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Message from Chairman

Yordan Gunawan
Chairman, International Conference on Law and Society 6,
Universitas Muhammadiyah Yogyakarta

Assalaamu'alaikumWarahmatullahiWabarakatuh,

In the Name of Allah, the most Gracious and the most Merciful. Peace and blessings be upon our Prophet Muhammad (S.A.W).

First and foremost, I felt honoured, on behalf of the university to be warmly welcomed and to be given the opportunity to work hand in hand, organizing a respectable conference. Indeed, this is a great achievement towards a warmers multilateral tie among UniversitasMuhammadiyah Yogyakarta (UMY), International Islamic University Malaysia (IIUM), UniversitiIslam Sultan Sharif Ali (UNISSA), Universiti Sultan ZainalAbidin Malaysia (UNiSZA), Fatoni University, Istanbul University, Fatih Sultan Mehmet Vakif University and Istanbul Medeniyet University.

I believe that this is a great step to give more contribution the knowledge development and sharing not only for eight universities but also to the Muslim world. Improving academic quality and strengthening our position as the procedures of knowledge and wisdom will offer a meaningful contribution to the development of Islamic Civilization. This responsibility is particularly significant especially with the emergence of the information and knowledge society where value adding is mainly generated by the production and the dissemination of knowledge.

Today's joint seminar signifies our attempts to shoulder this responsibility. I am confident to say that this program will be a giant leap for all of us to open other pathways of cooperation. I am also convinced that through strengthening our collaboration we can learn from each other and continue learning, as far as I am concerned, is a valuable ingredient to develop our universities. I sincerely wish you good luck and success in joining this program

I would also like to express my heartfeltthanks to the keynote speakers, committee, contributors, papers presenters and participants in this prestigious event.

This educational and cultural visit is not only and avenue to foster good relationship between organizations and individuals but also to learn as much from one another. The Islamic platform inculcated throughout the educational system namely the Islamization of knowledge, both theoretical and practical, will add value to us. Those comprehensive excellent we strived for must always be encouraged through conferences, seminars and intellectual-based activities in line with our lullaby: The journey of a thousand miles begin by a single step, the vision of centuries ahead must start from now.

Looking forward to a fruitful meeting.

Wassalamu'alaikumWarahmatullahiWabarakatuh

Foreword

Trisno Raharjo
Dean, Faculty of Law, Universitas Muhammadiiyah Yogyakarta

Alhamdulillah all praise be to Allah SWT for his mercy and blessings that has enabled the FakultasHukum, UniversitasMuhammadiyah Yogyakarta in organizing this Inaugral International Conference on Law and Society 6 (ICLAS 6).

This Conference will be providing us with the much needed academic platform to discuss the role of law in the society, and in the context of our two universities, the need to identify the role of law in furthering the progress and development of the Muslims. Muslim in Indonesia and all over the world have to deal with the ubiquity of internet in our daily lives life which bring with it the adventages of easy access of global communication that brings us closer. However, internet also brings with it the depraved and corrupted contents posing serious challenges to the moral fabric of our society. Nevertheless, we should be encouraged to exploit the technology for the benefit of the academics in the Asia region to crat a platform to collaborate for propelling the renaissance of scholarship amongst the Muslims.

This Conference marks the beginning of a strategically planned collaboration that must not be a one off event but the beginning of a series of events to provide the much needed platform for networking for the young Muslim scholars to nurture the development of the Muslim society.

UMY aims to be a World Class Islamic University and intend to assume an important role in reaching out to the Muslim ummah by organising conferences hosting prominent scholars to enrich the develompment of knowledge. This plan will only materialise with the continous support and active participation of all of us. I would like to express sincere appreciation to the committee in organising and hosting this Conference.

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Safeguarding Patient Safety: A Need to Re-Examine the Legal Responsibilities of Medical Trainees

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ABSTRACT

Although possessing the basic skills of practicing medicine, the post of 'medical trainees' are considered to be transitory until they metamorphose into fully qualified medical doctors. Thus, the medical training period tends to be crucial as it serves as a platform for the trainees to gain all the required practical knowledge and skills in treating the patients. During this period, medical trainees may be vulnerable to risks of medical errors, particularly, if they are not well supervised and are subjected to perform tasks that are beyond their capability. Many other factors such as heavy workload, fatigue and carelessness could lead to preventable medical errors causing patient safety to become compromised. Medical trainees may also find themselves exposed to law suits although the potential of being individually liable would be rare due to their status which is still considered as equivalent to 'students' under training. Nevertheless, the implications of medical errors may lead to patients' suffering physical injuries and also death in which their supervisors and hospitals may be held vicariously liable for their actions in the court of law. Subsequently, legal and judicial intervention have thus, become more prevalent in cases involving medical trainees as courts in various jurisdictions such as the United States, Canada and England have imposed high standard of care to be adhered to by medical trainees. Therefore, in safeguarding patient safety, it is imperative that medical trainees strive to attain the highest professionalism at all times in respecting the goals of patient safety and the demands of legal standards.

Keywords: *Patient Safety, Medical Trainees, Medical Errors*

I. Introduction

Medical training period is considered to be a crucial period for the medical trainees to gain the relevant practical experiences in order for them to obtain recognition as fully qualified doctors, which will eventually determine their future in the medical fraternity. In completing this training period, medical trainees have to be prepared physically and mentally to adapt with the new environment and challenges ahead. Strength and endurance are major attributes which they need to possess to complete the tasks given while training at various departments. However, during this period, they may be prone to commit medical errors if they are not supervised properly and given tasks to perform that are beyond their capability. Failure to complete the tasks given to them properly and efficiently may subsequently cause harm to the patient, and patient safety, may thus, be compromised. Thus, it is imperative that medical are fully guided and supervised by their superiors in order to avoid any untoward consequences that may lead to possibilities of a negligence suit.

II. Discussion

2.1 Definition of "Medical Trainees"

The word "trainees" means "someone who is being trained", "a person undergoing training" [1]. "Medical trainees" means "a registered doctor under training". In Malaysia, the term medical trainee is replaced with houseman or house officer. "House officer" means a medical practitioner undergoing internship training under the Medical Act 1971. "Housemanship" or "Internship" is the period of resident medical practice before full registration and it is only imposed after graduation. The house officers, need to complete their training for two years to enable them to gain the appropriate knowledge, skill and experience before they are fully registered and recognised as medical officers [2].

On the other hand, the term "medical residents" is much more commonly used compared to "medical trainees" in the United States of America and common law jurisdictions. The term "resident" has been defined as physician who has finished medical school and is receiving training in a specialized area, such as surgery, internal medicine, pathology, or radiology. Board certification in all medical and surgical specialties requires the satisfactory completion of a residency program and successful completion of a specialty board examination [3].

2.2 An Overview of Medical Errors Committed by Medical Trainees

The US Institute of Medicine (IOM) reports that medical errors can occur at any stage of care, including diagnosis, treatment and preventive care. Diagnostic errors can occur in circumstances when there is (i) a mistake or delay in clinical diagnosis; (ii) is a failure to act on the results of monitoring or testing; (iii) there is a use if outmoded tests. On the other hand, treatment errors can occur in (i) administering a procedure or in a surgical intervention; (ii) avoidable delay in treatment; (iii) the dose or method of using a drug; (iv) inappropriate care for a disease.

Likewise, preventative errors can occur when there is inadequate monitoring, follow-up or by not providing prophylactic treatment. Further, there can be many other forms of medical error caused by communication failure; equipment malfunction; implications of fatigue and infection control. Moreover, medication errors can occur during the processes of prescribing, dispensing, administering, monitoring and system and management control [4]. With regards to medical trainees, the Archives of Internal Medicine, [5] the top contributing factors in resident errors can be seen as follows:

CONTRIBUTING FACTOR	ERRORS CONTRIBUTED TO
Judgment error	173 (72% of cases examined)
Memory or vigilance error	137 (57% of cases)
Lack of technical competence or knowledge	139 (58% of cases)
Lack of supervision	129 (54% of cases)
Hand off problems	46 (19% of cases
Excessive workload	46 (19% of cases)

Note: Multiple factors could be present when an error was made.
Source: "Medical Errors Involving Trainees," Archives of Internal Medicine, Oct. 22

In Malaysia, despite recognition of these risk factors, information about the types and causes of errors committed by medical trainees are rather limited. This knowledge gap inhibits the design of effective prevention strategies, such as targeted educational programs and system changes to reduce trainee errors and the advancement of patient safety.

2.3 Causes and Implications of Medical Errors committed by Medical Trainees

a. The Causes of Medical Error Committed by Medical Trainees

Among the factors and causes of stress perceived by housemen include poor work and social life balance, annoying non-clinical personnel, medico - legal threats, high patient load, frequent night duties, insufficient salary, inadequate time to be spend with friends and family, annoying patients and relatives, work overload, lack of financial progress, death of a patient under care, substandard living condition in the housemen quarters, unappreciative patients, sleep deprivation, frequent on-calls, and poor interaction with consultants. However, for the purpose of this paper, focus will be made on four main causes namely (i) lack of supervision; (ii) excessive workload; and (iii) fatigue and carelessness.

1) Lack of Supervision and Knowledge Gap

Among the causes of medical errors committed by medical trainees is lack of supervision from the superior. In Malaysia, the house officers have to report to almost six or seven departments during their two years of housemanship. Most of the medical officers and specialists are willing to guide them patiently but the reality, treatment towards the medical trainees by their superiors may vary. Some superiors tend to have high expectations of them in terms of knowledge and capabilities. As such, the house officers are expected to handle their patients independently with minimal supervision. As this point, medical trainees may face tremendous difficulties in trying to bridge the gap between the theories which they had learned in medical school and the practical realities occurring at the hospitals. As such, lack of supervision may ultimately cause patient safety to be compromised [6].

2) Excessive Workload and Fatigue

Further, many trainees also work for long hours due to the excessive workload given to them. Basically, long working hours and not getting enough rest will cause physical and mental health issues such as excessive tiredness or fatigue, physical illness, weight loss, eating disorders, anxiety, irritability or depressed mood, withdrawal or self-neglect, and disturbed behavior which shall indirectly affect the performance of the medical trainees. In addition, there is some reported news of the motor vehicle accidents suffered by the medical trainees involving death cases attributable to fatigue. Most housemen also suffer excessive tiredness or fatigue since they need to adhere to a substantial number of night duties causing the deprivation of proper rest and sufficient sleep. Sleep deprivation and being under constant stress may ultimately affect patients' well-being [7].

3) Carelessness

Another cause for medical errors to be committed by the medical trainees is carelessness. Basically, lack of supervision, excessive workload and fatigue will indirectly lead to carelessness committed by the medical trainees. Undeniably, carelessness will also happen due to several factors such as insufficient knowledge and lack of focus on part of the medical trainees themselves. Medical trainees must avoid carelessness at all costs as it may contribute to the loss of life and death to the patients. Carelessness must be avoided to prevent greater harm leading to physical harm and the loss of lives.

b. The Implications of Medical Error Committed by Medical Trainees

Medical residents may face legal liabilities for alleged negligence during the course of their official duties; and their supervisors are at risk for either direct or vicarious liability. However, in

Malaysia, the house officers will not be individually liable for the medical errors committed during their housemanship period as they are not considered as fully qualified and registered doctors. Subsequently, it is the supervisors and hospitals that will be charged in breach of duty of care. Hospitals liability with respect to medical negligence can be direct liability or vicarious liability. Direct liability refers to the deficiency of the hospital itself in providing safe and suitable environment for treatment as promised.

Vicarious liability means the liability of an employer for the negligent act of its employees. An employer is responsible not only for his own acts of commission and omission but also for the negligence of its employees, so long as the act occurs within the course and scope of their employment. This liability is according to the principle of 'respondent superior' meaning 'let the master answer'. Employers are also liable under the common law principle represented in the Latin phrase, *qui facit per alium facit per se*, i.e. the one who acts through another, acts in his or her own interests [8]. Thus, an employer may be held liable for the negligent harm caused by employees acting within the scope of their employment, even if the employer acted appropriately. Claims alleging vicarious liability often coexist with claims attempting to hold the actual wrongdoer liable.

In Shull v Schwartz [9], when a medical resident followed the attending surgeon's appropriate directive to perform a postoperative procedure on the ward, but negligently left a needle tip in the patient, the surgeon was not vicariously liable. The court reasoned that in such situations medical resident, nurses, and other hospital staff were not under the control of the attending physician and were acting primarily for the benefit of the hospital. However, in Siebe v University of Cincinnati [10], a medical resident supervised the placement of a central venous catheter by a trainee nurse anesthetist.

The catheter was incorrectly inserted and the court found the hospital negligent due to violation of its hospital policy that all such catheters are to be inserted under the supervision of an attending physician. Similarly, in Felice v Valleylab [11], a medical resident performed a circumcision without an attending physician present in the operating room and injured the patient. The medical school was held liable for permitting the operation in violation of its own policy that all elective procedures be performed with an attending physician present. Thus, failure to implement the administrative structures and personnel arrangements that enable adherence to work hour restrictions may leave medical institutions highly vulnerable to liability when fatigue-related harms occur. It has to be noted that the attending physicians may also be held liable for improper supervision, as supervising medical residents is an inherent part of their job. This form of liability is direct and physicians may be directly liable due to the negligent oversight of care on their part.

2.4 The Legal Liability of Medical Trainees: The Required Standard of Care

In view of the fact that medical trainees may cause their supervisors and hospitals to be liable for their mistakes, what is the standard of care that must be observed by the medical trainees? In law, the test for breach of duty in the tort of negligence is whether the defendant's conduct was reasonable in all the circumstances of the case. This can be seen from Mr Justice McNair's judgement in Bolam v Friern Hospital Management Committee [12], in which His Lordship stated that "the test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill; it is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art in the case of a medical man, negligence means failure to act in accordance with the standards

of reasonably competent men at that time".

To date, there is no specific case law on the subject of houseman liability in Malaysia. However, house officers in Malaysia shall not be held liable for the medical errors during two years of housemanship period as discussed above. Thus, in order to examine the legal responsibilities of medical trainees in Malaysia with the objective of safeguarding patient safety, references will be made to several cases reported in the United States of America, Canada and England.

a. The Standard of Care in the United States of America

The trend in case law since the early 1980s has favored considering medical resident, even those in the first year of training, as bona fide, licensed physicians when it comes to the professional standard of care in medical malpractice cases. Specifically, the law expects first-year medical residents to exercise at least that level of knowledge and care expected of other practitioners at a similar stage of training or that standard of care applicable to licensed non-specialists, ie, 'general practice' doctors [13].

Although still acquiring the skills toward certification, medical residents remain individually responsible for their actions. But should the law demand the same standard of care as it would a fully qualified attending physician? [14]. Some have favoured a dual standard of conduct, with medical residents being held to a lower standard of care. This was articulated in Rush v. Akron General Hospital [15], which involved a patient who had fallen through a glass door. The patient suffered several lacerations to his shoulder, which an intern treated. However, when two remaining pieces of glass were later discovered in the area of injury, the patient sued the medical resident for negligence.

The court dismissed the claim, finding that the medical resident had practiced with the skill and care of his peers with similar training: "It would be unreasonable to exact from a medical resident, doing emergency work in a hospital, that high degree of skill which is impliedly possessed by a physician and surgeon in the general practice of his profession, with an extensive and constant practice in hospitals and the community". However, not all courts have embraced the dual standard of review. In a case in New Jersey, the Superior Court held that licensed medical residents should be judged by a standard applicable to a general practitioner, as any reduction in the standard of care would set a 'problematic precedent' as in Clark v. University Hospital[16].

In this case, the medical resident allegedly failed to reinsert a nasogastric tube, which caused the patient to aspirate. Further, in Pratt v. Stein [17], a second-year medical resident was judged by a specialist standard after he had allegedly administered a toxic dose of neomycin to a postoperative patient, which resulted in deafness. Although the lower court had ruled that the medical resident should be held to the standard of an "ordinary physician", the Pennsylvania appellate court disagreed, reasoning that "a medical resident should be held to the standard of a specialist when the medical resident is acting within his field of specialty. It is opined that a medical resident is already a physician who has chosen to specialize, and thus, possesses a higher degree of knowledge and skill in the chosen specialty than does the non-specialist".

However, a subsequent decision from the same jurisdiction suggests a retreat from this unrealistic standard. In Jistarri v Nappi [18], an orthopedic resident allegedly applied a cast with insufficient padding to the broken wrist of a patient. The plaintiff claimed this led to soft tissue infection with Staphylococcus aureus, with complicating septicemia, staphylococcal endocarditis, and eventual death. The court held that the medical resident's standard of care should be "higher than that for general practitioners but less than that for fully trained orthopedic specialists. To require a resident to meet the same standard of care as a fully trained specialist would be

unrealistic. A resident may have had only days or weeks of training in the specialized residency program; a specialist, on the other hand, will have completed the residency program and may also have had years of experience in the specialized field.

If we were to require the resident to exercise the same degree of skill and training as the specialist, we would, in effect, be requiring the resident to do the impossible". In 2007, a Michigan court also overruled an earlier state court ruling that had held residents to a generalist standard of care rather than a specialist standard. Gonzalez v St John Hospital & Medical Center [19] involved a third-year medical resident performing colorectal surgery that led to patient injury. The patient argued that a physician can be a specialist without being board-certified in the specialty, especially because the medical resident was receiving advanced training in general surgery at the time of the negligence. The Michigan court looked at preceding case law and decided that those medical residents who "limit their training to a particular branch of medicine or surgery and who can potentially become board-certified in that specialty are specialists" for purposes of the standard of care.

Thus, we can conclude that the standard governing the medical resident in the United States of America could be that of a reasonably competent generalist physician, that of a specialty physician, or that based on some subjective determination considering the medical resident level of training. The courts have struggled with the question of what standard of care should govern the conduct of medical resident. Unless a medical resident specifically discloses training status to the patient, most courts have held that the reasonable standard against which resident conduct is measured is that of a licensed practitioner in that specialty.

b. The Standard of Care in Canada

As regards to the resident's standard of care, there is uncertainty in this area of law [20]. An ambiguous statement made by the Supreme Court of Canada in Vancouver General Hospital v Fraser [21] regarding the medical resident's standard of care, has created a fractured interpretation. The resident's standard of care is best understood as a spectrum. Canadian jurisprudence has established three general points that guide medical residents in their legal obligations. These points include; (i) a generally agreed to minimum level of care that incorporates the doctor's standard of care; (ii) a middle standard of care that recognizes a resident's expanding skill set; and (iii) a more extreme upper level of care that approaches or reaches the specialist's standard of care.

Three major issues exist and contribute to making this an unpredictable area of law; (i) no point along the spectrum is specifically defined; (ii) No specific indication as to when a resident will fall into one of the categories. Logical indicators, such as year of residency, provide some guidance but are still vulnerable to varying results and (iii) the cases are complex. Medical residents are commonly joined by staff specialists and the medical institution as named defendants. Medical expert evidence, something very technical in nature, is usually targeted at uncovering the specialist's standard of care. This creates confusion as to whether this same standard is also applicable to the medical resident.

The earliest and most formidable comments made on the resident's standard of care were those of the Supreme Court of Canada in Vancouver General Hospital v Fraser. In this case, the patient was placed under the care of two emergency department interns after suffering injuries in a motor vehicle accident. The patient, Mr. Fraser, presented with visible lacerations, neck pain, and neck stiffness upon arrival. The medical residents, although untrained in radiology, read the x-

rays and diagnosed and discharged Mr. Fraser without consulting the available and certified radiologist. As Mr. Fraser's pain did not subside, he returned to the hospital and was diagnosed as having a fractured dislocation of his "axis, second cervical or "neck vertebrae".

He died shortly after this diagnosis and as a result his wife sued Vancouver General Hospital for the alleged negligence of the interns. In confirming the medical residents' negligence, Justice Rand identified two crucial aspects of the medical resident's standard of care. First, a medical resident "must use the undertaken degree of skill, and that cannot be less than the ordinary skill of a junior doctor in appreciation of the indications and symptoms of injury before him". Second, a medical resident must display, "an appreciation of his own limitations and of the necessity for caution in anything he does". Rand J's statement has come to form the lowest standard of care a patient can demand from a medical resident. This standard holds the medical resident to that of a "junior doctor" and demands the medical resident to be cautious and cognizant of their inexperience. Canadian jurisprudence has taken three different approaches when interpreting the appropriate standard to hold a medical resident to.

1) The Lower Limit: The Reasonable but Inexperienced Doctor

The first approach, as expressed in Wills v Saunders, Bearden v Lee and Adair Estate v Hamilton Health Services Corp, places the greatest focus on medical residents recognizing their professional inexperience. Within these cases the courts do not directly identify which of the "doctor" standards is most appropriately applied to the medical resident. However, given the deference that is granted to cautious medical residents, it is logical to infer support for the use of the lower "reasonable doctor" standard. Additionally, breach of the standard is usually determined on matters of protocol, an issue that does not require the skill and knowledge of a specialist. As a whole, this lower limit of care is most commonly applied to a medical resident within their first few years of residency.

In Wills v Saunders [22], Mrs. Wills, the 57-year old plaintiff, had surgery to correct her gallstones and reflux esophagitis. After surgery she developed serious infections and had to have her central feeding line removed. Ten days after the removal of the line, attempts were made to restart intravenous feeding peripherally, rather than by central line. A day after these attempts failed, Dr. Saunders, a first-year, medical resident, attempted to once again insert a central feeding line. This action was taken without supervision or written orders to proceed accordingly. Severe complications resulted, which ultimately lead to permanent vision loss for Mrs. Wills in her right eye. When establishing the appropriate standard of care expected of Dr. Saunders, the Court made reference to the junior doctor standard expressed by Rand J. This standard was interpreted in consideration of Justice Ellen Picard's statement, "there is no authority... to support a lower standard for the inexperienced".

As a result of these statements, Dr. Saunders' standard of care was not lowered, despite his junior resident status and inexperience. The Court is not explicit in whether Dr. Saunders would be held to the standard of a reasonable doctor or surgeon. Rather, focus was placed on the importance of Dr. Saunders understanding his limitations and thereby acting accordingly. In determining the standard of care, the Court focused on the fact Dr. Saunders undertook the procedure on his own and without supervision.

Despite a lack of direct guidance, it is logical to presume that the reasonable doctor standard is implied in this case. First, placing such an emphasis on caution is not fully consistent with the specialist's standard of care, one that demands action based on special skill and knowledge. Second, the Court identified that Dr. Saunders was "responsible to act as a primary care physician

to the patients". Fulfilling a primary care role is more indicative of a doctor's duties rather than a specialist's. Because of this, the Court seems to suggest that the standard of care for a medical resident, particularly an inexperienced junior medical resident, is that of a reasonable and prudent doctor who appreciates their limitations and inexperience.

2) The Middle Standard: The Developing Resident

Comments made in Bedard v Martyn, Rietze v Bruser (No 2), Allen v University Hospitals Board, and Bauer v Seager et al open the possibility of a second interpretation of the medical resident's standard of care. This second standard recognizes the medical resident's growing skill set. In these cases, the courts identify a new standard, the reasonable specialized resident (e.g. the reasonable obstetrics resident). This interpretation differs from other cases, which specifically compare the standard of the resident to that of a reasonable doctor or a reasonable specialist. This new standard, being rooted to a particular area of medicine, requires a resident to have more skill than the average doctor, but less than an average specialist in that area.

In Bedard v Martyn, Rietze v Bruser (No 2) [23], twin boys were delivered and cared for by two health care professionals, Dr. Amin, the staff neonatologist, and Dr. Mauer, an anaesthesiology resident completing a four-week rotation in neonatology. Approximately 24 hours after the birth of the twins one of the infants, Logan, began to show signs of stress and irritability. Dr. Mauer ordered an ultrasound to investigate a potential haemorrhage, but indicated that the tests be done 'today' rather than 'urgently'. Four hours after ordering these tests, Dr. Mauer conducted a lumbar puncture on Logan to test for meningitis, a procedure not recommended by neonatologists in the face of increased intracranial pressure. Ultrasound and CT scans were completed approximately six hours after the initial diagnosis, and they confirmed a brain haemorrhage.

The haemorrhage caused a large blood clot in Logan's brain, damaging brain cells and the brain stem itself. The issue before the Court was not the cause of the haemorrhage, but rather the doctor's lack of immediate testing upon the discovery of stress indicators. Dr. Maurer was found negligent for failing to order Logan's ultrasound urgently, a procedural matter that lends itself to the standard of the average physician. It was made clear that Dr. Maurer was not expected to have the full knowledge of a neonatologist as, unlike the staff specialist, she was not faulted for conducting a lumbar puncture. However, in describing the standard of care applicable to Dr. Maurer, the Court referred to her as a "resident of neonatology on October 20, 2001 (the date of injury)".

Given that Dr. Maurer was actually an anaesthesiology resident, it is possible that the standard of care expressed demanded some level of knowledge in the field of neonatology. On the facts this theory cannot be proven, as negligence was determined strictly on a general, procedural matter. This standard holds the medical resident to a level of skill greater than that of a doctor but less than that of a specialist. Given the language used in Bedard, this standard may also require the medical resident to have skill of the expressed level regardless of their actual focus of specialization.

3) The Upper Standard: The Reasonable Specialist

The third possible standard for a resident is that of the reasonable specialist or near specialist. In Sharp v Hurlbert [24], the plaintiff had spinal cord surgery to relieve pain in his neck. As part of this surgery, two of the discs in his spine had to be fused together. This procedure required bone graft to be attached to the plaintiff's vertebrae with a titanium plate. Dr. Bitting, a fifth year

resident involved in the surgery, was responsible for threading the graft so it would fit a screw. While Dr. Bitting was completing the threading procedure "the graft dislodged into (Mr. Sharp's) spinal canal".

As a result, Mr. Sharp "suffered a spinal cord injury" which impaired his "right arm and shoulder, decreased fine finger movement and (resulted in) mild weakness in motor control of his left hand". The court cites the junior doctor standard, expressed in Fraser and interprets it as meaning that "Dr. Bitting should be held to the standard of care of a prudent surgeon". Despite this elevated standard of care, Dr. Bitting was not found to be in breach, as he "neither saw nor felt anything which would indicate to him that the graft would slip".

The defendants argued that the appreciation of limitations test had application and consequently Dr. Bitting should have refused to complete the threading. This was not accepted by the Court. If a court holds a resident to the standard of a specialist, they are recognizing the experience and skill set of an individual and expecting they will act according to their knowledge. This includes performing complex surgical tasks and having the knowledge to differentiate between appropriate and inappropriate diagnostics and procedures.

However, in Sharp the Court does support some forms of limitation awareness, specifically noting that this was not a situation where "a resident was unsupervised and undertook a task beyond what was expected". This initially appears problematic given the application of the 'surgeon' standard of care. This issue is resolved by a close analysis of the words chosen by the Court. Dr. Bitting was held to the standard of a prudent surgeon, not that of a prudent neurosurgeon. This standard can be viewed as one that hovers near but does not actually equate with the reasonable specialist's standard. This standard still deems supervision and delegation of tasks by senior staff as appropriate, but recognizes the near specialist skill set of the resident. As a result the medical resident does not have to question his or her involvement in more complex procedures, but has to perform said procedures with the skill of an average surgeon.

To be successful, this standard would have to rely heavily on appropriate delegation of tasks by senior staff. The problem with this standard is that it fundamentally clashes with the Fraser principle of limitation awareness. As a result, the resident has the responsibility to function at a specialist's skill level, without the level of independence and deference such a standard usually provides.

Despite the confusion around the medical resident's standard of care, the case law is consistent on one issue: a resident's inexperience will not result in a reduction of the standard of care. Whether this approach is appropriate is brought into question by Aldana v March [25]. In this case, three interns were sued for negligence following the death of a patient in their care. The patient suffered post-operative chest pains following bariatric surgery. As the patient was moved from the surgery ward to the cardiac care unit, the interns provided care in the form of diagnosis, testing, and medication. The care was provided in accordance with supervising instruction. Unfortunately, the entire medical care team misdiagnosed the patient's symptoms. The patient had developed peritonitis as a result of his surgery, a condition that ultimately caused his death. In declining to find any of the three interns negligent, the Court determined the appropriate standard to be that of a "reasonably competent intern". This was distinguished from the standard of a "practicing physician or specialist". A lesser standard was found to be appropriate given the accepted description of the intern's role:

An intern is a junior doctor doing a year of post-university training at an accredited hospital. In British Columbia, and in other provinces in Canada, it was mandatory at the time to do an

internship as a prerequisite to becoming licensed to practise medicine independently. An intern works under the supervision of an attending staff physician who is usually a specialist. The intern is qualified and expected to perform histories and physical examinations on patients. Procedures, ordering of investigations, and initiating treatment are within the duties of the intern as long as it is under the supervision of and in consultation with an attending staff person. An intern may initiate emergency treatments and is qualified to do so as long as the attending physician for the patient is notified within a reasonable period of time.

The Court also brought attention to the fact that the interns were not certified to practice medicine independently and were training to become practicing physicians. In analyzing the standard of care issue, it was determined that given the time-sensitive nature of Mr. Aldana-Murray's condition, the interns had taken reasonable steps in diagnosis and had been prudent in their medical care and communication efforts. Taking these steps ensured they, at a minimum, satisfied the intern's standard of care. Additionally, the Court identified that to make the interns second-guess the instruction of the specialists would have placed an "unreasonably high duty upon their shoulders".

Two points of interest are raised by this case. The first is the similarities shared between the modern-day resident and the historic intern. Like the intern, the medical resident is restricted from practicing medicine independently. A resident is also required to work under the supervision of a staff physician. Given the likeness between the resident and the intern, it seems logical that the "reasonable intern" standard be applicable to residents. The point above may be moot given the second point of interest, the application of the "reasonable intern" standard. The interns satisfied the standard of care because they acted prudently, made reasonable diagnoses, and followed senior specialists' orders. This behaviour would have equally satisfied a standard requiring the interns to act like a reasonable, cautious doctor. Given that finding an appropriate diagnosis was something expected of a reasonable specialist, it appears that what the Court was actually opposed to was holding the interns to the standard of a reasonable specialist.

The medical resident's standard of care is an unclear area of the law. This is a consequence of vague governing legislation and Supreme Court of Canada guidance. As a result, the resident has been held to the standard of: a reasonable doctor, a reasonable near or actual specialist, a reasonable resident (somewhere between a doctor and a specialist), and a reasonable intern (less than that of a reasonable doctor). Despite the varying terminology used, the underlying goal of the courts is similar. At a minimum, they wish to hold residents accountable for a certain level of medical knowledge and want to ensure residents are actively aware of their professional inexperience. In addition to this, the courts want the flexibility to increase the care requirement, when it is appropriate.

To help ease the confusion, one succinct statement on the resident's standard of care needs to be adopted. This standard would, at a minimum, require the average resident's skill and knowledge, and demand acknowledgement of professional inexperience. Additional care expectations could be imposed on the resident as they progress through their training. Legally, the concept suggested does not significantly differ from a standard that requires a resident to act as a reasonable and cautious physician.

4) The Standard of Care in England

The junior doctor must meet the standard of care expected of his rank or status [26]. This is nothing new in the law of tort whereas the same standard of care as illustrated in the case of

Nettleship v Weston [27] was expected. In this case, the court held the same standard of care was expected of a learner driver as of an experience driver. This leading authority was applied in the case of Wilsher v Essex Area Health Authority [28]. Martin Wilsher was born prematurely suffering from various illnesses including oxygen deficiency. He was placed in a special care baby unit at the hospital. While he was in the unit a catheter was twice inserted into a vein rather than an artery and on both occasions he was given excess oxygen. The doctors administering the oxygen were a junior and an inexperienced doctor respectively.

The position of the catheter was not in itself negligent as it was a mistake a reasonably competent doctor could make. The catheter could be checked by means of an X-ray, which was in fact done in this case; however, the senior registrar failed to spot the mistake. The baby was subsequently found to be suffering from retrolental fibroplasia, which causes blindness. In the Court of Appeal, it was argued that the standard of care expected of the junior doctor was not the same as that of his experienced counterpart. It was said that a junior doctor had to learn on the job, otherwise it would be impossible for medicine to develop and function; it was therefore unavoidable that mistakes would be made. Sir Nicholas Browne-Wilkinson VC agreed with this argument (stating at page 833):

> …a doctor…should only be held liable for acts and omissions which a careful doctor with his qualifications and experience would not have done or omitted.

But the majority of the Court of Appeal dismissed this argument. Glidewell LJ applied the Bolam test commenting (at page 831) that if there was not a uniform standard of care then:

> …inexperience would frequently be urged as a defence to an action for professional negligence.

Thus, it has been concluded that:-

a) The judgment of Glidewell LJ sums up the current legal position. What is reasonable conduct on behalf of the defendant will not change with the post he held nor with his level of inexperience. It may be that the hospital was at fault in placing the junior doctor in such a situation; however, the wrong inflicted on the junior doctor should not be remedied at the expense of the patient;
b) Once a doctor performs a task, the patient can assume he has the competence to perform the task with care and skill. If the doctor either unwittingly or knowingly attempts a task beyond his experience then that will constitute a breach of the standard of care;
c) The junior doctor will not be liable if he seeks the advice of a senior or more experience colleague (as was the case in Wilsher). The liability will then fall upon the shoulders of the more experienced doctor for lack of supervision. A common illustration of inexperience is that often the doctor does not realize that the task at hand is beyond his capabilities and therefore does not seek help. In the Canadian case of Fraser v Vancouver General Hospital [1952] 2 SCR 36, 3 DLR 785 [Fraser cited to SCR], the Court held that an intern had to exercise the ‘ordinary skill of a junior doctor’ and must have an appreciation of his own limitations. Quite what this means is uncertain: it is all very well saying that a doctor must have appreciated his own capabilities but in most situations the junior doctor is already acting under the firm belief that this is in fact what he is already doing; and
d) The more experienced doctor could be held liable for failing to reasonably supervise the junior doctor, or the hospital could be made directly liable for placing the junior doctor in a position with which he was not qualified to cope.

5) The Standard of Care in Malaysia

Although the house officers in Malaysia shall not be held liable in the court of law, it is to be expected for them to exercise at least that level of knowledge and care expected of other practitioners at a similar stage of training. If they committed medical errors which are unacceptable due to carelessness although under full supervision of the superior, it is to be proposed that they have to face the court proceeding as well. Also, the house officers shall be held liable due to their negligence/failure/refusal in following the instructions of their superior.

This is to protect the patient safety and at the same time to give a good reminder for the house officers to always be extra careful since medical profession is a very serious profession involving life and death of patients. In addition, it is not a good practice to always put the blame on the superiors who have done their best in supervising the tasks of the house officers. In other words, a house officer's inexperience shall not be an excuse in a reduction of the standard of care. The standard of care in Canada by holding the residents accountable for a certain level of medical knowledge is actually a good step to be followed to make the medical trainees aware of their heavy responsibilities.

2.5 Safeguarding Patient Safety: Recommendations for the Prevention of Medical Errors

In safeguarding patient safety, medical errors should be prevented since based on the analysis of the standard of care of the medical trainees in few countries, we can summarize that the courts do not hesitate to put the high standard in imposing the punishment. Furthermore, patient safety should be among the main goal of the medical providers as economy and reputation of any country may be affected. We can see that most of the developed countries in the world provides good hospitals and medical services which can attract the people to get their services. Thus, in order to safeguard patient safety, medical errors should be prevented. The following are recommendations for the prevention of medical errors by medical trainees:

a. Active and Effecient Supervision

   First, more active supervision may prevent some mistakes or mitigate their adverse effects. Senior physicians should be more available for critical decisions about patient care, especially in complex cases that require more mature clinical judgment.

b. Proper and Systematic Delegation of Duties

   In legal actions, the Court generally considers whether the delegation, supervision and support provided by the supervising physician were reasonable in the circumstances. Supervising physicians should therefore consider the following:

   1) Is the task appropriate to delegate to an individual with the trainee's level of training?
   2) Does this specific trainee have the required knowledge, skill and experience to perform the task?
   3) What degree of supervision is required?
   4) Has the patient been informed of the educational status of the trainee?

   When consulting with residents over the telephone, supervising physicians may additionally want to consider the following:

   1) Do I have sufficient understanding of the patient's clinical presentation to offer an opinion on the diagnosis and management?
   2) Have I sufficiently questioned the resident to develop an appropriate management plan for the patient?

3) Would the patient's condition or the needs of the resident require me to personally attend the patient?
4) Have I taken steps to determine whether the resident requires additional support to meet the current workload demands?

c. Effective Communication and Promoting Open Disclosure

Open and supportive communication by the supervisor and readiness to help the trainee will allow the trainee to voice any concerns about a task. The trainee should feel free to clarify instructions, voice concerns and ask the supervisor for help and should never be reluctant to admit to their supervising physician that they are not proficient in performing a procedure. Failure to do so, not only robs the medical trainees of a learning opportunity, but it puts the patient at an unnecessary risk.

III. Conclusions

Open and supportive communication by the supervisor and readiness to help the trainee will allow the trainee to voice any concerns about a task. The trainee should feel free to clarify instructions, voice concerns and ask the supervisor for help and should never be reluctant to admit to their supervising physician that they are not proficient in performing a procedure. Failure to do so, not only robs the medical trainees of a learning opportunity, but it puts the patient at an unnecessary risk.

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The Nigerian Policy on Critical Information Infrastructure

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ABSTRACT

The relevance of critical information infrastructure is crucial to every nation. The National Critical Information Infrastructure (NCII) of Nigeria consists of critical national resources requiring the protection of the law, and the national security services. Any attack on the information resources of a nation would definitely damage the wider national resources as well the economy. Attacks on the NCII were commonplace and directed at information communication technology systems, which are critical infrastructures and fundamental for the operation of the wider national infrastructure. The objectives of the paper are to examine the provisions of the NCII under the Nigerian Cybercrime Act 2015, to examine the relevant attacks on the Nigerian NCII and few cyber activities relating to fraud. The problems of Nigeria in relation to cybercrimes are the implementation of the law, management of its operation and special prosecutors. The methodology adopted is doctrinal approach by examining the primary and secondary data, the statutes, case report and few responses from the interviews conducted. The findings of the paper reveal that the Nigerian Cybercrime Act 2015 has adequately addressed cybercrimes, but requires some amendments, particularly in the context of cyber warfare in relation to NCII. The paper recommends that the country should embark on public enlightenment on the danger of these attacks.

Keywords: Nigeria, cybercrime, critical information infrastructure, Cybercrime Act 2015.

I. Introduction

There was a general concern in the 1980s about the dangers of attacking critical infrastructure. The perception of critical infrastructure was just developing that time. The attacks centered on the infrastructures in the public sector, such as highways, roads, bridges, airports, public transit, water supply facilities, wastewater treatment facilities, and solid-waste and hazardous-waste services. The global attention was shifted by the terrorist attack in the 1990s, after 9/11, to a reform approach for the safety of the national security. This was due to the loss of a range of "critical" infrastructure divisions.[1] The NCIIs are not secluded, but extremely interrelated and equally inter-reliant.[2] For instance, water and telecommunication systems require a stable supply of electric energy to sustain their regular operations while electric power systems in turn need water and various telecommunication services for power generation and delivery.

The interdependence of the NCII can improve the function of infrastructure proficiently, however, the occurrences of global actions such as the World Trade Centre attack in 2001, the North American blackout in 2003, the hurricane season in Florida in 2004, the UK floods in 2007 and the Chile in 2010. Further, the Japan earthquakes of 2011 showed that this interdependence can enhance system weakness. The harm in one NCII would definitely result in the malfunction of the other within the region or nation.[3] Interestingly, the governments from different countries are aware of the rising significance of NCIIs and their interdependence.

The definition of National Critical Information Infrastructure (NCII) is wide in perspective and it

encompasses components such as infrastructures, data, database, networks, communications, military defence which are control by the state (national, provincial or local) for the purposes of public domain.[4] NCII further refers to infrastructures such as banks, water, energy, power system, medical sector, transportations, aviation, oil and gas etc., and it also relates to private companies. In a nutshell, NCII covers the essential infrastructures in human lives on earth. Infrastructure has been described as "the basic system and services such as transport and power supplies, that a country or organization uses in order to work effectively"[5].

The European Commission states that Critical Infrastructures consist of "those physical and information technology facilities, networks, services and assets which, if disrupted or destroyed, would have a serious impact on the health, safety, security or economic well-being of citizens or the effective functioning of governments in the Member States. Critical Infrastructures extend across many sectors of the economy, including banking and finance, transport and distribution, energy, utilities, health, food supply and communications, as well as key government services".[6]

II. Discussion

2.1 A Recap of Cybercrime in Nigeria

Previously, lack of cybercrime legislation results in loss of revenue to the Federal Government of Nigeria. It was reported by the Federal Inland Revenue Services recently that Nigeria is losing over N2 trillion due to cybercrime committed by companies because some Nigerians (notably company owners) are trying to evade tax.[7] This is because the government does not create any awareness and public enlightenment. A respondent stressed that "cybercrime is a new crime in our country, Nigeria, as the majority of the community lacks the knowledge of cybercrime and thus inability of the knowledge on cybercrime affects the positive and sound response to the draft and presentation of the Cybercrime Bill before the National Assembly".[8]

The indicators are absence or gap of information in terms awareness and understanding of the scope of cybercrime is wide. It is not the word 'cybercrime' that matters, but what it entails or encompasses. Even at the Parliamentary level, there is a misunderstanding of the scope of cybercrime. It is a technical area that needs to address some of the most important essentials in the draft legislation, but not just the presentation of it that matters. This statement further ascertains the view of a fellow who responded on the lack of enlightenment.[9]

A positive remark recently by the National Security Adviser (NSA), Maj-Gen. Babagana Munguno (Rtd), further acknowledged the views of one respondent, who stated that the condition is attributed to the absence of campaigns and awareness of what is entailed in the cyber-security, and the inadequacy of the legal framework to guide the system and the communal understanding. This also leads to the lowest ideals available in the security of government websites, especially the sensitive host databases in Nigeria.[10]

That a respondent's view is that the lack of the knowledge of cybercrime and the law in the country is among the problems faced in Nigeria.[11] Another respondent further stressed that the enactment of the Cybercrime Act 2015 is worthy of appreciation based on its purpose. 'The Act seeks to prohibit, prevent, detect and prosecute cybercrime and related offence.'[12]

In addition, the respondent explains that "the National Assembly was eager and concerned the Act will be passed into law, so as to prohibit the crime".[13] In analysing this issue, it proves that the Senate members were desperate to see this Bill become Law because it was in the 7th National Assembly platform for a number of years and has been drafted and presented as a Bill for at least three times during their 2011/2015 session. Since then, they have been unable to examine the

scope of the offences related to the Bill, call for a public hearing and request contributions from the few experts on law related to the field and ICT industries. It was until the last minutes of their session they decided to pass the bill. This raises the question whether there is a hidden motive. This attitude further re-affirmed the view of one of the respondents that the legislators are not fully aware of the scope of cybercrime.[14]

This helps the country a lot to make Nigerians know the existence of a Cybercrime Act in Nigeria though the community is not much enlightened on what a cybercrime is. Since the Act is in process of implementation, the legislatures should have called for a public hearing, workshop or a memorandum. The respondent also proceeds to highlight an important point that "State Houses of Assembly should be given the mandate to enact laws on matters that concern both the State and Federal so as to support the National Assembly".[15]

In view of this point, it becomes important for the National Assembly to issue an order or circular that will give the State Houses of Assembly the powers to contribute to the National legislation on any matter bothering the nation because State Houses too have some experienced legislators who can also constitute their own committee to come up with proposals and present such proposals to the National Assembly for deliberation. The major issue here lies on the adequacy of the provisions place in the Act on fighting the cybercrime in Nigeria.

A respondent maintained that the established Cybercrime Act is a good attempt made by the government because prior to enactment of the Act, the law enforcement used the Advanced Fee Fraud Act 2006 in filing charges against the offenders, under the provision of section 1 of the Act on false pretence and such provision does not provide for computer.[16] That alone has reduced the burden and chances of the convicts in securing a conviction or less punishment in the court of law and thus provides a clear approach for the law enforcement in discharging their duties.

Cybercrime incidence in Nigeria is on the rise due to accessibility of bandwidth through the underwater cables linking Nigeria to the world. Also, the establishment of cashless economic policy brings a sizeable amount of risks although the policy is ultimately good for the economic development of Nigeria and limits money laundering practices. However, a number of security complaints arising from this policy are coming in on daily basis.

In an interview, a respondent believes that cybercrime is really increasing every day because the number of threats keep multiplying. Most of the criminals take advantage of the prevailing circumstances to extend their criminal activities at every level; it has been increasing before both the government and the people realise they have become preys.[17] For instance, the introduction of Bank Verification Number (BVN) by the Central Bank of Nigeria[18] which is meant to control and monitor every single transaction by any individual and corporate body in the country so as to track any illegal transaction in the country.

The BVN is a unique identification of a customer. It protects customer's account, prevents identity theft, reduces fraud and has other security measures. But with all this security enhancement, the criminals still find their ways to access customers' BVNs through the telecommunication firms. The criminals penetrate telecommunication networks and send SMS to customers that they can activate their BVNs by sending or dialling a four-digit code, or they claim that their banks request their BVN for confirmation and verification purposes. Many people send their BVNs to these criminals before they reliaze what is going on since a lot of people are not fully aware of such scam. In such a situation, the criminal instantly accesses and takes control of the victim's account through the BVN, and steals any money available in it. Such practices of the criminals justify the statement of the above interviewee who stated that criminals make use of prevailing

circumstances to enhance their crime activities.

The proliferation of crimes has extended to federal institutions; a group of criminals have been issuing fake advertisements for employment; they ask people to buy a scratch card before accessing an institution's websites and sometimes they sell forms whereas the particular institution does not know anything about such dubious advertisements. This is another form of criminal activity used to spread fake or forged information concerning institutions, especially on the social media.

In addition, the Nigerian Police Force (NFP) once came out to the public and denied any knowledge of any adverts circulating information that the NPF wanted to recruit. The spokesman said that the attention of the Nigeria Police Management was drawn to some fake recruitment adverts being run by some criminally minded people, who were out to defraud credulous members of the public. He explained that Nigeria Police Force was not recruiting then and further warned the public to desist from becoming victims. The Force clarifies this assertion through their spokesman of the Force said that: [19]

The Public Relations Officer of the Nigerian Police Force, ASP Toyin Gbadegesin, said that the command was informed of the acts perpetrated across the nation via media of sale of recruitment forms. [20] He went further that some criminal groups might have intercepted the information that Nigerian Police Force might recruit soon in one of the states, and they, upon hearing that, start selling bogus forms to the unsuspecting interested applicants. Recently, some suspects were apprehended by the Nigeria Police Force of Yobe State Police Command in connection with printing and sale of fake police recruitment forms in the state. It was understood that they were members of a syndicate engaged in the act.[21]

Similarly, private corporations are also suffering from this act because the criminals attack the companies' websites and target their online delivery services most of the time, especially now that so much attention is given to online trading due to cashless policy introduced by the Central Bank of Nigeria. In a nutshell, the customers are not familiar with the security tips, though the banks have recently kept notifying their clients of the dangers of exposing the Personal Identification Number (PIN).

A respondent in an interview states that the Information Ministries should make it an obligation to enlighten the public on the cybercrime.[22] Looking at this point, it is a clear indication that there is the need for ministries, departments, agencies and Non-Governmental Organizations to engage in workshops, seminars and consultancy services in every part of the country to enlighten the community on cybercrime. It is also clear that the communities are not aware of the nitty-gritty of cybercrime and the Cybercrime Act 2015.

In another view [23] that agree with the views of Respondent 1, the interviewee also says that lack of enlightenment is a serious issue, and this has categories. There is absolute lack of computer knowledge; people use the computer freely without the knowledge of its reality. For instance, ordinary citizens do not count unauthorized access as an offence. Other aspects of lack of enlightenment concern the working of law and the crimes perpetrated. People do not have the knowledge of the law, what is cybercrime and what acts constitute a cybercrime. They need to be enlightened on perpetration of the crimes, the authorization for the perpetration of the crime, the interactions between the hackers and the mode of communication. For instance, the process of communication could be through the email for ease of distribution of malicious software.[24]

The above view is very fundamental to the research and has pointed out some areas to which the government paid attention. The related information is absence any enlightenment process to make the public understand and have a clearer picture of the scope of cybercrime. This poses a

great challenge to the law and the government in the fight of the crime. The government has to rise up to enlighten the public on the general picture of cybercrime and security tips.

The attack on the Nigerian government critical infrastructure information was new and until recently. The dangers of NCII attack are manifesting through the regular attacks on the websites of ministries, departments and agencies. Though such attacks are lesser, it is a step towards initiating attacks on NCII, but the government is yet to realize the aftermath. In an interview conducted by the author during a research, a respondent [25] is of the view that the extent of the cybercrimes in Nigeria are minimum in terms of NCII attacks because the notorious hackers resident in Nigeria are yet to start developing sophisticated software that could attack NCII, except through collaboration with their international criminal hackers. Still, such attack that would pose a serious threat to the national security is yet to manifest, but with the advancement of technology things might soon be different.

2.2 Problems

The main concern is that there are many crimes being perpetrated in Nigeria. Most of the prominent ones are ATM fraud, forgery, hacking and denial of service, and others are software piracy, pornography, cyber defamation, copyrights and trademark, spoofing and cyberstalking. The existing law, Cybercrime Act 2015, meant to control these offences is yet to be fully implemented.

Another major problem is international co-operation in terms of facilitation of the investigation because what is considered a crime in Nigeria may not be a crime in another country. Sometimes, the nature of the transactions or illicit proceed may end in another country legitimately whereas it was initially started in Nigeria illegally. So the receiving country will see such transaction to be legal while it was illegal in the country where the transaction was initiated. It takes a longer time to investigate the crime and the success of the investigation may be hindered eventually.

2.3 Reluctance from the Government

The reluctance of the government to implement the Act is one factor that delays the commitment of the government in the fight of cybercrime. Until recently, under the President Muhammad Buhari, the Nigerian government established the Cybercrime Advisory Council, which consists of 31 men, amongst the measures taken by the government to address cybercrime.[26] The Advisory Council emanated from the section 42 of the Cybercrime Act which provides for the establishment of the Cybercrime Advisory Council and section 43 of the Act provides for the function and powers of the Council.

The actual issue here is that the government is not ready to spend money to provide the essential requirements, training and facilities for the law enforcement in the fight against cybercrime as at now. Even if the government is ready to spend money to fight of the crime, such cannot be ascertained.[27] But if the government is not ready to provide necessary facilities in order to combat such crimes in the country, it becomes obvious that the government does not care about its annual huge loss emanating from the crime.

Investigation and prosecution of the cybercrime offenders are done by the Economic and Financial Crime Commission (EFCC) across the federation. The cases handle by EFCC are numerous, as a result of which the reliability, efficiency and manpower of the commission in prosecuting cybercrimes in Nigeria are being questioned. Currently, EFCC cannot on itself handle the fight

against cybercrime in the country.[28] The office of the EFCC was among the CAC representative in the Cybercrime Act 2015.[29] The commission has a lot of pressure in handling corruption cases in the country, and it is, therefore, feared that EFCC will not be able to pay adequate attention to cybercrime.

2.4 The Cost of the Rise of Cybercrimes

The level of the rise in criminal activities is a factor that contributes to the loss ₦127 billion annually in the country, and such practices further define the need for protection of the nation's cyberspace.[30] The rate of cyber-criminal activities in Nigeria is increasing, looking at how government websites are always hacked by the criminals. This amounts to a threat to the government infrastructures, particularly the sensitive areas such as the defence, Independent National Electoral Commission, etc.[31]

The expense of cybercrime to the country is colossal and has resulted in loss worth several US billions dollars. The United Nations Office on Drugs and Crime (UNODC) provided the figure identity theft at $1 billion per year globally. In addition, online traders misplaced $3.5 billion due to fraud activities as at 2012. In the information from the Center for Strategic and International Studies, cybercrime and intellectual property theft resulted to the detriment of the US economy up to $100 billion per year. In addition, the Federal Government of Nigeria stated in a recent update that a projected annual cost of cybercrime to Nigeria was 0.08 per cent of the country's Gross Domestic Products (GDP), which represents about N127 billion. The National Security Adviser further said that an Annual report by Nigeria Deposit Insurance Corporation (NDIC) in 2014 indicated that the practices of fraud on the e-payment platforms of the Nigerian banking sector has increased by 183 per cent. [32]

2.5 Attacks on NCII

The first attack on the Nigerian NCII experienced was in 2015 during the Nigerian general election. The attack came on the website of the Independent National Electoral Commission (INEC) while the country was conducting its presidential elections. This is a new factor in the national critical infrastructure information (NCII) attack. Some of the campaign organizations of the opposition party were not happy with new the method of voting system adopted by INEC so as to ease counting of votes, and to have a free, fair and credible election. The commission introduced electronic card reader with a Permanent Voting Card (PVC) which contains a chip readable by the machine. Therefore, each voter has his/her own PVC and their identity is stored in the INEC database. It was discovered that the criminals had infiltrated INEC website early in the morning of Saturday 28th March 2015, few hours after the accreditation of voters started.[33]However, INEC restored its hacked website, and further revealed that there was no damage to the database. These attacks are easily carried out by perpetrating through the DDOS and defacement.[34]

Another attack on NCII is the recent activity of hackers who attacked the Defence Headquarters (DHQ) information website on Friday, 23 January 2015 (defenceinfo.mil.ng). It took some hours before it was restored to its current position on the same day. A statement was issued that the front end of the website was defaced although they could not penetrate the database. The Director of Defence Information (DDI), Maj-Gen. Chris Olukolade, is of the opinion that the site was a target due to the communications with the military on the security issues concerning the nation, particularly in the fight against terrorism[35]

Moreover, computer forgery plays a significant role in destroying the originality of a docu-

ment. This is another crime that is gaining popularity in Nigeria. With the use of technology, it has become apparent that some undergraduate students in the Nigerian universities and other institutions forged admission letters, results, National Youth Service Corps (NYSC) certificates and other certificates in their favour. These criminal acts have mandated several institutions to use and install devices that track and identify the originality of the documents. If these activities are properly construed in the Nigerian cybercrimes law by highlighting the major issues concerning the offences and penalty is adequately specified, this menace will reduce greatly in Nigeria. The Cybercrime Act 2015 provides for the usage of computer devices in relation to forgery, and as such the offender will be held responsible [36]

In a related crime, the Ebonyi State University (EBSU) recently issued a notice to the public alerting them that some students engaged in the presentation of forged documents by some criminal cyber café operators across the nation for the purpose of securing admission into the university. Some even printed forged admission letters.[37] In the same vein, seventeen (17) National Youth Service Corps (NYSC) certificates were found and discovered to be fake, awarded and used by 17 staff members of Guaranty Trust Bank plc (GTB) in Nigeria. Four of the suspects have been arrested and are in police custody waiting to be prosecuted while the others are to be arrested.[38] The Cybercrime Act 2015 provides that any person who deliberately exceeds his authority in any related computer fraud commits an offence.[39] Finally, it was report in the daily newspapers that a Director General of the National Information Technology Development Agency, Peter Jack, who is a Principal Officer with the agency recently stated that 585 out of 2,175 websites damaged in Nigeria, are government institution websites.[40]

2.6 Attacks on Credit Cards and other Fraud Offences

Credit Card or ATM Fraud is another act of crime which is common and continues to be practiced in Nigeria. The Cards are usually stolen by the criminals. Most of the time, they follow their victims to the machines as if they want to withdraw money, but in actual sense, they are spying on the victim's security code. The hackers have their own way of retrieving the codes even without having access to the full PIN numbers. This happens at the time a user inserts his/her credit card for online transactions or at Point of Sale (POS) in shopping malls.[41]

A criminal suspected to be a member of an international organized group was arrested by the officials of Drug Law Enforcement Agency (NDLEA) at the Murtala Muhammed International Airport (MMIA) Lagos while boarding Qatar airline flight to China. The criminal was found in possession of 180 pieces of stolen credit cards, issued by five different financial banks in Nigeria.[42] The suspect further confesses: "I am not the owner of the cards. I was told to take them to China and that somebody will collect them from me when I get there …' He was an undergraduate student at a university. [43]

In *R v Okunkpolor*,[44] the appellant was sentenced based on an important role he played in Okosun's credit card fraud. The court noted that based on his plea, there was no financial gain that the appellant enjoyed. The fact that the credit card was used to launder for fraud by using someone's account was not known to the appellant and the appellant did not benefit in any form from the fraud activities. The court was convinced that there was the need to mitigate the sentence from 12 months based on the appellant's strong conviction. Accordingly, the court sentenced him to eight months' imprisonment.

Credit card theft in Nigeria is taking another dimension, with individuals stealing a number of hundreds of credit cards belonging to different individuals and the token devices for online bank-

ing transactions for Nigerian banks. A suspect was apprehended by the law enforcement agency at Malam Aminu Kano International Airport while trying to board a flight to Dubai. The suspect was in possession of 870 ATM cards and two bank internet tokens. The suspect was in possession of ATM cards of all most all the banks in the country.

In addition, the Nigerian Cyber Criminals (NCC)[45] are on the move; they syphon and redirect sums of money intended for wire transfers through access and interference with small business to big business communications using a 'man-in-the-email' technique.[46] There is a strong belief that offenders are Nigerian under the auspices of NCC.[47] This has been a great challenge to the Nigerian government, due to lack of a sound and coherent law regulating the offences of cybercrimes.

2.7 The Cybercrime Act 2015

The Nigerian Cybercrime (Prohibition, Prevention etc.,) Act 2015 was enacted by the House of Senate. The Act was assented by the then president on 15th May, 2015 and also was signed by the Federal Government on 29th May, 2015.[48] This Act is meant that to combat crimes related to information communication and technology across the country. It is divided into seven Parts;[49] the discussion on the Act is limited to offences related to critical national information infrastructure, credit cards fraud and forgery.

a. Offences againts Crititcal National Information Infracstucture

The Cybercrime Act provides for the offences of critical national information infrastructure and the punishment of offenders.[50] It was initiated under the control of National Security Adviser (NSA). Any breach in the national critical infrastructure information will be the concern of the NSA. The provision is adequate, but the powers of the Act have to be reviewed in terms of powers to prosecute and investigate because NSA cannot not prosecute cases. Assuming NSA investigate and forward their reports to the law enforcement agency, and EFCC for prosecution. This procedure becomes too long because NSA does not specialize in investigation, and the procedure may hinder the success of the prosecution.

There are investigators who specialise in tracking emails and spam messages. Some investigators interact personally with the criminals and have expertise in tracking records. Even among EFCC officers, some specialize in fraud investigation which is different from the cybercrime. The investigation itself ranges from IT related and conventional practices. Currently, EFCC cannot on itself handle issues of cybercrime in Nigeria.[51] The mandate to handle the Cybercrime Act should be an established Commission, not the NSA office.

The paper will further make use of the US cases in discussing the provisions of Cybercrime Act 2015 because some US cases are directly linked to the provisions of the Cybercrime Act and have sufficiently addressed the scope of the provisions of the Act. One of the reason why a US case becomes useful in highlighting the main issues concerned. Thus, the paper will further examine the relevance of the US cases in relation to the provisions of Cybercrime Act 2015. The relevancy of the provisions of the Act criminalises any interference with the national critical information through an unauthorised access to a computer. The US law, which is the Computer Fraud and Abuse Act (CFAA), 18 U.S.C. § 1030, criminalises any intrusion through a computer for the purpose of illegal access to national information which has the same connotation with the Act.

In a case that concerns interference of critical information of the United States, conspiracy and computer interference is the case of *United States of America v. Christopher R. Glenn,*[52]*.* Mr Glenn*,* aged 34, is a resident of South Florida and was charged with the offences in violations of Title 18, United States Code, Section 793(e), for the willful retention of classified national defense

information under the Espionage Act, Section 1030(a)(1), computer intrusion under the Computer Fraud and Abuse Act while employed as a computer systems administrator at a US Military installation in Honduras; and Sections 371 and 1425(a), conspiracy to commit naturalization fraud. During his plea, Mr. Glenn pleaded guilty to the offences on October 7, 2014. He was sentenced to 120 month's imprisonment by the court on July 31, 2015, followed by three years of supervised release.

The above case illustrates an intrusion or interference to a computer system by a former employee of the government with the intent to make use of the information by illegally accessing files for his own personal gain by fraudulently forging his wife's documents. This is a related criminal act that the Cybercrime Act criminalises for the purpose of enabling a peaceful environment for the development of the nation. Accessing the national critical information by any staff or agent will definitely compromise the whole database of the government and such vulnerability will put the national information at risk.

1). Trampering with Critical Infrastucture

The Cybercrime Act 2015 provides that temperance with the national infrastructure as a civil servant in the Nigerian institution without consent is an offence.[53] Misuse of electronic information for another purpose will be held liable.[54] Further, it considers unlawful interception of computer data and other related matters in the mechanical context an offence.[55] This is a situation where a civil servant or an unauthorised person accesses a computer system of the government, for instance, in the case of INEC website attack. Such attacks affect the national critical infrastructure information on a national duty. This has been followed up by the provisions of the Convention. See the case of *R v. Glen Steven Mangham.* [56]

In a case of *R v. Victor Lindesay* [57], the offender acted out of anger and a reprisal for his dismissal; he accessed the computers of his former employers by deleting particular data so as to create trouble. He pleaded guilty and had strong personal mitigation. The court upheld a sentence of the offender of nine months' imprisonment.

In *R v. Oliver Baker* [58], a young IT worker was dismissed by the Welsh Assembly for producing and distributing counterfeit parking tickets. He used a remote dial-up connection from his home computer to access the email account belonging to the senior worker involved in the decision to dismiss him, thereby committing an offence. The trial court sentenced Baker four months. Dissatisfied with the judgment, he appealed and the appellate court upheld the trial court decision of four months on a person of good character.

b. Credit Card and Fraud Related Offences under the Cybercrime Act 2015

The provision of the related offences has been identified in different sections under Cybercrime Act 2015, and each would be discussed seriatim. The Act provides for electronic cards related fraud,[59] dealing with cards of another,[60] and purchase or sale of the cards of another.[61] It also provides for use of fraudulent device or attached e-mails and websites.[62] The issue of credit card fraud and other matters has been a prevalent offence practice in Nigeria. The number of damage suffer by the victims as a result of the perpetrators is overwhelming.

The series of this crime is an international organised crime, where a group of syndicate operates a cycle of credit card theft and dealings. Recently, the credit card and international passport of a Nigerian citizen studying in one country in one of the South East Asia region were stolen by a criminal in the evening on 12th December 2016. He filed a complaint before the Police Division Office and before he left the Division, the criminal had already hacked the credit card and stole

the money in the account. He just received an alert of a withdrawal. Later he informed his bank in Nigeria to block the credit card so as to avoid future transaction.[63]

Perpetration of these crimes is growing and their radar keeps on expanding at the expense of the ordinary citizens. There is the need for the banks and other financial institutions to re-strategise the security measures to track these crimes. It then becomes essential for the banking industry to provide a code to their customers, immediately if a person credit card has been stolen or missing to dial the code for a prompt blocking of the credit card for any future transaction until it has been verified by the owner and the issuer.

Further, the relevance of the provisions of the Act can be seen also in the *United States of America v. Jermaine Smith.*[64] The defendant is popularly known as aka "SirCharlie57" and as aka "Fair businessman" 34, of East Orange, New Jersey. The defendant is a member of the identity – theft- and- credit -card –fraud- ring known as "Carder.su". In October 2014, he pleaded guilty to one count of participating in a racketeer- influenced most corrupt organisation. The court sentenced the defendant to 150 months in federal prison for selling stolen and counterfeit credit cards over the Internet and was further ordered to pay $50.8 million in restitution. The discussion of the paper in this aspect cannot be concluded without recourse to computer forgery and fraud as provided by the Act.

c. Computer related Forgery

A topic of discussion in some part of the paper because it forms part of the Act provides for the use of computer devices in relation to forgery by a person knowingly, and the offender will be held liable. [65] Computer-related forgery has been crimes that are easily committed by criminals. Its practices have been prevalent across the nation.

The act of forgery using any form of a computer- related device has been on the increase by the day. New methods are being introduced every day by the criminals to outsmart the security systems and card owners. Computer forgery has been an ongoing crime in many government institutions through computer-related means, e.g. by altering some information or deleting it so as to change the authenticity of the information. The provision is adequate in addressing offences like these.

d. Computer related Fraud

The Cybercrime Act 2015 deals with any person who deliberately exceeds his authority in any related computer fraud.[66] Such offence is becoming a common practice in some places in Nigeria. The telecommunication firms are sometimes involved in promoting such practices that end up to be fraud.

The rise in fraud practices contributes to circulation of fake information, particularly in relation to employment schemes. Sometimes in 2016, a group of criminals disseminated a fake peace of information through the Facebook platform, and fraudulently collected money from the unsuspecting applicants for purchase of the purported employment forms of the Nigerian Police Force (NPF). The criminals operate across the states of the federation because in Yobe State, the North East of Nigeria, some member of criminals were arrested in connection to the purchases of the employment forms.[67]NPF had to issue a statement rebutting such information.[68]

The discussed provisions of the Cybercrime Act 2015 have extensively addressed the scope of the crime. It only requires the full implementation to strengthen the commitment in the fight against these crimes in Nigeria.

III. Conclusions

The NCII constitute a very important tool in the security of a nation, and any breach or compromise against it will definitely put the nation at risk. The use of technology has become a menace; it is being used in systematic form to attack infrastructures in various areas. In most cases, the attack is for political and/or economic gains, and to sabotage the nation. Each nation must rise to ensure the adequacy of law that will identify the threats as offences to the national security and such must be brought to the public for awareness and understanding of what the offences entails under the law. It has become a duty of the government to carefully identify the problems and the challenges the pose in order to put the right laws in place. It is through this medium that the government will be able to protect its national security, protect the privacy and property of the citizens.

The paper finds that the public lacks the awareness of what cybercrime encompasses in Nigeria. This can be further understood from the NSA statement above. Interviews with the respondents further affirm that the community lacks knowledge and understanding about the cybercrime and the law on it. This implies that Nigerian communities are not completely aware of the danger of the attacks of NCII and other relation cyber activities in the country. It is evident that the legislatures and the public need to be enlightened.

The paper recommends that the government should seriously look into the implementation of the Act. There is also the need to make provision for special prosecutors, and to ensure training of Bar and Bench in matters concerning cyber activities. Finally, the fight against this crime is not easy, and cannot be handled and monitored by the office of National Security Adviser. In the initial discussion on the Act, the paper identifies the need for creation of a commission to handle the task of implementation and regulation of the Act. There is the need to have a special body to monitor, investigate and prosecution offence.

ENDNOTES

[1] O' Rourke, Thomas D. "Critical infrastructure, interdependencies, and resilience." *BRIDGE-WASHING-TON-NATIONAL ACADEMY OF ENGINEERING-* 37, no. 1 (2007): 22 at p. 22.

[2] Rinalidi SM, Peerenboom JP, Kelly T. Identifying, understanding and analyzing critical infrastructure interdependencies. IEEE Control System Magazine 2001:11–25 ; Peerenboom JP, Fisher RE, Rinaldi SM, Kelly TK. Studying the chain reaction. Electric Perspectives 2002;27(1):22–35 and Robert B, Senay MH, Plamondon MEP, Sabourin JP. Characterization and ranking of links connecting life support networks. Public safety and emergency preparedness.2003.

[3] Ouyang, Min. "Review on modeling and simulation of interdependent critical infrastructure systems." *Reliability engineering & System safety* 121, 2014, at p. 44.

[4] https://www.enisa.europa.eu/topics/critical-information-infrastructures-and-services/cii, accessed on 24/11/2016.

[5] http://dictionary.cambridge.org/dictionary/english/infrastructure, accessed on 24/11/2016.

[6] European Commission 2004.

[7] This was reveal by The chairman, Senate Committee on Establishment and Public Service Matters, Aloysius Etok, reported by Leadership Newspaper, ''Nigeria Loses Over N2trn To Tax Evasion, Cyber crimes', accesses on 4/6/2015, available at <http://leadership.ng/business/438310/nigeria-loses-over-n2trn-to-tax-evasion-cyber-crimes>

[8] Respondent 2. at 11:30 am, interview conducted by the Author on 6/8/2016.

[9] Respondent 1, at 2:00-3:40 am, interview conducted by the Author on 26/1/2017.

[10] He stated during the Inauguration of the Cybercrime Advisory Council, at the Office Of NSA (ONSA), Abuja. As Reported By Senator Iroegbu In Abuja, Thisday Newspaper, "Nigeria Loses Over N127bn Annually Through Cybercrime", Dated On April 19, 2016, Accessed On 20/10/2016, Available At http://Www.Thisdaylive.Com/Index.Php/2016/04/19/Nigeria-Loses-Over-N127bn-Annually-

Through-Cybercrime/.

[11] Ibid; this is in line with response of Respondent 3, interview conducted by Author at 03:45 pm on 15/07/2015; Respondent 4, interview conducted by Author at 12:15 pm on 15/07/2015; Respondent 5, interview conducted by Author at 11:30 am on 22/06/2015 and Respondent 6, interview conducted by Author at 2:00 pm on 13/7/2015.

[12] Respondent 6, Ibid.

[13] Ibid.

[14] Respondent 2, op. cit.

[15] Ibid; some of the respondent shared the same views,, thus are Respondent 7, Interview conducted by Author at 03:00 pm on 16/07/2016; Respondent 8, interview conducted by Author at 02:45 pm on 2/07/2016; Respondent 5, op.cit; Respondent 9, interview conducted by Author at 11:27 am on 7/06/2016; Respondent 10, interview conducted by Author at 12: 00 pm on 25/05/2016 and Respondent 11, interview conducted by Author at 10: 00 pm on 25/05/2015.

[16] Respondent 1, Op. cit. See also section 13 of the Advance Fee Fraud Act 2006, but the section only discusses electronic communication. There is no connection to computer related device.

[17] Ibid.

[18] The Bank Verification Number (BVN) was launched by the Central Bank of Nigeria through the Bankers' Committee, in cooperation with all the banks in Nigeria on February 14, 2014. BVN is a centralized biometric identification system for the banking industry. See Bank Verification Number home page, accessed on 12/12/2016, available at http://www.bvn.com.ng/,

[19] Chika Otuchikere, *Leadership Newspaper*, "IGP Warns Against Scam Recruitment Into Police Force", available at http://leadership.ng/news/450271/igp-warns-against-scam-recruitment-into-police-force, accesses on 27/07/2015. Further, the Inspector general of police, IGP Solomon Arase, has warned Nigerians intending to join the police force to beware of fraudsters placing fake recruitment advertisements.

[20] Sahara Reporters, "Police Arrest Members of A Syndicate Alleged To Be Printing And Selling Fake Police Recruitment Forms", reported on Sept 03, 2015, available at http://saharareporters.com/2015/09/03/police-arrest-members-syndicate-alleged-be-printing-and-selling-fake-police-recruitment. Accesses on 03/09/2015. Among the suspects, one Mohammed Kabir, while narrating his side of the story, said that as a cyber-operator, he prints various forms for different categories of people upon their request. He says that on that fateful day, some job seekers came to him with the website address, and that he ignorantly went to the site and printed the said form. Two days later, he says he was arrested. The suspect says he was not aware of any earlier announcement made on local media cautioning against the printing and selling of the recruitment form and had only done so as a cyber café operator who undertakes printing for people from different websites.

[21] Ibid.

[22] Respondent 2, Op. cit.

[23] Respondent 1, Op. cit.

[24] Ibid.

[25] Ibid.

[26] Daily trust Newspaper, 'FG inaugurated Council on Cybercrime', accessed on 19/04/2016, available at http://www.dailytrust.com.ng/news/business/fg-inaugurates-council-on-cybercrime/143045.html?platform=hootsuite. Further, in an attempt by the Federal Government of Nigeria to ensure the implementation of the law proceed to establish the Council, thus consist of the representatives of EFCC, ICPC, NAPTIP and DSS among others are to formulate ways of implementing the objectives of Cybercrime (Prohibition Prevention etc.) Act 2015 in Nigeria.

[27] Respondent 1, op. cit.

[28] Ibid.

[29] Daily trust Newspaper, 'FG inaugurated Council on Cybercrime', op. cit.

[30] Hassan Zaggi, "NPF gets specialised unit to combat cyber crime", dated on 25-10-2016, accessed on 27/10/2016, available at http://www.authorityngr.com/2016/10/NPF-gets-specialised-unit-to-combat-cyber-crime/

[31] Discussion on this part would be in the preceding pages.

[32] Senator Iroegbu in Abuja, Thisday newspaper, "Nigeria loses over n127bn annually through cybercrime",

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[37] 'Fraud Alert-EBSU Alert the Public on Forged Admission on October, 17, 2015, available at http://naijafengist.com/fraud-alert-ebsu-alert-the-public-forged-admission-letter/, accessed on 20/10/2015.

[38] A statement issued by the Director Certification, National Youth Service Corps (NYSC), Alh. Hudu Aliyu Taura, on November 15, 2015, available at http://scannewsnigeria.com/news/17-gtb-staff-members-found-with-fake-nysc-certificates/, accessed on 20/11/2015.

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[40] **Daily Trust Newspaper, '585 government websites defaced by cyber criminals-FG', on Nov 25 2015, available at http://dailytrust.com.ng/news/it-world/585-government-websites-defaced-by-cyber-criminals-fg/121248.html, accessed on 28/11/2015.**

[41] Ibid.

[42] Ben Ezeamalu, Premium Times, "NDLEA arrests man with 108 ATM cards", October 17, 2015, available at http://www.premiumtimesng.com/news/headlines/191672-%E2%80%8Endlea-arrests-man-with-108-atm-cards.html, accessed on 17/10/2015. The banks are First City Monument Bank (FCMB), which has the highest number of cards with 58; Stanbic IBTC Bank has 23 cards; Zenith Bank has 19; Fidelity Bank has 6, and Diamond Bank has 2.

[43] Ibid.

[44] [2014] EWCA Crim 181, (Transcript: Wordwave International Ltd (A Merrill Communications Company)).

[45] The term "Nigerian Cyber Criminal" in this context encompasses both the fraud and hacking methodologies.

[46] The term "man-in-the-e-mail" technique is a reference to accessing and interfering with e-mail communications between two victims, distinguishing it from other "man-in-the-middle"-type attacks, which is an act of active ease dropping used by the offender in communicating with the victims and spread junk mails among them by creating a thought to the victims that personally they are privately communicating.

[47] Federal Bureau of Investigation, UNCLASSIFIED, '(U) Nigerian Cyber Criminals Using "Man – in – the - E- Mail" Fraud Scheme to Interfere with Business-to- Business Communications', issued a Public Sector Advisory, July 5, 2013. Accessed on 20/10/2015, available at http://www.networksplusco.com/wp-content/uploads/2013/07/Nigerian-Cyber-Criminals-UsingMan-in-the-E-Mail-Fraud-Scheme-to-Interfere-with-Business-to-BusinessCommunications.pdf.

[48] ngCERT, accessed on 20/7/2015, available at https://www.cert.gov.ng/news-events/details/153

[49] Part I consists of objectives and application; Part II consists of protection of the critical national information infrastructure; Part III deals with offences and penalties; Part IV consists of duties and financial institution; Part V covers administration and enforcement; Part VI consist of arrest, search, seizure and prosecution; Part VII also deals with jurisdiction and international co-operation, and finally, part VIII deals with miscellaneous. Section 3 of the Act gives the president the power to recommend to the National Security Adviser (NSA) on matters relating to the protection of critical information infrastructure (CII) of the country and section 4 gives the NSA powers to audit and inspect any matters in connection to CII within the purview of the Act.

[50] Section 5(1)-(3), Ibid.

[51] Respondent 1, Op. cit.

[52] Department of Justice, U.S. Attorney's Office, Southern District of Florida, for immediate release, on Friday, July 31, 2015, accessed on 08/08/2015, available at http://www.justice.gov/usao-sdfl/pr/palm-beach-county-resident-sentenced-violations-espionage-act-and-computer-fraud-and.

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[56] [2012] EWCA Crim 973. Where the appellant appealed against his sentence of 8 months on the count charges, the appellate court grants his appeal from 8 months to 4 months and as such will run concurrently.
[57] [2001] EWCA Crim 1720, [2002] 1 Cr App R(S) 370.
[58] [2011] EWCA Crim 928.
[59] Section 33, Ibid.
[60] Section 34, Ibid.
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A Study on Demographic Information of the Respondent in Cross-Border Marriage: An Empirical Evidence from the State of Perlis

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ABSTRACT

Marriage is a sacred bond, a tie between a man and a woman. Such relationship is blessed by Allah as it is mentioned in the Quran and the tradition (Sunnah) of the Prophet (pbuh). The laws created by man are meant to streamline the conduct of marriage, apart from the already provided *hukm* laid down in Islam. However, there are people who tend to violate these laws due to their own ignorance and this violation affects the future of such marriage and as well other people who are attached to it. Cross-border marriage is a marriage without permission from the registrar of marriage in each States and its solemnisation can be contracted in Malaysia or outside Malaysia. The purpose of this study is to examine and analyse the demographic profiles among the respondents towards the factors of cross-border marriage among Muslims in Malaysia. The expected sample consists of 100 respondents from one selected state in north Malaysia, bordering Thailand namely Perlis. The questionnaire survey is the main data collection method employed in this study and further supported by semi- structured interview. Based on the findings, the respondents are expected to adhere and abide the regulation and policy in controlling cross-border marriage from worsening in the future.

Keywords: *Demographic Information, Cross-Border Marriage, Court, Respondent*

I. Introduction

Islam is a complete and comprehensive religion within each and every aspect of human life. In order to strengthen the family institution, Islam has laid down the guidelines and perfect rules so as to ensure the family welfare and to keep them in harmony. The Islamic Family Law has been imposed for the purpose of protecting the marriages. In Malaysia, recognition of lawful marriage must abide with two basic conditions which are the pillars of marriage and compliance with Act or Enactment provided in each state in Malaysia.

Despite the fact that available laws relating to solemnisation of marriage are reasonably observable and understandable, such laws are still violated, and this is primarily evident in the conduct of cross-border marriage. Muhammad Nasran explains that cross-border marriage refers to marriage solemnised by *Wali Hakim*, which contradicts the Islamic Family Law in each state as the parties to such marriage had failed to get a prior approval or permission from the Registrar of Marriage to get married[1].

This issue is not a new thing in Malaysia yet it has become a practice for certain Muslim and it is being overwhelming in all states across Malaysia especially state in Nothern Region namely States of Perlis. This matter happens to be easy when there is no special provision or law in Malaysia that combat this problem from lasting. Cross- border marriage has raises many issues and other major problems for Malaysian mainly the Muslims and Malays, particularly in matters of registration of marriage.

For Malaysian that lives in Perlis or any states that bordering Thailand, there are five provinces in southern Thailand which are popular and easy access for parties who wish to get married without the permission of the Malaysian authorities which are Satun, Songkhla, Setul, Narathiwat and Pattani.

In view of the increasing occurrence of cross-border marriage, the research undertaken is based on the assumption that cross-border marriage actually leads to problems in marriage. The problems are like uncertainties in determining the status of the marriage and the status of other claims related to the marriage including matters involving children and inheritance. Therefore, there is an urgent need for a research to solve these issues.

II. Research Methodology

This article uses both the quantitative and qualitative approaches. A survey was conducted in Northern state in Malaysia namely State of Perlis. Questionnaire was administered and distributed to collect the data from 100 respondents. Semi structured interview was also conducted with the informants who have the experience directly and indirectly involved in cross-border marriage. The collected data were analysed using SPSS version 22.

1. Research Objective

The purpose of this study is to examine and analyse the demographic profiles among the respondents towards the factors of cross-border marriage among Muslims in Malaysia.

2. Malaysian Legal Perspective

Basically, Islamic Family Law in Malaysia does not recognise this kind of marriage because it has violated the procedure of marriage under the Islamic Law in Malaysia. The law in Malaysia, especially the Islamic Family Law in each state does not have any specific provision governing the cross border marriages.

It is to be noted that any kind of marriage taken place in Malaysia must observe the procedures as per required by the Islamic Family Law Act or enactments. The Islamic Family Law Act or enactments stipulates that marriage can only be solemnized by certain individuals like *Wali mujbir*[2] before the registrar, by representative of *wali ijbar*, in front of and with the permission of the Registrar of marriage, marriage registrar himself with the permission of *wali ijbar* and *Wali Raja* who usually happen to be a Judge of Syariah court.[3]

The legal provisions states that *Wali Raja* or the judge, has the power to solemnize a woman who has no *wali nasab*[4] or in cases of *wali enggan* whereby the *wali mujbir* refused to give permission to solemnize the woman.[5] Apart from that, according to section 34 of Islamic Family Law Enactment 2006, "Nothing in this Enactment or rules made under this Enactment shall be construed to render valid or invalid any marriage that otherwise is invalid or valid, merely by reason of its having been or not having been registered".[6]

Thus, marriage is still valid according to the Syara' even though without registration. According section 25 of Islamic Family Law Enactment 2006, the marriage after the appointed date of every person resident in the Perlis and of every person living abroad who is resident in the Perlis shall be registered in accordance with this Enactment.[7] According to section 19 of Islamic Family Law Enactment 2006, No marriage shall be solemnized unless a permission to marry has been given (a) by the Registrar under section 17 or by the Syariah Judge under section 18, where the marriage involves a woman resident in the Perlis; or (b) by the proper authority of a State, where the marriage involves a woman resident in that State.[8]

From this section, we can conclude that, the marriage that was carried out without the permission of marriage registrar will be charged with punishment. This punishment is based on the above Section 40 of Islamic Family Law (Perlis) Enactment 2006 which allocates that the offense can be fine not more than one thousand Ringgit Malaysia and imprisonment not more than 6 months or with both.[9]

According to section 31(1) of the Islamic Family Law Enactment 2006, where any person who is a resident of the Perlis has contracted a valid marriage according to Hukum Syarak abroad, not being a marriage registered under section 24, the person shall, within six months after the date of the marriage, appear before the nearest or most conveniently available Registrar of Muslim Marriages, Divorces, and Ruju' abroad in order to register the marriage, and the marriage, upon being registered, shall be deemed to be registered under this Enactment.[10] From this section, it can be inferred that marriage must be registered within 6 month after the marriage before the nearest Registrar as stated in Section 31 of the Islamic Family law (Perlis) Enactment 2006. However, any marriage that is not registered is still considered valid if the spouses fulfill all the conditions that have been prescribed by Hukum Syara'.

3. Results

This chapter basically presents the results of demographic characteristics including background information of the respondents, level of education of the respondents, respondents' employment status, monthly income of the respondents, general information of cross-border marriage and factors for cross-border marriage.

III. Discussion

1. Demographic Characteristics of the Respondents

A total of 100 respondents were surveyed, comprising of 58.0% males and 42.0% females (Tables 2.1). In terms of age, only 36.0% are considered as young adults (below 30 years old), while those aged 31 to 50 years old made up 51.0% of the respondents. Almost one-fifth of the respondents (13.0%) aged between 51 to 72 years old. All of the respondents are married (100.0%). The mean of the age is 36.600, while the minimum age of the respondent that involves in cross-border marriage is 17 years old and the maximum age of respondent is 72 years old.

Table 2.1 Gender and Age of Respondents

DEMOGRAPHIC CHARACTERISTICS	CATEGORY	FREQUENCY	PERCENTAGE
Gender	Male	58	58.0
	Female	42	42.0
	Total	100	100.0
Age (Years)	17-30	36	36.0
	31-50	51	51.0
	51-72	13	13.0
Mean=36.600, SD=11.806, Min:17, Max:72	Total	100	100.0
Marital status	Married	100	100.0
	Total	100	100.0

With regards to education of the respondents, almost majority of the respondents (79.0%) acquired SPM, 8.0% completed lower secondary education (Table 2.2). Some of the respondents are able to further their education up to the Certificate/Diploma/Matriculation level (4.0%) and even up to Degree level (7.0%). Relating to the type of education, almost all of the respondents (94.0%) went to the National type system of education followed by National and Religious type (4.0%) and the rest went other types of schools (2.0%).

Table 2.2 Education of Respondents

DEMOGRAPHIC CHARACTERISTICS	CATEGORY	FREQUENCY	PERCENTAGE
Highest educational level			
	PMR/LCE/SRP	8	8.0
	SPM	79	79.0
	STAM/STPM/HSC	2	2.0
	Certificate/Diploma/Matriculation	4	4.0
	Degree	7	7.0
	Total	100	100.0
	National Type Only	94	94.0
Type of education	National and Religious Type Only	4	4.0
	Religious Type	1	1.0
	National-Type Indian School	1	1.0
	Total	100	100.0

Relating to the ethnicity, Table 2.3 displays that almost all of the respondents are Malays (97.0%). The rest of the respondents belong to other ethnicity (3.0%). Even though all respondents are Muslims, the data show that cross-border marriage is very popular among the Malays. With regards to the place of residence, more than half of the respondents (66.0%) live in the rural area while the rest are living in the urban area (34.0%). The data show that rural people are more interested in cross-border marriage.

Table 2.3 Ethnicity and Residence of Respondents

DEMOGRAPHIC CHARACTERISTICS	CATEGORY	FREQUENCY	PERCENTAGE
Ethnics	Malay	97	97.0
	Chinese	1	1.0
	Indian	1	1.0
	Others (Arab Yameni)	1	1.0
	Total	100	100.00
Place of residence	Urban	34	34.0
	Rural	66	66.0
	Total	100	100.00

2. Employment Status of Respondents

This part discusses about job-related information of the respondents including working status of the respondents, types of job, income of the respondents, and job categories.

3. Job-Related Information of Respondents

Table 2.4 shows job-related information of the respondents. The majority of the respondents are working (81.0%) and the rest are non-working (19.0%). Among those who are working, 46.0% are self-employed; followed by contract workers (17.0%), permanent workers (16.0%), and temporary workers (2.0%). More than one-third of the respondents are having an income of RM1000 and below (31.0%). More than one-quarter of the respondents also are having income between RM1001- RM2000 (33.0%). In addition, 22.0% of the respondents are having income of RM2001-RM3000 per month. The rest of the respondents (14.0%) having an income of RM3001 and above. The data reflects that cross-border marriage can be practised by low-income groups of less than RM3000.00.

In terms of job categories, almost half of the respondents (47.0%) are involved in business and self-employed, while 13.0% are sales and services workers; followed by clerical jobs (8.0%); while the rest are divided among others jobs (4.0%), administration and management jobs (3.0%), professionals (2.0%), and production and manufacturing sector (3.0%) and fishiries/agriculture sector (1.0%). A total of 19 respondents do not work and the highest numbers of respondents are housewives (15.0%). The rest are students (2.0%), and retired individuals (2.0%).

Table 2.4 Job-related Information of Respondents

Job-related Information	Category	Frequency	Percentage
Working status	Yes	81	81.0
	No	19	19.0
	Total	100	100.0
	Self-employed	46	46.0
	Contract	17	17.0
Types of job (N=81)	Permanent	16	16.0
	Temporary	2	2.0
	Total	81	100.0
Gross income	RM1000 and below	31	31.0
	RM1001 – RM2000	33	33.0
	RM2001 – RM3000	22	22.0
	RM3001– RM4000	7	7.0
	RM4001 – RM5000	5	5.0
	RM5001 – RM6000	2	2.0
	Total	100	100.0
	Business and self-employed	47	47.0
Job categories (N=81)	Sales and service worker	13	13.0
	Clerical	8	8.0
	Others (e.g., gardener)	4	4.0
	Administration and Management	3	3.0
	Production and manufacturing	3	3.0
	Professional	2	2.0
	Fisheries/Agriculture industry	1	1.0
	Total	81	100.0
	Housewife	15	15.0
Reasons for	Student	2	2.0
(N=19)	Retiree	2	2.0
	Total	19	100.0

4. General Information on Cross-Border Marriage

With regards to the country that the marriage was contracted (Table 2.5), almost all of the respondents got married in Thailand (99.0%), and followed by Malaysia (1.0%). Those marriages solemnised in Thailand, the highest is Songkhla (69.0%), followed by Satun (13.0%) and Patthalung (12.0%). The rest are performed at Pattani and Narathiwat (5.0%).

5. Status of Respondents of Cross-Border Marriage

Before involving in cross-border marriage, Table 2.6 indicates that 54.0% of the respondents were single, 31.0% of the respondents were married, while the rest were divorced (10.0%), and widowed (5.0%). With regards to the types of marriage, more than half of the respondents (55.0%) were practicing polygamous marriage while the rest were monogamous (45.0%). Al-

most all of the respondents (96.0%) were their first experience, while the rest were their second time (4.0%).

Relating to type of *wali* (guardian of marriage) during the cross-border marriage, results show that more than three-quarters of the respondents (71.0%) used service of *Wali Am/Hakim,* followed by *Wali Mujbir* (19.0%), and *Wali Nasab* (10.0%). Almost all of the respondents (95.0%) used both witnesses from Thailand, followed by 5.0% of the respondents used both witnesses from Malaysia. Majority of the respondents did not use marriage agent (87.0%), while only 13.0% of them used the service of an agent for their marriage.

Table 2.5 General Information on Cross-Border Marriage

Location of Marriage	Categor	Frequency	Percentage
Marriage country			
	Thailand	99	99.0
	Malaysia	1	1.0
	Total	100	100.0
Place of marriage in Thailand	Songkhla	69	69.0
	Satun	13	13.0
	Patthalung	12	12.0
	Pattani	4	4.0
(N=99)	Narathiwat	1	1.0
	Sub-Total	99	
	Grand Total	100	100.0

Table 2.6 Status of Respondent on Cross-Border Marriage

Status of Cross-border Marriage	Category	Frequency	Percentage
Status of respondent before getting involved in cross- border marriage	Single	54	54.0
	Married	31	31.0
	Divorced	10	10.0
	Widowed	5	5.0
	Total	100	100.0
Types of marriage			
	Polygamy	55	55.0
	Monogamy	45	45.0
	Total	100	100.0
Number of cross-border marriage	Category	Frequency	Percentage
	First	96	96.0
	Second	4	4.0
	Total	100	100.0
Type of *wali* during the cross-border			
	Wali Mujbir	19	19.0
	Wali Nasab	10	10.0
	Total	100	100.0
Witnesses for the cross- border	Both witnesses were from	95	95.0
	Both witnesses were from Malaysia	5	5.0
	Total	100	100.0
Using service of agent for the marriage			
	No	87	87.0
	Yes	13	13.0
	Total	100	100.0

6. Factors Leading to Cross-Border Marriage

The set of questions aimed to determine what factors lead to cross-border marriage (Table 2.7). Overall, 73.4% of the respondents agreed with all the factors of cross- border marriage. The top four highest factors leading to cross-border marriage are; cross-border marriage is a type of marriage that is fast and cheap (87.6%), the high cost of marriage (81.2%) the strict laws to apply for polygamy (78.8%), and having no permission from the *wali* for the marriage to take place (76.8%).

For the median factors are; ignorance of law (76.4%), followed by more than three-quarters of the respondents (76.2%) felt that the strict and complex marriage procedure in each state is the contributing factor leading to the cross-border marriage, followed by 76.0% of the respondents agreed it is a way to avoid from being charged and given penalty for being involved in close proximity and 73.8% of the respondents agreed that it is a way to avoid them from being involved in *zina* (unlawful sexual relation), 72.0% of the respondents agree that the leniency of laws and policies in Thailand and Malaysia. Lastly, the top four lowest items are; pregnancy before marriage (65.8%).desire to increase life status socially and economically by marrying someone perceived to have a high life status (58.8%), and having a great promotion from the agent (57.2%).

Table 2.7 Factors Leading to Cross-Border Marriage

No.	The Factors Leading to the Cross-border Marriage are…	Level of Agreement (%)*					Mean	SD	%
		1	2	3	4	5			
1	A type of marriage that is fast and cheap.		1.0	14.0	31.0	54.0	4.380	0.763	87.6
2	The high cost for marriage has led the couples to decide to tie the knot at the border.		3.0	18.0	49.0	30.0	4.060	0.776	81.2
3	The strict laws in polygamy.			24.0	58.0	18.0	3.940	0.649	78.8
4	Having no permission from the *wali* for the marriage to take place.		1.0	32.0	49.0	18.0	3.840	0.721	76.8
5	Ignorance of law		3.0	43.0	23.0	31.0	3.820	0.914	76.4
6	The strict and complex marriage procedure in each state.			33.0	53.0	14.0	3.810	0.662	76.2
7	To avoid from being charged and given penalty for being involved in close proximity.			30.0	60.0	10.0	3.800	0.603	76.0
8	To avoid from being involved in *zina* (unlawful sexual relation).			37.0	57.0	6.0	3.690	0.581	73.8
9	The lenient laws and policies in Thailand and Malaysia.			44.0	52.0	4.0	3.600	0.569	72.0
10	Getting pregnant Before getting married.	1.0	15.0	46.0	30.0	8.0	3.290	0.856	65.8
11	The desire to increase life status socially and economically by marrying someone perceived to have a high life status.		16.0	75.0	8.0	1.0	2.940	0.528	58.8
12	Great promotion from the agent or middleman.		17.0	80.0	3.0		2.860	0.427	57.2
	Total						3.67	0.671	73.4

7. Discussions of the Data

Almost all of the respondents for this study are of Malay race ranging from the age of 31 to 50 years old. The youngest respondent is 17 years of age while the oldest is 72 years of age. The average of the respondents' ages is 36.600. It is found that the education background of half of the respondents is only up to secondary school level as they obtained Sijil Pelajaran Malaysia (SPM) and majority of them are educated in non-religious education. This finding directly supports Nasran's suggestion that level and types of education play important roles in influencing one's decision whether to go or not to go for cross-border marriage.[11] Therefore, the current finding suggests that possessing higher education level, especially religious education could prevent one from committing cross-border marriage as he would be able to measure the cause and effect of such marriage mentally and spiritually.

One interesting finding in the respondents' demographic characteristics is almost three-quarters of the respondents live in the rural area while the other quarter lives in the urban area. This indicates that rural people in States of Perlis are more interested in cross-border marriage than the urban people.

Another important finding is that majority of the respondents are working, and nearly half of the respondents are involved in business and self-employed. This finding is in line with previous studies by Noraini[12] and Nasran[13] who found that businessmen and self-employed have higher tendency to go for cross-border marriage as compared with other category of jobs. This study also finds that less than one-third of the respondents have an income below RM1000 which proves that cross-border marriage can be afforded by any income earners.

The most popular countries where Muslims in State of Perlis choose to solemnise their cross-border marriage are Thailand and Malaysia. As far as Thailand is concerned, the present study finds that the province of Songkhla is the favorite place of cross-border marriage among Muslim couples in Malaysia. This finding however, differs from the previous research where the province of Narathiwat was found to be the favorite place for them to get married.[14] The change of finding in the current study from the previous might be due to today's better and easier access to the province of Songkhla by roads and other means of transportations such as train and flight.[15] Another possible explanation is the stability and safety of this province, thus making the province of Songkhla, Thailand as the target place for Muslims in Malaysia to get married.

This result may also be explained by the fact that the office of Consulate General of Malaysia is located in the particular province which makes it easier for the couples who have just got married to get faster clearance. Another important finding is that more than half of the respondents who contracted cross-border marriage are actually contracting polygamous marriage while less than half is contracting monogamous marriage. However, this finding does not support the previous research. This is because, according to Noraini, more than half of the respondents contracted their cross-border marriage by way of monogamous marriage and the rest contracted by polygamous marriage.[16]

A possible explanation for the different finding in the current and previous study is because of the amendment in the law that provides stricter procedure for those who wish to contract polygamous marriage in Malaysia. Thus, the way out for couples in Malaysia is to flee away and get married in the Southern Thailand. This result proves Gavin Jones' finding where in her research, Jones argued that the strict rules for polygamous marriage cause Malaysians to escape and get married across the border.[17] This finding can help us understand that if the laws are too strict, the violation of the laws may occur as a result of rebelliousness on the part of the laymen who are expected to abide by the law.

Consistent with the finding by Nasran[18] and Noraini,[19] the current study also discovers that three-quarters of the respondents utilised the service of *Wali Am* for the purpose of solemnisation of their marriage. On the other hand, with regards to the requirement of having two witnesses to witness the marriage, almost two-third of the respondents actually employed witnesses from Thailand.

As mentioned in the literature review that most of the couples obtain services to get married at the border from an agent.[20] Surprisingly, the current study reveals that only minority of the respondents did that; while the majority of them manage to handle their own marriage at the border without any help from an agent. A possible explanation for this might be that majority of the respondents know how to handle the matter by themselves because Thais use same language as Malaysians. Thus, it makes easy for them to communicate and find out.

Nevertheless, an important issue that surfaces based on this finding is the issue regarding use of service of a middleman or agent. Even though the current finding shows that respondents tend to have their cross-border marriage without the aid of an agent, it is important that the issue is brought to the attention of the government so that policies can be drafted which would serve as a way to control it in the future. The current study is in agreement with the study of Wang and Chang where they found that there were agencies in Taiwan that have cheated their clients' money.[21]

Another important finding with regards to the factors leading to cross-border marriage is that the majority of the respondents prefer to practise cross-border marriage due to the nature of its process that is fast, less hassle and cheaper than normal marriage performed according to customs. This is because, today's expenses for marriage ceremony is too expensive and before getting married the couples must undergo several steps, for example, marriage course, HIV test and interview session with a religious officer. These difficulties could contribute to the cross-border marriage. This finding is in line with the previous studies by Mahamad[22] and Noraini[23] where they discovered that the process of cross-border marriage is quick and cheaper than the others type of marriage. Therefore, this has made the cross- border marriage very popular among Malaysians.

This finding also reveals that majority of the respondents involved in cross- border marriage is due to high cost in marriage celebrated according to the customs. Among the plausible clarifications for this finding is that marriage expenditure is too high. Therefore, for couples who cannot afford the cost, the easiest way is to have the marriage solemnised at the border. This finding is consistent with data obtained by Nasran that one-tenth of the respondents who were involved in cross-border marriage is due to high cost of expenditure in marriage. Thus, it is suggested that marriage ceremony should be moderate and reasonable.

Apart from that, more than three quarters of the respondents strongly agreed that a strict law in polygamous marriage is one of the factors influencing cross-border marriage. An interesting explanation for this finding is simply husband wishes to contract subsequent marriage and for that he has to apply from the court a permission to practise polygamy. For him, the procedures are hassles, and it is a waste of time. This finding matches with an earlier study by Zaleha and Raihanah where they found that due to the high possibility that their application to practise polygamy be rejected, so husbands decide to marry at the border.[24]

This finding may help us to understand that there is a high tendency that strict laws and procedures before one could contract polygamous marriage can lead to him to go for cross-border marriage. The finding also reveals that a factor leading to cross-border marriage is due to *wali*'s refusal in giving away consent of marriage. This is strongly agreed by the majority of the

respondents. The reason for the refusal is connected with the *wali's* concern about the issue of equality *(kafaah)* between his daughter and the man who is asking for her hand in marriage.

In Islam, even though equality is not a pillar of marriage, it is emphasised. Therefore, in the case where the parents of the girl are not agreeable with the marriage, she and the boyfriend would decide to get married at the border. This finding is in accordance with Mahamad's study indicating that *wali's* refusal in giving away consent of marriage leads to the cross-border marriage.

IV. CONCLUSIONS AND RECOMMENDATIONS

In relations to the current findings, the study makes the following suggestions for the purpose of reducing and preventing cross-border marriage from occurring in the future. Therefore, several recommendations can be suggested to curb this phenomenon as it affects the family institution. The recommendations are as follow;

1. Clearer and More Specific Legal Definition of Cross-Border Marriage

The research has shown that there is no legal definition for cross-border marriage. In other words, the term of 'cross-border marriage' is not statutorily defined accordingly. Therefore, it is suggested that the term should be precisely defined by bearing all its possible elements and descriptions under the law in order to avoid misinterpretation of the act and confusion among the society members. For example, "Cross- Border Marriage can be legally defined as a marriage without authorisation of the court or Registrar of the Marriage, Divorce and Ruju' in each state and it can be solemnised either in Malaysia or outside Malaysia"

2. Specific Provision on Cross-Border Marriage under the Islamic Family Laws

Deriving from the above suggestion, it is proposed that there should be a specific provision in the Islamic Family Laws for each state pertaining cross-border marriage. Currently, cross-border marriage is treated under the provision of sections 40(2), 35, 123 and 133 of the Islamic Family Law in the State of Perlis. Therefore, possible amendment to provide a more precise law on cross-border marriage should be made under section 40(2) of the Islamic Family Law enactments in each state. Furthermore, a specific provision must also be introduced regarding the services of an agent in cross-border marriage. For this provision, a proper punishment shall be imposed for middleman or an agent who involves in cross-border marriage.

3. Dissemination of Knowledge

Clear information on matters relating to Islamic family laws should be disseminated to the public, especially the young Muslims. It could be done using varieties of media channels that can reach them. Therefore, the study suggests that the Legal Aid Department should organize more field campaigns on the illegality of this kind of marriage and the importance of registration of marriage in order to ensure the effectiveness of dissemination of such information to the members of public in the urban and rural areas.

ENDNOTES

[1] Prof Madya Dr. Mohd Nasran (et al.) "Perkahwinan Luar Negara Tanpa Kebenaran di Selatan Thailand," Fakulti Pengajian Islam, First edition, 2008, at 28.

[2] Section 2 of Islamic Family law (Perlis) Enactment 2006 has defined "*wali Mujbir*" as "father or paternal grandfather and above".

[3] Section 7(1)Islamic Family law (Perlis) Enactment 2006.

[4] Section 7(2) Islamic Family law (Perlis) Enactment 2006.

[5] Section 13(b) Islamic Family law (Perlis) Enactment 2006.

[6] Section 34, Islamic Family law (Perlis) Enactment 2006.
[7] Section 25, Islamic Family law (Perlis) Enactment 2006.
[8] Section 19, Islamic Family law (Perlis) Enactment 2006.
[9] Section 40 (2), Islamic Family law (Perlis) Enactment 2006.
[10] Section 31(1), Islamic Family law (Perlis) Enactment 2006.
[11] Mohd. Nasran et.al, "Perkahwinan Luar Negara…," at 50.
[12] Noraini Md Hashim, " Registration of Marriage…," at 232.
[13] Mohd. Nasran et.al, "Perkahwinan Luar Negara…," at 51.
[14] Noraini Md Hashim, " Registration of Marriage…," at 222.
[15] Md Akhir Yaacob and Siti Zalikhah Md Noor," Beberapa Aspek Mengenai…," at 51.
[16] Noraini Md Hashim, " Registration of Marriage…," at 204
[17] Gavin W. Jones, "Marriage and Divorce in Islamic South-East Asia," Kuala Lumpur Oxford University Press, 1994, at 276
[18] Nasran find that almost of the respondents (91.25%) used wali Am for the solemnisation of marriage and he also discovered that, respondent prefer to use both witnesses from Thailand. See Mohd. Nasran et.al, "Perkahwinan Luar Negara…," at 58-59
[19] Noraini finds in her study that 38.6% of the respondents prefer to use wali am for their solemnisation of the marriage. Noraini Md Hashim, " Registration of Marriage…," at 207
[20] Intan Nadia Ghulam Khan… (et al.) "Nikah Sindiket Di Malaysia," at 24, see also Zaleha and Raihanah, "Protecting Muslim Women….," at 190.
[21] Zan Wang and Shu Ming Ching, "The Commodification of International Marriages…," at 108.
[22] Najibah et.al, "Siri Isu-isu Mahkamah Syariah….," at 14.
[23] Noraini Md Hashim, " Registration of Marriage…," at 204.
[24] Zaleha and Raihanah, "Protecting Muslim Women….," at 188.

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The Legal and Economic Ramifications of Apology in Civil Dispute Resolution Process

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ABSTRACT

In recent years, the role of apology in resolving conflicts and preventing litigation has gained much prominence. Particularly, in civil litigation, apology has the potential to promote negotiations, generate settlements and to some extent mitigate and absolve liability. During the civil dispute resolution process, apology can exist and be used at various stages from the moment the wrong has been committed until the end of the pre-action and pre-trial procedures. Further, apology has been long recognised as an effective tool in the alternative dispute resolution process and a mitigating factor in cases on defamation and contempt of court. Studies have also shown that apology has been efficient in settling family disputes by expediting the reconciliation process. Although some apologies may be protected under the principle of "without prejudice communication" which promotes settlement out of court, it nevertheless, has the effect of being a "double-edged sword" and be used against the party who offered the apology as an evidence to establish guilt. In view of this, several jurisdictions have developed legal mechanisms to counter the negative effects of apologies while at the same time, trying to safeguard the benefits of apologies in promoting early settlements and reducing the number of litigated cases. By doing so, positive consequences whether financially as well as economically, can be seen in relation to the amount of compensation awarded as well as the relevant legal costs incurred at the end of the civil dispute resolution process. As such, this research paper seeks to discuss the ramifications of apology from the legal as well as economic perspectives in relation to civil disputes with the aim of safeguarding the benefits of apologies as well as promoting the use of apologies at various stages of the civil dispute resolution process.

Keywords: *Legal, Economic, Civil Dispute, Resolution Process*

I. Introduction

The role of apology in resolving conflicts has become very significant. Particularly in civil cases, apology have been recognised to promote negotiations, generate settlements and to some extent mitigate and absolve liability. In the words of Shuman, "an apology has the potential to help people who have suffered serious emotional harm through the wrongdoing of others in ways that monetary damages alone cannot" [1]. This statement suggests that, although monetary compensation has long been the main objective of the tort system, apology may be able to provide more benefits to the plaintiffs as it is able to assists them to procure non-legal remedies in the form of explanation and statements of regret from the defendants. The tort system has long been criticised as being ill-equipped to provide these kind of remedies, other than being a system that is costly, cumbersome and inefficient. By incorporating apologies at various stages of the civil dispute resolution process may allay concerns regarding the deficiencies of the tort system in providing the necessary redress and justice for persons suffering from harm, whether physical or emotional.

II. Discussion

1. The Various Definitions of Apology

The variety of definition of apologies has emerged due to the difference in the cultural and disciplinary background of the scholars [2]. According to Cohen, the term "apology" has its roots in the Greek word of "logos" which means "speech" or "word" and it is usually associated with formal justification, defense or explanation [3]. It actually refers to any statement or remarks made following any intentional or unintentional injury and a working definition of apology include "an admission of one's fault combined with an expression of regret for having injured another as well as an expression of sympathy for the other's injury"[4]. According to Lazare, apology is the expression of responsibility for an offense together with an expression of remorse. The offence here refers to violation of any rule, ethical principle or careless behaviour that results in injury or discomfort towards another in the form of hurt feelings, degradation or humiliation [5]. Further, apologies also may refer to admissions of blameworthiness and regret for any undesirable event which includes transgression, harmful act and embarrassing incident [6]. From the sociological perspective, according to Tavuchis, in defining apology, there must be two fundamental requirements which include that the offender has to be sorry and he also must say so or communicate his apology to the one who has been offended [7]. In commenting on Tavuchis' definition, Macleod stated that, in his definition, the apology should at least include an admission of responsibility and whatever statement that follows the admission must express sorrow on the part of the wrongdoer [8].

Major works on apology comes from the psychology field of study whereby from the psychological perspective, apology has been regarded as a form of remedial behaviour that is an attempt to explain about the harmful act so that it will become acceptable to the injured party [9]. From an ethical perspective, authors such as Taft regards apology as an internal process whereby in apologizing, a person will engage with himself to identify the offence and will later communicate it to the offended party. In doing so, the offender will move towards willingness to admit his fault and to express his remorse for the act done by him [10]. Further, a statutory definition of apology can be found from Ontario Apology Act 2009 whereby, the statute define apology as "an expression of sympathy or regret, a statement that a person is sorry or any other words or actions indicating contrition or commiseration, whether or not the words or actions admit fault or liability or imply an admission of fault or liability in connection with the matter to which the words or actions relate" [11]. Since the definition of apologies varies from various perspective, it is important to identify the core elements of an apology as discussed in the existing literature to determine the basis of a complete apology which this paper seeks to discuss [8].

2. The Core Elements of an Apology

According to Lazare, there are five elements of an apology namely: (1) there must be an acknowledgement of the offence, (2) there must be expression of remorse, (3) the offender must make appropriate reparation, (4) there must be an expression of care towards the injured party, (5) there must be an element of restoration of the offended party's dignity and self-respect [5]. Similarly, in the opinion of Macleod, there are seven core elements in an apology. They are (1) recognition of the wrongful act that involves the identification and acknowledgement of the wrong, (2) remorse which consist of genuine expressions relating to regret for the harm committed, (3) the wrongdoer assume responsibility or blame for the wrongful act, (4) repentance which includes regret, shame, humility, and sincerity at the part of the wrongdoer (5) providing reasons

or justifications for the harm done toward the wronged party, (6) reparation or restitution for the harm inflicted on the other party, and (7) reform on the part of the wrongdoer to enable both parties to learn from the incident and move forward [8].

Marrus, on the other hand identifies four major components of apology whereby, it must include (1) acknowledgement of a wrong committed including the harm it caused, (2) an acceptance of responsibility, (3) an expression of regret or remorse for the harm done, and (4) a commitment for reparation and non-repetition of the wrongful act [12]. According to Smith, a philosopher, the purpose of apology is to finally satisfy certain emotional expectation by the parties involved and according to him, there are several elements that must be fulfilled. (1) there must be a factual records of the event whereby the material facts must be identified by the parties involved, (2) there must be an acceptance of blame on the part of the wrongdoer, (3) the wrongdoer must be morally responsible for the fault, and (4) the wrongdoer must convey their regret and commitment for non-repetition of the fault [13].

Therefore, although authors have different opinion about the elements of a true apology, there are some similarities amongst them, particularly, that it must contain an admission or acknowledgement of fault, the person must take responsibility over the wrongdoing and there must be some sort or remorse or regret on the part of the wrongdoer. This findings is consistent with the findings of Zammint, whereby the most important and contentious elements of apology are (1) there must be an acknowledgement of fault and (2) the wrongdoer must take responsibility over the fault [14].

3. The Position of Apology in Dispute Resolution Process

Apology can exists at various stages in the dispute resolution process including spontaneously after the event, during the negotiation, mediation or even when the adjudication takes place. The implications of apologies differ according to the various stages that they have been offered [8].

3.1. Spontaneous Apology

At the first instance, apology can be made right after the injury was committed by the defendant. According to Mcleod, spontaneous apologies usually have the highest possibility to be accepted as being sincere and therapeutic in nature towards the parties. This is possible due to the fact that since the apology has been made promptly after the injury, it will usually pacify the wronged party before any legal action is initiated. However, spontaneous apology usually take place in an environment in which there is no proper legal advice and no legal privilege [8]. Despite apology at this stage can be seen as very sincere and might have the ability to disarm anger, nevertheless, apology at this stage have the effect of a "double-edged sword" whereby it can be used against the party who offered the apology as an admission of guilt in any legal proceedings [15]. Such negative implications have deterred parties from offering spontaneous apology and particularly in medical negligence cases, legal advisors often advise their clients not to apologise due to the fact that it can backfire against them during the legal proceedings [15].

3.2. Apology during Out of Court Settlement

The current civil litigation process promotes parties to settle their dispute amicably outside the court at any time before the decision is being made by the judge where it can be in the form of settlement agreement or by way of consent judgement. Therefore, apology may exists at this juncture and it may promote settlement out of court. During this out of court settlement process, apology offered by the parties might not be admissible as evidence as they might fall under the hearsay rule [16]. However, in some jurisdictions including Malaysia, the statement might still be

admissible as they can be considered as statement made by the party to the litigation as provided in section 18 of the Evidence Act 1950. Hence, apology at this stage may again be seen as an admission of guilt on the part of the defendant and this is the main reason why defendants will refuse to apologise towards the injured party.

3.3. Apology in Mediation Process

The role of apology has been said to be more significant in the alternative dispute resolution (ADR) mechanism such as mediation rather than litigation as this process offers higher hope and potential for healing the relationship between the parties before the dispute is brought to court [17]. According to the Oxford Law Dictionary, mediation is one form of the alternative dispute resolution mechanism which involve a neutral third party known as the mediator who will assist the parties involved in the dispute or negotiations to achieve a mutually acceptable resolution of the points in conflict. According to Levi, although apology can only come from the parties themselves, mediators are recommended to propose for an apology even when it was not initiated by either parties whenever appropriate because it can be an effective tool in resolving the dispute [18]. Apology at this juncture will reduce anger as well as the hostility between the parties and since mediation process does not restricted to the rules of evidence nor procedure, this would be a great avenue for the wrongdoer to offer sincere apology to the victim as the apology offered cannot be used as an admission of guilt in the court of law should the mediation failed in its process [19]. Further, many states has enacted mediation legislations which promotes the usage of mediation as a form of ADR to encourage and promote the usage of mediation to resolve civil disputes. In Malaysia, the Mediation Act 2012 was enacted to promote mediation as a dispute resolution mechanism and recognised its benefit in providing a fair, speedy and cost-effective process [20]. This legislation has made it clear that any communication made during this process is privileged and is not subjected to discovery and they are inadmissible as evidence for any proceedings as provided in Section 16 of the Act. According to Carroll, similar provisions exist in jurisdictions such as Australia [21], several states in the United States [22], and Hong Kong [23].Therefore, by virtue of this provision, parties will be convinced to make statements which includes apology and statement or fault without any legal implication for it to be used against them in any other further proceedings. In some jurisdictions, mediation has been incorporated in their civil dispute litigation process whereby with the establishment of court annexed mediation [24]. Court-annexed mediation means that mediation that is part of the procedure and sponsored by the court whereby the mediator may be any officer of the court such as the registrar, court-annexed mediation will take place after the case has been filed by the court and incorporated into the civil dispute litigation process. It is clear that apology given by the parties if it's made during the court-annexed mediation session will be protected by the law from being used as admission of guilt by the court. During mediation process, the parties involved will have the opportunity to make any retraction or corrections of statements, offering statements of regrets as well as apology and this will likely affect the outcome of the dispute resolution process itself.

Carroll further stated that, there are several aspects of the mediation process that make it the best setting to apologize which includes, providing an opportunity for direct participations by the parties in the negotiation process and at the same time, allow it to be confidential as well as a meaningful dialogue between the parties without taking into account the legal complications of the apology. Besides that, it will also allow the parties to be clear about what the dispute all about is and the expectation of both parties. As a neutral third party, the mediator needs to play the very important role to remind the parties that litigation is not the only way to settle their dispute.

Mediation will thus, empower the parties to resolve the dispute their way and may provide more psychological benefits to the parties [2]. Since apology may serve various benefits to the parties during the mediation process as it provides the best platform for the parties to apologise, this has created attention and interest of legal scholars and legislators for apology to be used beyond mediation in the resolution of dispute process [25].

3.4. Apology in Pre-Action & Pre-Trial Procedure

In Malaysia, before a case is fixed for hearing before the trial judge, the case will undergo the pre-trial case management process according to Order 24 of the Rules of Court 2012 whereby the court have the power at any time after the commencement of the proceedings on its own motion to direct any or both parties to the proceedings to appear before the court and give directions as the court thinks fit [26]. The objective of pre-trial case management is to ensure the smooth running of the case when it is to be heard by the court later. At this stage, the court will consider any matter which includes the possibility for settlement of some or all the issues in dispute and requires the parties to furnish the courts with all the information as the courts thinks fit [27] and make other appropriate orders to secure a just, expeditious, and economical disposal of the actions [26]. Apology made by the defendant at this juncture towards the plaintiff can be protected under the cloak of "without prejudice communication" shield. Besides that, during this pre-trial case management process also, the court may direct parties to go for the court-annexed mediation as stated above [28]. In some jurisdiction, the procedural law also provides for the pre-action protocols where it promotes settlement at the earliest stage, even before the case been filed into the court. Pre-action stage has been introduced in the United Kingdom for several types of civil actions including, defamation, personal injury claims, professional negligence, resolution of clinical disputes and many more. For instance, the specific objectives of the United Kingdom Pre-Action Protocol for the Resolution of Clinical Disputes, are among others, to encourage transparency and early communication between the patient and healthcare provider, to ensure sufficient medical and other information to be disclosed promptly, to promote early settlement and also to encourage the defendant to make an early apology to the patient if appropriate [29]. Based on this protocol, apology is encouraged to be offered by the parties at the earliest stage even before when the case was filed in the court. This would be the best avenue for the party who caused the injury to express their apology without the fear of it to be used against them in the court of law and at the same time might defuse the anger on the part of the patient and may avoid litigation in totality.

3.5. Apology during the Course of Trial

Even after the action has been taken to the court, apology can still be made and have the possibilities to be used for the purpose of settlement out of court. At this stage, there is also possibility for the wrongdoer to apologise and admit to the liability which may lead to the faster disposal of the case. Although apology at this stage can be used for very strategic purposes, it has been effective in promoting consent judgement, (a judgement by the judge which is based on the agreement of the parties) or promoting parties to enter into settlement agreement. The wronged party would be induced to accept the lesser amount of compensation coupled with apology due to the reason that they will speed up the fruit of the litigation. According to Shuman, apology at this stage can become a "commodity" that may be bargained for by the parties. Although the nature of apology in this setting would be in *quid pro quo* basis, therefore, it has been seen to have lesser degree of sincerity than the spontaneous apologies [1]. During this process, the wrongdoer will only apologise when there exist is a real prospect of negotiations. Due to the importance

of promoting negotiations, the law protects apologies by providing shield by virtue of the "without prejudice communication". During this negotiation process, the parties involved can yield the benefits of apology whereby it will speed up the time for resolution as well as it have the possibility to reduce the expected liability of the wrongdoer in the action should the apology be accepted by the wronged party [30]. Since spontaneous apology take place right after the wrong has been committed, such apology might prevent the wrongdoing from becoming more severe and should the apology offered at the earliest time as possible, this might initiate the negotiations process between the parties [31]. Although apology has been primarily used to establish liability, there are also some apologies which are protected by the law during the trial itself which is apology given in the course of negotiation for settlement are protected under the "without prejudice communication". This can be seen in the case of Dusun Desaru Sdn Bhd & Anor v Wang Ah Yu & Ors [32], Abdul Malik Ishak J has explained on the application of the rule of "without prejudice communication" whereby, before the principle to be activated, there must be two common features to be present before this privilege communication can be activated which are (1) the parties must be in dispute and due to that dispute, the parties are negotiating between each other, and (2) the communication between them must contain suggested terms that would finally lead to the settlement of the dispute [33]. From this case, it can be suggested that apology can be protected under this principle if they are given during negotiation after the dispute has arisen, but this principle would not protect spontaneous apology which has been given spontaneously or right after the injury was committed.

4. The Legal Ramifications of Apology in the Civil Dispute Resolution Process

Although apologies offer much benefits in defusing the desire for patients' to litigate but it also has the effect of being a 'double-edge' sword and be seen as self-incriminating on the party who apologises [34]. However, apology is not a foreign concept in the legal system whereby it has become established principles in several areas of law in being used as an evidence to establish guilt, mitigate or absolve the liability of the parties.

4.1. Apology as an Admission of Guilt

From the perspective of the law of evidence, apology has long been used to prove liability in the case of negligence [34]. Apology made by the one who caused the injury can be considered as statements made out court and the court may treat them to be inadmissible to establish liability as they can be a form of hearsay evidence. However, apology may be admissible as a statement which falls outside the hearsay rule which is known as "admission by party-opponent". In Malaysia, this is provided in section 18 of the Evidence Act 1950 whereby it is provided that;

18. Admission by party to proceeding, his agent or person interested

(1) Statements made by a party to the proceeding or by an agent to any such party whom the court regards under the circumstances of the case as expressly or impliedly authorized by him to make them are admissions.

Therefore, the fear of apology to be used against the one who offered them is real especially when such apology does not fall under the "without prejudice communication" privilege that is to be given to the one who offered apology for the purpose of settlement. Despite the fact apology can be used against the person who offered them as an admission of guilt, nevertheless, it can never be the sole evidence for the court to find that liability on the person who gave them [34]. This can be illustrated in the case of Gurmit Kaur A/P Jaswant Singh v Tung Shin Hospital &

Anor [35], whereby a woman sought treatment from the defendant which is a medical practitioner to remove a fibroid in her uterus. However, it was found out later that a hysterectomy procedure was conducted on her which caused her unable to have any more children. The medical practitioner was found liable and the apology given by him was considered as a proof for the negligence committed. The judge in her judgement stated *"My view, when the Second Defendant had apologized to the Plaintiff, proves that the Second Defendant had admitted to a mistake he had done"* [35]. This can be seen as a clear illustration on how an apology can be viewed as an admission of guilt.

4.2. Apology as a Defence and Mitigating Factor

In the tort of defamation, retraction, withdrawal, correction of statements, and apology can be offered as an evidence by the defamer to mitigate the damages awarded by the court. Apology is considered for this matter as it can be an evidence to weaken the inference of malice or bad faith on the part of defamer [36]. Apology as a mitigating factor has been long recognised in this area of law [37]. If the defamer provides apology as soon as he possibly can, it may have the effect of defusing the spur litigation by dissuading plaintiffs from initiating legal process. At this juncture, the apology given can be scrutinized by the court for the consideration for mitigation of damages [38]. It is important for the court to evaluate and consider apology offered by the defamer in defamation cases as the nature of defamation which aims to protect reputational interest of a person will reduce the mental and emotional distress on the plaintiff as well as having restorative effect that the money cannot sufficiently compensate [1]. The damages awarded in a defamation case will depends on the severity of the defamatory statement and how it affect the plaintiff. In assessing the severity of the defamatory statement, during the fact finding, the court may consider the apology to mitigate the damages to be awarded as defamation law does not only protect economic loses but non-economic loses as well, for example emotional distress suffered by the plaintiff. Therefore, by allowing the defendant to apologise, it will have the effect in reducing the mental or emotional distress which will ultimately restore the plaintiff in a way that money will not be able to do [39].

In Malaysia, before the court decides on the amount of damages to be awarded to the plaintiff in a defamation suit, the court will take into consideration the mitigating factors which may result in lowering the award of damages. If the defamer is able to give evidence to suggest that he has either made, or offered to make an apology to the plaintiff, the court will consider this as a mitigating factor as long as the apology was offered as soon as the defamer has opportunity to do so [40]. The position of apology in the law of defamation has also been codified in Section 10 of the Defamation Act 1957 where it reads as follows;

> 10. (1) In any action for defamation the defendant may (after notice in writing of his intention to do so duly given to the plaintiff at the time of filing his written statement of his case) give in evidence, in mitigation of damages, that he made or offered an apology to the plaintiff for such defamation before the commencement of such action or as soon afterwards as he had an opportunity of doing so in case the action shall have been commenced before there was an opportunity of making or offering such apology.

Gopal Sri Ram JCA, as he then was, in the case of MGG Pillai v Tan Sri Dato' Vincent Tan Chee Yioun & Other Appeals [41] mentioned about apology in a defamation case by saying that although apology does not exonerating a defendant, it has the effect of reducing the quantum of damages, and in some cases it can substantially reduce the amount of damages. He later added

that, although apology have the mitigating effect towards the amount of damages, the court also may award aggravated and exemplary damages if such apology aggravates the libel to reflects the court's disapproval towards the defamer's conduct. However, for such apology to be considered, it must be a full and frank apology and there must not be any conditions or qualifications attached to it [42]. Apology also play roles in actions for libel contained in newspaper as provided in the subsection 2 of section 10 of the Defamation Act 1957.

(2) In an action for libel contained in any newspaper any defendant who has paid money into court under the provisions of any written law relating to civil procedure may state in mitigation of damages, in his written statement of his case, that such libel was inserted in such newspaper without actual malice and without gross negligence and that, before the commencement of the action or at the earliest opportunity afterwards, he inserted or offered to insert in such newspaper a full apology for the said libel, or, if the newspaper in which the said libel appeared should be ordinarily published at intervals exceeding one week, had offered to publish the said apology in any newspaper to be selected by the plaintiff in such action.

For any defamation suits taken against any newspaper or broadcast, the defamer may use apology to mitigate the damages if the defamatory statements were inserted without any actual malice and it must not be caused by any gross negligence on the part of the newspaper or broadcast in the making statements. However, for the mitigation to be effective, the law also requires that the defamer to make a full apology in the in the newspaper or broadcast before the commencement of the action or as soon as the defamer has opportunity to do so [40].

Apology also plays a significant role in the law governing the 'contempt of court'. Contempt of court refers to any conduct that tends to bring the authority and the administration of the law into disrespect or disregard or to interfere with or prejudice parties, litigants, their witnesses during the litigation. The principal aim of this branch of law is not to protect the dignity of the judges but to protect the administration of justice and the fundamental supremacy of the law [43]. In an action of contempt of court an apology by the contemnor may "purge" a contempt of court charge or further suspend or mitigate the sentence for the charge [37].The superior courts in Malaysia are given the power to punish contempt of court by virtue of Article 126 of the Federal Constitution.

> 126. Power to punish for contempt The Federal Court, the Court of Appeal or a High Court shall have power to punish any contempt of itself.

For the apology to be effective in a contempt of court case, the apology offered by the contemnor must be sincere and unconditional [44]. It must also be made clearly and done as soon as possible as a delayed apology can be considered by the court as an after-thought and intended merely to avoid punishment [45].

5. The Economic Ramifications of Apology in the Civil Dispute Resolution Process

The tort system requires the wrongdoer to compensate its victims for the pecuniary and the non-pecuniary losses he or she has suffered. The principle of *restitutio in integrum* requires the victim to be placed in the pre-accident position so far as money can do so. In some of the jurisdictions, apology laws has been enacted whereby apology has been given full protection from being admissible in the court whereby the law makes them inadmissible and this will create a conducive environment to promote apology. There are some economic considerations that

must be highlighted with regards to the application of apology law in the civil dispute resolution process.

5.1. Apology may reduce the Number of Litigation

Amongst the economic implications of having apology laws is that it will decrease the number of cases filed as well as lowering settlement amounts in civil cases [46]. Enacting apology laws will encourage faster and more cost-effective resolution of medical disputes as it can be an effective means of preventing litigation [47]. This is due to the fact that medical practitioners are given the legal platform to make an apology which have the possibility to disarm the anger on the part of the patient. In Australia, it is believed that the introduction of apology laws has been able to reduce the number of litigated cases as the practice of apology will 'reduce the propensity of victims of accidents to sue'[48] Although there is no direct empirical data to show the reduction of medical disputes due to apology law, it has been found that there is significant reduction in number of new claims for compensation, increased number of closed claims and a reduction as to the proportions of large damage awards after the notable tort law reform in Australia which had allowed the defendants to apologise without the fear of that it will be considered an admission of guilt [49]. In the United States of America, effective disclosure has been found successful in reducing cost of a medical dispute process which had improved patient safety, and restore trust between the medical practitioner and the patient [50]. Although there are differences in the workings and approach on apology laws taken by several states, the culture of transparency through disclosure and apology has been manifested in the enactment of the apology laws in more than 35 states. In a research conducted by the Michigan Health Services reported that since the introduction of their apology and disclosure program, 'per case payments' had decreased by 47% and the settlement time had reduced from 20 months to 6 months [51]. Although the research was only conducted at hospital level, it can be seen that apology, disclosure and transparency do not only have ethical benefits but also financial & economic benefits as well.

5.2. The Effect of Apology towards the Amount of Compensation

In the state of Kentucky, after seventeen years of introducing a policy of full disclosure and apology, only three cases have gone to trial, with an average settlement of $16,000 [15]. Although lowering settlement amount is something good to the medical practitioner and the relevant institutions, the concern would be whether or not the patient will be sufficiently compensated for the injury suffered by the medical practitioner [47]. When medical practitioners are given the legal shield from liability for apologizing after a medical mishap, the patient will no longer perceive the medical professional as a personal threat [52]. Thus, it will reduce the tension and open the door to forgiveness and will create emotional vulnerability on the part of the patient which might encouraged them to accept settlements that are inappropriately lower than what they actually deserved [8]. Therefore, when apology is being exploited, it may contribute to the victims being under-compensated for the harm done towards them. The victim will no longer be in a position as though the accident did not occur and this will defeat the purpose of damages which is to place the patient in such position. This would be one of the economic implications as particulalrly, in medical negligence cases, where many of the victims usually wanted the medical practitioner to be responsible for the injury and to avoid causing the same harm to others [15].

5.3. Reducing the Cost of Civil Litigation

Further, the enactment of apology legislation has significantly reduced legal cost. Lawyers' fees had also dropped from three million dollars to one million dollars, and malpractice suits and notices of intent to sue have dropped from 262 in 2001 to approximately 130 per year [53]. Thus,

by allowing medical practitioners to apologise without fear of any negative legal consequence, will eventually encourage natural, open and direct dialogue between the parties and reduce the tension, antagonism and anger which will, ultimately, disarm the desire on the part of the patient to retaliate [3].

III. Closing

It can be seen that the making of apologies has legal and economic ramifications in the civil dispute resolution process. With the use of strategic apology in the legal system, it will bring positive outcome towards the parties in resolving the dispute between them. Although there are already some protection given by the law to parties who offered apology, this protection is still insufficient as it is always believed that apology will bring adverse consequence to the one who apologized and this has been proved by several jurisdiction such as the United States of America, Australia and Canada which had triggered them to introduce and implement apology legislations to give certainty to the implications of apologies made by relevant parties. Undeniably, the use of apologies during the dispute resolution process will eventually reduce the number of potential lawsuits, promoting prospects of settlement and inculcate a sustainable culture of honesty and openness that is fundamental in gaining public trust within any legal system.

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Internet of Things: Investigating Its Social and Legal Implications in A Connected Society

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ABSTRACT.

The myriad of successive technological waves have affected social lives and challenged legal norms in modern societies. The Internet of Things ('IoT') is one of those technological waves and is considered by many as the first real evolution of the Internet. It is about the digitization of physical things and objects, which enable them to communicate information about themselves and their surrounding environment with each other. Connected environment such as this could undeniably impact various aspects of life be it trade, services, healthcare, education as well as public governance. The "Internet of Things" also challenge existing legal concepts and this has in turn led to questions about the effectiveness and ability of laws to coexist with the rapid technology. This paper attempts to investigate the social and legal implications of the Internet of Things and its impacts on both society and governance, including on issues of data privacy, data security and data ownership. It is an introductory, descriptive and hypothetical analysis. It is also a preview to many more legally substantive questions surrounding the deployment of IoT in both commercial and non-commercial activities. This study is timely as it precedes the ongoing discussions about IoT from legal and social perspectives.

Keywords: *Internet of Things, Law and Regulations, Privacy, Security, Ownership*

I. Introduction

As an evolving technology, the Internet of Things (IoT) is expected to play an important role in daily life and to have an effect on social lives as well as to challenge legal norms in modern societies. The IoT is one of the successive technological waves and it is considered by many as the first real evolution of the Internet that will leave its imprint on most segments of modern life from little to big aspects.1 Even though the IoT was defined by many, there is no agreed concrete definition to the term IoT. However, the whole notion of the IoT is about digitization of physical things and enabling them to communicate information about themselves and their surrounding environment. Currently, there are countless of devices connect to the Internet, generate and process information

about themselves and their neighbours. In 2010, as an example, around 12.5 billion devices were estimated to be connected to the Internet and the number increased dramatically to 25 billion in 2015 and the waves of connectivity seem to grow as statistics estimate that in 2020 about 50 billion devices will be connected to the Internet.2

Connected environment such as this is likely to impact almost all aspects of life such as business, services, healthcare, fitness and wellbeing as well as consumer's lifestyle. In the business sector, the IoT cheap technologies could be employed to reduce cost and to improve services and productivity in manufacturing industries and agriculture, as an instance. In the healthcare area too, the IoT could help health professionals to serve more patients and detect diseases. Nevertheless, the endless connectivity may challenge existing legal concepts and this in turn could lead to question their effectiveness and ability to coexist with the rapid technology. Questions

such as who owns the information streamed in the IoT environment?' and 'who will legally be responsible in case of damage to people or property?' are among the challenges brought by the IoT.

This paper attempts to investigate the social and legal implications of the IoT and its impacts on both society and legal governance. Firstly, the current and foreseeable role that the IoT play in people lives will be discussed in order to present an idea about IoT penetration into modern life. Secondly, the paper will take three main areas into account when examining the IoT challenges to legal systems namely: data security, individual privacy and data ownership. This paper is an introductory study into many more legally substantive questions that arise due to the deployment of IoT in both commercial and non-commercial activities of people today. This study is arguably critical as it contributes to the ongoing discussion about the IoT from legal and social perspectives. It is a legal and doctrinal study, employing statutory interpretations, library work and case studies. In accordance with the notion of the IoT as a worldwide service, the jurisdiction involved is cross-jurisdictional but certain countries may be taken as an example. To achieve this, the paper will structurally be divided into four parts: the concept of the IoT, the IoT and its social implications, the legal challenges and the conclusion.

II. Discussion

1. The Concept of IoT

It is worthy to note that there is no precise single agreed definition to the term "Internet of Things" the definition differs depending on the approach and perspective taken.3 Semantically, the phrase "Internet of Things" consists of three words; Internet, of, and things. The Internet can be defined as "a global computer network providing a variety of information and communication facilities, consisting of interconnected networks using standardized communication protocols", while the thing is "an object that one need not, cannot, or does not wish to give a specific name to."4 In the IoT context, "things" can include almost everything such as computers, sensors, TV, refrigerators, vehicles, clothes, food, books, trees, utilities infrastructure, etc.

Citing some of the existing definitions could be a useful introduction to understand the concept of the IoT. For example, the International Telecommunication Union (ITU) through its Telecommunication Standardization Sector (ITU-T) defines the IoT from the perspective of technical standardization as "a global infrastructure for the information society, enabling advanced services by interconnecting (physical and virtual) things based on, existing and evolving, interoperable information and communication technologies".5 Another definition that focuses on the factions states that the IoT "connects devices such as everyday consumer objects and industrial equipment onto the network, enabling information gathering and management of these devices via software to increase efficiency, enable new services, or achieve other health, safety, or environmental benefits."6

Looking into the existing definitions of the IoT, one can conclude that the whole concept of the IoT is about digitization of physical things and enabling them to communicate information about themselves and their surrounding environments in order to provide advanced services. The next passage will analyse penetration of the IoT into modern activities by looking its implications in some sectors.

2. The Social Implications

As anticipated, IoT technology is going to play an essential role in modern life as it is being

used in many ways including, but not limited to, business, healthcare, fitness and wellbeing and consumers' lifestyle or in other words "IoT is in your home, in your car and phone, and, increasingly, on your body."7 In the subsequent sections we highlight the penetration of IoT on several aspects of life, namely business, healthcare and wellbeing, and consumers life.

2.1 The IoT in Business

The IoT is predicted to benefit the business sector in many ways such as reducing cost, creating values, facilitating new business models, opening new revenue doors, improving existing services and productivity in manufacturing, retail, agriculture, etc. For example, studies showed that 65% of organizations who employed IoT reported potential cost savings by an average of 28%, while 53% of them reported increased productivity and efficiency by 29%, in addition to the 38 percent of the organizations who said their revenues raised by an average of 33% due to the deployment of IoT.8

According to reports, IoT advantages include (1) cost saving – through improving asset utilization, enhancing process efficiency and boosting productivity; (2) increasing return on R&D investment; and (3) opening new business models and opportunities.9 It is also mentioned that every business will get three major benefits from the IoT namely: communication, control and cost savings.10 As an illustration, IoT solution can communicate the state of equipment (e.g. on, off, full or empty) and locate assets as well as persons within an organization. Regarding control and automation, the IoT enables business, as well as consumers, to remotely control assets through shutting down, turning equipment or closing/opening automated doors, etc. On top of that, the incomes accumulated or generated from IoT are huge. The International Data Corporation (IDC) estimated that IoT technology and services revenue will increase from US$1.9 trillion in 2013 to US$7.1 trillion in 2020.11 The above statistics and reports are a clear evident that the positive impact of the IoT in the business and organization is enormous.

2.2 Healthcare and Wellbeing

The health and fitness of human-being are among the sectors that have been benefiting from the IoT deployment. For instance, the global economic impact of the IoT in health and wellness could range from US$170 billion to US$1.6 trillion in 2020.12 Most of these values will come from using IoT devices for monitoring and treating illness and improving wellness by using data collected by those devices. IoT devices used in health and wellness can be divided into three categories: (1) ingestible, implantable, and injectable devices, (2) wearable devices worn or carried by people, and (3) non-wearable measurement devices used to transmit and collect health data periodically from the body.13 Using IoT technologies in healthcare could transfer healthcare from curing to preventing levels, improve clinical outcomes, and enable delivery of remote health-related services.14 In this regard, IoT devices can be used to manage chronic diseases and prevent diseases at other scenarios, in addition to the safeguards of the elderly.15

For instance, patients can be monitored and treated through using IoT devices. In return, this will improve the quality of care and lower its cost. For assisting the elderly, IoT devices that can detect a fall or other interruption can be used to monitor the ageing people's well-being and activities and then report any abnormality to those who are responsible for care such as family members.16 Taking into account the aforementioned, and the estimation by some that within a decade a third of U.S. population will have implantable devices inside their body, there is strong indication that that IoT health and fitness technologies will play a vital role in people life in the near future.17

2.3 Consumer Lifestyles

The impact of the IoT on consumers might be enormous as it has already presented in their surrounding environment such as homes, cars and even in their physical bodies such as wearable health and fitness devices, as mentioned in the previous paragraph. It was estimated that by 2020, half of the global consumers will own one or more IoT connected devices.18 These devices will offer consumers more personal and personalized products and services, based on their actual needs and locations.19 At home, for example, the IoT can help in terms of energy use, identifying deficiencies in home appliances, security and controlling home remotely.20

It could be true that the consumers will probably gain a lot of benefits from the IoT but in the same way they should also be aware that the IoT could bring a lot of harm to them too, especially in terms of security, privacy and so forth. The next passage will discuss some of those probable risks and response of laws to them.

3. IoT Legal Implications

Like the societal aspect, the legal side is also expected to be affected by the implementations of the IoT. Thus, the IoT might challenge the traditional rules that usually protect information such as data privacy and intellectual property laws.

The nature of the IoT as a cross-border service necessitates identification of the model laws that could efficiently regulate it. In this regard, some argue that self-regulation and international agreements can be considered more suitable for IoT as a global system, than the state law which is not appropriate due to its territorial limitations.21 The above could be true but this paper argues that combination of both international agreements and state laws that derived from them could be the most proper approach to regulate a worldwide system like the IoT. Talking about IoT specific regulation may be premature at this stage, however, highlighting some of the IoT challenges to the existing laws could be useful. This paper will examine IoT challenges to individual privacy, data security, and data ownership as selected examples on the difficulties of applying traditional rules in the information age.

3.1. Individual Privacy

The term 'privacy right' is a term that has its roots in international22 and national levels. However, the concept of privacy and its scope are fuzzy probably because privacy "is a time-honoured concept which manifest, in religion, philosophy and law."23 Thus, the nature of privacy depends on the norms of a given society and the value which is attached to it by that society.24 While there are some aspects of physical and territorial privacy, this paper focuses on the aspect of informational privacy which was defined as the individual's ability to control the circulation of information relating to them25 and also the claim of individuals... to determine for themselves when, how and to what extent information about them is communicated to others.26 Needless to say that protecting individual's privacy is potential for the growth and development of IoT services because distrust might lead users to partly or wholly abandon the usage of these services.27

Privacy laws generally seeks to protect individuals from unjustified surveillance or observation. The digital age effects on individuals' privacy can be seen in: (1) the ease of collecting data that leads to accumulation of massive personal information via recording almost every modern communication, (2) the digital revolution that flourishes the data market globally and gives every interested stakeholder an opportunity to examine and collect such data, and (3) that there is no means or mechanisms that can sufficiently protect data in the digital age.28

This becomes a serious issue in the IoT environment where everything can reveal everything and where generating, collecting recording and transmitting data about persons is easier done than said. As examples, some IoT smart devices such as smart TV and video game devices have voice recognition and vision features and so they can listen to conversations or watch activities and then transmit them to a cloud service for further processing29 – or to third parties without consent or even knowledge of users of such devices.30 Moreover, IoT devices such as cameras, sensors, and smart glasses can identify the location of persons and what they are doing at any-time.31

Legally speaking, the findings of IoT impacts on personal data protection principles32 pertaining to the processing of personal data in the electronic environment could be negative. For example, the principle of notice and choice aims to give affected individuals a chance to read policies and conditions of the services and then to freely agree or disagree with them before the data users, i.e. the industry, could ever collect and use the personal data. However, the IoT practically precludes the exercise of choices because the notice is predominantly absent by design. Often now the data processing is done without means to display privacy notices and/or to "provide fine-tuned consent in line with the preferences expressed by individuals."33

Needless to say, that scenarios such as the above do not give individuals the ability to control the circulation of information relating to them and therefore it violates data protection principles which grant data subjects the rights of knowing why and how the data will be used. Similar concerns apply to the inefficiency of data protection law in protecting data from unwanted disclosure, sharing or unjustifiable long retention after the use. Other IoT challenges can be observed in the security of data streamed in the IoT environment. The next section will elaborately discuss this issue.

3.2. Security of Data in the IoT

Security of data in the IoT environment is essential as IoT-based products and services are anticipated to penetrate into most societal settings. In the linguistic meaning, security is "the state of being or feeling secure".34 Not far from this, in the information technology environment security aims to ensure the confidentiality, integrity and availability of data.35

Security in the IoT environment is a problematic because a lot of IoT devices are technically susceptible to security breach and therefore they may be employed for launching attacks on other networks or computers; facilitating unlawful access to computers or systems, and modifying data which may put people's lives in danger.36 As an instance, criminals might take IoT vulnerabilities as an advantage and then use it for starting denial of service attacks or distributing hateful emails. As for endangering life and safety of individuals, unsecured IoT systems or devices could be used by criminals to remotely control smart cars, health or fitness devices etc., and modify their programs and data putting riders of such cars and those who use devices in hazard.

The challenges that the IoT brought to law could be seen in terms of difficulty of ensuring that the security principle relating to processing data has appropriately been observed. This principle in the Malaysian and the EU perspectives will be mentioned here. Article 32 of the EU Regulation 2016/679 which repealed the EU Directive 95/46/EC with effect from 25 May 201837 mentions that "the controller and the processor shall implement appropriate technical and organizational measures to ensure a level of security appropriate to the risk."38 The Malaysian PDPA 2010 also imposes this principle by stating that "A data user shall, when processing personal data, take practical steps to protect the personal data from any loss, misuse, modification, unauthorized or accidental access or disclosure alteration or destruction."39

The above texts demand those who process personal data to take suitable measures to protect such data. In the EU perspective where the application of data protection rules is concerned with processing of personal data40, applicability of the data protection rule on the data streamed in the IoT environment is unlikely to be problematic. However, in the Malaysian side, applicability of PDPA to some IoT data is uncertain because the Act only applies to personal data in respect of commercial transactions.41 Hence, data processed in or by an IoT-enabled processing out of the commercial atmosphere will not be subject to the Act. And this can be a serious loophole in Malaysian legal landscape. In addition, the Malaysian Act also precludes data processed by the Federal and State governments from its application.42 The scope of application could restrict the ability to protect personal data flowed in new technologies such as the IoT one if such processing is initiated or controlled by the Government entities.

Regardless of the applicability of security principle rules to some IoT data, it is argued that complying with this principle is indispensable to protecting personal data streaming in the turbulent techno-waves particularly in the IoT environment. In the IoT security may include controlling what things can do to themselves or to their surrounding environment as well as security of data which is processed (stored, sent or generated, etc.) by such things.43 However, the nature and functions of the IoT devices and systems make such controlling difficult if not impossible. Broadly speaking, IoT devices are technically insecure and so they can be susceptible to failure and compromise in themselves not only that but they can also be used to attack other systems.44 Additionally, securing IoT devices which may be positioned in different places also complicates and expands the obligation of securing personal data.

3.3. The IoT and Ownership of Data

Another issue related to the IoT is the ownership of data flowing in the IoT atmosphere. The issue of data ownership is important because of the increase of data volumes, the real-time nature of the data, and the growing awareness of data value.45 Accordingly, knowing the owner(s) of data and the scope of that ownership become an urgent issue.46

While investigating the state of information ownership in the cloud environment, Chris Reed mentioned however that the term "ownership" may not be accurate as digital information is not a personal property. But he added that information is nevertheless subject to laws such as intellectual property, privacy, confidentiality, contract laws, etc. These laws give the enterprise a level of control over information like owning a physical property.47 Other researchers use the ownership term and insists that its meaning extends from the narrow sense of ownership to include the rights of controlling the use of data.48 Still, some argue that data ownership can be used as a means to protect rights of data owners.49

Regrettably, laws that protect personal data in the information age do not usually deal with the issue of ownership as they largely concentrate on how to process data, who authorized to do so, the meanings of personal data, and so on. Nevertheless, personal data protection laws include provisions that suggest propertisation such as the provisions on data subjects rights and the need of their consent.50 It is argued that the absence of specific legislation about this issue plus the importance of data and the controversy over it in the information age could cause a dispute, uncertainty and failure of important services such as the IoT.

III. Closing

As it is outlined in the beginning of this paper, this study is a preview and introduction to many more substantial research areas in near future. While many countries, public and private

sectors alike, are increasingly reliant on the connectivity of data in their works and business processes, legal challenges on the issue of data privacy, data security and data ownership still unlikely be resolved in near future. Developing countries who adopt the IoT-based products and services should also review their legal readiness in relation to the above matters. Failure to prepare an appropriate legal and policy framework of the IoT may likely mean the failure of the IoT itself to deliver the full benefits expected by the society, or worse, may mean to trigger more social and legal problems in future.

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General Average and Jettison: The Policy Under Marine Insurance to Assist Master to Make Decision During Distress

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ABSTRACT

The master or captain is a person who has ultimate command of the vessel who bears great responsibilities towards the ship owner and cargo owner for safe voyage. The master is objectively accountable for every decision. However, the master usually encountered with situation where the loss cannot be avoided without scarifies some cargos on board or incur extra ordinary expanse (General Average and Jettison). The objectives of research are to analyze the potential and the limitation of General Average and Jettison to assist the master in making good decision during distress. In addition, the research will identify the advantage and disadvantage of choosing either one of them toward the interest of ship owner and cargo owner. It is a doctrinal research which descriptive in nature. The paper discuss and examine the situation by referring to the main sources of law as an authority under the law of marine insurance and other related laws. It is clear that there are differences between General Average and Jettison in which the former requires strict compliance with General Average elements such as common marine adventure and in time of peril otherwise it will consider as the latter. Moreover, General average and jettison is a relief for master since any act of avoiding loss to the voyage including throwing cargo off board is covered by the insurance. However, the main concern is the uniqueness of General Average where the scarified cargo entitle for the damages even though having no insurance coverage since the payment is claimed from those who survived. Meanwhile, the jettison is a risk covered under the policy of marine insurance. Therefore, it is crucial for master to have the knowledge on the status of cargo and ship before deciding to choose General Average or Jettison.

Keywords: *General Average, Jettison, Marine Insurance*

I. Introduction

The master who commands the vessel is objectively accountable for every decision. However, the master usually encountered with situation where the loss cannot be avoided without scarifies some cargos on board or incur extra ordinary expanse (General Average and Jettison). In most situation of distress, the masters have to act quickly to save the voyage. It creates pressure to the master to act independently and objectively for the best interest of voyage by taking into consideration to all interest parties who engage to the same voyage. For instance, in struggling to avoid the vessel from grounded, the master must be given full autonomy to reach the wise decision to reach the main objective of safe voyage i.e arrive safely to port of destination. However, the over-concern on the interest of cargo on board and to the vessel itself will refrain and avoid the master from making a prompt and prudent decision. Therefore, the objectives of research are to analyze the potential and the limitation of General Average and Jettison to assist the master in making good decision during distress.

General average and jettison is consider as a relief to master since any act of avoiding loss to the voyage including throwing cargo off board is covered by the insurance. However, the main

concern is the uniqueness of General Average where the scarified cargo entitle for the damages even though having no insurance coverage since the payment is claimed from those who survived. Meanwhile, the jettison is a risk covered under the policy of marine insurance. In addition, the research will identify the advantage and disadvantage of choosing either one of them toward the interest of ship owner and cargo owner. It is clear that there are differences between General Average and Jettison in which the former requires strict compliance with General Average elements such as common marine adventure and in time of peril otherwise it will consider as the latter. Nevertheless, there is no obligation to the master to make sure the act of throwing goods to save the voyage is amount to general average or jettison despite of the significant effect to the process of claim.

II. Discussion

1. General Average & Jettison

General Average Act is where any extraordinary sacrifice or expenditure is voluntarily and reasonably made or incurred in time of peril for the purpose of preserving the property imperiled in common adventure. According to the case of *The Brigella (1893) PD 189*, It is stated that general average is an unique concept where the property of the participant of Marine Adventure may, at any time become liable whether they are or not insured since the claim is made directly from those who survived. Where there is a general average loss, the party on whom it falls is entitled to a rateable contribution from the other parties interested. Such contribution is called a general average contribution. For example in the case of *Simonds V White 1824,* a ship lost her anchor cable in the journey. When the ship reached her destination the cargo owner had a General Average charged to the cost of replacing the anchor cable and he may claim from those who participating in the same common marine adventure such as the owner of cargo. In the case of Birkley v Presgrave (1801) 1 East 220, Lord Kenyon CJ.. [p 227]..

> "all ordinary losses and damage sustained by the ship happening immediately from the storm or perils of the sea must be borne by the shipowners, but all those articles which were made use of by the master and crew upon the particular emergency and out of the usual course, for the benefit of the whole concern, and the other expenses incurred, must be paid proportionately by the defendant of general average."

Under General Average Contribution, the property and goods is to be determined as if those subjects were owned by different persons. In the other words, when it come to general average, the goods on board and the ship is treated as they belong to different parties as in the case of Montgomery & Co v Indemnity Mutual Marine Insurance Co Ltd [1902]1 KB 734 pg 740. The principle later on is adopted by Marine Insurance Act 1906, under section 66(7), where ship, freight, and cargo, or any two of those interests, are owned by the same assured, the liability of the insurer in respect of general average losses or contributions is to be determined as if those subjects were owned by different persons.

The rationale behind General Average is a logical concept since all whose property has been saved by the sacrifice of the property of another shall contribute to make good of his loss. Later on, after the assured has paid, or is liable to pay, a general average contribution in respect of the subject insured, he may recover therefore from the insurer. However, the insurer is not liable for any general average loss or contribution where the loss was not incurred for the purpose of avoiding or in connection with the avoidance of a peril insured against.

1.1. Differences and Similarities between General Average and Jettison.

General Average and Jettison at the first glance seem to have common similarities. However, the General average have a wider scope compare to Jettison. The act of jettison as mention in standard Institute time clause hull and machinery policy c 6.1.4 only cover the act of throwing cargo, goods or part of vessel equipment or furniture at a time of danger, meanwhile the General Average is not limited to sacrifice cargo or goods and part of vessel with certain specific criteria, but it is cover extra ordinary expenses incurred such as hiring lighter to load cargo or goods instead of throwing them to sea. Under the act of Jettison, the claim is made directly to the insurer since it is one of the risks provided under the policy, meanwhile under the act of general average the claim is made to those who survive. Therefore, if the owners of the cargo or vessel who have been sacrificed have no insurance coverage, they will not entitle for claim if the sacrifice is amounting to jettison, however it is possible if the claim is made under the general average since the claim is made to the parties who survived instead of insurance company.

The act of sacrifice goods or cargo and vessel's property under general average scarifies requires strict compliance to its terms and conditions, otherwise it will become the act of jettison. The requirement of general average is mention under section 66(2) Marine Insurance Act 1906, There is general average act where any extraordinary sacrifice or expenditure is voluntarily and reasonably made or incurred in time of peril for the purpose of preserving the property imperilled in the common marine adventure. In the other word, the general average arise when its satisfied or comply with all the requirement general average act which is common marine adventure, sacrifice or expenditure, extraordinary circumstances, intentional or on purpose, reasonable and practical, in time of peril and to preserve or protect from peril and save the marine adventure. Failure to comply with the entire above requirement renders the act as the act of jettison.

Under Marine Insurance Act 1906, the first element of general average is common marine adventure. The parties to the voyage must be at the same marine adventure. in the other words, the cargo on board of different ship will not liable to indemnify or to compensate the loss due to the general average act even though it belong to the same owner. For example in the case of *Montgomery and Co v Indemnity Mutual Insurance Co [1902] 1 KB 734* when the Court of Appeal affirmed the decision of the trial Judge, and ruled that there could be a general average loss when the assured was the owner of both the ship and the cargo. In addition, there is no general average act when no cargo on board/empty liner.

General Average which is considering as a partial loss under extra ordinary expanses could be categorizing into General Average Sacrifice and general average expenditure. Sacrifice is deliberate destruction /purposely demolished of property exposed to peril in common marine adventure. For example, a tanker has aground at low tide. Master decide to losing some weight to make refloat again by throwing goods. In the other hand, General average expenditure relates to coast incurred by a ship operator pursuant to general average act. For example, rather than sacrifice cargo, the carrier can discharge some of the deck load into lighter. The cost incurred such towage, labour, warehousing allocate as general average expenditure.

The general average act must be executed intentionally as in the case of *Papayani and Jeromia v Grampian Steamship Co Ltd (1896)1 com Cas 448*. The ship operator must be able to display that the sacrifice was made deliberately for general average. Any cargo that fell overboard accidentally due to the efforts to save the adventure could not be treated as general average. Moreover, the general average act must be Reasonable and practical. It demand prudence on the part of master in deciding whether or not to sacrifice property and given the choice which property to

sacrifice. If incurring the expense was imprudent it would not be allowed in general average act. According to Section 66(2) Marine Insurance Act 1906, affirms that there is a general average act where any extraordinary sacrifice is voluntarily and reasonably made in time of peril. For Instance in the case of *Anderson, Triton and Co v Ocean Steamship and Co (1884)5 Asp MLC 401 HL* infer that the master must act reasonably when execute general average act before render the other parties partly liable. Therefore, excessive or unreasonable expenditure will defeat the general average act under this case.

The general average act must be made at the time of risk. The adventure must be at risk/ imperiled at the time of general average act and the sacrifice must be made for the purpose of avoiding loss from the peril. The peril need not be present at the time of the general average act but must be imminent. For example, a ship owner could claim as general average when he said a hurricane wind that is being down on the ship. However the peril must be factual as in the case *Joseph Watson and Son Ltd v Firemen's Fund Insurance Co of San Francisco[1922]2KB355* which mentioned that the peril must be real and actually exist, rather than simply believed to exist.

The final requirement for general average act is to preserve/protect from peril. The general average act must be successful. The purpose of general average act is to save the Marine Adventure. Any sacrifice or expenditure incurred which does not achieve this end (safe adventure) will not be considered as general average act. For example, master sacrifice 100 packages of cargo from 500 as a general average act. The ship reached safely but became a total loss with the remaining 400 packages. Therefore the sacrificed 100 packages would be disallowed in a general average act because it was destined for loss with rest of the cargo before the completion of the adventure as refer to case of *Joseph Watson and Son Ltd v Firemen's Fund Insurance Co of San Francisco [1922] 2 KB 355*

The act of throwing goods or cargo to save the voyage without comply with the general average condition will consider as the act of jettison under standard Institute time clause hull and machinery policy c 6.1.4.

1.2. Remedies under general average act and jettison

Under the act of jettison, the insured entitle for claim under the standard Institute time clause hull and machinery policy c 6.1.4. However, it subject to the compliance with terms and condition stipulated under marine insurance Act 1906. The insured who has insurable interest on the subject matter must comply with the policy by taking into consideration the warranties prior of claim. In addition, the insured are subject to main principle of marine insurance such as contract of indemnity which is to restore the insured at a situation and condition before the loss occurred. It is clear that, the remedies under the act of jettison subject to marine insurance act 1906 and hull and machinery policy. Therefore, for those who has no valid policy will not entitle for claim.

Meanwhile, for general average, the claim is made from the parties who are survived., the party on whom it falls is entitled to a rateable contribution from the other parties interested. In addition, according s 66 Marine Insurance Act 1906 where ship, freight, and cargo, or any two of those interests, are owned by the same assured, the liability of the insurer in respect of general average losses or contributions is to be determined as if those subjects were owned by different persons. Where the assured has paid, or is liable to pay, a general average contribution in respect of the subject insured, he may recover therefore from the insurer.

The significant difference is under general average the claim is made directly from the parties who survived as mentioned in the case of *The Brigella (1893) PD 189*.Thus, the claim is possible even though without having a valid marine insurance coverage.

2. General average and jettison will assist master to make decision during distress.

Master of the vessel is person who has an insurable interest via power of attorney. In situation of distress or at the time of peril, the master is responsible to make sure the safe voyage by minimizing the loss and at the same time to make sure the vessel able to reach the port of destination. The decision made by the master must be solely for the best interest of the owner of vessel as well as cargo. It only can be reach if the master posses a power to decide regardless the individual interest in order to save the whole journey. For instance, if the decision requires master to sacrifice some cargos or to sacrifice part of vessel in order to save the whole adventure, it is permissible and covered either under hull and machinery policy for act of jettison or under Marine Insurance Act for general average act. The master is free to make decision without subsequently be responsible for the loss suffered by some cargo owner. The loss will be covered by insurance or those who survived. The good decision hard to be reached is the master is put into a situation to save every single interest and liable for any loss suffered cause by his decision.

The main concern is regarding to the status of the cargo being sacrifice. If possible for master to know the status of cargo which is subject to sacrifice, the master will be advised to execute general average act by complying with the entire requirement to enjoy the uniqueness of the act if the cargos is not covered by insurance. Therefore, the owner able to get compensation from those who are survived as mention in the case of *The Brigella (1893) PD 189.* In the other hand, there is no issue if the cargo or the vessel is fully covered by the insurance. Nevertheless, the master is allowed to practice either one of them as long as to preserve the voyage from maritime perils. In a situation when the vessel suffered severe and total damage, the insurance will take all the liability to restore the insured to the situation before the loss which is consider as a relief to master and the ship owner as well as the cargo owner.

III. Closing

Jettison and general average act is a key for master to have a peace of mind when struggling to decide the best decision to save the voyage during maritime peril. Any consequences to the cargo or vessel will be borne by the insurance and those who survived. The main objective is to make sure the vessel arrive to the port of destination safely. In situation where some cargos do not have valid coverage policy, the general average act will allow them to claim to those who survived.

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The Protection of Endangered Animals Under Indonesian Legal System: The Case of Illegal Poaching for Trade

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ABSTRACT

As a country with humongous-biodiversity, Indonesia has a great deal of natural resources, consisting of plants and animals. According to World Wildlife Fund (WWF) of Indonesia, Indonesia is estimated has about 20% of world's mammals, 16% of reptiles and amphibians, 17% of birds, 25% of fish, all of them are inhabit the nature of this country. Unfortunately, the magnitude number of those animals are comparable with their extinction threat. This paper is the result of a normative research with statute, analytical and case approaches on protection of endangered animals under Indonesian legal system with special reference to the case of illegal poaching for trade. The study found that there are at least two main underlying causes towards the extinction of endangered animals in Indonesia. First, habitat loss due to the high rate of deforestation; second is illegal poaching for trade. There is linkage between one to another, and both of them contributing to the extinction threat of endangered animals. The Government of Indonesia has to consider the improving of wild animal protection by strengthening the legal system and its enforcement, supervising, controlling and by increasing the function of animal conservation as well. It will become the biggest concern if it relates to evidence of the illegal poaching for trade that has been overcome by Indonesia's Government.

Key words: *Endangered animal, illegal poaching, illegal trading, legal protection*

I. Introduction

Indonesia is a humongous-biodiversitycountry, because Indonesia is the richest biodiversity and the largest archipelago country in the world[1]. Indonesia has 2425 species of animals; consist of 515 species of mammals, 1519 species of birds, 270 species of reptiles and 121 species of butterflies. For the welfare of the biodiversity of Indonesia, Indonesia has a wealth of tropical rainforest in the world. Indonesian forest areas based on data up to 1990 reached 143.970 million hectares spread across the country[2].However, the truth to wildlife's especially endangered animals is shocking.

According to Natusch Daniel J.D in his journal, he stated the traders of amphibians and reptiles in the Indonesian provinces of Maluku, West Papua and Papua between September 2010 and April 2011. It recorded 5,370 individuals representing 52 species collected solely for the pet trade. At least 44% were either fully protected or had not been allocated a harvest quota, making their harvest and trade illegal. Approximately half were listed within the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)[3]. In the law aspect, it can be seen in the increasing cases of poaching of wild animals are increasingly time by time. In the whole cases of animal wild poaching in Indonesia, from January up to mid-December 2015 there were at least 5,000 cases of wildlife poaching and trade[4] on the web (including on social media like Facebook).

In reality, the endangered animals live under two threats that result in environmental damage

to ecosystem, the first is habitat loss due to the high rate of deforestation and the second is illegal poaching. Beside of that, this problem is because of the lack of punishment, risk of being arrest is small, and very big advantages in the poaching and trading of this endangered animals. As written in National Geographic, National Geographic stated "The trade attractsorganized crime. Because the return is high, the risk of getting caught is low, and,until recently, the minimum of penalties"[5]. If the illegal poaching, illegal trading, and deforestation can't be stop, then the extinction will be come true.

The solution is stop illegal poaching, illegal trading, and deforestation. To realize it, we need social engineering approach[6]to solve the problems that arise in the life of society. Because in essence, social engineering is a means of social change or the means of engineering societies. so as to function and targets tepa analysis of the problems, at least every problem can be solved even in periods varied. In this kind of engineering, the focal point of focusing on all aspects, from the outermost up to innermost. This paper would like to answer on how isthe effectiveness of law enforcement in Indonesia against the wild animal illegal poaching? Furthermore, we will address on the obstacles faced by the Government of Indonesia in combating illegal poaching for trade.

II. Discussion

1. Threats to Endangered Animals in Indonesia

Geographically, Indonesia is located on the border of the Ancient Asian plate and the Australian plate is causing the diversity of species that live in the area of Indonesia.[7] Coupled with the diversity of flora and fauna is one of the major assets and the advantage for Indonesia, which the impact will touch on many aspects, such as a tourist attraction as well as a wealth of ecosystems. This stability should be kept, because the more surplus value is obtained the more threats also received. It can be seen clearly in the case experienced by wildlife which their habitat is threatened. Of the several factors into danger, there are two primary indications of the most instrumental in this regard to the deforestation and illegal poaching for trade.

Deforestation is the main factor of the threatened wildlife in Indonesia due to the forest is the natural habitat for wildlife[8], it cannot be denied as the number of people who need a place to stay, the party who had many interests and eventually lead to the deforestation. Coupled with the act of the parties who are not responsible to poach animals, especially endangered animals for trade. This action resulted in many animals being threatened in their habitat and population. It is truly unfortunate, because it should a significant difference between the interest for private matters and using as well as managing the habitat (in this case is forest).[9] With the great deal of tropical forest resources in Indonesia, having of this kind of the heaven on earth, tropical deforestation phenomenon is the worst thing ever happening. Becoming the one of four countries (Indonesia, Brazil, Zaire and Peru) that contain of more than half of the world's total forests[10], Indonesia has been providing habitat for the vast majority of the animal species. If this present its been decreasing, it shows humans are destroying "the world" rapidly.

Ministry of Environment estimates that there are 51 cubic meters of logs were obtained from illegal logging,[11] besides, there also log smuggling that will be distributed to overseas. Which the logs are part of the forest, the habitat of animals.While, from January up to mid-December 2015 there were at least 5,000 cases of wildlife trade on the web only[12] (including on social media like Facebook). And the number increases considerably compared to the data compiled in 2014, when there were approximately 3,640 online ads offering wide range of wild animal species. It performs that with the easy access to illegal animal trade, flourishing also illegal poaching do. In

fact, the wild animals that made the object of poaching is animal with endangered or within protected status. Moreover, it has been surprising that the number of wildlife poaching case is also increasing. In East Java has recorded over 370 cases of wildlife poaching. Ironically, many of the cases took place within protection forests or nature conservation areas. Among the nature conservation areas in East Java that are vulnerable to poaching are Bromo Tengger Semeru National Park, R. Soerjo Grand Forest Park, Baluran National Park, Meru Betiri National Park, forests around Ijen Mountains, Yang Highlands Wildlife Reserve, Mt. Arjuna, and Mt. Kawi.[13]

In basic, the protection of wild animal protection also contains in Indonesian Criminal Code, Article 302 (1), for an offense of intentionally hurting or injuring an animal or harming its health, without purpose or exceeding what is necessary for the purpose. Meaning that every single conduct which threats the animals, is automatically prohibited, more specific legal provisions appears in Law no. 18 of 2009 on the Health and Productivity of Animals and on Animal Husbandry, and also prevention of animal cruelty does not appear yet to be a main concern of this legislation. This explains that it is not just a weakness in the law enforcement system, but also on the substance of the regulations. Besides, another obstacle emerged in the conservation of wild animals, especially on illegal poaching for trade.

2. Preventive and Punitive Measures for the Protection of Endangered Animals under Indonesian Law

In addition to the repressive measures for the perpetrators, automatically also necessary policies and preventive efforts in law enforcement in the field of conservation of protected animal species. roles involved also openings only the government, but society also has a role and responsibility in the effort. This evidence can be seen from the efforts of the government through legislation, the Minister of Forestry establish Riau as a conservation area Sumatran elephant (Elephas maximus sumatranus) Regulation No. P.73/Menhut-II/2006 change Regulation No. P.54/Menhut-II/ 2006 concerning the Riau province of Sumatra As Elephant Conservation Centre. Forestry Minister also regulates the establishment and operation of conservation agencies to Regulation No. P.54/Menhut-II/2006 on Conservation Institute[14].

On the other hand, it should also be noted that preventive measures should be carried out in line with the policy of the management of the species' habitat. In the case above shows that zoning is the human settlement tends to coincide with the species' habitat zoning so that conflict becomes inevitable. In addition, policy conversion of forests into oil palm plantations can no longer be considered from a commercial aspect alone, but also must be based on the value and ecological impact, taking into account the carrying capacity and carrying capacity carefully. Status of environmental preservation should be aligned with development. Required harmony and harmony between policy development with the conservation or preservation of the environment.

Meanwhile, in terms of the punitive, it registered some regulations relating to this issue, those are:

1. Indonesian Civil Code, Article 302;
2. Law No. 5 1990 on the Conservation of Natural Resources and Ecosystems;
3. Law No. 41 of 1999 on Forestry;
4. Law No. 32 of 2009 on the Protection and Environmental Management;
5. Government Regulation No. 8 of 1999 on Utilization of Wild Plants and Animals;
6. Government Regulation No. 7 of 1999 on Preservation of Plants and Animals;
7. Government Regulation No. 68 of 1998 on Nature Reserve Area and Nature Conservation

Areas;
8. Government Regulation No. 13 of 1994 on Hunting Wildlife Poaching;
9. Presidential Decree No. 4 of 1993 on Wildlife and National Flower Forestry;
10. Ministerial Decree No. 26 / Kpts-II / 1994 on the Use of Long Tailed Macaques (Macaca fascicularis), monkey (Macaca nemestrina) and Fish Arowana (Scleropages formosus) For Export Purposes Forestry and;
11. Agriculture Decree No. 104 / KPTS-II / 2000 on Procedures Taking Catch Wild Plant and Wildlife.

And for the international scope, we can refer to the Universal Declaration on Animal Welfare (UDAW).[15] Which for some principles that contains in UDAW are recognized in existing legislation, containing expansion and incorporation of more specific principles and goals from.

3. The Effectiveness of Indonesian Prevailing Law towards the Protection for Endangered Animals

It has to be admitted that in term of the legal enforcement on the case of illegal poaching for trade in Indonesia is still weak. Even there has the number of regulation is regulated in, but for the application of the regulation still need preparation. We can find the example on wildlife poaching in 2015 that it tends to be high. In East Java only, ironically, hunting of wildlife was just a lot going on in the protected forest and natural conservation area. There are at least six convictions for traffickers of wildlife, with a range of prison sentences of between 6 months up to 2 years, and that is not giving a deterrence effect. The effectiveness of the law in Indonesia is still less supported by all components that should indeed have a responsibility for this. Whereas in fact, the legal system that is already available should have been able to fulfill the rights and protection of wild animals in Indonesia, especially on the cases of illegal poaching for trade.

Meaning to say, with only a light punishment imposed, then the perpetrators have not felt a deterrent effect against the punishment which he received. Any type of animal cruelty, including illegal poaching for trade, conservation crime, all the substance of the law cannot provide the effect and results will be subject to reduced adverse action.

Discussion of the crime of wildlife conservation in Law no. 5 1990 constitute a criminal offense preservation of the diversity of wildlife, a policy to keep the diversity of species threatened with extinction, such Explanation of Article 11 of Law No. 5/1990. Criminal sanctions under Article 40 of Law No. 5/1990 hit equally to the relevant parties[16]. In terms of the substance of the Act No. 5/1990, it appears that the concrete form of legal protection is specifically given by the diversity of wildlife preservation efforts with the specifies status of protected species, which is threatened with extinction and animal population is rare or endemic[17].

But sometimes, the perpetrator could only divert the reason he did so on several occasions the offender was sentenced to only got a misdemeanor or even the punishment is abolished. Because it cannot be denied that (*strafuitsluitingsgrond* / grounds of impunity) is affirmed in Article 22 of Law No. 5/1990, which in theory is the justification of punishment *rechtvaardigingsgrond*[18], which can eliminate the unlawful nature (wederrechtelijk) deeds. One of the acts referred regulated in Article 22 paragraph (3) of Law No. 5/1990, namely murder as dangerous to human life (noodweer). And in some cases, this proposition is a strong reason hunters.\

4. The Obstacles Faced by Indonesia's Government in Combating Illegal Poaching for Trade

In dealing with this problem, the Indonesian government is still complicated by the increasing of the sophistication of technology and access to hidden from poaching offender and also elements that are not responsible for the participation of habitat damage which resulted in a decrease in the number of endangered animal populations and is also protected in Indonesia. The perpetrators of poaching in particular already has an extensive network in this illicit business so sometimes escaped from the observation and also not easy to be tracked. Monitored from the existing regulations in this regard, Indonesia seems to be enough to have strong legal ammunition.

However, the performance of the law itself still has not optimally impact on the phenomenon of illegal poaching for trade in Indonesia. Evaluating this, we can refer to the theory that put forward by Lawrence M. Friedman regarding to the success or failure of a rule of law that is depending on the three elements of the system, namely the legal structure, legal substance and legal culture.[19] A deeper note of the three elements, Indonesia is at particular attention on legal substance and legal culture. In the insistence on eradicating illegal poaching for trade, the synergy between the government and the role of the community still cannot be complementary to the fullest. This can be proved by the case has recorded in February 2009 reported that four Sumatran tigers were dead because of the people are snared them in the District of Pelangiran and Gaung, Indragiri Hilir, Riau, thence nine Tigers dead over the past four years in the area of South Aceh and the western coast of Aceh. From West Sumatra reported a resident was caught selling tiger skins and bones and ready to be marketed in Riau.[20] Whereas basically, these fatal acts could be prevented if there is good communication between government and society. Although this does not happen often, but their impact is big enough for the environment. In Indonesia, to deal with cases that resulted in habitat and the endangerment and extinction of animals, already initiatedstages of determining quotas, licensing trade in plant and wildlife, and control the circulation of wild plants and animals as a system for controlling the trade of plants and wildlife[21], as follows; quota. With using the principle of precautionary principle and non-detriment finding. Which means a limit on the type and number of plants and wildlife that can be drawn from the natural habitat; licensing; trading. The trader should have a license for doing this, and; supervision and oversight of trade. Yet it is truly unfortunate that the understanding of the requirements has been avoided. For some cases, the other party, except the trader, they feel that the regulation is provide to only for the trader.

Sometimes when the sale and purchase occurred in the society, the majority of people also enjoy the benefit of such transactions, so it is quite contrary to article 37, Law no. 5 of 1990 on the Conservation of Natural Resources and Ecosystems:

(1) The participation of the people in the conservation of natural resources and ecosystem is directed and driven by the Government through various activities that are efficient and effective.

With the purpose for public awareness will be one of the weapons and shields in case of illegal poaching for trade. Then If those three elements above are fixed (Lawrence M. Friedman), then the legal system in Indonesia in responding to and dealing with cases of illegal poaching of wild animals will also can be resolved. And another focus also concerned with the conservation and rehabilitation facilities for wild animals which are victims of illegal poaching.Also, holding of public education and specialized training to authorized officers to no longer missed the finesse of poaching in Indonesian jurisdiction. Since most of the consumers (the buyer of endangered ani-

mals) both living to be maintained as well as products made from endangered animal organs, errors only by the hunters and sellers only.

However, sometimes this hunt for the perpetrator could only divert the reason he did so on several occasions the offender was sentenced to only a misdemeanor or even abolished the punishment. Other problems also arise in the hall conservation or breeding animals, where the facilities are inadequate and lack of medical personnel to deal with the physical and psychological condition of the animals.[22]

III. Closing

The flare cases of animal wild illegal poaching in Indonesia is still not balanced with efforts to handle it. Even the regulation provided as listed in Indonesia Criminal Code, Article 302, Law no. 18 of 2009 on Husbandry and Animal Health, and so on has not been able to address this issue. Law enforcement is affirmed on the perpetrators of illegal hunting is still relatively mild and less deterrent effect, so it does not affect significantly to the reduction and countermeasures of this tort.

What the circumstances, the possibility is still very easy to fix is the prevention phase. If it should be categorized, then the base is needed in the handling of this case by classifying on the bases of action:

a. Base Community
b. Base Action[23]

Though the two are linked, but it seems the community base is the most powerful foundation to be built and repaired. The most fundamental thing is that the people around really know the circumstances da local phenomenon. but keep in mind, the direction of the government is also needed. government contribution itself is used as a reference, because each layer structure that works heavily influenced by the performance of the government as well. in this case the government is also required to continue gives specific directions for local residents, who live on site and habitat conservation, as well as training of officials to be more trained and alert in case illegal poaching for trade.

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[14] http://www.hukumonline.com/berita/baca/hol21707/kejahatan-konservasi-telaah-yuridis-atas-pembunuhan-satwa-langka-dilindungi, accessed on March 5, 2017 at 9:11 PM

[15] The Universal Declaration on Animal Welfare (UDAW) is a proposed formal international acknowledgement of a set of principles giving animal welfare due recognition among governments and the international community. An expression of support for the UDAW demonstrates a government's commitment to working with the international community to improve animal welfare.

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Dynamics and Problematics of Regional Head Election Disputes Settlement in Indonesia

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ABSTRACT
The success of free and fair elections (including local election) is not only measured by the voting process, but also determined on how the settlement of the disputes follows it. In connection with that, the institutional dispute settlement of local elections in Indonesia has experienced ups and downs that have not been interminable. The issuance of the Act Number 8 of 2015 which mandates the establishment of special judicial body for settlement of regional head election disputes still leaves a 'homework' of the shape or design of that special judicial institution, its authorities and procedural law that must be established ahead of national simultaneous elections in 2027. This paper is the result of a normative research with statute, analytical, comparative and case approaches regarding the background of the existence of special judicial body which is needed to be established to resolve regional head election disputes in Indonesia as an antithesis on the weaknesses and problems of institutional settlement of regional head election disputes that been there for years, namely: Supreme Court (through High Court) and the Constitutional Court. In order to provide an overview as well as an alternative institutional model of special court for regional head election disputes settlement to be formed onward, this paper will also be enriched with results of literature research on similar bodies in some countries.
Keywords:*regional head election disputes, Constitutional Court, Supreme Court, a special judicial body*

1. Introduction

In a democratic country, the general election is considered as the symbol and also as the benchmark of the democracy itself. The General Election is*conditio sine quanon*of the democracy principle in the nation and state life.The basic principles of the democratic state arethe sovereign citizen and the right to participate actively in the political process[1]which concretelyimplemented in the free and fair general/local election. The sovereignty of people is the most basic principle and viewed as the constitutional morality that in the general election embodied in the form of awards and ratings of voters whichshould not be distorted by the power of political parties to change the people's choice into an option of the political party officials[2], and cannot be used as a means of legitimacy of power[3], as what happened in the three decades of the New Order Regime. To restore the general election as the instrument of the embodiment of people sovereignty, The Third Amendment of The 1945 Constitution has included the provision on the general election in the Article 22E of The 1945 Constitution which elaborated furtherin the Decision of the Constitutional Court No.3/PUU-VII/ 2009.[4]

The success of the implementation of national general election in 1999 has became the inspiration for the structuring local democracy to interpret the provisions of the Article 18 verse (4) of the 1945 Constitution which stated ''*Governors, Regents and Mayors as the respective heads of the Regional Government of provinces, regencies, and cities are elected democratically*'' in the form of direct election of heads of regional government through the establishment of Law No 32 of 2004 on the Regional Government. The passion of the implementation of direct regional

election is as the correction of indirect democracy system (representatives system) in the previous period, where the Head of Regional and the Vice Head of Regional were appointed by Regional House of Representatives. In the political view, the change of this system is the conceptual change of the government system in the local level from the ''parliamentary system'' into ''presidential system''[5], and is a correct choice in managing the Indonesian transition period from authoritarian era to real democratization.[6]

To guarantee the realization of direct local election that is truly in line with the rule of democracy, the implementation should be done by the system which is based on the principle of free and fair through the good and integrative system, among others: (1).The existence of the valid material or formal legal framework, which binds and becomes the guidance for the organizers, contestants (candidate pairs), and voters in exercising the role and functions of each; (2). the implementation of all activities or stages which are directly related to the implementation of the local elections that based on the statutory provisions; (3). integration of law enforcement process (electoral law enforcement) of the rules of the local elections in accordance with stages at each level, both concerning the issue of administrative, criminal, ethical, and also disputes of the results.[7]

The success of the local election is not only be measured based on the polls, but also determined from the dispute resolution accompanying it. In regard to that institution, the existing court has limited and insufficient to implement justice on the local election. There are loopholes in the mechanism of electoral dispute resolution (EDR) in this country. As a result, the true justice has not been earned by those involved and disadvantaged in the election contestation.[8]In connection with the electoral law enforcement in Indonesia, particularly related to the settlement of election disputes has experienced ups and downs, starting from the authority of the Supreme Court (High Court) which is authorized to settle election disputes, then turned to the Constitutional Court, to the rise of legal political establishment of the Special Court to resolve local election disputes based on the Law No. 8 of 2015 on the Determination of Government Regulation in Lieu of Law No. 1 of 2014 concerning the election of Governor, Regents and Mayors become Law. Institutional dynamics of the local election dispute resolution is of course due to the problems that go with it, both injustice and legal uncertainty in the local election dispute resolution to the problem of constitutional interpretation of the constitutional authority. Until today, we still have to find an institutional design "special judicial bodies' for the local elections which have unclear status. Therefore, this study was conducted in order to respond to the dynamics and problems of the dispute settlement body of the results from the local elections.

2. Research methods

2.1. Type and Research Approach

The study of law is a research applied specifically on the science of law that helps the development of legal science in uncovering the truth of law.[9]This study is about the dynamics and problems of the local election dispute settlement institution which still have ups and downs and uncertainty. The type of research is doctrinal research that is legal research which is putting down the law as a system of norms building. Norm system in question is about the principles, norms of legislation, court decisions, agreements and doctrines (teachings). This study used several approaches, including: (1). statute approachis done by examining the legislation related to studied legal issues; (2). analytical approach which aimed to assess the implementation of legal terminology in different legislation or court rulings; (3). the comparative approach is done by comparing

the provisions of the law or legal practice here with other countries; (4). case approach that is intended to study the norms or rules of law which is applied in the practice of law, particularly in the resolution of local election disputes which are conducted by the previous trial.[10]

2.2. Data Collection

The data collection was done by a literature study (library research), which aims to study the primary, secondary, and tertiary legal materials.

2.3. Data Analysis

In this study, the data were analyzed by descriptive qualitative to give a description or explanation on the object of research which is the result of conducted research.[11]The approach of descriptive qualitative analysis is done by treating the object based on a specific category, that category is aimed at selecting the data relating to research, and then classified legally and arranged systematically. The systematic arrangement is intended to provide a comprehensive picture of research results.

3. Discussion

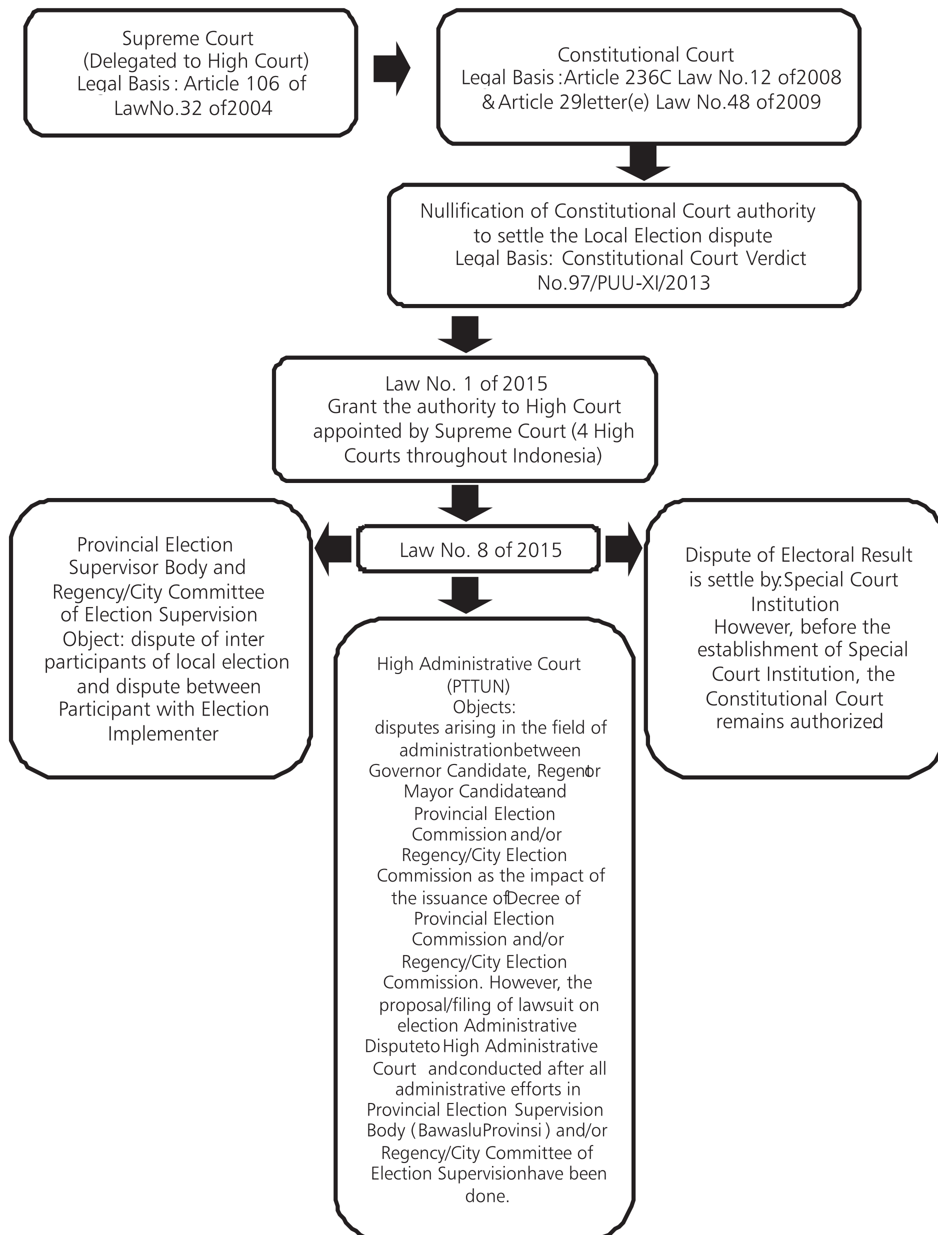
3.1. Direct Local Elections

Article 18 paragraph (4) of the 1945 Constitution which states that,*" 'Governors, Regents and Mayors as the respective heads of the Regional Government of provinces, regencies, and cities are elected democratically"*, is not set in a limited manner if the head of the region is elected directly by the people or elected by Parliament. At least there are two main principles contained in the formulation, "the head of region is elected democratically", namely: *first*; head of region must be "chosen" through a selection process and it is not possible to be appointed directly; *second*, elections are held "democratically". The clause "democratically" here can be interpreted directly by the people and can also be selected by the parliament whose members are also the result of a democratic election.[12]

Recent developments of the constitutional interpretation by the legislators to Article 18 paragraph (4) of the 1945 Constitution which contains the provisions of "democratically elected" is the direct election by the people (local elections).It is increasingly evident when Law No. 32 Year 2004 on Regional Government is proposed by the government and deliberated in Parliament,no any depth debate further about whether the head of the region is directly elected by the people or elected by Parliament. This, at least due to two things, namely: it had been agreed in the 1945 Constitution that the President and Vice President shall be elected directly by the people, and from the aspiration of various communities throughout Indonesia, either conducted by a team of Ministry of Internal Affairs or the Parliament, had obtained the dominant aspirations of people which want the head of the regionsare also being elected directly by the people.[13]

The local elections were a one of a significant political breakthrough in realizing democratization at the local level. This means that democratic governance is reflected in the pattern of '*recruitment*' of the head of government.[14]No matter how good a state is organized democratically, it will not be considered truly democratic when the leaders are not chosen freely by their own people. In fact, many democracy expertsargued that basically all politics basis is local, and democracy at the national level will grow and develop properly when it is supported by solid values of local democracy. The local elections are part of the process of strengthening and deepening of democracy as well as efforts to achieve effective governance at the local level. In addi-

tion, the implementation of the local elections is also essentially a follow-up to the realization of the principles of democracy that includes the guarantee of the principles of individual freedom and equality, especially in political rights.[15]



Some fundamental considerations of the implementation of direct local election are: *First,* direct local election is the answer of people's aspirations demands due to the other elections namely: President and Vice President, House of Representative, Regional Representative, even the Village Headman have been elected directly; *Second,* local election is mandatedby Article 18 (4) of the 1945 Constitution; *Third,* Local Election is viewed as civics education; *Fourth,* Local election is viewed as an instrument to strengthen regional autonomy. One of the factors of the success of regional autonomy is determined by local leaders. The better local leader elected by direct local election, the better commitment of local leaders to increase people welfare—whichis essentially the purpose of regional autonomy—couldpossibly be done; *Fifth,* local election is the

substantial instrument for regeneration of national leadership.[16]Nowadays, the basis of the implementation of direct local election is Law No. 1 of 2015 on the Enactment of Government Regulation in-lieu-of Law No 1 of 2014 on the Election of Governor, Regent, and Mayor which has been changed to Law No. 8 of 2015 and Law No. 10 of 2016. One of the fundamental changes in Law No.8 year 2015 is the existence of the order to establish Special Court or Judiciary as an institution to settle the dispute of the result of local election at latest before the national simultaneously local election held (in 2027).

3.2. Dynamics and Problems of the Institution of Local Election Result Dispute Settlement

Etymologically, *Institute for Democracy and Electoral Assistance* (IDEA) defines '*electoral dispute*'as *"any complaint, challenge, claim or contest relating to any stage of electoral process".*[17]From the definition above, it could be understood that the scope of electoral dispute is basically very broad, covering all steps of general election. In the contexts of local election, the disputes of local election covers the arising issues in all steps of local election, whether the dispute related to the procedural matters or related to result of the local election (the legitimated votes decreed by the Local Electoral Commission). On the other hand, Topo Santoso defines dispute on the implementation of local election as an administrative violation or the case of dissatisfaction of the implementer (KPUD) decision.[18]

The success of local election is not measured from the polls, but also determined by the mechanism of dispute settlement follow it. The matter is there are various institutions involved in the process of dispute settlement which obviously affected the process of dispute settlement.[19]Aside of that, the institution of dispute settlement of local election result is often change, following the political rhythm of local election. Although the electoral dispute covers all aspects of the steps of local election, however this research is intended to focus on the settlement of election disputes pertaining to the results of local election.

The development flow and the problem of dispute settlement institutions of the local election result from the beginning until the present days can be described in flow chart attached.

3.2.1. Supreme Court

In the earlier implementation of direct local election, Law No. 32 of 2004 has designed the dispute settlement of direct local election results. Based on the provision in Article 106 of the mentioned Law above, the authorized institution to settle the dispute of local election is Supreme Court. Article 106 of Law No. 32 of 2004 on Regional Government stated that:

1) Objections to the determination of the results of the regional head and deputy head of the region election can only be filed by a pair of candidates to the Supreme Court within the period of 3 (three) days after the determination of the results of the regional head and deputy regional head election.
2) The objection as it referred to in paragraph (1) only with respect to the results of the count of votes which influence the election of the candidates.
3) Filing an objection to the Supreme Court as referred to in paragraph (1) shall be submitted to the high court for the election of regional head and deputy head of the province and to the district court for election of the regional head and deputy head of the district/city.
4) The Supreme Court shall decide disputes over the results of vote counting as referred to in paragraph (1) and (2) at least 14 (fourteen) days from receipt of the petition objection by the

District Court/ High Court/ Supreme Court.

5) The decision of the Supreme Court referred to in paragraph (4) shall be final and binding.
6) The Supreme Court in exercising its authority as referred to in paragraph (1) may delegate to the High Court to decide disputed vote counting results of election of regional head and deputy heads of district and city.
7) The verdict of the High Court referred to in paragraph (6) shall be final.

The authority of Supreme Court on settling the local election result was only lasted for 3 years (2005-2008), it is due to the practice was creating a legal problem. For example, the problem of dispute settlement of Depok City direct local election results by Bandung High Court which became nationwide news. In this case, if it follow the Article 106 paragraph (7) of Law No. 32 of 2004 on Regional Government and Government Regulation No. 6 year 2004, the award of the High Court is final, so supposedly there is no more legal remedies that can be done. But the phrase of the award of Supreme Court is "final and binding", while in the Law is mentioned that the High Court award is only "final", without "binding". This interpretation made the Depok Election Commission to propose a Judicial Review to the Supreme Court on the Bandung High Court award. The Supreme Court granted the proposal of Judicial Review from Depok Election Commission and annulled the Bandung High Court verdict. The debate is focused on the meaning of "final" and "binding"verdict which in its implementation created the legal uncertainty on dispute settlement. The Supreme Court with its Judicial Review authority has annulled the decision of Bandung High Court which is final with the final and binding decision. In 2008, the Supreme Court handed over the authority of dispute settlement of local election to the Constitutional Court to fulfill the Decree of Constitutional Court No.072-073/PUU-II/2004 in conjunction with Law No.12 of 2008 on the Second Amendment of Law No.32 year 2004 on Regional Government which its Article 236C stated "the settlement of disputes over the results of vote count of election of regional head and deputy head by the Supreme Court is transferred to the Constitutional Court not later than 18 (eighteen) months since the promulgation of this Law. But, in 2014, the authority of Constitutional Court on settling the dispute of local election result was avowed as unconstitutional by Constitutional Court of Republic Indonesia through the Case Decision No.97/PUU-XI/2013.

Based on the Law No.1 of 2015 on Stipulation of Government Regulation in Lieu of Law No. 1 of 2014 on the Election of Governors, Regents and Mayors Become Law, Article 157 paragraph (1) provides that: "In case of dispute on determination of vote count results of election, the election participants may apply for the cancellation of the determination of the vote count results by the Provincial Election Commission and Regency/ City Election Commission to the High Court appointed by the Supreme Court", but paragraph (6) and (7) that article states that "Those who do not accept the High Court decision may apply for an objection to the Supreme Court and the decision of Supreme Court is final and binding. However, the High Court and the Supreme Court have never implemented this dispute settlement provision of the election results in accordance with Law No. 1 of 2015 because there was a change in the institutional dispute of election results based on Law No. 8 of 2015.

3.2.2. Constitutional Court

The authority of the election dispute resolution by the Constitutional Court (MK) is not an original authority that comes from 1945 Constitution, but as additional power. This authority is a long journey to the election disputes resolution processes that are looking for the ideal form. The

granting of this authority to the Constitutional Court due to the constitutional interpretation that incorporates the local election as a part of the general election regime, where the settlement of electoral disputes is the original authority of the Constitutional Court. On the other hand, at that time the Constitutional Court was a very authoritative and reliable institution in resolving constitutional disputes (including its successes in the election disputes resolutions). However, with time, The Constitutional Court is trapped on the paradigm of constitutional interpretation that is used for the elections, which eventually led to inconsistency decision and has implications for the revocation of the authority of the Constitutional Court in the resolution of the results of local election disputes. Here the dynamics and problems of settlement of the results of local election disputes in the Constitutional Court:

3.2.2.1. Constitutional Interpretation: Local elections Section of Regime General Election

The design of the settlement institution of local election disputes has been changeable as a result of the constitutional interpretation that the local elections be categorized as part of the general election and it brings the implicationto the authorized institution to settle the dispute over the results of local election since in 1945 Constitution the Constitutional Court is a state institution that is authorized to settle disputed general election results. The Constitutional Court decision No.072-073/ PUU-II/ 2004 providesa legal option for legislators to put the local elections either be a part of general election regime or local government regime. The legislature then included the local election became a part of general election and local election disputes as part of general election disputes that are resolved by the Constitutional Court.The above Constitutional Court verdict considerations stated that:

"As a logical consequence of the opinion of the applicant which stated that direct local election is the general election as referred to in Article 22E of the 1945 Constitution which set out in the Law No. 12 of 2003, the dispute over the local election results, according to the applicant, must be decided by the Constitutional Court. On the petition of the applicant to declare Article 106 paragraph (1) up to paragraph (7) as against the 1945 Constitution, the Constitutional Court considered that constitutionally lawmakers may ensure that the direct local elections as an extension of the notion of general election as referred to in Article 22E of 1945 Constitution, therefore, a dispute over the results become part of the authority of the Constitutional Court with the provisions of Article 24C paragraph (1) of 1945 Constitution. However, the legislators also are able to determine that direct local elections are not general election in the formal sense as referred to in Article 22E of the 1945 Constitution, so that the dispute regarding the result of local election is determined as the additional authority of the Supreme Court as possible by Article 24A paragraph (1) of the 1945 Constitution which stated, "The Supreme Court shall have the authority to hear a trial at the highest (cassation) level, to review ordinances and regulations made under any law against such law, and shall possess other authorities as provided by law."[20]

The above Constitutional Court decision is followed by the legislators by enacting the Law No. 22 of 2007 on General Election. Article 1 paragraph 4 of the Law states that "Election of regional head and deputy head of region is an election to elect regional head and deputy regional head directly in Unitary State of Republic Indonesia based on Pancasila and the 1945 Constitution".[21] Furthermore, Law No.12 of 2008 concerning the Second Amendment of Law No. 32 of 2004 on Regional Government, Article 236C provides that "the disputes settlement of vote count results of the regional head and deputy head of the region by the Supreme Court is transferred to the Constitutional Court no longer than 18 months from the promulgation of this Law ". In addition, by the enactment of Law No. 48 of 2009 on Judicial Power, Article 29 letter (e) governing the

provision that the Constitutional Court has "other authority granted by the Law", which in the explanation stated that "in this provision is included the authority to examine and decide on the dispute of the results of the local elections in accordance with the provisions of the legislation ".

According HamdanZoelva, the expansion of the authority signifies two things: First, the assertion that besides being a guardian of the constitution, the Constitutional Court also function as a guardian of democracy. In guarding democracy, Constitutional Court became the final resolver over disputed election results. Those roles make the Constitutional Court aware that its decision is not only about the candidates who are competing but also determine the fate of the people and democracy, especially in areas where the elections are being held; Second, The local elections be within the scope of the general election as stipulated in Section 22E of the 1945 Constitution, therefore the election disputes under the authority of the Constitutional Court. In this hoped, the Constitutional Court should be able to show a better performance in handling the cases. For the implementation of this authority can run optimally, the Court must have and prepare adequate support in all aspects. It is expected the transfer of authority from the Supreme Court election dispute to the Constitutional Court will create a democratic system becomes better with the dispute settlement institution's dignity. In addition, the Constitutional Court is assessed closer in competence in resolving election disputes compared to Supreme Court due to the election disputes are disputes in the field of constitutional law, so it is more appropriate if the authorization granted to the Constitutional Court as in the field of constitutional justice.

3.2.2.2. Problems of Constitutional Authority

The implication of the Constitutional Court verdict No. 072-073/PUU-II/2004 was the additional power possessed by the Constitutional Court in the local election disputes resolution and has run it for six years. During the local election as electoral regime, it did not cause constitutional problems and the existence of the Constitutional Court as a dispute settlement institution of local election results has also been true according to the constitution. Various local election result disputes had been successfully resolved by Constitutional Court. Even the approach used in the settlement of disputes has undergone a change to be more *substantial justice* approach by questioning the electoral process. The Constitutional Court explicitly justified that it is its authority to question the judicial process to ensure the quality not just quantity election by stating there was material breach of provision has occurred that affect the total vote of the regional election.[22]

At that point, the Constitutional Court also made a qualification, whether the violation or fraud is a structured, systematic and massive, although this led to the decision of the Constitutional Court "considered" beyond its authority, so that there was *ultra vires* and *ultra petita*.This argument is explicitly mentioned, for example, in Decision No. 41/ PHPU.D-VI/ 2008 on Local Election Dispute in East Java in 2008 that in order to achieve substantive democracy, the Constitutional Court couldn't be bound by the narrow interpretation of the legislation. The systematic, structured and massive fraud has been taken into consideration by the Constitutional Court in deciding the dispute of local election results.The structured fraud is fraud committed by government agency or election organizer in order to win any one contestant. Thesystematic fraud is planned (*by design*) violation, while the massive fraud means that the impact of violation or fraudis very broad and is not sporadic. This Constitutional Court step is considered as a legal innovation in deepening democracy. With this novelty, in terms of electoral disputes resolutions, Constitutional Court has not more viewed as 'calculator court', but as a court that succeeded in upholding justice in assessing and to judging the results of the disputed votes.[23]

Unfortunately, the authority of the Court in resolving disputes on local election results began to be questioned since one of the justices of Constitutional Court, AkilMochtar (the former Chief Justice) was caught red handed by the Corruption Eradication Commission (KPK) due to bribery in settlement of some local election disputes. This case has an impact on the decline of public confidence in the authority and constitutional justice. Therefore, the President has deemed it was necessary and urgent to take rescue efforts to restore public confidence in the authority of constitutional justices, especially in facing general elections in 2014. These circumstances have prompted the President to issue the Government Regulation in Lieu of Law No. 1 of 2013 on the Second Amendment to Law No. 24 Year 2003 regarding the Constitutional Court (hereinafter enacted into Law No. 4 of 2014), especially regarding the terms and procedures for the selection, election and nominating candidates for constitutional judges and the establishment of the honorary panel of the constitutional judges.

According Ni'matul Huda, the issuance of this Government Regulation has to be appreciated because it was issued by the Government intended to restore public confidence in the Constitutional Court due to the deterioration of the integrity and personality of one of the constitutional judges. Bribery scandal involving former constitutional judge has destroyed the credibility and legitimacy of the decisions that have been issued by the Court. Due to this scandal, public confidence collapsed instantly. Imagery that the Court is one institution that is considered sterile of corruption was fading. A bad image of the Court also seems to erase the fact that MK has respectable achievement in deciding election disputes.[24] This condition generated pros and cons to restore the dignity of the Court with amputation of its additional authority in resolving local election results disputes.

Furthermore, the design of the local election dispute resolution was further shaken by the release of Constitutional Court verdict No. MK 97/ PUU-XI / 2013 which stated that the Court is no longer authorized to resolve local election results disputes. In this verdict, the Court stated that "the additional authority of the Constitutional Court to hear disputes on the results of local elections with expanding the meaning of general election set forth in Article 22E of the 1945 Constitution is unconstitutional". The authority of the Court to settle local election disputes was amputated because the original intent of Article 22E regarding the authority of the Court only to resolve disputes on the results of general election alone (Electoral disputes on DPR members, DPD members, and the President elections), so it does not resolve the local election disputes. This ruling of the Constitutional Court annulled the contents of previous verdict (No.072-073 / PUU-II / 2004) and returned the electoral dispute resolution design to the legislator.

The Constitutional Court verdict number 97/ PUUXI/ 2013 has resulted that the local elections are no longer categorized as part of a general election under Section 22E of the 1945 Constitution. The Constitutional Court declared that some provisions of the legal framework of the authority of the Constitutional Court in the local election disputes resolution is contrary to the 1945 Constitution and has no legal binding force, namely: Article 236C of law 12 of 2008 on the Second Amendment to law Number 32 of 2004 on Regional Government. In addition, Article 29 letter (e) of the Act No. 48 of 2009 on Judicial Power governing the provision that the Court had "other powers granted by law" (including local elections disputes). However, it was noted also that the Court retains the authority to adjudicate disputes over the results of local elections as long as there is no legislation governing it.[25]

Legal arguments that were used by the Constitutional Court to understand the Constitutional Court authorities specified in Article 24C paragraph (1) of the 1945 Constitution must be looked

back to the original intent of the text which is a comprehensive grammatical meaning of the 1945 Constitution. The *original intent* is used to assess the authorities of the Constitutional Court and the meaning of general election based on the 1945 Constitution. According to the Constitutional Court, the provisions concerning the state institutionsare determined by the 1945 Constitution and their respective authorities should be rigid to follow constitutional norms, as the Constitutional Court Decision No.1-2/PUU-XII/2014 regarding judicial review about Act No.4 of 2014 on Stipulation of Government Regulation in Lieu of Law No. 1 of 2013 on the Second Amendment of Act No. 24 of 2003 on the Constitutional Court for being Law, which states that:

> "In addition, in order to maintain the constitutional system concerning the relationship between state institutions which are regulated by the 1945 Constitution as the supreme law, the Constitutional Court must use a rigid approach that the 1945 Constitution has been set clearly on the attributive authorities of each institution. In case the Constitutional Court has to interpretate the provisions governing state agencies, the Constitutional Court must apply the interpretation of the original intent, textual and comprehensive grammar that should not deviate from what has been clearly expressed in the 1945 Constitution as well as provisions regarding the authorities of state institutions established by the 1945 Constitution. If the Constitutional Court does not confine itself to a rigid interpretation but use freewill interpretation on provisions governing state agencies in 1945 Constitution, it has the same meaning as the Constitutional Court has allowed legislators to take the role of forming the 1945 Constitution and will be very vulnerable in case of misuse of power when the president is backed by the power of majority of the House of Representatives, or even the Constitutional Court itself which takes over the function of forming 1945 Constitution to change the 1945 Constitution through its decisions".

In short, the Constitutional Court verdict No.072-073/PUU-II/2004 has given additional authority to the Constitutional Court to resolve the local election disputes and the Constitutional Court judgment No. 97/PUU-XI/2013 has implication for the repeal of the constitutional authority of the Constitutional Court in the resolution of local election disputes. Accordingly, it has been proven that the differences in local election disputes resolution designs in Indonesia areoften altered by inconsistencyof constitutional interpretation and not because of the will of the legislators in the legislative process.

The author notes that the inconsistency of Constitutional Court in making a decision in the case of local election disputes settlement institution due to the double meaning of the constitution, that was the difference in understanding of the constitution and the use of the method of interpretation in understanding the rule of law (Article) 1945 Constitution. The 1945 Constitution is not only viewed in written form, but also the spirit and the soul in it, the meaning of the 1945 Constitution must be realized not only in text, but also the implementation of the text that is able to provide solutions to the problems of the nation and state. The task of the Constitutional Court is not only to stop the text (interpretation of the original intent), but further than that, that is able to turn the constitution amid changing times and problems of the nation and the state.The interpretation of the 1945 Constitution must become a way of life and living of every breath of the nation and the state, so that the breath of the nation is not stopped, then the meaning of the text is not enough, but needs the real meaning of "legal significance in the society (the living Constitutions)".

The Decision No.072-073/PUU-II/2004 is a decision that is able to translate the text of Article

22E and Article 18 paragraph (4) of the 1945 Constitution into the problems which are faced by this nation, provide solution, and also offer a good design in the resolution of local election disputes (non original intent). Meanwhile, the Constitutional Court Decision No. 97/PUU-X/ 2013 is a decision that puts the meaning of the constitution based on what is written in the text of the rule of law and prioritizing the use of interpretation of the original intent. Indeed, if the truth is assessed based on the constitution, the meaning of the constitution and the use of the method of interpretation in the two decisions is justified in theory and practice of judicial review. However, in the realm of democratic practice, the decision led to legal policy on electoral dispute settlement institution lost its way, unpredictable and does not have a definite grip.[26]

3.2.3. TheNotion of Formation of Special Judicial Body for Local Electoral Disputes Settlement

After the Constitutional Court Decision No. 97/PUU-XI/2013 which has implication for the repeal of the constitutional authority of the Constitutional Court in the local election dispute resolution, the President issued the Government Regulation in Lieu of Law No. 1 of 2014 which determines that the dispute of local election results will be resolved by the Supreme Court. The Government Regulation in Lieu of Law has been approved by parliament to become law No. 1 Year 2015. However, the law could not be implemented, the Act No.1 of 2015 was amended with the enactment of Law No. 8 Year 2015. Based on Law No. 8 of 2015 in conjunction with Law No. 1 of 2015, the local election dispute resolution process is divided into three forms: (1) election dispute resolution is conducted by General Election Supervisory Body(Bawaslu) of which its decision is final and binding; (2) state administrative dispute is resolved by the State Administrative High Court (PTTUN) after the entire administrative efforts in Supervisory Body of General Election or Provincial or District/City Supervisory Committee of General Election have been done, where the verdict of the State Administrative High Court can only be done the cassation to the Supreme Court; and (3) Article 157 of Law No. 8 of 2015 stipulates that the local election results dispute cases are examined and tried by a special judicial body. Article 157 also arranges that before a special judicial body is formed (before the implementation of a national general local electionsin 2027), thesettlement of local election results disputes becomes the authority of the Constitutional Court.

Legal policy regarding formation of special judicial body that deals with the local election disputes is still biased and requires a comprehensive review, for lest a special judicial body to be formed will be disastrous to the local democracy. The special judicial bodyto be formed should have an ideal design and measure for local democracy.In addition, the special judicial body should be more ideal than the previous institutions dealing with electoral disputes settlement. The problem is that no clarity on the form of that special judicial body[27], it does not provide detailed provisions on the position (structure) and the special authority of the judiciary, whether institutional design will be placed in one judicial body under the Supreme Court or another institution outside the courts. Moreover, it is unclear also whether its position is at the central, provincial or district/city.

Article 1 point 8 of the Act No. 48 of 2009 on Judicial Power stipulates that "the Special Court is a court that has the authority to examine, hear and decide a particular case that can only be established in one of the surroundings courts that is under the Supreme Court that is set out in the Acts". Furthermore, Article 27 paragraph (1) of Law No. 48 of 2009 stipulates that "Special courts can only be established in one of the courts under the Supreme Court as referred to in Article 25".

The problem is, if this special judicial body to be placed in the sphere of justice of the Supreme

Court as mandated by Law No. 48 of 2009, then in which judicial environment that special judicial body to be formed, in the scope of judicial of the general courts or the administrative courts? Here are the authority limitation of the two of these jurisdictions as stated in Article 25 of Law Number 48 Year 2009:

Paragraph (1): The judicial authorities under the Supreme Court are including the judiciary in general courts, religious courts, military courts, and administrative courts.

Paragraph (2): the general judiciary which is referred to in paragraph (1) has the authority to examine, hear and decide criminal and civil cases in accordance with the provisions of the legislation.

Paragraph (5): The state administrative judiciary as referred to in paragraph (1) is authorized to investigate, try, adjudicate, and resolve administrative disputes in accordance with the provisions of the legislation.

With the existing judicial structure, we are able to consolidate all of the ideas about the special judicial bodywithin one of courts' jurisdictions as determined by the 1945 Constitution. All forms and types of special courts should be returned their existence to the context of the general courts, religious courts, administrative courts or military courts.[28]According to Dian Agung Wicaksono, the most appropriate design of special judiciary body of local election is an ad hoc and operates within the Supreme Court.This court has the authority to deal with all matters relating to election disputes, including disputes on implementation process, dispute on the results, as well as administrative problems and electoral crimes,while for violations of code of conduct of election organizers remain under the authority of the Honorary Council of the Election Implementer.[29]

Most likely, if the special judicial body to be established within the scope of the courts under the Supreme Court, hence the most appropriate jurisdiction is under the state administrative courts. It is given that to date the local election administrative disputesare among the attributive jurisdiction of the administrative court, then the disputes on the results of local election should ideally also be under its jurisdiction. With this scheme, in future, the jurisdiction to settle the whole types of electoral disputes (on procedures/implementation and on results of local election) certainly will be more integrative under administrative court. Given that the settlement authority in administrative and implementation disputes so far, under the authority of High Administrative Court (administrative appeal), so the special judicial body for settlement of local election results disputes institutionally to be included as the part of High Administrative Court.

4. The Institutional Design for Dispute Settlement of General Election/Local Election in Other Countries

The settlement of electoral dispute can be categorized into formal and informal channels. The formal channels carried by state institutions, either through judicial or non-judicial mandated by the constitution or by legislation. While the informal settlement of electoral disputes normally through alternative dispute resolution models by way of arbitration, mediation, or conciliation.[30]

There are different systems of judicial review institution regarding elections. Such systems can be differentiated according to the nature of the court that is empowered to sort them out. Generally, electoral disputes can be brought before ordinary judges (as is the case for Canada and Great Britain); before an specialized area within the Judicial Branch of Government (as is the case for Argentina, Brazil, Mexico, Paraguay and Venezuela); before specialized and independent courts (as is the prevailing case for so-called electoral courts in Latin America); or before constitutional courts (as is the case for Austria). Each country develops systems in its own unique context.[31]

5. Closing

Dynamics and problems of the settlement institution of local election results disputes have ups and downs, starting from the authority of the Supreme Court (conducted by High Court), which in practice creating legal uncertainty in the resolution of the dispute. For example, the final judgment of the High Court of Bandung could have been annulled by the Supreme Court's Judicial Review decision. Supreme Court exercised its authority to resolve local election results disputes for 3 years and in 2008 this authority was transferred under the jurisdiction of the Constitutional Court based on the constitutional interpretation on Constitutional Court Decision No.072-073/PUU-II/2004 to include the local elections as part of the general election regime, then that decision is followed by Law No.12 of 2008 concerning the Second Amendment of Law No. 32 of 2004 on Regional Government, Article 236C.

Having lasted for 6 years, the institutional design for settlement of local election results disputes was further shaken following the Constitutional Court verdict No. 97/PUU-XI/ 2013 which states that the Constitutional Court is no longer authorized to resolve local election results disputes due to "the additional authority of the Constitutional Court to settle the case of local election results disputes by widen the meaning of general elections which regulated in Article 22E of the 1945 Constitution is unconstitutional". In the Constitutional Court verdict above and in Law No. 8 of 2015, the idea of establishing a special judicial body to resolve election results disputes has been initiated. However, by looking at the 1945 Constitution and the regulations beneath it, the most appropriate position of this special judicial body is to be placed under the jurisdiction of the administrative judiciary, especially within the realm of the High Administrative Court. It is given that to date the local election administrative disputes has been among the attributive jurisdiction of the the high administrative court (PTTUN), then the disputes on the results of local election should ideally also be under its jurisdiction.

The complexity of special judicial body for settlement of local election results disputes requires the legislator to design it as soon as possible as envisaged by Law No. 8 2015 without waiting for the imminent of implementation of a national direct local election in 2027. If it is delayed, it will be a lot of aspirations for justice to be delayed anyway and may even be neglected at all.

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[16] R.Nazriyah, dalam "Pelaksanaan Pemilukada di Otonomi Khusus Papua: Studi terhadap Putusan Mahkamah Konstitusi No.29/PUU-IX/2011, pp.532-534

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[18] Topo Santoso, "PerselisihanHasilPemilukada", paper presented in limited discussion conducted by MahkamahKonstitusi, March 24, 2011 in Jakarta.

[19] Kompas, September 30, 2015: 2,in AnomWahyuAsmorojati, Proceeding National Seminar of PK2P, FH UMY, October17, 2015, p.279

[20] In this verdict, 3 Constitutional Judges expressed dissenting opinion, the three judges have the judgment that the local election is included into the definition of General Elections: 1. Prof. Dr. H.M. LaicaMarzuki, SH, that "Other consequences, when it was agreed that the direct local election asgeneralelection in accordance with Article 22E paragraph (2) of the 1945 Constitution, the authority to decide disputes concerning local election results is hold by the Constitutional Court, pursuant to Article 24 C of paragraph (1) of the 1945 Constitution, not the Supreme Court "; 2. Prof. HA MukthieFajar, SH, MS, says that "the democratic election of heads of regionis direct local election,direct local election is generalelection, and generalelections are general elections that substantially based on the principles specified in Article 22E of the 1945 Constitution "; 3. MaruararSiahaan, SH, that "we can justify the arguments of the petitioners and argue that local election is included in the general election regime, which not only in its principles were taken over in the mechanism of the local elections, the setting and implementation should also be subjected to the system and rules in 1945 Constitution Chapter VIIB regarding General Elections namely Article 22E paragraph (1) until (6).

[21] Law No. 22 of 2007 on General Election Administrator is declared invalid after enactment of Law No. 15 of 2011 on General Election Administrator. Article 1 paragraph (1) states that "Election of governors, regents and mayors is election to elect governors, regents and mayors democratically within the Unitary State of the Republic of Indonesia under Pancasila and the Constitution of the Republic of Indonesia Year 1945"

[22] Bambang Widjojanto, 2009, *Kajian Putusan MK Tentang Pemilu & Pemilukada*, Kemitraan, Jakarta, pp.6-7

[23] M. Mahrus Ali, dkk., 2011, *Tafsir Konstitusional Pelanggaran Pemilukada yang Bersifat Sistematis*, Tersktruktur dan Massif, MKRI, Jakarta, pp.3-4

[24] Tanto Lailam, 2015, *Pertentangan Norma Hukum: dalam Teori dan Praktik Pengujian Undang-undang di Indonesia*, LP3M UMY, Yogyakarta, p.378

[25] Constitutional Court verdict No.97/PUU-XI/2013

[26] Tanto Lailam, *Op.Cit.,* hlm.418

[27] FajarL.Soeroso, "DesainKonstitutisionalPenyelesaianPerselisihanPemilihanKepala Daerah", Proceeding of National Seminar"MewujudkanKedaulatan Rakyat melaluiPemiludanPilkadaSerentak yang BerkualitasdanAkuntabel", PK2P, FH UMY, October 17, 2015

[28] JimlyAsshiddiqie, "PengadilanKhusus", accessed from http://www.jimly.com/makalah/namafile/126/PENGADILAN_KHUSUS_02.pdf, May 25, 2016.

[29] Dian AgungWicaksonoand Ola Anisa Ayutama, "InisiasiPengadilanKhususPemilihanKepala Daerah dalammenghadapiKeserentakanPemilihanGubernur, BupatidanWalikota di Indonesia", *JurnalRechtsVinding,* Volume 4 No.1, April 2015, p.177

[30] Anna Triningsih, "Perbandingan Batasan KewenanganPenyelesaianSengketaPemilu di Negara Demokrasi", Proceeding of the National Seminar "MewujudkanKedaulatan Rakyat MelaluiPemiludanPilkadaSerentak yang Berkualitas&Akuntabel", PK2P, FH UMY, Oktober 17, 2015.

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Criminal Legality Affecting Cybercrimes in Yemen

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ABSTRACT
Criminal legality is a principle that promotes justice and stability. A judge cannot criminalise or expand the interpretation of any existing laws to criminalise new actions or offences that are not provided by the legislature. Article 47 of the Yemeni Constitution 1990 states that "No crime or punishment shall be undertaken without a provision of Shari'ah or law". Further, section 2 of the Yemeni Penal Code 1994 states that "crime and punishment must be defined by law as such". Unfortunately, cybercrime is one of the new offences that are not specifically regulated by Yemeni laws. Since cybercrime is one of the greatest threats facing international community, this paper attempts to examine the criminal legality affecting cybercrime in Yemen. This study is a purely doctrinal legal research and data were collected from both primary and secondary sources like books, articles, legal doctrines, statutes and many others. To sum up, Article 47 of the Yemeni Constitution 1990 and section 2 of the Yemeni Penal Code 1994 generally cover traditional offences that are committed on the Internet and via computer such as online pornography and online defamation. Nonetheless, serious issues arise with regard to new offences that can only be committed in the cyber world such as hacking and spamming as they are nowhere provided in the Yemeni legal framework.
Keywords: *Criminal legality, Cybercrime, Legal framework in Yemen.*

1. Introduction

The criminal legality concept suggests that the legislature only has right to identify the criminal acts and determine the penalties executedfor the perpetrators[1]. This is one of the basic principles recognized in most modern criminal legislations, including the Yemeni legislation[2]. The principle assumes the separation of three powers: parliament, executive and judiciary. The parliament has the power to enact laws and decide on criminalization and punishment[3]. This is because it has the inherent jurisdiction to enact laws, which cannot be enacted by the executive authority[4]. If the executive authority has the power to enact laws, it would be problematic as it may enact oppressive laws to attain its own ends[5]. Apart from that, the task shall also not be entrusted to the judiciary because it may be viewed as an arbitrary authority of judges, and it may lead to conflict in judgments. Based on this, the judge's power is limited in applying the criminal rules formulated by the legislature. The act cannot be considered a crime unless stated by the law, even if the judge is fully convinced that the act is contrary to morality or public interest[6].

Criminal legality principle is formulatedto protect individual's interests, rights freedom, and to assign the task of identifying crimes and punishments to the legislative power. It serves as a guarantee of non-aggression on the individual's rights and freedom by other powers.[7] The judiciary does not have right to prosecute for actsthat are not criminal under the laws.Besides, the executive does not have power to execute punishments that are not issued by the judge. This principle is exclusively established to promote justice and stability.[8] When all people are under the law without discrimination and bias in punishment, justice can be attainedamong community

members.[9]

The principle of criminal legality has several significant results.First, relating to the source of criminalization and punishment, legislation is particularly the only source of the Penal Code.[10]Second, the judge cannot deviate from the provisions of criminalization and punishment when in applying or interpreting the lawwhich cannot be expanded, to avoid criminalizing new acts not provided by the legislature.[11] The third outcome is that the Penal Code applies only to present and the future acts,which means it only refers to non-retroactivity of criminal legislation, and itapplies to only those acts committed after the law becomes effective[12].

The principle of criminal legality has been criticized by itsopponents. They contended that it restricts the power of judges in addition as it constitutes a stumbling block for judicial and social development. It should be noted that the criminal legality principle has been developed based on certain ideologies. For instance, the judge has been given a flexibility option to estimate the penalty in consistence with the circumstances of the crime. On the other hand, most legislation provides maximum and minimum penalty. In this case, the judge can choose suitable punishment according to the circumstances of crime. Meanwhile, the judge has been given power to suspend sentence execution if it appears that the offender's issues are more likely to be resolved.[13]

For instance, sections 246, 247, 248 and 249 from the Yemeni Penal Code of 1994, which relates to crimes against personal freedom, the legislator states the maximum and minimum punishment for imprisonment. The judge has freedom to punishment appreciation. However, the flexibility of criminal legality goes to only the punishment appreciation, not criminalization which remains so rigid that prevents the judge from any discretionary power to criminalise the acts.[14]It allows legislatorsto criminalizeinjurious acts that affect community interests.Nevertheless, the legislatorsshould bear in mind the existing interests and acts that could harm those interests at the time of enacting the legislation[15].

Since the society is developing and people's interests are increasing, new lawsshould be passedto deal withacts that are detrimental to the society. This situation leads to inefficiency of the traditional penal legislation in protecting those interests because the legislative reforms often come late. Consequently, adherenceto the strict and narrow interpretation of legislations provides chances for criminals to commit criminal acts withoutpunishment, despite the harmful nature of those acts to social interests of people or personal rights.These actsare also beyond the scope of the offenses recognized by laws, and the existing laws do not criminalizesuch acts.[16]In addition, the situation suggests narrow interpretation of the laws according to the criminal legality principle. This may lead to lack of punishmentfor those who breach the laws and take advantage of the legislation's deficiency to commit harmful acts against people's interests and rights which can basicallybe protected by the law.This circumstance does not conform to the law which provides for the offenses expressly in the Penal Codes[17].

This paper attempts to examine the principle of criminal legality affecting cybercrime in the Yemeni legal frameworkon criminalization and punishment.

2. Discussion

2.1. The Principle of Criminal Legality in the Yemeni Legal Framework

The principle of criminal legalityin the Yemeni legal frameworkis provided in the 1990 Constitution and1994 Penal Code,Article 47of the Yemeni Constitution 1990 states:

> Criminal liability is personal. No crime or punishment shall be undertaken without a provision of Shari'ah or law. The accused is innocent until proven guilty by a final judicial sentence, and

no law may be enacted to put a person to trial for acts committed retroactively".[18]

Furthermore, section 2 of the 1994 Penal Code states that"Criminal Liability is personal and any crime and punishment must be defined by law as such".According to article 47 of the1990 Constitution andsection (2) of the 1994 Penal Code, no crime or punishment can exist without text law.[19]Penal Code and other supplementary laws are the only source of criminalization and punishment. According to Article 47 of the 1991 Constitution and section 2 of the 1994 Penal Code, the Yemeni legislationstates ".... without a provision of Shari'ah or law..." from this article the source of criminalization and punishment is Shari'ah20 or text law.

There is no difference whether the act is prohibited in Shari'ah or law. It does not detract from following Shari'ah or text law because the Constitution used 'or' which indicates a freedom of choice of either Shari'ah or text law. This does not mean that the transition from Shari'ah to text law is different because the Yemeni Penal Code is a codification of the provisions of Islamic Shari'ah[21]. In addition, the term 'Shari'ah' is very wide and can include all harmful acts that are prohibited under Shari'ah. However, it should be noted that section 2of the Penal Code is not similar with article 47of the Constitution which states that "... no crime or punishment except by law".This means the sources of criminalization and punishment are limited to law.The act may be permissible unless prohibited by law even if the act is prohibited by Shari'ah.This is not consistent with the provisions of the Constitution.However, the text of section 2 of the 1994 Penal Code should be reconsidered by the legislators.[22]

In contrast, Section 41 of Law No. 40 of 2006 Electronic Payments Systems for Financial and Banking Operations stats:

> "Any person who commits any act falls an offense under the provisions of existing laws by using an electronic means shall be punished with imprisonment for a minimum of three months and not exceed one year, or a fine of not less than three hundred thousand riyals and not exceed one million riyals".

Although this act relates to the electronic payment systems and financial, banking operations, section 41 provides a general provision thatany person who commits any act falls an offense under the provisions of existing laws by using an electronic means shall be punished.Hence the question is what is the meaning of electronic means in section 41 as it is not explicitly defined in the Act.Section 2 of this act provides examples of payment operations by electronic means such as Automatic Teller Machine (ATM),point of sale, credit cards and electronic transfers. Nevertheless, the exact meaning of electronic means is still vague and not clear.

E-signature and E-transactions Act 2012 in Iraq,Section (1)defines electronic means as hardware or equipment or power tools or magnetic, optical, electromagnetic, or any other similar means used to create processing and information exchange and storage[23]. In addition,E-transactions Act 2008 of Oman defines electronic in section 1 as any kind of means of modern technology with electric or digital or magnetic or wireless or optical or electromagnetic or photic or any other means of equivalent nature[24]. It is obvious that the meaning of electronic means in Iraqi and Oman law refers to any devices or means that may connect to technology such as Electrical, digital, magnetic, wireless, optical or electromagnetic, optical, or any similar capabilities thatfall under these capabilities. Therefore, data, text, images, sounds and symbols, databases and computer programs areinformation that can be exchanged electronically and can be created, sent, or saved by electronic means, including email, telegraph, telex and facsimile. Accordingly, based on

these definitions it could be said that smartphones and computers are also electronic means. Although, the electronic payments systems for financial and Banking Operations act No. 40 of 2006 regulates the electronic payments and financial transactions, but section 41 is a general text.According this section, any acts committed by electronic means, which are crimes under existing laws must be punished. Nevertheless, the Yemeni legislature need to provide cybercrime offenses explicitly, pursuant to the principle of legality.

2.2. Elements of Cybercrime

Thereare twoelements that must be proved before taking legal action; actus reus, mens rea.These cybercrime elements are explained in this study.

The Material Element (Actus Rea)

In every crime, actus reusgenerally consistsof the criminal behaviour or criminal act, result and causation[25]. Criminal behaviour as a component in actus reus of conventional crime could be physically seen withnaked eyes, such as murder, theft and forgery. However, it is difficult to identifycybercrimes, particularly actus reus that occur through the computer system and internet network.[26]Criminal behaviours in cybercrime require a digital environment, computer and internet network to identify beginning of the criminal act; when an attempt is made to commit the crime. For example, the offenderusually prepares the computer to achieve the crime result. In hackers' crimes, the Actus Reus is to download or prepare hacking programs to the offenders' computer[27]. In pornography crimes, the offender may prepare to upload or create websites, photos, videos that may contain materials against public manners[28]. The offender may prepare virus to plant or send it to other networks. It should be noted that not every crime requires preparation work to commit crime.[29] In fact, it is very difficult to differentiate between the preparation and the beginning the criminal activities in cybercrime. Even though crime preparation may not be punishable, cybercrime is somewhat different by hacking programs or tools to get passwords, possession of pornography images or videos; all these acts are crimes under Penal Codes.[30]

In conventional crimes, it is required that Actus Reus must be available with the criminal act, result, or causation which connects conduct with resulting effect. Nevertheless, in cybercrime Actus Reus may be achieved without result, reporting the crime before achieving the result, such as creating a website to defaming a particular person, but the result could not be achieved if the crime is reported before the website is launched. Although the result has not been achieved, the criminals must be punished.[31]

2.3. Attempting to commit cybercrime

Criminal behaviour in cybercrime is different from that in conventional crime. In cybercrime, the criminal behaviour might be realized with a click button on the keyboard only, which may cause irreparable damage to the target system or obtain information from the target system, forgery, data manipulation and other forms of cybercrime without preparations for the crime.[32] Contrary to conventional crime, some would argue that cybercrime is not a subject to attempt to commit crime because in cybercrime, it is difficult to determine the beginning, execution of the criminal act and preparation to commit the crime as long as it is a digital environment.[33] An attempt to commit a crime is an offense in criminal law when the criminal makes a substantial but unsuccessful effort to commit a crime and could not for any reason be prevented from achieving the result[34].

Section 18 of the Penal Codedefined an attempt to commit a crime astheinitial stage to

implement an act with intention to commit a crime with failure to achieve the result for reasons beyond the criminal's control, or impossibility to achieve the result because of incompetent tools used to commit the crime, or the victim was unavailable during the time of committing the crime[35].According to Section 19of the Panel code,attempts to commit crimesare always punishable. The punishment does not exceed half of maximum penalty for the offense[36]. Therefore, it seems that Yemeni Penal Code punishes attempts to commit a crime in conventional crimes, but in cybercrime, determining the preparation time to commit the criminal act is not significant if the offender prepared the crime tools and tried to achieve the result.However, the Yemeni law is silent in this regard; the legislators should have single provision or clarification for attempt to commit cybercrime.

The material element of crime is a criminal behavio;whether to commit an act criminalized by law or refrain from doing something ordered by law.[37] Material element of crime is generally provided under section 7 of the YemeniPenal Code, which states:

A person shall not be liable for a crime, which the Law requires for its consummation of a specific result thereof, unless the conduct of such a person in deed or omission was the cause leading to the occurrence of such result; causal linkage shall stand whenever in the normal course of events in life, the conduct of the perpetrator was the cause of the result; whatever the perpetrator caused which leads to a loss, provided that such linkage is rejected if another factor is involved, which in itself is adequate to lead to the same result, wherein such case the liability of the person's conduct, if the Law incriminates such a person for anything separate from such result.

According to section 7 of the Penal Code, material element must be an act or an attempt to do an act that can be proved;thoughts that are on human's mind cannot be criminalized. Material element in cybercrime is different from offense to another according to legal characterization of the act.Therefore cybercrime cannot be limited to one legal characterization. It may have a similar legal characterization to some conventional crimes such as defamation, criminal threatand incitement. These may take same provisions of offences under the Penal Code, but this may not cause problems.However, there are types of criminal behaviour related to cybercrime; we should distinguish between them and traditional crimes, and this needs a legislative intervention. Criminal behaviour in cybercrime which is similar to and which is different from conventional crimesare discussed in the following section.

2.4. Criminal Behaviorin Cybercrime Similar to Conventional Crimes

Criminal legality principle (No crime or punishment except by text law) has become one of the deep-rooted principles in criminal law. Accordingly, Section 2of YemeniPenal Code states that criminal liability is personal, any crime and punishment must be defined by law.[38]However, many types of criminal behaviours committedviathe Internet and computer could be subjectedto the provisions of the Penal Code such as criminal threats, indecent acts, information theft and defamation. Regardingcriminal threat, section 25 of theYemeni Penal Code1994stated the legislator has criminalised any acts that areconsidered as a threat since it uses flexible terms which could be a subject to interpretation in several forms, but does not specify means or methods of committing the crime.The criminal threat might be oral or written, or using the modern technology (computer and internet). For example, criminal threat might be sent by email,websites, social media or apps. Similarly, slander and defamation in sections 289-293of the Yemeni Penal Code state that the act does not require a particular way to commit these offences. However, the law use flexible terms that could be an appropriate method to commit these crimes, which may be oral, written on

paper or newspapers or video published through social media. The aforementioned statements suggest that the provisions of the Penal Codetend to be general and could be similar to some of cybercrime criminal behaviour. But as the criminal legality is adeep-rooted principle and in order to avoid broad interpretation of the criminal provisions, the legislators must regulate cybercrime in single law, and provide more severe punishment to be in consistent with the serious cybercrime, as it may harm individuals and institutions.

2.5. Criminal BehaviorinCybercrime Different fromConventional Crimes

Nowadays, as criminal acts are complex, criminals have become intelligent and well-equipped with high skills. There are new types of criminal behaviour that came as a result of technology, such as unlawful access to computer systems and networks and breaking into databases, tampering of data, system interference and unauthorised modification of computer systems, networksand data, unlawful interceptions of electronic money transfers, electronic messages and emails, scams based on fake websites, and viruses.[39]Obviously, Yemeni legal framework does not provide any specific provisions that criminalize the non-conventional criminal behaviour that could be committed using information technology. For these new crimes, provisions of the Penal Codecannot be applied.In addition, the enforcement of the existing legal texts would be criticized by jurists because it would be considered beyond criminal legality principle, which should abide by law enforcement authorities. On the other hand, the texts of criminal laws must not have a broad interpretation. Yemeni legislators must avoid the legislative deficiencies and criminalise these offences, and it is necessary to update the criminal legal framework in Yemen.They should take into account the scientific-technological development to prevent these types of new criminal behaviour s that are broad and growing up without legal restrictions.

2.6. The Mental Element in General Crimes

Mental element is the offender's mental intention or the offender's state of mind at the time of the offense.[40] Mental element is a very important component to prove that the criminal act has been committed.[41] It also requires that the offender must engage in illegal activity with a criminal intent, knowingly, maliciously[42], recklessness or negligence.

Criminal Intent is an explicit and conscious desire to commit an unlawful act[43]. For instance, if a person targets and assaults someone with the goal of inflicting harm on the victim, that person is displaying criminal intent[44]. Knowledge means to be aware that offender's actions will bring certain results or the expected result, but the offender does not care and insisted on achieving the result while knowing that the action is illegal[45]. For example, if a person violently lashes out at someone, inflicting harm may not be the primary goal. However, if the person was aware that harm would be a predictable result of the action, then the personwould be guilty of having criminal knowledge[46]. Recklessness refers to the decision to commit a certain action despite knowing about associated risks. For example, if a person causes injury while drunk driving, that person can be found guilty of recklessly causing harm. Though the person's intentionis not to hurt anyone, and does not expect it to happen, but the person knowsthere is risk of hurting someone by driving while inebriated[47]. Negligence is the mildest form of criminal culpability. A person commits negligence by failing to meet a reasonable standard of behaviour for circumstances. For example, if a child is injured because of the caretaker's failure to perform the duties, the caretaker may be guilty of criminal negligence[48]. Criminal Intent is available in the following cases[49]:

1. If the offender intends to commit a criminal conduct or expects that the criminal act will result

in damage or cause danger.
2. If the act or omission causes harm or risk more than the offender was accepting.

2.7. The Mental Element in Cybercrime

The availability of the mental element in cybercrime is important to determine the nature offense and find out the right legal characterization to determine the texts that need to be applied to the criminal behaviour [50]. It might not be necessary to prove the mental element in some cases of cybercrime to establish criminal liability.[51]To give an illustration, mental element of an unauthorised access to the system offense is different from the overrun of an authorised access to the system because in the former, the offender does not have a permission to access the system.But in the latter, the offender has an authority to access the system and exceeds the authorization and login to another files or documents or systems available within the main authorised system.Therefore, in this case the offenderwill be liable for exceeding the authorised access to the system[52]. The American justice did not settle the case for some crimes committed using the Internet in terms of how to determine whether they require a general or particular criminal intent[53]. In conventional crimes, the offender commits the criminal act with knowledge of the elements of criminal conduct and aims to achieve a particular purpose.The offender knows the crime elements and desire to achieve the result. For instance, in theft crimes the purpose is to possess the stolen materials[54]. In particular criminal intent, the offender's motivation for committing the crime is the specific result to be achieved. For instance, the particular criminal intent in the forgery of official documents crime is to use the documentfor illegal purposes, or committing murder in order to escape from prison.[55]

Crime is not a physical entity; it is a psychological entity because physical act cannot create a responsibility[56].This shall also be applied to cybercrime. Like any other crime, the person must be criminally responsible for the acts, unless if the offender - at the time of the occurrence of the crime - was unable to perceive nature of consequence, such as permanent or temporary insanity or mental disability, forcefullyor unknowingly or compelled by necessity to be under the influence of an intoxicating substance or drug (Section 34 of Yemeni Penal Code)[57], physical coercion and force majeure (section 35 Penal Code), necessity and moral compulsion (section 36 of Penal Code) as well as juvenile in section 31 of Penal Code[58].

According to the mental element, a crime is categorized into two types; intentional and unintentional crimes. This division isadopted by the Yemeni Legislation in the Penal Code sections 8, 9, 10[59]. Section 9*of the Penal Code* states that intent is there if the perpetrator of a crime carries out such a deed wilfully, knowingly and with the intent of realizing the result that is punishable. Intent is also realized if the perpetrator expects a criminal result for committing an act and perpetrated the act accepting such result accordingly. Alternatively, section 10of the Penal Code states thatunintentional crime exists if the perpetrator acted in a manner that is not committed by a normal person; if in the circumstances the act is characterized by carelessness, excessiveness, or negligence or without consideration to the relevant laws, procedures and decrees.[60] The question that may arise here is can cybercrime be an unintentional crime?

2.8. Cybercrime as an Intentional Crime

There is a perception that criminals are described as irresponsible and having cultural decadence, which makes them unfriendlyupeopleand dangerous to the community.However, this perception has elapsed with the emergence of new types of crimes especially crimes committed

by information technology. Cybercrime is an intentional crime committed using the Internet, computers, systems and networks in order to achieve objective or benefit[61], for instance, thinking and intent to destroy the stored information on computer, or the use of viruses to destruct the information, or defame, insults others, or incitement for immorality and debauchery.All these crimes require the intent of behaviour and achievement of the intended results, but the question that needs to be answered is'can cybercrime be considered an unintentional crime?'

2.9. Cybercrime as an Unintentional Crime

As mentioned earlier, cybercrime can only be an intentional crime.Although Yemeni laws do not address cybercrime, but consideringsection 10 of Yemeni Penal Code 1994, which states that "unintentional error exists if the perpetrator acted when committing the act in a manner that is not committed by a normal person; if in the circumstances the act is characterized by carelessness, excessiveness, or negligence or without consideration of the relevant laws, procedures and decrees. This is a situation where the perpetrator commits an act without expecting the result which a normal person would expect and thought that such result can be avoided accordingly.[62]

Although the aforementioned section is drafted to conventional crimes, it is possible to visualize cybercrime as an unintentional crime. A person who relies on personal skills to avoid virus problems, or using the computer for personal benefit and caused a destruction of the institution's computer or systemwill be liable for an unintentional crime due to carelessness, excessiveness, or negligence or without consideration of the institution's regulation.[63]Also a person who used personalpen drive in company's computerwithout checking confirming the absence of viruses in the pen drive and caused disruption to the system or damage or steal data is labile for an unintentional crime.[64]

Above all, it seems pertinent to say that any crime must have the mental element in all its classes. This is because the offender's mental state in general or the particular intent can appear to be responsibility of the perpetrator. However, cybercrime may have exceptions because of its immaterial nature with the high rate in committing this type of crime, which makes it difficult to identify the criminal intent and crime motivation. In this case, the criminal intent is not available, which means that mental element is not available in such crimes. In cybercrime, identifying the intentionis one of the difficulties in determining the legal characterization and punishment to the perpetrator of offense because of unavailability of the criminal intent.Example may be a situation wherea hacker hacks the database of a company for learning or for entertainment without intent to commit a criminal act, and it causes a huge damage to the company.In conventional crimes, the offender should be responsible based on the damage.

3. Closing

It could be concluded that there is a little correlation between the existing laws and cybercrime criminalisation. As cybercrime is a harmful act that is prohibited by shariah and this type of crimes could fall under Article 47 of the Yemeni Constitution 1990which is might be broadly interpreted. It observed that Article 47 of the Constitution includes the term law and shariah, but section 2 of the Penal Code Act 1994is limited to offences stated in the Act. In short, cybercrime activities might fall under section 41 of Electronic Payments Systems for Financial and Banking Operations Act 2006, but the section affects only the offenses committed by electronic means that are criminalised under existing laws. Since this act does not provide the definition of electronic means, section 41 is limited to acts that fallunderprovisions for offensesin the existing laws, which means

it does not include the new forms of cybercrime offences.In this regard, crimes that are basically traditional, but can be committed via the Internet and computer are criminalised under the Penal Code 1994. These include pornography, defamationand fraud. But the emerging crimes that can be committed only by the Internet and the computer are not criminalised in the Yemeni Penal Code 1994.These include hacking and planting viruses. This reveals the legal deficiencies in the Yemeni legal system on cybercrimes. Therefore, the legislators should pass a law regulating cybercrimes, or at least update the existing criminal laws to include cybercrimes in all its forms.

Acknowledgement

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A Comparison on the Scope of Limited Liability in Companies and

SHIRKAH AL-INAN

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ABSTRACT
Under the civil law, the metaphor of corporate personality justify the existence of corporation as a legal person. As a legal person, a company is granted the power to limit liability of its members for debts of the business. Members of the companies is only liable up to the amount of their shareholding. Although Shirkah al-Inan is commonly assumed by Shariah scholars to be similar to a civil corporation, there are many r differences between the two entities that to equate the two as similar entity would be a legal misconception.This paper analyzes the legal status of civil corporations and compare them with Shirkah al-Inan to highlight major differences between the two entities. Special reference is made to the scope of liability to highlight one of the major misunderstanding Research methodology adopted in this paper are statutory and doctrinal analysis.
Keywords: *Limited Liability, Companies, Shirkah*

1. Introduction

In Malaysia, partnership matters are regulated by the Partnership Act 1961. The Act was actually modelled on and *pari materia* to the English Partnership Act 1890.[1] Before the Partnership Act 1961 became the formal reference, all partnership matters were referred to the Contract Ordinance (Malay States) 1950.[2] The Partnerships Act 1961 defines partnerships as 'relation which subsists between persons carrying on business in common with a view of profit'.[3] Different from a company, a partnership does not require formal registration for its legal existence. There is no document required for registration although a partnership agreement shall be useful for the internal regulation.[4] As long as the parties fulfill all the required elements, namely relation, between persons, carrying on business in common and with a view of profit, a partnership can validly exist.[5]

Under the Shariah, partnerships structure is observed to be equivalent to the concept of *sharikah.* The literal meaning of *sharikah* is 'intermingle', implying the intermingling of properties that form the capital, whereby, one cannot be differentiated from the other.[6]

A study of the classical definitions of *sharikah* reveals a variety of legal meanings given to the term. For example, the Malikis define *sharikah* as a permission to transact *(tasarruf*), where each of the partners permits the other to transact with the partnership property while at the same time retaining his right to transact with the said property also. The Hanbalis define *sharikah* as the amalgamation of rights or freedom to transact (*tassaruf*). The Shafiis define *sharikah* as the confirmation of the rights of two persons or more over a common property. The Hanafis define *sharikah* as a contract between two parties in relation to capital and profit.[7] An overall analysis of the definitions shows that first; *sharikah* is essentially a contract between two or more parties. Second, that the focus of *sharikah* is authorization to transact with the capital or partnership prop-

erty. Third, the Hanafis' definition adds another dimension to the focus of *sharikah* contract, i.e., the profit-sharing element.

2. Discussion

2.1. Characteristics of a partnership

A partnership structure has four main characteristics, namely identification of individual partner with the firm, unlimited personal liability of each partner, non-transferability of a partner's interest and the right of all partners to take part in the management of the firm.[8]

Unlimited liability of partners is undoubtedly the trademark of a partnership. The Partnership Act 1961 clearly provides that partners are collectively liable for debts and liabilities of the firm as long as they are partners in the partnership.[9] The extent of unlimited liability of partners in partnership also covers up to their personal assets. This means, when the partnership's assets are not sufficient to pay the business debts, partners are personally liable to settle debts of the firm. As such, personal property of partners can be seized to settle the business debts when the firm's fund is insufficient.

The principle of unlimited liability in partnership is constantly criticized because it imposed big obligation and high business risk upon the partners. As business expanded and the firm gets bigger, it is more difficult for partners to know each other, what more to trust them to the extent of bearing each other's liabilities. The concept of unlimited liability may be appropriate for small and medium size partnerships whereby partners know each other but in large or international firms where partners are mostly strangers, it is not practical to apply unlimited liability.

From the Shariah perspective, the three definitional characteristics of *sharikah* are manifested in the juristic discussions on the essential elements *(arkan)* of the *sharikah* contract. Majority of the jurists[10] agree that there are three essential elements for the contract of *sharikah*, namely:

§ Offer and acceptance, since *sharikah* is essentially a contract
§ The two parties to the contract who have full legal competency to contract[11]
§ The subject matter of *sharikah*, which can be in the form of monetary/proprietary capital, and labour capital.[12]

A comparison of these three definitional characteristics of *sharikah* with that of modern partnership shows some similarities. The English as well as Malaysian law definition of partnership is, a "relation which subsists between persons carrying on business in common with a view of profit".[13] This definition is apparently implying some similar characteristics, i.e.: the contractual relation between the persons; carrying on business in common, partly implying the authorization to transact with a common property; and the profit-sharing element. Yet, some noticeable difference in focus between the definition of *sharikah* and modem partnership can also be traced. *Sharikah* focuses more on the authorization by partners to transact with the capital. Modem partnership focuses more on the commonality of actions by the partners for the purpose of business or profit.

2.2. Limited Liability

Under the common law, the concept of limited liability was introduced two hundred years ago in order to enable the large scale investment necessary for the Industrial Revolution to take place.[14] With the severance of investment in the business from the management of that business there was considered to be a need for the protection of the investors, who were often individuals

with a relatively small amount of capital, from the possible fraudulent actions of the managers of the business.[15] This paved the way for the attraction of many more investors, thereby enabling the growth in size of the business enterprises, with those investors secure in the knowledge that they were protected from any loss greater than the sum they had invested in the enterprise. Thus for relatively small levels of risk they were able to expect potentially great rewards and thereby escape from some of the consequences of the actions of the enterprise. Limited liability is normally justified by its economic benefits, which include:[16]

(a) the decreased cost to shareholders of monitoring the actions of managers;
(b) the increased incentive to managers to act efficiently and in the interests of shareholders by promoting the free transfer of shares;
(c) the increased efficiency of securities markets since share trading does not depend on an evaluation of the wealth of individual shareholders, only the company itself;
(d) its encouragement to shareholders to hold diverse share portfolios, thereby permitting companies to raise capital at lower costs because of theshareholders' reduced risks; and
(e) the facilitation of optimal investment decisions by managers by pursuing projects with positive net present values rather than being concerned with the risk to shareholders that such projects may bring.

From the legal perspective, limited liability of business enterprises is conceived to stem from the principle of separate legal entity. For example, in a company structure, limited liability flows from the fact that the companies are vested with a distinct legal personality by law when properly incorporated, and as such, the debts of the incorporated entity are distinct from the personal assets of the entrepreneur. In other words, the personal estate of the entrepreneur cannot be attached or utilized by creditors of the incorporated entity, in order to settle amounts owing by the incorporated entity to such creditors. This is perhaps one of the greatest advantages to trading through an incorporated entity.

2.3. Limited Liability in the Partnership structure

Malaysian Law

Section 7 of the Partnerships Act 1961 clearly provides that every partners is an agent of the firm and his other partners for the purpose of the business of the partnership; and the acts of every partner who does any act for carrying on in the usual way business of the kind carried on by the firm of which he is a member bind the firm and his partners, unless the partner so acting has in fact no authority to act for the firm in the particular matter, and the person with whom he is dealing either knows that he has no authority or does not know or believe him to be a partner. Whilst section 11 of the PA 1961 provides that every partner in a firm is liable jointly with the other partner for all debts and obligations of the firm incurred while he is a partner; and after his death his estate is also severally liable in a due course of administration for such debts and obligations, so far as they remain unsatisfied but subject to the prior payment of his separate debts.

These two provisions are the main provision which provide the basis of liability of partners in a partnership. Section 7 clearly provides that partners are agent to the firm and other partners. As such, the agency principles are main principle which established the liabilities of partner. Under the agency law, the Principal will be liable for any action of the agent which is committed within the authority given under the agency agreement/relationship. This means as the firm is the Princi-

pal, as long as the partners acted within authority which is given to them by the firm as agent, the firm shall be liable for the debts and obligation which arise from the action. However, as the firm is actually a collective of all partners (section 6 of PA 1961), the firm's liability means liabilities of all partners.

As an agent, the partners have three types of authorities; the actual authority, implied / or usual and apparent/ostensible authority. As long as the partners acted within these authorities, all the partners shall be liable for one another's action. Other than these authorities, partners' action shall also binds the firm if they acted for the purpose of the partnership business (Osman v Chan Kang Siew (1942) 4 FMSLR 292) or when the act was for carrying on business in the usual way (Chan King Yue v Lee & Wong (1962) 28 MLJ 379).

The statutory provisions and the precedents clearly highlighted that partners have unlimited liability in the firm and shall also be jointly and severally liable for the debts and obligation of the firm.

The Islamic Law

Under the Islamic law, *sharikah* and *rnudarabah* contracts can and have been utilized across the board, regardless of the formal business structures, i.e., whether they are partnerships or companies. For example, if the parties opt for the partnership structure, under Islamic principles, the contract will still be that of *sharikah* or *mudarabah*. The liabilities of partners are still limited up to their capital contribution, unless if they opt for *sharikah al mufawadah*, which is very rare. Similarly, even if the parties choose the company structure, the contract will still be that of *sharikah* or *mudarabah*. It follows that the extent of partners' liabilities remains the same under Islamic law, i.e., up to the amount of their capital contribution. There are no separate contracts on the basis of pure business structures - partnerships or companies. Thus, the paramount consideration in determining liability in Islamic law is not the business structure, but the actual *sharikah* contracts between the parties. If the parties want limited liability, they can choose *sharikah al 'inan* or *mudarabah*. If they want unlimited liability, they can choose *sharikah al mufawadah*. Thus, from the foregoing discussions we can see that the origin of limited liability regime in *sharikah* is the contract between the parties, and not the business structure opted for.

As regards to liabilities, *sharikah* normally refers to contractual obligations. Tortuous obligations are often regarded as personal liabilities on the persons who commit the wrong. In Islamic law, there is no clear-cut separation between civil and criminal wrongs. All are considered as wrongs and if injuries have been caused, should be duly penalized or compensated. The main distinction between the wrongs is the element of intention, which will in turn determine the type and degree of penalty/compensation imposed. As a general rule, culpable causing of injury is regarded as criminal and invites criminal punishment, personal or monetary. On the other hand, unintentional causing of injury is still a wrong, albeit not criminal, and will be subjected to monetary compensation. Both liabilities are considered as personal to the doer, and in normal cases cannot be extended to other parties.

It is also observed that the discussion on liabilities of partners in *sharikah* in the event of liabilities exceeding the assets has not been elaborately made in the classical Islamic law literature. What has been mentioned is just the general principle that liabilities follow the amount of capital contribution. This lack of elaborate discussion is understandable because the way Islamic economics and business works, ensures a built in mechanism against excessive mismatch in asset and liability ratio. As pointed out by Chapra,[17] in an Islamic economy, since all financial participation

in business would be essentially in the form of equity, the only exceptions being suppliers' credits and *qurud hasanah* (beneficial loans), the liability of the partners would in reality be limited to their capital contributions. Prudence would induce the suppliers to keep an eye on total equity, movement of sales and cash flows of the business concerned, while *qurud hasanah* would tend to be limited. All other participants in the business (whether by way of loan or equity) would be treated as equity holders and would share in the risks of business. Since interest bearing loans are not allowed, the total obligations of the business could not be out-of-step with the total assets, and any erosion in their value may not exceed the total equity. Hence, in the ultimate analysis liability would essentially be limited to the extent of the total capital (including ploughed-back profits) invested in the partnership business.[18]

There are many ways of categorizing *sharikah*. The classical categorization of *sharikah* is based on a variety of factors. If origin of the partnership becomes the determining factor, *sharikah* can be divided into two broad categories, namely, *sharikah al mulk* (proprietary partnership) and *sharikah al 'aqd* (contractual partnership).

For *sharikah al mulk* (proprietary partnership), the origin of the partnership is the joint ownership of property. Joint ownership is its only qualification, and no joint exploitation of property is necessary. It occurs when two or more people are partners in the possession of property. The rule governing this type of *sharikah* is that any increase in the property shall be shared by the co-owners in proportion with the extent of their ownership. Each of them is in the category of a stranger in regard to any action on the part owned by his colleague. In other words, it is not lawful for either partner to perform any act with respect to the other's share except with the latter's express permission.[19] Thus, in terms of liability of the partners, they are quite independent of each other, except for actions based on express authorization by any of the partners. Their partnership is only in terms of ownership and potential sharing of any profit or increase in the co-owned property, not in term of sharing the liabilities arising from the partners' actions. This type of *sharikah* may not be known in the common law or Malaysian law. In fact mere joint-ownership is generally insufficient to constitute a partnership in common and Malaysian law.[20]

For *sharikah al 'aqd* (contractual partnership), the origin of the partnership is the contract between the parties. The structure of this type of *sharikah* may have more similarities with the normal partnership in common law and Malaysian law. For *sharikah al 'aqd*, joint ownership is not an element necessary for the establishment of the partnership. The emphasis is rather on the joint exploitation of capital and the joint participation in profits and losses,[21] based on the terms of the partnership contract. Joint ownership is one possible consequence, and not a prerequisite for the formation of *sharikah al 'aqd.*[22]

The jurists further sub-divide *sharikah al aqd* into various other categories. The subdivisions depend on a number of factors. If the underlying factor is the subject matter of capital contribution, *sharikah al 'aqd* can be sub-divided into three main categories, namely, *sharikah al amwal*, *sharikah al a'mal* and *sharikah al wujuh*. When the subject matter of the capital is money, it becomes *sharikah al amwal* (monetary partnership). If the capital is in the form of labour, it becomes *sharikah al a'mal* (labour partnership). If the capital is in the form of reputation or creditworthiness, it becomes *sharikah al wujuh* (reputation partnership).

The jurists also make further sub-divisions to *sharikah al 'aqd* based on the terms of the contract, i.e., whether the partners are required to contribute equally to the capital and enjoy full equality in exploiting the capital and sharing the profit or not. Based on this consideration, *sharikah* can be divided into two types, *sharikah al mufawadah* and *sharikah al 'inan*.

Basically, *sharikah al mufawadah* means an unlimited investment partnership, whereby each partner must contribute equally to the capital, and enjoys full and equal authority to transact with the partnership capital or property. The Hanafis consider each partner as an agent (*wakil*) for the partnership business and stands as surety (*kafil*) for the other partners. Thus, the partners can be made jointly and severally responsible for the liabilities of their partnership business provided that such liabilities have been incurred in the ordinary course of business.[23] This type of *sharikah* clearly implies unlimited liability on the part of partners since they are both agents and guarantors of each other.

On the other hand, *sharikah al'inan* can be loosely defined as a limited investment partnership. Whereby each partner may only transact with the partnership capital according to the terms of the partnership agreement and to the extent of the joint capital. Hence, their liability towards third parties is several but not joint.[24] In other words, the liability of partners in *sharikah al'inan* resembles that of modern-day limited liability partnerships.

Both *sharikah al-mufawadah* and *sharikah al'inan* can occur in all the three earlier types of *sharikah*, i.e., *sharikah al amwal* (monetory partnership), *sharikah al a'mal* (labour partnership) and *sharikah al wujuh* (reputation partnership). The jurists differ with regards to a special type of commercial dealing, i.e. *mudarabah* (profit-sharing)[25]; whether it is a kind of *sharikah* or not. Some of them, i.ed. the Malikis and Hanbalis regard it as a from of *sharikah,* while others, i.e. the Hanafis and Shafi'is categorize it as a separate kind.

Mudarabah is basically a form of commercial arrangement where one of the contracting parties act as the provider of capital (termed as *rabb al mal),* while the other party acts as the entrepreneur (termed as *mudarib).* The essential difference between *mudarabah* and other forms of *sharikah* is wheterh or not all the partners make a contribution towards the capital as well as management of the partnership, or only one of these. In *mudarabah,* one party provides capital whilst the other provides management skill. In *shariakha,* all partners contribute to both capital and management of the partnership.

In mudarabah, the *rabb al mal* is the dormant partner, while the *mudarib* is the active partner who provides the entrepreneurship and management for carrying any venture, trade or industry with the objective of generating profit. Any accruing profit shall be shared between the *rabb al mal* and *mudharib* according to a pre-fixed ratio. In the event of loss, the *rabb al mal* bears the financial losses to the extent of his contribution to the capital, while the *mudharib* suffers the frustration of a fruitless effort. Again, in the mudarabah arrangement a limited liability regime is created. However, the regime is quite different from modern limited liability. On the one hand, in mudarabah, it is the active partner who is exempted from financial liability (except if proven negligent or fraudulent). On the other hand, the passive partner, though bears the bulk of financial liability also enjoys limited liability because his financial liability is just to the extent of his capital contribution.

From the many types of *sharikah*, the one mainly used in contemporary Islamic banking and finance is that of *sharika al 'inan* in the category of *sharikah al amwal. Sharikah al mufawadah* is rarely opted for due to the higher degree of responsibility and the practical difficulty to achieve full equality between the partners in all aspects of the partnership. Another commonly utilised contract is that of *mudarabah*, which, some jurists consider distinct from the other forms of *sharikah*. Actually, *mudarabah* can be construed as a *sharikah* with monetary capital on the one part and labour on the other part.

3. Closing

From the Islamic law perspectives, the approach on limited liability is quite distinct compared to the common law approach. Common law approaches limited liability from the perspective of the actual business structure, where clear distinction is made between companies and partnerships. As a general rule, the common law accords limited liability to companies but not to partnerships, because of the separate legal entity attribute of the former structure. Under Islamic law, the determining factor is the actual contract between the parties, not the formal business structure. If the actual contract gives full equality and authority to the partners, thus, making the partner agent and guarantor of the other partners (*sharikah al mufawadah*), there will be unlimited liability. But, anything short of that makes the *sharikah* contract limited and liability will also be limited. In addition to that, if the parties choose the special arrangement of *rnudarabah*, a unique situation exist, whereby the active partner is prima facie exempted from financial liability, while at the same time, the passive partner enjoys limited liability. Despite the different approach, it is apparent that the principle of limited liability is viable and acceptable under the Islamic law.

ENDNOTES

1 Shaik Mohd. Noor Alam S.M. Hussein, *Undang-Undang Perkongsian*, (Dewan Bahasa dan Pustaka, Kuala Lumpur, 1987) at p 2.

2 Ibid.

3 Section 3(1).

4 Per Peh SweeChin J in Dr.Rajan Sinha v Dr P.C Harman "I find that a partnership agreement in writing was not a condition precedent to the formation of the partnership, but having regard to all the circumstances, a mere form which all the parties had decided to adopt".

5 Per V.C George J in *Tan Eng Choon v Foo Kai Yuen*, "A partnership is a contractual relationship which subsists between persons carrying on business in common with a view of profit".

6 Al Zuhaili, Wahbah (1989), Alfiqh al islamiyy wa adiliatuhu, Dar al Fil˜, Syria, 3rd Edition, vol.5, p.792 and Sabiq, Sayyid (1987), Fiqh al sunnah, Dar al Kitab al 'Arabiyy, vol.3, p.287.

7 Ibid. Al Zuhaili prefers the Hanafis definition since it incorporates the essence of sharikah, i.e., it being a contract, whilst the other definitions explain more on the objectives and legal implications of sharikah.

8 Keith L Fletcher, The Law of Partnership in Australia and New Zealand, 7th edition, 1996, LBC Information Services, Sydney at p 11-12

9 Partnerships Act(Malaysia) 1961; section 7 and section 11

10 Except for the Hanafis who consider offer and acceptance as the only essential element for all contracts, including that of sharikab. Actually, the difference between the Hanafis and the majority is purely academic because the Hanafis consider the contracting parties and subject matter as automatically covered by the requirement for offer and acceptance

11 The jurists discuss the contractual competency in sharikah especially in relation to capacity to appoint and be appointed as agents (wakil), because the main underlying legal relation between the partners in sharikah is that of agency (wakalab).

12 Monetary/proprietary capital is allowed by all jurists, whilst labour capital is allowed by majority of jurists except the Shafi'is.

13 Section 3(1) of the Malaysian Partnership Act 1961 (revised 1974).

14 *David Crowther*, Limited Liability = Limited Risk = Limited Accountability. Retrieved from Fhttp://www.le.ac.uk/ulmc/research/crowther.pdf.

15 Ibid

16 Easterbrook and Fischel *The Economic Structure of Corporate Law*, Harvard University Press, 1991, pp. 41–4, summarized in *Ford's Principles of Corporations Law* at [4.160]).

17 Op. cit.

18 Ibid. For a variant view see S.M. Hasanuzzaman, 93The liability of partners in an Islamic Shirkah, Journal of Islamic Studies, Islamic Research Institute of Pakistan, 1971, at p. 332, whereby, he said that the liability of partners in a sharikah is unlimited and joint, and Al Qusi, op. cit. p. 213.

[19] Al Qusi, Abdul Mun'irn (1982), Riba, Islamic Law and Interest, unpublished Ph.D dissertation, Temple University, at p.p. 205-206.

[20] See section 4 (a) of the Malaysian Partnership Act 1961

[21] This is analogous to the concept of carrying on business in common with a view of profit in normal partnership.

[22] Al Qusi, op. cit.

[23] Umar Chapra, Towards a just innately system, at p. 253.

[24] Ibid.

[25] Also known as qirad or muqaradah. It has been said to be the possible origin for the commenda of medieval Europe, see for example, Hillman, R.W., "Limited liability in historical perspective", 54 Wash. & Lee Law Review, 1997, at p.p. 62 1-622.

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The Implications of ASEAN Banking Integration Framework (ABIF) to Indonesia Banking Law Reform

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ABSTRACT

ASEAN Economic Community (AEC) is the ultimate goal of economic integration. This agreement will make ASEAN into a single market and products based that will make ASEAN more dynamic and competitive. In 2020, ASEAN has the sole purpose of achieving the integration of the financial sector this is known as ASEAN Banking Integration Framework. The main problem is how the infrastructure readiness Indonesian banking law to use the opportunity and compete in order ABIF purposes and how the banking regulation to encourage national banks to meetthe criteria of Qualified ASEAN Banks? The results showed, required regulations that provide convenience for national banks to meet QAB through mergers and consolidation; Indonesia still has to prepare a series of agreements to support bilateral agreements with ASEAN countries, among others, related to surveillance, handling troubled banks, confidentiality or the exchange of information between the Bank and the human resources and other national interests that must be negotiated in bilateral agreements based on the principle of reciprocity. ABIF agreement made Indonesia need to remap all regulations relating to the implementation ABIF, including synchronization and harmonization of banking regulation with regional and global policies such as AEC agreement, ABIF and Basel Core as well as the guidelines issued by the global banking authority.

Keywords:*ASEAN Financial Integration, ABIF, Banking law reform*

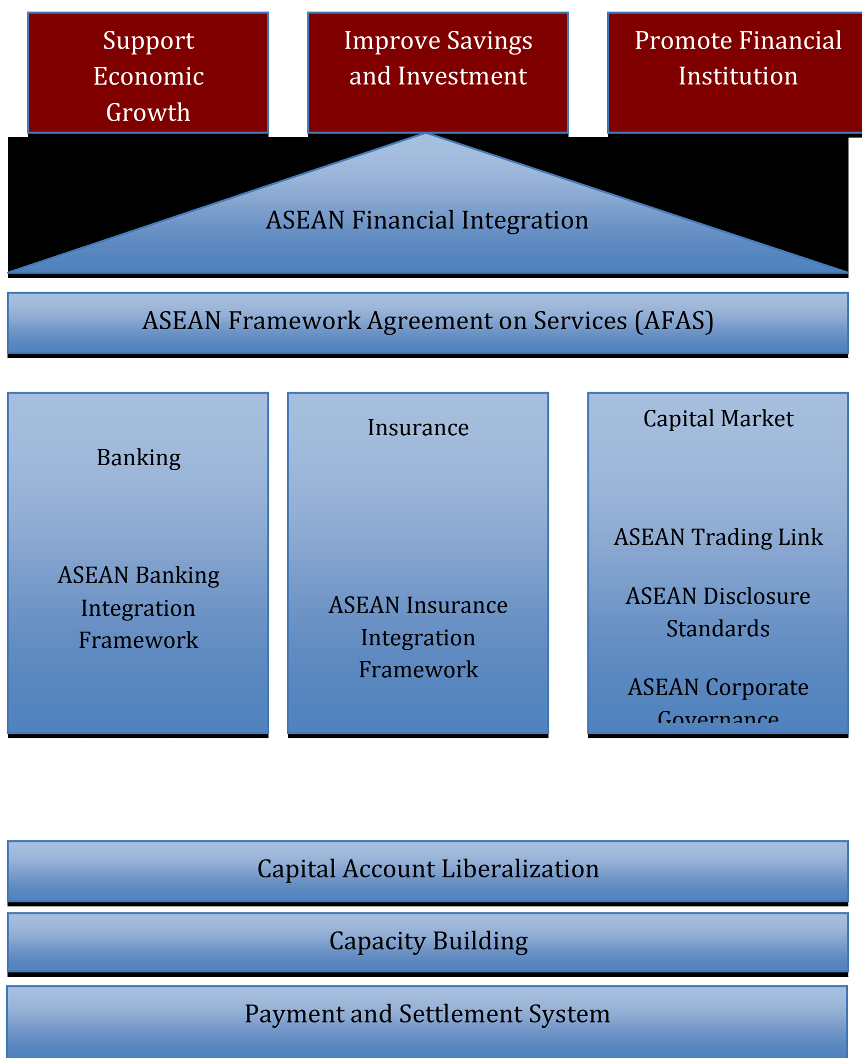
I. INTRODUCTION

The ASEAN framework Agreement on Services (AFAS) signed on December 1995 in Bangkok, Thailand, which seeks to enhance cooperation in services amongst member states, eliminate substantially restrictions to trade in services amongst member states and liberalise trade in services by expanding the depth and scope of liberalisation beyond those undertaken by member states under the General Agreement on Trade in Services (GATS) of the World Trade Organization (WTO). On October 2003 in Bali, ASEAN Leaders made the decision to establish the ASEAN Community including the ASEAN Economic Community (AEC). The declaration on AEC blueprint aims to transform ASEAN into a single market and production base, a highly competitive economic region, a region of equitable economic development and a region fully integrated into the global economy.

ASEAN single market and production base consists of five main elements, namely: (i) free flow of goods; (Ii) free flow of services; (Iii) free fiow of investment; (iv) the free flow of capital, and (v) free flow of skilled labor. Expected to harmonization, standardization of customs and trade, transaction costs can be reduced, so as to create movement in the investment sector, services and labor are more open. Subsequently published AEC Blueprint 2025 as a result of a review of the AEC blueprint in 2015 which is dynamic, highlighting their interrelation and characteristics

strengthen mutually beneficial cooperation, through: (i) a highly integrated and cohesive economy; (ii) a competitive, innovative, and dynamic ASEAN ; (Iii) enhanced connectivity and sectoral cooperation. Ensuring that the financial sector is inclusive and stable remains a key goal of regional economic integration. The financial sector integration vision for 2025 encompasses three strategic objectives, namely: financial integration, financial inclusion, and financial stability, and three cross cutting areas: Capital Account liberalisation, Payment and settlement Systems, and Capacity building.

Some of the benefits of financial integration in ASEAN is support for economic growth, improved earnings and investment and encourage inclusive finance. Furthermore, the framework of ASEAN financial integration can be seen from the chart below:



Sumber:*KementerianKeuangan*, Summary of Achievements of ASEAN Financial Integration, *Siaran Pers, 26 Maret 2015.*

Based on the above scheme, strong regional banks, competitive insurance markets, deep and liquid capital markets, supported by efficient payment and settlement systems will facilitate greater economic growth in ASEAN.

One part of the ASEAN financial integration is an ASEAN Banking Integration Framework (ABIF) which is expected to be implemented in 2020. Financial integration has many potential economic benefits but also carries potensial risk such as the harmonization of the prudential principles, bureaucracy, political condition and about legal infrastructure in each ASEAN member States were different.ABIF aims to provide greater market access and flexible operational for Qualified ASEAN Banks (QABs) to encourage QABs have a greater role in facilitating trade and investment between ASEAN member states. For example Central Bank of Singapore (Monetary Authority of Singapore / MAS), have no reason to inhibit plans the Bank Mandiri wishes that want to expand to Singapore. Based on the principle of reciprocity or equality, the foreign banks should also be allowed to enter Indonesia. So, Indonesia and Singapore can agree on specific areas they want to open up to each other, based on the commercial interests of their banks. The main concern is the readiness of Indonesian banks to take advantage of the flexibility access and operational that is now open wide. The condition of National banks in Indonesia have to compete with the Bank's acquisition, the capital comes from outside. In fact the state-owned bank's efforts to increase the assets through the merger failed to materialize.

Under the ABIF Indonesian banks should implementing commitments, macroprudential policy and strengthening financial sector sufficient. It will need stronger commitments, discipline, sacrifice andreal work to ensure that the problems are effectively solved.Indonesia have to prepared to implement the framework with strengthening the regulation and supervisory cooperation arrangements to support the effective surveillance and supervision of QABs. Legal infrastucture is the key point to achieve ABIF purposes, here aresome point considering Indonesia legal infrastructur readiness:

ABIF will be followed by a bilateral agreement between Indonesia and one of the ASEAN member states; August 2016 Indonesian Financial Services Authority has signed an agreement with Malaysia, and will be followed by Thailand; This Agreement will be the basis for the parties to negotiate a national banking interests of each country; The bilateral agreements is concerning a banking supervision, handling troubled banks; sharing information of bank secrecy and human resourcesavailablility;

Aspect of agreement became urgent in the implementation ABIF. In addition to the agreement, the existing regulations, including global and regional agreements in the services sector will certainly become a reference in the negotiating national interests in ABIF. In addition, in order to penetrate the ASEAN market, national banks must fulfill the requirements as a Qualified ASEAN Banks (QABs), which is also in need of reform of banking regulation. Therefore, integrative and comprehensive legal infrastructurereadiness for Indonesia, due to promote the role of national banks in 2020 is absolutely important. Some of the strategic issues related to legal aspect are: 1) the availability of a solid legal framework based on international reference and regional standards thathave been agreed upon by Indonesia; 2) cooperation between financial services authority and the relevant institutions to oversee the implementation of regulations and processes; 3) regulatory support synchronous and harmonious against ABIF agreements, such as investment regulations; business competition; employment and dispute resolution as well as consumer protection. Overall strategic issues in the legal field, requires mapping and assessment is comprehensive and integrative, so it is not only able to provide certainty and legal protection, but is able to make ABIF opportunities for the welfare of the community and national economic development.

Indonesian banking regulation has developed substantially due to the influence of global and regional economic policies. The global economic crisis has pushed the government and banking

authorities to follow the development direction of the economic order and global banking regulations. The first thing, is marked by the enactment of Law No: 21 of 2008 concerning Islamic Banking, to facilitate the development of banking activities based on Islamic principles, which is considered capable of solving the economic problems caused by the conventional banking system, which is based on financial engineering as the cause of the crisis.

The growth of economic activities based on sharia principles in Indonesia, particularly in the financial services sector such as banking, capital markets, insurance and other non-bank financial industry has made the Islamic financial services sector as a pillar of national economic development. It can be seen from the politics of law and the political will of governments to accelerate the economic growth of sharia by issuing some guidelines for the economic development of sharia, in the form of Master plan Architecture Islamic Financial Indonesia, Roadmap Islamic Banking.

Roadmap Islamic Capital Market and Industry Roadmap Non Bank Financial Sharia, furthermore, as part of the actors in the global economy can no longer be limited by time and place given the globalization of the economy has created a borderless world, Bank Indonesia as the monetary authority has issued regulations to capture global opportunities by issuing a Bank Indonesia Regulation Number: 17/PBI/2014 amended by Regulation Financial Services Authority (POJK) No: 25/POJK/2016 on the amendment POJK No: 73/POJK/2015 About the Event Custody with Management (Trust) to draw funds from export and operational funding oil and gas sector which has been deposited in Bank Trust or trust company abroad, in order to be recorded in the Bank in the country. Through this trust regulation, the national bank is expected to be able to provide trust services commonly performed by banks and trust companies overseas. In its development, in its development POJK Trust is also used in the framework of Law No. 11 Year 2016 About the Tax Forgiveness.

The development of banking regulation more, with regard to the objective of Bank Indonesia to maintain monetary stability, by issuing a series of Bank Indonesia Regulation concerning hedging transactions as a way to protect the value of the rupiah against foreign currencies, which are expected to save the government and corporations of swelling debts or liabilities due to fluctuations in currency valita rupiah against foreign currency, especially the US Dollar.

The development of some regulations as basic banking transactions above is particularly relevant in preparing national banks face ABIF, especially to encourage banks to meet capital Bank Indonesia should reach 30 trillion to be qualified as QABs. In line with regulatory developments, it can be seen that the Indonesian banking paradigm shift in strengthening the capital structure of profit, which no longer rely on interest-based income or margin-based income, but switched to the provision of fee based income. This is in line with the enactmentof Law No: 9 2016 On Prevention and Crisis Management Financial System (PPKSK) which significantly alter the original banking rescue system adheres to the bail-out mechanism into a bail-in mechanism. Changes in the mechanism of responsibility Bank demanded banks to diversify its business, services and products in order to strengthen the capital and assets of the bank, so the bank can overcome liquidity problems independently.

ASEAN Banking Integration Framework (ABIF)

ASEAN Banking Integration Framework is one of the consequences and objectives agreed upon in the framework of the Asean Economic Community (AEC). Juridical consequences ABIF for banks ASEAN member states, not just the policy reforms which require banks to have certain

assets to qualify as QABs, but also must have the legal infrastructure to provide protection and guarantee legal certainty for its customers that will be coming from member states of ASEAN. Indonesia needs to prepare a comprehensive legal infrastructure in anticipation of the deal ABIF remember ABIF has issued standards that must be implemented by the participating countries. At least, the Indonesian banking law requires harmonization and synchronization with the four main objectives to be achieved through ABIF agreement, namely: Harmonization of principles of prudential regulations; building of financial stability infrastructure; and setting up of agreed criteria for Qualified ASEAN Banks (QAB) to operate in any ASEAN country with single pasport. Within this framework, the countries that have been prepared with a bank that meets the criteria.

Financial integration can magnify the effects of economic integration by facilitating capital deepening and improving financial inclusion. One added benefit is less develop member countries tend to benefit more from the process, as they are expected to receive large capital flows as a result of the regional financial integration. Financial integration can also add to banking sector's resilience and competitiveness. As Part of the process, a system of well managed, integrated banks will be able to access a larger regional and international market. As ABIF policies are adopted across the block, healthy banks will be able to grow through regional mergers and acuisitions so that they can better compete in the global banking market.

Broadly, economic and financial integration can generate substantial growth across ASEAN. Financial integration can also extend the effects of economic integration by facilitating the deepening of capital and enhance financial inclusion. And one additional benefit is for developing countries will benefit more from the process, because these countries are expected to receive large capital flows as a result of regional financial integration. Financial integration can also increase the resilience and competitiveness of the banking sector. As part of the process, the system is well-managed, integrated bank will be able to access regional and international markets wider. ABIF policy will encourage national banks to grow healthy through mergers and acquisitions so that the banks can compete in the global banking market with better again. Besides mendapatan ABIF benefits from this, it should also look at what would become a bottleneck when ABIF was conducted and how the review of the potential losses that may arise.

In addition to the opportunities that can be exploited, ABIF implementation raises several obstacles, among others: the potential to achieve their objectives will not be because of differences in bureaucratic capacity between member states are derived from the level of economic development is different. The Asian Development Bank estimates that economic integration within the framework of the new AEC can realistically achieve the target by 2025, as well as in early 2020 ASEAN targets for banking integration may be delayed by political and structural barriers.

The main purpose of ABIF is to provide market access and operating flexibility of ASEAN Bank qualified (QABs), which consists of ASEAN Bank who have qualified that have a strong financial; A well managed and comply with prudential standards that apply internationally. QABs is expected to have a greater role in promoting trade and investment in ASEAN as described in the diagram attached.

ABIF is anchored in principles that emphasize inclusiveness, transparency and reciprocity. As long as the reciprocity principle can be implemented, the financial integration will be supportive for Indonesia. Reciprocity is seen as essential for Indonesian Banks to expand their business in foreign countries, it is also giving a mutually benefited for the otherASEAN member countries with the opening of market access and operating flexibility. Under ABIF, QABs candidates must meet prudential requirements of the ASEAN countries in order to enter and operate in the host

Sumber: bi.go.id

country.The readiness of a country is the first influential factor in considering the participation of ASEAN member countries in ABIF. Furthermore, for the implementation ABIF, ASEAN central banks and financial supervisory authorities to formulate guidelines ABIF multilateral, and this was followed by a bilateral agreement on the entry of banks into the member countries of ASEAN.

Bank Indonesia and the Financial Services Authority will try to ensure the implementation of the principle ABIF prioritizing national interests. Bilateral agreement between Indonesia and Malaysia, is the first agreement made within the framework of ABIF, building on the heads of agreement that aims to reduce the gap in market access and operating flexibility QABs based on the principle of reciprocity. The commitment made by heads of agreement will be reflected in bilateral agreements under ABIF and will be carried out by the financial services authority and Bank Negara Malaysia. ABIF positive impact for Indonesia is to increase opportunities and a greater potential for Indonesia's National Bank as well as expand into the ASEAN market. With emphasis on the principles of reciprocity and agree a mechanism to reduce the gap in market access and operating flexibility in the integration process of banking. Indonesian banks have greater opportunities and a broader scope of business activities in the ASEAN region.

In practice, the National Bank of Indonesia who meet the criteria QABs will get the commission of the same with Domestic banks that are in the Host Country, therefore Banking Indonesia must anticipate ABIF by strengthening the capital of the Indonesian banking, Improving the quality of human resources, and efficiency in order to compete in the regional and global levels. In return ABIF will benefit the business sector through greater resources and more secure financing for trade and cross border investment activities.

II. DISCUSSION

1. Indonesia Readiness in the implementation of ASEAN BankingInternational

Framework

Increasing interconnectedness in Asian Financial Systems, suggests the need for the regulatory framework to support regional financial stability. Financial integration and the growth of regional Banks give rise to the potential impact of financial instability across borders. In order to implement this framework ABIF Indonesia is pursuing a reciprocal arrangement of bilateral cooperation were balanced and keep national interests. Indonesia has the potential to be able to take advantage of opportunities given the extensive area of Indonesia almost covers half the population of the ASEAN area. FSA will continue to monitor and encourage the development of the financial services sector in order to grow up healthy and sustainable and can contribute more to the national economy and people's welfare.[1]

Mc Kinsey Global Institute estimates that Indonesia became one of the seven countries that are the economic engine of Asia in the future. However, there are several barriers for banks in Indonesia to be able to produce a balanced bilateral agreement. One of the obstacles to be overcome is not the creation of an integrated regulation to encourage banks to become Indonesia QABs. The other obstacles are such as regulations relating to law enforcement, dispute resolution, and licensing, the ASEAN countries have different levels of adoption of the banking regulatory standards such as Basel. Indonesia, Malaysia, Philippines, Thailand and Singapore have fully implemented on Basel II. Indonesia has adopted some of the standards that the Basel III capital framework and liquidity framework. Meanwhile, Brunei Darussalam partially implemented (credit risk and Operational Risk). In addition, the integration of ASEAN banking is still low due to the gaps in banking presence Among ASEAN countries.

In addition to regulatory and policy challenges, it can be identified several challenges for Indonesia to be overcome by integrated regulationand comprehensive policy, namely:[2]

Condition of macroeconomic economy where inflation and interest rates in Indonesia are relatively high compared to other ASEAN member states;The lag structure of the domestic industry;The difficulty of doing business in Indonesia;The competitiveness is still low, although increasing the competitiveness of Indonesia; which relies on the efficiency of labor issues; the readiness of information technology; education and health; The depth of the financial markets is limited;Access to finance is still limited, especially outside the island of Java;

ABIF is conducted by ASEAN Central Bank Governors process, the member states undertake to complete their internal procedures of ratification or acceptance for the entry into force of the sixth package of commitments on financial services under the ASEAN Framework Agreement on services protocol. The purposes of ABIF are deepening regional banking integration, in accordance with Article IV bis of the ASEAN Framework Agreement on Services (AFAS) and guided by the principles and governance of ABIF as Approved by the ASEAN Central Bank Governors Meeting, Indonesia was agree to liberalise the banking sector and already has the specificcommitment. Here are the schedule of specific commitment for financial services under AFAS for banking sector consist of two part:

1. Banking subsector: general conditions on Banking subsector, except for Qualified ASEAN Banks (QABs), where the commitments are specified in specific sector or subsector schedule:All market Access and National treatment limitation specified in the banking subsector will be eliminated by the year 2020 subject to similar commitment by other members; Foreign bank (s) and foreign legal entity (ies) are, in cooperation with Indonesian national (s) and/or Indonesian legal entity (ies), allowed to establish or acquire locally incorporated banks in accordance with existing regulations; To support national and/or local economies, branch office of the

foreign bank and joint venture bank may open their offices in the cities of Jakarta, Surabaya, Semarang, Bandung, Medan, Denpasar, Batam Island, Padang, Manado, Ambon, Makasar and all other capital of provinces of Indonesia subject to economic need test; Acquisition of local existing banks through the purchase of in the stock exchange is allowed up to 51% of the listed shares in the stock exchange; The condition of ownership and the percentage share of ownership as stipulated in the respective shareholder agreement establishing the existing individual joint venture bank shall be respected as the basis of ownership of the foreign service provider (s) and their Indonesian partner (s); With respect to presence of natural person no economic needs test will apply. A non Indonesian employed as manager or as techincal expert shall have at least two Indonesian under studies during his/her term; In addition to the horizontal measures, temporary entry will granted to technical expert (s)/advisor (s) of branch office of the foreign bank and join venture bank for no longer than 3 (three) months per person for any given year.

2. For Qualified ASEAN Banks, All commercial banking businesses, as listed in the sector or sub sector for Non QABs below also apply to Islamic Banking activities. Limitations on market access for Malaysia are: Malaysia will allow the formation of three groups of Indonesian banking institutions in Malaysia, Indonesia will allow the formation of three groups of Malaysian Banking institutions that already exist in Indonesia as two QABs. Each QAB may establish presence as a commercial bank, islamic bank or both. The third Malaysian QAB shall be established after 3 (three) Indonesian QABs in Malaysia Fully operate, The Agreement includes provisions establishment of branch offices and ATMs, QAB Access to electronic payment systems, types of business activities of banks, capital and guarantee customer funds.

Within this framework, the QABs will be allowed to signed a bilateral reciprocal agreement to operate QABs in the other member states of ASEAN and receives equal treatment as local banks. This matters are refers to the ASEAN principles, inclusiveness, tranparency an reciprocity. To Ensure that these principles are upheld, its necessary oversight of the banking sector and integrated and equipped settings effective supervision.

2. The Implementation and ImplicationsABIF for Banking Law Reform

The agreement of ABIF is making Indonesia should prepare as QABs to enter into bilateral agreements with others ASEAN countries. In order to achieve the status of QABs Indonesia had agreed on 4 steps that must be prepared to meet the ABIF, namely: Increase the capacity and competence of individuals and institution; Harmonization of banking rules between countries in order to have the same standards and definitions; Build the financial infrastructure; Prepare Indonesia Banking to meet the ASEAN category Qualified Bank. Therefore the national banking must begin to prepare and reform the legal basis, also prepare a strong banks of assets and capital in order to compete with the other QABs by 2020. Bank Indonesia ultimately agreed on the general criteria of Qualified ASEAN Banks i.e.[3]

Well Managed, Well Capitalised,Recomended by Authorities, Pass the provisions of Basel, and it is considered important in their country.The benefit of an integration of banking market for Indonesia is improving the efficiency and increased competition to be acompanied with enlarged operational bases. [4]Banks with qualifies as a QABs will be awarded full market access to the banking sector of the country involved in the bilateral agreement and is expected to be treated similary to domestic banks based in host country. Therefore, to anticipate ABIF implementation Indonesia banks must have strengthening the capital and improve the quality of human resource.

On August 2016 OJK and Bank Negara Malaysia (BNM) signed a bilateral agreement under the ABIF in promoting greater regulatory cooperation as the region moves forward in pursuit of deepening regional financial integration. This bilateral agreement aimed at reducing inequalities in access to markets and banking activities between two countries through the presence of banks that qualifies as QABs in their respective jurisdiction based on equal principle.

The deal is Malaysia will be doing consolidation first, CIMB group, RHB Capital, with Malaysia Building Society, with total assets of 614 billion ringgit or equivalent to Rp. 2.300 Trillion. While Indonesia, took a different way related to banking consolidation that the government plans to consolidate the state-owned bank to establish a holding, under PT. Danareksa (Persero) oversees seven companies, with total assets is projected to reach Rp. 2,477 Trillion.Four state-owned banks listed are PT. Bank Mandiri (Persero) Tbk., PT. Bank Rakyat Indonesia (Persero) Tbk, and PT. Bank Tabungan Negara (Persero) Tbk. Then, another state is PT. Bahana Pembinaan Usaha Indonesia (Persero) and PT. Asset Management Company (Persero) all will be consolitdate and the target realization of this roadmap is in year 2018. In addition to the consolidation efforts of the banking and financial sector, Indonesia still needs mapping all partial regulations concerning to banking activity, to utilize the principle of reciprocity, and the priority of national interests.

The integration of banking industry will face many challenges such as the different stages of banking sector development within ASEAN Member countries, concerning total assets, moreover cost to income ratio differs widely among ASEAN's banking industry. In order to compete with the other ASEAN member states, the banking sector in Indonesia needs to be more efficient. Indonesian Banking Law reform will be necessary to anticipate the changes, the development of communication technology is increasingly which impact to banking industry both on governance and practices, therefore banking law reform became particulary urgent and relevantin this situation.

The demands of the reform of banking legislation becomes urgent. Banking Law, which was enacted in 1992 and amended in 1998 is considered to be irrelevant to the development of the banking industry is more advanced. Since 1998 there have been several changes that need to be anticipated by the banking draft bill, such as the emergence of the transition part of the authority of Bank Indonesia (BI) to the Financial Services Authority (FSA/OJK) concerning to promote and organize a system of regulations and supervisions that is integrated into the overall activities in the financial sector. There is new institution related to customer protection, namely the institution deposit insurance (LPS) in 2004, the development of islamic banking which was enacted in 2008, Law No. 9 Year 2016 on the prevention and control of the Financial System Crisis.

According the demands of the banking law reform, banking law which was enacted in 1992 and amended in 1998 is considered to be irrelevant to the development of banking industry. In general, Indonesia's banking law reform leads to the accelerated growth of the national economy in order to become the foundation for sustainable development, including the anticipation of long-term challenges and the medium term, which include the following:The phenomenon of growth and development of the financial services conglomerate;The entry into force of the ASEAN Economic Community (AEC);Global economic uncertainty; Increased environmental issues and economic inequality on a global scale;Substitution national leadership and; Coinciding with the end of the implementation period of the Indonesian Banking Architecture (API) in 2013, then in 2014 to evaluate the implementation of the API as well as the process of drafting banking development direction for the next 5-10 years.

Paradigm shift in prevention Recent developments very need anticipated by the Law on new

banking is the entry into force of the ASEAN Banking Integration Framework (ABIF) which is part of the framework of the AEC in 2020 which is in need of focused attention on the assets and capital of national banks to be prepared to be QAB. Banking regulation is a provision that has the heavy regulated and prescriptive characteristics, it is because in any banking regulation is intended to give priority to the prudential banking principle, which refers to international standards. For example, Banking International Settlement (BIS) is the world's oldest international financial organisation and the mission of the BIS is to serve central banks kin their pursuit of monetary and financial stability, to foster international cooperation in those areas and to act as a bank for central banks.

The provisions concerning the prudential banking principles and supervision in the draft of banking law, aims to limit concerns that will happen by looking at the contents of the norms of prudence such as an assessment of the performance of the banks themselves through auditing and accounting, consumer protection and dispute settlement, and also comes with analysis of the institutional foundations and reforms aspired by national banks. This is in line with the opinion of Larisa Dragomir in her book stating that:[5]

> "Banking regulation, and most especially prudential regulation, tends to be particularly rules based and prescriptive. This seems to be a common characteristic of financial regulation in general, because it is traditionally perceived in terms of command and control."

A prescriptive approach focuses on spesific steps required for the accomplishment of a determinate regulatory objective, whereby detailed rules precisely dictate what the regulated firm has to do and how it should do it. Prescriptive rules are the outcomes of the interaction between, on the one hand, the interests of regulators, who look for standards they may easily monitor and enforce, and, on the other hand, the interests of the regulated entities that seek standards they can easily comply with theBanking regulation, and primarily related to the prudential regulation is a provision that is set and force. It is already a characteristic of the financial regulation has always been considered contains a command and control.

A prescriptive approach to focus on the specific steps needed to meet objectives based on the rules set by the company that dictate how and what should be done by the company and how to do it. Rules that force is the result of interaction between the interests of regulators who are looking for a standard to easily monitor and enforce the rules and then on the other hand the interests of regulated entities looking for the standards to be easily observed.

The Indonesian Banking law is urgent to reform immediately in order to achieve the wellbeing of the nation of Indonesia. The new Banking Law expected this can encourage Economic growth accelerated by involving the function of BI and OJK as macroprudential and Microprudential deciding policies, as the trustworthy monitoring institutionssurveillance integrated with banking as an agent of development to bring the financial services industry into becoming a pillar of national economy with global competitiveness.

The important thing that is required by the national banking now is the umbrella law referable to the Regent's policy for the development of banking in the future. In addition to banking law reform, another aspect of the law that requires the attention of Indonesia is a model bilateral agreement that puts national interests because it will be the basis for Indonesian Banks to exercise the rights and obligations, including to put important point related to the national interest, such as the contribution of QABs to the Indonesiaeconomy, to optimize the utilization of human resources; customer protection and fair dispute settlement mechanism. Banking law reform also should be able to encourage the quality of human resources improvement, given the high

proportionof the service sector to GDP, is expected to rise from 36% is currently 55% in the year 2020. With regard to the quality of human resources, Indonesia needs to issue a policy that puts certification for human resources.

In the financial services sector, the obligation of the certification for principals and financial institutions, most have entered into regulations issued by the financial services authority, but still continue to require renewal to be provisions which are forced and compulsory followed. This is in line with Indonesia's commitment in the liberalization of labor. Indonesia has issued commitment related to financial service sector and liberalization of labor as follows:

Type of commitment	Banking	Insurance	Capital Market
Foreign ownership	Max 51 % of listed shares	Max 80 %	Max 99 %
Operational activities	Foreign bank &JV Banks only can operate in province capital city	No limitation	No limitation
Number of branch	Foreign Banks : 2 sub-branch & 2 cach offices JV Banks : 2 Branches & 2 sub-branches	No limitation	No limitation
Expatriate's employee	Director, Manager, Expert.	Level : Director, Expert.	Level : Director (onlu for spesific posistion), manager, Expert.
	Manager–level employees are required to teach at least 2 Indonesian employees during tenure	All joint venture company is obliged to provide training to its employees	All joint venture company is obliged to provide training to its employees.

Source: OJK Report dalam Halim Alamsyah.

Thereby, one of the substances bilateral agreement between Indonesia and other ASEAN member states in order ABIF implementations is focus on Indonesia commitments on liberalization of labor.

III. CONCLUSION

Based on the results and discussion, it can be concluded that the implementation of ABIF implicates against need to do banking law reform to support the development of national banking in order to meet the criteria as QABs. There are a number of strategic issues that became Indonesia's challenge in the face of ABIF regulatory preparedness. Among other things, human resources and information technology, in addition to the challenge are macroeconomic. Some aspects of the banking law requires reform among other things the policy to encourage the consolidation of national banking either through merger or consolidation to improve banking assets; the dispute settlement mechanism that ensures legal protection and legal certainty for the parties; as well as proper regulation regarding disclosure of information between banks; and the utilization of information technology standards. ABIF should also include the establishment of a regional plenipotentiary authority to supervise banks QABs, and the authorities must have a legal basis and institutional framework that is clear. The regional surveillance and monitoring institutions should be strengthened to deal with the contagion risk, including by strengthening the institutions and the existence of ASEAN Integration Monitoring Office (AIMO).

ENDNOTES

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The Effectiveness of Interparty Coalition-Building in Presidential Democracy

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ABSTRACT

In democratic systems, political parties compete for support, mobilizing support behind distinct sets of policy proposals and political values. When in power, they seek to implement their vision. In opposition, they critique or present alternatives to ruling party proposals, helping to hold the government accountable by contributing to oversight of the executive. This competition of ideas encourages each party to refine its own proposals and seek common ground with others; it can also result in better outcomes for the public. Thus political pluralism and competition are necessary for democracy to function. Presidential system requires a grand coalition, not just minimum winning coalition, but the coalition government that is supported by an absolute majority of political parties in parliament. Grand coalition itself is possible because of the policies and attitudes of political parties were generally pragmatic. With the grand coalition, the president does not depend on a particular party because there is no dominant. The grand coalition that bringing together political parties and non-parties is very effective for the Presidential democracy, because it will get political support and public support at a time. Indeed, there is no guarantee of political parties coalition members would always support the President's policy, otherwise a grand coalition made the position of President strong because it does not depend on a particular political party entirely. Grand coalition is more effective when bonded to the government development agenda and priorities of mutual interest, so that members of the coalition would give its full support to the President.

Keywords: Interparty Coalition-Building; Presidential System; Party System.

I. Introduction

Since democracy became an attribute of the modern state, representatives is a mechanism to realize the normative notion that must be executed with a will of the people upon a will of the state.[1] Hence in democratic systems, political parties compete for support, mobilizing support behind distinct sets of policy proposals and political values. When in power, they seek to implement their vision. In opposition, they critique or present alternatives to ruling party proposals, helping to hold the government accountable by contributing to oversight of the executive. This competition of ideas encourages each party to refine its own proposals and seek common ground with others; it can also result in better outcomes for the public. Thus political pluralism and competition are necessary for democracy to function[2].

In established and emerging democracies alike, ruling and opposition parties have formed coalitions to: increase their electoral competitiveness; advocate for democratic reforms; improve their influence in policy formulation; use their limited resources more effectively; and reach agreement on programs for government. While coalitions have helped advance democratic competition and governance, parties have also formed partnerships to enjoy the spoils of office without regard for policies to improve socioeconomic outcomes for the broadest possible range of citizens. In countries such as Belgium, Germany, the Netherlands and Norway, coalitions are a common feature of the political landscape and parties have almost honed them to an art form. In

other places, increased political fragmentation has made coalitions more common than in the past. But in countries already fragile from conflict and decades of authoritarian rule, the failure to establish successful coalitions has weakened democratic reform efforts and contributed to political uncertainty[3].

Coalition is the most effective tool to gain a power. Coalition required to gain the support in forming government by a political party who is winning the elections, and to build and strengthen the opposition.[4] Shar Kpundeh in The World Bank (2008) stated that coalition as a self conscious, freely-organized, active and lasting alliances of elites, organizations, and citizens sharing partially overlapping political goal.[5] The definition indicates that the presence of a coalition primarily to provide facilities to the effort of coalition members to achieve the common interests. Thus, a coalition is the result of deliberation, alignment, and willingness for cooperation, as well as a collective understanding that collective action will be stronger than if done separately and independently. Coalition is formed by groups of individuals or organizations who agree to collaborate realize a certain goal. The form shows that the existing agreement will take place at a certain period in accordance with the coalition agreement and objectives. [6].

In Indonesia, the coalition has been known since the first elections in 1955. During the Old Order, various successive coalitions are formed and influenced the politic. But in the New Order party coalition was never exist because of the Suharto's control and the Golkar always won the majority vote in every election. In 1998, the Constitutional reform was affecting the political constellation. At the beginning of the reformation appeared Koalisi Poros Tengah initiated by Amin Rais, who supported President Abdurrahman Wahid can be an elected President. Furthermore, Kabinet Persatuan Indonesia under Presiden Abdurrahman Wahid was a political party coalition cabinet. In the President Megawati term, she formed the Kabinet Gotong Royong, a coalition cabinet of several political parties. The coalition runs until the end of the tenure of Megawati in 2004. President Susilo Bambang Yodhoyono (2004-2009), formed a coalition cabinet named Kabinet Indonesia Bersatu, which is a coalition of several political parties that have seats in parliament. Furthermore, the second term of President Susilo Bambang Yodhoyono (2009-2014), even though the Democratic Party won the general elections, however President Susilo Bambang Yodhoyono remains form a coalition cabinet named Kabinet Indonesia Bersatu II[7]. Futhermore in 2014, Koalisi Indonesia Hebat won Joko Widodo as elected President. In the 2014 general election, Partai Demokrasi Indonesia Perjuangan (PDI-P) won majority seats in parliament, so that the total support of the parliament consists of 386 seats, around 69 % of the total 560 seats[8].

Based on the above, there are several questions are (1) why the President today tends to form a coalition cabinet? (2) How is the form a coalition cabinet that suitable for presidential system?, and (3) Does the coalition effective in the presidential system?

Author use juridical normative and empirical analysis to find the answers of the questions. The juridical normative analysis is used for analizing the constitutional norms system. Whereas the empirical analysis is used analizing the existing coalition. In addition I use two approaches, namely the Statute approach and conceptual approach.

II. DISCUSSION

1. Basic Needs Coalition in Presidential Democracy

Presidential system is a system of government where the president as the center of executive power and the center of state power. The President is the head of government and head of state.

Feature presidential system is the election of the President directly by the people. The President is not part of the parliament and can't be dismissed by parliament except through impeachment. On the other hand, the president can't dissolve parliament as well as the parliamentary system[9]. In the presidentialism, the president divided from the parlement and independent, the minister appointed by and responsible to the president[10]. Arend Lijphart stated there are three essential characteristics of the presidentialism as follows: first, the president elected for a fixed term, second, the president is elected directly by the people or through electoral's college and the third, the president is a single chief of executive. [11].

The tendency of the political coalition in a system of government that adopts democracy has its own character on a presidential or parliamentary system. Characters that formed is strongly influenced by the principle of separation between the executive and the legislative in the government that is formed [12] and the relationship between the executive and legislative[13], and the formation of the executive and legislative branches. In a parliamentary system the executive and the legislature is basically a unity while at the legislative and executive presidential system separate from one another.

In a parliamentary system, the executive branch is a part of and established by the legislature. The legitimacy of the executive power comes from the legislature, the legislature can dissolve the executive and the executive must be responsible to the legislature. In such relationships, coalitions become a necessity in a parliamentary system. Coalition is built for continuous efforts on maintaining mutual support. The party was in a rulling government would always support the executive[14]. In this case the political parties have a strong desire to cooperate with each other. The unification of executive and legislative power can provide a great ability for the government to govern as it is supported by a majority in parliament[15].

Presidential system is divided government the executive is separate from the legislature. This affects the decision-making process. Government did not have the support of a parliamentary majority, there is a tendency character of political parties are weak and often deadlocked in policy discussions between the president and parliament. Character presidential system is the tendency of political parties lack commitment to support the government[16].

More generally, and in a much more pessimistic tone, this is also reflected in the following quote from Giovanni Sartori (1997: 113):

> Indeed, in most parliamentary systems which require government by coalition, governments prolong their survival by doing next to nothing. In this context the little what coalition governments can do is usually done in the first six months, the initial honeymoon period in which they cannot be decently overthrown[17].

Overall, the design of institutions and the reality of executive-legislative relations, there are two tendencies: first, pattern of relations is domination of one institution over another, both on the legislative and executive dominance instead. Second, the pattern of relations based on the balance of power[18]. Particular parties may find it necessary or advantageous to partner with others to accomplish particular goals. A coalition is usually a temporary pact or partnership between two or more political parties, for the purpose of gaining more influence or power than the individual groups or parties can hope to achieve on their own. By focusing on their common objectives and pooling resources – policy expertise, funding, geographic strengths, support – coalition members can build on each other's strengths and gain advantage on issues of common interest. With a particular objective in mind – winning an election or referendum, passing a specific piece of

legislation, or forming a government – coalitions have a limited life span until the objectives are achieved[19].

Coalition model is very diverse. The first will be presented in Table 1 is a coalition model based on the number of political parties that support or form a coalition.

Table 1. Model Number of Political Parties Coalition based Support Coalition

NO	MODEL	SKALA ATAU BESARAN
1	Minimal winning coalition	refers to the government obtain a simple majority support in the parliament
2	Minority coalition	government coalition of minor parties and was not supported by a simple majority in the parliament
3	Grand coalition or oversized coalition	Grand coalitions occur when a country's main political parties – those that are typically the main competitors for control of the government – unite in a coalition government. Coalition-building between these natural competitors can be especially difficult given the traditional rivalry between them. Grand coalitions may be formed during moments of national political crisis because no other configurations are possible or to limit the influence of one or more fringe parties. Germany has experienced a number of grand coalitions where the Christian Democratic Union (*Christlich Demokratische Union Deutschlands*, CDU) and the Social Democrats (*Sozialdemokratische Partei Deutschlands*, SPD) – usually natural opponents – have come together to form a government. Similarly, in Austria, Israel and Italy, the main political parties that usually oppose each other have formed grand coalitions.

Source: Arend Lijphart, pp. 134-138.

Coalitions can be formed in the legislature or the executive. Legislative coalition was formed by a coalition of political parties that have seats in parliament. The President may also form a coalition in the form of cabinet as the political support of political parties on the government. The model can be seen in the Table 2.

Tabel 2. Model of Political Coalition based its constituent institutions

NO	MODEL	SKALA ATAU BESARAN
1	Coalition Government	Coalition governments usually occur when no single political party wins a clear majority in the parliament. In parliamentary systems, typically, the largest party in the parliament reaches agreement with like-minded parties to form a cabinet, a legislative majority and a basis for government. Based on the policy agreements for the coalition, the cabinet includes representatives from the different member parties, and its legislative proposals are typically supported by members of parliament (MPs) from member parties. Minority coalition governments have sufficient support to form the executive in parliamentary systems, but lack a clear majority in the parliament. As a result, the executive has to constantly negotiate support to secure passage of its legislative proposals. In presidential systems, when the president's party lacks a majority in the parliament, coalition-building may be required to reach agreement on a legislative agenda that a majority of parliamentarians can support
2	Coalition Legislative	These typically involve an agreement to pursue specific legislative goals without a division of cabinet/executive responsibilities. These are most common among, but not exclusive to, opposition parties. After Kenya's 2013 election, the Coalition for Reforms and Democracy, initially an electoral alliance, transformed itself into a legislative postelection coalition to perform the role of opposition. In addition, during the early 1990s, Morocco's *Koutla* was particularly effective as an opposition coalition, pushing for reforms such as an independent electoral commission and a directly elected parliament. In presidential systems, an executive who lacks a majority in the parliament may negotiate a coalition around a legislative agenda without a division of cabinet roles

Source: Source: The National Democratic Institute and The Oslo Center for Peace and Human Rights: Coalition: A guide for Political Party. First Edition, pp. 15-17. The National Democratic Institute (NDI) & The Oslo Center for Peace and Human Rights, Norwegia (2015)

In practice, coalition tends to be an overlap between coalition legislative and coalition government. The concept refers to the alliance of two parties or more based on the political interests and similar political platform. In the context of the presidential system, coalition government is not

meant as a government formed by more than one political party, but a government that is supported by more than one party. Moreover, related to the support to particular policy agenda, there are two types of coalitions namely support ad-hoc coalition and the coalition. Political parties have the motivation and purpose in the coalition, the support of political parties can be done in a long time or a short time. The coalition model can be seen in Table 3.

Tabel 3. Coalition Model related to Political Parties's Support

NO	MODEL	SKALA ATAU BESARAN
1	Support coalition	The Coalition is on a formal coalition structure, where there are regular meetings and communication coalition members to share a variety of issues related to the decision-making process
2	Ad-hoc coalition	Formed by an agreement between the parties related to a particular agenda and usually does not last very long periods

Source: Stevension et. all., p. 256 (1985)[20]

In fact that a government's policy requires the approval from the legislature, its lead the coalition into an agreement of political parties in the legislative chamber. The deal of political parties is the key factor. The coalition linked with a variety interests that will be fought.

The coalition is a necessity, especially in a multi-party system. A coalition can be aranged before or after the elections. Generally, the main goal of a coalition is to win the electoral process and influence the policy process. Political coalitions can be formed either in the parliamentary and presindential system with their respective advantages and disadvantages. However, in any system, political parties remain the main actors, both in form or maintain the sustainability of the coalition. The Coalition has both advantages and disadvantages as shown in Table 4.

Tabel 4. Advantages and Disadvantages of Coalition-Building.

ADVANTAGES/OPPORTUNITIES	DISADVANTAGES/RISKS
By combining forces and resources with others, parties can increase their influence and accomplish goals they could not achieve on their own.	To find common ground with partners, each party must compromise on its priorities and principles, and cede some control.
Parties can broaden their appeal and increase their vote share by combining forces with others. This may create opportunities to secure legislative seats, form a government and achieve other specific political goals.	Parties lose some control over messaging and decision-making, and may find it difficult to maintain a distinct profile that distinguishes them from their coalition partners. (Junior coalition partners often emerge from coalitions weaker.)
They can provide opportunities to manage cleavages (e.g., ethnic, religious) and broaden participation in government.	The public may feel that party leaders have abandoned their principles to enjoy the spoils of power.
By sharing resources – e.g., money, people –parties can mitigate each other's weaknesses and benefit from partner strengths.	The public may associate individual parties with controversial/unpopular coalition policies, thus weakening party support in subsequent elections.
The public may see coalition-building as an admirable effort to consider other points of view and seek compromise.	The need to consult and reach agreement among coalition partners can make government decision-making more complex and/or slower.
Coalition members can learn from each other and thus strengthen their individual organizations based on those experiences.	Poor communication within individual parties on coalition goals, objectives and benefits can fuel intraparty tensions/divisions.
The public may associate individual parties with coalition successes, helping to increase support.	Grand coalitions or coalitions with an overwhelming majority can weaken or marginalize democratic opposition groups.
ons may provide a basis for consensus or compromise. This may be especially valuable for issues where policy stability/predictability is highly desirable (e.g., constitutional reforms, management of proceeds from extractive industries).	For dominant parties that face no real prospect of losing, coalition-building can be a way to co-opt, weaken or eliminate groups before they develop into competitive threats over the long-term.

Source: The National Democratic Institute and The Oslo Center for Peace and Human Rights: Coalition: A guide for Political Party. First Edition, p. 20. The National Democratic Institute (NDI) & The Oslo Center for Peace and Human Rights, Norwegia (2015)

In Indonesia, Political parties ahead of elections do the Electoral Alliances. The main purpose of an electoral alliance is to combine the resources of two or more parties to improve electoral

outcomes for the members of the alliance. This may involve uniting behind common candidates or, in plurality-majority systems, agreeing not to compete against each other in particular electoral districts. Often, the ultimate goal is to achieve the vote share required to win an election, achieve majority in the legislature and to form the next government. Coalition-building may also be necessary to meet legal criteria for fielding candidates. Despite their initial focus on electoral victory, electoral alliance coalitions should also plan for how they will govern if successful. The failure to develop such plans has fueled internal rifts, hampering the performance – and sometimes even leading to the collapse – of electoral alliances that have found themselves in government. Under Indonesia's electoral laws, only parties that control at least 20 percent of the seats in the People's Representative Council (*Dewan Perwakilan Rakyat,* DPR) or that win 25 percent of the national votes in the previous elections to the DPR can field candidates in presidential elections. In 2014, no party met that threshold so the country's political parties coalesced around two candidates: the Great Indonesia Movement Party's (*Partai Gerakan Indonesia Raya,* Gerindra) Prabowo Subianto; and the Indonesian Democratic Party of Struggle's (*Partai Demokrasi Indonesia Perjuangan*) Joko Widodo. Six parties, representing 63 percent of the 550 seats and 59 percent of the national vote, united behind Subianto, while four parties supported Widodo. Ultimately, Widodo won the election, garnering 53 percent of the votes[21].

The elected-President's Indonesia in a direct election since 1999-2014, all of which are minority government. The elected-Presidents have gotten a political base which does not reach a simple majority in the DPR. Therefore, the President requires political support from the political parties in parliament to maintain political stability. At the President Abdurrahman Wahid term (1999- 2001) and President Megawati Soekarnoputeri (2001-2004), Partai Kebangkitan Bangsa (PKB) which as the political base of President Abdurrahman Wahid only controls 51 seats of the 500-seat of DPR and Partai Demokrasi Indonesia as the Megawati's political base has only 153 seats. While President Yudhoyono (2004-2009), Partai Demokrat as his political base only obtained 55 of 550 seats in parliament and in the second period (2009-2014) of Partai Demokrat only obtained 149 of the 560 seats in parliament, even if Partai Demokrat won the legislative elections on the election 2009. Hereinafter President Joko Widodo (2014-present), Partai Demokrasi Indonesia Perjuangan as his political base only obtained 109 seats out of 565 seats.

As the minority government is pushing the president-elect to arrange a coalition cabinet. President of the coalition cabinet arrange to have the support of parliament, by dividing ministerial positions to parties supporting the coalition. This is so that the President can work with coalition partners in Parliament. The new era of Indonesian politics with the coalition cabinet, must have a clear direction, so that the coalition carried out by a political party must have a clear direction and purpose. After the coalition, for example: President Susilo Bambang Yudhoyono of the first period (2004-2009) supported by the seven political party namely Partai Demokrat, Partai Golkar, Partai Keadilan Sejahtera (PKS), Partai Amanat Nasional (PAN), Partai Persatuan Pembangunan (PPP), Partai Kebangkitan Bangsa (PKB), Partai Bulan Bintang (PBB) and PKPI, so overall coalition President Susilo Bambang Yudhoyono master 403 of the 550 seats in parliament (73, 3%). Meanwhile in the second period 2009-2014, he supported by Partai Demokrat, Partai Golkar, PKS, PAN, PPP, and PKB can gain the support of 423 of the 560 parliamentary seats in parliament (75, 5%). While President Jokowi after the second reshuffles, Jokowi's cabinet coalition become a grand coalition. Seven from ten parties in DPR join in it. Its composition consists of 386 seats alias approximately 69% of the total 560 seats in DPR. The compsition of Jokowi's cabinet coalition are consist of political parties elements and other groups, such as religious organizations

(Muhammadiyah and Nahdlatul Ulama), local representatives, representatives of women, and others. Jokowi's coalition both in parliament and in the cabinet, ensure gains the political support and the public support at the same time.

The practice of coalition in the Indonesia under the 1945 Constitution basically formed a political coalition that showed two models of both the coalition government and legislative coalition, such as in the Jokowi's government. In the coalition political parties as the coalition partners stand in two feet, one leg supporting the government, and the other leg in the parliament to control the president. Coalition is an option for the elected-President to secure his rule. As is known, the 1945 Constitution before the amendment clearly indicates the dominance of the executive.

The reign of President Soeharto, with his political hegemony, military officially sit in the legislature, either the House or MPR. This is why the legislature into subordination of executive, and a weak bargaining position in dealing with the government. After the amendment of the 1945 Constitution (1999-2002), Amendment Article 20 paragraph (1) define the position of the Parliament is getting stronger in power formation of legislation, in addition to oversight and budget (Article 20A paragraph (1)). The power design of The 1945 Constitution today is no longer executive heavy but legislative heavy as it should be in the scheme of presidential democracy. In carrying out these functions, DPR has various rights such as right of interpellation, inquiry, right to free speech, right to ask questions, right of immunity and right to propose legislation. All the duties, functions and rights lead DPR is more important in determining the sustainability of a government led by the President in accordance with the provisions of Article 7 of the 1945 Constitution, MPR Decree No. 6 / MPR / 2010 as well as the Constitutional Court Regulation No. 21 of 2009. Nowadays DPR's position is stronger than the government, especially in terms of determining the state budget. This is due to the change in the political party system and the electoral system, which encourages the formation of a coalition in parliament and the Cabinet.

Due to the nature of the coalition presidential system is nothing more solid or cohesive coalition of the parliamentary system, the grand coalition or oversized coalition is needed, not just minimum winning coalition, but the coalition government that is supported by an absolute majority of political parties in parliament. Grand coalition itself is possible because of the policies and attitudes of political parties were generally pragmatic. With a grand coalition, the president does not depend on the particular party because there is no dominant.

2. Effectiveness of the Inter-Party Coalition Politics in Presidential Democratic System

Indonesian political system in the 1945 Constitution amendment allows the coalition of political parties. Indonesia adheres to a presidential system of government, but the multi-party system is applied, so in every election result is no one dominant political party. In such circumstances, it is definitely necessary coalition system[22]. According to Saldi Isra[23] since the 1999 elections, the practice of Indonesian presidential system switched from a dominant party system into a multi-party system. Under the provisions of Article 6A of the 1945 Constitution, one of the purification efforts made direct presidential election.

Presidential system is placing the President as a fixed tenure executive with definite (fixed term). The position of the President does not affected of a number seat of political party in parliament, because the President is elected directly by the people. Politically, the President cannot be imposed by parliament, except through impeachment. Basically, the coalition made by the elected-President is raising the effectiveness. An effective government is that the government is able to implement a policy through good quality public services and free of political pressure on

policy implementation[24].

Meanwhile, according to Ni'matul Huda[25], effective government is a government that can run the power with the establishment of a constructive relationship between the president and parliament over the principle of checks and balances. On the other hand, Syamsuddin Haris [26] argued that the concept of effective governance refers to the situation where the executive can implement the policy without any obstacles from the legislature. Theoretically presidential system allows the realization of an effective government since the President has legitimacy and a strong mandate due to directly elect by the people. Separation of executive and legislative powers provides an opportunity for the President to implement government policies without being disturbed by the legislature.

The 1945 Constitution Article 1 (1) stated: The State of Indonesia shall be a unitary state in the form of a republic. Moreover, Presiden according to Article 4 (1) shall hold the power of government in accordance with the Constitution. In the other hand, accordings to Article 20 (1) The DPR shall hold the authority to establish laws. Both, President and DPR are elected trough direct election which its stated in Article 6A (1) The President and Vice-President shall be elected as a pair directly by the people, and Article 19 (1) Members of the DPR shall be elected through a general election. There is a dual legitimacy between the President and the Parliament due to the direct election system. Dual legitimacy would cause problems if the powers of the President and Parliament are not impartial. First, the President is elected by an absolute potential will ignore the Parliament and encourages him to be authoritarian. Second, the political parties that win the election will be felt as the representation of the people will potentially hamper the President's policy. This political reality can lead to patterns of relationship between the President and Parliament which is the domination of one institution over another, could have dominance over the Parliament president or vice versa, or a balanced relationship between the President and Parliament[27].

According to Kacung Marijan, the implications of is quite significant amendment of the 1945 Constitution. Relationships between the President and Parliament more balanced. On the other hand, these changes are likely to appear semi-presidential system of government, where elected President only has the formal support of the minority party in the House, while the power of the Parliament is very large[28]. In the context of unequal relations between the President and the House of Representatives, where President weaker, resulting in the government becomes ineffective, then what is needed is a coalition with a political party in the House.

The existence of minority parties are supporting the President, due espoused multiparty system. The multi-party system led to no one party has ever become the majority party in the House. Asshiddiqie, with the plurality that is 'segmented' and even 'fragmented' pluralism, any policy of 'threshold' which is intended to simplification the number of political parties naturally, in the long term the number of political parties in Indonesia will never successfully reduced to two dominant political parties such as the United States. Therefore, Indonesia must be ready to accept the reality of living with a lot number of political parties and no dominant as reflected in the results of the legislative elections of 2004, 2009, and 2014[29].

The main actor of a coalition is political parties, but in the context of the presidential system in Indonesia, the coalition that has formed based on the division of power in the cabinet, so it forms a coalition government coalition. In this coalition, the president determines the structure of the cabinet, although perhaps the president did not come from the majority party. This position makes the president will always be able to play a role with quite freely. This role will affect the

performance of government, and the entire government[30].

Political coalition formed by an agreement between the parties related to a country's agenda for the welfare of the people. The coalition supports the decision-making process. The effective coalition according to Djayadi Hanan[31] contain two meanings, namely the solidity and performance. In order to effectively achieve its objectives, the coalition should be solid. Solidity of the coalition in the presidential system cannot be interpreted as approval of all members of the coalition are 100 percent on all matters of policy and administration, or all of its members 100 percent always agree on all issues and government policies, such as the coalition in a parliamentary system. In a parliamentary coalition, if there are members who defected, it can threaten the collapse of the government. Meanwhile in a presidential system, if there is a coalition member of a different attitude with the president's policy will not make the government fall.

The author will present the solidity of the political coalition in the coalition Government Susilo Bambang Yudhoyono with Joko Widodo. As it is known during the period 2004 2009 President Yudhoyono face 14 proposed interpellation and 9 proposals submitted to an inquiry on the DPR, where the initiator is a member of a coalition of SBY. On the other hand, on most issues, a coalition of SBY is always agrees. In the other words, the solidity of SBY's government is relatively solid. While the Jokowi's Government, the coalition is solid, proven over nearly two years Jokowi has been successfully passed all of draft budget, whereas the coalition is still not a grand coalition. Likewise, the proposed tax amnesty policy approved by the Parliament.

The second meaning is an effective coalition of performance. It consists of two things. First, how many government policies that passes in the DPR and how many failed. Second, is the achievement of governance agenda, example: Jokowi's coalition gives guarantee over two indicators of performance achievements. Jokowi government is targeting economic growth of 7%. Coalition Jokowi can be judged effective if it can achieve the acceleration of economy and development. General criteria that can be used for the achievement of government's agenda is Nawacita which is a campaign promise Jokowi as president. If most of Nawacita it can be achieved, it can be said that the Jokowi's coalition is quite effective. Thus, the parties on the one hand did not difficult to make compromises, but on the other hand is also easily go separate paths. Indeed, there is no guarantee of political party members of the coalition Jokowi will always support the policies, but the grand coalition if there is one party who defected Jokowi, then he will rely on other political parties to support his policy.

Actually, by a grand coalition, lead the parties unwilling to defect, because the defection would not be effective in suppressing the president. In other words, a grand coalition is able to enhance the effectiveness presidential coalition possible. The main instruments which can be used in this case is clear agenda and assignation to each minister, especially ministers from the political parties, to ensure that all cabinet members implement the vision and mission of president. With this instrument the president can early detect if there is another agenda of the ministers, especially the indication of the political party maneuvers. If this is done, the possibility of cooperation between the political parties carry out a political agenda that the president assigned to his ministers can be reduced. However, if this remains the case, assertiveness of the president should be played.

Public support on a grand coalition's President Jokowi as one important element. The composition of the Cabinet Jokowi distributes portions of relatively equal between ministers from political parties and non-parties, and focus on the acceleration of economic and development that is considered one of the most important community programs. With high public support, the

coalition of Jokowi can be better focus on carrying out the government agenda that is more likely work optimally. There are only three parties outside the government Jokowi, namely Partai Demokrat, Partai Keadilan Sejahtera, and Partai Gerindra. PKS already declared as the loyal opposition. Means that it's possible PKS supports the president's agenda when there is suitability with the party's agenda. Likewise, Partai Demokrat declared as a counterweight. Meaning a counterweight is not really different from the loyal opposition. Thus, even with the parties outside the coalition, the president has the possibility to gain political support from political parties who is not the coalition members. Briefly, the environment and the current political situation are quite possible to create a Jokowi's coalition effective. What is the President needed is the definitive agenda and priorities of government achievements.

From the description it is clear that a grand coalition is an effective coalition in the presidential system. With the composition which it is comprising political parties, as well as public institutions, community organizations and political figures, hence coalition will gain political support and public support at the same time. With the leadership of the President, a large coalition is going to bound by the development agenda and priorities of the government as a mutual interest that must be undertaken, so that members of the coalition going to support to the President and reluctant to defect.

III. CONCLUSION

The President elected in direct elections is a minority government. President needs the support of political parties in parliament to maintain the political stability. The reality political is prosecuting elected-president to establish a coalition cabinet of political parties. It is intended solely for the president to be working with coalition partners in Parliament.

Presidential system requires a grand coalition, not just minimum winning coalition, but the coalition government that is supported by an absolute majority of political parties in parliament. Grand coalition itself is possible because of the policies and attitudes of political parties were generally pragmatic. With the grand coalition, the president does not depend on a particular party because there is no dominant.

The grand coalition that bringing together political parties and non-parties is very effective for the Presidential democracy, because it will get political support and public support at a time. Indeed, there is no guarantee of political parties coalition members would always support the President's policy, otherwise a grand coalition made the position of President strong because it does not depend on a particular political party entirely. Grand coalition is more effective when bonded to the government development agenda and priorities of mutual interest, so that members of the coalition would give its full support to the President.

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Strengthening Constitutional Democracy through Constitutional Adjudication Institutions: A Comparative Study between Indonesia and Australia

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ABSTRACT

Democracy which gives power to the majority may lead to hegemony of majority which potentially threaten rights of the minority. In response to such threats some scholars have formulated a new paradigm of democracy called "constitutional democracy".This article compares the experienceof Indonesia and Australia in incorporating the principle of constitutional democracy into their Constitutions and in creating institutions thatguarantee and protect constitutional rights of their citizens.This is a doctrinal research which uses comparative approach. The establishment, role and powers of constitutional adjudication institutions in realizing the goal of state in both countries are examined and assessed. The two countries adopt different model of constitutional adjudication. Indonesia follows kelsenian model as practiced in most European countries, while Australia follows the common law model which functions the high courts as constitutional adjudication institution. The study concludes that the Constitutional Courtof Indonesia andthe High Court in Australia are part of the realization the goal of the countriesbe democratic states based on the rule of law. The Courts perform their function as the guardian of the Constitution and protector the constitutional rights of citizen with varying degree of success. The constitutional adjudication in both countries also plays a role as checks and balances mechanism of other main organs in the constitutional system. The existence of the Constitutional Court in Indonesia and the High Courts in Australia has contributed to the upholding the principle of constitutional democracy and strengthening the consolidation of democracy.

Keywords: constitutional democracy, constitutional adjudication, constitutional rights

I. INTRODUCTION

The experience in particular countries shows that parliamentary sovereigntycreates problem of hegemony of majority which has potentiality to ignore minority. Therefore, the concept of constitutional democracy emerged to control the tyranny of majority. In the constitutional democratic state, the power of parliament is checked and balanced by judiciary through judicial review mechanism.

Indonesia and Australia are the two countries in the world which implement the concept of constitutional democracy. This doctrine emphasizes that parliament as the representative of the will of people is subjected to the supremacy of the constitution as the supreme law of the nation.The establishment of the Constitutional Court in Indonesia in 2003 and the function of the superior courts in Malaysia is a part of realizing the concept of constitutional democracy state.

Looking at the experiences of the countries called "the new emerging democracies", there are so many obstacles that are hampering efforts to develop an effective "rule of law" system which is expected to counterweigh the system of democracy. Firstly, all new emerging democracies in Eastern Europe such as Russia, Ukraine, Uzbekistan, Georgia, and other former Soviet Union States, as well as some Asian countries like the Philippines and South Korea, have a similar problem on how to institutionalize democratic values through law and based on the existing law, as many of them have inherited an undemocratic past.[1] Therefore, there are many laws and regulations that have to be reviewed and revised according to the present demand. Secondly, generally the new emerging democracy suffers from the "*anomia* syndrome" meaning that the integrity, the impartiality and the independence of the judiciary are seriously influenced. Under the authoritarian regimes, courts are usually politically intervened by the ruling elite.[2] In other words, in authoritarian regimes, courts are considered more as the attributes of the authority rather than as the attributes of justice. This situation also happened in Indonesia, in the era of the Suharto regime.[3] Authoritarian regimes also produce legal professionals without integrity. As a result, judicial corruption becomes very common.

Judges play a significant role in guaranteeing the enforcement of the "rule of law", which is the key point in achieving equilibrium in the above triadic relations among the state, civil society and the market, and between the state and its citizens. Besides, the courts and the judges play a pivotal role in controlling the practices of democracy which is usually glued to the principles of "majority rules" and a formal application of the principle of representation.[4] Some experts argue that the Constitutional Court is less dangerous compared to political institutions like parliament. Therefore, in some new emerging democratic countries, they delegated authority to review acts to a new court i.e. constitutional court.

With the present development of the idea of constitutionalism and the increasing demand for democratization all over the world, almost all countries claim themselves to be democratic countries, despite their different democratic levels. In the course of development, there have been many new democratic countries that start their democratization agenda by reforming their constitution. Constitutional reform has been deemed as the most fundamental measure for creating a constitution that provides better assurances for the institutionalization of democratic values. This has been due to the position of the constitution as the foundation and at the same time as the framework of democratic values.[5] The trend of new emerging democracies also shows that strengthening of checks and balancing principles among state institutions is unavoidable to create a better environment towards democracy.

II. DISCUSSION

1. Constitutional Democracy and Constitutional Adjudication

Historically, constitutional adjudication is much older and more deeply entrenched in the United States than in Europe. Judicial review as a part of constitutional issues has been implemented continuously in the United States since the Supreme Court's landmark decision in *Marbury v. Madison*, 5 U.S. 137 (1803). While constitutional review in Europe, however, is largely a post–World War II phenomenon.[6] In pre-World War II in Europe, democratic constitutions could typically be revised at the discretion of the legislature.They prohibited review of the legality of statutes by the judiciary and they did not contain substantive constraints, such as rights, on the legislative authority.

The rule of legislative supremacy meant that conflicts between a statute and a constitutional

norm were to be either ignored by judges, or resolved in favour of the former.[7] One of the remarkable political developments of the twentieth century has been the development of constitutional democracy in Europe after World War II. The defeated powers in the western part of continent adopted new constitutions that embrace notions of individual rights and limited government.[8] In other words, since the end of World War II, 'a new constitutionalism' has emerged and widely diffused. Human rights have been codified and given a privileged place in the constitutional law and quasi-judicial organs called constitutional courts have been charged with ensuring the normative superiority of the constitution. Such courts have been established in Austria (1945), Italy (1948), the Federal Republic Germany (1949), France (1958), Portugal (1976), Spain (1978), Belgium (1985), and after 1989, in the post-Communist Czech Republic, Hungary, Poland, Romania, Russia, Slovakia, the Baltic's, and several states of the former Yugoslavia.[9]

2. The Concept of Constitutional Adjudication

Grimm defines constitutional adjudication as:

"a system of rectifying, in the name of the constitution, violations of constitutional values and thereby maintaining the fundamental value-order inherent in the constitution. It refers to a system that seeks to protect the people's basic rights by making sure the constitution is respected as the supreme law in actual practice. More concretely, it seeks to protect the constitutional order and implement the constitution by having either regular courts or a separate constitutional institution to make an authoritative determination according to the constitution when cases arise in which violations of the constitution (e.g., infringement of basic rights) are alleged".[10]

Constitutional adjudication is as old as democratic constitutionalism. But for a long period of time, the United State of America remained alone in subjecting democratic decision-making to judicial review. While constitutions had become widely accepted already in the 19th century, it took almost 200 years for constitutional adjudication to gain world-wide recognition.[11] Rosenfeld also argues that constitutional adjudication is much older and more deeply entrenched in the United State than in Europe.[12]

Before the 20th century, the idea of constitutional adjudication was rejected by most European states, except in Switzerland for a particular area. Grimm further explains that the reason for the rejection of constitutional adjudication in the 19th century was its alleged incompatibility with the principle of monarchical sovereignty which governed most of the European states at the time. When the monarchy collapsed and was replaced by popular sovereignty as in France in 1871 and in many other states after World War I, constitutional adjudication was found to be in contradiction with democracy. Parliament as representation of people should be under no external control. The only exception was Austria, which in its Constitution of 1920 established a constitutional court with explicit power to review acts of legislature. Austria thus became the model of a new type of constitutional adjudication: by a special constitutional court.[13]

In response to the idea of constitutional adjudication, especially to review the acts enacted by parliament (constitutional review), there are differences among the countries. In many countries, so-called constitutional adjudication is based on constitutional law. Generally speaking, there are two types of constitutional adjudication institutions.[14] One type establishes the Constitutional Court as a special court, while the other type indicates that constitutional adjudication is conducted by general courts, especially by the Supreme Court in the final instance, without other

special courts.[15] Some common law countries like USA, Australia, India, and Malaysia[16] put constitutional adjudication powers on the Supreme Court, while continental European countries and some Asian countries like Austria, Germany, Eastern Europe, South Korea and Indonesia,[17]delegate the powers to a new court: the constitutional court, with a different scope of authority. Elliot points out that the most striking thing in this issue is that the review of acts must be justified constitutionally and evaluated normatively. Therefore, it must be justified by reference to relevant constitutional principles. He further explains that different types of power thus raised different challenges of justification.[18]

In the case of Indonesia, Hendrianto and Ginsburg state that in studying the emergence of the constitutional court in new democracies, some scholars have concluded that the political dynamics in a country in transition to democracy are one of the main driving forces behind the creation of constitutional courts. Hendrianto further adds that Indonesia and South Korea have the same background in terms of the reason of the establishment of the constitutional courts. In the context of the establishment of the Korean Constitutional Court, the decision to adopt a designated court was the result of compromise between the ruling party and the opposition parties. Korean constitutional court had influenced Indonesian politicians to look to the Korean Constitutional Court as a model.[19]

Hendrianto also concludes in his article that the Indonesian Constitutional Court, in fact, cannot avoid politically sensitive cases because its jurisdiction to review constitutionality of laws and government policies. The Court will always deal with constitutional issues that the powerful impact on the political realm. Consequently, the Court needs the leadership of a heroic Chief Justice who can command the institution in sometimes stormy waters of constitutional politics.[20] In other words, the Chief Justices of the Constitutional Court have to understand their position as the leader who lead the Court in functioning the Court as the guardian of the Constitution which must be able to correct the executive and legislative organ policies.

Lindsey argues that if effective, the new Constitutional Court has the potential to radically transform the Indonesian judicial and legislative relationship and formulates a new check on the conduct of lawmakers and the presidency.[21] Therefore, it is a meaningful effort if a more comprehensive evaluation is conducted after a decade of the emergence of the constitutional court.

Webber argues in his paper by quoting the concept of Dahl that Indonesia today may be described as a democracy and it would have completed transition to democracy after having legislative elections in 1999.[22] Meanwhile, in terms of consolidation of democracy, Webber views - by using the definition of democratic consolidation made by Schneider and Schmitter - that Indonesia has most of the attributes of a consolidated democracy.[23] He further concludes that by using the Schneider and Schmitter criteria, Indonesia almost all older 'third wave democracies' in terms of the extent of consolidation of democracy. However, Schneider and Schmitter confess that their conceptualization of democratic consolidation has an electoral bias. In a wider perspective, democratic consolidation may attach a greater importance to, for example, the implementation of the rule of law, should be the yardstick for measuring the degree of democratic consolidation. If the rule of law used as one of indicator, Indonesia's post-1998 performance will certainly look less impressive.[24]

3. The Constitutional Democracy and Constitutional Adjudication in Indonesia

3.1. The Framework of Constitutional Adjudication

This sub-topic will elaborate more about the framework of constitutional adjudication in Indo-

nesian constitutional system. There are some state organs that need to be discussed regarding the framework of constitutional adjudication in Indonesia, namely, DPR (House of Representatives), President, Supreme Court and Constitutional Court. The DPR and the President are relevant to be discussed since both organs have authority in the enactment of laws which can be reviewed by the Constitutional Court. The Supreme Court is also discussed in this sub-chapter in relation to clarify the different authority of both the Constitutional Court and the Supreme Court in term of judicial review.

3.1.1. The House of Representatives (DPR)

DPR is a legislative organ which has the authority to enact laws. To enact laws, the DPR has to discuss together with and approved by the President. Besides, there are some functions of the DPR namely 1) legislative function, 2) budgeting function and scrutinizing function.[25] In exercising the functions, every member of the DPR shall hold the rights of interpellation, investigation and to declare an opinion.[26] Every member of the DPR shall also hold the rights to submit questions, to propose suggestions and opinions, and the rights of immunity.[27]

Based on Article 20 of the 1945 Constitution, the DPR is considered as the legislative organ or legislator. In the context of law-making by the DPR, the 1945 Constitution highlights as follows:

1. The DPR shall hold legislative powers, not the President or the DPD;[28]
2. The President is the organ which signs bills jointly approved by the House of Representatives becomes a law;[29]
3. The bill which is officially enacted is compulsory promulgated;
4. Each bill shall be discussed by the House of Representatives and the President to reach joint approval;[30]
5. If the bill is initiated by the DPR, the DPR as an institution will face the President as an institution may reject the bill, wholly or partly. If a bill fails to reach joint approval, the bill shall not be reintroduced within the same House of Representatives term of sessions.[31] In this sense, position of the House of Representatives and the President are equal;
6. If a bill is initiated by the President, the House of Representatives also has right to receive or reject, partly or wholly. The DPR may have "voting" to receive or reject the bill proposed by the President;
7. If a bill has been approved in the meeting of the House of Representatives and enacted in the meeting, substantively the bill shall be legally become law. However, legislation of the law does not yet bind generally because the President does not sign yet and promulgated. Although the President may not change the materials, but as a law it has been legalized;
8. A bill which has been enacted by the House of Representatives as a law may enter into force as a law if achieving some conditions: a) Signed by the President to legalize the bill; b) within 30 days after decision, the bill shall legally become a law.[32] (substantive enactment by the House of Representatives, formal enactment by the President).

The House of Representatives shall hold legislative, budgeting and scrutinizing functions.[33] Legislative function means the function to establish law jointly approved by the President. Budgeting function means the function of deciding National Budgeting together with President. Scrutinizing function is the function of the House of Representatives to supervise the implementation of laws exercised by the President.

In carrying out its functions, the House of Representatives shall hold some rights which may be divided into institutional rights as well as individual rights. Institutional rights of the House of Representatives are the rights of interpellation, investigation, and opinion declaration.[34] As indi-

viduals, the members of the House of Representatives shall hold the rights to submit questions, to propose suggestions and opinions, and the right of immunity.[35]

3.1.2. The President

Based on the amendment of the 1945 Constitution, the President and Vice President shall hold an office for a term of five years and may subsequently be re-elected to the same office for one further term only.[36] The President of the Republic of Indonesia shall hold the power of government in accordance with the Constitution.[37] In exercising his/her duties, the President shall be assisted by a Vice-President.[38]

The President shall be entitled to submit bills to the House of Representatives.[39] Besides, the President may issue government regulations as required to implement laws.[40]

The President and the Vice-President shall be elected as a single ticket directly by the people.[41] Each ticket of candidate for President and Vice-President shall be proposed prior to the holding of general election by political parties or coalitions of political parties which are participants of the general election.[42]

With the approval of the House of Representatives, the President may declare war, make peace, and conclude treaties with other countries.[43] In making other international treaties which will produce an extensive and fundamental impact on the lives of the people which is linked to the state financial burden, and/or which will requires an amendment to or the enactment of an act, the President shall obtain the approval of the House of Representatives.[44] Besides, the President may declare a state emergency. The conditions for such declarations and the subsequent measures regarding a state emergency shall be regulated by law.[45]

3.1.3. The Supreme Court

The Supreme Court of the Republic of Indonesia is the independent judicial arm of the state. It maintains a system of courts and sits above the other courts and is the final court of appeal. It can also re-examine cases if new evidence emerges.

The Supreme Court is independent as of the third amendment to the Constitution of Indonesia. The Supreme Court has oversight over the high courts (*PengadilanTinggi*) of which there are about 30 throughout Indonesia and district courts (*PengadilanNegeri*) of which there are around 347 with additional district courts being created from time to time.[46]

Regarding the judicial review, the Supreme Court shall have authority to review legislations lower than the laws such as Government Regulation, Presidential Regulation and Regional Regulation. These are 'the judicial review' exercised by the Supreme Court, while judicial review of laws exercised by the Constitutional Court is also popularized specifically as the 'constitutional review".

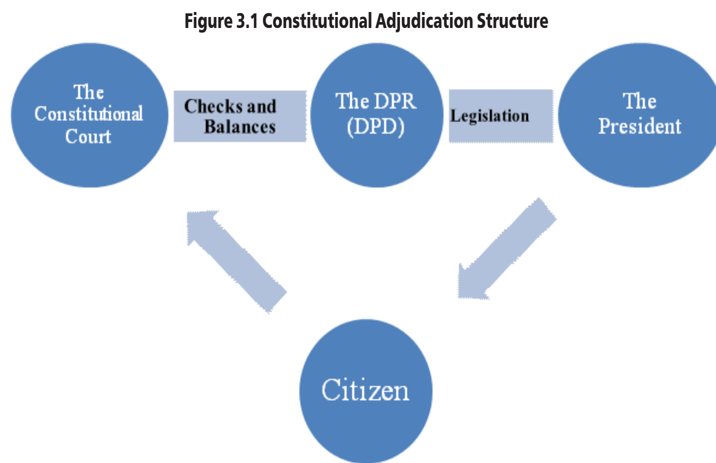
3.1.4. The Constitutional Court

The Constitutional Court of Republic of Indonesia is a new state organ in the Indonesia constitutional system as the result of the Third Amendment of the 1945 Constitution.[47] As a constitutional organ, the Constitutional Court of Republic of Indonesia is designed to be the guardian as well as the sole interpreter of the constitution through its decisions.

In exercising of its constitutional duties, the Constitutional Court aims at implementing its vision, "enforcement of the constitution in the context of realizing the goal of the rule of law state and democracy for a dignified life as a nation and state". This vision is then manifested into two missions of the Constitutional Court, (1) realizing a modern and accountable Constitutional Court as one of the actors exercising judicial power, (2) building Indonesian constitutionality and the culture of constitutional awareness.[48]

STRUCTURE OF CONSTITUTIONAL ADJUDICATION

Figure 3.1 Constitutional Adjudication Structure



The DPR as Parliament which enacts laws with approval of the President, since the amendments, has become a very powerful legislative body. Denny quoted SaldiIsra said that the amendments have, in fact, resulted in a 'supreme DPR and the Constitution have thus shifted from being an executive-heavy Constitution to a DPR-heavy Constitution.[49] In other words, in term of legislation, the DPR has stronger position rather than executive body.

Following Indonesia's independence and the replacement of and amendments to the Constitution, the idea of judicial review continued to develop over time. However, as the 1945 Constitution, which became applicable again as of July 5, 1959, did not adopt such an idea, the idea of judicial review had never been realized. Only following the amendment of the 1945 Constitution in 1999, 2000 and especially 2001, namely in the third amendment to the 1945 Constitution, and was reaffirmed in the fourth amendment in 2002.

a. Powers of the Constitutional Court

The four functions of the Constitutional Court are performed through the implementation of four authorities and one duty as listed in article 24C (1, 2) UUD 1945 as follows:

1. To review Acts.
2. To decide dispute on jurisdiction among the state organs which the authorities are given by the 1945 Constitution.
3. To decide dissolution of political parties.
4. To decide dispute over the result of election.

b. Nature and Procedures

Historically, the establishment of the Constitutional Court began withadoption of idea of the constitutional court in the amendment of the 1945 Constitution by the People Consultative Assembly in 2001 as formulated in Article 24 (2), Article 24C, and Article 7B of the Third Amendment of the 1945 Constitution on 9 November 2001. The idea to establish the Constitutional Court is one of the results of legal thought and modern constitutional law in 20th century. Then the existence of the Constitutional Court was asserted again in Constitutional Court Act 2003.

4. The Issues Facing Constitutional Adjudication in Indonesia

However, after a decade, some constitutional law experts conclude that there are some prob-

lems facing the constitutional adjudication in Indonesia. Firstly, as a new state organ, the Constitutional Court tends to be a super body institution without strong supervision either internally or externally. For instance, in case of judicial review of Judicial Commission Act in 2006, the Constitutional Court had nullified the authority of the Judicial Commission to supervise the Constitutional Court Judges. This is a kind of breach of principle of impartiality where the judges may not judge their own interest. Without having strong supervision, the code of ethics of the judges may not be enforced well. Internal supervision becomes weak when the problems lie in the hands of judges of the Constitutional Court. One of the results of this situation was in 2014, AkilMochtar, the chairman of the Constitutional Court was arrested by the Anti-Corruption Commission on bribery case relating to local election in Borneo.

Secondly, the function of constitutional adjudication in the Constitutional Court has disturbed by incorporating local election disputes become a part of the authority of the Constitutional Court. The Constitutional Court has the authority to settle local election disputes since Election Act No. 22 of 2007 and Amendment of Local Government Act No. 12 of 2008 states that local election is a part of the general election. However, article 22E of 1945 Constitution states that: "the general election shall be conducted to elect the members of the House of Representative, the Regional Representative Council, the President-Vice President, and the Regional House of Representatives".

Thirdly, after a decade of the existence of the Constitutional Court, there is an evaluation on the scope of the authority of the Constitutional Court whether the Constitutional Court has to have authority in settling disputes over the result of the local election or the scope of authority added by incorporating the authority to decide on constitutional complaints.[50]

Fourthly, in term of disputes on jurisdiction among the state organs, the Constitutional Court had not given a significant role in functioning as mechanism of constitutional adjudication due to two reasons, first, unclear concept of *subjectumlitis* of the petitioners to have legal standing in the Court. Second, lack of understanding of the subject matter jurisdiction (*objectumlitis*) of the Court.

Based on the previous discussion, it is believed that there is a need to comprehend the amendment of the 1945 Constitution since there are some weaknesses in the Constitution. Constitution is a political consensus among the citizens in a country. It is a resultant of social and political situation of particular country. Accordingly, social and political factors also take important roles in relation to the amendment of the Constitution. To amend the Constitution, of course, there is what it is called as a political reform or a political pressure which pushes the member of People's Consultative Assembly to amend the Constitution as what happened after the collapses of Soeharto regime.

5. Constitutional Democracy and Constitutional Adjudication in Australia

5.1 The Framework of Constitutional Adjudication

The Australian law of standing to raise constitutional issues is built on a private law paradigm,[51] one which sees 'administrative [and constitutional] review as concerned with the vindication of private and not public rights'.[52] It is reinforced by disparate elements of substantive and procedural law: the federal courts have jurisdiction only in relation to 'matters', a concept at whose core is the concrete dispute about the applicant's rights and duties on facts pertaining to their own situation; the requirement that in most cases an applicant have a special interest in the subject matter of the action; the limited role of interveners and amici curiae. It is also reinforced

by structural features of the legal system: the integration of public law and private law litigation in the one system of courts; the shared common law methodology in public law and private law; and the lack of a specialized corps of public law judges. Australian courts have not embraced with any enthusiasm the idea that they might have a role in overtly and deliberately shaping the interpretation of the Constitution to meet the governmental needs of the Australian people.[53]

Judges in constitutional cases are also potentially faced with a chaotic universe of relevant factors. First, there are higher-order interpretative decisions about the classes of materials that they will look at, such as constitutional drafting debates, the decisions of previous courts, the decisions of foreign courts, international law, religious law, the views of the population at the time of constitution making, and the views of the population now. These higher-order decisions may be made consciously and articulated as a commitment to a particular theory of constitutional interpretation; in Australia, for example, Justice Kirby has placed himself in the progressivist interpretative tradition[54] and Justice Heydon in a particular form of originalism.[55]

5.2 The High Court and Its Power

The High Court sits at the apex of the court system in the Australian federation and is both the constitutional court and the final court of appeal. It was established in 1901 by Section 71 of the Constitution. As in other common law countries and legal system the Common-law doctrine of precedent is established on the hierarchical structure of the court system where lower courts follow precedents set by higher courts. Being a federal country, Australia has both a federal court structure and a state court structure.

The functions of the High Court are to interpret and apply the law of Australia; to decide cases of special federal significance including challenges to the constitutional validity of laws and to hear appeals, by special leave, from Federal, State and Territory courts. The meaning and application of the Australian Constitution can be tested in the High Court of Australia which is the highest court in the Australian judicial system. The court interprets the Constitution and settles disputes about its meaning. It has the power to consider Commonwealth or state legislation and determine whether such legislation is within the powers granted in the Constitution to the relevant tier of government.

Constitutional narratives are not the sole creation of judges and legal theorists, but are also culturally- and politically-created conceptions.[56] Thus constitutional narrative is created – sometimes deliberately and sometimes not – by governments, legislators, litigants, religious leaders, historians, civil society movements, and newspaper editors who at various points attempt to push the narrative of the constitution in one direction or another. However, the judge is the primary storyteller in constitutional adjudication and does not merely unwittingly reflect back whatever cultural, political or other social values happen to exist at the time; the constitutional narrative has to be compelling to the legal mind as well.

6. Constitutional Adjudication: A Comparison between Indonesia and Australia

Based on the previous description of both countries on constitutional adjudication, it may discuss some similarities and differences as follows:

6.1 Similarities

First, the constitutional adjudication in both countries is a part of realizing the goal of the rule of law state and democracy.[57]In a country based on the rule of law and democracy, there is no authority or organs higher than the Constitution. The authority and organs are subject to the supremacy of the Constitution as the supreme law of the nation. This is a formula of modern state

for striving a dignified life of the nations. The existence of the constitutional adjudication is also a part of fundamental rights of citizen.

Second, exercising of judicial review in both countries is a part of mechanism of constitutional adjudication. Having this mechanism, the constitutional adjudication in both countries plays the role as check and balance mechanism of the main organs in their constitutional and political systems. This mechanism also prevents the trend of abuse of powers among the state organs.

From a logical and rational point of view, this general power of all judges and courts to act as constitutional judges is the obvious consequence of the principle of judicial supremacy of the Constitution. If the Constitution is the supreme law of the land, in case of conflict between a law and the Constitution, the latter must prevail and it is the duty of the judiciary to determine the issues in each case.[58] This is the impact of the emergence of idea of constitutional democracy where the parliament is not considered as the final and absolute element of democracy. In this sense, even the parliament as the representative of the will of people needs to be controlled by the courts in the light of the spirit of the constitution as the highest law.

6.2 Differences

However, both countries have differences in some ways. First, both countries follow different model of constitutional adjudication. Australia follows the common law model[59] with functions the superior courts as organs of the constitutional adjudication, while Indonesia follows kelsenian models[60] by establishing a new court, namely the Constitutional Court. American model is usually called also as John Marshall's doctrine. According to this doctrine, judicial review is conducted on every case relating to constitutional issues by all ordinary courts through a decentralized or diffuse or dispersed review.[61] This system has also been qualified as a diffuse system because all the courts in the country, from the lowest level to the highest, are permitted the power of judicial review.[62] In other words, in this model of constitutional adjudication, the review is not separate but includes in other cases that are ongoing process in every level of court. Therefore, all levels of courts have the power of judicial review.

The concentrated system of judicial review is characterized by the fact that the constitutional system empowers one single state organ of a given country to act as a constitutional judge. It is the only state organ to decide upon constitutional matters regarding legislative acts and other state acts with similar rank or value, in a jurisdictional way. This state organ can be either the Supreme Court of Justice of the country, in its character as the highest court in the judiciary hierarchy, or it can be a particular constitutional court, council or tribunal, specially created by the Constitution and organized outside the ordinary judicial hierarchy.[63]

Continental model has adopted by numerous countries all over the world. Off course, each country also modifies this model into various formulas. Some general features of continental model can be summarized as follows:

1. Constitutional review is implemented variously depending on the system in each country.
2. Constitutional review is exercised by an independent organ.
3. In case of constitutional complaint cases, they settle the case by separating the mechanism from ordinary courts.
4. The constitutional position of the constitutional court is guaranteed through independent administration and budgeting.
5. The constitutional court has monopolistic authority in exercising the constitutional review.
6. There judiciary has power to nullify the legislative acts.
7. The constitutional court judges are usually elected by bodies of political power.

8. The nature of decision made by the constitutional court is legal as well as political, although the constitutional court may have a purely consultative function.
9. The continental model of constitutional adjudication is generally repressive in nature, although in a small numbers, preventive review is also implemented in practice.[64]

Second, as the consequence of the models, Australia has an appeal mechanism of the constitutional adjudication because it may start from the High Court, while Indonesia which has a centralized model, has no appeal mechanism because the Constitutional Court's decision is first and final.

III. CONCLUSION

The establishment of the Indonesian Constitutional Court in 2003, and the functions of the superior courts in Australia are part of realizing the goal of the rule of law state and democracy. The constitutional adjudication through the Courts in both countries plays the role as checks and balances mechanism of the main organs in their constitutional systems.

However, both countries follow different model of constitutional adjudication. Australia follows the common law model which functions the superior courts as an organ of the constitutional adjudication, while Indonesia follows kelsenian models by establishing a new court, namely the Constitutional Court. The development and experiences of the institutions in both countries not only shed more lights of constitutional democracy, but also influenced the process of democratic consolidation in the region.

ENDNOTES

[1] Article 134, 136 and 137 of *KitabUndang-UndangHukumPidana* (Indonesian Penal Code) had been nullified by the Constitutional Court of Indonesia because the Court opined that those articles were not in line with the 1945 Constitution. This act is one of the legacies of Dutch Colonialism which was used by Suharto's Regime to muzzle his enemies or any person who criticized his policy during his 32 years in power.

[2]JimlyAsshiddiqie,Access to Justice in Emerging Democracies: The Experiences of Indonesia, A Proceeding of Workshop "Comparing Access to Justice in Asian and European Transitional Countries, Indonesia, 27-28 June 2005, in Betrand Fort (Ed) (2006),*Democratizing Access to Justice in Transitional Countries*, Jakarta, at 10.

[3] Many political scientists and constitutional law experts describe the era of the Suharto regime as bureaucratic-authoritarian regime which controls every single aspect of the nation, including judicial power.

[4]JimlyAsshiddiqie, n. 2 at 11.

[5] See Mohammad Mahfud MD. (2010), *Remarks of Chief Justice of the Constitutional Court of the Republic of Indonesia*, A Proceeding of the 7th Conference of Asian Constitutional Court Judges, Jakarta, 12-17 July, at 9.

[6]See Michel Rosenfeld(2004), "Constitutional Adjudication in Europe and the United States: Paradoxes and Contrast", No. 4, *International Journal of Constitutional Law* (2004). See also Anna Gamper, "The Justifiability and Persuasiveness of Constitutional Comparison in Constitutional Adjudication", Vol. 3, No. 3, *Online International Journal of Constitutional Law* (2009), at 154.

[7] Alec Stone Sweet(2000), *Governing with Judges: Constitutional Politics in Europe*, Oxford University Press, at 31.

[8] JohnFerejohn and Pasquale Pasquino (2004), "Constitutional Adjudication: Lesson from Europe", Vol. 82, No. 7, *Texas Law Review*, at 1.

[9]Alec Stone Sweet, n. 7, at 31.

[10]Constitutional Court of South Korea (2008), *Annual Report:Twenty Years of the Constitutional Court of Korea*, at 64.

[11] Dieter Grimm, (?) "Constitutional Adjudication and Democracy", Vol. 32, No. 1-4 and Vol.33, No. 1, *Israel Law Review*, (?) at 193-196.

[12] See Michel Rosenfeld(2004), "Constitutional Adjudication in Europe and the United States: Paradoxes and Contrast", No. 4, *International Journal of Constitutional Law*, at 633

[13] Dieter Grim, n. 11, at 195

[14]Donald L.Horowitz, (2006), "Constitutional Courts: A Primer for Decision Makers", *Journal of Democracy* Vol. 17, Issue 4, at 129.

[15]Jibong Lim (1999), "A Comparative Study of the Constitutional Adjudication System of the US, Germany and Korea," *Tulsa Journal of Comparative and International Law*, at 123.

[16]F.A Trindade, & H.P. Lee (1988), *The Constitution of Malaysia-Further Perspectives and Developments*, Petaling Jaya, PenerbitFajarBakti SDN. BHD, Pp 101-122.

[17] Taylor Cole (1958), "The West German Federal Constitutional Court: After Six Years", vol. 20, No. 2, *the Journal of Politics,* at 278-307.

[18]Mark Elliot (2001), *The Constitutional Foundations of Judicial Review*. Oxford-Portland: Hart Publishing, at 56.

[19]Hendrianto, *Institutional Choice and the New Indonesian Constitutional Court*, in Andrew Harding & Penelope (Pip) Nicholson (eds.)(Year?), *New Courts in Asia*, New York: Routledge, at 160. See also Tom Ginsburg, n. 19, at 140.

[20]Hendrianto(2016), "The Rise and Fall of Heroic Chief Justices, Constitutional Politics and Judicial Leadership in Indonesia", *Washington International Law Journal*, at 67-68.

[21] Tim Lindsey (2002), Indonesian Constitutional Reform: Muddling Towards Democracy, *Singapore Journal of International and Comparative Law*, at 244-304.

[22] In his book, Dahl proposes the concept of democracy as comprising elected officials, free, fair, and frequent elections, inclusive of suffrage and citizenship, freedom of expression, alternative sources of information and associational autonomy is taken as the yardstick. See also Douglas Webber (2005), "A Consolidated Patrimonial Democracy? Democratization in Post Suharto Indonesia", Paper presented at the Workshop on "Post-Cold War Democratization in the Muslim World: Domestic, Regional and the Global Trends", Joint Session of the European Consortium of Political Research, Granada, http://www.casaasia.es/pdf/520551939PM1115047179830.pdf, viewed on 7 December 2013, at 5.59 pm,at 2. See also Bunte&Ufen (2009), *Democratization in Post-Suharto Indonesia,*City?:Routledge, at 49.

[23] Schneider and Schmitter propose the definition of democratic consolidation as the process that makes mutual trust and reassurance among the relevant actors more likely, leading to the institutionalization of the practice of "contingent consent", namely the willingness of actors to compete according to pre-established (democratic) rule and, if they lose, to consent to the winners right to govern - contingent upon the right of the losers to compete fairly and win honestly in the future. They construct a behaviourally-oriented scale of democratic consolidation comprising 12 components or items. Whether a country is a consolidated democracy depends on whether all 'significant political parties' basically accept the existing constitution, whether elections have been regular, free, and fair and their outcomes accepted by government and opposition (s), whether electoral volatility has diminished significantly, whether there has been at least one 'rotation-in-power' or significant shift in alliances of parties in power, whether elected officials and representatives are constrained in their behaviour by non-elected veto groups within the country, and whether formal and informal agreement has been reached over the rules governing the formation and behaviour of associations, the territorial division of competencies and the rules of ownership and access to mass media. See Douglas Webber, n. 33, at 2-.3.

[24]Douglas Webber, n. 30, at 2-3.

[25]Article 20A (1) of the 1945 Constitution of Republic of Indonesia.

[26]Article 20A (2) of the 1945 Constitution of Republic of Indonesia.

[27]Article 20A (3) of the 1945 Constitution of Republic of Indonesia.

[28]Article 20 (1) of the 1945 Constitution of Republic of Indonesia.

[29]Article 20 (2) of the 1945 Constitution of Republic of Indonesia.

[30] Ibid.

[31]Article 20 (3) of the 1945 Constitutionof Republic of Indonesia.

[32]Article 20 (5) of the 1945 Constitution of Republic of Indonesia.

[33]Article 20A (1) of the 1945 Constitution of Republic of Indonesia.

[34]Article 20A (2) of the 1945 Constitution of Republic of Indonesia.

[35]Article 20A (3) of the 1945 Constitution of Republic of Indonesia.

[36]Article 7 of the 1945 Constitution. The limitation for two period of presidency was the result of First Amendment of the 1945 Constitution. The limitation was due to bad history of long period of Soeharto as President. More than 30 years in the presidents had lead Soerharto became a very authoritarian and bureaucratic regime which had violated fundamental rights of citizen through any restrictions, punishment, and corruption.

[37]Article 4 (1) of the 1945 Constitution of Republic of Indonesia.

[38]Article 4 (2) of the 1945 Constitution of Republic of Indonesia.

[39]Article 5 (1) of the 1945 Constitution of Republic of Indonesia.

[40]Article 5 (2) of the 1945 Constitution of Republic of Indonesia.

[41]Article 6A (1) of the 1945 Constitution of Republic of Indonesia.

[42]Article 6A (2) of the 1945 Constitution of Republic of Indonesia.

[43]Article 11 (1) of the 1945 Constitution of Republic of Indonesia.

[44]Article 11 (2) of the 1945 Constitution of Republic of Indonesia.

[45]Article 12 of the 1945 Constitution of Republic of Indonesia.

[46] In late 2011, the Chief Justice of the Supreme Court, Harifin A. Tumpa, said that the Indonesian government could only aim to establish district courts in 400 of the nation's 530 provinces, regencies (kabupaten) and municipalities (kotamadya). See also www.mahkamahagung.go.id.

[47] See Anonymous (2010), *Profile of the Constitutional Court of the Republic of Indonesia*, Secretariat-General and Registry Office of the Constitutional Court, at 2.

[48]Ibid, at 9.

[49]Denny Indrayana, n. 67, at 363.

[50] Some scholars argue that local election is not a part of the general election as stated in article 22E of the 1945 Constitution. Therefore, local election is not a part of the authority of the Constitutional Court. Incorporating local election disputes become a part of authority of the Constitutional Court has disturbed the main function of the Constitutional Court as the guardian of the constitution and democracy. I DewaGedePalguna further argues that it is better for the Constitutional Court to adopt authority of resolving constitutional complaints of the citizen than handling local election disputes.

[51] See Simon Evans and Stephen Donaghue, 'Standing to Raise Constitutional Issues in Australia' in Richard S Kay (ed), Standing to Raise Constitutional Issues (Bruylant, 2005) at 115, 137; and at greater length, Simon Evans and Stephen Donaghue, 'Standing to Raise Constitutional Issues in Australia' in Gabriël A Moens and RodolpheBiffot (eds)(2002), The Convergence of Legal Systems in the 21st Century: An Australian Approach (CopyRightPublishing) at 53, 97 8.

[52] 4 *Bateman's Bay Local Aboriginal Land Council v The Aboriginal Community Benefit Fund Pty Limited* (1998) 194 CLR 247, 262 [37] (Gaudron, Gummow and Kirby JJ) ('*Bateman's Bay*')(noting the need for caution in extrapolating from that model in the development of publiclaw review in Australia).

[53] But contrast *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, 600 (Kirby J); *Eastman v R* (2000) 203 CLR 1, 79 80 [242] (Kirby J).

[54] Justice Michael Kirby, "Constitutional Interpretation and Original Intent: A Form of Ancestor Worship?" (2000) 24 *Melbourne University Law Review* 1; "Living with Legal History in the Courts" (2003) 7 *Australian Journal of Legal History* 17, 21-4.

[55]*Roach v Electoral Commissioner* (2007) 233 CLR 162, 224-5 (Heydon J).

[56] Cover, above n 6 at 26-40 discusses the way in which interpretative communities, in his case religious communities, can create competing constitutional narratives.

14 See, for example, Legrand, Pierre (1997) 'The Impossibility of Legal Transplants' 4 *Maastricht Journal of European and Comparative Law* 11; Watson, Alan 'Aspects of Reception of Law', (1996) 44 *American Journal of Comparative Law* 335.

[57] Two of the fundamental principles adopted and reinforced in the new formulation of the 1945 Constitution of Indonesia were:(1) the principle of constitutional democracy, and (2) the principle of democratic rule of law or "*democratischerechtsstaat*". See Further JimlyAsshiddiqie (2009), *Creating A Constitutional Court for A New Democracy*, Paper presented at Seminar held by Melbourne Law School, March 11th, at 2.

[58] See Allan R. Brewer-Carias (1989), *Judicial Review in Comparative Law*, Cambridge University Press, at 127.

[59] This system has also been qualified as a diffuse system because all the courts in the country, from the lowest level to the highest, are permitted the power of judicial review. Although in case of Malaysia, it limits the authority of judicial review to the superior courts. In the US, as first model of the common law, judicial review may be exercised by all level of courts. See further Allan R. Brewer-Carias, *Judicial Review in Comparative Law*, Cambridge University Press, 1989, at 89.

[60] Most European countries have established special constitutional courts that are uniquely empowered to set aside legislation that runs counter to their constitutions. Typically, such constitutional courts review legislation in the abstract, with no connection to an actual controversy. This is contrast to the "American" model, whereby all courts have authority to adjudicate constitutional issues in the course of deciding legal cases and controversies. See further Victor FerreresComella, "The European Model of Constitutional Review of Legislation: Toward Decentralisation?", 2004, Volume 2, issues 3, the *International Journal of Constitutional Law, at* 461.

[61] Ibid, at 47. See also Richard H. Falllon, Jr, *The Dynamic Constitution: An Introduction to American Constitutional Law*, Cambridge University Press, 2004, at 13. In this book, Fallon states that Marshall gave the ruling for which Marbury is famous: It would defeat the purpose of a written constitution if the courts had to enforce unconstitutional statues. The courts must exercise judicial review because the Constitution is law, and it is the essence of the judicial function "to say what the law is."

[62] See Allan R. Brewer-Carias, n. 78, at 91.

[63] Allan R. Brewer-Carias, n. 136,at 185.

[64] JimlyAsshiddiqie (2006), *Model-Model PengujianKonstitusional di Berbagai Negara*, Konstitusi Press, at 54-55.

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Position and Acceptance of Fatwa of Council of Indonesian Ulama (MUI) by the State in Indonesian Legal System and Religious Court

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ABSTRACT

Positionand acceptance on fatwa of Council of Indonesian Ulama (MUI) in Indonesian legal system are questioned again. Generally fatwa is considered as unforcefull legal interpretations which cannot be equated with a court decision or *qanun* (the acts). On Indonesian legal system, MUI and its fatwa position in Indonesia are complex enough to be classified. On one side, MUI is not a state organ and the productsare not legally binding, but on the other side, both of them influence State and Muslim citizens legally, socially and politically. The acceptance of the fatwa by government, either fatwa of Sharia National Board or Fatwa Commission, is also depend on what State regulated in theActs. It can be influenced by direct-indirect legitimation of MUI, and it affects whether adopting fatwa fully or its principle only in the formal laws. Regarding the acceptance and the position of fatwa in religious court, it is concerned on the Islamic finance dispute settlement cases. Related to the issue, although fatwa is the sole resource of Islamic transaction and there is a Compilation of Sharia Economic Law legalized and adopted mostly from the fatwas, but the used is quiet invisible, especially utilizing fatwa on 'unlawful act', particularly claim of '*it is against sharia principles*' as its reason of case (*fundamentumpetendi*).

Keywords:Fatwa of MUI, Indonesian legal system, Religious court.

I. Introduction

Position of fatwa of the Council of Indonesia Ulama (MUI) was questioned again; after some concerns were happened indirectly accused triggered by the fatwa such in Ahok's case and MUI's fatwa of using non-Muslim attributes. Due to this condition, many people ask whether the fatwa has legal binding or not in Indonesian legal context. Institutionalizing of MUI basically was outside of state organ.However, in some formal laws, the accommodation of sharia principle is based on Fatwa Commotion MUI and fatwa of Sharia National Board MUI (DewanSyariahNasional/DSN MUI) have been adopted on legislation; furthermore, DSN MUI is selected as the sole resource and interpreter of Islamic finance. But still, the issue of the position and the acceptant of MUI and its fatwa is still unclear enough.

Position, acceptance and used of fatwa in religious court specifically in economic sharia case is should be seen objectively. It is still unclear understanding regarding the lawsuiton unlawful act (*perbuatanmelawanhukum*/PMH) as the reason of complaint (*fundamentumpetendi*) that mostly stated *'it is against to sharia principles'*, although there is Compilation of Sharia Economic Law(Kompilasi Hukum Ekonomi Syariah/KHES) taken mostly from fatwas.Concerning to these circumstances, this paper will discuss by qualitative normative analysis approach, where the legislation system theories and the state legitimation are the main points. The first will deal with how the position of MUI's fatwa and how it can be acceptant by state in national legislation context. The second will explain how the acceptant of fatwa especially as one of legal material of sharia dispute settlement in religious court.

II. Discussion

1. Position of Fatwa in Islamic Legal System

The Islamic legal system recognized two legal interpretation institutions. *Firstly*, Judicial interpretation by judge (*qhadi*), it has formal and legal binding power. Secondly, *Ifta'* (fatwa), non-binding and non-formal legal interpretation or advisory opinion, is submitted by *mufti*, either as institutional or individual representation. Terminology of fatwa is generally derived by word *al-fata*, generally specified into word forms of *futya*, *fatwa*, dan*futwa*. The other words likely referring to a fatwa are *ifta* and *istifta*. There are diverse definitions of fatwa among Islamic scholars; but, most of them agree to define it as an answer or a response from a mufti or mufti council (*ijtihadjama'i*) about a question that is asked by a questioner (*mustafi*), whether it is the law or other aspects of life. In fact, major *ulamas* approve that fatwa constituted as Islamic legal opinion issued by ulama. These two institutions have clearly distinctive aspects. While a judgment causes direct action, presumption of finality, and closely specific particular cases and its participants (*khâss*), a fatwa is general aspects (*'âmm*). Still, the fatwa can be enforced when the judge used it on its verdict, or the State utilized it on the *qanun* (formal law).

2. Position and Acceptant of MUI's Fatwa in Indonesian Legislation System

The position and the acceptance of MUI's can be seen by two aspects, firstly the position of the council on constitutional and state administration law, and secondly the accepted of its product on state formal rules. Discussing the first aspect, MUI was established on 1975 where Soeharto's government involvement obviously could not be denied. Concerning to the position of MUI, President Soeharto undoubtedly suggested the restriction, where its main function was advice giver on religious issue, and it did not allow doing a kind of practice program. After long periods, MUI became more recognized, and its position is evidently identified as a consensus forum of *ulama*outside the state*,* but it had more bargaining position to effect state policy.1 Currently, MUI does not only deal with religious matters merely, but it also covers other aspects of muslim social-economy till politic matters –even though MUI cannot involve practically/political practice-, and some of fatwas are suspected as the controversial ones.2 Two main boards of fatwa in MUI are established, Fatwa Commission (Komisi Fatwa) considering as the most competent on addressing the socio-religious issue; and, Sharia National Board (DewanSyariah National/DSN MUI) mainly on sharia economic, finance and business portions. Both of their products are addressed as a part of '*fiqh Indonesia'.*

The establishment of MUI obviously cannot be separated with the first principle of Pancasila '*religiousness'* and the protection of citizen religious rights on Constitution of Republic Indonesia 1945. Therefore, although it is created as non-state organ, MUI obviously cannot be neglectied by every period of government, mainly dealing with each regulation that affects legal materials for religious court jurisdiction. However, if MUI' fatwa isconsidered in general how the exactly the positions is, noticeably understood as informal law (unwritten positive law),3as consequent, it has not binding legitimation. Fatwa which represents part of the principle of Islamic law in Indonesian context, it is must be understand as one of main law resources on formal regulation system, and it can be generally classicized as unwritten, unbinding, non-formal, and enforcing law due to the position of MUI as non-state organ.4

The position of the council and the adoption of its products on the acts, it is divided into two areas. *First*, the rules indirectly stated legitimation of MUI position, but clearly absorbed and used its products, advise, suggestion and considerations as part of Islamic law principle acceptance.

Second, the rules directly delegated 'MUI' legitimation position and adopted its fatwas.5 Focusing on the first, it can be seen in some of acts, where the position of MUI' fatwa is specified as the main resource of sharia principle beside the others when government asking the consideration and advice of *ulama.*6In the second area the bargaining position is clearer then the first one, for the example: 1) Article 14 of Law No. 13/2008 about Hajj Organizing states that members of hajj commission can be takenfrom MUI; 2) Article 109 of Law No. 40/2007 on Business Company declares that all companies that operate based on sharia principle must have sharia supervisory board (DewanPengawasSyariah) appointed by recommendation of MUI;Furthermore, there are the Acts which evidently give the atributive authories to MUI in all Islamic finance regulations, found noticeably on 3) Article 25 of Law No. 19/2008 on Sovereign Sukuk; 4) Article 26 of Law No. 21/2008 on Sharia Banking; and 5) Article 12 and Article 13 of Law No. 1/2013 on Mirco Finance Institution. Comparing those fiveacts, the last threeacts have more specific legitimation on MUI and fatwa, because the legitimation directly came from attributive authority of acts. Therefore, regarding the legal problems of those aspects, it must follow MUI's fatwa particularly DSN's Fatwa.

3. Acceptant and Position of MUI's Fatwa in Religious Court

Position of fatwa in religious court is mainly as one of its *materiil* legal resources. It also connected into the acceptance of the fatwa in the religious court found at KHI and KHES, which both are adopted from fatwa, and both of them are used as a reference by the judges and justice seekers. After dispute of Islamic economic became religious court' jurisdiction,[7] the use of DSN' fatwa and KHES shall be preferred firstly, when the development and needs of sharia law on economic transactions are still not covered thoroughly by legal formal.[8]In case of KHES, Supreme Court gives legitimacy to KHES through Regulation of Supreme Court No. 2/2008 (PERMA), which is different to KHI that used Instruction of President No. 1/1991 and Decision of the Minister of Religion No. 154/1991. According to terms of the legislation theory, the type of norm in PERMA is an internal regulation rule, however JimlyAsshiddiqie said that PERMA is binding inside and outside at the same time, when the authority and the legal power of the products are ordered directly by higher regulation. Therefore, in the context of PERMA KHES, it was born firmly based on the authority of the Supreme Court obtained from the Constitution and the Acts. Both the DSN fatwas on Islamic finance transaction and fatwas were adopted on KHES should consider the legitimacy.

The confusion that often occurs in many Islamic economic disputes filing is when the suit was filed using the excuse (*fundamentumpetendi*) 'tort/unlawful act' (perbuatanmelawanhukum/PMH). Based on several verdicts that are classified as a tort lawsuit, the plaintiffs generally argued that an act committed by the defendant is the act that is contrary to Islamic principles (against *syariat Islam*). The issue that arises then is, in lawsuit (PMH civil matters), should be made clear what the actions are considered illegal, and which the rules were violated, and how the cause and the effect of actions that caused the damage. Kesalahan penerjemahanUnfortunately, at the PMH lawsuit, the plaintiffs mostly only mention *'contrary to Islamic principles' or 'not in accordance with Islamic law'* but do not specify which exactly rule of Islamic principles that has been infringed. If the case relates to Islamic finance such as Islamic banks or Islamic micro finance institution, '*SyariatIslam/ Islamic Principles'*means what is stated by DSN MUI, because the Acts said sharia principles is what is ruled by fatwas of DSN MUI '. But still there are many lawsuit reasons do not specifically mention the fatwa that was broken or where the rules are desecrated.

Due to the vagueness of the clause in the context of a civil case, almost all of the lawsuit will be stopped or completed at '*eksepsi* examination, regardless of the main subject matter of lawsuit.9

In addition, the use of fatwa by the judge as part of justification is still not clearly visible. Yeni S. Barlinti concluded that what was happened due to there is still the comprehension on DSN MUI' fatwa was legal opinion. Furthermore, this condition could be possible occur that because not all of fatwas set specific legal detail material, some of them only give general statements where it can be seen on the collateral execution and its rights (such as mortgage right on land and *fidusia* right) that arise mostly on Islamic economic cases. Regarding of the cases, judges will not likely refer to the fatwa that gives general statement, but they must consider primarily the acts. Similar to PMH' case transaction-sharia based, when there are neither rule nor fatwa, the meaning of 'against Islamic law', as consequences it is understood by what is stated on Civil Code;[10] therefore, 'contrary to *Islamic* principles' must be specified also as 'contrary to Civil Code or others code'.

III. Conclusion

The position of MUI in the Indonesian context must be understood as a necessity for Muslims which is established into independent and non-state organ, so generally its product (fatwa) categorized as a legal opinion, informal and non-legal binding law. Nevertheless, this legal opinion cannot be neglected by the State, therefore fatwa often become the substance of the formal rules, of informal law (Unwritten legal source) into a formal law. State acceptance of the legitimacy of MUI can be classified into two types: indirectly stated legitimation, but clearly absorbed and used its products as part of Islamic law principle*;* anddirectly delegated 'MUI' legitimation position and adopted its fatwas. Specifically on the second type, it is found in Islamic finance legal framework; where the legitimacy of fatwa should be considered more powerful due to the Acts give direct authority to MUI.Meanwhile, related to the acceptance in religious courts in sharia economic cases, neither KHES nor fatwa areclearlyused both by those justice seekers and judge. In case of *PMH lawsuit-against sharia principle* (*fundamentumpetendi*), there are always be problem regarding the mean of against sharia principle, because in PMH civil case it must be stated clearly with acts that has been violated, on the other word they must state clearly which sharia principleclause on fatwa of Islamic finance that has been infringed. The condition must be clarified regarding the legal term of PMH-against sharia principle both in Islamic finance and Islamic business transaction for justice seekers in religious court.

ENDNOTES

1President Regulation No. 151/2014 on Funding Support of MUI describes MUI as a consensus forum of ulamas, leaders and Muslim scholars dealing with Islamic life practices that aims to increse the muslimparticipan on national development programs.

[2]At the first period (1975-1988), many Islamic scholars assumed that the fatwas were mainly to support state policy; although, there were also fatwas opposite to government policy, like what AthoMudzhar found on fatwa of the prohibition of abortion, ban on vasectomy and tubectomy, and ban on Muslimspresence in Christmas celebration. In recent years, while in some areas it support public policies, in the other side, some fatwas also are accused as controversial ones due to its contradictive with state policy, and protested by some scholars and citizens. These days, I assume that fatwa of Ahok's case, fatwa of non-Muslim attributes and fatwa of BPJS are probably the most controversial ones. In case of BPJS, it mainly became the big issue because since 2013 BPJS has been offered as the most important government program; however, MUI stated the oppositedue to some contradictive elements to sharia principle. In case of fatwa of non-muslim, it became problematic due to the used as the legitimation on some direct-indirect enforcement actions, and it was getting worst because of the

used of the fatwa non-muslim attribute as the consideration on two official circular letters (SuratEdaran) of chief police officer in KulonProgo and Bekasi.

[3]The hierarchy of Indonesian laws on all of acts on the establishment of legislation, no one of them declares the position of fatwa as part of positive law. *See* Law No. 1/1959, Provision of People Deliberation Assembly Republic Indonesian Union No.XX/MPRS/1966, Provision of MPR No. III/MPR/2000; Law No. 10/2004; and Law No. 12/2011.Regarding formal written law and non-formal unwritten law, we must see what A. Hamid. S. Attamimi said that although the State recognizes legal pluralism, but there is something else related to the primacy of the written law against the unwritten law. It can be understood when the drafters of the Constitution changed the "basic law" to "Undang-UndangDasar or Indonesian Constitution' as written constitution. In addition, the general explanation of the sentence of the 1945 Constitution, which states:"...beside the Constitution applies the unwritten basic law....", it can be concluded that the unwritten basic law is not 'complementary' on written basic law. Thus, if there is a conflict between the unwritten basic laws with the written basic law, then the priority is aimed to the written basic law. Analogically it can also be concluded that if there is a contradiction between the formal law/act and customary law or others then the act is must be prioritized. Fatwa although is written with strict form, but it is still cannot be equalized to formal law (written legal resource).

[4]According to administrative and constitutional law, an organization accepted as part of state organs at least requires some obvious aspects. The easies characters are undoubtedly specified as state organ in the formal law, directly stated the name or the function, independent or dependent, and an authority comes from attributive or delegated power, financial support by state or district income (APBN/APBD) that must be audit regularly by state organ. The rule is enforcement depend on the hierarchy of norm and the form and its *addressat*, and the authority of the organ. Institutionalizing of MUI doesn't fulfill these aspects; though the establishment involved the president power, and getting financial support from state, it neither can be classified as state organ nor state auxiliary organ.

[5]The main aims of them are to protect Muslim interest and rights, and to regulate justice seeker for Muslim; moreover, it has proved that Islamic law, its principle and substation, can be practiced universally. Therefore, on Islamic banking transaction, it opens widely to all citizens regardless their faith and their religions. Consequently, the religious court main principle 'Muslim personality principle' can be extended to non-Muslims who become debtors. When they became Islamic finance customers, they legally accepted and practiced Islamic law principles, and they must chose religious court dealing with the dispute.

[6]Some of the laws are: Law No. 1/1974 on Marriage, the Laws on Religious Court, Law No. 13/2008 on Managing of Hajj', Law No. 11/2006 on Aceh Government system.

[7]It is based on Law No. 3/2006 on Religious Court, Law No. 21/2008 on Islamic banking, Verdict of Constitution court No. 93/PUU-X/2012.

[8]The use of fatwa in the Islamic economic dispute resolution should be understood as a form of dealing with their '*vacuum law*', moreover, in principle the judge may not refuse a case with no legal grounds as mentioned in article 16 paragraph (1) of Law No. 4/2004 on Judicial Power. This is also consistent with the conception of Islamic law understand the material is legally binding interpretation Came from *qhadi*.

[9]The Clarification is needed considering sharia economic disputes included 'islamic/sharia business' is still not regulated thoroughly in the acts. It can be seen on DSN' Fatwa on sharia multi-level direct selling on Umrah travel service (PenjualanLangsungBerjenjangSyariahJasaUmrah/PLBS umrah service) Fatwa No. 83/DSN-MUI/VI/2012 as the example, many umrah travel companies offer PLBS's model to muslims using the acceptability of the fatwa; but on the other hand Law No. 7/2014 on Treading doesn't rule direct selling on service product. Thus, the emergence of ambiguity of laws that must be used when the dispute occur possibly will be happened.

[10]*See* article 1365 Indonesian Civil Code.

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Penang World Heritage Office: *Quo Vadis*?

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ABSTRACT
Georgetown and Melaka have been declared as Malaysia's second World Heritage site by UNESCO in 2008. The number of tourists visiting the cities improved greatly following this listing. This paper will study the establishment of Penang World Heritage Office or officially known as Georgetown World Heritage Incorporated (GTWHI). The organization has been set up by the State Government of Penang to protect, promote, and preserve Georgetown as a sustainable city. Despite of these efforts, there have been several challenges to the organization in discharging its duties. These include the public apathy towards conservation and preservation that have been done by GTWHI. International convention and domestic laws related to heritage matters would be analyzed in this paper. GTWHI has also cooperated with the local government authorities and NGOs in performing its tasks as required by the law. It is found that more efforts need to be carried out in educating the public on heritage matters.
Keywords: *World Heritage Convention, preservation, conservation, local government*

I. Introduction

Pulau Pinang is one of the constituent states of the Federation of Malaysia. It is located on the west coast of the Malay Peninsula, nestled between two states, Kedah and Perak. It is a state which is relatively small by Malaysian standard, and whose population is 1,662,800.1

The state capital - Georgetown is exceptionally rich in historical sites, since it is the first British settlement in the Strait of Melaka. Founded in 1786 by Francis Light in the name of the East India Company, it is situated at the cape of the northeastern tip of the island, between the hills and the sea. The heritage site comprises a rich collection of historic buildings, vernacular, administrative and religious, constructed by the European trading settlers under the British East India Company, the British colonists, and migrants from various parts of the India-China trading route. These early settlers formed their own quarters, that were centered on certain streets or intersections. The Europeans chose the north side of the city where the Fort Cornwallis was built. The area nearby the fort served as the island's administrative center, that congregates around St George's Anglican Church on Farquhar Street. Eventually the city grew out of this early grid of Georgetown.

Befitting of Georgetown's historical significance, the city has always been a magnet for traders of various races, hence this leads to the city's cosmopolitan character. The residents of Georgetown are not only comprised of the Malays, Chinese and Indian communities but also the Peranakan Chinese, and Siamese communities. The existence of these communities in Georgetown, living side by side and practicing their diverse religious beliefs in peace and harmony is a testimony to the city's distinctiveness from other cities of the world. It is therefore natural that Georgetown, together with Melaka have been listed as a World Heritage Site under the auspices of UNESCO's World Heritage Convention (1972). These cities have been accepted by the World Heritage Committee as "Historic Cities of the Straits of Malacca".

With Georgetown and Melaka's joint inscription, this is the first site in West Malaysia as well as the first site for the country inscribed under 'Cultural Site' category. Therefore, this paper shall

look into the establishment of Penang World Heritage Office or officially known as Georgetown World Heritage Incorporated (GTWHI). The paper also aims to look whether the establishment of the office has fulfilled the requirements set by the international law and domestic laws with regard to national heritage.

II. Discussion

2.1 Penang Heritage Office (Georgetown World Heritage Incorporated)

The Penang Heritage Office has been established by the Government of Pulau Pinang in 2009. By April 2010, the Penang Heritage Office became a registered company, (Georgetown World Heritage Incorporated - GTWHI)2 which gives them necessary *locus standi* within the government, while letting it function as an independent body. The main task of this GTWHI is to spearhead efforts in ensuring that Georgetown's legacy will not be lost. It strives to protect, promote, and preserve Georgetown as a sustainable city. This body cooperates with the federal, state and local governments as well as non-governmental organizations in managing, monitoring, promoting and executing heritage-related activities. GTWHI also identifies problem areas, builds a strategy, and calls on experts in solving any problems relating to heritage.

The company is governed by a Board of Directors, headed by the honorable Chief Minister of Pulau Pinang, Lim Guan Eng. It is supported by a Consultative Panel that is made up of a broad range of Penang professionals from the various sectors related to heritage and to the management of the World Heritage Site.3As can be seen from the Chairman's message, the Government of Penang believes that the heritage sites need to be protected, preserved and promoted. That can only be done by utilizing three strategies. They are:

(i) Engaging civil society and experts in heritage conservation through collaboration with civil society and experts both local and international;
(ii) Involving the stakeholders comprising of the State and Federal Government, private investors and civil society to manage and implement projects in the heritage site through the concept of Public-Private-Partnership.
(iii) Enacting state legislation that will empower the State Government to preserve, promote and protect all heritage sites apart from George Town World Heritage Site. This includes the setting up of a State Heritage Fund which is hoped can attract both private and public donors whether locally or internationally.4

The company maintains an excellent, informative website which explains succinctly its missions and objectives.5 In the website, it states that it manages and regulates the World Heritage Site in accordance with the conditions agreed with UNESCO. GTWHI also monitors, prepares, and submits operational and activity reports to the Federal and State Authorities. In ensuring its tasks are unhindered, GTWHI provides advice to heritage building owners on appropriate restoration methods and designs. It also ensures that all future developments and interventions are in line with the accepted guidelines and international standards.6 A Conservation Management Plan (CMP)7 has been prepared to ensure that all conservation activities to be done according to its principles and rules.

GTWHI realizes that it cannot work single-handedly in executing the tasks that have been assigned to it. Therefore, it has formulated education and outreach programmers to educate and create awareness among the youth, adults and relevant parties on conservation and preservation of the World Heritage Site. These include using multi-faceted approach to education (e.g. talks, site visits, workshops, living heritage experiences etc.). These efforts are done to raise awareness

among the people about the 'outstanding universal value' (OUV) which become the criterion stated by the World Heritage Convention for a place to be prescribed as a World Heritage Site. GTWHI is also actively building its resource center as a repository of archival documents, and library of the heritage and history of George Town.8

2.2. International and Domestic Laws with regard to heritage

2.2.1. World Heritage Convention

The Convention for the Protection of the World Heritage9 is one of the most complete international instruments in the field of conservation.The treaty has given United Nation's Education, Social and Culture Organization (UNESCO) the authority to intervene on moral grounds or repairing damage caused by conflict, and of undertaking restoration of threatened sites and endangered ecosystems.

In its preamble, the World Heritage Convention states that cultural and natural heritage are increasingly threatened with destruction, not only by traditional causes of decay, but also by changing social and economic conditions. The protection of this heritage at the national level remains incomplete because of the insufficient economic, scientific and technical resources of the country where the property is situated. However, parts of the natural and cultural heritage are of outstanding interest and need to be preserved as part of the world heritage of mankind as a whole. Given the magnitude and gravity of the dangers, it is incumbent on the international community to participate in the protection of the cultural and natural heritage of outstanding universal value. As a result, it is necessary to establish an effective system of collective protection of this heritage, organized on a permanent basis and according to modern scientific methods.10

The World Heritage Convention was finally adopted by UNESCO in 1972. Considering the difficult negotiations that took place during the drafting process, the subsequent success of the Convention as the most effective international legal instrument for the protection of cultural and natural heritage could hardly have been foreseen. A primary factor in the Convention's popularity is the World Heritage List which records immoveable cultural and natural sites of "outstanding natural value". The List is updated every year by the World Heritage Committee.11

2.2.2. Definition of Cultural and Natural Heritage in the Convention

Before further examining the provisions of the Convention, it is necessary to outline its most important elements. The Convention refers only to the immoveable and tangible heritage, whether "cultural" or "natural". The Convention's provisions are an example of a balance between national sovereignty and international intervention. The Convention also states that the individual State Party is responsible for implementing the obligations towards its own heritage. On the other hand, the Convention in Articles 6 and 7 stipulates the duty "of the international community as a whole to cooperate", which should be achieved through the establishment of an international "system of cooperation and assistance."

Article 1 of the Convention provides the definition of "cultural heritage".12 Likewise, Article 2 of the Convention defines "natural heritage".1313 Article 2 of the Convention defines "natural heritage":

The cultural and natural heritage as defined in the above articles form the World Heritage List under Article 11 of the Convention. The properties must be regarded as having *outstanding universal value* in terms of the criteria that the World Heritage Committee has established. This

crucial term was introduced into the Convention to limit its application to the protection of a selected list of most important places of cultural and natural heritage in the world.

2.2.3. Key Articles of the Convention

Although it falls upon each state party to identify and delineate the different natural areas situated on its territory, an international system of protection is nonetheless provided. It consists of three parts:

First, as to property rights, cultural and natural property which forms part of the world heritage remains subject to the legislation of the state where it is located. These resources can continue to belong to public or private establishments or even to individuals as the national laws provides. Thus, territorial sovereignty over elements of the world natural heritage is respected. Second, the jurisdiction of the territorial state includes both rights and obligations in regard to determining the different parts of the world natural heritage. In fact, Article 4 of the Convention recognizes the duty of each state party to ensure the identification, protection, conservation, presentation and transmission to future generations of the natural heritage situated in its territory. Article 5 of the Convention provides that the state shall also endeavor, as appropriate to adopt a general policy to give the heritage a function in the life of community and to integrate the protection of that heritage into comprehensive planning programs. Other legal, scientific, technical, administrative and financial measures must be taken, including the creation of special services for the protection, conservation, and presentation of this heritage, research and training. State parties periodically submit reports to a specially created committee on the measures which they have taken to implement the Convention.

The final level of protection is international assistance. Article 6 of the Convention provides that the entire international community has a duty to cooperate in the protection of the world cultural and natural heritage. This duty includes the obligation not to take any deliberate measures which might damage directly or indirectly the cultural or natural heritage. The broad prohibition or indirect harm could apply to a development assistance programs which affect the environment or to local activities causing transboundary pollution that results in harm to a site. A state party may have recourse to international assistance and cooperation to preserve part of the world cultural and natural heritage where appropriate.14 In short, it can be said that Articles 4-6 are the key articles of the Convention.

For their part, other state parties undertake to support the requesting state in identification, protection, conservation, and the preservation of cultural and natural heritage, recognizing that it constitutes a universal heritage. Thus, Article 7 of the Convention establishes the concept of international protection of the world cultural and natural heritage, including the establishment of a system of cooperation and international assistance supporting state parties in their conservation and identification efforts.

2.3. National Heritage Act 2005

Prior to March 2006, the management and the protection of heritage sites in Malaysia are under the purview of various acts and legislations such as the Town and Country Planning Act 1976, the Antiquities Act 1976 and the Treasure Trove Act 1957. There are also state legislations looking after the preservation of heritage sites like the Malacca Enactment and the Johor Enactment.

A. Ghafar Ahmad stated that with the promulgation of the National Heritage Act 2006, Ma-

laysia has reorganized its heritage and antiquities management. Formerly, it was under the Department of Museum and Antiquities. However, with the passing of the new Act it is now to be placed under a new body called the Department of National Heritage. The department is under the purview of the Ministry of Information, Communications and Culture. The Act places the responsibility on the Minister, who is authorized to issue policies, statements or directives with regard to heritage protection and activities, mainly in the Federal Territories. However, should the heritage sites or properties are located in the states, the Minister must consult and obtain the agreements from the relevant State authorities. This is to ensure that both Federal and State authorities are in agreement on any decisions made on heritage matters.15

The preamble to the Act states that it is "an Act to provide for the conservation and preservation of national heritage, natural heritage, tangible and intangible cultural heritage, underwater cultural heritage, treasure trove and for related matters". The Act contains 17 Parts and 126 sections. It also defines concepts or matters that have not been covered adequately in the previous legislations such as cultural and natural heritage, intangible cultural heritage and underwater cultural heritage.

Under the Act, new mechanisms in managing heritage sites in Malaysia have been established. They are as follows:

(i) Commissioner of Heritage;
(ii) National Heritage Council;
(iii) Heritage Fund;
(iv) National Heritage Register.

Section 4 of the Act provides for the appointment of a Commissioner of Heritage. The said position is appointed by the Minister for the purpose of carrying out the powers and functions assigned to anyone who holds the post under the Act. The functions of the Commissioner are stated in section 6 of the Act and they include *inter alia*:

(i) to determine the designation of sites, registration of objects and underwater cultural heritage;
(ii) to establish and maintain the Register and to determine and specify the categories of heritage to be listed in the Register;
(iii) to supervise and oversee the conservation, preservation, restoration, maintenance, promotion, exhibition and accessibility of heritage;
(iv) to establish and maintain liaison and co-operation with State Authority in respect of conservation and preservation of heritage matters;
(v) to advise and co-ordinate with the local planning authority, the Council and other bodies and entities at all levels for the purpose of safeguarding, promoting and dealing with any heritage;
(vi) to advise the Minister with regard to any matter in respect of conservation and preservation of heritage.

In addition to the powers given to the Commissioner of Heritage, both the Commissioner and the Minister shall be advised by the National Heritage Council. The Council shall advise the Minister and the Commissioner on all matters relating to heritage, and the due administration and enforcement relating to heritage, as provided by section 9 of the Act. There shall be 12 members of the Council that are appointed by the Minister, which consists of a Chairman, four ex-officio officers from related Ministries and a maximum of six other members. However, the advice of the Council is not binding upon the Minister.

Another important mechanism which has been created under the new Act is the provision for establishment of a Heritage Fund. Section 20(2) of the Act states that the Fund is controlled and maintained by the Commissioner. The Commissioner may use the Fund for the conservation and preservation of any heritage and conservation areas; organizing campaigns, research and study as well as disbursement of grant or loan. In addition, Part VI of the Act provides for the setting up of a National Heritage Register. Section 23(2) of the Act states that the Register shall be made available to public inspection subject to any condition that the Commissioner thinks fit.

Part VII and Part VIII of the Act deal with Heritage Sites and Heritage Objects respectively. Part VII spells out how a place can be designated as heritage site, dealings involving heritage site, conservation and preservation of heritage site as well as conservation management plan. Section 24 of the Act states that the Commissioner may designate any site which has natural heritage or cultural heritage significance to be heritage site. If, however the site is located in the state, consent of the State Authority shall be obtained. Notices to the owner and the local planning authority would also be issued informing them the intention of the Commissioner. Should there be any objection by the owner or any other persons, a hearing can be held by the Commissioner. Once the hearing has been held, and it is to the satisfaction of the Commissioner that the site is of cultural heritage significance, the site shall be designated as a Heritage Site.

Part VIII provides for the procedures once a heritage object is discovered. Section 47 provides that the person who discovers any object which he has reason to believe it has cultural heritage significance shall immediately notify the Commissioner or any authorized officer or the District Officer of the district where the object was discovered. The proprietary rights of such object shall be the absolute property of the Federal Government provided that where the object is discovered on an alienated land, compensation may be paid to the owner of the land. The Commissioner may declare in the Gazette any object which has cultural significance and list it in the National Heritage Register.

Part X of the Act, in particular section 67 outlines the power of the Minister to declare any heritage site, heritage object, underwater cultural heritage listed in the Register or any living person as a National Heritage. In doing this the Minister may consider several factors which include *inter alia* the historical importance, the social or cultural associations or the importance in exhibiting the richness and diversity of features or its rarity. Any person may nominate to the Minister any natural heritage, tangible or intangible cultural heritage, living person or underwater cultural heritage to be declared as National Heritage. If the site, object or underwater cultural heritage is situated on State land, the State Authority shall be consulted by the Minister.

The National Heritage Act 2005 also contains powers relating to enforcement, seizure and arrests, as well as penal provisions. These matters are covered under PartsXIV and XV respectively. The Minister may appoint enforcement officers, who are given power to investigate any offences under the Act. This also includes the power to conduct searches and seizures (with warrants or without warrants). With regard to offences, there are three main sections (sections 112-114 of the Act) which describe offences in respect of heritage site; offences in respect of heritage object; and offences in respect of National Heritage.

2.4. State of Penang Heritage Enactment 2011

The State Legislature passed State of Penang Heritage Enactment 2011 which provides for the management, preservation and conservation of cultural heritage and natural heritage of the state. The passing of the enactment showed the commitment of the legislative body in preserving the

state's historical and cultural sites.

The Enactment contains 58 sections that provides for powers to the State Authority and the local authorities. Section 3 of the Enactment affirms that in enforcing the Enactment, it shall never derogate from the provisions of the National Heritage Act 2005. Section 4 of the Enactment provides for the establishment by the State Authority a committee to be known as Penang Heritage Council. This council shall advise the State Authority on matters of policy, administration and management of cultural heritage and conservation areas. This Council consists of:

i) The Penang Chief Minister who holds the position of Chairman;Three members of State Executive Council;
ii) The State Secretary or his representative;
iii) The State Financial Officer or his representative;
iv) The Director of Town and Country Planning or his representative;
v) The President of Penang Island Municipal Council or his representative;
vi) The President of Seberang Perai Municipal Council or his representative;
vii) The State Heritage Commissioner;
viii) The Curator of Penang State Museum and Art Gallery or his representative;
ix) The General Manager of Georgetown World Heritage Incorporated or his representative;
x) Not less than five members appointed by the State Authority.16

Section 15 of the Enactment provides that the State Authority may appoint a State Heritage Commissioner to carry out the provisions of the Enactment. His functions have been elaborately defined in Section 16 of the Enactment. In the similar vein, Section 18 of the Enactment states that the Commissioner, on the approval of State Authority may designate any site which has natural heritage or tangible cultural heritage to be a heritage site. Once a place has been designated as a heritage site, Section 21 of the Enactment details the procedures to be followed.

Part VII of the Enactment provides for the enforcement of the law relating to heritage in Penang. Section 39 of the Enactment empowers the State Authority to appoint public officers and officers of the local authority to assist the Commissioner in exercising his functions. Power to investigate any offence under the Enactment is also given to officers so appointed. This is stated by Section 42 of the Enactment.

2.5. Town and Country Planning Act 1976

Another piece of legislation that is used in ensuring conservation and preservation steps can be smoothly taken is the Town and Country Planning Act 1976. The Act contains 9 Parts with 59 sections. As stated in its preamble, it is an Act "for the proper control and the regulation of town and country planning in Peninsular Malaysia".

Section 2 of the Act defines planning permission as 'the permission granted, with or without conditions to carry out development'. The same section defines development '. the carrying out of any building, engineering, mining, industrial, or other similar operation in, on, over, or under land, the making of any material change in the use of any land or building or any part thereof, or the subdivision or amalgamation of lands'.

It is to be noted that Section 19 of the Act provides that no person other than the local authority, shall commence, undertake or carry out any development unless the planning permission in respect of the development has been granted to him under section 22 or extended under section 24(3) of the Act. It can be concluded here that obtaining approval from the local authori-

ties in respect of any development is compulsory. Should there be any failure in adhering to the requirement stipulated under section 19 or other sections of the Act with regard to development, one may be charged under section 26 of the Act. Upon conviction, the owner or developer shall be fined not exceeding five hundred thousand ringgit or to imprisonment for a term not exceeding two years or to both. In short, apart from the National Heritage Act 2005 and the Penang Heritage Enactment 2011, the Town and Country Planning Act 1976 can also be used by the authorities in ensuring conservation and preservation steps to be taken, monitored and controlled.

2.6. Implementation of the Heritage Laws

The establishment of GTWHI by the Penang State Government has clearly shown that Malaysia is committed to the requirements of international law with regard to heritage, conservation and preservation. In the federal level, the promulgation of heritage law like National Heritage Act 2005 is a huge step in upholding heritage matters in the country. With the passing of the act, all matters with regard to heritage is put under a piece of legislation, unlike previously where the laws were 'scattered' in various statutes. In addition, Penang State Legislature enacted the Penang Heritage Enactment 2011, thus ensuring that the laws in the state level would be in conformity with the Federal law.

In the State level, GTWHI co-operated with other state agency in implementing these laws viz. Penang City Council. According to Muhammad Hijas Sahari, (Manager of Built Environment & Monitoring of GTWHI) there were several challenges that GTWHI face in implementing the heritage laws.17 Firstly, GTWHI itself has no authority in law. To address this situation, it always seeks co-operation with local authority like Penang City Council. GTWHI gives guidelines to interested parties e.g. landlords, developers and consultants on how to develop any premises within the heritage area according to law. There were cases where landlords in the heritage zone or developers did not make any application to GTWHI in developing their premises. The manager is of the opinion that such actions arose due to ignorance of law, public apathy or refusal by the landlords or developers in following the Conservation Management Plan (CMP). Secondly, there are also contraventions in zoning regulations in the heritage zone. For example, a developer might have built a hotel in a place that has been classified for other use by the State Authority. Other challenges include the feedback received by GTWHI saying that the local residents feel difficulties in following the Comprehensive Management Plan (CMP).

Similar response was also obtained from Noorhanis Hj.Noordin, who is the Director of Heritage Conservation Department, Penang City Council.18 She elaborated the role played by her agency in enforcing the heritage laws in Penang. She affirmed that her office works together with GTWHI. She also pointed out that apart from using the current heritage laws, other statutes like Town Planning Act 1976 could also be used against errant developers. Drastic measures like demolition and court actions could be taken against them. She is of the opinion that the legislative body should consider increasing the fines. It is thought that bigger fines would deter any potential landlords or developers from breaking the rules and regulations as outlined in the Comprehensive Management Plan (CMP). Other alternatives can be considered, for example giving incentives to selected residents who complied with the rules and regulations in developing their premises.

Both respondents believe the current laws are sufficient in administering, protecting, conserving and preserving the State's heritage sites. However, there are areas that can be improved especially in the field of enforcement. The recent discovery of artifacts at Sia Boey which has been

slotted for development could be a good case in showing the roles played by different parties in conserving heritage in Georgetown.19The respondents also thought that more education about the importance of conserving and preserving heritage matters should be given to the public, especially to the residents of the heritage zone in Georgetown.20

III. Conclusion

It is submitted that GTWHIhas worked very well in ensuring that the heritage sites in Georgetown is managed, conserved, protected and preserved according to the law. The body also co-operates with other State authorities notably the Penang City Council to ensure that any developmental activities conducted in the heritage zone have followed the prescribed procedures as provided under the Comprehensive Management Plan (CMP). Failure in adhering these guidelines would attract the long hand of the laws. GTWHI also realizes that education is important, thus it has always been vital to engage the residents in the heritage zone. The body wishes that apart from preserving what is unique for the world, the interests of the residents would not be compromised, thus their understanding is essential.

endnotes

1 Malaysia 2014,Statistical Handbooks, Department of Statistics, 2014.
2 Hereinafter shall be called with its formal name - "Georgetown World Heritage Incorporated (GTWHI)".
3The current team at GTWHI is made up of individuals with backgrounds in urban planning, architecture, conservation, heritage and cultural management, and education. The company has a growing cohort of 15 full-time staff and work closely with a dedicated number of collaborators and volunteers.
4 The full speech of the GTWHI Chairman, Penang Chief Minister, Lim Guan Eng can be accessed here: http://www.gtwhi.com.my/introduction/who-we-are/chairman-s-message.html
5 GTWHI website: http://www.gtwhi.com.my/
6 All guidelines related to conservation that include State Enactment, GTWHI guidelines, regulations etc relating to conservation can be accessed here: http://www.gtwhi.com.my/regulate.html
7 Alternatively known as the Special Area Plan (SAP).
8 George Town World Heritage Incorporated (GTWHI) Handbook, 2016.
9 Hereinafter to be referred as "the Convention".
10 Alexandre Kiss & Dinah Shelton (1991). International Environmental Law. Transnational Publishers: New York, USA, p.244
11Peter Strasser (2002). "Putting Reform into Action - 30 Years of the World Heritage Convention: How to Reform a Convention without Changing its Regulations", International Journal of Cultural property, Vol.11 (2002) No.2, Oxford University press, UK, p.216.
12 Article 1 of the Convention provides the definition of "cultural heritage":
i.Monuments: architectural works, works of monumental sculpture andpainting, and combinations of features, which are of outstanding universal value from the point of view of history, art or science;
ii. Groups of buildings: groups of separate or connected buildings which,because of the architecture, their homogeneity of their place in the landscape, are of outstanding universal value from the point of view of history, art or science;
iii. Sites: works of man or the combined works of nature and man, and areas includingarchaeological sites which are of outstanding universal value from the point of view of historical, aesthetic, ethnological or anthropological point of view.
13 Article 2 of the Convention defines "natural heritage":
i. Natural features consisting of physical and biological formations or groups of such formations, which are of outstanding universal value from the aesthetic or scientific point of view;
ii. Geological or physiographical formations and precisely delineated areas which constitute the habitat of threatened species of animals and plants of outstanding universal value from the point of science and conservation;
ii. Natural sites or precisely delineated natural areas of outstanding universal value from the point of

science and conservation or natural beauty.
14 Article 4, World Heritage Convention
15 A.Ghafar Ahmad, Managing Heritage Sites in Malaysia, Keynote Speech delivered in Malacca World Heritage City Seminar, 8-9th July, 2009.
16 s. 6 (a)-(k) of the Enactment
17 Interview conducted in GTWHI Headquarters on 13th February 2017
18 Interview conducted in GTWHI Headquarters on 13th February 2017
19 Please see "Discovery of artifacts at Sia Boey may derail State's original plan" at: http://www.thestar.com.my/metro/community/2016/08/10/poser-over-komtar-lrt-discovery-of-artefacts-at-sia-boey-may-derail-states-original-plan/ ;
also see "Sia Boey market site put under Georgetown World Heritage Incorporated" at: http://www.thesundaily.my/news/1928664
20 Future plans need engagements with local residents like the proposed facelift for Lebuh Campbell Market. The researcher found the State authorities have put plans for the facelift on information board outside the market. - Personal observation by the author in field trip to Penang on 13th February 2017. Also see story by The Sun - "Campbell market traders hope for revival" at: http://www.thesundaily.my/news/2109271

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Measuring Feasibility of the Use of Chemical Castration Toward Offender of Sexual Violence Against Children in View of Human Rights And Proportionality Theory

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ABSTRACT

The enactment of chemical castration through the Government Regulation in Lieu of Law (Perppu) No.01 Year 2016 presumably has brought a new hope in reducing high frequency of sexual violence against children in Indonesia. Inspite of being relied as an effective measure, this punishment also attracts contentious arguments amongst various experts, and its feasibility starts to be questioned. In addition to violate code of medical ethics, the existence of paradoxal interests between children rights and the human rights of offender definitely become a substantial problem in resisting chemical castration as an effective way to protect children from sexual violence. Eventually, an issue is raised in this article is about the feasibility of the use of chemical castration in perspective of human rights and children protection in Indonesia. This article is written by using normative and theoritical approaches, which aims at measuring to what extent the feasibility of chemical castration in preventing sexual violence against children.The feasibility of chemical castration can be measured through two perspectives, namely human rights and proportionality. In view of human rights, the use of chemical castration is not justified and clearly constitutes human rights violation as prescribed in Article 7 ICCPR. Moreover, in accordance with Article 4 ICCPR, it is explicitly declared that free from this punishment is categorized as non-derogable rights. In perspective of proportionality principle, by considering criteria of *legitimacy ends, suitability, necessity, dan proportionality stricto sensu,* the use of chemical castration has not yet meet those criteria, thus its effectivity is still doubted.

Key words:*chemical castration, sexual violence, human rights, and proportionality theory*

I. Introduction

Child protection is an effort with simultaneous and continuous effect to improve the quality of current as well as future human civilization. Since the Convention on the Rights of the Child (CRC)was legalized on November 20th, 1989 through Resolution No. 44/25 of 1989, the child protection has been a major concern of the majority of countries in the world. Almost all countries, except the United States, Somalia and South Sudan, have ratified and integrated the CRC in law policies and strategies in each country.

These nations' great attention to child protection is generally based on an understanding that child is the best investment and irreplaceable for a nation and a country. Today's child is an adult in the future, and child, this time, is a leader and a civilization successor in the future. In addition, child is a weak individual who is potentially easy to be a victim of crime. David Finkelhor in his book entitled *"Childhood victimization"*, states thatchildrenare the human that mostly becomes victim of crime in the society, in addition to be victims of conventional crime happening to adults, as well as the specific crimes to children, such as maltreatment and neglect[1].

One type of crimes that increases significantly in Indonesia every year is a sexual abuse. Sexual abuse or sexual violence crimes has been transformed into the most frightening and alarming one. *The Jakarta Post* in 2016 even inspired an interesting question related to the sexual violence against children in Indonesia, it was "what has happened to Indonesia's moral?"[2]. The question surely arose together with getting more serious quantity and quality of sexual violence against children that happens in Indonesia.

In terms of quantity, the Indonesian Child Protection Commission (KPAI) also implicitly suggests an interest in the lives of Indonesian children. Since the quarter in 2014, there have been more than 400 cases of sexual violence against children reported in Indonesia. While, in 2015 the LPSK reported that there were approximately 1,726 cases [3], and the quarter in 2016 there were about 290 cases reported to KPAI[4].

In addition, the Directorate of Child Social Welfare - Indonesian Ministry of Social Affairs in 2015 also reported the prevalence of sexual violence against children aged 13-17, about 900,000 boys and 600.000 girls had experienced sexual violence[5]. The number is surely predicted to increase, and many increasing cases are not or have not been reported. Like an iceberg phenomenon, the number of cases reported or recorded is just the top of the iceberg, while the number of cases that are not recorded (dark number) is actually much larger

In terms of quality, the cases of sexual violence against children is getting more out of sense. In 2014 - 2016, there have been several phenomenal cases of sexual violence against children. Some of them are cases of pedophilia committed by Andri Subadri (2014), alias Emon who has victimized approximately 120 children, sexual abuse of 13 students in one of elementary schools in Kramat Jati, East Jakarta, committed by their own teacher at school, rape case of a 9-year-old girl in Kalideres who was then murdered (2015), and rape case of Yuyun by 14 teenagers in Bengkulu, which resulted death of the victim (2016).

The cases mentioned above are only a small number of sexual violence against children cases revealed to public. There certainly are still many sexual violence against children cases occurred in various environments and situations: within families, communities, schools, committed by people close to the child and strangers.

This condition is certainly not only alarming, but also very worrying. However, child sexual violence cannot be simply seen as only a sexual crime, but precisely more than just a crime against humanity. This crime can damage the child reproductive / sexual health, it also easily damages the psychological condition, honor, dignity, self-esteem, self-confidence, which if it continues, it will greatly affect the future of the child.

Considering being free from all forms of violence is the fundamental right of every child, without any exception, as explicitly stated in the Indonesian constitution, specifically Article 28 and paragraph (2) of the 1945 Constitution stating that "Every child has the right to live, grow, and develop as well as the rightto have protection from violence and discrimination". Furthermore, referring to Article 19 of the CRC[6], it states that "Each country shall take all Appropriate legislative, administrative, social and educational measures to protect the child from all forms of violence, therefore in the middle of 2015, Indonesian government planned to implement the surgical castration against perpetrators of sexual violence against children.

Various responses came up after the surgical castration discourse penalty was issued by the government. There surely were pros and cons. The Pros considered that surgical castration penalty was appropriate to reduce sexual violence against children that had been extremely massive, while penal and non-penal measures provided was considerably unable to overcome these problems

any longer. The Cons argued that the country needed to reconsider the surgical castration penalty, not only in the context of sentencing in general, but also in terms of human rights and the potential impacts that might occur as a result of the surgical castration penalties. The values of justice proportionality and benefits of chemical castration needs to be questioned.

In the middle of the pros and cons of the chemical castration imposition. In May 2016, the President finally signed (Perppu) No. 1 Year 2016 about the Second Amendment Act No. 23 of 2002 on Child Protection. The regulation brings new breakthrough not only increasing the quality of criminal sanction principal, but also the enforcement of chemical castration towards perpetrators of sexual violence against children with serious sanction quality, such as the repetition of actions, actions causing more than one casualty, resulting in serious injuries, mental disorders, infectious diseases, reproduction system impairment and / or fatalities.

In the middle of the pros and cons of the chemical castration imposition. In May 2016, the President finally signed (Perppu) No. 1 Year 2016 about the Second Amendment Act No. 23 of 2002 on Child Protection. The regulation brings new breakthrough not only increasing the quality of criminal sanction principal, but also the enforcement of chemical castration towards perpetrators of sexual violence against children with serious sanction quality, such as the repetition of actions, actions causing more than one casualty, resulting in serious injuries, mental disorders, infectious diseases, reproduction system impairment and / or fatalities.

Although the issue of Perppu No. 1 of 2016 has given juridical basis on the enforcement of chemical castration sanctions towards the perpetrators of sexual violence against children. Unfortunately, the existence of these regulations has not been able to ease the debates in various groups in society. Several national organizations, such as the National Human Rights Commission and the National Woman Commission did not approve the implementation of such sanction. In fact, the Indonesian Doctors Association (IDI) firmly rejected being the executor in the implementation since it was against the Doctor Code of Conduct.

Internationally, the castration penalty is actually not newly-enforced penalty known in handling perpetrators of sexual violence. At least 20 countries have enforced the penalty, as well as Germany and some Scandinavian countries. The enforcement which is always considered against the Human Rights would potentially cause juridical problems for the countries that enforce it. In addition, the negative impact of this penalty is quite serious on both physical and psychological health of the perpetrator, while the positive impact has not been considered significant. The Ambivalence handling of sexual violence against children through the chemical castration implementation is difficult to avoid. Conflict between the child rights protection from all forms of violence and human rights of the perpetrator influences the effectiveness of child protection from all forms of sexual violence. This condition requires further and deeper study on the proper existence of this sanction to the rules in Indonesia.

Based on the background mentioned above, therefore I propose the following title: MEASURING FEASIBILITY OF THE USE OF CHEMICAL CASTRATION TOWARD OFFENDER OF SEXUAL VIOLENCE AGAINST CHILDREN IN VIEW OF HUMAN RIGHTS AND PROPORTIONALITY THEORY.The legal issues that will be studied in this paper is whether it is viewed from the perspective of human rights and proportionality, the, chemical castration sanction theory towards perpetrators of sexual violence against children is still worth being maintained for child protection legislation in Indonesia?

II. Discussion

2.1 Sexual Violence against Children and Chemical castration

Currently, any place in the world,sexual violence against children becomes a concern of the international community. Its hidden, sustainable, and very dangerous characteristics make the crime require serious action. Frank W. Putnam in his work entitled *"Ten - Year Research Update Review: Child Sexual Abuse"*, stating that the sexual violence against children is not just the behavior disorder but more about life experience which is complex and painful for the child[7]. It is say so, because the consequences suffered by children from this crime continues.Child Physical injury may recover over time with appropriate treatment and medical therapy, but the psychic wounds inflicted will be felt throughout his life, even until they become adults.

Principally, the United Nations through the UN Secretary - General's Study on Violence against Children clearly states that "No violence against children is justifiable and all forms of violence against children is preventable"[8]. Positively, the Indonesian government legalizes the enforcement of chemical castration to give a deterrent effect for perpetrator. In long term, it is expected to realize protection for children from repetition of such crimes in the future.

2.1.1 Concept of Sexual Violence Against Children

To qualify sexual violence, it is needed to know what child is. Terminology of child without exact definition, perspective differences, knowledge limitation and society understanding triggers various definition of "child". Internationally, the definition of a child refers to Article 1 of the Convention Rights of the Child (the Convention on the Rights of the Child)[9], "A child means every human being below the age of eighteen years UNLESS under the law applicable to the child, majority is attained Earlier".While the definition of a child in Article 1 paragraph 1 of Law No. 23 of 2012 on Child Protection almost fully adopts international definitions,"someone who is not yet eighteen years old, including children in the womb"[10].

Compared to adults, children are more vulnerable to be victims of sexual violence either committed by adults or their peers. Their limited physical, psychological and socialability cause themnot to have proper awareness and self-control especially towards the situation or people around to select.

In general, sexual violence against children can be defined as child involvement in any kinds of sexual activities occurring before the child reaches adulthood. The basic concept of sexual violence against children is actually rarely debated among experts. At least, although with various wordings, their definitions come to a common understanding. For example, a concept proposed by Frank W. Putnam, stating "sexual violence against children is an array of sexual activities to the child the which includes an intercourse, attempted intercourse, oral-contact genitals, fondling of genitals Directly or through clothing, exhibitionism or exposing children to adult sexual activity or pornography, and the use of the child for prostitution or pornography"[11].

Phasar Bharati also argues that sexual violation against the children is "an inducement or coercion of children to engage in any sexual activity. This violence can take both a physical and mental form. Sexual violence against children includes both sexual abuse and sexual exploitation"[12] From this definition we can see that sexual violence against children includes physical and mental abuse, and can be divided into two categories; the sexual abuse and sexual exploitation.

Meanwhile, David Finkelhor, a Professor of Sociology and a director of the Crimes Against Children Research Center at the University of New Hampshire, defines sexual violence against children in more detail, that "the entire spectrum of sexual crimes and offenses in the which children up to age seventeen are victims. The definition includes offenders who are related to the

child victims as well as Reviews those who are strangers. It includes offenders who are adults as well as Themselves Reviews those who are children and youth. It includes Certain kinds of non-contact offenses, such as exhibitionism and using children in the production of pornography, as well as statutory sex crime offenses, in addition to the sexual fondling and penetrative acts that make up a majority of the cases"[13].

Another concept is the concept used by UNICEF, defining sexual violence against children as follows:"contacts or interactions between a child and an older or more knowledgeable child or adult (a stranger, sibling or person in a position of authority, such as a parent or caretaker) when the child is being used as an object of gratification for an older child's or adult's sexual needs. These contacts or interactions are carried out against the child using force, trickery, bribes, threats or pressure"[14].

According to several definitions above, I may conclude that sexual violence against children actually have a broad spectrum, both referring to its form and severity range, group of offender, and mode of the offender action. Either adults or children (including teenager) can be potential offender of sexual violence against children. The only purpose of their action is to satisfy their sexual desires, through performing some unlawfulness acts. The spectrum of sexual violence against children broadly encompassing various acts as follows:

a) Child abuse and its derivatives, including experimental efforts;
b) Child rape, along with their derivatives, including the experimental efforts;
c) Sodomy;
d) Incest;
e) Child voryeurism;
f) Child exhibitionist;
g) Child Sexual exploitation for prostitution, pornography.

2.2. Castration and Its Risk

Gelding or castration actions in development has two forms: surgical castration or medically known as*orchiectomy*, and chemical castration. According to the Dictionary of Medicine, surgical castration is surgical removal of the testes (*orchiectomy*) or ovaries (*oophorectomy*) to stop sex hormone production[15].While chemical castration is a procedure wherein medications are administered to reduce testosterone levels[16].The two definitions above come to an understanding that castration is a medical procedure either surgical or chemical use to stop or reduce the function of the male organs (testes) and female (ovaries) in producing sex hormones.

As a solution to resolve the cases of sexual violence, the implementation of castration is actually not a new phenomenon. Linda Weinberger even argues that castration is more widely accepted as a method to reduce testoteron among sex offenders[17]. In the past, precisely in the middle ages, castration was used as a kind of penalties and action against the perpetrators of rape and adultery. Started in Europe in the early 20th century, Denmark in 1929, was the pioneer country that enacted the rule of castration as medical interventions against perpetrators of sexual violence. Soon, it was followed by Germany (1933), Norway (1934), Finland (1935), Estonia (1937), Iceland (1938), Latvia (1938) and Sweden (1944).

Justification theory applied by European countries in legalizing castration sanction at the time was believed that the sexual elimination or drive reduction was one of the dominant etiological factors to influence individual sexual drive behavior. In its development, some other countries eventually implemented castration against perpetrators of sexual violence. They were the UK

(1952), South Korea (2011), Poland (2010), Russia (October 2015), and the nine states in the United States: California, Florida, Oregon, Texas and Iowa have been implementing chemical castration against perpetrators of sexual violence[18].

Denmark was a model country of castration practice against perpetrators of sexual violence for many countries. Castration Legislative process in Denmark was a long process. From 1935 to 1970, surgical castration was not considered as a penalty for sexual violence perpetrator, but as an option. Although it had been combined with psychiatric care, in 1970 the surgical castrationpractice in Denmark was suspended for being inhuman and against the human rights. Then in 1973, Denmark replaced it to chemical castration. This type of Castration was considered as the last resort, which was only imposed after series of therapeuticand psychiatric actionsin Herstedvester Institute for Abnormal Offender and was declared as failure.

As a medical intervention on the handling ofsexual violence perpetrators, the chemical castration imposition is basically intended as incapacitation acttowards the perpetrator's sexual organs function to suppress the repetition of sexual violence. Referring to review analysisdone by Weinberger, et al. Based on the success rate of castration observation in some countries, it is known that the administration of chemical castration does nothave direct impact totally stop such crimes. Instead of permanently stopped, prisoners who underwent castration will potentially be able to repeat their actions with more serious degree. The castrationpracticeonly reduces but does not stop all the functions of the perpetrator's sexual organs. Therefore, the potential of such crime occurrence is still possible although the perpetrators of sexual violence have undergone the castration.

Other risks of chemical castration was stated by Crystal Lombardo in his review, entitled 7 Key Pros and Cons of Chemical castration, as follows:[19]

a) Chemical castration is particularly at risk of developing osteoporosis or bone density lost. The greater the intensity of chemical castration administration is,the more inevitable fractures potential will be.
b) Chemical Castration has various effects. For people who have certain psychological uniqueness, resulting various reactions of the body after castration administration, the reaction can be very fast, slow or even has no effect at all, therefore it causes no effect on sexual ability.
c) Long term chemical Castration causes a diabetes mellitus risk, and prostate cancer for men, breast cancer for women.

In addition to the risks above, chemical castration which is conducted by applying antiandrogen drugs such as *medroxyprogesterone acetate*, *cyproterone*, euprolide acetate or goserelin, to human body will result in the accelaration of aging proccess[20]. Wimpie Pangkahila as Head of Andrology and Sexiology division in Medical Faculty of Udayana University also asserts that the effect of chemical castration is temporary[21]. If the treatment stops, sexual desire of offender will be coming back again. Brieftly speaking, in order to achieve optimum perfomance, chemical castration should be applied sustainably.In term of the expense, chemical castration is also widely known as a costly punishment, for example, the implementation of chemical castration in South Korea. As the first country in Southeast Asia imposing chemical castration, South Korea must issue medical cost more and less US$4.650annually for each chemical castration including the three times drug injection, therapy and supervision[22]. While in Indonesia, the cost can be estimated as amount as 700.000 to 1 million Rupiahs[23]. If chronic perpetrator of sexual violence against children reach out more than a hundred man, we can easily calculate how much cost that must be covered by government for prevention of this crime.

2.3. Chemical CastrationFeasibility in Perspective of Human Rights and Theory of Proportionality

1) Chemical Castration as Human Rights Violations

In the context of crimeprevention, criminal law is principally contradictory, dualistic or paradoxical. Criminal law protects legal interests (interests of the victims and the public))[24], whileat the same time attacks other legal interests (interests of offenders). Or, in other words, one side of the criminal law is to protect the human rights of the victim, but on the other side the implementation of criminal sanctions on the perpetrators'human rights is against itself. Therefore, many experts argue that implementing criminal sanctions to perpetrators is legalized human rights violations. It is said to be legal because it is done by the authorities with the legal procedures andclearratio legis.

Although the imposition of criminal sanctions on the perpetrators is allowed by law, it does not mean the country is allowed to confiscate the human rights of perpetrators, or that does not mean that when someone is being convicted or imposed a sentence, will automatically lose all his basic rights, whatever his status is, universally in the Universal Declaration of Human Rights (UDHR)it isagreed that "All human being are born free and equal in dignity and rights". This principle must be the most fundamental principle that should be figured out by all parties.

In the perspective of human rights, everyone is potential to violate human rights, and on the contrary, his human rights is potentially violated, even he is a criminal. Human rights itself is often described as a universalmoral matter. Some human rights are interaliable and unviolable, or commonly known as non-derogable human rights: human rights that can not be denied or violated even when the country in a state of"internal unrest", "civil war or public emergency"[25].

Some human rights in UDHR are considered as non-derogable human rights, as detailed by Muladi as follows[26]: a) the right to life (Article 3); b) prohibition of slavery (Article 4); c) prohibition of torture (Article 5); d) the right to recognition as a person by the law (Article 6); e) rights to equality before the law (Article 7); f) prohibition of imprisonment solely for inability to fulfill a contractual obligation (Article 9); g) prohibition of ex post facto and rights to the presumption of innocent (Article 11); h) rights to have civil recognition (Article16); and i) freedom of speak and religion (Article 18). In Indonesia, unalienable rights of all members of the human familylater adopted in Article 4 of the Act No. 39 of 1999 on Human Rights.

Based on the understanding of non-derogable human rightsabove, it should be understood that a convicted person will or has been deprived of some rights would remain entitled to his human rights protection which are non-derogable. It is clearly stated in Article 12 ofUDHR, which declares that[27]: "no one subjected to arbitrary interference with his privacy, family, or correspondence, or to attacks upon his honor and reputation, every one has the right to the protection of the law against such interference or attacks".

Within two years, Indonesian Government had issued two prominent regulations as the amendment of Child Protection Act No. 23 Year 2002, namely the Act No. 35 Year 2014 and the Government Regulation in Lieu of Law (Perppu) No. 1 Year 2016. An controversial issue raised from the enactment of Perppu No. 1 Year 2016 is about the imposition of chemical castration toward the offender of serious or repetitive sexual violence against children. Article 81, paragraph 7 stipulates that the imposition of chemical castration to the perpetrators of sexual violence is referred to those who are recidive (paragraph 4), and of serious sexual violence (paragraph 5), except child perpetrator (paragraph 9).

Regarding with imposition of this chemical castration, many parties such as Indonesian Medi-

cal Association, Woman Empowerment Commission, and Human Rights Commission, regret the inclusion of this sanction in Perppu No. 1 year 2016 because it is considered as a form of human rights violation itself. To see the extent of the feasibility of these sanctions from a human rights perspective, I will examine the existence of these sanctions on the views of some international instruments and national regulations below:

a) **International Instruments**

(1) Universal Declaration of Human Rights

It is clearly stated in Article 5 of the Universal Declaration of Human Rights(UDHR) that the imposition of any inhuman or degrading punishment is highly prohibited. Protection of phisycal integrity contitutes the fundamental human right, hence no one and even no country can be justified to execute any kind of punishment or treatment that may destroy or decrease thatright in real [28].

(2) International Covenant on Civil and Political Rights (ICCPR)

Similarly, Article 7 of the ICCPR is set in accordance with Article 5 of UDHR. In addition to stating that no one shall be subjected to inhuman or degrading treatment or punishment, the Convenant also particularly stipulates prohibition of medical or scientific experimentation without free consent of the people.Again, the imposition of chemical castration is a form of inhuman penalties. Administering chemical drugs which predictably will bring some negative impacts on perpetrator's health in the future, can not be justified, indeed.In addition, although the chemical castration is not a medical experiment, it includes medical measures requiring a medical approval or free consent from the related person. Thus, the implementation of castration without any consent from the related person (in this case the perpetrator), is clearly prohibited under this Covenant.

Furthermore, Article 10.1 of ICCPR also confirms thatall persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person. The provision implies that the loss of independence is the only misery imposed on perpetrators. Therefore, perpetrators should continue to be treated with humanity and respecting their dignities as individuals[29].

(3) Convention Against Torture and Other Cruel Degrading Treatment in Human or Punishment

In addition to the UDHR and the ICCPR, the Convention Against Torture and Other Cruel Degrading Treatment in Human orPunishment strictly prohibits all forms of violence and other criminal treatments, which are inhuman and degrading and also basic human rightsviolation[30].

We can see in Article 2 of this convention, it is clearly regulated that each State Party shall take any requied effective measures, either legislative, administrative, judicial and other to avoid any acts of torture under its territory or jurisdiction (paragraph 1). It is added in paragraph 2, that no exceptional circumstances whatsoever may be invoke as a justification of torture.

Moreover, by Article 16.1, the convention also call for each State Party to avert any practices of cruel, inhuman or degrading treatment or punishment under its territory or jurisdictions when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

Considering the prolonged impact to the health of perpetrator, in which severe pain and physical suffering are categorized as torture as mentioned in Article 1 of this Convention, it can be concluded that the imposition of chemical castration has also breached this Convention.

b) National Legislation

(1) The Constitution of the Republic of Indonesia Year 1945 (UUD 1945)

Without neglecting the mandate of various International Instruments related to the protection of perpetrator's human rights, Article 28 G paragraph (2) Constitution RI 1945 also regulates that "All persons have right to be free from torture or ill-treatment degrading human dignity and rights to obtain political asylum from another country". It constitutionally implies that Indonesia explicitly acknowledges that free from treatment degrading human dignity as human rights of every person that should be protected. Thus, in other words, the violation of this rights is similar to violation of the Constitution.

(2) Act No. 39 Year 1999 on Human Rights

Similarly, the Human Rights Act also follows and adopts provisions regulated in both international instruments and The Constitution of Republic of Indonesia 1945. Precisely in Article 33 paragraph (1), it emphasizes prohibition of inhuman and degrading dignity punishment as mentioned in.

According to legal instruments, it is very clear that the imposition of chemical castration is full of human rights violation. Neither international instruments nor national legislation of Indonesia, justify its practices. Whatsoever the reason behind, implementation of chemical castration principally violates personal integrity as well as health of perpetrators as human being. It should have been protected in any exceptional circumstances, not destroyed by a reason of crime prevention which has not clearly enough its effectivity in the future.

(3) Conflict between Child and Perpetrator Human Rights

Undoubtedly, sexual violence against children is not only a violation of law, but also a fundamental child rights violation. Both the Indonesian Constitution, Article 28 paragraph (2) of 1945 Constitution, and Article 58 paragraph (1) and Article 65 of Law No. 39 Year 1999 on Human Rights, and Article 9 and 15 of Law No. 35 Year 2014 on the Amendment Act law No. 23 Year 2002 on Child Protection, those 3 regulations explicitly states that children must be protected from any forms of sexual violence.

It is very rational when referring tothe impact of physical and psychological health and future of children, the majority of people agree that sexual violence against children must be taken care of, no matter how. Besides increasing the severity of imprisonment and fines imposed on perpetrators, other repressive treatment ofchemical castration for serious or repetitive sexual violence as mentioned in Perppu No. 1 Year 2016, seems to be a fatal final measure

Treated fairly, both sexual violence and the use of chemical castration are unacceptable human rights violations. Both victims (children) and the perpetrators have fundamental rights that are acknowledged both in international instruments and national legislation. On one hand, rights to be free and protected from sexual violence is recognized as a children rights. But on the other hand, to be free from penalties or inhuman treatment is also non-derogablehuman rights for everyone including perpetrator. Accordingly, conflict of rights between children as victim and human adult as perpetrator can not be avoided. Whose right should be prioritized? And, is it justified protecting one rights by violating other rights?. These two questions frequently become a dilemma amongst criminal law experts.

Here is the conflict of rights between the two opposing parties, as shown in the following table:

Table 1. Contradiction Rights Violation in relation to the Enactment of Chemical Castration for Perpetrators of Sexual Violence Against Children

NO	CHILD RIGHTS	PERPETRATOR RIGHTS
1.	Article 3,5, 22 UDHR	Article 5 UDHR
2.	Article 7 and 24 ICCPR	Article 7 and 10 (1) ICCPR
3.	Article 34 CRC	Article 2 and 16.1 Convention against Torture and Other Cruel in Human Degrading Treatment or Punishment
4.	Articlel 28 B paragraph (2) National Constitution of Indonesia Year 1945	Article 28 G (2) National Constitution of Indonesia Year 1945
5.	Article 58 (1) and65 The Act No. 39 Year 1999 on Human Rights	Article 33 (1) The Act No. 39 Th. 1999 on Human Rights
6.	Article 13 (1) The Act No. 23 Year 2002 on Child Protection	
7.	Article 9 and15 The Act No. 35Year2014 on Amendmentfor The Act No. 23 Year 2002	

At the point a and c in the considerations of Perppu No. 1 of 2016 shows that the chemical castration enforcement is normatively intended to ensure a deterrent effect and comprehensively prevent sexual violence against children, which finally can guarantee the fulfillment of protection right for children. However, referring to the table above, the chemical castration enforcement seems to be paradoxical. It means these sanctions enforcementprotects the human rights of children by violating the perpetrator's human rights. The sanction is expected to indirectly guarantee the fulfillment of child right protection from sexual violence committed by the same person, however, the sanction existence is human rights violation which is under the protection of legal justification.

In connection with the conflict over the fundamental right above, basically human rights are universal, inherent and non-derogable. However, under certain conditions, being derogable or violation of rights done by government is tolerable, such as freedom deprivation ofperpetrators by the government as part of the efforts of law enforcement to ensure public security.

Irregularities or exclusion of human rights is called the derogation. The term of derogation is a mechanism in which a country legally deviates its responsibilities for certain situation, such as an emergency that could threaten both the nation and security of its people. Here, the country can avoid its legal accountability for human rights even though the country has ratified the relevant international declaration[31]. However, this derogation can only be implemented against the enacted rights and obligations.

Based on Article 4 of the InternationalCovenant on Civil and Political Rights (ICCPR), not all human rights can have derogation for emergency situations. There are some human rights are not justified for derogation under any circumstances, namely the rights in Articles 6,7,8 (paragraphs 1 and 2), 11,15,16, and 18. Considering the imposition of chemical castrationcan be classified as prohibited action under article 7 on prohibition, inhuman and degrading punishment and treatment, so the rights in article 7 can not be derogated under any circumstances. Thus, castrationsanction from view of human rights clearly opposes and violates fundamental human rights.

c) Chemical Castrationin the view of proportionality Theory

In law enforcement, conflict of rights generally happens to almost all countries. The problems

potentially arise when there is a conflict of fundamental rights to determine which rights should be prioritized in law enforcement in connection with the problem solution, Matthew Klatt and Moritz Meister in their book entitled "The Constitutional Structure of proportionality", shows a formula applying the principle of proportionality. This formula is a continuation of the balancing theory developed by Dworkin and Alexis. The Implementation of proportionality principlein resolving this conflict of rights, according to Klatt and Meister, requires logical relationship between specific objectives and the ways to achieve them[32].

The way out of rights conflict by using principles of proportionality must take four (4) test steps, they are legitimacy ends, suitability, necessity and proportionality *stricto sensu*[33]. In order to address rights conflict arising from the implementation of chemical castration, as well as to weigh the feasibility of this sanction, it is significant to use the principles of proportionality for that purposes, as follows:

1) Legitimacy ends

This step measures the presenceof the legitimate objectives to be achieved. In Perppu No. 1 Year 2016, the legitimate objectives indirectly can be seen on the consideration point(a). The consideration shows that the provisions of this Perppu including penal and non-penal facilities arranged in are intended to ensure child rights to survive, grow, and develop as well as rights to have protection from violence and discrimination as stated in Constitution of the Republic of Indonesia Year 1945.

2) Suitability

This step is an attempt to measure whether the provisions are able to achieve the objectives. When talking about the feasibility of implementing chemical castration that in fact violates human rights, in achieving legitimate objectives mentioned in point 1, it is intended to measure the sanctioneffectiveness. The effectiveness probability of a sanction can be measured by weighing the positive and negative impacts of implementing the sanctions. Reviewing analysis of Weinberger and Lombardo as noted earlier, the negative impact of chemical castration exceeds the expected positive impact. The negative impact of such chemical castration tends to make the occurrence of sexual violence even greater because chemical castration is only temporary and latent. In addition, the chemical castration is dangerous for human health. It is potential to cause a various harmful diseases for the castrationrecipient, such as osteoporosis, heart attack, cancer, diabetic mellitus, high blood pressure, and early aging. Comparing to other crime prevention measures, chemical castration is surely not an efficient measure. It requires large funding continually, which one perpetrator at least need s three times injection anually. If it stops for a while, the sexual desires of offender likely come back, and can be more dangerous than the previous acts.

Thus, maintaining chemical castration in legislation of Indonesia not only violates human rights, butthe effectiveness to achieve child protection and the efficiency of crime prevention are still in doubt.

3) Necessity

This step measures which provisions do not impair the conflict of rights (the act impairs the rights as little as possible*)*. Or in other words,are the provisions required?. The same question for chemical castration, is it really needed this time ?.Are not there any other measures proposed as an alternative of chemical castration in protecting children from sexual violence?Consideringthe large extent of negative impacts and the costs, while its effectiveness is still uncertain, the chemical castration enforcement should be re-examined. In my opinion, sexual violence is not merely a matter of a person's biological drive, but psychological problems. Referring to Wille and Beier

(1989) that " it is not the sex hormones which represent the decisive driving force (sexual violence), but psychological factors"[34]. Some experts such as Hicks and Estrich also assert that castration will not work because rape is not a crime about sex, but rather a crime about power and violence[35]. If it is said so, the existence of chemical castration in Perppu No.1 Year 2016, does not really has influential effect on reduction of sexual violence and children protection. Thus, it is necessary to provide other measures that can still guarantee child protection, without neglecting the perpetrator's human rights

4) Proportionality *stricto Sensu*

Proportionality *stricto sensu* can be simply interpreted as the principle of proportionality. This point 4 refers to Alexy;s balancing theory, as follows: "The greater the degree of non-satifaction of, or detriment to, one principle, the greater the importance of satisfying the goals"[36]. By Matthias Klatt and Moritz Meister, this theory has been interpreted as an attempt to measure the result of a reduction of rights to the goal achievementlevel enacted in a provision. In connection with the chemical castration enforcement,it should be measured more details in practice, perpetrator's human rights with this measurewill be proceeded with potential improvement to achieve the objectives. in other words, the chemical castration imposition—in fact,a violation of human rights— must be accompanied by the success of child protection and the quantity reduction of sexual violence against children to the four measuring components above, in my view, the chemical castration is not feasibly imposed as a measure to solve sexual violence against children. Principally, the chemical castrationviolates fundamental human rights with international and national acknowledgment, and its existence is still not convincing to achieve the goals of child protection, considering it is temporary and proportionality between risks (including cost) and benefit achieved is still doubted or uncertain.

III. Closing

3.1. Conclusion

Either by using human rightsmeasurements, as well as the parametersofproportionalitytheory, chemical castrationsanctions is not yet feasiblyenacted in national legislation of Indonesia and needs to be more deeply re-examined.The existence of chemical castration itself is paradoxical contradictor or causes conflict to human rights. In view of human rights, the chemicalcastration as prevention measure of sexual violence against children can not be justified. According to Article 4 of the ICCPR, this sanction can be classified as prohibited action under article 7, which can not be derogated under any circumstances. In view of proportionality theory, under parameters of legitimacy ends*, suitability, necessity and proportionality stricto sensu,* the chemical castration imposition tends to cause a significant negative impact, however, the success level is still in doubt. Accordingly, it is necessary to provide other measures that can make simultaneous effect, which remain fulfilling child protection, but still respect for physical integrity of perpetrator as a part of his human rights.

3.2. Recommendation

The recommendations can be given related to the issues presented in this paper are as follows:

1) Child protection is not a pragmatic effort, but rather a sustained effort based on systematic and integral strategy. Therefore, all of government parties should evaluate and improve current child protection system and together regulate the facilities, which are more humane and have long-term effects in solving the problems of child rights violations.

2) In determining the child protection policy through the penal, governments should do various scientific studies in advance, Especially, anything related to the proportionality of cost and benefit or risk and benefit, prior to legalize it in a legislation.
3) Considering the perception of human rights, the chemical castration enforcement is a form of human rights violation and according to balancing impact, the negative impact is higher than the expected positive impacts. it needs to do judicial and legislative review related to the existence of this sanction as a facility to solve sexual violence against children in Perppu No. 1 of 2016.

ENDNOTES

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[4]Aryo Wicaksono, Viva News Online, *Kekerasan Seksual Anak Pelanggaran Konstitusi*, dipublikasikan di www.viva.co.id, published in June 06, 2016, accessed in July 19, 2016

[5]Social Children Welfare Directorate, *Children Situation* (Strategic Issues in 2015), Kemensos RI, 2015

[6]Artikel 19 of CRC mandates that "*States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent (s), legal guardian (s), or any other person who has the care of chidren".*

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The Dynamics of Human Rights Enforcement In Indonesia: a Misconception and Political Consideration in the Formulation of Law Number 26 Year 2000 on Human Rights Court

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ABSTRACT

Grounded on the existing obligations, States are required to provide a guarantee its rights. However, in practical landscape not all countries do with their obligations should be, including Indonesia. One important issue related to guarantees human rights in Indonesia is the occurrence of human rights violations in the past, such as the mass slaughter of 1965 that killed about 1,500,000 people and mysterious shooter "Petrus" in 1982. Need to understand, though these human right violations occurred in the past, one of the principles of law enforcement of human rights is the principle of impunity. One of the Government's efforts to enforce the law against past human rights violations in Indonesia is to establish a law number 26 year 2000 on human right Courts. Although it has been enacted for 17 years before, law enforcement against human rights abuses in the past is far from the perfect words. As a result, some opinions are debated each other dialectically in responding to the existence of a human rights tribunal legislation. The Synthesis of this paper, concluding that the law number 26 year 2000 was wrong in legislation concept of human rights and in addition to the manufacturing process also dominated with political paraphernalia. Therefore, the effectiveness of the enforcement of the law against such violations still has no power to enforce the human rights totally. Therefore, the author recommends doing the reformulating and revision of law number 26 year 2000 on human rights court.

Key Words: Enforcement, Human Right, Misconception, Political, Violation

I. INTRODUCTION

The existence of human rights in Indonesia is not something new. The long debate about the existence of Indonesian human right is becoming a Classic Story which has been discussing by our founding fathers, before human rights enshrined in our constitution. The long debate on human rights and the dignity of this view not only appeared in the Sukarno's era and in the new regime which usually called it 'Orde Baru'. However, the long debate about the existence of human rights in Indonesia has existed in a long time before the proclamation of independence of this nation. In the mid-1950s, human rights began to emerge to the surface of society and started to be accepted and understood by few people. Basically, human rights are becoming a social contract between citizens and Stakeholder which obliged the stakeholder to protect the individual rights of every citizen.[1]Therefore, a concrete step that occurs today is done by the Government of Indonesia with the enactment human rights enforcement regulation by law number 26 of 2000 which showed that how important the role of the State in dealing with rights owned by accommodating its citizens. In addition, the emergence of new regulations which has been poured in law number 26 of 2000 is becoming the real evidence that related to the state responsibility in protecting and fulfill human rights through judicial mechanisms of human rights law.[2]

The emergence of the enactment of judicial human rights mechanism in Indonesia which has been poured in law No. 26 of 2000 that driven by Government concern was born towards the end of the Orde Baru which is judged very much left the problem concerning serious human rights issues has feel became the positive step. Serious violations of such massive slaughter in 1965 that killed about 1,500,000 people, the mysterious shooter "Petrus" in 1982 to 1985 that killed about 1,678 people, Marsinah Cases, and other cases make a serious homework for the Government after the Orde Baru era. The emergence of pressure from civil society and the international world in handling cases from serious human rights violations has forced the Government after the regime of Orde Baru does not have the option to make laws that is used as the legal basis to punish the perpetrators of serious human rights violations in Orde Baru era to be prosecuted on domestic trial, so politically the perpetrators of serious human rights violation could not be prosecuted on trial in an International Court. Politically, the reason above that encourages government post-Orde Baru to authorize law No. 26 of 2000 which in general has provide regarding a criminal offense as the human rights violation and the mechanisms of judicial human rights in Indonesia. But on the other hand, the enactment of law No. 26 of 2000 is a formulation which in general adoption the Rome Statute which proved the regulation is ineffective. Therefore, law No. 26 of 2000 on human rights court considered the judiciary do not have fangs to prosecute the perpetrators of serious human rights violators in the past, although clearly stated that one of the principles of human rights enforcement was using the principle of impunity whereby the enforcement of human rights it has no expiration time.[3]

Therefore, in the name of justice the author felt that need to study and discuss more the framework of the formulation of human rights through the enforcement of law No. 26 of 2000 on human rights court mechanism, based on that argumentation the author will examine this paper research uses two frameworks of thought. First, the theory of the concept of State Responsibility. basically, the human rights norm is automatically owned by everyone since in the womb, the human right also does not require any justification of the State, but to do the enforcement of human rights effectively remains required a positive law governing the mechanisms of enforcement and protection of human rights. Therefore, the importance of the existence of the State to protect any citizens is an absolute obligation. In the context of human rights enforcement, the existence of State powers as stakeholder had rights and obligations as subjects of law. The emergence of the idea of rights and obligation of the State to protect any citizens had been declared contained in the Universal Declaration of Human Right (UDHR) in 1948. In the Declaration stated that the state categorized as the main responsible entity to promote, fulfill, and protect human rights.[4]The basic arguments concerning the responsibility of the State towards the enforcement of human rights are also seen in preamble the opening of the International Covenant on Civil and Political Rights (ICCPR) which confirms the responsibility of the State in enforcing civil rights and politics as follows:

> "Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world."
>
> Recognizing that these rights derive from the inherent dignity of the human person,

Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights,. Considering the obligation of States under the

Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms

Realizing that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant"[5]

Second, related to the context of an effectiveness of law enforcement, then Author refers to the theory presented by Soerjono Soekanto. Soejono Soekanto explained that there are five factors which influence the effectiveness of the law enforcement.[6] First, the substance of the law. The substance of the law in a legislation, in fact, become a guideline for the behavior of a human which give an option about which one is allowed to do or not allowed to do. In the other word, a substance of the law is one of the main element that gives a frame to a law enforcement. Second, law enforcement officers. By the theory and practice, the definition of law enforcement officers is a subject who has authority to enforce the law. In the other case, Friedman explained that actually the definition of law enforcement officers is divided into two definitions. The first one is a wide definition, which defines a law enforcement officers is a man, organ, or institution who has authority to maintain and make the law. But in the narrow definition, the law enforcement officers defined as a man, organ, or institution who has a duty to maintain an enforcement of a law. Third, the tools or facilities. The tools or facilities are a substitute aspect that will help the work of law enforcement officers. Fourth, the society. As a lot of sociologist's master explained that society was the strongest influence of an existing of a norm. We can refer to the philosophy question, "do the society determine the law? Or, do the law determine the society?". And fifth, the culture.[7] Culture become a factor that influences the law enforcement. Because in fact, a culture was a result of the behavior of human being. It means, among human (society), law, and the behavior of its human has a relation that could not separate. It will influence one with another.

II. DISCUSSION

1. Misconception on Law No.26 of 2000

a. The State Dimension in The Human Rights Conception

The existence of the society is an inevitability in a country. As regulated in the article 1 Montevideo Convention that "a permanent population" is a collective element over the position of a country.[8] Therefore, the people is one of the elements required in a country and between the both of them, absolutely there is a relationship which emerges the rights and obligations upon one party against the another party.

Historically, before there are any countries, public life is very chaotic. This is because everyone is free to do about anything based on his will, so that the life of the community at the time of being undisciplined. "homo homini lupus", according Thomas Hobbes which has been describing the condition of human life before the state formed, which is inevitably the people must behave like wolves towards other human beings in order to survive.[9] On the development of time, the consciousness to live safer, peaceful, justice, and prosperous then appears in the human mind. Starting from the awareness, according to Locke, firstly all individuals with another individual held a Community agreement to constitute a political community. The agreement on the first phase is called by Locke as pactum unionis. Afterward, the pactum unionis is not enough to provide security against the ideals of discipline in the life of the community landscape. Therefore, Locke added a pactum subjectionis as the second phase of the agreement. An agreement on the

community groups to provide and entrust the fundamental rights and freedom in order to be guaranteed by a few of individuals, with the scheme of granting authority against individuals given credibility.[10] The second phase of the agreement has two important implications. The first, State authority intrinsically limited and not absolute, basically limited based on the pretension of the citizens. Secondly, the human motivation to form the state which aims to guarantee fundamental rights, especially his self. Because of that purposed the people leaving their fundamental rights and freedom in the natural condition and belief on a subject which is called the State.

The emergence of the human rights conception basically cannot be released from the early history of the formation of the State. The distribution of basic rights and public freedom to the State is not without consequences at all. For the state, the inherent complexity of the authority then charged the duty to guarantee the fundamental rights and freedoms. On the other side the guarantee, in theory, and practice categorized into four kinds of guarantees. That is a guarantee to protect, to promote, to fulfill, and to respect. Therefore, historically-philosophical, basically a subject country is charged the duty to guarantee the fundamental rights and freedoms of people in it.

The philosophical value in its development has differentiated into a principle in the conception of human rights, namely State Responsibility principle. According to the principle, a country should not be either intentionally or unintentionally ignores the fundamental rights and freedoms of the citizens of the society.[11] On the opposite, the State assumed had a huge positive obligation for actively protecting and ensuring the correct fulfillment of the fundamental rights and freedoms of it. However, According to Hegel which has described on his dialectic,[12] Hegel substantially States that where there is a dynamics, it will be followed by a collided between the particles. Include the collided between the idealism and the reality of State obligations in guaranteeing the fundamental rights and freedom of society. In the practical level, not all countries realize these obligations properly. Of the inappropriate, in the context of human rights is referred to as "human rights violations".

What is meant by human rights violations? Until today there is no one concrete definition against that phrase. However, in General, human rights violations is meant as a violation of the State obligation in the guarantee of fundamental rights and freedoms of the people, between the act of commission or act omission. In the formulation above has seen clearly that the party who responsible is State, not an individual or other legal entity. So, the fact that a main point in this concept of human rights violations are the responsibility of the State.[13]

This is the element which distinguishes human rights violations with the violation of the law. Where violations of the law can be made of the individual as a subject in it. In addition to the state responsibility principle, the other principle which became the characteristic of the human rights conception is the presence of the principle of impunity. The principle of impunity is the principle by which substantially stated that against human rights violations, the human rights violation which conducted in the present and the past, the implementation of impunity principle does not reduce the obligation of the State to enforce the law against human rights cases.

b. The International Criminal Law Conception

International criminal law nowadays has to feel needed by the international community. This equal with the increasing quality and quantity of international criminal dimension which happened by transition and occurrence of globalization system at the social, economic, and cultural sector.[14] The establishment of the International Criminal Court Rome Statute at the end-1998 was

became one of the greatest achievements in law enforcement against international crime. Based on the substance in Rome statue 1988, international criminal law is containing into five basic principles, namely individuals accountability, non-retroactive, legality, the legality of punishment, and the jurisdiction principle. First, the principle of individual accountability. This principle is meant as a principle which can impose liability against an individual, not just State, for a crime that he did. The background of the concept of individual responsibility in international law is the idea of international law can be directly attributing responsibility towards the individual.[15] Second, the non-retroactive or should not be retroactive. This principle has oriented on legal certainty, where confirms and explain if a crime was conducted before but there is no regulation that regulated the act, automatically when there is an enactment which forbidding or prohibition that act, then it should not be imposed retroactively against acts that existed before the legal instrument over the deeds exists. Third, legality principle. Basically, legality principle is similar with the principle of non-retroactive principle. In the main idea, this principle ha stated that none of the actions that can be classified as a crime before there was the legal instrument declaring that the action is a crime. Fourth, the legality of the punishment. As the principle of non-retroactive and legality, this principle is a principle that synergized with the two principles mentioned earlier. It is a method and the type of punishment inflicted upon an act which significantly is defined as an international crime must be condemned and processed in accordance with the applicable legal rules. the fifth, jurisdiction principle that one of the characters of law enforcement against international crime is the enactment of the universal jurisdiction (jurisdiction borderless).

Based on the description above, then it looks clearly significant differences between the concepts of human rights and the concept of international criminal law, especially in terms of responsible parties and the impunity principle. Human rights conception basically stated that the only party which is legally charged to secure and responsible for human rights and human right violations is just state. However, in the concept of international criminal law (ICC-RS 1998), not only the State that can be charged the responsibility but also individuals became the subject of accountability charged. The existence of the principle of impunity on the concept of human rights with the principle of non-retroactive, legality, and the legality of the judgment on the concept of international criminal law also has the distinction of the concept. Human rights law enforcement can retroactive, but law enforcement against international criminal law can not be enforced in the non-retroactive.

c. Reveal the Misconception of Law No.26 of 2000

The worsening security situation and human rights in the governance regime of the past are a reason at the insistence of the international community, especially the United Nations (UN) to the Indonesian government which force to do law enforcement against human rights violations that happened, including massacre, torture and persecution, disappearances people, and others. The UN Security Council then passed a resolution Number 1264 year 1999 that denounced the human rights violations that occurred in Indonesia at the time. Therefore, the UN Security council requested that the perpetrators accountable for his actions in the face of Court. Departing from the insistence, then Indonesia Government initiative to establish a human rights court in order to prosecute human rights abuses not only in the present but also intended to prosecute the perpetrators of human rights violations in the past. The establishment of the human rights court through the enactment of law number 26 of 2000 on Human Rights Courts did not regardless of the pressure of the international community to the Government of Indonesia. It can be said, the establishment of this Court is one of Indonesia's government efforts to fulfill his international

obligations to maximize national legal mechanism to deal with human rights abuses in Indonesia.

Relate to the substance of the human rights court regulation, basically, the law of human rights court has adopted the substance of the Rome Statute 1998 as the material source of the law inside. The adoption of the law is not without considering the consequences. One of the consequences is the occurrence of a generalization of the concept of human rights violations. Mentioned in the law of human rights court that the definition of human rights is a set of rights that inherent in the nature of human beings and the existence of human being is created by God and it is responsible for being respected, protected and fulfil by the State, the law, Government, and any person as a honor and dignity of human being. On the other side, the words of each person are meant to individual people, groups of people, whether civilian, military or police which responsible as individually. Based on the provisions as defining above, it appears that the individual based on law also charged the obligation to protect human rights and accountable individually when negligent towards its obligations. The concepts are basically very contrary to the human rights conception, especially when it collided with the principle of State responsibility as the stakeholder and the concept of human rights violations as historically-philosophical and theoretical. The pure human rights conception basically stated that the only party which is charged by law to protect the human rights in the middle of society is the State, the consequences of the obligation that the only party that could become a subject of human rights violations and has the capacity to take responsibility is the state anyway. The kind of errors are basically due to the Indonesian government is very political decision to adoption the concept of Rome Statute 1998 that in the fact is a legal instrument within criminal law.

On the other side, The effect of misconception regulation does not achieve the effectiveness of law enforcement against human rights violations in Indonesia which occurred either in the present or occurred in the past. Soerjono Soekanto has been stated that there are any five factors that influence the effectiveness of the law enforcement power, one of the concern is closely related to the substance of the law. Soeakanto which has been stated, the substance of the law must be in accordance with the fundamental values and rules apply to any performance or action which became the objects of the legislation. inappropriate between the values, principles, and norms will have an impact on the effectiveness of the law enforcement itself. This is similar with the theoretical which formulated by Friedman, his stated that one of the essential elements that cannot be separated from a law enforcement is the substance of the law itself (the legal substance). Friedman basically also stated that on the complexity of the legal substance of a norm, synergy, alignment of values, principles, and norms is a necessity.

Based on the description above seems clear that substances the article of human rights court which is considered responsive to human rights abuses in the past have been basically wrong in terms of the concept. A law that forces to mix the concepts of criminal law with the concept of human rights that in the fact has the distinction of both historical, philosophical, and theoretical.

2. Political Considerations On the Formulation of law number 26 of 2000 on Human Rights Court

In Indonesia, the existence of the human rights Court is meant as a special court against serious violation of the human rights. Definition of human rights serious abuses can be seen in the explanation of article 104 Law No.39 of 1999 on human rights court regulation, which stated that the serious violations of human rights as follows:

"massacre, killings or outside the judicial decision, torture, disappearances of people, slavery,

or systematically conducted discrimination"

It realized or not, is precisely the human rights court regulation does not define the meant of the term "serious human rights violation". But only mention the categories of crimes which classify as the serious human rights violation, that is crimes against humanity and genocide. Citing the theory which has been presented by Mahfud MD related to legislation nowaday, he stated sometimes in the process of legislation, politics will always be the determination of the law.[16] It is meant, in the process of making regulation political, there is interference political interest in it, either aimed to maintain the existence of an interest, protect an interest, and many other things. In this occasion, the author will outline the political consideration in legislation refer to the law no.26 of 2000 by providing a qualitative analysis. First, the definition of both types of crime, crimes against humanity and genocide in the law of human rights court, basically the adoption of the crime it is refer to the jurisdiction of the International Criminal Court (ICC) which has been regulated in article 6 and 7 Romee Statute 1988, as the basis establishment of the ICC. On the other side, the definition of crimes against humanity in human rights court statute stated that "one of the acts committed as part of widespread and systematic attacks that he knew that such attacks are aimed directly at the civilian population that have been set up in the letters A to J in human rights court statute. Another definition of genocide according to the human rights court statute is "any acts committed with intent to destroy or destroy all or part of a group of Nations, races, ethnic groups and religious groups, conducted with the plan which has been mention in human rights statute. On the formulation, Rome statute is equipped with separate rules which regulated rules of Procedure and Evidence of the procedural law and the Elements of Crime about the explanation of the elements of crimes into the jurisdiction of the ICC. Afterward, the explanation of the elements of the crime is intended to provide a deeper understanding of the same understanding for judges in terms of classifying and give the limit on top of an act that would be classified as serious crimes.

In Indonesia, human rights court made without equipped with Elements of Crime as Rome Statute. So, often confusing law enforcers in particular especially judges when interpreting an act as a criminal offense or delict which classify as human rights violation. In some cases, especially in an Ad Hoc human rights court for East Timor proves there is a different understanding than judges when interpreting an act who are classified as crimes against humanity because of the references they use is different.

Secondly, related to the human rights court legislation which deliberately using equivalent Indonesian language isinnapropriate, the impact on the limits of the human rights court jurisdiction itself. For example, in the terms of Rome Statute has regulated "directed against the civilian population... " translates to " aimed directly against the civilian population... " The addition of the phrase "directly" clearly implies the difficulty of reaching the perpetrator not the perpetrator of the field (re: giver of commands). On the other side, the weakness in terms of usingIndonesian language which equivalent irregularities can be seen in article 42 based on human rights court statute on the responsibilities of command. The provisions of article 42 is a strategic and important provision in the human rights court statute. Because this article becomes the legal basis for a military commander or other individuals who are in the position of supervisor or holder of other powers position to be requested his responsibility as the criminal offense as negligence and failure to carry out the control of his lower rank. The Article 42 basically stated military commander or someone who is effectively acting as a military command and/or a supervisor, either police or other civil can be accounted against the criminal acts".

The Article 42 of this law uses the term of "could" and remove the phrase "criminally" on its formulation. Whereas, in the real script of Rome Statute 1998, in Article 28 alphabet A, firming "shall be criminally responsible" which is appropriate translated as "shall be criminally responsible" also, not "could be accounted to a criminal act". The consequence from its mistook could occur a multi-interpretative meaning around the law enforcement officers such as judge. It can be defined that the commander and/or an individual which has a higher level "not always have to" account criminally on their lower range's act. At least, the completion of Timor-Timur case, Tajung Priok case and Abepura case become a real evidence that showed the weakness of its regulation. At that time, almost all of the defendant in Ad Hoc Human Right Court and in a permanent court prosecuted based on this Article 42 because of mostly the doer was a person who has a higher range than the other, either civil or military. And with inappropriate translation, it will be not weird when most of them decided "free" by the court.

III. CLOSING

1. Basically law No. 26 of 2000 is an instrument that was adopted directly from the Rome statute 1988 which govern about the International Criminal Court (ICC) into a legal instrument that moves as Indonesian human rights court enforcement. There is a difference in historical-philosophy, juridical, principle, and theoritical of international criminal law with human rights. Mix up both of them in the context of the law proved ineffective because there is a difference characteristic in both them.
2. In accordance with the definition that the law No. 26 of 2000 which adopted from ICC basically should have the same substance with the ICC. But in the reality, there are some problem in the formulation of law No. 26 of 2000: First, based on the definition of world crime and genocide which transformation into a different meaning. Second, there is a differentiation word which influences the aims of law that adopted in ICC. The result of two misconceptions in the implementation of law No. 26 of 2000 on human rights enforcement has felt no power to catch the human rights offenders in the past which the majority of offenders is the apparatus Government.

Recomendation

1. To the government parties, it should immediately ammandement law no.26 of 2000 aims to make the regulation appropriate with the lanscape of historical-philosophy, juridical, principle, and theoritical
2. To the human rights activist have to always critical toward the human rights enforcement against human rights violation.
3. To the all of Indonesian society, refused to forget.

ENDNOTES

[1]Manfred Nowak, Introduction to The International Human Rights Regime, 2003, Leiden, Nijhoff Publisher, p. 9

[2]Rhona K.M. Smith, Christian Ranheim, dkk., HukumHakAsasiManusia, 2008, Yogyakarta, PUSHAM UII, p. XiX

[3]Eko Riyadi, *Bahan Ajar Mata Kuliah Hukum Hak Asasi Manusia*, 2015, Yogyakarta, Fakultas Hukum Universitas Islam Indonesia, p. 109

[4]Rhona K.M. Smith, Christian Ranheim, dkk., Opt.cit, p. 81

[5]**Preamble in International Covenant on Civil and Political Rights, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 23 March 1976, in accordance with Article 49**

[6]SoerjonoSoekanto, *Faktor-Faktor yang MempengaruhiPenegakanHukum*, 2007, Jakarta, RajaGrafindoPersada, p. 5

[7]*Ibid*., p.11-60

[8]Ni'matul Huda, *Ilmu Negara*, 2014, Jakarta, RajaGrafindoPersada, p.17

[9]*Ibid*,. p.40

[10]*Ibid*., p.41-43

[11]Rhona K.M., *Op. Cit*., p.40

[12] In the essence, Hegel explained that where there was a dynamic of a thing, then there was a clash also among the existing particle. At least, Hegel made a conclusion about Thesis, Anti-Thesis, and Synthesis also

[13]*Ibid*., p. 68-69

[14]Sefriani, *PeranHukumInternasionaldalamHubunganInternasionalKontemporer*, 2016, RajaGrafindoPersada, Jakarta, p. 282

[15]KoalisiMasyarakatSipiluntukMahkamahPidanaInternasional, *Mengenal International Criminal Court. MahkamahPidanaInternasional*, 2009, Sentralisme Production, p. 15. See also, http://referensi.elsam.or.id/wp-content/uploads/2014/09/Hukum-Pidana-Internasional.pdf accessed in 10 March 2017 at 22.59 WIB

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The Challenges to Build the Culture of Human Rights in Islam

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ABSTRACT

The Muslims world has a problem of accepting Human Rights in Islam, even the Islamic one. The skeptical attitude toward Human Rights in Islam are our awareness, knowledge and implementation in our life. There are many violations of Human Rights, which remain spread in all over the world until now. There are violations of Human Rights in all the countries in this universe. It is not possible to find a country, which free from this violation. It is very terrible, such as the professional killing and systematic murder. It will cause to grow the culture of dead. This culture does not respect on the human life. In front of the violations of human rights, all the people must respect the value of human person. With this reason, the promotion and protection of human rights for justice must be a priority program to build the culture of human rights in our country. The promotion and protection of human rights are considered as an obligation to promote, to protect and to observe the human value, which is the dignity of human person to create the real culture of human rights. In these situations we have obligations to build the culture of human rights in Islam. We must promote and to protect the value of human persons and their fundamental rights in Islamic perspectives. In the Islamic teachings, the human rights, justice and peace are inherent rights in our dignity as human person. Islam is the unique religion in this world, which has the official teaching of human rights. Beside the Qur'an and Hadits, since the prophet Muhammad, with the Declaration of Medina, Hudaibiyah Treaty, the Universal Declaration of Human Rights in Islam (of 1981), until the Cairo Declaration on Human Rights in Islam (of 1991), Islam always promote the human rights and would like to build the culture of human rights in all over the world. The culture of Human Rights can be built, if the culture of life has been respected, and the people, especially the organ of the government takes care and respect to Human Rights and promote them as well as possible. So, the human life will grow to the directions of the welfare for the people and more civilized. If the people develop the culture of Human Rights, the human civilizations will grow for respect them. We have task to develop the culture of Human Rights.

Key Word: *Human Rights, Human Rights in Islam, Culture of Human Rights, Culture of Dead.*

1. Human Rights are compatible with Islam?

In this presentation, we would like to discuss on what are the challenges to build the culture of Human Rights in Islam. Islam as a universal society has special declarations on human rights. But all Muslims have not yet recognized these official documents. So, we can begin our discussion with a principle questions: Human Rights are compatible or not Compatible with Islam?

To responds this question, we must trace, how and what the reactions of Muslims about the Human Rights. On the discussion of Human Rights among the Muslims, we can see the reactions in three groups: a). Human Rights are incompatible with Islam; b) Human Rights are compatible with Islam., and c). Neutral or Indifferent Opinion.

The first opinion states that the Human Rights are incompatible with Islam. The Muslims must against to the Human Rights. Islam is the supreme and perfect religion, and the Human Rights do not derive from the revelation and spirit of Islam, but come from the Christian and western

civilization. The consequences, we must refuse the Human Rights, which always obstacle the Islamic spirit and civilization. The other opinion is contrary with the first statement, the Human Rights are compatible with Islam. It is because all the human rights base on the natural law, compatible with the Holy Books and have rooted on the Islamic culture and civilizations. The real source of Human Rights is the Qur'an and the Hadists. We must accept totally the Human Rights. And the third opinion is neutral or Indifferent judgement on Human Rights in the relations with Islam. This Neutral or Indifferent Opinion affirms that Human Rights are not important and not disturb for their life. The existence of Human Rights can not change their attitude and the society.

The opinion and also the attitude of many Muslims do not so spontaneously to accept Human Rights as integral part of the Islamic religion. We speak on Human Rights and Islam. If we speak on this subject (: Human Rights and Islam), it seems that Human Rights come from out side of the Islamic system. We must think more advance to speak on Human Rights in Islam.

Until now there are three important documents on Human Rights in Islam: First, The *Medina Declaration*, from the early of Islamic religion, created by the Prophet of Mohammed in accordance with the society of Medina. This document contains the rights of every persons and gives the fundamental rights and freedom for the people to live in harmony and peaceful.

Second, The *Universal Islamic Declaration on Human Rights,* proclaimed by the Islamic Council in Europe, and it was declared in a meeting held at UNESCO headquarters in Paris on September 19, 1981. There are twenty-three articles on Human Rights in Islam, which have source come from the Holy Book (Qur'an) and immaculate Sunna (Hadits). These rights are the Right to Life, the Right to Freedom, the Right to Equality and Prohibition Against Impermissible Discrimination, the Right to Justice, the Right to Fair Trial, the Right to Protection Against Abuse of Power, the Right to Protection Against Torture, the Right to Protection of Honour and Reputation, the Right to Asylum, the Rights of Minorities, the Right and Obligation to Participate in the Conduct and Management of Public Affairs, the Right to Freedom of Belief, Thought and Speech, the Right to Freedom of Religion, the Right to Free Association, the right to ownership, the rights and duties of worker, the right of individual to self-sufficiency, the Right to Protection of Property, the Status and Dignity of Workers, the Right to Social Security, the Right to Found a Family and Related Matters, the Rights of Married Women, the Right to Education, the Right of Privacy, the Right to Freedom of Movement and Residence[1].

Third, The *Cairo Declaration on Human Rights*, adopted by the Islamic Conference of Foreign Ministers of the Islamic Countries Conferences (1991)[2]. This documents is very important, and the Muslims must accept it as a guide of their social life.

With these three documents and also, we can add the Hudaibiyah Treaty, all Muslims in this world must be grateful; it is because just only Religion of Islam has official documents on Human Rights. The other religions have not official documents of Human Rights as a social principle doctrine. The urgent question is why the Muslims speak on Human Rights and Islam? The best idea must profound the subject on Human Rights in Islam. This is an obligation for all Muslims, must take part actively to promote the Human Rights in Islam. Human Rights are integral part of Islamic system, or more exact terminology is that Human Rights in Islam must be a fundamental and basic of the total Islamic Teaching.

So, we must begin to know exactly: What are the Human Rights in Islam? We must find out the Notion of Human Rights in Islam and the discuss this subject for our life. The Human Rights in Islam can be formulated as: The fundamental rights, created by God, inherent in human dignity, have characteristics universal, sacred, absolute, inviolable, inalienable, indivisible, interde-

pendent, and must be protected and promoted especially by the Muslims in all over the world.

This notion and the meaning of Human Rights in Islam is clear and distinct. The consequence if we know well the notion of Human Rights in Islam, so the obligation of the Muslim scholars is to promote it to all over the world, and convince to all Muslims that Human Rights in Islam are integral part of the style of Islamic life. We must create the culture of Human Rights in Islam. Based on the 6 Considerans of the 10 s for promulgation the Cairo Declaration on Human Rights in Islam:

1. Aware of the place of mankind in Islam as vicegerent of Allah on Earth;
2. The Document on Human Rights in Islam that will serve as a guide for Member states in all aspects of life;
3. The Cairo Declaration on Human Rights in Islam that will serve as a general guidance for Member States in the Field of human rights.
4. The civilizing and historical role of the Islamic Ummah which Allah made as the best community and which gave humanity a universal and well-balanced civilization,
5. The efforts of mankind to assert human rights, to protect man from exploitation and persecution, and to affirm his freedom and right to a dignified life in accordance with the Islamic Sharia's
6. a. The fundamental rights and freedoms according to Islam are an integral part of the Islamic religion,
   b. Safeguarding those fundamental rights and freedoms is an act of worship whereas the neglect or violation thereof is an abominable sin,
   c. safeguarding of those fundamental rights and freedom is an individual responsibility of every person and a collective responsibility of the entire Ummah; we have task in our society to create the culture of human rights in Islam. This task is an expression and realization of our faith in Allah. It is because as Cairo Declaration affirms that "All human beings are Allah's subjects" (1, b).

The problem is how we must create the culture of Human Rights in Islam, if there are many violations of them. The violations of Human Rights are real social historical fact in all over the world.

2. Violations of Human Rights as Social Historical Fact

The violations of Human Rights remain spread in all over the world until now. There are violations of Human Rights in all the countries in this universe. It is not possible to find a country, which free from this violation. It is very terrible, such as the professional killing, systematic murder, genocide, torture, other cruel and inhuman treatment, violence against women and children. It will cause to grow up the culture of dead. This culture does not respect on the human life. The professional killing, systematic murder and torture are real social fact, which are not distinct and justly resolved. These criminal actions will grow more terrible, if the official organs of the government provoke and take apart in this matter, do not want to obstacle and stop them, although they have power and are capable to do it.

If we observe the recent annual report on Human Rights made by the Amnesty International, the Human Rights Watch and the US Department of the State, there are many violations of Human Rights in all over the world. The human situation is really terrible. Up till now the violations of human rights grow up and more professional. There are many victims. The governments of many countries are not capable to protect and promote the human rights in their countries,

although it is their task and they have power for resolve this problem. They should fulfill the rights of their people, but many people to be victims of the political action of their governments and other violence of the power in the society. The dignity of human person as if has not value in their life.

The situation of Human Rights in Asia[3], for example is real terrible. On August 1997, Asian Human Rights Commission (AHRC) established The Asian Charter on Human Rights, this Charter was updated on 30 March, 1998. The governments of the Asian countries in that time have not yet decision to compose the Asean Charter of Human Rights, later published the Asean Charter on November 20, 2007. In background to the Charter, established by AHRC, we consider how the struggle of Asian people for fundamental freedom and human rights. They suffer, caused the violations of their rights. This Charter affirms that the Asian struggle for rights and freedoms has deep historical roots, in the fight against oppression in civil society and the political oppression of colonialism, and subsequently for the establishment or restoration of democracy. The reaffirmation of rights is necessary now more than ever before. Asia is passing through a period of rapid change, which affects social structures, political institutions and the economy. Traditional values are under threat from new forms of development and technologies as well as political authorities and economic organizations that manage these changes (1.1).

The leaders of the Asian governments always promote Asian Value and stress that it is more important than human rights. But what is Asian value, they did not declare and announce. In reality, the Asian value has no value when there are violations of fundamental freedom and human rights. Also, the situation and development of this area makes dehumanity, as the charter said that in particular the marketization and globalization of economies are changing the balance between the private and the public, the state and the international community, and worsening the situation of the poor and the disadvantaged. These changes threaten many valued aspects of life, the result of the dehumanizing effect of technology, the material orientation of the market, and the destruction of the community. People have decreasing control over their lives and environment, and some communities do not have protection even against eviction from their traditional homes and grounds. There is a massive exploitation of workers, with wages that are frequently inadequate for even bare subsistence and low safety standards that put the lives of workers in constant danger (1.2). The situation of Asian people shows as a catastrophic mosaic. "Asians have in recent decades suffered from various forms of conflict and violence, arising from ultra-nationalism, perverted ideologies, ethnic differences, and fundamentalism of all religions. Violence emanates from both the state and sections of civil society. For large masses, there is little security of person, property or community. There is massive displacement of communities and there are an increasing number of refugees" (1.4).

We can observe the situation of Asia is very contradictive. The Asia as continent is very rich in natural resource, culture, race, religions, but this people suffers. The Asian Charter says: "Asian development is full of contradictions. There is massive and deepening poverty in the midst of growing affluence of some sections of the people. Levels of health, nutrition and education of large numbers of our people are appalling, denying the dignity of human life. At the same time, valuable resources are wasted on armaments, Asia being the largest purchaser of arms. Our governments claim to be pursuing development directed at increasing levels of production and welfare but our natural resources are being depleted most irresponsibly and the environment is so degraded that the quality of life has worsened immeasurably, even for the better of among us. Building of golf courses has a higher priority than the care of the poor and the disadvantaged".

(1.3)

Asia is never in peaceful situations. Also in Indonesia, there are more than 4.600 Churches and Mosques are burnt by the people in the name of God or religious mandate. Unfortunately, we can observe how the people in Asia, especially in Indonesia enter in the conflict situations, violate the human rights and fundamental freedom. Problem of majority and minority, prejudice, the characteristic religions, etc., always provoke the people do not support to live in harmony. The violations of human rights, is very terrible and uncountable again.

The violation of human rights spread not only in Asia, but also in all over the world, especially in Latin America and Africa. The violation of human rights in these two continents invite us to know more profound the meaning and value of human dignity. Human persons have value in their freedom and dignities as a human person. All human person has the same dignity, with differences in function and activity in their society.

In the *Millennium Declaration*[4], firstly however – there are 1,350 representatives of over 1,000 non-governmental organizations (NGOs) and other civil society organizations from more than 100 countries - gathered in New York from 22-26 May 2000 stated that entering the third millennium, the fulfilment of human rights is threatened by numerous challenges. The increasing economic gaps and the unprecedented increase in poverty that are the result of the existing world economic order, constitute the greatest and most unjust violations of human rights: the misery and death of millions of innocent people every year. In the same document, they affirm: "We are witnessing some of the worst violations of human rights, including the use of food as a weapon, in the context of the armed conflicts and civil wars, which have been erupting with increasing frequency. Moreover, civilians are bearing the brunt of the deployment of weapons of mass and indiscriminate destruction in such conflicts. We are also witnessing a resurgence of racism, fascism, xenophobia, homophobia, hate-crimes, ethnocide and genocide, which impact most greatly on indigenous peoples and other disadvantaged or under-represented groups; the resurgence of patriarchy that threatens to erode the gains made by women; the persistence of the worst forms of child labour; the impunity enjoyed by perpetrators of massive and systematic violations of human rights; the on-going and deepening process of globalization which undermines internationally recognized human rights, labour rights and environmental standards; the continued insulation from human rights accountability of non-state actors, ranging from transnational corporations and international financial institutions to fundamentalist civil society organizations and criminal syndicates; an upsurge of violence, militarism and armed conflict; the increase and growth of authoritarian regimes; and the fact that human rights defenders continue to be highly vulnerable targets of repression in many areas of the globe"[5].

The violation of Human Rights is real terrible, the consequences are the protection and promotion of Human Rights as an obligation for all human being, especially the government and the institutions who promote the dignity of human persons.

3. The Islamic Obligations to Create the Culture of Human Rights

In front of the violations of human rights, all the people must respect the value of human person. With this reason, the promotion and protection of human rights for justice must be a priority program to build the culture of human rights in our country. The promotion and protection of human rights are considered as an obligation to promote, to protect and to observe the human value, which is the dignity of human person to create the real culture of human rights.

In these situations we have obligations to build the culture of human rights in Islam. We must

promote and to protect the value of human persons and their fundamental rights in Islamic perspectives. In the Islamic teachings, the human rights, justice and peace are inherent rights in our dignity as human person.

Islam is the unique religion in this world, which has the official teaching of human rights. Beside the Qur'an and Hadits, since the prophet Muhammad, with the Declaration of Medina, Hudaibiyah Treaty, the Universal Declaration of Human Rights in Islam (of 1981), until the Cairo Declaration on Human Rights in Islam (of 1991), Islam always promote the human rights and would like to build the culture of human rights in all over the world; but many Islamic countries and organizations are ignore to implement these heritage and Islamic instruments of human Rights in Islam. Now we have obligations to build the culture of human rights in Islam and capable to counter the challenges from all aspects.

The culture of Human Rights can be built, if the culture of life has been respected, and the people, especially the organ of the government takes care and respect to Human Rights and promote them as well as possible. So, the human life will grow to the directions of the welfare for the people and more civilized. If the people develop the culture of Human Rights, the human civilizations will grow for respect them. We have task to develop the culture of Human Rights.

4. The challenges of Islamic Public Acceptance

The challenges of Islamic Public Acceptance for Creating the Culture of Human Rights in Islam should not in the theory or concept, but in the praxis, when we observe our situation in Asia or specially in our country, Indonesia.

The promotion and protection of human rights are considered as an obligation to promote, to protect and to observe the human value, which is the dignity of human person. In this sense, the contribution of Human Rights in Islam must be clear. All Muslims in this world have obligation to promote the Human Rights in Islam; and now to create the culture of Human Rights in Islam. To create this culture, we must be capable to implements of Human Rights in Islam as stabilised, as guide of our life. Human Rights as in Cairo Declaration are really Islamic official documents, that we must promote and to be acknowledge in all over the world.

These documents of Human Rights in Islam, such as Medina Declaration, Hudaibiyah Treaty, Universal Declarations of Human Rights in Islam (1981) and Cairo Declaration of Human Rights in Islam, must be fundamental instruments of Human Rights, which we must promote in all Islamic aspect of life. These documents are really basic Islamic teaching, and all Muslims must consider, know, understand and implement in our society. These Human Rights are integral and inseparable part of our life, which are capable to support all our society to follow and develop them.

So, the challenges to create culture of Human Rights in Islam are first, the public acceptance of Islamic people, the second is the knowledge of our people to the human rights Instruments, and the third is implementation of Human Rights in Islam in our society. It is not easy, but we must capable to create it, because to promote the culture of human Rights in Islam is our obligation as an expression of our Islamic faith and also as manifestation of our faith in Allah.

ENDNOTES

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[3] Martino Sardi, "The Challenges for Protection and Promotion of Human Rights and Peace", in Hilman Latief (ed.), *Rediscavoering Peace: Religion, Culture and Politics in the Age of Crisis"*, LP3M UMY, Yogyakarta, 2016, 74-78.

[4]Cf. *We the Peoples Millennium Forum*: Declaration and Agenda for Action, Strengthening the United Nations for the 21st Century, have gathered at the United Nations (UN) Headquarters in New York from 22 – 26 May 2000 or *Millenium Declaration*, part D. about "Human Rights". In This meeting there are 1,350 representatives of over 1,000 non-governmental organizations (NGOs) and other civil society organizations from more than 100 countries.

[5] Idem

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International Perspective on Incorporating Good Governance Principles in Three Countries' Land Administration System: Malaysia, Turkey and Indonesia

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Abstract

A Global model on incorporating good governance principles for developing Land Administration System to support strategic programs such as sustainable development, national economic growth, and ordered social life is undeniable for each country all over the world. These are interrelated between national and international development. Key global challenges such as technology development, many economic reform, globalization, and sustainable development for particularly land policy are needed to be responded by which different national policy, legal framework, institution, and customary law must be energized, harmonized and revolutionized well national land policy. However, sharing and comparison among countries carry a considerable lesson to achieve more efficient and effective land administration system. This article discusses a comparative study among countries in incorporating good governance principles in the land administration system based on global perspectives. This is to examine the differences and similarities on several substantial aspects in the different land law system. From the whole views on the comparative study, this chapter steps firstly by illustrating of overviews indicators on the global perspectives of good land governance. Later on, it then explains land policy among three countries that includes the ideological background, principles, objective and targets and the institution; secondly, national legal framework, institutional structure, authority; thirdly, land use planning in tackling disaster; fourthly, organizational land authority; fifthly, appreciation to the customary law in the national land development that examines indicators of land administration system in the form of local community responses and public participation in land policy making.Comparative study among three countries: Indonesia, Malaysia and Turkey, showed similarities and differences. The compared objects consist of policy, legal framework and legislation, land use planning in response to the disasters; cooperation among land institutions in sharing the land information data, and the respectability of customary law in the land policy development. Similarities are shown by them due to the existence of obligatory international legal framework and also to attract international foreign investment. Meanwhile, differences are occurred due to consider different local political and social backgrounds.

I. Introduction

A Global model on incorporating good governance principles for developing Land Administration System to support strategic programs such as sustainable development, national economic growth, and ordered social life is undeniable for each country all over the world.[1]These are interrelated between national and international development. Key global challenges such as technology development, many economic reform, globalization, and sustainable development for particularly land policy are needed to be responded by which different national policy, legal framework, institution, and customary law must be energized, harmonized and revolutionized well national land policy. However, sharing and comparison among countries carry a considerable

lesson to achieve more efficient and effective land administration system

This chapter discusses a comparative study among countries in incorporating good governance principles in the land administration system based on global perspectives.This is to examine the differences and similarities on several substantial aspects in the different land law system. From the whole views on the comparative study, this chapter steps firstlyby illustrating of overviews indicators on the global perspectives of good land governance. Later on, it then explains land policy among three countries that includes the ideologicalbackground, principles, objective and targets and the institution; secondly, national legal framework, institutional structure, authority; thirdly, land use planning in tackling disaster; fourthly, organizational land authority; fifthly, appreciation to the customary law in the national land development that examines indicators of land administration system in the form of local community responses and public participation in land policy making.

II. Discussion

A. General Indicators of International Perspectives on Incorporating Good Land Governance

Indicators in the land administration system in level of international perspective are very critical to examine how well incorporating universally good land governance principles have been performed. By argues, this mission basically were driven by international funding such as World Bank, IMF, ADB and WTO by which these international institution emphasize the good land governance only based certain indicators that are enforced in all important elements of the land administration system as well. Therefore, to highlight a comprehensive approach, scopes of the elements that to be analyzed is covered: land administration system about policies, legal framework, sustainable development programs in certain areas, particularly land management development. Otherwise, international perspectives also appreciate highly to the existence of each of countries' differences such as cultures, ideologies, religion, local wisdom and local geography.

Further influence, land administration system of the global context to the national one has occurred.As fast as the dynamic concept of the state's role is growing, the issue of governance is also developed and broken down into the deeper concepts and its implementation internationally and nationally. It is in the greater respects and wider social demands amid the more democratized and decentralized governments in all regions. Originally, good governance principles wereneeded to be incorporated in all public sectors such as public policies, law making processes, and fundamental public services.As socially desired condition that public stakeholders demanded, particularly state is required to be managed in line with the principles of rule of law, accountability, transparency and public participatory. The public sector dimensions, from their law making to law enforcements, needed to engage an involvement all parties. It is no longer managing public sectors by a monopoly-authoritarian -based exercise of one group that neglecting other parties.

However, the concept and its practice of governance later are expanded for all sectors includingprivate sectors. It is called as good corporate governance. Companies are getting concerned the public contributions and aware of them as their stakeholders. For this reason, they beware to manage institutions in line with the public accountability and public aspiration. Over the past decade, both parties, governmental and corporate institutions have been committed to enforce the principles of good governance, with good corporate governance for non-public dimensions as well.

The principles and legal framework of good governance incorporated in governmental prac-

tices are to make sure all exercises of power based on the rule of law, public participatory and accountability. It also implies on promoting all human right protection on the land and natural resource policies. In larger area, it is obligatory that government conducts an economic and social development for people's prosperity.

This is why the World Bank urges that it is either a platform for performing development potentials sustainably, implementing effective and efficient system and ensuring good management through all level of society in the world. For furtherdemand so, the World Bank Institute defines the importance of governance is set of tradition and institution by which authority is exercised, also processeson how government is selected, monitored, and even replaced; governance is the manners on how to respect citizens and to manage the state for the highest level of modern institutions that govern economic and social interaction among them.

In the main concept, in term ofprocess, land governance requires a democratization and decentralization. Democratization is a political framework by which every citizen is involved for decision making, controlling and its implementation of policy. Thus, in this concept, spirit of democratization is approached to achieving a political system on how the state is from, by and for people. In term of output, good land governance consists of understanding where state is administered for protecting people prosperity. Therefore, this is close to human right protection and sustainable development. Government is obligatory to provide an ordered legal framework, professional and high integrity institutions on the land administration system to make sure people's rights to access land and natural resources. In brief, general indicators for incorporating good governance principles have been determined as fundamental elements as follows:

a. The global ethic - based power exercises
b. Public aspiration based modern institution of state
c. Democratization and decentralization on governing state matters
d. Achieving people's prosperity

B. Global Land Governance Indicators, Between "Taken For Granted" And Tackling Common Problems on Countries' Land Administration System

Undeniably, each country in the word interprets the meaning of good governance principle in which there have differencesin manners and standards. Some take it for granted as well as global funding offering numerous programs such as a systematic land registration, land reform and land consolidation. Many take it as just considerable values onlydue to contextual culture, economic, legal, institution, social and administrative circumstances. Subsequently, difference strategy will carry out different results. Probably, good processes may result a bad thing or in contrary. Because of these factors, in designing policy, legal framework, and its strategy, it is important that every country needs to study a wide range of considerable aspects which substantially areconcerning relationship of humankind to land[2]. Therefore, land administration system is facing challenging complexities internally or externally in term of economic, politic, social and culture interests, in which among countries' land administration there are numerous similarities and numerous uniqueness.

There are key indicators of international principle for success on incorporating good governance principles in the reform land administration system, namely:

1. Land policy principles performed in line with the state's constitution illustrating incorporating the rule of law, legitimacy principle.
2. Legislation and Legal framework on Land tenure principles conducted in respect to people

rights and access to land for primarily fulfilling fundamental needs, it is as an illustration of incorporating the justice, public accountability and responsiveness principle. In addition, land administration and cadastre principles for people's legal right security and elevating people's land productivity reflects on incorporatingthe certainty, efficiency and effectiveness principle.Land Administration also must be supported by technical principles which are up to date andin line with the efficient, effective and sense environmental awareness principles

3. Institutional principles to guarantee minimum standard on fundamental public service reflect on incorporating efficiency and public accountability principle. For proper capacity building, human resource development principles must be conducted in line with the integrity and professional requirement
4. (Disaster management is well organized in) land use planning principles andwell available spatial data infrastructure to guarantee protecting justly economic and environmental necessities in line with sustainable development illustrate the incorporation of advance vision principle.
5. Efforts to protect local indigenous and their customary laws must be taken in account in modernizing national land law system.[3]

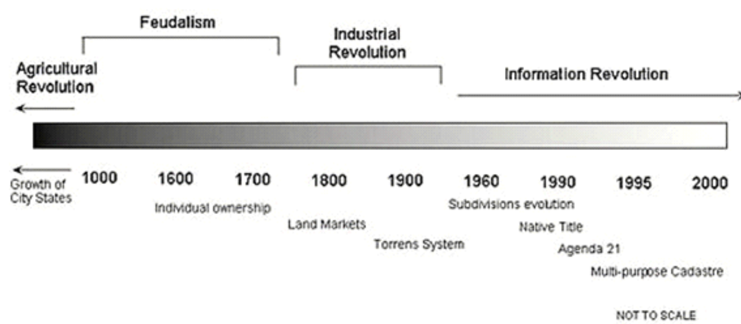
Land policy is set of values, principles, objectives, as reflection of constitutional values. As supreme law, constitution provides set of views system such certain ideology and fundamental idea that are embraced by community and certain social entity to achieve state's objectives. Ideology motivates people and organization to achieve their justice and prosperity. In this point, the policy products and mechanism need principles to be guidelines and standard. Therefore, it is critical that every single policy must be in line with the principles constitutionally. More accurate to spell constitutions, policy will be more legitimacy. Basically constitution articulates interests among government and governed in harmonious and just statements. Essentially, the policy also has to play a role once as guidelines and output to accommodate and harmonize different interests among parties, including to achieve an environmental vision such as maintaining the forests, water resources and other natural resources. It can be substantially connected to the pivotal tension on sustainable development in which theenvironment and the pressures of human activity occur. It covers value system and procedure of recognizing, controlling and mediating rights, restrictions andresponsibilities over land and resources that forms the fulcrum. Thus "land administration" can be one of the fundamental elements that play an important role in the infrastructurefor sustainable development. In this context, "sustainable development"means development that effectively incorporates economic,social, political, conservation and resource management factors indecision-making for development. The challenge of balancing these competing tensions in sophisticated decision making requires access toaccurate and relevant information in a readily interactive form. In delivering this objective, information business systems will play a critically important role. Unfortunately modern societies still have some way to go before they will have thecombination of legal, institutional, information technology and business system infrastructures required to support land administration forsustainabledevelopment[4]

Therefore, land policy generally must be reflected on constitution's mandates, ideological choice, fundamental guidelines on standard processes and social objectives. This element must be basis to incorporate good governance principle in term of legitimacy, rule of law and public participation. Legislation and legal framework on the land administration system are required to be tools of policy. As Roscoe Pond stated in the sociological Jurisprudence, the law is the tool of

social engineering. On the basis of law, the elements of land policy will be executable. State authorities, people's rights and obligation, and common prosperity can only be driven through legislation and legal framework. On it, land tenure matter, land reform visions, land registration can be exercised in civilized manners.

Land tenure system is one of the fundamental components of land policy by which state and government respect to people's land rights and how they can access to land for primarily fulfilling fundamental needs.It is as an illustration on incorporating the justice, public accountability and responsiveness principle. This is a critical evolution so that modernization of land tenure on people's land right is necessary.

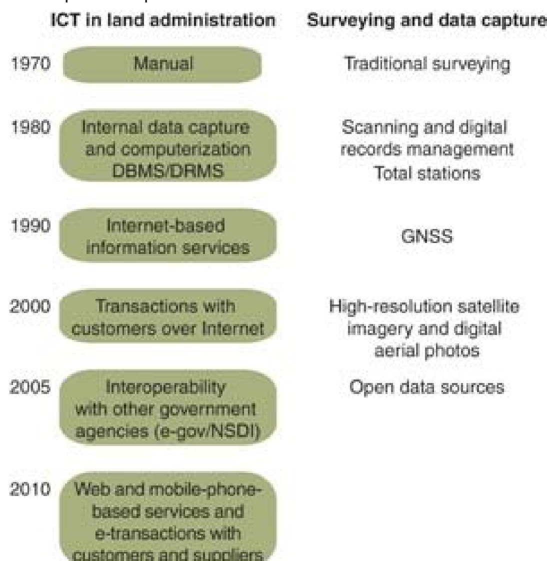
Picture 50.1. Illustration on evolution of land administration in the world



Because of different phases among countries in the world, there is no internationally agreed method specifically to evaluate and compare the international land administration system. This was caused as well that the soil was understood by each nation and society in different perceptions. Various social value system (ideology), political, and economic determinants becomevarious public perceptionsof the land and its relationships between the land and humankinds.

However, there are performance indicators of a country's land administration system that can be compared one to another. The evolution on the legislation and legal framework of land cadastre and land registration system could be marked with the indicators of modernized process from manual system of land registration to web and mobile phone based service.

Technology in the development phase can be visualized as follows:

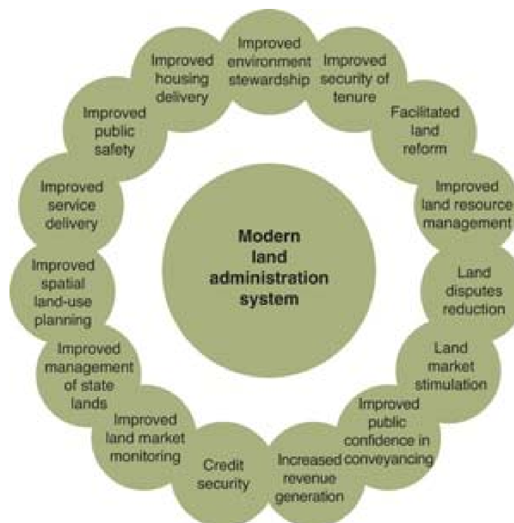


The evolution on incorporating good governance principles in land administration system in term of legislation and establishing legal framework could be also indicated through various phases that taking priority on certain dimension on land matters.

Based on interest groups, the phases of the land administration development arehistorically divided into three evolutions: first phase was to support the tax policy, by which interest group of power considered the tax as the people payment to government and state although people did not get a direct advantage, even still felt economic burden. Second phase was to support the capitalization of land policy. Third phase isto develop a priority on land planning to achieve sustainable development.

In land administration system, taking a priority on certain dimension carries out basic components of LAS internationally including ownership of land (land ownership), land value (land value) and land use (land use). In term of fundamental process the UN-ECE (1996) describes about LAS as the process of determining, recording, and disseminating theinformation about the ownership, the value and the use of land. All component arestrongly inherent in every land right.For these reasons, every state is mandated necessarily to develop the land policy that justly covers and protects all three components.

In term of legal framework, LAS functions include: judicial functions related to the protection of land ownership; function of fiscal policy regarding taxation in land, and regulatory functions concerning land use planning / land use and land planning, and land information management functions.



6.4. Similarities and Differences of Indicators on Good Governance Principles Derive from National and International Sources

Good Governance Principles indicated by the World Bank consist of:

1) Efficiency and Effectiveness
2) Transparency, consistency and predictability
3) Integrity and accountability
4) Subsidiary, autonomy and depolarization
5) Civic engagement and public participation
6) Equity, Fairness and impartiality
7) Legal Security and the Rule of Law

Good Governance Principles on the Land Tenure and Administration set out by FAO comprise:

1. Efficient, effective and competent
2. Responsive
3. Legitimate
4. Transparent
5. Consistent, predictable and as impartial
6. Accountable
7. Equitable
8. Sustainable
9. Locally responsive
10. Participatory
11. Providing of security and stability
12. Dedicated to integrity

C. TheorizingIncorporating GoodGovernance Principles in the Land Administration System Internationally to nationally.

The advantage of good governancein the land administration system isillustrated that the government and society are inspired to do together. Gathering among them lead to energize in achieving the existence of a good land administrationsystem in which the state condition is supported by: a good land tenure security, land reform facilitatinggood management of land resources, reduced land disputes. In term of economic performance, land marketing is supported by conducive climate, good public confidence on land based economic transactions increase, and, income gains get increase, security of credit is good, effective control on land marketing is effective.Public proposes such as good management on state land, land use planning and good land services, public safety, supply on housing program, service sector, and good environmental management reach at better growth.

Although good governance principles are a critical factor to accomplish a sustainable development, Steps to incorporate good governance principles in the land administration system can be identified chronologically and gradually as follows:

a. Acquisition in the 19thcentury of territory and the allocation of individualrights to this territory under *'a semi-feudal process'* (page 80).
b. Destruction of the indigenous law and its partial displacement by thereceived western law.
c. Reconstruction, a term used by Mc*Auslan* to describe a phase where*colonial authorities attempted to adapt customary law largely for their ownends'* (page 84).
d. Substitution, dating from the mid-1950s, where policies were adopted to rapidly move to a system of individual tenure for indigenous populations.
e. Integration, the attempt to develop a new common land law in a countrybased on the disparate parts of existing law.

D. Comparative Study On Incorporating Good Land Governance Principle In Various Sectors Of Land Administration System

1. Land Policy System of Indonesia

Indonesia had been colonized longer than 350 years by Dutch Colonist and inherited complicatedly agrarian law system in which there were three land law systems ruled nationally namely the west law system, *adat* law system and Islamic law system. To tackle the situation, the consti-

tution, particularly Article 33 (3) inspired to enact Basis Agrarian Law No 5 of 1960 by which national land law system is hopefully able to be generated. Based on this article, Indonesian land administration system was established. It takes into account of land customary law as foundation of national agrarian law. It is believed as the Indonesian aboriginal land law system. Many concepts in consideration, articles and its explanation on it are emerged to be general principles for the development of national agrarian laws.

The most critical principles that are needed to be incorporated to be good land governance are: positioning state authority, keeping unitary state, elevating nationalism, laying down social function on every land right, ruling the use of land sustainability with integrated land use planning, governing land matters based on decentralization, conducting land reform for achieving just and productive land, supporting the religious institution development by Islamic land endowment, recognition on private right and public interest by land registration and land acquisition system.

When changing regime occurred, political will on agrarian law and law got changingas well. The spirit to develop national land administration system turned to other direction. The intention to break down the concept of article 33 constitution for achieving an integrated national agrarian law system was facing barriers in the form of newer choice of ideology – rather turning into liberal-capitalism based land policy spirit, separation on agrarian law matters into complicated separated agrarian (natural resources) law product, creating less bureaucracy on foreign investment policy. These were indicated by issuing numerous laws in 1967 such as the Law No 1 of 1967 concerning Foreign Investment and other several natural resource laws as the No.9 /67 concerning the Forest. It was followed by issuing the law No 4 of 1974 concerning the local Government in which it started with initiation of decentralized governmental system of local government's authority. Emphasizing stronger on incorporating the efficiency and effectiveness that was supported by formal legitimacy of centralized policy making process has caused effects neglecting the principle public control and participation, accountability, transparency and responsiveness to the local communities. Social justice and common prosperity were far signified by distributions of development revenues that were uneven and poverty was in somewhere amid minority ofprosper people.

So far, incorporating good governance system through legislation is going on in terms of decentralization, democratization, globalization of investment, land tenure reform.

2. Land Policy System of Malaysia

As a country had ever been colonized by the British, Malaysian policy structure and institution of land administration system had been influenced by common law system. However, after announcement of its independence, it was time to rule it based on sovereignty state principles. Land as part of state's most foundation component in the rule of law state must be governed cleanly and clearly in the constitution. To guarantee good land governance, Malaysian federal constitution 1957 stated strongly regarding the existence of Malaysian Federal State's land administration system.

The Federation of Malaysia comprises Peninsular Malaysia in the East and the states of Sabahand Sarawak on the island of Borneo at the West side. In land administration contexts, theright of the individual to own property, including land, is safeguarded under the FederalConstitution (Salleh, 2010). Under the Federal Constitution, land is administered by the State's authority, although the Federal Government plays a very important role in legislating landmatters. Since it is a state matter, according to Azimuddin (2008), there are still differences over state land policies imple-

mentation. The kind of situation provides further challenges in the forming of uniform land policies to be practiced by the different states [5]

Therefore, incorporating good governance principles in term of the rule and law and legitimacy principle must be based on the federal constitution in which originally land matters are under states' authority by certain measured control by federal power for maintaining national interest.

3. Land Policy System of Turkey

Turkey's land policy refers to the constitution 1876 as stated in Article 12 states:

"Everyone possesses inherent fundamental rights and freedoms which are inviolable and inalienable. The fundamental rights and freedoms also include duties and responsibilities of the individual toward society, his family and other individuals."

Following this article has learning the importance of restrictions, prohibitions of abuse, and conditions for suspension of fundamental rights and freedoms. Article 14, for example, prohibits the exercise of rights and freedoms "with an aim of violating the indivisible integrity of the state or creating discrimination on the basis of language, race, religion or sect, or of establishing by any other means a system of government based on these concepts."

Citizens are granted the right to life; the right to protect and develop the material and spiritual entity of the individual; the right to personal liberty, security, and privacy of individual and family life and of domicile; and freedom of communication, residence, movement, religion, conscience, thought, opinion, expression, science, the arts, the press, assembly, and association. The right of property ownership and procedural rights in court are also guaranteed. The constitution establishes and deûnes social and economic rights

Therefore, Turkey land policy had been withdrawn from two global ideologies: Islam and Secularism. In practice, from earliest time Turkey land policy had been ruled by harmonization principles in which the constitution recognizes one freedom of individual to own property and, other side, provides sufficient authority to state of all levels to control and manage land and natural resources to make sure common prosperity and national security.

4. Differences and Similarities

Differences among them can be illustrated that Malaysia and Indonesia inherited the colonial land policy and underwent attraction of interest between leaving behind the old values and modern values. In fact turkey preferred to modernize land policy through strengthening people fundamental rights, particularly social and economic rights, especially right of residence. Otherwise Indonesia and Malaysia preferred to harmonize old values and current social demand values to achieve national land policy in spite of deference legal system between Anglo Saxon model and continental one for Malaysia and Indonesia respectively.

Similarities among them can be found out that all recognize various people rights as part of fundamental and inherent human rights that guaranteed in their constitution.

E. Comparative Study On Land Legislation And Legal Framework Among Indonesia, Malaysia, And Turkey

1) Land Legislation of Indonesia

The most critical objective of Basic Agrarian Law is to develop national land law system, the law that focuses on protectingnational interests, mandates to executive power to manage all agrarian aspects and realizes common prosperity nationwide. This encourages all state powers to generate national land law legislation. However, the process was not simple. To go beyond the

transitional condition, constitution is instructing to develop land administration system by article 33 and once still uses certain old agrarian law based on the additional article 2 of the constitution. The mandate of Article 33 (3) is later on followed by establishing Basic Agrarian Law No 5 of 1960 concerning Basic Agrarian Law and other agrarian law sectors that some of them in line with the BAL and many takeopposed to BAL[6].

Incorporating good governance principle was conducted by layingfourobjectives of legislatingBasic National Law Development:

1. Laid legal basic to develop a national land law for achieving a just and prosper people;
2. Laid legal basic to execute simplifying and unifying on national land law
3. Laid legal certainty on land ownership;
4. Establishing land reform programs consistently

Moreover, in developing national land law legislation, incorporating good governance principle is created by giving 8 principles as guidelines in developing national land law legislation. The 8 principles are as follows:

a) Principle on respecting nationalism spirit on land law development
b) Principle on restricting the concept of state authority on not to own but to regulate
c) Principle on respecting *hak ulayat* and religious values
d) Principle on promoting social function on land rights
e) Principle on land reform
f) Principle on emphasizing to Indonesian citizen in term of giving a strongest ownership
g) Principle on land planning based use activity

Before coming the New Order about 1967, Legislation and legal framework on the land matters and natural resources would be directed in integral agrarian law system, BAL could be called as an umbrella act, by which all agrarian aspects ruled integral on the same national principles. That time, certain article in BAL that recommended to be follow up with more technical law had been issued such as land acquisition with the Law No 20 of 1960, Land Reform, land Registration. Unfortunately, changing regime caused changing of policy, legislation agenda and legal framework development.

New order Regime preferred to turn legislation and legal framework development into economic development and achieving sustainable development. Since issuing the law no 1 of 1967 concerning foreign Investor Policy, diversifying kinds of natural resource exploitation through foreign and domestic investment attracting policy had supported to be high level economic growth and one of vast developing countries. The year of 1980 was the booming of oil and gas exploitation that had given relatively well to the Indonesian prosperity. Industrial zones conducted somewhere. The year 1981, after complicated problem on environmental issues occurred every places, was substantially the flashback of Indonesian development. Environmental damages, corruptions, mall administration, poverty issue, wider gap economically among groups of people were undeniably seen. Starting at the year of 1981 the government beware to take into account the views of sustainable development. Incorporating sustainable principle was then intensified to be promoted in all various laws of legislation and organizational scopes in all levels of governments. Cornerstone of national environmental awareness was signed by issuing the law No 4 of 1982 in which environmental law and its enforcement became an umbrella act to control all environmental activities in all national dimensions. To adapt to the social and economic demands,

the environmental law has undergone three phases of amendments. Therefore, incorporating good governance principle in term of sustainable development was conducted amid more increasing challenges economically and politically.

2) Land Legislation of Malaysia

At the beginning, the early Malay farmers practiced shifting cultivation whereby whosoever cultivates the land will pose it and in the event if he decides to quit cultivation and abandon the land, his right over the land will be distinguished. It then was brought in the evolution of coming of Hindu kingdom. Followed later the coming of Islam to the South East Asia since the 13th century, since the Rulers and their subjects had embraced the religion of Islam, the existing local custom of the people would be modified in order to make them conform to the Islam, it was then called as the Malay customary land tenure system.[7]

Afterwards, complex system of Malaysian land law system generally was later inherited form the colonist ruler that wasdivided into legislations in the Federated Malay States and Unfederated Malay States through various developed legislation.

Some disadvantages derived from pluralism of land law system by which local communities are appreciated. But, modernization, globalization and social demands need certainty, prosperity, and legal protection, and so the rule on order and law are necessary. This is why the National Land Code 1965 was enacted to achieve uniformity of law and administration of land matters in Malaysia especially in accordance with the Torrens System. It basically provides for dealings related to land, uses of land and other related matters.

The National Land Code 1965 recognizes the Malay Customary Tenure, and this embodied in Section 4 (2) of the Land Code 1965. In brief, incorporating good governance principles in the legal framework and legislation of land administration system in Malaysia has been conducted in evolution, starting from the colonist power through enactment many laws to the freedom age withnational land law system.Major land law system in Malaysia refers to:

a. Malaysia Land Code (Act 56 of 1965) is implemented at all states for peninsular of Malaysia only;
b. Sarawak Land Code (Cap 81) is implemented for Sarawak only; and
c. Sabah Land Ordinance (Cap 68) is implemented for Sabah only.

3) Land Legislation of TurkeyConstitution

Systematically, Turkey's land law is ruled based on numerous legal frameworks as follows:

a. Constitution
b. Taxation Act
c. Property Tax Act
d. Expropriation Act
e. Civil Code
f. Municipality Income Act
g. Development Act
h. Cadastre Act
i. State Bid Act
j. Leasing Act
k. Capital Market Act
l. Transaction Fees Act etc.

Since 1 November 1920 Turkey had undergone a transitional condition from the Islamic Kingdom System to the Secularism Republic System. This was the effects of national dynamic and global issues. From 1983 to 1980, restriction on strategic sectors particularly in land matters was taken. The government took more to control all public services and commercials, and currency circulation was tightened strongly while private parties were given less opportunity to expand their business. At this time, turkey ever underwent stuck. By 1980, liberalistic economic system started going on and in 1993 foreign investment, industrial sector and economic growth began to change people's social condition into better alive. It continues slowly but sure to a decade of ultimate success. Then turkey later on becomes state's emerging growth to reach high income country, from US 3.493 to US 16857 during a decade. This experience affected as well to evolution of the sector of the land policy and legal framework.

Incorporating model on the good governance principle can be learnt from Turkey experience namely:

a) Islamic (historical) values based modernization
b) Role model of the most emerging market
c) Open internationally based diplomacy system

4) Differences and Similarities

Historical background, constitution, social dynamics and global challenges are the same factors to have carried out influences of the quality and the quantity on the legislation and legal frameworks nature among countries. Indonesia and Malaysia inherited the colonists' legislation model and legal frameworks system. Differences can be identified based on the incorporating the efficiency and effectiveness principle.

F. Comparative Study On The Respect To The Customary Law In National Land Development

1. Indonesia Case

Article 18 Constitution recognizes strongly the existence of local communities, their local identities as long as in line with national interest and the national laws. Further, many laws protect the rights of local communities to access natural resources such as the land, water, forest, and other natural resources. Particularly, Basic National Land Law, in article even emphasizes that basic national agrarian law is developed based on *adat*laws. However, no all *ada*t laws can be foundation of basic national agrarian law, onlycertain types of *adat* law that isin line with the national interests and not contrary to national laws. Law no 13 of 2012 concerning Yogyakarta Special Region is a clear example of *adat* law in term of land law, spatial law that are recognized strongly by national laws.

2) Customary law in Malaysia

Land matters are basically administered by the states although the Federal State deserves to intervene as long as any national interests. Authority of legislation and law enforcement on land administration particularly land registration, land tenure and land survey are governed by the states. Thus, law making and law enforcement regarding customary law depend on the state legislation. However, constitution and the laws recognize the existence of customary land. Therefore, legal sources indicate that customary law and land rights and various customary law based property rights are recognized well in Malaysia.

Adat pepatih inNegeri Sembilan is one type of customary law that is mainly governed with

provision for land holding, including inheritance. Adat *Temenggong* is also a very popular customary law that is based on Islamic principles, applicable to all states except*negeri Sembilan*.*Iban* Customary law in state of *Serawak* and *Dusun* Customary law in state of Sabah are example of various living land laws that is enriched the plurality of Malaysian land laws.

The modern challenges of customary laws may come from land administration development that requires modernization and unification may harm the existence of customary laws. By doing this, single land administration and less cost can be achieved. However, by incorporating good governance principle in terms of harmonization principle, customary law is respected properly in the Malaysian land administration development.[8]

3) Customary Law in Turkey

Since Ottoman Empire, the ruling law was actually combined of law based on Islamic law principle and customary laws. This picture may be able to illustrate the position of customary law in the Turkey national land law system. Turkey's constitution recognizes strongly the existence of unwritten laws, and a part of them is customary laws. Basically, customary law in Turkey is based on Islamic law that it hadever been as ruling law. Later on, secularism rules emerge and Islamic law formally was abolished. However, it is traditionally still working and living to be acknowledged by society; particularly all of sectors which are classified in private dimension such as land, family, and labor matters.Islamic law is acknowledged as Turkey's living law.

The Ottoman legal framework consisted of two parts:The first part was the Shari'a or codified norms and rules of "Islamic law" which came directly from the Quran, *Sunnah, ijma*, and analogy-based *qiyas*and *fiqh* books.The other parts of the Ottoman legal framework consisted of customarylaw. Customary law was not the mere traditions and customs law. TheOttoman customary law consisted of the common law codified by the legalexperts under the limited legislative powers granted by the Sultan within theframework of the *ijtihad* and fatwa. The customary law also included thesultans' orders and edicts of the law. Customary law was only valid if did notcontradict with the provisions of the *Shari'a.*

Particularly Land Law as part of administrative law can be described that inTurkey, administrative law became the part of the legal system during the Ottoman Tanzimat period of westernization and it was modeled after the French legal system. The Turkish Constitution of 1961 is the main source of administrative law in Turkey now. The rules of administrative law are codified. Besides, the decisions of the judiciary are also the important source of administrative law and in the development of administrative law, judicial decisions have played a greater role. In Turkey, the administrative justice system is separated from the general courts system. Disputes are resolved in the administrative courts with different methods and rules of private law. The highest court in the administrative jurisdiction is the Council of State, which was established, for the first time, during the *Tanzimat* era.

Therefore, incorporating good governance principle in term of responsiveness to come up the traditional interests and local wisdom was conducted through turning it, harmonizing it and formalizing it into the modernized legislation.

4. Similarities and Differences

Similarities among three countries above can be illustrated that customary and statutory law are twin elements of law system in three countries above and all countries generally. As developing social and political demands, customary laws need to be modernized and protected for the interests of themselves. Universally, the nature of customary laws reflects on the characteristics as follows: unwritten law, basically the law belonging to aboriginal community, and influenced by

current religious and believed system.

However, these three countries have efforts to formulate appropriate policies by which they improve tenure security that maximize benefit to the poor, marginalized people, minimize market distortion. Therefore, it achieves equitable not only urban housing market but also rural and local indigenous properties. [9]The differences among them can be addressed with the indicator as follows: Different social and political background influence policy models in respecting the existence of customary law.

III. Conclusion

There are key indicators of international principle for success on incorporating good governance principles in the reform land administration system, namely:

1. Land policy principles performed in line with the state's constitution illustrating incorporating the rule of law, legitimacy principle.
2. Legislation and Legal framework on Land tenure principles conducted in respect to people rights and access to land for primarily fulfilling fundamental needs. Itis used as illustrationof incorporating the justice, public accountability and responsiveness principle. Moreover, land administration and cadastre principles for people's legal right security and elevating people's land productivityare reflected on incorporating the certainty, efficiency and effectiveness principle. Land Administration also must be supported by technical principles which is up to date and is in line with the efficient, effective and sense environmental awareness principles
3. Institutional principles to guarantee minimum standard on fundamental public serviceare reflected on incorporating efficiency and public accountability principle. For proper capacity building, human resource development principles must be conducted in line with the integrity and professional requirement
4. Disaster managementis well organizedand well connected to land use planning principles and well supported by information system on the spatial data infrastructure which it is designed to guarantee justly economic and environmental policies that are in line with sustainable development. This condition illustrates theincorporating of advance vision principle.
5. Efforts to protect local indigenous people and their customary laws must be taken in account in modernizing national land law system.

Comparative study among three countries: Indonesia, Malaysia and Turkey, showed similarities and differences. The compared objects consist of policy, legal framework and legislation, and the respectability of customary law in the land policy development.

Similarities are shown by them due to the existence of obligatory international legal framework and also to attract international foreign investment. Meanwhile, differences are occurred due to consider different local political and social backgrounds.

ENDNOTES

1 See Stig Enemark, Land Administration Infrastructures for Sustainable Development, PROPERTY MANAGEMENT Volume 19, Number 5, 2001, pp 366-383

2 Relationship people to land may be determined by kind of ideologies embraced by country in which there are at least capitalism, socialism and Islam.

3 For furtherer understanding, see Lorenzo Cotula, *Foreign Investment, Law and Sustainable development, Hand Book on Agriculture and extractive industries, by International Institute for environment and Development*, (2016), the best indicator may be called as governance requirement that indicates quality investment which carries out the principles of: investment preparedness; getting faire economic deal; addressing social and environmental issues; racing people at the centre of investment process (pages 2-100).

This indicators are considered having more workable and comprehensive criteria for example principle of placing people at the centre of investment process –in which this covers various principle of good governance- comprise essential elements: legal tool such policy and legal framework for bottom-up deliberation; transparency and public scrutiny; anti corruption measures and remedies of social and environmental components, for further understanding may be seen at pages 101 -145

4 See Ting and Williamson in Ian P. Williamson Best Practices For Land Administration Systems In Developing Countries, 1999b).

5 (Azimuddin, 2008).

6 See Maria Soemardjono, *Pertanahan antara Regulasi dan Implementasi*, Kompas Press, 2009, and also see Budi Harsono,

7 See Ahmad Ibrahim and Ahliemah Joned, *The Malaysian Legal System* in Ainul Jaria Maidin at all, *Principle of Malaysian Land Law*, LexisNexis, 2009, page 13-14

8 See Syafarina Syamdudin, ***A Review of Organizational Arrangements in Malaysia Land Administration System towards Good Governance: Issues and challenges,*** FIG Working Week Bridging the Gap between CulturesMarrakech, Morocco, 18-22 May 2011

9 See Geoffrey Payne, Urban Land Tenure and Property Right in Developing Countries, IT Publication/ODA, 1997 page 1-37

Mergers and Acquisition Law: The Need for Harmonization in ASEAN

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ABSTRACT

The topic of mergers and acquisitions continues to receive significant attention from both academic and practical perspectives. The growing incidence of company takeovers, especially cross-border, raises significant policy concerns. The sustainability of companies domestically and globally has thus become a major concern. There is a dire need for law to offer an avenue to allow an efficient and competitive environment for mergers and acquisition of companies. Cross-border mergers and acquisition activities have also increased in the current years, with a greater share of ASEAN firms in total acquisitions. With the introduction of ASEAN common market, ASEAN countries are now a more open, transparent and convenient investment regime which facilitate international trade and foreign investment. A comprehensive and effective legal framework for mergers and acquisitions is imperative to support the burgeoning of mergers and acquisitions as a result of the liberalization of the trade and services in the ASEAN countries. This paper suggest that harmonization of the law is inevitable in order to support the growing of mergers and acquisitions in the region. This paper suggests that a more consistent and uniform frameworks are needed to reduce restrictive regulations which may inhibit the mergers and acquisition deals in the ASEAN.

Keywords: Mergers and Acquisitions, Legal, ASEAN, Harmonization

I. Introduction

Global economic expansion has always been a common vision for every company.During colonisation age, company like British East India Company expanded their economic control by colonizing states like Malaya, India, China and others and extracting the natural resources available in those states. At present, one of the method to expand and widen economic globally is through the process of cross-border take-over and mergers.

From a layman perspective, take-over connotes a process where a company acquires majority shares in other company, in order to gain control over the management of the acquired company. For example, Company A wishes to take control over Company B, so Company A purchases 52% of share in Company B (which will make A to become the majority shareholder of company B). From an academic perspective, take-over can be defined as an offer made by a bidder to the target company shareholders to purchase the entire shares not owned by the bidder in the target company.[1] The effect of take-over is that the bidder has controlling interest over the target company, allowing it take control over the operational and strategic decision making.

Merger, on the other hand can be defined as an arrangement whereby the assets of two companies become vested in, or under the control of, one company (which may or may not be one of the original two companies), which has as its shareholders all, or substantially all, the shareholders.[2] In other words, merger refers to combination of two or more companies to become one company. Unlike take-over, the existing target company shareholders remain their power in the merged company, but the voting power might be less as their shareholding is reduced.[3]

Take-over and mergers activities and transactions are not just only confined to local territory; it has been exercised beyond border. Cross-border take-over and mergers thus refers to acquiring a new company or two companies in different territories or countries.

II. Discussion

A. The Rationale and Motives of Take-Over and Mergers

It has been accepted concept that the ultimate and main aim for take-overs and mergers is to have controlling interest in the target company, so that the transfer of corporate control from the target to the bidder could be effective. However, the purpose to have controlling interest is inspired by several motives.

One of the motives for takeovers and mergers is to acquire patent. Patent simply means a document, issued, upon application, by a government office (or a regional office acting for several countries), which describes an invention and creates a legal situation in which the patented invention can normally only be exploited (manufactured, used, sold, imported) with the authorization of the owner of the patent.[4] Innovation and invention requires intense research and development which consumes a great deal of time and money. One of the express ways to get innovation and invention without the need to conduct research and development is through taking over a company or merging with a company that has developed innovation and invention. The acquirer company is able to have proprietorship over the patented innovation and innovation, which was previously owned by the target company. With the accession of patent, the target company can move one step ahead from its competitor. The classic example in Malaysia was the acquisition made by Proton Holding Berhad over UK sport car maker Lotus Car Limited, which was designed to obtain its constancy and research and development facilities.[5] Another example is the takeover of Motorola by Google in 2012.[6] The takeover was initiated to acquire technology that leads to innovation of mobile phone at cheaper price.[7]

Cross-border take-over and mergers is also realised to synergy with the existing business of Target Company. Becoming world dominant conglomerate has always become the greatest dream of a company. The dream can be realised if economical command and conquer is extended outside of its national territory. However, one of the barricade faced in enlarging its economy power is the foreign business networking consideration. This includes distributors, logistics, suppliers, forwarding agents and other. If a company wishes to start up business from a scratch in foreign territory, a great deal of time and wealth would be spent to understand and appreciate the local circumstances.Thus a quick way to reduce this hassle is to take over a foreign company or merges with it. The prevailing business of Target Company willbe inherited by the acquirer company. This concept has been practiced by major companies in the world. Lenovo, for example took over Motorolain order to have access to Motorola's existing relationship with network operators in Europe and North America.[8]Good relationship with network operators can broaden up the market for Lenovo in North America.

In order to be fittest in this survival age, the corporate players will make use of anti-competitive strategies and actions to eliminate its rival from the market battleground. Halo-N (2013) stated that the philosophy that a competitor's bridge can be used for path to achieve victory.[9] Applying this philosophy, take-overs and mergers can be considered as using competitor's bridge, outreaching to be relevant in market. Furthermore, it is like killing two birds with one stone, where the bidder is able to add value to its strength by using its rival's advantages and at the same time to eliminate the rival from business competitive arena. The recent U.S. case, U.S. District

Judge in Washington prevented Aetna Inc. from mobilising take over Humana Inc. by the reason of violating US antitrust law in reducing competition among insurers.[10] Although the attempt to take-over was intervened, the case demonstrated that take-over initiative is also motivated by the desire to entrench the monopoly power in eliminating the competitor. It must be noted, however that currently many jurisdictions have placed competition law for purpose of protection of consumers.

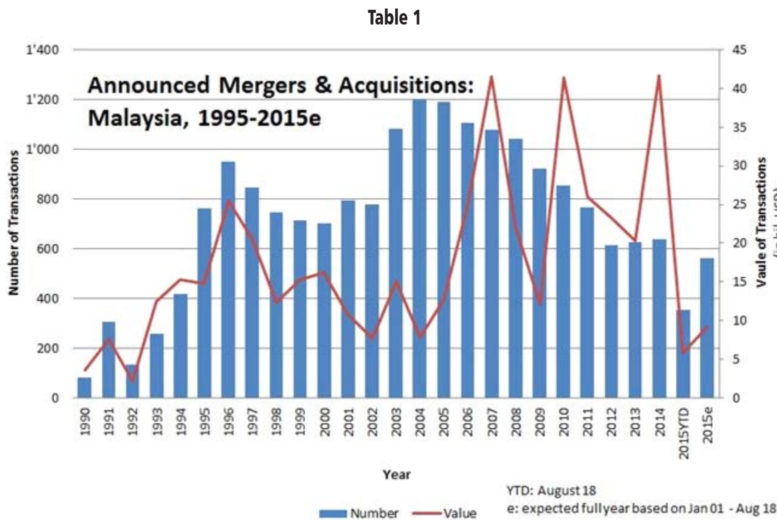
It is worth noting that South East Asia continues to become one of the growing economic zone which attracts investors from all over the world. This positive inference is indicated from the statistic by Institute of Merger and Acquisition, where the number of merger and acquisition deals increased by 10.63% from 2,258 in year 2015 to 2,498 in year 2016.[11]The great number of mergers and acquisition deals are contributed by acquisition of ASEAN companies by companies from other regions and acquisition of other region companies by ASEAN companies.

In 2016, the largest deal made by South East Asia company was QHG Shares Pte Ltd from Singapore, where it had successfully acquired NK Rosneft, a Russian company for 10.2 billion euros.[12]The acquisition gave signal to the world that South East Asia is ready to be acknowledged to the eyes of the world in expanding economical territory in other continentals to compete with other world champion companies.Despite the fact that most of the ASEAN member states are still in the stage of developing countries, ASEANcontinues to becomean economic zonethat capable to fulfil and satisfy the appetite of investors all over the world in growing their wealth. The sale of Edra Global Energy Bhd by 1MDB Development Bhd to China General Nuclear Power Corp for US$2.3 billionwas the biggest deal in Malaysia for 2016. It was arranged by Maybank Investment Bank, HSBC and Rothschild.[13] The acquisition of SGX-listed STATS ChipPAC by Jiangsu Changjiang Electronics Technology Co for US$750 million has also opened the eyes of the world about the economic strength of ASEAN region.[14]

The acquisition of ASEAN companies by neighbouring ASEAN companies has showed tremendous result.Asian Investment Report 2016 presented that the value of mergers and acquisition in ASEAN region was US$20,308 millionin year 2015 and acquisition among ASEAN companies within region contributed up to 40% from that amount. Indeed, there was increase up to 8.73% from US$7,316 in year 2014 to US$7,955 in year 2015.[15] In the first half 2016, some remarkable ASEAN companies have sprinted for investing in neighboringcountries through take-overs and mergers. For instance, Thailand Central Groupacquired a 100 per cent interest of Big C Vietnam Stores, a supermarket chain, from CasinoGuichard-Perrachon (France) for $1.1 billion, and TCC Holding (Thailand) acquired MetroCash& Carry Vietnam from the Metro Group (Germany) for $705 million. Singapore MNEshave also been active, and they include Frasers Center point's acquisition of a 29 per cent stake in Golden Land Property Development (Thailand) for $139 million and SATS acquisition nofBrahims Airline Catering Holdings (Malaysia) for a 49 per cent interest for a value of$51 million.These significant take-over and mergers are yardstick to prove that ASEAN region is an investment and wealth generating venue that can attract investors, even among ASEAN member states.

In Malaysia, there have been many takeovers and mergers over the past years. Table 1 makes a comparison between the numbers of takeovers and mergers that has taken place in Malaysia and the value of the deal. It can be seen that in the later years, the number of announced takeovers and mergers has decreased; however, the value of the transactions recorded higher value of the deals especially in the year 2007, 2010 and 2014. The value of the transactions during these three years went beyond US$30 billion.

Table 1



B. A Brief Introduction to the Regulation of Takeovers in Malaysia.

The Malaysian Code on Take-overs and Mergers applies to all types of public companies.[16] Unlike the previous Code, the current Code applies to a wider range of companies as a result of a wider definition given to the term "company" under the Code. Under section 3 of the Code, "company" also includes a company that is incorporated outside of Malaysia but listed on any stock exchange in Malaysia as well as a real estate investment trust (REIT) that is listed on any stock exchange in Malaysia. By virtue of this provision, all bursa listed companies including foreign companies which are listed on any stock exchange in Malaysia and holders of Malaysian listed REITs would come under the purview of the Code. This was not the situation under the previous Code. The Code also applies to a wider type of transactions.

Previously the 1998 Code was narrowed to acquisition of control through merger or conventional takeover. Section 44 of the 2010 Code states that the Code shall apply to any person who carries out a takeover offer, howsoever effected, including by way of a scheme of arrangement, compromise, amalgamation or selective capital reduction. The Code therefore applies not only to conventional takeover but also to schemes of arrangement, compromises, amalgamations and selective capital reductions.[17]Since a scheme of arrangement and selective capital reduction are regarded as a takeover and regulated under the Code, the shareholders of the company can enjoy similar protection afforded by the Code. [18]

Parties involve in takeovers and mergers must therefore comply with all aspects of the law which include the manner the offer is to be carried out, the timelines as set out by the Code, the obligations of the parties involved and the rules on disclosure as required by the Code. The law provides for a broad range of actions that can be taken against a person who violates the Code. The sanctions for a breach of the Code involve not only criminal and civil actions but also administrative sanctions.

The Code provides that a person who contravenes the Code or any rulings commits an offence and shall, on conviction, be liable to a fine not exceeding one million ringgit or to imprisonment for a term not exceeding ten years or to both. A breach of the Code thus exposes a person to criminal sanction. To date, however, it would appear that the Commission has relied on its wide powers to take administrative action and in some circumstances, civil action to achieve compliance with the Code rather than to utilise the criminal sanctions available.[19] The Commission is also empowered to apply administrative sanctions against those who breach the Code or any rulings.[20]

It is to be noted that the law on takeovers and mergers in Singapore closely resembles the Malaysian regulation since both countries adopted the English regulation in the same area. The other ASEAN countries however, given a different historical background, have different sets of law. This has caused complexities when in cross border mergers.

C. An Eagle-Eye View of Takeovers Related Issues

It can be predicted that cross-border take-overs and mergers in ASEAN region will continue to develop rapidly in the future. Hence, to accommodate with this fast development, liberalisation and transparentisationof domestic law among ASEAN countriesmembersisa matter to be looked at. The idea of liberalisation can be implemented and executed by formulating regional minimum standards for the harmonised take-overs and mergers law for ASEAN. Harmonisation is commonly used to refer to a process of 'combination or adaptation of parts, elements or related things, so as to form a consistent and orderly whole', presupposing 'the diversity of the objects harmonized'.[21] On the other hand, minimum harmonisation of law means a single law which sets a floor of criteria in which the particular national legislations must meet.[22] However, the national law can penetrate the threshold according to its desire and local circumstances. The modern example is European Union Harmonised Rule and Minimum Standards in the European Law of Civil Procedure, where the purpose is to set out the least principles relating to court civil procedure that recommended to be followed by European Union member countries.

It must be noted that topic of Mergers and Acquisitions continues to receive significant attention from both academic and practical perspectives. Apart from the usual contractual and deal-related issues, the growing incidence of takeovers (especially those of the cross-border variety) raises significant policy concerns. Regulators in various jurisdictions around the world are constantly reviewing the regulation governing takeovers and introducing harmonisation as appropriate. Takeover regulations in individual jurisdictions are shaped by various factors including corporate history, corporate holding structures, concentration of shareholding, the nature of legal systems, characteristics of shareholders, evolutions of regulatory regimes and the like. This has given rise to burgeoning, but influential, literature on comparative takeover regulation. There is however a limitation in the literature; most of the literature is situated in Western hemisphere. At present, there is a lack of similar comparatives academic studies in the Asian context. This despite the fact that Asian economics have become significant players in the global merger and acquisition market, both by regulating takeovers of companies within their jurisdictions (either by domestic or foreign acquirers), but also by enabling their own companies to seek out targets elsewhere (including in the developed markets).

Armour and Skeel[23] focuses on the need to conduct a proper study on the background of the takeover law in relation to defensive tactics. Their paper focuses on the directors' accountability in companies with dispersed shareholding structure. They argue that the law in The US and UK are shaped on the nature of the shareholding structure of the companies. There is no proper study conducted on countries that has predominantly concentrated shareholding structure which are primarily found in the ASEAN region. In the UK, defensive tactics by target managers are prohibited, whereas Delaware law gives US managers a good of deal of room to manoeuvre. Existing accounts of this difference focus on alleged pathologies in competitive federalism in the US. They focus on the supply-side of rule production, by examining the evolution of the two regimes from a public choice perspective. They suggest that the content of the rules has been crucially influenced by differences in the mode of regulation.

Donald argued that hostile takeovers are usually conceived as open market transactions to dispersed shareholders, who have to make a decision on complex issues within a short timeframe.[24] Aside from the simple fact that shareholders right to sell their shares, the risks takeovers present to market integrity are seen fully compensated by their contribution to corporate governance through providing a market for corporate control. Legal protections have been crafted to protect these benefits while countering risks. He focused on the role of the regulatory framework in Hong Kong plays in focusing an economy where shareholdings are generally concentrated into controlling blocks and hostile bids are all but non-existent. He argued that during 22 years of cases in which a UK origin takeover code has been applied, it plays very little role in the protection of the shareholders, thus affecting the integrity of the market. He further pointed out that takeover has been made variant of traditional schemes of arrangement, and has recently been used to move one of Hong Kong's largest companies. Cheung Kong (Holdings) Ltd. Offshore. In Hong Kong, takeover rules generally reflecting the UK model have taken on an evolutionary path that deviates significantly from that found in the UK. This provides a valuable example of variation through transplantation and a lesson for policy and lawmakers in developing countries.

A similar study in ASEAN will provide a better legal framework which will support the domestic market structure. Malaysia has taken some steps towards this aim. The current move of widening the scope of application of the Takeovers and Mergers Code had affected companies corporate restructuring considerably. It is also very important to address issues relating to the assets of the company including the intellectual property. Generally a Takeover Code is totally silent on IP issues.

SJ Choi focused on matters relating to establishing the proper decision maker to determine corporate governance and takeover-related regulation into the future in Korea particularly given the market's ability to react to new regulations and evolve over time in Korea.[25] The Essay argues that the Korea Stock Exchange (KSE) is well positioned to provide regulatory protections for listed companies into the future. It is equally important to consider the role of the regulatory bodies in relation to mergers and acquisitions.An in-depth study on similar matters is needed in ASEAN jurisdictions.

D. Issues Relating to Intellectual Property in Takeovers and Mergers

The role that intellectual property plays in mergers and acquisitions cannot be underestimated. If intellectual property due diligence is not properly done, it may inflate the true value of company's assets in the mergers and acquisitions process. There is growing evidence that companies engage in mergers and acquisitions to obtain external sources of innovation in order to maintain competitiveness towards market rivals. The national car maker Proton's acquisition of Lotus in 1996 was to inherit Lotus; immense research and development capabilities in high performance cars. It was envisaged at that the new partnership will enable Proton to make significant inroads into major markets including the Far East and North America. Similar trends can be seen in telecommunication Company. It has become a business tradition that mergers and acquisition activities are undertaken as a route to enhance technical efficiency which in turn will be translated into an increase in revenue.[26] Businesses also engage in mergers and acquisitions to strengthen capital base and lower cost of operation as a result of national fiscal policies. The liberalisation of the financial sector that started from 2009, among which foreign shareholding limits were eased to 70% from 49% has foreseen a flux of mergers and acquisition in the insurance sector, both conventional and Islamic (The Star online, May 26 2014). It was highlighted that among the

potential mergers and acquisitions are those involving Takaful IkhlasSdnBhd and Syarikat Takaful Malaysia Bhd.

Lanning G. Bryer& Scott J. Lebson, outlines all the need to factor the value of intellectual property in any mergers and acquisitions activity as it will be the dominant force in future commercial transactions.[27] These intangible assets in the form of patents, trademarks, copyright, know how, trade secrets and domain names can be valuable than the company's tangible assets. Despite that, these tangible assets are acquired, at least proper licence to use such work. This requires a full audit of the intellectual properties of the acquired company.

Saleh highlights that high tech companies need to engage in Mergers and Acquisitions to obtain higher technical efficiency and increase revenue.[28] In her research, such companies such as Telekom Malaysia Berhad, Time Dotcom Berhad, AxiataGroup Berhad, Redtone International Berhad and Green Packet Berhad were among the companies that routinely engaged in mergers and acquisitions for this specific purpose. The study indicated that forms need to strike a balance between acquisitions intensely and sequence of acquisitions.

Regulatory considerations such as competition law are named as one of the most important factor that may influence the success of Mergers and Acquisitions. In conducting a mergers and acquisitionsstructuring, it is important to apply the right strategies.[29] Both internal and external factors need to be given serious attention. Among the external aspects are taxation, financial arrangements,and regulatory consideration such as competition law, foreign investment approval, exchange control approvals, industry specific approvals and corporate control approvals.

It is also very important to carry out a proper valuation of the intellectual property assets and liabilities in international mergers and acquisitions.[30]Charles in his estimation, "In international mergers and acquisitions, just as in any domestic merger or acquisition, the lawyer's role in reviewing a company's intellectual property portfolio "must include the identification of all relevant rights, an assessment of their worth in the context of exclusivity, validity and enforcement and an identification of possible liabilities." In international mergers and acquisitions, the process is complicated as it involves identifying liabilities for overseas intellectual property assets which may have corresponding value in domestic setting.

Among the intellectual property that requires review and analysis are owned intellectual property, third party intellectual property, intellectual property disputes and office actions and information technology assets.[31] It is important to check whether these intellectual properties are still subsisting and living or already abandoned or expired or still pending. Inclusive in the list of intellectual property is unregistered owned intellectual property which may include trade secrets, unpatented inventions, and unregistered copyrights, including the software source code as well as unregistered trademarks and service marks.

III. Conclusion

The ultimate purpose of the existence of ASEAN is to cultivate integrated, peaceful and stable community with shared prosperity among ASEAN member states.[32] The shared prosperity vision is further elaborated into ASEAN Economic Community Blueprint (2008-2015), which will transform ASEAN into a single market and production base, a highly competitive economic region, a region of equitable economic development, and a region fully integrated into the global economy.[33] Harmonisation of take-over law among ASEAN member states is indeed part of single market module and activity, in line with ASEAN Economic Community Blueprint policy. This is because harmonisation will reduce the barriers of legislation differences among ASEAN member state,

which can slow down the movement of capital for investment through take-over and mergers across borders. A fast movement of capital will contribute to rapideconomic development in ASEAN region in pursuing the status of a high competitive economic region as embodied in ASEAN Economic Blueprint.

Full scale maximum harmonisation is not necessary. What is required is a sufficient standard of harmonisation that lays down minimum criteria to be followed by member states. After minimum harmonisation has taken place for period of time, perhaps then maximum harmonisation can be implemented in order to fully adopt the ASEAN integration policy.

ENDNOTES

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[15]ASEAN Investment Report 2016

[16] Section 216(1) of the CMSA states that a "company", in relation to a company being taken over, means a public company whether or not it is listed on any stock exchange and any other entity as may be prescribed in the Code.

[17]The law governing these corporate exercises are contained in the Companies Act 1965. There have amendments made by the Companies Bill 2015.

[18]In the selective capital reduction by Malaysia Airlines in 2012, the minority shareholders was offered cash payment as an exit offer. Khazanah, the government agency which has 69.37% equity interests in Malaysia Airlinesneeded at least 50% in numbers and 75% in value acceptance for its proposed selective capital reduction and repayment exercise to go through. see http://www.thestar.com.my/Business/Business-News/2014/11/06/Minority-shareholders-to-decide-on-the-privatisation-of-MAS/?style=biz. The independent advisor, AmInvestment Bank found Khazanah's buyout offer "fair" and "reasonable". The law requires that at least 50% in numbers and 75% in value in acceptance for selective capital reduction and repayment exercise to go through.

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The Urgency of Strengthening the Regulation And the Implementation of *Musharaka Mutanaqishah* Financing on Islamic Banking in Indonesia

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ABSTRACT

MusharakaMutanaqishah financing (MMQ) is a financing partnership based on the principles of *Musharaka* or *syirkah*, with the characteristics of assets ownership or capital of one of the parties (*syarik*) continue to decline gradually due to purchases made by the other parties.*MusharakaMutanaqishah* financing is relatively new. It has many advantages over other types of financing schemes. However, the regulation and its implementation in Indonesia are still not optimum. The paper aims to analyze the weaknesses of the regulation and the implementation of *MusharakaMutanaqishah* financing in Indonesia. The result shows that there are some weaknesses of the regulation related to the MMQ financing, as follows: *First*, the regulation governing MMQ needs to be completed by the government. *Second*, in term of language, the regulation should follow the principle of legal drafting. *Third*, in some ways, there are conflicts of law in the regulation of MMQ in Indonesia. *Fourth*, MMQ financing is only regulated in the Fatwa of National Sharia Board, Indonesian Ulema Council (MUI). Furthermore, the implementation of MMQ financing in Indonesia has not been ideal yet, since some criteria cannot be reached, namely: *First*, not all Islamic Banking offers MMQ financing products. *Second*, the interest of customers to MMQ financing is still low. *Third*, the implementation of MMQ financing cannot contribute in the improvement of the social-economy productivity. MMQ Financing can be optimally realized with some strategic steps, *i.e*: amendment of MMQ financing provision is needed and continued with dissemination to the public and stakeholders. The government should strengthen the Sharia Banking capital by allocating in the state budget. Last but not least, the spirit (*ghîrah*) from Muslims to do the Islamic teachings as a whole (*kâfah*), freeing themselves from the usury system in their economic activities.

Keywords: strengthening regulation and implementation, *musharakamutanaqishah* financing, Indonesian Islamic banking

I. Introduction

Musharakamutanaqishah financing (MMQ) is a financing partnership based on the principles of *Musharaka* or *syirkah*, with the characteristics of assets ownership or capital of one of the parties (*syarik*) continue to decline gradually due to purchases made by the other parties.[1] In other terms, MMQ financing also called as diminishing *musharaka*, because the ownership of assets of one of the parties has continued to decline as a result of the purchases made by the others, and at the end of *aqad*, ownership of one of the parties will move to the other parties. MMQ financing is financing partnership, in this case the bank participated as a financial partner and Islamic Bank just take a part of the capital of *musharaka*, while another part of the capital investment is the part of the customer.

The *capital* of the Islamic banks is usually far greater than the capital invested by the customer.

In the implementation of MMQ financing, it should be clearly defined about the profit-sharing ratio between the bank and the customer. Likewise, should be clearly defined the amount of installments to be paid by the customer to the bank, which is also the repayment of the funds invested by the bank. Through this way, part of the bank's capital will progressively reduce so that in the end the customer will become the full owner of the asset/project which is the object of the cooperation.

In Indonesia, MMQ financing is a form of financing that is relatively new compared to other forms of financing which is operated by the Islamic Banking. MMQ financing is not widely known to the public, many of them not even the human resources in Islamic banking, has a good understanding of this type of financing.

In other countries such as Malaysia, MMQ financing is quite long enough to be implemented, especially in Islamic home financing products. Haron and Shanmugam[2] stated that the products of Islamic home financing are the very competitively banking products for Islamic banks. Islamic home financing industry is very promising. There are two reasons, namely first, the financing products are generally approved by Sharia Scholars to advanceIslamic financing concept which rules out the interest rates, uncertainties and other elements of fraud. Instead of conventional home loans which based on the interest rate regime, and regarded as contrary to the philosophy of Islamic business.

Interest rate products are extremely prohibited in Islamic home financing because it creates social injustice. The products of Islamic home financing are supposed to be acceptable to the customer of Islamic bank. Second, the products of Islamic home financing are based on a number of Sharia principles, that is, *baibithamanajil*and*Musharakamutanaqishah.*

However, in operating these products, one bank with another has their own way depending on the policy of the related Islamic bank. Amin et al (2012)[3] gives an example, Bank Islam Malaysia Berhad (BIMB) and Public Islamic offering home financing products based on *baibithaman*ajil. The first bank offers a holiday payment[4] for home financing using *baibithamanajil*, while the second bank does not do so. This explains why each Islamic bank has a competitive advantage in attracting new customers while retaining existing customers.

Newell and Osmadi[5] stated that Islamic finance is becoming more popular in many countries. This is shown by the diversity of financial products of sharia-compliant as well as increased demand for investment opportunities that is in accordance with Sharia to Muslim investors in the Middle East and Asia, among others operationalized based on *musharakamutanaqishah*.

BaiBithamanAjil (BBA) is one attempt to provide Islamic-based home financing products. This concept is widely used by financial institutions in Malaysia. According to Rosly[6], BBA is based on the concept of selling by installments where the bank buys the house and then sell it to customers at a price covering the profit margin. Banks earn profits determined in advance on the property. In turn, clients are required to pay a sum of money that has been set up to the expiry of the agreement. It's the same with debt financing resulting in high costs and posing a burden on the family finance.

The critics to the concept have alleged that the existing BBA in Malaysia is not in accordance with the principle of Sharia, since the bank does not share the risk of ownership and does not take responsibility for the property. Relying on the interest to determine the profit margin is contrary to the concept of 'free interest'. The concept of *musharakamutanaqishah* or Diminishing Partnership (DP) was introduced to address the criticism over the BBA.

Usmani[7] DP models are based on practices that already carried out by the Islamic Cooperative

Housing Corporation (ICHC) in Toronto, Canada which was established in 1981 to prevent the Muslim community from usury. This model is based on the equity model which is different from the model of traditional mortgage-based debt. The DP focuses on the purchase of property shared between customers and banks. There are four sections in the contract. First, the customer entered into a partnership *(musharaka*) with the concept of "*Shirkah-almilk*" (joint ownership) with the bank (Usmani, 2007). Customers pay, for example, 10% of down payment, the bank was paid an advance of 90%.

Second, the customer has promised to buy the unit. Third, the bank divest its shares amounted to 90% in the ownership of the house to the customer with the concept of *ijarah* (leasing), which set the rent and the customer agrees to pay the rent to the bank in exchange for use of the property. Periodic rental amount will be shared between the bank and in accordance with their own percentage. Lastly, customers pay off part of the 90% of ownership by purchasing all of the remaining shares until the bank was actually owned by the customer. Bank co-owns and bears responsibility on the property until the loan amount has been fully carried out by the customer and the customer takes over the ownership of the property.

The DP concept is in line with Sharia and encourages the spirit of Islamic banks with emphasis on the welfare of people and society (Ahmad, 2000; Siddiqui, 2001; Rosly and Grill, 2003). Because the DP relies on for profit and loss sharing and not on debt as the BBA, and the DP is considered not to cause trouble and losses on customers. Banks have and bear responsibility over the property up to the amount of financing is fully completed and the customer takes over the ownership of the property. This is in accordance with the principles of Islam which requires the seller has the goods and takes responsibility before selling it to buyer. The use of rental fee for the cost of interest, however can also cope with the criticism addressed to the BBA.

The main difference between DP and BBA is that the customer does not owe the bank for a long time and the basis for setting the rent is the value of the property. No interest is allowed in Islam. The DP is also flexible and customers can discount the house by buying faster by paying off a part owned by the bank.

MMQ financing is initially one of various types of financing that is absolutely very beneficial, both for the Islamic banking, as well as the customer. In MMQ financing, the magnitude ratio can be changed, depended on the situation at hand, for example, depending on the situation of economic growth, inflation, exchange rate and so forth.

It is not so in other types of financing that is imposed on the Islamic Bank. For Islamic banking, this phenomenon is certainly provide benefits without having to operationalize its own capital of the bank and can be a way out in the Islamic banking when facing difficult situations as a result of the economic crisis. Islamic Banking can also develop business activities that are more varied and applying the teachings of *maqashid ash-Sharia* in the business, not just for profit, but also can contribute to the welfare of the society and the customer treats equitably.

For customer, MMQ financing is also considered quite beneficial for customer to meet its economic needs as well as to develop economically productive activities by the guidance of religion and at the end of the agreement (contract), the customer can have the object of the contract in a way that is easy, namely by buying capital owned by Islamic Bank in installments. The implementation of the agreement is also commonly performed in quite a long time, so that the customer is not too heavy to make payments in installments. MMQ financing also considered more in line with Islamic principles and in line with the purpose of the convening of Sharia banking (*maqashid ash-Sharia*).

Anwar[8] considers that the concept of MMQ financing has Islamic identity that reflects the philosophy, values and perceptions of Islam such as promoting the welfare of individuals and communities. In support of this view, Kuran[9] said that the purpose of Islamic banking is to strengthen the Islamic identity.

MMQ financing is a type of financing that has many advantages over other types of financing, but the regulation and implementation in Indonesia until now has not been realized optimally, so it requires various strengthening measures. This paper intends to study the various regulatory weaknesses and constraints in the implementation of MMQ financing in Indonesia and offers a strengthening solution.

II. Discussion

a. *MusharakaMutanaqishah* Financing Characteristics

Development of Islamic transactions based on MMQ happens for two contracts that are executed in parallel. First, the customer and the bank do *musharaka*contract through equity participation in the management of a business that will be profitable. It is indicated clearly as *syirkahamwal*, the two sides include the capital in an amount not to be the same. Second, customers do business with joint capital and the results of operations are divided according to the agreement between the bank and the customer. Additionally, the customer buys bank-owned capital goods in installments so that the capital owned by the bank in the *syirkah* gradually reduced. The reducing of capital bank, that's so called *mutanaqishah*.

MMQ financing is a derivative of *musharaka* contract, so that all the provisions are applicable to the *musharaka* contract will automatically applies to MMQ financing agreement. Other terms are also commonly used to refer to the MMQ financing is *musharakamumtahiyyah bit tamlik*, which means cooperation between a number of *syarik* (in this case the customer and the bank) to include a property to be used as venture capital, and venture capital of *syirkah* are then purchased by the customer gradually, so until the appointed time, the ownership of the bank's capital runs out and the whole venture capital of *syirkah* belongs to the customer, that's when actually *syirkah* ends. Thus it is called as *musharakamumtahiyyah bit tamlik* because of the ownership status of joint venture capital at an agreed time belonged to the *syarik* (the Customer) in full.[10]Dusuki and Abozaid describe Funding MMQ as:[11]

> "Musharakamutanaqishah is one of the equity-based models of financing in Islamic microfinance scheme. Argue that the provision of equity based financing by Islamic financial institutions will facilitate toward achieving the Islamic socio-economic objectives include social justice, economic growth and stability efficiency."

As *Bendjilali*, Khan and TaqiUsmani expressed opinions related MMQ financing with the following statement[12]:

> "Islamic scholars are basically in agreement on the implementation process of musharakahmutanaqishah. For example, agreed that the musharakahmutanaqishah can help people to rely less on other financing facilities such as the Bai-Bitthaman-Ajil, Murabahah etc. Islamic scholars agree that musharakahmutanaqishah is best implemented for house or machinery financing where both assets can be leased out according to agreed rental. Joint ownership of a house or asset is accepted by all schools of Islamic fiqh since the financier sells its share to the client".

The *fatwa* of National Sharia Board, Indonesian Ulema Council (DSN-MUI) No. 73/DSN-MUI/IV/2008 on *musharakamutanaqishah* stated that actually *musharaka*mutanaqishah is allowed.[13]

MMQ financing has special characteristics that distinguish it from other financing models in Islamic banking. The main character of MMQ financing products are as follows:

1) *Hishshah* (portion), the business capital of the parties must be expressed in the form of *hishshah* which is divided into a number of units of *hishshah*.
2) Constant, the total nominal amount of capital stated in the *hishshah* should not be reduced during the contract takes effectively.
3) *Wa'd,* Islamic banks pledged to divert commercially and gradually the whole *hishshah* to the customer.
4) *Intiqal al-milkiyyah*, namely every money deposit by the customer to Islamic banks, with the value of an amount equal to the value of the units of *hishshah*, as sharia is declared as a diversion unit of *hishshah* of Islamic banks commercially to the customer, while the amount of the value is more than the value of the unit of the *hishshsah*, expressed as the results-sharing which are being the rights of the Islamic banks.

Hishshah is one of the main characters of MMQ financing. MMQ venture capital must be expressed in the form *hishshah*, which is divided into units of *hishshah*. For example, if a bank business capital is IDR 80 million, and from the customer is IDR 20 million, the venture capital of *syirkah* is IDR 100 million. If each unit of *hishshah* agreed worth IDR 1 million, the venture capital of syirkah is 100 units of *hishshah*. Venture capital has been revealed in the hishshah should not be reduced during the contract applies effectively.

The statement in the form of hishshah required the following reasons: 1) Venture capital of *syirkah* of each *syarik* must be combined in such a way, that of mixing into an asset of *syirkah* and should not be sorted out. 2) For the sake of diversion, *hishshah* which has become an asset of *syirkah* are then broken down into units of *hishshah* as a way to facilitate the transfer, as is done in the securitization process. 3) As an illustration of the implementation of *musharakamutanaqishah*, when capital of *syirkah* has been used for business activities in the form of home or property, then for the customer's payment in installments to the bank, concluding the ownership of customers increasingly to be more dominant and the ownership portion of Islamic banks will be on the wane.[14]

The objects of MMQ financing must be agreed upon and set forth clearly, which include: 1) The term of delivery of the object. 2) The quantity and quality of the object. 3) The availability of the object, ie, most of the objects if in the form of building/physical must already exist at the time of the contract, even if the overall delivery is done in the future according to the agreement.[15]

MMQ products can be applied in the form of the productive and consumptive financing, though the real expectation is to develop and increase the productivity of the economic efforts. This type of financing can be applied to financing vehicles, and financing of residential property, flats, the home store (shop), home office, apartments and condominiums.

b. The Urgency of *Strengthening* the Regulation of MMQ Financing In Indonesia

Regulation concerning on MMQ financing in Indonesia in substance is still too minimal, so as a legal umbrella, the operational of MMQ has not been sufficient yet. The legal basis that had been used as guidance in implementing the MMQ financing is only the Fatwa of National Sharia

Board (MUI) or DSN MUI No. 08/DSN-MUI/IV/2000 which regulates *musharaka* financing in general and DSN MUI No. 73/DSN-MUI/XI/2008 on the *musharakamutanaqishah* financing. DSN No. 73/DSN-MUI/XI/2008 was then followed up with MUI Decree No. 01/DSN-MUI/X/2013 on the Guidelines for the Implementation of MMQ.

The Fatwa of MUI No. 08/DSN-MUI/IV/2000 governing the *musharaka* financing is generally only includes the notion of *musharaka*, the argument underlying the *musharaka* financing, the provision of the contract, the provisions regarding the parties do *syirkah*, *syirkah* object and the provision of operational costs and disputes.

The MUI Fatwa No. 73/DSN-MUI/XI/2008, which is the legal umbrella of MMQ financing, also just set five things, namely general provisions, legal provisions, contract provisions, special provisions and closing.The MUI Fatwa DSN is confirmed that, first, the *akad* of MMQ consists of the*akad* of *syirkah* contract and the *akad* of *bai*/sale-purchase.

Second, the *syarik*relevant provisions, in the form of guidance that *syarik* obliged to include assets to be used as working capital, and labor agreements in deed, *syarik* entitled to make a profit based on the agreed ratio at the time of the *akad*; *syarik* bears the advantage according to the proportion of capital; *syarik* obliged to promise to sell the entire of its *hishshah* gradually, and other *syarik* obliged to buy it. Sale and purchase is done according to the agreement and after the entire process of buying and selling, the entire *hishshah* of Islamic banks turned to other *syarik*/ customers.

Some of the specific provisions set out in the DSN MUI No. 73 Year 2008 were minimal substance as follows: first, MMQ asset can be leased (*ijarah*). Second, if the MMQ asset be the object of *ijarah*, then *syarik* or customer can hire these assets with a value of *ujrah* (lease) based on the agreement; third, the benefits of these efforts are divided according to a ratio agreed in the *akad*, while the loss-sharing should be based on the portion of capital/ownership; benefit of *nisbah* follows the proportion of capital/ownership as agreed by the *syarik*.

Then the fourth, grade or size of the part/portion of *musharaka* asset ownership of the *syarik*/ bank reduced due to payment by *syarik*/customer, must be clear and agreed upon in the contract; fifth, the acquisition cost of the MMQ asset would be borne jointly, while the cost of transfer of ownership into the buyer's expense. In closing provisions, the Fatwa of MUI is set for dispute settlement, namely any disputes between the parties, the settlement of disputes carried out by the legislation in force and according to the principles of sharia.

If the Fatwa of MUI No. 08/DSN-MUI/2000 on *musharaka* financing, compared with DSN Number 73 Year 2008 on *musharakamutanaqisah*, then the Fatwa No. 73 Year 2008 positioned as *lexspecialis derogate legigenerali* against the Fatwa of MUI No. 8 Year 2000. However, if examined in depth, the Fatwa of MUI No. 73/DSN-MUI/XI/2008 is actually more repeat the provisions already made in the Fatwa of MUI No. 8 Year 2000, while regulations that specifically regulate the MMQ is just a few only.

Therefore, understanding and interpretation of the community towards the rules on MMQ is very diverse, so as to overcome these problems later on November 4th, 2013, the DSN MUI issued Decree No. 01/DSN-MUI/X/2013 on Guidelines for the Implementation of *MusharakaMutanaqishah* Financing Products. This decision is not a new Fatwa, but is intended to clarify the Fatwa of MUI No. 73/DSN-MUI/XI/2008. The decision therefore is not framed in the form of Fatwa or even Fatwa Modification.

In the Consideration considers, the Decree referred to affirm that the DSN-MUI No. 73/DSN-MUI/XI/2008 on *MusharakaMutanaqishah* understood vary by community, including practitioners

of Islamic financial and financial services authority, which can cause unevenness implementation in financial products and banking sharia. Though, society requires clear and certain guidelines to implement the Fatwa regarding the MMQ.

MMQ financing regulation is basically in term of legal drafting is too complicated and difficult to understand by the common people. It was recognized in the DSN MUI Decree No. 01/DSN-MUI/X/2013. However, the issuance of Decree DSN-MUI No. 01/DSN-MUI/X/2013 as the rule of a technical nature, it is also not enough to help providing a clear picture of the rules governing the MMQ financing, so that in February 2016 the Financial Services Authority felt the need to publish Standard Products of *MutanaqishahMusharaka* Financing Book, in order to provide clearer and more detailed guidance to the public. In substance, the various provisions governing the MMQ financing used too many languages that are less familiar, difficult to digest and it indeed results to multiple interpretations.

Indonesia has laws that specifically regulate the procedure of forming legislation, namely Act No. 12 Year 2011 on the Establishment of Legislation. Article 5 of the Act confirmed that in shaping the legislation should be based on the principle of formation of the legislation that is good, which further stated in letter f, namely the clarity of the formulation. Elucidation of Article 5 letter f outlines that the reference to the principle of the clarity of the formulation is that any legislation must meet the technical requirements of the preparation of legislation, systematize, the choice of words or terms, as well as the legal language that is clear and easy to understand so as not to cause a wide range of interpretation in its implementation.

In the content, the regulations governing the MMQ financing also not meet the legal needs of the rapidly growing community. For instance, there has been no way out related to the ban on Islamic banks in issuing debt acknowledgment, nor are the rules relating to the procedures for putting a security interest in the transfer of ownership. Then the rules concerning on the *akad* of MMQ consisting of two akad, namely *akad* of *syirkah* and *akad* of *bai* (sale and purchase), even three *akad* in terms of the object of the contract are hired by the customer itself, there is no regulation that answers questions about should least two or three such *akad* formulated into one *akad*, for making the operation easy.

The problem of incomplete regulations governing the MMQ financing also be recognized and be the legal issues in the Standard Products of *MutanaqishahMusharaka* Financing Book stating that the Fatwa of MUI is not yet adequate regulating the substance of the agreement required by the notary and Islamic banks as well, so the clause of the agreement used by the notary still refers to the full concept of the conventional banking.[16]

In some cases, a controlled substance under the technical regulations also seems inconsistent. An example is the provision which confirms that the object of MMQ financing should be vested in the customer directly on the approval of Islamic banks/Sharia Financial Board as stipulated in the MUI Decree No. 01/DSN-MUI/X/2013, this provision is actually not set on the Fatwa of MUI No. 73/DSN-MUI/XI/2008. If the function of MUI Decree No. 1 Year 2013 is to further clarify the Fatwa of MUI No. 73/DSN-MUI/2013, then in the MUI Decree should not be created new rule, and vice versa if such new rule was necessary for the perfection of the regulation of MMQ, it should also stipulated in the regulations framed 'Fatwa' and is not in the frame of the Decree that is technical in nature.

If it viewed as a hierarchically, regulations governing the financing of MMQ is also not ideal yet because it has not placed yet in the position as stipulated in Article 7 of Act No. 12 Year 2011. Article 7 paragraph (1) of the Act stated that the type and hierarchy of legislation consists of:

a. The 1945 Constitution of the Republic of Indonesia
b. People's Consultative Assembly Decree
c. Law/Government Regulation in Lieu of Law
d. Government Regulations
e. Presidential Regulations
f. Provincial Local Regulations, and
g. District/Municipalities Local Regulations.

Paragraph (2) of Article 7 of the Act No. 12 Act Year 2011 explicitly stated that the legal force of legislation is in accordance with the hierarchy as referred to in paragraph (1).

In connection with this, the Fatwa of MUI as principal regulation governing the MMQ, has many questions on the strength of its law. Chairman of the MUI, K.H. Ma'ruf Amin stated that Fatwa of MUI is not a positive law that can be the basis of the regulation. But the Fatwa of MUI is a living law as like as sharia economic law. K.H. Ma'ruf Amin wanted such Fatwa can be upgraded to the Act in order to have binding force for the entire nation.[17]

Indonesian National Police Chief, Police General Tito Karnavian also found that Fatwa of MUI is not a positive law, so it cannot serve as a legal basis for issuing further rules[18], Meanwhile, Chairman of Muhammadiyah, BusyroMuqoddas confirmed that the Fatwa of MUI is a positive law. BusyroMuqoddas stated that law there are four, one of which is the religious law and the Fatwa issued by MUI are religious Fatwa I mean, so the Fatwa of MUI is a positive law.[19]

Opinion on the legal position of the MUI Fatwa also stated by AgusRiewanto, which states that the positive law is a law made by the state official institutions under Article 20 of the 1945 Constitution of the Republic of Indonesia, is by the Parliament and the Government and is implemented by the legal apparatus and bureaucracy.

AgusRiewanto argued that in the concept of a constitutional state should not be any other applicable law, other than the legal procedure of preparation set forth in Article 20 of the 1945 Constitution, whereas the regulations made outside the state institutions cannot be recognized valid and cannot be used as the basis for the legal apparatus and bureaucracy in taking legal action on behalf of the state. In this connection AgusRiewanto considered that the MUI Fatwa is not a positive law. MUI Fatwa position in the context of the country according to law is simply an informal law that has no binding and sanctions.[20]

Position and power of the MUI Fatwa, in the perspective of legislation can be assessed based on Act No. 12 Year 2011 on the Establishment of Legislation. Article 7 of the Act referred to, as already noted above, including seven types of legislation in the hierarchy. However, in Article 8 of Act No. 12 Year 2011 outlining the status of the various rules that are not included in the hierarchy, namely in paragraph (1) affirmed that the type of legislation other than those referred to in Article 7 paragraph (1) includes rules established by the People's Consultative Assembly, House of Representatives, Regional Representatives Council, the Supreme Court, the Constitutional Court, the State Audit Board, the Judicial Commission, Bank Indonesia, the Ministers, the Agencies, the Bodies or Commissions that is equivalent.

Then, it should be established by law or government at the behest of the Act, the House of Representatives at Province, Governor, the House of Representatives in District/City, Regent/Mayor, Head of Village or its equivalent. Then in paragraph (2) of Article 8 affirmed that the legislation referred to in paragraph (1) recognized and binding legal effect as long as ordered by legislation that is higher or established by the authority.

The MUI Fatwa governing the subject of Islamic banking have binding legal force and be recognized as the birth of the MUI Fatwa in the field of Islamic banking ordered by Act No. 21 Year 2008 concerning on the Islamic Banking. Article 26 paragraph (1) says that the business activities referred to in Article 19, Article 20 and Article 21 and/ products and services of sharia, shall be subject to Islamic principles. In paragraph (2) states that Islamic principles referred to in paragraph (1) will be formulated in fom of Fatwa by the Indonesian Ulema Council (MUI). This Article 26 paragraph (2)basically gives binding force to the MUI Fatwa in the field of Islamic banking.

However, in paragraph (3) Article 26 also confirmed that the Fatwa referred to in paragraph (2) shall be set forth in the Regulation of Bank of Indonesia (since the promulgation of Act No. 21 Year 2011 on the Financial Services Authority, Bank of Indonesia Regulation is transformed into the Regulation of Financial Services Authority). The provision is very clearly shows that Article 26 paragraph (3) has mandated that the MUI Fatwa forth in the Regulation of Bank of Indonesia/ Regulation of Financial Services Authority. However, in reality, quite a lot of MUI Fatwa which is not followed by Bank of Indonesia Regulation and the Regulation of the Financial Services Authority, including the financing of *musharakah* and *musharakamutanaqishah*.

Therefore, maintain the authority of the MUI Fatwa, then the compliance of MUI and Financial Services Authority of the order of the Article 26 paragraph (3) on Islamic Banking Act must be enforced. However, a violation of the rules of law is a behavior that inappropriate to left.

In connection with the explanation above, the financing arrangements for the MMQ is still not comprehensible in substance and is not in accordance with the rules of Islamic Banking Act, so it is necessary to strengthen to be more ideal and has the power and legal certainty. MMQ regulations governing the financing would be ideal if the principal provisions stipulated in legal umbrella framed as Act. Certainly, not actually to be in the law that specifically regulates the MMQ financing, but it is enough to be accommodated in the legislation governing the Islamic Banking in general, for example, contained in an Amendment of Law No. 21 Year 2008 concerning on Islamic Banking, which at this point, the existence of the law has to be modified to suit with the development of society.

c. The Urgency of Strengthening the Implementation of MMQ Financing In Indonesia

Regulation which is not ideal of course also affects operational practices. Implementation of MMQ Islamic bank financing or worksheets can also be said is not capable of running both as expected. It can be seen from some indication as follows: First, the percentage of public interest against MMQ financing is still very low. In the records of the FSA, the data in December 2015, *musharaka* financing realization (which is the parent of MMQ) recorded only has its share of 28,50% of the total of Islamic banking financing. While the MMQ financing is just accounted for 15% of the overall realization of *musharaka* financing. The MMQ financing supposed to be the flagship products of Islamic banking because it has very different characteristics to conventional bank products.

Second, in the general practice of MMQ financing, the customer does not use the object of financing as a means of doing productive business but is used to meet the needs of residential houses. While the original purpose of the implementation of the MMQ financing is to increase the economic productivity of society. This can be seen for example on the MMQ financing of Bank Muamalat, which operationalize MMQ financing on financing for Housing Loan (KPR) of

MuamalatiB or KPR iB at Bank SyariahMandiri.

Home as the object in the Housing Loan (KPR) of MuamalatiB financing is the fulfillment of a means of living, not as a means of business activities. Implementation mechanisms of KPR iB financing done by participation of joint capital between the bank and the customer with the portion as mention in the agreement (usually the bank's capital is greater than the customer), then the customer buys a bank-owned capital by way of installments. Furthermore, the object of financing in the form of the house rented by the customer itself, and the rental money over the object of joint venture between the bank and the customer divided by agreement or divided proportionally according to the amount of capital, and after the customer pay the installments in keel, the house which was the object of MMQ, the ownership changed fully belongs to the customer.

Third, the implementation of the MMQ financing can just be realized for the fulfillment of any form of residential property. Though in theory, MMQ financing could be applied to vehicle financing, home stores, business flats, houses offices, apartments, condominiums or other business in accordance with Islamic principles.From some indications as noted, it is understandable that the implementation of the MMQ financing has not been able to run properly.

From the discussion, then we could conclude that the regulation governing the financing of MMQ is necessary to strengthen, because some of the following: First, Substantially is not complete yet and therefore need to be refined to reflect the changes and social needs. Then, the regulation of the MMQ financing also still use language that is complex and difficult to be understood by ordinary people, so it needs to be formulated in accordance with the rules of legal drafting, and in some ways, there are content that is still not synchronized between the one term with another term, so that it is necessary doing alignment.

Second, hierarchically, if the review is based on the theory of the hierarchy of legislation in force in Indonesia, the regulations governing the financing of MMQ still occupies a weak position, because it is regulated by MUI Fatwa. Islamic Banking Law mandates for MUI Fatwa poured into FSA regulation has not been fully complied with. The regulation on the financing of MMQ would be ideal if it is poured in the frame of law, even though the legal source of the content of the law still has to refer to the MUI Fatwa.

Implementation of MMQ financing in Indonesia has not been able to run optimally, with the indication: First, not all Islamic Banking provides financial services of MMQ. Second, the interest of customers towards the financing of MMQ is still low. Third, the implementation of MMQ financing is more dominant used to meet the financing needs of the consumer so that the MMQ has not been able to contribute in improving the productivity of the economy.

MMQ financing in Indonesia actually can be realized more optimal if it is taken strategic steps as follows: first, necessary to improve regulations governing the financing of MMQ. Secondly, it is necessary to conduct a massive socialization, in order to be understood by all stakeholders. Thirdly, there should be a legal breakthrough which did not deviate from the principles of sharia to eliminate any technical obstacles of its operational to make it financing more attractive MMQ Islamic banking industry and the Customer. Fourth, the need of the high religious consciousness (*ghirrah*) from the Muslims to implement the teachings of Islam as a whole (*kaffah*), and also freeing themselves from the usury system in developing productive economic activities.

Based on the theory of *Maqashid Ash-Sharia*, MMQ Financing should be able to provide the greatest benefit to mankind, since the purpose of the revelation of the true Islamic sharia is to realize human welfare and happiness both in this world and in the hereafter. Based on this theory

all the obstacles encountered either in regulation or in operation can be solved aand find the solutions. In theory of *Maqashid Ash-Sharia*, there are rules of fiqh which states "*Al-haajatuqodtanzilumanzilataadloruuroti*", namely that a need can occupy the position of emergency. Then the principles of *fiqh*in *muamalah* also confirmed that "*Al-ashlufilmuaamalaati al-ibaahatuillaanyadulladaliilualaatahriimihaa"* namely that essentially all forms of *muamalah* could be made unless there is proof (*dalil*) that forbids it.

MUI as an institution that is mandated to issue a Fatwa, need to find a solution to the obstacles encountered in the implementation of the operations of Islamic banking, including MMQ financing, so that the Muslims can meet its economic needs comfortably, without the burden of misgivings due to imperfect rules and regulations that should have to be the guidelines.

III. Conclusion and Recommendation

a. Conclusion

Based on the discussion as described above, it can be concluded that actually, the regulations governing the financing of MMQ is necessary to strengthen, because some of the following: First, Substantially is not complete yet and therefore need to be improved, the regulation of the MMQ financing is also still a lot of languages which are complicated and difficult to be understood by ordinary people, so it needs to be formulated in accordance with the rules of legal drafting, and in some cases the regulations on MMQ financing still there is a content seems inconsistent so needs to do the alignment. Second, hierarchically, the regulations governing the MMQ financing are still weak, because it is regulated by MUI Fatwa.

The MUI Fatwa governing the financing of MMQ has not set forth in the Regulation of the Financial Services Authority as mandated by the Islamic Banking Act. The regulation of MMQ financing would be ideal if it is poured in the frame of law, although the legal source still has to refer to the MUI Fatwa which serves as the main source of law.

The implementation of MMQ financing in the Islamic bank can also be said that it has not been able to run properly in accordance with the expectation with some indication as follows: *First*, the percentage of public interest against MMQ financing is still very low. *Second*, generally in practice of MMQ financing, the customer does not use the object of financing as a means of doing productive business but is used to meet the needs of residential houses. Third, the implementation of the MMQ financing can just be realized for the fulfillment of any form of residential property. Though in theory, MMQ financing could be applied to vehicle financing, home stores, business flats, houses offices, apartments, condominiums or other business in accordance with Islamic principles.

MMQ financing in Indonesia actually can be realized more optimal if it is taken strategic steps as follows: first, necessary to improve regulations governing the financing of MMQ. Secondly, it is necessary to conduct a massive socialization, in order to be understood by all stakeholders. Thirdly, there should be a legal breakthrough which did not deviate from the principles of sharia to eliminate any technical obstacles of its operational to make it financing more attractive MMQ Islamic banking industry and the Customer. Fourth, the need of the high religious consciousness (*ghirrah*) from the Muslims to implement the teachings of Islam as a whole (*kaffah*), and also freeing themselves from the usury system in developing productive economic activities.

b. Recommendation

a. To the Indonesian Ulema Council, the Financial Services Authority, the Government and the

Parliament, which has regulatory authority in the field of Islamic banking, are expected to more optimally initiate proposed Amendment to the Law No. 21 Year 2008 concerning on Islamic Banking. The completion of the Act referred to at once be a momentum to strengthen regulation in the field of MMQ particularly and programs of Islamic banking as a whole.

b. MUI and the Financial Services Authority recommended that the provisions governing the MMQ financing as formulated in the form of MUI Fatwa needs to be actionable, set forth in the Regulation of the Financial Services Authority as mandated by Act 21 Year 2011 concerning on Islamic Banking, in order to force the law of these provisions become stronger and more binding, since the violation of the Islamic Banking Act is inappropriate and should not be allowed.

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Securing the Right to Life on the War on Terror: A Comparative Analysis of Indonesia and Europe

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ABSTRACT

This article analysis the adequate protection of the right to life in cases of deaths caused by the use of lethal force, particularly in the effort of preventing terrorism in Indonesia and Europe. Under the European Convention of Human Rights (ECHR), the taken of life shall be done in a condition of "absolutely necessary" that later shall be proved by an effective and adequate investigation. A failure to investigate deaths arising from the acts of state officials will amount to a violation of the right to life. Conversely, in Indonesia in the name of war on terror and saving the security of nations, terrorist suspects are frequently killed on the process of arrest without having to be brought to a trial. This ironical condition leads to a question whether the right to life is protected in Indonesia. By utilising a comparative legal method, the discussion will be presented in four sections. First, is how the right to life is regulated in Indonesia. Second, is how the right to life is considered in the effort of counter-terrorism in Indonesia. Third, is how the right to life is secured under the system of ECHR, especially in cases of deaths caused by the use of force. The last is how to improve the protection of the right to life in Indonesia.

Keywords: the right to life, duty to investigate, terrorism, ECHR, Indonesia.

I. Introduction

In this era, it is widely believed that there are some common enemies among countries to be eradicated; one of which is terrorism. Basically, terrorism has many perspectives to be defined. The Secretary of State for the Home Department and the Secretary of State for Northern Ireland (1998) argue that the definition of terrorism is too limited in explaining the meaning of terrorism itself. The narrow definitions, in some cases, are still used and defined in the last 15 years. For example, based on the Government Regulation In Lieu of the Law of the Republic of Indonesia Number 1 Year 2002 on Combating Terrorism, terrorism is defined as criminal actions that make fear, lost people lives and lost public and private belongings. Almost in the same meaning, Section 20 Prevention of Terrorism (Temporary Provisions) Acts (PTA) 1989 emphasises terrorism as an action to make fear on others. Indonesian Official Dictionary (*KamusBesarBahasa Indonesia*) (2016) has less specific definition on terrorism as a violence in order to make fear by way of political affairs. Those examples of definition are criticised by some experts since there is almost no differences between ordinary crimes and terrorism. Thus, the Secretary of State for the Home Department and the Secretary of State for Northern Ireland (1998) offers an emphasis that terrorism is a 'serious violence' harming others and states.

As a serious violence, terrorism logically needs special treatment to combat. In Indonesia, Special Detachment 88 (*DetasemenKhusus/ Densus 88*) was formed in 2002 in order to combat terrorism in Indonesia. Interestingly, the treatments over terrorism cases in Indonesia have two different consequences. In one side, the role of *Densus 88* seems to have a positive impact in order to combat terrorism. *Densus 88* is included as one of the best Detachement in combating

terrorism around the world (Voice of America, 2016). Voice of America (2016) also notes that *Densus 88* has been preventing more than fifty plans of terrorism action in Indonesia and has been arresting more than a thousand suspected terrorist (Mahar, 2016) since established. One of international recognitions comes from Saudi Arabia to give hajj packages for family members of *Densus 88* personnel who die on duty (Halim, 2017).

On the other side, there are also some negative perspectives on the actions of *Densus 88*. Jones and Solahudin (2014) question the high number of dead terrorists in raids, although the group of terrorist, in some cases, is in a weak condition or low in number. Almost in the same opinion, HajriyantoThohari, Vice Chairman of the People's Consultative Assembly (*MajelisPermusyawaratan Rakyat* / MPR), in BBC (2014) dissagree with the ways of *Densus 88* to kill immediately people suspected of being terrorists. Two suspected terrorists in Tulungagung were fired by personnel of *Densus 88*, although they were arguably helpless and no resistance (Margianto, 2013). Based on the case, SianeIndriani, a member of National Commission on Human Rights of Indonesia (hereinafter "*Komnas HAM*"), argues that *Densus 88* has violated the values of human rights; in which she describes the action as 'extra judicial killing' (Margianto, 2013). Surprisingly, many suspected terrorists are fired other than Tulungagung's case in Indonesia. Indriani in Listy (2016) reveals that more than a hundred suspected terrorists have been fired in the weak positions. The controversial case is the death of Siyono, a suspected terrorist in Central Java, because the cause of the death is unclear. *Densus 88* explains that Siyono is killed because he resists to be arrested and tries to attack some officers (Artharini, 2016a). However, some organisations, such as *Muhammadiyah*(one of Islamic organisations in Indonesia) and *Komnas HAM* believe that based on the autopsy, there is no indication that Siyono's death is because of his resistance (Artharini, 2016b). Furthermore, Chairman of Muhammadiyah for Legal Affairs, Human Rights and Public Policy in Artharini (2016b) believes that *Densus 88* seems to have no intention to be transparent unpacking terrorism cases by the death of Siyono. Interestingly, unsatisfied people on the work of *Densus 88* makes a movement by writing a petition to dismiss *Densus 88* (Awal, 2016).

The treatment for suspected terrorist by *Densus 88* has two consequences. First, vicious circle on terrorism cases will be happened continuously, especially to revenge *Densus 88* (Jones and Solahudin, 2014). *Densus 88* needs to be transparent handling terrorism cases in order to build trust to the people. Killing suspected terrorists, in some cases, will close the opportunity to solve the root problem of the cases. Thus, the death cases of suspected terrorists on the basis of counter-terrorism agenda has to be accountable. Second, by killing the suspected terrorists, *Densus 88* seems to violate human rights, especially right to life.Based on these factual reasons, this article will analyse the adequate protection of the right to life in cases of deaths caused by the use of lethal force, particularly in the effort of preventing terrorism in Indonesia and Europe. The reason behind choosing European Human Rights System as a comparison to Indonesia is because it introduces transparency by imposing a duty to investigate as a procedural limb of the right to life (Listiningrum, 2017). The legitimacy of the taken of life by the authorities has to be proven by a rigorous investigation. A member state of the European Convention on Human Rights (hereinafter "ECHR") can be considered as breaking its obligation under the Convention when it fails to implement the procedural requirement of the right to life.

II. Discussion

A. Laws Related to the Right to Life inIndonesia

In Indonesia, the right to life is one of fundamental rights guaranteed by the Constitution (*Undang-UndangDasar Negara Republik Indonesia Tahun 1945*) and the Human Rights Act of 1999 (Act No 39 Year 1999). The right is also one of civil and political rights enumerated by the International Covenant on Civil and Political Rights (hereinafter "ICCPR"), which has been acceded by Indonesia on 23 February 2006 (United Nations Office of the High Commissioner of Human Rights, n.d.).

Within the Indonesian Constitution, the right to life was not included as one of enumerated rights until the second amendment of the Constitution in 2000. The inclusion of the right to life and other list of rights as a separate chapter of rights (chapter XA) into the amended Constitution were gained as a consequence of the wave of reformation after experiencing two decade of unstable democracy during the presidency of Soekarno and three decade of authoritarian regime during the presidency of Soeharto.

Prior to the current or amended Constitution, Indonesia has experienced three changes of constitution. The first is called as the old Constitution of 1945 (*Undang-UndangDasar 18 Agustus 1945*), the second is named as the RIS Constitution (*KonstitusiRepublik IndonesiaSerikat*), and the third is known as the Temporary Constitution of 1950 (*Undang-UndangDasarSementara 1950*). These three previous constitutions did not enumerate the right to life as one of protected rights. During the creation of the old Constitution of 1945, there was a sharp debate of universalism versus particularism concept of human rights among the creator of the Constitution (Kusuma, 2004). There was a fear of individualism or liberalism when a number of rights are listed within Constitution. Soekarno as the opponent of rights reveals that the inclusion of the rights of citizens or now called as human rights (*droits de l'homme et du citoyen*) to the Constitution is contrary to the spirit of mutual cooperation (*gotongroyong*) of the nation. Mohammad Hatta as the proponent of the rights agreed to Soekarno's opinion for apart and stated that he also opposed the idea of individualism, but embraced the importance of the recognition of rights to be listed in the Constitution in order to avoid tyranny and despotism. That is why finally, some civil, political, social, and economic rights, such as freedom of religion (article 29 paragraph 2), equality before the law (article 27 paragraph 1), freedom of thought (article 28), freedom of assembly (article 28), right to education (article 31 paragraph 1), right to a decent work and an adequate livelihood (article 27 paragraph 2) were enumerated as a result of agreement between the two camps (Manan, 2012). Those rights were not regulated in a particular chapter of rights, but spread into the articles.

The right to life was first became known in Indonesia since the enactment of the Human Rights Act of 1999. In the article 4, the Act asserts the non-derogable character of the right to life together with freedom from torture; the right to personal freedom, thought, and conscience; freedom of religion; freedom from slavery; equality before the law; and the right not to be prosecuted based on a retroactive law. In the article 9, the Act explains the scope of the right to life, including a right to preserve and improve the quality of life, a right to have a peaceful life, and a right to an appropriate and healthy environment. As a duty barer, the state has positive obligations to respect, protect, fulfill and enforce the right to life. Not only because the right to life is guaranteed by the Human Rights Act of 1999 and the Constitution, but also because the right to life is promised by other international treaties that has been ratified or acceded by Indonesia, for instance the ICCPR. This requirement of positive obligations is emphasised by article 71 of

the Act. Moreover, in the article 72, the state is required to take effective steps in ensuring the implementation of the rights, including legislative, political, economic, social, cultural and others type of measures.

Although having a great pledge of human rights protection, the Human Rights Act of 1999 actually leaves a loophole of enforcement mechanism. The provision of remedies or access to justice only applies to the violation of gross violation of human rights, such as genocide and crime against humanity (see article 104 paragraph 1 of the Human Rights Act of 1999 and article 7-9 of Act No 26 Year 2000 on Human Rights Court). There is no judicial mechanism or provision of access to justice for the violation of other rights listed in the Human Rights Act of 1999, involving the right to life.

Actually, Indonesia has an obligation to provide remedies for the violation of civil and political rights enumerated in the ICCPR (article 2 paragraph 3 of the ICCPR). Nevertheless, the obligation has not been done thoroughly. It is true that ICCPR does not set uniformity to the personification of remedies or access to justice under article 2 paragraph 3 (Listiningrum and Bachtiar, 2017). A state has a wide margin of appreciation to determine the domestic authorities in charge whether conducted by a court of law, legislative or executive. Nevertheless, if the given remedy is personified by an investigation of the alleged violations, that investigation should satisfy the requirement of effectiveness and conducted by independent and impartial bodies (General Comment No 31 of the ICCPR: The nature of the general legal obligation imposed on States Parties to the Covenant, paragraph 15).

Article 89 paragraph 3b of the Human Rights Act of 1999 gives a mandate to Komnas HAM for conducting investigation for any suspected human rights violation. Nevertheless, Komnas HAM has no mandate to file the case to the court. The result of investigation by Komnas HAM will only be given to the government or parliament, but there is no guarantee of follow up. Therefore, Komnas HAM investigation could not be considered asan effective remedy to the victims of human rights violations. Moreover, as most of civil and political rights listed in the ICCPR are also enumerated by the Constitution, the citizen of Indonesia can file a judicial review to the Constitutional Court if any provision of an act that has been enacted by the parliament potentially violates the rights. Nevertheless, there is no clear answer for remedies of human rights violation if it is conducted by the actions of state agents or non-state actors. In the absence of national mechanism, the victims of human rights violation could also not file an individual complaint to United Nations Human Rights Committee because Indonesia has not ratified or acceded the Optional Protocol to the ICCPR. The only action that can be done is through universal periodic review, but the effectiveness of the process remains uncertain (see Abebe, 2009; Smith, 2011; McMahon and Ascherio, 2012; and Dominguez-Redondo, 2012).

B. The Right to Life in the Effort of Terrorism Prevention in Indonesia

There is a fundamental problem that impedes the protection of to the right to life in Indonesia, in particular in the process of counter-terrorism. As explained in the introduction that in its terrorism prevention action, the state agents called Densus 88 has killed a high number of terrorist suspects in the process of arrest of which some are not in the acts of resistance. Therefore, the legitimacy of the taken of life by Densus 88 as the agents of state should be questioned.

There should be a proof of killing validity whether it was done in a necessary condition or not. If the agents of state arbitrarily killed a terrorist suspect, the acts can be considered as a violation of the right to life under article 4 of the Human Rights Act of 1999. Even, article 9 actually

stresses the non-derogative character of the right to life that no taken of life is permitted in any condition. Ironically, there is no a clear mechanism of finding remedies or access to justice if the right is violated.

The suspicious killing of terrorist suspects has never been investigated properly, for instance in the case of Siyono. He was a suspected terrorist that was killed in the process of arrest by Densus 88. Later, it was recognized that the arrest of Siyono was not accompanied by a proper warrant. Ironically, this case was never neing investigated properly and the Police claimed that the assassination of Siyono was necessary in order to tackle his resistance. Knowing irregularities, Siyono's family accompanied by civil society called as Muhammadiyah started an independent investigation by conducting autopsy to the dead body of Siyono. The doctor observation resulted in an astonishing fact that Siyono was not killed because of his resistance actions. Nevertheless, the Police object the doctor observation because it was not conducted within a formal police investigation and avoid providing a further investigation as well as explanation. Therefore, the legitimacy of the taken of life by Densus 88 was never confirmed.

The Terrorism Act of 2003 (Act No 15 Year 2003 on the Determination of Government Regulation in Lieu of Law No 1 Year 2002 on Combating Crime of Terrorism, Becoming an Act) does not specify a certain requirement of prosecution. The provision of arrest is explained by a police chief regulation (Police Chief Regulation No 23 Year 2011 on the Procedure of Prosecution of Terrorist Suspects). The regulation specifies that the process of arrest shall be done in the principle of legality, proportionality, integrality, necessity, and accountability. Although mentioning the requirement of accountability, the regulation remains silent on the issue of mechanism, such as how to prove the accountability and the legality of the actions.

To the present, there is little efforts can be taken by the deceased family of the terrorist suspect. Sometimes they can rely to an internal mechanism of Police, but this process is lack of transparency and public scrutiny. They can also file a civil claim of tort to the court, but they have to prove the requirements of fault and person in charge (see article 1365 and 1370 of Civil Law Procedures). Due to the secrecy of the Police operation, proving the elements of fault and person in charge is not easy.

C. Procedural Obligation of the Right to Life under the System of ECHR

The European Court of Human Rights (hereinafter "ECtHR") puts a high standard of protection to the right to life. This due to the fact that article 2 of the ECHR requires state to not deprive someone's life unless in a condition of "absolutely necessary". The taken of life by the agents of state shall be investigated effectively by an independent investigator in order to ensure the legitimate aims of the authorities (see McCann and Others v. the United Kingdom; Kaya v. Turkey; Ergi v. Turkey; Çakici v. Turkey; Tanrikulu v. Turkey; McKerr v. the United Kingdom; Hugh Jordan v. the United Kingdom; Kelly and Others v. the United Kingdom; Shanaghan v. the United Kingdom; Anguelova v. Bulgaria; UlkuEkinci v. Turkey; Hackett v. the United Kingdom; Nachova and Others v. Bulgaria; Ramsahai v. the Netherlands; Al-Skeni v. the United Kingdom). Maintaining transparency and accountability to the public is important, not only for ensuring the adequate protection of the right to life, but also for assuring that the state does not abuse its power.

State as a duty bearer has a positive obligation to ensure the protection of the rights listed in the ECHR (article 1 of the ECHR). This positive obligation if read in conjunction with state obligation to protect the right to life under article 2 results in a procedural obligation of state to effectively investigate the cases of deaths conducted by its agents. A failure to perform this procedural

obligation will amount to a violation of the right to life (Kaya v. Turkey).

There four element of an effective investigation that shall be satisfied in order to satisfy the procedural limb of the right to life. The ECtHR applies these elements as a test of effective investigations to unravel the legitimacy of the taken of life in cases of homicide arising from the acts of state agents by the use of lethal force. First, is the requirement of independency, which can be proved by the absence of hierarchical or institutional connection between the investigators and perpetrators. Second, is the requirement of proper capacities to unpack the case and punish the offenders. Third, is the element of a prompt and reasonable expedition to initiate the investigation that there should not be any delay causing the ineffectiveness of the investigation. Fourth, is the requirement of deceased family involvement in the inquest proceedings (Listiningrum, 2017).

D. Introducing a Better Protection to the Right to Life in Indonesia

Solving the problem of the right to life is the same with unraveling the dilemmas of human rights protection as well as enforcement in Indonesia. As explained in previous discussions that the Human Rights Act of 1999 is lack of enforcement mechanism. A special human rights court is only addressed for gross violation of human rights. In this regards, it seems the government put only a concern on that type of violation, but forgetting the enforcement of other rights. The Human Rights Act of 1999 only specifies gross violation of human rights, such as genocide and crimes against humanity as enforceable rights and puts no status on other listed rights. Therefore, a revision of the Human Rights Act of 1999 is needed in order to clarify the loophole problem of enforcement mechanism.

Regarding to Indonesia's commitment as the member state of the ICCPR, it is important to categorised civil and political rights as a group of enforceable rights recalling article 2 paragrapgh 3 of the ICCPR. This categorisation can be used a fine line between civil and political rights that requires immediate implementation; and economic, social, and cultural rights that the realisation could be done progressively (General Comment No 3 of the International Covenant on Economic, Social and Cultural Rights: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant); Courtis, 2008; Eide, 2011).

Another substantial problem is there is no clear provision of authorities in charge to prosecute human rights violation. It is true that Komnas HAM is mandated to investigate any cases of human rights violations, yet they do not have an authority to bring the case before the court. The prosecutorial powers is important to be given to Komnas HAM in order to seriously resolve and settle the case of human rights violation in Indonesia. Compare to the system of ECHR, the investigation conducted by Komnas HAM only satisfies two elements of an effective investigation, which are the requirements of impartiality and deceased family or victims involvement. As mandated by the Human Rights Act of 1999 that Komnas HAM is an independent auxiliary body a part from executive or Police troops. It consists of 35 academics, politicians, lawyers and/or human rights activists selected by the Parliament (DewanPerwakilan Rakyat Republik Indonesia) (article 83 and 84 of the Human Rights Act of 1999). In the investigation process, Komnas HAM also involves and receives complaints as well as information from public in order to find facts regarding to alleged human rights violations. Hence, the involvement of public in the works of Komnas HAM is not doubtful. However, Komnas HAM has no power to prosecute and punish the offenders. That is why most of investigated cases are never settled to the court and victims do not get any remedies for the violation they have suffered.

III. Conclusion and Suggestion

The right to life is one of fundamental rights guaranteed by the Constitution of Indonesia and the Human Rights Act of 1999. The right is also protected by one of international human rights treaties acceded by Indonesia, the ICCPR. Nevertheless, the right to life is actually has not been protected thoroughly in this country, especially when dealing with counter-terrorism. A high number of terrorist suspects are frequently killed by the agents of state suspiciously in the process of arrest. Ironically, these excessive actions have never been investigated properly. This is due to the lack of human rights enforcement mechanism.

As a comparison, the system of ECHR put a high concern on the violation of the right to life. Any cases of the taken of life conducted by the agents of state, even in the effort of terrorism prevention, shall be investigated properly by independent bodies. The investigation also has to be able to reveal the facts on the ground leading to a capacity of prosecution if the offenders are found to be guilty. During this investigation, there shall not be any delay that can cause ineffectiveness to the investigation. Moreover, the investigation also has to be done transparently.

Learning from the human rights system of ECHR, some improvements have to be done in order to introduce a better protection to the right to life in Indonesia. As a suggestion, the revision of the Human Rights Act of 1999 is urgently needed in order to unravel several human rights enforcement problems. In this regards, two main points that shall be detailed in order to improve the adequate protection to the right to life are (1) the emphasis of the enforceability nature of civil and political rights; and (2) the introduction of litigating or prosecutorial function to Komnas HAM.

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The Inconsistency of Supreme Court Decision to Annul the Arbitratral Award in Indonesia

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ABSTRACT

This study firstly examines the consideration of the Supreme Court in deciding the annulment of arbitral award both by reason under Article 70 and outside of article 70 Law No 30 of 1999 concerning Arbitration and Alternative Dispute Resolution, secondly reviewing and analyzing theories used in consideration for the Supreme Court to annul the Arbitral Award. Thirdly formulate a concept in deciding the annulment of an Arbitral award based on the principle of justice. This type of research is normative juridical research. Some of the approaches used in the analysis of this research are case approach, statue approach, the comparative approach. In more detail, the data obtained from the reserch processed and analyzed using prescriptive analytical. The results showed firstly based on the consideration of The Supreme Court Decision No. 729 / K / Pdt.Sus / 2008 interpret Article 70 of the Arbitration Act in limiting, contrast with The Supreme Court Decision No.03 / Arb.BTU 2005 interpret Article 70 is enunciation. secondly, The Judges annul the arbitral award under Article 70 of the Arbitration Act is limitedly using analytical theory meanwhile, the Judges annul the arbitral award refers to reasons beyond Article 70 of the Arbitration Act uses Progressive legal theory. Thirdly based on Procedural and Substantive Justice reasons for annulment of an arbitral award pursuant to Article 70 of Law Arbitration is too limitedly when it is compared to Article 34 The UNICITRAL Model Law. The substantive justice should be limited to a restriction so that arbitrators use it arbitrarily.

Keywords: *Inconsistency, the Supreme Court decision, the annulment, the arbitral award*

I. INTRODUCTION

In the business world, certainly many considerations that underlie the business persons to choose arbitration as the dispute resolution efforts that they will face or face (Sudiarto Zaeni and Asyhadie, 2004:32). There are various reasons that can be used by business persons to select arbitration in an effort to resolve its trade disputes, among others, can be read in the fourth Paragraph of the General Elucidation Law No. 30 of 1999 regarding Arbitration and Alternative Dispute Resolution, namely:

In general arbitration institutions have advantages compared to the judiciary. The advantages are among other:

1. Guaranteed confidentiality of the parties' dispute
2. The inevitable slowness caused due to procedural and administrative matters
3. The parties can choose the Parties can choose the arbitrator who he believes to have the knowledge, experience as well as sufficient background on the issues in dispute and fair
4. The parties may determine the choice of law to resolve the problem as well as the process and the venue for the arbitration and
5. The arbitral award is binding on the parties through the simple procedure or it can be immediately implemented.

One of the advantages of a settlement through arbitration compared to court is avoidable slowness due to procedural and administrative matters. This is in accordance with one of the

principles applied in arbitration law that is a Final and Binding principle. It is an arbitral award that is final and binding upon the parties directly the arbitral award cannot proceed with another remedy, such as appeals or cassation. This principle already agreed by the parties in their arbitration agreement or clause in the agreement, but in the arbitration, the act is given the remedy for the parties namely the annulment of the arbitral award if it meets the conditions regulated in article 70 of Law No 30 of 1999.

Arbitration act governs the annulment of the arbitral award in article 70 which states that the parties may apply for annulment if the arbitral award is allegedly contains elements of forgery of a letter or document, or a document found hidden by the opposing side, or decision taken from the ruse performed by one of the parties in the dispute. However, in practice, the annulment of the arbitral award based on article 70 decided inconsistency by the District Court and the Supreme Court. On the one hand, the Supreme Court annul the arbitral award can only be done on the basis of the reasons contained in article 70 that is the verdict of the Supreme Court Number 727/K/Pdt. Sus/2008. In this regard article 70 interpreted limited, on the other hand, the Supreme Court decided the annulment of the arbitration award shall be implemented on the basis of reasons outside of article 70 of the Supreme Court Verdict Number i.e. 03/Arb/the Btl/2005. Surely the Supreme Court decision raises legal uncertainty and injustice to the disputant parties

Based on the above conditions, the researcher is interested in researching inconsistencies the Supreme Court Decision decided the annulment of the arbitral award. The subject of the research is the judge at the Central Jakarta District Court and the Supreme Court with the consideration that many business disputes are resolved using arbitration and most of the respondent domiciled in Jakarta. This research is the juridical normative research. Types of data used in this research are the primary data and secondary data. Some approaches used in conducting the analysis in this study is a case approach (Peter Mahmud Marzuki,: 93-95). In this study, the data obtained were analyzed using the model of flow analysis (Mattew B Miles and Michael Huberman, 1992:19-20). In more detail the data obtained from research, both the library research or field research, processed and analyzed critically and analytically presented in a descriptively qualitative.

Based on the introduction above, then the research issues that are studied are as follows: (1) How did the Supreme Court consideration in deciding the annulment of arbitral award both according to the reason of the annulment under article 70 and outside article 70 of Law No 30 of 1999 regarding arbitration and alternative dispute resolution? (2) whether the Theory used by the Supreme Court in deciding on the annulment of the arbitration? (3) how to formulate a concept of annulment of the arbitral award based on justice?

II. DISCUSSION

2.1 The Consideration of the Supreme Court in deciding the annulment of Arbitral Award both under article 70 and outside of Article 70 Arbitration Act

Discrepancies of Supreme Court decision regarding the annulment of the arbitral award refers to Article 70 Arbitration Act raises two streams first Supreme Court is consistent with the Article 70 states that the reason for the annulment of the arbitral award must refer to the content of Article 70 is limitedly and recognized in MARI decision 729 / K / Pdt.Sus / 2008, so that the annulment of the arbitral award does not refer to Article 70 can not be justified. A second strain in which the Supreme Court stated that Article 70 is not limiting and has been recognized and become jurisprudence in MARI Decision No.03 / Arb.BTU 2005 dated May 17, 2005, stating the word “include” in the General Elucidation of the Arbitration Act allows the applicant to apply for

annulment of an arbitral award on grounds beyond those listed in Article 70 of the arbitration Act.

The judges in Award MARI No. 729 / K / Pdt.Sus / 2008 interpreted Article 70 Arbitration Act is a limitation, in contrast with MARI Decision No.03 / Arb.BTU 2005 interpreting Article 70 is enunciation, underlies the words "among others" in the General Elucidation of the Arbitration Act gave slit add to reasons other than article 70 of the Arbitration Act, but it is also the reason for annulment of an arbitral award under Article 70 do not contain matters which are fundamental. According Hikmahanto Juwana basis of the annulment of arbitral award is not limitedly under Article 70 Arbitration Act, there are several reasons for the annulment of arbitral award that the delay in deciding the case where the time specified in the Arbitration Act is 180 days, the absence of the arbitration agreement, the authority of procedure making the arbitration decision, for example process choice of the arbitrator, the implementation of the law chosen by the parties to the dispute (Rengganis, 2011: 75). In line with the opinion of Hikmahanto, according to Priyatna Abdurrasyid (former Chairman of BANI and arbitrators), there is another reason to annul the Decision BANI outside Article 70 Invitation Arbitration Act, ie when there is "procedural error" in the arbitration decision. (Priyatna Abdurrasyid, 16). Although in modern arbitration practice, restrictions on the reasons for annulment of arbitral award by law has been recognized as a universal principle of least reason for canceling arbitral award shall contain matters that are fundamental to Articles 34 The UNICITRAL Model Law

2.2 The Theory Used in Consideration of the Supreme Court to Annul the Arbitral Award

The Legal theory plays an important role in guiding the decision of the judge preparing qualified and able to accommodate the objective of the law, namely fairness, certainty and legal expediency. The Supreme Cout Judge annul the arbitral award under Article 70 of the Arbitration Act is limitation using analytical theory. According to this theory the judge in applying the law only match the case heard by the sound of the text of legislation (M.Natsir, 2014: 52). The Supreme Court Judge annul the arbitral award refers to reasons outside Article 70 of the Arbitration Act uses Progressive legal theory. The founder of the theory of progressive law is Satjipto Rahardjo. The Judges can no longer simply decide within a narrow space for the text and does not capture the will and social needs as well as the existing law (M.Natsir, 2014: 69)

2.3 The Concept of the Arbitral Award Annulment Cancellation Based on the Principle of Fairness

In the discourse of the concept of justice is found various notions of justice, among others, justice is put things in place (proportional), justice is a balance between rights and obligations etc. Likewise, the classification of justice is also found, for example, Aristotle divided commutative and distributive justice. In the context of the arbitral award that is often mentioned is in the form of procedural justice and substantive justice.

So essentially, the fairness issue in its implementation in practice perceived as fair or unfair is based on an assessment of each party, which is very likely different (Bambang Sutiyoso, 2010: 9).In the ideal level to realize the judge's decision that meets the expectations of seekers of justice, which reflects the value of law and society's sense of justice, there are some elements that must be met as well. Gustav Radbruch argues, ideally in a decision must contain idée des recht, which includes three elements, namely justice (gerechtigkeit), legal certainty (rechtsicherheit), utility (zwechtmassigkeit). Three elements should be considered in proportion so as to produce a quality

decision to meet the expectations of the justice seekers (Sudikno Mertokusumo, 2004: 15). In connection with the annulment of the arbitral award if it refers to substantive justice and procedural fairness.

Referring to procedural justice, the annulment of the arbitral award in Indonesia should be refers to the Model Law on Arbitration International Trade adopted by the United Nations Commission on International Trade and Law on June 21, 1985 (the UNICITRAL Model Law) and these have been written in the Law of Arbitration of many countries in the world. This Universal procedure is the main reason for basing on the view that the arbitral award is acceptable, appropriate, fair to resolve domestic disputes and across the country. Thus the reason for the annulment of arbitral award based on the provisions of article 70 of the arbitration act is too limitedly when compared to Article 34 The UNICITRAL Model Law i.e. firstly the parties or one of the parties that made the arbitration agreement is a person who does not have the capacity or authority (under incapacity) to create an agreement, resulting in the arbitration agreement it becomes invalid, when the arbitration agreement becomes the basis of the case was resolved through arbitration, secondly it should be the fulfillment of the audi alteram partem principle which the parties are given an equal opportunity to adequately defend their interests, for example, where one party was not informed appropriately about the appointment of the arbitrator, or to defend, the arbitration decision is considered reasonable for a tribunal has to be partial or biased so the process of the case investigation is underway dishonestly, thirdly arbitration panel has ruled that exceeded its authority, fourthly the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this law from which the parties cannot derogate, or failing such agreeement, was not in accordance with this lawfifthly the subject matter of dispute is not capable of settlement by arbitration under the law of this state sixthly the arbitral award contrary to the public order of the country. The Substantive justice is something abstract. Based on interviews with Judges of the Supreme Court, Rahmadi substantive justice must be restricted with a guide, so that arbitrators use it arbitrarily except for reasons not referring to the law in deciding the case as long as the reason is contrary to public order.

According to Philippe Fouchard, in modern arbitration practice, restrictions on the reasons for the annulment of arbitral award by law has been recognized as a universal principle, and according to Sujayadi, the reason for annulment of arbitral award can only be made for the fundamental reason stipulated in the Act (Ilham Ginang Pratidina, 2014: 314) and should be a case where the court does not need to intervene in the dispute which the parties have agreed to resolve by arbitration should be a case where the court does not need to intervene in the dispute which the parties have agreed to resolve by arbitration moreover arbitration decision cancellation (less intervention of state).

III. CLOSING

Based on the formulation of the problem, the results of research can be concluded as follows (1) Observing the consideration of the decision MARI 729 / K / Pdt.Sus / 2008 and No.03 / 2005 Arb.BTU apparent inconsistency of the reasons for annulment of the arbitral award. The Supreme Court judges in MARI No. 729 / K / Pdt.Sus / 2008 interprets article 70 of Arbitration Act is a limitation. Unlike the MARI Decision No.03 / Arb.BTU 2005 interpreted enunciation (2) The Supreme Court Judges annul the arbitral award under Article 70 is limitation using analytical theory. According to this theory, the judge in applying the law only adjust the case heard by the

text of the legislation. The Supreme Court Judges annul the arbitral award refers to reasons outside Article 70 of the Arbitration Act uses Progressive legal theory. The originator of the theory of progressive law is Satjipto Rahardjo. Supposedly The Supreme Court judges should no longer merely decided in a narrow space for the text and does not capture the will and social needs as well as existing laws (3) Refers to the procedural substantive justice, the reason for annulment of arbitral award pursuant to Article 70 of Law Arbitration is too limitedly when compared to Article 34 The UNICITRAL Model Law, but the substantive Justice should be restricted for use with a guide, so that arbitrators use it arbitrarily except for reasons not referring to the law in deciding the case as long as the reason is contrary to public order. Based on the conclusion, researchers proposed recommendations as follows: Arbitration Act relating to Article 70 concerning the annulment of the arbitral award was changed to adjust to the provisions of Article 34 The UNICITRAL Model Law so that no longer occur inconsistency Supreme Court's decision in the annulment of arbitral award, because the reason for annulment of the arbitral award may be broader

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Utilization (*intifa'*) of Unlawful Wealth Acquired by Unlawful Means from Islamic Legal Perspective

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ABSTRACT

This study examines the issue of utilization (*intifa'*) of unlawful wealth which is acquired by unlawful means from Islamic legal perspective. The question is whether it is permissible for a Muslim to take benefit from the wealth that acquired by unlawful means? The discussion focuses on the meaning of utilization and its means; the meaning of unlawful wealth that acquired by unlawful means and its classification. It further examines the legal ruling on utilization of unlawful wealth by various means of utilizations. In addition, the study also deals with the manner in which the unlawful wealth is treated under Islamic law. The research is a library research where the issue will be examined from the perspective of the Qur'an and the *Sunnah* as the primary sources of Islamic law and follows with the examination of the view of Muslim jurists of four well-known schools of law as well as the view of contemporary Muslim scholars. In addition, the reference also will be made to legal opinions (*fatawa*) from some Muslim countries and some renowned Muslim scholars. It is hoped that the study may provide a clear reference and guideline regarding the utilization of unlawful wealth under Islamic law that is significant and beneficial to all in our present day.

Keywords: *Utilization, Unlawful wealth, Islamic Law, Unlawful means.*

I. Introduction

One of the significant characteristics of a perfect ownership of wealth under Islamic law is that an owner of wealth has a full right and legal authority to utilize the wealth that he or she owns by all means of utilization.[1] Such enjoyment is to be within the limits prescribed by Islamic law and it is applicable to the case of wealth which is acquired by lawful means. The question arises here is that whether a person who acquired the wealth by unlawful means enjoys such right and possesses such legal authority?

II. Discussion

1. Concept of Utilization (*intifa'*)

Utilization in Arabic is termed as '*intifa'*' and it is a verbal noun from the word *intafa'a*. It literally means to reach to the benefit.[2] Legally, there are some definitions given by the Muslim scholars. According to QadriBasha, 'permissible utilization' is a right of a person to use and exploit the wealth as long asits substance remains on its condition and even though such wealth is not owned.[3]This definition confines the utilization mainly on the using and exploiting the wealth whether by its owner or other person who is not an owner. Meanwhile Qal'ahJidefines utilization (*intifa'*) as the disposition of (*tasarruf*) something in the manner that intendsto gain benefit from it.[4]The 'disposition' is a general word includes any act done with respect to wealth to gain benefit from it whether by word or deed. On this basis,Jumanah asserts that the technical meaning of *intifa'* is not departed from its literal meaning. Both meanings refer to the reaching to

the benefit of something. This is not only confined to actual dispositions like eating, drinking, and so forth but it includes also verbal disposition like sale, leasing, gift etc. This isbecause these two types of disposition mean to reach to benefit of something.[5] In addition, al-'Abbadi classifies utilization mainly into two types: tangible disposition (*tasarrufatmadiyyah*) and legal disposition (*tasarruffatitibariyyah*).[6] Tangible disposition is the consumption and use. Meanwhile the legal disposition refers to the transferring of ownership of wealth where its legal effect is based on the consideration of the law. It is whether on the basis of exchange or without any exchange.[7]Similar to what has been defined by Qal'ahJiand outlined by al-'Abbadi, Hattabdefines utilization as the authority of enjoying three rights: right of use (*haq al-istikhdam*), right of exploitation (*haq al-istighlal*) and right of disposition (*haq al-tasarruf*).[8]The first one includes also consumption. The second one refers to the using of wealth to gain profit or fruit from it like leasing the wealth in return of rent. And the third one concerns with the transferring of ownership of wealth either with exchange or without exchange like sale, gift, bequest etc.[9]

Thus, it may conclude that utilization includesany actdone with respect to wealth either by deed or by word to get benefit from it by means of consumption, use, exploitation and disposition.

2. Unlawful Wealth Acquired by Unlawful Means and its classifications

There are mainly two types of unlawful wealth under Islamic law: unlawfulness because of its attribute or substance (*muharram li wasfihiwa 'aynihi*) and unlawfulness because of its acquisition (*muharram li kasbihi*).[10] The first category refers to all type of tangible object which is physically prohibited by *shari'ah* because of its harmfulness or dirtiness such as liquor, pork, dead animal and blood.[11]Second category is unlawfulness because of other factor which is not related to its substance, as its substance is not dirty or harmful like the first category, but it is related to the means of its acquisition which is prohibited by *shari'ah*.[12] This type of unlawful wealth is of two types. Firstly, wealth which is acquired not based on the consent of its owner such as wealth which is acquired by means of theft, misappropriation and breach of trust. Secondly, wealth which is acquired through consent between the parties' involved but it is not recognized by Islamic law such as taking usury (*riba*) or wealth which is acquired by means of gambling, bribery, prostitution, human trafficking, trading of prohibited items like liquor, pork etc.[13]

The discussion in this paper focuses on the utilization of the second type of unlawful wealth i.e. unlawful wealth which is acquired by unlawful means with respect to consumption, exploitation and transaction.

3. Utilization of unlawful wealth from Islamic legal perspective

The Muslim jurists of four well-known schools of law, Hanafi, Maliki, Shafi'i and Hanbali,are in agreement that it is not permissible for Muslim to utilize wealth which is acquired by unlawful means. Al-Sarakhsi[14]of theHanafi jurist clearly states that if a means of earning is prohibited, the income from such earning is certainly prohibited for consumption. This is because,as means of gaining an income is prohibited, the income which is resulted from it would also be prohibited. The example is that if the selling of wine is prohibited for Muslim, the consumption of income from the sale of wine is also prohibited.[15] In addition, he further asserts that a person will be punished (in hereafter) for taking or having an income from unlawful means of earning.[16] His argument is based on many Sunnah of the Prophet (peace be upon him)[17] and among others,

"From Abu Bakr that the Messenger of Allah says: every flesh which grows from unlawful

wealth, the hell-fire is more deserving for it."[18]

IbnTaymiyyah of the Hanbali school also clearly states that the income which is acquired by unlawful means like selling wine and prostitute is not permissible for one who acquired it.[19]According to al-Dusuqi of the Maliki jurist, a channel of lawful wealth in case if it cannot be returned to its original owner is to be given to the poor people or for the interest of Muslim.[20]Al-Ghazali of the Shafi'i jurists asserts that one who has in his possessionwholly unlawful wealth, it is obligatory on him to giving out the whole wealth either to its original owner if the owner is known or to the poor if the owneris unknown.[21]

The contemporary Muslim scholars are also in the same position with the classical Muslim regardingthe utilization of unlawful wealth. Rafiq al-Misriclearly contends that,

"It is not permissible for one who acquired income by unlawful means to utilize such income. It is obligatory on him to return it back to its original owners if it is possible to know them unless it has to be channeled for public interest and charity with the condition that he is not continuing of acquiring it."[22]

Some of the contemporary Muslim scholar clearly expresses that unlawful wealth cannot be utilized by all means. The well-known Yusof al-Qardawiwhen he is asked about the issue of the usury from the bank, he replies that,

"It is not permissible for one who acquired wealth by unlawful means to utilize such wealth. This is because it is considered as consuming something forbidden. It is the same thing with the utilization for food, drink, cloth, lodging, any payment to Muslim and non-Muslim, payment of any tax to the government…and also for fuel…"

The late Wahbah al-Zuhayli also agreed with al-Qardawi that unlawful wealth cannot be utilized by all means. In replying to the question on the issue of bank interest he states that,

"It is prohibited for one who earns unlawful wealth from usury to utilize it by all means. It is not for the payment of tax, any payment to the states, payment of zakat, or any payment with respect to banking transactions…"[23]

The legal opinion (fatwa) of the Muslim countries like Egypt, Saudi Arabia, Jordan, Kuwait as well as Malaysia is also in the same position with the view of Muslim jurists and contemporary Muslim scholars.

The prohibition of utilizing unlawful wealth is based on the authority of the Qur'an.There are many verses of the Qur'an that clearly states to the effect,

"And do not eat up your property among yourselves for vanities nor use it as bait for the judges with the intent that ye may eat up wrongfully and knowingly a little of other's people".[24]

"O ye who believe!do not eat up your property among yourself in vanities; but let there be among you trade by mutual consent." [25]

In this respect, al-Jassas asserts that the taking of wealth unlawfully is by two means. Firstly, the taking of wealth by means of oppression, theft, breach of trust, usurpation and others of similar nature. Secondly, the taking of wealthby means which is prohibited by *Shari'ah* even though with the consent of owner like gambling,…income from selling wine, swine, human trafficking and other means which are not allowed to own its income.[26]

The prohibition of utilizing unlawful wealth is also based on the *sunnah*. There are many

sunnah reported from the Prophet on this issue, among others,

"From AbiMas'ud 'UqbahibnAmru, he said: The Messenger of Allah (peace be upon him) forbade taking the price of dog, money earned by prostitution and the earning of sooth-sayer."[27]

"Abu Hurayrah reported the Messenger of Allah (peace be upon him) as saying: Allah forbade wine and the price paid for it, and forbade dead meat and the price paid for it and forbade swine and the price paid for it."[28]

"The Messenger of Allah (peace be upon him) says…: when Allah declared eating of a thing forbidden for apeople, He declares its price also forbidden for them."[29]

In this regard, IbnRijab of the Hanbali contends that anything that Allah forbade,to sell and to consume its price are also prohibited.Thus the discussion clearly shows that the utilization of an income from unlawful means is not permissible.

4. Spending unlawful wealth for maintenance

The question here is whether a person can utilize unlawful wealth for maintenance of himself and his family. As discussed above, the unlawful wealth cannot be utilized by those who acquired it. The general rule is that theunlawful wealth has to be returned to its original owner or to be given to the needy and the poor or for the public interest. But the issue arises in the case if the original owner is unknown and a person who acquiredunlawful wealth or earner is poor, the question is whether the earner can expense such wealth for maintenance himself instead ofdonating it to another poor or needy person.

There are two opinions regarding this matter. According to the majority of Muslim jurists, theHanafis, Malikis, Shafi'is and Hanbalis, in case if the earneris in need and there is no means of lawful income, he or she is allowed to take it for maintaining himselfand his family.[30] Imam Nawawi of the Shafi'i jurists contends that it is for the earner to spend for maintaining himself and his familyif they are poor. This is because they are under the category of poor person and they are more deserved.[31] The argument of this view is that this unlawful wealth has to be disposed to the poor and needy because its original owner is unknown. In case if the earner of this unlawful wealth is poor and in need, he certainly comes under the category of a person who is entitled to receive this wealth.[32]

On the other hand, according to al-Harith al-Muhasibi, it is notpermissible for a poor earner to spend the unlawful wealth for maintaining himself and his family. In the case if he spends it for maintenance, it isconsidered as a debt due on him and he has to pay it back when he is well-off.[33] The argument is that it is an obligatory for a Muslim to dispose of all unlawful wealth in his possession. He has to be patient and has trust in Allah. Further, he has to find a lawful income and notto take unlawful wealth. Thus, if he takes unlawful wealth he has transgressed and breached the trust to Allah.[34]

The preferable view is the view of the majority of Muslim jurists who based on necessity and needsand the protection of one's life and thisis in line with the objectives of Islamic law. This is also because the earner of unlawful wealth and his family come under the category of those who are entitled to be recipient of this type of wealth. Therefore, they are more deserved. Thus the poor and needy earner of unlawful wealth is allowed to take such wealth for maintaining himself and his family. Nevertheless, the Muslim jurists have differences of opinion regarding to the amount which is permissible to be taken for maintenance.

There seems to be no discussion under the Hanafi jurists on this issue. As regards the Hanbali jurists, they do not clearly outline the amount that to be taken for maintenance. But as stated byIbnQayyim,the earner is allowed to take as according to his need only and the rest has to be disposed of.[35] Meanwhile the Maliki jurists are of the view that it is allowed to take the wealth which is sufficient for one day. On the other hand, Imam Ghazali of the Shafi'i jurists states that it is allowed for the earner to take the unlawful which is sufficient for maintaining himself and his family for one year.[36]It follows that taking such property cannot seemto be excessive as the permissibility for the earner to take unlawful wealth for maintaining himself and his family is based on necessity and need and thus it should be measured as according to the need. This is based on the *fiqh* maxim "Necessities are estimated according to their quantity."[37]

In addition to the above, for the purpose of maintaining the children,according to Muhammad Albaz, if the child is a needy or poor and doesn't have any income except from his father, it is permissible forthe child to accept this unlawful wealth from his father based on necessity. But, if the child is affordable to get his own income for his expenses, it is prohibited for him to accept this unlawful wealth from his father or otherwise he is sinful.[38]

5. Treatment of unlawful wealth

The Muslim jurists are of the view that a person who earns an income or acquires wealth by unlawful means, he or she has to repent for what has been done. The Muslim jurists are in agreement that if the wealth which is acquired without the consent of the owner, the earner has to return it back to its owner if it is known and alive. In the case if the owner has died, the wealth has to be given to his legal heir.In the case that the owner is unknown, the wealth has to be given to the poor and needy or any charitable purpose for the benefit of the public.[39]

With regard to the wealth which is acquired with the consent of the owner, the Muslim jurists again differed. Majority of the Muslim juristsare of the opinion that the unlawful wealth cannot be returned back to the owner because it may encourage persons to continue with wrongful activities. They enjoy with what have been done and they will get back what they have spent.[40]Their argument is based on the Sunnah of the Prophet (PBUH) that stated to the effect,

> "Narrated Abu Humaid As-Sa`idi: Allah's Messenger (PBUH) appointed a man called Ibn Al-Lutabiyya to collect the Zakat from BaniSulaim's tribe. When he returned, the Prophet (PBUH) called him to account. He said (to the Prophet, 'This is your money, and this has been given to me as a gift." On that, Allah's Messenger (PBUH) said, "Why didn't you stay in your father's and mother's house to see whether you will be given gifts or not if you are telling the truth?" Then the Prophet (PBUH) addressed us, and after praising and glorifying Allah, he said: "AmmaBa'du", I employ a man from among you to manage some affair of what Allah has put under my custody, and then he comes to me and says, 'This is your money and this has been given to me as a gift. Why didn't he stay in his father's and mother's home to see whether he will be given gifts or not? By Allah, not anyone of you takes a thing unlawfully but he will meet Allah on the Day of Resurrection, carrying that thing. I do not want to see any of you carrying a grunting camel or a mooing cow or a bleating sheep on meeting Allah." Then the Prophet (PBUH) raised both his hands till the whiteness of his armpits became visible, and he said, "O Allah! Haven't I have conveyed (Your Message)?"...[41]

This above *hadith* shows that the Prophet did not askIbn al-Latbiah to return back the wealth to its owner, but the Prophet asked him to give it to *baitulmal* for the interest of Muslims.

Another view is the Hanafi jurists who are of the view that the wealth must be returned back to the owner whether it is taken with or without his permission. This is because the wealth can only be given for the donation if it cannot be returned back to its owner.[42]The preferable view is the view of the majority of the Muslim jurists who held that the unlawful wealth cannot be returned back to its owner. This is because if it given back to the owner, it will encourage and promote a wrongful act and sin in society.[43]The promotion of sin is prohibited. This is based on the authority of the Qur'an that states to the effect,

> "Help you one another in (virtue, righteousness and piety); but do not help one another in sin and transgression"[44]

On the other hand, the Zahiri school of law and al-FudhilIbnI'yad are of the view that unlawful cannot be utilized by anyone and it has to be thrown away.[45]

III. Closing

1. Conclusion

The discussion clearly shows that the wealth which is acquired by unlawful means cannot be utilized by an earner by all means. Nevertheless, there is an exceptional rule in the case where the earner is poor and in needs. He is allowed to take such wealth for maintaining himself and his family as for subsistence only and not for excessive and luxury.The unlawful wealth has to be disposed of to the right recipient and for the interest of the public. It is not to be thrown out without making any benefit. This is considered as wasting of resources and thus not in line with the objectives of Islamic law. This is due to the fact that the wealth itself is not physically unlawful but the unlawfulness is because of the means of its acquisition. Therefore, it can be utilized for the interest of the public.

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[6] Al-'Abbadi, 'Abd al-Salam Daud, *al-Milkiyyah fi al-Shari'ah al-Islamiyyah*, Mu'assasah al-Risalah, Beirut-Lebanon, Vol, 1, p. 453.

[7] Ibid.

[8]Hattab, Kamal Tawfiq, '*al-Amwal ghayr al-Mutaqawwimah min ManzurIslami*' Journal of Shariah and Islamic Studies, 31 (104), 2016, p. 241.

[9]Ibid., pp. 240-241.

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[11] Al-Baz, p. 40. ; Fayyad, p. 33.

[12] Al-Baz, p. 43. ; Fayyad, pp. 33-34.

[13] Fayyad, p. 34.

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[16]*Ibid.*, Vol. 30, p. 311.

[17] Ibid., Vol. 30, pp. 311-312.

[18] It is reported by al-Tirmizi.

[19]Ibn Taymiyyah, vol. 15, pp. 170-171.

[20]Al-Dusuqi, Sham al-Din al-Shaykh Muhammad 'Arafah, *Hashiah al-Dusuqi ala al-Sharh al-Kabir*, Dar al-Fikr, Beirut-Lebanon, 1998/1419H, Vol. 3, p. 426.

[21]Al-Ghazali, Abi Hamid Muhammad bin Muhammad, Dar al-Hadith, Cairo-Egypt, 1992/1412H, Vol. 2, p. 208.

[22]Yunus al-Misri, Rafiq, *Fiqh al-Mu'amalat al-Maliyyah*, Dar al-Qalam, Damascus-Syria, 2005/1426, p. 319.

[23]Al-Zuhayli, Wahbah, *Fatawa Mu'asirah*, Dar al-Fikr, Damascus-Syria, 2010/1431, pp. 124-125.

[24]*Al-Quran*, Surah Al-Baqarah, 2:188

[25] Al-Qur'an, al-Nisa' (4): 29

[26]Al-Jasas, Abi Bakr Ahmad bin Ali al-Razi, *Ahkam al-Qur'an*,

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[37]Article 22 of The Majelle.

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[39]Al-Turi, Takmilah al-Bahr al-Ra'iq, vol. 8, p.369.; al-Sawi, Buldhat al-Salik li Aqrab al-Masaliq, vol. 3, p. 231.

[40] Abdul Majid Qasim Aswaikir, *Ghaslu Al-Amwal fi Dhui Ahkam Al-Syariah Al-Islamiah, Dirasah Muqaranah,* Libya: Jamiah Sirat, 2009, p 308

[41] Sahih al-Bukhari, Book of Tricks, Chapter: Tricks by an official person to obtain presents, 6979.

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[43] Abdul Majid Qasim Aswaikir, *Ghaslu Al-Amwal fi Dhui Ahkam Al-Syariah Al-Islamiah, Dirasah Muqaranah,* (Libya: Jamiah Sirat, 2009) p 310-311

[44]*Al-Quran*, (Surah al-Maidah), 5:2.

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The Urgency of ASEAN Human Rights Court Establishment to Protect Human Rights in Southeast Asia

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ABSTRACT

The issue of Human Rights enforcement in Southeast Asia has become the serious problem and attracts the attention of international community. Principally, ASEAN has mentioned the Human Rights as one of the focus and be a part of the ASEAN Charter in 2008. It was followed by the establishment of ASEAN Inter-Governmental Commission on Human Rights (AICHR). AICHR is the commission of Human Rights enforcement in Southeast Asia which has a duty, function, and an authority to conduct dissemination and protection of Human Rights. In the end of 2016, however, the function of protection mandated to AICHR have not achieved yet. It can be proved by several cases of Human Rights violation which still exist and have not settled yet. One of case which attract the public attention recently is human rights violation towards Rohingya in Myanmar. Using the juridical-normative method, the research aims to examine the urgency of Human Rights court establishment in Southeast Asia region which able to issue the decision that bind the ASEAN members or the violating parties. The data shows that ASEAN needs to establish a regional court which intended to settle the Human Rights violations in ASEAN region. Furthermore, the research also highlights three strong factorsshould be settled by ASEAN for establishinghuman rights court *i.e.*the significant distinction of democracy and human rights development among the members, the strong implementation of non-intervention principle, and the financial matter to sustain the court.

Keywords: *Human Rights, ASEAN, AICHR, Human Rights Court*

I. INTRODUCTION

Established in 1967, the Association of Southeast Asia Nations (ASEAN) is a key regional organization in the world today. While the original aims of the organization did not encompass human rights explicitly, it's the profile has been raised in recent years in relation to human rights. In a welcome note of ASEAN, human rights already integrated into its framework by adopting ASEAN Charter on 2007. Consequently, various bodies have been established as part of the quest for a regional human rights mechanism. For example, ASEAN has established a body which purposed to promote and to protect human rights in ASEAN namely ASEAN Inter-Governmental Commission on Human Rights (AICHR). Another two sectoral bodies which working on the field of human rights are established namely ASEAN Commission for Promotion and Protection of the Rights of Women and Children (ACWC) and the ASEAN Committee on the Implementation of the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers (ACMW).[1]

Those sectoral bodies are paralleled with national institution (such as local courts, national human rights commissions, and ombudspersons) and international mechanism particularly the United Nations (UN). The plurality of mechanisms and actors are important, it means that human

rights protection interplays with the issue of power and the need for checks and balances to prevent abuse of power. This panoply also provides inspiration for addressing the challenge of human rights in Southeast Asia comprehensively and effectively, with key implications for the region and beyond.[2]

Many crimes have occurred in ASEAN caused by the difficulty of the courts to settle the cases. The court which usually handles the crimes in International scope is International Criminal Court (ICC). The establishment of ICC aimed to settle the extraordinary crimes including genocide, war crimes, crimes against humanity, crimes against aggression. However, the extraordinary crimes are not only categorized on those four, but also include terrorism. It is referring to the crime that cause more danger and more threat to human life. Although, there are institutions or courts exist to handle it, but the cases remain happen.

The establishing of human right court in ASEAN is to facilitate the court process which conducted or suffered by ASEAN countries. The function is to facilitate ASEAN countries to settle the case which happen within the ASEAN without bringing it to the ICC. The development of International Criminal Law has challenge the lawyers in settling the serious violations of human rights and international humanitarian law. The deterrent effect of international prosecutions is unclear. Moreover, international criminal justice represented only one possible response to atrocities. Truth and Reconciliation commissions, for example, may be more effective in certain testimony, historical record corrections, and victims' solace. While international criminal justice constitutes an increasingly important area, it raised the questions on how the international legal system could effectively respond to atrocities.[3]

II. RESEARCH QUESTION

Is it possible to establish the ASEAN Court of Human Rights due to the existence of Non-Interference principle?

III. RESEARCH METHOD

A. Type of Research

This is a normative legal research[4] combined to comparative and statutory approach[5] in analyze the issue of the establishment of human rights court in ASEAN. In this study, the authors use the method of exploration method that aims to recognize or get a new view of a phenomenon which is often able to formulate the research problem more precisely or to formulate the research hypothesis.[6]

In this case, the research is done by surveying the literature and the study of the urgency of the establishment of human rights court in ASEAN by looking its efficiency and comparing to another related human rights court. Doctrinal method is also used in this research which focusing on reading and analyzing primary materials (such as the legislation) and secondary materials (such as legal dictionaries, textbooks, journal articles, case digest and legal encyclopedias).[7]

B. Technique of Collecting Data

The data were collected by library research such reading, analyzing, and deriving conclusion from related documents (charters, declarations, law books, legal journals, internets and other which related to the main problem of this research).

C. Data Analysis

The data were analyzed systematically through juridical point of view. Systematically means the research analyzes international laws which related to the issue of ASEAN human rights violations. Juridical thinking means connecting the law principles, charters, declarations, and another related to the main problem of this research.

IV. DISCUSSION

A. ASEAN

ASEAN formation was preceded by an organization established in 1961 called the Association of Southeast Asia (ASA), a group consisting of the Philippines, Malaysia, and Thailand. ASEAN was officially established on 8th of August 1967 by five foreign ministers from Indonesia, Malaysia, the Philippines, Singapore, and Thailand. They signed the ASEAN Declaration, commonly known as the Bangkok Declaration. The creation of ASEAN was motivated by a demand of economic development.

ASEAN grew when Brunei Darussalam became its sixth member on 7th of January 1984, barely a week after gaining independence. ASEAN achieved greater cohesion in the mid-1970s following the changed balance of power in Southeast Asia after the end of the Vietnam War. The region's dynamic economic growth during the 1970 have strengthened the organization, enabling ASEAN to adopt a unified response to Vietnam's invasion of Cambodia in 1979. ASEAN's first summit meeting, held in Bali, Indonesia on 1976, resulted an agreement on several industrial projects and the signing of a Treaty of Amity and Cooperation, and a Declaration of Concord. The end of the Cold War between United States of America and the Soviet Union at the end of the 1980s allowed ASEAN countries to exercise greater political independence in the region, and in the 1990s ASEAN emerged as a leading voice in regional trades and security issues.

On 28th of July 1995, Vietnam became ASEAN's seventh member. Laos and Myanmar (Burma) joint the next two years on 23th of July 1997. Cambodia supposed to join at the same time as Laos and Myanmar, but its entry was delayed due to the country's internal political struggle. It later joint on 30th of April 1999, following the stabilization of its government.[8]

Since ASEAN's establishment, international relations in Southeast Asia have played out at two levels: the state-to-state bilateral level and the ASEAN multilateral level. At each level, there are two sets of relationship among Southeast Asia state themselves and the relationship of the Southeast Asia state to external actors the great powers. At the ASEAN level, an analysis of southeast Asia's international relations must add the question of how the two levels with the four categories of transaction mutually interact in term behavior at one level influencing behavior at another one. For example, at the policy level this question is opposite to the discussion of Myanmar and Indonesia regional roles and impact.[9]

1. Human Rights and Human Security

The principled value base of the contemporary international human rights regime to which Southeast Asian states belong was first enunciated in the 1945 preamble to the charter of the United Nations reaffirming faith in fundamental human rights, in the dignity and worth of the human person, and the equal rights of men and women. Article 2 of the charter states that a principle of the UN is "sovereign equality," which means that the UN has no authority to intervene in matters essentially within the domestic jurisdiction of a member. The tension between the international goal of protecting human rights and the domestic authority of a sovereign state has been the constant thread in the dialogue between defenders of rights and alleged violators. This

tension is replicated at the Southeast Asia regional level in ASEAN's inability to reconcile its claimed commitment to the norms of democracy and human rights with its insistence that state sovereignty and noninterference were the bedrock of the region's international relations.[10]

2. Regional Views of Human Rights

Despite the UN's rights system's claim to universality, there is no unified view on human rights either globally or in Southeast Asia. To many Southeast Asian elites, the West's emphasis on civil and political rights in a democratic framework is the expression of a historical and cultural process in economically developed societies. According to ASEAN leaders, the preoccupation from West ignores economic, social, and cultural rights that are of paramount importance for the full realization of human dignity and individual achievement. The more extreme views see the West's human rights campaign as a kind of political or cultural neo-colonialism, particularly it is applied to trade and to aid on the basis of rights judgements.

The Western and Asian views were compromised, if not reconciled, at the 1993 United Nations Vienna World Conference on Human Rights. The "Vienna Declaration" stated that "while the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, nevertheless "it is the duty of regardless of their political, economic and cultural systems, to promote and protect all human rights and freedoms." As for economic development, it was agreed that "while development facilitates the enjoyment of all human rights, the lack of development may not be invoked to justify the abridgement of internationally recognized human rights as the legal context of national sovereignty and non-interference in domestic affairs was not challenged.

Shortly after the Vienna Convention, at its annual meeting of ministry of ASEAN reaffirmed its commitment to human rights and freedoms as set out in the "Vienna Declaration." In line with this, the members agreed that ASEAN should consider the establishment of an appropriate mechanism on human rights. It was argued by ASEAN officials that a precondition for an ASEAN human rights body was the establishment of national human rights commission in each ASEAN state. National human rights agencies exist in only four ASEAN countries namely the Philippines (1987), Indonesia (1993), Malaysia (1999), and Thailand (1999).

The establishment of an ASEAN human rights is the contentious issues in the charter's drafting. The CLMV body, a human rights compliance mechanism, has been included in the charter. No time frame was set for the foreign ministers and diplomatic to exercise common denominator consensus on what the terms of reference of the proposed human body might be. With the authoritarian states holding consensus vetoes, it is unlikely that any ASEAN human rights instrument will be approved or it will substantially alter the human rights practices of the undemocratic ASEAN states. It was the lack of credibility on the full protection of human rights in ASEAN that led Philippine President Arroyo to warn Myanmar to release Aung San Suu Kyi or the Philippines might not ratify the charter. One of Thailand's most respected political scientists bitterly commented that ASEAN's highly proclaimed charter has turned into a regional exhibit for Burma's intransigent internal repression and blatant disregard for basic civil liberties.[11]

B. Extraordinary Crime in ASEAN

Crimes against humanity are extraordinary crimes. The law of crimes against humanity has primarily developed through the evolution of customary international law. The terms of the concept of Human Rights Crime as an Extraordinary Crime in Indonesia still has many interpretations and there is no standardization of raw, in a sense, what kind of crime that deserves to be included

in the category of extraordinary crime.

According to Muladi who tried to put forward some of the rationale for grouping an extraordinary crime. In the views of Muladi, the crime can be classified as *kriminogen*and *viktimogen*also potentially to harm the interests of various dimensions, from the security order, systematic or organized, threatening political stability, future development and others. ZainalAbidin added some statement based on Muladi's opinion that in accordance with the principle of Intent Court, universality principle cannon treat several violations of human rights as an ordinary crime and as universal qualification of the crime against humanity.[12]

Based on the information above, extraordinary crime can be formulated that serious crimes against human rights because it has the specificity as described below: First, serious human rights crimes are against humanity as the background of motive power, carried out in a systematic and widespread. Second, serious human rights crimes result in the rending of the conscience of humanity, because of the enormity of the impact. Third, serious human rights violations betrayed the largest man on humanity. Fourth, human rights resulted in the emergence of serious crimes of terror, anxiety and fear in the community which can eliminate the public trust in the State. Fifth, serious human rights violations recognized internationally as the most serious crimes and even became an international jurisdiction if the settlement cannon be resolved at the national level.

Serious crimes against human rights can be concluded as the extraordinary crime. The crime has special characteristics and payloads, which is not the same and even more than the formulation of the evil that exists in the Criminal Code at the national level. Therefore, the handling of the cases was incredible and became a logical consequence to be categorized as extraordinary crime. The international community has recognized four types of serious human rights violations, the international jurisdiction, so that all countries that respect human rights can prosecute through the International Criminal Court (ICC). It is clearly stated in the Rome Statute of the establishment of International Criminal Court in 1998 that those four types of serious human rights violations namely genocide, crimes against humanity, war crimes, and crime of aggression. At the national level, Indonesia only adopt two types of serious human rights crimes, both the crime of genocide and crimes against humanity, as stipulated in the Law No. 26 of 2000 concerning on Human Rights Court.

These are examples of extraordinary crime cases that occurred in ASEAN countries:

1. Indonesia (Terrorism)

   On 12th of October 2002, two bomb attacks at tourist bars on the Bali island which killed nearly 200 innocents, many of them are Australians. According to Rosa, terrorism is not only an ordinary crime, but also has become a crime against humanity because it is so widespread and systematic, which has killed thousands of innocent people. Among those crimes were tragedy of the World Trade Centre, an explosion Bali bombings, a blast bomb in Madrid, London bombing, and many more. It is acknowledged that terrorism is a latent danger that will arise and continue to occur within the international society.[13]

2. Thailand (Human Trafficking)

   Based on the 2000 United Nations Protocol to Prevent, Eradicate, and Punish Trafficking in Persons, especially women and children, United Nations (UN) defines human trafficking as: The recruitment, transportation, transfer, harbour, or receipt of persons, by the threat or use of force, or other forms of coercion, abduction, fraud, deception, abuse of power or vulnerability, giving or receiving of payments or benefits to obtain the consent of persons having authority over another person, for the purpose of exploitation.

Human trafficking considered as serious violation of human rights. It is because contribution to human trafficking are commonly believed to be related to poverty, globalization, and economic disparities among countries. An estimated one-third of victims worldwide were trafficked for economic purposes other than sexual exploitation (ILO, 2005a). In Thailand, the International Organization for Migration has estimated that currently there are about 1.9 million migrants in the Greater Mekong Sub-Region (GMS). In the past, a large influx of migrants into Thailand was due to war or internal conflict in other GMS economies. However, in recent years, migration from Thailand's neighbours was stimulated largely by economic conditions.

A shortfall in low-skilled laborers in Thailand created a demand for migrant workers, from neighbouring relatively poorer economies with surplus labour. Although Thailand instituted a registration program for issuance of work permits to regularize the stay of migrant workers in the country, most of migrant workers in Thailand are illegal. Migrant workers enter Thailand through many channels, both legal and illegal, and in many cases, they became victims of human trafficking. Many of those who registered upon entry stayed beyond their permit period; others did not register at all.

In 2008, an estimated 1.3 million migrants in Thailand were unregistered. Their illegal status, coupled with their general lack of understanding of the relevant Thai laws and their rights plus the fear of deportation, open them up to exploitation and harassment from their employers, police, and other officials. The vulnerable conditions of migrant workers also provide fertile ground for corrupt practices to take place. Their abuse and the violation of their human rights and labour rights continue to be reported. Although linkages between human trafficking and the forced labour of migrants can be established, they are not always straightforward. Largely because of the economic situation in their own country, many aspirant migrants chose to migrate illegally on their own before being coerced or deceived into forced labour at their destination. Sometimes, if such adverse events do not occur at their first destination, the migrants may be trafficked or led into forced labour at their second or third destination. Therefore, the distinction of whether they were cases of human smuggling or trafficking is often raised, but any conclusion needs to be treated with care.

C. Myanmar (The Muslim Rohingya in Myanmar)

The Burmese military government claims that the Rohingyas are not indigenous people but have migrated from Bangladesh. However, even prior to 1962 Rohingyas were holders of government-issued identity cards and had also British-issued ration cards which affirmed they are citizens of Burma. Then on the pretext of checking these identity cards before the very eyes of the genuine holders of the cards, these old identity cards were forcibly taken and torn to bits just to refuse their identity.

In February 1978, the Burmese military junta launched a large-scale program with military precision aptly named "operation Dragon King" (Naga-Min). The indigenous Rohingyas were persecuted on false allegations of violation of nationality laws ultimately leading to mass killing and expulsion of the Rohingyas from their land. Nearly ten thousand of Arakani Muslims (Rohingyas) were killed in cold blooded murder and over two hundred thousand were pushed to Bangladesh on the plea that they are not indigenous children of the Burmese racial stocks, even though the Rohingyas already been there and existed for hundreds of years; the bones of their great grandparents are buried there. Before independence and particularly after independence there have been numbers of Muslim members of parliament (MP) and always two Muslim took a position in the

ministry of cabinet till the 1962 military coup.

During the army regime from 1962 to 1995, however, not a single Muslim was appointed to be a minister or even deputy minister. This is an evidence of utmost discrimination against the Muslims in Burma. In purpose to Muslim administrations, State Law and Order Restoration Council (SLORC) formed district councils, township councils and village ward councils. Even in the 100% Muslim villages in Arakan, army intelligence officers were place to guard the Muslims. The Burmese military junta has a special bias against the Rohingya. Throughout 34 years of army rule not a single Muslim was ever appointed as judge in the Supreme Court or the Session Courts or even in the Lower Courts. Muslim schools were nationalized in 1963. Thus, there are no any high school at the time. Muslim headmasters and senior Muslim teachers were replaced with Buddhist teachers.

The Muslims concentrated on trade and cottage industries and became quite successful. The army junta, however, has continuously tried to dislocate them in various ways particularly through inhuman atrocities and forced mass expulsion from Arakan. Rohingya refugee movements pose a non-traditional threat to human and societal security. Traditional security concerns have so far always ruled the game. Global political power, geo-strategic and security concerns as well as economic interests complicated the security dilemma with regard to Rohingya refugee issues, which made international community less interested in overcoming the current challenges. Political goals and political power contributed to ignore the potential danger of providing legitimacy to increase non-traditional threats emerging from the migration of Rohingya from Myanmar to Bangladesh and to other neighbouring countries.

The research found strong support for the proposition in this case: the more severe the violation of human rights, insecurity and repression, the larger the scale of the refugee flow. The more the refugee flow, the larger the non-traditional security threats. There is a positive correlation between the number of refugees and repression, the variety of which ranges from violations of human rights. Rwanda, Uganda, Kampuchea, etc. are also known for brutal mass executions. There is a clear link between migration and security as well. The perceived and actual threats were emerged from the plight of Rohingya refugee, from Myanmar to the border areas of Bangladesh and also to other neighbouring countries such as Malaysia, India and the Middle East. Refugee scholars are traditionally concerned with the human security of refugees, as they often flee to highly volatile areas and need protection. The security of refugees is often threatened in host countries like Bangladesh. Because this country has been struggling with rampant poverty and encountered with various economic challenges. Moreover, there is a lack of adequate international assistance and interest from UNHCR and other international communities to solve the Rohingya problem between Bangladesh and Myanmar. From the perspective of the security scholars, the focus is on the security of the host society (citizen and state).

C. The Establishment of Human Rights court

1. European Court on Human Rights (ECHR)

Discussing about the establishment of ASEAN Human Rights court, it is important and instructive to refer to other regional human rights courts. Southeast Asia in successfully establishing and designing their own human rights courts. Their developments may share important insight for many problems that Southeast Asia will probably encounter in the future. In fact, the international and regional courts have many lessons to learn from each other.[14]

It's very important to distinguish the Human Rights Act 1998 (HRA 1998) from the European

Convention for the Protection of Human Rights and Fundamental Freedoms, usually known as the European Convention on Human Rights. The Act is an ordinary Act of Parliament and is part of the law of the United Kingdom. The Convention is a legal instrument of the Council of Europe (the Council is identified and explained later in the chapter). The Convention is not part of UK law. However, its content, the rights and freedoms contained in it, are given effect in the law of England and Wales, Scotland and Northern Ireland by the Act.

The Convention is interpreted and applied by the Court of Human Rights. Its judgements are not directly binding as legal judgments in the United Kingdom. However, both the Convention and the judgements of the Court are central to any understanding of what the Human Rights Act is about. They are also major source of principles followed by the UK courts when putting the Human Rights Act into effect.

In 1998, the original two institutions created by the ECHR, the European Commission of Human Rights (the Commission) and the European Court of Human Rights (the Court), were replaced by one institution on which each of the parties to the ECHR is entitled to one judge. The jurisdiction of the Court extends to all matters concerning the interpretation on application of the ECHR. An individual, a legal person, an NGO or a group of individuals can make an application to the Court alleging a violation of the ECHR. A member State may also allege a breach of the ECHR by another member State, but this is rare. An application will not be admissible unless all local remedies have first been exhausted. The application must then be made within six months. Applications can be made in any official language of a member State, but if the participant is careless. admissible, all subsequent documentation must be in an official language of the Court: English or French. The applications and pleadings are normally available to the public.

The Court sits either as *Committees* of three judges, *Chambers* of seven judges or a *Grand Chamber* of seventeen judges. An application is first examined by Rapporteur (one of the judges) who decides whether it should go to a Committee or straight to a Chamber. A Committee, by a unanimous vote, may declare inadmissible or strike out an individual application. Otherwise, by majority vote, a Chamber will decide on the admissibility of the case and, if it is declared admissible – but is not settled – on the merits of the application. If the case raises a serious question of interpretation of the ECHR, or might result in a judgement inconsistent with a previous judgement of the Court, the Chamber may, before giving judgement, provided no party to the case object relinquish jurisdiction to the Grand Chamber. In exceptional cases, judgement of a Chamber may refer to a party to the case to the Grand Chamber, but it will be heard by the Grand Chamber only if that party accepts that the judgement of the Chamber raises of serious questions of interpretation or application of the ECHR, or serious issue of general importance.[15]

2. ASEAN Human Rights Court

The issue of the establishment of ASEAN Human Rights Court has been discussed by the community of ASEAN itself. At present, there is a blueprint of the establishment of ASEAN Human Rights Court. At the 13th ASEAN Summit on November 18th to 20th, 2007, in Singapore, ASEAN leaders agreed to adopt the Charter of the Association of Southeast Asian Nations (hereinafter ASEAN Charter), including an article that mandates the creation of an ASEAN human rights body (AHRB). Since ASEAN has never had any human rights organ, the adoption of the ASEAN Charter could be viewed as a major step forward in the process of establishing a human rights mechanism for ASEAN. It is, however, too soon to have any sense of accomplishment. The process is not over yet. In fact, it has just started. The ASEAN Charter does contain elements that

could affect the prospect of a strong AHRB. In the ASEAN Charter, the non-intervention principle retains its supremacy and is placed above the adherence to human rights norms.[16]

ASEAN values had established consultative style of discussion among member of ASEAN in resolving its regional disputes.[17] The establishment of ASEAN Intergovernmental Commission on Human Rights (AICHR), transforming the ASEAN Human Rights Body,[18] had been its realization. Under its Terms of Reference (TOR), ASEAN had affirmed such consultative style in their human rights settlement mechanism. It is ascertained that the nature of AICHR shall be an intergovernmental consultative body.[19]

Due to unresolved issues of human rights such as minority rights and human trafficking, AICHR role of advisory seems inadequate in addressing future challenges. What the region needs is a strong mechanism that is composed of independent experts who are able to: investigate and evaluate reports of human rights violations; consider individual complaints free from outside interference; and make decisions that the concerned nations are obligated to follow.[20]

Regarding the procedure of ASEAN human right court, the blueprint has determined the rules of procedures, structure and procedure before the ASEAN human rights court. As the proposed ASEAN, human rights court is expected to be a small human rights court, it should probably have a simple organizational structure. The first option is to establish a single-court formation, without dividing into smaller chambers or sections. The ASEAN human rights court will then be in charge of making decisions on admissibility and rendering judgements on merits. It is very important that procedure before the ASEAN human rights court should be explicit, clear and transparent. Hearings should be open, unless the ASEAN human rights court decides otherwise. In principle, the ASEAN human rights court's judgements and annual reports should be made accessible to the public.[21]

On the way to establish a regional human rights court for Southeast Asia, challenges certainly abound ahead, especially when rapid changes have uncovered violations of human rights in all nations in the region. While challenges should be acknowledged, they nevertheless should not be an excuse for doing nothing and do not eliminate the possibility of a human rights court for Southeast Asia. In comparison to other regional states, Indonesia, the Philippines, Thailand and Malaysia appear to be in a better position to manage human rights issues and participate into the global framework of human rights protection. They have been more ready to accept a bolder foreign policy and deeper regional cooperation. Officials from these countries have been more active in pushing for change in the matters of human rights in ASEAN because they all have independent national human rights institutions accredited with status "A" and a vibrant network of human rights NGOs that has been playing an important force behind any steps of human rights evolution.

Regarding the subject included, ASEAN human rights court may compare from the nature of admissibility of cases from ECHR, European Court shall recognize case submitted by both individual and state party.[22] It needs much progress to realize the idea of a ASEAN human rights court. Although the realization of such a proposal may proceed very slowly in the face of many challenges is evidence indicating that in a group of regional countries, positive change is possible and initial impetus may be created for further developments in favour of establishing a regional human rights court. It is about time that the region moved ahead and acted towards that goal. Though human rights advocacy in the region needs to be patient and realistic, they should not waver in their actions.[23]

On the other hand, the obstacles of establishing ASEAN human rights court is a high cost. At

a minimum, some amount of money must be available to build or buy or lease an office for the ASEAN human rights court to arrange for the necessary facilities, provide accommodation for judges, and provide salaries to the judges, registrar, lawyers, administrative assistants, specialists, translators, interpreters, and accountants. This is certainly not a small amount of money. Hence, it is not impossible to establish ASEAN human rights court if all of ASEAN state members have a will to cooperate.

From the function of the AICHR, there are some functions which states that human rights protection mechanisms in ASEAN resisting individual complaints, i.e. complaints of violations of human rights as we know them in national level. For an example, individual may complaint to the National Commission of Human Rights or to the Embassy, even to the National Commission for Women.

Nevertheless, it is proposed that the ASEAN Human Rights Court received complaints from individual but with the permission of the provisions that the state of individual has ratified this Convention on ASEAN Human Rights Court. Thus, if there is an extraordinary crime and resulted in one individual, the individual may bring the complaint to the AHRC, because AHRC will accept individual complaint.

The establishment of the ASEAN Human Right Court is a step forward for ASEAN countries to realize one of its objectives which are to strengthen democracy, enhance good governance and the rule of law, to promote, and to protect human rights and fundamental freedoms by considering the rights and obligations of ASEAN states member. This formation will give a greater improvement of the implementation and enforcement of human rights in ASEAN.

Every single state as the member of ASEAN have their own representative judge. So, there will be 10 judges in ASEAN human rights court. But for the country who is in the charge of dispute cannot represent their judge to settle the disputes. If there are two disputed parties, the rest of the judge should have appointed one more judge as an *ad hoc* judge. It is important to make odd number of judges.

V. CONCLUSION and SUGGESTION

A. Conclusion

At present, there is a blueprint of the establishment of ASEAN Human Rights Court. On the way to establish a regional human rights court for Southeast Asia, challenges certainly abound ahead, especially when rapid changes have uncovered violations of human rights in all nations in the region. It is not impossible, however, to establish ASEAN human rights court if all ASEAN state members willing to cooperate and ratify the convention regarding the establishment of ASEAN human rights court. By referring to the European Court of Human Rights, ASEAN can learn the successful way to establish and to design their own human rights courts. Entering its new level of regionalism as a more one-united-envisioned community by 2015, ASEAN had been put in the position to reform its longstanding principle of ASEAN Way, especially in the view of human rights cases. As presented by the other regionalism practice, an idea of the regional court in ASEAN had a lot to offer. It is also considered as potential entry-points in strengthening the community into a stronger regionalism, as it is aligned by the sole purpose of ASEAN. However, a deeper research should be conducted in assessing a proper blueprint

B. Suggestion

To contribute to the implementation of a world order based on freedom, lasting peace and

social justice, ASEAN needs to establish a new human rights court. All ASEAN state members need to corporate each other and make a convention on the establishment of ASEAN human rights court. Then, all ten countries shall ratify to make the status of ASEAN human rights court is binding but the case which brought to ASEAN human rights court only the case that can't be handled by domestic court. The authors suggest the location of ASEAN human rights court supposed to be in Singapore considering that the lowest crime rate and the most stable country in the aspect of economic, social, and political issues.

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Religiosity in Criminal Law: Islamic Perspective

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Abstract

The fundamental premises of Islamic law are that Allah has revealed His will for human-kind in the Holy Quran and the inspired example of the Prophet Muhammad (Peace be Upon Him), and that society's law must conform to Allah's revealed will. The scope of Islamic law is broader than the common law or civil law. In addition to core legal doctrines covering the family, wrongs, procedure, and commercial transactions, Islamic law also includes detailed rules regulating religious ritual and social etiquette. In Islam, religiosity is not asceticism in monasteries nor is it chattering from the pulpits. Instead, it is behaving in a manner that is requested from the Creator under all circumstances, places and times, in belief, statement and actions. Historically, law and religion have never been completely separated. They have never been so independent as to achieve complete autonomy from each other. Religion has essentially been embodied in legal systems, even in those that have aspired to privatize religion. Based on this fact, this paper discusses such fact on specific theme of Islamic law that is criminal law which means the body of law dealing with wrongs that are punishable by the state with the object of deterrence is known as criminal law.

Keywords: *Islamic law – religiosity – the will of god – criminal*

I. Introduction

Modern law and religion are essential sociopolitical phenomena that have in common some veiled elements. Both aspire to constitute, or at least to frame, human consciousness and behaviour in all spheres of private and public life. Accordingly, modern law and religion are complementary, contradictory and simultaneous sources of rule-making, adjudication and execution. Both embed obedience and obligations, leadership, institutions and legal ideology as foundations of their maintenance and prevalence, based on a strict structure of commands. Modern law and religion are engendered through written and oral intergenerational – sometimes transnational – texts that are enforceable through authorities, and are subjected to authoritative, corresponding and alternative hermeneutics.[1]

In the religious sense, law can be thought of as the ordering principle of reality; knowledge as revealed by God defining and governing all human affairs. Law, in the religious sense, also includes codes of ethics and morality which are upheld and required by God. Examples include customary Hindu law, Islamic law, and the divine law of the Mosaic code or Torah.[2]

The first and foremost source of Islamic law is the Holy Qur'an. It was revealed gradually over a period of some two decades and its application was done by rejecting, modifying, condoning or accepting the prevalent socio-cultural and economic norms as deemed compatible with the new set of social norms enshrined in the Holy Qur'an. Therefore, in order to gain a proper understanding of the laws, this must be understood in the context of the revelation of each of its verse.

The ultimate objective of every Islamic legal injunction is to secure the welfare of humanity in this world and the next by establishing a righteous society. This is a society that worships God and flourishes on the Earth, one that wields the forces of nature to build a civilization wherein

every human being can live in a climate of peace, justice and security. This is a civilization that allows a person to fulfill his every spiritual, intellectual, and material need and cultivate every aspect of his being. This supreme objective is articulated by the Quran in many places.[3] God says: *"We have sent our Messengers with clear signs and have sent down with them the book and the criterion so that man can establish justice. And we sent down iron of great strength and many benefits for man..."* (Quran Surah al-Hadid, 57:25)

According to Rudolf Peter in his book titled *Crime and Punishment in Islamic Law Theory and Practice from the Sixteenth to the Twenty-First Century* criminal law means: "the body of law that regulates the power of the state to inûict punishment, i.e. suffering, on persons in order to enforce compliance with certain rules." Such rules typically protect public interests and values that society regards as crucial, even if the immediate interest that is protected is a private one.[4]

However, "All the theories of criminality, propounded by the Western Criminologists, originate from the distorted vision of human nature, based on 'Trial and Error Method'. Islamic concept of crime, like the concept of law, is permanent, unchanging and unanimous among all the scholars and schools of law: "Crime is an unlawful act for which punishment has been prescribed by the Shariah by way of fixation or discretion."[5]

The concept of Islamic criminal law is different from the concept of criminal law in the man-made law. The man-made law defines crime as an offence against the public where it relates to the rights of the society only. On the contrary, in Islamic criminal law, it also covers the rights of individuals as well as the rights of society. Hence, "Islamic criminal law divides crimes into categories that are distinct from those employed in most common law and civil law countries."[6]

The cultural hemisphere of the Muslim world has been on the spotlight of international interest ever since the events of 9-11.... One of the most controversially debated issues within this context is the Islamic criminal law as such, which is "the epitome of Islamic thought, the most typical manifestation of the Islamic way of life, the core and kernel of Islam itself", as Joseph Schacht, an eminent scholar of Islamic jurisprudence has once described it.[7] However, there is a general debate about the Sharia, as it is commonly called, without much understanding of the basic principles of this law which often leads to misconceptions and prejudice. The pictures usually evoked - regarding the Muslim legal practise - are preoccupied with extraordinary cruelty and hardship imposed upon offenders to the law. Cutting off hands as a common practice for thieves or stoning adulteresses are popular images of a very one-sided debate.[8]

International crime statistics indicate that in Islamic countries crime rates are lower than in other countries. This feature of Islamic countries is most often explained by two factors: a) the relatively low level of development, which has a positive effect on crime rates, and b) the strictness of Islamic penal law.[9]

This paper attempts to clarify that criminal law in Islam is considered as divinely law and there is religiosity in implementing and practicing it. Hence, the believers are obliged to implement and practice it as they have been implemented and practiced any other religious duties and activities.

II. Discussion

1. Religiosity Means

Religiosity[10] can mean "piety" or "the state of being religious"... To be religiose is to be "excessively or sentimentally religious" or to practice one's religion in a meddlesome way. Thus, religiosity is characterized by excessive involvement in religious activities. Religiosity usually entails extreme zeal outside of and beyond the norms of one's faith. It is more than affection for

religion; it is affectation in religion. Religiosity usually reflects one's individual beliefs more than those of the religious organization itself. Another term for religiosity, though less common, is *religiousness*, "the state of being superficially religious."[11]

Religiosity, in its broadest sense, is a comprehensive term used to refer to the numerous aspects of religious activity, dedication, and belief (religious doctrine). Another term less often used is *"religiousness"*. In its narrowest sense, religiosity deals more with how religious a person is, and less with how a person is religious (in practicing certain rituals, retelling certain stories, revering certain symbols, or accepting certain doctrines about deities and afterlife).[12]

The concept of religiosity in Islam is misunderstood by many people including some Muslims. Religiosityis commonly taken to mean performing ritualistic acts such as prayers, fasting, charity, pilgrimage etc. This limited understanding of religiosity is only one part of the meaning of worship in Islam. That is why the traditional definition of religiosity in Islam is a comprehensive definition that includes almost everything in any individual's activities. The definition goes something like this: "religiosity is an inclusive term for all that God loves of external and internal sayings and actions of a person." In other words, relihiosity is everything one says or does for the pleasure of Allah. This, of course, includes rituals as well as beliefs, social activities, and personal contributions to the welfare of one's fellow human-beings. Islam looks at the individual as a whole. He is required to submit himself completely to Allah, as the Quran instructed the Prophet Muhammad to do: "*Say (O Muhammad) my prayer, my sacrifice, my life and my death belong to Allah; He has no partner and I am ordered to be among those who submit, i.e.; Muslims.*" (Quran, Surah Al-An'am: 162-163)

Religiosity in Islam is worship *per se.* Worship is *'Ibadah* in Islamic term. The Arabic word *'ibadah* (عبادة), usually translated "worship", is connected with related words literally meaning "slavery", and has connotations of obedience, submission, and humility. In terms of Islam, '*ibadah* is the ultimate obedience, the ultimate submission, and the ultimate humility to Allah along with the ultimate love for Him. Muslims believe that '*ibadah* is the reason for the existence of all humanity. That is, Muslims believe that all people exist only to worship Allah. '*Ibadah* consequently means following Islamic beliefs and practices – its commands, prohibitions, the *halal*, and the *haram*. For Muslims, '*ibadah* is also something that comes from the heart, or sincerity, as a result of belief in Islam. Therefore, '*ibadah* is something that cannot be forced upon another person.

Allah The Most High says to the effect: "*I did not create the Jinn, nor mankind, except to worship Me.*" (Al-Quran, Surah al-Zariyat,51: 56)

According to Muslim scholars worship has been defined in several ways. Al-Qurtubi (d.671H) in his book *al-Jami' li Ahkam al-Quran* when commenting Ayat 21 of Surah al-Baqarah above writes: "The people in this verse have two interpretations the first says that they are the non believer and the second says that it is general for all people. Meaning that the call for believer is to continue worship and the call for non believer is to start the worship. The root of *'ibadah* is humility and submissiveness. The various duties that have been prescribed upon the people are called *'ibadat* (acts of worship), since what is required is that these acts of worship must be done with humility and submissiveness to Allah - the Most High."[13]

IbnTaymiyah (d. 728) describes '*ibadah* or worship as "obedience to Allah by following that which He ordered upon the tongues of His Messengers." He also said, "Worship is a comprehensive term covering everything that Allah loves and is pleased with - whether saying, or actions, outward and inward."[14]

According to IbnTaymiyah's pupil, Ibn al-Qayyim (d. 751) "Worship revolves around fifteen principles. Whosoever completes them has completed the stages of *'ubudiyyah* (servitude to Allah). The explanation of this is that *'ibadah* is divided between the heart, the tongue, and the limbs. And that for each one of these three come five types of rulings, covering all actions: *wajib* (obligatory), *mustahabb* (recommended), *haram* (prohibited), *makruh* (disliked), and *mubah* (permissible)."[15]

And IbnQayyim's disciple, IbnKathir (d. 774) said: "And *'ibadah* is obedience to Allah by acting upon what He commands, and abandoning what He forbids; and this is the reality and essence of Islam. And the meaning of Islam is '*istislam'* (submission and surrender) to Allah - the Most High - along with the utmost compliance, humility, and submissiveness to Him." He continued "Indeed Allah - the Most High - created the creation so that they could worship Him alone, without associating any partner with Him. Whoever obeys Him will be completely rewarded, whereas whoever disobeys Him would be punished with a severe punishment. And He has informed that He is neither dependant, nor does He have any need for them. Rather, it is they who are in dire need of Him, in every condition and circumstance, since He is the One who created, sustains, and provides for them."[16]

According to Muslim scholars, in order for mundane actions to be counted as acts of worship deserving of divine reward, the following conditions must be met:[17]

- First: The action must be accompanied by the proper intention. Allah's Messenger (peace be upon him) said: "Actions are but by intentions, and a person gets only what he intended."[18]
- Second: The action must be lawful in and of itself. If the action is something prohibited, its perpetrator deserves punishment. Allah's Messenger (peace be upon him) said: "Allah is good, and He accepts only what is good."[19]
- Third: The activity must be performed in the best possible manner. Allah's Messenger (peace be upon him) said: "Allah has prescribed excellence for all things."[20] He also said: "Allah loves that if one of you does something, he does it well."[21]
- Forth: The dictates of Islamic Law must be completely observed. Deception, oppression, and iniquity must be avoided. Allah's Messenger (peace be upon him) said: "He who deceives us is not one of us."[22]
- Fifth: The activity should not keep the person from performing his or her religious obligations. Allah says: "*O you who believe, do not let your wealth and children distract you from the remembrance of Allah.*" (al-Quran, Surah al-Munafiqun, 63: 9)

In conclusion, worship is everything one says or does for the pleasure of Allah. This, of course, includes rituals as well as beliefs, social activities, and personal contributions to the welfare of one's fellow human-beings. Islam looks at the individual as a whole. He is required to submit himself completely to Allah, as the Quran instructed the Prophet Muhammad to do: "*Say (O Muhammad) my prayer, my sacrifice, my life and my death belong to Allah; He has no partner and I am ordered to be among those who submit, i.e.; Muslims.*" (al-Quran, Surah Al-An'am, 6: 162-163)

The natural result of this submission is that all one's activities should conform to the instructions of the one to whom the person is submitting. Islam, being a way of life, requires that its followers model their life according to its teachings in every aspect, religious or other wise. This might sound strange to some people who think of religion as a personal relation between the individual and God, having no impact on one's activities outside rituals. As a matter of fact Islam does not think much of mere rituals when they are performed mechanically and have no influence

on one's inner life.

Referring to 2 United States cases,[23]Barzilai commented on the importance of religion in a state or country: "In both rulings the Court admits the crucial importance of religion in American public life and accordingly emphasizes the need to protect religious educational practices even of non-liberal fundamentalist religious communities. The Amish desired to gain an autonomous system of education based on their religious dicta."[24]

The partial divorce of law from religious dicta and its construction as an 'autonomous' professional field have framed law as a ruling setting. Accordingly, a concept of divine sovereignty, an earthly sacred religious ruling authority, was replaced by a concept of the secular state's sovereignty.[25]

2. Islamic Criminal law

A discussion on Islamic criminal law and its punishments system "is important for a number of reasons.

i) Firstly, similar to the conventional system, a crime is a public wrong and thereby brings laws relating thereto to the realm of the public. Islamic criminal law is therefore central to the entire Islamic legal system.
ii) Secondly, religio-political parties in a number of Muslim countries have increasingly been advocating for the application of the Islamic criminal justice system within their respective jurisdictions. Countries such as Saudi Arabia, Iran, Sudan, Pakistan and Nigeria have demonstrated the application of the law in varying degrees.
iii) Thirdly, the use of the law has had wider implications. This is particularly so when one considers the compatibility of this law with international human rights treaties, to which the Muslim countries are party. These are but a few reasons as to why the Islamic criminal justice system has become an important, and arguably, the most discussed branch of Islamic law.[26]

According to L.B. Curzon, crime is any act or omission resulting from human conduct which is considered in itself or in its outcome to be harmful and which the State wishes to prevent, which renders the person responsible liable to some kind of punishment as the result of proceedings which are usually initiated on behalf of the State and which are designed to ascertain the nature, extent and legal consequence of that person's responsibility. In Board of Trade v. Owen, the House of Lords adopted as a definition that given in Halsbury's Laws of England: a crime is an unlawful act or default which is an offence against the public and renders the person guilty of the act liable to legal punishment.[27]

Hence in general criminal law (penal law) is the body of laws which regulate governmentalsanctions (such as imprisonment and/or fines) as retaliation for crimes against the social order.[28]

The Western liberal constitutional myth of the separation of religion from the state is utterly problematic since religion is irreducibly significant in formation of modern states, laws and legal ideologies. Thus, surveys in Europe, for example, demonstrate to what degree religion is prominent in both liberal and post-communist political regimes. In relation to religious practices of praying in church, the figures are illuminating: 88 per cent in Ireland, 85 per cent in Poland, 69 per cent in Northern Ireland, 51 per cent in Italy, 43 per cent in Switzerland, 41 per cent in Portugal, 39 per cent in Spain, 34 per cent in Hungary, 34 per cent in West Germany, 30 per cent in the Netherlands, 24 per cent in the UK, 20 per cent in (East) Germany and 17 per cent in France

attended church 'at least monthly'. Obviously, fluctuations in levels of secularization and religiosity are to be expected. Yet the significance of religion as a central political and legal phenomenon in modernity is far from being marginal.[29]

Hence, the goal of this project [Basic Values of Western and Islamic Criminal Law] is the identification, comparative analysis, and description of the fundamental axioms, value measures, and techniques that differentiate western and Islamic criminal law. Such fundamental, underlying principles are, for example, the concept of the state governed by the rule of law, which in Islamic criminal law – in contrast to secular, western criminal law – is characterized as a theocracy; the concept of human rights, which in Islamic criminal law is not influenced by humanism, as it is in the west, but by religious rules; and the purpose of criminal law, which in Islamic criminal law is seen not only in the protection of society and of individual liberty but also in the protection of religious values.[30]

The word *jurm*, *jarîmah* and *jinâyah* are used for crime and offence in Islamic criminal law. The root word *jurm* literally means to cut off. It is said جرمه (He cut it off), جرم صوف الشاة (He shore or sheared or cut off the wool of the sheep). The Holy Qur'ân says: "*And let not the hatred of others to you make you swerve to wrong and depart from justice.*" (Al-Quran, Surah al-Maidah: 8)

Thus the word *jurm* means a sin, a crime, a fault, an offence, or an act of disobedience, a transgression,[31] whether intentional or committed through inadvertence. It is for this reason that this word has been used for unfair earning and unfair action. It has been used in verses 5:8, 11:89, 77:46 and 83: 29 of the Holy Qur'ân in the same sense. It is derived from these verses that all that is against justice and right path is called *jurm* and the person who does unfair and unjust action is called *mujrim*. All the orders of Sharî'ah are fair being the orders of Allah and His Prophet(PBUH) and thus their disobedience amounts to *jurm*. Therefore the word *jurm* signifies to do what has been prohibited in Sharî'ah or not to do what has been ordered by Sharî'ah to be done and for which punishment of *hadd* or *ta'zîr* has been prescribed.[32]

According to the majority of the jurists, *Jinâyah* signifies all kinds of prohibited and injurious actions whether they relate to human body or property or other violations. However, according to some jurists, it indicates prohibited act, which is committed upon a person like murder, causing hurt etc., while according to others it signifies the offences liable to *hudûd* and *qisâs*. But, generally the jurists do not differentiate between *jurm* and *jinâyah* and consider them synonym.[33]

However, as the jurists deal with the matters of proving the crimes in a court and execution of their punishments, they have defined *jurm* and *jinâyah* in that context. According to Anwarullah, the word crime is an act or omission in which any provision of divine law is violated and is declared punishable.[34]

HashimMehat wrote that, crime or *jinâyah* in Islam means committing sins either (i) committing what is forbidden (by Allah), or(ii) omitting what is commanded by Allah. In other words committing what is *harâm* (unlawful) and omitting what is *wâjib* are more or less similar to the concept of 'criminal act' and 'criminal omission' provided in section 33 of Malaysian Penal Code. Based on this, al-Mâwardî defined '*hudûd*' as deterrent punishments which God (Allah) established to prevent man from commission of what He forbade and from neglecting what He commanded. Al-Mâwardî proceeded further to define '*jinâyah*' (crime) in Islam as 'legal prohibitions against which Allah deters through *hadd* or *ta`zîr*.[35] The legal prohibitions (*al-mahzûrât al-shar`iyyah*) here mean commission of *harâm* and omission of *wâjib* or *fard*.[36]

Islamic criminal law is based on the principle of individual responsibility. Persons are punished for their own acts. Collective punishment is not allowed, although thereare exceptional cases of collective liability, such as in the Hanaûte*qasama* doctrine, where the inhabitants of a house or

village can be held liable for the ûnancial consequences of a homicide with an unknown perpetrator, committed in the house or village. Under certain circumstances a person who has committed an offence is not responsible for the consequences. Some of these circumstances are connected with the absence of *mensrea*, the 'guilty mind' or the blameworthiness of the defendant, for instance because the offence was committed by a minor or an insane person. In such cases the offence cannot be imputed to the offender. Other circumstances cause the offence to lose its unlawful character (*actusreus*): an act which contains all the elements of a crime and can be imputed to the person who has committed it must sometimes be regarded as lawful because of a justifying circumstance, such as for instance self-defence.[37]

In Islamic criminal law, punishments form only a small component of Islamic law, and are fixed only for a very limited number of offenses. The constant association of Islamic law with stoning for adultery and amputation for thefts in the modern media is a deliberate effort to misrepresent the true nature of Islamic law. The Shari'ah is not a vindictive, vengeful penal system focused on punishment. On the contrary, it is a comprehensive ethical code that emphasizes the universal values of peace, compassion and forgiveness and seeks to build an ideal society based on its noble ideals. The fact that out of the vast array of crimes known to man, only six- and according to some scholars, four- have been identified by the Shari'ah for fixed punishments is testimony to this fact. The rest of the crimes, which include even murder, are open to arbitration and even pardon by the victims. Where else, can the family of a murdered individual grant clemency and forgive the killer? In contrast, some Western penal systems in modern nations carry a mandatory death penalty for murder.[38]

Islamic criminal law has certain mechanisms in place to actually prevent the implementation of legal punishments. How many people are aware that the Messenger of Allah stated the following?:"Ward off the hudood punishments from the Muslims as much as you can. If there is any possible way for the accused, let him go. For a judge[39] to err in pardon is better than his erring in punishment."[40]

What are some of these mechanisms? Foremost among them are doubts and uncertainties. According to Islamic legal principles, doubts are to be interpreted to the benefit of the accused. The infliction of punishments requires absolute certainty of guilt, and any considerable degree of uncertainty in a case is enough to suspend punishment. As a matter of fact, the Prophet actually encouraged his followers to ward off these punishments by looking for these uncertainties: "Ward off the *hudud* with the doubts (*shubuhat*)."[41]

Any Islamic legal scholar will agree that the purpose of punishment is not vengeance against the culprit. It rather aims at protecting society from the aggressions of legal offenders and to halt transgression and crime. It seeks to prevent further criminal acts and can also be understood as a warning against its repetition by others. In this sense, there is not much difference compared to Western systems of criminal law since both approaches aim at occupying a preventive as well as a curative role.[42]

But in addition to those very general aims, Islam also sees punishment as a necessary requisite of divine justice and the Sharia "as the most prominent distillation of Islamic morals and law."[43] This has to do with the strong connection of religious and state affairs in the Muslim world. Any judicial proceeding operates on the ground of divine affirmation; justice is pronounced in the name of God. It is believed that all penalties following the accusation and trial of an offender to the law are measured with a divine balance of justice. Punishments are, therefore, harsh where necessary and lenient where appropriate. No matter how harsh the sentence may be, it is viewed

as ultimately merciful.[44]

As in most Western penal systems, punishment is justiûed in Islamic law by deterrence, retribution, rehabilitation and, ûnally, the idea of protecting society by incapacitating the offender. In addition, the rules regarding punishment are, as we shall see, closely intertwined with those of redress by means of damages, not only in the law of homicide, but also with regard to theft and unlawful sexual intercourse. Since the Shari'a is religious law, some of the laws of punishment also have a 'vertical' dimension, in that they relate to reward and punishment in the Hereafter. This is the case with the law of *hadd* and the institution of *kaff¯ara*.[45]

Muslim jurists explain that there are three requirements for the application of legal punishment: the offender must have had the power to commit or not to commit the act (*qudra*); he must have known (*'ilm*) that the act was an offence; and he must have acted with intent (*qasd*).14 Thiscanberegarded as a framework for a theory of *mensrea* in regard to offences punishable with retaliation and *hadd* offences. It implies that minors and the insane are not held responsible for their offences, because they are presumed not to be aware of the unlawfulness of their acts and, moreover, lack criminal intent. Further, this framework is a starting point for considering coercion as a defence in criminal proceedings. Finally, it provides the theoretical basis for the concept of uncertainty (*shubha*)asalegal defence: actual or presumed ignorance of the unlawfulness of an act is a legal defence in cases of homicide and *hadd* offences.[46]

3. Sources of Islamic Criminal Law

Since the Islamic legal injunctions are aimed at achieving human welfare, they can all be referred back to universal principles which are necessary for human welfare to be secured. These universal principles are:

1. The preservation of life.
2.The preservation of religion.
3. The preservation of reason.
4. The preservation of lineage.
5. The preservation of property.

The Islamic penal system is aimed at preserving these five universal necessities. To preserve life, it prescribes the law of retribution. To preserve religion, it prescribes the punishment for apostasy. To preserve reason, it prescribes the punishment for drinking. To preserve lineage, it prescribes the punishment for fornication. To preserve wealth, it prescribes the punishment for theft. To protect all of them, it prescribes the punishment for highway robbery.[47]

Islamic criminal law is rooted in the divinely code that finds expressing in the Qur'an and Sunnah. The sources of Islamic criminal law are referred to four principal proofs, namely the Qur'an, Sunnah, consensus (*'Ijma'*)and analogy (*Qiyas*). Sources in this sense are synonymous with *usul*(sing. *asl)*, hence the four sources of Islamic criminal law are known both as *adillah* and *usul*. There are a number of ayat in the Qur'an which identify the sources of Islamic law including criminal one and the order of priority between them. But one passage in which all the principal sources are indicated occurs in *ayat*which says: '*O you believers! Obey God and obey the Messenger and those of you who are in charge of affairs. If you have a dispute concerning any matter, refer it to God and to the Messenger.*' (al-Quran, Surah al-Nisa, 4: 58-59) 'Obey God' in this ayah refers to the Qur'an, and 'Obey the Messenger' refers to the Sunnah. Obedience to 'those who are in charge of affairs' is held to be a reference to ijma', and the last portion of the ayah which requires the referral of disputes to God and to the Messenger authorisesqiyas. For

qiyas is essentially an extension of the injunctions of the Qur'an and Sunnah. The rationale or the effective cause of qiyas may be clearly indicated in these sources or it may be identified by way of inference (*istinbat*). In either case, qiyas essentially consists of the discovery of a *hukm* which is already indicated in the divine sources.[48]

To conclude crime as defined in the Shariah consists is legal prohibitions imposed by Allah, whose infringement entails punishment prescribed by him. "Crime as defined in the Shariah is identical with Crime as defined in modern law".[49]

In Islamic criminal laws everything prohibited by God and his prophet is a Crime. Unlike in Western law where only that which has a specified punishment is a Crime, in Islamic law every crime is punishable but not every punishment is specified. The role of the State is to ensure that, in a person's public conduct, he does not commit a crime or any act likely to lead to one. Islamic law does not empower the State to infringe on the right of an individual citizen. It cannot break into a man's room and punish him for adultery. It cannot plant a camera in a hotel room and punish a man based on a recording of a sexual act or drinking spree. But if a man and a woman choose to have sex where four eye witnesses actually see coitus, or if a man chooses to drink his beer in front of his house instead of inside his living room, the act immediately leaves the realm of private conscience to one of public morals and the state punishes this severely. "Crime is an act or conduct whereby a person breaks the law and (ii) infringes upon the rights of others. In the religious parlance it is called "a sin"[50].[51]

4. Religiosity of Islamic Criminal Law: Isn't It?

The jurists have discussed three classifications of crime on different aspects, namely,

1. Classification according to punishment;
2. Classification according to intention; and
3. Classification according to violation of rights.[52]

In the classical text books of *ûqh*, criminal law is not regarded as a single, uniûed branch of the law. It is discussed in three separate chapters:

1) Provisions regarding offences against persons, i.e. homicide and wounding, subdivided into (a) those regarding retaliation (*qisas*) and (b) those regarding ûnancial compensation (*diya*).
2) Provisions regarding offences mentioned in the Koran and constituting violations of the claims of God (*huquq Allah*), with mandatory ûxed punishments (*hadd*, plural *hudud*); these offences are: (a) theft (b) banditry (c) unlawful sexual intercourse (d) the unfounded accusation of unlawful sexual intercourse (slander) (e) drinking alcohol (f) apostasy (according to some schools of jurisprudence).
3) Provisions concerning discretionary punishment of sinful or forbidden behaviour or of acts endangering public order or state security (*ta'zýr* and *siyasa*).[53]

Islamic law identified the most serious crimes as those mentioned in the Quran and Sunnah. "These were considered sins against Allah and carried mandatory punishments."[54] These crimes and punishments are:

1. Adultery and fornication: death by stoning or 100 lashes.
2. Highway robbery: execution; crucifixion; right hand and left foot cut off; or exile, imprisonment.
3. Theft: hand cut off.
4. Slander: 80 lashes
5. Drinking wine or any other intoxicant: 40 or 80 lashes.

6. Apostasy: killing.
7. Rebellion.

Crimes against the person included murder and bodily injury. In these cases, the victim or his male next of kin had the "right of retaliation" where this was possible. This meant, for example, that the male next of kin of a murder victim could execute the murderer after his trial (usually by cutting off his head with a sword). "If someone lost the sight of an eye in an attack, he could retaliate by putting a red-hot needle into the eye of his attacker who had been found guilty by the law".[55] But a rule of exactitude required that a retaliator must give the same amount of damage he received. If, even by accident, he injured the person too much, he had broken the law and was subject to punishment. The rule of exactitude discouraged retaliation. Usually, the injured person or his kinsman would agree to accept money or something of value ("blood money") instead of retaliating. In a third category of less serious offences such as gambling and bribery, the judge used his discretion in deciding on a penalty. Punishments would often require the criminal to pay reparation to the victim, receive a certain number of lashes, or be locked up.[56]

First: *Hudud* (Prescribed Punishments)

Crimes that fall under this category can be defined as legally prohibited acts that God forcibly prevents by way of fixed, predetermined punishments, the execution of which is considered the right of God.

These punishments have certain peculiarities that set them apart from others. Among these are the following:

1) These punishments can neither be increased nor decreased.
2) These punishments cannot be waived by the judge, the political authority, or the victim after their associated crimes have been brought to the attention of the governing body. Before these crimes are brought before the state, it may be possible for the victim to pardon the criminal if the damage done was only personal.
3) These punishments are the 'right of God', meaning that the legal right involved is of a general nature where the greater welfare of society is considered.[57]

The following crimes fall under the jurisdiction of the fixed punishments:

1. Theft (*Sariqah*)

Theft is defined as covertly taking the wealth of another party from its secure location with the intention of taking possession of it.[58]

Source of law: "*As to the thief, male or female, cut off their hands as a reward of their own deeds, and as an exemplary punishment from God. For God is Mighty and Wise. But whoever repents and mends his ways after committing this crime shall be pardoned by Allah. Allah is Forgiving and Merciful*." (al-Quran, Surah al-Ma'idah, 5:38-9)

The above ayat indicate that the punishment of amputating the hands is prescribed for a thief, both male (*Sariq*) or female (*Sariqah*);the punishment, according to the *Qur'an*, should be exemplary in nature; the objective of this punishment is stated in the words جزاء بما كسب نكالا من الله (*jaza an bimakasabanakalanminallah*: as a reward of their deeds and as an exemplary punishment);this is merely a punishment in this world. As far as the Hereafter is concerned, a person can only attain salvation if he repents and mends his ways.[59]

A hadith reported to say: "By God! If *Fatimah* the daughter of Muhammad had committed this theft, I would definitely have cut off her hand."[60]

2. Highway Robbery (*Hirabah*)

Highway robbery is defined as the activity of an individual or a group of individuals who go

out in strength into the public thoroughfare with the intention of preventing passage or with the intention of seizing the property of passers-by or otherwise inflicting upon them bodily harm.[61]

Source of law: "*The punishments of those who wage war against Allah and His Prophet and strive to spread disorder in the land are to execute them in an exemplary way or to crucify them or to amputate their hands and feet from opposite sides or to banish them from the land. Such is their disgrace in this world, and in the Hereafter theirs will be an awful doom save those who repent before you overpower them; you should know that Allah is Oft-Forgiving, Ever Merciful.*" (al-Quran, Surah al-Maidah, 5:33-4)

It is obvious from the style of these verses that the meaning implied by *Muharabah*(waging war against Allah and His Prophet (sws)) and spreading disorder in the land is when an individual or a group of individuals take the law into their own hands and openly challenge the system of justice which in accordance with the *Shari'ah*is established in a piece of land. Consequently, under an Islamic government, all those criminals who commit rape, take to prostitution, become notorious for their ill-ways and vulgarity, become a threat to honourable people because of their immoral and dissolute practices, sexually disgrace women because of their wealth and social status, or rise against the government in rebellion, or create a law and order situation for the government by causing destruction, by becoming a source of terror and intimidation for people, by committing mass murder, plunder, decoity or robbery, by indulging in hijacking and terrorism and by committing other similar crimes are criminals of *Muharabah*, and spreading such disorder in the society should be severely dealt with.[62]

3. Fornication and Adultery (*Zina*)

This is defined as any case where a man has coitus with a woman who is unlawful to him. Any relationship between a man and a woman that is not inclusive of coitus does not fall under this category and does not mandate the prescribed, fixed punishment.[63]

Sources of law: "*The man and the woman guilty of fornication, flog each of them with a hundred stripes and let not compassion move you in their case in the enforcement of the law of God, if you truly believe in Allah and the Last Day. And let a party of the believers witness their punishment. The man guilty of fornication may only marry a woman similarly guilty or an idolateress and the woman guilty of fornication may only marry such a man or an idolater. The believers are forbidden such marriages*." (al-Quran, Surah al-Nur, 24:2-3)

The initial directive of the *Qur'an* regarding the punishment of fornication is mentioned in *Surah Nisa*. No definite punishment is mentioned there; it is only said that that until some directive is revealed about women who as prostitutes habitually commit fornication, they should be confined to their homes, and the common perpetrators of this crime should be tortured until they repent and mend their ways. This torture may range from exhorting and reprimanding, scolding and censuring, humiliating and disgracing the criminal to beating him up for the purpose of reforming him.

And upon those of your women who commit fornication, call in four people among yourselves to testify over them; if they testify [to their ill-ways], confine them to their homes till death overtakes them or God formulates another way for them. And the man and woman among you who commit fornication, punish them. If they repent and mend their ways, leave them alone. For God is Ever-Forgiving and Most Merciful." (al-Quran, Surah al-Nisa, 4:15-6)

Thiswas the punishment of fornication in the *Shari'ah*before a definite directive was revealed in *Surah Nur*. Once this was revealed, it repealed the previous directive permanently.The directives mentioned in these verses are: the man or woman who have committed fornication, both shall

receive a hundred stripes; the criminal should be given this punishment publicly to humiliate him in front of the people, and to make him a lesson for those present; after this punishment has been carried out, no chaste man or woman should marry men and women who commit fornication; while stating this punishment, adjectives are used to qualify the men and women who commit fornication.[64]

Hadith of the Prophet *SallallahuAlaihiWasallam*: Abu Huraira reported Allah's Apostle as saying: "Allah has decreed for every son of Adam his share of zina, which he will inevitably commit. The zina of the eyes is looking, the zina of the tongue is speaking, one may wish and desire, and the private parts confirm that or deny it."[65]

The public lashing and public lethal stoning punishment for zina are also prescribed in Hadiths. 'Ubada b. as-Samit reported: Allah's Messenger as saying: Receive teaching from me, receive teaching from me. Allah has ordained a way for those women. When an unmarried male commits adultery with an unmarried female, they should receive one hundred lashes and banishment for one year. And in case of married male committing adultery with a married female, they shall receive one hundred lashes and be stoned to death.[66]

Umar ibn al-Khattab said: "Allah's Messenger awarded the punishment of stoning to death to the married adulterer and adulteress and, after him, we also awarded the punishment of stoning, I am afraid that with the lapse of time, the people may forget it and may say: We do not find the punishment of stoning in the Book of Allah, and thus go astray by abandoning this duty prescribed by Allah. Stoning is a duty laid down in Allah's Book for married men and women who commit adultery when proof is established, or if there is pregnancy, or a confession.[67]

4. False Accusation (*Qadhf*)

This is defined as accusing the chaste, innocent person of fornication or adultery. It also includes denying the lineage of a person from his father (which implies that his parents committed fornication of adultery). False accusation includes any claim of fornication or adultery that is not backed up by a proof acceptable to Islamic Law.[68]

Sources of law: "*Those who accuse honourable women and bring not four witnesses as an evidence [for their accusation], inflict eighty stripes upon them, and never accept their testimony in future. They indeed are transgressors. But those who repent and mend their ways, Allah is Ever-Forgiving and Most-Merciful. And those who accuse their wives but have no witnesses except themselves shall swear four times by Allah that they are telling the truth and the fifth time that the curse of Allah be on them if they are lying. But this shall avert the punishment from the wife if she swears four times by Allah and says that this person is a liar and the fifth time she says that the curse of Allah be on her if he is telling the truth*." (al-Quran, Surah al-Nur, 24:4-9)

This is the directive for *Qadhf*, ie accusing someone of fornication. Although in these verses only the accusation of women is mentioned, yet in the Arabic language this style which can be termed as 'Úáì ÓÈíá ÇáÊÛáíÈ' (*'alasabil al-taghlib*: addressing the dominant element) is adopted because normally in a society only women become targets of such allegations, and the society is also sensitive about them. Consequently, there is no doubt that on the ground of 'similarity of basis' this directive pertains to both men and women and cannot be restricted to women only.[69]

5. Drinking Intoxication (*Shurb al-Khamr*)

One of the most important objectives of Islam is the realization of human welfare and the avoidance of what is harmful. Because of this, it "permits good things and prohibits harmful things." Islam, thus, protects the lives of people as well as their rational faculties, wealth, and

reputations. The prohibition of wine and the punishment for drinking it are among the laws that clearly show Islam's concern for these matters, because wine is destructive of all the universal needs, having the potential to destroy life, wealth, intellect, reputation, and religion.[70]

Sources of law:*"O you who believe! Verily wine, gambling, idols, and divination are but the abominations of Satan's handiwork, so abandon these things that perchance you will be successful. Satan only wishes to cause enmity and hatred between you through wine and gambling and to prevent you from the remembrance of God and prayer. Will you not then desist?"* (al-Quran, al-Maidah, 5:90-91)

6. Apostasy (*Riddah*)

Apostasy is defined as a Muslim making a statement or performing an action that takes him out of the fold of Islam.[71]

Sources of law: "*But those who reject Faith after they accepted it, and then go on adding to their defiance of Faith,- never will their repentance be accepted; for they are those who have (of set purpose) gone astray*." (al-Quran, Ali Imran, 3: 90) "*Make ye no excuses: ye have rejected Faith after ye had accepted it. If We pardon some of you, We will punish others amongst you, for that they are in sin*." (al-Quran, al-Taubah, 9: 66)

Allah's Apostle said, "The blood of a Muslim who confesses that none has the right to be worshipped but Allah and that I am His Apostle, cannot be shed except in three cases: In Qisas for murder, a married person who commits illegal sexual intercourse and the one who reverts from Islam (apostate) and leaves the Muslims."[72]

Ali burnt some people and this news reached Ibn 'Abbas, who said, "Had I been in his place I would not have burnt them, as the Prophet said, 'Don't punish (anybody) with Allah's Punishment.' No doubt, I would have killed them, for the Prophet said, 'If somebody (a Muslim) discards his religion, kill him.'[73]

The punishment prescribed for it in the Sunnah is execution, and it came as a remedy for a problem that existed at the time of the Prophet, may the mercy and blessings of God be upon him.Thus, the prescribed punishment for apostasy was instituted so that apostasy could not be used as a means of causing doubt in Islam.At the same time, the apostate is given time to repent, so if he has a misconception or is in doubt about something, then his cause of doubt can be removed and the truth clarified to him. He is encouraged to repent for three days.

Second: Retaliation (*Qisas)*

1. Intentional Murder

Sources of law: "*O you who believe! decreed for you is the Qisas of those among you who are killed such that if the murderer is a free-man, then this free-man should be killed in his place and if he is a slave, then this slave should be killed in his place and if the murderer is a woman, then this woman shall be killed in her place. Then for whom there has been some remission from his brother, [the remission] should be followed according to the Ma'ruf and Diyat should be paid with goodness. This is a concession and a mercy from your Lord. After this, whoever exceeds the limits shall be in a torment afflictive. There is life for you in Qisas O men of insight that you may follow the limits set by Allah*." (al-Quran, Surah al-Baqarah, 2:178-9)

2. Unintentional Murder

Source of law: "*It is unlawful for a believer to kill a believer except if it happens by accident. And he who kills a believer accidentally must free one Muslim slave and pay Diyat to the heirs of the victim except if they forgive him. If the victim is a Muslim belonging to a people at*

enmity with you, the freeing of a Muslim slave is enough. But if the victim belongs to an ally, Diyat shall also be given to his heirs and a Muslim slave shall also have to be set free. He who does not have a slave, must fast two consecutive months. This is from Allah a way to repent from this sin: He is Wise, All-Knowing." (al-Quran, Surah al-Nisa, 4:92-3)

In Islamic law, according to the *Qur'an*, the punishment of unintentionally murdering or wounding in some cases is *Diyat*and Atonement (*Kaffarah*), and in some cases only Atonement (*Kaffarah*) except if the wounded person or the heirs of the slain person forgive the criminal. In this case, life for life, wound for wound and limb for limb cannot be demanded from a person.

Third: *Ta'zîr* (Crimes of Discretionary Punishments)

Ta'zîr literally means disgracing the criminal for his shameful criminal act. In *ta'zîr*, punishment has not been fixed by law, and the *qâdi* is allowed discretion both as to the form in which such punishment is to be inflicted and its measure. This kind of punishment by discretion has been provided in special consideration of the various factors affecting social change in human civilisation and which vary on the basis of variations in the methods of commission or the kind of criminal conduct indictable under the law. Offences punishable by this method are those against human life, property, and public peace and tranquility.

III. Closing

1. Conclusion

Based on the facts above and religiosity of Islamic criminal law, the believers are obliged to implement and practice it as they implement and practice all Islamic religious pillars such as salat, Ramadan fasting, pilgrimage in their daily life without any denying and objection. Because salat, Ramadan fasting and pilgrimage are the rules of Allah which must be done, it is also the same regarding the implementation of Islamic criminal law because it is also the rule of Allah which must be done by the believers.

ENDNOTES

[1]Barzilai, Gad. 2007. Law and Religion. England: Ashgate Publishing Limited. P. xi

[2] See: Wikipedia, 'Religious law'.

[3]Dr. Abdurrahman al-Muala. (2006). "Crimes and Punishment in Islam", www.islamtoday.com, last modified 16 Oct 2011.

[4] Rudolf Peter. (2005). *Crime and Punishment in Islamic Law Theory and Practice from the Sixteenth to the Twenty-First Century*. UK: Cambridge University Press, p, 1.

[5] See: Dr Muhammad Tahir-ul-Islam, "Islamic Penal System and Philosophy".

[6] Susan C. Hascall, "Restorative Justice in Islam: Should Qisas Be Considered a Form of Restorative Justice?" in *Berkelly J of Meadle Eastern and Islamic Law,* 2011, vol. 4:1, p. 37.

[7] Schacht, Joseph. 1950. *Origins of Muhammadan Jurisprudence*. Oxford, 124ff.

[8]Mohamed al-Awabdeh. 2005. "History and Prospect of Islamic Criminal Law with Respect to the Human Rights", Ph D Dissertation submitted to Faculty of Law, Humboldt-Universität, Berlin in 2005, p. 6.

[9]SeyedHosseinSerajzadeh, "Islam and Crime: the Moral Community of Muslims", *Journal of Arabic and Islamic Studies* 4 (2001–2002), p. 111.

[10]Religiosity (rjljd'iRsjti) - uncountable noun: If you refer to a person's religiosity, you are referring to the fact that they are religious in a way which seemsexaggerated and insincere. (COBUILD Advanced English Dictionary. Copyright © HarperCollins Publishers); Religiosity in American English (rjÌljd'iÈQsYti;rilijÌçäsÈYtç) – noun: the quality of being religious, esp. of being excessively, ostentatiously, or mawkishly religious. (Webster's New World College Dictionary, 4th Edition. Copyright © 2010 by Houghton Mifflin Harcourt); Derived forms: religiose (reÈligiÌose) (rjÌljd'iÌoŠs; rilijÌçôsÌ) –

adjective; Word origin of 'religiosity' ME religiosite< LL(Ec) religiositas; Example sentences containing 'religiosity': "Perhaps a nation that wantspublic religiosity is better than one that has abandoned it." Christianity Today (2000).https://www.collinsdictionary.com/dictionary/english/religiosity.

[11]https://www.gotquestions.org/religiosity.html

[12]https://en.wikipedia.org/wiki/Religiosity

[13] Abu Abdullah, Muhammad ibn Ahmad. (1423H/2003).*Al-Jami' Li Ahkam al-Quran*. Riyadh: Dar 'Alam al-Kutub, Vol. I, p. 225 and Vol. 17, p. 56.

[14]Abu al-'Abbas, Ahmad ibn Abdul Halim.(1426H/2005).*Majmu' al-Fatawa*. 3rdedt. Edt. Anwar al-Baz and Amir al-Jazzar.N.p.: Dar al-Wafa, vol. 10, p. 149.

[15]Muhammad ibn Abu Bakar.(1393H/1973).*Madarij al-Salikinbaina Manazil Iyyaka Na'budu WaIyyaka Nasta'in*. 2ndedt. Edt. Muhammad Hamid al-Faqi. Beirut: Dar al-Kitab al-'Arabi, vol. I, p. 109.

[16]Abu al-Fida, Ismail ibn Umar ibnKathir.(1420H/1999).*Tafsir al-Quran al-'Azim*. 2ndedt. Edt. Sami Muhammad Salamah. Jeddah: Dar Taybah li al-Tiba'ahwa al-Nashr. Vol 7, p. 402.

[17]*Al-'Ibadah*, http://www.islam.com, p.5-8.

[18]Narrated by al-Bukhari and Muslim.

[19]Narrated by Muslim.

[20] Narrated by Muslim

[21] Narrated by al-Tabrani, Abu Ya'la,, and al-Baihaqi'.

[22]Narrated by Muslim.

[23]*Wisconsin v. Yoder 406 US 205* (1972).The case was argued on 8 December, 1971 and decided on 15 May, 1972; and *Board of Education of Kiryas Joel v. Grumet* (1994). The case was argued on 30 March 1994 and decided on 27 June 1994.

[24]"Law and Religion", p. xi-xii.

[25]Ibid. p. xiv.

[26]Lawan, Mamman. e*t. al.* (2011), *An Introduction to Islamic Criminal Justice: A Teaching and Learning Manual*. UK: UK Centre for Legal Educators, p. 3-4.

[27] See: "The Concept of Crimes in Islam", http://termizi-mylife.blogspot.com/2008/01/concept-of-crime-in-islam.html

[28] Wikipedia, 'Religious Law'.

[29]Barzilai, "Law and Religion, p. xii-xiii.

[30]Mohammad Sadr Touhid-Khaneh. 2014. "Basic Values of Western and Islamic Criminal Law. Ph. D Thesis at University of Freiburg, Germany.

[31] See: Ma'an Z. Madina. 1973. *Arabic - English Dictionary of the Modern Literary Language.* New York: Pocket Books.

[32] See: Abdurrahman RadenAjiHaqqi, "*Muzakkirat fi Jinayat 1*", Kuwait University, 1988; "The Concept of Crimes in Islam".

[33] Ibid.

[34] Ibid.

[35]Al-Mawardi, Abu Hasan Ali ibn Muhammad.N.d.*al-Ahkam al-Sultaniyyah*.Dar al-Kutub al-'Ilmiyah, p.273.

[36] See: Abdurrahman RadenAjiHaqqi, "*Muzakkirat fi Jinayat 1*", Kuwait University, 1987; "The Concept of Crimes in Islam".

[37] Peter, *Crimes and Punishment*, p. 20.

[38] Dr. Abu Zayd. 2005. "The Face of Mercy". p. 3.https://obeyd.files.wordpress.com/2007/10/mercy-in-islamic-law.pdf

[39] The term used is imam, or leader of the state, but it has been interpreted by jurists to include judges as the separation of political and legal authority occurred early in Islamic history.

[40]Narrated by Al-Tirmidhi #1344 with a weak chain. However, all jurists have accepted this hadith and used it in their works on the basis of other chains that strengthen it. Categorized as authentic (*sahih*) by al-Hakim

[41]See al-Mubarakpuri (d. 1353H), Tuhfah al-'Ahwadhibisharh Jami' al-Tirmidhi.

[42] Al-Awabdeh, "Historical...", p. 22.

[43]Forte, David F. 1999.*Studies in Islamic Law*.Oxford, 236ff.

[44] Al-Awabdeh, "Historical...", p. 22-23.

[45] Peter, *Crimes and Punishment....* p. 30.
[46]Ibid. p. 20.
[47]Al-Muala."Crimes and Punishment in Islam".
[48] See: Mohammad HashimKamali. 1991. *The Principles of Islamic Jurisprudence*. Kuala Lumpur: Pelanduk, p. 19.
[49]Abdusamed, Kader. 1994. *Crime and punishment in Islam*. Lenasia (South Africa): n.p, 3ff.
[50] Abu Zahra, Mohamed. 1976. *Crime in Islam*, Cairo: n.p, 26 ff.
[51] Al-Awabdeh, "History…". p. 24-25.
[52]Firstly, the crimes in Islamic criminal law have been classified into three kinds on the basis of the quantum of punishment: *Qisâs* and *diyat* (crimes of retaliation and blood money); *Hudûd* (crimes of fixed punishments); and *Ta'zîr* (crimes of discretionary punishment).
Secondly, regarding intention, the crimes have been divided into two kinds: (i) Intentional crimes; and (ii) Unintentional crimes.
Intentional crimes means the crimes wherein the criminal commits crime knowing that he is committing an illegal act and understands the result of his act similar to intentional homicide, intentional hurt, etc. On the other hand, unintentional crimes means the criminal does not intend to commit a crime but he commits the crime by negligence or mistake.
Lastly, the crimes on the basis of violation of rights have been divided into two kinds: crimes against public; and crimes against individuals. The former are preponderantly injurious to the society at large. Such crimes may be committed against individuals as well as against public. And the latter means crimes directly affect the individuals though they are injurious to the public as well.
[53] Peter, *Crimes and Punishments…*, p. 7.
[54]Tahir, Mohamood. 1996. *Criminal law in Islam*, Delhi, 62ff.
[55]Sayyid, Sabiq. 1953. *Fiqh Al Sunnah*, Cairo: 330ff.
[56] Al-Awabdeh, "History…", p. 25-26
[57]Al-Muala."Crimes and Punishment in Islam".
[58] See: Haqqi, "*Muzakkirat…*", 28/3/1988
[59]Javed Ahmad Ghamidi/ShehzadSaleem, "Penal Law in Islam".
[60] Muslim: No. 1688.
[61] See: Haqqi, "*Muzakkirat…*", 9/4/1988.
[62]Javed Ahmad Ghamidi/ShehzadSaleem, "Penal Law in Islam".
[63] See: Haqqi, "*Muzakkirat…*", 13/2/1988.
[64] See: Javed Ahmad Ghamidi/ShehzadSaleem, "Penal Law in Islam".
[65]Sahih al-Bukhari, 8:77:609; Sahih Muslim, 33:6421
[66]Sahih Muslim, 17:4191.
[67]Sahih Muslim, 17:4194
[68] See: Haqqi, "*Muzakkirat…*", 5/3/1988.
[69] See: Javed Ahmad Ghamidi/ShehzadSaleem, "Penal Law in Islam".
[70] See: Haqqi, "*Muzakkirat…*", 13/4/1988; al-Ma'ala
[71] Ibid. 1/2/1988
[72]Sahih al-Bukhari, 9:83:17; Sahih Muslim, 16:4152, Sahih Muslim, 16:4154, Sahih Muslim, 20:4490
[73] Sahih al-Bukhari, 4:52:260

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Assessing the Legal Protection for Farmers in the Policy Agricultural Insurance Facility

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ABSTRACT

Farmers have a significant contribution in the development of agriculture and rural economic development. Farmers as agricultural development actors need to be given protection and empowerment to support the food needs which is the fundamental right of everyone to achieve food sovereignty, food sovereignty and food security in a sustainable manner. Through the State Constitutional Court Decision No. 002 / PUU-I / 2003 Jo Constitutional Court decision 87 / PUU-X / 2013 in relation to the concept of the rights of control of the state under Article 33 of the 1945 Constitution states that the state authorities to regulate their protection and empowerment these farmers. Referring to article 7 paragraph (2) and Article 12 paragraph (2) of Law No. 19 In 2013, one of the ways to protect farmers is through agricultural insurance program. Legislative policy in the form facility on Agricultural Insurance program was held to protect the farmer from the loss of crop failure due to natural disasters. The issue of agriculture requires a separate study, especially agricultural insurance in Indonesia. This study aims to investigate the policies facilities on Agricultural Insurance program, to know the legal certainty for the implementation of agricultural insurance and to know the scope of the commodities that could be protected by agricultural insurance, as part of a self-sufficiency program in the framework of food sovereignty.

Keywords: *Legal Protection of farmers, agricultural insurance, food sovereignty.*

I. Introduction

During this time Farmers have a significant contribution in the development of Agriculture and rural economic development. Agricultural farmers as development actors need to be given protection and empowerment to support the food needs is a basic right of every person to achieve food sovereignty, food sovereignty and food security in a sustainable manner.

Referring to the provisions of Article 33 UUD 1945, the State has made a legislative policy to ensure the realization of food sovereignty program through Article 7 paragraph (2) of Law No. 19 Year 2013 jo. Article 12 paragraph (2) protection of farmers is one done in the form of agricultural insurance are program. Agricultural insurance is an agreement between the farmer and the insurance company to enter into risk coverage Farming (see article 1 poin 16 of Law number 19 Year 2013).

Legislative policy in the form of facilities for Agricultural Insurance program established to protect the farmer from the loss of crop failure due to natural disasters, outbreaks of infectious animal diseases, climate change; and / or other types of risk stipulated by the Minister; and can provide help redress crop failure due to extraordinary events in accordance with the financial capacity of the state (article 37-38 of Law Number 19 Year 2013)

The problem is how the birth of the basic concepts of program policies facilities for Agricultural Insurance, Is there any legal certainty for the implementation of agricultural insurance and how to limit the commodities which may be covered by agricultural insurance.

II. Method

As a normative juridical research. The assessment will be done using primary data and secondary data. The primary data of legal material relating to the policy in the form of legislation relating to the regulation concerning the protection and empowerment of farmers, which starts from the provisions of the 1945 Constitution and Act No. 19 of 2013 on the Protection and Empowerment of Farmers. The primary data collectors do with literature review.

While the secondary data from various agencies involved work program of agricultural insurance and food self-sufficiency program in the context of food security. Secondary data collection is done through a literature search and a digital library to generate data and information in order to achieve objectives.

Analysis conducted Content analysis of various legislative policy document in the form of legislation relating to the regulation concerning the protection and empowerment of farmers through insurance-related statute approach that agriculture and food self-sufficiency program in the context of food security.

III. Discussion

3.1 State Right to Control

Article 33 UUD 1945 asserts:

(1) The economy is structured as a joint venture based on family principles. Production branches which are important for the country and dominate the life of the people controlled by the state.

(2) The earth and water and natural resources contained in it are controlled by the state and used for the people's welfare.

(3) The national economy shall be organized based on economic democracy with the principles of togetherness, efficiency with justice, sustainability, environmental friendliness, independence, and balancing economic progress and national unity.****)

(4) Further provisions on the implementation of this article are regulated by law.

The above provisions according to BagirMananis including the definition of Controlled by State and State

Control Rights as follows: (a) Mastery sort of ownership by the state, meaning the state through the government is the sole authority to determine the right to authorize it, including here the earth, the water, and the riches contained in it, b). Organize and supervise the use and utilization,c).Equity and in the form of state enterprises to the efforts of certain.[1]

If Article 33 UUD 1945 are interpreted so, then how the intangible right to control state policy-setting by the State in relation to the protection and empowerment of farmers, particularly related to issues of food sovereignty and agricultural insurance. For that need to be discovered a common thread that connects them.

The interpretation of the concept of state authority of Article 33 UUD 1945 we can also look in the Decision of the Constitutional Court (MK) on cases of judicial review related to natural resources. Legal considerations of the Court in Case Decision and Gas Law, the Law on Electricity, and Water Resources Act (Act SDA) and the Law on Protection and Empowerment of Farmers. The Court interprets the "right to control state (HMN).

Right to control the country as defined in Article 33 paragraph (3) of the 1945 Constitution in conjunction with Article 2 paragraph (2) BAL can be interpreted associated with this problem if it is connected with the explanation Pasa1 33 paragraph (3) of Law No. 26 Year 2007 on Spatial

Planning (UUPR) which asserts that in order stewardship of land on the space that had been planned for the construction of infrastructure and facilities for the public interest, the government (both central and local) have the right first priority to receive the transfer of land rights from the rights holder on the ground. If the interests of the community in terms of stewardship of land above, interpreted as the public interest, it is in the context of land acquisition for development, provision of Article 33 paragraph (3) in conjunction with Article 1 UUPR PP 16 of 2004 must be interpreted as the government's first priority right is a manifestation of the right to control the country as defined in Article 33 paragraph (3) of the 1945 Constitution in conjunction with Article 2 paragraph (2) BAL.

So according to the interpretation of the Constitutional Court, meaning controlled by the state under article 33 UUD 1945 is the people collectively, mandates the state to create a policy *(beleid)* and acts of management *(bestuursdaad),* setting *(regelendaad),* management *(beheersdaad)* and supervision *(toezichthoudensdaad*) to the purpose of the prosperity of the people.[2]

Arrangements function *(bestuursdaad*) by the state carried out by the Government with the authority to issue and revoke licenses facilities *(vergunning*), licenses (licentie) and concessions *(Consessie).*[3]

The regulating function of the state *(regelendaad*) is done through legislative authority by the Parliament and the Government, and regulation by the Government. [4]

Management functions *(beheersdaad*) carried out through the ownership of shares (shareholding) and / or through direct involvement in the management of State-Owned Enterprises or State Owned Legal Entity as institutional instrument, through which the State, c.q. The government, leveraging its control over the sources of wealth were to be used for the greatest prosperity of the people. [5]

Likewise, the function of oversight by the state (*toezichthoudensdaad)* conducted by the State, c.q. The government, in order to monitor and control that exercise of control by the state over the resources in question really do for the greatest prosperity of the people.[6]

In this regard, the state plays an important role for consummate ground as elements of public goods into private goods equitably, to align and integrate land acquisition activities in layout. So is the right to control the State under Article 33 UUD 1945 is the right of the State to formulate policies, make arrangements, Arrangements, management and control, including in this case is to formulate policies and organize a wide range of issues related to the protection and empowerment of farmers.[7]

3.2 Food Security Policy

Food security is one of the strategic issues of food sovereignty policies in the context of development of the country as a developing country, because it has a dual function: 1). One of the main objectives of development, 2). One of the main instruments of economic development.[8]

The concept of food security refers to the terms of their ability to access food in adequate amount to maintain an active and healthy life. Food security is a multidimensional concept that includes the chain of food and nutrition system, ranging from the production, distribution, consumption, and nutritional status. Briefly food security is actually only about three important things, namely the availability of, access to, and consumption of food.[9]Formal definitions of food security, according to some experts is as follows:

1. *The World Food Conference in 1974, UN 1975:* Food Security is the world sufficient food

availability in all the time to maintain the sustainability of food consumption and balance fluctuations in production and prices.

2. *FAO 1992*: Food Security is a situation in which all people in all times have sufficient amount on food safety (safe) and nutritious for the sake of a healthy and active life.
3. *World Bank* 1996: Food Security are: access by all people at all times to food that is sufficient for healthy and active life.

In contrast to the concept of food security (food security), now the concept of sovereignty / self-sufficiency (food sovereignty) more relevant to put forward. You see, the paradigm of food sovereignty can overcome the weaknesses food security policy which has relied more on compliance with food in a modern way through the application of agro-business, free trade and privatization of productive resources.[10]

Indonesia has Law No. 7 of 1996 on Food, which confirms that food security is a condition in which the sufficiency of food supply for households as measured by the adequacy of food in terms of quantity and quality and also the guarantee of security (safety), the equitable distribution and the ability to buy.[11]

Conditions lack of access to food commodities that cause food insecurity. Rise and fall of the number of people classified as food insecure usually follows the rise and fall of the number of poor people in Indonesia. There are still many poor people who are vulnerable to food insecurity. Local and national food situation is being affected by climate change and global warming (global warming). Upon the occurrence of climate change and global warming, food self-reliance had become a global issue. In fact, farmers in various parts of the world are now demanding their food self-sufficiency. [12]

Local and national food situation is being affected by climate change and global warming (global warming). Upon the occurrence of climate change and global warming, food self-reliance had become a global issue. In fact, farmers in various parts of the world are now demanding their food self-sufficiency. In contrast to the concept of food security (food security), now the concept of food sovereignty (food sovereignty) more relevant to put forward. You see, the paradigm of food sovereignty can overcome the weaknesses food security policy which has relied more on compliance with food in a modern way through the application of agro-business, free trade and privatization of productive resources.[13]

Some examples of cases that occurred in Indonesia, among others:

1. According to the Head of Food Insecurity availability and EkoHaribasukiTjuk Department of Agriculture, total of 2.5 of the total population of Indonesia in conditions of food insecurity. That is, there are about 5 million people of this agricultural country who ate less than twice a day.[14]
2. Conditions lack of access to food commodities that cause food insecurity. Rise and fall of the number of people classified as food insecure usually follows the rise and fall of the number of poor people in Indonesia. There are still many poor people who are vulnerable to food insecurity (processed from BPS data) that in 2006 the number of poor people reached 39.3 million (17.75%) and residents were very insecure about 10.04 million (4.52%), whereas in 2007 the number of poor population of 37.17 million (16.58%) and residents were very insecure about 5.71 million (2.55%).[15]
3. Report of the Indonesian Farmers Union (SPI) states, occurred 144 cases of violation of farmers' rights. This figure does not include cases of malnutrition, which until December 2011 and then recorded 686 cases. While the KPA (Consortium for Agrarian Reform) in 2011 noted there

were 163 cases of agrarian conflicts across Indonesia with 22 farmers killed victim.[16]

4. As part of the Ministry of Agriculture agricultural development planning, goals and objectives of Food Security Agency in 2010 -2014 will be realized through a national priority activities and areas, namely: (1) Development and Availability of Food Handling Food Insecurity; (2) Distribution System Development and Stability of Food Prices; (3) Development of Food Consumption Diversification and Food Safety Enhancement fresh; while supporting activities is management support and other technical including Welfare Improvement Small Farmers.[17]

It is recognized that in order to achieve the development of food security as a form of food sovereignty is not easy, but with determination and cooperation of the scope of the Food Security in the central and regional governments, as well as coordination with the First Echelon scope of the Ministry of Agriculture and related agencies, will be able to achieve the goals and targets of national food security.[18]

Implementation of the Food Security in the Strategic Plan 2010 - 2014 in the planning and development phases annual food security, it is still possible to experience improvements and enhancements for policy changes, problems, and results of the evaluation in the implementation of development programs of food security.[19]

3.3 The Concept of Protection and Empowerment of Farmers

Related to the protection and empowerment of farmers, there is a lot of legislation that has been made and is applicable in Indonesia, whose setting scattered in various fields' settings.

In the hatchery, applicable regulations include, among others Cultivation System Act 12 of 1992, Law No. 19 of 2013 on the Protection and Empowerment of Farmers, PP of Seed Plants 44 1995, Kepmentan 803/Kpts / OT.210 / 7/97 on certification and seed quality control bina, KepMentan No.1017/ Kpts / OT /TP.120/ 12/1998 on seed production permit construction, permit entry of seeds and super seed expenses.

Nonetheless textually legislation that expressly regulates the protection and empowerment of farmers is Law No. 19 of 2013 on the protection and empowerment of farmers (Law 19/2013). Because they were limited in the assessment of the scope of Law No. 19 of 2013 on the protection and empowerment of farmers.

Studies on Law No. 19 of 2013 on the protection and empowerment of farmers, found that key Starring in the procurement of food sourced from agriculture are farmers. They are involved directly or indirectly in tilling the land, tenants / owners of agricultural land, seeding, planting, fertilizing, maintenance, harvesting, and post-harvest processing to marketing. By using all the potential they have the slightest.

So SatriaNugraha found Farms Farmers as agents of development need to be given protection and empowerment to support the food needs which are basic rights everyone has to realize food sovereignty, food sovereignty and food security in a sustainable manner.[20]

Farmers generally tried on a small scale, the average area of farm land less than 0.5 hectares, and even some of the farmer does not own the land called Farmers Farming or tiller, and even farm laborers. Farmers generally have a weak position in acquiring the means of production, financing Farming, and market access. The likelihood of climate change, vulnerability to natural disasters and business risk, globalization and the global economic downturn, as well as the market system does not favor the Farmer.[21] Therefore very urgent needs clear regulations related to the protection and empowerment of farmers.

In Law No. 19 of 2013 on the protection and empowerment of farmers, Scope of Protection

and Empowerment of Farmers covering: a. plan. b.protection of Farmers; c. Farmer empowerment; d. financing and funding; e. supervision; and f. community participation (see article 4).

Article 5 of Law 19 Year 2013, insists that the protection and empowerment of farmers planning must contain strategies and policies. Planning the protection and empowerment of farmers must be done in a systematic, integrated, effective, thorough, transparent, and accountable. Careful planning must be based on the carrying capacity of natural resources and the environment, spatial planning, and the development of science and technology, economic growth rates, the number of farmers, needs infrastructure and facilities; and the technical and economic feasibility and compliance with institutional and local culture.

In the strategy of protection and empowerment of farmers referred to in Article 6 adopted by the Government and local government pursuant to its authority under the policy of protection and empowerment of farmers.

Table 6. Providers and / or manager Protection Strategy Policy and Farmer Empowerment

No	Policy	Strategy		provider and / or managers
1	Farmers Protection Strategy (article 7 paragraph 2) is done through:	a.	Agricultural production infrastructures and facilities	Government and local governments and business communities
		b.	business assurance;	Government and Local Government
		c.	Agricultural commodity prices;	Government
		d.	he elimination of the practice of high-cost economy;	-
		e.	compensation of crop failure due to an extraordinary event;	Government and Local Government
		f.	early warning systems and the impact of climate change; and	Government and Local Government
		g.	Agricultural Insurance	Government and Local Government
2	Farmer Empowerment Strategy (Article 7, paragraph 3) is done through:	a.	education and training	Government and Local Government agency and / or an accredited institution, business agent
		b.	extension and advisory services;	Government and Local Government
		c.	system development and marketing of the means of Agriculture;	Government and local governments and business communities
		d.	consolidation and assurance Agricultural land area;	Government and Local Government
		e.	the provision of financing and capital facilities;	Government and Local Government
		f.	ease of access to science, technology, and information; and	Government and Local Government
		g.	Institutional strengthening farmer.	Government and Local Government

Source: Adapted from Law No. 19 in 2013

Legal protection for farmers in Law No. 13 In 2013, the split in the form of policies for the protection of farmers and farmer empowerment policy. Each policy has its own strategy in implementation. As it is seen in the table above by mentioning the provider and / or managers of the policy.

The strategy of protection and empowerment of farmers is done through several ways. Deliberately differentiated protection strategy with the strategy of empowering farmers and further elaborated with different emphasis on various programs related to the guarantee implementation. Program protection and empowerment of farmers also governs the provider and / or managers, in order to more clearly who is in charge associated with the authority, duties and programs that can be planned.

Planning Protection and Empowerment of Farmers compiled by the Government and Local Government in accordance with its authority by involving farmer, compiled at the national, provincial, and district / city, into a plan Protection and Empowerment of Farmers both short term, medium term and long term.

Where it as a planned effort in order to ensure the sovereignty and independence of the farmer in order to improve the welfare, quality, and a better life.

Policy Protection and Empowerment of Farmers should consider: alignment with community development projects and public participation and / or other stakeholders as partners with government and local governments. What is the protection and empowerment of farmers? Farmers are the protection of all efforts to help the farmer in confronting difficulties in obtaining infrastructure and production facilities, business certainty, risk pricing, crop failure, high cost economy practices, and climate change (see article 1 point 1 of Law Number 19 Year 2013).

While the definition of Farmer Empowerment is all efforts to improve the ability Farmers to implement Farming better through education and training, counseling and mentoring, development of systems and means of marketing of Agriculture, consolidate and guarantee the extent of agricultural land, the ease of access to science, technology and information, as well as institutional strengthening Farmers (see article 1 point 2 of Law Number 19 Year 2013).

3.4 The Concept of Uncertain Losses in Insurance

The Book of the Law Legal trade/*Wetboek van Koophadel* (Commercial code) in Article 246 states that the definition of insurance is an agreement in which the borrower promises to the guaranteed to receive a sum of money premium in lieu of damages, which may be suffered by the guaranteed as a result of an event that will happen is unclear.

So insurance / coverage is an agreement in which a binding to an insured to receive a premium, to provide turn him for a loss, damage, or loss of expected profit, which may be suffered due to an event that is not necessarily.[22]

Insurance is defined as the "insured". Insurance or coverage is an agreement between two or more parties, the insurer committed to the insured to receive insurance premium, to give the turn to the insured for loss, damage or loss of expected benefits or legal liability to third parties which may be suffered by the insured, the arising from an uncertain events, or to provide a payment based on death or life of an insured person. [23]

The objective of insurance among others, are as follows:

1. To transfer my earlier listed risks on the part of the owner to the insurer is willing to accept the risk, the risk is a possible hit by a loss.[24]
2. To provide compensation to the parties concerned and the benefit in addition to doing some assurance to the participants.[25]
   a) Provide a guarantee of protection from the risks of losses suffered by one party
   b) Improving the efficiency, because we do not need to specifically conduct surveillance and patrolling to provide protection that takes a lot of energy, time and cost.
   c) To help hold the cost of equity, which is enough to pay any premiums which amount is fixed, and regularly every period, so no need to replace or pay for their own losses arising whose number is not certain and uncertain.
   d) Basic lending from the Bank or other financial institutions, which in granting the credit or leasing, the lender or leasing requires guaranteed protection of goods collateralized loan / leasing

e) As Savings, even more than that, because that is paid to the insurance company would be returned with a larger number.[26]

In the book of the Penal Code article 264 also stated that the purpose of insurance is to prevent at least reduces the risk of loss that may arise due to lost, damaged or destruction of goods insured of an uncertain event.

From the description above can be understood that the purpose of insurance is to keep from a business suffer losses and to provide redress to the parties concerned. Including in this case it is possible to provide insurance to farmers who experienced crop failure, because failure of the harvest can be included in the scope of the terms of the risk of loss that is not expected occurrence.

3.5 Agriculture Insurance as a Note

Policy on agricultural insurance facilitation program stipulated in Law No. 19 in 2013 with the general assumption that the farmer faced with the likelihood of climate change, vulnerability to natural disasters and business risk, globalization and the global economic downturn, as well as the market system does not favor the farmer. Therefore, it is necessary to protect and simultaneously empower (see general explanation of Law Number 19 Year 2013).

1)Legislation Governing the Agriculture Insurance Law.

Facilitation of agricultural insurance program in Law No. 19 2013 On the protection and empowerment of the farmer, reinforced with a variety of regulations supporting the program, among others:

a) Act No. 17 of 2003 on State Finance (State Gazette of the Republic of Indonesia Year 2003 Number 47, Supplement to the State Gazette of the Republic of Indonesia Number 4286);
b) Act No. 1 of 2004 on State Treasury (State Gazette of the Republic of Indonesia Year 2004 Number 5, Supplement to the State Gazette of the Republic of Indonesia Number 4355);
c) Act No. 41 of 2009 on the Protection of Agricultural Land Sustainable Food (State Gazette of the Republic of Indonesia Year 2009 Number 149, Supplement to the State Gazette of the Republic of Indonesia Number 5068);
d) Act No. 13 of 2010 on Horticulture (State Gazette of the Republic of Indonesia Year 2010 Number 132, Supplement to the State Gazette of the Republic of Indonesia Number 5170); Act No. 19 of 2013 on the Protection and Empowerment of Farmers (State Gazette of the Republic of Indonesia Year 2013 No. 131, Supplement to State Gazette of the Republic of Indonesia Number 5433);
e) Act No. 23 of 2014 on Regional Government (State Gazette of the Republic of Indonesia Year 2014 Number 244, Supplement to State Gazette of the Republic of Indonesia Number 5587); Act No. 39 of 2014 on Plantations (State Gazette of the Republic of Indonesia Year 2014 Number 308, State Gazette of the Republic of Indonesia Number 5613);
f) Act No. 40 of 2014 on Insurance (Official Gazette of the Republic of Indonesia Year 2014 Number 337, Supplement to the State Gazette of the Republic of Indonesia Number 5618);
g) Act No. 18 of 2009 on Animal Husbandry and Animal Health, as amended by Act No. 41 of 2014 (State Gazette of the Republic of Indonesia Year 2014 Number 338, Supplement to State Gazette of the Republic of Indonesia Number 5619);
h) Presidential Decree No. 121 / P of 2014 on the Establishment of the Ministry and the Cabinet Appointment Work Period 2014-2019;
i) Presidential Regulation Number 7 Year 2015 on Organization of the Ministry of State (State

Gazette of the Republic of Indonesia Year 2015 Number 8);

j) Presidential Regulation No. 45 Year 2015 concerning the Ministry of Agriculture (State Gazette of the Republic of Indonesia Year 2015 Number 85);

k) Regulation of the Minister of Agriculture No. 61/Permentan/OT.160/10/2010 on the Organization and Administration of the Ministry of Agriculture

l) Regulation of the Minister of Agriculture of the Republic of Indonesia Number 40/Permentan/ SR.230 / 7/2015 on Facilitating Agricultural Insurance.[27]

Those many legislation underlying the policies of agricultural insurance facilities program is to demonstrate the efforts of the government to guarantee legal certainty associated with the risk of collateral damages which may be suffered by farmers caused by crop failures.

Therefore, various agricultural issues are so complex and requires extensive study of its own, especially agricultural insurance in Indonesia, in order to later be known restriction commodity that can be covered by agricultural insurance and legal certainty for the implementation of agricultural insurance.[28]

2) The Urgency of Agricultural Insurance Policy

During this time Farmers have a significant contribution in the development of Agriculture and rural economic development. Agricultural farmers as development actors need to be given protection and empowerment to support the food needs is a basic right of every person to achieve food sovereignty, food sovereignty and food security in a sustainable manner (see general explanation of Law Number 19 Year 2013).

Referring to the provisions of Article 7 paragraph (2) of Law No. 19 Year 2013 Jo. Article 12 paragraph (2) protection of farmers is one done in the form of agricultural insurance are program. Agricultural insurance is an agreement between the farmer and the insurance company to enter into risk coverage Farming (see article 1 point 16 of Law Number 19 year 2013).

The legal basis for agricultural insurance in Law No. 19 in 2013, as follows:*Article 39:*

(1) Government and Local Government in accordance with the authority to facilitate each farmer participated Agricultural Insurance.

(2) Facilitation referred to in paragraph (1) shall include:a. ease of registration to be a participant;b. ease of access to the insurance company;c. socialization program to Farmers Insurance and insurance companies; and / ord. premium payment assistance.

According to Law No. 19 of 2013 Article 12, paragraph 2 that the agricultural insurance to farmers with the following criteria:

a. Peasants food crops that do not have farm land and most area work on two (2) hectares;
b. Farmers who do not own land and do business of producing food on the land area of 2 (two) hectares; and / or
c. Horticultural farmers, planters, or small-scale farmers in accordance with the provisions of the legislation.

Criteria for agricultural insurance in accordance with article 12, paragraph 2 of the only set of candidates farmer insurance recipients but has not set a prospective locations insurance recipients. Candidates need insurance recipients specified location criteria in order to reduce misuse / abuse of the field.

Legislative policy in the form facilities' Agricultural Insurance program established to protect the farmer from the loss of crop failure due to natural disasters, outbreaks of infectious animal diseases, climate change; and / or other types of risk stipulated by the Minister; and can provide help redress crop failure due to extraordinary events in accordance with the financial capacity of

the state (see article 37-38 of Law Number 19 Year 2013).

While the "compensation of crop failure due to an extraordinary event" is compensation that is not covered by the Agricultural Insurance caused among others by the destruction of plant cultivation or livestock caused by endemic area, periodic natural disasters, and / or damage to infrastructure Agriculture. Meaning "premium payment assistance" is the payment of a premium to help and educate Agricultural Insurance Farmers in following with attention the financial capacity of the state. Help came from the insurance premium revenue and expenditure budget and / or budget revenue and expenditure, paid up otherwise by the Government and Local Government that the farmer can afford to pay the premiums themselves.

Some definitions that need to be understood as follows:

1. Agricultural insurance is an agreement between farmers and insurance companies to engage in agricultural business risk coverage.
2. Agricultural Insurance Facility is easily alleviate damages through an agreement between the farmers with the insurance company to engage in agricultural business risk coverage.
3. Insurance Premium Farms is a value for money that is set by the insurance company as the person and paid by Farmers as the insured as a condition for the validity of the insurance agreement and entitles the farmer to claim damages.Agricultural Insurance Policy is a document engagement agricultural insurance, includes among others the rights and obligations of each party as written proof of the insurance agreement and signed by the person.
4. The claim is a claim for compensation for the disaster that resulted in financial losses for the insured and give him the right to file a claim for compensation to the insurer.

3)The concept of disadvantage uncertain In Insurance.

Article 246 of the draft Law of trade / Wetboek van Koophadel (KUHD) states that the definition of "insurance is an agreement in which the borrower promises to those who are guaranteed to receive a sum of money premium in lieu of damages, which may be suffered by the guaranteed as a result of an event that will happen is not clear ".

o insurance / coverage is an agreement in which a binding to an insured to receive a premium, to provide turn him for a loss, damage, or loss of expected profit, which may be suffered due to an event that is not necessarily.[29]

Insurance is defined as the "insured". Insurance or coverage is an agreement between two or more parties, the insurer committed to the insured to receive insurance premium, to give the turn to the insured for loss, damage or loss of expected benefits or legal liability to third parties which may be suffered by the insured, the arising from an uncertain events, or to provide a payment based on death or life of an insured person (article 1 of Law Number 2 Year 1992 about Insurance Business).

The objective of insurance among others, are as follows:

1. To transfer my earlier listed risks on the part of the owner to the insurer is willing to accept the risk, the risk is a possible hit by a loss.[30]
2. To provide compensation to the parties concerned and the benefit in addition to doing some assurance to the participants.[31]
   a) Provide a guarantee of protection from the risks of losses suffered by one party
   b) Improving the efficiency, because we do not need to specifically conduct surveillance and patrolling to provide protection that takes a lot of energy, time and cost.
   c) To help hold the cost of equity, which is enough to pay any premiums which amount is fixed, and regularly every period, so no need to replace or pay for their own losses arising

whose number is not certain and uncertain.

d) Basis of credit from the Bank or other financial institutions, which in granting the credit or leasing, the lender or leasing requires guaranteed protection of goods collateralized loan / leasing.

e) As Savings, even more than that, because that is paid to the insurance company would be returned with a larger number.[32]

The benefits obtained by the farmers after participating in agricultural insurance, including:

1) Protect farmers from the financial / funding against losses due to crop failure,
2) raise farmers' position in the eyes of financial institutions to credit farmers,
3) Stabilizing farm income for their dependents losses of the insurance company in the event of losses due to crop failure,
4) Increase production and productivity of the agricultural sector by following the procedures of good farming as a prerequisite to follow the agricultural insurance,
5) Insurance is one way to educate farmers to grow crops as well as one of the prerequisites to follow the agricultural insurance.[33]

While the benefits by the Government with the facilitation of the agricultural insurance program, including:

6) Protect the state budget from losses due to natural disasters in the agricultural sector because it is already covered by a company insurance,
7) reduce ad hoc allocation of funds for natural disasters,
8) The certainty of allocation of funds in the state budget, in the amount of insurance premium assistance,
9) In the long term to reduce poverty in the agricultural sector,
10) In the long term can increase national agricultural production that are expected to reduce imports.[34]

While in the book Commercial code article 264 also stated that the purpose of insurance is to prevent at least reduces the risk of loss that may arise due to lost, damaged or destruction of goods insured of an uncertain event.

From the description above can be understood that the purpose of insurance is to keep from a business suffer losses and to provide redress to the parties concerned. Including in this case it is possible to provide insurance to farmers who experienced crop failure, due to the crop failure can be included in the scope of definition of risk occurrence of unexpected losses.

While the "compensation of crop failure due to an extraordinary event" is compensation that is not covered by the Agricultural Insurance caused by including: (a) The extermination of crop cultivation due to the endemic area, or b). the destruction of livestock caused by endemic area, c). the periodic natural disasters, and / or, d). Damage to infrastructure Agriculture.

4) Type and Agricultural Insurance Facility

Insurance companies implementing agricultural insurance must have the permission of agricultural insurance products authorized by the Financial Services Authority (FSA).

Agricultural insurance is done to protect the farmer from the loss of crop failure due:

a. Natural disasters;
b. Plant Pest Organisms attack;
c. outbreaks of Infectious Animal Diseases;
d. the impact of climate change; and / or

e. Other types of risks.

Broadly speaking Agricultural Insurance type that can be facilitated in the program, including:

a. Agricultural Insurance Crop insurance covers (crops, horticulture and plantation)
b. Insurance Livestock (Livestock ruminant and *monogastriclivestock nonruminansia / pseudoruminant)*

Agricultural insurance premium payments differentiated by patterns

a. independent patterns, and
b. the pattern of government premium support
   (1) The premium payment assistance made through registration
   (2) The premium payment assistance from the state budget will be further stipulated by the Director General on behalf of the Minister

Implementation of Agricultural Insurance Facility, can be provided through multiple policies, which include:

a. The Ease of Applying for a Participant of Insurance

Conducted through data collection / inventory Farmers insurance applicants by insurance companies that are known by the Department of districts / cities, namely:

(1) Ease of registration is done through data collection / inventory Farmers insurance applicants by the Office of the district / city.
(2) The results of the inventory by the Department of the district / city verified and subsequently submitted to the Office of the province to the proposed establishment of insurance participants.
(3) The provincial offices have accepted the proposal as and assign candidates and propose to the Ministry of Agriculture through the Directorate General.
(4) Registration form insurance applicants accompanied by the official of the district / city.
(5) Beneficiary verification is performed gradually by district / city, provincial and Center.

b. Easy Access to the Insurance Company;

Ease because it is done through farmer meetings with the insurance company with the involvement of the Office of the district / city.

(1) Ease of access to the insurance company conducted by the Office of the district / city by means of:
   a. encourage understanding and benefits of agricultural insurance membership;
   b. Farmers bring together potential participants agricultural insurance with an insurance company; and
   c. Encourage the formation of binding of agricultural insurance.
(2) Data collection or inventory financed by the State Budget (APBN) is performed gradually over the proposed regent / mayor to the governor, to then be submitted to the Minister.

How true realization? So far the government has issued many policies and programs to help the agricultural sector. Some policies / programs in the agricultural sector such as subsidized seed, fertilizer subsidies, aid inputs, and credit program for the agricultural sector such as Credit Food and Energy (KKPE), Credit energy Development and Plantation Revitalization (KPEN-RP), *Kredit Usaha Rakyat* (KUR)). However, such assistance is felt not quite able to overcome the various problems in the agricultural sector, especially the problem of crop failure due to natural conditions / natural factors.[35]

The low realization of agricultural insurance from the target caused many farmers are not

interested in insuring their farmland. Therefore, there is a part of the farm that is rarely experienced failed crops, so farmers are reluctant to enroll in the program. There are farmers who find it hard to pay a premium to take insurance.[36]

As an example of the application of agricultural insurance in Klaten district, as follows: Head of Department of Agriculture and Food Security Klaten district WahyuPrasetyo, said "Now there is agricultural insurance facilities as stipulated in the Regulation of the Minister of Agriculture No. 40 of 2015. The agricultural insurance program that is managed by PT AsuransiJasa Indonesia (Jasindo), state-owned enterprises in the field of insurance. In the period 2015-2016, Klaten gets a quota of 21 thousand hectares of rice fields that can be insured. The total rice area in Klaten reached 33 thousand hectares. Klaten got a quota is greatest when compared to six other central areas of rice in Central Java. Therefore, the total quota for the fields that can be insured in Central Java, only an area of 162 thousand hectares. "Boyolali could be just about 10 thousand hectares," Only the fields of technical Air irrigation, semi -tehnical and simple that can be insured. While rained area of 3000 hectares in the district of Bayat, Kemalang, Jatinom, and Tulung excluding paddy insurable category. Indeed, the premium to be paid for each season of Rp 180 thousand per hectare. Because the government subsidizes 80 percent of the 2015 Revised State Budget, farmers simply pay a premium of Rp 36 thousand per hectare per cropping season. If the farmers who insure their fields crop failures, PT Jasindo will pay compensation amounting to Rp 6 million per hectare. Because the majority of farmers in Klaten only has about 2,500 square meters of land, the premium paid only Rp 9,000 per growing season and the compensation of Rp 1.5 million.[37]

Results facilitating agricultural insurance policies nationally, showed in 2016, the Ministry of Agriculture targets to insure paddy farmers of 700,000 hectares (ha). Throughout 2015 and the realization of land are insured up to 200,000 ha. But until the beginning of September 2016, the actual area under rice cultivation that has been insured only about 375,000 ha, or only reached 53.57%. Target agricultural land included in the insurance program in 2017 reached 1 million hectares across Indonesia. Whereas 2016, the budget allocation of Rp 750 billion for agricultural insurance program.[38]

From the example above, the implementation of agricultural insurance in Indonesia need to see important note into consideration whether or not applied after previously done a few things, as follows:

a. calculations of the cost of premiums,
b. Wide range of land and other auxiliary preparations.
c. the scope of agricultural commodities which may be covered by agricultural insurance
d. Government regulations required that regulate more clearly, so that in the implementation of agricultural insurance in the future will produce clarity and legal certainty.
e. Implementation of agricultural insurance needs to be disseminated by the government as a form of information disclosure, so that people, especially farmer knows that farmers in conducting economic activities protected by Laws Invitation. So that the community, especially farmer knows that farmers in conducting economic activities protected by Laws Invitations.
f. It requires Farms area based on the conditions and potential of natural resources, human resources, and man-made resources; [39]

In addition to the above, in 2015, been a matter related to the issuance of a regulation about farm insurance from the Ministry of Agriculture in the form of Regulation of the Minister of Agriculture (Permentan) No. 40 / Permentan /SR.230 / 7/2015 signed by the Minister of Agriculture AmranSulaiman on July 13, 2015, which is a derivative of the regulation of Law No.19 /

2013 on the Protection and Empowerment of Farmers, still a policy on paper but not yet implemented in the field. The proof, the majority of farmers in West Java claimed not to know due to lack of socialization. Moreover, the Financial Services Authority (FSA) as a regulator of financial institutions, including non-bank financial industry (IKNB), it is not certain when it will issue a more detailed regulation of insurance related to agriculture.

Study Pathways Implementation of Agricultural Insurance Nationally, noting Based on the preparations made by the Ministry of Agriculture, public hearings and trials agricultural insurance, there are several findings and inputs that would need to be discussed jointly by the Ministry of Agriculture and Ministry found some cause, that the end result is concluded, as follows:

1) Implementation of national agricultural insurance has been mandated in Law No. 19 of 2013. Therefore, all parties concerned, including the Ministry of Finance will need to prepare a comprehensive study on the implementation of the national agricultural insurance from the aspects of technical, financial, and legal. preparation for the implementation of agricultural insurance is generally divided into two, namely:
   a. preparation related substances / materials of agricultural insurance.
      Preparation of the substance / material is more mainstream and should be done before the preparation of funding, including the roadmap program, features, stakeholders involved, monitoring and evaluation, insurance schemes, etc.
   b. Preparation of funding.
      Preparation of funding includes the preparation of funds before the program is running and during the program runs.
2) In the early stages of the implementation of agricultural insurance, the model could be used in trials by the Ministry of Agriculture used to carry out the mandate of Act No. 19 of 2013, on the grounds:
   a. Ministry of Agriculture has made preparations through a review in 2008 to support the implementation of the national agricultural insurance, but these results need to be improved together. Ministry of Agriculture also has been testing agricultural insurance.Currently the Ministry of Agriculture is preparing a regulation of the Minister of Agriculture (Permentan) related agricultural insurance.[40]

4 Conclusion

1. Facilities for Agricultural Insurance policy is a policy program to provide coverage against the risk of losses incurred by farmers caused by crop failures. This policy in facilitation by the Government and Local Government in accordance with the authority granted to each farmer participated Agricultural Insurance, including ease of registration to be a participant; ease of access to the insurance company; socialization program to Farmers Insurance and insurance companies; and / or the premium payment assistance.
2. The rule of law for the implementation of agricultural insurance has been guaranteed by the State through various legislations created to support the implementation of agricultural insurance facilitation program.
3. the scope of the commodities that may be covered by agricultural insurance, facilitated through the establishment type Agricultural Insurance which covers Insurance plants (crops, horticulture, and estates) and Insurance Livestock (Livestock ruminants, Livestock nonruminansia and monogastric / pseudoruminant), implemented by patterns of premium payments divided into pattern and the pattern of self-government premium support.

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Reviews Juridical on Fee Arrangements in Bankruptcy Curator After the Supreme Court Decision no. 54 P/HUM/2013

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ABSTRACT

Curator plays an important role in bankruptcy, because in the next curator who will be assigned to manage and complete the bankruptcy estate (boedel bankruptcy). In performing its duties guided by the law No. 37 of 2004 on bankruptcy and suspension of debt payments (PKPU). Curator entitled to receive payment for its services. It is stipulated in the Regulation of Minister of Law and Human Rights No. 1 in 2013. The purpose of this study to determine how the regulations on fee curator in bankruptcy in Indonesia, and what the legal consequences of the curator in handling the settlement of bankruptcy in Indonesia after the Supreme Court Decision No 54 P/HUM/2013. This study is a normative juridical: statueand case approach. That concluded:First, there have been inconsistencies curator fee arrangement between Justice and Human Rights Minister Regulation No. 1 of 2013, particularly Article 2 paragraph (1) letter c with Law No. 37 of 2004 on Bankruptcy and PKPU particular Article 17 Paragraph (3). Secondly, the legal consequences of the Supreme Court Decision No 54 P/HUM/2013, that Article 2 paragraph (1) letter c Regulation of the Minister of Justice and Human Rights of the Republic of Indonesia Number 01/2013 regarding Guidelines for Remuneration for Receivers and Administrators declared contrary to legislation higher, namely Law No. 37 of 2004 on Bankruptcy and Suspension of Payment(PKPU). Thus, Regulation Minister of Law and Human Rights of the Republic of Indonesia Number 01 Year 2013 is not valid and does not have binding legal force.

Keywords: *Fee Curator, Judicial Review, Bankruptcy Law and PKPU, Permenkumham*

I. Introduction

In the event of bankruptcy to a debtor or creditor then the next one will do the maintenance of the bankruptcy estate by the curator. Curator is the Heritage Hall or an individual appointed by the court to take care of and cleared Bankrupt Debtors assets under the supervision of the Supervisory Judge in accordance with this Law Article 1 (5) Labor Law and PKPU.

Curator authorities carry out the task of management and / or clearance on the bankruptcy estate from the date of the bankruptcy decision pronounced although the verdict was appealed or judicial review (Article 16 Paragraph (1) Labor Law and PKPU. Top management services or settlement bankruptcy estate, the curator of the right to be paid (fee). Fee curator reward or wages must be paid to the curator of the amount determined based on the legislation in force.

Magnitude curator fee for this refers to the Decree of the Ministry of Justice (MOJ SK) No. M.09-HT.05.10 1998 on the magnitude of PES curator, but on January 11, 2013, Secretary of Justice and Human Rights Amir Syamsuddin issued new regulations governing the remuneration guidelines for the curators and administrators. Regulations which are numbered 1 Year 2013 on remuneration for the Board's curator and replaces Decree of the Minister of Justice No. M.09-HT.05.10 1998 on Guidelines magnitude of PES Receivers and Administrators.

While the Decree of the Minister of Justice and Human Rights was born based on the mandate of Article 17 of the Labor Law and PKPU, which in essence that for the determination of compensation for services Curator which guidance will be set back by a ministerial decree authorized as attribution of Article 76 in conjunction with Article 75 of the Labor Law and PKPU. Associated with the Decree of the Minister of Justice and Human Rights when seen from the contents, there are some changes in the regulations related to remuneration or fee for the curators and administrators.

Based on the background that has the writer described above, then that becomes the focus pernmasalahan in this study are: about the setting of the fee curator in bankruptcy in Indonesia and the legal consequences of the curator in handling the settlement of bankruptcy in Indonesia after the Supreme Court Decision No 54 P / HUM / 2013.

II. Methodology

This type of research is normative, because studied is the philosophy of norms related to the subject matter studied, which is the norm in the field of Bankruptcy Law, especially regarding the aspect of justice and legal certainty. Using a shrimp-law (statute approach), the conceptual approach (conceptual approach), and the approach of the case (case approach)[1].

Legal materials that are used in the form of primary legal materials and secondary law. Primary legal materials consist of legislation, in the areas of Bankruptcy and PKPU, Decree of Ministry of Law and Human Rights of 1998 and in 2013 associated with the magnitude of PES For Receivers and Administrators and the decision of Supreme Court of the Supreme No 54 P / HUM / 2013.Bahan law secondary obtained from text books / literature, journals and the results of previous studies that discuss related legal issue in this study. In addition to the publication of the law and bankruptcy through the websites and the websites of the commercial court, namely http://www.pengadilan-niaga.go.id/, http://www.hukumonline.com /, as well as legal dictionary will also be used.

Primary and secondary legal materials that have been collected through the inventory and classified and analyzed, examined and studied by comparing with the doctrine, theory and legal principles suggested by experts, based on reasoning or logic in legal arguments. Analysis Content analysis is done, to find the truth of the law.

III. Discussion

3.1 The arrangement of the PES / Fee Curator in Indonesia

A. Periode enactment of Government Regulation 1 of 1998 jo Law No. 4 of 1998

Since the change in the regulation of kepailtan in Indonesia that were previously in the resolve insolvency is based on the Insolvency Regulation (ferordering vailissment called FV). Then, since 1998 has been successfully delivered PERPU No. 1 of 1998 on Bankruptcy and Suspension of Payment. Later in the same year where the PERPU increased to legislation that became Act 1 of 1998 The delay neighbor Bankruptcy and Debt Payment Obligation (Labor Law and PKPU).

In its decision, the amount of remuneration included a declaration of bankruptcy receivership services are applied based on the guidelines set out in the Decree of the Minister of Justice of the Republic of Indonesia No. M.09-HT.05.10 1998 on Guidelines magnitude of PES For Receivers and Managers[2].

What is meant by a service fee is the wages to be paid to[3]:

1. curator, curator of additional or substitute curator in order management and settlement or

bankruptcy assets;

2. The temporary receivership in order to oversee the management of the debtor's business, and overseeing payments to creditors, wealth transfer or pledge debtor in bankruptcy order requires approval curator; and
3. The board, an additional board, or the board of management of the property in order to substitute the debtor in the event of delay debt payment obligations.

Regarding the amount of remuneration for the services of a curator, as referred to in Article 1 paragraph 1 is determined as follows[4]:

a. in the event of bankruptcy ended with peace, the amount of fee is equal to a percentage of the value [5]of the bankruptcy estate out of debt as determined in peace with the calculation as follows:

   Administrators in bankruptcy that ended with the peace (accord)[6]:

   1. up to Rp 50 billion.................................... 6%
   2. The excess above Rp 50 billion s / d Rp 250 billion.... 4.5%
   3. The excess above Rp 250 billion s / d Rp 500 billion.... 3%
   4. advantages over Rp 500 billion................................. 1.5%

(Attached as Appendix I- MOJ Decree RI No. M.09-HT.05.10 1998)

b. In the event of bankruptcy ended with settlement, the amount of fee is equal to a percentage of the value of the bankruptcy estate settlement outside debt was calculated as follows[7]:

   1. up to Rp 50 billion.................................... 10%
   2. The excess above Rp 50 billion s / d Rp 250 billion.... 7.5%
   3. The excess above Rp 250 billion s / d Rp 500 billion.... 5%
   4. 4. The excess above Rp 500 billion.............................. 2.5%

   (Attached as Appendix II; Decree of the Minister of Justice RI; No. M.09-HT.05.10 1998)

c. in the case of declaration of bankruptcy petition rejected an appeal or reconsideration level, the amount of service fee set by the judge and charged to the debtor.

In determining the amount of compensation for services (Article 2 Paragraph (1) c, the judge shall consider the work that has been done, the ability, and the work rate of the curator, provided the highest 2% (two percent) of the estate of the debtor.

Regarding the amount of fee for temporary receivership as referred to in Article 1 paragraph 2 of Decision of the Minister of Justice of the Republic of Indonesia No. M.09-HT.05.10 1998 is determined as follows:

a. in the case of declaration of bankruptcy petition is granted, then the service fee set out in the first meeting of creditors; or
b. in the case of declaration of bankruptcy petition is rejected, then the amount of service fee set by the judge and charged to the debtor.

In determining the amount of compensation for services referred to in paragraph (3) b, the judge shall consider the work that has been done, capabilities, and tariff job of curator temporary, provided the highest ½% (one half percent) of the estate of the debtor.

In addition to the business or services referred to in Article 2 of this Kepmenkeu, curator can perform sales service of the wealth of the debtor as referred to in Article 57 paragraph (2) of Law No. 4 of 1998. And the fee for the sale referred to in subsection (1) is 2 ½% (two and one half percent) of the sales made by the curator.

Specified in Article 4 that, a service fee for the board is determined as follows:

1. in the case of delay debt payment obligations which ended with peace, the amount of com-

pensation for services is determined by a judge and charged to borrowers by considering the work that has been done, the ability, and the work rate of the board is concerned with the provision of the highest 3% (three percent) of the value of assets of the debtor; or

2. in the case of delay debt payment obligations ended without peace, the amount of remuneration is determined by a judge and charged to borrowers by considering the work that has been done, the ability, and the work rate of the board is concerned with the provision of the highest 5% (five percent) of the value of the property debtor.

B. Period of entry into force of the Labor Law and PKPU No. 37 of 2004

In PERPU No. 1 Year 1998 on Bankruptcy and PKPU well as in Law No. 4 Year 1998 on Bankruptcy and PKPU not explicitly stated in the article about compensation for services /fee curator in bankruptcy. Sebagiamana has been described researcher berlakunyan seblumnya that in the period to two rules, the curator of the fee stipulated in the Decree of the Minister of Justice of the Republic of Indonesia No. M.09-HT.05.10 1998 on Guidelines magnitude of PES For Receivers and Managers.

B.1. And PKPU Labor Law (Law No. 37 of 2004)

Meanwhile, when Law No. 4 of 1998 was revised and amandement in 2004 into Law No. 37 of 2004 on Bankruptcy and Debt KewajibanPembayaran delay, then on compensation for services / fee for the curators have arranged implicit in the chapters. Several articles that regulate the fee curator / recompense for the curators is Article 17 Paragraph (2), Article 17 Paragraph (3) and Article 76.

Complete that provisions of the regulation on compensation for services curator / fee fan PKPU curator in the Labor Law are as follows:

1. Article 17 Paragraph (2) and Paragraph (3) Labor Law and PKPU. Article 17 Paragraph (2) states that: "The judges who overturned the verdict of bankruptcy declaration of bankruptcy costs and also set a fee for the Curator".
2. Article 17 Paragraph (3) and PKPU Labor Law states that: "The cost referred to in paragraph (2) shall be charged to the applicant or the applicant's declaration of bankruptcy and the debtor in the comparison set by the panel of judges".
3. Article 76 of the Labor Law and PKPU. In Article 76 of the Labor Law and PKPU explained that: "The amount of fee to be paid to the Receiver as referred to in Article 75 are set based on the guidelines set by the Minister whose scope of duties and responsibilities in the field of law and legislation".

B.2. Regulation Minister of Law and Human Rights No. 1 Year 2013 on GuidelinesRewards For Receivers and Administrators

Departing from their chaotic curator regarding fee payments Telkomsel case it gives birth to a regulation of the Minister of Justice and Human Rights Amir Syamsudin which issued Decree No. 01 Year 2013 on Guidelines Rewards For Receivers and Administrators, on 11 January 2013. Chewing No. 01 Year 2013 is then used as the basis for refusing to pay the fee curator Telkomsel.

In Article 2 Paragraph (1) states: that the amount of remuneration for the Receiver is determined as follows: "(c) in the case of application for a declaration of bankruptcy was rejected on appeal or reconsideration, the amount of remuneration set by the judge and charged to the applicant a declaration of bankruptcy".

Be related to the curator fee or service fee as determined by the Labor Law and PKPU, the Minister of Justice No. M.09-HT.05.10 1998 on Guidelines magnitude of PES For Receivers and Administrators and Minister of Law and Human Rights No. 1 Year 2013 on Guidelines Rewards For Receivers and Administrators, it is known that the amount of compensation for services curator from each of these regulations differ from one another.

This can be seen in the provisions of Article 17 paragraph (2) and (3) Labor Law and PKPU which states that "paragraph (2): The judges who overturned the verdict of bankruptcy declaration also establishes bankruptcy costs and compensation for services Curator; Paragraph (3): The cost referred to in paragraph (2) shall be charged to the applicant or the applicant's declaration of bankruptcy and the debtor in the comparison set by the panel of judges ". The amount of fee charged receivership under this provision to the two parties that the applicant's bankruptcy and the debtor bankrupt.

The provision is compared with the provisions of Article 2 paragraph (1) letter c Decree of the Minister of Justice of the Republic of Indonesia No. M.09-HT.05.10 1998 on Guidelines magnitude of PES For Receivers and Administrators (abbreviated Decree) states that the amount of compensation for services specified curator by a judge and charged to the debtor in the case of declaration of bankruptcy petition was rejected on appeal or reconsideration.

So by looking at this provision and PKPU course between the Labor Law and the Decree will look different in the case of a service fee for in the Labor Law curator and curator PKPU service fees charged to the applicant and and debtors, while in the Decree the amount of fee charged to debtors curator.

Furthermore, in the Regulation of the Minister of Law and Human Rights No. 1 Year 2013 on Guidelines Rewards For Receivers and Administrators, the amount of service fee charged to the applicant curator bankruptcy declaration in the application for a declaration of bankruptcy was rejected on appeal or reconsideration. Provision of a service fee based Permenkumham curator is different from the previous provisions of the Decree which imposes a fee for the curator to debtors. They will also be at odds with the Labor Law and PKPU which determines that the amount of service fees charged to the applicant curator bankruptcy and debtors.

Their differences regarding the imposition of a service fee curator of the Labor Law and PKPU, Decree and Permenkumham will have an impact on the interpretation or the law to be used, because of the assignment under the Labor Law and PKPU charged to the applicant for bankruptcy and debtors, while in the Decree are charged to the debtor and in Permenkumham charged to the applicant a declaration of bankruptcy.

However, after the Minister of Justice of the Republic of Indonesia No. M.09-HT.05.10 1998 on Guidelines magnitude of PES For Receivers and Administrators revoked and declared null and Article 2, paragraph 1, letter c Permenkumham 1 in 2013 declared invalid and does not have binding legal force after the tested material, then recompense curator regarding request for a declaration of bankruptcy was rejected on appeal or reconsideration charged to the applicant a declaration of bankruptcy and debtors established by a panel of judges based on the provision inArticle 17 paragraph (3) Labor law and PKPU.

Based on the three regulations (PKPU adn Labor Law, Decree and Permenkumham) then to ensure legal certainty to recompense curator will still refer to the Labor Law and PKPU.

Rewards curator services pursuant to Article 17 paragraph (3) Labor Law and PKPU was charged to the two parties that the applicant's bankruptcy and debtors. This means that the judge must set a service fee charged to applicants' curator bankruptcy and debtors in the verdict as prescribed by

law. With regulation of the imposition of a service fee curator ensuring legal certainty so as to avoid different interpretations of the parties who bear the cost of compensation for services curator.

In addition to the rules governing compensation for services curators also give legal certainty to be the legal security for individuals/parties against the imposition of a service fee curator. Legal certainty not only in the form of articles of the law but also their consistency in the judge's ruling that one with another judge's ruling on a similar case has already been decided[8] (in this case the judge must set a service fee curator at the verdict so hakim- the next judge in dealing with cases of bankruptcy, especially in determining compensation for services curators can consistently follow the previous judge's decision). The legal certainty would support the creation of legal certainty because the objective of the law is also part of the objective of the law[9] where the purpose of law is to ensure certainty in the midst of society and can make a decision only fully legal certainty.

Curator Sitanggang Andrey own interpretation of Article 17 paragraph (2) Labor Law and PKPU. According to Andrey, determination of the number of bankruptcy costs and compensation for services curator of the bankruptcy status is revoked in the Supreme Court (MA) is located on the panel of judges deciding cases of bankruptcy at the first level, instead of MA. You see, MA did not know how much is the curator of the costs incurred during the maintenance process and property settlement debtors. Moreover, the practice is often done too, which is the authority of the judges of first instance court fees curator after getting a recommendation from the supervisory judge[10].

To make it easier to understand the regulation of PES Receivers in bankruptcy in Indonesia, it can be observed in the following table is a comparison of the setting / regulation of PES (Fee) Receivers 1998 and 2013.

Table 1. Comparison of Benefits Regulation Curator 1998 And 2013 *Provisions Regulations 1998 Regulations 2013*[11]

Provission	Regulation 1998	Regulaton 2013
The amount of fee for the Board if PKPU ended with peace	Highest 3% of the value of the property the debtor (Article 4 paragraph (1))	At most 10% of the value of the debt owed by the debtor (Article 4 letter a)
The amount of recompense for the board if PKPU high end without peace	least 5% of the value of the property the debtor (Article 4 (2))	At least 15% of the value of the debt to be paid debtors (Article 4 letter b)
The amount of recompense for the curator regarding request for a declaration of bankruptcy was rejected on appeal or review	of the Most High 2% of the assets of debtors (Article 2 (2))	was determined based on the work that has been done, the level of complexity, capacity and rate of work of the caretaker (Article 2 paragraph (2))
Party charged if the declaration of bankruptcy is rejected	and the applicant charged to debtors (Article 2 paragraph (1) letter c)	charged to the applicant a declaration of bankruptcy (Article 2 paragraph (1) letter c).

3.2 The legal consequences Against Curator in handling the settlement of bankruptcy in Indonesia after the Supreme Court Decision No 54 P / HUM/2013

A. Brief description of the Supreme Court Decision No 54 P / HUM / 2013

Position Case / Content Type:

1. To accept and grant petitions this test right;
2. To declare that the provisions in Article 2 paragraph (1) letter c of Regulation No. 1 Year 2013 on Guidelines for the Management of Rewards and Curator contrary to Article 17 paragraph (2) and (3) of Law Number 37 of 2004 on Bankruptcy and Suspension Debt Payment obliga-

tion because it has no binding force.

3. Declare Regulation of the Minister of Justice and Human Rights 1nTahun No. 2013 on Guidelines for the Management of Rewards and Curator contrary to Law No. 37 of 2004 on Bankruptcy and Suspension of Payment (PKPU);
4. To declare the provisions in Article 2 paragraph (1) letter c of Regulation No. 1 Year 2013 on Guidelines for the Management and Curator Rewards has no binding force;
5. To order the publication of this petition in the Statute and the Supplement to the State Gazette;

Amar Verdict:

Granted a right of judicial objection of the applicant:

1. Darwin Marpaung, et al (No 9 the applicant)
2. To declare that Article 2, paragraph (1) letter c Regulation of the Minister of Justice and Human Rights of the Republic of Indonesia Number 01 Year 2013 regarding Guidelines for Remuneration for Receivers and Administrators contrary to legislation higher, namely Article 17 paragraph (2) and paragraph (3), as well as Article 76 of Law Number 37 of 2004 on Bankruptcy and Suspension of Payment;
3. To declare that Article 2, paragraph (1) letter c Regulation of the Minister of Justice and Human Rights of the Republic of Indonesia Number 01 Year 2013 regarding Guidelines for Remuneration for Receivers and Administrators, invalid and does not have binding legal force.
4. To instruct the Minister of Justice and Human Rights of the Republic of Indonesia to repeal the provisions of Article 2 paragraph (1) letter c Regulation of the Minister of Justice and Human Rights of the Republic of Indonesia Number 01 Year 2013 regarding Guidelines for Remuneration for Receivers and Administrators;
5. To instruct the Registrar of the Supreme Court to submit excerpts of this decision to the State Secretariat for inclusion in the State Gazette;
6. Punishing the Respondent to pay court costs amounting to USD 1,000,000.00 (one million rupiah).

Basic Legal Considerations Assembly, related to the substance of the case:

1. Whereas Article 17 paragraph (2) and (3) of Law No. 37
2. In 2004, affirmed “The judges who overturned the verdict of bankruptcy declaration also establishes bankruptcy costs and compensation for services curator” (verse 2). Furthermore, “The cost referred to in paragraph (2) shall be charged to the applicant or the applicant’s declaration of bankruptcy and debtors in the comparison set by the panel of judges” (paragraph 3);
3. Further provisions of Article 76 of Law No. 37 of 2004, states “The amount of fee to be paid to the Receiver as referred to in Article 75 are set based on the guidelines set by the Minister whose scope of duties and responsibilities in the field of law and regulations invitation”;
4. Then the Minister is authorized to determine the amount of guidance services curator with the decision of the minister, but the minister is not authorized to determine which party bears the curator of the service fee, because it is the duty of a judge under the provisions of Article 17 and Article 76 of Law No. 37 of 2004;
5. It is evident that the provisions of Article 2 paragraph (1) letter c Regulation of the Minister of Justice and Human Rights of the Republic of Indonesia Number 01 Year 2013 regarding Guidelines for Remuneration for Receivers and Administrators, contrary to higher laws, namely

Article 17 paragraph (2) and paragraph (3), as well as Article 76 of Law No. 37 of 2004 on Bankruptcy and Suspension of Payment;

6. Based on the above facts and legal considerations as described above, the Supreme Court concluded that, (i) the Supreme Court has the authority to examine the object of the petition in this case, (ii) the Petitioner has the legal standing to file the petition a quo, and (iii) object of the petition conflict with legislation that is higher;
7. The Supreme Court found the petition a quo legal grounds and deserves to be granted. Therefore, the article of the regulations which became the object of a judicial petition of objection rights should be declared invalid and does not have binding legal force;
8. Furthermore, the Supreme Court considering the substance of the objection petition object, whether the provisions petitioned for judicial quo contrary to legislation that is higher or not;
9. The provisions of Article 17 paragraph (2) and (3) of Law No. 37 In 2004, affirmed "The judges who overturned the verdict of bankruptcy declaration also establishes bankruptcy costs and compensation for services curator" (verse 2). Furthermore, "The cost referred to in paragraph (2) shall be charged to the applicant or the applicant's declaration of bankruptcy and debtors in the comparison set by the panel of judges" (paragraph 3);
10. Furthermore, the provisions of Article 76 of Law No. 37 of 2004, states "The amount of fee to be paid to the Receiver as referred to in Article 75 are set based on the guidelines set by the Minister whose scope of duties and responsibilities in the field of law and legislation";
11. Then the Minister is authorized to determine the amount of guidance services curator with the decision of the minister, but the minister is not authorized to determine which party bears the curator of the service fee, because it is the duty of a judge under the provisions of Article 17 and Article 76 of Law No. 37 of 2004;
12. Hence it is evident that the provisions of Article 2 paragraph (1) letter c Regulation of the Minister of Justice and Human Rights of the Republic of Indonesia Number 01 Year 2013 regarding Guidelines for Remuneration for Receivers and Administrators, contrary to higher laws, namely Article 17 paragraph (2) and paragraph (3), as well as Article 76 of Law No. 37 of 2004 on Bankruptcy and Suspension of Payment;
13. Based on the above facts and legal considerations as described above, the Supreme Court concluded that, (i) the Supreme Court has the authority to examine the object of the petition in this case, (ii) the Petitioner has the legal standing to file the petition a quo, and (iii) object of the petition conflict with legislation that is higher;
14. Then the Supreme Court found the petition a quo legal grounds and deserves to be granted. Therefore, the article of the regulations which became the object of a judicial petition of objection rights should be declared invalid and does not have binding legal force;

C. As a result of its Law Against Curator

After the Supreme Court overturned the verdict of the Supreme Court No 54 P / HUM / 2013 related to the substantive review of the Regulation of the Minister of Justice and Human Rights of the Republic of Indonesia Number 01 Year 2013 regarding Guidelines for Remuneration for Receivers and Administrators, then result in:

1. It states that Article 2 paragraph (1) letter c Regulation of the Minister of Justice and Human Rights of the Republic of Indonesia Number 01 Year 2013 regarding Guidelines for Remuneration for Receivers and Administrators contrary to legislation higher, namely Article 17 paragraph (2) and paragraph (3), as well as Article 76 of Law Number 37 of 2004 on Bankruptcy

and Suspension of Payment;

2. Furthermore, Article 2, paragraph (1) letter c Regulation of the Minister of Justice and Human Rights of the Republic of Indonesia Number 01 Year 2013 regarding Guidelines for Remuneration for Receivers and Administrators, invalid and does not have binding legal force.
3. Article 2 paragraph (1) letter c Regulation of the Minister of Justice and Human Rights of the Republic of Indonesia Number 01 Year 2013 regarding Guidelines for Remuneration for the enactment of Receivers and Administrators revoked.

With the granting of the application for judicial review of Article 2 paragraph (1) letter c Regulation of the Minister of Justice and Human Rights of the Republic of Indonesia Number 01 Year 2013 regarding Guidelines for Remuneration for Receivers and Administrators is then for the Receiver to the task completed settlement treasures of the debtor in bankruptcy based on Labor Law and PKPU as a rule higher especially in relation to Article 17 paragraph (1) and paragraph (3) and Article 76.

And since Article 2, paragraph (1) letter c Regulation of the Minister of Justice and Human Rights of the Republic of Indonesia Number 01 Year 2013 regarding Guidelines for Remuneration for Receivers and Administrators has revoked the entry into force so long as there is no rule that the new Decree of the Minister of Justice of the Republic of Indonesia Number: M.09 -HT.05.10 1998 on Guidelines magnitude of PES For curator and the Board may be enforced by legal principles.

IV. Conclusion

Based on the results of research and pembahsaan as described in the previous chapter, it can be concluded that:

1. The arrangement of the Fee Curator / Curator in Bankruptcy compensation for services in Indonesia has been based on:
   a. Decree of the Minister of Justice of the Republic of Indonesia Number: M.09-HT.05.10 1998 PES For Receiver and Administrator,
   b. Bankruptcy Law No. 37 of 2004, especially in Article 17 Paragraph (2) and paragraph (3), in conjunction with Article 76.
   c. Regulation of the Minister of Justice of the Republic of Indonesia No. 1 Year 2013 About PES For Receivers and Administrators.
2. The legal consequences against the Curator in dealing with the settlement of bankruptcy in Indonesia after the Supreme Court Decision No. 54P / HUM 2013:
   a. That the main core of the judicial review of Article 2 paragraph (1) letter c Permenkumham No. 1 Year 2013 on PES Receivers and Administrators to the Supreme Court in the grant by the Supreme Court. In its legal considerations assemblies found Candy's legal and human rights proved to be contrary to the law of higher Law No. 37 of 2004 on Labor Law and PKPU. So that Article 2 (1) c is declared invalid and not legally binding, the provisions of the repealed enactment of.
   b. Legal consequences for the Receiver in bankruptcy: that in execution completed settlement treasures of the debtor in bankruptcy based on the Labor Law and PKPU as a rule higher especially in relation to Article 17 paragraph (1) and paragraph (3) and Article 76. And because Article 2 paragraph (1) letter c Regulation of the Minister of Justice and Human Rights of the Republic of Indonesia Number 01 Year 2013 regarding Guidelines for Remuneration for Receivers and Administrators has revoked the entry into force so long as there

is no rule that the new Decree of the Minister of Justice of the Republic of Indonesia No. M.09-HT. 05:10 1998 on Guidelines magnitude of PES For Receivers And Board may be applied based on the principle of law. Until later born again guidelines on compensation for services for the curators and administrators

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[2]Rahayu Hartini, 2003, *Bankruptcy Law,*Bayu Media, Malang, first printed, page 95 jo Rahayu Hartini, 2012, *Bankruptcy Law, Revision edition*, the Third printed, UMM Press, Malang, hal 117.

[3]See Article 1, *the Decree of the Minister of Justice of the Republic of Indonesia No. M.09-HT.05.10 1998 on Guidelines magnitude of PES For Receivers and Managers.*

[4] See Article 2, *the Minister of Justice of the Republic of Indonesia No. M.09-HT.05.10 1998 on Guidelines magnitude of PES For Receivers and Managers.*

[5]Rahayu Hartini, op. Cit, page 118.

[6]Ibid, page 119.

[7]Ibid,page120, see also Article 2 (4), *the Minister of Justice of the Republic of Indonesia No. M.09-HT.05.10 1998 on Guidelines magnitude of PES For Receivers and Managers.*

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The Causes of Terrorism in Malaysia

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ABSTRACT

15 years after the declaration of 'War on Terror', terrorist groups have not been stopped and defeated. Instead, unprecedented increase of terrorist attacks occurred worldwide, greatly accelerated by wars and armed conflict in Iraq, Afghanistan, Pakistan, Palestine, Chechnya, Lebanon, Libya and Syria. By the end of year 2016, almost 300 Malaysians and foreigners had been detained by Malaysian authorities due to links with terror groups like ISIS. Those arrested includes professionals, lecturers and even policemen. The efforts to combat terrorism is usually limited to building a coalition of military allies, to educate the public, to fortify public spaces with improved securities, to combat terrorism financing and to make better use of the expertise of technology giants especially those in the United States, Korea, France and Canada to help governments enhance security and prevent attacks and to increase monitoring and surveillance. The problem with this approach is that it is dealing with the symptoms rather than addressing the illness. To address the illness, the root causes must be identified. This article analyzes the causes of terrorism in Malaysia. The causes from micro, meso and macro level are scrutinized. Radicalization, political reasons, religion reasons, economic and social reasons and psychological reasons are analyzed further andreviewed.

Keywords: *Terrorism, Causes, Malaysia*

I. INTRODUCTION

Malaysia is no stranger to terrorism. The numerous threats face by Malaysia include the threats of attack from the Malayan Communist party during the early formation of Malaysia. State terrorism was obvious during the Japanese invasion.

This was followed by the emergence of local and foreign terrorist groups including Al-Ma'unah, DarulIslamiah Malaysia, Kumpulan Mujahidin Malaysia, Abu Sayyaf, Al-Qaeda, Darul Islam, Islamic State of Iraq and Syria (ISIS), Japanese Red Army (dissolved), Jemaah Islamiyah, Liberation Tigers of Tamil Eelam, Moro National Liberation Front (NurMisuari faction), Indonesian pirates, Moro pirates, Somali pirates, Sultanate of Sulu (JamalulKiram III faction) (defeated) and TanzimQaedat al-Jihad.

Nowadays, terrorism is on the rise in Malaysia, partly due to the emergence of Daesh. According to the U.S Country Report on Terrorism 2015, by the end of 2015, the Malaysian government has identified 72 Malaysians, including 14 women, who have joined ISIL, 51 of whom were armed fighters.1 The report highlighted that by the end of 2015, a total of 14 Malaysians was killed fighting with Daesh, and seven had returned to Malaysia. During that year, Malaysian authorities arrested approximately 90 suspected Daesh supporters and other terrorists in 2015 and convicted at least 13 in court, all of whom pled guilty in return for reduced sentence.

In June 2016, at about 2AM, two Daeshsympathisers on a motorcycle tossed a hand grenade into a nightspot (Movida) in Puchong town, Selangor, Malaysia injuring eight people. This marks the first successful attack by Daesh on Malaysia. The attackwas ordered by Muhammad Wanndy Mohamed Jedi, a Malaysian Islamic State fighter in Syria.2 Muhamad Wanndy, 26, was identified in 2015 as one of the two Malaysians in an ISIS beheadingvideo.3

In July 2016, it was reported that a total of 186 Malaysians and 27 foreigners had been detained to facilitate investigations into suspected links with terror groups.4 This includes 15 people who have been arrested in the wake of the Movida attack. Those arrested included two policemen; one for harboring ISIS elements, while the other was arrested for involvement in robberies to collect funds for ISIS.

Shortly after, Malaysia's top anti- terrorist cop, Counter-Terrorism Division head Ayob Khan has received a death threat from Muhamad Wanndy Mohamad Jedi himself. During the same month, the Deputy Prime Minister Ahmad ZahidHamidi announced that 63 Malaysians have travelled to Iraq and Syria, and 261 suspected militants are behind bars.5

By August 2016, it was announced that Malaysian police have arrested nine suspected members of the ISIS during a two-week sweep, as part of a crackdown on suspected extremists. Among those arrested were two suspects in the grenade attack on the nightspot.6

The Prime Minister of Malaysia, NajibRazak announced in October 2016 that '250 Malaysians involved with the group (Daesh) have been detained thus far, 32 have died in Iraq and Syria, and more than 60 people are still fighting for thegroup.'7

The rise of terrorism in Malaysia is so alarming, not just because the number itself, but also the types of individuals involved which include not just ordinary citizens but also professionals in the form of lecturers, civil servants and even security forces. This highlights the importance to identify the causes of terrorism.

This article analyzes the causes of terrorism, with special focus on Malaysia. It starts will analysis on terrorism in Malaysia. Radicalization, political reasons, religion reasons, economic and social reasons and psychological reasons are then analyzed and discussed.

II. CAUSES OF TERRORISM

There are many different causes of terrorism. Richardson (2006) rightly pointed out that "terrorists fight for very different reasons." The many causes of terrorism include political grievances, social and political injustice, unfair socio-economic status, discrimination, the belief that violence or its threat can be effective, religion.8

Generally, causality can be divided into three levels; macro-level, micro-level and meso-level. Macro-level analyses focus on the outcomes of interaction over a large population. For terrorism, this includes economic and social reasons, political reasons, environment in which terrorism occurs, general injustices and grievances, inequality etc. Micro-level analyses focus on the individual involved orsometimes, a small group of individuals in certain social context. This includes radicalization, demographic factor, psychological reasons and matters involving emotion and psyche.

A meso-level analysis indicates a population size that falls between the previous two; micro and macro, such as an organization or community.

This article analyzes *inter alia* the following major causes of terrorism:

1. Radicalization
2. Grievances and psychological reasons
3. Religion
4. Economic and social reasons
5. Political reasons

The analysis suggests that root causes of terrorism are usually at meso-level.

2.1 Radicalisation

Radicalisation is a process by which an individual or group comes to adopt increasingly extreme religious, political or social ideals and aspirations that reject or undermine current ideas and expressions of freedom of choice. Radicalism and extremisim are the opposite of moderate or mainstream.

Radicalisation to extremism is one of the main problems in Malaysia. However, identifying the causes of radicalisation is problematic. According to Schimd (2013):

"The current propensity to focus in the search for causes of radicalisation on 'vulnerable' young people has produced inconclusive results. The number of push and pull factors that can lead to radicalisation on this micro- level is very large – the same is true for the factors which can impact on de-radicalisation and disengagement. However, in the literature most findings are derived from small samples and few case studies, making comparison and generalisations problematic, and findings provisional."

The Internet creates more opportunities to become radicalised, since it's a worldwide 24/7 medium that permits people to find and meet people who share and will reinforce their shared belief or ideology. Unfortunately, Malaysia seems to have underestimated the sophisticated use of the internet by terrorist groups like ISIS and the appeal of its call to establish a caliphate especially to alienated young Malays.

Experts warned that terrorist group like Daesh has at least 6,000 channels in the social media, including Twitter, Telegram, Whatsapp and YouTube and in various languages, to promote its propaganda and beliefs.9 In 2015, a Malaysian woman wasconvicted for trying to join ISIL in Syria. The woman planned to marry an ISIS fighter she had met online. In October 2016, the Royal Malaysian Police (PDRM) has announced that the militant group like Daesh is using the Telegram messaging app as the latest medium through which to disseminate its ideology and recruit Malaysians.10

Dr Ahmad Fauzi Abdul Hamid, an expert on political Islam warned the authorities that Muslims in Malaysia are "surely but slowly becoming radicalised". According to him, in the 1980s and 1990s, many Malaysians went to the Middle East and Saudi Arabia for their higher education but when they returned, some of them brought back intolerant and exclusivist way of thinking that makes it easier to become
radicalise.11

In other countries like India and Pakistan, it has been alleged that madrasah or religious school in certain areas is a breeding ground for terrorism in which radicalisation occurs. 12 The situation in Malaysia is different. In Malaysia, the management of madrasah and religious schools was supervised and coordinated by the Education Ministry and the national committee on Islamic education affairs. In July 2016, it was reported that the Indian Prime Minister NarendraModi has shown interest in Malaysia's moderation agenda and its many counter-terrorism effort.13 It is essential that monitoring and supervision of religious school in Malaysia continue to promote moderation and the rejection of extremism elements.

2.2 Grievances and Psychological reasons

There is a tendency in the mass media to portray terrorist as rigid and irrational people with psychological problems. The tendency is also reflected in politics. For example, during the U.S Presidential election 2015, Donald J. Trump stated:

"Without looking at the various polling data, it is obvious to anybody the hatred is beyond comprehension. Where this hatred comes from and why wewill have to determine. Until we are able to determine and understand this problem and the dangerous threat it poses, our country cannot be the victims of horrendous attacks by people that believe only in Jihad, and have no sense of reason or respect for human life. If I win the election for President, we are going to Make America Great Again."14

In an OIC conference between Muslim countries on terrorism, the former Prime Minister of Malaysia, Mahathir Muhamad warned "we cannot just dismiss them as senseless perverts who enjoy terrorizing people."15 In many cases, there are legitimate concerns and grievances that if addressed properly, can mitigate the risk of terrorism.

Collective grievances have long been noted to be a factor for terrorism. According to Crenshaw, "the first condition that can be considered a direct cause of terrorism is the existence of concrete grievances among an identifiable subgroup of a larger population, such as an ethnic minority discriminated against by the majority."16

The mindset of the group also plays a very important factor in determining whether the group will resort to violence or passively accept the grievances. For example, throughout history, slaves rarely revolt or resort to violence despite their collective grievances.

The psychological relation between a terrorist and his group is a strong motivation for terrorism. Crenshaw further warned "the psychological relationships within the terrorist group-the interplay of commitment, risk, solidarity, loyalty, guilt, revenge, and isolation-discourage terrorists from changing the direction they have taken."17

Many terrorist groups hope that polarization will increase grievances of their target group and sympathizers so that some will eventually join them. For terrorists, publicity is one of the main targets. Many terrorists hope that the negative publicity given by media will increase polarization and discrimination against certain group, and these will eventually lead to more tension and dissatisfaction. Under such environment, it will be easier for the terrorist groups to radicalize and recruit more individuals.

The propaganda used by Daesh on injustice towards Muslims will definitely tempt Muslims to subscribe to their fight, "but what they fail to understand is that if they go deeper, what they are doing is causing more trouble to Muslims all over the world."18

Scheffler (2006) warned that 'terrorists may hope that their violent acts will attract publicity for their cause, or promote their personal ambitions, or provoke a response that will widen the conflict, or enhance their prestige among those they claim to represent, or undermine their political rivals, or help them to achieve a kind of psychological or metaphysicalliberation.'19

Dershowitz (2002) further cautioned that 'terrorists have consistently benefited from their terrorist acts' and 'terrorism will persist as long as theinternational community rewards it'.20

2.3 Religion

Malaysia has been facing threats from extremists for some time now. Salafists militancy took root in Malaysia since the 1980s. Jemaah Islamiah (JI), a militant extremist Islamist terror group with cells in Thailand, Singapore, Malaysia and the Philippines was founded in 1993 and has become a threat since. The emergence ofISIS in Iraq, 2014 gave a new injection to Salafist jihadism and the plan for a Southeast Asian caliphate based on strict Shariah law. Malaysian terrorists also formed a vital component of ISIS's Southeast Asian unit, Katibah Nusantara. The Katibah Nusantara

cell is the one responsible for the attack in Jakarta in January 2014.

Schimd (2013) warned that religion extremist is difficult:

'Extremists generally tend to have inflexible 'closed minds', adhering to a simplified mono-causal interpretation of the world where you are either with them or against them, part of the problem or part of the solution. Radicals, on the other hand, have historically tended to be more open to rationality and pragmatic compromise, without abandoning their search for getting to the root of a problem (the original meaning of 'radical' which stems from radix, Latin for root). Radicalism is redeemable – radical militants can be brought back into the mainstream, extremist militants, however, much less so.'21

Mainstream media often selectively generalize and associate Islam with terrorism. This association is unfair and discriminatory. According to the list of Foreign Terrorist Organizations issued by the U.S Department of State, there are 61 designated terrorist groups, and 47 out of these 61 groups belong to Muslim. White supremacist groups, anti-Semitic groups and anti-Muslims groups rarely made into the list.

Mass media often portrays religious fanaticism as the reason for the increase of terrorist attacks. However, 'religious fanaticism does not explain why the world leader in suicide terrorism is the Tamil Tigers in Sri Lanka, a group that adheres to Marxist/Leninist ideology, while existing psychological explanations have been contradicted by the widening range of socio-economic backgrounds of suicide terrorists.'

Pape reminded that it is essential to understand that suicide terrorism is mainly 'a response to foreign occupation rather than the product of Islamic fundamentalism has important implications for how the United States and its allies should conduct the war on terrorism'.22

Maszlee Malik explained that religious arguments were often used in justifying terrorism because religion 'gives hope'. He elaborated that the oppression of the Jews by the Europeans created Zionism while some Muslims nowadays become terrorists because they believe they are being oppressed (*FMT* 18 December 2016).

The Malaysian government and its Islamic agencies have been trying to prevent Malaysians from joining terrorist groups. In October 2015, the government's Department of Islamic Development, in charge of Malaysia's mosques and Islamic scholars, issued a fatwa against ISIS and sought to convince followers that terrorists who have died while fighting with the group were not martyrs.

2.4 Economic and social reasons

Cinar (2009) suggested that "terrorism is a political problem and it is not an economic problem" although admitted that "politics affects the economy through the design of economic policies".23 He clarified that although there is a link between economic conditions and terrorism, the link is not direct.

Briggs *et al* (2006) comment about the attraction of British Muslims to Al Qaeda that, 'while factors such as foreign policy and the Middle East are important,they will have no traction unless they can be linked to sources of grievance and anger closer to home, such as the poverty and discrimination suffered by the Muslim community in the UK'.24

The interaction between terrorism and economy can happen through many ways. Poverty, unemployment and perceived economic inequality can all motivates terrorism. In this situation, the victims often opted terrorism for two objectives; either to force changes or merely for revenge

and retaliation.

Beside this, people also resort to terrorism when it is profitable to them. Who benefits from terrorism and war? War is very profitable for various groups. The first one is the 'defense' industries. Without the threat of war and terrorism, the profit for the international arm dealers will drop substantially. Beside international arm dealers, war also provides huge demand for new and improved military technology. Shortage of supply of commodities during war will increase price and benefit certain traders. Politicians are also known to accept bribes from companies involved in war production.

At state level, states will sometimes benefit from war and state terrorism. In addition to territorial expansion, a state that has won a war in certain circumstances can also claim political benefit. War and terrorism can also be used to divert the attention of the public from economic turmoil to perceived external threat.

However, in general, terrorism is usually very bad for economy. Investors and traders will shy away from countries associated with terrorism or terrorist attacks. The tourism industry will also be badly hit.

In the context of Malaysia, the economy is moderate and developing. The rate of employment is also good. However, it has been suggested that even when the economy is good, there is still a risk that someone can be lured to terrorism as long as that someone can identify with the grievances of others. According to Homer-Dixon, "these people can still powerfully identify with communities elsewhere that they believe have been exploited, victimized, reduced to crushing poverty, or otherwise treated with disrespect. In fact, their relative wealth and education can reinforce a twisted sense of responsibility to do something for their suffering brothers andsisters."25

2.5 Political Reasons

Politics refers to the exercise of power of governance or organized control over a territory, particularly a state. Political reasons like patriotism and nationalism are some of the main causes for state terrorism. The bombing of Hiroshima and Nagasaki, the genocide by Nazis against the Jewish population and the mass murder of Bosnian population are amongst many examples.

With the exception of state terrorism, terrorism is usually described as a strategy of the weak seeking to gain advantage against stronger political powers or armed forces.

Wilkinson (1974) highlighted that the most successful revolutionary wars of the last 25 years has been due to nationalism and patriotism.26 Political reasons and considerations are very strong driving factors of war, and war breed terrorism. Silke (1998) suggested that terrorism is actually a political strategy, chosen from among a range of options.27

Zionists who bombed British targets in 1930s at the British-mandate Palestine felt they must do so in order to create a Jewish state. According to Enders and Sandler (2012):

'Two terrorist groups – Irgun ZvaiLeumi and the Stern Gang – applied and refined the methods of Micheal Collins in order to make British rules in Palestine costly. These groups relied on bombings and assassinations directed at British targets to raise the cost of not conceding to Jewish demands for statehood.'28

In the 1960s and 1970s, the Popular Front for the Liberation of Palestine concluded that armed attacks in Israel were an acceptable response to the usurpation of their land. Pape (2003:344) observes that 'viewed from the perspective of the terrorist organization, suicide attacks are designed to achieve specific political purpose: to coerce the government to change policy, to mobilize additional recruits and financial support, or both.'

Crenshaw (1981: 385) argued that 'significant campaigns of terrorism depend on rational political choice. As purposeful activity, terrorism is the result of an organization's decision that it is a politically useful means to oppose a government.' This line of argument is based on the view that terrorism is often a rational choice, calculated to achieve short-term or long-term political goal.

Leeman (1987: 45-53) proposed that ideologies associatedwithreligion, nationalism, revolution and the defense of the status quo have allinspired terrorism. 29 If the terroris macts originated from the minority, rebels or insurgents,such actions will be justified by the doer as necessary and unavoidable step to achievetheirobjective; freedom and independence. If the terrorism acts come from the government side, then national security and public interest will be cited as the justification. The steps taken by the government will be justified by the perpetrators, in this case the government, as a necessary mean to preserve freedom. Sharansky claims that 'the lack of freedom in many parts of the world that was the greatest threat to peace and stability.30

Nesser (2004) concludes that many analysts perceived the Islamist terrorism in Europe in the 1980s and 1990s as being motivated by political developments in the MENA region in which the Islamist movements declare a 'local jihad' against authorities perceived as corrupt, incompetent and hypocritical. The example given includes the GIA's terrorist campaign in France and Belgium (1994-1996) to punish France for interfering with the 1992 elections in Algeria in which the Islamist party was posed to winan overwhelming majority of votes.

In a way, terrorism seems to be an unfair solution to an unfair situation. For example, there are many injustices in the MENA region reflected in the imbalance of power. Mollov (2005) suggested that suicide bombs is related to the imbalance ofpower and this can be seen in the occupation of Palestine, the invasions of Iraq, Afghanistan, of Chechnya and Kashmir.31

Terrorism rarely occurs in a society with fair and acceptable political system. Terrorism is like a cancer cell of the political system and this cancer be visible, grow and spread to the whole system once the system fail to work perfectly (Çýnar, 1997: 247). Current global political system is seen by many to be unfair and unjust bymanywhom 'see themselves as defending the weak against strong and punishing the strong for their violation of all moral codes'.32

In the context of Malaysia, politics have motivated terrorism during certain period. Examples include the communist attacks, the Sulu incursion and sporadic attacks by terrorist groups including ISIS and al-Maunah.

Most Malaysian adopted peaceful and democratic means when it comes to politic. Since its early formation, none of the political parties in Malaysia had resorted to military means or violence to achieve their political target. However, there is a legitimate concern that some politician might indirectly promote terrorism by breeding extreme hatred and attitude of intolerance, especially towards the minority non-Muslim in Malaysia. In addition, there is also real concern that terrorist group might infiltrate political parties.

III. CONCLUSION

The many causes of terrorism include poverty, disease, illiteracy, bitter hopelessness, social inequality, marginalization and exclusion, political oppression, extreme poverty and the violation of basic rights, injustices, misery, starvation, drugs, exclusion, prejudices, despair for lack of perspectives, oppression of peoples in several parts of the world, alienation, economic deprivation and political tension and uncertainty, sense of injustice and lack of hope, desperation and frustration.

Despite the many causes, radicalization has been identified as one of the strongest reasons. The situation has changed drastically from the past, in which students from Middle East or other conflict zones were the primary suspects for terrorism activities in Malaysia. Since the radicalization process can happen online, anyone with Internet access can be a possible target for radicalisation. Radicalisation can happens through interaction with extremists, either online or through the fiery speeches of radical preachers.

Anyone from any background can be a potential threat if the person has been radicalised. More collective efforts are needed to combat radicalisation including reaching out to identified targets, a more inclusive educational system, preventive measures etc. For example, to combat radicalisation of youth in Malaysia, the Youth and Sports Minister is roping in youth associations to reach out to young Malaysians in a bid to curb the Daesh menace targeting the demographic group.33

As radicalisation has been identified as strong motivation factor for terrorism, more efforts are needed to combat it; identification of methods of radicalisation, clear policy to combat radicalisation, better legal and regulatory framework to prevent online-radicalisation etc.

Although radicalisation has been identified as one of the primary causes, this study also share the same conclusion with Haider*et al* that 'no cause has a unilateral connection with terrorism, and focusing on a single factor may not suggest effective policy measures.'34

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Adequacy of the Law in Protecting the Rights of Adopted Children in Malaysia

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Abstract

Adoption is one of the means to protect children who have been deprived of parental care. The United Nation Convention on Rights of Child guaranteed such protection and as in other action concerning children, the principle of the best interest of the child must be primarily considered by the State parties when dealing with the process of adoption. In Malaysia, adoption process is governed under two main legislations, i.e. Adoption Act 1952 and Registration of Adoption Act 1952. This paper addresses the extent of these legislations and practices of the Court in Malaysia in ensuring the best interest of the child is guaranteed when dealing with adoption procedures and the protection provided after the adoption. One of the main issues to be highlighted is concerning the citizenship of the adopted child, particularly in a case where the child is not from Malaysia. Does the law give equal protection as provided to the adopted child born in Malaysia? This paper uses a qualitative data collection method where in-depth document analysis is carried out. Primary sources such as the Acts, Regulations, court orders and decision are scrutinised. On the other hand, secondary sources that are studied include law reports, law reviews and legal periodical articles. The study is significant as it addressed crucial concerns raised in reference to the current laws relating to the protection of adopted children in Malaysia. The paper ends with some possible recommendations that may spur improvement to the present legislations in ensuring that the rights of adopted children in Malaysia are duly protected.

Keywords: *adoption, best interest of the child, protection, Malaysian*

I. Introduction

Adoption is a lifelong experience that affects adopted children and adults, and birth and adoptive families. It is both a legal and a social process. The purpose of adoption is to provide every child legally available for adoption with the stability and security of new and permanent family ties, giving paramount consideration in every respect to the child's best interests. Adoption is also one of the means to protect children who have been deprived of parental care. It is a common practice in many countries in providing children in need with permanent family care.

Alternatively, it is also one of the means for childless couples to have children. The practice of adoption allows a child to be transferred from his or her birth parent to adoptive parent legally. The United Nation Convention on the Rights of the Child 1989 (hereinafter referred to as the UNCRC) provides adoption as substitute or alternative care for children who have been deprived of family environment other than foster care, *kafala*[1] and residential care.[2] Substitute care basically refers to a service that is designed for substitution of natural parental care, either partially or wholly and it is still the major child welfare service.[3] Thus, vulnerable children like orphans as well as those who have been abused, neglected or abandoned by their birth parents require substitute care in ensuring that their wellbeing is upheld.

II. Discussion

Application of Best Interest of the Child Principle in Adoption in the International Legal Framework

International adoption legislation and practice has purported to take into account the principle of "best interest of the child." As discussed above, the United Nations Convention on the Rights of the Child (UNCRC) specifies adoption as one of the avenues for deprived children of family environment and the process for adoption must paramountly be in the best interest of the child.

Article 20 of the UNCRC states that;

"any child who is temporarily or permanently deprived of his or her family environment is entitled to special protection and assistance from the State, which could be in the form of adoption, a foster family, *kafala* in Islamic States, or, if necessary, placement in suitable institution for the care of children. When choosing among these various solutions, one has to take into account the need for continuity in the education of the child, as well as ethnic origin, religion, language and culture."

While Article 21, requires;

"The States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall:

(a) ensure that the adoption of a child is authorized only by competent authorities

(b) recognize that inter-country adoption may be considered as an alternative means of the child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin;

(c) ensure that the child concerned by inter-country adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption;

(d) take all appropriate measures to ensure that, in inter-country adoption, the placement does not result in improper financial gain for those involved in it.

It is important to note that for certain specific actions, including adoption and separation from parents against their will, the UNCRC requires that the best interests be the determining factor, whereas for other actions it has to be a primary consideration, which does not exclude other considerations to be taken into account.4 The ratified countries of the UNCRC are under the duty to provide adoption processes that uphold the best interest of the child as in other action concerning children.

Adoption in Malaysia

Malaysia as one of the ratified countries has enacted legislations that provide comprehensive processes of adoption. There are two legislations that govern adoption of children in Malaysia, namely Adoption Act 1952 (hereinafter referred to as AA 1952) and Registration of Adoption Act 1952 (hereinafter referred to as RAA 1952). Adoption under the AA 1952 is made through the court's order and it is only applicable to the non-Muslim.5 Adoption under this Act will confer the adopted child a legal status of being the legitimate child of the adoptees and as such will be entitled to all rights as the biological child born in wedlock of the adopted parents.6 RAA 1952 on the other hand is applicable to both Muslims and non-Muslims. Unlike AA 1952, the Act only provides for registrations of adoptions without affecting the legal and biological status of the adopted child. The Act seems to be in line with the principle of Islamic law. Adoption through this

act is also known as de facto adoption, which means "existing in fact, whether legally recognized or not". Under De facto adoption the child is being raised, supported and educated by any person or husband and wife as their child without affecting his legal and biological status as mentioned above.7

Process of Adoption

1. Adoption Act 1952

The application of adoption under AA 1952 is made to the court and the applicant/s must fulfil certain requirements as provided in the Act. There is a provision which stipulates a minimum age of the adopter to be at least twenty five years old and at least twenty one years older than the child or over twenty one years if he or she is a relative of the child. The Act also prohibits the adoption of female children by a sole male applicant unless under special circumstances. The application is commenced by filing an adoption petition at the High Court of Malaya (or the Sessions Court). An adoption petition is supported by an affidavit affirmed by the adoptive parents. The adoptive parents are ordinarily required to obtain express consent from the child's birth parents to the adoption. However, the court has the discretion, pursuant to Section 5(1) of the Adoption Act, to dispense with the birth parents' consent if, for example, the child has been abandoned, ill-treated, or if consent is being unreasonably withheld.

Adoption hearings are conducted confidentially in the judge's chambers. At the first hearing, the court will grant an interim order for the appointment of a social welfare officer as the guardian *ad litem* (court appointed guardian) to investigate the welfare of the child. The guardian *ad litem* will monitor the home environment and will interview the adoptive parents and the child. The welfare officer will then prepare a welfare report for the court either to support or oppose the adoption application. The court will usually fix the subsequent hearing about 3 months from the date of the first hearing to enable the welfare officer sufficient time to complete his investigations. At the second hearing, the court will consider the welfare report and decide the application in the best interests of the child. The court is also entitled to and may interview the adoptive parents to confirm their intentions and the child to ascertain his or her wishes.

If the adoption application is allowed, the order for adoption will be sealed and a copy will be sent to the National Registration Department for registration in the Adopted Children Register. The National Registration Department will then cancel the original birth certificate and re-issue birth certificate for the adopted child. The new birth certificate will carry the name of the adoptive parents and the child as if the child was born to the adoptive parents. Significantly, the new birth certificate will not have any reference to the adoption or to the child's birth parents.

2. Registration of Adoption Act 1952

RAA 1952 provides for the registration of adoption upon application made by the adoptive parents of a child under the age of eighteen years who has never been married and is in the custody of, and is being brought up, maintained and educated by the adoptive parents. The adopted child must be a permanent resident and have stayed with the adoptive parents for two years before an application for adoption can be made and the certificate of registration of adoption is issued by the National Registration Department. The provisions of RAA 1952 are to ensure the welfare and development of the adopted child, protection of the adopted child from exploitation and abuse and safeguards on adoption. The procedure under this Act is only by way of registration of the adoption at the National Registration Department.

Effect of Adoption

A child adopted under the AA 1952 is legally considered a child born to the adoptive parents in lawful wedlock. According to section 9 of the Act, upon an adoption order being made, all rights, duties, obligations and liabilities of the birth parents, in relation to the future custody, maintenance and education of the adopted child, shall be extinguished, and all such rights, duties, obligations and liabilities shall vest in and be exercisable by and enforceable against the adoptive parents as though the adopted child was a child born to the adoptive parents in lawful wedlock. The right to inheritance under the Wills Act 1959 and the Distribution Act 1958 is also transferred from the birth parents to the adoptive parents.8

In relation to adoption of Muslim child, the RAA 1952 does not confer any legal status and rights to the adopted Muslim child over the adopted parents. Registration is only a formality to document the adoption and to give recognition to the de-facto adoption. Failure to register shall not affect the validity of the adoption if all the necessary requirements are fulfilled.9 As the Act only provides for registrations of adoptions without affecting the legal and biological status of the adopted children, accordingly, they cannot assume the name or inherit property of the adoptive parents. The non-conferment of legal status and rights to the adopted Muslim child by RAA 1952 is in fact in line with the precepts of Islam, in which it prohibits the severity of legal relationship between the child and the birth parents and every child should maintain his or her natural identity.10 In the case of *Sean O'Casey Patterson v Chan Hoon Poh & Ors*,11 the court held among others that the RAA 1952 was enacted to cater for Muslims whose personal laws are repugnant to adoption yet it is a common practice for Muslims in this country to "adopt" a child.

The interests and welfare of a Muslim child taken into custody by the adopted parents after the registration under this Act, nonetheless, will not be jeopardised as the adopted parents are morally bound to protect and care for the child as expound in the system of *kafala*. In matters like inheritance the fostered Muslim child may be entitled to benefit from the foster parents' property by way of gift (*hibah*) or the foster parents may devise not more than one third of their property by will (*wasiat*) to the child. The Islamic Family law Acts of the states in Malaysia (which govern the Muslims) also guaranteed the rights of the child accepted as a member of the family, particularly in the matter of financial support.12

Whether The Laws Uphold The Best Interest Of The Child And Provide Adequate Protection

From the above discussion, it can be seen that the detailed requirements and processes of adoption under AA 1952 and RAA 1952 seem to reflect that the principle of the best interest of the child is highly emphasized, although the provisions did not clearly specify that the principle of best interest must be paramountly considered by the court as to what has been promulgated in the UNCRC.

There are several processes and requirements of adoption, which directly reflect the emphasis on the safeguarding of the best interest of the child in adoption order. Firstly, the requirement of fulfilling certain age differences between the adopter and adoptee. As being discussed, the proposed adopter/adopters must be at least 25 years old and being 20 or 18 years older than the adopted child under the AA 1952 and RAA 1952 respectively.13 Indirectly, this requirement is to safeguard the interest of the child in which the child's wellbeing will be looked after by adult person/s with parental responsibilities. Additionally, the age gap requirement adequately establishes the usual parents and a child age gap in a family.

Secondly, the general requirement that a single male adopter is not allowed to adopt a female child in AA 195214 is also seen as a means to protect the interest of the female child. Such requirement is to prevent the child from being exposed to any possible mistreatment by the proposed male adopter, for instance being sexually abused or rape. Conversely, there is no similar requirement in the RAA 1952.

Consent of the natural parents to the adoption is the most fundamental requirement in the adoption process and is another important factor to safeguard the interest of the adopted child. As being discussed, an adoption order or registration of adoption order can only be made by the court with the consent of the natural parent/s except in some circumstances where the court is satisfied that the consent may be dispensed with based on several valid reasons.15 For instance, in cases where the natural parent has abandoned, neglected or persistently ill-treated the child; has persistently neglected or refused so to contribute to the maintenance of the child and person whose consent is required cannot be found or is incapable of giving his consent or that his consent is unreasonably withheld. The need to obtain the consent of natural parents is to ensure that the adoption is truly in the best interest of the child and it may be dispensed with if it is contrary to the welfare of the child. This also indicates that the requirement of parental consent in an adoption case is not mandatory when it is in conflict with the welfare of the child.

Another requirement that directly reflects the consideration of best interest of the child is the need for the child to be in the continuous care of the proposed adopter before the adoption. Under the AA 1952, the requirement is for three months before an application for an adoption can be made whilst RAA 1952 requires the child to be cared and in the possession of the adopter for at least two years. Under the AA 1952, the purpose of this requirement among others, is to ensure the child's suitability and adaptability with the proposed adopted parents. The period of care and in possession of the adopted parents under the RAA 1952 is much longer compared to AA 1952, and within this period, the child must also be maintained by the proposed adopter. This is to ensure that child's well being is protected before the adoption can be legalized.

Appointment of Guardian *ad litem* before the court granted an adoption order under AA 1952 is also seen as one of the ways of safeguarding the best interest of the child in an adoption order. As discussed above, the purpose of appointment of guardian *ad litem* is mainly to monitor the adoption process and to determine the suitability of the applicant to the proposed adopted child by conducting an investigation. The investigation among others would determine that for the welfare of the child, the Court should be asked to make an interim order16 on the applicant, or in the making of an adoption order, to impose terms or conditions requiring the adopter to make any particular provision for the child.17

The effect of adoption under the AA 1952 is also for the purpose of safeguarding the best interest of the child. After an adoption order has been granted by the court, the adopted parents will assume the parental responsibility as if they are the natural parents and the adopted child is considered to be the legal child as if he or she was born to the adopter in a lawful wedlock. The court will issue a certificate of adoption, which is similarly valid as the birth certificate. Conversely, the registration of adoption under the RAA 1952 does not have a similar effect. RAA 1952 only gives the right of custody to the adoptive parents over the adopted child. There is no ascription as to the paternity of the adopted father to the adopted child and thus, would not render parental status over the adopted children. Nevertheless, the registration is crucial as it will render benefits to the adopted children in education, application for an identity card and passport and more importantly, the nationality or citizenship. This is in line with the concept of *kafala* or

fostering in Islam, in which it would bring huge benefit to the Muslim adopted children and as such their best interest is duly protected.

Citizenship of Adopted Children

Both the Adoption Act and the Registration of Adoptions Act and are silent on the issue of citizenship for adopted children. Whether Malaysian citizenship is automatically acquired by adopted children whose original immigration status are unknown or are foreigners are not specifically addressed. Although Malaysia has acceded to UNCRC, it has done so with an express reservation to Article 7 which relates to the right of a child to acquire a nationality. The article stipulates:

> "The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and. as far as possible, the right to know and be cared for by his or her parents".

The unfortunate result is that where the child's original immigration status is uncertain or unknown, the National Registration Department will declare the child as a "permanent resident" or "non-citizen" on the re-issued birth certificate or the certificate of adoption. The National Registration Department will disregard the fact that the adoptive parents may be Malaysian citizens. In such circumstances, a judicial review application may be filed to challenge the decision of the National Registration Department (NRD) for failing to recognise the adopted child's citizenship as Malaysian.18

A number of adoption cases have gone through judicial reviews in resolving this matter. For instance in an unreported case of Lee Chin Pon & Anor v. Registrar General of Births and Deaths Malaysia (2010), the High Court Judge allowed the Malaysian adoptive parents' application for judicial review which challenged the NRD's decision in registering their child (a stateless child who was born in Malaysia) as a "permanent resident" in his birth certificate. The court granted inter alia, the declaration for their child's Malaysian citizenship which was an automatic operation of law1919 See Article 14(1)(b) of the Federal Constitution 1957:"PART II Citizenship By Operation Of Law Of Persons Born On Or After Malaysia Day [Article 14 (1) (b)],, as he was born in Malaysia to Malaysians who were lawfully married. In summary, the case is authority for the principle that a lawfully adopted child born in Malaysia on or after Malaysia Day (16.9.1963) has the constitutional right to be recognised as a citizen, provided either of the adoptive parents is a citizen or permanent resident of Malaysia; and a child who is born in Malaysia on or after Malaysia Day has the constitutional right to be recognised as a citizen of Malaysia, provided he or she is not born a citizen of any other country. The case also emphasizes the supremacy of the Federal Constitution and reminds of the necessity for the Court to protect the constitutional rights of all and sundry, including the most defenceless adopted children.20

The above case was referred in Foo Toon Aik v Ketua Pendaftar Kelahiran & Kematian, Malaysia.21 However, the High Court in Foo Toon Aik's case refused to grant similar declaration that the child is automatically a citizen of Malaysia by operation of law because the biological parents in this case did not go through a valid marriage. The father is a Malaysian citizen while the mother is a Thai woman; had undergone a tea ceremony in Malaysia as a way of solemnizing their marriage. However, the so-called marriage was neither registered under the governing laws of Thailand (Civil & Commercial Code of 1935, 1976 and 1990) nor in Malaysia, under the Law Reform (Marriage & Divorce) Act 1976. Thus the marriage was invalid. As a result of the said relationship, a male child was born in Malaysia in March 2006. Due to his illegitimate status, he

took on the citizenship of his Thai mother and was listed as non-citizen on his original birth certificate. The relationship between the parties later broke down and the child's mother returned to Thailand, voluntarily relinquishing her parental rights to the father. The father's application for an adoption order to acquire guardianship rights over the child was granted by the High Court, but the NRD did not change the status of non-citizen of the child when it issued a new birth certificate. The court has considered the child as an illegitimate child since there is no valid marriage and thus is not entitled to be declared as a citizen of Malaysia by operation of law. It is submitted that the decision of the court will definitely affect the child's well being and interest as he will be deprived of many rights as enjoyed by a citizen such as the right to receive education in local schools and treated differently from any future children of his adopted father.

Similar decision was held in the case of Yu Sheng Meng & Anor v Ketua Pengarah Pendaftaran Negara & Ors,22since the adopted mother failed to produce any evidence about the whereabouts of the child's biological parents and thus, has not fulfilled the requirements of Article 14(1)(b), section 1(a) of Part II of the Second Schedule and section 17 Part III of the Second Schedule of the Federal Constitution which requires to be shown that those biological parents were not only legally married but at least one of them was a citizen of, or permanently resident in, the Federation at the time of the child's birth.

However, in an unreported case of Leong Peng Keong & Anor v Registrar-General of Birth and Deaths Malaysia23 and a recent case Pang Wee See & Anor v Registrar-General of Birth and Deaths Malaysia,24 the courts in both cases agreed with the decision of Lee Chin Poh's case in which the applications for judicial review to confer Malaysian citizenship by operation of law to the adopted child were granted even though the biological parents in both cases were untraceable. The basis of the decisions in both cases lies in the effect of section 9(1) of AA 1952 in which it recognises the adopted child as a child born to the adopter in lawful wedlock. Thus, when a new birth certificate was issued under section 25A of the same Act, by operation of law, the requirements of Article 14(1)(b), section 1(a) of Part II of the Second Schedule and section 17 Part III of the Second Schedule of the Federal Constitution have been fulfilled. Therefore the child is a Malaysian citizen by enforcement of law.

III. Conclusion

The findings from the analysis of AA 1952 and RAA 1952 seems to suggest that generally, both Acts adequately protect the interest and well being of adopted child. The strict requirements of the procedural laws directly reflect the consideration of best interest of the child in adoption application processes. Although both Acts confer different legal effect to the adopted child, it does not mean that there is an unequal protection provided by both Acts which may jeopardise the adopted child's welfare. The RAA 1952 provides an option to the Muslims who may want to register the adoption, although no legal status and rights as a natural child is conferred to the adopted child. This is in line with the precepts of Islam, in which it prohibits the severity of legal relationship between the child and the birth parents and every child should maintain his or her natural identity. In regards to citizenship, the recognition of adopted children as citizens appears to be in the discretion of the NRD and the court. The AA 1952 is silent on this matter and citizenship is not automatically granted when the court made an order of adoption. The application for judicial review to the court in determining the citizenship of the child involves another court procedure which is time consuming and costly. Additionally, it is not guaranteed that the court will grant the application. Thus, this will undeniably deprive the adopted child of many

rights as enjoyed by a citizen and ultimately may affect the overall well being of the adopted child. It is hoped that the legislature amends the existing law or enacts specific legislation to provide for the inclusion of adopted children as citizens in ensuring that their interest and welfare are duly protected.

ENDNOTES

1 *Kafala* is defined as "the commitment to voluntarily take care of the maintenance, of the education and of the protection of a minor, in the same way a parent would do for a child. It resembles foster-parenting and is seen as "primarily a gift of care and not a substitute for lineal descent." See International Reference Centre for the Rights of Children Deprived of their Family (ISS/IRC), "Specific Case: Kafalah," Fact Sheet No51, (Geneva: ISS, 2007).

2 UNCRC, Article 20

3 Child Welfare. "Substitute care". The Encyclopedia Americana (International Edition), Vol.6, 1982, at p 463.

4 UNHCR Guidelines on the Formal Determination of the Best Interests of the Child, p.6. assessed on 27 February 2017 at http://www.unicef.org/violencestudy/pdf/BID%20Guidelines%20%20provisional%20realease%20May%2006.pdf

5 Section 31 of Adoption Act 1952

6 See section 9 of Adoption Act 1952

7 Norliah Ibrahim, et.al., Family Law for the Non-Muslim in Malaysia, 2014 IIUM Press, IIUM Kuala Lumpur, at 366

8 http://www.mahwengkwai.com/adoption-malaysia/, assessed on 9 March 2017.

9 Section 11 of Registration of Adoption Act 1952

10 Dejo Olowu, Children's Rights, International Human Rights and the Promise of Islamic Legal Theory, available at http//www.ajol.info/index.php/Idd/article/viewFile/52894/41495

11 [2011] 3 CLJ 722.

12 For instance, Section 78 of the Islamic Family Law (Federal Territory) Act 1984 provides that that where a man has accepted a child who is not his child as a member of his family, he is duty bound to maintain the child.

13 See section 4(1)(a) of AA 1952 and 19(2)(a) of RAA 1952

14 See section 4(2) of AA 1952

15 See section 5 of AA & 6(1)(b) of RA

16 See AA, s. 17(1). The interim order shall be in accordance with Form No 6 of the first schedule. See Adoption Rules 1955, rule 17.

17 Adoption Act 1952, s. 13(1e). For the condition during interim order see *Re Baby M (an infant)* [1994] 2 MLJ 635.

18 http://www.mahwengkwai.com/adoption-malaysia/, assessed on 9 March 2017.

19 See **Article 14(1)(b) of the Federal Constitution 1957:** "***PART II*** *Citizenship By Operation Of Law Of Persons Born On Or After Malaysia Day [Article 14 (1) (b)],*

See **Section 1(a), Part II Second Schedule of the Federal Constitution 1957:** *1.Subject to the provisions of Part III of this Constitution, the following* ***persons born*** *on or* ***after Malaysia Day are citizens by operation of law****, that is to say: (a) every person born within the Federation of* ***whose parents one at least is at time of the birth either a citizen*** *or permanently resident in the Federation."*

20 http://www.mahwengkwai.com/citizenship-for-adopted-children-a-malaysian-perspective/

21 [2012] MLJU 205

22 [2015] MLJU 637

23 Application for Judicial Review No. 25-103-05 of 2014

24 [2016] 6 MLJ 396

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New Developments on Waqf Laws in Malaysia: Are They Comprehensive?

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ABSTRACT

Five (5) states in Malaysia have introduced their own waqf laws. The other five (5) states are working on new laws and the remaining states maintain waqf matters in the general statutes on administration of Islamic law. The new developments which took place in the 5 states are expected and most awaited after voluminous researches reveal that the legal framework has contributed to the slow development of waqf in Malaysia. Using the doctrinal approach and comparative analysis method, this study reviews the latest developments in the waqf enactments of Selangor, Perak and Terengganu and discusses how the changes in the laws have helped to improve the slow and restricted jurisdiction (legal framework?) dealing with waqf. The findings show that the new Enactments have addressed most of the observations from the previous literatures especially with regards to challenges in waqf development. Observations also relate to the fast development of waqf which moves in tandem with various other aspects of the economy and finance. Waqf is now recognised as the third economic sector in several jurisdictions. In addition, the need to employ Islamic finance products as vehicles for waqf development has also been recognised by the stakeholders. Although new laws are welcomed, the awareness on the emerging new needs is vital.

Keywords: *Waqf, laws, Islamic finance, third sector economy*

I. Introduction

This paper reviews the latest waqf enactments in Malaysia. The latest waqf enactments refer to the Enactment introduced from 2015 and 2016. During this period, three (3) states have made proactive efforts towards enhancing the application of waqf laws, replacing the old enactments as well as the provisions on waqf in some Administration of Islamic Law Enactments. The discussion involves three Enactments introduced in three states i.e. Selangor, Perak and Terengganu. It is noted that the first wave of change on waqf laws has taken place earlier in 1999-2005 involving the states of Selangor (1999), Negeri Sembilan (2005) and Melaka (2005). It is acknowledged that the first attempt has to a certain extent contributed to mould a basis for a new paradigm shift in waqf management in Malaysia. Nevertheless, the fast development of waqf especially in the corporate sector demands a wider role to be assumed by all waqf stakeholders. This research is important in providing reference for the administration and management of waqf laws, in Malaysia and other Muslim countries. While the administration is different between the states, the similarities are worth reference.

1.1 Literature Review

Mohammad Tahir Sabit (undated) was of the opinion that the past changes that took place involving waqf laws in Negeri Sembilan and Melaka are still lacking in a few matters. Firstly, it was argued that an effective organisational administration, appropriate assets management, and innovative Shariah compliant financial mechanisms are needed to further strengthen the waqf institu-

tion. Mohammad Tahir also focuses his proposal on five main aspects; recognition of legal personality for individual waqf - the corporation and *Majlis*; the new institutional structure for waqf management; the nature of waqf instrument and its effect; the management of waqf properties and accounting thereof. Other minor proposals are made too, which are discussed on sections relating to registration, creation of new waqf offences, monitoring and power of courts.

Nor Asiah, Sharifah Zubaidah and Zuraidah (2012) observed that legal reform for waqf is necessary in order to provide for an enabling legal environment dealing with specific provisions for the creation of waqf and provide specific law? relating to waqf to guarantee the sustainability of the development of waqf lands in Malaysia. Specifically, Nor Asiah (2015) commented on the provisions of the NLC which in her opinion cannot provide a better management and sustainable protection of waqf land. It lacks specific and clear provisions on waqf which has resulted in different practices among the States in Malaysia.

Sohaimi and Syarqawi (2008) highlighted that one of the major issues in waqf administration in Malaysia is lack of waqf enactment in many States. Norilawati Ismail (2012) observed among the legal challenges in waqf is that without a specific waqf enactment, Shariah Court judges will face problems in hearing waqf cases. One of the obstacles is that the judges have no reference in substantive, procedural and administration aspects.

Abu Bakar,M. (2007) asserted that among the challenges in the development of waqf properties in Malaysia are legal issues, management issues, location, small size of land and lack of experts in strategizing effective development of waqf. On an extreme note, Murat Cizakca (2000) observed that in Malaysia, the waqf centralized system by the state has resulted in the appointed trustees by the *waqif* has to be replaced by the *Majlis* or transferred to the appointed trustee by the *Majlis.*

1.2 Important Areas in the New Waqf Laws

The Selangor Waqf Enactment 2015 replaces the Selangor Waqf Enactment 1999, the first waqf enactment in Malaysia. The 2015 enactment is an improved and more comprehensive version compared to the 1999 enactment. Perak passed its first waqf enactment in December 2015 while Terengganu passed its waqf enactment in November of the following year.

Table 1: New Enactments On Waqf In Malaysia 2015-2016

	STATE	DATES OF Gazette	NEW LAWS	PREVIOUS LAWS
1	Selangor	19 October 2015	Wakaf (State of Selangor) Enactment, 2015. (Enactment no 15)	Wakaf (State of Selangor) Enactment 1999 (Enactment No 7 of 1999) repealed.
2	Perak	31 Dec 2015	Wakaf (State of Perak) Enactment, 2015) (Enactment no 9)	Administration of Religion of Islam (Perak) 2004 (Enactment No 4, 2004)
3	Terengganu	Passed by the State Legislative Assembly on 24 November 2016.	Wakaf (State of Terengganu) Enactment, 2016	Administration of Islamic Law Enactment No.2 2001 (Sec 63-69)

A comparison of the scheme of new waqf laws above reveal that to date the Terengganu Waqf Enactment 2016, being the latest waqf enactment amongst the three, has the most provisions including provisions for offences and penalties and enforcement and investigations.

Table 2: Important Areas In The New Waqf Laws

States	Selangor	Perak	Terengganu
Provisions	49 Provisions 1 Schedule -Arabic Scripts	50 Provisions 1 Schedule -Arabic scripts for certain words	61 Provisions 2 Schedules Schedule 1 – Arabic scripts Schedule 2 – *Wakaf* Committee
Parts	10 Parts I -Preliminary II–Powers and Responsibilities of *Majlis* III- Appointment of Chief Registrar of *Wakaf* and Registrar of *Wakaf* IV- Formation of *Wakaf* V- Mawquf VI – *Mawquf Alaih* VII-Wakaf by Way of Will VIII-*Wakaf* Fund IX-Determination of *Hukm Syara'* X-General Provision	10 Parts I –Preliminary II-Creation of *Wakaf* III-*Mawquf 'alaih* IV-Invalid *Wakaf* V- *Mawquf* VI- *Istibdal* and Development of *Mawquf* VII-Powers of *Majlis* VIII- Chief Registrar of *Wakaf* and Registrar of *Wakaf* IX- Financial X-General Provision	13 Parts I –Preliminary II-Powers and Responsibilities of *Majlis* III-*Wakaf* Management Committee IV-Registrar of *Wakaf* and Other Officers V- Creation of Wakaf VI- *Mawquf* VII-*Mawquf 'alaih* VIII- *Wakaf* by Will IX- *Wakaf* Fund X-Determination of *Hukm Syara'* XI-Offences and Penalties XII- Enforcement and Investigation XIII-General Provision

Sources: Selangor Wakaf Enactment 2015 (SWE), Perak Wakaf Enactment 2015 (PWE) and Terengganu Wakaf Enactment 2016(TWE).

II. Discussion

2.1 Preliminary on Prerogative Saving Clause

It is interesting to note that both the Selangor Waqf Enactment (SWE) and Terengganu Waqf Enactment (TWE) have a saving prerogative clause declaring the rights of the Sultan being the Head of Religion on matters pertaining to Islam. The Perak Waqf Enactment (PWE) lacks this provision. It is thus understood that although the Sultan is also the Head of the *Majlis*, but the Sultan has a prerogative power to decide on any matters pertaining to Islam in which waqf is one of the matters. The source of this power is enshrined in the Federal and State Constitution. The implication is that if there is any matter concerning waqf which is vague or falls contrast to the interest of Islam, Sultan may decide on his capacity as the Head of Religion, provided that the decision is not contrary to *hukm syarak*.

2.2 Types of *Mawquf*

While most enactments provide definitions for *mawquf* in the definition section, each enactment has dedicated different Parts for *mawquf* with separate headings, and the scope of *mawquf* differs. For example, SWE has clearer and detailed provisions on *mawquf* supporting the literal meaning of *mawquf* in the definition section. SWE has further detailed the types of *mawquf* which consist of some jurisprudential principles on waqf. For example, types of waqf under SWE include moveable property, immoveable property, the benefits, intellectual property or expertise or services. This detailed illustration reconciles various opinions of jurists on what can be a subject matter of waqf or otherwise.

2.3 Powers

There are many issues arising from the several provisions on power of the *Majlis* on waqf. Under PWE, powers of the *Majlis* cover the *Majlis* to be the sole trustee, power to purchase property, claim on rental, usufruct, or benefit of *mawquf*. Powers on *istibdal* is dealt with under Part VI on *istibdal.* The law which provides for the *Majlis* as sole *Mutawalli* for all waqf properties in their respective states has been criticised as contributing to the slow development of waqf. In fact, it is further provided that any person or body found managing waqf property without the approval of *Majlis* commits an offence and can be fined to the maximum RM5000 or maximum 3 years jail or both. While some jurisdictions such as Singapore and the Middle East countries encourage or retain the existence of private trustees, the legal framework in Malaysia does not appear to be so.

The *Majlis* can be the *mawquf alaih* for any *mawquf* situated in and outside the respective states. This is positive for a better management of *awqaf* properties. This will also give a chance to the trustee to be appointed as trustee by *Majlis* in other states. This will encourage positive competition among the *Majlis* to approve and appoint other bodies as waqf trustees. Indirectly, it rationalises the common perception that *Majlis* is controlling and monopolising the role as sole trustee thus contributing to hampering or slowing down the management of waqf in Malaysia.

Under the new enactments, the law has made clear that any waqf relating to land needs to be vested under the *Majlis* by virtue of section 416C of the National Land Code 1965. Previously, the Director-General of Land and Mines has issued a circular to the same effect but such circular has not been followed by the *Majlis* or the land office of the particular state as it is merely directory and has no legal effect. Furthermore, land is a state matter, each state has its own discretion to decide and the same principle is also adopted for land matters where the State Authority is the highest decision making body. As such, they are not obliged to adopt any circular issued at the Federal level by a Federal agency.

There is a clear provision for the *Majlis* to be the beneficiaries of any *mawquf* of waqf in the respective state as well as for any *mawquf* situated elsewhere. *Majlis* as sole trustee, may be made a *mawquf alaih* for any *mawquf (*s. 4(1)(b) of TWE and s 4(1)(d)). This is a proactive provision which allows healthy competition among the *Mutawalli*.

2.4 Can *Majlis* delegate its power to a corporation?

The next issue concerns the power of the Majlis to delegate its power to its body corporate created under its authority. Section 8(1) of SWE clearly says that the Majlis may delegate its power subject to the conditions and restrictions as it deems fit. Ironically, the other enactments do not use the term delegation, thus there is no such similar provision on delegation. Perhaps, one consideration may be looked under the administrative law principle there is a maxim says *Delegata potestas non potest delegari* which means in "no delegated powers can be further delegated." Or also known as *delegatus non potest delegare* which means "one to whom power is delegated cannot himself further delegate that power". A review of various authorities under American law and English law on this issue provides *pro* and *contra* views. We may however reconcile this by taking the approach that the delegatee may be made to perform certain tasks but such trustee, in this case the *Majlis* as the sole *Mutawalli* may not delegate its personal responsibility to oversee the administration of the waqf. The exercise of discretion by the trustee in making prudent delegations allows him to be more flexible and, perhaps pragmatic, in furthering the goals of the waqf than under a more restrictive view.

2.5.Waqf Scheme

While TWE (s.4(1)(f)) and PWE allow the *Majlis* or any institution to establish and manage or approve a waqf scheme by dedicating a specific provision on waqf schemes, SWE has no such similar and straightforward provision for the approval of waqf scheme. Nevertheless, it is argued that such similar power may be exercised by the *Majlis* in Selangor under section 4(1)(4) of the Enactment.

2.6. The Position of *Mufti* as a member in *Wakaf* Management Committee.

While PWE and SWE do not have a Second Schedule which lists down members of the *Wakaf* Management Committee, the TWE which is similar to *Wakaf* Enactment Melaka provides a detailed Schedule for that matter. The issue is the Mufti is one of the members in the Committee while at the same time he is also a member in the State *Fatwa* Committee. The query is what happens if there is any issue raised with regard to matters concerning *hukm syarak* which was decided by the *Wakaf* Management Commitee, and this matter needs to be brought to the State Fatwa Committee? Will there be issue of conflict of interest? Furthermore, any person who is not satisfied with any decision of *Majlis* or *Wakaf* Management Committee may need to refer the matter to the Mufti for a clarification or refer the matter to the State Fatwa Committee for deliberation. It may be awkward since the Mufti happens to be a member in both bodies.

2.7 Tribunal or Court?

The Enactments clearly provide that if there is any ambiguity concerning the instrument or declaration of waqf, thus reference must be made to the court. By definition, the court refers to both, the Shariah court and the civil court. It is unfortunate that the option has not been made to other means of alternative dispute resolution or Tribunal for waqf. When waqf is special in character and law, it is best to refer to a specialized Tribunal for any conflict rather than to the Court. This would also be able to preserve the good name of the *Majlis,* rather than seen as being embroiled in various litigations involving waqf.

2.8 Appointment of *Wakaf* Management Committee

Both PWE and TWE have a clear provision allowing the establishment of a *Wakaf* Management Committee. Unlike PWE and TWE, SWE does not dedicate a clear provision to that effect. This creates a few questions as to whether *Majlis* under SWE relies on provisions on the establishment of corporation to assume a similar role with Wakaf Management Committee. A comparison on the functions and roles of *Perbadanan Wakaf Selangor* (PWS) and the roles of the *Wakaf* Management Committee under the TWE shows some similarities in feature, thus it could be concluded that by having a clear provision on delegation of powers from *Majlis* to corporation, the PWS has assumed a wide duty and function similar to a *Wakaf* Management Committee in other states. Nevertheless, under TWE the provisions on *Wakaf* Management Committee are more detailed and clearer in terms of appointment, terms, termination, benefits and other administrative matters (Schedule 2). Unlike TWE, although the PWE has a provision allowing for the establishment of a *Wakaf* Management Committee, it lacks details in which case reference must be made to the power of *Majlis*. Having stated the establishment of a corporation under the SWE, it is noted that TWE (s 4(1)(c) and PWE also have provisions for the establishment of corporation or companies by the *Majlis* for the purpose of carrying out any activity of the *Majlis*.

2.9 Promoting Waqf as Third Economic Sector

It is a known fact that the government and private sectors are the main players in providing infrastructure and facilities for the people. Similarly, it is recently acknowledged that waqf is contributing and supports the government in performing the same responsibilities. As such, it is necessary for law to be designed towards realising the same vision and mission. Thus, it is observed that the new Wakaf Enactments in the three selected states have provided a wider scope of waqf, and a clearer role of *Mutawalli* especially in ensuring the working of corporate waqf within the existing legal framework. The Enactments have provisions on investment of waqf, gathering of waqf capital, accounting requirements, waqf scheme, waqf share, etc. What is needed in addition to that is laws to govern the professionalism of the waqf trustee either through specific provision in the waqf enactments or to bind them through their professional body's work ethics.

2.10 Corporate Waqf and Islamic Finance Products

The most applauded effort in introducing a new package of Waqf Enactment is the need to keep abreast with the new developments in Islamic finance, Islamic capital market, Takaful and waqf. It has been realised that waqf or waqf products need the product of Islamic finance, Islamic capital market and takaful as vehicles for development since the *Majlis* is known for not being an income generating institution. In fact, in most cases, the *Majlis* has to raise capital to maintain waqf properties. The new Enactments have ventured for cooperation and collaboration of Islamic finance institutions either as a partner or pioneer to generate income for development or purchasing of properties for waqf purposes. Apart from the improvement on the definition and scope of waqf, recognising the various types of waqf including recognition of *waqf muaqqat* or temporal waqf or *waqf musytarak*, the Enactments also allow the *Majlis* to utilize money from other sources allowed by *Hukm Syarak*. In Malaysia, there are examples like Waqf Hj Ahmad Dowjee Dadabhoy where the two acres plot of land in the middle of Kuala Lumpur was developed as multi-storey offices and an in-house mosque.

The main challenge of raising funds to finance waqf lands has been resolved with various Islamic products such as *sukuk, waqf an nuqud, waqf* share etc. Nevertheless, despite new changes, the challenge continues in this sector. Making waqf a third or fourth sector is far from reality. In fact, taking cash waqf for example, the enactments merely provide a definition and give some authority to the *Majlis* to collect or receive cash waqf. The question is what is next? How can the cash waqf be further dealt with to make it a sustainable source of *mawquf* and remain competitive in the global market? In fact, it may be argued that the existing legal framework is inadequate thus making matters pertaining to the waqf market extra legal.

2.11 Illegal Occupation on Waqf land

TWE has made a special PART to cover matters on how to deal with illegal occupation on waqf land while the SWE and PWE deal with illegal occupation under General Provisions relates to the power of *Majlis*. (s 42 PWE). As this area is sensitive and touches on various issues including universal principles of human rights, politics and religion, it is advisable for the *Majlis* to provide details in the provisions on methods of eviction and their remedies, taking into account some universal principles prepared by the United Nations. This can be achieved through a Schedule or adoption of procedures in the Manual prepared by *JAWHAR* (Department of Waqf, Hajj and Zakat).

2.12 Enforcement, Investigation and Penalties

The PWE clearly gives power to the *Majlis* to take actions against any person who illegally or without permission from the *Majlis,* enters, inhabits or occupies any waqf land. (s 42 PWE). Their acts vary to include erecting, demolishing, ploughing, takes, destroy, letting of cattle straying on waqf land etc. PWE also gives power to the Chief Registrar of *Wakaf* or Registrar of *Wakaf* to or their representative to have access to all waqf properties for the purpose of the implementation or enforcement of the Enactment or the related regulations.(s 33 PWE).

2.13 Family Waqf

Recent researches show that there are calls for revival of family waqf in many jurisdictions. Reference to family waqf may fall under the terms 'private waqf' or '*wakaf khas*'. The legacy of the colonials in prohibiting or restricting family waqf is concurred and Malaysian law on waqf is not an exception. There is no clear provision for reviving family waqf in the Enactments. Some Enactments continue to emphasise that *wakaf khas* for family or descendants or heirs of the *waqif* is invalid. Some specify that the effect of such waqf is subject to the approval of the Majlis (s 14 SWE). The PWE clearly states that administration or management of *wakaf khas* without the permission of the *Majlis* is an offence and upon conviction shall be subject to penalty. Under SWE, any person who manages *wakaf khas* without the permission of the *Majlis* or Corporation commits an offence be liable to a fine not exceeding RM1000 or imprisonment not exceeding 6 months. It is a missed opportunity for the Malaysian legal framework for not recognising private waqf or family waqf while the need is there among the Muslim. In the eyes of Shariah, there is no essential difference between public welfare waqf and a waqf created for the benefit of individuals such as family members (A. Rahman Sadiq, 2017). It is high time to consider allowing the founders or *waqif* to administer their own waqf and for the *Majlis* acts as the supervisory body that can punish the trustee for failure to uphold the trust honestly. In fact, the Muslim has an option to create family waqf under the Labuan Islamic Services and Securities Act 2010.

III. Conclusion

The emergence of various new waqf enactments is welcomed. The Malaysian legal framework on matters pertaining to Islam and land has resulted in various Enactments being introduced in various states, including waqf enactments. To some extent, there are different headings with different wordings used in the Enactments. The differences are comprehensible as it facilitates the current needs of the jurisdictions. Some states may experience a fast and vast aspect of waqf development thus requiring urgent solutions to the problems. Some states are slow due to less demand for new legal and juristic opinion. Nevertheless, they learn from each other. It is observed that Malaysia is fast in catching up with the latest developments in waqf administration covering almost all aspects of economy, social, welfare, Islamic finance, *takaful* or even tax law. The waqf enactments are the product of continuous efforts to improve and making Malaysian waqf law to be held in high regard in the eyes of the world and towards becoming a waqf hub in the region.

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The National Land Code 1965

Detention under Anti Terrorism laws in Malaysia and Nigeria: An Expository Study on Boko Haram Suspects

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Abstract

Terrorism is an organised transnational crime that has the potential danger to the stability and security of nations, and largely a threat to international peace. The rise of terrorist armed groups across the globe has brought about renewed efforts by States to enact legislations that will curtail the harmful activities of terrorists. Detention is one of such effort used in preventing and disrupting the plans of these terrorists. Nations affected by the activities of armed terrorists experienced arrest and detention of suspects, backed with terrorism prevention legislations with the expected aim of safeguarding the national security. Nevertheless, such detentions are often posed with perceived threat of violation of rights. Cases of prolonged detention without trials are alleged, where suspects are kept on unsubstantiated suspicions with denied access to lawyer and family members. The opportunity to challenge these violations and the basis of detention before the court of law are equally denied. The paper, using doctrinal research method examines anti terrorism laws in Malaysia and Nigeria, with particular reference to detention of Boko Haram suspects in Nigeria. The paper concludes with recommendations on the challenges faced by detainees and the need for adequate safeguards on their rights.

Keywords; *Terrorism, Detention, Boko Haram, Human Rights*

I. Introduction

Prevention of terrorism is undeniably an important task in maintaining peace, security and stability of any country. Terrorism is an emerging phenomenon across the globe. It is used to achieve political, religious or ideological aim, by the intentional use of force on indiscriminate people. The act of terrorism is usually carried out with the intention of causing death or serious bodily harm on civilian, government or organisations. Terrorism has been a great threat to the society and it is necessary to control, including by preventive laws. States for instance detains suspects of terrorism for long period of time without trial. The detention of suspects is generally permitted under human right laws – either domestic or international - provided it is based on reasonable grounds and procedures as established by law. The detention should not be arbitrary, discriminatory, or disproportionate and should be subjected to fair and effective judicial review. Hence, persons in detention should not be maltreated and adequate safeguards should be provided for the protection of their rights. However, not all state actions are within the permitted confine of the laws. In balancing between the security of the nations and the rights of alleged terrorists, the state apparatus sometime err on the side of security.

Nations affected by the activities of armed terrorists experienced arrest and detention of suspects, backed with terrorism prevention legislations with the expected aim of safeguarding the national security. Nevertheless, such detentions are often posed with perceived threat of violation

of rights. Cases of prolonged detention without trials are alleged, where suspects are kept on unsubstantiated suspicions with denied access to lawyer and family members. This could be seen for instance in states that have suffered prolong fights against armed terrorists such as the state of Nigeria in dealing with the Boko Haram insurgents of Nigeria that carried out deadly attacks in the sub Saharan Africa which destroyed lives and properties including that of civilians. Malaysia also has a fair share of dealing with armed terrorists albeit in much smaller scale and less persistence. Taking into account the fact that terrorist threats has no possibility of being abated any time soon, it is important to consider the legal complication arising from the use of detention law to tackle the threat.

II. Discussion

2.1 Meaning of Terrorism

With the severity and complexity of terrorism attacks, there is no unvarying definition of the act. Nevertheless, there are highlights given by scholars on the subject. Thus, terrorism is a generic term which encapsulates the method of causing harm based on certain motivations or ideologies prompting such actions. Terrorism is defined as the use or threat of violence to intimidate or cause panic, especially as means of affecting political conduct.[1] The acts of violence or intimidation can be carried out by a person or a group of persons. Terrorism is usually politically motivated and secretly planned to carry out a mischief. It could also be the use or threat of use of force for the purpose of advancing a political, religious or ideological cause. Similarly, the act of terrorism is described as the recurrent use or threatened use of politically motivated and clandestinely organised violence, by a group whose aim is to influence a psychological target in order to make it behave in a way which the group desires.[2]

Most of definitions on terrorism have a common feature of use of threat or violence to intimidate or cause panic. This goes to show the danger involved in the act of terrorism that requires major regulation by government in protecting its citizens from the harmful act of terrorists. Notably, the act of terrorism is often used against the state or the public with a politically or ideologically motivated attacks to intimidate or coerce the society or government to do or refrain from doing an act.[3]

Terrorism is both complex and sensitive, as it combines many aspects of human experience and existence. It is characterised by the use of violence against civilians with the shared desire of causing terror or panic in the society.[4] Terrorism advances violence in opposition to government and the targets are mostly state officials and government properties. Ultimately, the term terrorism is used to describe wide range of violence, and by its nature and characteristics it can occur both in conflict and peace time.[5] Hence, terrorism constitutes crime under domestic and international law, and it is motivated by complex medium of reasons and ideals. Due to the nature of threats from modern terrorism, it is no longer realistic for countries to rely on existing criminal law legislations to deal with terrorism. As such, it has become imperative for countries to enact separate laws to counter the menace, hence, Malaysia and Nigeria have enacted separate laws to deal specifically with terrorism threats.

2.2 Boko Haram Insurgency in Nigeria

Nigerian unfortunately have been living with the threat of terrorist activities of Boko Haram since 2009. Boko Haram is a radical sect that is against western ideology, with linkages with other terrorist groups like, *al-Qaeda* and *al Shabaab*.[6] Since 2009, the Boko Haram insurgents have

engaged in several attacks and heinous acts that have embossed the word 'terrorism' on the conscience of the Nigerian populace. The origin of Boko Haram can be tracked to 2002 when Mallam Mohammed Yusuf founded the sect, and gave it an official name as *Jama'atu Ahlis Sunna Lidda'awati wal Jihad*, an Arabic term meaning "People Committed to the Propagation of Prophet's Teaching and Jihad".[7] However, the sect is popularly known as Boko Haram, a Hausa name which translates into "Western education is prohibited". The conflict of Boko Haram has resulted in the death of thousands of innocent civilians, security personnel and government officials and have displaced over 2 million persons from their homes.[8] While the insurgency continued, Boko Haram is alleged to have committed war crimes and crimes against humanity in Northern Nigeria killing several persons.[9] They have wilfully carried out deadly attacks targeting innocent people.[10] Several places were targeted and bombed by Boko Haram, including markets, transport hubs, bars, restaurants and places of worship in cities across Northern Nigeria.[11] According to the Global Terrorism Index 2016, Boko Haram is one of the four most deadly terrorist groups in the world.[12] They have engaged in terrorist attacks in 5 countries, resulting in death of several persons.[13]

Serious human rights violations have been listed as part of the atrocities resulting from the fatal terrorist attack in the North Eastern Nigeria by Boko Haram against civilians, officials and the military targets.[14] Abduction of women and children has been recorded as part of the activities of the terrorist. Boko Haram as a national security problem, has posed threats and have carried out several attacks in Nigeria. One of the notorious attacks carried out by Boko Haram is the suicide car bomb attack on the United Nations Building in Abuja, where at least 18 people were killed, and many more injured.[15]

In response to the wicked activities of the insurgent's government deployed security operatives to enforce the law and protect innocent civilians, several arrest and detention of suspects linked with the activities of the insurgents were made.[16] However, there are allegations of prolonged detention under the Terrorism Prevention Act of Nigeria, where suspects are kept for long period without trial. Several arrests were made under the terrorism prevention law, thus, in November 2011 a member of the Nigerian parliament was arrested and charged for having a connection with one Ali Sanda Umar Konduga (a Boko Haram's spokesman). According to the authorities several communications were traced between the Boko Haram member and the legislator.[17] Recently, the Nigerian Army released over 348 suspects of Boko Haram, who were arrested at different locations of Borno State in Nigeria. According to the Army they are released after they were found to be innocent.[18] Similarly, United Nations (UN) negotiated the release of 876 children from army detention for Boko Haram suspects in Nigeria.[19] Several detentions under the TPA have been carried out by the security operatives in Northern Nigeria, with the view of investigating and curtailing the act of Boko Haram suspects. This paper considers the Boko Haram insurgency due to their notorious attacks in the north eastern part of Nigeria that destroyed lives and properties. Consequent upon that, several suspects are still in detention awaiting prosecution, while others are still being investigated as their attacks on innocent public has not end.

2.3 Terrorism Prevention in Malaysia

Malaysia as a peace-loving, moderate and progressive Muslim-majority country has generally outside the incidence of terrorism or hot-bed of terrorists. However, Malaysia is not completely immune. Relatively minor terrorist-related incidences do occur from time to time. In July 2000, the al-Ma'unah group robbed firearms and ammunition from army posts.[20] They launched incipi-

ent attacks on electrical cable tower and planned to target a major Hindu temple and major refineries of alcoholic drinks in Kuala Lumpur. In December 2000, Kumpulan Militan Malaysia (KMM) robbed 2 banks in suburbs of Kuala Lumpur. However, in the second robbery a member of the group was shot dead and others arrested.[21] The arrests uncovered 84 other members and led to the discoveries of other violent crimes committed in line with the group plan for a Daulah Islamiah Nusantara. In 2015 and 2016, Malaysia arrested and convicted several supporters of ISIL (Islamic State of Iraq and the Levant).

Offences related to terrorism could be found under the Penal Code. Chapter VI of the Penal Code provides for offences against the state including waging war against the King which members of the al-Maunah group were convicted upon. Recognising the increasing threat of terrorism, amendments were made to the Penal Code to create offences specifically to terrorism. Chapter VIA provides for offences relating to terrorism including providing devices and recruiting members and supporting for terrorist groups. Included in the amendment to the Penal Code are new offences of activities "detrimental to parliamentary democracy" under section 124B and the offence of "sabotage" under section 124K of the Penal Code.[22] The Penal Code defines "activity detrimental to parliamentary democracy" as an activity "designed to overthrow or undermine parliamentary democracy by violent or unconstitutional means".[23] Sabotage is defined as an act or omission intending to cause harm i) for the interest of foreign powers or foreign organizations; or ii) to premises or utilities used for national defence or for war; or iii) to the maintenance of essential services.[24]

Malaysia has devised several means to prevent and minimise the increasing threat of terrorism that may likely to occur. Recently, Malaysia launched its first integrated special operations unit charged with the responsibility to respond to terrorism attacks and neutralise such threats.[25] The operation consists of officers from Malaysian police, army, navy and coast guard to act as first responders in an event of terrorism attacks. The integrated force is setup to strengthen the nation's security and protecting it from threats of terrorism. The Southeast Asia Regional Centre for Counter-Terrorism (SEARCCT) is also hosted by Malaysia. Malaysia also adopted hearts-and-minds approach in counter-terrorism.[26]

In connection with detention, the law that governs the act of terrorist and terrorism prevention in Malaysia is the Prevention of Terrorism Act 2015 (POTA). The law prevents the conduct and support for the act of violence involving terrorist organization of foreign countries and it provides for the control of persons affected by such act, as well as persons engaged in terrorism. The Act empowers the Malaysian authorities to detain terror suspects without trial for a period of two years and does not allow any judicial reviews on the detentions. Nevertheless, such detentions will be reviewed by a special Prevention of Terrorism Board.[27] Under the newly enacted Prevention of Terrorism Act 2015 (POTA), a board is established to approve detention or restriction orders for individuals "in the interest of security of Malaysia". Thus, a suspect can first be detained for 59 days without charge before being presented to the board. The board is appointed by *Yang di-Pertuan Agong* and its actions and decisions are excluded from the jurisdiction of any court, it has the power to renew detention orders indefinitely.[28] The decision of the board cannot be appealed upon, except in relation to question on compliance with procedural requirement in POTA.[29]

The POTA is reminiscent of Malaysia's Internal Security Act 1960 (ISA), abolished in 2012, which also allowed for indefinite detention without trial. However, the new law has not included the necessary safeguards to ensure fair trials and respect of human rights so it could be just as susceptible to abuse as the widely condemned ISA, which was used to unjustly detain govern-

ment critics and created a climate of fear in the country for decades.[30] The Act provides for the prevention of terrorism, its support or act involving listed terrorist organisation in foreign countries or any part of it. The Act further protects Malaysia from any act by person that threatens or prejudicial to its security.[31] Nevertheless, POTA has some safeguards on the rights of detainees. Even though a police officer is empowered under the Act to arrest without a warrant where he has reason to believe that there is justification to hold an inquiry into a person, the person arrested is to be produced within twenty-four hours before a Magistrate.[32] An Inquiry Officer, who is not a police officer, conducts his inquiry and makes his reports on his findings to the Prevention of Terrorism Board.[33] Consequently, where a person is detained under the Act and where it was found that there are no grounds for which he is lawfully detained, the Sessions Court Judge will direct his release, subjects to certain conditions such as provision of bond, police supervision and attaching an electronic monitoring device.[34]

Suspect arrested for terrorism is subject to the decision of the board constituted under POTA and it reviews cases in line with the provisions of the Act. Although the powers and decision of the Board are subject to judicial review, the grounds for reviews are very limited, namely to the issue on compliance with procedural requirements under the Act.[35] These restrictions seems to repeat the legal position with regards to orders of the Minister under the repealed Internal Security Act 1960 (ISA) and thus at odds with the avowed objective of reforming the ISA.

The Prevention of Terrorism Act was enacted to fight the growing global threat of terrorism, even though it transgresses basic civil liberties as laws a preventive detention law is expected to do. In order to avoid these constitutional breaches against articles 5, 8, 9, 10 and 13, the Act relied on Article 149, which allows Parliament to enact special laws to stop or prevent threats to security and public order. In spite of this constitutional allowance, the court had held that article 149 of the Federal Constitution is not a *carte blanche* denial of rights.[36] Rather, it is merely a mechanism to allow Parliament to enact provisions contrary to such rights.[37]

Thus, the law is specific on the rights of individuals, which are considered as fundamental and needs to be upheld at all times. However, due to the nature of terrorism and the terrorist acts, strict measures have to be in place to prevent it, as it consequences are loss of life and damage to properties. Nevertheless, it is important for adequate safeguard to be in place to prevent potential abuse of the law.

2.4 Terrorism Prevention in Nigeria

As a part of efforts geared towards the activities of the terrorist in Nigeria, particularly the Boko Haram as described above, various security operatives have established counter-terrorism units to tackle and address the issues of insurgency.[38] The legal framework for the prevention of terrorism in Nigeria is principally incorporated in the Terrorism (Prevention) (Amendment) Act 2013. The Act was essentially enacted to prevent and deal with the trend of terrorism emerging in Nigeria. The Constitution empowers the National Assembly to make laws for the peace, order and good government of Nigeria.[39] It may make laws for the Federation or any part thereof with respect to the maintenance and securing of public safety and public order and providing, maintaining and securing of supplies and services as may be designated by the National Assembly as essential supplies and services.[40]

Before the enactment of the Terrorism Prevention Act, the Criminal Code[41] and the Penal Code[42] and other legislations managed the administration of criminal justice system in defining and prescribing punishment for criminal offences in Nigeria. Both the Criminal Code and Penal

Code did not make specific provisions for terrorism. The legislations however, criminalise specific acts of violence such as kidnapping, murder, homicide, rape, riot, and other violent activities which are synonymous to terrorist activities. Therefore, the coming into force of the Terrorism (Prevention) Act has brought relief for Nigerians with the specific prohibition of terrorism and other ancillary offences.[43]

The act of terrorism causes great danger on the lives and the peaceful wellbeing of the society. Hostage taking in form of kidnapping is an act of terrorism under the Act.[44] This can be done by detaining or seizing a person or its attempt to a third party to do or refrain from doing an act may be capable of being a terrorist act.[45] More often, detention has been the measure used in curtailing the acts of terrorist, so that they do not have the opportunity of carrying out their attacks. However, under the Nigerian Constitution every person is entitled to enjoy his liberty without hindrance except in accordance with the law.[46]

2.5 Detention of Terrorist

Generally, the liberty of a person is guaranteed under the law. However, there are certain situations and acts that will deny him of this right and will be construed as forfeited. The fact that a person has a duty to ensure that he should not exercise his rights to the detriment of other person's right or against the accepted social order or prejudicial to public order.[47] Thus, his right stops where other's right's begins, and as such his act and conduct must conform with the laid down norms and practice of the law and society. Accordingly, the UDHR states that an individual in the exercise of his rights and freedoms, shall be subject only to such limitations as are determined by law, solely for the purpose of securing due recognition and respect for the rights and freedoms of others and meeting the just requirements of morality, public order and the general welfare in a democratic society.[48]

Therefore, if a person exceeds his bounds, he is certainly liable to face the consequences of his actions. Usually, whether or not a person exceeds his bound will be determined by the courts. Upon conviction, the court will impose the punishment which may include imprisonment. The problem with such laws that provide for detention is that it provides for "detention without trial" or executive detention. Without judicial intervention, the law could be easily be abused for political purposes as the late Hugh Hickling, the architect of the notorious repealed Malaysian Internal Security Act 1960said that he "could not imagine then, that the time would come when the power of detention...would be used against political opponents, welfare workers and others dedicated to nonviolent, peaceful activities".[49]

Be that as it may, after repealing the Internal Security Act 1960, Malaysia enacted the Prevention of Terrorism Act 2915 where any person who is reasonably suspected and believed that grounds exists as to which it could justify holding an inquiry into his case may be arrested and his case referred by a police officer to the public prosecution for direction.[50] The person arrested shall unless sooner released be taken without reasonable delay, or within 24 hours be brought before a magistrate.[51] Where person is taken before a magistrate, the magistrate shall after the production of a written statement by a police officer, and on a satisfied grounds that he is engaged in the commission or support of terrorist act involving listed terrorist organisation in foreign or any part of a foreign country be remanded in police custody for a period of 21 days.[52] Consequent before the expiry of the 21 days if the person is not released, and the magistrate is satisfied that there are sufficient evidence to justify the holding of inquiry, he could be further remanded for a period of 38 days.[53] Where no ground for his lawful detention exists his release shall be directed. Therefore,

the person so arrested and detained shall if not sooner released be brought before an inquiry officer.[54] At any time during his detention, a person may be brought before a Sessions Court Judge who may release him if there is no ground to detain him.[55] The person may also be released with bond or police supervision, and with electronic monitoring device.[56]

In addition to the 21 days detention with a further extension of 38 days under POTA, a suspect could be arrested and detained under the Security Offences (Special Measures) Act (SOSMA) 2012.[57] The Act allows for 2 days detention without legal representation and for detention for up to 28 days. Not long after the enactment of this law, criticisms have been raised to alleged abuse of the law by resorting to its draconian nature to deal with dissidents of the government of the day rather than with genuine existential threat to the state.[58] Nevertheless, authorities have claimed that detentions under SOSMA are said to be carried out within the ambit of the law which still begs the question of whether the authorities are adhering to rule of law or rule by law.[59]

Similarly, in Nigeria the Terrorism (Prevention) Act provides that, where a person is arrested under a reasonable suspicion of having committed an offence described under the Act,[60] the National Security Adviser or Inspector General of Police or a delegated officer may, subject to the section, direct that the person arrested be detained in a custody for a period not exceeding 24 hours from his arrest, without having access to any person other than the Medical Doctor and legal counsel of the detaining agency.[61]

However, the Constitution of the Federal Republic of Nigeria recognises the fundamental right of an individual to a counsel of his own choice.[62] Section 28 of TPA borders on the discretion of a detainee to engage the counsel of his choice, the provision has the sanctified provision of the constitution that gave him an unhindered choice to engage who will represent him. Thus, it is uncertain to determine the intent of the legislations as to what it seeks to achieve.

The idea of detaining suspected terrorist for a longer period is perhaps to achieve a preventive and disruptive measure on the activities and network of terrorist, thereby making it difficult to carry out their plans. Nevertheless, prolonged detentions can only be condoned where the detention has been judicially sought and obtained.

Conversely, Nigeria's Terrorism (Prevention) Act,[63] gives the military wide powers to arrest and detain people for a long period without trial. Section 27 accepts the arrest and detention of a person found on any premises or places or in any conveyance, by an authorised officer of any agency until the completion of the search or investigation under the act. The act allows for unspecified detention, allowing the court to grant an order for the detention of a suspect for 90 days, and to renew the order for additional 90-day periods until the conclusion of investigation and prosecution.[64] Under the act, anyone who engages in, attempts, threatens or assists an act of terrorism, or omits to do anything that is reasonably necessary to prevent an act of terrorism may be guilty under the act and subject to penalties including up to life imprisonment.

Conversely, the treatment of suspects detained for terrorism slightly differs in Malaysia and Nigeria. Thus, in Malaysia the case of a suspected terrorist is handled by a Board established under the POTA, who decides and deal with the case. However, in Nigeria such Board does not exist, a suspected terrorist is detained and treated like any other detainee under the applicable criminal laws, but subject to certain conditions and requirements provided under the TPA, for instance the length of time provided by TPA that a detained suspect of terrorism is to be held.

Nevertheless, Malaysia and Nigeria have some similarities with regards to the period of detention for investigation in the case of suspected terrorist, the laws preventing terrorism in both countries allowed for a longer period of detention than provided for in their Constitutions.[65]

However, on the treatment of terrorism suspect, POTA provides that once a suspect is arrested for the offence of terrorism his case will be referred to an inquiry officer who will inquire into the matter and report same to the Board established under the Act. The Board upon receipt of such report will decide either to prosecute or release the suspect on conditions determined by the Board. Conversely, in Nigeria the trend of dealing with terrorism suspects is different with that of Malaysia, in Nigeria the suspect if arrested, will be detained and after investigations he will be arraign before a court of law. However, at the moment where suspects of terrorism are mostly kept in Military barracks, because there are reported cases of prison break in facilities where Boko haram suspects are detained.[66]

III. Conclusion

The unique nature of terrorism reveals that its prevention and control need a special approach of detaining suspects in an unusual manner. Thus, detention for terrorism takes longer period than other offences. In that suspects are kept for long to break the chain of plans designed by the terrorist. Greater caution and restraint should be observed when security detentions are resorted to under the law. Allowing officials to exercise authority, on the basis of classified intelligence information gathering and subject only to limited judicial review, to deprive persons of their liberty based on grounds of security, is hazardous to liberty and to the rule of law. In many countries, political dissidents may be deemed security threats. Even in democracies under the rule of law, over-zealous officials may be too quick to conclude, on the basis of inconclusive intelligence information, that someone is a security threat. Nevertheless, if security detention is to be allowed, its use must be restricted to an absolute minimum, and subjected to rigorous procedural safeguards.

The laws on prevention of terrorism were described as legislation having loosely defined clause with minimal provisions on the safeguards that will ensure that the rights of on detainees are not abused. The provision ousting the jurisdiction of courts is a major setback on the safeguard of rights. Therefore, laws on prevention of terrorism should make adequate provisions for the protection of the rights of detainees because both laws on prevention of terrorism in Malaysia and Nigeria provides for a longer period of detention for suspects of terrorism.

In addition, the fight against terrorism must be done comprehensively taking into the short term and long term strategies and dealing with its root causes. It is insufficient to be successful in the tactical aspect in the fight against terrorism but failed to prevent regeneration of new terrorists. Perhaps the Malaysian hearts-and-minds approach in counter-terrorism should be emulated.

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Robust Yet Fragile: Enactment of Law Number 16 Of 2011 to Promote the Role of Advocate in Implementing Legal Aid[1]

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ABSRACT

Legal aid is crucial in fulfilling rights to equality before the law. In Indonesia, before 2011, underprivileged citizens may access free charge of trial cost (*pro deo*) and free charge of lawyer' fee (*pro bono*) procedures. The procedure of *pro deo* is guaranteed by Law Number 48 Year 2009 concerning Judicial Power, meanwhile performing *pro bono* is an obligation for advocate mandated by Law Number 18 Year 2003 regarding Advocates. These procedures are found to be beneficial. In fact, with vast number of underprivileged justice seekers and still small number of advocates fulfilled *pro bono* obligation, wider public participation is needed. The enactment of Law Number 16 Year 2011 tries to answer that challenge. The law mandates to the government has the responsibility to fund legal aid performed by legal aid provider. Clearly, legal aid provider is defined as legal aid institution or any civil society organization. Five years after the enactment, legal aid has stellar performance in helping thousands of underprivileged justice seekers. This article analyses how does the law affect to create synergy between *pro bono*, *pro deo*, and legal aid to boost advocate performance in giving back to community.

Key words: *advocates, legal aid, Law Number 16 Year 2011*

I. Introduction

Article 27 (1) of the Constitution of Republic of Indonesia Year 1945 states that every citizen has the rights of equality before the law and government. The article is then supported by Article 28 D (1) stating that every citizen has the rights of recognition, security, protection, and certainty of fair law along with equality before the law. The Constitution gives the State of Republic of Indonesia to fulfil those constitutional rights.

To fulfil the rights of equality before the law, justice system has an important role. The system shall be independent for any influences. Importantly, the system has to provide speedy, simple, low cost trial as mandated by Law of the Republic of Indonesia Number 48 Year 2009 concerning Judicial Power. Unfortunately, cost of trial has always been challenging due to high number of disadvantaged citizens. [2] For them the cost is barely affordable. [3] This condition, by all means, contradicts with the goal to fulfil rights of equality before the law.

The Constitution does not mention explicitly on giving legal aid for disadvantaged citizens. However, several articles may be used to see how the Constitution aims the State to give positive discrimination so that equality may be achieved, as mandated by Article 28H (2), (4), and (5), along with Article 34 (4) and (5). Those articles then supported by laws and government policy. Legal aid is acknowledged as one of the methods in implementing positive discrimination for disadvantaged citizens in accessing trial.

Historically, legal aid was first introduced by the Dutch Colonizer by the enactment of HIR and RBg (procedural law code book) for The Dutch East Indies—which included Indonesia. After Indonesia won its independence, the State still recognizes the code book and adds more specific laws regarding procedural laws which govern on legal aid. Several to mention are Law of Republic of Indonesia Number 8 Year 1981 regarding criminal procedural law code book (Kitab Undang-Undang Hukum Acara Pidana-KUHAP), Regulation of Minister of Justice Number 1 Year 1945, Law of Republic of Indonesia Number 48 Year 2009 concerning Judicial Power, and Law of Republic of Indonesia Number 16 Year 2011 regarding Advocates. Using those laws, we can recognize that in implementing legal aid, the State requires advocates to give free charge of lawyer' fee (*pro bono*) and mandates to court to allows disadvantaged justice seekers to access trial by free charge of trial cost (*pro deo*).

Those mechanisms were found to be beneficial, but do not open more engagement of civil society in providing legal aid. Notably, encouraging advocates to give *pro bono* is challenging since tension within Indonesia Advocate Bar Association whereas now Indonesia has more than one national bar associations. As result monitoring and evaluation of *pro bono* is in limbo. With those problems faced, a new hope has come by the enactment of Law of Republic Indonesia Number 16 Year 2011 regarding Legal Aid.

The law mandates to the government to provide legal aid helped by legal aid providers. The providers are non-governmental organization focus on giving legal aid (includes campus) accredited by the government. The legal aid conducted by permanent or non-permanent advocates work for the providers. Five years after the enactment, the question rises how how does the law affect to create synergy between *pro bono*, *pro deo*, and legal aid to boost advocate performance in giving back to community.

II. Discussion

A. Concept of Legal Aid

Legal aid is crucial fulfilment of human rights, as it is mentioned by Reginald Heber Smith *"To withhold the equal protection of the laws, or to fail to carry out their intent by reason of inadequate machinery, is to undermine the entire structure and threaten it with collapse."*[4] Legal aid is beneficial both for disadvantaged citizens and advocates. For disadvantaged citizens, they would be able to access trial assisted and represented by advocates. Meanwhile for the advocates, they have the opportunity to enhance their expertise,[5] lift up the legal professional's status in society, increase trust from society to advocates.[6] Additionally, legal aid is beneficial in achieving efficient trial[7] whereas by good representation, trial is proceeded easier and more efficient.[8]

Hennie van As classifies two approaches in providing legal aid. [9] First, it is solely the obligation of advocates to give free legal aid. [10] Second, advocates shall be supported by the State in performing such action. [11] In this second approach, the government will reimburse all expenses spent by the advocates. The advocates perform the aid can be those who work as permanent or non-permanent advocates in the institution. [12]

In the United States of America (USA), over sixty years, the American Bar Association (ABA) joined in providing legal aid.[13] Started 1996, ABA invited campuses to also participate in giving legal aid by support their students' involvement in providing legal aid or by establishing a legal aid institution/facility in prodiving the aid.[14] As for design on legal aid, the USA set up three methods.[15] First is by the establishment a special federal institution namely Legal Service Corporation

(LSC) funded by federal government by grant mechanism.[16] LSC is required to invite private advocate for at least 12.5% of its representation for legal aid.[17]

Second is legal aid conducted by civil legal aid association which has not affiliation to the LSC.[18] Unlike with the LSC, the association is not funded by the federal government. This association, typically, is established by law schools.[19] The institution gets its funding from private or government.[20] Furthermore, the USA also provides legal aid by obligating to advocates to serve for *pro bono*.[21]

B. Indonesia Legal Aid Framework in Promoting Advocate' Role on Legal Aid

In Indonesia, legal aid is served by several methods. Using As' classification above, the government supports the role of lawyer in giving *pro bono* service. As if we use comparative study with the USA, unlike the USA, Indonesia does not have a national institution providing legal aid. Before the enactment of Law concerning Legal Aid, disadvantaged justice seekers may access *pro bono service* and *pro deo* proceeding.

First, giving *pro bono* service is a duty of advocates carried out by Article 22 Law of Republic of Indonesia Number 18 Year 2003 concerning Advocates. Additionally, Article 7(h) of Indonesia Advocate Code of Etic by Indonesian Advocates Association mentions the same obligation for advocates. Accordingly, to Regulation of Indonesian Advocates Association Number 1 Year 2010 issued by Indonesian Advocates Association (Peradi), every advocate has to spend at least 50hours/year for *pro bono* service. However, there is no explanation on monitoring and evaluation of *pro bono* service by advocates.

Another advocate association namely Congress of Indonesian Advocate (KAI) also gives obligation for its members to perform *pro bono* for at least 50hours/year. In fact, the service is not counted with hours of performance but accordingly to number of cases.[22] Members of KAI are spread out all over Indonesia working with non-governmental legal aid providers such as, Legal Aid Institution (LBH).[23] KAI has been preparing for its Deed of Establishment where it will explain procedure in serving *pro bono* and enforcing punishment by its own internal mechanism.[24]

Nonetheless, issues on monitoring and evaluation take small parts of the implementation of *pro bono* is explained technically by Government Regulation Number 83 Year 2003 concerning Requirement and Procedure on *Pro Bono* Service whereas it is stated in Article 14 (2), to advocates who did not perform *pro bono* service may get: oral warning; written warning; suspension of license consecutively from three to twelve months; disbarment. Unfortunately, enforcement of the article is given to the advocates association. With there is no unification of advocate bar associations, it then gets hard to undertake the enforcement.

Regarding *pro deo* service, the Supreme Court of Republic of Indonesia (MA) released Regulation of the Supreme Court Number 10 Year 2010 amended by Regulation of the Supreme Court Number 1 Year 2014 on Guidance of Legal Aid Service in Court. The regulation gives support to Law of Republic of Indonesia Number 48 Year 2009 concerning Judicial Power by stating that every citizen deal with justice system have the rights to get legal aid and the State bears the trial cost via Supreme Court and the Supreme Court requires underneath courts to establish a center to provide the legal service (POSBAKUM) in the area of Religious Court, General Court, and Administrative Court. Additionally, the underneath courts also have to create a mobile trial.

The *pro deo* service is found to beneficial for advocates who have high commitment to perform *pro bono*.[25] With combination of *pro bono* and *pro deo*, the disadvantaged justice seekers will get free of trial cost and advocates' fee.[26] Meanwhile, mobile trial is located near

community, aimed to help justice seekers who have problems to appear before the court due to distance, transportation, and travel cost.[27]

Data from Indonesia Statistic Institution shows that huge number of disadvantaged citizens, approaching 2015, there are 28.5 million disadvantaged citizens.[28] It is not enough to depend on *Pro Bono* service and *Pro Deo* proceeding. Addressing this problem, Law of Republic of Indonesia Number 16 Year 2011 concerning Legal Aid was enacted. The law defines legal aid as free legal service given by legal aid providers to recipient of legal aid. The recipient is a person or group of disadvantaged justice seekers. Legal aid covers cases in field of civil, criminal and administrative law both for litigation and non-litigation service. Legal aid is aimed to guarantee and fulfill rights for recipient to achieve access to justice, to fulfill constitutional rights of equality before the law to all citizens, guaranty certainty of implementation of legal aid in all over Indonesia and achieve effective, efficient and reliable judiciary.

In 2016, there are 405 legal aid providers give legal aid service.[29] Counted from November 2014, Jakarta Legal Aid Institution (LBH Jakarta) received 1322 cases, includes 1142 individual cases and 180 group cases, with number of justice seekers served is 56451 people. [30] Jakarta Legal Aid Institution of the Indonesian Women Association for Justice (LBH Apik Jakarta), every year, obtains 500-700 cases. In Yogyakarta, Yogyakarta Legal Aid Institution (LBH Yogyakarta) received 400 cases last year. [31] Those institutions were established long before the Law concerning Legal Aid is established, but with the huge number of disadvantaged justice seekers, the new model of legal aid more NGO and campuses may contribute and again more justice seekers may be served. Another benefit of the 2011 Law, the legal aid covers both litigation and non-litigation expenses, as shown by this table.

Table 1 Details on Legal Aid Coverage

NON-LITIGATION		
Number	Activity	Coverage (IDR)
1	Community Lawyering	3740000
2	Legal Consultation	140000
3	Research	2500000
4	Case investigation	290000
5	Mediation	50000
6	Negotiation	500000
7	Community Empowerment	2000000
LITIGATION		
	Out of court assistance	500000
	Type of cases	Coverage (IDR)
1	Criminal cases	5000000
2	Civil cases	5000000
3	Administrative cases	5000000
4	Final Review (Peninjauan Kembali) Legal remedies to Supreme Court	1000000

Source: *Decree of Minister of Justice and Human Rights Number M.HH-01.03.03 Year 2015*

This legal aid method is conducted by reimbursement system. Whereas every year, the legal aid providers are required to submit a year plan. After they finished their service or activity and they may submit the financial report and the Government will reimburse. Yet the reimbursement system is found to be very complicated. In many cases, the legal aid providers do not have idle

money to proceed. Furthermore, the reimbursement takes long time.[32]

The problem above then leads to low absorption of the legal aid funding. In 2014, only 34% was absorbed and went up to 60% in 2016.[33] In total, for 2016, the Government prepares for 45 billion.[34] Again, due to the complexity of reimbursement system, lots of legal aid providers not solely relied on the legal aid, they use grants and donors for their operational to perform legal aid.

In summary, Indonesia has established at least three methods in accommodating disadvantaged justice seekers: *pro bono*, *pro deo*, and legal aid. Those methods are found to be beneficial to boost number of recipients, and advocates' performance. With those methods, still several obstacles are found when it comes to more advocates' contribution for disadvantaged justice seekers. First, no exact detail on monitoring and evaluation of *pro bono* performance. Second, polarization of national bar association leads to lack on enforcement of *pro bono* obligation. Third, the complexity of legal aid system of reimbursement makes advocates at legal aid providers discouraged to use legal aid and spent their energy to get grants and donors.

Those obstacles shall be responded by the Government, the Supreme Court, the bar associations. There shall be a synergy between three methods. The Supreme Court shall be given authority to object advocates who did not fulfill their *pro bono* service to stand before the court. The bar associations shall have same standards in examining legal aid performance. Lastly, the government shall find solution to solve complexity of the reimbursement system.

ENDNOTES

[1] This article is based on research conducted in 2016 by writers with title The Role of Advocates in the Implementation of Legal Aid after the Enactment of Law of Republic of Indonesia Number 16 Year 2011 concerning Legal Aid. The research was funded by Faculty of Law, Universitas Gadjah Mada.

[2]Badan Pusat Statistik, jumlah penduduk miskin di Indonesia per September 2015 berjumlah 28, 59 juta orang lihat http://www.bps.go.id/linkTabelStatis/view/id/1494, jumlah pencari keadilan ke Lembaga Bantuan Hukum (LBH) Jakarta selama 2014 adalah 1.221 orang, lihat http://news.metrotvnews.com/read/2014/12/23/335823/jumlah-pencari-keadilan-meningkat-di-tahun-2014, date access February 28, 2016, at 12:36 WIB.

[3] *See* Circular Letter of Supreme Court of Republic of Indonesia Number 04 Year 2008 concerning Trial Cost (Surat Edaran Mahkamah Agung No. 4 Tahun 2008 tentang Pemungutan Biaya Perkara)

[4] Theodore Voorhees, *Legal Aid: Past, Present, and Future*, American Bar Association Journal, Vol. 56, No. 8, August 1970, p. 768.

[5] Roberth Granfield, *The Meaning of Pro Bono: Institutional Variations in Professional Obligations among Lawyers*, Law & Society Review, Vol. 41, No. 1 (March 2007), at116.

[6] Glenn R. Winters, *Why I believe in Legal Aid: Equal Justice for All in America*, American Bar Association Journal, Vol. 43, No. 7 (July 1957), p. 618.

[7]*Ibid.*

[8]*Ibid.*

[9] Hennie van As, *Legal Aid in South Africa: Making Justice Reality*, Journal of African Law, Vol. 49, No. 1 (2005), p. 54.

[10] *Ibid.*

[11]*Ibid.*

[12]*Ibid.*

[13] Voorhees, *Op. Cit.*, p. 756.

[14] Granfield, *Op. Cit.*, p. 83.

[15] Rebecca L. Sandefur, *Lawyers' Pro Bono Service and American-Style Civil Legal Assistance*, Law & Society Review, Vol. 41, No. 1 (March 2007), p. 83.

[16] *Ibid.*

[17] *Ibid.*

[18] *Ibid.*

[19] *Ibid.*
[20] Ibid.
[21] Ibid.
[22] Data from interview with LBH Jakarta, taken in July, 2016.
[23] *Ibid.*
[24] *Ibid.*
[25] Data from interview with Zahru Arqom (advocate), taken in June, 2016.
[26] *Ibid.*
[27] Panduan Sidang Keliling, http://www.pa-panyabungan.net/index.php?option=com_content&view=artcile&id=282&Itemid=599
[28] **Badan Pusat Statistik, 2015, *Persentase Penduduk Miskin Maret 2015 Mencapai 11,22 Persen,* https://www.bps.go.id/Brs/view/id/1158, last access August 15, 2016, at 14:10 WIB.**
[29] Data from interview with Legal Aid Division of Supervisory Body on Regulation of Ministry of Justice and human Rights, taken in July, 2016.
[30] Lembaga bantuan Hukum Jakarta, 2015, *Catatan Akhir Tahun Refleksi Hukum dan HAM di Indonesia 2015*, Lembaga Bantuan Hukum Jakarta, Jakarta, p. 7.
[31] Data from interview with LBH Yogyakarta, taken in August, 2016.
[32] Data from interview with LBH Aliansi Perempuan Untuk Keadilan (APIK) Jakarta, July 2016.
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2017 Constitutional Reform in Turkey: What the Constitutional Ammendment Draft will Change

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ABSTRACT

On 10 December 2016 Turkey's ruling Justice and Development Party (AKP) together with Nationalist Movement Party (MHP) subbmitted a draft of constitutional amendments that aim to change current parliamentary government system that Turkey is governed to a presidential system. The draft constitutional ammendment bill has been approved by parliament on 21 January well more than the 330 votes in the parliament needed for approval. These changes will now go to a popular referendum, which will take place on 16 April. The important changes that envisaged by the constitutional ammendment bill are that The prime minister's office and the cabinet will be abolished , The president will become the head of the executive branch and will be allowed to issue decrees, The president will be allowed to retain ties to a political party, The presidential and parliamentary polls will take place simultaneously, every five years, The Judiciary will be required to be impartial and independent, the age for right to be elected will decrease to 18 and the number of member of parliaments will increase from 550 to 600. The main aim of the changes is to eliminate the pupillage system over the civilian politics as the 1982 Constitution prepared after the military coup and by the military junta has estabklished an institutional pupillage system over the civilian govrnments. It is obvious that any attempt to form an institutional control over the people's will is against democracy. By making will of the people as central decision making of the political mechanism the ammendment bill is envisaged to change the whole system to be more accountable to people. The paper is discussing 2017 constitutional ammendment bill in Turkey which will be voted in popular referandum on 16 April 2017.

Monitoring Implementation of the Convention on the Rights of Persons with Disabilities (CRPD) at National Level: Obligations on and Options for Malaysia

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ABSTRACT

The Convention of the Rights of People with Disabilities is an international human rights treaty of the United Nations that has the objective to safeguard the rights and upheld the dignity of persons with disabilities. It was adopted on 13 December 2006. Malaysia ratified the Convention on 6 July 2010. Consequently, the country is obliged to fulfil obligations and duty under the convention. The Convention includes both national and international monitoring mechanisms. One of the obligations that Malaysia has to fulfil is to monitor the implementation of the Convention at the national level. Article 33 of the Convention requires the States set up national focal points governments in order to monitor implementation of the Convention's precepts. States must also set up some sort of independent monitoring mechanisms. States also need to establish or designate a framework that includes one or more independent mechanisms to promote, protect and monitor the Convention's implementation. After almost a decade of its adoption by the UN, and seven years after its ratification by Malaysia, it is pertinent to determine to what extent have the country managed to realize the spirit and to achieve the objective of the Convention. This is a qualitative and legal studies adopting doctrinal and legal research approaches. The focus of this paper is to outline obligations and duties of Malaysia under article 33 of the CRPD. It also examines whether the country has fulfilled the obligations and duties as well as outlining the current position on the matter. It also considers available options in fulfilling the obligations in monitoring the implementation of the Convention.

Keywords: *People with disabilities, Convention of the Rights of People with Disabilities, Human Rights, Monitoring.*

I. Introduction

WHO and World Bank estimated that there are 15% of the world population have some form of disabilities in 2011. Over 650 million persons around the world live with disabilities. While poor people are significantly more likely to acquire disabilities during their lifetimes, disability can result in poverty, too, since disabled persons often face discrimination and marginalization. There are 445,006 people with disabilities registered In Malaysia as of 2012. However, as registration is voluntary, it is not reflective of the real numbers in the country. Disabled people are part of the community. Therefore, they have equal rights and opportunities to live a life like other members of society.

II. Discussion

2.1 Rights of Persons with Disabilities and the CRPD

Persons with disabilities are still primarily viewed as "objects" of welfare or medical treatment

rather than "holders" of rights. Despite being theoretically entitled to all human rights, persons with disabilities are still, in practice, denied those basic rights and fundamental freedoms that most people take for granted. Rights-based approach (rights-based) and protection should be used to ensure of the interests and well-being of the disabled.

In order to realize the rights the Convention on the Rights of Persons with Disabilities and its Optional Protocol, was adopted by the United Nations General Assembly on 13 December 2006. At its core, the Convention ensures that persons with disabilities enjoy the same human rights as everyone else and are able to lead their lives as full citizens who can make valuable contributions to society if given the same opportunities as others.

The Convention clarifies the obligations and legal duties of States to respect and ensure the equal enjoyment of all human rights by all persons with disabilities. Once a country ratifies the Convention, the obligations established by the Convention must be reflected in the State's national legal framework, development planning and budgeting, and in related policies. The Convention highlights the concrete, pragmatic steps that States Parties should take to support the inclusion of persons with disabilities into all areas of development. Implicit in the Convention are three distinct duties of all States parties:

a. The obligation to respect – States parties must refrain from interfering with the enjoyment of the rights of persons with disabilities;
b. The obligation to protect – States parties must prevent violations of these rights by third parties. States must be diligent in protecting persons with disabilities from mistreatment or abuse; and
c. The obligation to fulfil – States parties must take appropriate legislative, administrative, budgetary, judicial and other actions towards the full realization of these rights.

2.2 Rights of Persons with Disabilities and the CRPD in Malaysia

Malaysia is fully committed in improving the welfare and development of its disabled population. This is evident in the signing of the Proclamation on Full Participation and Equal Opportunities for People with Disabilities in Asia and the Pacific region on 16 May 1994; and the ratification of the Convention of the Rights of the Child. The government has also endorsed the "Biwako Millennium Framework for Action Towards an Inclusive, Barrier-free and Rights-based Society for PWDs in Asia and the Pacific" to enable them to enjoy equal opportunities and to participate in the mainstream development of the country. The national Advisory and Consultative Council for People with Disabilities was established to coordinate the implementation of this framework.

In Malaysia, an act that specifically addressed the concern of this group had been suggested in 2002 through various consultations between government and disabled people organisations. The current legislation dealing with disabled people known as Persons with Disabilities (PWD) Act 2008 (Act 685) was enacted to fulfill the spirit of the CRPD. Malaysia ratified the United Nations Convention on the Rights of Persons with Disabilities (CRPD) on 6 July 2010, with reservations to Articles 15 and 18. Malaysia has not signed the Optional Protocols to this Convention. However, ratification of the CRPD is a step towards proving Malaysia's readiness to translate these rights into action. Enactment of the Act is consequential to the ratification of CRPD by Malaysia in 2010.

Besides the parent act, there are also other stipulated legislations covering the protection for disabled people such as Education Act 1996, Street, Drainage, and Building Act 1984, Employees' Social Security Act 1969, Limitation Act 1953. The current PWD Act 2008 has the objective

stated in the preamble 'to provide for the registration, protection, rehabilitation, development and wellbeing of persons with disabilities, the establishment of the National Council for Persons with Disabilities, and for matters connected therewith.' This statute, divided into 5 parts and 46 sections, is the first right-based legislation promoting and protecting the rights of disabled people in Malaysia

2.3 Monitoring the Implementation of CRPD

In accordance with article 4 of the Convention on the Rights of Persons with Disabilities, States parties undertake to ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind. To that end, States parties are required to adopt all appropriate legislative, administrative and other measures for the implementation of the Convention. In all human rights treaties, the implementation obligation is closely linked to a monitoring component.

The process of monitoring can be defined as 'collection, verification and use of information to address human rights problems.' It may be done through researching, gathering, analyzing and reporting information to identify human rights abuse and violations together with a systematic plan to reform the laws, policy, institutions and remedy to such violations.

The monitoring of human rights treaties is needed to assess not only whether measures to implement the treaty are adopted and applied but also to evaluate their results and therefore provide feedback for implementation. Monitoring mechanisms foster accountability and, over the long term, strengthen the capacity of contracting parties to treaties to fulfil their commitments and obligations. The Convention includes both national and international monitoring mechanisms. The relevant articles of the CRPS in this aspect are articles 33 and 34.

2.4 International Monitoring Mechanisms

International monitoring mechanisms (IMM) is provided in article 34. It establishes the Committee on the Rights of Persons with Disabilities, a committee of independent experts with several functions. Among the functions are stated below:

a. On the basis of periodic reports received from States and other interested parties such as national monitoring mechanisms and civil society organizations, the Committee engages in a constructive dialogue with States on the implementation of the Convention, and issues concluding observations and recommendations for follow-up action to improve and strengthen implementation;
b. The Committee holds days of general discussion, open to the public, during which it discusses issues of general interest arising from the Convention;
c. The Committee may issue authoritative statements, known as general comments, to clarify specific provisions in the Convention or specific issues arising in the implementation of the Convention;
d. The Optional Protocol gives the Committee authority to receive complaints, known as communications, from individuals alleging violations of any of the Convention's provisions by a State that has ratified the Optional Protocol. The Committee may present its views after considering the complaint in the light of the comments from the State concerned; and
e. The Optional Protocol also provides the Committee with an opportunity to undertake inquiries in States parties if it receives reliable information indicating grave or systematic violations of the Convention.

2.5 National Monitoring Mechanisms

National monitoring mechanisms (NMI) is dealt with by article 33 of the Convention on the Rights of Persons with Disabilities (CRPD). The article outlines state obligations regarding national implementation and monitoring. Historically the main accountability mechanism in UN human rights treaties has been periodic reporting by states to a UN expert committee or monitoring at the international level. An innovation in the CRPD is the requirement of states to create a framework to facilitate constructive domestic dialogue with the aim of promoting ongoing implementation of the Convention. Other conventions outline obligations only. They are silent on how these obligations are to be realized.

Article 33 obligates states to take concrete procedural, organizational, and administrative actions to transform rights into actions. The Convention thus provides practical guidance as to how it should be implemented: (through adoption of new acts, policies and measures that need all to be consistent with provisions of the Convention), and on the other side, it also indicates a number of institutions that need to be set up in order to coordinate and promote the implementation of the Convention.

Article 33 National implementation and monitoring:

a. States Parties, in accordance with their system of organization, shall designate one or more focal points within government for matters relating to the implementation of the present Convention, and shall give due consideration to the establishment or designation of a coordination mechanism within government to facilitate related action in different sectors and at different levels;
b. States Parties shall, in accordance with their legal and administrative systems, maintain, strengthen, designate or establish within the State Party, a framework, including one or more independent mechanisms, as appropriate, to promote, protect and monitor implementation of the present Convention. When designating or establishing such a mechanism, States Parties shall take into account the principles relating to the status and functioning of national institutions for protection and promotion of human rights; and
c. Civil society, in particular persons with disabilities and their representative organizations, shall be involved and participate fully in the monitoring process.

At the level of institutions, article 33 clearly identifies three mechanisms that are relevant for the implementation and monitoring of the Convention:

a. States have to designate one or more focal points within government for matters relating to implementation;
b. States have to give due consideration to the establishment or designation of a coordination mechanism within government to facilitate actions across sectors and at different levels; and
c. States have to establish or designate a framework that includes one or more independent mechanisms to promote, protect and monitor the Convention's implementation.

2.6 Focal Points Within Government

Under article 33 (1) States have to designate one or more focal points within government for matters relating to implementation. To fulfil this requirement the Malaysian government established the National Council for Persons with Disabilities by virtue of section 3 of the Persons with Disabilities Act 2008. The Council consists of:

a. The Minister who shall be the Chairman;
b. The Secretary General of the Ministry responsible for social welfare, who shall be the Deputy

Chairman;

c. The Attorney General of Malaysia, or his representative;
d. The Secretary General of the Ministry responsible for finance;
e. The Secretary General of the Ministry responsible for transport;
f. The Secretary General of the Ministry responsible for human resources;
g. The Director General of Education;
h. The Director General of Health;
i. The Chairman of the Commercial Vehicle Licensing Board; and
j. Not more than ten persons having appropriate experience, knowledge and expertise in problems and issues relating to persons with disabilities to be appointed by the Minister.

The Department of Social Welfare, Ministry of Women, Family and Community Development is basically in charge of matters pertaining to Persons with Disabilities. The Minister who is responsibility for PWD's matters is the Minister of Woman, Family and Community Development (MWFCD). Two main institutions that been given responsibility under the act are the National Council for PWD and Department for the Development of PWD (Section 2, PWD Act 2008).

The act gives many functions and power to the Council for PWD to make recommendations, coordinate, oversee, monitor the implementation and impact of any laws, policies, programs and activities relating to PWD including encouraging, promoting research and development (R&D) relating as directed by Minister (Section 9, PWD Act 2008). The promotion and protection towards people with disabilities must be consistent with the Federal Constitution and any written laws, and take into consideration the financial obligation held by government (Section 14, PWD Act 2008). The law also listed down several rights of promoting the wellbeing of people with disabilities.

Various rights for disabled people are being protected under the legislation including access to public facilities, amenities, services and buildings, public transport facilities, education, employment, information, communication, and technology, cultural life, leisure and sports (Section 26-32, PWD Act 2008). In addition, the rights also cover rehabilitation, healthcare, community support services and assistance during a situation of risk and humanitarian emergencies (Section 33-40, PWD Act 2008).

The Social Welfare Department Malaysia (JKMM) was established in 1946 and has been through several structural changes since. The department started with its involvement in managing problems that stemmed from World War II. From there, its roles and functions have expanded to preventive and rehabilitative services in social issues and the development of the community. It is one of the agencies under the administration of the Ministry of Women, Family and Community Development. One of the objectives of the Department is to provide rehabilitation of People with Disabilities. The objectives of the rehabilitation services for People with Disabilities (PWDs) are to assist PWDs to be self-reliant and to achieve their full potential. Services provided include:

a. Registration;
b. Artificial Aid and Assistive Devices;
c. Launching Grants;
d. Disabled Workers Allowance;
e. Work Placement;
f. Institutional Training and Medical Rehabilitation;
g. Community Based-Rehabilitation Programmes; and
h. Group Homes.

2.7 Designation or Establishment of One or More Independent Mechanisms

Article 33 (2) of CRPD requires that States designate or establish one or more independent mechanisms to promote, protect and monitor the implementation of the Convention taking into account the 'Principles relating to the status and functioning of national institutions for the protection and promotion of human rights'. These Principles, commonly called the *Paris Principles*, were drafted at the First International Workshop of National Human Rights Institutions held in Paris in 1991 and endorsed by both the UN General Assembly and Commission on Human Rights in 1993.

The Paris Principles basically is a set of international standards which frame and guide the work of National Human Rights Institutions (NHRI). NHRIs have been created by States to implement human rights at the national level and are a response to the gap between human rights standards and their practical application. NHRIs have mainly three functions: the monitoring and advising of State authorities, the promotion and providing of human rights education and the handling of complaints on alleged human rights violations (the last function being optional according to the *Paris Principles*). Regarding the first function, NHRIs examine the compliance of both legislation and practice with human rights. They evaluate not only their conformity with human rights treaties but also the broader implications of policies for human rights enjoyment. NHRIs may also conduct general inquiries and submit reports to State authorities on human rights issues that seem important or urgent.

Regarding the second function, NHRIs aim to increase awareness of human rights by disseminating information on human rights. They do so both within and outside the formal education system. Some NHRIs also focus on research in order to promote a better understanding of human rights. In addition to setting out the functions of NHRIs, the *Paris Principles* lay emphasis on two fundamental principles: independence and pluralism. Independence has facets in the *Paris Principles*.

First, NHRIs should be functionally independent. This means that they should be free from governmental interference. They must also be able to choose their own staû and to determine their priorities. Second, NHRIs should be personally independent. This means that their members should be able to act in a pressure-free environment and be appointed (and, if necessary, dismissed) according to a fair and clear procedure. Third, NHRIs should be financially independent. They must have sufficient resources at their disposal, which should be determined preferably by parliament. Pluralism links NHRIs with civil society. The *Paris Principles* provide that the composition of NHRIs should ensure 'the pluralist representation of the social forces (of civilian society) involved in the promotion and protection of human rights'.

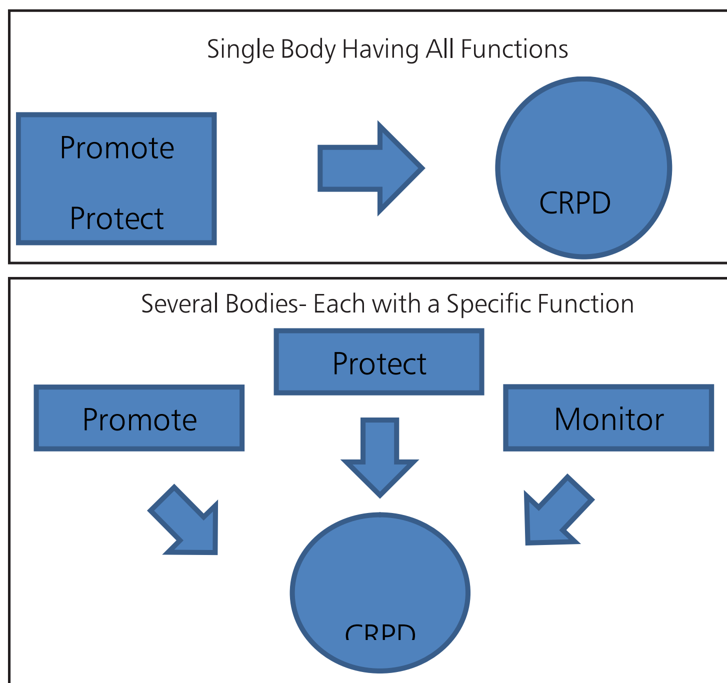
Human rights treaties define which rights States should respect, protect and fulfil. However, these treaties do not determine through which means they should do this. This follows from the principle of subsidiarity, which considers that States are best placed to determine how they should implement human rights. Thus treatises like International Covenant on Civil and Political Right (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) do not state what measures exactly States should take in order to reach the objectives of the treatises. In contrast, Article 33(2) of CRPD provides that States should designate or establish one or more independent mechanisms to promote, protect and monitor the implementation of the Convention taking into account the *Paris Principles.*

Article 33(2) of CRPD requires that States 'maintain, strengthen, designate or establish' 'one or more independent mechanisms'. States should 'maintain, strengthen, designate or establish' in-

dependent mechanisms. This gives them two possibilities. First, they may *designate* existing bodies, which means that they may maintain these bodies and give them the functions to promote, protect and monitor the implementation of the Convention. This option is interesting for States that already have bodies exercising some of these functions and avoids the creation of new bodies. As required by the *Paris Principles*, there should be an official designation act and not a mere statement that one or more bodies will play the role of independent mechanisms. Second, States may *establish* independent mechanisms. They can therefore start from scratch and create new bodies that will exercise the functions provided for by Article 33(2) of CRPD. This option is made for States that have no bodies that can fulfil these functions.

States should designate or establish 'one or more independent mechanisms'. There gives them again two possibilities. First, States may designate or establish a *single* body carrying out the functions to promote, protect and monitor the implementation of CRPD. This option can facilitate coordination between different organisations and help them to adopt a comprehensive approach to disability issues.

Second, States may designate or establish *several* bodies which together play the functions provided for by Article 33(2). States may therefore share these functions between these bodies, whereas federal or decentralised States may designate or establish regional or local bodies.



Based on these functions to a certain extent, the Malaysian Human Rights Commission (SUHAKAM) can be seen to be playing a role as an independent monitoring mechanism. However, it has not been officially appointed as an independent mechanism to monitor the implementation of the CRPD by the Malaysian government. Since Malaysia is found to have not officially appointed an independent mechanism as yet the options in the process of designating or establishing the independence mechanism cannot be examined. Similarly, factors that made up the argument in favor of the option to be chosen also cannot be determined as of now since the appointment process has yet to take place.

2.8 Framework of Independent Mechanisms

Article 33 (2) of CRPD provides that States must designate or establish 'a framework, including one or more independent mechanisms, as appropriate'. The idea is that the independent mechanisms should form a coherent whole. Different bodies operating in isolation would be counterproductive, especially if they share similar functions. There should therefore be some form of coordination between them.

The ûexibility of Article 33 (2) of CRPD allows diûerent combinations to be adopted by a state. First, a State might either have an NHRI or an equality body or ombudsman that is already exercising these functions and could simply designate it independent mechanism. Germany, for instance, designated the German Institute for Human Rights (GIHR). Latvia designated its Ombudsman.

Second, a State may designate both its NHRI and its equality body or ombudsman and provide a division of labour between them and organise their collaboration, as done by Northern Ireland which designated both the Northern Ireland Human Rights Commission and the Equality Commission of Northern Ireland and by France which designated both the Commission nationale consultative des droits de l'homme (CNCDH) and the Haute autorité de lutte contre les discriminations et pour l'égalité (HALDE). Third, a State could designate or establish a representative body, as done by Austria which established the Austrian Monitoring Committee and by Spain which designated the Committee of People with Disabilities Representatives (CERMI).

Fourth, a State could combine the first or second option with the third option, that is designate its NHRI or its equality body or ombudsman, or do both, and establish or designate a representative body. Spain, for instance, designated the Spanish Defensor del Pueblo in addition to CERMI.

These options can be tailored to federal or decentralised States in which regional or local bodies could be designated or established too, as allowed by Article 33(2) of CRPD. Tis may result in a combination of several options. The United Kingdom, for instance, designated three NHRIs independent mechanism, namely the Equality and Human Rights Commission, the Scottish Human Rights Commission and the Northern Ireland Human Rights Commission, in addition to the Equality Commission of Northern Ireland (as far as Northern-Ireland is concerned). The possibility to have more than one independent mechanism may also facilitate the involvement of regional or local organizations of persons with disabilities (DPOs). These organizations could either be represented in the independent mechanism or be individually designated independent mechanism in the framework. After knowing all the options available above, it is essential that one body leads the framework.

Following the CRPD ratification. Malaysia enacted the Persons with Disabilities Act 2008 aimed at providing for the "registration, protection, rehabilitation, development and wellbeing of persons with disabilities" and the establishment of the National Council for Persons with disabilities. Several obligations under CRPD have been included in the Act. This could be a good start, yet it still has a long way to go and a lot to be improved in order to achieve its primary goal and objectives.

2.9 Civil Society and Cooperation with Disabled Persons

Disabled persons have had an important role in the elaboration of CRPD. Under the slogan 'Nothing about us without us', they successfully convinced the drafters of the necessity to guarantee their participation in the adoption of any measure concerning them. This is why Article

33(3) of CRPD stipulates that '[c]ivil society, in particular persons with disabilities and their representative organisations, shall be involved and participate fully in the monitoring process'. Article 33(3) is not the only article in the Convention that refers to the participation of disabled persons. Article 4(3) provides that States should consult disabled persons in the implementation of CRPD, thereby providing them with general participatory rights. Article 33(2), through its reference to the *Paris Principles*, also requires that DPOs, in addition to other actors, be involved in the work of the independent mechanisms. DPOs, as a result, are given three diûerent ways of participating in the implementation of the Convention. First, they can directly interact with State authorities that is through the focal points. States must even endeavour to reach them by virtue of Article 4(3) of CRPD. Second, DPOs should be involved in the work of the independent mechanisms. This follows from the *Paris Principles* as well as Article 33(3). Third, they may participate through other means, again by virtue of Article 4(3). They can therefore withdraw from existing structures, if they deem that acting on their own will enable them to better realize their aims.

The CRPD has shown 'new development' on the importance to monitor the human rights condition for a person with disabilities in the country by various parties such as international and domestic non-governmental organisations (NGO), disabled people organisations (DPO), and others global society organisations. This monitoring approach will be in line with a social model which proposes by the UNCRPD which upholds the standard of human rights for disabled in any countries.

In relation to the process of monitoring, the initiative to conduct training and employing several techniques are important to ensure the reliability of data. The monitoring process might be done by organisations such as DPO individually or collectively analysing the situation of human rights for disabled people through qualitative research nature covering interviewing the experience, types of violation occurred, analysing statistical data and studying relevant reports. These processes are crucial to ensure the reliability and validity of data represented with the intention to create awareness for the government and society on various human rights violations suffered by people with disabilities. The process of monitoring human rights situation is also in line with the issues and challenging facing research and development of the potential for disabled people especially in developing nation.

In Malaysia persons with disabilities have somewhat been empowered in the implemen-tation and monitoring of the Convention through the Persons with Disabilities Act 2008 and the membership of persons with disabilities in the National Council of Persons with Disabilities as well as in its six subcom-mittees. Although some improvements have taken place, much is yet to be desired despite the establishment of these bodies since the ratification of the Convention. Membership of persons with disabilities in the National Council of Persons with Disabilities comes from DPOs or individuals who may not necessarily be associated with DPOs but have the necessary expertise. At the moment there is no formal coordination mechanism between the National Council as the focal point and the DPOs Representatives of DPOs in the National Council or its six committees are consulted in the decision-making process, while representatives from other DPOs arc also consulted from time to time- depending on the issues. It is currently up to the Minister and the Secretariat of the National Council to ensure that DPOs consulted duly represent the different groups of persons with disabilities.

III. Conclusions

The Government in Malaysia provides social protection services in areas such as health, reha-

bilitation and education people with disabilities guided by the National Policy for Persons with Disabilities and the National Plan of Action for Persons with Disabilities. Malaysia also has taken an important step to protect the rights of people with disabilities by adopting the Persons with Disabilities Act 2008 and by ratifying the Convention on the Rights of Persons with Disabilities (CRPD) in 2010. The challenge ahead for Malaysia is to transform its approach from a welfare perspective to a human rights one. The fulfilment of obligation under CRPD has been fulfilled by Malaysia but only in certain areas. Among the notable success is that the requirement in article 33 (1) for States to designate one or more focal points within government for matters relating to implementation is fulfilled by the establishment of the National Council for Persons with Disabilities by virtue of section 3 of the Persons with Disabilities Act 2008.

The Government will be better positioned to protect and promote the rights of People with Disabilities by withdrawing its formal reservations to the CRPD concerning the prohibition of torture and other ill-treatment (article 15), the right to liberty of movement and nationality (article 18) and its declaration limiting the government's legal application of the principles of non-discrimination and equality. Additionally, the Government should sign and ratify the CRPD's Optional Protocol, which allows individuals to send complaints of human rights violations to an international monitoring body. These steps will guide the country in implementing policy and legal frameworks fairly, reducing disparities in access to essential services and coordinating multisector efforts more effectively.

The Government should establish a national monitoring mechanism (NMM) comprising independent bodies to promote, protect and monitor the implementation of CRPD. It should be designated as the main or coordinating body of the NMM. Other bodies in the NMM may include civil society organisations (CSOs), in particular CSOs representing persons with disabilities. To materialise this aim, there must be full support and commitment from multi-sectoral involvement of all government ministries and other stakeholders such as civil society organisations, academic institution, private sector. There are a few countries that have assigned their NHRIs role of coordinating the other focal agencies or as one of the agencies monitoring the implementation of the Convention. Among countries whose NHRIs have been designated to play a role in the NMM are Australia, Germany, Jordan, Kenya, Northern Ireland, Scotland, Thailand and United Kingdom. Having this in mind within the context of Malaysia SUHAKAM is the appropriate body the play the role for the time being.

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The Roles Of Kppu On Supervision Of Business Competition: A Case Study Of Cartel Dispute Settlement In Indonesia[1]

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ABSTRACT
Since 1999 Indonesia has the Law on Anti-Monopoly and Unfair Business Competition (Indonesian Monopoly Law/IML). Anti-Monopoly and Unfair Business Competition Law provides the roles for the Commission to supervise on any unfair business competition. However, there are many strategies prohibited business conducted by business, such as cartel. Cartel is a banned agreement mentioned in Article 11 of Anti-Monopoly Law in Indonesia because gives loses to the consumer and others businesses. The research aims to discuss on the roles of KPPU on disputes settlement of cartel cases in Indonesia. The research method used in this research is Normative Legal Research, by reviewing to some theories, legal principles, Indonesian Law, KPPU and Court Decision in settling the Cartel Cases. The research conducted through library legal research with legal document. The result of research first, KPPU has authority to settle the unfair business cases from the investigation process until the first proceeding. Second, shows that some of cartels cases may be settle through KPPU. While, other cases conducted the legal effort to the General Court and Supreme Court.
Keywords: *Unfair Business Competition, KPPU, Cartel.*

1. Introduction

Business activities in Indonesia starting after independence. See many opportunities to leverage existing natural resources in Indonesia, the foreign investors are interested to investing in Indonesia and compete with other investor. Most investors are from China, and investors are mostly doing small businesses, but there are also some investors who have the capital to build a great business. Business activities in Indonesia progressively increasing, but since the monetary crisis in 1997-1998 investors who had invested heavily in Indonesia want to stop that cooperation with Indonesia and prefer to invest in other countries. After that the government rebuilds the economic system to make the investors come back to invest and open for business in Indonesia.

Year by year business activities progressively increasing until now. Not only from the foreign investor but also from the local investor who has to understand playing in the capital markets field. Due to the increasing of businesses and the tight competition of business activity in Indonesia so the government has initiative to make the regulation on business activity. Currently, on March 5, 1999 President of Republic of Indonesia ratified the bill on the Prohibition of Unfair

Business Competition and Monopoly Practice Law 1999. Behind the reason on proposing of this law is to provide the benefits for the society especially to the business.[2] The effort to regulate the business competition was started from the establishment of Law No. 5 of 1984 on Industrial (hereafter Industrial Law 1984) which is mentioned the urgency on regulation, supervision and industrial development by the government, intended to improve the good and healthy competition, prevention unfair business competition, or industry domination by group or person in the form of monopoly which loses to the public.[3] Based on Indonesian monopoly law the government create the new institution named Business competition supervisory commission (after this we called KPPU) that has been given mandate by the regulation to supervise the business activity in Indonesia

Business Competition Supervisory Commission (KPPU) was formed with the aim to prevent and follow up monopolistic practices and to create a climate of healthy competition to businesses in Indonesia. It is mentioned in article 30 of Act Number 5 of 1999 concerning prohibition of monopolistic practices and unfair business competition that the KPPU are an independent agency that regardless of the influence and power of the government and other parties. KPPU is a special organ which has dual tasks, that is to create healthy competition and served to maintain conducive competition, and also give contribute to social justice and economic progress in indonesia.[4]

Although KPPU has in particular law enforcement functions on Competition Law, KPPU is not a judicial institution on specialized competition. Thus, KPPU is not authorized to impose civil and criminal penalties. Position of KPPU over an administrative agency for the authority attached to it is the administrative authority, so that sanctions are imposed on administrative sanctions.

Prohibition of Unfair Business Competition and Monopoly Practice Law 1999 provided the supervisor body to conduct the investigation, prosecution on the agreement and any banned business activities. The Law mandates to the Business Competition Supervisory Commission (hereafter KPPU), as one of the special commission to handle all the unfair business competition. Mentioned in the Article 35 and 36 of the Law number 5 of 1999 on the Duties and Authorities of KPPU.

Inline with the economic development in Indonesia while followed by the prohibited action that conduct by the businesses, cause of that reason the government should make the regulation.[5] Nowadays, some of businesses conduct unfair business action, such as; cartel, oligopoly, monopoly, monophony etc. However, there are many unfair business competitions in practices conducted by the business especially cartel. and in this article the researcher will be focus on discussing about cartel cases.

A cartel is an anti-competitive arrangement between two or more competing businesses. Based on black's law dictionary cartel is a combination of producers or seller that join together to control a product's productions or price.[6] Cartel is one of the unfair business competitions, which is mentioned in Article 11 of Law No. 5 of 1999 on Prohibition of Unfair Business Competition and Monopoly Practice (hereafter Prohibition of Unfair Business Competition and Monopoly Practice Law 1999). Indonesia realizes that cartel is prohibited under the Prohibition of Unfair Business Competition and Monopoly Practice Law 1999 as follows:

> Entrepreneurs are prohibited from making any contract with other business competitors with the intention to influence the price by determining production and/or marketing of goods and/or services that can cause monopolistic practices and/or unfair business competition.[7]

The crimes of corporation, in the form of Monopoly and Cartel are the most dangers comparing to the crimes on Corruption. While, corruption was damaged the money of the state, and monopolies also cartels damaged to the public interest through a price to be paid more expen-

sive.[8] Moreover, Monopoly and Cartel are an invisible crime, because the crimes are not only damage to the state money but also the public. In adding together, cartelized industrial sectors lack competition which certainly reduces competitiveness in the long run and may have a negative impact on the overall performance of a country's economy. Widespread shapes of cartels conduct are: price fixing, market sharing, bid rigging and output control.

Based on the background above, this legal research analyzed the role of KPPU to protect the healthy business competition in Indonesia in the Cartel Cases, with in accordance to the Prohibition of Unfair Business Competition and Monopoly Practice 1999 Law.

2. Discussion

Business competition has the very significant role in development of the state. Business activity supports the national development, so the government has the main duties to improve the development of economic progress in their territory. The effort of government to improve their business activity has to be appropriate with the applicable regulation in term of law perspective, economic and any government policy.[9] This economic system contain the principles of balances, equality, give the same opportunities, justice and equally to the all society. Based on the consideration before, business competition becomes the basis of economic sector and trade, so the competition should be performed in the good and health condition. While, the result of good and healthy business competition will create an efficiency of price, and will give the alternative of product for the consumer. In contradict, unfair business competition while create the centralization of economic power, will impact to the domination of production sector and/or distributions of goods and/or services by the businesses, and so can impact to the losses of public interest, against to the social justice.

The reason on the proposing the bill on anti-monopoly practice is 1945 constitution, which require for the welfare of the society,[10] not for the welfare of individual.[11] Prior to the enactment of the Indonesian Competition Law, the Indonesian government did not pay much attention to the development of competition law.[12] In the 1980s, internal discussions on competition and consumer protection had been conducted several times among officials at the Department of Industry, but no comprehensive legal regime was adopted. The desire to have a comprehensive antimonopoly law in Indonesia dates back to around 1990. Many scholars, political parties, non-governmental organizations, and even certain government institutions discussed and proposed developing an antimonopoly law.

The Prohibition of Unfair Business Competition and Monopoly Practice Law 1999 specifically regulate on the Business Competition Supervisory Commission mentioned in Chapter VI which consists of 8 articles from Article 30 until Article 37. In the Article 30 Paragraph 1 stated that: "to oversee the implementation of this law, a Business Competition Supervisory Commission is formed, hereinafter referred to as Commission". To strengthen of this article was enacted by the Presidential Decree No. 75 of 1999 on the Business Competition Supervisory Commission.

By the establishment of KPPU as the independent body which specifically intended to supervise the implementation on the Prohibition of Unfair Business Competition and Monopoly Practice Law 1999, in every roles, duties, authorities and responsibilities including settling any cases. KPPU is an independent institution with judicial authority to conduct investigations, evaluate alleged violations, hear and decide a case, impose administrative sanctions, and provide advice and opinions regarding government policies.[13] In the context of the structure of the Indonesian state, KPPU is an auxiliary organ and is a quasi-judicial body given the task of supervising the

competition law.[14] Quasi institutions carry out the authority already accommodated at an existing state institution. Due to public distrust of the existing state institution, it is considered necessary to form an independent institution.[15]

The Duties of the Commission as mentioned in Article 35 of the Law are:[16]

a. Conducting evaluations of contracts that might cause monopolistic practices and/or unfair business competition as regulated under Articles 4 through 16;
b. Conducting evaluations of business activities and/or entrepreneurs' behavior that might cause monopolistic practices and/or unfair business competition as regulated under Articles 17 through 24;
c. Conducting evaluations if there is any abuse or not in the dominant position that might cause monopolistic practices and/or unfair business competition as regulated under Articles 25 through 28;
d. Taking actions based on the authority of the Commission as regulated under Article 36;
e. Providing suggestions and consideration on Government policy related to monopolistic practices and/or business competition;
f. Set up guidelines and/or publication related to this Law;
g. Providing periodic report on the work results of the Commission to the President and the House of Representative.

Refer to the duties of KPPU above the establishment of the commission are to supervise of the implementation of the law which needed by institution given by the state. By the authorities from the state the commission hopes may run their duties well.[17] Based on Article 36 of the Indonesian Competition Law, KPPU has the authority to (i) receive reports regarding violation of the Indonesian Competition Law, (ii) conduct investigations including inviting witnesses and any person deemed to have knowledge of violations of the law, (iii) determine and stipulate the existence or non-existence of losses on the parts of business persons or society (iv) decide on the case, and (v) impose administrative sanctions.

The judicial procedure in the Commission shall be fully in Commission Decision No. 05 / KPPU / Kep / IX / 2000 on Procedures for Submission of Reports and Handling Alleged Violation of Law 5 Year 1999. This decision shows that the Commission can also act as a self-regulatory body, whose provisions are binding on members of the community. The process of a dispute settlement case in the Commission passed several stages, which can be classified as follows:

a. gathering phase indication;
b. the stage of preliminary examination;
c. phase advanced inspection;
d. imposition stage of the decision;
e. the execution phase verdict.

The dispute settlement procedure based on article 44 on law number 5 of 1999 are;

(1) Within a period of 30 (thirty) days counted from the date the entrepreneurs receive notification of the Commission's decision as referred to under Article 43, Paragraph (4) above, the entrepreneurs shall be obligated to carry that decision and deliver the implementation report to the Commission.
(2) Entrepreneurs may submit a position of objection to the District Court within a maximum period of 14 (fourteen) days upon receiving notification of the Commission's decision.
(3) Entrepreneurs who do not submit a petition of objection within a period as referred to under Paragraph (2) of this Article shall be regarded as to have accepted this Commission's decision.

(4) If provisions as referred to under Paragraph (1) and Paragraph (2) of this article are not carried out by the entrepreneurs, the Commission shall hand over the said decision to the investigators for investigation pursuant to the existing law.
(5) The Commission's decision as referred to under Article 43, Paragraph (4) constitutes preliminary evidence which is sufficient for the investigators to conduct investigation.

If the parties still not accepted the decision of KPPU, the parties can conduct legal remedy to general court or supreme court, this is based on article 45 of Law number 5 of 1999 stated that;

(1) The District Court must examine the objection by the entrepreneurs as referred to under Article 44, Paragraph (2), within a period of 14 (fourteen) days counted from the date the objection is received.
(2) The District Court must make a decision within a period of 30 (thirty) days counted from the date the objection begins to be examined.
(3) The parties objection to the District Court's decision as referred to under Paragraph (2) of this article, within a period of 14 (fourteen) days, may submit a petition for cassation to the Supreme Court of the Republic of Indonesia.
(4) The Supreme Court must make a decision within a period of 30 (thirty) days counted from the date the cassation petition is received.

There are some provisions based on the Law No. 5 of 1999 on Prohibition on Unfair Business Competition and Monopoly Practice prohibits anticompetitive conduct mentioned on Article 4-16 which deals with prohibited of agreements one of the provision related to the cartel. The provisions of Indonesian Competition Law do not specifically define the term "cartel". However, the term "cartel" is used as the heading of the prohibition of production and distribution cartels in Article 11.[18] The definition of the term "cartel" can be found in KPPU Regulation[19] No. 4 of 2010 concerning the Guidelines on Article 11 of Indonesian Competition Law as: "a cooperation of a number of competing undertakings to coordinate their activities in order to control the volume of production and the prices of goods and or services to gain a profit above reasonable profit".[20]

Widespread shapes of cartels conduct are: price fixing, market sharing, bid rigging and output control. Price fixing take places when competing businesses make an agreement that has the purpose or effect of fixing, controlling or maintaining the price of goods or services prices. This may be in the form of agreed selling or buying; agreed minimum prices; agreed formula for pricing or discounting goods and services; agreed rebates, and allowances or credit terms. Such agreements may be in writing but are often informal and verbal. Here we will discuss on price fixing cases;

This cases conduct by the biggest two company that are Yamaha Indonesia Motor Manufacturing (hereafter YIMM) and PT Astra Honda Motor (hereafter AHM). The end of 2016, KPPU was investigated on the case between Yamaha Indonesia Motor Manufacturing and PT Astra Honda Motor which alleged on conducting Cartel practice. Syarkawi Rauf[21] stated, that the commission was conducted an investigation on this case from 2014. While, this violation was indicated from 2013 until 2015.[22]

In the last of 2016, KPPU decide the cases which contradict to the article 5 Law Number 5 of 1999 on the Prohibition on Unfair Business Competition and Monopoly Practice to the parties between YIMM and AHM. This two companies can be proving that conduct cartel based the cases number 04/KPPU-I/2016 on assuming of conducting cartel practice. Syarkawi Rauf, the head of KPPU stated that, the settlement of case No. 04/KPPU-I/2016 has been stated from 2013 until 2015. Moreover, Yamaha as the first plaintiff in this case attempted intentionally presented

the data and facts are not true to the goals of company.[23]and this cases already settle and get decision from KPPU, but after the decision of KPPU both parties did not feel satisfy with the decision because of that both of parties want to bring this cases to the general court, and this cases still on general court proceedings.

And other example is about telecommunication cases, this KPPU cases No.26/KPPU –L/2007 this cases started when there is a parties send report to the KPPU on violation of-Net messenger conduct by cellular operator on 2004 until 1 April of 2008. KPPU can proved this violation based on the agreement between the operator cellular in of-net messenger price fixing. This action can give loses to the consumer and can damage the economic system in Indonesia. KPPU already give decision on this cases, on the KPPU decision stated that they are 6 cellular operator that violate article 5 of law number 5 of 1999 and KPPU give punishment to the cellular operator to pay the fine around 4 billion – 25 billion rupiah. And all parties accepted the KPPU decision, no more legal remedy.[24]

The next cases are about cartel on chicken meat.[25] Thursday, October 13, 2016 KPPU was investigated on the case between the businesses of chicken. The judges of KPPU Kamser Lumbanraja stated that there are 12 parties proved guilty. Based on the investigation process KPPU find some evidence that the parties already have continuestly business meeting before start from February 25, 2015 to discuss and make agreement between the parties to control a parent chicken stock. This action has damage to the small businesses of chicken farmerbecause the price pf poultry more expensive then before. The comsumer also get impact because the price of chicken meat more expensive too.

In March 13,2016, KPPU decide the cases which contradict to the article 11 Law Number 5 of 1999 on the Prohibition on Unfair Business Competition and Monopoly Practice, and the parties should pay maximum 25 billion. The parties can be proving that conduct cartel based the cases number 02/KPPU-I/2016 on assuming of conducting cartel practice. Kamser, the head of KPPU judges stated that, the settlement of case No. 02/KPPU-I/2016 has been stated from February 25, 2015 until March, 3, 2016. and this cases already settle and get decision from KPPU.

Other cases is about cartel on meat,[26] Thursday, October 13, 2016 KPPU was investigated on the case between feedloter company . The KPPU judges Chandra Setiawan stated that there are 32 parties proved guilty. Based on the investigation process KPPU find some evidence that the parties already have continuestly business meeting before to discuss and make agreement between the feedloter to control the meet production. This action has damage and loses to comsumer because the price of meat increasing until RP 170.000/Kg, this is so expensive then before.

KPPU decide the cases which contradict to the article 11 Law Number 5 of 1999 on the Prohibition on Unfair Business Competition and Monopoly Practice, and the parties should pay maximum 21 billion. The parties can be proving that conduct cartel based the cases number 10/KPPU-I/2015 on assuming of conducting cartel practice. Chandra Setiawan, the head of KPPU judges stated that, the settlement of case No. 10/KPPU-I/2015 has been stated on 2015. and this cases already settle and get decision from KPPU. but after the decision of KPPU both parties did not feel satisfy with the decision because of that both of parties want to bring this cases to the general court, On April 22,2016 this cases bring to general court and now still in proceeding.

3. Conclusion

a. KPPU are an independent agency that regardless of the influence and power of the government and other parties. The KPPU has authority to supervise the business competition in

Indonesia, KPPU also settle the business competition cases from the investigation process until give the decision on the firs court proceeding. The authority of KPPU already regulated in article 36 of Law No. 5 of 1999 on Prohibition on Unfair Business Competition and Monopoly practice.

b. some of cartels cases may be settle through KPPU, While other cases conducted the legal effort to the General Court and Supreme Court. if the parties didn't feel satisfied with the KPPU decision the parties can conduct legal remedy effort to the general court, if the parties still didn't feel satisfied with the decision from general court, they can conduct the cassation process on the Supreme Court.

endnotes

[1]

[2] To prevent monopoly practice needs The Law on Anti-Monopoly, Republika, March 19, 1998. See also Article 3 point b of Prohibition of Unfair Business Competition and Monopoly Practice Law 1999: "... to create the good business competition through healthy business competition act to guaranty the same business opportunities for high, medium and small businesses..."

[3] Article 5 of Industrial Law 1984

[4] Suyud Margono, 2009, *Hukum Anti Monopoli*, Sinar Grafika, Jakarta, h. 136.

[5] In line with the concept of *ubi societas ibi ius (Wherever there is society, there is law)*

[6] Bryan A.Garner, 2009, Black's Law dictionary, Thomson west

[7] Article 11 of Law No. 5 of 1999 on Prohibition on Unfair Business Competition and Monopoly Practice

[8] Gusti, "Kejahatan Monopoli dan Kartel Lebih Bahaya dari Korupsi", available at https://ugm.ac.id/id/berita/9360-kejahatan.monopoli.dan.kartel.lebih.bahaya.dari.korupsi, accessed on Saturday, March 4, 2017, at 9.32 pm.

[9] Muladi. 1998. "Menyosong Keberadaan UU Persaingan Sehat di Indonesia", dalam UU Antimonopoli Seperti Apakah yang Sesungguhnya Kita Butuhkan? Newsletter Nomor 34 Tahun IX. Jakarta : Yayasan Pusat Pengkajian Hukum. p. 36.

[10] Prohibition of Unfair Business Competition and Monopoly Practice Law 1999.

[11] A.M. Tri Anggraini, 2003, Larangan Praktek Monopoli dan Persaingan Tidak Sehat perse illegal atau rule of reason, Jakara, FH UI. p.6.

[12] Juwana, H. (2002), 'An Overview of Indonesia's Antimonopoly Law', Washington University Global Studies Law Review. p.186.

[13] Article 35, 36 and 37 of Law No. of 1999

[14] Jentera Jurnal Hukum (Jentera Law Journal) 12 editions, April-June 2006, p.37.

[15] Lubis, 2009, Hukum Persaingan Usaha Antara Teks & Konteks , Bonn: Germany. p. 312.

[16] Article 35 on the Prohibition of Unfair Business Competition and Monopoly Practice Law 1999.

[17] Jinner Sidauruk, 2008 *Peranan Komisi Pengawasan Persaingan Usaha dalam Pengembangan Usaha di Indonesia,*

[18] Art. 11 of Indonesian Competition Law reads: "Undertakings are prohibited from making any agreements with their competitors with the intention to influence the price by determining the production and/or the marketing of goods and/or services that can result in monopolistic practices and/or unfair business competition." See unofficial English translation in K. Hansen, et.al., Undang-undang Larangan Praktek Monopoli dan Persaingan Usaha Tidak Sehat, Revised edition, Jakarta Katalis 2002.

[19] Kppu Regulation has a similar function to an act of soft law, provides guidelines and interpretation of certain provisions of Indonesian Competition Law and binds Kppu only internally. Thus, it does not have a binding character for courts, for example.

[20] Kppu Regulation No. 4 of 2010.

[21] Syarkawi Rauf is A former of Head KPPU

[22] Komisi Pengawas Persaingan Usaha Indonesia, "KPPU Persilahkan Yamaha dan Honda Ajukan Keberatan ke PN", available at http://www.kppu.go.id/id/blog/category/press-release/, accessed on

Sunday, March 5, 2017, at 12.56 pm.

[23] **KPPU, KPPU Persilahkan Yamaha dan Honda Ajukan Keberatan ke PN, available at http://www.kppu.go.id/id/blog/category/press-release, accessed on Friday, March 24, 2017, at 7pm.**

[24] Andi Fahmi Lubis dkk, 2009, *Hukum Persaingan Usaha,* Jakarta, Gtz. Pg.63

[25] Hendra, "Perusahaan divonis bersalah melakukan kartel ayam", available at http://m.tempo.co/read/news/2016/10/13/090812032/12-perusahaan-divonis-bersalah-melakukan-kartel-ayam, accessed on Monday, April 04, 2017, at 7am.

[26] Muhammad Idris, "KPPU denda 32 perusahaan kartel daging sapi, tertinggi rp 21 miliar", available at http://finance.detik.com /berita-economi-bisnis/3194665/kppu-denda-32-erusahaan-kartel-daging-sapi-tertinggi-rp-21-miliar, accessed on Monday, April 04, 2017, at 7am.

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Role of Criminal Investigation Under Malaysian Land Law

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ABSTRACT

Investigation is a pre-requisite process to the prosecution proceedings. Process of preparation of Investigation Paper (IP) is new to Malaysian Land Administration. The need of IP is vital once the National Land Code (amendment) 2008 comes into force in January, 2009. Prior to amendment, Land Administrator can simply compound the offender under the code but after that, by substituting subsection of 429A and 429B, the Land Administrator is required to get written consent from Public Prosecutor before compounding or prosecuting the offender. Since the amendment, The Land Administrator failed to offer compound or institute any prosecution proceeding because of the lack of expertise among them in conducting criminal investigation and preparing Investigation Paper. This paper will discuss the process of investigating criminal offences under Malaysian Land Law. It will begin with the process of appointment of Investigator until the process on how the Investigator proves the offences have been committed by the offender. The aim is to identify any inadequacies and challenges faced by the investigators during completing the investigation. The main reference would be the National Land Code 1965 and the Criminal Procedure Code.

Keywords: *Investigation, prosecution, Land Administrator, Public Prosecutor*

1. Introduction

'Criminal Offence' is a very rare term in land administration. When we refer to Land Administration, our mind will focus on processes of recording and disseminating information about the ownership, value and use of land and its associated resources1. Basically, there are twenty six (26) provisions under National Land Code 1965 ('NLC') is constituted as criminal offences or quasi criminal offences. State Director or Land Administrator will institute the prosecution action under the power given by section 16 of National Land Code 1965 with the consent from Public Prosecutor under section 429A and 429B of the Code when a person committed these criminal offences. This article will discuss the process of investigating criminal offences under National Land Code 1965 as a pre-requisite process to the prosecution proceedings with the aim to identify any inadequacies and challenges faced by the investigators during completing the investigation. The main reference would be the National Land Code 1965 and the Criminal Procedure Code.

2. Discussion

2.1. Criminal Offences Under the National Land Code 1965

There are twenty six (26) provisions under National Land Code 1965 is constituted as criminal offences. Amongst them are seven seizable offences where Land Administrator or any authorized person can arrest without warrant. The arrest can be made by the authorised enforcement officer whenever he notices the offence had been done or in the circumstances where the officer received credible information and exists reasonable suspicious2 of his having been concerned in any seizable offence.

The most popular offences under Malaysian Land Law are illegal occupation of State Land3

and unlawful extraction or removal of rock material4. These offences are much relate to the environmental issues as a result of the recklessness of illegal occupier in carrying on such illegal activities. Since the government are very concerned to this issue, parliament amended the National Land Code 1965 by increasing the maximum punishment for both offenses5 effectively from 1st January 2017. Illegal activities caused environmental damage such as landslides and flash floods especially at high land area due to illegal land clearing and logging activities6. The uncontrolled sand extraction activity also affects to the contamination of rivers like was happened in Sungai Kinabatangan7. Illegal activities also give impact to the increased shortterm turbidity at the mining site due to re-suspension of sediment, sedimentation due to stockpiling and dumping of excess mining materials and organic particulate matter, and oil spills or leakage from excavation machinery and transportation vehicles. Encroachment of river caused riverbed and bank erosion and also increases suspended solids in the water at the excavation site and downstream. Suspended solids may adversely affect water users and aquatic ecosystems. The impact is particularly significant if water users downstream of the site are abstracting water for domestic use. Suspended solids can significantly increase water treatment costs8.

Instead of causing environmental damage, illegal occupation of State Land and illegal extraction of rock material affect to the income and revenue of the State. Its can be seen through payment statistics of royalty of removal of rock material and collection of fine for illegal activities under these two section. Its showed significant difference to the collection of royalty and fine after empowering enforcement process compared to before. For example, according to statistics from Office of Kelantan Director of Land and Mines (PTG), the collection of royalty and fine increased as stated in the schedule below:

Table 1: Collection of royalty and fine under section 426 of NLC from 2012-2017

YEAR	2014	2015	2016	2017 (Feb)
Royalty(RM)	4,468,607.53	6,906,499.02	6,649,923.75	1,708,268.01
Fine (RM)	0.00	112,750.00	723,830.00	683,564.00

Significant increase begins after PTG formed an Investigation Division in 2015 under its administration to strengthen the enforcement process. Low collection of royalty indicates that lacking in the investigation and prosecution process lead to the failure of the State to deter the infringement of the law by the offender. Thus, it is very important to have an efficient process of investigating, detecting and gathering of criminal evidence to achieve a successful prosecution.

2.1.1. Elements of Offences that Need to be Proved

Section 425 of National Land Code 1965 states that whoever occupies, on any State land, reserved land or mining land without lawful authority shall be guilty of an offence. In order to constitute the offence of illegal occupation, there are 3 elements must be fulfilled. Firstly there must be an act of occupation by the offender. The occupation may be in the form of erecting any structure or building on the land, clearing, digging, enclosing or cultivating any such land and cutting or removing any timber or produce on or from such land. The second element is the occupation must be on State Land, reserved land or mining land. The third element is there must be no any lawful authority for the said occupation has been granted to the occupier. Lawful authority is the authority given by State Authority to the person either by alienating the state land under section 76 or granting leases under section 63 or issuing Temporary Occupation Licences

section 66 of National Land Code 1965.

For the offence under section 426 there are 2 elements must be fulfilled in order to prove the commission of the offence by the offender. The first element is there must be an act of extracting or removing or transporting the rock material from the land. The second element is there must be no any lawful authority for the said extraction or removal of rock material. The lawful authority is given by issuing Form 13 by Land Administrator under Rule 21, Item 59 of Kelantan Land Rules 1966. The Form 13 is issued to the licensee under section 71 of National Land Code 1965.

2.2. THE ROLE OF INVESTIGATION AND THE PROCESS

Investigation process is a pre-requisite to the prosecution proceeding. Prior to the amendment of National Land Code 1965 in year 2009 through A1333, Land Administrator can simply offer to compound the suspect according to section 429B of the Code. After amendment, A1333 substituted the whole section 429A and Section 429B of National Land Code 1965 with new provision, requiring the consent of Public Prosecutor before compounding or prosecuting the offender. The requirement under these sections caused Land Administrator failed even to offer compound. This situation happened when the consent from Public Prosecutor only will be granted if the Investigation Paper ('IP') being produced to him. It makes the IP is a pillar to the success of enforcement under the Code. Basically, criminal cases are investigated under the Criminal Procedure Code ('CPC') of Malaysia. This Code is derived from the English criminal procedure and practice through the adoption of the Indian Criminal Procedure Code 1873. Besides that, National Land Code 1965 also provides power for State Director and Land Administrator to investigate the commission of an offence under the Code. If the procedure of investigation is silent in NLC then the investigator should refer the matter to provisions stated in CPC.

2.2.1. The investigation procedure under CPC

The CPC outlines the duties and obligations of the police officer to investigate criminal cases. The Code also provides a guideline for proper investigation and it starts when the officer in charge receives a report from the complainant. Chapter XIII deals with information given to the police and their powers to investigate. Further, the Code also provides specific powers to the court to issue a search warrant, authorizing a search prior to the seizure process. However, there is no specific provision in the CPC on investigating cases under National Land Code.

2.2.2. The investigation procedure under the NLC

As mentioned above, the process of investigation for criminal cases are laid down in the CPC. However, NLC provides certain provisions relating to procedure of investigation for offences under the Code. Power of Investigation is mentioned in Part thirty one of NLC. Section 421AA authorized State Director and Land Administrator to conduct investigation for crimes under the Code. Any authorized person who is appointed as Investigating Officer is advisable to be gazetted as Land Administrator for special purpose to carry out the investigation process. The procedure of investigation in the NLC 1965 is mentioned in section 421AB (power to require attendance of witness) and Section 421AC (power to examine the witness) which is *in pari material* with section 1119 and 112 of CPC10. Nevertheless the investigating officer ('IO') relies greatly on the CPC due to its comprehensiveness. For instance, the requirement of recording the process of investigation in Investigation Diary ('ID') under Section 119 of the CPC must be thoroughly observed and strictly conducted using the prescribed forms and procedures. Its same goes to the procedure where the IO cannot complete the investigation to the arrested person within twenty four (24) hours fixed by section 28 of CPC, the IO may produce the arrested person under section 117 of

CPC before a magistrate to get authorization to further detain the arrested person in his custody. Further, the CPC also provides specific powers to the court to issue a search warrant and warrant to compel a witness or suspect to give evidence in the course of investigation.

2.2.3. Steps in Investigation

The duty of Investigating Officer begins once he receive Police Report (First Information Report) regarding to the commission of the crime under the NLC. Immediately after getting the order to investigate from his superior officer, the IO will first visit the place of the incident to gather information from the scene and start to record the cautioned statement from the suspect. The IO also will record the statement of the complainant and the witnesses11. The complainant is usually the Raiding Officer or Enforcement Officer who made the arrest. All the statements also will be recorded and reduced into writing and signed by the person making it. If the IO cannot complete the investigation within twenty four hours, an order to further detain the suspect must be acquired from a magistrate12. The IO is under a duty to respect the personal liberty of the suspect. Any wrongful detention will constitute a deprivation of the suspect's personal liberty13.

The IO will continue to investigate until the elements of offence have been fulfilled. The IO will gather all information to be analyzed to trace the real culprit because in the most of the incident, the arrested person only an agent to the main offender. The investigator must also ensure that there is no break in the chain of evidence. A failure to adduce evidence to provide the necessary link in the chain of evidence would be fatal to the prosecution case. There for, the IO must observe the service form from a hand to another especially if its involved the sample of exhibits to be analyzed by laboratory department.

2.3. THE ISSUES AND CHALLENGES OF INVESTIGATION PROCESS

Criminal Investigation by Land Administrator for offences under National Land Code 1965 is very new and not much exercised in this country. Therefore, it did not get much attention from the Management to enhance and to strengthen this area. The main problem with the investigation process is lack of expertise in this area. The officer especially Settlement Officer never being exposed to the process of investigating criminal offences. The Settlement Officer is more synonym with land survey and plan. There is no manual provided by Department of Director General of Land and Mines Malaysia (JKPTG) pertaining to the process of completing Investigation Paper. The Manual of National Land Code 1965 produced by JKPTG have 'forgotten' to prepare the guideline for Investigation process under National Land Code 1965.

Another problem which leads to the failure to prepare Investigation Paper is appointment of IO. Most of Land Office including Office of State Director did not appoint any officer to be an IO to handle the case. The Public Prosecutor unable to give consent either to compound or to prosecute the suspect if there is no IP prepared for him. The consent from Public Prosecutor is mandatory to allow Land Administrator to proceed the case. For example, the cases handled by PTG Kelantan only being granted the consent to compound and prosecute the suspect after PTG initiated the appointment of IO in year 2015. The statistic for the consent from Public Prosecutor after the amendment of National Land Code 1965 can be seen in the schedule below:

Table 2: Number of Consent from Public Prosecutor

YEAR	2009	2010	2011	2012	2013	2014	2015	2016	2017
Consent	0	0	0	0	0	0	28	37	6

Lacks of facilities also contribute to the problem in completing investigation process. The most crucial is the availability of lock-up. In the event when the IO needs to detain the suspect in his custody, the IO need to apply to PDRM to 'borrow' the lock-up. Sometimes, PDRM reluctant to lend the lock-up because the case is not under their investigation. The suspect finally was released although the investigation did not being completed yet.

3. CONCLUSION

Investigation is the most important aspect to ensure the success of enforcement process under National Land Code 1965. Without investigation and prosecution, the offenders cannot be convicted for the offences that was committed by them. The punishment is important to deter the offender from repeating the same offences. Thus, the government should give attention to enhance the procedure of criminal investigation among IO appointed to handle the case under National Land Code 1965. The government also should consider to establish separate department for Investigation Unit in Office of State Director to make sure the officer appointed as IO can concentrate to their core business and to develop the expertise in this area. For the Investigating Officer, they should equip themselves with skills and legal knowledge because any negligence on the part of the investigator will result the failure in the prosecution.

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1 Mohd Shukri Ismail, Land Administration In Peninsular Malaysia: A General Overview, Jurnal Pentadbiran Tanah, 2011

2 Section 23 of CPC

3 Section 425 of National Land Code

4 Section 426 of National Land Code

5 Amendment of Act A1516 was effective from 1st January, 2017.

6 Harlida Abdul Wahab, Kawalan Undang-Undang Terhadap Pembangunan Di Tanah Tinggi, Jelapang, 2002

7 http://www.bernama.com/bernama/v3/bm/printable.php?id=286173

8 Muhammad Aqeel Asyraf (2011), Sand mining effects, causes and concerns: A case study from Bestari Jaya, Selangor, Peninsular Malaysia. Accademic Journal.

9 S 111 mentions about power of Investigating Officer to require attendance of witness and if the witness refuses to attend as so required the officer may report such refusal to a Magistrate to issue a warrant to secure the attendance of that witness.

10 S 112 mentions about oral examination of witnesses by the police. The witness is bound to answer all questions relating to the case in a truthful manner. His statement then shall be reduced into writing and signed by him. This section is read together with s 113 of the CPC hat states about admission of statements made by the person who is charged with any offence

11 Section 421AC provides power of Investigating Officer to examine orally any person supposed to be acquainted with the facts and circumstances of the case and the person is bound to all questions relating to such case.

12 Section 117 of CPC

13 Article 5(1) of Federal Constitution

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National Land Code 1965

Kelantan Land Rules 1966

Criminal Procedure Code (ACT 593)

The Importance of Comparatýve Law in Legal Educatýon

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A. hýstorýcal background

In the western countries, the basis of studies of "comparative law" that started in 17th century aims for mutual legal solutions in a way that analyzes and compares the norms of several legal systems. Despite the gradual convergence of the systems, legal academicians have been avoiding the chance for a long time. Through the remarkable meetings of Roscoe Pound Comparative Law Studies in Paris, 1901 and the U.S., 1919, the idea of creating mutual norms that can be applied to several legal systems is accepted. Following that, "Comparative Law" became a department and a research area in law faculties.

Comparative law is a frequently emphasized and growing area, especially in recent years. The system simply looks for a research, comparison of different cultures and the best possible compatibility in a world where the concepts of "far" and "close" or "local" and "foreigner" constantly and widely change. This field of science has an important role on expanding the general knowledge of law and the progress of law as a field of study. Overall, it provides a better understanding on national institutions as well as it contributes to those institutions in practice. A glimpse on comparative law reveals that it contributes to any area of law, from civil law to commercial law and from criminal law to social security law.

B. key poýnts ýn comparatýve law

The study of comparative law requires a broader research than comparing a state to another. It is not sufficient for a study of comparative law to express that the approaches of the compared states to a legal problem are exactly the same or detect and list the differences. The reason of similarities and differences is also needed to be both researched and expressed. Likewise, it is essential to address the necessity of both a detailed analysis of the compared states and historical backgrounds, socio-political structures and general attributes of the legal sphere. For example, if a direct adaptation from one legal system to another is drawn as a conclusion, the historical base or cultural interaction causing the result should be explained.

A better review on the weak and strong sides of our national system may be achieved through comparative law studies. Other examples may provide hints and benefits to our legal codifications. It can be possible to develop a theory on the field of industrial relations and test the hypothesis on certain models. The models may provide hints for possible events in the future along with the theory. A resource can be created for research findings, national and multinational enterprises, international trade unions and law protectors. At this point it should be taken into consideration that the rules and institutions' comparative technique may cause problems in terms of efficiency and usefulness. A far more correct approach than the comparison of rules and institutions is to compare the functions of these institutions. It is perhaps necessary to conduct country studies (horizontal method) based on a common plan, but that is not enough. It is more

beneficial to compare in vertical method; using the horizontal method, through the data and information (on employment assurance, participation in administration litigation and mediation etc.), it can be turned into an in depth comparison[1].

C. contribution of comparative law to the education at law faculties

Even though the comparative law is perceived as examining the foreign legal systems, it is also a tool to have a look at our own legal system as a third eye and at least to crosscheck it to synchronize. By this way, we can have a chance to see the deficiencies of our own legal system and we can check the consistency between our legal system and the needs of the time, social structure and the realities of the time. In the same direction, having comprehensive knowledge of foreign legal systems became very important to be a contemporary lawyer[2] and studies of comparative law is a precious tool to have that comprehensive knowledge.

In this sense, I believe it is important for Turkey, who is founded as a secular western state of law, to be at peace with its own civilization and enrich it with the values of western legal systems will make an important contribution to our legal system[3]. Defending only the legal education system of a hundred years ago, will make it become a dogma and will not allow us to make progress in this field.

A nice progress not to be ignored is that; selective courses in Turkish law faculties are becoming more important[4]. However, as far as I could observe at law faculties during my dean duty, and at other faculties, we could not reach the target of having a system that offers 65% of the courses as selective courses in line with the "Bologna Process". There are many reasons for this situation. In my opinion, some of the main reasons are that we can not break the old habits and there is a strong will of the old generation for the next generation to have the same law education with the past. For example, we do not have some classes such as bargain law or some special classes on declamation and negotiation; which are now in an institutive form at European law faculties today[5].

Without a doubt, comparative law branch has application in both private law and public law. However, legal academicians stayed away from taking advantage of comparative law, maybe because of their intense programs. But both in public law and private law, academicians should have benefited from comparative law. Legal academicians should be able to teach the equivalent institutions and practice of the related institution in both western legal systems and eastern legal systems (Islamic Law, Chinese Law, Indian Law etc.) and should encourage the students to improve themselves in that direction by giving them homework. Otherwise we, the legal academicians, can face the danger of being locked in a confined space instead of benefiting from the opportunities of the legal systems that are getting closer every day. For example Roman Law got over the obstructions it had by adopting Islamic Law institutions in 10th century. Especially on the problem that the slaves don't have power of attorney since they are not a person in Civil Law. Roman Law solved this problem by adopting "attorneyship and representation" institutions which are created by Islamic Lawyers.

Apart from the important roles of comparative law, increasing numbers of the comparative law institutes both in and abroad Turkey; and frequently taking place in the universities as courses shows us the importance of the comparative law in present day. On the other hand, the point that comparative law has reached shows us that it will be an indispensable part of the notion of law.

Consequently; benefiting from comparative law,

1. adds value learning the current legal system and its practice
2. creates new perspectives on solving the problems in current legal system
3. gives the opportunity to learn the equivalent institutions of the institutions in our legal system
4. improve the students' ability to think genuine and comparative

Endnotes

[1] http://journals.istanbul.edu.tr/tr/index.php/sosyalsiyaset/article/view/81 E.T. , 01.12.2013.
[2] ÖZSUNAY, s. 283.
[3] ROTTLEUTHNER, Hubert, Hukuk Eðitimine Genel Bakýþ, s. 28.
[4] GÜRÝZ, Adnan, Hukuk Eðitimine Genel Bakýþ, TBB Yayýnlarý, S. 59, Ankara-2004, s.25.
[5] ROTTLEUTHNER, s. 28.

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http://journals.istanbul.edu.tr/tr/index.php/sosyalsiyaset/article/view/81 E.T. , 01.12.2013.
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ROTTLEUTHNER,

The Reposition of Mediation Process in Islamic Economic Dispute Resolution Trough Religious Court After Perma No. 1 of 2016

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ABSTRACT
Mediation, as "non-litigation dispute resolution", becomes a choice for people who expect the dispute settlement process can provide impartial settlement to both the customer and institution of Islamic Finance. In practice, the implementation of mediation still reached a low rate of success. Since 2003 until 2015. Data shows that the maximum achievement is only 18.1 %. The research aims to determine reposition of mediation process in Islamic finance dispute resolution through religious court after the issued of Supreme Court Regulation No. 1 of 2016. The research is normative and empirical legal research which uses qualitative method. The research is based on data collected in the library and court cases. Interview from field research will involve 5 (five) religious court in Yogyakarta. Interview and Focus Group Discussion (FGD) will be conducted to support the information of the research. The results of research shows that reposition of mediation process is one of requirements to file a suit. The five factors for support legal enforcement are law and legislation, law enforcement officers, facilities and infrastructure, society and culture. The recommendation of this research is there is a need to revise the Supreme Court Regulation No. 1 of 2016.
Keywords: *Reposition, Mediation Process, Dispute Resolution, Islamic Economic.*

I. Introduction

Mediation mechanism is integrated in the courts has been in effect since 2003. The use of these mechanisms is a mandatory procedure in the resolution of civil matters including the settlement of civil matters Islamic. In the context of the Islamic economic dispute resolution, such a mechanism was implemented in line with the expansion of the Religious Courts competence in handling disputes, through Law No. 3 of 2006 on the Amendment of Act No. 7 Year 1989 About the Religious Courts (UU PA). Utilization mediation mechanism in the Religious Courts continues. Even the release of the decision of the Constitutional Court No. 93 / PUU-X / 2012 and the Supreme Court Regulation No. 1 of 2016 on Mediation Procedure in the court dispute resolution strengthens the Islamic banking institutions Religious Courts, the use of mediation mechanisms show success in some cases and has improved. However, if viewed from the achievements of the percentage of success in previous studies obtained 18.1%, means it is still below 50%.

Based on the results of previous studies indicates that the process of settling disputes through mediation mechanism in a religious court can't be said to be successful. Assumptions of researchers that has not been successful settlement of disputes through the courts because of different religious culture of Indonesian society with mediation models that become part of the law of civil procedure formal nature. Likewise with the publication of PERMA No. 1 of 2016 on Mediation Procedure in court. Based on the PERMA the mediation mechanism included in the judicial procedure. Such a condition which causes the mediation process a high percentage of failures caused

by the character of the party if it has been summoned by the court for the defendant's guilt and feel a win for the plaintiffs. The defendant has been discouraged to negotiate while the defendant is often reluctant to give waivers or leeway to reduce the burden on the plaintiff. Such conditions often prevent the success of the mediation process. Other problems are also caused due to a lack of judges who have competence as a mediator and a mediator is still inadequate availability of non-judges.

1.1. Problem Formulation

Based on some of the problems mentioned above, the authors are interested in doing research on Repositioning Settlement Mediation Process In the Islamic Economic Justice Through Religion After Applicability PERMA No. 1 of 2016. The formulation of the problem is how the repositioning of mediation in resolving disputes through religious courts sharia economy, after the enactment of the Supreme Court No. 1 of 2016.

1.2. Methodology

1.2.1. Point of View/Stand Point

In this research used socio-legal approach with qualitative tradition , the operasionalization done according constructivism. Constructivism paradigm is a set of beliefs on a legal reality (Islamic banking) as a result of the construction of the relative, and contextually specific. The relative position (stand point), the author of the problem in this study at the level epiteme not as a participant but rather as an observer. As an observer, the writer will seek answers to any formulation of the problem posed by studying the reality of Islamic banking dispute settlement through mediation (constructed) spread in legislation or related policies and their implementation in the religious court. Understanding plenary obtained a product of the interaction between researchers with products observed object. There is a relatively subjective transactional relationship between researcher and research subjects. The researcher is the instrument, and thus at the level of axiology notch researcher is as a facilitator that bridges the diversity of existing data and subjects.

1.2.2. Strategy Research

The study was conducted with two strategies, namely research library (Library Research) and case studies (Case Study). Literature study conducted on all documents or literature about Islamic banking dispute settlement through mediation du religious court. Documents then grouped according to the dimension of time or period. The case studies in this research is the case nationwide, particularly the case of Islamic banking disputes. Research with this case study, carried out to record the social facts that accompany the development of society in supporting and sustaining human needs in the field of economics in society.

This study uses the codes of socio-legal studies1, ie understanding the law not as a normative normologik entities and esoteric merely the law of Islamic banking in this study is understood as an entity which is heavily influenced by non-legal factors. Formulation of the substance or content, choice of goals and the means used to achieve the objectives of Islamic banking or dispute settlement is believed to be interaction with non-legal factors.

1.2.3. Teknik Data Collection

1.2.3.1. Secondary data was obtained through the Research Library (Library Research) and Legal Document, which includes:

a. Material Primary Law, include:

1. Law No. 21 Th, 2008 and its implementing regulations, PERMA No. 1 of 2016.
2. The Constitutional Court Decision No. 93 / PUU-X / 2012.

b. Secondary Legal Materials, consisting of books about the legal system, the principles of law, the agreement (contract), Islamic banking, political law, legal theory, legal research methodology, journals.

1.2.3.2. Primary data obtained through research in the field (Field Research) with observations, interviews and Focus Group Discussion (FGD) / workshop, which includes: 1) Law sanction institution: Judge at the Religious Court and Supreme Court, Staff Legal Section at the Islamic Bank, notary Advocate, Registrar. 2) Role Occupant: Management Islamic Bank, Islamic Bank Customer-do with hermeneutics, sociology of law and phenomenology.

II. Discussion

2.1. Research Result

THE DATA OF THE RESEARCH IN RELIGIOUS COURT

Location	Number of Islamic Economics Cases	Mediation Process	Percentage
Yogyakarta	6	0	0 %
Sleman	12	2	16.66 %
Bantul	6	2	33 %
Gunung Kidul	20	18	90 %
Temanggung	3	0	0 %
Purbalingga	27	10	37 %
Bandung	10	1	10 %
	84	33	39.3 % 26.67 %
Data on Nov 2016		Average	32.98 %

Previous research: 18.1 % (Religious Court Data, Year 2012-2016
From Research Data of Dewi NM and Team, Faculty of Law, University Muhammadiyah Yogyakarta, October 2016.

Previous research: 10 % (Supreme Court Data, Year 2012-2016
From Research Data of Benny Riyanto and Team, Faculty of Law, Diponegoro University, Agustus 2016.

Based on the results of research in the field in the Religious Court of Yogyakarta, Central Java and West Java to 8 Religious Courts for the data years 2012 to 2016 and research literature data obtained as follows:

Sources: Filed Research and Library Research, 2012-2016

In the practice of settlement of civil disputes, especially disputes sharia economy, when the legal arrangements were incomplete or unclear, the parties can make interpretation of existing laws and relevant. While in terms of setting the law does not exist, then it can do the legal construction of new or provide arguments relating to urgency setting in question, to provide ease in finding a solution to the problems in this research will be described several sub topics on: 1) the dispute resolution mechanisms in general; 2) Model and mediation mechanisms in the Religious Courts, and 3) constraints on the implementation of the mediation of religious courts in Indonesia and the factors that affect law enforcement.

2.2. Mediation in Dispute Resolution Mechanism

Conceptually, the applicability of “mediation remotely” by the Supreme Court Regulation is one of the only types of models associated with “joint meetings”. Thus, the question, “why this type of ‘joint meetings’ more is not adopted? More essential questions that should be put forward, namely “why other models were not adopted anyway, so mediation is integrated on the court became more varied?” There should to give freedom to the mediator build strategy, the

Supreme Court Regulation do not call "joint meeting" which is a contrario means also limiting strategy. It has been the cause of ineffectiveness of mediation in a religious court if viewed in terms of the model or type of mediation. This condition is confirmed one of the factors that influence the effectiveness of mediation as stated by Tobias Böhmelt2 that:

With regard to mediation effectiveness, the existing literature frequently emphasizes three factors. The first one pertains to characteristic of the dispute, i.e. its intensity and duration or the issues at stake. The third factor describes the mediators as such or the type of mediation pursued.

Variation concept of the mediation process, according to Laurence Boulle3, can be grouped by three (3) models or types, namely: (1) the variation in relation to the number of mediators (variations in relation to the number of mediators), (2) variations in relation to the a joint meeting (variations in relation to the joint meetings), and (3) variations in relation to a separate meeting (variations in relation to the separate meetings).

The first model (variation in relation to the number of mediators) are distinguished in some kind of process, namely: (a) the mediation process solo (solo mediation) and (b) the process comediation (the co-mediation process). Mediation solo essence is the use of a single mediator (singgle mediator). While comediation process used in the situation of more than one mediator.

The second model (variation in relation to the joint meeting) divided into several types of processes, among others: (a) meeting of doubles (multiple meetings), (b) a mediation different (different venues), and (c) meetings with teleconferencing (telephone conferences). Meetings multiply has significance as most mediation does not reach the final in one sitting (meeting) and delays become necessary. Delays can have multiple functions in the mediation process. The meeting doubles enable the parties to obtain further information, such as assessment, professional advice, to reassess their situation, and is planning and response. In addition, it also allows (the) mediator, filed a confidentiality restrictions, assess progress and plan the strategy of the next session. However, delays have weaknesses among regression to things that have been agreed.

Regarding the different mediation may arise regarding the reasons of space and logistics. The statements from each side of the rotation can be used to indicate the side of the parties. As for meetings with teleconferencing can be done telefonik either for reasons of geographical distance, lack of resources, as well as a requirement or legal necessity.

The third model (variation in relation to a separate meeting) includes: (a) mediation back and forth (shuttle mediation), (b) a separate meeting with the advisor and the parties (separate meetings with advisers and parties). Mediation alternating means separate meetings without the parties meet together. Mediator move from one party to another party; solely as a vehicle of communication and negotiation between the parties. This is achieved when in a state of antagonism and if a meeting will take at the meeting were counterproductive. The second type, ie separate meetings with advisors and stakeholders to explain the flexibility of the mediation process. This type allows the mediator did separate meetings with attorneys (lawyers) or advisor of the parties. This type of process be allowed to teach.

In the context of the strategic freedom and flexibility to choose the model, which is integrated with the mediation of the court undoubtedly allow mediators to choose among models and strategies appropriate to the situation in Indonesia. Joint meeting could fit a particular situation, but it does not guarantee compliance with certain other case situations. In many cases the side do not want to see any reason other than the model would require a joint meeting.

Theoretically, a mediation model can also be grouped into a model settlement (settlement model/compromise), facilitation (facilitative model), therapeutic (theurapetic style), and evalua-

tive (evaluative model). Acceptance strictly categorization model in Indonesia has caused distortion in the court mediation evaluative models. Susanti Adi Nugroho4 determiner that the court mediation is more focused on evaluative models. This model is characterized by several things: (a) the parties come and expect the mediator gives an understanding that if this case continues, then determined between winning and losing, (b) is more focused on the rights and obligations, (c) mediators are usually experts in their fields or an expert in the field of law because of the focus on the right approach. Mediators tend to provide a way out and get the legal field in order to lead to a final result that is inappropriate, (d) provide advice or counsel to the parties in the form of legal advice or the way out offered by the mediator, so that it contains weaknesses (e) the parties were not has signed an agreement together. This makes the determination of the court mediation is less soft. Failure resulting models are not compatible with the situation of the parties to the dispute - which harmed the interests, demands, psychological conditions, legal relationships underlying the dispute – can't be resolved variations of the model, so there is no other way to accomplishing.

The above description leads to the understanding that a mediation model that is integrated in the courts require reconstruction for the purpose of achieving optimal results, the success of a dispute settlement efforts is significant. Based on a model that has been developed, possible variations in practice in Indonesia needs to be relaxed. That means changing the settings of mediation tight on the model and strategy into the open on the choice of mediator in accordance with the unique conditions of the case at hand.

2.3. Model and Implementation Mechanisms Mediating On Religious Courts in Indonesia

Model resolving disputes using mediation mechanism, is part of a model of alternative dispute resolution (ADR) or alternative dispute resolution (APS). The existence of developing mediation in addition to other models such as the negotiation and conciliation born gradually. Theoretically, there are two (2) models are often used to resolve disputes, namely5:

a. First, the model of dispute resolution is adjudicative. This approach is an approach to justice through the system resistance (the adversary system) and the use of force (coercion) in managing disputes and to produce a decision win-lose solution, for the parties to the dispute. In this adjudicative models in addition to the court (litigation settlement) were born in the first wave, also arbitration born in the second wave.
b. Second, the model dispute resolution non-litigation. In this model, achieving justice prefer the approach of "consensus" and attempt reconcile the interests of the parties to the dispute and aims to get the dispute towards a win-win solution. Non-litigation dispute resolution is often called the ADR.

Ehrmann in Riyanto Benny and his friends6 as quoted by Steven Vago7. revealed that "There are two principal forms of resolving legal Disputes throughout the world. Either the parties to a conflict, determine the outcome themselves by negotiation, the which does not preclude that a third party acting as a mediator might assist them in their negotiations. Or, the conflict is adjudicated, the which means that a third, and ideally as impartial party decides the which of the disputants has the superior claim ". The forms mentioned above, used and sometimes intertwine to disputes over civil, criminal, and administrative8. Accordingly, Steven Vago confirms that the main dispute resolution mechanisms that can be described in a continuum range (series) of the negotiation to adjudication. In negotiations, voluntary participation and the disputing parties prepare for their own settlement. In the circuit (continuum) is the next mediation, in which a third

party to facilitate a settlement and assist the parties in reaching an agreement voluntarily (voluntary agreement). At the end of the series, namely adjudication (whether judicial or administrative)- the parties were forced to participate, and the case was decided by a judge. In this case, the parties may be represented by legal counsel (advocate) with a formal procedure, and the results can be enforced by law. Meanwhile, adjacent to adjudication is arbitration, which is more informal9.

Islamic economic dispute settlement through mediation that is integrated in the Religious Courts have not been effective. It is caused by several things, among others: a) Litigation for dispute resolution infestation excessive formalities, b) Expensive; c) there is a potential sati siding with one party; and d) the results of the judge's decision is disappointing there are still seeking justice. In that context, ADR (alternative dispute resolution) be an alternative that offers the processes more efficient and effective, simple and confidential, whether in the form of negotiation or mediation. In practice, when negotiation or mediation fails to offer, the choice of the parties engaged in arbitration or court.

In Indonesia, the general provisions on mediation based on Law No. 30 of 1999 on Arbitration and Alternative Dispute Resolution (Arbitration Act and APS). However, in the APS Act, are not regulated in detail related to the implementation of the mediation mechanism. Moreover, it is not mentioned that the mediation mechanism should be integrated in the judiciary. The new provisions on mediation in courts governed by the Rules of the Supreme Court No. 1 of 2016 on Mediation in the Court Procedure (hereinafter referred to Supreme Court Regulation).

Arbitration Act and APS at the level of ideas to contain the controversy with the Supreme Court Rules. Related to the mechanisms of mediation, on the one hand gives freedom of mediators to use variations of the model. But on the other hand turned out to be a model of mediation offered is very limited. Thus, technically, a mediation mechanism to be very tight. The impression created about the freedom of mediators to use variations of the model is actually a wrong impression because liberated by APS and the Arbitration Act and the Supreme Court is a technical regulation of the model has been specified limited. That is, the Arbitration Act and Regulations and APS Supreme Court adheres to the paradigm of "limited model" and open "space of freedom models and technical". This is evident in Article 6 paragraph (2) of the Arbitration and APS which confirms that: Settlement of disputes or differences of opinion through alternative dispute resolution referred to in paragraph (1) resolved in the meeting directly by the parties within a period of 14 (fourteen) days and the results are set forth in a written agreement.

Regulation of the Supreme Court actually set wider than the provisions of Article 6 paragraph (2) of the Arbitration and APS regarding the possibility of applying the model of mediation. Article 5 (3) of the Regulation of the Supreme Court, provides that "The meeting Mediation may be through communications media, audio visual remote that allows all parties were seen and heard in person and participate in the meeting." The provisions of the Regulation of the Supreme Court can be said to be more advanced than the Arbitration Act and the APS, but leaves the question "whether it is by no means the Regulation of the Supreme Court and the law on Arbitration and APS?" Apart from this conflict means legally, it shows that the Arbitration Act and APS's time to be revised so as not to cause multiple interpretations top the contradiction. Preferences to select the APS changes Arbitration Act and the resulting incompatibility with the nature of mediation as a dispute resolution more flexible - and technical models - compared to court or arbitration that is adjudicative.

2.4. Constraints in the Implementation of the Mediation and Factors Affecting Law Enforcement

Issues that are integrated on the court mediation does not work effectively because there are some obstacles are due to the failure to create a model of integration, including the failure of a mediator in the mediation process. Mediation is confidential should be integrated with civil judicial models are open to the public. This has caused some problems for the legal culture mediators, advocates and the parties to the dispute in mediation practice. As revealed by Tony Whatling10 that cultural assumptions affect the success of a mediator in the practice of mediation. Steven E. Barkan11, based on socio-legal view suggests the influence of social factors as well as individuals. Communities have differences in certain aspects of the structure and their culture, which helps explain the difference in preference method of dispute resolution processes. As explained why some communities or individuals prefer mediation than other communities12. If it is considered as a special situation, then as stated by Christopher W. Moore13, a strategy is needed to respond to that particular situation.

We now turn to an examination of contingent strategies and activities - interventions and preventions by mediators to respond to unique or unusual situations, conflict dynamics, or parties, the which are not present in every negotiation or dispute. Though it is impossible to identify or describe all the situations that may require contingent activities by mediators, and details about Reviews their actual moves, there are a number of them that are common enough to merit description.

Moore in Riyanto Benny14 also mentions several authors among others Fisher, Maggiolo, and Wall describing a unique situation and potential contingency strategies that can be selected by a mediator to address the issue of failures in the practice of mediation. The situation and strategies meant, among other things15:

a. Problems with parties working together in joint sessions that may require private meetings or Caucuses;
b. Situations involving time and timing that may require time management by mediators
c. Situations requiring mediator influence and potential strategies and techniques;
d. Problems with parties' bases of power and means of influence, and mediator techniques to address and manage them;
e. Issues related to gender, working with women, and women as mediators;
f. Problems related to past, resent, and future causes of conflicts, and grand strategies to address them;
g. The presence of strong values and how they may be handled.

Seventh of the situation and the strategies, the Supreme Court Rules is strictly regulated, so as mediator in the Religious Court does not have the creativity to adjust to the conditions of the parties to the dispute. In addition, the number and skills of Judge Mediator is still limited. Each justice there are only 1-3 Judge Mediators are certified. Even still there are courts that do not have Judge Mediator. In case of any violation of the procedures which must be carried out as intended in PERMA No. 1 of 2016, then it can lead to the imposition of sanctions, so that the court decision becomes null and void.

Placement mediation mechanism is integrated in the Religious Courts is a means to replace and optimize the provisions of Article 130 HIR/Article 154 Rbg. Articles specify peace. Meanwhile, the "peace" under Article 130 HIR, in its implementation should be through the registers case and the announcement by the Religious Courts. This last is in fact quite serious impacts.

These conditions cause the defendant to feel embarrassed, even challenged. The next result, Defendants in particular, is very difficult to give concessions in the process of bargaining/negotiating when mediation. Reality, in reality is one reason the birth of ADR mechanisms. ADR is present and growing, due to the inability of such mechanisms in the judicial process to maintain confidentiality (confidential) of the parties in legal relations arising from the dispute. Thus, when mediation is also placed in a process that has been open since been announced by the court, the mediation process also creates cynicism on the parties. It thus Laurence Boulle said as quoted by Benny16 that "mediation is often promoted in terms of the privacy of the mediation sessions and the confidentiality of what transpire there."

To overcome this, need to be rethought liability session "openness" of the process of the court connected mediation, so as not to injure the main character ADR mechanism is more confidential. Mediation should be carried out before the case is registered by the Religious Courts, so it has not made a public announcement by the Religious Courts. This directly reduces the burden on openness disputes, since the parties have not felt defamed as a result of the lawsuit is not necessarily stating his actions against the law, default or coercion. In this case, a "purification" remediation that is integrated with the Religious Courts becomes inevitable.

Purification of mediation that is integrated within the Religious Courts is not easy. It is considering for this, Procedural Law Religious Courts in Indonesia are still using HIR / Rbg, governing openness all disputes in court, including a peace which rests on Article 130 HIR / Article 154 Rbg. These conditions reflect the need for immediate reform and Rbg HIR. Conditions of use mediation model that is integrated on the court, still need an open model, to achieve the expected results. As confirmed by Esin Orucu17 that:

> "Cultural diversity 'reflecting on the legal systems must be appreciated since' diversity 'and' flexibility ', being related to freedom of choice, are part of democracy, the one fundamental value upheld by all in at least the Western world. Aims such as' harmonization, 'integration' and 'Globalization' show acceptance of the existence of differences but, nevertheless, aspire to produce sameness. Yet the distinctiveness and mutuality should be emphasised Also within the concept of 'harmony'. "

That is, the use or selection of more open models still require harmonization with the culture of the recipient society. The plurality of the Indonesian nation with the traditional patterns of dispute resolution that creates peace, need to get a part in the formation of a mediation model that is integrated on the court.

In the resolution of economic disputes Islamic Religious Court, known mechanism of "deliberation", which means the effort or the road of peace between the parties. However, the mechanism of "deliberation" is not entirely the same as mediation mechanism known in the APS. In certain cases, deliberations have fundamental differences with the mediation. Basically, in terms of reconciling the principle is the same, while there are differences in terms of technical aspects. Therefore, the integrated mediation in courts is not easy, and it requires modifications to the levels of strategies and models.

Based on the results of research in the practice of mediation in 8 (eight) religious courts, namely: PA Yogyakarta, PA Sleman, PA Bantul, PA Gunung Kidul, PA Kulon Progo, PA Bandung and PA Purbalingga, shows the ineffectiveness of the implementation of the mediation. It is based on the evaluation of the Principles of Good Corporate Governance. Based on this principle the notion efficient and effective is ensuring the service to the community by using the available resources

optimally and responsibly, should the achievement of the results of the mediation is higher than 18.1%18 but in fact to this research achievement of mediation has been no improvement even there is a declining trend. Likewise, when evaluated with theoretical effectiveness of law enforcement by Soerjono Soekanto mediation mechanism in the Religious Courts has not been effective. Conclusions are based on the premise that the mediation process should be successful if the five factors, namely a law enforcement. Factors law (Law); b. Areas of law enforcement; c. Factors supporting different facilities or facilities; d. Community factors; e. Optimized and synergized cultural factors in its implementation. However, in reality, the factors referred to is not yet fully functioning optimally and synergy.

Based on the above results, then as a thought solution can be analyzed with the theory of operation of the law. Mediation be integrated into economic dispute resolution sharia in Indonesia easier to obtain results or would be more effective to use the theory of operation of the law of Robert B. Seidman. Supposedly every legal regulations tell about how a holder of the role (role occupant) in this case a mediator was expected to act. How it will act as a mediator in response to legislation that is a function-regulations aimed at him, the sanctions, the activities of the implementing agencies as well as the whole complex of social, political and others about him. Furthermore, how the implementing agencies in this case religious court, will act in response to legislation that is a function of legal rules directed at them, the sanctions, the whole complex of social, political and others are about themselves and feedback coming from the holder role. It should be noted also is, how the legislators will act, in implementing the functions of the rules governing good behavior for judges and mediators as well as his party, the sanctions, the whole complex of social, political, ideological, and others who about themselves as well as the feedback comes from stakeholders as well as the bureaucracy. The series of activities will be more optimal if applied also Sibenertika Theory of Talcoot Parson that essentially says that a social system in essence is a synergy between the various sub-systems experiencing social mutual dependence and connection with one another. Relationship interconnectedness, interaction and interdependence.

Based on the results of research in the practice of mediation in 8 (eight) religious courts, namely: PA Yogyakarta, Sleman PA, PA Bantul, Gunung Kidul PA, PA Kulon Progo, PA Temanggung, PA Bandung and PA Purbalingga, shows the ineffectiveness of the implementation of the mediation. It is based on the evaluation of the Principles of Good Corporate Governance. Based on the principle of efficient and effective understanding is ensuring the service to the community by using the available resources optimally and responsibly, should the achievement of the results of the mediation is higher than 18.1% but the fact hingga4.Simpulan and Suggestions

III. Conclusion

Based on the research conducted, the position of the mediation process as a requirement to file a lawsuit no longer in the proceedings through the court. The concept of integrated mediation in accordance Religious Court and can be applied to the Religious Courts in Indonesia although it can be said yet effective, given the level of achievement on average 18.1% (not yet reached e" 50%). Nevertheless, the average level of attainment of 18.1% for the mediation mechanism referred to, are also influenced by factors compatibility between law enforcement with the culture that flourished in the Religious Court by the parties to the dispute. Moreover, the attitudes of the Muslim community who like peace stigmatize positive and the support of the judiciary to encourage the compliance of parties to implement the decision. Furthermore, Mediator Judge awake professional *Sidiq* nature, *Amanah*, *Tabligh* and *Fathonah* be one of the factors that influence the

success of mediation Religious Courts in Indonesia. However, the number and skills of Judge Mediator remains to be improved.

Recommendation

Based on the above conclusions, some suggestions are necessary in the context of this study is that is making an amendment to the Supreme Court Regulation No. 1 of 2016. In the process of amending the peril steps are taken:

a. Establishment of processes and procedures for settling disputes need to be adapted to the character of Indonesian society that emphasizes deliberation;
b. The need of harmonization between Rule of Law APS with the Supreme Court as well as the revision of the HIR and RBg., Which is still valid;
c. Necessary preparation of human resources with competence as a mediator non judges because judges mindset as decision makers and as a mediator is different;
d. Access the opportunity to become a non-judge mediator (independent mediator) also need to be increasingly expanded.
e. The synergy of the various aspects such as: legal, political, cultural, economic and social need to optimize.
f. Change the culture developed in the community should be prioritized to get the support of the political, economic and social.

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Endnotes

1 Socio Legal Studies to see the law as one of the factors in the social system that can determine and be determined. There are a number of terms used to describe it, such as apply social science to law, social scienctific approaches to law, social scientific disciplines that aply perspective to the study of law. Rikardo Simarmata, Socio-Legal Studies and Legal Reform Movement in the Law Digest, Society and Development, Volume 1 December 2006-March 2007
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16 *Ibid.,p.* 41.
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18 The average results of field research in eight (8) Religious Court: PA Yogyakarta, PA Sleman, PA Bantul, PA Gunung Kidul, PA Kulon Progo, PA Purbalingga, PA Temanggung and PA Bandung.

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