lagee Zat ngon Sifeut” is (law with custom cannot be separated, for example substances with their nature). Therefore, law (Hukôm) as a substance is difficult to change. The law as substance originates from Islamic Law, while adat is the nature (pattern-behavior) which can basically change. The inclusion of Islamic law as a basis for adat in Aceh gave rise to the abusive habits formed by the ulamas. One habit cannot be accepted generally before there is a legal basis. the above conditions explain, in addition to the norms and customary laws governing the lives of the Acehnese, there are still other norms, namely Qanun and reusam. Qanun is an
implementing regulation related to the habits of the Acehnese people. In the time of Sultan Iskandar Muda, the power of the Qanun maker was in the hands of Putroe Phang (Putri Pahang).

Reusam is the habit of local residents who differ from one region to another in Aceh. Reusam is a local habit, because it’s called "adat reusam". Reusam has a level. Reusam, which is a local habit, arranges things that are simple, complicated. Some Reusam rules are for ordinary people, and some other rules are only for Kings and nobles. Multilevel understanding of adat reusam relates to the position of reusam, as the content of adat in Aceh. The government of Sultan Iskandar Muda, the customary procedure was arranged and lived with an Laksamana named Bentara Seumasat, so the reusam problem was under the Laksamana. To find out the structure of the Acehnese indigenous people who inhabit and support themselves by earning a living in the customary law area in the fields / fields, sea and forest, described in diagram II (Sri Walny Rahayu: 2014).

Data diagram II shows that the livelihoods of indigenous peoples in Aceh are divided into 3 (three), namely earning a living, in the Sea (Laôt) as fishermen, led by Panglima Laôt. Customary law communities who make a living by farming, cutting wood in the mountains/forests (glee/uteuen), are led by Pawang Glee/Pawang Uteuen. Customary law communities who make a living working on fields (blang) led by Keujruen Blang. Each of these customary law communities has their own autonomous rights over their own territory based on Customary Law (Hukôm Adat) derived from Islamic teachings (Islamic Sharia).
The three types of ecosystems of indigenous peoples, are part of the Aceh Customary Institution, as well as functioning as customary courts that regulate and have authority in every customary law community. This is in accordance with the privileges of the Aceh Province, which is regulated by Law No. 44 concerning the Implementation of the Special Rights of the Aceh Special Region in 1999 and specifically stated in Article 98 and Article 162 of the Law on the Governing of Aceh in 2006.

5. The History of Courts in the Kingdom of Aceh

During the reign of Sultan Iskandar Muda in Aceh, there were four types of judicial institutions. The first is called a civil court. Second, criminal court. Three religious courts and four commercial courts, (Denys Lombard, 2007: 118). The civil court is held every morning except Friday in the big hall (Balai), near the main mosque. The Balai shows every building is rather large, intended for public life (paseban) "main mosque" is Bait Baitul Rahman (Baiturrahman) which was established during the time of Sultan Iskandar Muda. Now this mosque is known as the Baiturrahman Great Mosque. The judge who was tried was led by the richest person in Aceh.

Criminal court practice is held in another hall towards the palace gate (pendopo). A number of rich people took turns to become its chairman. The method of examination and punishment imposed is quite difficult, namely dipping the prisoner into hot oil, and licking hot iron. During the time of Sultan Iskandar Thani, the inhumane punishment was abolished. there is a judge's decision in the criminal court, with the decision to whip using rattan. This penalty can be avoided by paying a gold fine. If the mistake made by the person sentenced is very severe, the judge's decision is to pry the prisoner's eyes, cut their noses, cut off their hands or feet. When finished cutting their hands or feet, immediately dip them in very cold water to stop bleeding. Finally, the legs or hands that have been cut are wrapped in leather. (Sri Walny Rahayu, 2014: 160-161).
People who have served sentences are accepted back in the community and their honor is restored. However, against serious crimes, several disabled people sentenced were returned to Pulau Weh. Crimes punishable by capital punishment because adultery is punished by fighting elephants. This punishment also applies to most people. For the nobility, the execution of the death penalty was carried out honorably than ordinary people. The nobility was placed in a large field which was closed, given a large scythe as a weapon to defend themselves by fighting the attacking group consisting of the families of the victims.

Two other courts, namely religious courts and commercial courts, only examine special cases. The judge referred to as "Kadi" who was responsible for resolving this case in the trial of the Religious Court, had broad authority covering those who violated religion. Sultan Iskandar Muda formed a government system based on Islamic law to his people. There is an order requiring prayer five (5) times a day, fasting of Ramadan, prohibiting gambling and liquor. Commercial Court, which was held in a building near the port to settle disputes between traders, both foreign and indigenous traders. This court was led by a rich man named "Admiral" who was considered the same as the mayor. The commercial court is the forerunner to the formation of the Sea Customary Court (Laôt) and its leader is called Panglima Laôt. (Dennys Lombard, 2007: 120-121).

6. Customary Courts and Women's Relations in Socio-Cultural Construction in Aceh

The position of women and men in the 1945 Constitution is regulated by Article 27 of the 1945 Constitution, in which men and women have the same rights and obligations in law and government. Thus women are seen as subjectum juris. However, the patriarchal system that has taken place in various parts of the world including Indonesia, especially in Aceh, has caused patterns and ways of thinking, and partiality towards men, causing unequal relations. this
causes customary justice in Aceh and the government system to be dominated by men as holders of control and decision makers.

Adat and culture is a guide for the community to behave daily which is passed on from one generation to the next and internalized to form a mindset. There are still restrictions on access to women’s control starting with double burden, stereotyping and subordination, both in the domestic sector and the public sector. Women are often considered not to have the same strength as men in doing things. What women produce is only called sides. This subordination and stereotype causes women to be in a very weak position as decision makers, (Fauzi Abubakar: 2015: 333).

In Aceh, there are differences in roles between women and men in kinship social relations and employment based on the criteria of community structure. Communities with those who make a living as farmers, having a philosophy that is "Ureung agam geujak meuue ureung inong geujak bak dapu" means that men (husbands) go to the fields, women (wives) go to the kitchen. This concept shows the role of domestic and public. The division becomes different from the community/ fisherman, where the husband works to find fish in the sea, then the woman works to clean the fish, dry the fish. Husband/man sells fish to the market. Furthermore, the phenomenon of "habits" was discovered and is now a trend in social life in Aceh. The majority is done by men. Men / husbands spend their time in coffee shops or caffe, or sit in public places. Wives / women do almost all household matters and also take care of children (domestic scope). This condition is closely related to a number of wise words in Aceh, (Sri Walny Rahayu et al, 2007: 62-64) which includes:

1) "Lagee aneuk hana ma" It is said to children who do not have anyone to care for him, both body, clothes, character and morals. Ma is a mother, playing a role in caring for her children.
2) "Paleh aneuk muda hana lob pakat". That is, Men must get along in the community. It is very bad if their people do not enter into a relationship

3) "Paleh aneuk dara hana jeut buet droe". That is, every girl must be good at doing handwork related to femininity.

4) "Manok Agam Tuleueng Rapoh, Inong Mita Agam Pajoh", meaning, men who are lazy to make a living, their lives depend on the work of the wife. These wise words are intended for people who are lazy in earning a living and only enjoy the results of his wife's hard work.

Some examples of wise words (hadih madja) above regulate the standardization of domestic roles for women and the public role is only for men. Public activities are explained in wise words, more to relationships and joint decision making that starts at the village level. The role of women is more oriented to physical work in the domestic realm.

Another thing from women's subordination occurred in the field of law in Aceh. This imbalance is shown by an unequal relationship between women and men. Gender inequality is usually based on internal thought patterns and internalization. This is a social problem that must be resolved integratively, coupled with the existence of interpretive arguments that tend to be subjective which use reasons for arguments that marginalize women's rights in various aspects of social, cultural, legal and governmental, in the name of Islamic teachings as justification. Stereotypical views among members of society that place women as moral buffer, so that efforts to uphold morality and law in society must begin with women. This is what causes the limited access and control of women in the public space, so that they are also not equal to men as beneficiaries of the results of development in the field of law and government. The limitations of the women's movement in the public sphere in Aceh are found in the circular letter / regulation of the regional head, even regulated in the Qanun which always places women as subordinates.
This condition should be placed in reality, moral enforcement includes the process of seeking justice, in social and human responsibility (adult and sane), without distinguishing between men and women. Men and women have the same obligation to be moral people in religion, law, government, customs, culture, social and economy.

Religion aims to shape morality and morality. Thus women and men are legal subjects who have the same obligations as a moral buffer in society and can contribute equally according to their dignity. The role of women in can be seen from the perspective of women’s transformation which includes functions, feminism and gender specificity, which involve behavior patterns, emotional expressions that can be socially studied and used to assess femininity and personality. (Paulus Tangdilintin, 1991: 9). Gender problems faced by women occur because of the thick values in society that determine the nature of women having access to domestic work, so that thoughts and struggles that provide opportunities for women for activities outside the household (public space), are considered as something that violates the nature and not suitable. (Tjandraningsih, 1996: 66).

Access and a balanced role of women and men are generally rarely involved in the adat justice process. This is due to a number of considerations, namely: first, customary courts are often conducted at night. In the view of unethical women’s society outside the home at night. Second, women are considered less assertive in handling cases. However, women’s services are often used by Keuchik as a mediator in resolving various cases, especially cases of domestic violence. And it turns out that the role of women is very important in the process of organizing customary justice. So there is no reason for women not to be involved in the adat justice process and even their representatives must be in the Tuha Peut institution. So that formally the presence of women in adat instruments is in the Gampong Government structure (Fauzi Abubakar, 2015: 342).
The role of women as mediators and negotiators in the deliberation process is very important to be able to determine whether the trial can be held or not. Because every complicated case has the possibility to be resolved if the customary law implementer applies the negotiation and mediation techniques appropriately. In this technical consultation, women have a role to help disputing parties to resolve cases, with results that can satisfy both parties. The ability and skills of these women to listen carefully, speak clearly and ensure effective communication among all parties is an important factor in facilitating the peaceful resolution of joint cases.

Customary justice management practices when there are problems that cannot be resolved, due to lack of skills or the ability to consult with traditional leaders, or when the victim is a woman, the case report can be submitted directly to the female leader in Tuha Peut. therefore, women must be actively involved in resolving disputes starting from the initial handling to the decision process in the adat court. This effort is important because it facilitates the communication process, it will be very helpful to know the problem. A large number of women must be able to involve women in access, roles and control over adat courts. (Fauzi Abubakar, 2015: 342).

Community obedience to heavy law is not a compelling rule, but also aims to create benefits for society. On the other hand, the law is not obeyed, because the reality is detrimental to society. Settlement of disputes through adat, in customary law communities, which are based on values, mindset, and norms have given birth to indigenous peoples. Compliance with disputing parties to accept the decision of the Customary Court, in accordance with the optics of Law sociology is closely related to the Authority Theory, as stated by Max Weber. There are 3 (three) types of authority in the community, (Sri Walny Rahayu, 2018), namely:

1. Rational Legal Authority. Authority that comes from legality, law or legislation. Based on the theory of legal authority, the parties'
adherence to Customary Judicial Decisions, because the authority of traditional instrument functionaries has been legally legalized both in writing and unwritten.

2. Traditional Authority (Traditional Authority), authority whose validity is based on customs. Traditional authority is an authority that has validity based on the sanctity of certain traditions that live in society. Someone obeys certain rules or authority structures, because their trust in things is sustainable. Based on this theory, parties adhere to the Customary Court, because the creation of relationships between traditional leaders or devices, which have authority with members of the community, is a personal relationship, which tends to lead to broad family relationships. There is full awareness between the instruments of traditional institutions to carry out their obligations in society, as a form of loyalty and love for traditional institutions. According to Max Weber, in one's traditional order is the loyalty of the past and they represent the past, loyalty is often rooted in sacred beliefs. Other things are certain historical events, because there is authority over sacred habits.

3. Charismatic Authority. The authorities whose validity comes from special charisma or quality possessed by someone who is recognized by others. This is only owned by certain people, regardless of economic status. This charismatic authority tends to be found in selected people in society. For example, because of personal abilities, the nature of ownership and personality possessed. (Max Weber, 2009: 293). Community compliance with adat leadership like this is because its validity is recognized based on its quality, privilege and excellence as a leader.

Compliance and acceptance of customary court decisions if viewed by the authority theory approach proposed by Max Weber, namely the legal rational authority, traditional charismatic authority, can be assessed based on 2 (two) points of view, positive and negative. The
The theory of authority is positively correlated with full and unanimous compliance and acceptance of decisions of the Customary Court. The disputing party is in a win-win position.

Every peace agreement that has been obtained through customary courts is always obeyed by the parties. The factors that encourage the compliance of the parties in implementing the agreements that have been obtained are due to family factors, besides that the adat court is effective and efficient (cheap). This low cost due to customary courts does not burden lawyers’ fees and other costs such as state courts.

Max Weber’s theory is related to the authority (charisma) of traditional leaders, which causes the community or parties to disobey Customary Justice, it can be understood that obedience is due to traditional authority (charisma) of numbers in LAA that behave either written or not. The community will ignore the decision of the adat court, if there is a possibility of recurring disputes or conflicts. This is what is called the awareness of thickening and thinning in the community when accepting and obeying the decisions of customary courts.

Community fulfillment of customary court decisions if studied epistemologically because of the influence of authority, position or social status or religion of adat judges. The more experienced someone who holds the position of chairman of the LAA or customary justice judge, influences his mindset both from the mind and from the heart or mind. The wider the inner and inner experience of a person, the more charisma and authority gained will have implications for decisions issued by Customary Judges.

Based on the facts mentioned above, the depletion of the results of the peace agreement obtained through the Judicial Customary Court based on a number of reasons, namely, (1) the parties did not accept the decision, (2) the parties ignored the collective agreement stipulated by the court custom, (3) the decision of the adat court is judged to have weak sanctions and not optimal to cause deterrent effects compared to state judicial sanctions. (4) the law in practice is found to be double
faced, protecting strong parties because they have the power and authority, (5) legal sanctions do not have binding power for the parties and do not give rise to legal certainty. This is why the decision of the adat court cannot be fully accepted in the community. this condition is different from the settlement carried out through the state court which has execution power.

Based on the facts mentioned above, not all of them can be achieved through the settlement of customary law. Some people, especially urban areas, consider the ineffectiveness of customary justice due to reasons, namely, (1) the parties do not accept the decision, (2) the parties ignore the collective agreement set by the adat court, (3) the adat court decision is considered to have weak sanctions and not optimal to cause deterrent effects compared to state judicial sanctions. (4) sanctions in customary justice are also found, in practice, double-faced, protecting strong parties because they have the power and authority in their community, (5) legal sanctions do not have binding power for the parties and do not cause legal certainty. This is why the decision of the adat court cannot be fully accepted in the community. these conditions, in contrast to the settlement carried out through state courts that have the power of execution, and submit appeals, cassation, and even extraordinary legal remedies with the submission of a Review Again when new evidence is found.

**Conclusion**

Women are legal subjects who have the same rights and obligations as men regulated in the 1945 Constitution. They must also be accommodated in customary law. women’s access and control over adat decisions is very important as a form of balance of roles, women are very important and needed when women and children become victims. Women must be involved in the access, role and control of adat courts to fill development in various fields.

Community fulfillment of customary court decisions if studied epistemologically because of the influence of authority, position or
social status or religion of adat judges. Someone who is more experienced who occupies the seat of the Aceh Customary Institution (LAA) or customary justice judge, influences his mindset both from the mind and from the heart or mind. The wider the inner and inner experience of a person, the more charisma and authority gained has implications for decisions issued by the Customary Court.

**Recommendation**

There must be political will from the village / village government, to include a budget to increase women's capacity that can be budgeted through village funds based on Law Number 6 of 2014 concerning Villages.

In-depth study is needed through academic texts or the results of ongoing research from academics and non-governmental organizations in collaboration with other donors, to develop models of customary courts in Indonesia, as input for Customary court designs and the Bill on Rights Indigenous Peoples in Indonesia.

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The Role of ASEAN in the Law of World Peace
Diplomacy for Palestinian Independence

Murry Darmoko
Faculty of Law, Bhayangkara University of Surabaya, Indonesia
E-mail: murry@ubhara.ac.id

Abstract

This paper examines the role of ASEAN in realizing world peace with the main indicator, Palestinian independence. This study uses IMRAD Structure. The background research is the role of ASEAN is still regarded as a small role in realizing world peace, especially in Palestinian independence. Legal and geographical-political issues make ASEAN no role. There are two research questions, first, how to improve the role of ASEAN diplomatic law in realizing world peace? Second, how to improve the diplomacy pattern of communication in law and geographic-politics of ASEAN has a stronger influence on Palestinian independence?. The purposes of the research is to find the answers of the two research questions with qualitative methods derived from documents that are directly related to the two approaches of sociology of law and science of communication. Results, First, the role of ASEAN in the independence of Palestine can be strengthened along with the improvement of political and economic power of the culture and defense culture of ASEAN countries’ legal security. Second, the diplomacy pattern plus the solution to Palestinian independence in the form of a win-win solution. Discussions, pro parties claim that ASEAN has played a role in various fields and has a strong influence in peace diplomacy law that needs to be strengthened even more strongly, the contra stated that ASEAN countries do not need to interfere in the independence of Palestine because it is not from the political geography of ASEAN. In conclusion, first, the role of ASEAN diplomacy in realizing world peace with Palestinian independence can be urged through international forums and both of these are manifested through balanced diplomacy patterns of communication while still being debated between the pros and cons.

Keywords: ASEAN, Communication, Diplomacy, Freedom of Palestine, Law.

Introduction

Palestinian independence has always been a global peace issue. Palestine is one of the problems that has yet to be resolved. on November 15, 1988 Palestine through the Palestine Liberation Organization (PLO) declared the independence of Palestine in exile in Algiers, Algeria. Although 136 countries from 193 countries have recognized a Palestinian state. Countries that do not recognize Palestinian sovereignty take the position that Palestine can only be
determined through direct negotiations between Israel and Palestine\(^1\). Countries like Israel, United States, Canada, Greenland, Colombia, Trinidad and Tobago, Jamaica, Mexico, Cameroon, Cyprus, Spain, France, England, Germany, Italy, Slovenia, Romania, Finland, Norway, Moldova, Armenia, Eritrea, Myanmar, Taiwan, North Korea, Japan, New Caledonia, Australia and New Zealand are countries that do not recognize Palestinian sovereignty\(^2\).

Palestine was one of the first countries to recognize the independence of the Republic of Indonesia, besides Egypt. Emotional closeness that is woven through religious education institutions in Egypt, becomes a close friendship to this day, then woven into diplomatic relations.

Indonesia - in the course of history - in 1967 formed ASEAN (Association of Southeast Asian Nations) along with other countries (Thailand, Malaysia, Singapore and the Philippines) which were in a geographical area and cultural similarities with different mastery of science and technology to play a broader role in maintaining world peace. One of the issues of world peace is Palestinian sovereignty. And ASEAN countries in international forums always support Palestinian independence and sovereignty. Although Palestine is geographically far apart from ASEAN and politically and legally included in the realm of the Middle East.

**Method**

The sources of research I obtained through: first, the regulations concerning the state sciences and laws relating to its sovereignty.


Second, research sources on ASEAN’s diplomatic role, researchers trace the roles of ASEAN and examine the types of diplomacy that can be done to strengthen ASEAN’s influence at the world level. I obtained the above sources through books and news media that are directly and indirectly related to research.

In discussing Palestinian Sovereignty and independence, theories of State Science are needed. Palestine will be studied whether it meets the conditions and materials so that it can be said as an independent country as written by George Jellinek, Father of State Science in his Algemeine Staatslehre. These things can be reviewed in the following:

- Inductive, Study specific symptoms to get generally accepted rules,
- Deductive, generally accepted rules to be studied in specific rules,
- Historical, Looking for the symptoms of past society that has a relationship with the current state of society,
- Comparative, Make comparisons between two or more objects and then look for similarities and differences,
- Dialectic, Dialogue or Question and Answer,
- Empirical, relying on real circumstances,
- Rationality, Prioritizing thinking with logic to get an understanding of social problems,
- Systematic, Collecting the materials that are already available and then doing the painting, decomposition, assessment, classification of groups systematically,
- Juridical, Focusing on legal aspects,
- Functional, Linking symptoms and seeking reciprocal relationships,
- Syncretic, combining juridical and non-juridical factors.  

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There are several theories about the origin of a country, first, the Godhead Theory: formed by the approval of God which is included in the Constitution or Constitution: On the Blessings and Grace of God (by the Grace of God). Second, Covenant Theory: formed through the process of groups of people who initially lived alone and entered into joint agreements in carrying out life and common interests (Social Contracts or Community Agreements). Third, the Theory of Power: created strong and powerful because the wild is given to the strongest, braver and has the willpower to force the will on the weak. And fourth, the Sovereignty Theory: which is divided into God's Sovereignty, State Sovereignty, Law Sovereignty and People's Sovereignty.

A one country can be said to be a state that is legally recognized by the existence of rulers, alliance of people and government by using no-matter in matters that make (needed) existing (formed) countries: first, in Classical (Traditional): Specific Area, People, sovereign Government. Second, directly Juridical: (a) Gebiedslee (jurisdiction) covering land, sea, air, people, and the end of its authority, (b) Persoonsler (legal subject): sovereign government (c) De leer van de rechts works (relationship law): between rulers with those controlled and between countries internationally, and thirdly Sociological: Society, Economics, Culture and Natural Factors (Region + Nation)\(^4\).

Then recognition from other countries over a country is divided into two things: first, not the absolute element of the state, because it is not an element of forming the state, only explaining the existence of the state. And secondly, without recognition from other countries, a country can stand, such as (1) the United States of America proclaimed its independence in 1776 and Britain recognized it in 1873, (2) Indonesia proclaimed independence in 1945 and the Dutch recognized it in 1949\(^5\).

Recognition from other countries can be divided into two theories, first, Declaratory Theory - Evidentiary Theory: if all elements of the state

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\(^4\) Ibid., hal. 13  
\(^5\) Ibid., hal. 12
are owned by a political society, then automatically they are a country and must be treated as a country by another country, *ipso facto*. And second, Constitutive Theory: even though elements possessed by political society, are not automatically accepted as a state among the international community, it is acknowledged if there is recognition⁶.

And there is a theory of the occurrence of the state in Primary (Primaire Staats Wording): the occurrence of a state that is not connected with a country that has existed before through 4 phases: first, the Genootshap (Genossenschaft) phase: grouping people who combine themselves for common interests and rely on the equation interests and leadership are chosen from the foremost: elements of the state. Second, Reich Phase (Rijk): aware of property rights to land until landlords emerge: elements of the territory. Third, Staat Phase: has been aware of not being a state and is aware that they are one group: sovereign and last nation, region and government Democratische Natie Phase: formed on the basis of national democratic awareness and awareness of sovereignty in the hands of the people⁷.

Then there is the theory of the occurrence of the state in a Secondary (Scundaire Staats Wording): the occurrence of a state that is connected to the countries that have been there before, namely the problem of recognition: first, de facto recognition: recognition is temporary because in fact the new state does exist but the procedure the occurrence has not been through the law, and if the procedure of the new state has gone through legal procedures, the recognition can be increased to de jure or second recognition, the acknowledgment of de jure: the broadest and permanent recognition of the formation of a country because it is formed by law © Recognition only against the de facto government: Proclamation of the Independence of the Republic of

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⁶ Ibid., hal. 12
⁷ Ibid., hal. 44
Indonesia according to Van Haller Dutch scholar: recognition only of the
government of a country while the territory is not recognized\textsuperscript{8}.

And a country can be declared a lost state with two main factors:
Natural Factors (Disasters, if geographically and the area sinks and
cannot be inhabited due to toxic air, for example) and Social Factors
(conquests by colonial countries, revolution and changes in state
status, merger between two or more countries into the new state system
or the breakup of unitary states into their own countries)\textsuperscript{9}.

In the materials and research sources on ASEAN, it can be
reviewed from the ASEAN website, asean.org. ASEAN has the One
Vision One Identity One Community slogan. With this motto, these roles
are realized in three working communities: Political Security, Economic
Community and Socio Cultural Communities. Three communities have
roles to play in realizing world peace, especially Palestine which is
included in the scope of the Asian region. Until now, 82 agreements
have been carried out jointly by ASEAN member countries, all of which
aim to provide mutually beneficial cooperation\textsuperscript{10}.

ASEAN has an external relations role with countries: Australia,
Canada, China, European Union, Germany, India, Japan, New Zealand,
Norway, Pakistan, Turkey, Russia, Republic of Korea (ROK),
Switzerland, United States, to ASEAN Plus Three, Ambassadors to
ASEAN, ASEAN Dialogue Coordinatorship, East Asia Summit (EAS),
International / Regional Organizations. Therefore, it is necessary to
study in depth the roles that can be strengthened by the resilience and
stability of ASEAN countries in dealing with crises and global issues
through diplomacy can give influence to countries including refusing to
recognize Palestinian sovereignty and independence.

This research was carried out with qualitative methods through the
approach of legal sociology and science communications approach. The

\textsuperscript{8} Ibid.
\textsuperscript{9} Ibid., hal. 19
\textsuperscript{10} http://asean.org/asean-political-security-community/
two approaches above were chosen by researchers with the awareness that in answering the first problem formulation, the approach of legal sociology was used and the formulation of the second problem could be given the answer through a science communications approach.

There are three main keywords in sociology: domination, influence and dependence. These three keywords determine the journey of individuals, groups, communities and even a country. In relation to this research, which relates to Palestinian sovereignty and independence, the Law Sociology Approach is the most appropriate thing to do. This social theory can be applied in finding answers, namely with the theories of Social Behavior and Social Exchange. The theory of social behavior has a tendency to state that every individual or group tends to benefit themselves first which of course depends on the stimulus of social interaction. and finally issued legal decisions, which regulate, bind and impose sanctions for violations\textsuperscript{11}.

Social Exchange Theory focuses on matters relating to the giving of each other or the exchange of objects that contain unreal value (in the form of direct or finished material) by considering motivation and hedonism. Exchange Theory Principles: (1) Unit of Analysis, which is an important role in the social order (2) Exchange, that everyone has their own desires, to join with others to fulfill and complement each other (3) Rules / Benefits, always get pleasure from emotions, and (4) Social Endorsement as self-satisfaction and motivation in exchange. The main purpose of the exchange is to get the maximum possible reward.

The theories of Science Communications always consist of two main elements: Source (sender of the message) and Receiver (receiver of the message), plus Message and Channel, if you want to add more complete. In the context of this study, researchers used two key words in communication built on state diplomacy: first, communication was entertaining and both communication gave solutions. Communication

can be done between individuals, between groups and communication between countries. Communication carried out in handling peace issues in Palestine can be directly categorized as fulfilling the two elements mentioned above. First, it contains many entertaining elements and secondly, it contains a little element of solution.

Entertaining communication, among others, is when the community merely sends symbols of grieving and prayers containing requests to God that Israel be destroyed and defeated, Palestine wins and is recognized internationally. Communication Solution is to persuade or 'force' other countries to recognize Palestine as an independent and sovereign state, but until now communication of this solution has not been fully realized, because each country has different interests in the issue of Palestinian sovereignty.

**Analysis and Discussions**

There are two formulations of problems relating to Palestinian independence and sovereignty: first, what role can ASEAN take in realizing world peace, especially with issues relating to Palestinian sovereignty and independence? Secondly, How to increase the strength of ASEAN diplomatic influence at the world level in accelerating the realization of Palestinian sovereignty and independence as a whole from countries that join the United Nations?

The purpose of this study is to answer the two formulations of the above problems by conducting a study and describing ASEAN’s roles in realizing world peace and providing alternative solutions on how to increase the influence of ASEAN diplomacy at the world level through international law and legislation.

The results of studies and research that can be described are as follows: first, the role of ASEAN, especially for the Republic of Indonesia is by conducting activities that strengthen the relationship of Political Security, Economic and Socio Cultural Communities between ASEAN countries. After ASEAN agreed, ASEAN as a whole strengthened relations with external relations countries that did not recognize
Palestinian sovereignty by inserting messages of friendship that changed the political flow that sided with Palestinian independence. Without activities tucked in with persuasion, the role of ASEAN will not succeed. And if it is done by means of military diplomacy, it is certain to create an atmosphere of war for the ASEAN region.

Second, Palestine - Israel Summit can be offered by ASEAN to interested countries and countries that do not recognize Palestinian sovereignty to sit together in Jakarta to reach an agreement that benefits both parties, namely independence and sovereignty, both for Palestine and also for Israel. Indonesia is capable of being an ASEAN country that has successfully implemented ASIAN GAMES 2018 in the Asian Olympic Games and has also previously received voting support at the UN as a non-permanent security council. Indonesia along with ASEAN with the power of influence of diplomacy, is believed researchers will provide communication solutions greater than just entertaining communication on the issue of Middle East peace.

The opinions of the pros and cons can be explained as follows: first, ASEAN countries that are predominantly Muslim will agree with ASEAN’s role in fighting for Palestinian sovereignty and independence that the majority of the population is Muslim. Emotional religious ties are used as the main reason in supporting ASEAN to play a stronger and stronger role, because it involves reward and sin. Second, countries that are Muslim minorities will tend to be passive in wanting ASEAN’s role in Palestinian independence, different geographical and political factors and different races to be the main reason.

Conclusions

The conclusions of the study are as follows: ASEAN’s role is carried out through three community diplomacy by strengthening ASEAN with external relations by persuading countries that do not recognize Palestine to be able to recognize Palestinian sovereignty and independence. Diplomacy, suggestions for the Indonesian foreign ministry in the International Law network, so that the messages
conveyed in international forums contain communication solutions not just entertaining communication. And for other researchers it is expected to be able to examine from different angles, such as the things that make Israel sovereignty not recognized by most ASEAN countries.

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The Model Of Teaching Materials For Indonesia Communicative Writing In Teaching Language For Law Faculty

Syanurdin¹
Laily Ratna
Ashibly²
Faculty of Law, University of Prof. Dr. Hazairin, S.H., Indonesia
¹Email: syanurdin@yahoo.co.id
²Email: ashibly@unihaz.ac.id

Abstract

The Indonesian language for law faculty that is used was still in style. There are still many imperfect, both semantic, word, and composition of the sentence. There are still many terms that are not fixed and unclear. The caused by the Indonesian weaknesses is the language that is influenced by the terms of translation from the Dutch language correct and grammar. The objective of the research is a product model for teaching appropriate teaching needs for students, lecturers, and law faculty institutions. The methods used in this research are R and D by Bold and Gall. The instrument used to collect the data were questionary, interview, and test. The data were analyzed qualitatively and quantitatively. The results of the study are a study of students' needs, lecturers, and law faculty institutions. The results of the study concluded that the product of Indonesian communicative writing in teaching models. Language for the law, the faculty is very effective to be applied as teaching material for state and private universities in Bengkulu city.

Keywords: Model of teaching, Indonesian communicative writing, language for law.

Introduction

The Indonesian Law course in college is one of the Mandatory General Courses (MK WU). Indonesian law must be included in the core curriculum of every law study program. This means that Indonesian language learning must be given to all types, levels, and majors/courses in higher education, including law study programs. Basic competency courses Bahasa Indonesia law aims to make students become professional scientists have the knowledge and positive attitude towards Indonesian, either as an official state language even as Indonesian national language. In addition, students must be able to use it properly and correctly to express an understanding of nationality and love of the
homeland, and for various purposes in the fields of science, technology, art, law, and profession.

Writing skills demanded by law faculty students certainly, lead to scientific writing abilities. Students are directed to be accustomed to convey all forms of scientific writing such as writing papers, theses, dissertations, and writing other scientific papers. A very worrying thing if students are not able to express ideas and thoughts in scientific writing. The tasks given by the lecturer require that students always carry out writing activities, such as writing lecture reports, book studies, criticism of books, research reports, and others. All these activities are part of the learning process of writing in college and training to improve writing skills.

The legal practitioners themselves still have different interpretations of the use of legal Indonesian language, specifically in the service of language-based legal products, such as correspondence with clients, letters of reprimand/subpoena, warning advertisements, police reports, lawsuits, application for registration including: brand, copyright, patent rights, translation of types of goods / services, and draft agreements. By looking at the reality of the above seems true that the use of Indonesian language law still much confusion in the community, including students, of course, people will be harmed. Though society is bound and burdened the obligation to comply with the resulting legal documents (Suryomurcito, 2009).

**Analysis and Discussion**

When viewed from the classification of language skills and the type of writing skills expected in law students, students should have the ability to write. But in fact, on the field, many students have not been able to write properly and correctly. The problem of students' writing ability is actually a classic problem, but it is still interesting to study until now because the problem of writing among students is still a concern of linguists. This apprehensive situation can be found, for
example in a thesis and papers written by students. Akkadian, et al. (1988: 1) said that facing the writing task above many students considered it a heavy burden. This assumption arises because writing skills do ask for a lot of energy, time, genuine attention, and skills that are sometimes not owned by students. Even Sadtono (1978: 24) conducted research on the use of Indonesian, especially educated groups in Indonesia. The conclusion, among others, stated that mistakes made sentences in educated groups were 40%. Therefore, this can not be considered a minor issue. Sadtono considers the situation as a "national disaster." In line with the research; Soehadi (1995: 32) also said that there were many cases of plagiarism lately, including showing students' inability to write. This lack of ability is caused by the lack of students or unwilling to train themselves, in addition to scientific writing in this country not too appreciated as in developed countries.

The explanation above is a small part of the phenomenon that occurs in Indonesian universities. Then what about the reality in the field about the ability to write students at the Bengkulu city college? It seems that the results are also not much different. This was corroborated by the results of a study conducted by Suhartono (2001: 1) that the writing activities of University of Bengkulu (UNIB) students had not been encouraging. For example in the Indonesian Language, Literature and Regional Education Program FKIP - UNIB the average time to complete an S1 study ranges from six years. One of the causes of delays in the completion of the study, because students find it hard and heavy in writing the thesis. Likewise, the results of research conducted by Syanurdin (2009: 20) on PTS students in the City of Bengkulu were very surprising, they underestimated the Indonesian language, prioritizing foreign languages rather than Indonesian. Indonesian has shifted its use to English. Indonesian does not need to be studied, because from birth we already know that language, including in Indonesian. However, that does not mean learning a foreign language is not necessary.
The phenomenon above is a challenge that must be faced by lecturers and students in learning writing skills. There are many factors that influence students' failure to write, including lack of lecturers' attention to how to choose the right vocabulary, determine the correct sentence structure, how to train thinking skills, how to train a complete and complete idea pouring. It is all part of various aspects that must be the attention of lecturers when teaching writing skills. Additionally, lecturers must also consider the issue of basic capabilities of students, because it can affect the success of the students' writing skills.

Based on observations in the class that writing is often found misconceptions and errors in the assignment. Conceptually writing learning is a teaching given after students have the ability to listen, speak and read. Writing skills require the ability to organize ideas with collisions and can be understood. Likewise, the task given should relate to the development of the ability to organize ideas in written form. On the other hand, some lecturers consider writing to be an easy implementation. Writing is considered a teaching that only learns about writing what is felt in the form of writing.

In teaching writing skills only considered giving dictation exercise, an exercise in transcribing, manipulating or composing essays. While teaching material is considered less important, even though the ultimate goal of writing learning is that students can express ideas and thoughts in the form of good and true writing obtained from the teaching material.

There are several obstacles to having the ability to write, namely (1) internal factors, such as interest, motivation, and talent, (2) external factors, such as lecturers, curriculum, facilities, syllabus, and teaching materials. Both of these factors influence each other in the ability to write students. Surya (1979: 32) says k arena interplay of these variables, then there are individual differences in writing. Similarly, Tarigan (1993: 2) suggests that these factors affect the success of the
teaching and learning process, including writing skills. Writing skills are determined by (1) language learners, (2) language instructors, and (3) language teaching systems.

The success of the learner’s language is closely related to willpower. Learning a language is not just about memorizing and producing forms that are memorized, read or heard only, but the relevance is more than that, which is the hope to be achieved for the future of students. These factors are related to the motivation, attitude, interests, attention of the learner. While the language teacher wants his success in his duties as a teacher. That success is largely determined by the professional competence of teachers, teacher appreciation against the student, positive attitude, motivation, interest, and a strong will to develop the science that teaches it.

On the other hand, the system of language teaching is also determined by the existence of realistic goals, can be accepted by all parties, the existence of good facilities and organizations, the existence of high teaching intensity, and the availability of appropriate curriculum, syllabus and teaching materials. According to Tamsin (2006: 82) one of the problems of language teaching systems in universities is (1) large class content (> 40 people), (2) lack of number and quality of teaching staff, (3) lack of relevance of methods, media, and time that is not enough, (4) the absence of a complete textbook, and (5) not the uniform curriculum and syllabus. Whereas if the teaching system can be balanced, both by teachers of learners, and supported by a teaching system that can be accepted by all parties, is expected to be achieved the expected goal of learning to write.

In an effort to heal the chronic weak writing ability of students, it is necessary to agree in advance that the objective of the General Compulsory Courses (MKWU) Indonesian law course in higher education is based on the Circular of the Ministry of Research, Technology and Higher Education No. 435/B/SE/2016 is not for printing students into linguists or linguistic experts, so that students
can use Indonesian language well. Thus, it is not wise if the lecturer
crams students with complicated linguistic terms. What must be an
emphasis on students is continuous training in improving sentences
and paragraphs. In addition, it is necessary to practice improving
spelling, diction, and other language tools, so that students have the
ability to write.

Specific writing teaching material is one of the important
components in the learning process. On the other hand, well-organized
teaching materials can be the key to success in learning. Lecturers and
students will more easily achieve learning objectives as set out in the
curriculum. In addition, teaching material can also be a learning tool
that will strengthen the objectives, roles, attitudes, and strategies that
the lecturer will use to get active, useful, and effective learning in
writing learning.

Based on technical reasons as described above, there are also
theoretical reasons. Theoretically based approach audiolingual that
writing skills are the skills most end-controlled student in learning the
language, while communicative approach writing skills should not be
given after the third skill mastered. So, according to the audiolingual
approach writing skills require initial abilities such as the ability to
listen, speak and read. While in the communicative approach writing
skills do not have to be given after the three skills are mastered.

There are several models of teaching materials that can be used as
a reference in developing scientific teaching materials, namely: a formal syllabus model, structural syllabus, functional
syllabus, semantic syllabus, situational syllabus, notional syllabus, and
syllabus models based on communicative approaches. In
the material model, the communicative approach emphasizes the
function of language (communicative), not in the form of language
(grammatical). Here will be given some material that combines
grammatical forms with communicative functions, namely models
designed by Brumfit, Maley, Valdman, and Higgs and Clifford.
In addition to the instructional material must be based on research and needs analysis, without any effort to make and develop a syllabus which is continued with the preparation of teaching materials it is difficult for lecturers to find models and teaching materials that are in accordance with the demands of the curriculum. Due to the absence of a syllabus as a reference, MKWU lecturers in Indonesian law are often trapped only to teach grammar or cause a shift in language learning goals to linguistic knowledge.

Theoretically, the concept of communicative language learning is a criticism of Chomsky that was first proposed by the Hymes. Hymes argues that Chomsky's language competence emphasizes the capacity of individuals to develop a grammatical system (linguistic competence). The definition of communicative competence at the top, then the competence of Indonesian law also developed the ability to listen, speak, read, and write with the aspect of discourse, sociocultural, actional, and linguistics. Indonesian language learning through various texts according to Trianto (2004:17) is assumed to be able to summarize discourse competencies, sociocultural competencies, strategic competencies, optional competencies, and linguistic competencies. The text in this paper is interpreted as a communication event involving language verbally, in writing, or visually. The type of text used in legal Indonesian courses is the type of text in everyday life.

Communicative writing learning basically aims to develop student communicative competencies, namely the ability to use language in the context of actual communicative interaction (Huda, 999: 93). From this goal, students are required not only to produce grammatically correct forms of language but expected to have the ability to use these language forms in accordance with the purpose of communication.

The right communicative mastery is not only based on linguistic abilities but also includes other abilities that direct students to choose forms of language that are appropriate to the context. That ability is
usually referred to as communicative ability that allows students to interact effectively with communication. Ellis (1994: 13) states that communicative competence is related to the accuracy, truth, and effectiveness of usage and language behavior in accordance with certain communicative goals. So, communicative competencies include linguistic competencies and pragmatic competence. The correct language is not only seen from the accuracy and correctness of vocabulary usage and sentences, but also the accuracy in language functions. Here it can be understood that linguistic abilities must be supported by pragmatic abilities. This view is supported by Hadley (1993: 4) which also implies the lack of meaning in linguistic ability if it is not supported by pragmatic abilities. According to Hadley communicative competence can be interpreted as the ability to communicate in a natural setting in accordance with certain functions. From this view, it can also be said that the purpose of communicative language learning is the development of abilities which include grammatical abilities and adjustment of language forms with various linguistic and nonlinguistic inputs.

Comprehensive communicative ability proposed by Canale and Swain (1980) elaborated by Canale (1983) in the proposed model there are four components of communicative competence, namely:

a. Grammatical competence relates to knowledge of an internal language such as grammatical rules, word and sentence structures, vocabulary, speech, and spelling.

b. Sociolinguistic competence is related to the use of language in society such as accuracy in choosing and using words, individual languages, language ethics in a particular cultural language society.

c. Discourse competence relates to the ability to integrate various language structures in various cohesive discourses such as political language, poetic language, and others.
d. Strategic competence is related to strategic knowledge of verbal communication and nonverbal that can improve communication efficiency, besides, this communicative competence can help students to overcome obstacles and difficulties in the event of communication barriers.

Celce-Murcia in Kaswanti (1986:5) composes a scheme that describes the interrelationships between competencies such as pyramids surrounding a circle and surrounded by a larger circle. The circle in the pyramid is discourse competence and at three points of the triangle are sociocultural competencies, linguistic competencies, and optional competence. Optional competence as an addition that is not included in Canale and Swain competency models is a competency that aims to understand and interpret communication intentions. This is related to understanding and interpretation of utterances. The circle around the pyramid represents the strategic competence of the speaker to negotiate and solve problems.

In addition, Sheils from van Ek summarizes six communicative competencies that are the basis for every language teaching. These competencies include:

a. Linguistic competence, the ability to master certain vocabulary and structures through meaningful expressions.

b. Sociolinguistic competence, the ability to interpret forms of language in the right situation (choosing forms of language in a context of discourse, who communicates with whom, what, where and what purpose).

c. Discourse competence, the ability to produce and receive messages of discourse coherently and meaningfully in communication.

d. Strategic competence, the ability to use verbal and nonverbal symbols! To deliver messages in communication.
e. Socio-cultural competence, the ability to understand sociocultural contexts in the language culture that is being used at certain limits.

The various models of curriculum and syllabus described above, it is necessary to acknowledge that there are various weaknesses and advantages. These weaknesses and strengths can be identified as follows:

a. The grammatical syllabus does not consider the communicative language, language is only learned from a linguistic perspective rather than language skills.

b. The structural syllabus does not consider context and meaning, because the focus of language learning is only on the free vocabulary, grammatical and phonological mastery of vocabulary taught sequentially from easy to difficult, from simple to complex without considering the needs of students. Teachers tried wherever possible to be a model in a language that can be replicated students during exercise (drill). Students try to imitate the teaching language automatically so that in the end students can use the language as a habit. Students only focus on textbooks as training material.

c. The situational syllabus is the development of a structural syllabus. The selection of material which initially remained based on the selection of vocabulary and grammatical structure that needed to be taught, then included in an artificial language situation so that the language taught looked rigid and complicated. Teachers hold fast to the text without variations in the form of natural language in everyday life. Students practice using language in certain situations, but they are stuck in rigidity which is ultimately difficult to implement in everyday language with a lot of variety.

d. The notional-functional syllabus has shown the importance of language meaning and function. However, in terms of the user's
point of view and the holistic use of language, the function and nose are still atomistic, the interaction involves only two participants. Lecturers collect many functions and suggestions to be taught to students. There are no functions and notions which must be given first.

e. The communicative syllabus was originally intended to enable students to use language in communication. But in practice, the lecturer ignores grammar completely. This results in language users being free from language rules.

By looking at the various strengths and weaknesses from the explanation above as one of their perfecting in designing the syllabus mixed models. This model syllabus attempts to adopt all the advantages and reduce the weaknesses of the syllabus model. The design of this new syllabus model can be offered to teach writing Indonesian law as the target language, which is adjusted to the learning objectives of students.

**Conclusion**

From the description above, here are some conclusions as follows:
The variety of Indonesian languages used in the field of law is called Indonesian law. Indonesian law is the Indonesian language used in the field of law. Indonesia in law is the typical pattern of language use and have characteristics in law. The characteristic of Indonesian law lies in the specificity of the term, composition, and style. Indonesian law is a modern language whose use must have a fixed, bright, monosemantic, and aesthetic requirement.

The legal Indonesian language that we use now is still in the style of the old order, there are still many imperfect, both semantic, word, form, and composition of the sentence. There are still many terms that are not fixed and unclear. This is because legal scholars in the past have never received special legal Indonesian lessons and have not paid
attention to and studied Indonesian language requirements and rules. The weakness is because the Indonesian legal language that we use is influenced by terms which are translations of Dutch legal language made by Dutch law scholars who have more mastery of Dutch grammar than Indonesian grammar.

On the other hand, we must admit that Indonesian is compared to foreign languages that are rich in terms, so Indonesian is still poor in terms. Often in translating Dutch terms, legal scholars make their own terms. That causes often there is the use of terms that are not in accordance with the real intention. Sometimes two or more terms of the foreign law are translated only with one term or one term translated into several Indonesian legal terms. This can be seen in the legal literature whose writing still includes the original language in parentheses.

The legal practitioners themselves still have different interpretations of legal language, so there are still many services based on language-based legal products, such as correspondence with clients, letters of reprimand/subpoena, advertisement warnings, police reports, lawsuits, application for registration (brand, copyright, patents, etc.), and translation of types of goods/services, draft agreements. In the case of Indonesia law still confuses the community, of course, the community will be harmed. Though society is bound and burdened obligation to comply with the law.

The components of the learning model that need to be developed in writing legal Indonesian language that suits the needs of students, lecturers, and according to the needs of law institutions / faculties include: (1) reading to write, (2) writing to compile scientific work, (3) reading scientific papers to write Indonesian law and writing legal products, and (4) implementing legal Indonesian language for academic purposes.
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Opportunities for Community Recognition in Lebong District after the Constitutional Court's Decree Number 35/Puu-X/2012 Concerning The Test of Forestry Law

Muhammad Yamani
Faculty of Law, University of Bengkulu, Bengkulu, Indonesia
Email: muhammad.yamani@yahoo.co.id

Abstract

The decision of the Constitutional Court Number 35 / PUU-X / 2012 abolished and stated that several articles in Law Number 41 of 1999 concerning Forestry contravene the 1945 Constitution of the Republic of Indonesia, which explicitly recognizes the existence of customary forests in the community customary law. The Constitutional Court provides opportunities for recognition of indigenous peoples in the management of customary forests in their territories. The protection of customary forests does not have to be done centrally by state law, but it is more effective if it involves indigenous peoples by giving them the opportunity to apply customary law from the community itself. This empirical legal research was conducted in Lebong Regency. Using secondary data obtained through the study of Rejang customary law literature, and primary data obtained by interview methods and discussions focused on informants consisting of traditional law functionaries Rejang. Data were analyzed by qualitative juridical analysis method. The results of the study show that genealogical Rejang (kuteui) customary community units still exist, still have customary law structures, but do not have customary forest areas, because all forest areas are designated as state forests; that the existence of the Rejang customary law community can still be recognized by strengthening the living unit of the kuteui-kuteui by changing the status of the area occupied by the Kuteui of the Rejang customary community to become a traditional village in accordance with the Village Law.

Keywords: Customary forest, Rejang customary law, Traditional village.

Introduction

Recognition of the existence of the customary law community in the era of independence for the first time contained in the 1945 Constitution of the Republic of Indonesia Article 18B paragraph (2) which reads "The State recognizes and respects customary law units along with their traditional rights as long as they are alive and in accordance with the development of society and the principles of the Unitary State of the Republic of Indonesia, which is regulated in the law." This article is a constitutional basis for indigenous and tribal peoples to regulate themselves and uphold their customary law.
The rights of indigenous peoples in the use of forests, based on Article 67 paragraph (1) of Law Number 41 of 1999 concerning Forestry, are given with difficult conditions, only customary law communities insofar as they are in reality still exist and are recognized as having the right: a. collect forest products to fulfill the daily needs of the indigenous people concerned; b. carry out forest management activities based on applicable customary law and do not conflict with the law; and c. get empowerment in order to improve their welfare.

The juridical constraints for indigenous peoples in exercising their rights in forest use are precisely caused by the Forestry Law itself which claims customary forests as state forests. In addition, another requirement is that the establishment and abolition of customary law communities is stipulated by Regional Regulations.

The Constitutional Court in Decision Number 35 / PUU-X / 2012 stated that removing and declaring several articles in the Forestry Law contradicted the 1945 Constitution of the Republic of Indonesia, which explicitly acknowledged the existence of customary forests in the territories of customary law communities so that the boundaries were clear-based forests controlled by the state and customary forests controlled by customary law communities. In his point of view, the Constitutional Court stated that "Regional Regulation is a delegation of authority regulating the Customary Law Society of the Central Government. This delegation is an effort to implement Article 18B paragraph (2) of the 1945 Constitution of the Republic of Indonesia. The regulation concerning the Customary Law Society is actually carried out in the Law, but to avoid a legal vacuum, the Constitutional Court believes that the arrangements by the Regional Government are justified ". Therefore, state recognition of the rights of indigenous peoples, after the decision of the Constitutional Court brought a fundamental change, so that it does not need to be rigidly dependent on the phrase as long as in reality it still exists, but the main thing is as long as it is alive and in accordance with community development and principles The Unitary
State of the Republic of Indonesia. The Rejang customary law community unit in Lebong Regency, originally known as kuteui (geneology), is still alive. Post-Decision of the Constitutional Court Number 35 / PUU-X / 2012, efforts to recognize, respect and protect the existence of Kuteui as a Rejang Customary Law Society and their original rights can be carried out by issuing Regional Regulations on Recognition of Rejang Customary Law Communities in Lebong Regency.

The policy of acknowledging the existence of the Kuteui as a genuine and genealogical Rejang customary law community can be followed by the implementation of Rejang customary law, as an effort to revitalize Kuteui’s participation in the management, maintenance of forest sustainability. Kuteui deserves to be given a role in maintaining the sustainability of the functions of customary forests in its territory, by re-implementing the customary legal norms of Rejang as the living law which is part of the soul (volksgeis) of the Rejang customary community itself, both direct and direct adopt the values they contain which are subsequently rearranged in the Regional Regulations.

The problem in this study is how is the existence of the Kuteui as the Rejang customary law community in its original and current genealogical tenure in Lebong Regency? and how are the opportunities for recognition of the Kuteui as the Rejang customary law community and the enactment of Rejang customary law after the Constitutional Court Decision Number 35 / PUU-X / 2012 concerning the judicial review of the Forestry Law?

This research takes a sociological juridical type because it specifically looks at the existence of the Rejang customary law community in Lebong Regency in social reality and aims to develop in-depth knowledge as the basis for arguments to give recognition to the existence of Kuteui in Lebong Regency. This research directly leads to the circumstances and actors involved in empirical practices of the elements associated with the Rejang customary law community. This study prioritizes secondary legal materials, and additional information
in the form of explanations obtained from informants. Non-legal materials in the form of empirical data are obtained through in-depth interviews, which are determined purposively which are divided into three groups of informants, namely groups of informants relating to traditional government systems ;; the group of informants relating to the traditional functionaries of Rejang, and groups of informants who were considered to have knowledge of Kuteui and the customary law of Rejang in Lebong District. Analysis of legal materials is carried out using analogical reasoning methods, both analogies of legal doctrine and precedent analogies (Nasution, 2008: 119). The analogy of legal doctrine with deduction reasoning that departs from generally accepted law in this case the provisions of legislation in the Rejang customary law community, and the precedent analogy with induction reasoning which is based on the practice of applying Rejang customary law in Kuteui institutions in Lebong Regency.

**Analysis and Discussion**

The existence of Kuteui as a Rejang Customary Law Society in its original and genealogical tenure is currently in Lebong Regency, the customary law community is a group of people who have traditionally settled in certain geographical areas because of ties to ancestral origins, strong relationships with the environment, and a value system that determines economic, political, social, and legal institutions (Article 1 paragraph (11) LHK Candy Number P.32 / Menlhk-Setjen / 2015 concerning Private Forests). In this definition there are several things that mark the customary law community, including groups of people or communities, have ties to ancestral origins, have certain territories, have strong relationships or ties with natural resources, have customary laws, and have customary institutions or institutions.

The existence of the Kuteui is tested with the mark of the customary law community can be explained, first, the existence of groups of people or communities. The Rejang tribe is a group of people who started and settled in Lebong. Indications that indicate the Lebong
Region as the origin of the Rejang Tribe include William Marden, British Resident in Lais (1775-1779) who reported on the existence of four Rejang Courts namely; interpreter Kalang, Bermani, Selupu and Tubai (Marsden, 1966: 178). Research on the origin, and customs of the Rejang tribe, was carried out by researchers including William Marsden with his book History of Sumatra in 1777, Hazairin with his dissertation De Rejang in 1932 (Hazairin, 1932), MA Yaspan from Australian National University with his work From Patriliny to Matriliny: Structural Change Amongst the Rejang of South Sumatra in 1961-1963 (Yaspan, 1964), Muhammad Hoesein wrote a text about Tambo and Adat Rejang Tiang IV in 1932 (Harun Nur Rasyid, 1976), Richard Mc Ginn Professor of Ohio University USA (2006), which focuses on the origin of the Rejang Tribe.

Secondly, it has a bond of ancestral origins. Research on the origin and customs of the Rejang tribe has been carried out by researchers including Marsden, Hazairin, Muhammad Hoesien, Yaspan and Zayadi, they explained that the Rejang tribe came from four groups of people living in the Lebong area led by the Ajai (Zayadi Hamzah (2010: 73). Richard Mc Ginn’s (2006) study states that the ancestors of the Rejang tribe came from Indochina Tonkin. They moved to Sumatra via Kalimantan sailing towards Sarawak (North Kalimantan) around 1200 years ago. Some of them settled there and still using the Rejang language, there is even a river called the Rejang River, from Sarawak they sail through the island of Bangka Belitung to the Musi river, then deviate to the right towards the Rawas river to the most upstream Rawas area (Richard Mc Ginn, 2006). and some sailed along the Rawas river to reach Mount Hulu Topos, and settled there.

Another note states that the Rejang tribe originated from the Malay Proto Period along with other tribes such as Toraja, Dayak, Batak. An immigrant from Yunnan. The history of this origin is proven by historical facts which show that the Chinese people have come to this region from 225-216 BC or 147–138 years, they generally come from the
land of Hyunun (Mainland China), in Mon language. It is this language that spreads to various countries in Thailand, Burma, Cambodia and parts of Korea, and first established a country called Lu-Shiangshe which means glorious river or life-giving / hope river or golden river, whose population is called Rha-hyang or Ra-Hyang or Re-Hyang or Rejang, a place located on the west coast of Sumatra Island, this proof is then reinforced an interesting thing is the discovery of the Chinese (Numismatic) currency that read Chien Ma dated 421 AD in North Bengkulu (Island Enggano). The same currency is also found in Criviyaya or Criwiyaya (read: Palembang) and in Tarumanagara (read: Jakarta). From the word CHIEN MA, the word Cha-Chien (Caci = money in the Rejang language) appears (Judge Benardi Sabri, in the Akar Foundation, 2013).

Third, having a certain area, at first the Rejang tribe occupied the Lebong area in small groups wandering and moving. Their lives are very dependent on the natural environment, and settled somewhere around the Ketahun River Valley led by an Ajai. Geographically, the Rejang tribe can be categorized into two parts, namely the Rejang Pesisir and Rejang inland or the mountains, some of the Rejang customary law communities in Lebong Regency are customary forests, which are then designated by the government as State forests.

Fourth, having a strong relationship or bond with SDA, in the early phases of its development, the life patterns of the nomadic Rejang tribe were very dependent on nature obtained by hunting and gathering food, moving around and living in caves. There is no cultivation system for food needs. Everything is taken from nature, and eats all kinds of animals (Rahabilah Firda, 2010). An important development in the history of the Rejang Tribe was when they came to know the techniques of farming, began to settle down and build settlements that were inhabited by several families to meet common needs or called Petulai. Family unity arising from a unilateral system, with a patrilineal lineage system, and an exogamous way of marriage (Abdullah Siddik, 1980). In
this period smaller community unity also emerged, which was later called Kuteui (W.L. de Sturler, 1843: 6) with a population of no more than 100 people, and consisted of 10 or 15 heads of families. Kuteui is a customary law community unit that is genealogical with its origin in patrilineal exogamy (Abdullah Siddik, 1980) led by Tuei Kuteui (Pramasty Ayu Kusdinar, 2016). The Kuteui Alliance then formed four Banggo or Margo who carried out the coordination and communication functions but important decisions were still taken at the Kuteui level with the musharaka pattern. John Marsden (British Resident in Lais, 1775-1779), in his report he told of the existence of four Rejang pilots namely Joorcalang (Jurukalang), Beremanni (Bermani), Selopo (Selupu) and Tooby (Tubai) (W. Marsden, 1777: 178). Hok Kuteui in the form of Taneak Tanai, Imbo Piadan is an expression to explain the procedures for natural resource management in indigenous territories consisting of land, water and forests: In the management of natural resources in the form of land, water and forests based on indigenous wisdom and norms agreed upon in the Kuteui meeting.

Fifth, having customary law, in the history of Adat Rejang the legal process covers all aspects of the lives of its citizens who do not only regulate sanctions but also regulate rights and obligations both with fellow citizens and with certain beliefs that are usually magical. Rejang Customary Law recognizes general standards that refer to true adat, ancestral inheritance, custom that is accentuated namely the addition of true adat both which is a rule resulting from the agreement and deliberation in Kuteui, the form is not written (Herlambang, et.all, 2004).

Sixth, have customary institutions or institutions. The Rejang customary community system has a regular institutional structure. In general, these custom institutions include Jang, Kuteui, Jang customary law, Jang customary law, Kelpiak Ukum Adat Jang, and Jenang Kuteui (Akar Foundation-HuMA, 2013).
The description of the customary law community above shows that the Kuteui fulfills the requirements to be recognized as a customary law community (adatrechtsgemeneschap), because it shows the existence of a regular human unit (Rejang tribe), settled in a certain area, has rulers, and has wealth tangible or intangible, in which members of each unit experience life in society as natural according to nature and no one in the members has a mind or tendency to dissolve the bond that has grown or leave it in the sense of breaking away from that bond forever (Bushar Muhammad, 1976: 30). It is proven that until now the traditional leadership of Tuwei Kuteui is still practiced in every village in Lebong Regency.

Kuteui as a Rejang customary law community is an undeniable fact. Its existence has been well documented in a number of historical literature and customary law. Each customary law community contains in its structure descendants (genealogical) or has a structure that is of territorial genealogy (in terms of territorial elements stronger than genealogical elements) or has a territorial genealogical structure (in terms of genealogical elements stronger than territorial). In this genealogical context, there are then known three kinds of offspring relationships, namely the patrilineal customary law, matrilineal customary law and parental customs (Bushar Muhammad, 1976: 31-34).

Territorial customary law communities are customary law communities that are structured based on the regional environment, where the members feel united, because of the ties between them each with their land. The foundation that brings together members of the customary law community whose territorial structure is a bond between people and the land they have inhabited since their birth from generation to generation. Bonds with land are at the core of territorial principles, so in this context the village law community, the territorial law community and the village union law community became known (Bushar Muhammad, 1976: 36).
Historically, the form of the Rejang Customary Law Community unit experienced five stages of development from genealogical to territorial, namely meramu (genealogical), petulai (genealogical), kuteui (genealogical), kuteui (territorial), and clan (territorial). The Rejang customary community unit in Lebong Regency has two categories, namely genealogical (kuteui) and territorial (hamlet, marga). The genealogical Rejang customary law community is still alive and has never been removed, in contrast to the Rejang customary law community which is territorial which came to be known as the clan (territorially made by Dutch colonialism), which existed for approximately 120 years (1862-1982), already deleted by the government as a consequence of the enactment of Law Number 5 of 1979 concerning Village Government (M. Yamani, 2010: 179).

Opportunities for Recognition of Kuteui as Rejang Customary Law Communities and Enforcement of Customary Law in the Post-Decision of the Constitutional Court Rejang Number 35 / PUU-X / 2012 concerning the Material Test of the Forestry Law. Recognition of customary law communities after the Decision of the Constitutional Court Number 35 / PUU-X / 2012, whose decision abolished and stated that several articles in Law Number 41 of 1999 concerning Forestry contravene the 1945 Constitution of the Republic of Indonesia, which explicitly recognizes the existence of forests adat which is in the territory of the customary law community so that the boundaries of the forest controlled by the State and customary forests are controlled by customary law communities. The Constitutional Court stated in its main point that "Regional Regulations constitute delegation of authority regulating Customary Law Communities from the Central Government in an effort to implement Article 18B paragraph (2) of the 1945 Constitution of the Republic of Indonesia. but in order to avoid a legal vacuum, the Constitutional Court believes that the arrangements by the Regional Government are justified ". Therefore, state recognition of the rights of indigenous peoples, after the decision of the Constitutional
Court brought a fundamental change, so that it does not need to be rigidly dependent on the phrase as long as in reality it still exists, but the main thing is as long as it is alive and in accordance with community development and principles Republic of Indonesia Kesatun Country.

Judging from the authority of the regional government, the recognition of customary law communities is based on Article 12 paragraph (2) of Law Number 23 Year 2014 concerning Regional Government, which states that mandatory Affairs which are the authority of regional governments for districts / cities that are not related to basic services include: among others letters e. environment, which is detailed further in Appendix letter K. Division of Government Affairs in the Environment, number 7. Sub-sector Recognition of the existence of customary law communities (MHA), local wisdom and MHA rights related to PPLH, where the authority of districts / cities is letter a. Determination of MHA recognition, local wisdom or traditional knowledge and local wisdom rights or traditional knowledge and MHA rights related to PPLH in the district / city area. Thus hierarchically it does not conflict with the content of the provisions of higher legislation.

Then, the opportunity to recognize the Rejang customary law community viewed from Law Number 6 of 2014 concerning Villages is more likely to be directed towards the establishment of customary villages, whose territory covers the Kuteui area.

Article 1 number 1 is formulated. Villages are traditional villages and villages or what are called by other names, hereinafter referred to as Villages, are legal community units that have territorial limits that are authorized to regulate and manage government affairs, interests of local communities based on community initiatives, origin rights, and / or traditional rights recognized and respected in the system of government of the Unitary State of the Republic of Indonesia. The Village Law authorizes the Government, Provincial Governments, and
Regency / City Governments to organize customary law community units and to be designated as Customary Villages (Article 96).

Requirements that must be fulfilled in setting customary law community units into traditional villages, namely a. customary law community units along with their traditional rights are actually still alive, both territorial, genealogical and functional; b. customary law community units and their traditional rights are deemed to be in accordance with community development; and c. customary law community units and their traditional rights in accordance with the principles of the Unitary State of the Republic of Indonesia. Unity of customary law communities along with their traditional rights that are still alive, must have territory and at least fulfill one or a combination of elements: a community whose citizens have shared feelings in a group; b. customary government institutions; c. assets and / or customary objects; and / or d. device of customary law norms. Inauguration of the establishment of customary villages is stipulated by Regency / City Regional Regulation.

Based on the regulation above, the application of law as a tool for social engineering in the form of revitalization and recognition of the Rejang customary law community has a strong legal basis.

**Conclusion**

Whereas the existence of the Kuteui as the Rejang customary law community in its original and independent form that is of the genealogical tenure characterized by the patrilineal exogamy where the jue’i-jue’i was founded which was led by Tuei Kuteui in Lebong Regency still exists and has never been deleted, while the Marga as a community Rejang customary law that is territorial in nature which includes the Selupu Lebong clan, Marga Suku Sembilan, Marga Suku Delapan and Marga Bermani Jurukalang have been deleted along with the enactment of Undag Law No. 5 of 1979 concerning Village Government.

That after the Decision of the Constitutional Court of the Republic of Indonesia Number 35 / PUU-X / 2012 the existence of the Kuteui as
a Rejang customary law community in its original and independent form that is of genealogical tenure can be confirmed by Regional Regulation on Kuteui recognition and followed up with the formation of the Kuteui as a given traditional village the ulayat area (taniak tanei) of the former customary forest that was once owned by the kuteui-kuteui concerned.

Recommendation, in a formal juridical manner the local government of Lebong Regency establishes a Regional Regulation concerning the recognition of indigenous peoples is very strong, but the initial stages that still need to be fought for, namely inventorying and verifying the territory of the Rejang indigenous people consisting of land, water and natural resources in it, the mastery, management and utilization are carried out according to the values of Rejang Customary Law adopted in the Customary Village Regulations.

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Re – Orientation on Curriculum of Law Faculty or Law School in Indonesia: Arbitration Law Studies

Jafar Sidik
Bambang Hariyanto

Faculty of Law, University of Lalang Buana, Bandung, Indonesia
E-mail: jafarlawcenter@gmail.com
BHP Institute, Palembang, Indonesia
E-mail: bambang.arbiter@gmail.com

Abstract

Legal Policy of the Government of the Republic of Indonesia (RI Laws) describes that the settlement of disputes outside the general courts by Arbitration or Alternative Disputes Resolution (ADR). Arbitration as a mechanism of settling commercial disputes outside the general courts based upon an arbitration agreement entered into by disputing Parties. Practically, Mostly Arbitration Law has not been included in curriculum of Law Faculty or Law School in Indonesia. Research Methods is descriptive qualitative approach and normative juridical analyses on Indonesian Laws. This Paper describes the implementation and the possibility of re-orientation law curriculum in Indonesia based on Literature Studies. It is discovered that there is various implementation of arbitration law in curriculum of Law Faculty or Law School in Indonesia and need re-orientation law curriculum in Indonesia.

Keywords: Arbitration, Law, Curriculum, Settlement of Disputes.

Introduction

In Indonesia, matters refer to disputes resolution and arbitration are regulated under Law No.30 of 1999 concerning Arbitration and Alternative Dispute Resolution (RI Law No.30/1999). Prior to that, the law that was replaced by this law was the Law on Arbitration, which was part of the Old Law of Civil Procedures of 1848 which was enacted during the Dutch Colonial Administration. Law No.30/1999 accommodates the development trends in national and international ADR/Arbitration.1

The Law No.30/1999 provides the rule and procedure for the conduct of the settlement of disputes outside the Court. Now, legal

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1 M. Husseyn Umar. BANI and Settlement of Disputes. Publisher PT.Fikahati Aneska, Jakarta, 2016, page 232.
policy of the RI Law trends and applied the settlement of disputes outside the Court, such as construction law, banking law, financing law, OJK law, insurance law, capital market law, investment law, property rights law, sports law, trading law, industrial law, etc.

However, the curriculum of Law Faculty or Law School in Indonesia has not included the arbitration subject. Consequently, Arbitration is not familiar among Law Graduation. This means they are left by the trend of national and international issues which has been familiar and has applied the settlement of disputes outside the Court. In this case, University has to follow the development trends of the settlement of disputes outside the Court, such as arbitration law and ADR.

**Analysis and Discussion**

William H. Gill, in book “the Law of Arbitration”, states that “An arbitration is the reference of a dispute or difference between not less than two persons for determination after hearing both sides in a judicial manner by another person or persons, other than a court of competent jurisdiction”. BLACK’S Law Dictionary states that:

“Arbitration. The reference of a dispute to an impartial (third) person chosen by the parties to the dispute who agree in advance to abide by the arbitrator’s award issued after hearing at which both parties have an opportunity to be heard. An arrangement for taking and abiding by the judgement of selected persons in some disputed matter, instead of carrying it to establish tribunal of justice, and is intended to avoid the formalities, the delay, the expense and vexation of ordinary litigation”.

Stanford M. Altschul in book “The Most Important Legal Term You’ll Ever Need to Know” states that “Arbitration. An alternative dispute resolution system that is agreed to by all parties to a dispute. This system provides for private resolution of disputes in a speedy fashion”. Subekti in his book “Arbitration in Indonesia” states that:

“Arbitrase itu adalah penyelesaian suatu perselisihan (perkara) oleh seorang atau beberapa orang wasit (arbiter) yang bersama-
sama ditunjuk oleh para pihak yang berperkara dengan tidak diselesaikan lewat Pengadilan”.

Arbitration shall mean a settlement of dispute by a referee or more referee (an arbitrator or arbitrators) was appointed together by disputing parties and conducted outside the General Courts.

Priyatna Abdurrasyid in his book “Introduction to Arbitration and Alternative Dispute Resolution (ADR) states that:

Arbitrase adalah salah satu mekanisme alternatif penyelesaian sengketa-aps yang merupakan bentuk tindakan hukum yang diakui undang-undang dimana salah satu pihak atau lebih menyerahkan sengketanya – ketidak sepahamannya – ketidak sepakatannya dengan satu pihak lain atau lebih kepada satu orang (arbiter) atau lebih (arbiter-arbiter-majelis) ahli yang professional, yang akan bertindak sebagai hakim/peradilan swasta yang akan menerapkan tata cara hukum negara yang berlaku atau menerapkan tata cara hukum perdamaian yang telah disepakati bersama oleh para pihak tersebut terdahulu untuk sampai kepada putusan yang final dan mengikat. Oleh karena itu dikatakan bahwa aritrase adalah hukum prosedur dan hukum para pihak (“law of procedure” dan “law of the parties”). Selain putusan yang final dan mengikat, dikenal pula pendapat yang mengikat ("binding opinion”” – “bindend advise”).

Arbitration shall mean a mechanism of alternative dispute resolution – ADR, the legal action that is recognized by law where one or more parties submit the disputes – disagreement – with other party or parties to an arbitrator or arbitrators panel professional expert, as a judge / private courts with apply the peaceful means agreed together by prior the parties reaching the final and binding award. Therefore, arbitration shall mean law of procedure and law of the parties. Beside final and binding award it is also known as binding opinion).

Definition of Arbitration and ADR according to RI Law No.30 / 1999 states that: “Arbitration shall mean a mechanism of settling civil disputes outside the general courts based upon an arbitration agreement entered into in writing by the disputing Parties” (Article 1 (1) RI Law No.30/1999). Whereas, Alternative Dispute Resolution (or ADR) shall mean a mechanism for the resolution of the disputes or
differences of opinion through procedures agreed upon by the parties, i.e. resolution outside the courts by consultation, negotiation, mediation, conciliation, or expert assessment (Article 1 (10), RI Law No.30/1999).

The Philosophy of Arbitration

a. Empowerment of individual; and
b. Settlement of disputes with cooperation.2

The Principles of Arbitration: Good faith; Non-confrontation; Cooperation; Law of the parties; Law of the procedure; Non-disclosure; Non-publication; Non-interference; Non-intervention; Confidentiality; Equality; Unanimity; Impartiality; and Time limitation.3

The Doctrines of Arbitration, Internationality Doctrine (The philosophy of arbitration is “peaceful settlement of disputes”); Universality Doctrine (All disputes, both private or public disputes are amicable settlement); Globality Doctrine (Everyone may be appointed as arbitrator); Transnationality Doctrine (The venue of process arbitration can be conducted everywhere that is agreed by disputing parties); Implied Power Doctrine (The arbitrator or arbitration tribunal has been appointed or designated that have been given the absolute power by the disputing parties); Competence-Competence Doctrine; and Separability Doctrine (Independent Arbitration Clause).4

The Advantages of Arbitration: Arbitration has the advantages compared with general courts, i.e.:5 Guarantied confidentiality of cases of the parties; Avoid delay of procedural dan administrative matter; The Parties are able to chose arbitrator based on their consideration has knowledges, experiences and also good background on disputes problems and issues, honest and fair; The parties are able to decide choice of law to settle their disputes and also process and place of

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5 The Explanation of RI Law No.30 of 1999.
arbitration; Arbitrator awards shall be final and binding upon both parties to the dispute and with simple procedures or voluntarily to implement the arbitration award; Other advantages of arbitration.

The Source of Law on Arbitration. Underlying of Arbitration in Indonesia, i.e.: RI Law No.30 of 1999; RI Law No.49 of 2009; RI Law related to Arbitration; Arbitration Clause or Arbitration Agreement; Reputation Doctrine of Arbitration; The Court Awards related to Arbitration.

The Scope of Arbitration; Refer to Article 5 (1) and Article 5 (2) RI Law No.30 / 1999 provide “only dispute of commercial nature, or those concerning rights which, under the law and regulations fall within the full legal authority of the disputing parties, may be settled through arbitration”. “Disputes which may not be resolved by arbitration are disputes where according to regulations having the force of law no amicable settlement is possible”. The scope of commercial law means activities nature including, i.e.: Commercial; Banking; Financing; Capital Investment; Industrial; Property Rights. Practically, the Scope Settlement of Disputes was submitted to BANI Arbitration Center, Jakarta, as per Year 2016, such as below:

Figure 1: Cases were submitted to BANI as per Year 2016.

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6 Vide Article 5 (1) jo Explanation Article 66 (b) RI Law No.30 / 1999.
Ad-Hoc Arbitration and Institutional Arbitration. RI Law No.30/1999 provides there are two kind of arbitration: Ad-Hoc Arbitration; and Institutional Arbitration. Ad-Hoc Arbitration (“Arbitration Volunteer”) means certain arbitration for one occasion. Arbitrator(s) is appointed by disputing parties. In the event the parties cannot reach agreement on the choice of arbitrators or no terms have been set concerning the appointment of arbitrator, the Chief Judge of the District court shall be authorized to appoint the arbitrator or arbitration tribunal. In an ad-hoc arbitration, where there is any disagreement between the parties with regard to the appointment of one or more arbitrators, the parties may request the Chief Judge of the District Court to appoint one or more arbitrators for resolution of such dispute.

Institutional Arbitration means permanent nature of National or International Arbitration Board of Arbitration, i.e. BANI Arbitration Center (Jakarta), BASYARNAS (Jakarta), ICC (The Court of Arbitration of the International Chamber of Commerce, Paris), The London Court of International Arbitration, London U.K.).

Arbitration Clause and Arbitration Agreement. RI Law No.30 / 1999 in Article 1 (3) stated that “Arbitration agreement shall means a written agreement in the form of an arbitration clause entered into by the parties before a dispute arises, or a separate written arbitration agreement made by the parties after a dispute arises”. According to BANI Rules & Procedures, The BANI recommends all parties wishing to make reference to BANI Arbitration, to use the following standard clause in their contract:

“All disputes arising from this contract shall be binding and be finally settled under the administrative and procedural Rules of

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8 Vide Article 13 RI Law No.30/1999.
Arbitration of Badan Arbitrase Nasional Indonesia (BANI) by arbitrators appointed in accordance with said rules.

RI Law No.30 / 1999 in Article 9 (1) and (3) stated that “In the event the parties choose resolution of the dispute by arbitration after a dispute has arisen, The written agreement contemplated must contain:

10 The subject matter of the dispute; The full name and address of residence of the parties; The full name and place of the residence of the arbitrator or arbitrators; The place the arbitrator or arbitration panel will make their decision; The full name of the secretary; The period for in which the dispute shall be resolved; A statement of willingness by the arbitrator (s) and; A statement of willingness of the disputing parties that they will bear all costs necessary for the resolution or the dispute through arbitration.

An institutional arbitration n is one which is administered by one of the many specialist arbitral institution under its own rules of arbitration. Institutional Arbitration in Indonesia, such as: BANI; BAORI/BAKI BAPMI; BAKTI; BASYARNAS; BAMHKI, Etc.

Indonesia in International Cooperation Agreements: In Indonesia, Institutional Arbitration i.e. BANI has cooperation agreement, with arbitration association and centers in other countries for the purpose of promoting international commercial arbitration and other forms of ADR amongst companies, business persons and other parties in those countries. These other arbitration associations and centers include the following institutions: The Japan Commercial Arbitration Association; The Netherlands Arbitration Institute; The Korean Commercial Arbitration Board; Australian Centre for International Commercial Arbitration; The Philippines Dispute Resolution Centre; Hong Kong International Arbitration Centre; The Foundation for International

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10 Vide Article 9 (4) RI Law No.30 / 1999 that “A written agreement not contain the matters specified in paragraph (3) will be null and void”.


12 BANI Rules and Procedures, page.7.
Commercial Arbitration and Alternative Dispute Resolution (SICA-FICA); Singapore Institute of Arbitrators.

Furthermore, BANI is one of the founder and member of Asia Pacific Regional Arbitration Group (APRAG) and Host of Regional Arbitral International Forum (RAIF). Based on review to several academic curriculum of law faculty or law school in Indonesia, such as below (subject to review):

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<th>Semester</th>
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<td>Alternative Subject Law of International Trading (Business)</td>
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<td>5 / 7</td>
<td>Alternative Subject Law of IT &amp; Communication Mandatory Subject</td>
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RI Law No.18 / 2003 concerning “Advocate” stated in Article 3 (2) that “Advocates practically are able to concentrate to certain legal matter capability i.e. arbitration and ADR”. RI Law No.30 / 1999 concerning Arbitration and Alternative Dispute Resolution stated in Article 3 that “The District Court shall have no jurisdiction to try disputes between parties bound by arbitration agreement”. RI Law No.30 / 1999 Article 9 (1) stated that “in the event the parties choose resolution of the dispute by arbitration after a dispute has arisen, their designation of an arbitration as a the means of resolution of such dispute to this must be given in a written agreement signed by the parties”. Article 9 (2) sated that “in the event the parties are unable to
sign the written agreement as contemplated in paragraph (1), such written agreement must be drawn by a Notary in the form of a notarial deed”.

RI Law No.12 / 2012 concerning Higher Education stated in Article 15 related to Academic (S1 & S2) to development of science and IT and Article 16 related to Vocational are able to prepare expertise of human resources. RI Regulation of President No.8 / 2012 concerning KKNI (Edu care for long life) jo RI Regulation of Minister of Human Resources No.5 /2012 SKKNI (Standard Competence of Work) jo RI Regulation of Minister No.44 / 2015 stated of kind of educational, i.e. academic, professional and vocational education that arbitration and ADR is included in Level 9 (expertise of law on arbitration and ADR).

There are mis-perspectives or mis-understanding about arbitration in Indonesia. The arbitration for settlement of business disputes rapidly develop in Indonesia. However, This is not anticipated by Law Education System by Law Faculty or Law School. Arbitration subject has not been included in academic curriculum and it is only an alternative subject of private law or business law as an introduction into it. There is no comprehensive study on it.

Based on our studies 70% of the arbitration award was voluntary implemented by disputing parties. A few application to annul an arbitration award to the District Courts, but after refusal by the District Courts they voluntary implement it without execution by the District Courts. Discussion with Dr. Nani Trihastuti a lecture of Faculty of Law University of Diponegoro (UNDIP) Semarang said that it was not easy to know the process of arbitration that it was because of all hearings of arbitration disputes shall be closed to the public. Nani hoped that BANI goes to campus Faculty of Law to socialize arbitration.

**Conclusion**

Accordingly, various implementation arbitration subject on academic curriculum of Faculty of Law or Law School in Indonesia. It is undoubtedly that Law Education System in Indonesia needs re-
orientation on curriculum of law faculty or law school, i.e. Arbitration Law Studies. Numerous RI Law & Regulations have been launched and announced related to provisions on the settlement of disputes outside the General Courts. BANI needs to socialize arbitration goes to campus i.e. Faculty of Law or Law School in Indonesia.

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Juridical Analysis Of Decision Number :
60/Pid.Sus.Tpk/2016/Pn.Bgl 16 Februari 2017
Concerning Corporate Criminal Liability In The
Case Of Money Laundering

Eka Ilham Ferdiady
Faculty of Law, University of Bengkulu, Indonesia
Email : Ekailhamferdiady@gmail.com

Abstract

Development law with progress global economical is as the subject of corporate
criminal law. Corporation is function have authority to make something or no to do, so
that give right and obligation, this is, to come auction project, make a contract project.
Corporation role is some the power economic, this make corporation to law violation this
criminal offense of corruption and money laundering court decision No :
60/Pid.Sus.TPK/2016/PN.Bgl. The purpose of this study is to understand and analyze juridical of base the panel judge to free corporation is a money laundering, description
and to find how to arrangement as a proof criminal offense of money laundering in to
future. The method used in this study is a normative legal research, approach to the case
by looking at the cases that have occurred, and the historical approach to the
history, legal materials, Secondary legal materials, legal materials collection techniques
trough study documents, processing the data using the data editing and research uses
qualitative analysis. The results of the study authors, this is : (1) Base juridical panel of
decision to free a corporation criminal offense of money laundering, (2) how to arrangement
as a proof criminal offense of money laundering, (3) how to arrangement as a proof
criminal offense of money laundering to future. Of the results of these studies conclude
that : (1) the judge wrong apply a proof criminal offense of money laundering, (2)
absence uniformity determine punishment criminal offense of money laundering, (3)
absence uniformity arrangement to apply a proof criminal offense of money laundering.

Keywords : Juridical Analysis, corporation liability, criminal offense of money
laundering.

Introduction

Legal developments and the progress of the global economy are
known to be corporate law subjects. Corporations based on their
functions have the authority to act to do something or not to do, giving
rise to rights and obligations between corporate owners / managers and
corporations, such as participating in project auctions, making project
contracts.
The role of corporations is increasingly strengthened as a form of economic power, these conditions make corporations in their business activities take actions that can harm the public interest, this is known as corporate crime. Corporate Crime is a criminal act committed by a corporation or business entity or by people acting for and on behalf of a corporation or business entity.¹

"In the case of a crime of money laundering as referred to in Article 3, Article 4, and Article 5 it is carried out by the corporation, the criminal is imposed on the corporation and / or corporate control personnel."²

Corporate case of PT. Puguk Sakti Permai (PT. PSP) originated from an infrastructure development project to improve roads with hotmik construction through the implementation of multi-year work for a period of 5 (five) Fiscal Years, with a budget allocation of Rp. 350,000,000,000 (three hundred fifty billion rupiah) sourced from the Seluma Regency APBD for the work of 26 (twenty six) roads. In 2011 the corporation PT. Puguk Sakti Permai (PT. PSP) participates in the project auction and is declared the auction winner. In the project work, there was a lack of volume and work that was not in accordance with the spec, namely on road works (Ampar Gading-Sembayat, Jalan Talang Saling-Petai Keriting, Jalan Bunga Mas-Kejari-Kota Agung Roundabout) for the work allegedly the corporation PT. Puguk Sakti Permai (PT. PSP) together with corporate administrators have committed acts of corruption as well as money laundering, then carried out investigations and prosecutions.

The Public Prosecutor has proven the First Indictment of Subsidies and Second Charges, the Panel of Judges decides the First Indictment of Subsidies has been proven as in the consideration of the decision the panel of judges stated "that because of the overpayment so that the Assembly therefore believes that according to the law in the case a quo

² BPHN Republik Indonesia, Undang-Undang Nomor 8 tahun 2010 tentang Pemberantasan dan Pencegahan Tindak Pidana Pencucian Uang.
has clearly existed element of detrimental to state finances, therefore this element was declared to have been proven”.

Based on the facts of the trial of witness testimony, expert testimony, instructions, letters and evidence, the Public Prosecutor has proven the elements of money laundering, but the panel of judges in Decision Number: 60 / Pid.Sus.TPK / 2016 / PN. The date of February 16, 2017 does not consider the demands of money laundering and ignores the verification of the criminal act of money laundering of the Public Prosecutor.

This is not in line with the evidentiary principle adopted by the money laundering law. The essence of the crime of money laundering is to hide or disguise the origin of the proceeds of crime.

Based on the description as mentioned above, there are problems that must be examined, as for the object of research with the title "Juridical Analysis of Decision Number: 60 / Pid.Sus.TPK / 2016 / PN. Date 16 February 2017 concerning Accountability of Corporate Crimes in Criminal Cases Money Laundering. Identification of issue for this paper : What is the juridical basis of the Panel of Judges in freeing corporations from money laundering? How is the regulation of proof in determining corporate criminal responsibility based on the Money Laundering Act? How is the regulation of proof in determining corporate criminal responsibility based on the Money Laundering Act in the future?

Methods

This type of research in terms of its nature is descriptive research, descriptive research describes the state of the object or problem without the intention to draw conclusions that generally apply.\(^3\) The research approach used in this study is the approach of the law, the case approach, and the historical approach.

\(^3\) Ronny Hanitijo Soemitro, (1983), *Metodologi Penelitian Hukum*, Jakarta : Ghalia Indonesia, hlm. 16.
Analysis and Discussion

According to the analysis of the author that in Decision Number: 60 / Pid.Sus.TPK / 2016 / PN.Bgl dated February 16, 2017. Which is included in the category of his actions is a public legal act so that the legal subject is law person, that there are 2 criminal law subjects, namely: natural person or natural person that is human personally this refers to man and, law person or legal person that is public law subject and subject of private law. This is also as stated by R. Soeroso The subject of Indonesian criminal law is known to have two legal subjects, namely the nature of the person is a mens person called a person or a personal person and rechtperson is a legal entity.  

According to the analysis of the author that in Decision Number: 60 / Pid.Sus.TPK / 2016 / PN.Bgl dated February 16, 2017. In one of the judges’ consideration above theoretically the act referred to in the element is entered into the term Placement ie an effort to place assets generated from a crime into the financial system, the form of its own activities can be in the form of placement of funds in a bank, financing activities that appear to be legitimate so as to convert cash into credit.

In the opinion of the author based on the results of reading and analyzing the decision, the Public Prosecutor has proven the elements of the crime of money laundering, but the panel of judges in Decision Number: 60 / Pid.Sus.TPK / 2016 / PN. Dated February 16, 2017 consider the demands of money laundering and ignore the proof of the crime of money laundering of the Public Prosecutor. This is not in line with the evidentiary principle adopted by the money laundering law. The essence of the crime of money laundering is to hide or disguise the origin of the proceeds of crime. The money laundering law provides room for law enforcement officials (APH) to criminalize money laundering.

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Proof of Arrangement in determining the criminal liability of corporations that commit money laundering. In criminal law from the point of view according to the method of committing a crime. An offense or criminal offense can occur because of an act which is prohibited from being called a commission offense, does not require the act to be called an ommissie delict or performs an act that at the same time includes the understanding of doing while not taking action. which are prohibited and are required to be referred to as an offense mixture of commissions and omissions (delicta commissioner per commisceo commission).\(^5\) (1) **Delic commission is an active handeling action which is prohibited for violation of the law;** (2) **Delic Omisi is a passive handling that is required, which if not done is threatened with crime.**\(^6\)

Delic commission means that the offender commits a violation of law or law by doing an active act. A corporation is considered as doing an act like a natural human being. Whereas the omission offense means that the perpetrator does not do something, so that results in consequences that are prohibited by law. He (human / corporate manager) did not do an act but he transferred to the corporation. As for some doctrinal teachings that become the foundation of the corporation, criminal liability can be requested, namely:

1). **Vicarious Liability**

_The legal responsibility of one person for the wrongful acts of another._\(^7\)

Such accountability, for example, is found in acts committed by other people within the scope of work or position. Hamzah Hatrik said that a corporation could be held responsible:

1) **Those who can commit criminal acts and those that can be accounted for are persons and or corporations. In the case of a corporation committing a crime, then the person responsible is the corporate manager.**

2) **Those who commit criminal acts and those that can be accounted for are persons and or corporations.**\(^8\)

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\(^6\) Ibid.

Mardjono Reksodiputro stated that there were three models of criminal responsibility, the corporation was based on the position of the corporation as the maker and the nature of corporate criminal responsibility, namely:
1) Corporate administrators as makers and administrators are responsible;
2) Corporations as responsible makers and administrators;
3) The corporation as the maker and also as responsible.9

The regulation of evidence in determining the criminal liability of corporations that commit the crime of money laundering as in the Money Laundering Act has undergone several phases of change from the enactment of the 2002 Money Laundering Act, the 2003 Money Laundering Act to Money Laundering Crime Act of 2010, for this reason the author will describe to determine the concept in the future.

Money laundering crime according to Mardjono Reksodiputro has the characteristics of specificity among other economic crimes, as follows: First, this crime is an advanced process of other crimes, namely money or funds that are known or reasonably suspected to come from criminal acts; Second, the way the perpetrator in “hiding /disguising” the proceeds of crime is related to the activities / services of banks and non-bank financial institutions and using information/internet technology (the global connection of interconnected computer networks spanning state and national borders).10

The regulation of evidence in the Money Laundering (TPPU) Law According to Yudi Kristiana in handling the crime of money laundering the evidence used to prove the crime of money laundering is first, evidence as stipulated in the Criminal Procedure Code, namely Article 184 of the Criminal Procedure Code and / or second , other evidence in the form of information that is said, sent, received or stored electronically with optical devices or similar optical devices and

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documents. The theoretical juridical concept of proving money laundering is as follows: 1) Evidence. The evidence used to prove the crime of money laundering is first, evidence as stipulated in the Criminal Procedure Code, namely Article 184 paragraph (1) of Law Number 8 of 1981 concerning the Criminal Procedure Code, namely: witness testimony, expert testimony, letter, instructions, statement of the defendant. And or second, other evidence in the form of information that is said, sent, received or stored electronically with an optical device or similar optical and document equipment, this provision is regulated in Article 73 of the TPPU Law as follows:

Legitimate evidence in proving the crime of money laundering is: (a) evidence as referred to in the Criminal Procedure Code; and / or; (b) other evidence in the form of information that is said, sent, received, or stored electronically with optical devices or similar optical devices and documents.

a. Additional additional evidence as formulated in Article 73 letter b of Law Number 8 of 2010 concerning Eradication and Prevention of Money Laundering in line with the development of the types of evidence as stipulated in Law Number 19 of 2016 concerning Amendments to Law Number 11 in 2008 concerning Information and Electronic Information Transactions and Electronic Transactions (ITE), the regulation regarding electronic information and electronic documents as evidence in Article 44 of the ITE Law as follows:

b. Evidence of investigation, prosecution and examination in court proceedings according to the provisions of this law are as follows:

According to M. Yahya Harahap, the law-based verification

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12 BPHN Republik Indonesia, Undang-Undang Nomor 8 tahun 1981 tentang Kitab Undang-Undang Hukum Acara Pidana.
14 BPHN Republik Indonesia, Undang-Undang Nomor 8 tahun 2010 tentang Pemberantasan dan Pencegahan Tindak Pidana Pencucian Uang.
system is negatively constituted as a theory between the legal evidence system in a positive manner and a verification system according to conviction or conviction in time. Negative evidence-based systems (Negatief Wettelijk Stelsel) "combine" into themselves in an integrated system of proof according to belief with a positive system of proof according to the law. From the results of the merger of the two systems from the opposite, a "law-based verification system is realized". The formulation reads: whether a defendant is wrong or not is determined by the judge's conviction based on the method and by means of legal evidence according to the law.\(^\text{15}\)

According to this system, in the event that a defendant commits a criminal offense that is charged to him, the judge does not fully rely on the evidence and in the ways determined by law. However, it must also be accompanied by the conviction that the defendant is guilty of criminal conduct. The verification system according to Article 183 of the Criminal Procedure Code is: "The judge must not impose a criminal sentence on a person unless if with at least two valid evidences he obtains the conviction that a criminal act actually occurred and that the defendant is guilty of doing so.\(^\text{16}\) In addition to article 183 of the Criminal Procedure Code above, based on the author's observations the law of proof in the crime of money laundering is also regulated in Article 77, namely: For the purpose of examination at a court hearing, the defendant must prove that his Assets are not the result of a criminal act. Article 78 namely: (1) In the examination at the court as referred to in Article 77, the judge orders the defendant to prove that the Assets related to the case do not originate or are related to the criminal act as referred to in Article 2 paragraph (1). (2) The Defendant proves that the Assets related to the

\(^{15}\) M. Yahya Harahap, Op.Cit, hlm 278-279.

case do not originate or are related to criminal acts as referred to in Article 2 paragraph (1) by submitting sufficient evidence.

The aforementioned Article Formulation states that the defendant must be able to prove that his assets are not related to a criminal act carried out as in Article 2 paragraph (1) of the TPPU Law.

Law Number 8 of 2010 concerning Prevention and Eradication of Crime of Money Laundering has produced another proof system, namely the "reserve burden of proof" or Omkering van het Bewijslat, which is specifically applied to deal with criminal cases money laundering. The burden of proof which is usually the duty of the Public Prosecutor is reversed or charged to the Defendant (person / corporation) to prove otherwise. The defendant (person / corporation) must prove that the assets he owns are not the result of a criminal act or in this case the principle of "presumption guilty" is stated that the defendant is deemed to have possessed assets derived from crime unless he can prove otherwise. Therefore this system is an exception to the principle of "presumption of innocence" as regulated in Article 6 paragraph (2) of Law Number 48 of 2009 concerning Judicial Power.

The reserve burden of proof (Omkering van het Bewijslat) proof burden reversal system is regulated in Article 77 and Article 78 reads: Article 77, namely: For the purpose of examination at a court hearing, the defendant must prove that his Assets are not the result of a criminal act. Article 78 namely: (1) In the examination at the court as referred to in Article 77, the judge orders the defendant to prove that the Assets related to the case do not originate or are related to the criminal act as referred to in Article 2 paragraph (1). (2) The Defendant proves that the Assets related to the case do not originate or are related to criminal acts as referred to in Article 2 paragraph (1) by submitting sufficient evidence.

From the description of the article above, the reversal of the burden of proof is still within the framework of the interest of the examination in court and is limited to the origin of the assets, so that it
is not a proof of the money laundering activities. The defendant’s examination process still uses the procedural law as regulated in the Criminal Procedure Code unless otherwise specified.

The law provides space for the panel of judges to be able to order the defendant to explain the origin of the assets they possess. However, if the defendant cannot prove the origin of his possessions, this will strengthen the Public Prosecutor’s indictment. Then if the defendant wants to prove otherwise, that his assets come from a legitimate source then the defendant must prove it with sufficient evidence.

**Conclusion**

In the Decision Number: 60 / Pid.Sus.TPK / 2016 / PN.Bgl, the panel of judges is wrong in applying the evidence of criminal acts of money laundering. That there is no uniformity in determining the punishment of money laundering. There is no uniformity of regulation in applying evidence of money laundering. There are four recommendations from the author regarding the problem of the judge’s decision, namely: It is recommended that the panel of judges in making decisions must pay attention to the legal principles of proving the crime of money laundering. There must be a common perception between law enforcement officials, especially in determining the prosecution of money laundering crimes. There must be synchronization between laws and regulations regarding the development of evidence and prosecution of money laundering crimes. In Law No. 8 of 2010 concerning the prevention and eradication of the crime of money laundering in the future, it must regulate firmly the regulation of money laundering so that law enforcement officials do not misapply and interpret the contents of the law.
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Restorative Justice as Alternative in the Criminal Solution of Criminal in the Influence System in Indonesia

Henny Saida Flora
Faculty of Law, St. Thomas Catholic University, Indonesia.
E-mail: hennysaida@yahoo.com

Abstract

The criminal punishment system in the Criminal Code in essence still retains the retributive paradigm, which is to provide appropriate retribution for crimes perpetrated by the perpetrator and still focus on the prosecution of the perpetrator of the crime, has not paid attention to the recovery of losses and the suffering of the victims lost due to the crime. Retributive paradigm with the aim to provide a deterrent effect for the perpetrator not to repeat the crime again and prevent the community from committing the crime. The use of retributive paradigm has not been able to recover the losses and suffering experienced by the victim. Although the perpetrator has been found guilty and sentenced, the victim’s condition cannot return to normal. With this weakness, came the idea of a punishment system that was oriented to the recovery of victims’ losses and suffering, called restorative justice, because the victim was the most disadvantaged party due to the crime. The purpose of this study is to determine the application of law enforcement through restorative justice in the criminal justice system in Indonesia. By using the normative juridical method, it can be concluded that the settlement of crime with restorative justice can accommodate the interests of the parties, including the victim because the victim is involved in the determination of sanctions for the perpetrator. Restorative justice returns conflicts to the most affected parties - victims, perpetrators, and communities, and gives priority to their interests. The concept of restorative justice not only focuses on the needs and punishment of the perpetrators, but also concerns and involves the victims and their communities that are perceived as marginalized by the current mechanism of criminal justice system. With law enforcement through restorative justice it is expected that the harm and suffering experienced by victims and their families can be recovered and the burden of guilt of the criminals can be reduced because they have received forgiveness from the victim or his family.

Keywords: Restorative Justice, Criminal Settlement, Penal System

Introduction

Restorative justice is a form of a new approach to solving criminal cases. This restorative justice approach model has been actually used in several countries with a focus on the approach to perpetrators, victims and the community in the process of resolving legal cases that occur between them. Although the model of this approach is still widely debated at the theoretical level by experts. In reality, it continues to grow and exist and influence legal policies and practices in many
countries. Problems that occur in Indonesian society is a social phenomenon that has always existed since the start of human life because humans are social beings who have uneven wants or interests between one human being and another. The increasing complexity and competition that are getting harder in social life tends to increase or at least have the potential to cause various problems. The emergence of many cases or disputes in the community if not handled properly will certainly disturb the balance in the community especially if the problems are related to a criminal act.

In general, the resolution of this problem or dispute can be pursued in two ways, namely by using litigation and non-litigation. Basically, these two lines aim to create justice for society in general, and justice for the parties in particular. The use of one of the settlement paths for litigation and non-litigation cases will be largely determined by the concept and objectives of the settlement of the case to be achieved by the parties and equally important is the good faith of the parties to settle the case.

Today when a crime occurs, the community tends to use a court line that conceptually creates justice but in reality this is not an easy thing to achieve. This is because the results that will be achieved from the process of resolving cases with the judicial route are win-lose solution, where there will be parties who win and those who lose. With this reality, the settlement of a case through traditional justice channels, in general, often results in a feeling of discomfort in the minds of the losers, so that it seeks to seek justice to the court level further. Related to this, Satjipto Rahardjo stated that the settlement of cases through the justice system which led to a court verdict was a law enforcement towards the slow lane. This is because law enforcement through long distances, through various levels ranging from the police, prosecutor’s office, district court, high court even to the Supreme Court. In the end it affected the accumulation of cases that were not small in court. Besides causing a buildup of cases in many cases that occurred
specifically in Indonesia, for example theft of flip-flops that hit AAL, cases of theft of plates that hit Rasminah, cases of theft of cocoa worth Rp. 2,500,000 that befell Aminan, and cases of fruit theft, watermelon theft and some other similar cases should not be prosecuted and entered into court. It was said that because the judge’s decisions in these cases and other similar cases were widely criticized by the public because they were deemed not to fulfill the sense of justice. The public considers that law enforcement officers who in this case are the police and prosecutors should not continue the case to court because they can be resolved through settlement patterns agreed by both parties. This is interesting to discuss considering that the nature of criminal law is ultimum remidium which means a last resort taken when there is no other effort to resolve the case. But in its development the criminal law was actually used as the first attempt to solve a problem, instead it was used as the first attempt to solve a problem between one person and another. This shift in the function of criminal law shows that society has left little by little a culture of law.

Thus, it can be seen that the phenomena that occur indicate that in Indonesian law there is often the fact that justice which is expected through formal channels does not necessarily reflect a sense of justice, is expensive, prolonged, tiring and does not solve problems and worse is full of corrupt practices collusion and nepotism. From these matters, it turns out that many cases that occur in the community are basically unfit to go to court or even undergo prosecution.

Dissatisfaction with the existing criminal mechanism (one of them is because it feels that it does not fulfill the sense of justice and the goal to be achieved from the punishment itself is to prevent and overcome criminal acts), has triggered a number of ideas to make various alternative efforts in addressing issues related to the handling of criminal acts that occur. The criminal justice system can be understood as an attempt to understand and answer the question of what is the
task of criminal law in society and not just how criminal law is in law and how the judge applies it.

Based on this, in law enforcement in Indonesia today, law enforcement officials, especially the police, prosecutors and judges and other law enforcement officials, should prioritize the principle of restorative justice. The emergence of the concept of restorative justice is due to dissatisfaction and frustration in many parts of the world of formal criminal law and punishment which in fact often cannot answer the problems in the criminal justice system that are deemed no longer able to provide justice, protection of human rights, lack of transparency in handling criminal cases and public interests that are often ignored or increasingly not felt.

The concept of restorative justice is a popular alternative in various parts of the world for handling illegal acts because it offers a comprehensive and effective solution. Restorative justice aims to empower victims, perpetrators, families and communities to correct an act against the law by using awareness and conviction as a basis for improving social life. The concept of restorative justice has long been practiced by indigenous peoples of Indonesia, such as in Papua, Bali, Toraja, Minangkabau, and other traditional communities that still hold strong culture. If a crime occurs by someone, the settlement of the dispute is resolved in the indigenous community internally with peace without involving the state apparatus. Although general criminal acts handled by the community itself are contrary to positive law, this mechanism has proven to have succeeded in maintaining harmony in the community.
The mechanism for resolving cases based on restorative justice is based on consensus deliberations in which the parties are asked to compromise to reach an agreement. Every individual is asked to give in and put the interests of the community above personal interests in order to maintain mutual harmony. The concept of deliberation proved to be more effective in resolving disputes in society amid the failure of the role of the state and the courts in providing a sense of justice.

Completion of criminal cases with this approach or concept of restorative justice focuses more on direct participation from the perpetrators, victims and the community in the process of resolving cases. In addition, the concept of restorative justice emphasizes more on the values of balance, harmony, harmonization, peace, tranquility, equality, brotherhood, and kinship in society rather than punishment or imprisonment. Efforts to resolve cases carried out in this way not only solve problems that arise but deeper than that the concept of resolving cases using a restorative justice approach is felt to provide a greater sense of justice for the community.

The principles of restorative justice can simply be interpreted as a model for resolving cases outside the judiciary or or often referred to as out of court settlement that is more concerned with justice, the goals and desires of the parties with the concept of victim awareness work. In the normative framework as well as from the theoretical framework the principle of resolving criminal cases outside the court institution or out of court settlement is questionable but in reality there are also several practices for resolving criminal cases outside the criminal justice system.

A restorative justice approach that upholds the values of balance, harmony, harmonization, peace, tranquility, equality, brotherhood and spirituality is certainly in harmony and in accordance with the values contained in Pancasila. Thus the restorative justice approach is essentially in accordance with the souls of the Indonesian people who put forward the values of kinship, community, kinship, mutual
cooperation, tolerance, easy to forgive, and prioritize the attitude of giving priority to common interests.

Besides being in accordance with the values contained in the Pancasila, a restorative justice approach that upholds the values of balance, harmony, harmonization, peace, tranquility, equality, brotherhood and kinship are also consistent with the values contained in customary law. In this case it can be seen that the settlement of cases in Indonesia including the settlement of cases using customary law is often carried out in ways that involve the perpetrators, victims, communities and community leaders who are considered to be able to mediate and resolve these problems.

Peace between the victim and the perpetrator or the disputing party as well as the peace in question aims to make the situation that causes disputes or disputes be neutralized so that the victim and the perpetrator return to their original condition before this dispute is called peace. In addition, the implementation of the concept of peace in resolving problems can certainly overcome all problems in the traditional criminal justice system, for example, the accumulation of cases, problems in the penal institution and so forth.

Based on the description above, the problem in this writing is the concept of restorative justice in its law enforcement in the criminal justice system in Indonesia. In resolving a criminal case, both the pattern of law enforcement and the personnel of law enforcement officers is unfair if resolving a criminal matter only pays attention to one of the interests, both the perpetrator and the victim. So we need a criminal theory that represents all aspects of the settlement of a case, whether the victim, the perpetrator and the community are therefore needed a combination of one theory and another theory. For this reason, a multidimensional approach that is fundamental to the impact of punishment is needed, both with regard to individual effects and the necessity to choose an integrative theory of criminal objectives that can
affect its function in order to overcome the damage caused by a criminal act.

Restorative justice is a new legal philosophy which is a combination of existing criminal theories. Restorative justice oriented to the settlement of cases that focus attention on the perpetrators, victims and the community. Here restorative justice contains the value of classical criminal theory that focuses on efforts to recover victims found in retributive punishment, deterrence, rehabilitation, resocialization. In addition to focusing on restorative justice actors also pay attention to the interests of victims and the community. The characteristics of the implementation of restorative justice in responding to a criminal act are as follows: a) Identify and take steps to correct the losses created; b) Involving all parties involved; c) There are efforts to transform existing relationships between the community and the government in responding to criminal acts.

Thus, the essence of restorative justice is healing, learning, morality and participation and public attention, dialogue, a sense of forgiveness, responsibility, and making changes which are all guidelines for the restoration process in the perspective of restorative justice. Restorative justice aims to empower victims, perpetrators, families and communities to correct an act against the law by using awareness and conviction as a basis for improving community life. According to Wright, the concept of restorative justice is basically simple. The measure of justice is no longer based on retribution according to the victim to the perpetrator (either physically, psychologically, or punished) but the painful act is cured by providing support to the victim and requiring the perpetrator to be responsible with the help of the family and community if needed.
**Method**

In this paper the author uses normative legal research by conducting literature studies to collect secondary data. Normative legal research is carried out by examining library material which is secondary data. Method data collection is carried out with the literature study with the legal materials as follows:

a. Primary legal materials, namely legal materials that are binding and consist of basic norms or basic principles, namely the Preamble of the 1945 Constitution, Basic Rules, Legislation, Unmodified Legal Material, Jurisprudence, and Treaty.

b. Secondary legal materials, namely legal materials that provide an explanation of primary legal materials such as the draft law, research results, works from the law, the opinions of legal scholars.

c. Tertiary legal materials, namely supporting legal materials that provide guidance on primary and secondary legal materials. Legal materials that are used include Large Indonesian Dictionary, Legal Dictionary, Internet, Encyclopedia and so on.

Data processing and analysis basically depends on the type of data, for normative research that only knows secondary data, which consists of primary legal materials, secondary legal materials, and tertiary legal materials, so in processing and analyzing data cannot be separated from various legal interpretations. In this normative study, data were analyzed qualitatively juridically, namely analysis with descriptive analytical and prescriptive decomposition. In carrying out qualitative descriptive analysis and prescriptive analysis, the analysis starts from systematic juridical analysis. In addition, it can also be combined with historical and comparative juridical analysis. Juridically qualitative data analysis was developed to study human life in limited cases, casuistic nature but deep and total holistic in the sense of not knowing the conceptual sorting of symptoms into exclusive aspects called variables, in this connection qualitative methods also developed to reveal the symptoms of community life as perceived by citizens.
**Analysis and Discussion**

The concept of restorative justice is basically not a new or foreign thing for the people of Indonesia. It is said that because all this time the Indonesian people with a heritage of indigenous diversity or culture (local wisdom) and values that live in the community have had a mechanism or process of problem solving (dispute) essentially in accordance with the concepts or values contained in restorative justice.

According to Rufinus Hotmaulana Hutauruk, the basic concept of a restorative justice approach in the form of actions to restore relations damaged by criminal acts has long been recognized and practiced in customary law in force in Indonesia. In addition, the basic philosophy of the goal of the restorative approach is to restore the state to its original state before the conflict is identical to the philosophy of restoring the disturbed balance contained in Indonesian customary law.

The concept of combating crime through restorative justice is considered as an option to cover weaknesses and dissatisfaction with the retributive and rehabilitative approaches that have been used in the criminal justice system in general. According to Zehr in Nur Rochaeti, several notes about restorative justice can be compared with conventional criminal justice which ultimately gives 4 key variables, namely:

<table>
<thead>
<tr>
<th>Differences in views on the two models of justice</th>
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</thead>
<tbody>
<tr>
<td><strong>Criminal Justice</strong></td>
</tr>
<tr>
<td>1 Crime is violation of the law and the state</td>
</tr>
<tr>
<td>2 Violations create guilt</td>
</tr>
<tr>
<td>3 Justice requires the state to determine blame (guilt) and impose point (punishment)</td>
</tr>
<tr>
<td>4 Central focus: Offenders getting what</td>
</tr>
</tbody>
</table>
According to Gordon Bazemore, the main ideas in the restorative justice paradigm include the following:

a. The purpose of imposing sanctions. There is an assumption that in the aim of imposing sanctions, the victim must be actively included to be involved in the judicial process. Indicators of achieving the objectives of the imposition of sanctions are reached or cannot be seen by an indicator of whether the victim has been restored, the victim's satisfaction, the amount of compensation, the awareness of the perpetrators of their actions, the number of agreements made improvements, the quality of service and the entire process. Forms of sanctions namely restitution, mediation of perpetrators and victims, victim services, community restoration, direct service to victims or restorative fines. In imposing these sanctions must actively involve the perpetrators, victims, the community and law enforcement. The perpetrators will play an active role in restoring the victims' losses, and face victims' victims. Instead the victim is active in all stages of the process and will assist in determining sanctions for the perpetrator. The community in this case is involved as a mediator or facilitator (in this case law enforcers) helping victims and supporting the fulfillment of the obligations of the perpetrators.

b. Rehabilitation of perpetrators. The main focus of restorative justice is for positive and constructive interests. Thus the perpetrator is the main source. In the interests of rehabilitation, actors are required to change the attitudes of today's social institutions and criminal paradigms. Rehabilitation of actors in the concept of restorative justice is carried out with actors who are counseling and therapeutic to motivate the active involvement of the parties.

c. Community protection aspects. The next basic value that exists in restorative justice is the achievement of community protection by
collaborating the judicial system and the general public to develop prevention. Laying or imprisonment is limited only as a last resort. The community is responsible and plays an active role in supporting the restoration. Indicators of achieving community protection if the recidivism rate drops, while the perpetrators are under the supervision of the community, the community feels safe and confident in the role of the restorative justice system, involving close associates of perpetrators, families and social institutions to prevent crime, social ties and reintegration in this concept. must be improved.

Based on these opinions, indicators in restorative justice can be seen from the roles of perpetrators, victims, communities and professionals or law enforcement. each acts as follows:

a. Actor: active perpetrator to restore the loss of the victim and the community, thus he must face the victim / victim's victim and face the community.

b. Victim: actively involved in all stages or process of resolving cases and playing an active role in mediation and participating in determining sanctions for perpetrators.

c. Community: involved as a mediator, tasked with developing community services and providing opportunities, for perpetrators as a form of reparative obligation, helping victims and supporting fulfillment of obligations of perpetrators.

d. Professionals or law enforcement officers: facilitating mediation, guaranteeing restorative implementation, developing creative / restorative community service options and involving community members in the settlement process.

Today's restorative justice approach has become the dominant model of the criminal justice system in the development of history and human civilization. Solving cases with a restorative justice approach is generally carried out by applying compensation by the perpetrator and his family to the victim and / or his family and to the community.
Recovery carried out by the perpetrator can also be in the form of compensation, social work or doing something repairs or certain activities in accordance with a joint decision agreed upon by all parties in the meeting. Thus it is appropriate if it is said that the settlement model with a restorative justice approach is a process outside the formal justice system that is carried out by taking into account the wider influence on victims, perpetrators and the community itself.

According to Komariah E. Sapardjaja, the basic principles contained in the restorative justice approach are:

a. The justice demanded is a recovery effort for the injured party
b. Anyone who is involved and affected by a crime must have the opportunity to fully participate in following up.
c. The government plays a role in creating public order while the community builds and maintains peace.

In the concept of restorative justice handling crimes or criminal acts that occur is not only the responsibility of the state but also the responsibility of the community. Therefore, the concept of restorative justice is built on the understanding that crime or criminal acts that have caused harm (both for the victim and the wider community) must be restored both the losses suffered by the victim and the losses suffered by the community. Thus the linkages and involvement of community members are needed to help correct errors and irregularities that occur in the community concerned.

Giving appreciation and respect to the victims and / or their families and the community by requiring the perpetrator and / or his family to recover from the consequences of the crimes that have been committed in the form of compensation, social work or doing certain improvements or activities in accordance with joint decisions agreed by all parties in the meeting.

According to Rufinus Hotmailana Hutauruk, the process of combating criminal acts through a restorative approach is a process of resolving a criminal offense that aims to restore conditions which
include compensation to victims through certain means agreed upon by the parties involved. The main principle of the settlement of a crime through a restorative approach is a solution that is not only a tool to encourage someone to compromise the creation of an agreement, but the approach must be able to penetrate the hearts and minds of the parties involved in the settlement process in understanding the meaning and purpose of a recovery and sanctions applied are sanctions that are recovering and preventive.

Thus, there is a shift in thinking from the traditional punishment model (retaliation and rehabilitation) to the punishment model that provides justice, namely by giving access to justice itself, especially justice which is aimed at the wider community justice. This becomes important to be considered both for academics and for legal practitioners because this value is the starting point or on the basis of the birth of the concept of restorative justice.

Restorative justice approach is a new paradigm in responding to criminal acts. In the perspective of a restorative justice approach, criminal acts are understood as a dispute or conflict that damages the relationship between individuals and society (not just as a violation of the law where as a consequence the perpetrator will deal with the state. In other words, the victim of a crime is not the state playing with an individual. crime creates an obligation to correct damage to the relationship due to a crime.

According to Van Ness, as quoted by Rufinus Hotmaulana, Hutauruk postulates several models of approaches as alternative choices that can describe the place and position of the restorative justice approach in the criminal law system, as follows:

a. Unified System. In a society that is increasingly aware of the importance of equality in law. Christie stated that the state had stolen conflicts from the parties into an option that could provide a view to visualizing a restorative approach to replace criminal justice. to return the conflict to its rightful owner requires a completely
different approach to managing the delivery of justice processes that allow victims and offenders to determine the outcome of the conflict themselves and the state does not have the absolute right to the conflict, so that based on this view the process - the process of settling a criminal act through a restorative approach should replace all processes in the criminal justice system in general.

b. Dual Track System. This Dual Track System model can be made into an alternative companion with the existing criminal justice system. In a double track model, the restorative process and traditional processes will co-exist together where parties can determine the course of a particular case. If an agreement to enter a restorative process cannot be achieved (with the consensus of all interested parties) the criminal justice court system will remain available. So in this case the restorative approach is placed in the primary position while the formal institutions are acting as a supporting element.

c. Safeguard System. This model is a model designed to deal with criminal acts through a restorative approach where restorative programs will be the main means to deal with criminal acts. Thus this means that there will be a major transition from the criminal justice system in general which will experience a reduction to the restorative justice system. But for certain cases it will still be handled by the contemporary criminal justice system (cases that are deemed inappropriate to be handled by a restorative process or program).

d. Hybrid System. In this model the process of determining or guiding someone guilty is processed in the criminal justice system in general and then in the process of determining sanctions the concept of a restorative approach can be used to determine the type of sanction. In a hybrid system, both the restorative approach response and the contemporary criminal justice response are seen as normative parts of the justice system.
Restorative practices actually exist in Indonesian culture or culture as they have been done in West Sumatra, even though this is done by certain elites from society. From the restorative approach, there are general views about these restorations, including:

a. The purpose of divinity must be interpreted as the recovery of circumstances and compensation for losses suffered by victims.

b. The purpose of recovery and compensation is part of the overall repair process of all relations that have been damaged including to prevent similar crimes from recurring.

c. The definition of crime is not just a violation of the law against the state, but is also interpreted as an act that damages the relationship between individuals and individuals, and society and individuals.

d. Criminal acts are acts that cause harm to victims who must be recovered.

e. The burden of proof and settlement of criminal acts is not merely a burden from the state, but is a burden on individuals and society.

f. The settlement of crimes must be resolved fairly and in a balanced manner, through a constructive forum of discussion and dialogue for the parties involved, especially victims and perpetrators who have expressed regret or their respective families.

g. The recovery process aims to resolve conflicts and prevent criminal acts that can be done through a series of choices between family or community meetings and government representatives that are adjusted to the complexity of the problem and other practical settlement processes. The meeting is needed to be able to make joint decisions and ensure that the process runs safely, respects each other, and can guide the parties to face critical matters. The meeting was also intended to find solutions to how to deal with incidents after the onset of a crime including to ensure the welfare or material satisfaction of the victim, a reaffirmation that they would not be blamed, attention to the emotional needs of the victim, a solution to any conflict between the victim and the perpetrator (both because of
the crime itself or pre-existing), the resolution of conflicts that occur between family members or with the community, solving the difficulties between the perpetrator and his family and other friends as a result of the crime, such as being ashamed to know the perpetrator, and giving opportunity for the offender to release guilt through requests for compensation and compensation.

h. The recovery process also includes the act of overcoming the reasons / causes of the crime in question, making a rehabilitation plan, an agreement between family members and the community present based on a system of support for the perpetrators, to ensure that he is able to obey the plan.

i. The role of the government is to maintain public order, while the role of the community is to create and maintain peace.

Solving cases with criminal prosecution often does not satisfy all parties and does not have a positive impact on the perpetrators, victims and the community. Therefore, it is necessary to have thoughts and breakthroughs in the field of law precisely in the method of solving criminal cases through non-litigation channels with the principles or values of restorative justice, namely by applying the ADR (Alternative Dispute Resolution) model or some mentioning it as Appropriate Dispute Resolution.

Criminalization and imprisonment are not the only best solution in resolving crimes or criminal acts in particular crimes or criminal acts with the damage or loss they can still be restored, so that the condition that has been damaged or the injured party can be returned to its original state. The restoration allows the removal of bad stigma from the community against individual perpetrators. The punishment paradigm is known as restorative justice, where the offender is obliged to correct the losses he has caused to the victim, the community and other parties who feel aggrieved.

The settlement of cases with the principle of restorative justice, one of which is implemented in the form of judicial mediation or in some
terms also called mediation in criminal cases, or mediation in penal matters. To illustrate this there are several terms used depending on the language used.

The settlement of criminal cases with the principle of restorative justice, one of which is implemented in the form of judicial mediation is assessed and felt very significant in the process of law enforcement even though at that time it could be said to still deviate from legal system procedures. Therefore, the settlement of criminal cases in the principle of restorative justice, namely in the form of judicial mediation, should be properly included or regulated in the prevailing legal system. In addition, it is necessary to realize that the settlement of criminal cases with the principle of restorative justice, namely in the form of penal mediation, cannot be separated from the ideals of law and the principles of law which are based on the basis of legal philosophy, namely justice and legal principles in the process of resolving cases that refer to legal sources. written and unwritten legal sources. Therefore, the application of the concept of settlement of criminal cases with a peaceful path or known as the term mediation must be applied to funds carried out by referring to the values of justice, the value of legal certainty, the value of expediency while still considering the philosophical, juridical and sociological basis.

Nevertheless, the application of the concept of settlement of criminal cases with a restorative justice approach implemented with the settlement of cases with a peaceful path or known as penal mediation in fact cannot be implemented in an integrated and comprehensive manner. This is because not a few law enforcement officials have not yet realized the importance of settling cases by means of peaceful means or reasoning mediation and have not yet understood the concept and implementation of criminal case resolution with a restorative justice approach because these two concepts (the concept of restorative justice and the concept of reasoning mediation) are relatively new in criminal law enforcement.
In the concept of solving criminal cases with a restorative justice approach implemented with the settlement of cases through a peaceful path or known as the term mediation, it is considered to have several advantages. These advantages, for example, can prevent someone from entering prison, avoid stigmatization of convicts, save state costs, recover losses of victims and the community, maintain community relations, achieve criminal objectives (deterrent and preventive effects) and so on.

The application of the settlement of criminal cases with restorative justice between victims and perpetrators is carried out in the following ways:

a. Organizing meetings that invite victims, perpetrators and families who support them
b. Providing opportunities for all parties to tell how the crime has occurred and propose a solution or plan of action
c. After the actors and their families listen to the opinions of others, give them the opportunity to propose a final solution that can be agreed by all parties present.
d. Keep an eye on the implementation of the proposal, especially those relating to compensation for victims.

The concept or approach to restorative justice must be implemented in an integrated manner between the police, prosecutors, judges, correctional institutions, judicial commissions and advocates. In addition, the implementation or implementation of a restorative justice concept or approach must be applied in the structural, substantial and cultural integrated Indonesian criminal justice system. This is important considering that if one of these components does not apply a concept or approach to restorative justice, a restorative decision is impossible. For example, the police and prosecutors have adopted the concept of restorative justice, but judges still adopt a logistic mindset. In such cases, judges will impose very normative decisions so that the correctional institution cannot apply the concept of restorative justice.
Therefore, the approach or concept of restorative justice must be implemented in an integrated manner between one component and the other. Conversely, if one component does not carry out the approach or concept of restorative justice, the approach or concept of restorative justice itself will not be well realized.

**Conclusion**

The concept of restorative justice has not been clearly regulated in the Indonesian criminal justice system so that it places law enforcers in a difficult and dilemmatic position considering the completion of cases in the current criminal case is very formalistic legalistic. The approach or concept of restorative justice basically exists and has long been practiced in Indonesian society. This is because the values of peace are contained in the approach or concept of restorative justice in accordance with the values contained in customary law and Islamic law and also in accordance with the values of Pancasila. Islamic Criminal Law and customary law (especially customary criminal law) as a living law in Indonesia strongly advocates resolving disputes in a peaceful manner. Thus, for these two legal systems, all disputes can be reconciled if there is an agreement between the perpetrator and the victim. The spirit of peace between the two legal systems that have long existed in Indonesia is certainly the same as the spirit or values contained in the concept of restorative justice. The Indonesian state is a state of law. Criminal law enforcement in Indonesia must be implemented in an integrated manner in the corridor of an integrated criminal justice system as stipulated in the Criminal Procedure Code. Nonetheless, it should be noted that in the legal system in Indonesia at present it does not recognize the existence of mediation in the criminal justice system. however in practice in the field many criminal cases are settled through a mechanism with a restorative approach which is an initiative of law enforcement officials as part of the settlement of cases, as the implementation of customary criminal law and Islamic criminal law. In this concept of restorative justice gives equal attention to victims
and perpetrators. In addition, the authority to determine people’s sense of justice is in the hands of the parties, not the authorities (the state). The spirit of resolving a case with a restorative crime based on peace between the victim or family by involving the community and law enforcement officials to discuss their legal issues by putting forward the principles of win-win solution that is the hope of the Indonesian people so that the prisons in Indonesia are not as crowded as they are now this.

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Application of Assessment for The Victims of Narcotics Abuse in Investigation Level at Musi Rawas Resort Police Station 2018

Elisyah Marsiah
Faculty of Law, University of Bengkulu, Indonesia.
E-mail: elisyah.marsiah79@gmail.com

Abstract
The basis for the assessment arrangement in rehabilitating victims of narcotics abuse is Article 4 letter d, Article 54-58, Article 103 Law No. 35 of 2009 concerning Narcotics, Supreme Court Circular Letter (SEMA) No. 4 of 2010 concerning the Determination of Narcotics Abuse and Addicts to the Institutions of Medical Rehabilitation and Social Rehabilitation and the Joint Regulation of the Chair of the Supreme Court of the Republic of Indonesia. The implementation of the joint regulation includes forming an Integrated Assessment Team (TAT) to undertake efforts to manage rehabilitation for misuse of abusers and addicts who are in the process of legal proceedings. Police involvement in the assessment team is an important part in handling narcotics addicts, because in Law No. 35 of 2009 concerning Narcotics of police, including part of investigators other than BNN. But the fact is that until now in Musi Rawas there are still many investigators who have not carried out the joint rules in question. In the Musi Rawas District Police Station, in 2018 there's 43% of cases that were eligible for integrated assessment were not carried out. This research is a normative, descriptive analytical study which describes and analyzes a phenomenon related to the Application of Assessment of Narcotics Abuse Victims at the level of investigation at the Musi Rawas Resort Police Station which aims to find out about the assessment of narcotics abuse victims at the investigation level at Musi Rawas Resort Police Station. In addition, to find out the obstacles in carrying out assessments for victims of narcotics abuse at the level of investigation at the Musi Rawas Resort Police Station. The institution that was used as the object of the study was the Narcotics Department of Musi Rawas Resort Police Station and National Narcotics Board of Musi Rawas. The assessment of drug abuse victims who have evidence under SEMA at the stage of investigation at Musi Rawas Resort Police Station has not been carried out till now. It was suggested that investigators at the Musi Rawas resort police station so that victims of drug abuse or drug addicts caught by the police were carried out an integrated assessment. receipt of application for assessment from the investigator no later than 1x24 (one twenty-four times) hours, the integrated assessment team conducts an assessment after receiving the application and the integrated assessment team carries out its duties and provides assessment recommendations within a maximum period of 6 (six) days to the investigator to be reported written to the local district court.

Keywords: Assessment, Addicts and Victims of Narcotics Abuse, Rehabilitation.

Introduction
Every year the number of drug abusers continues to increase. The National Narcotics Agency (BNN) noted that the number of narcotics abusers in Indonesia in 2017 increased to 6.4 Million. Narcotics handling using a law enforcement approach apparently has not produced the solution that is expected. The community and law enforcement officials themselves consider violent abusers as perpetrators of crimes that are highly imprisoned. This situation caused the emergence of prisons to be more than capacity, and became one of the destinations for the slaughterers in prisons. Narcotics users or addicts in the legal perspective are criminal offenders. However, closer scrutiny, they are victims of syndicates or chains of distribution and trafficking of narcotics, psychotropic drugs and illegal drugs. Addicts are the main conscious as
"regular customers". Physically and psychologically, Narcotics make them separate, and it is difficult to free them from drug traps. Different handling in the criminal process. Based on this, the "punishment" also needs to be done separately, with different patterns of handling, coaching and treatment.

In essence, what is regulated in Law Number 35 of 2009 concerning Narcotics adheres to a dual track system, namely in the form of criminal sanctions and sanctions for action. Juridical implications of the provisions of Article 4 letter d, Article 54 and Article 127 of the Narcotics Law to determine narcotics users of victims or perpetrators, namely narcotics users as perpetrators of crime and victims as victims. Basically, narcotics "dealers" in legal terminology are categorized as "dader", however, "users" can be categorized as "perpetrators and/or victims". As a victim, the "user" is the person responsible and involved in the legal process and the health and social dimensions. While Rehabilitation is a form of action sanctions. In Article 103 of Law Number 35 of 2009 concerning Narcotics it is confirmed that judges can decide or regulate drug addicts for treatment and treatment. Period of treatment and care at age. Besides that, it is a reduction in the demand for strategy, namely cutting the fingers of narcotics users.

Arrangement in Narcotics Law No. 35 of 2009 concerning Chapter IX concerning Medicine and Rehabilitation, article 56 which reads "Narcotics addicts and victims of Narcotics withdrawal must undergo medical and social rehabilitation", the implementation of narcotics carried out Translated to: 127 laws No there were 35 years of 2009 that were not fully carried out but sentenced to body punishment. Article 103 of Law Number 35 of 2009 concerning Narcotics states that judges who examine narcotics addicts can do two things; first, the judge may decide to order the person to undergo treatment and/or treatment if the drug addict is found guilty of narcotics crime. Second, the judge can determine to order the person to undergo treatment and/or treatment, if the narcotics addict is not proven guilty of narcotics crime. This authority implicitly recognizes that narcotics addicts, other than as criminals as well as victims of crime themselves, are often referred to as Victimless Crime in the context of victimology.

In relation to the above, the Supreme Court of the Republic of Indonesia also issued several circular letters, including: Circular of the Supreme Court of the Republic of Indonesia (SEMA) No. 07 of 2009 concerning Placing Drug Users into Therapy and Rehabilitation Institutions as outlined in Letter No. 07/BUA.6/HS/SP/III/2009 dated
March 17, 2009 (hereinafter abbreviated as SEMA No. 07 of 2009); RI Supreme Court Circular (SEMA) No. 04 of 2010 concerning the Determination of Narcotics Abuse and Addicts to the Institute of Medical Rehabilitation and Social Rehabilitation (hereinafter abbreviated as SEMA No. 04 of 2010). But empirical facts on the ground show that judges tend to impose criminal sanctions on addicts. As a result, narcotics addicts languish in prison without being given the opportunity to be rehabilitated, so the implementation of rehabilitation has not run optimally. This can be seen from the number of prisoners in Indonesia reaching 246,389 people who are drug abusers who are serving prison sentences in prisons. In Musi Rawas District the number of inmates in the Narcotics Prison class IIA Muara Beliti until September 2018 there were 776 perpetrators of Narcotics Crime.

To be able to function the role of the judge in deciding or stipulating rehabilitation needs support from other law enforcement officials. There must be mutual understanding and agreement that drug abuse is a serious problem of the nation and the enemy of the nation. This understanding and agreement from the government and law enforcement officials was then realized through the Joint Regulation of the Chair of the Supreme Court of the Republic of Indonesia, Minister of Law and Human Rights of the Republic of Indonesia, Minister of Health of the Republic of Indonesia, Minister of Social Affairs of the Republic of Indonesia, Attorney General of the Republic of Indonesia, Chief of the Republic of Indonesia Police, Head of the National Narcotics Agency of the Republic of Indonesia. No. 01/PB/MA/III/2014, No.03 of 2014, No.11 of 2014, No.03 of 2014, No.PER-005/A/JA/03/2014, No.1 Year 2014, No.PERBER/01/III/2014/BNN concerning the Handling of Narcotics Addicts and Narcotics Abuse Victims into Rehabilitation Institutions, which is then referred to as Joint Regulation. Thus drug addicts no longer boil down to sanctions in prison but instead end up in a rehabilitation place, because sanctions for addicts are agreed in the form of rehabilitation. The main problem faced by law enforcement is how to determine a narcotics offender as a perpetrator and/or victim.

The establishment of this Joint Regulation, among others, aims to be a technical guide in handling narcotics addicts as suspects, defendants, or prisoners in undergoing medical rehabilitation and/or social rehabilitation from the level of investigation, prosecution, trial and punishment, so that the initial assessment, especially the level of investigation in the National Police and Narcotics Agency can be done with the criteria set out in the
provisions, in accordance with article 9 paragraph 2 letter a which reads "at the request of the investigator to analyze the role of someone who was arrested/arrested whether a person is a victim of narcotics abuse/addicts or dealers narcotics ".

In addition, the aim is that the process of medical rehabilitation and social rehabilitation at the level of investigation, prosecution, and trial can be carried out in a synergistic and integrated manner. Institutions that are bound by the joint regulation then issue implementing regulations. The Indonesian National Police issued a Chief of Police Telegram No. STR/865/X/2015 and others.

The implication is seen by the establishment of an Integrated Assessment Team, hereinafter referred to as TAT, which is tasked with carrying out an analysis of the role of suspects arrested at the request of investigators relating to illicit drug trafficking, especially for addicts, where the team consists of a team of doctors, namely doctors and psychologists and a legal team consisting on elements of the National Police, National Narcotics Agency, Prosecutor's Office and involving the Ministry of Law and Human Rights (BAPAS) if the suspect and/or defendant are children.

Police involvement in the assessment team is an important part in handling narcotics addicts even though the portion of BNN's authority for narcotics crime is greater than the police. According to Law No. 35 of 2009 concerning Narcotics there are 2 (two) institutions that are authorized to conduct investigations, namely the Indonesian National Police and the National Narcotics Agency (BNN). This is in accordance with Article 81 of Law No. 35 of 2009 concerning Narcotics, reads: "Indonesian National Police Investigators and BNN investigators are authorized to conduct investigations into the abuse and illicit trafficking of Narcotics and Narcotics Precursors under this Law". The results of the analysis of the legal team in the TAT will sort out the role of suspects as abusers, abusers and dealers. Team Analysis Medical assessments of these abusers will result in a level/criteria of addiction that is a criterion of weight, moderate, and mild where each of these addiction criteria requires rehabilitation therapy and a different time period.

In Musi Rawas Regency itself, the implementation of the Integrated Assessment has not been effective. This can be seen from the narcotics crime data that the author got from the Musi Rawas Police Resnarkoba which showed that there was no implementation of the narcotics abusers who had evidence under the SEMA standard No. 04 of 2010. The data that I got from the Police Department of Musi Rawas, in 2017 there were 85
cases of narcotics crimes in which 41 cases with the amount of evidence under the standards of SEMA 04 in 2010, while up to September 2018 of 33 cases as many as 10 cases with the amount of evidence under SEMA 04 standard in 2010 but none of the integrated assessments were carried out.

The results of the initial interviews conducted by researchers on the Musi Rawas Police Narcotics investigator, it is known that this is constrained by several factors; Among others, the Investigator has difficulty determining whether someone caught with evidence under SEMA No. 04 of 2010 belongs to the category of users or addicts. Because both are victims of narcotics crime. This difficulty occurred, because the number of perpetrators who were caught carrying evidence of drugs as much as specified in SEMA No. 04 of 2010 is a recidivist or even a big drug dealer. Other obstacles were also faced by Musi Rawas Police Investigators in carrying out assessments on narcotics offenders; the integrated assessment team is not ready as intended, as well as the absence of the nearest rehabilitation institution as a place to safeguard the suspect during the investigation and the minimum budget for integrated assessment.

Based on the description above, the author is interested in conducting a study and research with the title: "Application of Assessment of Narcotics Abuse Victims at the Level of Investigation in Musi Rawas Resort Police Station in 2018" Based on the descriptions above, the problems to be examined are: How do the assessments apply to victims of narcotics abuse according to Positive Law in Indonesia? What is the application of assessment to victims of narcotics abuse at the level of investigation at Musi Rawas Resort Police Station in 2018? What are the obstacles and obstacles to the application of assessments to victims of narcotics abuse at the level of investigation at Musi Rawas Regional Police in 2018? How can efforts be made so that the assessment of victims of narcotics abuse at the level of investigation at the Musi Rawas Resort Police Station can be carried out?

Method
The method that will be used in this study is the normative juridical and empirical juridical research method. An empirical juridical approach is an attempt to obtain clarity and understanding of problems based on reality. That is studying theories and concepts and views to obtain secondary data by linking written regulations to law books that are closely related to the problems in this research. And a direct approach to obtaining primary data is done by looking at the reality directly based on
information and field research and interviews with several resource persons who are competent to answer the problems in this research.

**Analysis and Discussion**

1. **Application of assessment of victims of narcotics abuse according to Positive Law in Indonesia**

   Abuse of narcotics is basically a criminal act, so that the perpetrators should be subject to legal proceedings as appropriate law enforcement against other criminal cases. Based on Law No. 35 of 2009 concerning Narcotics, drug abuse is a "criminal act" which has implications for the provision of criminal sanctions for the perpetrators. The handling of narcotics abuse problems requires a criminal law policy that positions narcotics abusers as victims, not criminals. In law number 35 of 2009 concerning narcotics is the judge's authority to pass a sentence for someone who is proven to be a drug addict for rehabilitation. Implicitly, this authority recognizes that narcotics addicts, in addition to being perpetrators of crimes as well as victims of the crime themselves, are often referred to as self-victimization or victimless crime.

   The placement of addicts and drug abuse victims into rehabilitation institutions in accordance with the objectives of the Narcotics Act, namely Article 4 letter d, which states to guarantee the regulation of medical and social rehabilitation efforts for drug abusers and addicts. In addition Article 127 with due observance of Articles 54, 55 and 103 of the Narcotics Law can be used as a guide to impose decisions on rehabilitation of drug addicts and drug abusers. Specifically the placement of rehabilitation for addicts and victims of narcotics abuse who are undergoing legal proceedings is also regulated in: Government Regulation No. 25 of 2011 concerning the Implementation of Compulsory Narcotics Addictions; Supreme Court Circular Letter No. 04 of 2010 concerning Putting Drug Users into Therapy and Rehabilitation; and the 2014 Joint Regulation concerning the Handling of Narcotics Addicts and Narcotics Abuse Victims into Rehabilitation Institutions.

   Apart from the above regulations, the Indonesian National Police also issued Kapolri Telegram No. Letter. STR/701/VIII/2014 dated August 22, 2014 concerning Guidelines for Rehabilitation Implementation at the Investigation level, and also the State Narcotics Agency (BNN) issued Regulation of the Head of the National Narcotics Agency No. 11 of 2014 concerning Procedures for Handling Narcotics
Suspects and/or Accused of Addicts and Victims of Narcotics Abuse into Rehabilitation Institutions.

Narcotics addicts and abusers who have entered the jurisdiction need careful and careful action through the assessment process in advance in determining whether or not addicts and drug abuse have been determined as suspects and/or defendants to be placed in medical rehabilitation and/or rehabilitation institutions social. Briefly the purpose of the assessment is to find out the extent of addiction and the role of addicts and narcotics abuse in narcotics crime. Technically, the integrated assessment system for narcotics abusers and addicts based on positive law in Indonesia is regulated in the Joint Regulation concerning the Handling of Narcotics Addicts and Narcotics Abuse Victims into Rehabilitation Institutions.

The Assessment Process is the initial stage where Narcotics Addicts and Narcotics Abuse Victims report to the National Narcotics Agency requesting to be rehabilitated. The assessment is carried out by 2 (two) Assessment Teams, called the Integrated Assessment Team. The Integrated Assessment Team is a team consisting of the Medical Team and Legal Team established by the head of the local work unit based on the decree of the Head of the National Narcotics Agency, the Provincial National Narcotics Agency, and the Regency/City National Narcotics Agency. The Integrated Assessment Team is tasked with analyzing a person who is arrested and/or caught, if the addict is caught, in relation to the illicit trafficking of narcotics and narcotics abuse, and medical, psychosocial analysis, and recommends a plan for therapy and rehabilitation of the person who is the applicant.

The results of this assessment are used as a benchmark for consideration of the Integrated Assessment Team in making decisions regarding the application. The authority of the Integrated Assessment Team, namely at the request of the investigator to analyze the role of someone who was arrested or caught, for those caught, only as victims of narcotics abuse, as drug addicts, or even narcotics dealers. Then determine the criteria for the severity of narcotics use in accordance with the type of content consumed, the situation and conditions when captured at the incident scene. And the latter recommended a plan for therapy and rehabilitation of Narcotics Addicts and Narcotics Abuse Victims. Seeing the duties and authority of the Integrated Assessment Team above, the assessment process is very important in considering
the decision on the application. It can be said that assessment is the first step of rehabilitation.


In the last two years, the Musi Rawas Police Investigator in handling suspected addicts who were arrested without evidence but the urine test was positive, the suspect was transferred to BNNK Musi Rawas for medical assessment and then undergoing rehabilitation therapy according to the treatment plan determined by the assessor and physician to a Rehabilitation Institute that is suitable for the needs of the drug abusers. This rehabilitation can be in the form of outpatient rehabilitation or inpatient rehabilitation and for the case the legal process is not continued. However, if the suspect is found evidence in the form of Narcotics even though the number is below the SEMA standard number 04 in 2010, the Musi Rawas Police investigator did not submit an application for an Integrated Assessment to BNNK Musi Rawas as the Secretariat and Chair of the Integrated Assessment Team. In other words, the Investigator did not give the suspect the opportunity to be rehabilitated.

This action is not in accordance with the provisions in Government Regulation Number 25 of 2011 and the Joint Regulation article 3 Paragraph (1) and Article 4 paragraph (1,2 and 3) and Telegram Letter of the Chief of the Indonesian National Police (Kapolri) No. STR/701/VII/2014, dated August 22, 2014. These provisions principally state that addicts and victims of narcotics abuse can be rehabilitated, namely those who are addicts and victims who in Joint Regulation Article 4 Paragraph (1) are affirmed as addicts and victims those who were arrested but without evidence, but from the results of urine, blood, hair tests were tested positive for narcotics and those in Article 4 Paragraph (2) were mentioned as addicts and victims who were arrested with a certain amount of evidence with or not using narcotics according to the results urine, hair, blood or DNA test, as long as the case is in the judicial process, within a certain period of time it can be placed in a rehabilitation institution, after the Minutes of Examination of Laboratory Results and Minutes of Examination by the BNN Investigator are made and completed with integrated assessment results.
There is a certain amount of evidence required by the suspect, Musi Rawas Police investigator does not refer to SEMA Number: 04 of 2010, April 7, 2010 concerning the Placement of Misuse, Narcotics Abuse and Addicts into the Institute of Medical Rehabilitation and Social Rehabilitation because of the large number of perpetrators caught hands carrying drug evidence as specified in SEMA No. 04 of 2010 was a recidivist, even a big drug dealer.

The action taken by the Musi Rawas police narcotics investigator against addicts, victims of narcotics abuse with proof of use of less than 1 gram a day was not given an assessment recommendation so that rehabilitation could not be carried out, it could be considered as a cautious measure.

In the Kapolri Telegram Letter Number 701 of 2014, it was determined that applications for rehabilitation for addicts and victims of suspected drug abuse should be submitted in writing by the suspect or the family or legal advisor to the investigator. According to the statement of the Head of the Narcotics Narcotics Unit of the Musi Rawas Police, the actions of the Musi Rawas Police investigator to rehabilitate the addicts were based on the initiative of the investigator, while the application of the suspect or legal counsel had never existed. Drug investigator Musi Rawas police action by taking the initiative to carry out rehabilitation actions on narcotics addicts is in accordance with the mandate of Government Regulation Number 25 of 2011 and the Joint Regulations, so there is no need to wait for an application from the suspect, because not necessarily rules that provide opportunities for rehabilitation for these addicts known by the public.

From the results of the examination of the suspect under the criteria of mild addiction and ongoing outpatient rehabilitation at the Primary Clinic "Sehat Berkarya" BNNK Musi Rawas, the suspect with severe addiction criteria was referenced for rehabilitation of hospitalization to BNN's Inpatient Rehabilitation Institute at the BNN Rehabilitation Center Lido Bogor or BNN rehabilitation workshop in Kalianda, South Lampung, or to the Syifaa Alif Ar-Rahman Social Rehabilitation Institute in Lubuklinggau City. The suspect who was rehabilitated at the Institution for Rehabilitation of Government Agencies is free of charge, because the overall cost is borne by the government, in this case the BNN. While at the Syifaa Alif Ar-Rahman Social Rehabilitation Institute, rehabilitation costs are borne by himself.
Rehabilitation actions taken by BNNK Musi Rawas do not include forms of detention by investigators, because investigators have fully surrendered the responsibilities of the suspect including security to rehabilitation institutions. What is done by this Rehabilitation Institution in accordance with the provisions in Article 3 e of the Joint Regulation, which states that the security and supervision of the implementation of medical rehabilitation and social rehabilitation for addicts and victims of drug abuse are carried out by hospitals and/or rehabilitation institutions appointed by the government in the implementation can coordinate with the local police.

So far the Musi Rawas Police Investigator has only provided opportunities for rehabilitation for addicts. Actually, according to the rules, not only addicts can be rehabilitated, but addicts as well as dealers can be given rehabilitation, as regulated in the Joint Regulation 2014 Article 5 Paragraph (1) which states that narcotics addicts and drug abuse victims as suspects and/or defendants are concurrent traffickers narcotics can be detained in a State Detention Center and for those concerned can get social rehabilitation carried out in detention centers or correctional institutions where the perpetrators are detained.

The difference in rehabilitation for addicts and victims with addicts and dealers is a place to rehabilitate. For addicts as well as victims, rehabilitation can be done at a Social Institution or Hospital appointed by the government. Whereas rehabilitation places for addicts who are also traffickers can only be done in detention centers or prisons, where detainees or defendants are detained. Whereas the TAT consisting of the legal team and the medical team, which the two teams should have carried out jointly assessment of an addict, namely between the Musi Rawas Police Investigator and the State Prosecutor Musi Rawas, the Ministry of Law and Human Rights, BNN Musi Rawas, since the establishment of BNNK Musi Rawas in September 2016 turned out to have never been used. This is because in the first year it was established in 2017 BNNK Musi Rawas was not available for the activity budget for this TAT. Whereas in 2018 this TAT has not yet functioned even though it has been supported by the budget, this is due to the absence of requests from investigators both Musi Rawas Police investigators and BNNK investigator Musi Rawas himself to conduct an Integrated Assessment of captured drug abuse suspects.

The reason of the Musi Rawas Police investigator, if an addict as well as a dealer is given rehabilitation during his case in the
examination process, it will not deter the deterrent effect of his criminal actions. In addition, according to the Head of BNNK, Musi Rawas, there is no availability of inpatient rehabilitation institutions in Musi Rawas Regency appointed by the government to carry out rehabilitation of narcotics abusers who are in the investigation stage. So that the suspect must be entrusted to the designated rehabilitation institution, Ernaldi Bahar Hospital, Palembang, which is approximately 365 KM from Musi Rawas Regency, making it difficult for investigators to deliver and bring back the suspect during the trial. Besides that, there is no availability of the budget for sending and picking up the intended suspect to take part in the trial.

3. Obstacles and constraints in the application of assessments to victims of narcotics abuse at the level of investigation at Musi Rawas Resort Police Station in 2018?

Law number 35 of 2009 concerning Narcotics Article 127 paragraph (3) states that: "In the event that the Abuse as referred to in can be proven or proven to be a victim of Narcotics abuse, the Usual Abuse is obliged to undergo medical rehabilitation and social rehabilitation." In some cases of arrests of drug addicts, they have proven not to be involved in drug trafficking, in other words they are only users. For cases like this after a court verdict is decided, the users can be submitted to undergo rehabilitation both medically and socially. According to the Narcotics Act, every drug user who after a court verdict is proven not to distribute or produce narcotics, in this case they are only limited to users, then they are entitled to apply for rehabilitation services.

But after the enactment of the Joint Regulation which instructed Narcotics Addicts and Narcotics Abuse Victims as suspects and/or defendants in Narcotics abuse who were undergoing the process of investigation, prosecution and trial in court to be given treatment, treatment and recovery in medical rehabilitation institutions and/or social rehabilitation institutions. So the implementation of medical rehabilitation and/or social rehabilitation must be carried out based on the results of the assessment of the TAT and in accordance with the provisions of the prevailing laws and regulations. Whereas in its implementation to date, TAT is still experiencing various obstacles in carrying out integrated assessments for drug users and addicts, including:
a. There are differences in views between law enforcement officers in handling narcotics cases

Law no. 35 of 2009 concerning Narcotics, does not provide sufficient limits on who is meant by dealers and who is meant by addicts. Likewise Law Number 35 of 2009, explains that narcotics addicts and narcotics abuse victims are required to undergo medical rehabilitation and social rehabilitation. This means that the law only requires rehabilitating addicts and victims. Only a few and very limited victims are explained in the explanation of Article 54 that “Narcotics abuse victims” are someone who accidentally uses Narcotics because they are persuaded, deceived, deceived, forced, and/or threatened to use Narcotics, while the understanding of addicts is people who use or misuse Narcotics and in a state of dependence on Narcotics, both physically and psychologically.

Based on this matter in a victimological manner, someone who is deceived into drug trafficking is also part of the victim, but the practice is sometimes considered as a criminal offender. Another thing that is not explicitly regulated between victims, addicts and drug abusers can result in stoning a person, such as the police as someone who must be punished while on the other hand the BNN considers someone as a victim/addict who must be rehabilitated.

In addition, the limitation of the number of Narcotics evidence according to SEMA No. 04 of 2010, in the view of the author needs to be reviewed, considering the limitation of this number is still quite high and dangerous for the increase in the number of narcotics abusers in Indonesia, one example is the limit of evidence of shabu as much as 1 gram. As an illustration, 1 gram of methamphetamine as stated in the limit of the number of evidence according to SEMA number 04 of 2014 can already make 5 people drunk from the narcotics. This means that if the suspect carries 1 gram of meth, the narcotics are not consumed by themselves but can be suspected of being the distributor.

b. Legal provisions governing integrated assessments lack legal force

Whereas as explained in the previous discussion, the implementation of integrated assessments for addicts and narcotics abusers has been regulated in the 2014 Joint Regulation concerning the Handling of Narcotics Addicts and Narcotics Abuse Victims into Rehabilitation Institutions. The provision basically aims that the implementation of rehabilitation can be carried out at each stage of
the legal process starting from the stage of investigation in the police, prosecution, and at the examination stage in the court session. The implementation of rehabilitation at each stage of the examination, of course, is carried out based on the discretion of the relevant apparatus after passing through the integrated assessment process.

Although medically and socially, the implementation of rehabilitation at every level of the examination is very well done, but in practice it is often used as an excuse for every person who becomes an addict and victim of narcotics abuse or his own law enforcement officials, that there is rehabilitation after passing the integrated assessment process as if it could eliminate criminal penalties, both imprisonment and criminal penalties. This assumption is certainly not in accordance with the provisions of the Narcotics Act which stipulates that every addict and narcotics abuser must be sentenced and given rehabilitation. With the existence of several laws and regulations that require rehabilitation efforts, do not eliminate criminal liability.

The paradigm must of course be instilled in every law enforcement officer and BNN which in this case has the responsibility in combating the spread of narcotics in Indonesia. The existence of criminal responsibility with penalties that have been determined based on the Narcotics Act, the purpose is as a form of retaliation for the actions he did with the aim that the narcotics offender be deterred. As for rehabilitation, based on the legal aspect of punishment is one of the acts of sanction (matrige), because the perpetrator other than the person who must account for his actions for violating the law, must also be given treatment so that they can recover.

In formal juridical terms, that the enactment of the Joint Regulation and other regulations governing rehabilitation orders for addicts and narcotics abusers, in the implementation phase is contrary to the Narcotics Law. Before the enactment of the Besama Regulation and other regulations governing rehabilitation orders for addicts and narcotics abusers, rehabilitation must be carried out through the establishment of a court. However, with the existence of these regulations, the implementation of rehabilitation can be carried out without having to wait for the determination of the court. Therefore, juridically the enactment of the regulation concerning rehabilitation
orders for addicts and narcotics abusers does not have legal force. This was made worse by the implementation in the field. Whereas regarding the decision handed down to Narcotics Addicts and Narcotics Abuse Victims to be rehabilitated and rehabilitated by the social who have not been proven guilty or found guilty can only be imposed by the Court, namely by the judge. However, because narcotics addicts are also the perpetrators of a crime / crime, then he must also be punished, because this is why it is said that the double track system in the formulation of sanctions against criminal acts of narcotics abuse is the most appropriate. Unlike the volunteers or those who voluntarily want to be rehabilitated.

The criminal sanction imposed on narcotics addicts as self victimizing victims is in the form of serving a sentence in prison, while the sanction of action given to narcotics addicts as victims is in the form of treatment and/or treatment carried out in the form of rehabilitation facilities. On the one hand he is a criminal offender who must be punished, but on the other hand is a victim of the crime he committed himself, so an action needs to be taken in the form of rehabilitation.

c. The unavailability of a rehabilitation institution for Government Agencies as a place to implement rehabilitation for suspected drug abusers who are in the process of investigation.

According to the Head of BNNK, Musi Rawas, there is no availability of inpatient rehabilitation institutions owned by government agencies in Musi Rawas Regency which are appointed to carry out rehabilitation of narcotics abusers who are in the investigation stage. So that the suspect must be entrusted to the designated rehabilitation institution, Ernaldi Bahar Hospital, Palembang, which is approximately 365 KM from Musi Rawas Regency, while the social inpatient rehabilitation institution belonging to the nearest community component does not meet the security standards so that the suspect has the potential to escape, making it difficult for investigators to deliver and bring back the suspect during the trial process.

So that the mandate of the 2014 Joint Regulation Article 5 Paragraph (1) states that narcotics addicts and narcotics abuse victims as suspects and/or defendants who are also drug traffickers can be detained in the State Detention Center and for those concerned can obtain social rehabilitation carried out in detention centers or
institutions correctional facilities where the perpetrator has been detained cannot be carried out.

d. Lack of budget/funding sources in the implementation of integrated assessments

Before rehabilitation is carried out, every addict or victim of narcotics abuse must pass the assessment process by the Integrated Assessment Team that has been established by the government. With the spread of information about increasingly intense rehabilitation, more and more people came/surrendered and were caught and then carried out an assessment process by the Integrated Assessment Team, because they wanted to be rehabilitated rather than have to stay in prison. Especially after the issuance of regulations concerning the obligation to rehabilitate, it is certainly increasingly used by addicts and victims of drug use, as if they would avoid criminal liability for their actions. In practice, it was found that there was a lack of budget/funding at BNNK Musi Rawas for the process of investigation (integrated assessment) and the unavailability of rehabilitation institutions for suspected narcotics crimes in Musi Rawas Regency so that the cost of sending suspects to rehabilitation institutions located in the provincial capital was quite high and not accommodated in the Musi Rawas BNNK DIPA so that it becomes an obstacle to the implementation of an integrated assessment.

4. Efforts that can be made so that the assessment of victims of narcotics abuse at the level of investigation at the Musi Rawas Resort Police Station

From several obstacles in the assessment process for addicts and narcotics abusers, there should be actions and attention from the government (BNN) starting from understanding law enforcement officers in combating narcotics crime; the use of appropriate legal instruments; the establishment of a rehabilitation institution owned by a government agency that can accommodate criminal suspects of narcotics abusers who are in the process of investigation, for example by functioning of detention centers and/or prisons in the implementation of the intended rehabilitation; and the availability of sufficient budget, both for the integrated assessment process and rehabilitation; review of Law number 35 of 2009 concerning Narcotics, as well as other technical regulations.
Conclusion

The conclusion of this research are Should make changes to the regulation of Law No. 35 of 2009 concerning Narcotics specifically narcotics rehabilitation because the rules contained in the law have not explicitly mandated law enforcers to tend to be weak because there is a word “can” in article 103 paragraph (1) of Law No. 35 of 2009 concerning Narcotics; Law enforcers should be more careful in looking at narcotics addicts and victims of narcotics abuse as a victim by taking into account the existing rehabilitation rules; The BNN should establish a good support system in the implementation of this integrated assessment, both in terms of budget, infrastructure and clear and firm policies.

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Legal Protection To The Brands Of Micro Small And Medium Enterprises In Bengkulu City

Radi Meydiansyah
Faculty of Law, University of Bengkulu, Indonesia.
E-mail: radi_meydiansyah@yahoo.co.id

Abstract

This research examines the legal protection of brands of micro small and medium enterprises in the city of Bengkulu. As for the problems in this study is how the legal protection of the brand of micro small and medium small businesses in the city of Bengkulu and whether the efforts of micro small and medium micro businesses in the city of Bengkulu and related institutions in seeking legal protection of micro small and medium enterprises in the city of Bengkulu. This is based on the laws and regulations, especially those related to brands, namely Law No. 20 of 2016, and laws and regulations relating to brands. With the increasing importance of the role of the brand of micro small and medium enterprises in the city of Bengkulu, the brand needs to be put in place, namely legal protection as an object against it regarding the rights of individuals or legal entities. Law No. 20 of 2016 aims to provide more legal protection for holders of brand rights. To guarantee legal protection of the brand of micro small and medium enterprises in the city of Bengkulu in the process of trade in goods and services, the brand owners of micro small and medium enterprises in the city of Bengkulu are expected to register their brands in order to obtain legal certainty.

Keywords: Brand, legal Protection, Micro Small And Medium Enterprises

Introduction

Globalization in the era of the increasing open flow of free trade, goods and services trade traffic no longer knows the difference in the territory of the State. inhibit can be ascertained in the era of globalization of free trade both trade in goods and services not including national and international trade that do not use brands. Brands as a part of the Intellectual Property Rights (IPR) system are important instruments for IPRs, especially in the trade sector. Brands are labels that are attached to a product that is made into a distinguishing differentiating power for a product with other products traded.

In Indonesia itself by changing and adding to the Trademark Law in such a way since Law Number 21 of 1961 was then amended by Law Number 12 of 1992, and then amended again by Law Number 15 of

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1 Raymon, 2016, Pengantar Merek, Penerbit Badan Pengembangan Sumber Daya Manusia Hukum dan HAM, Depok, page 9
2001, and the latest Law Law Number 20 of 2016 concerning Trademarks and Geographical Indications proves that the role of brands is very important. More flexible arrangements are needed along with the rapid development of the business world. Brand is a prestige. For certain circles, one’s prestige lies in the goods used or services used. The reason that is often asked is for the sake of quality, bona fide or investment. Sometimes brands become lifestyles. Brands can make a person become confident or even determine his social class. Using goods whose brands are well known is a matter of pride for consumers, especially if these items are genuine products that are difficult to obtain and reach most consumers. The variety of brand products offered by producers to consumers makes consumers faced with a variety of choices, depending on the purchasing power or ability of consumers. Lower middle class people who don’t want to miss using famous brand goods buy fake goods. Even though the items are fake, imitation and of low quality, it doesn’t matter as long as they can be bought. The occurrence of brand fraud, trade certainly will not develop well and will further worsen Indonesia’s image as a violator of Intellectual Property Rights (IPR). Therefore, the issue of legal protection for brands becomes interesting to discuss, considering the world will continue to grow, and in it the brand has a fairly calculated role especially in the process of trading goods and services in the global era. Therefore, it is appropriate that products or other works that are IPRs and have circulated in the global market need effective legal protection from all violations that are not in accordance with the approval of TRIPs and agreed conventions.

Brands are very important in the business world. Certain product brands (both goods and services) that have become well-known and sold in the market will certainly tend to make other producers or entrepreneurs spur their products to compete with well-known brands, even in this case unhealthy competition finally emerges. Brands can be

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2 ibid
considered as "spirits" for a product or service1. Trademarks as identifiers or distinguishing marks can describe the guarantee of personality (individuality) and reputation of the goods and services resulting from their business when traded. When viewed from the point of view of the producer, the brand is used as a guarantee of its production, especially regarding quality, in addition to the promotion of merchandise to find and expand the market. Furthermore, from the consumer side, the brand is needed to make choices for the items to be purchased. If a product does not have a brand, of course the product concerned will not be known by consumers. Therefore, a product (a good product or not) certainly has a brand. Not even impossible, a brand that has been widely known by consumers because of its quality and price will always be followed, imitated, "hijacked", maybe even faked by other manufacturers who do fraudulent competition. Specific brand protection is needed considering the brand as a means of individual identification of goods and services is the center of the "soul" of a business, very valuable seen from various aspects. Thus, brands are very important in the business world. The first registrant system mechanism actually opens up opportunities for trademark piracy that can be carried out by foreigners, which results in cases in the court. An example of a "Natasha" brand piracy case, the Supreme Court in its decision (No.699K / Pdt.Sus / 2009) states that the brand "Natasha" of Then Gek Tjoe has carried out brand piracy, which was previously used by Dr. Natasha. Fredy Setyawan3. The trademark owners will get legal protection so that they can develop their business calmly without fear that the mark is claimed by another party4.

Micro, Small and Medium Enterprises are one of the economic sectors that can survive when the economic crisis occurs and are able to develop the Indonesian economy for the better.

3 www.blogger.com is accessed on 30 September 2018
With the role of Micro, Small and Medium Enterprises that are very strategic, it is necessary to have good legal protection in carrying out economic activities in the face of the ASEAN Economic Community, able to compete with products from other ASEAN member countries that will be free to enter Indonesia as a form of free trade. This needs to be done by the Government as an effort to provide legal certainty for the actors of Micro, Small and Medium Enterprises who play an important role in building the national economy as well as having the ease of registering the product brands they produce in order to be able to compete with other country’s products.

According to Acting The Governor of Bengkulu, in the development of Micro, Small and Medium Enterprises in Bengkulu, the role of policy makers, he values the most influential to be able to make policies that favor the growth of Micro, Small and Medium Enterprises.

**Method**

This study uses an empirical juridical approach. Law is not only seen as rules or rules, but also includes the operation of law in society. The research specification is analytical descriptive, because this research is intended to provide a detailed, systematic and comprehensive picture of all things both legislation and legal theories. The types and sources of data in this study use primary data and secondary data. Primary Data is data obtained directly from field research. Secondary Data, namely data obtained based on literature study is intended to compare the theory and the reality that occurs in the field through literature study.

**Analysis and Discussion**

Brands have a very important role in economic life, especially in the world of trade in goods and services to distinguish from other similar products in one class\(^5\). Classes of goods and services are groups of goods and services that have the nature, method of manufacture and

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\(^5\) Dasananto Anggoro, 2016, Klasifikasi Barang dan Jasa, Penerbit Badan Pengembangan Sumber Daya Manusia Hukum dan HAM, Depok, page. 2
purpose of their use. Registration of a mark is a valid proof of a registered trademark. Brand registration is also useful as a basis for refusal of the same brand as a whole or the same as essentially being applied for by other people for similar goods or services. Brand registration as a basis for preventing other people from using the same brand in principle or as a whole in the circulation of goods or services.

Brand registration aims to obtain legal certainty and legal protection for brand rights. Brand registration is done at the Directorate General of Intellectual Property Rights. The Directorate General of Intellectual Property Rights (IPR) is a trademark registration agency assigned to register trademarks for registration by the brand owner. Brand registration is carried out by fulfilling the requirements as stipulated by Law No. 20 of 2016. There are two systems adopted in brand registration, namely the declarative system and constitutive system (attributive). The 2016 Brand Law in its registration system adheres to a constitutive system. Brand registration in this case is to give the status that the registrant is considered to be the first user until someone else proves otherwise. The right to trademark does not exist without registration. This is what brings more certainty. Because if someone can prove he has registered a brand and he is given a Trademark Certificate which is proof of his ownership rights on a brand, then other people cannot use it and others are not entitled to use the same brand for similar items. So this constitutive system provides more certainty. Referring to the definition of the mark in Article 3 of the Law on Trademarks and Geographical Indications, it is clear that the mark is an exclusive right granted by the state to the registered brand owner. So what is emphasized here is that the right to the mark is created because of registration and not because of the first use. Obviously here is a constitutive system. And this guarantees more legal certainty. Terms and Procedure for trademark application are regulated in Article 4 of the Law on Trademarks and Geographical Indications.
(1) Application for registration of Mark is submitted by the Applicant or his Proxy to the Minister electronically or non-electronically in the Indonesian language.

(2) In the Application referred to in paragraph (1) must include:
   a. date, month and year of application;
   b. full name, nationality and address of the Applicant;
   c. full name and address of attorney if the application is filed through a proxy;
   d. color if the Brand requested for registration uses the color element;
   e. the name of the country and the date of request for the first Brand in the event that the Application is filed with Priority Rights; and
   f. class of goods and / or class of services and description of types of goods and / or types of services.

(3) An application is signed by the applicant or his attorney.

(4) The application referred to in paragraph (1) is accompanied by a Brand label and proof of payment of fees.

(5) Fees for Application for registration of Marks are determined per class of goods and / or services.

(6) In the event that the Mark as referred to in paragraph (4) is in the form of 3 (three) dimensions, the Brand label attached is in the form of the characteristics of the Mark.

(7) In the event that the Mark as referred to in paragraph (4) is in the form of sound, the Brand label attached shall be in the form of notation and sound recording.

(8) The application as referred to in paragraph (1) must be accompanied by a statement of ownership of the Mark being applied for registration.
Further provisions regarding the application fee as referred to in paragraph (5) shall be regulated by Government Regulation\(^6\).

The right to trademark is a special right granted by the state to registered brand owners. Therefore, other parties cannot use a registered brand without the permission of the owner. The transfer of rights to a registered trademark is an act of the brand owner to transfer ownership rights to others. Article 41 paragraph (1) Act No. 20 of 2016 states that the rights to registered trademarks can be transferred or transferred because: inheritance; will; endowments; grant; agreement; or other reasons that are justified by the legislation.

The transfer of rights to a registered trademark must be filed with the Directorate General of Intellectual Property Rights with accompanying documents. If the recording is not carried out, the transfer of the right to the trademark does not have a legal effect on the third party.

Protection of Brands The consequences of the trademark that has been registered is to be used with the registration request. The Brand Law requires brand owners to be honest in using their brands, meaning that the brands that have been registered are used according to the class of goods or services that are registered must also be the same shape as the brand used. pursuant to Article 72 of Law No. 20 of 2016 concerning Trademarks and geographical indications of the removal of meren, the method is carried out by:

1. Abolition of registered Trademarks may be submitted by the relevant Mark's owner to the Minister.

2. Application for deletion as referred to in paragraph (1) may be submitted by the owner of the Mark or through their attorney, whether for part or all types of goods and / or services.

\(^6\) Undang-Undang No 20 Tahun 2016 Tentang Merek dan Indikasi Geografis.
(3) In the event that the Mark as referred to in paragraph (1) is still bound by a License agreement, deletion can only be done if it is agreed in writing by the licensee.

(4) Exceptions to the approval referred to in paragraph (3) are only possible if in the License agreement, the licensee expressly agrees to override the existence of the agreement.

(5) The deletion of registration of Marks as referred to in paragraph (1) shall be recorded and announced in the Official Gazette of Marks.

(6) Abolition of registered marks can be carried out on the initiative of the Minister.

(7) Abolition of registered Marks under the Minister's initiative can be done if:
   a. have the same principal and / or the whole with Geographical Indications;
   b. contrary to state ideology, legislation, morality, religion, decency, and public order; or
   c. have in common with the expression of traditional culture, cultural heritage intangibles, or names or logos that are a hereditary tradition.

(8) Elimination as referred to in paragraph (6) and paragraph (7) can be done after obtaining recommendations and Brand Appeals Commission.

(9) The Trademark Appeals Commission provides recommendations as referred to in paragraph (8) at the request of the Minister.

Brands as company assets will be able to generate huge profits if used with regard to business aspects and good management of management. With the increasing importance of the role of this brand, the brand needs to be put in place for legal protection as an object

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7 Undang-Undang No 20 Tahun 2016 Tentang Merek dan Indikasi Geografis.
against it regarding the rights of individuals or legal entities. In Indonesia. Before being registered, the mark must first be checked regarding the mark itself and an application for registration of the mark will be accepted if the registration has fulfilled the requirements of both the formal and substantive nature that has been determined by the Trademark Law\textsuperscript{8}, namely about the differentiation. The success of brand law enforcement cannot be achieved by only relying on laws that regulate brand issues. The success of brand law enforcement requires the support of other elements, especially institutions / agencies engaged in the brand. Legal protection against registered trademarks is absolutely given by the government to holders and users of the rights to the brand to guarantee: Business certainty for producers; and Attract investors to foreign trademarks, while the legal protection provided to local trademarks is expected to be able to expand internationally internationally.

The issue of brand protection is actually not new to Indonesia. In the history of brand legislation, it can be seen that in the Dutch colonial era the Industriele Eigendom (RIE) Regulations were enacted in the 1912 Staatblad Number 545 jo Staatblad 1913 Number 214. During the Japanese occupation, a brand regulation was issued, called Osamu Seire Number 30 concerning Registration of a trade stamp which will take effect on the 1st of the month 9 Syowa (Japan’s year 2603. After Independent Indonesia (August 17, 1945), the regulation is still applied under concerning Corporate Brands and Commercial Brands was adopted which replaced the Dutch colonial inheritance regulations which were considered inadequate, even though in the Law basically had many similarities with the products Dutch colonial law furthermore, the Trademark Law has changed, both replaced and revised because the value is not in accordance with the development of circumstances and needs. In the end, in 2016 Act Number 20 of 2016

\textsuperscript{8} Mela Yusnita Irnie, 2016, Prosedur Pemeriksaan Substantif Merek, Penerbit Badan Pengembangan Sumber Daya Manusia Hukum dan HAM, Depok, page. 7
concerning Trademarks and geographical indications was promulgated. This Brand Law is a law that regulates brand protection in Indonesia. The Act is the latest legal product in the brand field as a response to adjusting brand protection in Indonesia to international standards contained in Article 15 of the TRIPs Agreement. Based on Article 1 point 1 of Law Number 20 Year 2016, it is stated that Trademark is a sign that can be displayed graphically in the form of images, logos, names, words, letters, numbers, color arrangement, in the form of 2 (two) dimensions and / or 3 (three) dimensions, sound, hologram, or a combination of 2 (two) or more elements to distinguish goods and / or services produced by a person or legal entity in the activity trade in goods and / or services. Brand Violation

Forms of brand violations include:

1) Using identical brands or similar brands that have been registered by other parties for identical or similar goods and services. Although these items are genuine items produced and sold by their owners, the act of selling these items that are put into several bags, which shows the same brand as the brands that have been registered in the bags, is considered, as brand violation actions;  
2) Using goods resulting from brand violations to be sold even if the goods are produced by another person, displaying them in a store, storing them in a warehouse for sale, then goods whose brands have been registered by another person have used their mark or packaging without permission, and others, are considered to violate the brand. Whether buying or storing items without knowing that selling these items is an easing of the brand, the action is still considered a brand violation;  
3) Selling or using a brand or container, etc. which is a brand that is used without the permission of the brand owner. The act of using

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9 Silalahi ignasius, 2016, Litigasi Merek, Penerbit Badan Pengembangan Sumber Daya Manusia Hukum dan HAM, Depok, page 42
a brand, etc., which is a violation of a trademark owned by another person for personal use or allowing others to use it is a violation of the brand. Furthermore, using "western" plates or bowls whose brands have been registered by others to provide services, food and drinks for use in your own restaurant allows others to use them is also a brand violation;

4) Producing or importing a brand, container, A which indicates the brand used without permission from the brand owner. Although the mark is produced or imported based on orders from other people who are not entitled to use the registered mark, this is considered as a brand violation;

5) Producing, selling or importing goods for business purposes for its own use in order to produce a brand, container, and others. Which is a brand that is used without the permission of the brand owner. An act of producing, using or importing "printing blocks" for brands, tools for producing and others. For business purposes without instructions or permission of the brand owner or person who has the rights to the mark is a brand violation. The Indonesian Brand Law relating to repressive brand protection is limited to legal protection for similar goods or services.

Brand development is an important thing, but not yet realized by many UMKM. Although there is a lot of evidence that shows the efficacy of a brand in developing a business, there are still many businesses who choose to ignore the benefits of developing this brand. The brand development strategy for UMKM is a result of the branding decision process that covers six main aspects. In the first aspect, branding decisions, UMKM must decide whether to use the brand or not. Seeing the increasingly fierce competition to survive UMKM should not only focus on how to get customers, but also how to retain customers. Therefore the use of brands is a necessity. This is closely related to brand benefits, especially for producers. Requests for trademark registration are submitted by UMKM in 2018 totaling 5,795 (five
thousand seven hundred and ninety five) applications, with a trademark application amounting to 5,024 (five thousand twenty four) and applications for trademark as many as 771 (seven hundred seventy one). Inversely proportional to the trademark application submitted by non-UMKM in 2018 as many as 43,022 (forty three thousand twenty two) applications with the type of trademark application totaling 31,778 (thirty one thousand seven hundred seventy eight) applications and service brand applications as many as 11,244 (eleven thousand two hundred and forty four) requests\(^\text{10}\).

As an effort to improve the capability and protection of micro, small and medium enterprises in the national economy, it is necessary to have comprehensive, synergistic and sustainable intellectual property management by the government, institutions of education, business, and society\(^\text{11}\).

Intellectual property management is intended as a means to increase public knowledge, understanding and awareness as well as to make steps to carry out legal protection of intellectual property for business actors, especially UMKM, especially brands. The management starts from education, coaching and mentoring. Community needs for the existence and development of products, training, cooperation and institutions need to be fulfilled Article 29 Bengkulu Province Regional Regulation Number 2 of 2014 concerning EMPOWERMENT OF MICRO, SMALL AND MEDIUM ENTERPRISES Provincial Governments, Regency / City Governments, businesses, non-governmental organizations, educational institutions and communities must provide business protection to micro, small and medium enterprises. Furthermore, Article 32 facilitates and encourages micro, small and medium enterprises to obtain IPR certificates in the country and abroad\(^\text{12}\).

\(^{10}\) https://statistik.dgip.go.id/statistik/production/merek_umkm.php

\(^{11}\)https://www.academia.edu/35549107/PENGELOLAAN_HAK_CIPTA_DAN_MEREK_SEBAGAI_UPAYA_PERLINDUNGAN_HUKUM_Ashibly

\(^{12}\)Peraturan Daerah Provinsi Bengkulu Nomor 2 tahun 2014 tentang PEMBERDAYAAN USAHA MIKRO, KECIL DAN MENENGAH
Conclusion

All procedures for registration, transfer and elimination of protection of brand rights have been arranged in such a way as to obtain legal certainty. In essence, registration is the only way to get legal protection for brands. Registration of marks is carried out at the Directorate General of Intellectual Property by fulfilling the procedures specified in the Trademark Law. Likewise, the transfer and elimination of the protection of the mark can be done if it has fulfilled the provisions stated in the Trademark Law. Basically. Legal protection of brands in the trade of goods and services is absolutely necessary to prevent and avoid dishonest practices, such as counterfeiting and piracy, as well as obtaining legal certainty. For this reason, the state has regulated legal provisions concerning brand protection that are adapted to developments in the global era whose purpose is to accommodate all the interests that exist to create legal protection. Legal protection for well-known brands and brands that are given a preventive and repressive Trademark Law is in line with the TRIPs provisions, including protection of goods or services of the same or not. that is, by registering a trademark. In addition, matters relating to brand protection are also refractive. To guarantee legal protection of brands in the process of trading goods and services, brand owners are expected to register their brands in order to obtain legal certainty. In addition, the transfer and elimination of the right to the mark must be carried out in accordance with the law to ensure legal protection. Firm action is needed against those who violate the rights to the mark. For this reason, the provision of legal instruments in the field of brands must be supported by human resources who are reliable and truly competent in handling the issues in the field of brands. Existing legal instruments are expected to provide strict sanctions for violators of brand law so that there is a deterrent effect for the community to not violate the law, especially in the field of brands. In addition, socialization in the field of brands is felt to be necessary to the community. Awareness of the general public or
businessmen is needed to avoid the practice of fraudulent practices in the field of brands, and can also guarantee the implementation of the process of trading healthy goods and services. Protection of intellectual property is the time to be the attention, interest and concern of all parties in order to create conducive conditions for the growth of innovative and creative activities that are boundary conditions in fostering the ability to implement, develop and master technology. As a step in improving the capability and protection of micro, small and medium enterprises in the City of Bengkulu, it is necessary to have a comprehensive, synergistic and sustainable Brand management by the government, educational institutions, business world, and society.

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Juridical Basis of Society Refuses Corruption (MAKI)  
In proposing pretrial to the Century Bank case

Abi Pujangga Putra  
Faculty of Law, University of Bengkulu, Indonesia  
E-mail: abipujanggaputra95@gmail.com

Abstract

Nowdays law enforcement in Indonesia make a lot controversy, one of them is a decision of judge pretrial (Commissioner Judge) No. 24/ Pid/ Pra/ 2018/ PN. JKT. Sel, because the judge make a decision with decide that is to order Corupption Eradication Commission (KPK) to continue investigation about centrury corupption scandal and assign suspect to Budiono, Muliaman D. Hadad, Raden Pardede and others (according indictment of prosecutor KPK toward Budi Mulya).This decision according request of Society Rejects Corupption (MAKI), whereas before KPK haven't stopped this investigation, but MAKI as representative of Indonesia society don’t want this case to be forgetten KPK. Problem of this paper is (1) what is juridical basis MAKI apply for pretrial? (2) what is the juridical consequences from this decision?, objective of paper (1) to discribe juridical basis of MAKI apply pretrial (1) to discribe juridical consequences from this decision.Methodology this paper is, type of descriptive research with approach normative research (law approcah, case approach, and historical approach), the legal material is ( primary legal material, secondary legal material, and tertiary legal material), techniques collection of legal material use study document, management legal material with edit and analysis legal material with qualitative analysis and content analysis. Reserach result is (1) one of the basis MAKI apply pretrial is legal certainty and justice (2) juridical consequences from this decision is KPK followed this decision or KPK doesn’t respect the judge decision and make KPK abuse of power.

Keywords: pretrial, decision, justice, legal certainty

Introduction

Nowdays law enforcement in Indonesia have a lot controversy, one of them decision to Budi Gunawan which add object pretrial that is valid or not suspect determination, pretrial effort is an effort to ensure law enforcement according procedure of law which become control and watching law enforcement process. The latest interesting case is century bank scandal : The Century Bank case began with its determination to become a bank failed to have a systemic impact. According to the KPK’s public prosecutor, the stipulation of Antonius Budi Satria was aimed at obtaining a rescue fee worth a total of Rp 6.76 trillion from the Deposit Insurance Corporation (LPS). Initially, on November 16, 2008 the Minister of Finance / Chairman of the Financial System Stability Committee (KSSK) Sri Mulyani Indrawati, BI Governor Boediono, Senior Deputy Governor Miranda Swaray Goeltom, Deputy Governor of the Banking / Financial System Stability Policy Muliaman Hadad held a meeting at the BI office. The meeting at that time discussed the consideration of the cost of rescuing Century Bank. However, on November 20, 2008 the Board of Governors of BI (DGBI) stated that they did not want Bank Century to be determined as a failed bank and could still operate. Siti Chalimah Fadjriah
as Deputy Governor of Public Bank and Islamic Bank V Supervision and Halim Alamsyah as Director of the BI Banking Research and Regulation Directorate said that based on the assessment, Century Bank was not individually classified as a systemic. In response to this, former Bank Indonesia deputy governor in monetary and foreign exchange management and representative office (KPW) Budi Mulya did not agree with the attachment of data submitted by Halim Alamsyah. He requested that the data not be attached. Through Boediono, each member of the BI Board of Governors related to Century, and all DGBI members agreed that Century Bank was declared a failed bank. In fact, according to Chairman of the LPS Rudjito, Fuad Rahmany, Anggito Abimanyu, Agus Martowardjo in normal circumstances Bank Century should not be categorized as a systemic bank. Then it was continued with the termination of all Bank Century management. Then, the capital injection began to be disbursed in stages starting from November 24, 2008 to July 24, 2009 with a total fund of Rp 6.76 trillion. Such actions also harm state finances in the provision of short-term funding facilities. So, Budi Mulya was charged with an article on the misuse of authority, opportunity or means in which he had a position or position so that it could harm the state’s finances and economy.¹

On this case KPK assign suspect to Budi Mulya, Budiono, and others, on the indictment of KPK said: Defendant Terdakwa Budi Mulya has been proven legally and convincingly committed a criminal act of corruption together with Boediono as Bank BI Governor, Siti Chalimah Fadjiriah as Deputy Governor for supervision of Commercial Banks and Sharia, S. Budi Rochadi (currently deceased) as Deputy Governor in the field of 7 payment systems, money circulation, BPR, and credit, Muliaman Darmsnyah Hadad as Deputy Governor in the field of 5 banking policies / stabilization of the financial system and as the Board of Commissioners of the Deposit Insurance Agency (LSP), Hartadi Agus Sarwono as Deputy Governor in 3 monetary and Ardhayadi policies Mitroatmodjo as Deputy Governor of 8 logistics, finance, asset settlement, secretariat and KBI and Raden Pardede as secretary of the Financial System Stability Committee (KSSK), have carried out or participated in several actions that have relations in such a way that they should be considered as continuing actions.²

¹ Mansyur Faqih, Mengingat kembali awal mula kasus bank century, https://www.republika.co.id/berita/nasional/hukum/14/12/05/ng2qzi-mengingat-kembali-awal-mula-kasus-bank-century, diakses tanggal 13-08-2018 pukul 20.46 WIB.
Proces on the court judge make decision: Stating that the defendant Budi Mulyant has been proven legally and convincingly guilty of committing a criminal act of corruption together as the act continues. From this decision Budi Mulya take legal remedies until supreme court, but supreme judge not change decision however supreme court increase imprisonment from 12 years until 15 years, while the phrase: Stating that the defendant Budi Mulyant has been proven legally and convincingly guilty of committing a criminal act of corruption together as the act continues. Not changes that all, so Budion, Raden Pardede and others status not clear.

After no follow up KPK to investigate Budiono, Raden Pardede and others or seem to be lost, to make MAKI apply petrial againts KPK, and petrial judges make controversial decision: Order the Respondent to proceed with the legal process in accordance with the provisions of the laws and regulations applicable to the alleged Bank Century corruption crimes in the form of conducting Investigations and establishing suspects against Boediono, Muliaman D Hadad, Raden Pardede et al, (as stated in the indictment above the name of the Defendant BUDI MULYA) or delegate it to the Police and / or Prosecutor’s Office to proceed with Investigation, Investigation and Prosecution in the trial process at the Central Jakarta Corruption Court. From this decision must investigate Budiono, Raden Pardede and others or give this case to police or prosecutor. KPK poistion is a leader and coordinator corruption case so KPK cannot give this case to police and prosecutor. On the side KPK said; The Deputy Chair of the Corruption Eradication Commission, Basaria Pandjaitan, said that her institution must follow up on a court order asking for the appointment of former vice president, Boediono, in the Century Bank corruption case. Two proofs to strengthen it will be explored. Without that the KPK did not dare to establish a suspect (Boediono) So, this controversy decision made as the writer title paper “Juridical Basis of Anti-Corruption Society (MAKI) In proposing pretrial to the Century Bank case”

3 Decision No. 21/Pid.Sus/TPK/2014/PN. Jkt.Pst.
4 Decision No. 21/Pid.Sus/TPK/2014/PN. Jkt.Pst.
Method

This type of research in terms of its nature is descriptive research, descriptive research describes the state of the object or problem without the intention to draw conclusions that generally apply. The research approach used in this study is the approach of the law, the case approach, and the historical approach.

To collect secondary data, researchers do so by studying the laws and regulations, the results of research, thesis, thesis, and the internet that are related to the material discussed. At this stage, the legal material is read and re-examined to find out whether the required legal material is complete or not, if not, it will be improved. In analyzing legal material, researchers use qualitative analysis and content analysis.

Analysis and Discussion

The legal basis for MAKI in filing pretrial, one of which is therefore any other official from Bank Indonesia including Budiono which approved the establishment of Century Bank as a Failing Bank Systemic impact and approval of FPJP disbursement must be declared as a suspect and processed to Corruption Court as happened to Budi Mulya. Based on these reasons MAKI considered the Century Bank case to be protracted, even though there was a court ruling stating that Budiono and his friends participated in criminal acts with Budi Mulya, the author believes MAKI wants justice in law enforcement where everyone has the same position but in reality here only being punished is Budi Mulya while Budiono and his friends are left alone without being processed. Based on the court’s decision on the charges against Budi Mulya stating: Defendant Terdakwa Budi Mulya has been proven legally and convincingly committed a criminal act of corruption together with Boediono as Bank BI Governor, Siti Chalimah Fadjriah as Deputy Governor for supervision of Commercial Banks and Sharia, S. Budi Rochadi (currently deceased) as Deputy Governor in the field of 7 payment systems, money circulation, BPR, and credit, Muliaman Darmansyah Hadad as Deputy Governor in the field of 5 banking policies / stabilization of the financial system and as the Board of Commissioners of the Deposit Insurance Agency (LSP), Hartadi Agus Sarwono as Deputy Governor in 3 monetary and Ardhayadi policies Mitroatmodjo as Deputy Governor of 8 logistics, finance, asset settlement, secretariat and KBI and Raden Pardede as secretary of the Financial System Stability Committee (KSSK), have carried out or participated in

7 Ronny Hanitijo Soemitro, Metodologi Penelitian Hukum, Ghalia Indonesia, Jakarta, 1983, Page. 16
several actions that have relations in such a way that they should be considered as continuing actions.\(^8\)

So the legal certainty is clear, namely this decision, because Budi Mulya was sentenced to commit a crime jointly and as a continuing act so it is certainly not only Budi Mulya who must be convicted, of course who participates as the prosecutor’s indictment. On the other hand MAKI wants legal certainty in the century bank case law enforcement process, this legal certainty will also benefit Budiono and his friends so that their status is clear. The judge’s decision against Budi Mulya stated: Stating that the defendant Budi Mulyant has been proven legally and convincingly guilty of committing a criminal act of corruption together as the act continues.\(^9\) According to the author, all people who participated in the crime as the decision must be investigated. MAKI argued that the process of law enforcement against budiono and friends was deliberately left to drag on, while Budi Mulya was convicted while Budiono and his friends were not processed, it is not in accordance with commutative justice according to the Aristotle, because in this case Budiono and his friends are not treated equally by the investigator, so that the purpose of law that is, justice cannot be carried out by the KPK, because it still seems selective.

In terms of benefit MAKI wants the discovery of judges, because in the Criminal Procedure Code itself it is unclear how long the investigation process can be carried out, so that a person’s status can become a suspect for life, this pretrial decision is then expected to become a legal basis for law enforcement to not allow a case late. So in terms of this benefit, according to the author, MAKI proposes pretrial. Based on this, the foundation of MAKI in proposing pretrial in terms of legal objectives according to the author is more directed towards justice, because it wants law enforcement that is not selective, while legal certainty is only to ensure the legal process against Budiono and his friends whose names are already mentioned in the KPK against Budi Mulya. The consequences that arise from the issuance of this decision are:

1. Recht Finding. The legal finding in this case is to fill the legal vacuum, because so far it has not been regulated for how long the investigation and investigation process takes so that a person can be carried out a life-long investigation, with the issuance of this decision it will provide legal certainty for the suspect regarding his status, so that investigators will be careful in determining the

\(^8\) Judge considerent on decision No. 24/Pid.Pra/TPK/2018/PN. Jkt.Pst. page. 65.
\(^9\) Decision No. 21/Pid.Sus/TPK/2014/PN. Jkt.Pst.
suspect, the principle of fast judicial law will be realized, the legal
discovery in this pretrial decision is to instruct the investigator to
conduct an investigation and determine a suspect, then the pretrial
object is able to speed up the process of someone to be tried

2. The submission or absence of the KPK against pretrial decisions. (a) If the KPK is not subject to a pretrial decision, and still does not proceed with a pretrial decision for any reason, the KPK may be deemed not to respect court decisions and can even be prosecuted for obstructing the investigation process. (b) If the KPK is subject to a pretrial decision then this decision can be used as a yurisprudensi for the future so that there is no protracted law enforcement process.

3. Pre-trial efforts are the last resort, so that other legal remedies cannot be filed, this results in the suspect Budiono and his friends being unable to submit pretrial again if later the KPK is appointed as a suspect

4. If the KPK is unable to continue the process against Budiono and his friends, then based on the judge’s decision stating: Order the Respondent to proceed with the legal process in accordance with the provisions of the laws and regulations applicable to the alleged Bank Century corruption crimes in the form of conducting Investigations and establishing suspects against Boediono, Muliaman D Hadad, Raden Pardede et al, (as stated in the indictment above the name of the Defendant BUDI MULYA) or delegate it to the Police and / or Prosecutor’s Office to proceed with Investigation, Investigation and Prosecution in the trial process at the Central Jakarta Corruption Court. So the KPK must submit the Century Bank case to the Police or Attorney General’s Office, this is not in accordance with the authority of the KPK, because the establishment of the KPK is based on the inability of the Police and the Attorney General’s Office to prosecute corruption, so that if the KPK submits a case to the police or prosecutor’s office, the KPK does not needed again, so that the spirit of the KPK was gone.

5. Decision of pretrial judge against positive law. The KPK does not have the authority to stop investigations, the KPK is expected to be careful in determining someone to be a suspect, in the pretrial decision the judge does not examine the formal object from pre-trial,

namely the termination of the investigation because the KPK has no right to issue it, but the judge still receives the case on the grounds that the judge cannot reject the case on the grounds that there is no law governing it, in addition, the judge also opposes the positive law, namely the pretrial object in accordance with Article 77 of the Criminal Procedure Code by adding a pretrial object, which is to instruct the suspect and determine the suspect.

Conclusion
The legal basis for MAKI to propose pretrial is a court decision against Budi Mulya, and the basis is justice and legal certainty. The juridical consequences that arise are the emergence of legal discoveries and the prosecution of the Corruption Eradication Commission (KPK) because it inhibits pretrial decisions. Investigators must be careful in making charges, because they must be proven in court. There should be an institution that can correct the judge’s decision, so that the judge makes a decision

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Paper and Internet


Implementation of Article 8 Paragraph 1 of Law No. 10 Of 2008 about General Election

Nanik Mandasari, S,IP, M. Si
STIA_NUSA Sungai Penuh, Indonesia.
E-mail : Mandasari_nanik@yahoo.com

Abstract

Representation of women in parliament is very important in public decision making because it will have implications for the quality of legislation produced by State and public institutions. In Law No. 10 of 2008 states about General Elections (Elections), general election of DPD, DPR and DPRD members. Article 8 paragraph (1) letter d states that must include at least 30% women's representation in the management of central political parties. The text in Article 55 paragraph (1) states that the names of candidates in the list of candidate candidates as referred to in article 54 are arranged by serial number. Paragraph (2) states that in the list of candidates as referred to paragraph (1), for every three candidates there is at least one woman, this is known as the zipper system. Thus, gender mainstreaming is also an effort to uphold the rights of women and men to equal opportunities, equal recognition and equal appreciation in society. The conditions and problems above show that between the text and context and the meaning that occurs strongly shows inequality and even leads various parties to do multiple interpretations on the role of women in the political arena, so that it will lead to a lack of clarity in ensuring the fulfillment of women's rights. This study aimed to find out how the Implementation of Women's Representation in the April 9 2014 Election in Sungai Penuh City. The focus of the study was to describe 30% of women representation in the April 9 2014 elections in Sungai Penuh City. The research method used was qualitative where the results of the research will be processed based on the interpretative researchers and described in descriptive form. The results of field research show that the implementation of 30% of women's representation in the April 9 2014 elections in Sungai Penuh City was still not optimal. Women candidates for DPRD members of Sungai Penuh City were very lacking and did not meet the quota, only dominated by men. Whereas the communication ability of women candidates for Sungai Penuh City DPRD members was very low and there was no direct interaction with the community. In terms of human resources, women candidates for Sungai Penuh City DPRD members have very low quality and political ability when compared to men candidates. Disposition (behavior and characteristics) from women were very limited because they feel doubt, shyness, and feel taboo with politics. This was strongly influenced by the local culture. able to interact with the public.

Keywords: Implementation, Article 8 paragraph 1 of Law No. 10 of 2008

Introduction

General elections are instruments of change and improvement in the context of democracy. In Law No. 2 of 2008 about Political Parties as stated in Article 2 paragraph (2) states that the establishment and formation of a Political Party as referred to paragraph (1) includes 30% (thirty percent) of women’s representation. Law Number 2 of 2008 about Political Parties Chapter V concerning on the Purpose and Functions of Article 11 paragraph (1) letter e also places political recruitment in the
process of filling political positions through a democratic mechanism by taking into account gender equality and justice.

Furthermore, Law No. 10 of 2008 about General Elections (Elections) of DPD, DPR and DPRD members. Election Article 8 paragraph (1) letter d includes at least 30% representation of women in the management of central political parties. The text in Article 55 paragraph (1) states that the names of candidates in the list of candidate candidates as referred to in article 54 are arranged by serial number. Paragraph (2) states that in the list of candidates as referred to in paragraph (1), for every three candidates there is at least one prospective woman, this is known as the zipper system.

At the current level of political reality, only a few parties (around 10%) have responded by placing women in candidate numbers, and even some parties that have openly demonstrated that their party has a special division that handles women’s issues. Although this was already a good first step for increasing the role of women in the political field, what needs to be examined further is whether the policies that have been issued by the party are only incidental or rhetorical and even pseudo-policies that only win empathy especially women’s sympathy.

Representation of women in parliament is also very important in public decision making because it will have implications for the quality of legislation produced by State and public institutions. Besides that it will also bring women to a different perspective in seeing and solving various public problems because women will think more holistically and be gender responsive. The significance of the existence of women in parliament will also have an impact on the formulation of policies and legislation as part of the national agenda that will accelerate the implementation of gender mainstreaming.

This should be carried out by a critical and logical analysis to provide a deep meaning, both juridical, philosophical and sociological to the text of women’s representation in politics which has only been interpreted as partial and only from the needs of the parties. In relation
to gender equality, there was an appeal from the 1974 CEDAW (Convention on the Elimination of All Forms of Discrimination Against Women) to the States that signed the Convention that had been made (including the Indonesian state). One of CEDAW UN’s appeals is to eliminate all forms of discrimination against women by taking affirmative action. Affirmative actions are special actions of correction and compensation from the state for gender injustice against women all this time (Imas Rosidawati, Paper, *Keterwakilan Perempuan di Dewan Perwakilan Rakat Kesiapan Partai Politik & Perempuan Indonesia di Arena Politik Praktis*, p. 4).

Article 4 of the CEDAW UN, states that "affirmative action is special temporary measures taken to achieve equal opportunity and treatment between men and women". Its initial understanding is "the laws and policies that require it to be imposed on certain groups give compensation in privileges in certain cases in order to achieve proportional representation in various institutions and occupations. In Indonesia, one of the affirmative actions is the establishment of a quota system of at least 30% in State policy-making institutions.

The focus of this research was to describe the Implementation of 30% Representation of Women in the April 9 2014 Election in Sungai Penuh City. Sungai Penuh City is a new city government from the expansion of Kerinci Regency. April 9 2014 Election was the first election for the people of Sungai Penuh City which was followed by 12 political parties. The hope of the people of Sungai Penuh City is to get their qualified representatives and be able to fight for their aspirations, as well as the optimism of female candidates in every party seen from the nomination of each party that has fulfilled 30% of the women’s representation quota. But the author saw from the results of the Plenary Commission KPU in Sungai Penuh of 25 elected candidates none of whom were elected.

From the background above the author found several phenomena that occurred in the April 9 2014 elections in Sungai Penuh were as
follows: Political parties did not carry out women's regeneration; Women's nomination was just a quota fulfillment; Recruitment of women candidates who were not qualified; The inability of female candidates to compete with male candidates.

Based on the description of the background above and to provide limitations in the research process, the formulation of the problem in this study were as follows: What was the Implementation of 30% Representation of Women in the April 9 2014 Election in Sungai Penuh City? What caused the 30% quota for women to be elected in the April 9 2014 elections in Sungai Penuh City?

The analytical method used in this study was descriptive method, where the data obtained in the field is processed using interpretative researchers to process the relevant raw data obtained in the field then the results of the research were described in sentences rather than numbers or statistical data. This method was used to trace and describe the implementation of 30% women's representation in the April 9 2014 election in Sungai Penuh City. Data collection techniques were carried out by means of library research and field research conducted by in-depth interviews and observations related to the unit of analysis in this study, namely KPU, Political Parties and Sungai Penuh City people who already had the right to vote.

**Analysis and Discussion**

The aspect that the author examined was the implementation of 30% women's representation in the April 9 2014 elections in Sungai Penuh City. Based on the results of the vote counting of Sungai Penuh City DPRD Members conducted by Sungai Penuh City KPU in the Plenary Meeting held on May 11, 2014, determined 25 members of Sungai Penuh City DPRD consisting of elements of political parties including: Democrats Party was 5 people; The GERINDRA Party was 3 people; The PAN Party was 3 people; The HANURA Party was 3 people; The PDIP Party was 3 people; The PKS parties was 2 people; The
GOLKAR party was 2 people; The PPP party was 2 people; The NASDEM party was 1 person; The PKB Party was 1 person.

In the April 9 2014 election in Sungai Penuh City, out of 234 people there were 79 candidates for Sungai Penuh City DPRD members from women elements with the following details: Sungai Penuh Dapil 1 (one) 29 people out of a total of 89 people; Sungai Penuh Dapil 2 (two) 30 people out of a total of 86 people; Sungai Penuh Dapil 3 (three) 20 people out of a total of 59 people.

As for the fulfillment of 30% submission of female representation from candidates submitted to candidates for Sungai Penuh City DPRD Members from female elements in the April 9 2014 elections, all parties have fulfilled 30% women’s representation. Following are the results of the Sungai Kota Full legislative election April 9, 2014:

**TABLE: 3.1**

**NAME OF SELECTED DPRD MEMBERS IN APRIL 9 2014 ELECTION**

<table>
<thead>
<tr>
<th>No</th>
<th>Name of Party</th>
<th>Number of Position</th>
<th>Name of Candidates</th>
<th>Gender</th>
<th>Dapil</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>NASDEM</td>
<td>1</td>
<td>Muhamad Sanusi, SH</td>
<td>Male</td>
<td>Sungai Penuh 1</td>
</tr>
<tr>
<td>2</td>
<td>PKB</td>
<td>1</td>
<td>H.M Arip Al Malik</td>
<td>Male</td>
<td>Sungai Penuh 1</td>
</tr>
<tr>
<td>3</td>
<td>PKS</td>
<td>2</td>
<td>Ferry Satria, ST</td>
<td>Male</td>
<td>Sungai Penuh 1</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>H. Damri Miftah</td>
<td>Male</td>
<td>Sungai Penuh 2</td>
</tr>
<tr>
<td>4</td>
<td>PDIP</td>
<td>3</td>
<td>Hardizal, s.sos</td>
<td>Male</td>
<td>Sungai Penuh 1</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Fahrudinin</td>
<td>Male</td>
<td>Sungai Penuh 2</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Damrat</td>
<td>Male</td>
<td>Sungai Penuh 3</td>
</tr>
<tr>
<td>5</td>
<td>GOLKAR</td>
<td>2</td>
<td>Desrianto, A.Md</td>
<td>Male</td>
<td>Sungai Penuh 1</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>H. Yuzarlis Rusli. Dpt</td>
<td>Male</td>
<td>Sungai Penuh 1</td>
</tr>
<tr>
<td>6</td>
<td>GERINDRA</td>
<td>3</td>
<td>Azhar Hamzah</td>
<td>Male</td>
<td>Sungai Penuh 1</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Buzarman, S.Pd</td>
<td>Male</td>
<td>Sungai Penuh 2</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Burhanuddin, S.Pd</td>
<td>Male</td>
<td>Sungai Penuh 3</td>
</tr>
<tr>
<td>7</td>
<td>DEMOKRAT</td>
<td>5</td>
<td>Drs. Mulyadi. Y</td>
<td>Male</td>
<td>Sungai Penuh 1</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Aspar Nasir</td>
<td>Male</td>
<td>Sungai Penuh 1</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Fajran, SP. M.Si</td>
<td>Male</td>
<td>Sungai Penuh 2</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Syahmil Amsi</td>
<td>Male</td>
<td>Sungai Penuh 2</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Fikar Azami, SH</td>
<td>Male</td>
<td>Sungai Penuh 3</td>
</tr>
<tr>
<td>8</td>
<td>PAN</td>
<td>3</td>
<td>Satmar Landan. Dpt</td>
<td>Male</td>
<td>Sungai Penuh 1</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Karnaini, SH</td>
<td>Male</td>
<td>Sungai Penuh 2</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Zulhandri, SP</td>
<td>Male</td>
<td>Sungai Penuh 3</td>
</tr>
<tr>
<td>9</td>
<td>PPP</td>
<td>2</td>
<td>Armadi</td>
<td>Male</td>
<td>Sungai Penuh 2</td>
</tr>
</tbody>
</table>
Out of 25 members of the Sungai Penuh City DPRD as a result of the April 9 2014 Election, there were not 1 (one) woman elected. Means the provisions of Law Number 8 of 2012 concerning the election of DPR, DPD, DPRD Article 24 paragraph (1) letters c and b, and PKPU Number 7 of 2013 concerning the nomination of members of DPR, Provincial DPRD, Regency / City DPRD Article 11 letter b and d about 30% representation of women in the Sungai Penuh City DPRD was not implemented or not fulfilled.

Based on the results of the determination of Sungai Penuh City Election Commission about the Members of Sungai Penuh City DPRD elections on April 9, 2014, women's representation was not implemented at all or 0%. From this fact the author wanted to know the implementation of 30% representation of women by obtaining data by conducting interviews and direct observation based on 3 (three) indicators, namely: communication, resources, and disposition.

Policy implementation as a dynamic process, where there were many factors that interact and influence policy implementation. According to Edward (2011: 96) there are 3 (three) factors that influence the success or failure of policy implementation, namely:

It is the process of delivering information from the communicator to the communicant, which means the process of delivering policy information from policy makers to policy implementers. How is the communication carried out by prospective members of Sungai Penuh City DPRD from female elements when socializing and campaigning on the April 9 2014 elections? The results of the study showed that the communication ability of female candidates of Sungai Penuh City DPRD in the April 9 2014 elections did not master communication well, could
not influence the public, had weak political abilities and limited communication skills, and still lacking in the ability to influence others.

This is all sources that can be used to support all successful implementation of policies. What are the resources of female candidates for the Sungai Penuh City DPRD in the April 9 2014 elections? From the results of the study, it can be explained that the resources that must be possessed by female candidates are the resources that have scientific competence, ability to socialize, interaction skills, ability to recruit, ability to move others, financial ability, communication skills, must understand politics, must have a basis real mass and have access to the community and free to move.

It is the behavior or characteristics of the policy implementer that plays an important role in realizing the implementation of policies that are in line with the goals or objectives. How was the disposition (behavior and characteristics) of female candidates in the Sungai Penuh city in the April 9 2014 elections? From the field results, it can be concluded that what should be the behavior and characteristics of candidates for Sungai Penuh City DPRD members in the April 9 2014 election is to socialize the vision and mission, interact, must always be consistent, must always be good, actively communicate, actively generate future thinking, and approach self-reliance with the community by using maternal instincts.

**Conclusion**

Based on the results of the analysis and study in this research, the authors conclude that, the implementation of 30% female representation in the April 9 2014 elections in Sungai Penuh were: The implementation of 30% women’s representation in the April 9 2014 elections in Sungai Penuh City in terms of nominating 30% female representation has been carried out in accordance with Law No.8 of 2012 concerning the election of members of DPR, DPD, Provincial Regency / City DPRD and in accordance with KPU regulation No. 7 of 2013 or KPU regulation No. 13 of 2013. However, the representation of
women in the elected candidates in accordance with the KPU plenary held on May 11, 2014 determined that from 25 elected candidates not even one woman was elected.

These are the reasons why female candidates of the Sungai Penuh City DPRD members were not being elected in the April 9 2014 elections: Communication of female candidates of the Sungai Penuh City DPRD members in the April 9 2014 elections were not good and not interactive with the community. Their communication skills were lack of control over the conditions on the ground, could not affect the public, weak political ability, limited communication skills. Of these 3 (three) factors, the implementation of communication was the dominant factor causing the non-election of female candidates of the Sungai Penuh City DPRD members in the April 9 2014 elections. The resources of female candidates of the Sungai Penuh City DPRD members in the April 9 2014 elections were very far behind the male candidates, lacking quality, not being glimpsed by voters, and not having political abilities. Resources that should be owned by female candidates are resources that have competence, scientific ability, socialization skills, interaction skills, ability to recruit, ability to move others, financial ability, communication skills, must have a real mass base and have access to the community and free to move.

Disposition (behavior and characteristics) of female candidates of the Sungai Penuh City DPRD members in the April 9 2014 election, it can be explained that they have no real effort, just wait, consider as a complement, most of them are passive, less sacrificial, lacking in confidence, can't do campaign in a good way. What can be seen in the candidates for the DPRD City of Sungai Penuh in the April 9 2014 elections were passive, inactive, not creative, not so proficient, shy, lacking in confidence, unable to campaign properly, when speaking does not carry a vision and mission and in communication not so active.
It is expected that each political party can carry out cadre formation from female figures who have good communication skills, adequate resources and characteristics that are able to appear in the political and public areas. Each party should be able to prepare candidates from women who are able to compete well and optimally. Maximizing the role of women's organizations by building networks that can show off the importance of recognizing the role of women in the political area and in taking policy. There must be motivation and participation for women themselves to understand the importance of implementing 30% of women's representation in the Sungai Penuh City DPRD.

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**Peraturan Perundang-undangan**

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Law Number 2 of 2008 about Political Parties

Law Number 68 of 1958 about Women's Political Rights;

Law Number. 7 of 1984 about the Ratification of the Convention concerning the Elimination of All Forms of Discrimination Against Women (CEDEW);

Law Number 23 of 2004 about Elimination of Domestic Violence

Law No. 17 of 2014 about the MPR, DPR, DPD and DPRD

Law No. 23 of 2014 about Regional Government

Regulation of the DPRD of Sungai Penuh City. Number 2 of 2014 about the Rules of Procedure of the DPRD of Sungai Penuh City

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