PROCEEDING BOOK

International Scientific Seminar
Legal Culture And Fundamental Right

Tema:
Comparative Study Legal Culture and Fundamental Right in Asia

Hankuk University, South Korea
25 Januari 2019

Program Pasca Sarjana
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Buku Proceeding

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Program Doktor Ilmu Hukum Universitas Borobudur, Jakarta
South Korea, 25 Januari 2019, Hankuk University

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KATA SAMBUTAN
KETUA PROGRAM DOKTOR ILMU HUKUM
UNIVERSITAS BOROBUDUR

Melihat Pembaharuan dan pembangunan Hukum di Indonesia, tidak secepat perubahan di segmen lain , sehingga belum terasa adanya pembangunan Hukum yang arahnya menuju masyarakat yang adil dan makmur. Kita sadar bahwa pembangunan hukum itu dimaknai sebagai sesuatu perubahan,sehingga perubahan itu sendiri membawa pembaharuan terhadap sikap pelaku nya, kita masih melihat banyaknya pencederaan cita hukum.

Pembaharuan hukum pada dasarnya bukan saja monopoli suatu Negara, tetapi pembaharuan hukum merupakan jawaban atas kebutuhan karena adanya perubahan budaya serta perubahan perubahan yang mendasar yang telah disepakati bersama.

Dalam kesempatan ini Universitas Borobudur melalui Program Doktor Ilmu Hukum mengambil kesempatan untuk melakukan sharing knowledge melalui kegiatan Seminar Ilmiah International , dimana terjadi koloborasi keilmuan antara 2 (dua) Negara yaitu Korea Selatan dan Indonesia dalam melakukan penyelesaian perkara, diharapkan partisipan seminar ini memperoleh pemahaman yang benar tentang bagaimana penyelesaian sengketa.

Tema " Comparative Study Legal Culture and Fundamental Right in Asia" diharapkan dapat memberi gambaran bagaimana Perkara perkara yang terdapat di Korea Selatan yang bertujuan untuk menghindarkan litigasi dan menyelesaikan sengketa.

Lahirnya pemikiran para pemateri dalam proceeding ini, patut mendapat apresiasi sebagai reflektif yang berkontribusi kepada semua pihak, terutama keilmuan yang aplikatif. Akhir kata kami sampaikan ucapkan terima kasih untuk pihak yang membantu penyelenggaraan seminar ilmiah International ini seperti pihak : Law School Hankuk University South Korea (HUS), Center for International Area Law Studies of HUFS Lawa Research Institute, Korean Comparative Lawa Association & Korean Association Vietnamese - Indonesian Lawa & Culture Studies (KAVIN&CS), Panitia dan seluruh mahasiswa Program Doktor Ilmu Hukum Universitas Borobudur.

Jakarta, 25 Januari 2019
ketua Program Doktor ilmu Hukum Universitas Borobudur

EDITORIAL

Assalamualaikum Warahmatullah Wabarakatuh, Shallom, Om Swastiatu, Namo Budhaya, Salam sejawat

Puji syukur kita panjatkan kepada Tuhan Yang Maha Esa, atas rahmat dan hidayah-NYA, atas terselenggaranya seminar Intemasional yang merupakan hasil kerjasama antara Program Doktor Ilmu Hukum Universitas Borobudur dengan Law School Hankuk University South Korea (HUS), Center for International Area Law Studies of HUFS Lawa Research Institute, Korean Comparative Lawa Association & Korean Association Vietnamese - Indonesian Lawa & Culture Studies (KAVIN&CS), dalam kesempatan ini mengambil topic : "Legal Culture and Fundamental Right" (Comparative Study Legal Culture and Fundamental Right in Asia), yang diselenggarakan pada hari Jumat, 25 Januari 2019 di Hankuk University South Korea (HUS).

Atas nama penyelenggara Seminar Intemasional kami mengucapkan terima kasih atas partisipasi rekan-rekan sejawat mahasiswa Program Doktor Ilmu Hukum Universitas Borobudur sebagai pemateri maupun partisipan, juga kepada pihak Hankuk University dan KAVIN&CS, South Korea, sehingga Seminar Ilmiah International ini berjalan dengan baik.

Kami menyadari keterbatasan sehingga izinkanlah kami menyampaikan maaf sebesar-besarnya, dengan harapan Tema kegiatan ilmiah ini mencapai tujuan dalam rangka mensukseskan Pembaharuan Hukum di Indonesia.

Terima kasih,
Jakarta, 25 Januari 2019

Prof. Dr.H.Faisal Santiago,SH.,MM.

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Legal Culture and Fundamental Rights

Date : 2019.01.25, Friday, 13:00 - 18:00

Place : No 101, Law School Bldg., HUFS

Co-organized by : Center for International Area Law Studies of HUFS Law Research Institute, Korean Comparative Law Association & Korean Association Vietnamese-Indonesian Law & Culture Studies (KAVINL&CS)

Dr. BINSAR JON VIC S (Borobudur University, Indonesia)
Prof. Dr. Hanki Son (NANJING UNIVERSITY OF SCIENCE&TECHNOLOGY)
Dr. Lee, Seok Min (Senior Research Officer, Constitutional Research Institute of the Constitutional Court of Korea, KCC)
Dr. Wasis Susetyo (Dean, Faculty of Law Esa Unggul University, Indonesia)
Battsengel Tumendemberel (Lawyer, Mongolia)
Dr. Ahmad Sobari (Unas, Indonesia)
Prof. Dr. Ade Saptomo, (Dean, Faculty of Law Pancasila University, Indonesia)
Prof. Dr. Chulwoo Lee (Yonsei Univ.)
Prof. Dr. Heemoon Jo (HUFS) & Raissa Otaviano (Lawyer, Brazil)
Prof. Dr. Ryu Seung Hoon (Sunmoon University)

Time	Program
13:30~14:00	❖ Registration
14:00~14:20	• Opening Speech : Prof. Dr. Byun, Haecheol (President of KAVINL&CS) • Congratulatory Speech : Prof. Dr. Jo, Heemoon (Head of Center for International Area Law Studies)
14:20~15:40	❖ 1st Session • Moderator : (사이버 한국외대 베트남·인도네시아학부) • **Dr. BINSAR JON VIC S (Borobudur University, Indonesia)** "Cultural Constitution & Fundamental Rights" • Prof. Dr. Hanki Son (NANJING UNIVERSITY OF SCIENCE&TECHNOLOGY) "Amendment Culture of Chinese Constitution"
15:40~15:50	❖ Coffee Break
15:50~17:50	❖ 2nd Session • Moderator : • Dr. Lee, Seok Min (Senior Research Officer, Constitutional Research Institute of the Constitutional Court of Korea, KCC) "Ethics, private sphere and fundamental right : A comparing review on the decisions of the Korean Constitutional Court on 'criminal adultery', and 'same-surname-same-origin marriage ban'. • Dr. Wasis Susetyo (Dean, Faculty of Law Esa Unggul University, Indonesia) "State Owned Enterprises As A Pillar Economic Indonesia For Business Innovation And Transformation Based On Pancasila And Constitution Of 1945 Related With Decrees Of Constitutional Court Number 62/Puu-Xi/2013 & Number 12/Puu-Xvi/2018 (Universality Perspektif)" • Battsengel Tumendemberel (Lawyer, Mongolia) "The Constitutional Gurantee of Property Rights in Mongolia" • Dr. Ahmad Sobari (Unas, Indonesia) "Obligation to hold a religion in Indonesia"
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	University, Indonesia) "Legal Transplantation, Reformation Movement, And Model For Judge Made Law" • Prof. Dr. Chulwoo Lee (Yonsei Univ.) "Differing Forms of Decupling the Nation and the State: Multiculturalism and Diaspora Engagement" • Prof. Dr. Heemoon Jo (HUFS) & Raissa Otaviano (Lawyer, Brazil) "Multiculturalism and Diaspora Engagement-experience of Latin American Countries" • Prof. Dr. Ryu Seung Hoon (Sunmoon University) "Legal Culture in Koryo Dynasty"
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18:30	❖ Closing Remark

LEGAL TRANSPLANTATION, REFORMATION MOVEMENT, AND MODEL FOR JUDGE MADE LAW IN INDONESIA

Ade Saptomo[1]
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Abstract

Historically, Indonesia had ever been colonized by the Dutch Colonization for more than 350 years, as a consequent of it that there are many life aspects influenced by Colonial Policy. In the legal aspect, after independent on August 17, 1945, Colonial legal transplantation has continued to take place in Indonesian Nation based on the concordance principle, as long as not against to the Constitution 1945, and the goal of establishment of United Nation of Republic of Indonesia. So since 1945 until 2016, Colonial Legal Transplantation, particularly the Penal Code of Indonesia, still has been taking place to the National Law. Before reformation, there are as many as 38 articles of Code Penal of Indonesia repealed by acts. After reformation movement 1998, Indonesian state-legal policy has been changed by many approaches, for instance, from centralization to decentralization, top down to bottom up approach, etic to emic perspective. The main legal research question: why did the legal policy change? What's the legal implication? Which articles of Code Penal have been repealed after changing such approach? To answer it, social legal research has been done. Theoretically, the good law is not separated from its social norms and culture norms where it's existence. In the sense of public law, good public law must accommodate to the social norms and culture norms as recommended by Friedman's concept that law (judicial decision) as product of system (legal substance, legal structure, legal culture). Legal culture itself means Indonesian-social and cultural forces. The results of research is below: (1) not all legal transplantation can't be retained but must be repealed in accordance with Indonesian social-cultural character; (2) to make the good legal substance, judge made law should accommodate social and cultural forces; (3) after new approach, there are 2 (two) articles of Code Penal repealed by and 15 articles of Code Penal appealed to Constitutional Court Decision. Its recommendation, in the decision making process, law should accommodate the Indonesian social and cultural forces.

Key words: legal transplantation, model for judge made law, social-legal culture

A. BACKGROUND

We knew that the Indonesian independent day on august 17, year 1945. As Independent state, its governement needed the criminal law to create the public order. To reconfirm the validity of colonial-criminal law in Indonesia on February 26, 1946, government issued the Act 1 year 1946 on Criminal law Regulation. Based on this Act, legal penal became the legal basic the changing for Wetboek van Straftrecht (WvS) vor Netherlands Indie (Code Penal for Indonesian). This code translated into Indonesian language as Kitab Undang-Undang Hukum Pidana (KUHP). Although article XVII Act Number 2 Year 1946 has a norm which states that This Act began to operate for Java and Madura Region since announce but for other region will be set up by president. Because of it, *Wetboek van Strafrecht voor Netherlands Indie become Wetboek van Strafrecht* limited for Java and Madura Region. Implementation of KHUP for all Republic of Indonesia regions started September 20, 1958 by UU No. 73. As stated article 1 Act 1958 that "Act 1 Year 1946 on regulation of Criminal Law valid for all the region of Republic of Indonesia.

The Criminal Code of Indonesia has a real name *Wetboek van Strafrecht voor Nederlansche Indie* (WvSNI) enacted in Indonesia and first with the Koninklijk Besluit (Edict of the King) No. 3315 October 1915 and entered into force on 1 January 1918. The facts of history behind the birth of the Criminal Code as a means of legitimacy of the rule of substantive criminal law in Indonesia, of course, basically in the Criminal Code that make her a basic rule rather than the rule of law, is inseparable Netherlands, can be implemented for suggestions to achieve the requirements, legal certainty and fairness in society. However, with the development of the social structure in society, it will have implications for the legal deminding legal needs that must be adapted to the development of society.

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Therefore, KUHP rules which have been the material rules of criminal law as a result of developments in the social structure of society also have to adapt to various changes. It can be observed when we look at some of the rules in the Criminal Code that are not purely transplanted into national law, even in development there are some rules in the Criminal Code which is then separated into forms of legislation more concrete law such as the Law. After 40 years, Year 1998 had occurred Indonesian People Movement, one of appeals that government is to amandement Constitution State 1945. Particulaly issued The Contitution Court (Mahkamah Konstitusi-MK). In the context of the authority of MK Article 24 paragraph (2) of the 1945 Constitution state, judicial powers shall be carried out by a Supreme Court and judicial bodies underneath it in the environment, namely: general courts, religious courts, military courts, administrative courts, and the Constitution Court.

Under those provisions, the Court is one of the institutions of judicial power in addition to Suppreme Court. Judicial Power shall be an independent power to organize judicial administration to uphold law and justice. Thus, the Constitutional Court is a judicial institution, as a branch of the judiciary, which is prosecuting the case-specific matters under its authority under the provisions of the Constitution 1945. On the other hand, after the birth of the Constitutional Court in the reform era in Indonesia which is intended as a guardian of the constitution (The Guardian of Constitution) with the authority to examine a law on the 1945 Constitution has given the implications of changes to the substance of the Criminal Code itself with changes in the articles of the Criminal Code that have been tested its material to the Court, this was done to address the legal needs in the community in order to achieve the substantive justice values. Related to validity of KUHP as Code of Penal, Good KUHP is not separated from its culture, social, where it"s existence. Because of it, main legal research question: why did the legal policy change? What's the legal implication? Which articles of Code Penal have been repealed after changing such approach?

B. METHODOLOGY

To answer it, social-legal research approach has been done. In relation to such approach, theories on legal transplantation are a tool of analization. There are three views on whether legal transplantation is a desirable one. The first approach is referred to as the custom theory. Frederich Karl von Savigny, elaborated this approach. The approach states that law and society have inherent connections. It means that laws are found in the common consciousness of the people where they are existence. This common consciousness is manifested via the behaviors of individual members of that society or community. So that laws are related to the identity of a society for which they are created, it has legal system. So in such society, legal transplantation will never solve the problems of a recipient legal system.

Second, the custom theory assumes that countries take the laws of other nations on the basis of their own free will. In such cases, developing countries do not have a choice; they have to borrow laws such as family law, inheritance laws and land laws. This position is also called the degree of transferability approach. This moderate approach to legal transplantation states that the contexts of the recipient country should be studied well before the borrowing of laws is made.

Thirtly, the theories of Legal Transplantation talks the relationship between a state's law and its society. The phrase "legal transplants" refers to the movement of legal norms or specific laws from one state to another during the process of law-making or legal reform. The main theory that the good law is not separated from its social norms and culture norms where it's existence. In the sense of public law, good public law must accommodate to the social norms and culture norms as recommended by Friedman's concept that law (judicial decision) as product of system (legal substance, legal structure, legal culture). Legal culture itself means Indonesian-social and cultural forces.

C. DATA AND DISCUSSION

1. The Reformation Movement and its implication

Along with the momentum of the 1945 changes in the reformation movement period (1998-2004), and has implication. Reformatin movement asks the government for changing the legal policy, centralization to decentralization, from top down to botum up. In the field of judiary, in the making process of law or jugde made law must accomadate the social-cultural needs. Related to this appeal, an idea of the establishment of the Constitutional Court in Indonesia became stronger. The peak occurred in 2001 when the idea of forming the Constitutional Court adopted in 1945 changes were made by the Assembly, as defined in Article 24 paragraph (2) and Article 24C of the 1945 Constitution in the Third Amendment. Furthermore,

to elaborate and follow up on the mandate of the Constitution, the Government, together with the House of Representatives to discuss the Bill on the Constitutional Court. After discussion for some time, the bill was finally agreed by the government and the House of Representatives and approved in plenary session on August 13, 2003.

On that day, the Law of the Constitutional Court was signed by President Megawati Soekarnoputri and published in the State Gazette on the same day, then given a number of Law No. 24 Year 2003 regarding the Constitutional Court (State Gazette of 2003 No. 98, Supplement No. 4316). Judging from the aspect of time, Indonesia was the 78th that form the Constitutional Court as well as the first country in the world that make up this institution in the 21st century.

In the context of the authority of Constitution Court, article 24 paragraphs (2) of the 1945 Constitution states, judicial powers shall be carried out by a Supreme Court and judicial bodies underneath it in the environment, namely: general courts, religious courts, military courts, administrative courts, and the Court Constitution. Under these provisions, the Court is one of the institutions of judicial power in addition to Supreme Court. Judicial Power shall be an independent power to organize judicial administration to uphold law and justice. Thus, the Constitutional Court is a judicial institution, as a branch of the judiciary, which is prosecuting the case-specific matters under its authority under the provisions of the 1945 Constitution.

2. Models for Judge Made Law

Theoretically, the good law is not separated from its social, culture where it's existence. In the sense of public law, good public law must accommodate to the social and culture norms as recommended by Friedman's concept that law (judicial decision) as product of system (legal substance, legal structure, and legal culture). Legal culture itself means Indonesian-social and cultural forces. Model of the Constitutional Court from 2003 to 2013 include: (1) the model decision that is legally cancel and declare void (Legally Null and Void); (2) The decision of the constitutional model of conditional (conditionally constititional); (3) models unconstitutional decision conditional (conditionally unconstititional); (4) model of decision postponed the application of the decision (limited constitutional and (5) decision models that formulate new norms. Implementation of the decisions of the Court can be seen from its decision model. Implementation of the decision model that is legally cancel and states that not apply and the model of the decision to formulate a executable norm (self executing/ self implementing), whereas both decition model of constitutional conditional and the model decision of unconstitutional conditional can not be directly executed (non-self-executing /implementing).

In this context of due process, Constitution Court in Indonesia present consistently based on Article 5 paragraph (1) Law Number 2009 that judges and constitutional judges shall explore, and understand the values of law and justice in the society. in the frame of that, Constitutional Court Judges consider deeply information, explanation, opinion from all experts on social, culture angle to give explanation accordance with their expert. Theoretically, such article 5 related to Frederich Karl von Savigny's concept that states "all law is originally formed by costum and popular feeling, that is, by silently operating forces. Law is rooted in a people's history; the roots are fed by the consciousness, the faith and the customs of the people". I saw that models of judge made law also based on the Friedman's concept that law (judicial decision) as product of system (legal substance, legal structure, and legal culture). Legal culture itself means Indonesian-social and cultural forces via Article 5 paragraph (1).

Data shows (below matrix – Recaptulation Report of Constitution Court Republic of Indonesia 2003-2016)) that The total cases of judicial review provisions of the Criminal Code on the 1945 coming into existence of the Constitutional Court since 2003 to 2016 is cases with details: - 2 cases granted; - 2 courts granted in part; - 6 cases rejected; - 2 cases can not be accepted; - 2 case status assessment; - 1 case status Unauthorized Passing; Since 2003 until 2006 there was no filing of Judicial Revew provisions of the Criminal Code submitted to the Constitutional Court, but the filing of judicial review provisions of the new Criminal Code started in 2006 until today.

D. CONCLUSION

Theoretically, the good law is not separated from its social norms and culture norms where it's existence. In the sense of public law, good public law must accommodate to the social norms and culture norms as recommended (1) Frederich Karl von Savigny, that law and society have inherent connections. It means that laws are found in the common consciousness of the people where they are existence. (2) Friedman's

concept that law (judicial decision) as product of system (legal substance, legal structure, legal culture).

The result of research is (1) not all legal transplantation can't be retained but must be repealed in accordance with Indonesian social-cultural character as described on Constitution 1945; (2) to make the good legal substance, judge made law should accommodate social and cultural forces; (3) after new approach, there are 2 (two) articles of Code Penal repealed by and 15 articles of Code Penal appealed to Constitutional Court Decision. Its recommendation, in the decision making process, law should accommodate the Indonesian social and cultural forces.

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MINERAL AND COAL MINING FOR SUSTAINABLE ENERGIES

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Abstract

Mineral and coal itself has a very strategic value for the life of the Indonesian people as a source of domestic energy and a very significant source of state revenue. However, various policies on mineral and coal issued by the government are still considered not able to elaborate the challenges and problems of mineral and coal reserves. Beside the importance of mineral and coal to help the Indonesian economy, it has negative effects on the surrounding environment. Supposedly, the development of the mineral and coal sector can go hand in hand with development in the environmental sector. The creation of a balance between the utilization and sustainability is an important prerequisite for the implementation of sustainable development of the environment as well as mineral and coal sectors. This study will discuss environmental impact of mineral and coal mining and how the protection of environmental sustainability of mineral and coal mining. The study shows that mineral and coal mining has many negative impacts such as water and pollutions. It also has the possibility of radiation effects from radioactive elements.Indonesian laws and regulations have clearly regulated the social and environmental responsibilities required to the Mineral and Coal Business Entity.

Keywords: Coal, Mineral, Mining, Sustainability

A. INTRODUCTION

Indonesia's natural wealth is famous for its abundance. Forests are extensive, the soil is fertile, the landscape is very beautiful. The area of the waters is very wide with a very large commodity fish playing an important role in human life (*Fauzi 2010*). The surface of fertile soil and also contained in various mining materials such as minerals, coal, iron ore and various chemical elements that can be processed for the welfare of the community.

Mining is a complex business activity, capital-intensive, risk-laden and involves high technology. Therefore, the management of mines must manage them wisely. So that mining activities should pay attention to various important aspects, both technical and non technical, such as: socio-economic aspects of culture, environment and conservation of mining commodities. Mining law is the whole legal norm governing the authority of the state in the management of minerals and regulating the legal relationship between the State and the person or legal entity in the management of the utilization of minerals.

Management concept of Mineral and Coal mining in Indonesia implement the sustainable concept, based on conventional development emphasizes on economic growth, that resulted in negligence or social and environmental aspect failures, due to the reason that conventional development put mere economic targets as the central issue of growth, and puts social and environmental factors in a position that is less important, although we recognize that natural resources Mineral and Coal is a natural resource that is not renewable (*Aziz et al. 2010*).

The non-renewed issue of mineral resources and non-renewable resource management is also highlighted by UNEP (*Drexhage and Murphy 2012*) which introduces the concept of sustainable development that seeks to collaborate on economic, social, environmental and legal aspects in a concept of cumulative mineral and coal mining management based on the principle of mineral exploitation and coal is done in order to fulfill the needs of industry and energy present, and sacrifice the fulfillment of future generation's needs.

Philosophically, the mineral and coal management policy in the mining jurisdiction land of Indonesian must be in accordance with article 33 paragraph 3 of the 1945 states that "The land, the waters and the natural resources within shall be under the powers of the State and shall be used to the greatest benefit of the people". As affirmation of Constitutional Court Decision which in essence that State as holder of right to control.The mining licensing system refers to the Ministerial Regulation No. 34 of 2017 on Licensing

in the Field of Mineral Mining and this is a revision of the previous Regulation which is made to facilitate the reporting system for mining license (IUP) or Work Agreement on Coal Mining Concession (PKP 2B) and mining guarantee business license (IUJP) Permit holder especially in the RKAB (Work Plan of Cost Budget) Reporting System each year.

The authority of the government in the management of natural resources of minerals and coal is contained in Law No. 4 of 2009 on Mining and Minerals and its implementation regulation in the form of Government Regulation No. 23 of 2010 on Mineral and Coal Mining Business Activities hereinafter referred to as Government Regulation No. 23 Year 2010 as amended the last few times with Government Regulation No. 77 of 2014 on the Second Amendment to Government Regulation No. 23 of 2010, the Regulations on the authority of the government in the granting of licenses both business licenses and business territories are regulated in Articles 6, 7, 8, Article 35 to Article 63 Law No. 4 of 2009.

The existence sector coal mining is urgently needed to support development. The mining sector is contributing economically to the local level. This is one of the natural resources that is not renewable (*Unrenewable Resources*). So that mining can last for a long time, the utilization should be done wisely and planned, so it can be passed on to the future generations. Indonesia is a country which is rich in mines (*Soedarso 2009*). According to the annual survey of PWC (PriceWaterhouse Coopers), mining products exports contributes 2 percent of total exports since 2002, while the sector also contributes 2.7% of gross domestic product (GDP) and US $ 920 million in taxes and non-tax levies for different levels of government. The Mining Sector also provides substantial employment, whether directly involved and in the production process as well as in various mining support products and services (*PWC 2003*).

Sustainable development is a visionary development paradigm; and over the past 20 years governments, businesses, and civil society have accepted sustainable development as a guiding prunciple, made progress on sustainable development metrcs, and improved businesses and NGO participation in the sustainable development process. Yet the concept remains elusive and implementation has proven dificult"(*Draxehage and Murphy 2012*) (it is generally accepted that sustainable development requires convergence between the three pillars of economic development, social justice, environmental protection Sustainable development is a visionary paradigm, and over the past 20 years governments, businesses and civil society have accepted sustainable development as potential guides progress on sustainable development metrics, and improve business and NGO participation in sustainable development processes, but the concept remains elusive and implementation has proved difficult.)

Environmental impacts due to mining activities include: decreasing land productivity, increasing soil packing, erosion and sedimentation, soil or landslide movement, disrupt ion of flora and fauna, disruption of coal mining health. In addition, mining activities caused damage to several areas of mangrove forest and swamp, mangrove palm forest and area's fish and shrimp catch as one of the sources of community life. Mining is often conducted traditionally by local communities with business actors who are not complemented with equipment facilities, knowledge and capital. In addition to these limitations, the regulatory constraints also exacerbate the situation and conditions, so mining is likely to be undertaken without permission (PETI), making it vulnerable to accidents and workplace safety violations and sometimes causing pollution and uncontrolled environmental damage.

The idea of Environmental Law is in fact progressive so that development and industries are controlled, planned to become sustainable. Therefore, in Law No.32 of 2009 Article 1 Paragraph 3 which states that sustainable development is a conscious and planned effort that combines aspects of the environment and the safety, abilities, welfare and quality of life of present and future generations.

B. PROBLEMS

From the description above the following problems are :

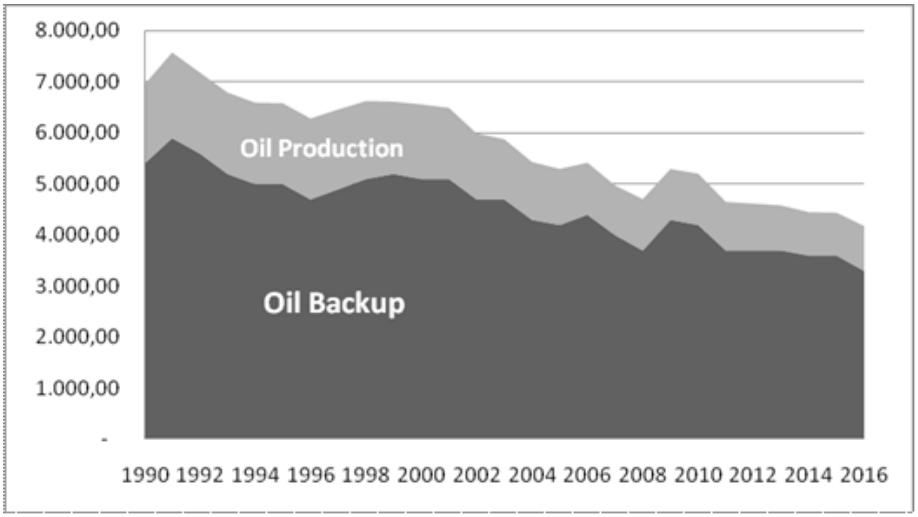
1. What is the environmental impact of mineral and coal mining in Indonesia?
2. How the protection of environmental sustainability of mineral and coal mining?

C. DISCUSSION

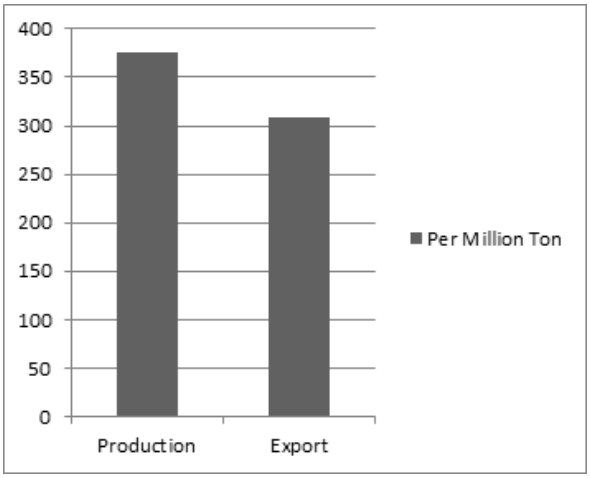
Indonesia is a country rich in natural resources.The minerals include gold, silver, copper, oil and natural gas, and others.The natural wealth belonging to the people of Indonesia which is empowered to the state is mandated to be managed well in order to achieve the goals of the state of Indonesia. Government as a representation of the state is given the right to manage the wealth of natural resources to be enjoyed by

the people in fair and equitable manner. The prosperity of the people is the spirit and the ultimate ideals of the welfare state that must be realized by the state and the government of Indonesia. Natural resource management is one of the instruments to achieve it.

Mining activities are activities with temporary land use, which take place as long as the ore or valuable materials to be mined are still available and still have economic value to extract. In case the ore or material reserves have been exhausted then the mine closure is done.



Oil Production and backup from 1990-2016 (Source :Bappenas RI)



Data of production and export of coal mining in Indonesia (Source :Bappenas RI)

1. *Current Energy Conditions in Indonesia*

Indonesia's energy is still dominated by fossil energy. Energy price is required to be pushed down to make it affordable so that all of people can use it well. Abundant renewable energy potential is not yet optimally utilized. Renewable energy such as hydro, wind solar, geothermal, bioenergy, and sea has a big potential to be used for the future.

FossilEnergy	Proven Reserve	Production	Estimation
Oil	3,6 bilion barrel	288 million barrel	12 years
Gas	98 TSCF	3,0 TSCF	33 years
Coal	32,4 billion ton	393 million ton	82 years
Shale Gas	574 TSCF	-	-

Table 1. Fossil Energy Potential

No.	RE Generation Types	RE-Based Electricity Supply Achievement					
		2012	**2013**	**2014**	**2015**	**2016**	**2017**
1.	Geothermal Power Plant (MW)	1.336,00	1.343,50	1.403,50	1.438,50	1.643,50	1.808,50
	Geothermal (SBM)	17.555.980	17.511.720	18.109.676	18.696.400	19.941.278	23.389.128,41
2.	Bioenergy Power Plant (MW)	26,00	126,00	898,50	1.767,10	1.787,90	1.840,70
	Bioenergy (SBM)	169.243,51	820.180,09	5.848.665,17	11.502.700,30	11.638.095,11	11.981.789,62
3.	Hydro Power Plant (MW)	4.078,24	5.058,87	5.059,06	5.079,06	5.124,60	5.124,60
	Hydro (SBM)	33.518.631,27	41.578.327,45	41.579.889,04	41.744.266,97	42.118.555,50	42.118.555,50
4.	Micro/Mini Hydro Power Plant (MW)	37,88	67,22	105,58	137,57	162,36	206,13
	Micro/Mini Hydro (SBM)	410.957,96	729.265,95	1.145.431,40	1.492.489,09	1.761.434,38	2.236.292,61
5.	Solar Power Plant (MW)	8,92	14,34	16,99	22,81	85,00	90,12
	Solar (SBM)	19.350,17	31.114,77	36.864,71	49.492,88	184.432,03	195.541,35
6.	Wind Power Plant (MW)	0,93	0,93	1,12	1,12	1,12	1,12
	Wind (SBM)	10.089,52	10.089,52	12.150,82	12.150,82	12.150,82	12.150,82
TOTAL (MW)		**5.487,97**	**6.610,86**	**7.484,75**	**8.446,16**	**8.804,48**	**9.071,17**

Table 2. Renewable energy potential from 2012-2017 in Indonesia

2. *Environmental Impacts of mineral and coal mining in Indonesia*

Mining activities spent a considerable amount of energy in the form of fuel, this energy used for mining material transport from mining location to processing place. In underground mines, the transport of material to the surface, air vents and hole temperature control up to the ore terminal are consuming enormous energy. Overall it eventually releases CO_2 which contributes to global warming. In addition, mining activities have an effect on air quality. Starting from the blasting events, the operational trucks are transported on open land, uncovered tailing dams. All that has released dust into the air. And a number of radioactive elements present in the ore can cause radiation. Smelters that operate by ignoring work safety cause the release of heavy metals bound to sulfide into the air. Acid rain and smog are also often the effect of mining activities.

Mining activities have a lot of water use although some are the result of recirculation. Sulfide-containing minerals , due to their contact with air, form sulfide acids in combination with trace elements. This condition, in its entirety, has a negative impact on both surface and ground water. Water pollution can also come from piles of coal or coal waste, not to mention the explosion process that can raise water salinity.

In the underground mine the possibility of accidents is greater than the surface mine due to lighting factors, air ventilation and the danger of rock falls. The biggest health risk is the presence of dust that can cause problems (Silicosis). In addition, there is also the possibility of radiation effects from radioactive elements. Developing countries, often victims of mining activities due to contamination of clean water sources.

Law No. 4 of 2009 on Minerals and Coal still legalizes coal dredging. This law deals with environmental laws and forest laws or umbrella provision for other legislative bodies.In fact until now with the issuance of Law No.4 of 2009 it is still felt that the dredging of coal does not meet on the environment, namely forest destruction and reclamation that failed.The forestry minister has warned mining companies to pay attention to the environment in south Kalimantan. For that is not to be over-exploited, because it will harm

the environment in the future. The warning of the forestry minister is very severe, this is because the Coal Minerals Law has granted extensive permits in accordance with what procedures it regulates.

It can not be denied that mining activities can cause irreversible damages. Once an area is opened for mining operation, then the area will potentially be damaged forever. In order to restore the condition of the land in such a way that it can be functional and efficient according to its allocation, then to the former mining land, in addition to the closure of the mine, also must be done recovery of the former mining area. Issues of mineral and coal are not only to social issues but also environmental issues also have an impact on society in the future.positive national law that can be used for community renewal still needs improvement and development.

Mining activities often cause damage to the environment such as landslides, floods and ecosystem changes. These activities include stripping mine soil, land clearance, stripping of overcrowded coal seams, coal hauling and coal sealing required an activity to rehabilitate in order to avoid continuous environmental neglect. These efforts can be pursued by post-mining land reclamation.

3. *Sociological and Economic Interests*

Based on the results of research from Mark L Wilson that globally over one hundred million people of their lives depend directly or indirectly on small-scale mining activities, whereas in Indonesia the existence of several smallholder mines has existed long before the country became independent and this small-scale society has been hung his life as a source of income for the people of the miners from mining activities for generations and considering some problems related to the above mentioned permits that encourage unlicensed mining activities (*Wilson 2015*).

4. *Environmental Sustainability of Mineral and Coal Mining*

It is undeniable that the mining industry of the mineral and coal provides economic benefits and huge state revenues for Indonesia. It is a strategic, non-renewable natural resource. In the last five years, the energy and mineral resources sector accounted for an average of 20-30% of total state revenues. Where most of it is sustained by oil and gas sector.On the other hand, the impact of the oil and gas industry is a matter of environmental sustainability. Mineral and coal industry is often a major problem in environmental pollution.It is the responsibility of mineral and coal business entities to preserve the environment after mining exploration. The responsibility for environmental protection aims to protect the territory of the Unitary State of the Republic of Indonesia (NKRI) and also the survival of human life.

According to juridical understanding, as provided by law on the basic provisions of environmental management no.4 of 1992 (hereinafter referred to as UUPLH 1982), the environment is defined as the unity of space with all objects,styles and circumstances and living things, including human beings and their behavior that affect the survival of the life and welfare of human beings and other living beings (*Siahaan 2006*).Fro the theories above, it can be concluded that the environment is that environmental sustainability is determined by human behavior, because all human behavior towards the environment greatly affects the totality of good environmental conditions including the sustainability of animals and plants.

UUPLH 1997 lays down the principle of management of the circle which in its formula explicitly listed 3 principles. The basic assumptions can be seen in article 3 as follows: The management of the environment which is carried out with the principle of State responsibility, sustainable principle, and the principle of benefit aims, realizing sustainable development that is “Environmentally minded” in the context of the development of the whole Indonesian people as well as the building of the whole community who believe and piety to God Almighty.

D. CONCLUSION

Nature has the dominant function of environmental sustainability, so it is better for industrial companies especially mineral and coal mining can operate the company’s waste well so that it is beneficial for the survival of the universe. Based on an assumption that environmental protection and improvement is a subject matter that affects the welfare of mankind, plants and animals.And in helping the development of the economy around the world. “Only in a good environment human beings can develop maximally, and only with good human environment can develop well”.

Indonesian laws and regulations have clearly regulated the social and environmental responsibilities required to the Mineral and Coal Business Entity. Legislation already regulates it, after which it means

the implementation of those rules. The Mineral and Coal Business Entity should consider environmental aspects and benefits for people in addition to thinking about economic benefits alone.

Nature and a healthy environment is the desire of every human being. How to care for the environment can be realized because of the human role as well. Humans who will make the environment and nature become damaged or sustainable.

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THE ROLE OF NOTARY AS A GENERAL OFFICER IN ITS RELATIONSHIP WITH THE IMPLEMENTATION OF SINGLE SUBMISSION (OSS) ONLINE BASED ON GOVERNMENT REGULATION NUMBER 24 / 2018 ON BUSINESS LICENSING SERVICES INTEGRATED ELECTRONICS

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Abstract

Since the enactment of Government Regulation Number 24/2018 concerning Electronic Integrated Licensing Services, every licensing service activity must go through the Online Single Submission (OSS) system. The purpose of this regulation is to simplify the service of copying. With the enactment of these regulations, it also influences the duties and roles of the notary to help business actors. Along with the Industrial Revolution era, Notaries must also be able to adapt and use the system. In reality, some problems were found so that it hampered the licensing services assigned to the Notary. For this reason, coordination with related parties is needed so that the system runs well.

Keywords: Cyber Notary; business licensing; people in business; Online Single Submission.

A. INTRODUCTION

The development of the business world in Indonesia is proliferating. Progress in the field of science and technology makes people in Indonesia become active communities, especially in the business world. The freedom to access information through the internet makes it an opportunity to try to be more open with its breadth. The increasingly rapid development of the business world is expected to realize increasingly rapid economic growth in our beloved country.

Indonesia is not the most comfortable country to establish a new company or to play an active role in the business field. This situation is reflected in the Doing Business 2018 Index ranking report issued by the World Bank, in this report, Indonesia is currently at 72. (Business in Indonesia, 2018). One of the most significant problems in establishing a new company in Indonesia is to get all the necessary permits. The licensing process can be time-consuming and expensive. The bureaucracy that is difficult to understand in the relevant agencies in issuing business licenses is the reason for the difficulty in managing business licenses in Indonesia. This situation causes the development of the business world to be hampered by difficulties in obtaining licenses in the business world. To overcome this, the government in Indonesia issued a business convenience policy known as **EASY OF DOING BUSINESS (EODB),** by implementing **Online Single Submission (OSS)** based on **Government Regulation number 24 of 2018 concerning Business Licensing Services Integrated Integrated Electronics.**

Government Regulation number 24 of 2018 regulates provisions concerning:

1. Types of licenses, applicants for licensing and issuance of licenses;
2. Licensing implementation mechanism, rearranging K / L / P functions;
3. Licensing reform; delete, merge, simplify, group forms and types of permits in the list of licensing lists;
4. OSS; institutions, systems, and funding;
5. Incentives and disincentives for the implementation of licensing through OSS;
6. Resolving licensing problems and obstacles through OSS;
7. Imposition of sanctions.

The grouping of types of business licenses as stipulated in Article 5 of this regulates business licenses and commercial or operational permits, all business licenses regulated in sector legislation, classified as business licenses or commercial or operational permits.

A notary is an official who holds a particular position who runs a profession in legal services to the public (Helena and Freddy Harris, 2017). The existence of the notary profession regulated in Law number 30 of 2004 concerning the Act of Notary Position was further expanded through the opinion of the Constitutional Court Judges stating that Notaries were professions and public officials who carried out part of the government's duties.

Cyber Notary is a necessity. At present, the registration for obtaining a Decree regarding the establishment of a company in the form of a legal entity in the form of a Limited Liability Company (PT) has been carried out online through the Directorate General of Public Law Administration and Online Services. This progress has caused much increase in the acceleration of the issuance time of the decree of the establishment of a company and cut down on long-winded bureaucracies because all registration processes are done online. The ease of getting this information in society makes a value system in society. The public wants a government that is accountable, transparent and free of corruption.

Based on this fact and concerning ease in the world of business with the issuance of Government Regulation number 24 of 2018 concerning **Electronic Integrated Licensing Services,** it is interesting to conduct a discussion entitled: **THE ROLE OF NOTARY AS A GENERAL OFFICER IN ITS RELATIONSHIP WITH THE IMPLEMENTATION OF SINGLE SUBMISSION (OSS) ONLINE BASED ON GOVERNMENT REGULATION NUMBER 24 / 2018 ON BUSINESS LICENSING SERVICES INTEGRATED ELECTRONICS.**

B. PROBLEMS

Based on the above description, legal issues arise which will be discussed in this paper, namely:

1. How far is the role of a notary in Indonesia as a public official authorized to make the deed of establishment and register the establishment of the company in connection with the enactment of Government Regulation number 24 /2018?
2. What obstacles are faced by notaries in Indonesia in connection with the enactment of Government Regulation number 24 /2018 concerning Business Licensing Services to be Integrated Electronically in Indonesia?

C. DISCUSSION

1. OF THE ROLE OF NOTARIES IN INDONESIA AS AUTHORIZED GENERAL OFFICERS TO MAKE ITS ACCESS TO ESTABLISHMENT AND REGISTRATION OF COMPANY ESTABLISHMENT IN CONNECTION TO THE APPLICATION OF NUMBER 24 OF 2018

The government in the Republic of Indonesia to respond to and support the development of the business world in Indonesia. Number 24 /2018. In the context of accelerating and increasing investment and business, it is necessary to apply licensing services to try to be integrated electronically. The legal basis for the issuance of Government Regulation Number 24 /2018 is:

a. Article 5 paragraph (2) of the Constitution Republic of Indonesia;
b. Regulation number 25 of 2007 concerning Investment (State Gazette of the Republic of Indonesia) of 2007 number 67, Supplement to the State Gazette of the Republic of Indonesia number 4724;
c. Regulation number 23 of 2014 concerning Regional Government (State Gazette of the Republic of Indonesia of 2014 number 244, Supplement to the State Gazette of the Republic of Indonesia number 5587) as has been changed many times with Law number 9 of 2015 concerning Amendment to Law Number 23 2014 concerning Regional Government (State Gazette of the Republic of Indonesia of 2015 number 58, Supplement to the State Gazette of the Republic of Indonesia number 5679). Based on a series of regulations, the government of the Republic of Indonesia at this moment issues Government Regulation number 24 of 2018 concerning Business Licensing Services Integrated Integrated Electronic.

In Article 1 of Act No. 2 of 2014 that a *Notary is* ***a public official authorized to do authentic deeds and has other authorities as referred to in this Act or under other laws*** (Association of Legislation of Notary Position, 2015)**.** With this affirmation in Article 1 of Law Number 2 the Year 2014, a notary must carry out his authority responsibly. A notary must act honestly, thoroughly, independently, impartially, full of a sense of responsibility based on legislation and the contents of a notary oath of office (Notary code of ethics).

The first breakthrough of the Ministry of Law and Human Rights of the Republic of Indonesia was the existence of a Legal Entity Administration System or abbreviated as SABH for the establishment of a Limited Liability Company as a legal entity that is supporting the economy of a country. The Legal Entity Administration System is implemented with the aim of creating a fast, accountable and transparent public service towards e-government in Indonesia.

With the enactment of Government Regulation number 24 of 2018, the community of business people has become more widespread in carrying out integrated company registration. In this case the role of the notary is only as an authorized official in making the deed of the founder of the company and providing legal consultation on the implementation of Government Regulation number 24 of 2018 without being able to play an active role in registering company services based on Government Regulation number 24 of 2018 in Indonesia. Article 6 paragraph (1) Government Regulation number 24 of 2018 that the Applicant for Business Licensing consists of:

a. Individual Business Actors;
b. Non-individual business actors.

Thus the role of the notary in connection with the enactment of Government Regulation number 24 of 2018 is as a General Officer authorized to make company deed in the form of a legal entity and not a legal entity and register changes related to the company based on applicable legal regulations.

2. CONSTRAINTS THAT ARE FACED BY NOTARIES IN INDONESIA IN RUNNING ITS AUTHORITY IN CONNECTION TO BE DONE BY GOVERNMENT REGULATION NUMBER 24 / 2018 ON BUSINESS LICENSING SERVICES INTEGRATED ELECTRONICS IN INDONESIA

At present there are differences in Limited Liability Companies in the Legal Entity Administration System with OSS System Coordinating Ministry The Economic Sector is because the OSS system uses KBLI 2017 while the Legal Entity Administration System uses KBLI before KBLI 2017 which results in data mismatch between the Ministry of Law and Human Rights with the Coordinating Ministry of Economic Affairs so that the Employer Identification Number (NIB) cannot be processed on the OSS System.

To overcome this, the Ministry of Law and Human Rights Cq the Directorate General of General Legal Administration and the Coordinating Ministry for Economic Affairs cq the OSS Institution will process and issue NIB for Limited Liability Companies whose purpose moreover, business activities have not used KBLI 2017, by adjusting the aims and objectives and activities the business is in accordance with KBLI 2017 through SABH the Directorate General of General Legal Administration in accordance with the mechanism stipulated in the provisions of legislation concerning Limited Liability Companies. This is done through changes in the articles of association of the company as referred to in the provisions of Article 21 paragraph (2) of Law Number 40 of 2007 concerning Limited Liability Companies where changes in intent and purpose constitute the articles of association which must be approved by the Minister of Law and Human Rights.

With the issuance of Government Regulation number 24 of 2018, it is clear the hope of the Government of the Republic of Indonesia to further develop the business world in Indonesia. The development of the business world in Indonesia is intended to increase economic growth in Indonesia further. The creation of healthy economic growth in Indonesia is expected to improve welfare for the people of Indonesia further.

D. CONCLUSION

In this discussion, it can be concluded that:

1. The role of the notary in connection with the enactment of Government Regulation number 24 of 2018 is to act as a public official authorized to assist the business community by making a deed of incorporation and adjusting the articles of association of the Minister of Justice & Human Rights, the purpose and objectives are adjusted to KBLI 2017 so that it is in accordance with the OSS system.
2. The obstacle that occurs with the issuance of this Government Regulation is that the Notary needs to provide information to the perpetrators to immediately adjust the company's articles of association by adjusting the aims and objectives stated in the company's articles of association so that it complies with KBLI 2017 following the OSS system.

E. SUGGESTIONS

To the development and improvement of people's welfare in Indonesia, several suggestions can be put forward, namely:

a. The government in Indonesia should be critical in observing the economic behavior of the people in Indonesia, the basic needs of which are the government's attention in formulating regulations in Indonesia.
b. Coordination and cooperation are needed between parties who play a role in the development of the business world; the government should involve the relevant elements in the community, especially professional experts such as Notaries so that the implementation of these regulations can run optimally in the community of business people.

Related parties such as the business community and Notary public should improve the quality and knowledge in the field of technology so that they do not stutter technology and be able to perform their roles in their respective fields.

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GENDER-BASED LEGISLATION REGULATIONS TO SAFEGUARD THE CONSTITUTIONAL RIGHTS OF WOMEN IN INDONESIA

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Abstract

Indonesia as The legal state declares this matter in the Indonesian constitution, namely in Article 1 Paragraph 3 of the 1945 Constitution which reads "Indonesia is a Law State." The consequences of this are also written in Article 27 paragraph 1, namely "All citizens together in the law and government and are obliged to uphold the law and government with no exceptions. Based on this, the authors raise the issue as follows 1. Why does the Legislation have to be gender based? 2. How to guard against women's constitutional rights in Indonesia? To answer this, then this paper uses this source of legal material consisting of a. Primary sources or authorities were the Constitution State of the Republic of Indonesia in 1945. b. Secondary legal document for reading materials related to the problem under study. c. Tertiary legal materials, in the form of dictionaries and legal encyclopedias. That within the state of law, the rules of legislation that are created must contain the values of justice for all people. Speaking of truth, the solution must be to instill gender equality. Gender equality means the balance of conditions for men and women to obtain opportunities and their rights as human beings, so that they can play a role and participate in political, legal, economic, socio-cultural, educational and defense and security activities, and similarities in enjoying the results of development. Gender equality also includes eliminating discrimination and structural injustice for both men and women. Gender justice is a process and fair treatment of women and men. The 1945 Constitution of the Republic of Indonesia applies to every Indonesian citizen. It can be seen from the formulation that uses the phrase "everyone," "all citizens," "every citizen," or "every citizen," which shows that each citizen owns the constitutional rights without distinction, either based on ethnicity, religion, political beliefs, or gender. These rights are recognized and guaranteed for every citizen for both men and women.

Keywords: Women; constitutional rights; gender.

A. INTRODUCTION

The rule of law mainly aims to provide legal protection for the people. Therefore, the legal protection for the people according to Philip M.Hadjon that legal protection for the people against government actions is based on two principles, namely the principle of human rights and the principle of the rule of law. (Fatria Khairo, 2016).

Indonesia as a legal State declares this matter in the Indonesian constitution, namely in Article 1 Paragraph 3 of the 1945 Constitution which reads "Indonesia is a Law State." The consequences of this are also written in Article 27 paragraph 1, namely "All citizens together in the law and government and are obliged to uphold the law and government with no exceptions. (1945 Constitution).

This principle of equality eliminates discrimination. Therefore every citizen has equal rights before the law and government regardless of religion, ethnicity, gender, position, and class.

With the recognition of equal rights of citizens, it means that between men and there is no difference between women. Admitting the principle of equality before the law and government in the Constitution shows that the founders of the Indonesian state, before establishing the country, were well aware of the importance of protecting human rights. Juridically, at the international and national level, Indonesian legal and regulatory instruments recognize the principle of equality between men and women.

However, at the level of implementation of state administration, discrimination, and injustice towards women. Women are always left behind and marginalized in the fields of economics, education, health, employment, and politics. One of the reasons is the patriarchal culture that developed in Indonesian indigenous peoples. In a society with patriarchal culture, men have a more significant role in holding power,

which can automatically degrade the purpose and existence of women even though women have the same rights or opportunities to participate in every aspect of community and state life. Based on this, the author is interested in bringing up the article entitled "**Gender-Based Legislation Regulations to safeguard the constitutional rights of women in Indonesia."**

B. PROBLEMS

1. Why should the legislation be gender based?
2. How to guard against women's constitutional rights in Indonesia?

C. METHODOLOGY

The source of legal material used in answering questions that appear is used by several legal documents consisting of:

a. Document of primary sources or authorities, namely the 1945 Constitution of the Republic of Indonesia.
b. Secondary sources (secondary sources consisting of literature,results of research, seminars, journals, articles, and reading materials related to the problem being studied.
c. The tertiary legal material, in the form of dictionaries and encyclopedias Law

D. DISCUSSION

1. Legislative Regulations Must Be Gender-Based

That within the state of law, the rules of legislation created must contain the values of justice for all people, as quoted by Jimly Asshiddiqie, from Wolfgang Friedman in his book, "Law in a Changing Society", distinguishes between organized public power (the rule of law in the formal sense), and the rule of just law (the rule of law in the material sense) . The state of law in the official (classical) sense concerns the notion of law in a narrow mind, namely in the sense of written legislation, and not necessarily guarantee substantive justice, the rule of law in the spirit of material (the modern) or the state of just law is the embodiment of the rule of law in the broadest sense that concerns the notion of justice in it, which is the essence rather than merely functioning of legislation in a narrow sense (Jimly Asshiddiqie, 2010).

In the formation of law, it is necessary to be guided by the principles of the structure of regulations excellent and ideal. This is intended to avoid mistakes and defects in the formation of norms.

The principles of the formation of good legislation according to IC van der Vlies in his book entitled Handboek Wetgeving are divided into two groups, namely: Formal principles:

1) The policy of a clear goal (beginsel van duidelijke doelstelling), namely every formation of legislation must have clear objectives and benefits for what is made;
2) The principle of the right organ/institution (beginsel van het juiste orgaan), that is, every type of legislation must be made by an institution or organ forming the regulatory authority in force; the bill can be canceled (vernietegbaar) or null and void by law (vanrechtswege nieteg), if an unauthorized institution or organ make it;
3) The principle of urgency in making arrangements (het noodzakelijkheidsbeginsel);
4) The policy of implementation (can be implemented) (het beginsel van uitvoerbaarheid), that is, every formation of legislation must be based on the calculation that the bill formed will later be useful in society because it has received support both philosophically, juridically, or sociology from the stage of its preparation;
5) Consensus principle (het beginsel van de consensus).

An article in the Act must not be formulated vaguely and must be clearly and detailed formulated regarding acts that are qualified as criminal acts, and their understanding must not be too broad and complicated. So that it has the potential to be misused by the authorities and certain parties because the unclear Article will be flexible, subjective, and highly dependent on the interpretation of the powers. Therefore it is potentially and factually creates legal uncertainty and violates human rights.

The content of the Laws and Regulations must reflect the principle:

1. Principle of protection, that each Content Material Laws and Regulations must function to protect to create public tranquility;
2. Humanitarian principles, that each Content Material of Laws and Regulations must reflect the protection and respect for human rights and the proportional dignity of every citizen and citizen of Indonesia;

3. Nationality principle, that each Content Material of Laws and Regulations must reflect the diverse nature and character of the Indonesian nation while maintaining the principle of the Unitary State of the Republic of Indonesia;
4. Family principle, that each Content Material of the Laws and Regulations must reflect deliberation to reach consensus in every decision making;
5. Principle of mediation, that each Content Material of Laws and Regulations always takes into account the interests of the entire territory of Indonesia and the content of the Laws and Regulations made in the regions is part of the national legal system based on the 1945 Constitution and State Constitution of the Republic of Indonesia;
6. The principle of Bhinneka Tunggal Ika, that the Material of the Laws and Regulations must pay attention to the diversity of the population, religion, ethnicity, and class, specific conditions of the region and culture in the life of the community, nation and state;
7. Principle of justice, that each Content Material of the Laws and Regulations must reflect fairness proportionally for every citizen;
8. The principle of equality of position in law and government, that every Content Material of the Laws and Regulations may not contain things that are discriminatory based on background, among others, religion, ethnicity, race, class, gender, or social status;
9. Principles of order and legal certainty, that every Content Material of Laws and Regulations must be able to create order in society through assurance of certainty;
10. Principle of balance, harmony, and harmony, that each Content Material of the Laws and Regulations must reflect balance, harmony, and harmony, between individual interests, society, and the interests of the nation and state; (Firman Freaddy Busroh, 2016)

Based on the description above, it should be appropriate in a statutory regulation to include gender participation because in this case, every Indonesian citizen has constitutional rights equal to male Indonesian citizens. Women also have the right not to be treated discriminatively based on their status as women, or the basis of other differences.

2. Escorting Women's Constitutional Rights in Indonesia

Women's rights championed since the 18th century began with formulating "feminism" by a British feminist, Mary Wollstonecraft. In the Wollstonecraft formula, women's rights were analyzed, and women's rights were limited to law and custom (culture) related to the state's constitutional system. Peeling feminism according to Wollstonecraft has a perspective on the lack of education in women, so that they are unable to carry out their rights left behind by men. The role of women in the family at that time in carrying out their rights, both as individuals (as citizens), as mothers, as wives, must be carried out within the framework of the national legal system of the country concerned.

In juridical women's rights in the fields, economy, social, culture, civil and politics which are the substance of the CEDAW Convention, have been internationally recognized including Indonesia which has ratified the Convention in 1984 and at the same time has an obligation to implement it. After the ratification of the CEDAW Convention, world women's meetings were continued at the Women's Conference II in 1980 in Copenhagen, III in Nairobi in 1985 and 1995 in IV in Beijing. The struggle of women and women's activists worldwide continues to be active in following the development of the world by attending international meetings, such as the 1992 United Nations Conference on the Environment in Rio de Janeiro, 1993 Human Rights, Population and Development in Cairo in 1994 and other international meetings.

After participating countries have ratified the CEDAW Convention, the state concerned is obliged to periodically report the implementation of the CEDAW Convention in the form of National Report to the Commission on the Status of Women / CSW, in fact, discrimination against women in the world is still ongoing. This was reported in the Women's Conference in Beijing in 1995. In the meeting, it was agreed to issue a "Beijing Platform for Action" (BPFA), which criticized the 12 critical areas facing women worldwide, such as women's rights in education, health, employment for children -girl. After the Beijing Declaration of Platform for Action and Plan for Action (BPFA Action Plan) in 1995, the Women's Status Commission / CSW in 2000 in the 23rd session of the UN General Assembly reported on the development of participating countries in the CEDAW Convention. (LMGandhi Lapian, 2012)

Talking about Indonesian women's constitutional rights. It is better to understand in advance what the constitution is. The term constitution comes from the word constituer (French) which means forming which

in this case has the meaning of composing, arranging, and compiling a country. In English constitute words can mean lifting, establishing or collecting. Then the Dutch language, the term constitution is known as gronwet which means the constitution. The term constitution generally describes the entire constitutional system of a country. The system consists of rules that form, regulate or govern the state.

Based on the opinions of experts, there are two understandings or understandings of the constitution. First, in a broad sense, the constitution is an overall rule and basic provisions (a fundamental law which includes written fundamental law and the basic unwritten law governing a government held in a country. Second, in a narrow sense, the constitution is a law the basis, which is a document that contains the basic rules and provisions of a state's constitutionality. The constitution itself is aimed at limiting the power of state administrators so that they cannot act arbitrarily and can guarantee the rights of citizens. This constitution is an idea called constitutionalism. The purpose of constitutionalism is an idea that views the government as a collection of activities organized by and in the name of the people. (Firman Freaddy Busroh & Fatria Khairo, 2018)

In addition, there is also a function of the constitution being formed own first function a limiting or controlling the power of the ruler so that in exercising his power is not arbitrary to his people. Then the second function gives a framework and legal basis for the change of society that is aspired in the next stage. Third, the constitutional purpose is a structural basis for the administration of the state according to a particular legal system that is respected by all its citizens, both the ruler and the people. Besides being a juridical constitution, it also has sociological and political meanings. This means that the constitution reflects the social-political life in a society as a reality. The 1945 Constitution of the Republic of Indonesia is a constitution that was born from the identity of the Indonesian nation as a whole and contains noble ideals.

The life view of the Indonesian Nation is embodied in the formulation of the principles of Pancasila which was used as a state philosophy of life based on the 1945 Constitution of the Republic of Indonesia. Pancasila in the context of national and state life is present as grondslag philosophy and common platfroms to ensure togetherness in the presence of the nation in realizing common goals and ideals. (The People's Consultative Assembly Socialization Team, 2013)

Pancasila as the philosophy of the life of the nation and state became philosophical foundations in the preparation of the Constitution The state must fulfill and protect the constitutional rights of citizens in the form of recognition of human rights, the existence of an independent judiciary that is not affected by the authorities and all government actions must be carried out on a legal basis. Human rights differ from citizens 'rights because citizens' rights only apply to citizens, while human rights are universal.

The human rights contained in the 1945 Constitution of the Republic of Indonesia can be said to be constitutional rights of Indonesian citizens. This means that human rights are inherent rights of every human person who must be adequately protected by the state as a human being. This is what distinguishes between human rights and the understanding of citizen rights (the citizen 's rights). Constitutional rights according to Prof. Jimly Asshiddiqie is the rights guaranteed in and by the 1945 Constitution of the Republic of Indonesia. After the amendment to the 1945 Constitution, the principles of human rights were included as the subject matter. These principles form the basis of citizens' constitutional rights which give birth to an obligation for the state to fulfill them. As the rule of law, one of the absolute elements that must exist is the fulfillment of basic rights and the protection of human rights. The guarantee of human rights protection in the constitution as the highest law means that the state is also prohibited from committing violations of human rights and even the primary task of protecting human rights is the state.

Regulations concerning Human Rights in the 1945 Constitution of the Republic of Indonesia are contained in CHAPTER XA relating "Human Rights", regulated from articles 28 A to Article 28 J. Human rights which cover all areas of life, in marriage (article 28 B, especially children are given special arrangements for protection from violence and discrimination in paragraph 2), develop themselves (article 28 C), recognition, courtesy, protection and fair legal certainty and equal treatment before the law (article 28 D), free embracing religion (article 28 E), communicating and obtaining information (article 28 F), personal, family, honor and so on (article 28 G), inner and outer prosperous life (article 28 H), right to life, right not to tortured, and so on (article 28 I) and article 28 J which is the obligation of every citizen to respect the human rights of others. Citizens 'constitutional rights which include human rights and citizens' rights guaranteed in the 1945 Constitution of the Republic of Indonesia apply to every Indonesian citizen. It can be seen from the formulation that uses the phrase "everyone," "all citizens," "every citizen," or "every

citizen," which shows that each individual citizen owns the constitutional rights without distinction, either based on ethnicity, religion, political beliefs, or gender. These rights are recognized and guaranteed for every citizen for both men and women.

E. CONCLUSIONS

1. Laws and Regulations Must Be Gender-Based

That within the state of law, the rules of legislation that are created must contain the values of justice for all people. Speaking of justice, the solution must be to instill gender equality. Gender equality means the equality of conditions for men and women to obtain opportunities and their rights as human beings, so that they are able to play a role and participate in political, legal, economic, socio-cultural, educational and defense and security activities, and similarities in enjoying the results of development. Gender equality also includes eliminating discrimination and structural injustice for both men and women. Gender justice is a process and fair treatment of women and men.

2. Escorting Women's Constitutional Rights in Indonesia

The 1945 Constitution of the Republic of Indonesia applies to every Indonesian citizen. It can be seen from the formulation that uses the phrase "everyone," "all citizens," "every citizen," or "every citizen," which shows that each individual citizen owns the constitutional rights without distinction, either based on ethnicity, religion, political beliefs, or gender. These rights are recognized and guaranteed for every citizen for both men and women.

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THE CONTENT OF HUMAN RIGHTS IN INDONESIAN CONSTITUTION AND LAW

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Abstract

Human Rights (HAM) is absolute rights that give authority to someone or an individual to conduct an act. In article 1 point 1, Law Number 39 of 1999 concerning Human Rights1[1] defines human rights as: "…a set of rights bestowed by God Almighty in the essence and being of humans as creations of God which must be respected, held in the highest esteem and protected by the state, law, Government, and all people in order to protect human dignity and worth. Indonesian Constitution, the 1945 Constitution strictly state that Indonesia is a State based on Law (Rechtstaat) and is not a State based on Power (Machstaat). This should be interpreted constitutionally that the State requires guarantee and legal protection of the rights and obligations of citizens, as well as the implementation of state government power based on legal provisions. Regulations concerning Human Rights have existed since the Pancasila is legalized as the state guideline basis of the State of Indonesia, both for the relationship between humans and the Supreme God, as well as the relationship between humans and humans. It contained in the values of the precepts contained in the Pancasila. Whereas in the 1945 Constitution (which has been amended), Human Rights is specifically included in CHAPTER XA articles 28A to 28J which is the result of second amendment of 2000, Law No. 39 of 1999 concerning Human Rights is legalized in 1999, and on November 23, 2000, Law No. 26 of 2000 concerning Court of Human Rights is stipulated.

Keywords: Human Rights, Constitution and Law.

A. INTRODUCTION

The 1945 Constitution as an Indonesian Constitution, explicitly states that Indonesia is a State under the law (*Rechtstaat*) and not a State under the mere power (*Machstaat*). This must be interpreted that constitutionally the State requires the guarantee and legal protection of the rights and obligations of citizens, as well as the implementation of the power of state government shall be based on rule of law.

This means that all activities that take place in Indonesia are ruled by law. Activities that rely on power and arbitrage are not permitted in Indonesia.

In the 1945 Constitution in article 1 point (2) that sovereignty is in the hands of the people and carried out according to the Constitution. It is clear that the Indonesian state is a country based on the Constitution which regulates all aspects of life with regulations that start from the sovereignty of the people delegated to the state which is geared towards the sovereignty of the people themselves.

The Declaration of Human Rights for the country of Indonesia has existed from earlier times, but has only pledged in the basic guidelines of this country which is in the opening of the 1945 Constitution. In which there are Human Rights as human beings both as personal beings as well as social beings which in their lives all become something inherent, and reinforced in the *Pancasila* from the first precept to the fifth precept. If seen from the formation of the declaration of the Human Rights of the Indonesian nation, it was first formed from the newly formed UN Human Rights in 1948.

The statement of Human Rights in *Pancasila* contains the idea that humans are created by God Almighty by bearing two aspects, namely, aspect of individuality (personal) and aspect of sociality (community). Therefore, everyone's freedom is limited by the rights of others. This means that everyone has the obligation to recognize and respect the human rights of others. This obligation also applies to every organization in any order, particularly the state and government, especially in the State of Indonesia. Thus, the state and government are responsible for respecting, protecting, defending and guaranteeing the human rights of every citizen without discrimination. The obligation to respect human rights is reflected in the Preamble of the 1945 Constitution which animates the entire article in its content, especially with regard to the equal

1 *State Gazette of The Republic of Indonesia* Year 1999 Number 165, *Supplement to State Gazette of the Republic of Indonesia* Number 3886.

position of citizens in law and government, the right to work and decent, right freedom of association and assembly, the right to issue thoughts with oral and written, freedom to embrace religion and to worship according to their religion and belief, the right to obtain education and get teaching.

In Law No. 39 of 1999 concerning Human Rights, the arrangement regarding Human Rights are determined by reference to the Declaration of Human Rights of United Nations, The United Nations Convention on the Elimination of All Forms of Discrimination against Women, the United Nation Convention on the Rights of Children, and various other international instruments governing human rights. The material of this Laws is also adapted to the legal needs of the community and the development of national law based on *Pancasila* and the 1945 Constitution. Whereas in the 1945 Constitution (amended), Human Rights are specifically included in Chapter XA Articles 28 A to 28 J, which are the results of the Second Amendment of 2000.

B. HUMAN RIGHTS

Human Rights (*HAM*) are absolute rights, which is the rights that give authority to a person or individual to do deeds also can be maintained by all people. Thereof every person must respect these rights. Thus Human Rights are inherent rights to individuals who are absolute.[22]

The development of human rights can be briefly divided into three categories, including: *first*, the first period of Human Rights concerning the issue of civil and political rights, *second*, concerning economic, social and cultural rights, and *third*, representing equality rights. Especially regarding to the second period of Human Rights, these rights arise so that the State active provides protection and fulfillment of Human Rights. The first Human Rights departed from representing civil and political rights which began in the Classical Greek period[3]. But the modern conception then became Human Rights, especially civil and political rights[4]. These rights emerge from the demand to break away from the confines of the power of State absolutism and other social forces.[5]Then the second period of Human Rights are developed such as economic, social and cultural rights. Which emerged from the demand that the State provide fulfillment of the basic rights of citizens. In broad terms, it is a response to violations and abuses of capitalist development and underscores it; without essential criticism, the conception of individual freedom that tolerates - even legitimizes, the exploitation of the working class and colonial society.[6] The emergence of the third period of Human Rights is based on a sense of solidarity or the right of solidarity or joint rights and is a reconceptualization of the two previous periods of Human Rights.[7] Reflected in Article 28 Universal Declaration of Human Rights.[8]

The Human Rights inherent in humans themselves have various rights, the basic rights of Human Rights include:

a. The Personal Rights, which includes freedom to issue opinions, embrace religion, move and so on.
b. The property Rights, which the right of ownership, buy and sell and use something.
c. The Human Rights to get equal treatment in law and government or commonly called “The Rights of Legal Equality”.
d. The Political Rights, which the right to participate in government, rights of suffrage (choosing and being elected in general elections), the right to establish political parties and so on.
e. Social and Cultural Rights for example the right to choose education, develop culture and so on.
f. The Procedural Rights, The Human Rights to obtain judicial procedure treatment and protection for example regulations in terms of arrests, searches, justice and so on.[9]

So that Human Rights can be understood as part of the constitution and it is must be protected by the

2 Kansil CST, *"Introduction to Indonesian Legal Data Law"*, Jakarta, Balai Pustaka, 1986.

3 Especially those who came from the reformists who were put forward in the early 17th and 18th centuries, which were related to British, American and French revolutions. Influenced by the political philosophy of liberal individualism and the *laissez-faire* social economic doctrine, see Article 2-21 Universal Declaration of Human Rights.

4 LG Saraswati, et. Al, *Human Rights, Case Legal Theory*, (Jakarta: Philosophy Department, Faculty of Cultural Sciences, University of Indonesia, 2006), p. 9.

5 Rhona K. Smith., Et. Al, *Human Rights Law*, (Yogyakarta: Center for Human Rights Studies, Indonesian Islamic University, 2008), p. 15.

6 Satya Arinanto, *Human Rights in the Transition of Politics in Indonesia*, (Jakarta: Center for Constitutional Law Studies, Faculty of Law, University of Indonesia, 2008), p. 80.

7 *Ibid.*

8 Everyone has the right to a social and international order in which the rights and freedoms set forth in this Declaration can be fully implemented.

9 Dardji Darmodihardjo and Santiaji, *Pancasila*, (National Business, 1981), p. 80-81. 18 See the Preamble to the 1945 Constitution: "Then from that to form an Indonesian State Government that protects the entire Indonesian nation and all of Indonesia's bloodshed and to promote public welfare, educate the nation's life, and participate in carrying out world order based on independence, eternal peace and social justice ... "

constitution itself. Masyur Efendi explained the notion of Human ights from various opinions including:[10]

The United Nations Centre for Human Right (PBB) defines: human rights as those rights which are inherent in our nature and without which we cannot live as human beings.

Human Rights have also be defined as moral rights of the higher order stemming from socially shared moral conceptions of the nature of the human person and the condition necessary for a life of dignity.

***Nickel**; characterizes human rights as norms which are definite, high priority, universal, existing and valid independently of recognition or implementation in the customs or legal systems of particular countries.*

***Szabo**; puts human rights within the framework of constitutional law, the purpose of which is to defend by institutional means the rights of human beings against abuses of power committed by the organs of the state and at the same time to promote the establishment of 0 humane living conditions and the multidimensional development of human personality. Human rights are those minimal rights which every individual must have against the state or other public authority by virtue of his being a 'member of the human family', irrespective of any other consideration.[11]*

***Human rights are universal**, that is, they belong to each of us regardless of ethnicity, race, gender, sexuality, age, religion, political conviction, or type of government. **Human rights are incontrovertible**, that is they are absolute and innate. They are not grants from states and thus cannot be removed or denied by any political authority, and they do not require, and are not negated by the absence of, any corresponding duties. **Human rights are subjective**. They are the properties of individual subjects who possess the because of their capacity for rationality, agency and autonomy.*[12]

Kuntjoro Purbopranoto defines Human Rights as the right of the humans according to their nature, which cannot be separated from its essence and is therefore sacred.[13] Jan Materson as quoted by Baharudin Lopa defines Human Rights as inherent right to humans, without which humans are impossible to live as "Human Rights which are inherent in our nature and without which we cannot live as human beings." Baharudin Lopa defines phrase "impossible to live as a human being" with "it is impossible to live as a human being besides having the right to be responsible for everything it does."[14]

Al Maududi as quoted by Ahmad Kosasih interpreted Human Rights as right that is granted by God since human was born and therefore there is no one person or institution who has the right to revoke or cancel it.[15]

C. CONSTITUTION AND LEGAL COUNTRIES

Arrangements regarding Human Rights have existed since the adoption of *Pancasila* as the basis of the Indonesian state guidelines, albeit implicitly. Both concerning the relationship between humans and God Almighty, as well as the relationship between humans and humans. This is contained in the values found in the precepts of the *Pancasila*.

Whereas in the 1945 Constitution (which has been amended), the issue concerning Human Rights is specifically included in CHAPTER XA articles 28A through 28J which is the result of the second amendment of 2000.[16]

1) Article 28 A:
   Every person shall have the right to live and to defend his/her life and existence.
2) Article 28 D point 1:
   Every person shall have the right to recognition, guarantees, protection and certainty before a just law and of equal treatment before the law.
3) Article 28 G point 1 and 2:

10 A. Masyhur Effendi, *Development of the Dimensions of Human Rights (HAM) and the Dynamics of the Process of Drafting Human Rights Law (HAKHAM),* (Ghalia Indonesia, Jakarta, 2005), p. 47

11 Durga Das Basu, *Human Rights in Constitutional Law, second edition*, (edited by: Bhagabati Prosad Banerjee & Ashish Kumar Massey, Wadha Nagpur, 2003). p. 8.

12 Darren J O'byrne, Human Rights an Introduction, (Pearson Education, Singapore, 2004) p. 27.

13 Kuntjoro Purbopranoto, *Human Rights and Pancasila*, Pradya Paramita, Jakarta, 1982, p. 19.

14 Baharudin Lopa, *Al Quran and Human Rights*, PT. Dhana Bakti Prima Yasa, Yogyakarta, 1996, p. 1

15 Ahmad Kosasih, *HAM in Islamic perspective; Revealing the similarities and differences between Islam and the West,* Salemba Diniyah, Jakarta, 2003, p. xvii.

16 Indonesia, the 1945 Constitution and its Amendments, (Jakarta: Sower of Science, 2003) p

(1) Every person shall have the right to protection of his/herself, family, honour, dignity and property and shall have the right to feel secure against and receive protection from the threat of fear to do or not to do something that is a human rights.
(2) Every person shall have the right to be free from torture or inhumane and degrading treatment and shall have the right to obtain political asylum from another country.

4) Article 28 I point 1, 2 and 5:

(1) The right to life, freedom from torture, freedom of thought and conscience, freedom of religion, freedom of enslavement, recognition as a person before the law, and the right not to be tried under a law with retroactive effect are all human rights that cannot be limited under any circumstances.
(2) Everyone shall have the right to be free from discriminative treatment on any based upon any grounds whatsoever and shall have the right to protection from such discriminative treatment.
(3) For the purpose of upholding and protecting human rights in accordance with the principles of a democratic and law-based state, the implementation of human rights shall guaranteed, regulated and set forth in laws and regulation.

5) Article 28 J point 1:

Every person shall have a duty to respect the human rights of other in orderly life of the community, nation and state.

The concept of law-based state of Indonesian is manifested in the form of protection of citizens contained in the 1945 Constitution of the Republic of Indonesia. The rule of law is an effort to limit the absolutism of the state (king)[17] through a set of rules in the constitution (constitutionalism).[18] According to Sri Soemantri, in general the constitutional material or the constitution includes three fundamental things: 1) There is a guarantee of Human Rights and its citizens; 2) The determination of the constitutional arrangement of a country that is fundamental; 3) There is a division and limitation of constitutional duties that are also fundamental.[19]

The existence of the 1945 Constitution as a constitution, according to A.A.H. The Struycken Constitution (grondwet) as a written constitution is a formal document that contains: 1) The results of the nation's political struggle in the past; 2) The highest levels of national constitutional development; 3) The views of national figures who want to be realized, both now and in the future; 4) A desire, with which the development of the life of the state constitution will be led.[20]

The contents of the 1945 Constitution are based on the opinion of A.A.H. Struycken has included views, desires and developments in the life of the country by national figures, who want the establishment of a law-based state that protects Human Rights. In its development the term law-based state in various literatures are not single meaning, but is interpreted differently in different *tempus* and *locus*, very dependent on the ideology and political system of a country. Therefore, Tahir Azhary, in his research, came to the conclusion that the term law-based state is a genus that consists of five concepts, which are the concept of law-based state according to the Qur'an and Sunnah[21] which he termed Islamic nomocracy,[22] a law-based state according to a continental European concept called *rechtsstaat*, the rule of law concept, the socialist legality concept and the law-based state of *Pancasila*.[23]

Regarding to the inclusion of Human Rights there are three views including: first, those who hold that the 1945 Constitution does not provide a guarantee of comprehensive Human Rights; second, they have the view that 1945 Constitution as a guarantee of comprehensive Human Rights; and third, the opinion that the

17 A. Mukhtie Fajar, *Type Negara Hukum*, Bayumedia Publishing, Malang, 2001, p. 19.

18 Jimly Asshiddiqie, Indonesian *Constitution and Constitutionalism, Republic of Indonesia*, Constitutional Court and Center for Constitutional Law Studies Faculty. Law UI, Jakarta, 2004, p. 1.

19 C. Anwar, *Theory and Constitutional Law*, (Malang: In-Trans Publishing, 2011), p. 61.

20 Dahlan Thaib., Et. al., *Theory and Constitutional Law*, (Jakarta: PT Rajagrafindo Persada), p. 15

21 In Islam there are laws that also regulate human rights including the Right to Life (al-An'am: 151), the Right to Equation degree (al-Hujurat: 13), the Right to obtain justice (al-Maidah :, 8)

22 This can be seen in the *Universal Islamic Human Rights* made September 19, 1981 mentioning several kinds of rights, namely: *Right to Life, Right to Freedom, Right to Equality and Prohibition Against.*
Impermissible Discrimination, Right to Justice, Right to Fair Trial, Right to Protection Against Abuse of Power, Right to Protection Against Torture, Right to Protection of Honor and Reputation, Right to Asylum, Rights of Minorities, Right and Obligation to Participate in the Conduct and Management of Public Affairs, Right to Freedom of Belief, Thought and Speech, Right to Freedom of Religion, Right to Free Association, The Right to Protection of Rights, Right to Protection of Property, Status and Dignity of Workers, Right to Social Security, Right to Family and Related Matters, Rights to Married Women, Right to Education, Right to Privacy, Right to Freedom of Movement and Residence.

23 Paper presented at the Law State Seminar at UGM Yogyakarta, on 31 May 2009, in commemoration of the anniversary of the Pancasila.

1945 Constitution only provides collateral for Human Rights.[24]

The first view was supported by Mahfud MD and Bambang Sutiyoso. This is based on the fact that the term Human Rights (*HAM)* is not found explicitly in the preamble, text-body, or explanation. In fact, according to Sutiyoso,[25] the 1945 Constitution only found the inclusion of the words of the rights and obligations of citizens, and the rights of the House of Representatives (DPR).[26] The second view was supported by Soedjono Sumobroto and Marwoto, Azhary and Dahlan Thaib. Sumobroto and Marwoto said that the 1945 Constitution raised the phenomenon of Human Rights living in the community, on the basis that human rights implied in the 1945 Constitution stemmed from the basic philosophy and outlook of the nation, called *Pancasila*.[27] The third group was supported by Kuntjoro Purbopranoto, G. J Wolhoff, and M. Solly Lubis. According to Kuntjoro, guarantees of Human Rights are not non-existent, but in the provisions of the 1945 Constitution, they include non-systematically.[28]

In another view, Ismail Sunny saw many contents in the 1945 Constitution relating to Human Rights. Look at the opening (preamble) for example, the first paragraph with the recognition of the existence of "freedom to be free",[29] the second paragraph of the opening which mentions Indonesia as a just State. The third paragraph emphasizes that the Indonesian people say that to have a free national life is one of the recognitions and protections of Human Rights, which contains equality in the form of politics. The fourth and final paragraph, which contains the outlines of the recognition and protection of Human Rights in all its fields, such politics, law, social, economic, cultural and educational.[30] At that time the Human Rights problem had not become a matter of national life because Indonesia was still in an effort to defend its independence from Dutch military aggression.

Moh. Mahfud MD stated that the rule of law in the *rechtstaat* concept is rooted in the civil law system which focuses on administration and prioritizes *wetmatigheid* and *rechtmatigheid*. On the other hand, the rule of law is rooted in the common law system which focuses on the judicial aspects and prioritizes the principle of equality before the law.[31] In view of A. V. Dicey, formulating three meanings of the rule of law, first, the rule of law means absolute supremacy or legal predomination and eliminates arbitrariness. Second, the rule of law means equality before the law. Third, the rule of law means that the recognition of constitutional law is not a source for Human Rights, but vice versa, as a consequence of recognition of Human Rights.[32]

Another opinion by Friderich Julius Stahl suggests four elements of *rechtstaat*, which are: 1) Protection of Human Rights; 2) Separation or division of powers to guarantee those rights; 3) Government based on regulations; 4) Administrative justice in disputes.[33] One characteristic of the rule of law, or in the Dutch language is called *rechtstaat*, is a feature of limiting the performance of state power.[34] The characteristics of the law-based state according to Franz Magnis Suseno are: 1) The power is carried out in accordance with the applicable positive law; 2) State activities are under the control of effective judicial power; 3) Based on a constitution that guarantees Human Rights, and; 4) According to the division of power. Similarly Scheltema states that the elements of *Rechtsstaat* are legal certainty, equality, and democracy.[35]

The government shall serve the public interests of its citizens, not otherwise the citizens serve the government. Furthermore, Philipus M. Hadjon stated the characteristics of *Rechtsstaat* are:

a. The existence of a constitution that contains written provisions concerning relationship between the ruler and the people.

24 Majda El-Muhtaj, *Human Rights in the Indonesian Constitution*, (Jakarta: Prenada Media, 2005), p. 95.

25 *Ibid.*

26 See Article 21: paragraph (1) Members of the House of Representatives have the right to advance the draft law, Article 29: paragraph (1) The State guarantees the independence of each resident to embrace their respective religion and to worship according to their religion and belief, Article 30: paragraph (1) Every citizen has the right and obligation to participate in the state defense effort, and Article 31: Paragraph (1) Every citizen has the right to receive teaching. In the 1945 Constitution before the amendment.

27 Majda El-Muhtaj, *Ibid.,* P. 96.

28 *Ibid.*

29 The first paragraph of the opening of the 1945 Constitution, that in fact independence is the right of all nations and therefore, colonization of the world must be abolished, because it is not in accordance with humanity and justice.

30 Ismail Sunny, *Human Rights*, (Jakarta: Yarsif Watampone, 2004), p. 2

31 Janedjri M. Gaffar, *Democracy and Elections in Indonesia*, (Jakarta: Constitution Press, 2013), p. 56.

32 *Ibid.*, Janedjri M. Gaffar, p. 52.

33 *Ibid*., Janedjri M. Gaffar, p. 55

34 Jimly Asshiddiqie, *Introduction to Constitutional Law Volume II*, (Jakarta: General Secretariat and Registrar's Office of the Constitutional Court of the Republic of Indonesia, 2006), p. 11. 30 *Op. Cit*., Janedjri M. Gaffar, p. 50 - 51

35 *Ibid.,* P. 70.

b. There is a division of state power.
c. Recognized and protected the rights of people's freedom.[36]

In this connection, Sri Soemantri also stated the four most important elements of the rule of law, which are:

a. The government in carrying out its duties and obligations shall be based on the law or legislation.
b. There is a guarantee of Human Rights (citizens).
c. There is division of power in the country.
d. There is supervision (from judicial bodies).[37]

D. HUMAN RIGHTS IN THE REFORM ERA

The wave of reforms that took place in Indonesia triggered significant changes regarding Human Rights. Among them are the changes of the 1945 Constitution in stages and make constitutional reform which previously only contained 71 items into 199 items. Seen in the second and third changes in the 2000 MPR Session which included Human Rights in Article 28A-28J. The regulation of Human Rights in the 1945 Constitution is a commitment of the state to fulfill the requirements for the existence of Indonesia as a law-based state.[38]

The impact of the amendment confirms that the protection, promotion, enforcement and fulfillment of Human Rights are the responsibility of the state, especially the government, although in the first year the reforms were marked by horizontal conflicts, including in Ambon, Poso and Kalimantan, where violations of rights were carried out by own groups community themself.[39] There are even a number of democratic agendas that were proclaimed after the era of President Soeharto, including:

1) Constitutional and rule of law;
2) Regional autonomy;
3) Civil-military relations;
4) Civil society
5) Governance structure reform, social-economic development, good governance, and ombudsman;
6) Gender;
7) Religion pluralism.[40]

The Government in terms of carrying out the mandate which was mandated through the MPR TAP mentioned above, Law No. 39 of 1999 concerning Human Rights was formed, In 23 September 1999, Law No. 39 of 1999 concerning Human Rights which regulates several important matters concerning the Human Rights Court has been ratified.

Article 1 point 1 of Law Number 39 of 1999 concerning Human Rights defines human rights as:[41]

"... A set of rights bestowed by God Almighty in the essence and being of human as creation of God that must be respected, held in the highest esteem and protected by the state, law, Government, and all people in order to protect human dignity and worth.

On November 23, 2000, Law No. 26 of 2000 concerning the Human Rights Court in lieu of laws No. 1 of 1999. The Human Rights Court is tasked with resolving serious violations of Human Rights in this case is the crime of genocide, namely the destruction of all or part of a national group, race, ethnic group, religious group by committing an act of killing group members. Result in severe physical and mental suffering for group members. Create living conditions that aim to cause the group to be destroyed. Imposing actions aimed at birth in the group. Forcibly transfer children from certain groups to other groups.

The Human Rights Court is regulated in Law no. 26 of 2000 concerning Human Rights Court. Its existence legally "answers" that Indonesia wants and is able to seriously prosecute serious Human Rights violators, as mandated by the Declaration of Human Rights and various international instruments as well as International Criminal Justice. There is a special feature of the Indonesian Human Rights Court that adheres

36 Philipus M. Hadjon, *Legal Protection for the Indonesian People*, (Surabaya: PT. Bina Ilmu, 1987), p. 76.

37 Sri Soemantri (a), *Interest on Indonesian Constitutional Law,* (Bandung: Alumni, 1992), p. 29.

38 Republic of Indonesia People's Consultative Assembly, Guidelines for Correcting the 1945 Constitution of the Republic of Indonesia and the Decree of the People's Consultative Assembly of the Republic of Indonesia, Jakarta: Secretariat General of the Republic of Indonesia Republic of Indonesia, 2011, p. 166 67 See Article 28I paragraph (4) of the 1945 Constitution.

39 Miriam Budiardjo, *Basics - Political Sciences*, (Jakarta: PT Gramedia Pustaka Utama, 2010) p. 256.

40 Satya Arinanto, *Human Rights in Context of the Historical Non-Aligned Countries on Universalism and Cultural Religion, and Current Human Rights Development in Indonesia*, Paper presented at the XVI International Annual Meeting in Political Studies on "Human Rights Today: 60th Anniversary of the Universal Declaration of Human Rights ".

41 *State Gazette of The Republic of Indonesia* Year 1999 Number 165, *Supplement to State Gazette of the Republic of Indonesia* Number 3886.

to the principle of "retroactivity", namely prosecuting severe violations of Human Rights, which were carried out before Law 26 of 2000, this was made possible by the proposal of the House of Representatives and the decision of the President. This retroactive Human Rights Court is called the Ad Hoc Human Rights Court.[42]

Besides that Indonesia formed the National Human Rights Commission. The National Commission on Human Rights is an independent institution that has the same level as other state institutions which functions to carry out studies, research, counseling, monitoring and mediation of Human Rights. The role of the national Human Rights commission as mandated in Law Number 39 of 1999 concerning Human Rights is regulated in Chapter VII.

Article 75 states:

The National Commission of Human Rights (*Komnas HAM*) aims:

a. Develop conditions conducive to the execution of human rights in accordance with Pancasila, the 1945 Constitution, the United Nations Charter, and the Universal Declaration of Human Rights; and,
b. Improve the protection and upholding of human rights in the interests of the personal development of Indonesian people as a whole and their ability to participate in several aspects of life.

That the National Commission on Human Rights (*Komnas HAM*) has the aim of developing conditions conducive to the creation of enforcement of Human Rights in Indonesia, inseparable from the *Pancasila*, the 1945 Constitution, the UN Charter and the Universal Declaration of Human Rights. In addition, it also enhances the protection and enforcement of Human Rights so that in full human development.

Article 76 states:

1) To achieve these aims, the National Commission on Human Rights functions to study, research, disseminate, monitor and mediate human rights issues.
2) Members of the National Commission on Human Rights are drawn from public figures who are professional, dedicated, have a high level of integrity, who fully who fully comprehend the aspirations of a democratic and welfare state based on justice, and who respect human rights and obligations..
3) The National Commission on Human Rights is domiciled in the capital city of the Republic of Indonesia.
4) Representative offices of the National Commission on Human Rights may be established in the regions.

Article 77 states:

The National Commission on Human Rights should be based on *Pancasila*.

This implies that the legal basis of the National Commission on Human Rights is based on *Pancasila*, which means that the National Commission on Human Rights carries out its role and function of course by applying the values contained in the *Pancasila* from the 1st precept to the 5th precept. When carrying out its role the National Commission on Human Rights in upholding Human Rights is in accordance with the existing values in the Indonesian territory in line with the Indonesian *Pancasila* philosophy, not based in understanding other than it, which will uphold Human Rights in Indonesia in accordance with existing guidelines in Indonesian society. Human Rights are characterized by the values of the nation's philosophy.

E. CONCLUSION

One of the important aspects of the nation and state is the existence of a constitution. The Indonesian Constitution such 1945 Constitution contains regulations for the protection of Human Rights for citizens.

The amendment of the 1945 Constitution will increase the extent of Human Rights arrangement. Therefore the Human Rights are not only based on the right to associate, gather and issue opinions but are broader and specific. The content of Human Rights in the amendment to the 1945 Constitution almost contained all arrangements for the 1948 Declaration of Law. In 1999 was made Laws No. 39 of 1999 concerning Human Rights to arrange more details about Human Rights and the following year Law No. 26 of 2000 concerning the Human Rights Court.

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42 Soedjono Dirdjosisworo, *Human Rights Court,* (Bandung: Citra Aditya Bakti, 2002), Cet. I. things. 145.

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TOWARDS AN INDONESIAN LAW STATE

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Abstract

The articles are called "The Indonesian Law" is a study about the conception of the Indonesian law that distinguishes it from the conception of other law. Despite the influence of various thoughts, but the concept of the Indonesian law is different from the concept the rule of law and rechtsstaat. It can be examined from the bottom of a philosophy, the nature of the sovereignty, power organs, and human rights. There are six main elements of the Indonesian Law, that we called: 1) Pancasila); 2) supereme law ; 3) democratic ; 4) restrictions and distribution power of State ; 5) the power of free and independent ; 6) the protection of human rights.

Keywords: Pancasila, the State of Law, Democracy, Human Rights.

A. INTRODUCTION

In the literature of law and politics in Indonesia, the term state law be paired with rechtsstaat (in the netherlands) and the term the rule of law (English). In many countries civil law, and the implementation of the law came up with the conception rechtsstaat while in countries with common law with the concept the rule of law, however, much earlier, the idea of the law and sovereignty of the law actually has long since developed at the time of Ancient Greece. Plato introduced the idea of the law with nomocracy.[1]

In the development, the concept of State law in Europe Continental was developed, including, by Immanuel Kant, Julius Stahl, and others by using the term of "rechtsstaat", while in the tradition of Anglo the Saxons, the concept of State law developed by A.V. Dicey as "the rule of law".

Political Constitution of Indonesia after the amendment of UUD 1945 established Indonesia as the State of Law. Article 1 paragraph (3) The 1945 Constitution of the Republic of Indonesia that "Indonesia is a State based on Law". The formulation of the support the principle of State law adopted by the 1945 Constitution before the amendment. Before the amendments, the provisions of Indonesia as the law does not set firmly but in the explanation of the The 1945 Constitution of the Republic of Indonesia that says "Indonesian state was based on the law (rechtsstaat), not based on authority (machsstaat)". After the amendment to Article (3) The 1945 Constitution of the Republic of Indonesia didn't use more rechtsstaat term and part of the explanation was removed.

Rechstaat and the rule of law, therefore hoping for a supreme law against acts of regional authorities the country, but there is a difference among them. Rechtsstaat was born of a struggle against absolutism, so it is revulosioner. In the other side, charachteristic of civil law is administrative, and charachteristic of common law is Judicial.

The concept of State law in civil law tradition and common law affects the conception of the Indonesian law in the process of drafting the The 1945 Constitution of the Republic of Indonesia. It appears the debate about whether the concept of State law in the early days of independence this understanding rechtsstaatat or the conception itself. On the one hand, there is that mean that Indonesia shouldn't be stuck on the issue of language, but have to find meaning that is suitable for Indonesia.

The 1945 Constitution of the Republic of Indonesia try and solve the confusion of meaning of the law. However, to excavated how the stable state and the application.

B. INDONESIA AS THE STATE OF LAW

1. The concept of the Indonesian Legal Based on Pancasila

In Indonesia, concept of "state law" be released from the influence of the development from best thinking

1 Plato : The laws, Peguin Clasic, edition 1986, Translated and given an introduction by Trevor J Saunders in Jimly Asshiddiqie, 2004 "Cita Negara Hukum Indonesia Kontemporer, orasi Ilmiah Pada wisuda Sarjana Hukum Fakultas hukum Universitas Sriwijaya, Palembang, 23 Maret 2004.

of rechtsstaat and the rule of law, but still has the characteristic of typical as shown in The 1945 Constitution of the Republic of Indonesia.[2]

In The 1945 Constitution of the Republic of Indonesia (Before the amendment), the "Indonesia is a State based on Law" not be determined on limitative in the body of (articles). The statement was found in explanation of the The 1945 Constitution of the Republic of Indonesia that says the term "The country was based on the law", followed by the term rechtsstaat who are in parentheses after the phrase "The country was based on the law". The description of the 1945 Constitution on the part of the system of State said twice with the editor of the different: Indonesia is " based on law (rechtsstaat) and State of Indonesia was based on the law (rechtsstaat), not only authority (machtsstaat).

Eventhough followed by the rechtsstaat term, it doesn't mean that the concept of Indonesian State will be on track with rechsstaat. The very mention of the term rechtsstaat it does not mean that Indonesia adheres to the conception rechtsstaat that grew up in Europe. Based on terminology, according to the Bagir Manan, the term of "The state based on law" in language is not the translation of de rechtsstaat but the state under the rule of law. There's an effect of conception rechtsstaat it does not mean that the concept of State law with the conception rechtsstaat.[3] The use of phrases "The country was based on the law" without holding the term rechtsstaat to show that Indonesia has the concept of a typical about the Land of the law, which is a bit of a much different from the concept of rechtsstaat and the rule of law.

Understanding of Indonesia was based on the law (rechtsstaat), not based on authorities (machtsstaat), then the government should be based on law and constitutional (fundamental law), does not have a absolutism. The function of constitution to determine the boundaries of power. It explains that all activities of the country and the government should be based on law, with the other languages, Rukmana Amanwinata said that in a state law, the state's power is limited and specified by law, as well as the tools of their equipment, (including the government) should be made and deeply rooted in law.[4]

In The 1945 Constitution of the Republic of Indonesia try and solve the debate the notion of state law by removing the word rechtsstaat. Article 1 paragraph (3) In The 1945 Constitution of the Republic of Indonesia said that "Indonesian is a constitutional state". The formula will sturdy the principle of state law adopted by The 1945 Constitution of the Republic of Indonesia before the amendment. After the Article 1 paragraph (3) of the Unitary State of the year 1945, the rechtsstaat be eliminated and the explanation was removed. According to Sudjito, unfortunately these steps are not recognized consistently with the steps to purge foreign elements which disrupt the characteristics of the communalistic-religious Indonesian legal system.

Review of the basic philosophical, the conception state law's is different among rechtsstaat and the rule of law. Rechtsstaat and the rule of law based on a philosophy of the Indonesian nation is the Pancasila. The Pancasila, is the key for difference how the state law in Indonesia.

Pancasila is not a philosophy are closed which rejected civilization and progress. In such a context, the basic philosophy of Pancasila provide a report on the legal system and justice in Indonesia. This openness of what was going on adoption of the conception, ideas, as well as the legal system and constitutional from various traditions of law. Transparency is not means eliminating the essence of Indonesia as a state law.

Notonagoro affirms that Pancasila is not just an ideal, and a delusion, but it has a form of formal and material content to become a guideline in life and state.[5]

Azhary in his The Professor of Faculty Law in the University of Indonesia called Theory of the nation of Indonesia (One of concept about the meaning and principle background in the constitutional), calling it with a state law of the Pancasila, which the founding fathers is the state welfare was state welafare is full of wealth of physical (material) and prosperity of spiritual.[6]

Differences from Azhary, some jurist trying to formulate elements of the country of Indonesia. According to Muhammad Tahir Azhary, state law of the Pancasila is a most special state law. In his analysis prior

2 Sudjito bin Atmoredjo, Negara Hukum Dalam Prespektif Pancasila, Paper presented at the congress of Pancasila, Cooperation by Mahkamah Konstitusi dengan RI dan Gadjah Mada tanggal 30-31 Mei dan 1 Juni 2009 at Balai Senat Gadjah Mada University Yogjakarta.

3 Imam Subechi,2012, Judicial Review Perda Pajak dan Retribusi Daerah, Sinar Grafika, Jakarta page16.

4 Rukmana Amanwinata, 1996, Pengaturan dan Batas Implementasi Kemerdekaan Berserikat dan Berkumpul dalam Pasal 28UUD1945 (The regulation and Implementation Limit of Freedom of Assciation and Assembly in Article 28 the 1945 Constitution), in Bandung, Dissertation, Padjdjaran University.

5 Notonagoro, Pancasila Secara Ilmiah Populer, in Jakarta, CV Pantjuran Tujuh, 1980 page 174.

6 Azhary, 1994, Teori Bernegara Bangsa Indonesia (Satu Pemahaman tentang Pengertian dan Asas-asas dalam Hukum Tatanegara), Speech of Inauguration of Professor Law Faculty in University of Indonesia, Depok, 16 Nopember 1994.

to amend The 1945 Constitution of the Republic of Indonesia, argue that elements of the State of the Indonesian territories include: 1) Pancasila); 2) People's Consultative Assembly; 3) The constitution; 4) Equation; and 5) Free Trial.

Along with the country's development since the time of independence until now in the reform era, the principles of the Indonesian law also changed. According to Jimly Asshiddiqie, the principle of state law can be divided into 12 (twelve) of : 1) Supremasi the law (supremacy of law) ; 2) Equation in the law (equality before of law) ; 3) principle of the legality of (due process of law) ; 4) Restrictions on power ; 5) independent executive Organ; 6) Monitoring the free and impartial ; 7) Monitoring the state (constitutional court) ; 9) Protection of human rights ; 10) Democracy (democratische rechtsstaat) ; 11) It's working as a means of realizing the goal state (welfare rechtsstaat) ; 12) Transparency and social control.[7]

Thinking about the state of Indonesian law according to experts on them is contemporary is not fundamental. The contemporary can change in line with constitutional change and political law in Indonesia. The above does not answer in subtansial, what elements of the country of Indonesian law.

According to the author of the state law that ajeg and became the basis of the changes and updates both constitutional and political, legal. It can be examined from the bottom of a philosophy, the nature of the sovereignty, the power of the state organs, human rights. The main characteristics of state law is : (1) the Pancasila ; (2) Supermasi of Justice ; (3) Democratic ; (4) The restraints and **separate** to the authority of State ; (5) authority of Justice which is free and independent ; and (6) the Protection and Development of Human Rights.

a. Pancasila

The first and is a major state law is the Pancasila. the Pancasila is a philosophy or staatsidee (the country) that serves as filosofische grondslag and common platforms between fellow citizens in the context of the life of the state and society. the Pancasila is also a staatssfundamental-norm in the hierarchy of laws and regulations of Indonesia. The content of 5 (five) base of Pancasila as the basic values of the nation Indonesia become source and the state law. Based on the Pancasila, the conception of Indonesian law is different from the conception state law that thrive in other countries.

According to Oemar Seno Adji[8], state law had the characteristics of Indonesia, because the Pancasila has to be appointed as the basis of the base and source of law, the state law can also called State of Pancasila. One characteristic of a staple in state law the Pancasila is the guarantee of freedom of religion or religious freedom. Freedom of religion in Indonesia means always in connotation positive, which is no place for atheisme or propaganda.

Notonegoro, in his Dies Anniversary of the University of Airlangga, 10 November 1995 entitled "Pembukaan Oendang-oendang Dasar 1945," (Just basic rules of Indonesia) ", says that the epitome of Opening of the Constitution of 1945 the fourth part is to do one. The composition of Pancasila is the hierarkis and have a form of the pyramid. Seen from the order, the five principles of showing a series of levels in the scope of the content, each of which in the back of the other is a specialisation of bases the upfront. If the base of Pancasila, then the five principles of there to do with each other so that Pacasila is one of the unity of the round. I wish that order is not absolute and between one of the principles of the other there is no sangkutpaut, then of a fragmented, therefore Pancasila can't be used sebai the spirituality for the state.

Pancasila is the principle of spirituality (philosophy, founder and view of life), which is the basis for the principle of state (political) in the form of a republican which is has the people's sovereignty. The constitution was the basis for the establishment of the structures of the whole Indonesian nation and the entire bloodshed of Indonesia in in a joint biological union**,** family and mutual cooperation. Most emphatically Notonagoro said that "among the fundamental elements of the fundamental principles of the State, the principle of spirituality of Pancasila has a special in life state and the law of Indonesian people".

Moving from the historical philosophical, pancasila is a major state law. On the level of such a difference of conception state law, with the conception state law west that is liberal.

7 Jimly Asshiddiqie, 2005, Konstitusi dan Konstitualisme Indonesia, Konstitusi Press, Jakarta. page 123-130.

8 Oemar Seno Adji,1980, Pengadilan Bebas Negara Hukum, Airlangga, Jakarta, page 35.

b. Supremacy of Law

The second is supremacy of law. The Indonesia is a constitutional state. The law as the nation and society. The power of the state and state organs based on law and constitution and refused to arbitrary power (the power of the arbitrary). The power state is restricted and is determined by law, as well as the tools of their equipment, (including the government) should be made and deeply rooted in law. According to Rukmana Amanwinata, the birth of the state law, as a result of the individual to release her of interest as well as an arbitrary act of the (absolutism). On that basis, the state / ruler must not act arbitrarily against the individual and his power must be limited.[9]

Supremacy of law) is a principle that has been recognized by modern countries. Absolute supremacy or dominance between laws (the absolute supremacy or predominance of regular law) as a counterweight to arbitrary power, overrides arbitrariness, from the prerogative, or even discretionary authority from the government.

The understanding of the state law can be seen from its elements such as the A.V. Dicey in his book Introduction to the study of the law of the constitution a feature important in every state law or rule of law, that called with[10]

1) Supremacy of law against abitrary power:
In the first feature, Dicey said that:
"It means, in the first place, the absolute supremacy or predominance of regular law as opposed to influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of goverment"

2) Equality before the law that is equality in the face of the law or submission of the same from all classes to ordinary law of the land that was conducted by ordinary court. In a second, Dicey said It means, again, equality before the law, or equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts.

3) To protect a human rights that guaranted by constitution. Constitution is a result of the ordinary law of the land. That's mean constitution is not the source but is a consequence of the rights of individuals in draft and reiterated by the court about this, Dicey explain that:
"lastly, may be used as a formula for expressing the fact that with us the law of constitution, the rules which in foreign countries naturally form part of constitutional code, are not the source but the consequence of the rights of individual, as definedand enforced by the courts".

The rule of law is similar to the rechtsstaat in the civil law system. Freidrich Julius Stahl said that the main elements of the formal law as follows : 1) recognize and protect human rights ; 2) to protect human rights, the state officials should be based on trias politica (the separation of powers of the state) ; 3) in carrying out their duties, the government was based on the rules or laws ; 4) the civil administration court.

The similarity among rechtsstaat with the rule of law can be seen with the absolute supremacy or predominance of regular law (the rule of the rules of law) to the idea of the rule of law, while in the idea rechtsstaat there is a desire in order for the government should be based on the rules. It would be more of a struggle against absolutism and its revolutionary, otherwise the concept of the rule of law have evolved an evolutionary significance. On the other hand, the concept of rechtsstaat is based on the legal system the continental called civil law or modern roman law.

Indonesia make the principle of the rule of law as an absolute to protect citizens from arbitrariness of the ruler. The State and the authorities should not act arbitrarily against individuals and power.

c. Democratic

Sovereignty of the people is an important pillar of establishment the Indonesian state. Fourth Indonesian state constitution (UUD 1945, Constitutional RIS, UUDS 1950, and The 1945 Constitution of the Republic of Indonesia the firm to determine the sovereignty of the people with different editorial. The opening of The 1945 Constitution of the Republic of Indonesia said that the Republic of Indonesia with the people who are then repeated in the provisions of Article 1. There are differences in the implementation of the sovereignty of the people according to the 1945 Constitution (before the amendment) and The 1945 Constitution of the Republic of Indonesia (after the amandement).

9 Rukmana Amanwinata, op.cit., page122-123.

10 A. V. Dicey, 2005, Introduction to The Study of The Law of The Constitution, Macmillan Press, London, page 197-198.

Article 1 paragraph (2) the 1945 Constitution Mention "Sovereignty is in the hands of the people, and be done entirely by the People's Consultative Assembly", the 1945 Constitution (before amandement) clearly state the sovereignty of the people as a pillar of the state which is guided in Article 1 paragraph (2), whereas the legal state is not stated in Articles (torso) but appears in the explanation of the 1945 Constitution of the Republic of Indonesia.

The formulation of Article 1 paragraph (2) the 1945 Constitution is so different from the arrangement of Article 1 paragraph (2) The 1945 Constitution of the Republic of Indonesia (after the amendment) that says : "Sovereignty in the hands of people are executed according to the Basic Law". In The 1945 Constitution of the Republic of Indonesia (after the amendment) in addition to mention the term sovereignty of the people also said the state law that was published in Article 1 (3) the statement of Indonesia is a constitutional state.

More decisive, Constitutional RIS and UUDS 1950, mentioned that Indonesia is an independent and sovereign state is a democratic constitutional state. Article 1 paragraph (2) the Constitution RIS said the Republic of Indonesia States an independent and sovereign is a democracy state law. In the meantime, Article 1 paragraph (2) UUDS 1950 said "of the Republic of Indonesia is an independent and sovereign state is a state law a democracy".

The provisions of the above decisively determine the principles of democracy or popular sovereignty in Indonesia where the people as a source of sovereignty. On the other hand, Indonesia is also based on the principle of state law that put the law as the commander. the two concepts such as the implementation of democracy in a legal framework. On the other hand, the principle of democracy or the sovereignty of the people in the process of forming the norm of law, good laws and regulations and the court's decision to guarantee the existence of the role of the community. This process makes any regulations set reflects the principles of democracy.

The rule of law (rechtsstaat), which was developed is not 'absolute rechtsstaat', but 'democratische rechtsstaat' or a democratic constitutional state. In other words, in every state law that is monocratic must be guaranteed a democracy, as in every State of Democracy must be guaranteed the implementation was based on the law.

d. The Restrains and Dissulotion of Power

Supermacy of law rejects arbitrary power from state organs. Restrictions of arbitrariness can be done through restrictions on power. Restrictions on the generated some state organs that can be separated. According to C.F. Strong, a country should have the powers of government (in the broad sense) that can be sorted into power the legislature, executive, and the power of the judiciary. One country will continue to exist to have the authority or power that the government who were given the right to exercise the powers of sovereignty.[11]

Separation of powers between the third branch of power is seen as something that is absolutely by Montesquieu. Regarding the separation of legislative and executive., Montesquieu said if the power of legislative and executive, in any one person or an agency of the judicial authorities, then there is no freedom because people will be worried if the king or the senate that makes the laws of tyranny will punish or rule them through tyranny. There is no freedom, too, if the power of not separated from power the legislature and executive.

The idea of limiting the powers of the state then raises the importance of separation or authorities of country. The separation or the authorities of country. The separation/division of power, sketchily can be done horizontal and vertical. The horizontal power of the state in an equal position and controls among one organ and another country's organs.

In addition to the separation of powers in a horizontal, the state's power can beam down or the separation of vertically. Dispersal of power according to create decentralization of power close to the people who are the goals to make prosperous people.

Sovereignty of the government in a country in the form of unity can be organized with the way centralized, so that all matters in the country is located in the hands of the central government, and all the committed by single centralized government, or should the center, together with the organs that dispersal in these areas.

The government that is emitted in areas to do as a result of the demands of democracy, efficiency and effectiveness of government. The government is based on the principle of deconcentration and

11 C. F. Strong. 2004 Konstitusi-Konstitusi Modern, Nuansa dan Nusamedia, Jakarta, page 10-11.

decentralization. Either deconcentration nor decentralization is obviously in the distribution of the governmental power on the basis of certain areas.

Deconcentration to the administration while decentralization to create an autonomous region.

e. The power of Justice of the Free and Independent

The power of Justice is the organ of State did control against the power the executive and legislative branches. Montesquieu demand to separation of explicitly against the three branches of power, the better is pleased with the function and comprehensiveness organ which held power. The desire to separate them from explicitly for the third branch of power those state based on the idea that the separation of powers is a prerequisite of the judiciary.

Various international instruments recognizing the power an independent of Justice in a state law. In Indonesia, Article 24 paragraph (1) The 1945 Constitution of the Republic of Indonesia unequivocally determines that the power of Justice is the power of the freedom to organize the court to enforce law and justice. The Article 24 of The 1945 Constitution of the Republic of Indonesia spelled out in Act Number 48 of 2009 about the Dukedom of Justice. Sifat independence from the power of Article 3 of Act Number 48 of 2009 that determines when carrying out their duties and functions, judges and constitutional judges must maintain a sense of justice. Any interference in matters of justice by the other by the judiciary prohibited, except in the things referred to in The 1945 Constitution of the Republic of Indonesia.

The definition of "a sense of justice" is free from interference by foreign parties and free from any kind of pressure, both physically and psychologically (These Article 3 of Act Number 48 of 2009) the power of free and independent not only as an organ of the institutionally but free and independent in performing its function is to realize the rule of law through the independent and impartial judiciary.

f. Protect and Advancement Human Rights

Human rights are in the law is an element absolute are to be protected and developed. The rights it has been recognized universally. The state have to give guarantee, protection, and the development of human rights in a democratic societies. Constitutional Court and legislation and the court's decision to ensure the realization of human rights. Delimitation of human rights should be established with the law in order to ensure recognition and respect for the right to freedom of others and to meet the demands of a fair.

2. Implementation of The Rule of Law

Establishment of the State Government is to realize the ideals of the formation of the Republic of Indonesia. In the Preambule of The 1945 Constitution of the Republic of Indonesia contains the noble purpose of the formation of the government of the Republic of Indonesia which is loaded in paragraphs II and IV, namely:

1) The ideals ... of the Indonesian State, which are free, united, sovereign, just and prosperous (Opening of paragraph II)
2) ……. To form an Indonesian State Government that protects the entire Indonesian nation and the entire Indonesian bloodshed and to promote public welfare, educate the nation's life, and participate in carrying out world order based on independence, eternal peace and social justice, the Indonesian Independence was formulated the constitution of the Republic of Indonesia which is formed in a composition of the Republic of Indonesia which has the people's sovereignty …….

Notonegoro said that innovation II was an ideal of the Indonesian people who wanted to be achieved with their independence, namely the maintenance of independence and sovereignty, national unity, and the region for legal and moral justice for themselves and others, as well as shared prosperity and justice. The Indonesian state is aspired to be a place of life for all people, where everyone can fulfill their daily needs. These ideals are related to the purpose of establishing a State Government, namely carrying out the mandate in the opening paragraph IV.

Guided by the provisions above, all forms of national and state actions must aim to realize the ideals of the formation of the State and the government of the Republic of Indonesia. All government actions both in the executive, legislative and judicial domains must be oriented towards these ideals.

The provision also, according to Azhary, emphasized that the reference to trace the conception of the State of Indonesian law was based on the opening. Therefore the Indonesian state of law, according to Azhary, is interpreted as a welfare state.

The rule of law itself is one of the principles adhered to in Article 1 paragraph (2) of The 1945 Constitution of the Republic of Indonesia. In addition to the State of law Indonesia also adheres to the principle of popular sovereignty. Based on these principles, the rule of law (rechtsstaat) developed was not 'absolute rechtsstaaat', but 'democratische rechtsstaat' or a democratic state of law. In other words, in every state of law that is monocratic in nature there must be guaranteed a democracy that guarantees the protection of human rights.

The 1945 Constitution of the Republic of Indonesia juxtaposes the two principles adopted by the State of Indonesia, namely the rule of law and the sovereignty of the people. Article 1 paragraph (2) of The 1945 Constitution of the Republic of Indonesia (after the amendment) states: "Sovereignty is in the hands of the people and carried out according to the Constitution" while Article I paragraph (3) which reads the State of Indonesia is a rule of law. The two principles adopted by the 1945 show that the rule of law (rechtsstaat) developed was not "absolute rechtsstaat" but rather "democratische rechtsstaat" or a democratic state of law. In other words, in every legal state nomocratic nature must be guaranteed by democrats, as in every State of democracy the organizer must be guaranteed based on the law.

Democratic legal state according to the role of citizens and protection of human rights. The role of the community in the democratic process is involved not only in every policy making but also after the policy is taken. Citizens who feel their rights are violated because of the issuance of legislation or other government actions that can raise objections. The government is obliged to provide channels for the active role of the people in the democratic process and to uphold and protect human rights according to the principles of a democratic rule of law. The efforts of citizens to defend their rights can be done through judicial review.

C. FINAL

The adoption of the principle of Indonesian law is inseparable from the influence of the thinking of rule of law that developed in countries with common law traditions and also the influence of rechtsstaat conceptions in countries with civil law traditions. However, the conception of the State of Indonesian law has its own characteristics that are different from other conceptions. Elements of a stable Indonesian law and the basis of changes and reforms in both the constitution and other legal policies. This can be examined from the philosophical basis, the nature of the rule of law, the power of state organs, human rights. The main characteristics of the Indonesian law are: (1) Pancasila; (2) Supremacy of law; (3) Democratic; (4) Restrictions and Dissemination of State Power; (5) Free and Independent Judicial Power; (6) Protection and Development of Human Rights.

These elements can be developed according to the development of thought and constitution in Indonesia. The history of the Indonesian Constitution has proven that the implementation of the Indonesian law has shifted. The meaning and implementation of the rule of law is not "absolute rehabilitation" but "democratische rechtsstaat" or a democratic state of law. Democratic law states demand the role of citizens and protection of human rights. The people are subject to nation and state in the sense that the people are involved not only in every policy making but also after the policy was taken.

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THE RIGHT TO LIVE AS HUMAN RIGHTS (STUDY ABOUT EUTHANASIA)

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Abstract

The right to live in international law is part of international custom, which is then included in Article 6 of the International Covenat on Civil and Political Right, Article 2 (Charter of Fundamental Rights of the European Union, and Article 4 of the American Convention on Human Rights. Those three international law states that everyone has the right to live. However, in Indonesia, Netherlands and Switzerland, there are laws and regulations that allow for an action that can cause a person to die, namely the implementation of euthanasia. The debate arises whether the euthanasia action can apply alongside protection the right to live, or it is a violation of the protection of the right to live which is protected by international law.

Keywords: Coal, Mineral, Mining, Sustainability

A. INTRODUCTION

Everyone is born in a free state and have principle rights that stick to them, in which something called human rights. In the Big Indonesian Dictionary (KBBI) human rights are defined as internationally protected rights (i.e. the UN Declaration of Human Rights), such as the right to live, the right to freedom, the right to own, the right to issue opinions. (Ministry of National Education, 2008: 474)

Human rights rights can be said as a law from the community, because the law that governing human rights basically comes from public trust, which then becomes the reasons conveyed by the community, in which become the reasons and the basis for the conduct of international political action.

The right to live is one of the human rights which is regulated at the beginning of the protection of human rights, the right to live is always included in various international treaties concerning the protection of human rights. Which has the most fundamental value of modern civilization. In a final analysis, if there is no right to live, there will be no crux of the matter in human rights.

The right to live in an international instrument is stated in Article 3 of the Universal Declaration (Universal Declaration of Manuusia Human Rights). The United Nations formulates that everyone has the right to live, the right for freedom, and the right to be safe. This provision clearly guarantees the right to live.

The right to live has several different definitions. The right of livethat exist in the International Covenant on Civil and Political Rights (ICCPR), which is a multiratelal agreement ratified by the General Assembly of the United Nations on December 16, 1966, valid since March 23, 1976, in which in Article 6 states that every human being has an attached right to live and undoubtedly is the most important right of all human rights. Civilized society will not be without legal protection against human live. Although the right to live described as “attached” to everyone, legal rights are never inherent as properties, because rights are created within the legal framework. If the right to live is guaranteed by general international law, then clearly that right applies to all States, including States that are not parties to certain international agreements. If the right is protected regardless of whether or not there is an international agreement, the inclusion in international agreements becomes important, not only to reinforce the right but to articulate the content and its implications. (Ifdal Kasim, ed., 2001: 130)

In other provisions, the right to live is also protected in Article 6 of the Convention on the Rights of the Child which states that the Contracting States of the Convention recognize that each child has inherent rights to their live. Every child on earth can declare that “I must live and develop as a human being”. (Eva Achjani Zulfa, 2005: 4)

Live rights in international agreements as contained in the Statute of the International Court of Justice are international agreements, international customary law, legal principles, and court decisions and the state of the world’s leading scholars. (Http://www.icjicj.org/document/index.php?p1=4&p2=2&p3=0#CHAPTER_II ,: October 2, 2018)

In Indonesia the formulation of the right to live is contained in a number of regulations, one of which is the 1945 Constitution (UUD 1945) which has been amended through several main regulations to formulate the right to live, along with Article 28 A, Article 28 B paragraph (2), Article 28 H paragraph (1), Article 28 I paragraph (1). Other instruments relating to the Right to Live are Law Number 39 of 1999 concerning Human Rights, the right to live for an instance is controlled in Article 4, Article 9 and Article 53 paragraph (1). Human rights according to this law are a set of rights inherent in the nature of human existence as a creature of God Almighty and is a gift of His Mandatory Dimension, upheld and protected by the State, law, government, and every person for the sake and protection of dignity and human dignity (Human Rights Law, Law No. 39 of 1999, Article 1 number 1).

The problems related to the Right to Live are the ongoing death execution in some countries, including in Indonesia, even in some countries in Europe and America are still allowing the death penalty. However, several countries on the two continents have abolished the death penalty, and also in some other countries the death penalty is no longer imposed on criminals or convicts over the age of seventy.

Another problem is about abortion, in this problem the question arises, when someone's right to live begins? Is it since fertilization or when a baby is born as a human being? Such controversy continues and is not solved completely.

Another problem concerning the Right to Live is Euthanasia, this problem is the opposite of an abortion case, the question that arises is is there a right to die for someone? This issue of Euthanasia will be discussed by writer in this paper, which is about the practice of Euthanasia in the Netherlands, Switzerland and Indonesia.

The problem of Euthanasia is a problem that is quite dilemma both among doctors, legal practitioners and religious circles. In Indonesia this problem has also been discussed, as was done by the Indonesian Doctors Association (IDI) in its seminar in 1985, which involved medical experts, positive lawyers and Islamic jurists, but the result was still no unanimous agreement on the matter. (Akh. Fauzi Aseri, 1995: 51).

If assessing euthanasia from the aspect of human rights, then the act of euthanasia is an act that violates the basic rights of human live, violates the declaration issued by the United Nations, Article 28A of the 1945 Constitution of the Republic of Indonesia, Criminal Code and what most important stepping over authority from the authority of God Almighty.

Indonesia is a member country of the United Nations, which participated in ratifying the Charter of Human Rights in accordance with the 1945 Constitution, then the People's Consultative Assembly established a decision on human rights, namely with the TAP MPR No. XVII / MPR / 1998 concerning the Views and Attitudes of the Indonesian Nation on Human Rights and the National Human Rights Charter, and Law No. 39 of 1999 concerning Human Rights, with these two sources the enforcement of human rights in Indonesia gets formal legality, and the right to live is fully guaranteed to be protected by the constitution.

B. PROBLEMS

Is the right to die (Euthanasia) contrary to the Human Rights?

C. RESEARCH METHODS

The research used in this paper is a normative juridical research method, namely research that emphasizes the use of secondary data in the form of written legal norms from studies of the International Covenant on Civil and Political Right, Charter of the Fundamental Right of the European, American Convention on Human Rights, and regulations national legislation and euthanasia.

D. DISCUSSION

1. Definition of Euthnasia

The term Euthanasia is etymologically derived from the Greek words *eu* and *thanatos* which means "die good" or "die in a state of calm and pleasure". In English it is often called Mercy Killing. In the Netherlands it is mentioned that Euthanasia is intentionally not doing an effort (nalaten) to prolong the life of a patient or intentionally not doing something to shorten or end a patient's life, and all this is done specifically for the patient's own sake. (Cecep Tribowo, 2014: 200)

So Euthnasia can also be defined as an action to end a person's life by not experiencing pain, when the action can be said as an aid to alleviate the suffering of someone who will end his life, or help from medical personnel for patients to die well, without suffering in deep pain.

Euthnasia in the medical world, Since the beginning of medical history, intends to base the tradition of medical disciplines in a professional ethic all humanity recognizes and knows the existence of some fundamental traits that are attached inherently in a good and wise doctor, namely purity of intention, sincerity in work, humble and scientific and social integrity that are not doubtful. Therefore all doctors throughout the world intend to base the tradition of medical discipline in a professional ethic that has always prioritized treatment and the safety and importances of these sufferers. (Djoko Prakoso and Djaman Andhi Nirwanto, 1984: 79)

The professional duty of doctors are so noble in their dedication to fellow human beings and the responsibility of the doctors are increasingly heavy due to the advances made by medical science. Thus, every doctor needs to live up to medical ethics, so that the glory of the doctor's profession is maintained properly. This is realized by doctors throughout the world, and almost every country has its own Code of Medical Ethics. In general, the code of ethics was based on Hipocrates' oath, which was reformulated in the statement of the World Medical Association in London in October 1949 and was corrected by the 22nd session of the association in Sydney in October 1968. (Joko Prakoso and Djamal Andhi Nirwanto, 1984: 79)

Universally, the obligation of the doctor has been stated in the Declaration of Geneva which is the result of the deliberation of the world Doctors Association in Geneva in September 1948. The declaration is stated as follows:

"I will maintain the utmost respect for human life from the time of conception, event under threat, I will not use my medical knowledge, contrary laws and humanity." (National Committee of Susila Medical Working Meeting Editorial Committee, 1969: 20).

Also the doctor's obligations are also listed in Chapter II Article 10 of the Indonesian Medical Ethics Code, which states that a doctor must always remember the obligation to protect the lives of human beings. (Decree of the Minister of Health of the Republic of Indonesia No. 434 / Men.Kes / SK / X / 1983).

So giving rights to individuals to get help in terminating their lives, for many countries is still a debate, because until now, recruiting non-legal rules both religious, moral and politeness rules, determines that helping others end their lives, even at the request of the concerned with real and sincere actions are not good.

2. Classification of Euthanasia

Euthanasia can be distinguished into active euthanasia and passive euthanasia, active euthanasia, which is deliberate action carried out by the nurse or other health personnel to shorten or end the patient's life, for example by giving cyanide tablets or injecting harmful substances into the patient's body. While what is meant by passive euthanasia, which is where doctors or other health workers intentionally do not (again) provide medical assistance that can prolong the lives of patients, for example not providing oxygen assistance to patients who have difficulty breathing or not giving antibiotics to patients with severe pneumonia, or by removing equipment that help them survive. (Wila Chanhandrawila Supriadi, 2001: 97-99)

From the point of implementation, Euthanasia can be divided into:

a. Aggressive euthanasia, or can be referred to as active euthanasia, is a deliberate act carried out by a doctor or other health worker to shorten or end a patient's life. Aggressive euthanasia can be done by administering a lethal compound, both orally and by injection. One of the deadly compounds is cyanide tablets. (J. Guwandi. 2000: 4-9)

b. Non-aggressive euthanasia, or sometimes called automatic euthanasia (autoeuthanasia) is classified as negative euthanasia, that is, the condition of a patient expressly and consciously rejecting medical care despite knowing that his rejection will shorten or end his life. The refusal is officially made by making a "codicil" (statement written hand). Non-aggressive euthanasia is basically a practice of passive euthanasia on the request of the patient concerned. (Ibid)

Euthanasia in terms of licensing, can be classified as:

a. Euthanasia that is out of the patient's will, which is an act of euthanasia that is contrary to the patient's desire to stay alive. This kind of euthanasia can be likened to murder.

b. Voluntary euthanasia which is often a matter of debate and is considered an erroneous act by anyone, this occurs when someone who is not competent or has the right to make a decision to do and act on behalf of the patient's guardian. (Qomariyah Sachrowardi, Ferryal Basbeth, 2011: 14).

c. Voluntary Euthanasia, which is done with the consent of the patient itself, but this kind of euthanasia is

still a debate because it is considered controversy.

3. Legality of the Implementation of Euthnasia

a. Implementation of Euthanasia in Switzerland

Article 114 of the Swiss Criminal Code or the Swiss Criminal Code regulates the murder or disappearance of life on request of the victim. In this article it is stated that if someone kills another person on request and coercion that comes from another person, then someone who kills can be sentenced to no more than three years, or subject to certain fines. In this case, Switzerland does not legalize murder in any way, including murder by the request of the victim himself.

The prohibition of killing is stated in Article 115 of the Swiss Criminal Code, about inciting and helping suicide. If someone influences or helps someone else to commit suicide or attempt suicide, if that another person commits suicide or attempts to commit suicide, then someone who influences or helps can be sentenced to no more than five years or subject to certain fines. (Http: // admin.ch/ch/e/rs/311_0/a115htm)

Accordingly, based on Article 114 and 115 of the Swiss Criminal Code, the two actions described in the article are criminal acts with the threat of punishment.

However, even though euthanasia according to the Swiss Criminal Code is illegal, but in fact euthanasia can still be done in Switzerland, or the terminology used is suicide with the help of medical personnel (assisted suicide), which can be done with fairly easy conditions, namely the origin of the wishes of the patient himself. If medical personnel can legitimately prove that the patient is asking for medical personnel to do euthanasia, and euthanasia is done so that the patient can have a dignified death, then actions such as in Switzerland do not include criminal acts.

b. Euthanasian Implementation in the Netherlands

In the Netherlands the implementation of euthanasia received support from parliament for the proposed legislation on the activities of Dutch doctors and doctors to help patients with severe illness who chose to end their lives. Parliament's support is 104 votes compared to 40 votes that reject it, so it is clear that the parliament's alignments to immediately enact the euthanasia legislation.

On April 10, 2001, the Dutch issued Wet van April 12, 2001, a law that allows euthanasia, namely: "Hodende toeting van levensendiging op verzek en hulp bij ljorzorging or Review of procedures for the termination of life on request and assisted suicide and amendament to the Criminal code and the Burial and Crimation Act." (Http: // www. International force.org/ task rpt 2005-3 htm #)

This law was declared effective since April 1, 2002, thus the Netherlands was the first country to legalize the practice of Euthanasia.

Euthanasia in the Netherlands is carried out based on the Termination of Life on Request and Assisted Suicide (Review Procedures) Act 2002 ("Dutch Euthanasia Law"), which corresponds to Wetboek van Strafrecht or the Dutch Penal Code. As a benchmark for implementing euthanasia in the Netherlands, namely Article 2 of the Dutch Euthanasia Law, which is based on health care and with caution, and carried out with the help of phsycian or medical personnel.

The medical personnel must fulfill the conditions stated in the Article 2 paragraph (1) of the Dutch Euthanasia Law, namely:

"The requirement of due care, referred to in Article 293 second paragraph Penal Code mean that the physician:

a. hold the conviction that the request by the patient was voluntary and wellconsidered.
b. holding the conviction that the patient's suffering was lasting and unbearable.
c. has informed the patient about the situation he is in and about his prospects.
d. and the patient hold conviction that there was no orthher reasonable solution for the situation he was in.
e. has consulted at least one other, independent psychology who has seen the patient and has written opinion on the requirements for care, referred to in partsa-d, and
f. has been terminated a life or assisted in asuicide with due care. (Termination of Life on Request and Assisted Suicide (Review Procedures) Act 2002, Article 2 paragraph (1)).

The limitation was made so that the implementation of euthanasia was indeed the last resort the patient wanted, because the patient had indeed suffered from a very severe illness that was known for certain by medical personnel who helped implement euthanasia.

Article 2 paragraph (2) of the Dutch Euthanasia Act, states that a patient is 16 years of age or older, but cannot express his will for euthanasia, but before reaching the coma, he understands his physical condition

and has written a written statement about the application for life withdrawal, then medical personnel can carry out the request. (Ibid, Article 2 paragraph (3)). If someone in the above conditions is still between the ages of 16 and 18, medical personnel can implement the request by involving parents or guardians in making decisions, in accordance with Article 2 paragraph 3) of the Dutch Euthanasia Act. Furthermore, according to Article 2 paragraph (4) of the Dutch Euthanasia Act, if someone in the above conditions is still 12 to 16 years old, then medical personnel can carry out life termination or suicide with help. (Ibid, Article 2 paragraph (4)).

Since the end of 1993, the Netherlands has legally regulated the obligation of doctors to report all cases of euthanasia and assisted suicide. The judiciary will always judge whether or not the procedure is applied. In 2002 a 20-year-old convention was codified by the Dutch Law in which a doctor who carried out euthanasia in a particular case would not be prosecuted before the court as long as he followed several established procedures.

The procedure is to hold consultations with colleagues (not necessarily specialist) and make a report by answering 50 questions. and it was stated that assisted suicide was carried out on the basis of ongoing suffering and irresistible, legal. Furthermore, in the regulation states that patients must be calm, doctors must get a second opinion and only doctors who are not families have the right to give deadly drugs to patients. (Muh. Amiruddin, 2017: 113).

c. Implementation of Euthanasia in Indonesia

In Indonesia, Euthanasia is something that is against the law, because in the Criminal Code (KUHP) Article 344 it is affirmed that "Whoever seizes the lives of others at the request of the person himself is stated with conscience threatened with the longest imprisonment twelve years".

Based on the provisions of the Article, it was concluded that even if the murder was at the request of the victim, it would still be subject to criminal sanctions for the perpetrators. Thus, in the context of positive law in Indonesia, euthanasia would still be considered as a prohibited act. Therefore, in the context of positive law in Indonesia, it is not possible to do a "life termination of someone" even if the request of the person himself is done, and the act is still qualified as a criminal act that can be punished.

Talking on the problem of death, according to the way it occurs, science distinguishes into three types of deaths, namely: a). *orthothanasia*, namely death that occurs due to a natural process, b). *dysthanasia*, which is unreasonably occurring, c). *buthanasia,* which is death that occurs with help or with no doctor's help, (Tjandra Sridjaja Pradjonggo, 2016: 60).

In Indonesia for active and passive euthanasia, there are several articles of the Criminal Code relating to or can explain the legal basis for euthanasia for people or families who apply for euthanasia:

1. Article 340 of the Criminal Code, "Anyone who intentionally and planned to eliminate the soul of another person is punished, because murder is planned (moord), with a death sentence or a lifetime imprisonment or a prison for twenty years at the most."
2. Article 359, "Whosoever, because of his fault, causes the death of a person, is sentenced to imprisonment for a maximum of five years or confinement for a maximum of one year".
3. Article 345, "Anyone who incites another person to commit suicide, helps him in doing so, or gives the effort to commit suicide, is sentenced to imprisonment for four years in prison".

Based on the explanation and legal provisions for euthanasia, the doctors and families who give permission in carrying out these actions can be charged under Article 345 of the Criminal Code.

In the absence of clear regulations, formal jurisdiction in Indonesia, the issue of euthanasia still has no place, but is likely to get a place that is legally recognized in the development of future positive Indonesian law.

E. CONCLUSION

Human rights are basic rights that are owned by everyone, inherent in everyone, and cannot be given or taken arbitrarily by others. In the implementation and protection, rights which are included as human rights basically depend on the implementation of a right, namely the right to live. The right to live is one of the human rights that is internationally recognized and protected through legislation in the world.

Some countries in the world still carry out and legalize euthanasia. In Switzerland euthanasia can be done by deviating from Article 114 and 115 of the Swiss Criminal Code, euthanasia in Switzerland is based on the right to die which is believed to be owned by every person who has the right to live, and uses the

term assisted suicide to ensure that the act of revoking life is true from patient. The Netherlands is based on the Termination of Life on Request and Assisted Suicide (Review Procedures) Act 2002, on the other hand, Indonesia considers euthanasia as a criminal act, whatever the reason.

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TATE-OWNED ENTERPRISES AS A PILLAR ECONOMIC INDONESIA FOR BUSINESS INNOVATION AND TRANSFORMATION BASED ON PANCASILA AND CONSTITUTION OF 1945 RELATED WITH DECREES OF CONSTITUTIONAL COURT NUMBER : 62/PUU-XI/2013 & NUMBER : 12/PUU-XVI/2018

(Universality Perspective : *Cultural Constitution & Fundamental Rights*)

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Abstract

State-Owned Enterprises Indonesia (hereinafter abbreviated with SOE's) is national economic pillar of Indonesia by virtue of both Indonesian's Five Philosophies and Article 33 Constitution of 1945 has assignment from the state to make profit and/or as agent of development as well as to produce goods and/or services in order to increase economy and State Revenue while manifesting welfare and prosperity Indonesia of the people. Then, in order to achieve such aim and objective of SOE's establishment, in scope of the faster and flexibility Indonesia both national and international competition, it is required business innovation and transfomation. Stand on frames of Indonesian's Five Philosophies, Constitution of 1945, Unity in Diversity and Unitary State of Indonesia Republic. Corporation action of SOE's (Persero /atau Perum or other name) in order to achieve the targets as wished by the State, Government and People, in business practices there are problem to be faced, those are : firstly, the overlapping many regulation/ legislation resulting in position and role of SOE's is not strong. Secondly, the weak leadership in legal/ business sector for Board of SOE's and involved in legal case/problem. Thirdly, Bill of SOE's problem (House of Representative's Initiative) potentially, it had hindered fast action of corporation of SOE's. This research had been conducted by Indonesia normative research methodology based on legislation, Decree of Constitutional Court , secondary and tertiary documents, and wishfully, it may give the answer for solving problem. For classical solution of SOE's, some decrees of Constitutional Court pertaining to SOE's management may give strong and has long term impact. Wishfully, philosophically and constitutionally, this research may give Indonesia to SOE's (as business actor), the Government (Regulator), House of Representative (Supervisory) and related stakeholders as well as large public. Wishfully, the implication and focus of this research may result in SOE's to be pioneer of consistent implement and against Indonesian's Five Philosophies finally.

Keywords: Economic Pillar, Innovation , Transfomation, Excellent, SOE's, Pancasila, Constitution of 1945, Decree of Constitutional Court.

A. INTRODUCTION

Indonesian's Five Philosophies is any ideology and philosophy as well as integrator of Indonesia state and nation. Constitution of 1945 is State Constittution as fundamental legal resource which integrate nation and state of Indonesia. Indonesian's Five Philosophies and Constitution of 1945 is social contract and agreement of Indonesia nation Indonesia by State Founders (the founding fathers) for last decades and as source and Indonesia as well as noble values of national identity of Indonesia. Indonesian's Five Philosophies and Constitution of 1945 as source and pillar of all strength from components of Indonesia Nation including SOE's as any economic pillar in order to manifest welfare and prosperity Indonesia of the people of democracy, justice and polite in accordance with 5 (five) foundaments of Indonesian's Five Philosophies. State and Government as well as the people wish SOE's will obtain the profit and/ or and may implement social function/duty of State for the People by realizing business innovation and transfomation while Indonesia best practices of business.[1]

The goals of this Indonesia State based on five of State Fundaments (Indonesian's Five Philosophies),

1 Jimly Assihidiqie, Public Lecture, Perspective of State and Nation : "Any Study of Attitude and Governmental Policy in Millenial Era (Now Era)", Graha Wlliam Soeryadjaja, Campus of UKI, Cawang, Jakarta, 27 November 2018.

those are : Belief in the one and only God (Godhead); Just/Fair and civilize humanity; The unity of Indonesia; Democracy is guided by inner wisdom in the unanimous Indonesia sing out deliberations among representatives (Indonesia led by wisdom in consultations/ representatives); Social justice for the whole of the people of Indonesia. This Indonesian's Five Philosophies which guide national legal/politic for some sectors : Law as instrument to achieve goals of State, unless based on five foundaments (Indonesian's Five Philosophies), also, it should be functioned by four Indonesia principles of law idea *(rechtsidee),* those are:

1. To protect all national elements for sake of integration
2, To manifest social justice in sector of social and economic
3. To manifest people's sovereignty (democracy) and Law State (nomocracy)
4. To create tolerancy based on humanity and civilization for live in diversity

The target of SOE's should be in line with the goals of state and nation of Indonesia in order to manifest fair and prosperous of People based on Indonesian's Five Philosophies. Definitely, the goals of State as referred to Fourth Paragraph of Preamble of Constitution of 1945 Indonesia:

1. Protects the entire Indonesia nation and the whole of Indonesia's bloodshed
2. To promote public welfare
3. To educate the nations's life
4. To participate in carrying out world order based on independence, lasting peace and social justice

State-Owned Enterprises of Indonesia (SOE's) up to now (base on data 2017) both Persero or Perum has registered as amout 114, and Assets will be reach 7.913 billiones and give Deividents for Indonesia ± up to 37 billiones.SOE,s has given many contribution for National obligations (taxes, employees and solve for social problems) and others public/societies.[2]

SOE's existence as independent (separate) legal entity had been recognized by law Number : 19 of 2003. It results in the application all Independent Indonesia principles of Limited Liability Company into SOE's institution for SOE's (Persero and/or Perum) specially.

Nevertheless, inconsistency of regulation related with SOE's institution within legislation had resulted in legal Indonesia in normative order. Among other thing, it appears in between law Number : 19 of 2003 and In terms of SOE's, law Number: 40 of 2007 on SOE's (Persero or Perum) in accordance with its establishment it had obtained profit and Governmental assignment, practically, it had collided with regulation of Limited Liability Company and other related statute.

SOE's have responsibility for ± 12 act/law and government regulations, and minister regulations. Those are not equal playing thas act/law or regulations for private sector/company.

In process and SOE's business operations to achieve such aim and goals there are some problems to be faced and solved immediately, hence, potentially, it will not hinder the fast action of SOE's.

B. RESEARCH METHODS

Research methods used in scope problem formulation is normative research methods (literature study). It is conducted by library research by collecting, studying and analyzing some relevant secondary and tertiary legal Indonesia (decrees of constitutional court, act/law, regulations, scientific books, newspaper, paper seminar result, related sources scientific, legislation, etc.).

C. PROBLEM FORMULATION

Then, based on the description above, it can be formulated problem formulation in this research as follows :

1. How Indonesian's Five Philosophies (Pancasila) had sifnificant contributed to inspined as a philosophy and vision (cultural constitution) sources against lack of Leadership of SOE's Boards in scope of increasing business innovation and transfomation?
2. How Constitution of 1945 had contributed highly fundamental guidance to certainty of law and/or justice as well as benefit for law problem (overlapping regulation) and/or SOE's permits?
3. How its relevance with legal consideration of Decree of Constitutional Court Number : 62/PUU-XI/2013 & Number : 12/PUU -XVI/2018 for SOE's in scope of facing constitutional obstacle of Bill of SOE's (RUU BUMN) substance (as a Initiative of House of Representative/DPR RI) ?

2 Ministry of SOE's, Strategy Plan of SOE's 2015-2019, Jakarta.

D. DISCUSSION

1. Significantly, Pancasila (Indonesian's Five Philosophies) Had Given Impact to Leadership Vision and Mission of SOE's Boards

Boards of SOE's (Directors and Commissioners) must have a strong innovation and transformation business for the competitiveness, suc as, general agreement on, tariff and trade in service, AFTA, APEC, etc.

Role of SOE's as hands of state based on separated State Finances participation since the establishment of SOE's, then, SOE's as Trustee should adhere to related statute in view of law of limited liability (UU PT) adhere to some statutes as well, hence, SOE's should adhere to and comply with Statute other than as manifestation of State of Indonesia, Ethic and Justice had been applied universally. Internally and externally, all RJPP, RDP and Corporation Commitment of SOE's had been considered and its based on Indonesian's Five Philosophies, and it became corporation culture which had been delved from Indonesia country it self, hence, Board Directors and Stakeholders of SOE's should be based on and soul of Indonesian's Five Philosophies. Any Decree of Directors Board of SOE's should be based on Indonesian's Five Philosophies from 1 (one) through 5 (five) fundaments/philosophies. Wishfully, for now digitalization era, SOE's will be able to overcome all views contradicted with such Indonesian's Five Philosophies by fast business information and transfomation.

The SOE's domination by State, it is not meant that State as entrepreneur but, the State may result in regulation for preventing subjection of economy. Such regulation may place SOE's as hands of state without leaving business Indonesia principle, and State should make classification of sectors role of SOE's, not one so called strategic by State.[3]

SOE's management conducted by democracy, nevertheless, Indonesia is different with other count.

Indonesia democracy, because existing democracy and law should be illuminated by Indonesian's Five Philosophies, the philosophy/foundament of Belief in the one and only God (Godhead) as ideals of founding fathers of the State of Indonesia Republic specially.[4]

In now digital era there are 3 (three) of SOE's challanges (3), those are : the Service, growth of IT/ Digital oriented milineal generation, impact of political party and politicians as well as overlapping legal/ regulation and Licensing bureucracy.

In order to achieve and maintain SOE's which supersede business innovation and transformation and its participation in national domain and its expansion at global/world order refere to and based on Indonesian's Five Philosophies as follows :

a. To view Pluralism as strength in togetherness
b. To increase inclusiveness;
c. Universality;
d. Constitutional Identity.[5]

Constitution of corporate culture for SOE's contains values and ideas as well as business innovation and transfomation applied by the world universally among them: friendly, profesional and synergity as well as to be strategy to filter foreign investors to invest in Indonesia, hence, the SOE's is no longer as local player but in global/international scale.

Corporate action of SOE's Boards are not comply for many act/law, but in all business processes must be in the spirit and filosofi Pancasila.

2. Constitution of 1945 As Legal Foundation of Business innovation and transfomation of SOE's

SOE's has strategic and significant role in obtaining profit from APBN, Divident, Tax or PNBP and others as well as assignment from State and Government should adhere to applicable statutes. Supposedly, there is unequal playing (when all treatments in business with Private Company) by comparison of statutes and regulation which should be applied remain as application of Article 33 of Constitution of 1945 may not be conducted by justification of SOE's so as not make profit when Article (28), hence, Constitution of 1945 which of management of SOE's should internalize it from statutes related with SOE's. As business, it is out of control of Government against statute (House of Representative and Government)

3 Harjono, Any Economic Pillar, SOE's is mirror of Article 33 of Constitution of 1945, General Meeting of Legal Forum Member, SOE's, Bali, 25 August 2017.

4 Arief Hidayat, Any Economic Pillar, SOE's is mirror of Article 33 of Constitution of 1945, General Meeting of Legal Forum Member, SOE's, Bali, 25 August 2017.

5 Jimly Asshidiqie, Op.Cit. Page 2.

but, for adjustment process may be given inputs to related parties or file Judicial Review at Constitutional Court to statute or government Regulation or Ministerial Regulation at Court Supreme level or other legal proceedings as long as SOE's has opinion that there is fundamental rights contradicted with both Constitution of 1945 and Indonesian's Five Philosophies. The enforcement of Human Rights, Environment as well as Small and Medium Business Scale is mandate of fundamental rights provided by Constitution of 1945 and applied to the world universally. Also International convention had been ratified and as source for related SOE's. For SOE's, education is constitutional assignment and as dedication to nation and state. The update of business innovation and transfomation should follow business spirit of SOE's.

Solely, constitution of 1945 is not only law of Indonesia developed in society or business but also in rule of law, but, presently, SOE's had been included as pioneer of rules of ethics in business while maintain win win solution principles in business agreement with other parties.

Law Number: 12 of 2011 of legislation formulation had contained philosophy, sociological and juridical aspects hence, all regulations established by SOE's remain follow Indonesian's Five Philosophies and Constitution 1945 and as internalization in corporation organization of SOE's.

Article 2 of law Number: 19 of 2003, it had been provided that the aim and objective of SOE's is national economic growth and State Revenue as well as to make profit, goods and services supply, pioneer of business activity having not been touched by private and cooperation sectors, counselling and assistance for weak/small economic, cooperation and People.

Article 3 of law Number: 19 of 2003, against SOE's applied this statute, Charter and other legislations. Article 13 of law Number: 19 of 2003, scope of law of limited corporats of SOE's Number: 40 of 2007 (Article (1) paragraph (2)) Organ Perserois General Meeting of Shareholders, Directors and Commissioners Board, hence, whomever had been prohibitted to intervene in SOE's Management (Article 90 of Statute of SOE's).

SOE's in accordance with law of Number 40 of 2007, Articles of 63 through 73 setout Work Planning and Annual Report and Use of Profit.

But of SOE's are noble citizens to comply many act/laws but it's very importen to fully commitment law in ethics.

3. Relevance of Decrees of Constitutional Court Number: 62 of 2013 and Decree of Constitutional Court Number: 12 of 2018 against Bill of SOE's, (RUU BUMN as an Initiative of House of Representative/DPR RI.

Potentially, SOE's operation will collide with some institutions among them House of Representative, for some times a year, Boar of Directors will be invited by RDP.[6]

Decree of Constitutional Court No. 12/PUU-XVI/2018, the Court have opinion principally, that Board (Directors and Commissioners Boards of SOE's) will not be appointed or assigned by House of Representative, because it is not public official, the mechanism of General Meeting of Shareholders in accordance with law Number 40 of 2007 regulating the appointment of Directors and Commissioners Boards of Company. [7]

Then, against management and role of SOE's, Decree of Constitutional Court comprising as follows:

a. Decree of Constitutional Court No. 77/PUU-IX/2011
b. Decree of Constitutional Court No. 48/PUU-XI/2013
c. Decree No. 62/PUU-XI/2013
d. Decree No. 12/PUU-XVI/2018
e. Decree of Constitutional Court Number: 14/PUU-XVI/2018

The substance of Decree No. 62/PUU-XI/2013 as follows:

a. The court has opinion that SOE's has strategic role as implementer of public service, balancer of large private strength and participate in developing small/cooperation business scale. In order to achieve such objective, role of SOE's should be optimized by growing Corporation Culture in mechanism of General Meeting of Shareholders in accordance with law Number 40 of 2007 on Limited Liability Company, hence, it will not be under supervision/agreement of House of Representative.

6 Elisa Manik, processed from some resurces, Obstacles To be Board of Directors SOE's, Jakarta November 2018.

7 www.hukuonline.com, Decree of Constitutional Court Number 62 of 2013 and Decree of Constitutional Court Number 12 of 2018, some times access, November 2018.

b. House of Representative may valuate and supervise performance and proffesionalism of Directors and Commissioners Boards by mechanism of law No. 17 of 2014 on People's Consutative Assembly, House of Representative, House of Representative in local, for related article on mechanism of regular meeting, Commission Meeting and others specially. The House of Representative may ask clarification from Dwiwarna's shareholders (The Minister of SOE's of Indonesia as President) to clarify SOE's performance including proffessionalism of Directors and Commissioners Boards of SOE's.

Decree of Constitutional Court Number : 14/PUU-XVI/2018 dated 26.11.2018 on Article 4 (4) SOE's regarding adding capital is that for SOE's it is derived from national budget by agreement of House of Representative and further its planning will be setout in government regulation more accurately, because it is below the Statute, so that, adding capital is not contradicted with Constitution of 1945.

As to potency of legal and business problems of SOE's is by initiative of law Amendement of SOE's Number: 19 of 2003, it is initiative of House of Representative on Bill of SOE's (proposal of 147 Articles) filed to the Chairman of House of Representative to President of Indonesia dated 3 October 2018, as follows :

I. Legal Response of Bill of SOE's (Inisiative of House Of Representative)[8]

No	Materials	Existing Statute of SOE's	Billo SOE's In Version of House of Representative	Legal Response
1.	Appointment of Board of Directors of Company	**Article 15** 1. Appointment and dismissal of Board of Directors of Company implemented by RUPS. 2. In case of the Minister to act as RUPS, then, it is conducted by his/her.	**Article 43** 1. President Director of Company Appointed by Minister based on proposal of selection committee established by Ministerial Decree . 2. Selection committee as referred to paragraph (1) evaluate and choose and deliver 3 (three) President Director candidates to the Minister 3. In implementing election the President Director of company as referred to paragraph (1) the Minister consultate with House of Representative of lndonesia by instrument which handle the SOE's.	The independency of RUPS (Shareholders) in accordance with law No. 40 of 2007 on Limited Liability Company to appoint President Director and President Commissioner potentially, it will not follow Best Practices of Business
2.	Subsidiary Establishment of SOE's	It had not been regulated	Article 82 paragraph (2) Subsidiary Establishment as referred to Article 80 should have approval from house of representative.	Adjusted with law No. 40 of 2007 on PT that RUPS had agreed Subsidiary establishment. .
3.	Release of Assets of SOE's	It had not been regulated	Article 90 1. The release and transference of SOE's assets may be implemented by selling, exchanging, granting or even capital participation in other SOE's. 2. In case of release and transference of SOE's assets of SOE's as referred to paragraph (1) has large impact to State Finances, then, it should be approval of House of Representative of Indonesia	Approval mechanism of RUPS (Sharehoders) in accordance with law No. 40 of 2007 on PT.

8 Processed from Discussion Result of DIM Concept of Bill of SOE's between Legal Bureau of KM of SOE's and Legal Forum of SOE's, Oktober 2018.

II. Responses of Legal Enforcement on Decree of Constitutional Court of Indonesia Number : 62/PUU-XI/2013 & NUMBER : 12/PUU-XVI/2018

No.	Decree of Constitutional Court	Content of Decree
1.	Decree of Constitutional Court Number: 62/PUU-XI/2013	Essentially, according to the Court, SOE's or other name in kind . any or all shares owned by State is state in this case is Sentral Government /Local Government in economic sector which of any or all shares derived from separated State Finances. As hands of state the SOE's /LOE had been applied Constitutional provision as referred to Chapter XIV on National Economic and Social Welfare at Article 33 of Constitution of 1945 specially.
2.	Decree of Constitutional Court Number : 62/PUU-XI/2013	• HOUSE oF REPRESENTATIVE will not be allowed to intervene the appointment of board (Directors and Commissioners Board of SOE's), it had not followed Statute Number : 40 of 2017 on Limited Liability Company . • HOUSE oF REPRESENTATIVE had not been authorized to implement supervision to subsidiary establishment of SOE's, it is authority of RUPS of Company (Shareholders). • HOUSE oF REPRESENTATIVE had not been authorized to implement supervision and transference of SOE's assets, it is contradicted with law Number : 4 on 2003 on State Treasury . • HOUSE of REPRESENTATIVE had not been authorized to implement supervision of inter SOE's synergity, it is contradicted with Statute Number : 5 of 1999 on Prohibition of Monopoly Practice and Business Competition.

E. CONCLUSION

Based on description above, then, this research will draw conclusion as follows:

1. Indonesian's Five Philosophies (Pancasila) as State foundament to be philosophy foundament of SOE's (Directors and Commissioners Board) and all employees and stakeholders to reduces conflicts of law, society, government, and or international business/cooperation.
2. Constitution of 1945 as highest legal foundament whether in written or not in Corporation Commitment of SOE's to be foothold of legal solution for problems in terms of numerous regulations and or licenses faced by SOE's and to become role model of implement law in ethics.
3. In this digital era, the SOE's may implement business innovation and transfomation in domestic or at abroad while remain based on Indonesian's Five Philosophies (Pancasila) and Constitution of 1945.
4. The integrity and leadership in apointing SOE's Boards, high level management and employees may be given profesional fit dan protes test while remain based on Indonesian's Five Philosophies (Pancasila) and Constitution of 1945.
5. Decrees of Constitutional Court on Management and Role of SOE's to reference for substance/articles from Bill of SOE's (RUU BUMN) to be Statute of SOE's by Government and House of Representative/ DPR RI.
6. SOE's Indonesia are leading to become excellent and role model in the world in implement of constitutional culture and fundamental rights in best practice for business.

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THE ANALYSIS OF LEGAL PROTECTION FOR E-MONEY USERS

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Abstract

The purpose of Indonesian Banking in accordance with banking laws number 10 of 1998 in Article 4 is to support the implementation of national development in order to improve the equitable distribution of economic growth and national stability towards increasing the welfare of the people. With the existence of business transactions that use electronic money (E-Money), the Indonesian nation has begun to develop in the business economy and investment sectors. For three years, on August 14, 2014, Bank Indonesia campaigned for the use of electronic money "I Am Less Cash Society." Legal protection in e-money payment is mainly regulated by Bank Indonesia through Bank Indonesia Regulation Number 11/12 / PBI / 2009 concerning Electronic Money and its changes in 2014 and 2016 along with Circular Letters. The circulation is quite adequate. It's just that it needs to be considered to regulate the existence of a reserve requirement, the need for insurance to anticipate the inability of the Issuer to experience insolvency, considering that the funds do not receive collateral from Deposit Insurance Corporation (LPS). This regulation does not explicitly stipulate that electronic funds owned by the User can be redeemed to the Issuer in the form of cash or through transfers to the account in question. In addition there is no regulation regarding the recognition of income for e-money cards that are not claimed up to a certain period of time, for example due to damage, loss, etc.

Keywords: Banking in Indonesia, payment using electronic money (e-money), consumer protection.

A. INTRODUCTION

1. Background

In the era of globalization, the development of technology in the Unitary State of the Republic of Indonesia currently has a considerable influence on aspects of life, especially in the field of information technology. These developments affect the legal, political, cultural and economic aspects.

In the current development process, payment instruments from time to time, it turns out that payment instruments have experienced some form of significant changes. Payment instruments in the form of conventional coins and paper, are now more developed in the form of payment instruments made through electronic systems.

Every year the amount of electronic money circulating increases. As of August 2017, it has reached 68.84 million. This increase is drastic. When compared to the first time it was introduced to the public in 2010. At that time only the amount of electronic money circulating only reached 7.91 million. While growth in 2014, it also shot up when compared to the first year. Growth reached more or less five times or 35.73 million. [1]

While in terms of total electronic money transactions also experienced a positive trend. As of July 2017 the value of electronic money transactions reached Rp1.14 trillion or continues to increase when compared to previous months. Where in January 2017 the value of electronic money transactions was only Rp.665.7 billion. While in terms of volume of electronic money transactions also showed a significant increase. It was recorded that in July 2017 the volume of electronic money transactions reached 68.6 million transactions increased compared to previous months. In January 2017 the volume of electronic money transactions was only 58.4 million transactions. [2]

The development of technology and information has had an impact on various fields, not least in the field of payment systems, especially the retail payment system with the emergence of payment instruments known as electronic money (e-money). The use of e-money as an alternative means of non-cash payment

1 Merdeka.com, Edisi 25 September 2017
2 Infobanknews.com, 19 September 2017

in several countries shows that there is considerable potential to reduce the growth rate of the use of cash, especially for payments that are micro to retail.

Electronic money (e-money) has different characteristics with pre-existing electronic payments such as: phone banking, internet banking, credit cards and debit / ATM cards, because any payments made using e-money do not always require an authorization process and not related directly to the customer's account at the bank (when making a payment not charged to the customer's account at the bank), because e-money is a product of stored value where the monetary value has been recorded in the payment instrument used (prepaid). [3]

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E-money or electronic money is different from credit cards, debit cards or vouchers that are used as payment instruments. Money in e-money must be deposited first by the buyer whose value is equal to the amount deposited and stored in the media in the form of server or chip, the amount paid is not a deposit, therefore if the e-money is lost, the balance of money is lost and if the issuer is bankrupt, LPS (deposit insurance company) will not replace because it is not a deposit. In the provisions of Bank Indonesia Regulation Number 11/12 / PBI / 2009 concerning Electronic Money in the provisions of Article 1 Paragraph 3, "Electronic Money is a payment instrument issued on the basis of money deposited in advance by the holder to publisher." The value of money is stored electronically in a media server or chip that is used as a means of payment to traders who are not publishers of electronic money. The electronic money value deposited by the holder and managed by the issuer is not a deposit as referred to in the law governing banking.

The development of payment instruments in the form of electronic money which was previously regulated as prepaid cards was not only issued in the form of cards, but also developed in other forms so that in 2009 Bank Indonesia issued Bank Indonesia Regulation No. 11/12 / PBI / 2009 concerning Electronic Money. This Bank Indonesia Regulation on Electronic Money includes arrangements including procedures for licensing and transfer of licenses, procedures for implementation, supervision, improvement of technology security and sanctions. Previously, banks were the only institution that was permitted to issue card-based payment instruments, such as credit cards, debit cards and prepaid cards, but nonbank institutions such as TELKO were allowed to be involved in the payment business since Bank Indonesia issued Bank Indonesia Regulation No. 11/12 / PBI / 2009 concerning Electronic Money (e-money). This regulation has been renewed several times, among others, with Bank Indonesia Regulation No. 16/8 / PBI / 2014 and Bank Indonesia Regulation Number 18/17 / PBI / 2016. In 2017 BI only issued a regulation, mainly related to the regulation of additional money for electronic money refills. Through the Board of Governors' Member Regulation Number 19/10 / PADG / 2017 dated September 20, 2017. This rule is about the National Payment Gateway (PADG GPN). Through this policy the central bank regulates the scheme up to refill fees.

In terms of the non-cash payment system, Bank Indonesia has an interest in ensuring that the non-cash payment system used by the community can operate safely, efficiently and reliably. [66] Therefore,

3 BI, Paper Kajian Mengenai E-Money, http://www.bi.go.id, hlm.2, diakses pada tanggal 22 November 2018.

4 Infobanknews.com, 19 September 2017

5 BI, Paper Kajian Mengenai E-Money, http://www.bi.go.id, hlm.2, diakses pada tanggal 22 November 2018.

6 Working Paper, 2006, *Upaya Meningkatkan Penggunaan Alat Pembayaran Non Tunai Melalui Pengembangan E-Money*, Tim Inisiatif Bank Indonesia, available from: URL: http://www.bi.go.id/NR/rdonlyres/70AD6420-DA75-4D45- 8F3CC6F3465312FB/7858/WorkingPaper_MicroPayment.pdf., diakses pada tanggal 22 November 2018, Hlm 2.

the development of the use of non-cash payment instruments has received serious attention from Bank Indonesia, given that the development of non-cash payments is expected to reduce the burden of using cash and further improve economic efficiency in the community. Although in terms of alternative technology the use of non-cash payment instruments is very feasible to replace cash. However, psychological aspects, security, comfort, and public trust in cash are likely to remain an obstacle that remains to be faced in the development of non-cash payment instruments.

These non-cash payments, in particular the types of payment using cards or electronic payment instruments, were initially known as credit cards, which then developed types of payment instruments using other cards, namely debit cards (Debit Cards) and deposit cards (stored value card). The appearance of these cards with various types has given the user the choice to choose the method of payment that suits their individual needs.

Based on the Law Number 3 of 2004 concerning Bank Indonesia, one of the authorities of Bank Indonesia in order to regulate and maintain the smoothness of the payment system is to determine the use of payment instruments. Determination of the use of payment instruments is intended so that payment instruments used in the community meet the requirements of security and efficiency for its users. The development of technology in the field of information and communication has an impact on the emergence of new innovations in electronic payments.

In this case electronic payments are payments that utilize information and communication technologies such as Integrated Circuit (IC), cryptography and communication networks. Electronic payments that we know and already have in Indonesia today include phone banking, internet banking, credit cards and debit cards / ATMs. [7] Even though the technology used is different, all electronic payments always go through an authorization process and will be charged directly into the customer's account.

Although relatively still in the development stage, e-money has the potential to shift the role of cash for retail payments because retail transactions can be done more easily and cheaply for both consumers and merchants. The development of e-money towards the policies of the Central Bank, especially those related to the function of monitoring the payment system and the effectiveness of monetary policy.

Protection of e-money users must be provided based on the advancement of science and technology which is the driving force for productivity and efficiency of goods or services produced in order to achieve business goals. In order to pursue and achieve these business objectives, ultimately both direct and indirect consumers who will generally feel the impact. Considering that all of course has become a necessity that urges the protection of e-money users as consumers, to find a solution immediately, given the complexity of the problems concerning consumer protection, moreover to meet the era of future free trade. [8]

Therefore, a user of a payment instrument using a card should be legally protected with adequate regulation of information technology. In addition, it also requires the capability of law enforcement officials, public legal awareness and infrastructure that supports law enforcement in the field of information technology. [9]

On the other hand, banks as those who issue e-money have quite complicated issues. Although currently the use of e-money is increasing both in terms of card quantity and total transactions, they still state that in e-money issuance this is still a loss and still provides subsidies in its operations. This can be seen from the statement given by the President Director of Bank Mandiri and Bank Central Asia as representatives of the e-money issuing bank. Bank Indonesia (BI) also admitted that banks still suffered losses from e-money sales.

B. PROBLEMS

From the description above, the problems that arise in connection with e-money transactions that can be submitted in this study include:

1. How is the legal protection for electronic money card holders in conducting e-money transactions?
2. How is the status and utilization of e-money funds recorded in the Issuer's Bank Financial Report?

C. THEORETICAL FRAMEWORK

In connection with the concept of legal protection, According to Satjipto Raharjo, defining legal protection is to provide protection for human rights that are harmed by others and that protection is given

7 BI, Paper Kajian Mengenai E-Money, http://www.bi.go.id, hlm.2, diakses pada tanggal 22 November 2018.

8 Sri Rejeki Hartono, 2000, *Hukum Perlindungan Konsumen*, Mandar Maju, Bandung, Hal 33.

9 Johanes Ibrahim, 2004, *Kartu Kredit Dilematis Antara Kontrak dan Kejahatan*, Refika Aditama, Bandung, hal 1.

to the community so that they can enjoy all the rights granted by law. [10]

Whereas According to Philipus M. Hadjon argues that Legal Protection is the protection of dignity and recognition of human rights possessed by legal subjects based on legal provisions of arbitrariness. [11]

Before discussing Legal Protection for Users of E-Money Electronic Money, the definition of Electronic Money is defined as a means of payment that fulfills the following elements:

1. Published on the basis of the value of money deposited in advance by the holder to the issuer;
2. The value of money is stored electronically in a media such as a server or chip;
3. Used as a means of payment to traders who are not publishers of electronic money; and
4. The value of electronic money deposited by the holder and managed by the issuer is not a deposit as referred to in the law governing banking.

In Indonesia, the rules relating to electronic transactions are regulated in:

1. Bank Indonesia Regulation Number 11/12 / PBI / 2009 dated 13 April 2009 concerning Electronic Money.
2. Bank Indonesia Circular Letter No.11 / 11 / DASP dated April 13, 2009 concerning Electronic Money.

In recent years, the development and innovation of electronic payment instruments using cards has developed into a more practical form. In the development of the globalization era, currently in Indonesia is developing a payment instrument known as electronic money. Although it contains characteristics that are slightly different from other payment instruments such as credit cards and ATM / Debit cards, the use of these instruments remains the same as credit cards and ATM / Debit cards, which are intended for payment.

In simple form, electronic money is defined as a means of payment in electronic form where the value of money is stored in certain electronic media. The users must deposit the money first with the publisher and store it in electronic media before using it for transactions. When used, the value of electronic money stored in electronic media will be reduced by the value of the transaction and after that it can top-up. To store the value of electronic money, electronic media can be in the form of chips or servers.

The use of electronic money as an innovative and practical means of payment is expected to help smooth the payment of economic activities that are mass, fast and micro. In its development, electronic money is also expected to be used as a very reliable alternative for non-cash payment instruments that can reach people who have not had access to the banking system.

D. DISCUSSION

1. The Legal System of Electronic Transaction in Indonesia

Legal presence in the community includes integrating and coordinating interests that can conflict with each other. In this regard, the law must be able to integrate it so that conflicts of interest can be minimized. Organizing those interests is done by limiting and protecting those interests. Indeed, in a traffic of interest, protection of certain interests can only be done by limiting the interests of others.

According to Satjipto Rahardjo, the law protects one's interests by allocating a power to him to act in the context of his interests. The allocation of power is carried out in a measurable manner, in the sense that it is determined by its flexibility and depth. Such power is what is referred to as rights. Thus, not every power in society can be called a right, but only certain powers, namely those given by law to someone. [12]

In relation to electronic money, the establishment of legislation must also apply to business actors or publishers, there must be a match or consistency between the regulations promulgated and their implementation. These rules must be announced and formulated clearly and can be understood by the card holder as the object of the arrangement.

Judging from the hierarchy of the formation of legislation in accordance with Law Number 12 of 2011 concerning the Establishment of Legislation Regulations, judging from the object of regulation, the establishment of regulation of electronic money as a means of payment must be in accordance with the rules of regulation and fulfillment of legal needs in the community. The regulations relating to the establishment of electronic money arrangements are:

1. Law Number 11 of 2008 concerning Information and Electronic Transactions which was later amended by Law No. 19 of 2016.
2. Law Number 8 of 1999 concerning Consumer Protection;

10 Satjipto Rahardjo, Ilmu hukum,(Bandung: Citra Aditya Bakti, Cetakan ke-V 2000). hlm. 53.

11 Philipus M. Hadjon, Perlindungan Bagi Rakyat diIndonesia, PT.Bina Ilmu, Surabaya,1987,hlm. 1-2.

12 Hermansyah, SH, M.Hum, *Hukum Perbankan Nasional Indonesia*, Paramedia Group, Jakarta: Agustus 2014, Hlm 143

3. Law Number 10 of 2008 concerning Amendments to Law Number 7 of 1992 concerning Banking.
4. Law Number 3 of 2004 concerning Amendment to Law Number 23 Year of 1999 concerning Bank Indonesia.
5. Bank Indonesia as the Central Bank then issues a regulation in accordance with its authority in the form of a Bank Indonesia Regulation concerning Electronic Money, namely Bank Indonesia Regulation Number 11/12 / PBI / 2009 concerning Electronic Money which is then amended by PBI No. 16/8 / PBI/ 2014 and PBI Number 18/17 / PBI / 2016 and also regulated technically with related Circular as mentioned in the previous Chapter.

Regarding the duties and authority of BI, Article 7 of Law No. 23 of 1999 concerning Bank Indonesia as amended the last several times by Law of the Republic of Indonesia No. 6 of 2009 (hereinafter abbreviated as UU-BI) regulates: (1) The objective of Bank Indonesia is to achieve and maintain rupiah stability, (2) To achieve the intended objectives, BI conducts monetary policy in a sustainable, consistent, transparent manner and must consider policies general government in the economic sector. Regarding monetary policy with the birth of UU-BI, the authority to determine monetary policy which was previously held by the Monetary Board (see Law No. 13 of 1968 concerning the Central Bank) was transferred to BI.

Furthermore, Article 8 of the BI-Law states that in order to achieve its objectives, BI can determine: (a) stipulate and implement monetary policy; (b) regulating and maintaining the smooth payment system; (c) regulate and supervise the Bank. Based on the above article, it can be understood that BI has an important role in maintaining the stability of the Indonesian economy. The main objective is to achieve and maintain rupiah stability. The stability of the rupiah value and reasonable exchange rate is one of the prerequisites for achieving economic growth. Therefore, the tasks that BI carries out are not easy things in realizing public welfare.

On the basis of the authority of Bank Indonesia which has not been transferred to OJK, in the explanation of Article 15 paragraph 2 of Act Number 23 of 1999 concerning Amendment to Law Number 3 Year of 2004 concerning Bank Indonesia, Bank Indonesia is declared as a supervisor and regulator of the implementation of electronic money activities explained in the main points of the provisions to be stipulated in a Bank Indonesia Regulation which include:

1. Types of payment system services that require Bank Indonesia approval and procedures for granting approval by Bank Indonesia;
2. Coverage of authority and responsibility of providers of payment system services, including responsibilities related to risk management;
3. Security and efficiency requirements in the implementation of payment system services;
4. Implementation of payment system services that are required to submit activity reports;
5. Types of activity reports that need to be submitted to Bank Indonesia and the procedures for reporting them;
6. Types of payment instruments that can be used by the public include electronic payment instruments such as ATM cards, debit cards, credit cards, prepaid cards and electronic money;
7. Security requirements for payment instruments; and
8. Administrative sanctions in the form of fines for violations of the provisions in letters a, d, and f above.

On the basis of the authority of Bank Indonesia as a supervisor and regulator of the implementation of e-money payment activities, it is regulated in a separate Bank Indonesia Regulation, namely in Bank Indonesia Regulation Number 11/12 / PBI / 2009 concerning Electronic Money including Letters Bank Indonesia Circular Number 11/11 / DASP Year of 2009 concerning Electronic Money (Electronic Money), which was later amended by Bank Indonesia Regulation Number 18/8 / PBI / 2014 and Bank Indonesia Regulation No. 18/17 / PBI / 2016 along with Circular Letter No. 16/11 / DKSP in 2014 and Bank Indonesia Circular No. 18/21 / DKSP in 2016.

In the Report on Electronic Money issued by the European Central Bank (ECB) in August 1998, there were several factors that became a concern and background to the need for e-money arrangements. This regulatory concern in general is also relevant for other central banks in their position as monetary authorities and payment system authorities. In the intended report, in broad outline there are 6 (six) factors which are the central bank's concern in e-money regulation, namely: [13]

1. The need to maintain the effectiveness of fundamental monetary policies.
2. The need to maintain efficiency in the payment system and trust in payment instruments.

13 BI, Paper Kajian Mengenai E-Money, http://www.bi.go.id, hlm.30, diakses pada tanggal 22 November 2018.

3. The need for protection of consumers and merchants.
4. The need to maintain financial system stability.
5. The need for protection against crime.
6. The need for anticipation of market failure.

Based on the factors that became a concern in the e-money arrangement, the ECB then set 7 (seven) minimum requirements that must be fulfilled by the central banks of its members, in setting e-money policies and arrangements in their respective countries, namely: [14]

1. Prudential supervision
E-money issuers must be subject to prudential supervision provisions.
2. A strong and transparent legal framework
The rights and obligations of each party (consumers, merchants, issuers, operators) must be clearly defined and informed.
3. Technical Security
The e-money scheme held must have a good security system that covers technical, organizational and procedural aspects.
4. Protection against crime
In designing and developing e-money must anticipate the need for protection against crime such as money laundering.
5. Reports related to Monetary statistics
There is a report submitted to the central bank for the sake of monetary statistics.
6. Redeemability
Issuer must be able to fulfill the electronic value redeem request in the form of central bank money in accordance with the exchange value (at par value).
7. Reserve Requirement
The central bank must have the authority to assign reserve requirements to all e-money issuers.

2. Regulations that provide current e-money consumer protection

a. Prudential supervision by BI

Supervision of e-money transactions is currently within the authority of Bank Indonesia. Based on Bank Indonesia Regulation Number 11/12 / PBI / 2009 Year of 2009 concerning Electronic Money which was later amended by PBI No. 16/8 / PBI / 2014 and PBI Number 18/17 / PBI / 2016 (hereinafter referred to as PBI) and regulated also technically by a related Circular, the principal supervision carried out by BI includes the following: [15]

1) To be able to carry out activities as a Principal, the Issuer, Acquirer, Clearing Operator and / or Settlement Operator must obtain a license from Bank Indonesia. (Article 2 to Article 8 PBI) The permit is valid for a period of 5 (five) years and can be extended by Bank Indonesia (Article 9A). BI has the authority to stipulate a policy of limiting licensing as Principal, Issuer, Acquirer, Clearing Operator and / or Final Settlement Operator. (Article 9B PBI).
2) BI supervises Principals, Publishers, Acquirers, Clearing Operators and / or Final Settlement Providers, and requires submission of reports to BI in writing and / or on-line regarding electronic money activities, providing information and / data, and providing opportunities for BI (or another party appointed by BI) to conduct an inspection / on side (Articles 22 and 23). Based on the results of the supervision, BI can provide guidance and / or impose administrative sanctions.

b. Strong and transparent legal framework

PBI along with the circulars that have clearly explained the rights and obligations of each party. From the consumer side, the most important relationship is with the issuer. The most important issue is that the issuer plays a very important role in the implementation of e-money, because the issuer is the party that manages the float over the electronic value it issues. Trust in e-money is largely determined by the ability of the issuer to fulfill refunds or redemptions made by customers or merchants. In the Board of Governors' Member Regulation Number 19/10 / PADG / 2017 there has been a set of policies on electronic money pricing schemes to top up electronic money. For top up on us transactions, a maximum fee of Rp. 750, -

14 *Ibid.*
15 Bank Indonesia, *Paper Kajian E-Money*, Op. Cit, Hal 12-13.

for transactions of more than Rp. 200,000, - while transactions under Rp. 200,000, are not charged. While top of us transactions are subject to a maximum fee of Rp.1,500. This regulation provides legal certainty and protection in the morning for e-money users so that the fees charged have an upper limit that has been previously known.

c. Technical Security and Protection against Non-Crime.

The role of e-money as a form of non-cash payment in addition to providing benefits and convenience for cardholders also has various potential security risks. Potential risks that can occur in micro payments include the risk of card forgery and duplication, data modification or e-money applications, message conversion, theft, repudiation and risk of malfunction. In order to minimize the risk that can occur, the implementation of e-money must be regulated in realizing a strong and transparent legal framework and being able to provide guarantees of protection for e-money card holders.

The use of e-money will provide advantages compared to using cash or other non-cash payments, the use of e-money is more convenient than cash, especially for small-value transactions, because in conducting transactions do not need to have a certain amount of money and must save change, other than that it can reduce errors in calculating change. Transactions using e-money cards are easier than payment instruments using other cards because they do not require a signature authorization process or PIN (Personal Identification Number).

The disadvantages of e-money are:

1) It is not a deposit as referred to in the Banking Act, so the value of electronic money is not guaranteed by the Deposit Insurance Corporation (LPS);
2) Does not require data confirmation or authorization process;
3) Not directly related to the customer's account at the bank, because the card holder does not have to be a customer at the issuing bank;
4) Transferable and balance can be used by anyone if the card is lost;
5) Does not include bank inventory, so it cannot be tracked if the card is lost;
6) If the lost card cannot be blocked and the value of lost electronic money will not be replaced;
7) Can be used as a means of money laundering;
8) Cannot eliminate the cash function completely.

In the case of card loss (Lost / Stolen Card), the card can still be used until the legal owner notifies the issuing bank, but the card can still be misused by another party. Card misuse by other parties can occur with theft by other parties or negligence from the owner of the card itself. After the card is on the other side, the abuse can of course be used in various ways, one of which is to shop directly to the merchant, because when the card is lost the card can be used without authorization by the merchant and cannot be tracked by the card.

The level of securities on e-money is an important aspect considering the losses that can be incurred for both the issuer and the cardholder. Crime attempts to penetrate e-money security systems can occur at the level of users, merchants or publishers, including theft of equipment belonging to merchants or cardholders, card forgery or messages, change data stored on cards or message content sent, and can also be done by changing the software function.

Some forms of security that can be done to protect e-money products include:

1) The use of microchips that are tamper-resistant or hard-resistant for card-based products;
2) The use of encryption technology, both for card-based and software-based products that are used to authenticate equipment and messages sent and to protect data stored from the efforts of parties who wish to make changes;
3) Limitation of the maximum value that can be saved or that can be paid is also one of the efforts to minimize losses in the event of abuse.

Electronic money / e-money issuers must apply the principle of customer protection in carrying out their activities by conveying information in writing to the cardholder. The obligation of providers of electronic payment systems to e-money holders is based on the fact that the organizer and card holder are not equal and that the interests of e-money card holders are very vulnerable to the purpose of the organizer who has knowledge and expertise not possessed by the cardholder. [16]

16 John Pieris dan Wiwik Sri Widiarty, 2007, *Negara Hukum dan Perlindungan Konsumen Terhadap Produk Pangan Kedaluwarsa*, Pelangi Cendikia, Jakarta, Hal 54.

E. CLOSING

1. Conclusions

Based on the discussion as described above, thefollowing conclusions are:

a. Legal protection in e-money payment is mainly regulated by Bank Indonesia through Bank Indonesia Regulation Number 11/12 / PBI / 2009 concerning Electronic Money and its changes in 2014 and 2016 along with Circular Letters. -The circular letter is quite adequate. It's just that it needs to be considered to regulate the existence of a reserve requirement, the need for insurance to anticipate the inability of the Issuer to experience insolvency, considering that the funds do not receive collateral from LPS. This regulation does not explicitly stipulate that electronic funds owned by the User can be redeemed to the Issuer in the form of cash or through transfers to the account in question. In addition there is no regulation regarding the recognition of income for e-money cards that are not claimed up to a certain period of time, for example due to damage, loss, etc.

b. The float fund cannot be invested by the Issuer and must be placed on highly liquid instruments. On the one hand this adds protection to Users because the certainty of claims for funds is better, but for being a fund that can not be utilized by the Issuer to be able to make a profit.

2. Suggestions

Based on the conclusions that have been described, the following suggestions are:

a. At present, Bank Indonesia has provisions governing e-money. Based on the current scope of regulation, issues that have not yet been accommodated, such as redeemability, minimum security, and so on, still need to be regulated. Therefore, it is necessary to review the current regulations by paying attention to the aspects that need to be regulated in this discussion. Regulations also need to keep abreast of increasingly rapid technological developments.

b. In order to succeed in expanding the use of e-money in Indonesia, it is necessary to pay attention to the factors that succeed in implementing e-money. Education and the introduction of e-money in various regions, especially those that are still less / less touched by banking services will help increase the use of e-money, thus increasing the economic scale for Publishers.

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LEGAL PROTECTION ON VICTIMS IN CRIMINAL ACTS OF HOUSEHOLD VIOLENCE

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Abstract

Applicability of Law No. 23 of 2004 concerning the Elimination of Domestic Violence (PKDRT) is a manifestation of the commitment of the Unitary State of the Republic of Indonesia to eliminate all forms of violence that occur in households. Philosophically it can be stated that every citizen has the right to get a sense of security and freedom from all forms of violence in accordance with the philosophy of Pancasila and the 1945 Constitution of the Republic of Indonesia. women in all fields, as well as recognition of human rights legitimized in the state constitution.

A. INTRODUCTION

Protection of victims in cases of domestic violence has been going on for approximately 14 years but it is very difficult to carry out effectively within a national framework, namely towards a change or renewal of criminal procedural law in Indonesia with a criminal justice system that is not only fair to suspects but it is also fair for victims as a law enforcement that is fair and fulfills the protection of human rights.

> *Cases of Domestic Violence have recently been increasing in statistics but the resolution is still far from the expectations of the people who always crave court decisions that fulfill justice and provide legal certainty for justice seekers.*[1]

Birth of Law No. 23 of 2004 concerning the Elimination of Domestic Violence (PKDRT) is a milestone in Indonesia as a groundbreaking government of the Republic of Indonesia to eliminate all forms of violence that occur in households as a realization of ratification of international conventions on the elimination of discrimination against women in all fields.

The Indonesian Government's commitment has been stated in the dictum of Law No. 23 of 2004 concerning the Elimination of Domestic Violence (PKDRT), stated as follows:

1. That every citizen has the right to feel safe and free from all forms of violence are in accordance with the philosophy of Pancasila and the 1945 Constitution of the Republic of Indonesia.

2. That victims of domestic violence, who are mostly women, must receive protection from the state and/or the community to be protected and free from violence or threats of violence, torture, or treatment that demean humanity's dignity.

3. That in reality cases of domestic violence occur a lot, while the legal system in Indonesia has not guaranteed protection for victims of domestic violence.

The legal system of proof in an investigation of criminal acts in Indonesia uses the Criminal Procedure Code (KUHAP), namely Law No. 8 of 1981, in which the investigation and investigation phase and the examination phase in the court must refer to Law No. 23 Year 2004 which has granted rights and protection to victims.

> *If necessary, the victim must obtain protection from the Witness and Victim Protection Agency based on the provisions stipulated under Law No. 13 of 2006 concerning the Protection of Witnesses and Victims.*[2]

The birth of these two laws is expected to provide a strong legal basis for the protection of victims in

1 Aris Burhanuddin, *Tindak Pidana Diluar KUHP*, Jakarta; Pamator Press, 2016, hal 163

2 Amran Muladi, *Perlindungan Saksi dan Korban Dalam Kekerasan Rumah Tangga*, Yogyakarta; Jakalpress, 2015, hal 173

providing information that actually happens to get the true truth without experiencing threats or torture as well as possible lawsuits for victims to report.

The condition of very little attention to victims in all types of acts of violence, especially crimes of domestic violence is worthy of being used as a material for study in writing this paper.

B. PROBLEM FORMULATION

The formulation in this paper is why protection against victims of criminal acts of Domestic Violence need effort legal response from the country?

C. DISCUSSION

Legal protection is basically a picture of the working of the legal function to realize legal objectives, namely justice, benefit and legal certainty. Legal protection is a protection given to legal subjects in accordance with the rule of law, both preventive (prevention) and in a form that is repressive (coercive), both in writing and unwritten in order to enforce legal regulations.

Grammatically, protection is: 1. shelter; or, 2. things to protect. Protecting is causing or causing refuge. The meaning of refuge includes: (1) placing himself so that he is not seen, (2) hiding, or (3) asking for help. In the meantime, the notion of protecting, includes: (1) covering so that it is not visible or visible, (2) maintaining, caring for or maintaining, (3) saving or providing help.[3]

Based on Article 1 number 1 of Government Regulation Number 2 of 2002 concerning Procedures for the Protection of Victims and Witnesses in Severe Human Rights Violations, it is stated that; Protection of a form of service that must be carried out by law enforcement officers or security forces to provide a sense of security both physically and mentally, to victims and witnesses, from threats, harassment, terror, and violence from any party, which is given during the investigation, investigation, prosecution, and / or examination in court.[4]

According to Satjipto Raharjo, legal protection is: Providing protection for human rights (HAM) that are harmed by others and that protection is given to the community in order to enjoy all the rights granted by law.[5]

Related to the actions of the state to do something by enforcing exclusive state law and the purpose of providing assurance of the rights of a person or group of people.

The elements listed in legal protection include:

1. The existence or form of protection or purpose of protection;
2. Legal subject; and
3. Object of legal protection.

Forms of legal protection are divided into two forms, namely:

1. Preventive protection; and
2. Repressive protection.[6]

Preventive legal protection is preventive legal protection. Protection provides an opportunity for the people to submit objections (inspraak) to their opinions before a government decision gets a definitive form. Thus, this legal protection aims to prevent the occurrence of disputes and is very significant for government actions based on freedom of action.

Responsively the existence of preventive legal protection encourages the government to be careful in making decisions relating to the principle of freies ermessen, and the people can raise objections or be asked for their opinions on the planned decisions. Repressive legal protection functions to resolve when a dispute occurs. In principle, legal protection against weak parties is always associated with the protection of the rights of the weaker party or the victim and related to the provision of services to the community.

The need for adequate legal protection for victims of crime is not only a national but international issue, therefore this problem needs to get serious attention.

The importance of the protection of victims of crime has received serious attention, as can be seen from

3 Departemen Pendidikan dan Kebudayaan, *Kamus Bahasa Indonesia,* Jakarta: Intermedia, 1998, hal. 526.

4 Pasal 1 angka 1 Peraturan Pemerintah Nomor 2 Tahun 2002 tentang Tata Cara Perlindungan terhadap Korban dan Saksi dalam Pelanggaran Hak Asasi Manusia yang Berat

5 Satjipto Rahadjo, *Ilmu Hukum,* Bandung; Citra Aditya Bakti, 2008, hal. 54.

6 Phillipus M. Hadjon, *Perlindungan Hukum bagi Rakyat Indonesia,* Surabaya: Bina Ilmu, 2007, hal. 2

the establishment of the United Nations Declaration of Justice for Victims of Crime and Abuse of Power, as a result of The Seventh United Nations Congress on Prevention of Crime and the Treatment of Offenders. , which took place in Milan Italy in September 1985.[7]

In the process of investigation, prosecution and examination in court proceedings in cases of criminal acts of domestic violence legal actions and legal remedies can be carried out according to the provisions of criminal procedural law (KUHAP) and using Law No. 23 of 2004 concerning the Elimination of Domestic Violence.

This contains the concept of several advantages possessed by Law No. 23 of 2004 concerning the Elimination of Violence in the Household in the face of Indonesian criminal law, including:

1. Law No. 23 of 2004 concerning the Elimination of Domestic Violence has encouraged dome stic violence cases from private jurisdiction to enter public jurisdiction.
2. Law No. 23 of 2004 concerning the Elimination of Domestic Violence has made a new breakthrough in criminal procedural law, namely the principle of one witness not a witness, this law gives the right of witnesses to victims of domestic violence plus the post-mortem the doctor has fulfilled the evidence of violence.
3. The scope of the household has been expanded by this Law, namely husband, wife, child and everything in the household.
4. The definition of violence in the Criminal Code has been expanded by this law including physical, psychological and sexual neglect of the household.

These strengths of Law No. 23 of 2004 concerning the Elimination of Domestic Violence have brought controversy to criminal law experts in Indonesia, including judges, prosecutors and the police, who are still strong with the legalistic paradigm so that the application of Law No. 23 of 2004 concerning the Elimination of Domestic Violence is still not effective.

The handling of cases of domestic violence through criminal law according to Law No. 23 of 2004 concerning the Elimination of Domestic Violence is called the handling of an integrated criminal justice system. It is called integrated, meaning that handling cases of domestic violence not only prosecutes suspects/perpetrators of violence but also thinks about the rights of victims and how they are recovered.

Therefore article 4 of Law No. 23 of 2004 concerning the Elimination of Domestic Violence regulates the purpose of eliminating domestic violence

1. Prevent all forms of domestic violence
2. Protect victims of domestic violence
3. Acting against perpetrators of domestic violence
4. Maintain wholeness in a harmonious and prosperous household.

Based on the purpose of eliminating violence in the household, the handling of both the investigation and trial stages must have a balance between giving sanctions to the perpetrator and protecting the victim and restoring the victim.

In response, Law No. 23 of 2004 concerning the Elimination of Domestic Violence Article 26, expressly stipulates that the victim has the right to directly report domestic violence to the local police, both at the place of residence and at the scene of the crime. Furthermore, based on Article 27 it is stated that; in the event that the victim is a child, the report can be carried out by the parent, guardian, or child concerned in accordance with applicable legal provisions. In terms of legal action, related to the investigation process there are clear differences between the KUHAP and Law No. 23 of 2004 concerning the Elimination of Domestic Violence. Among other things, that the Criminal Procedure Code is more concerned with the perpetrators to immediately be investigated, while Law No. 23 of 2004 concerning the Elimination of Domestic Violence is more concerned with victim services first to obtain legal protection as victims of domestic violence.

The victims' rights are regulated in articles 16 to 38 of Law No. 23 of 2004 concerning the Elimination of Domestic Violence, namely:

1. Within 1 x 24 hours from knowing or receiving reports of domestic violence, the police must immediately provide temporary protection to victims.
2. This protection is provided for 7 days.

3. The National Police in providing protection can work together with health / hospital personnel, social

7 Darmawan Sartono, *HAM & Perlindungan Hukum*, Jakarta; Media Penapress, 2017, hal 61

workers, escort volunteers, spiritual guides or shelter if available.

4. Determination of the Court for the protection of victims by the National Police within 1x24 hours must be issued immediately.
5. Requests for protection can be submitted by victims themselves or families of victims, friends of victims, police, assistants or spiritual guides.

Implication of Law No. 23 of 2004 concerning the Elimination of Domestic Violence, the government issued Government Regulation No. 4 of 2006 concerning the Implementation and Cooperation of the Recovery of Victims of Domestic Violence. Based on Article 39 of Law No. 23 of 2004 concerning the Elimination of Domestic Violence, Victims have the right to obtain remedies as stipulated in article 39 of Act No. 23 of 2004 concerning the Elimination of Domestic Violence and in more detail in the rules of implementation namely Regulations Government No. 4 of 2006 stating that:

1. Recovery of victims is all efforts to strengthen victims of domestic violence to be more empowered, both physically and psychologically.
2. The implementation of recovery is all actions that include service and assistance to victims of domestic violence.
3. Mentoring is all actions in the form of counseling, psychological therapy, advocacy, and spiritual guidance, in order to strengthen self-victims of domestic violence to solve problems faced.
4. Collaboration is a systematic and integrated way between recovery organizers in providing services to recover victims of domestic violence.
5. Recovery organizers are health workers, social workers, escort volunteers and / or spiritual guides.

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3. The National Police in providing protection can work together with health/ hospital personnel, social workers, escort volunteers, spiritual guides or shelter if available.
4. Determination of the Court for the protection of victims by the National Police within 1x24 hours must be issued immediately.
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4. Collaboration is a systematic and integrated way between recovery organizers in providing services to recover victims of domestic violence.
5. Recovery organizers are health workers, social workers, escort volunteers and/or spiritual guides.

Furthermore, it was stated that the organizers of the recovery of victims of domestic violence were carried out by government agencies, in this case the Ministry of Empowerment of Women and Children, as well as Local Government and Social Institutions in accordance with their respective duties and functions, including the provision of facilities needed for the recovery of victims. For this reason, in terms of the law enforcement process, health workers, social workers, volunteer assistants, spiritual guides can establish cooperation with law enforcement in an integrated criminal justice system in the context of eliminating acts of domestic violence.

Government Regulation No. 4 of 2006 concerning the Implementation and Collaboration of the Recovery of Victims of Domestic Violence, based on Article 18, regulates legal actions in cross-work units that explain cooperation:

1. Police, to report and process perpetrators of criminal acts of domestic violence.
2. Advocate, to assist victims in the judicial process.
3. Other law enforcers, to assist victims in the process at court.
4. National Commission on Violence Against Women (Komnas Perempuan).
5. Indonesian Child Protection Commission (KPAI).

Based on these studies, in the context of protecting victims' witnesses in domestic violence, it is carried out thoroughly starting from comprehensive prevention, handling and recovery of victims. With the forms of legal protection which are outlined in Law No. 23 of 2004 concerning the Elimination of Domestic Violence and its implementing regulations, namely Government Regulation Number 4 of 2006 concerning the Implementation and Cooperation of the Recovery of Victims of Domestic Violence.

Protection of victims is actually based on the principle of human rights and side by side with utility theory which focuses on the greatest benefit, namely for the benefit of the victims as well as the law enforcement system in general. Law as a means of renewing society, it seems still relevant to continue to be developed and used as a benchmark in acting and socializing with other communities keeping in mind that changes in society are seen as a progress of human civilization both physically and physically.

D. CONCLUSION

In the context of legal protection for victims in the crime of domestic violence in a preventive manner as well as repressive as well as the recovery of victims, it has received the attention of the Government of the Unitary State of the Republic of Indonesia together with the community.

Philosophically the pouring in Law No. 23 of 2004 concerning the Elimination of Acts of Domestic Violence and Government Regulation No. 4 of 2006 which regulates the Implementation of Recovery of victims which essentially provides comprehensive physical and psychological protection so that victims' witnesses safely and comfortably can assist the process of enforcing criminal law by giving information in front of the court without under threat and pressure.

It is suggested that, in the context of providing legal protection against witnesses of victims of domestic violence, it is a unity with the elimination of acts of domestic violence, should neither the government nor the community just stop political will but must be followed by political action by improving the program action plan the government in the future by providing an adequate gender budget, both at the central, provincial and district / city levels throughout Indonesia.

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ANALYSIS OF SYAHBANDAR AND PORT AUTHORITIES ROLE IN SEA TRANSPORTATION

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Abstract

Marine wealth is a part of the wealth of Indonesian people which in its function as capital of National Development has tangible benefits for the life and livelihood of the Indonesian people, therefore its existence must be maintained optimally and sustainably and must be preserved. Indonesia has a sea area of 3,257,483 km2 or 2/3 of the total area of Indonesia. The region caused sea transportation (ships) to be one of the main transportation in this era of globalization. Of course the government has an important role to support the smooth running of shipping. Through government agencies, namely the Kesyahbandaran Office and Port Authority. The government indirectly handles shipping activities in Indonesia. Law Number 17 Year 2008 concerning Shipping provides the foundation for reforming the port system in Indonesia as a whole. However, the transformation of the Indonesian port system is a long and difficult process. Law Number 17 Year 2008 concerning Shipping has become very important and is the first positive step, but many things still need to be done related to the development of supporting institutions, regulations, and planning documents. This journal has 3 (two) problem formulations, First; what is the role of the port authority and the main port authority in sea transportation according to applicable regulations. Second; how the sea transportation system in Indonesia with the sea transportation system of other countries. Third; how is the authority between the Port Authority and PT Pelindo in Law Number 17 Year 2008 concerning Shipping. This research was conducted using the Normative Juridical approach, using secondary data which included primary legal materials, secondary legal materials and tertiary legal materials.

Keywords: Sea Freight, Port Authority, Syahbandar, PT Pelindo

A. INTRODUCTION

Marine wealth is a part of the wealth of the Indonesian nation which in its function as capital of National Development has tangible benefits for the life and livelihood of the Indonesian people, both ecologically, socially, culturally and economically, in a balanced and dynamic manner, where in the sea fishery is wrong one determinant of the life support system and the source of people's prosperity. Therefore, its existence must be maintained optimally and sustainably and must be preserved.

The Indonesian Sea has a very important meaning for the Unitary State of the Republic of Indonesia (NKRI), namely, the sea as a unifying media of the nation, the sea as a transportation media, the sea as a resource medium, the sea as a defense and security media, and the sea as a media of diplomacy. The concept of thought is very much needed by the Indonesian people not to make and consider the sea as an obstacle, obstacle or obstacle as exhaled by foreign parties who do not want progress for the nation and state of Indonesia.

Transportation according to Purwosutjipto is a reciprocal agreement between the carrier and the sender, where the carrier binds himself to carry out the transportation of goods and / or people safely from one place to the destination, while the sender binds himself to pay transportation fees[1]. The purpose of holding transportation is to move goods from the place of origin to the destination to reach and increase the benefits and efficiency. Broadly speaking, transportation modes can be classified as follows[2]

1. land transportation (transportation by road (highway) and train);
2. sea transportation; and
3. air transportation.

1 Purwosutjipto*, The main definition of Indonesian Commercial Law 3, Transport Law,* (Jakarta: Djambatan, 2003), page 2.

2 Ridwan Khairandy, Machsun Tabroni , Ery Arifuddin , DjohariSantoso, *Introduction to Indonesian Commercial Law, Volume 1,* (Yogyakarta: Gama Media, 1999), page 196.

From the three types of transportation modes mentioned above, sea transportation has a very large role in transportation for Indonesia. Sea freight is the most widely used because it can provide the following benefits[3]:

1. Transportation costs are cheaper than other transportation equipment.
2. Able to carry passengers while transporting goods weighing hundreds or even thousands of tons.

Indonesia has a sea area of 3,257,483 km^2 or 2/3 of the total area of Indonesia. The region caused sea transportation (ships) to be one of the main transportation in this era of globalization. the system of transporting goods between regions should have shifted from land to sea. Because it is impossible for us to force the delivery of goods by land, the more inadequate days are.

The transport of water by ships is regulated by Law Number 21 Year 1992 concerning Shipping (State Gazette of 1992 Number 98). At the time of the enactment of this law, all the legislation relating to the transport of water that still applies since the Dutch colonial era, was declared invalid. This law comes into force two years from the date of promulgation. This law was promulgated on September 17, 1992. Because it was no longer in line with the needs that were developing now, this law was then no longer in force and was replaced with Law Number 17 of 2008 concerning Shipping. This Shipping Law shall come into force on the date of promulgation, which is dated May 7, 2008 in the 2008 State Gazette Number 64.

The shipping flow is one of the basic facilities of the allotment of the waters of a port and has an important role as access to and / or entering the port. The flow of shipping becomes a vital object of a port whose development and management must be carried out on consideration of aspects of shipping, especially in ensuring shipping safety and security. The implementation of shipping lanes in Indonesia is the responsibility of the government whose implementation must be carried out as well as possible in order to ensure the smooth and effective operation of the port as a whole. The government, in accordance with the applicable laws and regulations, must establish and maintain a shipping channel that is carried out by port operators. The construction and maintenance of shipping lines is carried out through dredging activities whose implementation is the responsibility of the government and its implementation is carried out by certain companies that have qualifications in accordance with the provisions of the legislation.

Many countries have advanced with the sea transportation system that has been integrated and in a good system management system. For example, Singapore has developed rapidly through its sea transportation, and even Singapore has become the second busiest port in the world.[4] Of course good things from other countries should be exemplified as a renewal for the progress of the nation.

The sea transportation system is still the mode used as a freight forwarder amidst many transportation systems in the world. Based on data that sea transportation in the transportation of goods both exports and imports is still dominated by the sea transportation system, which is equal to 95%.[5]

In an effort to realize these conditions, of course the government has an important role to support the smooth running of shipping. Through government agencies, namely the Port Authority and Port Authority Office. The government indirectly handles shipping activities in Indonesia. This is in line with the sound of Article 5 section (1) of Law Number 17 Year 2008 concerning Shipping, saying that shipping is controlled by the state and its guidance is carried out by the government. One of the coaching carried out by the government based on Article 5 section (3) of Law Number 17 Year 2008 concerning Shipping is a regulatory function, which includes the establishment of general and technical policies, including the determination of norms, standards, guidelines, performance, planning and procedures including, requirements, safety, and shipping security and licensing.

Law Number 17 Year 2008 concerning Shipping provides the foundation for reforming the port system in Indonesia as a whole. The most obvious is that the law removes the state sector monopoly on ports and opens opportunities for new private sector participation. This can lead to the entry of competition in the port sector, which can put pressure on reducing prices and generally improve port services. However, the transformation of the Indonesian port system is a long and difficult process. The 2008 Shipping Law became very important and was the first positive step, but many things still needed to be done related to the development of supporting institutions, regulations, and planning documents.

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3 R.Soekardono, *Indonesian Shipping Law,* (Jakarta : Dian Rakyat, 1969), page 12.

4 Wikipedia, "List of the World's Busiest Cargo Ports" is located on the site https://id.wikipedia.org/wiki/Daftar_pelabuhan_kargo_tersibuk_di_dunia; accessed on January 1, 2018.

5 Yusuf Chandra Motik, *Maritime Law,* (Depok: FH UI, 2011), page 68.

B. RESEARCH METHOD

This research was conducted using the Normative Juridical approach using secondary data. Library material is used as the main ingredient, namely primary legal material consisting of basic norms or rules, basic rules or regulations, as well as legislation. In addition, secondary legal materials are also used as secondary data covering primary, secondary and tertiary legal materials as a result of research by academics and legal experts.

C. PROBLEM FORMULATION

Based on the introduction described above, the formulation of the problem in writing this journal is:

1. What is the role of the port authority and the main port authority in sea transportation according to applicable regulations?
2. How is the sea transportation system in Indonesia with a sea transportation system in other countries?
3. What is the authority between the Port Authority and PT Pelindo in Law Number 17 of 2008 concerning Shipping?

D. DISCUSSION

1. The role of the Syahbandar and the Port Authority in Sea Transport

The shipping industry, even maritime transportation, which is one part of it, has many interrelated aspects. Therefore, efforts to increase competitiveness in the relevant aspects today need to be carried out in a timely manner. In this case it is certainly in terms of the aspect of carrying out sea transportation from the aspect of the government. Improvement of aspects of all lines needs to be done to achieve advanced sea transportation.

Syahbandar is the head and government official at the port who has the highest authority to run and supervise sea transportation in Indonesia. Syahbandar plays an important role in the port system both in shipping, law enforcement, and coordinating the entire activities that take place within the port. Syahbandar was appointed and appointed directly by the Minister of Transportation in accordance with Article 207 of Law Number 17 Year 2008.

In the implementation of the port, both the port authority and the Shahbandar have duties and functions that are regulated in the good regulations of the law to ministerial regulations.

The Port Authority has the duty to oversee and manage trade operations in each port. Their main responsibility is to regulate, price and supervise access to basic port infrastructure and services including land and port waters, navigation equipment, pilotage, breakwater, port sites, sea lanes (dredging) and road networks port. In addition, the Port Authority will also be responsible for developing and implementing port master plans (including determining land and sea control areas) while ensuring the orderliness, security and sustainability of the port environment. Port operators, on the other hand, can participate in providing, among other things, cargo handling, passenger facilities, mooring services, refueling and water supply, ship withdrawals as well as storage and buildings above other ports.

Indonesia's transportation system in the regulations has many authorities between the Main Port Authority and the same Syahbandar. This has become an overlapping authority in regulations that actually inhibits sea transportation. Even in the regulation of authority for Syahbandar, which in principle is basically regulating whether a ship can enter or not is the authority of Syahbandar, the regulation on Syahbandar authority in Law Number 17 of 2008 concerning Shipping does not clearly regulate and ultimately adds authority by overseeing the proper loading and unloading process at the port is the authority of the Port Authority.

As should be the case with the Syahbandar and the Port Authority having different authority from one another. Arrangements that are indeed different in both bodies should underlie this. According to the Minister of Transportation Regulation Number PM 82 of 2014 the Sail Approval is a state document issued by Syahbandar to each ship that will sail. Every ship that wants to sail must have a Sail Approval issued by Syahbandar or Syahbandar in a fishing port except warships and / or state ships / government ships as long as it is not used for commercial activities.

Syahbandar, which can issue a Sail Approval Letter, covers the Head of the Main Broadband Office, Head of the Batam Port Office, Head of the Port Authority and Port Authority Office, and Head of the Port Operator Unit Office. Syahbandar in a fishery port is an official / officer who is authorized to handle transportation in the fishing port.

The Sail Approval issued by Shahbandar is only valid for 1x24 hours and for one voyage. Application

for Sailing Approval is submitted by the owner or operator of the ship in writing to the syahbandar. The application is completed with a Master Sailing Declaration and proof of fulfillment of the obligations of other vessels in accordance with the purpose of the ship sailing. Proof of fulfillment of other obligations include, Proof of Payment of Port Services, Proof of Payment for Navigation Services, Proof of Payment for Receipt of Shipping Money, Clearance of Customs and Excise, Clearance of Immigration, Clearance of Health Quarantine and / or Clearance Animal and plant quarantine. Fishing vessels must be equipped with an operation worthy letter from the fisheries supervisor. Syahbandar requires data obtained from State-Owned Enterprises (SOEs), namely the Indonesian Classification Bureau (BKI) which is a special body to supervise sea transportation (ships) in construction and shipbuilding so that the porter can issue documents or document documents that will used by sea transportation for shipping.[6]

The application for issuing a Port Clearance is submitted to the Syahbandar after all activities on the ship are completed and the ship is ready to sail which is stated in the ship's readiness statement departing from the Master Sailing Declaration. In the regulations of the Ministry of Transportation of the Republic of Indonesia Number PM 23 of 2014 concerning Amendments to the Minister of Transportation Regulation Number KM 01 of 2010 concerning Procedures for Issuance of Port Clearance in Article 2 paragraph (3) Implementation of the Shahbandar function as referred to in paragraph (1) implemented by:

a. Head of the Main Syahbandar Office,
b. Head of the Syahbandar and Port Authority Office,
c. Head of Port Settlement Unit Office, and/or
d. Head of the Batam Port Office.

This is proof that the sea scavenger system in Indonesia is still too long and wordy in terms of its sea-borne system. As such, the authority between Syahbandar and the Port Authority should have different authorities. The authority of the port authority at the port only and the port authority at the permit for the entry and exit of the ship should be authorized. But in reality the authority is still overlapping which ultimately inhibits the sea transportation system in Indonesia.

In paragraph (1), each ship sailing must have a Port Clearance issued by Syahbandar after the ship meets the ship's compliance requirements and other obligations. In the regulation, if interpreted literally, of course, it would be assumed that the Shahbandar who has authority but in paragraph (3) becomes a reference and explanation. In this case the authority overlaps in the regulation.

2. Indonesia's Sea Freight System Compared to Sea Freight Systems in Other Countries

Based on the results of interviews with the captains of national and international shipping vessels. That the natural sea transport system in every developed country already has a system that is good and efficient. Based on the results of the interview, the sea transportation system in other countries has been advanced. In the sea transportation system in other countries, all actions and handling from entry to sea transportation do not exist through the Shahbandar system and the main port authority.

The overseas system of the sea transportation system is very modern and very efficient. A good system will certainly support every action in act. A system must be able to reduce complexity.[7] Then the Indonesian sea transport system should also implement the system as it should for the smooth and progress of the nation. Today the Indonesian sea transport system as stipulated in Law Number 17 Year 2008 concerning Shipping and to ministerial regulations, is indeed a revolutionary from the old regulations but becomes a polemic when changes is not easy.

Based on the results of interviews with ship captains who often conduct voyages both domestically and abroad stated that our transportation system lags far behind from other countries. The sea transportation system in Indonesia still uses a system that has long been abandoned in various countries.[8] Indonesia should abandon the system that didn, t facilitates the sea transportation system.

In developed countries the sea transportation system is under one roof through Ministry of Transportastion. The Ministry of Transportation is a state institution formed by the government in the task of assisting the government. Or what we usually know is a ministry from an Indonesian perspective. Even in other countries the sea transport system with this model is very fast in terms of licensing.

In no more than 1 x 24 hours a permit can be issued. Indeed, it should not just make an authorized

6 Bayuputra, Tenda Bisma, *"Juridical Review of the Role of SyahBandar in Sea Transportation in Indonesia",* Lex et Societatis, 3:3, (Manado: Fakultas Hukum Universitas Sam Ratulangi, 2015), page 25.

7 George Ritzer, *Modern Sociological Theory,* (Jakarta: Kencana Prenadamedia Group, 2014), page 249.

8 D. A. Lasse, *Port Management*, (Jakarta: Raja Grafindo Persada, 2011), page 64.

institution come up with the notion of why not simplify the system and speed up workmanship as a solution. But if it is drawn further based on article 1 number 56 of Law Number 17 Year 2008 Syahbandar is a government official at the port who is appointed by the Minister and has the highest authority to carry out and supervise compliance with statutory provisions to ensure shipping safety and security. Obviously based on that understanding, a Syahbandar was also appointed by the minister.

The port authority is based on the Port Authority article as referred to in Article 81 section (1) letter a of Law Number 17 Year 2008 concerning Shipping that the Port Authority is formed by and is responsible to the Minister. Although between Syahbandar and the Port Authority there are 2 (two) different things, but based on this, it becomes clear that the port authority meets in the aspect of the Ministry of Transportation which makes work easier.

But if you look at it in general you will certainly see a lot of similarities. Whereas in the matter of the procedure for issuing sailing letters in article 2 number 1 of the Minister of Transportation Regulation of the Republic of Indonesia Number PM 23 Year 2014 concerning Amendments to the Minister of Transportation Regulation Number KM 01 Year 2010 concerning Procedures for Issuance of Sailing Approval that every ship sailing must have a Letter The Port Clearance Agreement issued by the Shahbandar after the vessel meets the ship's compliance requirements and other obligations. At first glance, we are sure that the authorities are Syahbandar. However, in the regulation, it is understood that the Syahbandar referred to in Article 2 point 3 of the Republic of Indonesia Minister of Transportation Regulation Number PM 23 Year 2014 concerning Amendment to the Minister of Transportation Regulation Number KM 01 Year 2010 concerning Procedures for Issuance of Sailing Approval that implements the Shahbandar function in section (1) carried out by:

a. Head of the Main Kesyahbandaran Office
b. Head of the Kesyahbandaran and Port Authority Office
c. Office of Port Operator Unit and / or
d. Head of the Batam Port Office

In this case, it is evident that the authority between the port authority and the Shahbandar has the same authority and makes overlapping of authority. Indeed, there must be a revolutionary movement by turning it into one roof.

In the end, many people think that the sea transportation system with other countries is different from Indonesia because they believe that the system depends on its perspective. But here we should have the same enthusiasm for a better change. Already many countries have changed their sea transportation system only through one roof. And the results provide the most tangible evidence providing many benefits and conveniences.

3. Authority Between P.T Pelindo and Port Authority in Law Number 17 Year 2008 concerning Shipping

The scope of Port Management based on Law Number 17 Year 2008 concerning Shipping which is authorized by the Port Authority includes the Formulation of the Port Master Plan, Port Land Provision, Conservation Land Use Supervision and DLKp and DLKr, and Port Land Exploitation. Specifically, for Port Business Concession, the Authority to access BUP users has not provided the concession. The authority of PT. Pelindo II (Persero) panjang branch in port management after the issuance of Law Number 17 Year 2008 concerning Shipping is only limited to seaport land exploitation without going through concessions from the Port Authority considering Article 344 section (3) of Law Number 17 Year 2008 concerning Shipping and Article 165 section (3) of Government Regulation Number 61 Year 2009 concerning Port, in the article provides certainty of legal status regarding port in the business of port activities.

The failure of Law 17/2008 on Shipping, especially in port management, which has been cultivated by Pelindo Panjang, has caused several new problems such as the unclear authority of port management where the Port Authority and Pelindo Panjang as BUMN and BUP still dominate the land. So that the task of the Regulator carried out by the Port Authority in the provision of land and waters for later concessions to the BUP has not yet been implemented. Considering the existing land is still within the authority of Pelindo Panjang, which currently only acts as a BUP.

Separation of the roles of Regulators and Operators in the Port makes the Authority of Port Land Management divided according to their Duties, Obligations and authorities. Provision of land under the authority of the Port Authority is an implication of the legalization of the participation of the private sector

and the Regional Government in carrying out Port Concession activities. Provision of land in question is the provision of land by the Port Authority to the newly formed Port Business Entity to carry out commercial activities. The land provided by the Port Authority to BUP is one that is taken into account in the concession. This means that Pelindo at the time before Law Number 17 Year 2008 concerning Shipping did not carry out the provision of land and waters. Because before Law Number 17 Year 2008 concerning Shipping, only Pelindo was a BUP that carried out port services and served as government representatives as regulators. So that the same as the duties and authority of the Arrangement of the Port Master Plan and Supervision of Land Use, Provision of Land and Supervision of its Use becomes the duty of the Port Regulator. Anyone appointed by the government to become a regulator.

In the activities of port services by Pelindo Panjang branch, which use port land, Pelindo Panjang continues. The basis of the Port land Concession activities is still carried out by Pelindo Panjang branch based on Article 344 section (3) of Law Number 17 Year 2008 concerning Shipping which regulates explicitly that the implementation of port business activities that have been carried out by BUMN is still held. The said provisions have provided direct delegation (concessions) to BUMN PT Pelabuhan Indonesia I, II, III, and IV in the implementation of port business activities. The article is an affirmation of concession by law (concessions granted directly by the Law).

Article 92 of Law 17/2008 concerning Shipping which explains that the provision and / or service activities carried out by BUP based on concessions or other forms of the Port Authority, as outlined in the agreement, are only intended for BUP newly formed after Law 17/2008 concerning Birth Shipping. Concession according to Law17 / 2008 concerning Shipping is the granting of rights by the Port Operator to the Port Business Entity to carry out certain port supply and / or service activities for a certain period and certain compensation.

That basically the port authority is an extension of the government in the port. Then immediately the port authority is the institution that plays a major role in the port.

Based on Article 82 section (4) of Law Number 17 Year 2008 concerning Shipping, it is indeed true that the Port Authority is an extension of the government that indeed holds control of the port. The authority should be the Port Authority in controlling, but in fact it is the one who sets the price, even the one in power is Pelindo as a form of business on the port that controls the port. What is appropriate is the duty of the Port Services Authority.

E. CONCLUSION

The conclusions that can be taken from the previous discussion in writing this journal are as follows:

1. In the sea transportation system both the Port Authority and the Syahbandar have the authority as stipulated in the legislation. Whereas in the transportation of the sea between the main port authority and the Syahbandar, basically they have different authority. But the settings are different from the basic concepts that exist. In the authority of the port authority syahbandar has overlapping authority which should be the authority of one party, but the other party can also have authority that should be the authority of the other party. In its arrangement Syahbandar was still in charge when the ship was leaning, which Syahbandar was supposed to only enter and exit the ship but in the current regulation a Syahbandar has authority in the port which is part of the authority of the main port authority. Speaking of the Shahbandar and the main port authority, in principle, the tasks and functions should be different but one purpose. The same aims to achieve a good sea transport system.
2. Based on the results of interviews with academics involved in maritime transport law that indeed the martyrdom model and port authorities or such have been left far away in developed countries in the sea transportation sector. Transportation in several countries is directly handled by one institution and some are handled directly by the Minister or authorized Ministry of Transportation. The sea transportation system only through one institution has been implemented in various countries because the system is considered very good and provides many benefits for the country, especially with the system saving a lot of time and costs that must be spent by sea freight providers. In the dual system, the authorized institutions only make the bureaucracy longer and there is an overlapping of authority that makes it long and hampers sea transportation in Indonesia.
3. Authority between the PT Pelindo and Port Authority in Law Number 17 Year 2008 concerning Shipping changed the port system in Indonesia, which was originally an Operating Port, to become a Landlord Port. And separate the functions of Port Regulators and Operators. So that the Scope of Port Management

is carried out by parties acting as Regulators and Operators. Indeed, between the Port Authority and PT Pelindo, it should have different authorities from one another. But in reality the two institutions have overlapping authority, such as in the determination of land which is the right of the port authority. Basically, PT Pelindo is a state business entity that has been separated and should not be able to determine as a regulator, which has the right is the Port Authority.

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THE CONCEPT OF THE RIGHT TO SUBMISSION OF THE OPINION OF THE OPENED GENERAL AS A HUMAN RIGHTS EVALUATION GUARANTEED CONSTITUTION IN INDONESIA

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Abstract

Conveying opinions in public is one of the human rights guaranteed in article 28 of the 1945 Constitution which reads: Freedom of association and assembly, issuing thoughts with oral and written and so forth is stipulated by law. Which is further emphasized in article 28 E paragraph (3); Everyone has the right to freedom of association, assembly and opinion.Law Number 9 of 1998 concerning Freedom of Delivering Public Opinion is the state's commitment to realize human rights, guaranteed by the 1945 Constitution and the Universal Declaration of Human Rights.

A. INTRODUCTION

Indonesia as a country based on law, legitimizes the protection of human rights related to the delivery of opinions in public, is a form of implementing human rights, which is accommodated in the opening of the 1945 Constitution and in the articles of the 1945 Constitution, as well as Law Number 9 of 1998 concerning the Submission of Opinions In public.

Philosophically, freedom to express public opinion in its implementation is carried out with full responsibility, in line with the provisions of the applicable laws and consider the principles of international law as outlined in the Universal Declaration of Human Rights institutionally sponsored by the United Nations, December 10, 1948 in Geneva, in Article 29 of the Universal Declaration of Human Rights,[1] stating that:

1. Everyone has an obligation to society that allows the development of his personality freely and fully;
2. In the exercise of their rights and freedoms, each person must submit solely to restrictions imposed by the Law with the intention of guaranteeing the recognition and appreciation of the rights and freedoms of others, and to fulfill the conditions that are fair to morality, order, and general welfare in a democratic society;
3. This right and freedom must not be carried out in a manner contrary to the purposes and principles of the United Nations.

Furthermore, based on an article 19 of the Universal Declaration of Human Rights[2], it is stated that: Everyone has the right to freedom of opinion and opinion, in this right including the freedom to have an opinion without getting disturbed and to seek, receive and deliver information and opinions in any way also and by looking at boundaries.

In the constitution of the Unitary Republic of Indonesia as a democratic state based on law, the protection of human rights is related to the delivery of opinions in public, which gets the most attention internationally, the concept of human rights is accommodated in the opening of the 1945 Constitution and in the articles of the 1945 Constitution. freedom of opinion as outlined in an article 28, states; Freedom of association

1 *he Universal Declaration of Human Right* (Deklarasi Universal Hak-hak Asasi Manusia), Jenewa; Perserikatan Bangsa-Bangsa, 1948, Pasal 29.

2 Ibid, Pasal 19

and assembly, issuing thoughts with oral and written and so forth is stipulated by law. Then article 28 E paragraph (3), states; Everyone has the right to freedom of association, assembly, and opinion.[3]

The implication of the enactment of Law Number 9 of 1998 concerning the Submission of Public Opinion, in its implementation that all public behavior or parties involved in the submission of opinions in public, whether individually or in groups, is obliged to realize order according to the law, so that it is constructive and benefit the community.

Ideally it is expected that the submission of opinions in public is conveyed in a polite manner and does not interfere with the public interest. This means that, the delivery of opinions in public in the form of demonstrations should be accompanied by legal awareness of the community, to continue to be observed, monitored, directed and in accordance with applicable legal provisions, so that the public opinion provides benefits in accordance with the intent and purpose. As a form of freedom of opinion that is consistent with the concept of human rights, it has become an obligation for those who commit to remain submissive to the law, without exception anyone who demonstrates in public.

In Indonesia, the legitimacy of delivering opinions in public is a commitment of the nation and state. Therefore, in its position as a civilized nation and state, the basis of its philosophy stems from thinking on Pancasila as its ideal foundation and the 1945 Constitution as its constitutional basis. Thus, the submission of opinions in public whoever the perpetrators must fully understand the conscience and spirit of the nation's philosophy and obey the country's constitution?

B. PROBLEMS

The problem is from this paper, how the concept of the right to submit opinions in public as a manifestation of human rights guaranteed by the constitution of the Unitary State of the Republic of Indonesia.

C. DISCUSSION

1. Position of Human Rights (HAM) in the Constitution of the Unitary State of the Republic of Indonesia

Philosophically, recognition of human rights in the Indonesian constitution is implied through the opening of the 1945 Constitution, which stated "that in fact, independence is the right of all nations and therefore, occupation of the world must be abolished because it is not in accordance with humanity and justice". Upon recognition of the constitution, the substance should be developed in a broad sense.

This means that colonization is not only related to state sovereignty. However, it should also be noted, the importance of developing interpretations that colonization is not justified by the exploitation of the ruler of his people, nor the occupation of each other. Colonialism can basically be in the form of oppression, coercion, and castration of human dignity. That does not have to happen in a country if the country is willing to recognize basic human rights that have dignity.

In the life of the nation and state, one of the rights legitimized in the concept of Human Rights, namely the submission of opinion in public, it becomes a substantive part of the Constitution of the Unitary State of the Republic of Indonesia, namely the Law Basic 1945 Amendments.

As a rule of law, implementing the concept of human rights as outlined in the constitution, then the obligation of the state is that the will written in the constitution is then regulated in more detail in legislation, according to its philosophical, sociological and juridical purposes. This is because the implementation of human rights is not possible to be carried out properly, without beginning with a legal will that intends to function the law, maintain order, security, protection, and legal certainty of the community.

According to Jeremy Bentham that there are no legal rights; and if these rights are based on natural law, there are only imaginary rights. According to Bentham, the fact that many countries have placed human rights in their constitution.[4] Human rights do not come out from anywhere, and human rights are guaranteed by the constitution, laws, and contracts. Further according to Bentham: Right is a child of law; from real laws come real rights, but from imaginary law, laws of nature, come imaginary rights. Natural rights is a simple non-sense, natural and imprescriptible rights rhetorical nonsense, nonsense upon stilt. The concept of human rights that is universal and cannot be contested, because it contains rights owned by a person and cannot be reduced or eliminated where those rights are said to be non-derogable rights, for

3 UUD 1945, Pasal 28, Pasal 28 E ayat (3)

4 T. Mulya Lubis, *Hak-hak Asasi Manusia Dalam Masyarakat Dunia*, Jakarta: Yayasan Obor Indonesia, 1993, hal. xi

example the right to life, freedom from persecution and cruel treatment or punishment, freedom of thought, religious freedom.[5]

In the Unitary State of the Republic of Indonesia, it is quite clear that the State is sufficient to provide a responsibility for the implementation of human rights, including the Pancasila, the constitution of the Amendment to the 1945 Constitution, and Law No. 9 of 1998 concerning Public Speakers.

The legal position of Law Number 9 of 1998 concerning the Conveying of Opinions in Public, is an implementation of the legitimacy of the concept of human rights related to freedom of opinion as outlined in the constitution of the Amendment to the 1945 Constitution, article 28; Freedom of association and assembly, issuing thoughts with oral and written and so forth are stipulated by law and article 28 E paragraph 3; Everyone has the right to freedom of association, assembly and opinion.

To regulate its implementation, it is obligatory to consider the rights of others, namely the principle of a balance between rights and obligations and is intended for understanding to recognize the rights of other people or groups of people. Therefore, in terms of giving recognition to the realization of human rights, the adoption is for the sake of public order, which regulates the regularity of human rights implementation behavior, namely all humans who have a commitment to society, nation, and state, namely legislation which is the product of a country's law. The legal products produced by a country must be obeyed in order to realize legal certainty and justice for the entire community of a country.

If it is examined more closely, independence expresses the opinion in public, throughout the world, this behavior is not only about natural rights and civil matters as well as the concept of human rights. Furthermore, this behavior has been the legitimacy of a perception of political rights and the legal rights of a person or group of people. In Europe and in the United States, in Islamic countries, communist countries or other countries in the world, public opinion in the form of demonstration speeches has been considered a reflection of humanity in criticizing a policy or a matter that must be used as a policy by the government.

Submission of opinions in public, as a form of freedom of opinion that is consistent with the concept of human rights, has become an obligation for those who commit to remain subject to the law, without exception anyone who demonstrates in public.

A country based on law according to Dicey,[6] must be based on democracy and human rights. In the general sense, human rights "are the rights brought by humans from birth as the gift of God Almighty. Even according to the Civil Code the rights are considered to have existed since humans are still in the womb of their mothers, namely the right to live until humans are born which must be acknowledged "[7].

In order to maintain order, it regulates the regularity of the behavior of applying human rights for every human being who has a commitment to society, nation, and state, namely legislation which is the product of a country's law. The legal products produced by a country must be obeyed in order to realize legal certainty and justice for the entire community of a country. From this thought, it can be assumed, that the existence of human rights is guaranteed by the constitution, it turns out that it is often ignored so that human rights are often violated.

In Indonesia, the legitimacy of delivering opinions in public is a commitment of the nation and state. Therefore, in its position as a civilized nation and state, the basis of its philosophy stems from thinking of Pancasila as the basis of its ideals and the 1945 Constitution as a constitutional basis. Thus, the submission of opinions in public whomever the perpetrators must fully understand the conscience and spirit of the nation's philosophy and obey the country's constitution.

2. The concept of human rights; Purpose of Freedom to Issue Based Opinion Law Number 9 of 1998 concerning Submission of Public Opinions

The concept of human rights, in the opening of the 1945 Constitution as well as in the articles of the 1945 Constitution, is related to the Freedom to Issue Opinions regulated in article 28; Freedom of association and assembly, issuing thoughts with oral and written and so forth stipulated by law, and article 28 E paragraph 3; Everyone has the right to freedom of association, assembly and opinion.

Furthermore, the concept of freedom of expression in public in its implementation regulated by Law Number 9 of 1998 concerning the Submission of Public Opinions, is the state's commitment to realizing human rights, guaranteed by the 1945 Constitution and the Universal Declaration of Human Rights. The

5 Satya Arinanto, *Politik Hukum I, Bunga Rampai Tulisan,* Jakarta:Fakultas Hukum Universitas Indonesia. 2002, hal. xiii

6 Ismail Sunny, *Pembagian Kekuasaan*, Jakarta; Gramedia, 1998, hal 39.

7 Mansyhur Efendi, *Dimensi Dinamika HAM*, Jakarta, Ghalia Indonesia, 2002, hal 51.

law is also part of the philosophical legal basis that the freedom of every citizen to express their opinions in public is a manifestation of democracy in a society, nation, and state. Therefore, to build a democratic country that organizes social justice and guarantees human rights, a safe, orderly and peaceful atmosphere is needed, and the right to express opinions in public is carried out responsibly in accordance with legal provisions.

The freedom of expression is in line with article 19 of the Universal Declaration of Human Rights, which reads "Every person has the right to freedom of opinion and opinion, in this right including the freedom to have an opinion without getting disturbed and to seek, receive and submit information and opinions with anyway and by looking at the boundaries ".

The embodiment of the will of citizens freely in expressing thoughts verbally and so on must be maintained so that the entire social order and institutions both infra-structure and supra structure remain free from irregularities or violations of the law which are contrary to the intent, purpose and direction of the process of disclosure and law enforcement so as not to create social disintegration, but rather must be able to guarantee a sense of security in people's lives.

Can be described for example according to article 2 of Act Number 9 of 1998 concerning the Submission of Opinions in Public, that freedom to express opinions in public is human rights guaranteed by the 1945 Constitution and the Declaration of Unversal of Human Rights. [8]

According to Law Number 9 of 1998 concerning the Submission of Public Opinions, Article 4, that the purpose of the regulation on freedom of expression in public is:

a. Realize responsible freedom as one of the implementation of human rights in accordance with Pancasila and the 1945 Constitution;
b. Realize consistent and legal protection continuous guarantee of freedom of expression;
c. Creating a climate that is conducive to the development of participation and creativity of every citizen as a manifestation of rights and responsibilities in a democratic life;
d. Placing social responsibility in the life of the community, nation and state, without neglecting the interests of individuals or groups.

The background of Law No. 9 of 1998 concerning the Submission of Opinions in Public is based on the freedom of every citizen to express their opinion in public is a manifestation of democracy in society, nation, and state, to build a democratic state that organizes social justice and guarantees human rights humans need a safe, orderly and peaceful atmosphere and so that the right to express their opinions in public is carried out responsibly in accordance with the provisions of the applicable laws and regulations.

Thus, the independence of expressing an opinion in public must be carried out with full responsibility, in line with the provisions of the applicable legislation and international legal principles as stated in Article 29 of the Universal Declaration of Human Rights.

Associated with the development of the legal field which includes legal instruments, legal apparatus, legal facilities and infrastructure, the legal community and human rights, the government of the Republic of Indonesia is obliged to make it happen in the form of an aspirational political attitude towards openness and law enforcement.[9]

The repulsive form of the legal development approach, whether viewed from the side of national interests or in terms of the interests of relations between nations, the independence of expressing opinions in public must be based on:

a. principle of balance between rights and obligations;
b. the principle of deliberation and consensus;
c. the principle of legal certainty and justice;
d. principle of proportionality; and
e. benefit principle.

The five principles are the foundation of freedom that is responsible for thinking and acting to express opinions in public, in line with legal signs must have autonomous characteristics, be responsive and reduce or leave repressive characteristics.

By adhering to these characteristics, Law No. 9 of 1998 concerning Submission of Public Opinions is a regulative statutory provision, so that if it has been accommodated and implemented properly it can protect the rights of citizens in accordance with article 28 The 1945 Constitution.

8 Burhanuddin Imron, *HAM & Negara Hukum*, Jakarta; Intermasa, 2015, hal 194

9 Andi Lukmana, *Penegakan Hukum dan Hak Asasi Manusia*, Jakarta; Pamator Press, 2016, hal 149

D. CONCLUSION

Conveying opinions in public is one of the human rights guaranteed in article 28 of the 1945 Constitution which reads: Freedom of association and assembly, issuing thoughts with oral and written and so forth is stipulated by law, which is further emphasized in article 28 E paragraph (3); Everyone has the right to freedom of association, assembly and opinion.

Law Number 9 of 1998 concerning Freedom of Delivering Public Opinion is the state's commitment to realize human rights, guaranteed by the 1945 Constitution and the Universal Declaration of Human Rights.

The law is also part of the philosophical legal basis that the independence of every citizen to express their opinions in public is a manifestation of democracy in a society, nation, and state. The freedom of expression is in line with article 19 of the Universal Declaration of Human Rights, which reads: "Everyone has the right to freedom of opinion and opinion, in this right including freedom of opinion by not getting disturbed and to seek, receive and submit information and opinions in any way and by looking at the boundaries ".

The embodiment of the will of citizens freely in expressing their thoughts verbally in writing and so on must be maintained so that the entire social order and institutions of both infrastructure and superstructure remain free from irregularities or violations of the law that are contrary to the purpose, direction and direction of the process of openness and law enforcement so that it does not create social disintegration, but rather must guarantee security in people's lives. According to Article 2 of Act No. 9 of 1998 concerning Public Dissemination that freedom of expression in public is human rights guaranteed by the 1945 Constitution and the Declaration of Unversal of Human Rights.

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ENFORCEMENT OF LEGAL PROBLEMS OF HUMAN RIGHTS IN CRIMINAL LAW ON CONSUMER PROTECTION IN PROPERTY BUSINESS

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Abstract

Human Rights Issues in Criminal Law for consumer protection in the field of Property Business include efforts to protect, promote, enforce and fulfill consumer human rights and human rights in charge of criminal events in the property business sector through enforcement of criminal law based on principles of law enforcement that respect human rights by law enforcers are related to consumers and business actors as human beings who have dignity and dignity, as referred to in the formulation of human rights regulated both in the 1945 Constitution of the Republic of Indonesia, Law No. 39 of 1999 concerning Human Rights, Law No. 8 of 1999 concerning Consumer Protection and in the universal declaration of human rights, 1948 and other international conventions.

Keywords: Law enforcement, human rights issues, criminal law, consumer protection, property business, and business actors.

A. INTRODUCTION

Protection and law enforcement related to human rights issues in criminal law relating to public welfare or social welfare is a basic human need that must receive legal protection, because consumers are human beings who have human rights relating to security and protection from degrading treatment and human dignity, in this case including the responsibility of the state especially the government to provide protection, promotion, enforcement and fulfillment of human rights in the form of legal protection to consumers which is an important aspect that must be fulfilled in the context of implementing law enforcement in the property business.

However, national economic development in the era of globalization can support the growth of the business world, so that it is able to produce a variety of goods and / or services that have technological content which is one aspect of Human Rights. Consumers are related to education, science and technology that can improve welfare public / community and at the same time obtain certainty about goods and / or services obtained from trading businesses by not harming consumers.

To increase human dignity, prosperity, happiness, and intelligence and justice, consumers need to increase awareness of knowledge, concern, ability, and independence of consumers to protect themselves and to develop attitudes and behaviors of responsible business actors.

According to the literature, in fact the law enforcement of consumer protection in the property business field is not a national concept, but has become an international concern, in this case by the United Nations Guidelines for Consumer for Protection, which has been established through the General Assembly Resolution Nations Number 70/186 dated December 22, 2015.

The united nations guidelines for consumer protection basically intends to help UN member countries including Indonesia in formulating and enforcing laws against consumer protection, which of course can be adapted to the social, economic and cultural situation and conditions of each UN member state, by creating a synergic framework of cooperation international in the context of law enforcement in the field of consumer protection.

The united nations guidelines for consumer protection establish policies on a number of principles and main characteristics of legislation for effective and efficient legal protection of consumers, as well as the establishment of law enforcement institutions and the establishment of institutions regarding compensation (Article 1365 of the Civil Code).

In our beloved Unitary State of the Republic of Indonesia, which is based on Pancasila and the 1945 Constitution of the Republic of Indonesia, it has encouraged the creation of certain criminal law (TIPITER), namely the Republic of Indonesia Law Number 8 of 1999 concerning Consumer Protection, which was passed in Jakarta on April 20, 1999 by Akbar Tanjung as the State Minister of State of the Republic of

Indonesia, and the law included still in force in legality and legitimacy until now and there has never been a change with the new law.

Thus, there are 3 (three) main roles of law in the community, namely: a. law as a means of social control; b. law as a means to facilitate social interaction, and c. law as to create certain conditions relating to law enforcement efforts for consumer protection in general and specifically consumer protection in the field of property business in the Indonesian Legal System can be carried out effectively, objectively, transparently, accountably and fairly for the sake of upholding human rights issues in criminal law as part of the whole applicable law in the country of Indonesia as a legal state.

B. DISCUSSION

1. Definition of law enforcement

Law enforcement is: a series of activities in the context of the implementation of applicable legal provisions both in the form of enforcement and prevention covering all technical and administrative activities carried out by law enforcement officers, so as to create a safe, peaceful and orderly atmosphere for the sake of stabilizing certainty law in society (R. Abdussalam, 1997: 18).

In the Big Indonesian Dictionary, Enforcement is the one who establishes / enforces. Law enforcers are those who enforce the law (Anton M. Moelyono et. Al., 1980: 912). In a narrow sense it only means the police and prosecutors. In Indonesia this term is expanded, so that it includes judges and lawyers (Mardjono Reksodiputro, 1994: 91).

In English known as Law enforcement officer means that those whose duty is to preserve the peace (Henry Cambell Black, MA, 1979: 797). So law enforcers are officers who carry out or carry out laws, namely the Police, Prosecutors, Judges, Lawyers (Advocates) including prisons.

2. Human rights

a. The human meaning of the concept of human rights

Today, the world no longer views human rights as an embodiment of individualism and liberalism as it once was. Human rights are better understood humanely as inherent rights to the dignity and nature of our humanity, regardless of our race, ethnicity, religion, color, gender, age or occupation.

A more human understanding is the background of the modern concept of human rights as follows :

"Human rights could generally be defined as these rights which are inherent in our nature and without which we cannot live as human beings".

Meaning: In general, human rights can be formulated as rights inherent in our nature as human beings, which if not available, it is impossible for us to live as humans. (Saafroedin Bahar, 1996: 6).

With such understanding, the concept of human rights is characterized as a common standard of achievement for all peoples and all nations, namely as a common benchmark for humanitarian achievement that needs to be achieved by all people and all nations in the world.

b. Human rights in the amendments to the 1945 Constitution of the Republic of Indonesia

The formulation of human rights included in the 1945 constitution amendments to 1945 covers 10 (ten) aspects, which are formulated in Articles 28a, 28b, 28c, 28d, 28e, 28f, 28g, 28h, 28i and Article 28j of the 1945 Constitution of the Republic of Indonesia.

c. Definition of human rights according to the Law of the Republic of Indonesia Number 39 of 1999 concerning Human Rights

In essence Law No. 39 of 1999 is a law formed by integrating the understanding of the nature of universality and contextuality of human rights.

Based on Article 28i paragraph (5) amendments to the 1945 Constitution of the Republic of Indonesia, the enforcement of human rights will be regulated by legislation. Based on this provision, RI Law No. 39 of 1999 concerning Human Rights. Article 1 number 1 of the RI Law states: "Human Rights are a set of rights that are inherent in the nature and existence of human beings as God Almighty and are a gift that must be respected, upheld and protected by the state, law, government and everyone for honor and protection of human dignity".

3. Definition of law and criminal law

a. Law is a collection of rules that must be adhered to by everyone in a community with the threat of having to compensate or get a criminal if it violates or ignores those regulations, so that an association can be

achieved in an orderly and fair society. (R. Soesilo, 1984: 1).

b. Criminal Law is part of the entire law in force in a country that holds the basics and rules for.

4. Definition of consumer protection

Consumer protection is defined in the Republic of Indonesia Law Number 8 of 1999 concerning Consumer Protection through CHAPTER I: General Provisions Article 1 number / point one. In this law what is meant by "Consumer protection is any effort that guarantees legal certainty to provide protection to consumers.

Point 2, Consumers are every person who uses goods and / or services available in the community, both for the sake of themselves, family, other people and other living beings and not for trading. Whereas point 3, business actors are every individual or business entity, whether in the form of a legal entity or not a legal entity established and domiciled or conducting activities within the jurisdiction of the Republic of Indonesia, both alone and jointly through agreements to conduct business activities in various economics.

5. Existence of Law No. 8 of 1999 concerning Consumer Protection

Before talking further about this law, we need to know in advance what are the underlying and underlying causes of the issuance of law number 8 of 1999 concerning consumer protection.

In the opinion of the author, the main thing is of course based on the demands of the community for the protection, enforcement and promotion and fulfillment of the human rights of consumers in general and in particular the property business as well as the state's obligation to carry out the mandate of the NRI Constitution. 1945 year.

Article 28i paragraph (4) protection, promotion, enforcement and fulfillment of human rights are the responsibility of the state, especially the government. Paragraph (5) reads: "To uphold and protect human rights in accordance with the principles of a democratic legal state, the implementation of human rights is guaranteed, regulated, and set forth in legislation".

6. Material content

Overall, the Republic of Indonesia Law Number 8 of 1999 concerning Consumer Protection consists of 15 Chapters and 64 Articles and 13 items.

1) CHAPTER I : regarding General Provisions (Article 1 and 13 numbers / items)
2) CHAPTER II : concerning Principles and Objectives (Article 2-Article 3)
3) CHAPTER III : concerning Rights and Obligations (Article 4 - Article 7)
4) CHAPTER IV : concerning Actions that are prohibited for Business Actors (Article 8-17)
5) CHAPTER V : concerning Provisions on the Inclusion of Standard Clauses (Article 18 paragraph (1), (2), (3), (4)
6) CHAPTER VI : Regarding the Responsibility of Business Actors (Article 19-Article 28)
7) CHAPTER VII : concerning Guidance and Supervision (Article 29-Article 30)
8) CHAPTER VIII : about the National Consumer Protection Agency (Articles 31-43)
9) CHAPTER IX : about the Institute for Self-Help Consumer Protection (Article 44 paragraph (1), (2), (3), (4))
10) CHAPTER X : concerning Settlement of Disputes (Article 45-Article 48)
11) CHAPTER XI : about the Consumer Dispute Settlement Agency (Articles 49-58)
12) CHAPTER XII : about Education (Article 59 paragraph (1), (2), (3), (4))
13) CHAPTER XIII : concerning Sanctions (Administrative Sanctions and Criminal Sanctions) (Article 60-Article 63)
14) CHAPTER XIV : concerning Transitional Provisions (Article 64)
15) CHAPTER XV : concerning Closing Provisions (Article 65)

7. Criminal Act in the Consumer Protection Act

Criminal acts in the consumer field are regulated in Law Number 8 of 1999 concerning Consumer Protection. In this law, regulations are prohibited for business actors to commit acts that will harm consumers, namely every user or user of goods and / or services available in the community, both for the sake of themselves, family, other people and other living beings. and not for trading.

The criminal provisions as referred to in Article 62 paragraph (1) of Law No. 8 of 1999, Article 62

paragraph (2), Article 62 paragraph (3), Article 63 of Law No. 8 of 1999 concerning Consumer Protection. While the provisions of the Criminal Law of Property; can be snared through KUHP criminal provisions in the form of falsification of letters (general), use of fake letters, forgery of authentic letters, use of authentic authentic letters, order to place false information into authentic deeds, use of authentic tools made based on false information, and benefit themselves and / or other people have no right to land.

Criminal Provisions Act No. 1 of 2011 concerning Housing and Settlement Areas, as stipulated in Article 151, Article 152, and provisions of Article 151, Article 152, and provisions of Article 153, Article 154, Article 155, Article 156, Article 157, Article 159, Article 160, Article 161, Article 162, and Article 163.

Criminal Provisions Act No. 20 of 2011 concerning Flats, as stipulated in Article 109, Article 110, Article 111, Article 112, Article 113, Article 114, Article 115, Article 116, and provisions of Article 117.

Criminal Provisions Act No. 28 of 2002 concerning Building Buildings, as stipulated in Article 46 and the provisions of Article 47.

C. CONCLUSION

Thus a brief description of the Law Enforcement of Human Rights Issues in Criminal Law on Consumer Protection in the Property Business field, according to the Republic of Indonesia Law Number 8 of 1999 concerning Consumer Protection jo. Law of the Republic of Indonesia Number 1 of 1946 concerning the Criminal Code Law jo. Law of the Republic of Indonesia Number 1 of 2011 concerning Housing and Settlement Areas jo. Law of the Republic of Indonesia Number 20 of 2002 concerning Building Buildings.

On the basis of regulations that are interrelated with each other, the need to enforce the law of consumer protection in the field of property business can be carried out effectively against business actors who harm consumers with the economic principles of business people as much as possible with minimum capital so resulting in the provision of quality goods and / or services for consumers who must obtain legal certainty based on the law according to the Republic of Indonesia Law Number 8 of 1999 concerning Consumer Protection jo. Law of the Republic of Indonesia Number 39 of 1999 concerning Human Rights jo. 1945 Constitution of the Republic of Indonesia.

Hopefully it can be an information material and further study material.

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IMPORTER BASIC RIGHTS ON FAIR TRADING IN DETERMINING THE CUSTOMS VALUE OF IMPORTED GOODS

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Abstract

Indonesia has ratified the establishment of the WTO agreement with Law No. 7 Year 1994 in which the multilateral trade negotiations of the GATT (General Agreement on Tariffs and Trade) Uruguay Round in Morocco on 15 April 1994 has approved the establishment of the World Trade Organization WTO (World Trade Organization). One of the agreements that attached on this agreement is the Agreement on implementation of Article VII of the GATT (Agreement on Implementation of Article VII of the GATT). This agreement is often referred to as the WTO Valuation Agreement. With the ratification of the agreement has brought the juridical consequences for Indonesia, meaning that Indonesia should harmonize national legislation as agreed WTO. Thus, Indonesia should harmonize Indonesian customs system with the WTO Valuation Agreement. The results of the study indicate the imposition of penalties due to the determination of customs value on the declaration of customs value by importers in the process of importing goods, inconsistent with the WTO Valuation Agreement. Imposing of fines in customs value determination due to differences in perceptions of customs value and not based on violations of customs value (valuation fraud), is felt as a treatment that creates unfair trade and creates legal uncertainty for importers. Therefore, it is proposed that the legislation regarding the Indonesian customs system be related to the determination of customs value by imposing fine sanctions harmonized with the WTO Valuation Agreement in order to fulfill a sense of justice for global trade business actors & legal certainty.

Keywords: Imposing Penalty, Harmonization and Fair Trading.

A. INTRODUCTION

At the Uruguay Round international trade conference in 1994, Indonesia was one of several countries that became original members of the World Trade Organization (WTO). As proof of the acceptance of the results of the Uruguay Round by the Republic of Indonesia is the promulgation of Law No.7 Year 1994 concerning the Approval of the Establishment of the WTO. The existence of this law is expected to provide benefits for economic development, especially in the industrial, agricultural and trade sectors. This law strongly supports Indonesia's efforts in developing foreign trade, especially non-oil and gas exports, which are the main supporters of national economic development. Through its membership in the WTO, Indonesia hopes to participate in encouraging the realization of a new order in the field of international trade.[1]

Indonesia has ratified the agreement to establish the World Trade Organization (WTO) with Law Number 7 Year 1994. With the ratification of the agreement it has had juridical consequences for Indonesia, meaning that Indonesia must implement the national legislation according to the results of the WTO agreement. Thus, this agreement is binding on Indonesia, including all agreements attached to the agreement, including the Agreement on Implementation of Article VII of the General Agreement on Tariff and Trade (GATT), which is called the WTO Valuation Agreement. The consequence is that Indonesia must adjust all provisions relating to customs value in accordance with the provisions of the intended agreement.

The GATT was established based on an international agreement, but was not intended to establish an international organization. But with the formation of the WTO starting in January 1995, the GATT 1947 was integrated into one of the agreements that constituted the annex to the WTO agreement namely the Multilateral Agreement on Trade in Goods.[2]

As an implementation of the WTO Valuation Agreement, Indonesia has implemented the results of an agreement on customs value in Law Number 10 Year 1995 concerning Customs as amended by Law Number 17 Year 2006 (hereinafter referred to as "Customs Law"). In principle, the customs value used to

1 Sood Muhammad, 2011, *International Trade Law,* PT RajaGrafindo Persada, Jakarta, page. 271-272.

2 Hata, 2006, *International Trade in the GATT & WTO System, Legal & Non-Legal Aspects,* PT Refika Aditama, Bandung, page. 86-87.

calculate the amount of import duty on the import of an item is the transaction value of the imported goods concerned. This has been stated in Article 15 paragraph (1) Customs Law. The provisions for the use of transaction values to calculate import duties are the realization of the agreements of the countries joined in the WTO.

The customs system in Indonesia adheres to the principle of self assessment, where importers are asked to notify in import customs declaration of the quantity, type and price of goods. Customs value is the price of imported goods that must be notified by the importer in the Import Declaration of Goods (PIB). Prices of imported goods are usually listed in invoice documents issued by suppliers in exporting countries. Article 12 of the Customs Law states that "imported goods are subject to tariff-based import duties of a maximum of forty percent of customs value for import duty calculation". This can be interpreted that the amount of import duty depends on the amount of the tariff and the amount of customs value. The greater the customs value notified by the importer, the greater the import duty to be paid. Conversely, the smaller the customs value notified, the smaller the import duty paid by the importer. The size of state levies in the form of import duty, excise, and tax in the context of imports, for transactions of imported goods, depends on the amount of customs value notified by the importer. The function of government control in monitoring the correctness of payment of import duty, excise and tax in the framework of import is at the Directorate General of Customs and Excise by giving authority to customs inspection, which includes document research and physical inspection of goods (Article 3 Customs Law).

Specifically regarding the stipulation of customs value regulated in Article 16 paragraph (2) Customs Law, Customs and Excise Officials are authorized to determine customs value for calculation of import duty before or 30 (thirty) days after customs declaration is submitted by the importer. Based on Article 16 paragraph (4) of the Customs Law, importers who incorrectly notify customs values for calculating import duties resulting in a lack of payment of import duties are subject to administrative sanctions in the form of fines of 100% to 1000% of less paid import duties.

The GATT / WTO Valuation Agreement was prepared to establish an international system to determine the customs value of imported goods. The main objective of the WTO Valuation Agreement is to create a neutral, fair and uniform customs value setting system that does not provide space for the use of arbitrary or fictitious customs values.

WTO as an institution that aims to create harmonization of world trade agrees that customs value refers to the Agreement on Implementation of Article VII of GATT. The Agreement on Implementation of Article VII of GATT stipulates that in principle the customs value for calculating import duty is the transaction value of an imported item, and in stipulating customs value there are provisions governing the right of appeal and no imposition of fines.

Article 11 paragraph (1) of the Agreement on the Implementation of Article VII of GATT states: "The legislation of each Member shall be of the right to respect the right of appeal, without penalty, by the importer or any other person liable for the payment of the duty ", which means the laws and regulations of each member, in stipulating customs value, must regulate provisions regarding the right of appeal, without being subject to sanctions, submitted by importers or parties who are obliged to pay import duties.

International trade plays a significant role in the economy of a country, so throughout history the government has used trade barriers, both directly and indirectly, to impose changes on government and other countries' policies. Trade barriers include boycotts, quotas, tariffs, export and import restrictions, licenses, consumer and financial requirements, and environmental regulations. Trade sanctions are often used to influence domestic policies or practices of other countries and to protest a country's aggressive actions against its neighbors. Meanwhile, trade preferences are given to countries that make changes as desired.[3]

Determination of customs value by imposing sanctions in the form of fines in the determination of customs value of imported goods, allegedly not in accordance with international trade agreements and will lead to unfair treatment for impotirs, because it creates unfair trade, creates legal uncertainty, unfair competition, and can reduce national product competitiveness. For this reason, this study is entitled Fundamental Rights of Fair-Trading Importers in the Determination of Customs Value of Imported Goods.

3 Karla C. Shippy, J.D., 2001, *Compiling International Business Contracts, Guide to Developing International Business Contract Drafts,* Penerbit PPM, Jakarta, page. 17.

B. RESEARCH METHODS

The research method uses library research to obtain secondary data. The research is based on a normative juridical approach, through the study of documents on primary legal materials such as legislation and secondary legal materials such as journals, legal articles, internet pages related to the object of research. Data that has been collected is presented descriptively to be analyzed qualitatively. Furthermore, the data in question is analyzed to test and look for alternative solutions to the problems regarding the application of the WTO Valuation Agreement in the Indonesian customs system regarding the imposition of fines as an implication of customs value determination.

C. PROBLEM

From the description of the background of the above problems, the problem of this research can be formulated, namely how are the provisions for imposing penalties for establishing customs value in the import of goods under Indonesian customs regulations based on the WTO Valuation Agreement?

D. DISCUSSION

1. Customs Value Provisions

Customs Value is a value that is used as the basis for calculating import duties and levies in other import frameworks. Customs value is used to calculate import duty if the tariff used is based on advalorum rates (percentage). The size of customs import levies depends on the size of the customs value and the tariff imposed on an imported item. In the self-assessment system, the importer independently notifies the data of imported goods, including calculating the levies themselves which must be paid. Declaration of the customs value by the importer must be in accordance with the applicable provisions. In the event that the declaration of customs value is lower than what is supposed to be, then in addition to having to pay a lack of payment, the importer is also subject to administrative sanctions in the form of fines.

Referring to the WTO Valuation Agreement, there are 6 (six) customs value determination methods that must be applied hierarchically, namely:

1) Transaction Value Method,
2) Identical Transaction Value Method,
3) Method of Value of Similar Goods Transactions,
4) Deduction Method,
5) Computational Methods,
6) Fallback Method.

In accordance with the main principles of the WTO Valuation Agreement, the main basis for determining customs value is the transaction value of the imported goods concerned. Transaction value is the price that is actually or supposed to be paid by the buyer to the seller for goods sold to be exported into the customs area, plus certain costs, insofar as certain costs are not included in the actual price or should be paid.

The actual price paid (price paid) is the price of goods which the goods are imported (the import customs declaration submitted to the Customs Office) has been paid / paid by the buyer. Whereas what is meant by the price that should be paid (payable) is the price of the item at the time of import (the customs declaration given to the Office) has not been paid / paid by the buyer concerned. Fees paid by importers that are not yet included in the price actually paid or which should be paid, in the form of:

1) Sales and Intermediary Services Commission
2) The cost of packing, including labor costs and packing materials
3) Packaging costs, the costs of packaging packaged goods which are an integral part of the goods concerned include labor wages and the value of packaging materials.
4) Assist, the value of goods and services supplied directly or indirectly by the buyer for free or at a reduced price, for the purpose of production and sales for the export of the relevant imported goods, provided that the value is not included in the actual price paid or should be paid.
5) Royalties and Licenses, payments relating to, among others, patents, trademarks and copyrights.
6) Proceed, the value of the portion of income obtained by the buyer for the resale, utilization or use of imported goods which is then delivered directly or indirectly to the seller.
7) Transportation costs of imported goods to import places in the Customs Area, namely transportation costs that are actually paid or which should be paid which are generally listed on transportation documents, such as Bill of Lading or Air Way Bill of the relevant imported goods.

8) Loading, unloading and handling costs that do not include transportation costs are all costs related to the transportation of goods to import places in the Customs Area which are not yet included in freight costs.
9) Insurance costs are the guarantee fees for the transportation of goods from overseas export places to import places in the Customs Area which are generally proven by insurance documents in the form of certificates of insurance, insurance policies or open policies. The date of the insurance document must be before or no later than the date of delivery.

In the provisions of customs value, not all costs incurred by importers must be included in the elements of calculation of customs value. The costs / or values that are not included in the actual price or should be paid, namely:

1) Costs incurred from activities carried out by buyers for their own interests, including costs for trials, making showrooms, market investigations and opening costs for L / C.
2) Costs incurred after importing goods, namely:
   a) Costs of construction, construction, assembly, maintenance or technical assistance carried out after importing,
   b) Transportation costs, insurance and / or other costs after importing,
   c) Import duties, excise, and / or levies in the context of imports.
3) Interest (Interest charges) charged by the seller to the buyer for payment for the purchase of imported goods.
4) Dividends are the distribution of profits relating to all businesses of the company and not only related to the sale of imported goods. Dividends or other payments by buyers to sellers not related to imported goods are not included in the price actually paid or should be paid.
5) Discounts are a component to reduce the price of imported goods as long as they are generally accepted in trade.

Rules relating to the stipulation of complete Customs Value are listed in Minister of Finance Regulation Number 160 / PMK. 04/2010 concerning Customs Value for Calculation of Import Duty as amended by Minister of Finance Regulation Number 34 / PMK.04 / 2016.

2. Violation of Customs Value

In any violation or unlawful act, there is always a motive behind it. In relation to customs, the most common motive is.[4]

a. to avoid payment of import duties and other import taxes;
b. for importing prohibited or restricted goods;
c. intentionally informing the country of origin that is not correct to obtain a profit from a trade agreement or to avoid a ban on certain trade agreements;
d. to get competitive prices;
e. to enter new markets with very tight competition;
f. the desire to reduce domestic fiscal taxes.

The types of violations of customs value (valuation fraud) can be stated as follows

1) ***Undervaluation***

Undervaluation is a violation by making an incorrect declaration of customs value whose value is lower than the actual transaction value. The undervaluation is intended for the purpose of:

a. Minimizing the amount of import duties and other import taxes that must be paid.
b. Avoid quota restrictions.

Undervaluation violations are carried out by various methods including:

a Double Invoice
An invoice with a lower value is notified to the customs institution, while the invoice with the actual value is stored by the importer for payment needs to the supplier.

b. Invalid Invoice
Often referred to as under-invoicing, the value stated in the invoice is not the actual value, but a lower value.

4 Direktorat Jenderal Bea dan Cukai, 2005, *ASEAN Customs Valuation Guide*, Indonesian Edition, First Edition, page. 144.

c Gradual payment
The invoice does not include previous payments (down payment) or payments made in stages, but only includes the final balance.

2) *Overvaluation*

Overvaluation is a violation by making an incorrect declaration of customs value whose value is higher than the actual transaction value. The overvaluation is intended for various reasons, including the following:

a. Prevent or avoid the possibility of an examination of antidumping import duties or reward fees. Notifying prices of lower goods can cause suspicion, resulting in antidumping customs duties and reward fees.

b. Avoid or reduce the basis of domestic tax calculation. In some countries, domestic taxes paid by companies are based on higher company profits compared to import levies. Therefore if you have a transfer price with a company that is interconnected, import levies are made bigger to reduce the domestic tax that the company must pay. Because taxes are based on company profits, interconnected companies will manipulate customs values so that greater actual profits will be levied in countries that collect lower domestic taxes.

c. Informs of higher prices for commodities with a low import duty rate and conversely notifies lower prices for commodities with high import duties. If importing goods of more than one type of goods from the same seller and the goods are subject to different import duty rates, importers usually increase the price of goods whose import duty is low and reduce the price of goods for which the import duty rate is high. With the agreement, the seller receives the same amount of payment for goods, while the importer as a whole pays a smaller import duty.

3) Description of Incorrect Invoice

a. The invoice lists the quality of the item that is incorrect with the intention to influence the price.

b. Describe the number or weight of items that are not correct in the invoice.

c. A description of the final use / function of the item that is incorrect in the invoice, where it affects the import duty rate. Some countries have relief policies or exemptions from import duties depending on the use of goods after importation (for example for agricultural purposes, medical research) or for whom the goods are imported (eg non-profit organizations, universities, religious institutions).

d. Wrong description to avoid quota restrictions or to avoid import duty and anti-dumping import duties.

e. Description of country of origin that is incorrect, with reasons:

1) To avoid quota restrictions.
Usually restrictions on quotas are applied differently for each country. The description of the country of origin notified incorrectly to avoid the quota ban.

2) To avoid antidumping import duties and import reward fees.
Antidumping import duties and import reward fees are usually applied in certain companies/ countries. The description of the country of origin notified is incorrect to avoid the import duty.

3) To get benefit from special programs offered in the form of relief or exemption from import duty. Some countries offer waivers or exemptions from import duties with special trade programs, such as Generalized System of Preferences (GSP), or special bilateral free trade programs, or different tariffs for certain countries such as MFF (Most Favored Nation) tariffs. Of the several facilities, the main issue is the country of origin which greatly determines whether the special trade program can be applied.

Article 82 paragraph (5) Customs Law states that:[5]

Anyone who incorrectly notifies the type and / or amount of goods in customs declaration of imports which results in a lack of payment of import duty subject to administrative sanctions in the form of a fine of at least 100% (one hundred percent) of the less paid import duty and a maximum of 1,000% (one thousand percent) from less paid import duties.

5 Indonesia, *Law Number 10 Year 1995 concerning Customs as amended by Law Number 17 Year 2006,* Article 82 paragraph (5).

If there is an error in the declaration of the type and / or number of items in the customs declaration on imports, it can be interpreted that the description of the goods, both the type and / or the items listed in the invoice is not in accordance with the actual facts. for the violation is subject to administrative sanction in the form of a fine of at least 100% (one hundred percent) of the less paid import duty and at most 1,000% (one thousand percent) of the underpaid import duty in accordance with Article 82 paragraph (5) Customs Law.

Article 17 paragraph (1), (2), and (4) Customs Law states that:[6]

(1) The Director General may re-stipulate customs tariffs and values for the calculation of import duty within a period of 2 (two) years from the date of customs declaration.
(2) In the event that the stipulation referred to in paragraph (1) is different from the stipulation as referred to in Article 16, the Director General shall notify in writing to the importer to:
    a. pay off underpaid import duties; or
    b. get a refund of more paid import duties.
(3) Determination as referred to in paragraph (2), if caused by an error in the value of the transaction notified resulting in a lack of payment of import duty, subject to administrative sanctions what is the fine of at least 100% (one hundred percent) of the least paid import duty lots of 1000% (one thousand percent) of import duties that are less paid.

Explanation of Article 17 paragraph (4) Customs Law states that:[7]

> "This provision is meant that basically the one who knows the amount of a transaction is only the seller and buyer so that the truth of the transaction value depends solely on the honesty of the transaction party. customs subject to administrative sanctions in the form of fines."

Based on the description in the Elucidation of Article 17 paragraph (4) of the Customs Law above, it can be concluded that the error in the transaction value notified by the importer contains an element of intent due to the dishonesty found in the research again or in the conduct of customs audits.

If there is an error in the deliberate transaction value due to dishonesty, it can be interpreted that the description listed in the invoice is not in accordance with the actual facts, thus the act is a violation of customs value, and the violation is subject to administrative sanctions in the form of the least penalty 100% (one hundred percent) of less paid import duties and at most 1,000% (one thousand percent) of import duties that are less paid in accordance with Article 17 paragraph (4) Customs Law.

Article 103 letter a Customs Law states:[8]

"Everyone who:

a. submit fake or falsified customs declaration and / or customs supplementary documents; ..... shall be sentenced to imprisonment of at least 2 (two) years and imprisonment for a maximum of 8 (eight) years and / or criminal fine of at least Rp. 100,000,000.00 (one hundred million rupiah) and a maximum of Rp. 5,000,000,000.00 (five billion rupiah)".

An invoice is one of the complementary customs documents, thus an importer submitting a fake or falsified invoice is a criminal act based on the provisions of Article 103 letter a Customs Law.

Submission of invoices that are fake or falsified, it can be interpreted that the data listed in the invoice is fake or intentionally falsified, in the sense that it is not in accordance with the actual facts, thus the deed is a crime based on Article 103 letter a Customs Law.

The system of threatening fine criminal sanctions in the Customs Law has several specificities compared to the provisions in criminal law as known in the Criminal Code, namely:

1. everyone: the culprit offenders can be human individuals or corporations (corporations);
2. prohibited acts in the form of fake or falsified documents which if associated with the provisions in the Criminal Code have specificity with respect to falsified letters;
3. threatened criminal sanctions contain threatening patterns that are both absolute and relative cumulative (and / or);

6 *Ibid.,* Article 17 paragraph (1), (2), and (4).
7 *Ibid.,* Explanation of Article 17 paragraph (4).
8 *Ibid.,* Article 103 letter a.

4. criminal sanctions that are threatened with determining specific criteria, so that the judge may not decide under the special minime provisions;

International trade refers to policies made by various governments in the trade sector. The government as the regulator has the authority to make policies not only for business people who carry out activities in their territory but also the authority to make policies on goods or services from other countries that will enter their country.[9]

3. Imposition of Sanctions for Customs Value

In the practice of international customs, handling violations of customs regulations which are classified as violations of administrative provisions are more focused on fiscal settlement, namely in the form of paying a sum of money to the state in the form of fines. The application of administrative sanctions in the form of fines is an influence of the era of globalization which demands the speed and smooth flow of goods for the advancement of international trade. Because of the speed and smoothness of the flow of goods, customs regulations are not expected to be a barrier to the development of the trade.

The principle of self assessment adopted by the Customs Law, namely the principle for calculating and depositing the fees owed by importers or exporters, as well as understanding the self assessment system which in principle gives great confidence to the importer or exporter. However, this trust must be balanced with responsibility, honesty, and compliance in fulfilling statutory provisions. If the importer or exporter in the context of fulfilling customs obligations violates customs, administrative sanctions in the form of fines are imposed.

The administrative sanctions in the form of fines are imposed on violations of customs, the amount of which is stated in:[10]

a. certain rupiah value;
b. minimum to maximum rupiah value;
c. a certain percentage of the import duty that should be paid;
d. a certain percentage up to the maximum from the lack of payment of import duty or export duty; or
e. certain percentage minimum to maximum of import duty that should be paid.

The application of administrative sanctions in the form of fines using the principle of proportionality (proportionalite beginset), namely the size of an administrative sanction in the form of fines imposed, is influenced by the size of state losses or frequency of violations committed in a certain period of time.[11]

The principle of comparability in customs administration sanctions is applied in details as follows:

a. For violations threatened with administrative sanctions in the form of fines, the amount of which is stated in a certain rupiah value, is subject to a fine in the amount of the rupiah value stated in the article in the relevant law.
b. For violations threatened with administrative sanctions in the form of fines, the amount of which is expressed as a percentage of the import duty to be paid, is subject to a fine in the amount of the rupiah value obtained from the multiplication of the amount of administrative sanctions that should be paid.
c. The violations that are threatened with administrative sanctions in the form of a minimum fine up to the maximum amount stated in the rupiah value are subject to a fine in the amount of the rupiah determined in stages based on the number of violations in the past six months.[12]
d. The violations threatened with administrative sanctions in the form of a minimum fine up to the maximum amount stated in a certain percentage of the lack of payment of import duty are subject to a fine in the amount of the rupiah stipulated in stages based on a comparison between the payment of import duty and the paid import duty.[13]

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9 Hikmahanto Juwana, 2010, *International Law, in the Perspective of Indonesia as a Developing Country,* PT Yarsif Watampone, Jakarta, page. 101.

10 Indonesia, *Government Regulation Number 28 Year 2008 concerning Imposition of Administrative Sanctions in the Form of Fines in the Customs Field,* Article 2 paragraph (2).

11 Eddhi Sutarto, 2010, *Reconstruction of the Indonesian Customs Legal System,* Penerbit Erlangga, Jakarta, page. 106.

12 Indonesia, *Government Regulation Number 28 Year 2008 concerning Imposition of Administrative Sanctions in the Form of Fines in the Customs Field, op.cit.,* Article 4 paragraph (1).

13 *Ibid.,* Article 6 paragraph (1).

Based on Article 11 of the WTO Valuation Agreement[14] states: paragraph (1) The laws and regulations of each member, in stipulating customs value, must regulate provisions regarding the right of appeal, without being subject to sanctions, submitted by importers or parties obliged to make payment enter, and paragraph (2) Appeal of the initial stage without being subject to sanctions, submitted to the customs authorities or an independent institution. Appeal rights without being subject to sanctions submitted to the court are regulated in the respective laws and regulations member.

From the description of Article 11 of the WTO Valuation Agreement which states that the stipulation of customs value is granted the right of appeal without being subject to sanctions. Determination of customs value using the customs value method based on the WTO Valuation Agreement is not subject to sanctions, meaning that the determination of customs value using the customs value determination method based on the WTO Valuation Agreement is not a customs violation related to valuation fraud as previously described , or in other words violations of customs value (valuation fraud) are outside the scope of Article 11 of the WTO Valuation Agreement.

Based on Article 17 of the WTO Valuation Agreement[15] states that none of the provisions in this agreement can be interpreted as limiting customs rights to demand an explanation of the truth and accuracy of the statements, documents or declarations submitted for customs assessment.

From the description of Article 17 of the WTO Valuation Agreement, it can be interpreted that the WTO Valuation Agreement does not limit the efforts made by customs institutions to disclose the truth and accuracy of customs values in the framework of stipulating customs value. This means that customs institutions can attempt to disclose customs violations related to violations of customs value (valuation fraud).

With the provision of Article 17 WTO Valuation Agreement, it is more emphasized that the stipulation of customs value under the WTO Valuation Agreement is not a violation of customs value (valuation fraud), therefore it is not subject to sanctions as referred to in Article 11 of the WTO Valuation Agreement. Article 16 paragraph (2) and (4) Customs Law states that:[16]

(2) Customs and excise officials can determine the customs value of imported goods for calculating import duties prior to the delivery of customs declaration or within 30 (thirty) days from the date of customs declaration.
(4) Importers who incorrectly notify customs value for calculation of import duty resulting in a lack of payment of import duty subject to administrative sanctions in the form of a fine of at least 100% (one hundred percent) of import duty which is less than 1000% (one thousand percent) of import duty less paid.

Based on the description of Article 16 paragraph (2) of the Customs Law mentioned above, it is stated that the customs and excise officials have the authority to determine the customs value of imported goods for calculating import duties. Determination of customs value for the calculation of import duty is based on the method of determining customs value based on the WTO Valuation Agreement that has been implemented in the Indonesian customs system.

Importers who incorrectly notify customs value for calculation of import duty as referred to in Article 16 paragraph (4) of the Customs Law above, there is no further explanation of the type of error referred to, so that it can be interpreted that any customs value determination carried out by customs officials and excise that is different from the declaration of customs value by importers in customs declaration documents on imports, is considered to be the importer's fault and is treated as a violation of customs value, in other words any difference in declaration of customs value is the violation customs value (valuation fraud), for that is subject to administrative sanctions in the form of a fine of at least 100% (one hundred percent) of the less paid import duty and at most 1000% (one thousand percent) of the underpaid import duty.

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14 Article 11 *The Agreement on Implementation of Article VII of GATT* states that: *(1) The legislation of each Member shall provide in regard to a determination of customs value for the right of appeal, without penalty, by the importer or any other person liable for the payment of the duty". (2) An initial right of appeal without penalty may be to an authority within the customs administration or to an independent body, but the legislation of each Member shall provide for the right of appeal without penalty to a judicial authority".*

15 Article 17 *The Agreement on Implementation of Article VII of GATT* states that : *"Nothing in this Agreement shall be construed as restricting or calling into question the rights of customs administrations to satisfy themselves as to the truth or accuracy of any statement, document or declaration presented for customs valuation purposes".*

16 Indonesia, *Law Number 10 Year 1995 concerning Customs as amended by Law Number 17 Year 2006, op.cit.,* Article 16 paragraph (2) and paragraph (4).

In accordance with the 1994 Agreement on Implementation of Article VII of the General Agreement on Trade and Tariff (GATT), Article 22 states that national legislation must contain provisions on the stipulation of customs values in accordance with the WTO Valuation Agreement.[17]

Indonesian law, doctrine and practice regarding the status of international agreements in the Indonesian national law have not yet developed and often pose practical problems at the level of implementation of international agreements within the framework of the national legal system. This lack of clarity is part of the absence of law or doctrine in the Indonesian legal system concerning the relationship of international law and national law. Various confusion arose in the world of practitioners in answering questions about the status of international agreements in the Republic of Indonesia legal system.[18]

In international transactions, basically the interests of importers and exporters are the same as those of buyers and sellers in domestic transactions. Importers want to get the items they pay for, and the seller wants to get payment for the items that have been delivered. However, in international transactions there are uncertainties and risks that are not found in pure domestic transactions. In international transactions, between importers and exporters separated by long distances, differences in culture and business traditions, differences in government and economic systems, differences in currencies, and differences in the banking system and currency.[19]

In determining policies in the field of international trade, especially customs in the field of import, it should be able to create a conducive business climate to support the smooth flow of goods and business development, while being able to provide legal certainty and maintain healthy competition for national business actors in international trade, especially the application establishment of neutral, fair and uniform customs values. Legal certainty and healthy competition are absolute requirements for the development of the national business world, especially concerning the trade in goods and services between countries that have entered into international trade agreements as stipulated in the GATT.

As a logical consequence of relations between countries, the possibility of a conflict of law cannot be denied. Therefore, an understanding of international trade law, in this case is that international regulations in the field of trade in goods and services in accordance with bilateral, regional and multilateral trade agreements, need to be carefully studied by both economic actors and government officials as regulators.

In Lawrence M. Friedman's Law System theory, law as a system consists of 3 (three) components, namely:[20]

1. Legal Substance, namely statutory regulations both written and unwritten;
2. Legal Structure consisting of legal institutions and legal human resources as well as legal facilities and infrastructure;
3. Legal Culture, reflected in public legal awareness.

According to Lawrence M. Friedman, substance is the rules, norms, and patterns of real human behavior in the system. The substance also means the products produced by people who are in the legal system, including the decisions they make, the new rules they compile. Substance also includes living law, and not only the rules in the law or law books. Structure is a frame or frame, a part that remains, a part that gives a kind of shape and boundary to the whole. While legal culture is the human attitude towards the law (trust), values, thoughts, and expectations. Legal culture is also an atmosphere of social thought and social power that determines how the law is used, avoided, or misused.

To uphold the rule of law, the three components mentioned above need to be developed simultaneously and integrally because one and the other are mutually complementary and are in an interrelated functional relationship. The importers have understood the national agreement on the WTO Valuation Agreement and questioned the fundamental rights as international trade business actors to obtain fair trading treatment, namely justice & legal certainty.

As explained above, the Agreement on the Implementation of Article VII of GATT (Agreement on Implementation of Article VII of GATT) concerning Valuation Agreement, has been implemented in the Customs Law, but there are inconsistencies in its application, because not all rules contained in the WTO

17 Article 22 *The Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994* states that: *"Each Member shall ensure, not later than the date of application of the provisions of this Agreement for it, the conformity of its laws, regulations and administrative procedures with the provisions of this Agreement."*

18 Damos Dumoli Agusman, 2010, *International Treaty Law, Study of Theory and Practice of Indonesia,* PT Refika Aditama, Bandung, page. 95.

19 Edward G.Hinkelman, 2002, *International Business Payment Methods, Letters of Credit Documentary Collection and Cyberpayments in International Transactions,* Penerbit PPM, Jakarta, page. 6.

20 Lawrence M. Friedman, 1998, *American Law An Introduction,* W.W. Norton & Company, New York-London, page. 18-20.

Agreement Agreement are applied in Customs Law, there are even contradictions that can cause disputes between importers as taxpayers and the Directorate General of Customs and Excise as the Fiscus.

Boermauna in his book International Law, describes international agreements as the main source of international law, binding on state parties. This binding nature means that the parties' parties must comply with and respect the implementation of the agreement. Of course, those who implement the agreement are state organs that must take the necessary actions to ensure their implementation. The binding power of the agreement is based on the principle of pacta sunt servanda.[21]

Referring to the 1969 Vienna Convention, Article 26 Pacta sunt servanda:

Based on *"Every treaty in force is binding upon the parties to it and must be performed by them in good faith"*.

Based on the article above, that the stipulation of customs value and imposition of fines that are not in line with the international trade agreement as enacted in Law Number 7 Year 1994 concerning the Approval of the Establishment of the WTO. is not properly applied in the process of stipulating customs value as referred to in Article 11 paragraph (1) and (2) The Agreement on Implementation of Article VII GATT, and the issuance of Determination of Customs Value by Imposing Penalty Sanctions has the potential to violate the fundamental rights of importers on fair trading, namely creating legal uncertainty, unfair treatment, creating unfair trade, unfair competition, and can reduce the competitiveness of national products made from non-local raw materials.

E. CONCLUSION

Based on the description and analysis of the discussion mentioned earlier, it can be concluded that there are legal inconsistencies in the stipulation of customs value in the form of penalties stipulated in the Indonesian Customs System with the WTO Valuation Agreement, giving rise to disharmony in the legal relationship between Indonesian customs regulations and WTO Valuation Agreement, and potentially violating the fundamental rights of importers on fair trading.

Based on the conclusions stated above, suggestions were submitted to the authorities to make improvements to the laws and regulations of Article 16 of Law Number 17 Year 2006 concerning Amendments to Law Number 10 Year 1995 concerning Customs by abolishing Article 16 paragraph (4).

The improvement of the above regulations is necessary to fulfill the element of legal certainty and justice so as to create fair trading in international trade.

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RECOGNITION OF LEGAL STATE ON HUMAN RIGHTS THROUGH CONSTITUTION OF THE 1945 CONSTITUTION

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Abstract

Recognition of human rights as the legal basis for several articles of the 1945 Constitution, has led all Indonesian citizens to be required to obtain legal protection wherever they are. The existence of a democratic legal state, then the soul of the state of law exists in human rights that have been recognized, respected, and implemented and maintained. The inevitable consequences of state power holders, that the enforcement and realization of the legitimacy of human rights are part of the legal power of a legal state, especially the Unitary State of the Republic of Indonesia. The 1945 Constitution expressly states that the State of Indonesia is a Law State. That means that, the Republic of Indonesia is a rule of law based on Pancasila and the 1945 Constitution, upholds human rights and guarantees all citizens at the same time in law and government, and must uphold the law and government with no exceptions.

A. INTRODUCTION

The Universal Declaration of Human Rights adopted by the General Assembly of the United Nations on December 10, 1948, is the official legitimacy of the Charter of the United Nations, which contains in more detail the number of rights registered as Human Rights.

> The declaration serves as a standard of mutual achievement. Therefore, he was formulated in the form of a declaration, not an agreement that would be signed and ratified. Nevertheless, the declaration has proven to be a giant step in the process of internationalizing human rights. [1]

As time went on, the legal status of the declaration continued to receive strong recognition. Apart from being seen as an authentic interpretation of the contents of the Charter of the United Nations, this declaration also developed into international customary law that is legally binding on all countries. Thus the violation of this declaration is a violation of international law.

The birth of the Charter of the United Nations (UN) on December 10, 1948, called the Universal Declaration of Human Rights 61 years ago, turned out to have a broad influence on community relations between nations and countries, related to recognition and legitimacy the application of human rights.

Human rights are human rights only because they are human. Mankind has it not because it was given to him by the community or based on positive law, but solely based on his dignity as a human being. [2]

In this sense, even though each person is born with different skin color, gender, language, culture, and citizenship, he still has those rights.

> In addition to being universal, those rights cannot be revoked (inalienable). It means that no matter how bad the treatment has been experienced by someone or no matter how harsh the treatment of a person is, he will not stop being a human being and therefore still have those rights. In other words, those rights are inherent in themselves as human beings. [3]

Regarding the recognition of universal human rights and inherently inherent in every human being, the declaration is based on the principle of announcing to the civilized society that there is a limit to that power. Power in community and state life is indeed needed insofar as that power guarantees the freedom of its citizens and advances and protects their basic rights. Therefore, respect and application of human rights that pass between generations of the nation, it does not stand alone.

The application of human rights coincides with the obligation, namely the obligation of individuals to other people, individuals to families, individuals to the community, individuals to their country, which as

1 Suparman Marzuki, Eko Riyadi (Editor), *Hukum HAM*, Yogyakarta; PUSHAM UII, 2008, hal 36

2 Jack Donnely, *Universal Human Rights in Theory and Practice*, London; Cornell University Press, Ithaca, 2003, hal. 21

3 Loc.cit, hal 11

a whole the legitimacy of civilization is regulated by law [44]. This is a form of integration of the character of universalism with pluralism at all levels of behavior, without any kind of difference for mankind, and adopted as national law, as well as international law.

In fact, human rights, through the recognition of December 10, 1948, were a formal pilot for the preparation and formation of human rights law.[5]

Therefore, since 1948, various charter, conventions, treaties, human rights agreements have been prepared, both internationally and regionally, which will continue and are a source of human rights law. Therefore, agreements, rules, agreements relating to efforts to uphold human rights, both internationally and nationally, in addition to being a major source of human rights law, are also evidence of the commitment of members of the community of nations to their concerns about human rights.

Discussion of human rights law reviewed in a multi-and interdisciplinary manner can find a more comprehensive and demanding conclusion that the existence of human rights is a condition sinequanon with human dignity itself. In the sense that the essential recognition of human rights means towards the recognition of civilized human beings.

For Indonesia, the real attitude of upholding human rights, for the Indonesian people is by the inclusion of human rights elements in the opening of the first paragraph of the 1945 Constitution, that: "independence is the right of all nations and therefore, occupation above the world must be abolished because it was not in accordance with humanity and justice. [6]

This is an attitude as a legal basis and the foundation of constitutional politics in each of their respective countries which wish to recognize and implement Human Rights for the sake of human dignity.

The implementation of a democratic government system, transparent to its citizens will be easier to give confidence to citizens and will gain greater trust from the people so that the implementation of human rights accompanied by basic obligations and basic responsibilities can be understood. In terms of education, it contains elements of maturing citizens. Instead, the government is closed, this is difficult to implement. [7]

The closeness of the government in appreciating the realization of human rights in Indonesia can be analogous to not having the full political will towards the realization of human rights as has been the commitment of the state constitution. This can be exemplified in relation to the behavior of the New Order regime which was so slow in actualizing the human rights charter and the rights and obligations of citizens.

In the course of history, the New Order government seemed to be anti against the existence of a human rights charter. Every question that led to the need for a charter of human rights, tended to be answered that such a charter (at the time) was not needed, because human rights issues were regulated in various laws and regulations.[8]

With the acknowledgment of universal human rights and inherently inherent in every human being, the declaration on the principle of wanting to declare to the civilized peoples of society that power has its limits. Power in community and state life is indeed needed insofar as that power guarantees the freedom of its citizens and advances and protects their basic rights.

B. PROBLEM

The problems raised in this paper are how to respect and apply human rights that pass between generations of nations based on the constitution of the Unitary State of the Republic of Indonesia, the 1945 Constitution?

C. DISCUSSION

Substantially the Universal Declaration of Human Right is a reference to the "International Bill of Human Rights" is a term used to refer to three main international human rights instruments along with optional protocols designed by the United Nations.

4 Ali Achmad, *Hak Asasi Manusia & Negara Hukum*, Jakarta; Intermasa, 2016, hal 162

5 Ibid, hal 74

6 SF.Marbun, *HAM Dari Sudut Pandang Ketatanegaraan di Indonesia*, Yogyakarta; Unisi Press, 2001, hal 138

7 Nunik Triyanti, *Memahami Hukum: Dari Kontruksi sampai Implimentasi*, Jakarta; Rajawali Press, 2009, hal 80

8 Satya Arinanto, *Hukum dan Demokrasi*, Jakarta; Ind-Hill-Co, 1991, hal 30

The three instruments are: (i) Universal Declaration of Human Rights; (ii) International Covenant on Civil and Political Rights (International Covenant on Civil and Political Rights); and (iii) the International Covenant on Economic, Social and Cultural Rights (International Covenant on Economic, Social and Cultural Rights). While the optional protocol included in this category is, "Optional Protocol to the Covenant on Civil and Political Rights" (Optional Protocol to the Covenant on Civil and Political Rights). [9]

It is referred to as the principal instrument because of its central position in the corpus of international human rights law. The two covenants that followed, namely the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, were ratified by the United Nations General Assembly in 1966. But the two Covenants only became legally binding in 1976.[1010] Two instruments The point of international human rights shows two broad areas of human rights, namely civil and political rights on the one hand, and economic, social and cultural rights on the other. Both of these instruments are prepared based on the rights listed in the Universal Declaration of Human Rights, but with more specific elaborations.

The International Covenant on Civil and Political Rights, for example, describes more specifically which rights are non-derogable and which rights are permissible. Likewise, the International Covenant on Economic, Social and Cultural Rights, which contains complete economic and social rights, formulates different state responsibilities compared to the International Covenant on Civil and Political Rights. So actually these two Covenants were made to answer practical problems related to the protection of human rights. In practice, human rights problems arise always related to injustice, poverty, arbitrariness, the act of action, arbitrary wisdom, and various practices that contain elements of uncertainty, anxiety towards other humans.[11]

The birth of the Charter of the United Nations (UN) on the steps of December 10, 1948, called the Universal Declaration of Human Rights 70 years ago, turned out to have a broad influence on community relations between nations and countries, related to recognition and legitimacy the application of human rights.

Indonesia, which joined itself in 1950 as a member of the United Nations, basically recognized the charter, which in its implementation was adjusted to the cultural conditions of the Indonesian people.

In terms of recognition of human rights in Indonesia, the conceptual is not only directed at personal self. Moreover, this recognition is also given to group rights such as family, society and the state. Human rights are universal, cultural factors of a nation's history allow for "differences". Therefore, if there is an assumption that the West and East views are different, the degree of difference is only on the surface. [12] With the acknowledgment of universal human rights and inherently inherent in every human being, the declaration on the principle of wanting to declare to the civilized peoples' audience that power has its limits. Power in community and state life is indeed needed insofar as that power guarantees the freedom of its citizens and promotes and protects their basic rights. "

Therefore, respect and application of human rights that pass between generations of the nation, it does not stand alone. The application of human rights coincides with the obligation, namely the obligation of individuals to other people, individuals to families, individuals to the community, individuals to their country, which as a whole the legitimacy of civilization is regulated by law. This is a form of integration of the character of universalism with pluralism at all levels of behavior, without any kind of difference for mankind, and adopted as national law, as well as international law.[13]

For the Indonesian people, the real attitude of upholding human rights is the inclusion of human rights elements in the opening of the first paragraph of the 1945 Constitution, that:"independence is the right of all nations and therefore, occupation above the world must be abolished because not in accordance with humanity and justice ".[14]

This is an attitude as a legal basis and the foundation of constitutional politics. Various articles in the body that have been amended by the 1945 Constitution also specify matters that provide guarantees for human rights recognition, including:

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9 Louis Henkin, *The International Bill Of Rights: The Universal Dedaration and the Covenant*s, Jenewa; International Enforcement of Human Rights, 1997, hal 94

10 Imron Abraham, *Perspektif Internasional Hak Asasi Manusia*, Jakarta; Media Penapress, 2015, hal 31

11 A. Mansyur Effendi, *Membangun Kesadaran HAM Dalam Masyarakat Modern*; Jakarta; Rajawali Pers, 2009, hal 79.

12 Ibid, hal 79

13 Eman Prabowo, *HAM dan Eksistensinya,* Surabaya; Airlangga Press, 2016, hal 62

14 Undang-Undang Dasar 1945

"All citizens are at the same time in law and government and are obliged to uphold the law and the government with no exceptions. Everyone has the right to recognition, guarantee, protection, and fair legal certainty and equal treatment before the law. Every person has the right to work and receive compensation and fair and proper treatment in work relations. Every citizen has the right to get equal opportunities in government. Everyone has the right to freedom of belief, express their thoughts and attitudes, according to their conscience. Everyone has the right to freedom of association, assembly, and opinion. Everyone has the right to communicate and obtain information to develop their personal and social environment, and has the right to seek, obtain, possess, store, process and convey information using all types of available channels. Everyone has the right to personal, family, honor, dignity and property protection under his authority, and has the right to security and protection from the threat of fear of doing or not doing something that is a human right ".[15]

Protection, promotion, enforcement and fulfillment of human rights are the responsibility of the state, especially the government. To uphold and protect human rights in accordance with the principles of a democratic legal state, the implementation of human rights is guaranteed, regulated, and set forth in the legislation.

> In exercising their rights and freedoms, each person must submit to the restrictions set by law with the sole purpose of guaranteeing the recognition and respect for the rights and freedoms of others and to fulfill just demands in accordance with moral considerations, religious values, security, and public order in a democratic society ".[16]

Despite the character differences caused by the development of a growing generation, it is possible to include elements of human rights that cannot be ignored. In Indonesia, since its inception, it has guaranteed and protected human rights. The Indonesian state based on the law (rechtstaat) cannot tolerate any human rights violations, and if there is a violation of human rights, it will certainly be thoroughly investigated in accordance with the applicable law.

> Basically, human rights, is a gift of human glory from the creator of GOD, since humans were born to the end of their lives. Although human rights are so complex, a contextual approach and integral placement of human rights in one package is are important. So that a person who has rights has obligations and responsibilities as well.[17]

In the context of a society that is universally more advanced, open and modern, moreover facing the cybernetic revolution, this component is expected to constitute a common doctrine or handle, while at the same time forming an international community that is more aware in behaving primarily in recognizing the protection of human rights.

> To formulate a boundary for rights is a business that is full of risks. From here, it appears that talking about human rights is relevant for the present because it is closely related to injustice, ignorance, misery, lies, ill-treatment and other types of actions.[1818] Here is the need for wisdom and openness. Openness based on good intentions is the beginning of civilizing the spirit of respecting human rights.[19]

Furthermore, the conceptualization of universality includes, among others, the fields of social economy and culture.

> The concept of human rights includes efforts to ensure the fulfillment of the need to pursue economic, social and cultural progress including the right to education, the right to determine political status, the right to enjoy various scientific discoveries and so on. The peak of this development was achieved by the signing of the International Convenant on Economic, Social and Cultural Right in 1966.[20]

With the existence of an international agreement, as such, ownership of rights to human rights does not mean free. But the consequences are binding. The existence of human rights actually exists, when the community has the willingness and willingness to acknowledge the rights of others, which ultimately can be connoted as a binding obligation for themselves. Therefore, in order for public order those rights and obligations are then regulated by law.

Human rights, in its implementation are not merely a matter of social authority can be a legal problem. Therefore, applied human rights must be regulated through products the law so that the realization and

15 Dalam pasal-pasal Undang-Undang Dasar 1945 Amandemen

16 Eman Prabowo, loc.cit, hal 83

17 Yusfendi Sudarso, *Implimentasi HAM di Negara Hukum*, Jakarta: Pamator Press, Jakarta, 2016, hal 135

18 Ibid, hal 148

19 Loc.cit, hal 79

20 Satya Arinanto, *HAM dalam Transisi Politik di Indonesia*, Jakarta; Pusat Studi HTN FH UI,2011, hal 82

protection of human rights must be maintained by the government as the organizer of the government. Especially in the perception of a state based on law (rechtstaat) in achieving its goals, automatically the dynamics of its constitutional life are based on existing legal rules, with the principle of obeying all norms both philosophically and the principles of law between others in the rule of law on the basis of equality before the law.

The realization of the ideals of the rule of law in a material sense as well as the Rule of Law as proof of the implementation of the legal order can be observed through the existence of full recognition by all legal community communities on the relationship between rights and obligations and responsibilities that cannot be emphasized just right. These three components are correlated as basic human rights individually, which then becomes the basis of human perception of living in a society, nation and state, whose philosophy must not be harmed through forms of exploitation unilaterally by anyone, including by the ruling community which is legitimized by authority country.

Conversely, if the emphasis is only on "rights" in the community that is carried out without responsibility, then the consequences can lead to the behavior of anarchist society. On the other hand, if the emphasis is on "obligations" that are emphasized to the community without the responsibility of the authorities, then the tendency of these authorities can become authoritarian. Or if the "obligations" become the burden of government alone, tend to lead a liberalistic government. Soon, if the aspects of responsibility to the government alone or to the community alone will tend and lead to communal government.

For states of democratic and constitutional law such as Indonesia, there is no other choice, except to carry out "rights, obligations, and responsibilities" equally regulated by legal products in the form of legislation which must then be applied, must be obeyed and must be upheld according to the moral law. Enforcement and implementation of the right human rights, from a legal perspective, is not formal. The existence of recognition of human rights recognized by our basic law contained in the 1945 Constitution both before and after amendments and having universal legal relations, which are correlated with international human rights recognition.

Recognition of human rights as the legal basis for the articles of the 1945 Constitution, deliver or require all Indonesian citizens to obtain legal protection wherever they are, without exception and without distinction of ethnic, religious, ethnic or other backgrounds. The existence of a democratic legal state, then the soul of the state of law exists in human rights that have been recognized, respected, and implemented and maintained. So then the inevitable consequences of state power holders that must be recognized, that the enforcement and realization of the legitimacy of human rights are part of the legal and political power of a country, of course, including in particular the Republic of Indonesia, which according to the 1945 Constitution explained firmly, that the State of Indonesia is based on law (rechtsstaat), not based on mere power (machtsstaat). That means that the Republic of Indonesia is a rule of law based on Pancasila and the 1945 Constitution, upholds human rights and guarantees all citizens at the same time in law and government, and must uphold the law and government with no exceptions.

> Correction or oversight of the enforcement of human rights in a legal state such as in Indonesia does not need to be assumed as an undermining of the authorities. Or even more so, do not be considered as undermining the state. In fact, the correction helped the government not to assume that this country was one of the countries "labeled" as a human rights violator by the international legal community. At present human rights are no longer just regional or national issues of a country. But human rights also involve a society between countries and are truly universal.[21]

So it is clear, that human rights in a state of law are not merely a compliment. The existence of human rights is precisely a measure that is feasible or not worthy of a country called So the existence of human rights in a state of the law is not just a symbol of human rights, in its implementation, it is not merely a matter of social authority which can be a legal problem. Therefore the application of human rights must be regulated through legal products so that the realization and protection of human rights must be maintained by the government as the organizer of the government. Especially in the perception of a state based on law (rechtstaat) in achieving its goals, automatically the dynamics of its constitutional life are based on existing legal rules, with the principle of obeying all norms both philosophically and the principles of law between others in the *rule of law* on the basis of *equality before the law.*

Enforcement and implementation of the right human rights, from a legal perspective, is not formal. The existence of recognition of human rights recognized by our basic law contained in the 1945 Constitution both

21 Andi Sunarto, *HAM di Negara Demokrasi*, Yogyakarta; Jakal Press, 2014, hal 207

before and after amendments and having universal legal relations, which are correlated with international human rights recognition.

D. CONCLUSION

Human rights in a state of law are not merely a compliment. The existence and legitimacy of accommodating basic rights in the state constitution, this is precisely a benchmark that is feasible or inappropriate for a country to be called a law state. So the existence and legitimacy of human rights in the rule of law are not just symbols. But human rights gain recognition through the state constitution, such as in the Unitary State of the Republic of Indonesia, which proclaims human rights in the constitution of the 1945 Constitution. Dissemination of human rights will be effective if the meaning of dissemination is interpreted sociologically by paying attention and weighting meaning, purpose and ideals of human rights itself. So that the spread is not enough to be allowed to run independently without being supported or encouraged by the government. The role of the government becomes very large to act actively and expansively together with non-governmental organizations, educational institutions, religious political institutions, and others.

The mode of disseminating knowledge of human rights can be carried out systematically, through various formal and non-formal educational institutions. Thus, from one educational material, both at the elementary, secondary, upper and higher levels of education, human rights material is proportionally or balanced and special, according to the level of its ability.

The dissemination of human rights knowledge is a proof of the commitment of the constitution of the 1945 Constitution, that humans live in a society, nation and state basically to lead a safe, peaceful and peaceful life based on the principle of mutual understanding regarding the nature of rights and obligations that must be obtained and carried out.

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Yusfendi Sudarso, *Implimentasi HAM di Negara Hukum*, Jakarta: Pamator Press, Jakarta, 2016.

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INTRODUCTION TO BAIL OUT TO BAIL IN THE HANDLING OF THE CRISIS OF BANKING FINANCE ACCORDING TO LAW OF THE REPUBLIC OF INDONESIA NUMBER 9 YEAR 2016 CONCERNING PREVENTION AND HANDLING OF THE FINANCIAL SYSTEM CRISIS

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Abstract

Regarding the implementation of national development, Indonesian Banking aims to support the implementation of national development in order to increase equity, economic growth, and national stability towards increasing the welfare of the people. Bail out in economic and financial terms is used to describe a situation in which a bankrupt or almost bankrupt entity, such as a company or a bank is given an injection of liquid fresh funds, in order to fulfill its short-term obligations, while Bail In is a crisis handling system finance where this system emphasizes if the Bank is unhealthy or bankrupt how to settle it from within the Bank itself in other words there is no bailout from the government. Related to the replacement of Bail Out into Bail In stipulated in the PPSK Act raises pro contra among banking law observers this is then interesting to analyze in the perspective of banking law and protection of bank customers who do not implement the Bail In system. This journal has 2 (two) problem formulations, First; how the legal aspects of substituting Bail Out can be a Bail In overcoming a banking financial crisis. Second; how to protect customers for banks that do not address the problem of the banking crisis through Bail In. The research method used in this study is normative legal research. In normative legal research, it uses secondary data that includes primary legal materials, secondary legal materials and Tertiary legal materials.

Keyword: Bail In, Bail Out, Bank.

A. INTRODUCTION

Regarding the implementation of national development in the provisions of Article 4 of Law Number 10 Year 1998 as a change to Law Number 7 Year 1992 concerning Banking, stipulates that, "Indonesian Banking aims to support the implementation of national development in the framework of increasing equity, economic growth, and national stability in the direction of improving the welfare of the people at large. Banking institutions act as agents of development to achieve these national goals, and do not become a burden and obstacle in the implementation of national development.[1]

A country must have a Central Bank created to catalyze other Banks. Article 23D the 1945 Law of the Unitary State of the Republic of Indonesia stipulates "The State has a central bank whose structure, position, authority, responsibility and independence are regulated by the Law".

The bank has a special position as a trust institution because it has the main activities to raise funds and channel funds from the excess parties to the disadvantaged parties. If the trust is disrupted, run phenomena can occur which can eventually drag the entire banking system into a crisis. Therefore, banking institutions need to be carefully regulated and monitored.[2]

Bank supervision aims to create and maintain a healthy banking system, grow naturally and benefit the national economy. In line with the development of a system of supervision of banks and financial institutions adopted in developed countries, since the early 1990s a concept known as careful supervision of the Bank has been adopted, a method of supervision used to prevent banks and financial institutions from taking excessive risks that could endanger the interests of creditors (depositors) and financial system stability.[3]

1 Hermansyah, *Indonesian National Banking Law*, (Jakarta: Prenada Media Group, 2011), page 41.

2 Try Widiyono, *Operational Legal Aspects of Banking Product Transactions in* Indonesia, (Bogor: Ghalia Indonesia, 2006), page. 7.

3 Zulf Diane+ Zaini dan Sopian Febriansyah*, Legal Aspects and Functions of* Lembaga Penjamin Simpanan, (Bandung: Keni media, 2014), page. 128.

The provision of BLBI at the time of the 1998 crisis was a dilemma option that must be faced by the Government. The dilemma option is to first close a number of banks at the risk of inviting depositors' panic, the paralysis of the entire banking system, chaos in payment traffic and stagnation of all national economic activities. Second, saving the Bank through the provision of banking liquidity assistance to prevent the collapse of the banking system with the risk of creating moral hazard. Thus, second - both contain risks and are very dilemmatic. Finally, the Government firmly takes the two choices outlined above. At first the bank that could not be rescued was closed. However, this can lead to a crisis of confidence in the national banking system. To prevent this kind of impact, depositors' money contained in closed banks is bailed out. Meanwhile, banks that may still be saved are given liquidity through Bank Indonesia or in other words using the Bail Out system. And in the case of the government Century Bank through Bank Indonesia, it also uses the Bail Out concept which ultimately harms the public and the state because the bailout cannot be returned properly.[4]

Bail out in economic and financial terms is used to describe a situation in which a bankrupt or almost bankrupt entity, such as a company or a bank is given an injection of fresh liquid funds, in order to fulfill its short-term obligations. Often the bailout is carried out by the government or a consortium of several investors who will ask for the role of control of the entity as a reciprocal for funds injected. Bail In is a financial crisis handling system in which this system emphasizes if the Bank is not healthy or goes bankrupt the way the settlement is done inside the Bank itself in other words there is no bailout from the government.[5]

The privileged position of a large bank, known as a systemic bank, has been questioned with the increasingly intensive discussion of the concept of Bail In as an alternative systemic bank rescue problematic. The Bail In concept introduced by Credit Suisse said that the best way to deal with systemic Bank problems was by forcing creditors, not taxpayers, to bear the losses of the Bank.

Related to the replacement of Bail Out into Bail In which is regulated in the PPSK Law raises pro contra among banking law observers this is then interesting to analyze in the perspective of banking law and if Bail In is positioned as a system then this is in line with the thesis delivered by Talcott Parsons about functionalism Structurally, a system that is good will automatically affect the sub-systems below, including the behavior of actors engaged in the banking sector.[6]

B. RESEARCH METHODS

The research method used in this study is normative legal research. In normative legal research, it uses secondary data that includes primary legal materials, secondary legal materials and Tertiary legal materials. The legal material used in this journal writing consists of:

1. Primary legal material in the form of basic regulations and legislation that includes:
   a. 1945 Law of the Republic of Indonesia
   b. Law Number 10 Year 1998 concerning Amendment to Law Number 7 Year 1992 concerning Banking.
   c. Law Number 3 Year 2004 concerning Amendment to Law Number 23 Year 1999 concerning Bank Indonesia.
   d. Law Number 9 of 2016 concerning Prevention and Management of the Financial Crisis Law Number 21 Year 2011 concerning Otoritas Jasa Keuangan.Law of the Republic of Indonesia Number 7 Year 2009 concerning Stipulation of Government Regulation in lieu of Law Number 3 Year 2008 concerning Amendment to Law Number 24 Year 2004 concerning Deposit Insurance Corporation.
   e. Otoritas Jasa Keuangan Regulation Number 14/03/2017 concerning Determination of Status and Follow-Up of Commercial Bank Supervision.
   f. Otoritas Jasa Keuangan Regulation Number. 03/15/2017 concerning procedures for Establishing Intermediary Banks.
   g. Otoritas Jasa Keuangan Regulation Number 15/03/2017 regarding the obligation for systemic Banks to have an action plan or recovery plan.

2. Secondary legal material that includes all reference books that the author uses, namely, among others,

4 Bank Indonesia Research Results (Satgas BLBI) dengan HLB Hadori & Rekan, *BLBI Legal, Political and Economic Perspectives*, (Jakarta: Bank Indonesia, 2003), page 17.

5 Definition or meaning Bailout, http://www.untukku.com/artikel-untukku/defenisi-atau-arti-bailout-untukku.html, diakses pada 17 April 2017.

6 George Ritzer, *Modern Sociology Theory*, (Jakarta: Prenada Media Group, 2014), page 117.

with material from various sources which includes books on Modern Sociology Theory, and Economic and Banking Law.

3. Tertiary Legal Materials Legal dictionaries, magazines, articles, and other materials relevant to the writing of this essay.

C. FORMULATION OF THE PROBLEM

Based on the background of the problem that the author described above a problem can be drawn as follows:

1. What aspects of legal considerations for Bail Out replacement can be a Bail In overcoming a banking financial crisis?

2. What is the protection of customers for banks that do not address the problem of the banking crisis through Bail In?

D. DISCUSSION

1. Legal Considerations Bail Out Replacement Becomes a Bail In Handling Banking Financial Crisis

Legal considerations for replacing Bail Outs become Bail In for the following reasons:

a. The bailout scheme or "Bail Out" is no longer the main choice in systemic bank rescue, because the policy is ineffective and spills state money, there is no Bail Out scheme that has succeeded in both Bail Out 1998 and 2008 and the bailout distribution scheme to help the Bank more has a negative side, because it makes the Bank not independent which leads to moral hazard and the results do not necessarily increase the Bank's resilience to the crisis and the existence of the Bail In concept will create a balance between the government, the private sector and market mechanisms / civil society due to handling the financial crisis of each party is involved from the government element represented by the Financial System Stability Committee, from the party can be represented by the private bank or the bank itself and from civil society can be represented by the customer, while in the Bail Out concept only relies on the government achieve it p roporsional in the handling of bank problems.[7]

b. The impact of the implementation Century Bank Bailout policy caused state losses of Rp 6.762 trillion in the Century Bank's determination as a failed bank to have a systemic impact.[8]

c. In the comprehensive text of UUPPKSK, the philosophical reason for substituting Bail Out is a Bail In that related to efforts to resolve the Bank's problems, Key Attributes (2014) provide guidance that alternative solutions to Bank problems should not depend on public ownership or Bail Out funds, solving the Bank's problems through market mechanisms is considered more appropriate than the settlement through public funds. Thus, alternative solutions to problems of the Bank must prioritize settlement through market mechanisms. Furthermore, if needed, institutions / authorities can provide incentives as an alternative solution through these market mechanisms. This is in line with the results of the assessment of the condition of Indonesia in the 2014 Peer Review of Indonesia that the solution to problem solving should not rely on public funds and also not provide statements or expectations that these funds are available. This is done to avoid moral hazard motives for banking industry players.[9]

d. The Bail In arrangement in this PPKSK Law adopts the results of international studies and practices in accordance with international standards that have been adjusted to consider the needs, urgency, conditions of the current financial system, legal system, and financial system in Indonesia.In addition, the arrangement has also adjusted to the needs based on the experience of the institution/ authority in dealing with crises in the past. This adjustment allows the provisions contained in the PPKSK Law to be implemented.[10]

e. The juridical basis for the existence of the Bail In concept in the PPKSK Law in the comprehensive draft PPKSK Bill is the need for the establishment of the PPKSK Law in order to carry out Article 11 section (5) of the Act concerning Bank Indonesia which states that " systemic impact, the provision of emergency financing facilities, and funding sources originating from the State Budget and

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7 Suci Sedya Utami, Skema *Bail-in* UU PPKSK, Minister of Finance Wants Owner of Capital struggle, http://ekonomi.metrotvnews.com/makro/eN4Q867b-skema-BailIn-uu-ppksk-menkeu-ingin-pemilik-modal-berjuang accessed on June 20, 2017.

8 Dian Maharani, The "Bail Out" Swelling of Rp. 6.7 Trillion for Century Has Been Predicted Early: http://nasional.kompas.com /read/2014/05/12/2059287/Membengkaknya.Bail.Out.Rp.6.7.Triliun.untuk. century. Sudah.Diprediksi.Sejak.Awal/, accessed on July 20, 2017.

9 Academic Script Draft Law on Prevention and Management of Financial Crisis, page 53.

10 *Ibid.,* hal.20-21.

Expenditures are regulated in separate laws "and Article 69 section (4) of the Law concerning the Otoritas Jasa Keuangan stating that" Provisions regarding the coordination protocol as intended in Article 44, Article 45, and Article 46 is valid until the enactment of the law concerning financial system safety nets ". The PPKSK Law will provide a strong legal basis for institutions / authorities to maintain and create financial system stabilization. Along with the needs and developments, the content of this Act was expanded not only to regulate matters as ordered by the Law concerning Bank Indonesia and the Law on the Otoritas Jasa Keuangan, but also include Principles and Objectives, Implementation of Financial System Safety Nets, Committees Financial System Stability, Handling of Financial System Stability Issues, Handling of Bank Problems, Incentives and / or Facilities in the Context of Handling SIB Banks, Funding, Data and Information Exchange, and Accountability and Reporting. As such, the PPKSK Law is intended to fill the gaps that exist in the current legislation, by stipulating provisions concerning:

1) Increased coordination between institutions / authorities related to the management of Indonesia's Financial System Stability;
2) Improving the quality of regulations concerning handling the financial system in abnormal conditions;
3) Preparation of a legal basis that is stronger for regulators in making polici es for handling abnormal conditions; and
4) Increasing public trust in the financial system, especially the banking sector.[11]

f. The sociological foundation of the presence of the Bail In concept in the PPKSK Law in the comprehensive draft PPKSK Bill that Financial System Stability is a very important factor in increasing public confidence in the financial sector. In abnormal conditions panic will arise in the community . Under these conditions the Bank has a problem of liquidity difficulties, so that public trust in the Bank will diminish, even triggering large-scale withdrawal of funds (Bank run) by the public. If there are no handling steps taken by the Government or there is a mismanagement to save the Bank, then the public trust in the national banking will decline. In the end, this will disrupt the national economy. Therefore, the handling of the financial system in the face of Abnormal Conditions is the responsibility of the Government, institutions / authorities in the financial sector, economic actors, and the public using the financial system. This shared responsibility can alleviate the Government's duty in maintaining economic stability, so that it can realize a national economy that grows sustainably. To not cause a dispute over decisions taken by the institution / authority that handles the settlement of the SIB Bank, clear and accurate decision-making mechanisms are carried out.

g. The Bail In concept contained in the PPKSK Law places more emphasis on prevention in the event of a financial crisis that has a systemic impact while the Bail Out action taken is focused not on prevention but acts after the crisis so that the Bail concept will lead to the realization of legal certainty, benefits and justice for all parties.

h. The Bail In mechanism does not use the APBN funds at all while the Bail Out still uses APBN funds.

i. The global financial crisis is unpredictable when it is possible to eliminate economic paralysis in Indonesia. More prevention mechanisms are needed compared to the rescue mechanism (Bail In or Bail Out). become Bail In.

j. *Bail Out* makes the Bank not independent while *Bail In* makes the Bank independent.

Bail Out as a system for dealing with financial crises can not be chosen as a solution because it is feared that *Bail Out* actions will lead to state losses because *Bail Out* uses APBN funds so that when his bailout is not returned it certainly causes state losses.

2. Customer Protection for Banks that Do Not Overcome Problems in the Banking Crisis Through Bail In

Bank customer protection for Banks that cannot overcome the financial crisis through Bail In, among others:

a. In the civil law book Article 1365, that: Any act that violates the law, which brings harm to another person, requires the person who caused the wrong to issue the loss, to compensate for this loss and in Article 1367 that a person is not only responsible for his own damages but also for losses caused by thE ctions of people who are responsible or caused by goods that are under their supervision, so that

11 *Ibid.,* hal. 98-99

a Bank that does not deal with a financial crisis that can cause losses to the Bank's customers is the responsibility of the Bank itself.

b. Law of the Republic of Indonesia Number 10 Year 1998 concerning amendments to Law Number 7 Year 1992 concerning Banking in Article 29 section 2-3 that Banks are required to maintain the soundness of the Bank in accordance with the provisions of capital adequacy, asset quality, management quality, liquidity, profitability, solvency, and aspects others related to the Bank's business, and are obliged to conduct business activities in accordance with the principle of prudence. In providing credit or financing based on Sharia Principles and conducting other business activities, Banks are required to take measures that do not harm the Bank and the interests of customers who entrust their funds to the Bank and for the benefit of customers, Banks are required to provide information about possible risk of losses in connection with customer transactions conducted through the Bank.

c. Found in Law Number 24 Year 2004 concerning the Deposit Insurance Corporation in Article 4 that LPS functions to guarantee deposits of depositors; and actively participate in maintaining banking system stability in accordance with its authority and in Article 10 that LPS guarantees Bank customer deposits in the form of demand deposits, deposits, certificates of deposit, savings, and / or other similar forms. (1) The value of deposits that are guaranteed for each customer in one bank shall be a maximum of Rp 100,000,000 (one hundred million rupiah). (5) Further provisions regarding the determination of guaranteed Deposits for each depositing customer in one Bank as referred to in paragraph (1), are regulated by the LPS Regulation. then with the issuance of Government Regulation in subtitution of Law Number 3 Year 2008 concerning Amendments to Law Number 24 Year 2004 concerning the Deposit Insurance Corporation into Law, the value of deposits guaranteed is 5 billion rupiah.

d. In Law Number 21 Year 2011 concerning the Otoritas Jasa Keuangan regulates consumer and public protection in Article 28 that for the protection of consumers and the public, OJK is authorized to take measures to prevent losses of consumers and the public, which include: a. provide information and education to the community on the characteristics of the financial services sector, services and products; b. ask the Financial Services Institution to stop its activities if the activity has the potential to harm the community; and c. other actions deemed necessary in accordance with the provisions of legislation in the financial services sector. Article 29 that OJK performs Consumer complaints services which include: a. prepare adequate equipment for the service of complaints of Consumers who have been harmed by actors in the Financial Services Institution; b. make a mechanism for complaints of Consumers who are harmed by actors in Financial Service Institutions; and c. facilitate the settlement of complaints of Consumers who have been harmed by actors in the Financial Services Institution in accordance with the laws and regulations in the financial services sector. And article 30 that for the protection of consumers and the public, OJK has the authority to carry out legal defense, which includes: a. order or take certain actions to the Financial Services Institution to settle Consumer complaints that the Financial Services Institution has harmed; b. filing a lawsuit: 1. to recover assets belonging to the party who is harmed by the party causing the loss, both those under the control of the party causing the loss and under the control of another party in bad faith and / or 2. to obtain compensation from the party causing losses to the Consumer and / or the Financial Services Institution as a result of violations of laws and regulations in the financial services sector. (2) Replace losses as referred to in paragraph (1) letter b number 2 only to be used for payment of compensation to the injured party.

e. The PPKSK Law does not explicitly explain customer protection with the Bank but the author tries to analyze if the PPKSK Law prioritizes prevention in the event of a crisis that affects the Bank, meaning that with this Act the Bank can be protected from financial crisis threats if the Bank can be protected Bank customers are also protected. The protection starts from the prevention stage of the financial crisis by establishing a Financial Stability Committee filled by Bank Indonesia, LPS, OJK, the Minister of Finance in charge of monitoring and maintaining Financial System Stability in accordance with the duties and authority of each member to prevent the Financial System Crisis, monitoring and maintenance of Financial System Stability by members of the Financial System Stability Committee based on the Act and in accordance with the crisis management protocol of each member, systemic Bank determination, Handling of Systemic Bank Liquidity Problems, Handling of Systemic Bank Solvability Problems, Handling of Bank Problems other than Systemic

Banks and handling of financial crises starting from handling the problems of the Bank, Banking Restructuring in the Financial System Crisis. Even if the Bank does not want to overcome the financial crisis through the Bail concept as described above, the Bank must be responsible for the losses suffered by the customer and may be subject to Article 1365 and 1367 of the Civil Code.

E. CONCLUSION

The conclusions that can be taken from the previous discussion in writing this journal are as follows:

1. Legal considerations for replacing Bail Outs become Bail In for the following reasons:
   - **a)** Bail Out schemes or Bail Outs are no longer the main choice option in systemic Bank rescue, because the policy is ineffective and costs state money.
   - **b)** Alternative solutions to Bank problems should not depend on public ownership or Bail Out funds.
   - **c)** Bail In arrangements in the PPKSK Law have adjusted to the needs based on the experience of the institution / authority in dealing with crises in the past.
   - **d)** PPKSK Law will provide a strong legal basis for institutions / authorities to maintain and create financial system stabilization.

   Bank customer protection for Banks that cannot overcome the financial crisis through Bail In, among others:
   - **a)** Banks that do not overcome the financial crisis that can cause losses to bank customers are the responsibility of the Bank itself based on Article 1365 of the Civil Code.
   - **b)** Banks are required to maintain the soundness of the Bank in accordance with the provisions of capital adequacy, asset quality, management quality, liquidity, profitability, solvability, and other aspects related to the Bank's business, and are obliged to conduct business activities in accordance with the precautionary principle.
   - **c)** LPS functions to guarantee deposits of depositors; and actively participate in maintaining the stability of the banking system in accordance with its authority
   - **d)** In Law Number 21 Year 2011 concerning the Otoritas Jasa Keuangan regulates consumer and public protection in Article 28 that for the protection of consumers and the public,
   - **e)** The PPKSK Law prioritizes prevention in the event of a crisis that affects the Bank, meaning that with this Act the Bank can be protected from the threat of a financial crisis, if the Bank can be protected then the Bank's customers will also be protected.

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STATE FINANCIAL LOSSES IN PERSERO COMPANIES MANAGEMENT

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Abstract

Persero or Perseroan Company is one form of State-Owned Enterprises (BUMN). The form of Persero is designed like a Limited Liability Company (PT). An interesting character in PT is its status as a legal entity that has a separate legal entity and capital divided into shares (shares). The legal consequence of a separate legal entity is that the Company can own wealth and act as a legal subject or rechtpersoon. As a result of the regulation and the inconsistent and non-synchronous application of the law, it raises legal rules of conflict (rechtsnorm) between private law and public law. Continuous conflicts certainly result in blurring the boundaries between public law and private law, which ultimately affects the guarantee of legal certainty (legal certainty, rechtszekerheid). This legal problem is very important to study, especially in the context of rules relating to the Persero in its position as PT (privaatrechtelijk rehtspersoon) which are within the scope of private law, with the application of law or law enforcement related to government interests that are within the scope of public law.

Keyword: Persero, public law, private law, corruption.

A. INTRODUCTION

Persero or Perseroan Company is one form of State-Owned Enterprises (BUMN), besides the form of Public Corporation.[1] The form of Persero is designed like a Limited Liability Company (PT). The old arrangement that shows this is Article 2 of Law Number 9 Year 1969 which determined that the Persero is a company with a form of Limited Liability Company which is regulated by the Commercial Law Act (Wetboek van Koophandel).[2] Current understanding according to Article 1 number 2 of Law Number 19 Year 2003 concerning BUMN (UU BUMN), Persero is defined as a State-Owned Enterprise in the form of a limited liability company with a capital of at least 51% (fifty one percent) owned by the State with the aim of pursuing profits.[3] This capital is a minimum of capital, thus all companies in the form of PT are Persero if the shares are between 51% and 100% owned by the State.

The use of the form of the Persero as a state business with legal construction is the same as PT, which certainly has certain reasons. An interesting character of PT is its status as a legal entity that has a separate legal entity and capital divided into shares (shares).

The legal consequence of a separate legal entity is that the Company can own property and act as a legal subject or rechtpersoon, make agreements, demand and be prosecuted, carry out the rights and obligations granted by the state or in Chidir Ali's terms to have rechtsbevoegdheid.[4] The status of law for the Perseroan Company is important, to separate itself from the influence of the State. Even though Rudhi Prasetya stated that, "… *an enterprise needs not only a separate personality, but also the authority to divise its own budgetary and accounting procedures in accordance with well established (or sometime newly established) commercial principles and to frame and apply its own personal relations*."[5] The loss of the Persero from the power of the state means that all consequences and debts arising from the activities

1 Berdasar Pasal 9 UU BUMN diatur bahwa BUMN terdiri dari Persero dan Perum. Bentuk Persero dikenal pertama kali ketika diterbitkan Inpres Number 17 Tahun 1967 tentang Pengarahan Dan Penyederhanaan Perusahaan Negara Ke Dalam Tiga Bentuk Usaha Negara. Sebelum diterbitkannya Inpres Number 17 Tahun 1967 dan UU Number 9 tahun 1969 tentang Bentuk-bentuk Usaha Negara, hanya dikenal satu bentuk usaha negara yaitu Perusahaan Negara.[1] Untuk efisiensi melalui Inpres 17 Tahun 1967 semua PN diubah bentuknya ke dalam tiga bentuk usaha negara yaitu Perjan, Perum dan Persero.

2 Untuk Pertamina pada tahun 1971 diterbitkan UU Number 8 Tahun 1971 tentang Pertamina yang menghilangkan kata PN di depan Pertamina tanpa merubah struktur hukumnya. Anehnya Pertamina bukan berbentuk Persero dan diproteksi dari kemungkinan partisipasi modal dari luar, tetapi diperbolehkan melakukan *production sharing contract*. Tetapi pada saat ini Pertamina telah berbentuk Persero.

3 Pasal 1 angka 2 UU BUMN.

4 *Ibid*., hal.168.

5 Dikutip dari Rudhi Prasetya, *Op.Cit*., Kedudukan Mandiri PT, hal 114, yang mengutip dari *Report Of The United Nations Seminar On Organisastion And Administration Of Public Enterprise* yang juga disebut dalam Rudhi Prasetya dan Neil Hamilton, dalam The Regulation of Indonesian State Entreprises, Law and Public Enterprise in Asia, Chapter V, International Legal Center, Praeger Publishers, New York, 1976, hal 158.

of the Persero as legal subjects must be borne by the Persero itself. Claims on Persero cannot be sued on the personal assets of the management or its shareholders, even if the shares are controlled by only one person.[6] It is important to separate State assets from the assets of the Persero, which has its own budgeting and accounting procedures, so that third parties can only claim up to the limits of the Persero's assets, and cannot sue or collect the State.

In its development there are many legal problems that arise in the activities of the Persero. The assumption for this is due to the arrangements that do not apply consistently or out of sync. The consequence of this inconsistent and inconsistent application has led to the rule of law conflicts (rechtsnorm) between private law and public law. Continuous conflicts certainly result in blurring the boundaries between public law and private law, which ultimately affects the guarantee of legal certainty (legal certainty, rechtszekerheid). This legal problem is very important to study, especially in the context of rules relating to the Persero in its position as PT (privaatrechtelijk rehtspersoon) which are within the scope of private law, with the application of law or law enforcement related to government interests that are within the scope of public law.

To clarify the description of the rules of conflict above, two examples of the following cases are presented. First, the case of PT. Bank Mandiri Tbk. (Persero), where the former Managing Director (Managing Director) of the bank was prosecuted for corruption because of the credit disbursed. Second, the former Managing Director of PT Jamsostek (Persero) was sued for corruption, because the country lost Rp. 311 billion, related to the purchase of medium-term notes (MTN) in four companies, namely PT Dahana (Rp. 97.8 billion), PT Sapta Pranajaya (Rp. 100 billion), PT Surya Indo Pradana (Rp. 80 billion), and PT Volgren (Rp 33.2 billion). In both of these cases, the judges argued that the Managing Director proved to be detrimental to the country's finances, thus fulfilling the element of criminal acts of corruption.

The application of public law to the Persero is a result of the view or perception that the Persero is a state asset. Such views are contrary to the law of the company, where the Company is considered as a private legal entity (privaat rechtelijk rechtpersoon) which has its own rights and obligations apart from the influence of the State or shareholders. Regardless of the decisions of judges in sample cases, it should be recognized that there are no juridical differences between the Persero and PT, and that the involvement of the State results in inconsistency in the application of the law. This is evident from the decisions in the case of the previous example.

B. RESEARCH METHODS

This research was conducted using the Normative Juridical approach. Library material is used as the main ingredient, namely primary legal material consisting of basic norms or rules, basic rules or regulations, as well as legislation. In addition, secondary legal materials are also used as secondary data covering primary, secondary and tertiary legal materials as a result of research by academics and legal experts.

C. FORMULATION OF THE PROBLEM

Based on the introduction above, the starting point of the problem in this paper is:

1. Can Persero Companies Directors be subject to corruption?
2. What is the concept of loss in public law / administration and private law / corporate law?

D. DISCUSSION

1. Whether or not Persero Companies Directors can be subject to Corruption Crimes

a) Due to Insynchronization Settings

The application of criminal acts of corruption to Persero Directors that have proven to be detrimental to the State's finances in the case of an example is principally based on the asynchronous arrangements described above. Broadly speaking, this problem of inconsistency is among the arrangements that determine that Persero's assets are State assets that must comply with the PTPK Law.

1) The assets of Persero are treated as State assets based on the following arrangements:

2) Article 2 letter (g) of the State Finance Law which determines that, including in the sense of state finance is state wealth, which is managed by itself or by other parties, including assets separated from state enterprises.

6 Bandingkan dengan Rudhi Prasetya, *Ibid*., Kedudukan Mandiri PT, hal. 50 – 51.

3) Article 1 number 5 of the State Finance Law which determines that, a State Company is a business entity whose entire or part of its capital is owned by the Central Government.
4) Explanation of State Finance Law number 3 concerning Understanding and Scope of State Finance, includes an understanding of the object, subject, process and purpose.
5) General explanation of paragraph IV of the PTPK Law which states that including state finances are all state assets in any form, which are separated or not separated, and in the control of anyone.

All arrangements above are contrary to Article 4 section (1) of the BUMN Law. After the separation process is complete, and then the State engages in participation, then for the sake of law the participation becomes the assets of the Persero. This investment is a legal claim from a legal entity to be used as capital. After that, full capital becomes the wealth of the Persero, it is no longer the wealth of the State, so that all financial problems in the Persero must be settled according to the provisions of the Law on PT. In this case Arifin P. Soeria Atmadja stated that there had been a legal transformation from public finance to private finance.[7]

Based on the formulations mentioned above, all regulations concerning state finance automatically apply to the Persero, because the Persero falls into the category of State Enterprises. The breadth of this understanding is the basis of the mistaken view that the rules apply to the management of State finances; so that the losses of the Company due to the mistakes of the Board of Directors are also losses of the State. Incorrect understanding due to the regulation of separated state wealth as outlined above, and thus the assets of the Persero is the wealth of the State, resulting in the use of the budget of the Persero also being the object of examination in public / criminal law.

The inconsistency in the formulation of this regulation results in a wrong understanding of the legal concept between the law of the company; State financial law and special criminal law concerning corruption. The next result is the absence of legal certainty. The indictment of corruption due to the loss of State finances to the Persero's directors as described in the example case can be said that there has been a crisis in the law of the company / PT.

Erman Rajagukguk believes that there is nothing wrong with the formulation of State finances in both the PTPK Law and the State Finance Law. It's just that there has been a misunderstanding and application with what is meant by State finance when it is associated with separated state assets.[8]

This opinion is not entirely true. The real problem is that there is a lack of understanding of the character of the Persero as a legal entity that has different funding sources than most private PT.

On the other hand, the Company has a burden on Public Service Obligations (PSO) with a separate budget system. PSO is a special task related to public services regulated in Article 66 of the BUMN Law. In the legal concept the administration of this assignment is a mandate. In the construction of the mandate, all responsibility for its implementation is with the creditor. Therefore, in this special assignment all costs are borne by the government. Because PSO is a government obligation. For this reason, the position of the Persero in this case is the recipient of the mandate or mandate. The Mandatary acts for and on behalf of the credentials or mandans.

Based on these specific tasks, many government funds are included in the Persero companies' budget. The accountability of funds related to PSO depends on the government's intention. If the PSO funds are then used as Persero companies' capital / wealth participation, the participation mechanism must be followed by issuing a Government Regulation. But if it is not used as capital participation, it must be accounted for based on the rules of state financial management, namely the Law on State Finance, the State Treasury Law and the State Financial Accountability Act. Likewise, if there are deviations, these three rules should be used instead of being transferred to criminal law / corruption. An important reason that can be stated here is that the granting of a mandate is within the scope of administrative law, therefore the system of accountability of the implementation of the mandate must also be within the scope of administrative law.

Despite implementing PSOs, directors of the Persero remain non-public officials and not civil servants. This position cannot be changed. Similarly, the form of private legal entity does not change into a public legal entity (publiekrechtelijke rechtspersoon). As such, it should be if the Directors of the Persero are not "perpetrators" in the formulation of Article 2 and 3 of the PTPK Law. Persero Directors are appointed and dismissed by the GMS. For this reason, the Persero Directors are responsible only to the GMS. The

7 Loc. Cit: www.hukumonline: Tanggal 24 Februari 2003.

8 Ridwan Khairandy, Jurnal Hukum Bisnis, Volume 26, N0. 1 Tahun 2007, Konsepsi Kekayaan Negara Yang Dipisahkan Dalam Perusahaan Perseroan, hal. 36-37, yang mengutip dari Erman Rajagukguk, Nyanyi Sunyi Kemerdekaan Menuju Indonesia Negara Hukum Demokratis, Fakultas Hukum Universitas Indonesia, Lembaga Studi Hukum dan Ekonomi, Depok, 2006, hal. 386.

formulation of Article 1 section (2) letters d and e of the PTPK Law does not automatically cause the Directors to be treated as "people". Based on this formula, the possibility of Directors, Commissioners and employees of the Persero is included in the category of "people" who "civil servants" in this formula do not exist, if the Persero is recognized as not receiving assistance and using capital or facilities from the State. It is precisely Article 1 section (1) of the PTPK Law which designates that "both legal entities and non-legal entities", make it easy for public law / criminal corruption to enter private / corporate law.

In addition to the function of the spider web PTPK Law, it can also be done through Article 3 of the PTPK Law regarding abuse of authority. This is unfortunate, has occurred in the purchase of Medium-Term Notes (MTN) and the purchase of debt securities to the former Managing Director and Investment Director of PT Jamsostek. High risk investments that are not guaranteed security, are considered to have been misused of authority. In Article 3 of the PTPK Law it is regulated that:

> "Everyone who aims to benefit himself or another person or a corporation, misusing authority, opportunity, or means available to him because of a position or position that can harm the State's finance or the country's economy, is punished with a life sentence or the shortest imprisonment 1 (one) year and no later than 20 (twenty) years and or a fine of at least Rp. 50,000,000 (fifty million rupiah) and at most Rp1,000,000,000.00 (one billion rupiah). "

The emphasis of this arrangement is that the purpose of abuse is to benefit oneself or another person or a corporation. Thus, if it is proven that someone has benefited from an act of abuse, then this category is included in the formula. On the other hand, the condition must be fulfilled that from the profits obtained, the State is harmed. Thus, if someone gets a profit but the State is not harmed, then there is no element of abuse of authority. In the case of Jamsostek, a high-risk investment that is not guaranteed to be safe has been considered as potentially detrimental to the country's finances.[9]

The parameter of someone misusing authority is if the authority is used but it is not in accordance with the purpose of giving the authority. If then, based on the authorities granted, the Company will suffer losses, then the Board of Directors can be held accountable. In the concept of private law / corporate law losses of the Company can be tested, whether the loss is a mistake of the Board of Directors or not. If later this is included in the administrative legal concept, the loss of the Persero cannot simply be categorized as an abuse of "public" authority, because abuse of authority at this level remains in the "private" authority. Persero's loss is PT's loss which is in the legal concept of the company, although in Persero it is related to state shares of at least 51%.

b) Possibility of Defects Procedure

Defects Procedure in the Persero companies, can occur at the level of the implementation of the PSO. This can happen because the PSO budget is separate from the assets of Persero. The purpose of the PSO is related to the supply of goods and services to fulfill the lives of many people. Article 99 PP Number 45 Year 2005 stipulates that the procedures for procuring Persero goods and services using APBN funds must be carried out based on the General Guidelines of the minister. For Closed Persero, the General Guidelines must be considered as a GMS decision, whereas for Persero which is not all its shares owned by the State, these general guidelines must be confirmed in advance by the GMS.

As a result of the budget system that is separate from the assets of the Persero for the implementation of the PSO, the implementation of Goods and Services Procurement must be referred to Presidential Decree 80 Year 2003 concerning Guidelines for Procurement of Government Goods and Services jo Presidential Regulation Number 8 Year 2006. In administrative law, the process implemented in accordance with Presidential Decree 80 Year 2003, a procedure defect is considered, which must be repeated. At this level, Persero Directors can be deemed to have violated procedures, and or can even be indicated on corruption if it turns out that their actions in the future, related to the procurement of goods and services are considered to have harmed the state finances.

Based on Presidential Decree Number 80 Year 2003 jo. Presidential Regulation Number 8 Year 2006, all Procurement of Goods and Services whose financing is partially or wholly charged to the State Budget, the process must comply with this Presidential Decree. Article 7 of Presidential Decree Number 80 Year 2003 stipulates that:

9 Potensi kerugian dapat dianggap sebagai tindak pidana korupsi berdasar Pasal 2 Uu PTPK, bukan Pasal 3 UU PTPK. Hal ini yang mengakibatkan kerancuan.

1) The scope of validity of this Presidential Decree is:
2) procurement of goods / services whose financing is partly or wholly charged to the APBN / APBD;
3) procurement of goods / services that are partially or wholly financed from foreign loans / grants (PHLN) that are in accordance or not in conflict with the guidelines and provisions for the procurement of goods/services from the lenders / grants concerned;
4) procurement of goods / services for investment in the BI, BHMN, BUMN, BUMD, whose financing is partly or wholly charged to the APBN / APBD.

Presidential Decree Number 80 Year 2003 in conjunction with Presidential Regulation Number 8 Year 2006. stipulates that the procurement of goods or services with a budget above 50 (fifty) million rupiah must be made by tender. As an example of this case is the case of the project for the procurement of two turbine gas mounted trucks for the Borang PLTGU, Palembang, South Sumatra carried out by PT PLN. In this case, there was a mark-up in the purchase of the two devices.[10] Besides that, in the process of procuring the turbine it was not carried out by tender because of the very urgent conditions, namely the planned power outage in Sumatra, the implementation of the National Sports Week, and the implementation of the 2004 Election.[11] The mode of corruption, is that the project implementation team buys used machines, even though the budget is for the purchase of new generating machines.

On November 2, 2007 the South Jakarta District Attorney issued a Decision Letter on Termination of Investigation and Prosecution (SK-SP3) Number Tap 03 / 0.1.14 / ET.1 / 11/2007 for Ali Herman Ibrahim and Agus Darmadi, Number Tap 04 / 0.1. 14 / ET.1 / 11/2007 for Yohanes Kenedy Aritonang, and Number Tap 05 / 0.1.14 / ET.1 / 11/2007 for Edy WidioNumber[12] Termination of Investigation Letter on alleged corruption in purchasing the PLTGU machine This form stipulates that the purchase process is in accordance with Presidential Decree Number 80 Year 2003 concerning Procurement of Goods and Services;[13] and that there was not enough evidence in the investigation process, whether it was an element against the law or an element of state loss.[14]

The existence of a defect's procedure does not automatically contain elements of abuse of authority. Procedure defects have implications for abuse of authority if the use of such authority deviates or contradicts the purpose of granting the authority set by law.[15] For example, direct appointment is intended to benefit one of the partners. At this level there is abuse of authority and procedural defects. If then the abuse of authority and disability of this procedure results in State loss, it can be subject to corruption.

2. Concepts of Losses in Public Law / Administration and Private / Legal Law of the Company

a) State Losses and Losses

The definition of State loss is regulated in Article 1 number 22 of Law Number 1 Year 2004 concerning State Treasury. There are three conditions that must be met, namely the lack of both money, securities, and goods; definite and real amount; due to acts against the law both intentionally and negligently.

Based on this rule, all forms of shortages or reductions in certain numbers and proven results due to illegal acts or due to negligence, can be declared as State losses. On the other hand, Article 2 section (1) of the PTPK Law, specifies about actions that cause losses to the State and / or the country's economy. Harm the economy of the country, which is detrimental to the economy, structured as a joint venture, which aims to provide benefits, prosperity, and welfare of the people.

Based on this study, there are differences in the formulation of the State Treasury Law and the PTPK Law. In the State Treasury Law uses the state loss formula with a lack of pressure or a reduction in the amount, while the PTPK Act seeks to cover anything not just a reduction in the amount, but enough on word pressure can be detrimental. In addition, the State Treasury Law uses formulations against the law, while the PTPK Law uses the formula against the law. This difference in formulation shows that there are different uses of legal concepts between the two laws. The State Treasury Law has the background of an administrative legal concept, while the PTPK Law has a background in the concept of criminal law.

10 www.AntiKorupsi.org: Jumat, 21-April-2006: Pembelian Dua Buah Turbin Gas Truck Mounted Pada 2004.
11 www.tempointeraktif, Dirut PLN Mengaku Tak Tahu Penggelembungan Dana Proyek Borang, Kamis, 26 Januari 2006 | 11:29 WIB.
12 www.INNChannels, Minggu, 04 November 2007: Penghentian Kasus Borang Dinilai Positif.
13 www.sinarharapan.co.id/berita/0711/03/nas03.html: Proses Hukum Dugaan Korupsi PLTGU Borang Dihentikan.
14 www.hariansib.com/2007/.../tak-cukup-bukti-kasus-korupsi-dirut-pln-di-skp3
15 Bandingkan dengan Nur Basuki, *Op. Cit*., hal. 132.

In the concept of criminal law criminal acts (Strafbaarfeit) the point is the wederrechttelijk feit or acts that are against the law.[16] The normative measure to determine whether the deed can be done is nulla poena sine praevia legi poenali which is regulated in Article 1 section (1) of the KUHP. So, for the existence of criminal (straf) must be preceded by the criminalization of acts in the legislation.[17] On the other hand the formulation of acts against the law in administrative law adopts onrechtmatige daad from the concept of private law. It must be admitted that Article 1365 BW has indeed developed and spread to various types of laws.[18]

In the onrechtmatige daad it is regulated that: "Elke onrechtmatige daad, waardoor aan een ander schade wordt toegebragt, stelt with door wiens schuld die schade veroorzaakt is de verpligting dezelve te vergoeden". Which is translated: "every act that violates the law and brings harm to another person, requires the person who caused the loss because of his mistake to compensate for the loss".[19]

Article 1366 BW regulates losses due to negligence as follows: "Een ieder is verantwoordelijk, niet alleen voor de schade, door to door zijne daad, maar ook voor die welke hij door zijne nalatigheid of onvoorzigtigheid veroorzaakt heeft".[2020] Which is translated: "everyone is responsible, not only for losses caused by acts, but also for losses caused by negligence or carelessness".[21] The purpose of these two arrangements is to affirm, that not only is wrongdoing (schuld) or intentional (nalatigheid), but also culpoos actions can be sued to pay compensation.

Thus, it can be said that the two concepts of regulating State losses and or State financial losses in the State Treasury Law with the PTPK Law are different, although State losses can of course be included in the category of State financial losses. Basically, a loss (schade) in private law refers to the economic meaning that can be judged by money alone is enough. Therefore onrechtmatigedaad includes: a) actions that violate the rights of others; and b) contrary to dader's legal obligations.[22]

Economic calculation at a loss means very broad. Whereas "detrimental to state finances" in the formulation of the PTPK Law only points to one thing, namely state money that has very broad coverage. If the formulation of the PTPK Law adopts the narrow meaning of onrechtmatigedaad that the act of "detrimental to the State's finances" is a form of "reduction in number", and for that it is categorized as "an act that violates the rights of others". open norm genus.[23]

The form of "deficiency" or "reduction in number" in the concept of the State Treasury Law, must refer to the number of "definite and real". This is very reasonable. In the concept of private law, even though the loss is due to "violation of a right", the amount of the loss must be calculated economically with a "certain and real" amount. In the formulation of the PTPK Law, the word "can be detrimental" is used, which certainly refers to an uncertain number because it relates to the word "can". This cannot be explained in the concept of criminal law.

The procedure for resolving State compensation stipulated in the State Treasury Law has been completely regulated apart from criminalization, but more towards recovery efforts. This is in accordance with the concept of private law adopted, that the pressure on the concept of onrechtmatigedaad is payment of compensation. Preventive, repressive and internal control measures that exist are settlement of compensation, administrative sanctions and criminal sanctions, both those determined by the State Treasury Law itself, as well as the State Finance Law, and the Law on Examination of Management and Responsibility for State Finance.

b) Shareholder Losses and State Losses

The State's position in the Persero companies as a shareholder equal to other shareholders if any. This is confirmed in Article 14 section (1) of the BUMN Law. In company law, shareholders will suffer losses if they do not receive dividends or share prices fall. No receipt of dividends or a decrease in stock prices due to the economic crisis can be said to be detrimental to the State. This is a natural consequence that must be borne by the state as a business actor.

16 Mariam Darus, *Op. Cit*., hal. 5,

17 *Ibid.*

18 *Ibid.,* hal. 2.

19 Himpunan Peraturan Perundang-undangan Republik Indonesia, Disusun Menurut Sistem Engelbrecht, Jakarta, Ichtiar Baru – Van Hoeve, 1989, hal. 521.

20 *Loc. Cit*.

21 *Loc. Cit*.

22 Prawirohamidjojo, Soetojo dan Marthelena Pohan, Onrechtmatige Daad, Foto Copy Perc. & Stensil "Djumali", Surabaya, Desember 1979, hal. 3.

23 *Op.Cit*.

The form of PT is a business entity that is widely chosen because it is easy to know the risks that will be borne by the shareholders. The risk that will be borne by shareholders if the Persero loses is only limited to the invested shares.[24] The non-receipt of dividends and the possibility of a decline in share prices should also be a risk that shareholders have calculated when buying shares. Such construction ownership is actually a fair or fair construction.

Through stock institutions, shareholders benefit in the following ways:[25]

1) shareholders do not need to monitor the possibility of financial loss because their responsibilities have been limited to the number of shares planted;
2) shareholders can reduce individual risk, because losses will be borne together with other shareholders.

Thus, the risk of loss of shareholders, namely not receiving dividends, loss of capital gains (margin), and loss of the assets of the Persero either partially or wholly at the time of dissolution of PT, must be known or at least accounted for by shareholders, in this case the State. For this reason, the importance of the establishment of a Persero by the Minister of Finance, the Technical Minister and the BUMN Enterprises is very important.[26]

In the concept of private law, the risk of loss of shareholders is called the profit that should be obtained. The amount of profit that should be obtained cannot be ascertained, and the form is not real. For uncertain losses, economic calculations can only be used for losses due to violations of rights (onrechtmatigedaad in the narrow sense). Likewise, with State losses due to a decline in stock prices. Legal remedies that can be taken if a decrease in share price occurs due to illegal acts or negligence of the Directors and / or Commissioners, are based on Article 1365 BW (onrechtmatigedaad).

Shareholders' legal protection for possible losses in their business, in company law regulated Article 97 section (6) and Article 114 section (6) of PT Law that: "On behalf of the Company, shareholders representing at least 1/10 (one per tenth percent) part from the total number of shares with voting rights, they can file a lawsuit through a district court against members of the Board of Directors and / or Commissioners who caused a mistake or negligence to cause a loss to the Company ".

E. CONCLUSION

Based on the descriptions in the discussion above, a line can be drawn that basically whatever the reason is the Persero's Board of Directors cannot be subject to criminal acts of corruption. Errors in Persero's wealth management do not necessarily harm the State. This assumption is wrong and endangers legal certainty (rechtszekerheid). Persero's losses are not State losses, because the losses of the Persero do not necessarily harm the shareholders. State losses as shareholders will be known with certainty when the distribution of the remaining assets in the case of Persero disburses. The limit of State losses as a shareholder is only limited to its shares.

In law enforcement practices, there seems to be no understanding of legal concepts both corporate law and administrative / state finance law. The PTPK Law and the State Finance Law which are essentially made to save the state's money are not clearly defined in terms of law enforcement practices. In certain cases, if the National Finance Law, State Treasury Law and Management Examination Law and State Financial Responsibility Law are insufficient, indications of corruption can only be used by Persero Directors regarding their position as PSO budget users.

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24 Pasal 3 ayat (1) UU PT.

25 Ian M Ramsay dan David B. Noakes, *Loc. Cit*.

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LEGAL PROTECTION FOR PEOPLE IN CAPITAL MARKET ACTIVITIES ON CRIMES IN THE CAPITAL MARKET

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Abstract

National economic development is a reflection of the will to continuously improve the welfare and prosperity of the Indonesian people fairly and evenly. to carry out national economic development requires funding sources, one of which is through the capital market. The capital market is defined as a business sector trading in securities such as stocks, stock certificates, and bonds or securities in general. Law Number 8 Year 1995 concerning the Capital Market provides legal certainty for Indonesian capital market players. Because capital market activities are complicated, there is the possibility of capital market crimes in the form of criminal acts and / or violations in the capital market, so that legal protection is needed for capital market activity actors to maintain the smooth operation of capital market activities so that they can attract other investors to invest capital in the capital market for the continuity of national economic development. This journal has 2 (two) formulation of the problem, namely how the form of crime in the capital market and the form of legal protection for capital market activity actors against crimes in the capital market. The research method used to solve these problems uses normative legal research methods, with legal materials consisting of primary legal material in the form of laws and regulations, namely Law Number 8 Year 1995 concerning Capital Markets, secondary legal materials which include several books as references relating to investment, and tertiary legal materials in the form of Economic Law Dictionaries, articles, and other materials relevant to the writing of this journal.

Keywords: Capital Market, Legal Protection, Capital Market Crime

A. INTRODUCTION

National economic development is a reflection of the will to continuously improve the welfare and prosperity of the people of Indonesia in a fair and equitable manner, as well as to develop people's lives and the implementation of a developed and democratic state based on Pancasila and the 1945 Constitution. Human beings, and the people of Indonesia carried out in a sustainable manner, based on national capabilities, by utilizing scientific and technological advances and paying attention to the challenges of global development. In its implementation, it refers to the personality of the nation and universal noble values to realize a nation's life that is sovereign, independent, just, prosperous, advanced and strong in its moral and ethical strength ".

Indonesia is a developing country. As a developing country Indonesia is currently trying to carry out national-scale development in all fields in order to increase the country's economic growth. In order to carry out national economic development, there are not a few costs needed, large needs in national economic development cannot be financed by the government alone through tax revenues and other revenues.[1] One alternative source of financing for national economic development is through the capital market.

Capital market / Capital Market / Stock Exchange / Stock Market in the classical sense is defined as a business sector trading in securities such as stocks, stock certificates, and bonds or securities in general. Meanwhile, the capital market according to the Economic Law Dictionary is defined as a market or meeting place for sellers and buyers who trade long-term securities such as stocks and bonds.[2]

The capital market as well as the market in general, which is a meeting place for sellers and buyers, only that distinguishes it from the market in general, namely in the capital market traded are various kinds of financial instruments such as stocks, bonds, mutual funds and others. Capital market institutions are trust institutions, namely as intermediary institutions that connect the interests of users of funds (issuers, ultimate borrowers) and fund owners (investors, ultimate lenders).[3]

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1 Jusuf Anwar, *Capital Market as a Financing and Investment Facility,* (Bandung: Alumni, 2005), page 1.

2 Tavinayati dan Yulia Qamariyanti, *Capital Market Law in Indonesia,* (Jakarta: Sinar Grafika, 2009), page 2.

3 Munir Fuady, *Modern Capital Market (Legal Review): First Book,* (Bandung, Citra Aditya Bakti, 2001), page 21.

In the context of national development which aims to improve equity, growth and national economic stability towards improving people's welfare, the capital market has a strategic role as a source of financing for the business world and investment vehicles for small and medium-sized people so that it requires a capital market legal instrument contains legal norms or legal rules governing all aspects relating to the capital market.[4] With the enactment of Law Number 8 Year 1995 concerning the Capital Market, it provides legal certainty for Indonesian capital market players. Because capital market activities are classified as complicated, there is a possibility of capital market crime.

Capital market crimes are all forms of violations related to capital market activities, both violations of capital market regulations and other regulations related to activities in the capital market. Law Number 8 Year 1995 concerning the Capital Market also regulates crimes that occur in capital market activities. Crimes in the capital market can be divided into two types, namely criminal acts and violations in the field of capital markets. Crimes and violations that occur in the capital market can be assumed for several reasons, namely the wrongdoing of the perpetrators, the weakness of the apparatus which includes integrity and professionalism of regulations, for which legal protection is needed for the capital market activity players in order to maintain the smooth operation of capital market activities so that they can attract other investors to invest capital in the capital market for the continuity of national economic development.

B. RESEARCH METHOD

This research was conducted using normative legal research methods or also called the library method. The legal material used in this writing consists of primary legal material in the form of legislation, namely Law Number 8 Year 1995 concerning Capital Markets, secondary legal materials which include several books as references relating to investment, and tertiary legal materials in the form of Economic Law Dictionaries, articles, and other materials relevant to the writing of this journal.

C. PROBLEM FORMULATION

Based on the introduction described above, the formulation of the problem that can be taken as follows:

1. What are the forms of crime in the capital market?
2. What are the forms of legal protection for capital market activities against capital market crimes?

D. DISCUSSION

1. Forms of Crime in the Capital Market

In capital market activities, there have been arrangements regarding any activities in the capital market which are included as capital market crimes, namely in the Law Number 8 Year 1995 concerning Capital Markets which regulates various forms of violations and criminal actions on capital markets and sanctions for perpetrators. The prohibited acts in the capital market include:

a. Counterfeiting and Fraud

Fraud according to Article 90 letter c of Law Number 8 Year 1995 concerning Capital Markets, is to make false statements about material facts or not to disclose material facts so that statements made are not misleading regarding the circumstances that occur when a statement is made with the intention to benefit or avoid loss for yourself or another party or with the aim of influencing another party to buy or sell securities.

By continuing to pay attention to the provisions stipulated in the Criminal Code (KUHP), Law Number 8 Year 1995 concerning Capital Markets provides several specifications regarding the definition of fraud, which are limited to Securities trading activities which include activities of offering, buying and or selling Securities that occur in the context of Public Offering, or occur at Stock Exchanges or outside the Stock Exchange on the Issuer's Securities or Public Company.

Arrangements concerning fraud (fraud) against material facts in the implementation of securities trading activities can be seen from the formulation of Article 90 of Law Number 8 Year 1995 concerning Capital Markets which affirms that in Securities trading activities, each Party is prohibited from directly or indirectly deceiving or deceiving other Parties by using and or in any way, participating in cheating or deceiving other Parties, and making false statements about the facts material or not disclosing material facts so that statements made are not misleading about the circumstances that occur when a statement is madewith the

4 *Ibid.,* page 2.

intention of benefiting or avoiding loss for yourself or another party or with the aim of influencing another party to buy or sell securities.

Capital market fraud, as explained in the explanation of the Law Number 8 Year 1995 concerning the Capital Market, may include fraud committed through a prospectus or in securities trading activities at the Exchange. In addition, fraud can also be carried out both on listed securities on the stock exchange and over the counter securities. This last statement is of course intended to anticipate future developments, where there may also be securities traded outside the stock exchange (such as securities traded through means of "pink sheets" in the United States). Article 90 paragraph 3 of Law Number 8 Year 1995 concerning the Capital Market, which regulates making false statements or not disclosing material facts, is not only intended to counteract issues (rumors), which do occur in many exchanges, but also to establish that any material information and facts submitted are indeed true and not misleading. The obligation not only charged to the issuer is intended to provide an opportunity for investors to decide to buy, sell or keep holding securities, because the decision for this investment is always done based on the right and correct information concerning the effect. On the trading floor itself this false statement can arise from both the exchange members, investors and people in the issuer itself. Based on the formulation of Article 90 paragraph 3, it can be classified as fraudulent crime concerning the principle of openness, namely making a statement of misrepresentation of facts or removing material facts which makes the statement misleading in connection with the trading of shares with the intent to mislead, causing loss.

b. Market Manipulation

In addition to fraudulent acts, there are criminal acts in the form of market manipulation based on Article 91 and Article 92 of Law Number 8 Year 1995 concerning the Capital Market. Based on the two aforementioned Articles, it can be seen the provisions concerning the elements that are said to be market manipulation, namely each party both alone and together with other parties; prohibited from taking action or carrying out 2 (two) or more Securities transactions, both directly and indirectly; with the aim of creating a false or misleading picture regarding trading activities, market conditions, or prices of Securities on the Stock Exchange. Or with the aim of causing the price of Securities in the Securities Exchange to remain, rise or fall with the purpose of influencing other Parties to buy, sell or hold.

In the explanation of Article 91 of Law Number 8 Year 1995 concerning the Capital Market which reads: "Investors' communities really need information about trading activities, market conditions, or prices of securities in the Stock Exchange, which are reflected in the strength of selling offers and Securities buying offers as a basis for making investment decisions in Securities". In connection with this, this provision prohibits actions that can create a false picture of trading activities, market conditions, or the price of securities, including: a. conduct Securities transactions that do not result in changes in ownership; or b. make a selling offer or a securities buy offer at a certain price, where the Party has also conspired with another Party that made the same buying offer or Securities selling offer at approximately the same price. "Meanwhile, in the explanation of Article 92 of Law Number 8 Year 1995 concerning the Capital Market which reads: "This provision prohibits the conduct of a series of Securities transactions by one Party or several conspiring Parties so as to create an artificial price of Securities at the Stock Exchange because it is not based on the power of selling or buying actual Securities with the intention of benefiting themselves yourself or another party."

Based on the explanation of Article 91 and 92 Law Number 8 Year 1995 concerning the Capital Market, it can be seen that the first plan of the practice of market manipulation was artificial restriction or the creation of false appearances of actual trading activities in supply by acquiring substantial shares in controlled accounts. The activity stimulates intentional stock demand by controlling stock availability. Then make a sale of the stock purchased, in line with the stock price that has soared (price manipulation).

Every party that practices pre-market manipulation is prohibited by Law Number 8 Year 1995 concerning the Capital Market, may be subject to administrative sanctions and criminal sanctions that are the same as committing criminal acts of Capital Market Fraud. Deception by manipulating the differences basically only lies in the consequences of the act. In market manipulation, as a result of these actions the stock price becomes false, while in fraudulent acts, the result of information or the actual situation will be detrimental to the other party without having to have an effect on the manipulated market.

c. Insider Trading

Information is a very important commodity in a stock exchange. Therefore, information about a news that occurs on an issuer whose shares are traded on the exchange must not be known by one party exclusively. Once the importance of this information, for example, can be seen from the fluctuation of stock prices on the exchange when an event occurs on a company whose shares are traded on the stock.

Insider Trading is securities trading carried out by those who are classified as 'insiders' (in broad terms), which trade is based or motivated by an 'inside information'.[5] Insider trading is trading securities using Insider Information (IOD). IOD is material information held by insiders that is not yet publicly available. Law Number 8 Year 1995, does not provide strict insider trading limits.

Prohibited transactions include, among others, insiders from issuers who have information on people in carrying out sales or purchases of securities of issuers or other companies that conduct transactions with the issuer or public company concerned. Thus the subject matter of insider trading is information. People in or known as 'insider' are managers, employees or major shareholders of the issuer or public company, parties who because of their position or profession or because of their business relationship with the issuer or public company allow them to have IOD, including those in the last 6 (six) months no longer be those people. While other parties that are prohibited from conducting insider trading are those who obtain an IOD against the law, as determined in Article 97 of Act Number 8 Year 1995 concerning the Capital Market, that the party seeks to obtain an IOD from an insider against the law and then obtain it. subject to the same prohibition as the ban that applies to the person referred to in Article 95 and Article 96 of Law Number 8 Year 1995 concerning the Capital Market.

Likewise, securities companies that have IODs, Bapepam employees who are given assignments or other parties appointed by Bapepam to conduct inspections are also prohibited from using it for themselves or other parties unless instructed by other laws (Article 98 paragraph (4) Law Number 8 Year 1995 concerning Capital market).

The possibility of trading by using inside information can be detected by the presence or absence of an insider who conducts transactions on the company's securities where the person concerned is an insider. In addition, it can also be detected from an increase in the price and volume of securities trading before the announcement of material information to the public in connection with an increase or decrease in unnatural trade. Insider trading has several elements, including: a. The existence of securities trading; b. Done by people in the company; c. There is an inside information; d. This information has not been disclosed and opened to the public; e. Trade is motivated by that information; f. Aim to make a profit.

The prohibition of trade by insiders is closely related to the provisions governing 'disclosure of information' which must be announced to the public, as stipulated in the Decree of the Chairman of Bapepam Number Kep-22 / PM / 1991. The decision of the Chairperson of Bapepam requires every public company to submit to Bapepam and announce to the public as soon as possible, no later than the end of the second working day after an event or event, important and relevant information that might be used to value the company's securities or investment decisions. investor investment decisions. In this regard, it should also be emphasized here that trade by insiders not only results in a criminal act but is also an act against the law according to the provisions of Article 1365 of the Civil Code. This is because trade by insiders can harm other investors and therefore the aggrieved investor has the right to get a replacement if he can prove it. Therefore, according to the provisions of Article 1365 of the Civil Code, "every act that violates the law, which brings harm to another person, requires that the person who caused the wrongdoing to issue the loss, compensates for the loss".

2. Forms of Legal Protection for Actors in Capital Market Activities Against Capital Market Crimes

As an institution that oversees the capital market, Bapepam has the authority to make regulations. As which is stipulated in Article 100 of Law Number 8 Year 1995 concerning the Capital Market, Bapepam has the authority to examine any party suspected of being involved in a violation of the Capital Market Law and / or its implementing regulations. In addition to Bapepam Based on Law Number 8 Year 1995 concerning Capital Market, when a capital market crime occurs, the OJK may conduct an investigation or investigation on any party suspected of committing capital market violations or so-called Capital Market crimes by forming Civil Servants (Civil Servants), but after the enactment of Law Number 21 Year 2011

5 Reno Rahmat Fajar, Transactions Based on Openness of Information (An Insider Trading Perspective), http://www.lkht.net/artikel-lengkap.php, accessed on October 21, 2018.

concerning the Financial Services Authority (OJK), the authority that originally existed in Bapepam turned to OJK.

OJK as an institution that now has the authority to oversee activities in the capital market and in its efforts to provide legal protection to investors, the OJK does so in two ways, namely:

a. Preventive legal protection efforts.

Preventive legal measures are legal safeguards carried out to prevent the occurrence of practices of violations in the field of capital markets that can harm investors. This prevention effort is in the form of legislation including Law Number 8 Year 1995 concerning Capital Markets, through guidelines, guidance, and direct direction. In Law Number 8 Year 1995 concerning the Capital Market explained one of the important elements in capital market transactions, namely the element of information disclosure.

The principle of full disclosure is a fundamental principle that must exist in the capital market. Arrangements regarding the principle of full disclosure are in Law Number 8 Year 1995 concerning the Capital Market is regulated in sufficient detail starting from the disclosure of information in propectus when going to conduct a public offering (IPO) and also afterwards, namely regarding the disclosure of material information at the time of submission of periodic reports by the issuer company.

In addition, one form of protection against investors is through supervision of the exchange trading. Supervision of exchange trading is regulated in article 3 paragraph (1) of the Law Number 8 Year 1995 concerning the Capital Market which states:

"the daily guidance, regulation and supervision of capital market activities is carried out by the Capital Market Supervisory Agency, hereinafter referred to as Bapepam."[6]

In order to carry out the supervisory duties, hereinafter in Article 7 paragraph (2) it is explained:

"in order to achieve the objectives referred to in paragraph (1), the stock exchange must provide supporting facilities and supervise the activities of the members of the stock exchange".[7]

With the established of the OJK, the supervisory duties moved from Bapepam to OJK. The transfer of this supervisory task is explained in Article 6 letter b of the OJK Law which states: "OJK performs the task of regulating and supervising financial service activities in the capital market sector."

In addition to OJK, supervision of stock exchange trading is also carried out by the Stock Exchange. The Indonesia Stock Exchange Transaction Division ensures that all transactions that occur must be fair, orderly and provide information that is open to the market, if there is an indication of irregularities in a transaction on the stock then the related shares will be included in the announcement of the Unsual Market Activity (UMA) and then request issuers to convey information disclosure that should be delivered to the public. However, if there is no corporate action but the stock price continues to soar or decline, the IDX will immediately suspend it in order to cooling down.[8]

b. Repressive Legal Protection Efforts

Repressive legal protection efforts are carried out in the form of examinations, investigations and the application of sanctions. If there is a violation in the capital market sector, the OJK has the authority to carry out inspections and investigations as stated in the Article 9 of the OJK Law c: *"... To carry out supervisory duties as referred to in Article 6, the OJK has the authority to supervise, inspect, investigate, consumer protection, and other actions towards financial service institutions, actors, and / or supporting financial service activities as referred to in legislation in the sector of financial services. "*

In addition to conducting inspections and investigations, OJK also has the authority to stipulate sanctions as explained by Article 8 letter I of the OJK Law which reads: *"To carry out regulatory tasks as referred to in article 6, OJK has the authority to stipulate regulations regarding the procedure for imposing sanctions in accordance with the provisions legislation in the financial services sector "*

Referring to these articles, the investor as the holder of the shares has the right to hold the directors accountable civilly, if the directors' policy causes a loss to the company. Investors who suffer losses also have the right to report to the OJK for investigation and investors have the right to claim compensation

6 Indonesia, *Law Number 8 Year 1995 concerning Investment,* Article 3 paragraph (1)

7 *Ibid.,* Article 7 paragraph (1).

8 The article with the title "stock exchange member compliance increased" IDX News October 2010 urip budhi prasetyo director of transaction and compliance supervision of the Indonesia Stock Exchange accessed September 17 2018.

wherein Article 111 of the Law Number 8 Year 1995 concerning the Capital Market reaffirmed that: *"every party suffering from calamity as a result of violations of the law and / or implementing regulations can claim compensation, both individually and together with other parties who have similar demands, the party or party responsible for the violation."*

E. CONCLUSION

Based on the previous discussion, the conclusions that can be obtained are that:

1, Crimes in the capital market that often occur are 3, namely: fraud and market manipulation. Fraud in the capital market is making false statements about material facts so that statements made not misleading about the situation that occurred at the time of the statement were made with the utmost to benefit or avoid losses for themselves or other parties or with the intention of influencing other parties to buy and sell securities. While market manipulation is an action carried out by each person directly or indirectly to create a pseudo or misleading picture about trade, market conditions, or prices for securities securities. The third insider trading is insider trading.

2. Institutions that are authorized to regulate regulations and have the authority to conduct inspections are OJK because the Law Number 21 Year 2011 concerning the Financial Services Authority (OJK) has been promulgated. Legal protection for investors in the capital market is carried out through 2 (two) ways, namely preventive legal protection and repressive legal protection. For preventive legal protection efforts are made to prevent the occurrence of market manipulation practices by the application of Law Number 8 Year 1995 concerning the Capital Market and the application of the principle of full disclosure for issuers in addition one form of preventive legal protection is through exchange trading supervision methods conducted by parties OJK as an institution authorized to oversee capital market activities as specified in article 6 letter b of the OJK Law. In addition to the OJK, supervision of the stock exchange is also carried out by the Stock Exchange. Whereas for repressive legal protection, it is carried out in the form of examination, investigation and application of sanctions determined by the FSA as stipulated in Article 9 and Article 8 letter i of Law Number 21 Year 2011 concerning the Financial Services Authority.

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BKPM'S AUTHORITY IN COORDINATING CAPITAL INVESTMENT IN INDONESIA

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Abstract

National economic development of a country certainly cannot be separated from the influence of capital / funds in realizing it. Investment or investment plays an important role in accelerating Indonesia's National Economic Development, so there is a need for legal certainty that regulates the application of investment law in Indonesia, namely by enacting laws and regulations related to investments such as the Republic of Indonesia Law Number 25 Year 2007 concerning Investment . In addition to the need for legal instruments, institutions that are authorized to deal with investment issues are also needed. After the issuance of Presidential Decree Number 29 Year 2004 concerning Investment Implementation in the Context of Foreign Investment and Domestic Investment (PMDN) through the One-Stop Integrated Service System (PTSP), the official authorized to coordinate the implementation of investment in Indonesia is the Capital Market Coordination Agency (BKPM), which is a government agency that handles investment activities in the context of Domestic Investment (PMDN), and Foreign Investment (PMA). Therefore the importance of being discussed related to the authority of BKPM is regarding BKPM's authority in the One-Stop Integrated Service System (PTSP) relating to approval / licensing in the framework of establishing PMDN and PMA companies. This journal has 2 (two) problem formulations, first; how the authority of BKPM in coordinating Investment in Indonesia is based on Law Number 25 Year 2007 concerning Investment. Second; What is the authority of BKPM in coordinating Investment in Indonesia based on the Regulation of the Head of the Indonesian Investment Coordinating Board Number 6 Year 2016 concerning Amendments to Regulation of the Head of the Investment Coordinating Board Number 14 Year 2015 concerning Guidelines and Procedures for Licensing the Investment Principle The research method used to solve these problems is by using normative legal research methods, with primary legal materials in the form of laws and regulations related to investment, secondary legal materials in the form of reference books, and finally Tertiary legal materials covering articles, as well as other materials in accordance with writing this journal.

Keywords: BKPM Authority, PTSP, Principle License.

A. INTRODUCTION

National economic development of a country certainly cannot be separated from the influence of capital / funds in realizing it. As stated in the National Development Program (Propenas), which aims to create a just and prosperous society based on Pancasila and the 1945 Constitution of the Republic of Indonesia which is realized through development in various fields, one of which is from the economy, such as agriculture, forestry, fisheries, animal husbandry, mining, industry, trade and services.[1] Therefore, this is where the role of investment is needed in accelerating Indonesia's National Economic Development.

The term investment or investment is known terms, both in daily business activities and in the language of legislation. The term investment is a term that is more popular in the business world, while the term investment is more used in the language of legislation. The term investment comes from Latin, namely investire (use), while in English it is called investment.[2]

The definition of investment according to H. Salim is "Investments made by investors, both foreign and domestic investors in various business fields that are open to investment, with the aim of gaining profit".[3]

The development of the economy in Indonesia, which was realized through investment, has been running for approximately 43 (forty three) years since it was proclaimed by the new order government in 1970. Over four decades it has slowly brought changes in Indonesian society, driven by economic development with various dynamics and escalation of economic growth. Then there is a need for legal certainty that regulates

1 Aminuddin Ilmar, *Investment Law in Indonesia,* (Jakarta: Kencana, 2010), page 1.

2 H. Salim dan Budi sutrisno, *Investment Law in Indonesia,* (Jakarta: Rajawali Pers, 2008), page 31.

3 *Ibid.,* page 33.

the validity of investment law in Indonesia, namely by enacting Republic of Indonesia Law Number 25 Year 2007 concerning Investment which has revoked Law Number 1 Year 1967 concerning Foreign Investment as amended by Law Number 11 In 1970 concerning Amendments and Additions to Law Number 1 Year 1967 concerning Foreign Investment, and Law Number 6 Year 1968 concerning Domestic Investment as amended by Law Number 12 Year 1970 concerning Amendments to and Supplementary Law Number 6 Year 1968 concerning Domestic Investment.[4]

The definition of Investment as referred to in Article 1 point 1 of the Republic of Indonesia Law Number 25 Year 2007 concerning Investment, Investment is all forms of investment activities, both by domestic investors and foreign investors to conduct business in the Republic of Indonesia. Indonesia.[5]

In addition to the need for legal instruments to ensure legal certainty in terms of capital management in Indonesia, institutions that are authorized to deal with investment issues are also required. The existence of an institution that has authority in coordinating investment in Indonesia has a strategic role in determining the high and low investment that will be invested by investors, both foreign investors (Foreign Investors / PMA), and domestic investors (Domestic Investors / PMDN).[6] Initially, officials authorized to coordinate the implementation of investments at the Central level were the State Minister of Investment / Head of the Investment Coordinating Board, while at the regional level, the agency authorized to coordinate investment implementation was the Regional Investment Coordinating Board (BKPMD). However, after the issuance of Presidential Decree No. 29 Year 2004 concerning Investment Implementation in the Context of Foreign Investment and Domestic Investment (PMDN) through a One-Stop Service system, the official authorized to coordinate the implementation of investment in Indonesia is the Capital Market Coordination Agency (BKPM), which is a government agency that handles investment activities in the context of Domestic Investment (PMDN), and Foreign Investment (PMA). After the Minister of Home Affairs Regulation Number 24 Year 2006 concerning the Guidelines for Implementing One-Stop Integrated Services (Permendagri 24/2006) in view of Law Number 25 Year 2007 concerning Investment, the government implemented a One-Stop Integrated Service in granting investment licensing to replace the One Service system Roof.

In Law Number 25 Year 2007 concerning Investment, the government implements one-stop integrated services in the provision of investment licenses that aim to assist investors in obtaining service facilities.[7] The definition of One-Stop Integrated Services (PTSP) based on Presidential Regulation Number 27 Year 2009 concerning One-Stop Integrated Services is the implementation of licensing and non-licensing activities that receive delegation or delegation of authority from institutions or agencies that have licensing and non-licensing authority that is the management process starting from the application stage to the issuance stage of the document carried out in one place. So from that the importance of the One Stop Integrated Service (PTSP) is related to approval / licensing in the framework of establishing PMDN and PMA companies whose granting of the permit is the authority of BKPM. To start investing, the necessary permits as regulated in the Regulation of the Head of the Investment Coordinating Board No. 14 Year 2015 concerning Guidelines and Procedures for Licensing of Investment Principles as amended by Regulation of the Head of the Indonesian Investment Coordinating Board Number 6 Year 2016 concerning Amendments to Regulation of the Head of Investment Coordinating Board No. 14 Year 2015 concerning Guidelines and Procedures for Licensing Investment Principles, the intended permit is principle permit in Article 1 point 10 of the Regulation, that the Investment Principle License, hereinafter referred to as Principle License, is a mandatory permit owned in order to start a business. Therefore, the granting of the permit is the authority of BKPM in publishing it.

B. RESEARCH METHOD

This research was conducted using normative legal research methods. The legal material used in this paper consists of primary legal materials, namely legislation covering Law Number 25 Year 2007 concerning Investment and Regulation of the Head of the Indonesian Investment Coordinating Board Number 6 Year 2016 concerning Amendments to Regulations of the Head of the Agency Investment Coordination Number 14 Year 2015 concerning Guidelines and Procedures for Licensing of Investment Principles, then secondary legal materials covering all reference books that the author uses, and finally tertiary legal materials covering articles, as well as other materials that are in accordance with the writing of this journal.

4 Indonesia, *Law Number 25 Year 2007 concerning Investment*, Article 38.

5 *Ibid.,* Article 1 point 1.

6 H. Salim dan Budi sutrisno, *Op.Cit.,* page 227.

7 Ana Rokhmatussa'dyah, *Investment and Capital Market Law,* (Jakarta: Sinar grafika, 2010), page 94.

C. PROBLEM FORMULATION

Based on the introduction described above, the formulation of the problem that can be taken as follows:

1. What is the authority of BKPM in coordinating Investment in Indonesia based on Law Number 25 Year 2007 concerning Investment?
2. What is the authority of BKPM in coordinating Investment in Indonesia based on the Regulation of the Head of the Indonesian Investment Coordinating Board Number 6 Year 2016 concerning Amendments to Regulation of the Head of the Investment Coordinating Board Number 14 Year 2015 concerning Guidelines and Procedures for Licensing Investment Principles?

D. DISCUSSION

1. BKPM's authority in coordinating Investment in Indonesia based on Law Number 25 Year 2007 concerning Investment

Based on Article 26 paragraph (1) Law Number 25 of 2007 concerning Investment explains that the purpose of the implementation of one-stop integrated services is to assist investment in obtaining facilities for fiscal facilities, and information on investment. In this one-stop integrated service, the BPKM must involve representatives directly from each sector and region related to officials who have competence and authority.

In the provisions of Article 26 paragraph (2) of Law Number 25 Year 2007 concerning Investment, it is stated that one-stop integrated services are carried out by institutions or agencies authorized in the field of investment that receive delegation or delegation of authority from institutions or agencies that have licensing authority and non-licensing at the central level or institutions or agencies authorized to issue licenses and non-permits in the province or district / city. For this reason, synergic coordination between institutions, between governments and between the central and regional governments is needed, as well as between regional governments.

To regulate the coordination of the implementation of investment policies including licensing, according to Article 27 paragraph (2) submitted to the Investment Coordinating Board (BKPM) which in carrying out its duties and functions as well as integrated one-stop service according to Article 29 of Law Number 25 Year 2007 concerning Investment , must involve representatives directly from each sector and region related to officials who have competence and authority. The duties and functions of the Investment Coordinating Board, according to Article 28 paragraph (1) of Law Number 25 Year 2007 concerning Investment are:

a. carry out duties and coordinate the implementation of policies in the field of investment;
b. review and propose investment service policies;
c. establish norms, standards, and procedures for implementing investment activities and services (in setting norms, standards and procedures, BKPM coordinates with relevant departments and agencies);
d. develop investment opportunities and potential in the region by empowering business entities;
e. make a map of Indonesian investment;
f. promote investment;
g. developing the investment business sector through fostering investment, including increasing partnerships, increasing competitiveness, creating fair business competition and disseminating information as widely as possible in the scope of the implementation of investment;
h. assist in resolving various obstacles and consulting problems faced by investors in carrying out investment activities;
i. coordinate domestic investments that carry out investment activities outside the territory of Indonesia; and:
j. coordinate and carry out one-stop integrated services.

In addition to the task of coordinating and implementing investment policies, the Investment Coordinating Board is tasked with implementing investment services based on legislation. The authority of the Investment Coordinating Board (BKPM) is further strengthened by Law Number 25 Year 2007 concerning Investment. The authority of the BPKM has been determined in Article 27 up to Article 30 of Law Number 25 Year 2007 concerning Investment.

In Article 27 it is determined that coordination of the implementation of planting policies is carried out by the Investment Coordinating Board (BKPM). Investment policy coordination includes coordination: between government agencies, between government and Bank Indonesia, between government agencies and local governments, and coordination between regional governments. The Investment Coordinating

Board (BKPM) is headed by a head. The head of the BKPM is responsible to the president. The Head of BKPM is appointed and dismissed by the President.[8]

Observing the duties and authority or functions carried out by the investment coordinating body, it is undeniable that BKPM is the only non-ministerial institution that is responsible to the president for the management, formation and supervision of investment, especially foreign investment. With the role of BKPM as an institution that manages investment, especially investment, of course, from one side, it can be seen from the importance of service in terms of capital licensing, making it easy to apply investment in Indonesia. In addition, the establishment of the BKPM was also intended to simplify the chain of licensing of capital investment permits, especially foreign investment which had previously been spread in various departments that fostered the field of investment business, so often very troublesome prospective investors in applying their capital.[9]

2. The authority of BKPM in coordinating Investment in Indonesia based on the Regulation of the Head of the Indonesian Investment Coordinating Board Number 6 Year 2016 concerning Amendments to Regulation of the Head of the Investment Coordinating Board Number 14 Year 2015 concerning Guidelines and Procedures for Licensing the Investment Principle

The Importance of One-Stop Integrated Services in the Investment Sector (PTSP), in terms of submission of conditions so that Foreign Investors can invest their capital in Indonesia is because PTSP is a licensing and Non-licensing activity based on delegation or delegation of authority from institutions or agencies that have licensing authority and Non-licensing, the management process starts from the application phase up to the issuance stage of the document carried out in one place, the implementation of which is carried out by delegation or delegation of authority from the Minister / Head of Non-Ministerial Government Institution (LPNK) to the Head of BKPM; and Assignment of Ministry / LPNK Officials or employees of State-Owned Enterprises. [10]

One of BKPM's authorities in the Regulation of the Head of the Republic of Indonesia Investment Coordinating Board Number 6 Year 2016 concerning Amendments to Regulation of the Head of Investment Coordinating Board Number 14 Year 2015 concerning Guidelines and Procedures for Licensing of Investment Principles is to provide principle permits to PMDN and PMA, which the procedure will be explained in the next discussion.

Based on Article 4 of the Regulation, that the Authority in terms of providing Principle Licenses is given by the Central Government, PTSP Free Port and Free Trade Area (PTSP KPBPB), Special Economic Zone PTSP (PTSP KEK), Provincial Government and Regency / City Government, in accordance with their authority , and the institution provides a Principle License through the implementation of PTSP. The implementation of the PTSP in question is:

a. The Central Government is carried out by the Central PTSP at BKPM which obtains delegation/delegation of authority from the Technical Minister / Head of Non-Ministry Government Institutions (LPNK) to the Head of BKPM;
b. The Provincial Government is carried out by the Provincial BPMPTSP, which obtains delegation/delegation of authority from the Governor to the Head of the Provincial BPMPTSP;
c. Regency / City Government is carried out by Regency / City BPMPTSP, which obtains delegation/ delegation of authority from the Regent / Mayor to the Head of Regency / City BPMPTSP;
d. Concession Agency of the Free Port and Free Trade Zone by PTSP KPBPB, which obtains delegation/ delegation of authority from the Technical Minister / Head of LPNK, Governor and Regent / Mayor to the Head of KPBPB Concession Agency; and
e. Special Economic Zone Administrator by PTSP KEK.

Then regarding the Authority of Granting Principle Licenses by the Central Government in Article 5 the Regulation consists of:

a. Implementation of investment in the scope of cross-provincial scope;
b. Investment which includes:

8 H. Salim dan Budi sutrisno, *Op.Cit.,* page 230.

9 Aminuddin Ilmar, *Op.Cit.,* page 212.

10 *Indonesia, Regulation of the Head of the Indonesian Investment Coordinating Board Number 6 Year 2016 concerning Amendments to the Regulation of the Head of the Investment Coordinating Board Number 14 Year 2015 concerning Guidelines and Procedures for Licensing the Investment Principle. Article 1 point 7.*

1) Investment is related to non-renewable natural resources with a high level of risk of environmental damage;
2) Investment in industrial fields which is a high priority on a national scale;
3) Investment related to unifying functions and connecting between regions or their scope across provinces;
4) Investments related to the implementation of national defense and security strategies;
5) Foreign Investment and Investors who use foreign capital, which comes from the Government of other countries, which is based on agreements made by the Government and the government of other countries, including Foreign Investment carried out by governments of other countries, Foreign Investment conducted by citizens foreign countries or foreign business entities, and investors who use foreign capital originating from other countries' governments, which are based on agreements made by the Government and the governments of other countries, and
6) Other Investment Fields which are Government matters according to the Law.

Regarding the Authority for Granting Principle Licenses by the Provincial Government in Article 6 of the Regulation consists of:

a. Investment in the scope of activities across districts / cities;
b. Investment in which the authority of the Central Government and the Provincial Government is granted delegation / delegation of authority from the Central Government to the Governor; and
c. Investment which is the authority of the Provincial Government based on the Laws and Regulations.

Then regarding the Authority of Granting Principle Licenses by the Regency / City Government in Article 7 the Regulation consists of:

a. Investment in the scope of activities in the Regency / City;
b. assigned to the Regency / City Government.

The last is regarding the authority to grant principle permits by KPBPB and KEK in Article 7. The regulation is carried out based on delegation / delegation of authority from the Central Government / Regional Government and takes into account Legislation concerning KPBPB and KEK.

E. CONCLUSION

Based on the previous discussion, the conclusion that can be obtained is that the Authority of BKPM in coordinating Investment in Indonesia based on Law Number 25 Year 2007 concerning Investment is regulated in Article 28 paragraph (1) of Law Number 25 Year 2007 concerning Investment, then besides the task of coordinating and implementing investment policies, the Investment Coordinating Board is tasked with carrying out investment services based on laws and regulations, which are regulated in Article 27 up to Article 30 of Law Number 25 Year 2007 concerning Investment, namely in terms of conducting planting policy coordination capital between government agencies, intergovernmental with Bank Indonesia, between government agencies and local governments, and coordination between regional governments, while one of BKPM's authorities in the Regulation of the Head of the Indonesian Investment Coordinating Board Number 6 Year 2016 concerning Amendments to Per rules of the Head of Investment Coordinating Board Number 14 Year 2015 concerning Guidelines and Procedures for Licensing Investment Principles, namely in terms of giving Principle Licenses to PMDN and PMA, given by the Central Government, PTSP KPBPB, PTSP KEK, Provincial Government and Regency / City Government based on their authority each.

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THE LEGAL PROTECTION OF CONSUMERS IN TRADING OF GOODS THROUGH TRANSACTIONS ELECTRONIC (E-COMMERCE)

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Abstract

Transaction purchase agreement through an electronic (e-commerce), where businessmen and consumers don't relate directly and do not make a deal directly.
Transactions electronic (e-commerce) even though there is agreement in the purchase agreement the goods electronically, but overall electronic transactions (e-commerce) is not fulfilled the terms of an agreement that legitimately provided for in the provisions of article 1320 KUHPerdata. Transaction purchase agreement through an electronic (e-commerce), in case of occurrence of a tort committed by businessmen, not satisfy the rights of the consumer, then the consumers are not protected by law because of the existence of the rules has not technically about the subject of consumer protection when transacting with utilizing electronic media.

Keywords: Consumer Protection In The Trade Of Goods Through Electronic.

A. INTRODUCTION

The development of information and communication technology has brought changes in various fields of life and plays an important role in national development. Advances in information and communication technology has changed the behavior of society and human civilization globally that has resulted in the world to become infinite and cause the social changes significantly faster and makes people think more practical. This makes the business person in carrying out its business activities by making use of advances in technology over the internet, also called or known by the name of e-commerce. The presence of e-commerce brings changes in trade transactions that used to only be done face-to-face, can now use trade transactions through electronic (e-commerce).

In the electronic transactions law governing law number 11 Year 2008 Of the information and electronic transactions, this is emphasized by the provision of article 1 point 2 formulate that:

"Electronic transactions law is made using a computer, computer network, and/or other electronic media".[1]

E-commerce transaction provides convenience for the trade as well as consumers. Businessmen can promote, market or do the buying and selling of goods or services and sellers quickly and effectively distribute directly to consumers via e-commerce so as to create high efficiency, cheap and informative. Similarly, with consumers in choosing the needed goods or services can be viewed through the medium of the internet freely over goods or services in accordance with his wishes. More consumers are spoiled with the facilities offered by the internet, which for the purposes of any live view via the internet.

Trade transactions through electronic (e-commerce) besides giving a lot of convenience and benefit for consumers, but on the other hand also raises new problems. In the practice of trading through electronic (e-commerce) did not escape from a variety of crucial issues, relating to the rights of consumers, such as:

1. Consumers could not directly identify, seen or touched the items to be ordered.
2. Information on the products offered by the seller are sometimes incompatible with the products received by the consumer and the seller normally lists that items purchased cannot be returned or are returning with a time limit fixed the destination address is not clear.
3. There is no guarantee the security of the payment transaction electronically either by credit card or cash elektronic.

1 Law number 11 Year 2008 Of the information and electronic transactions, article 1 point 2.

4. The risk incurred is not balanced, because in General, buy sell electronically (e-commerce), the consumer is required to pay in full upfront, while the receipt requires time or holding or cooling stuff not necessarily accepted, or the goods are not in accordance with the exchanged.
5. When goods are traded cross border borderles then state law jurisdiction where they should have been put in place because there is no status of legal subject he explained from the businessmen.

From a wide array of issues that occur in electronic transactions (e-commerce) to the detriment of the consumer. Regardless of the rule of law to law number 11 Year 2008 Of the information and Electronic Transaction set about electronic transaction. In transactions through e-commerce indeed have considerable risks, namely the quality of the goods that do not yet know for sure, the goods received are in accordance with the information offered, the absence of guarantees of security in payments, the risk of unbalanced and not if the importance of civil law persepktif validity of electronic business transactions do not have legal certainty, if there is a breach of the agreement or contract in case of tort law, jurisdiction, and also legal issues which must be applied when the dispute occurred.

In civil law in Indonesia, concerning agreements or contracts must meet which is contained in the book of the law of civil law (KUHPerdata) and consumer protection refers to law No. 8 Year 1999 on the protection of consumers.

Based on the problems that occur in transactions electronic (e-commerce), then in this study took the title: **The Legal Protection Of Consumer In Trading Of Goods Through Transactions Electronic (E-Commerce).**

B. FORMULATION OF THE PROBLEM

The problems that arise with its transaction electronic is

1. What is transactions electronic (e-commerce) have qualified legitimately a purchase agreement?
2. How is the legal protection of the consumer in the buying and selling of goods electronically (e-commerce) if there is a tort?

C. RESEARCH OBJECTIVES

The goal in this research are:

1. To analyze the transactions electronic (e-commerce) against legitimate terms of a purchase agreement.
2. To analyze and study the legal protection of the consumer in the buying and selling of goods electronically (e-commerce) if there is a tort.

D. RESEARCH METHODS

The methods used in this study are normative research namely legal research conducted by way of examining secondary data or references. The legal research that aims to gain knowledge about the relationship between a normative regulations with other regulations and/or application in practice.

E. THE RESULTS OF THE RESEARCH AND THE DISCUSSION

In the world of trade today, the businessmen exploit advances in information and communication technology to expand the space motion of the flow of goods through transactions electronic (e-commerce). E-commerce is a business process by using electronic technology that links between companies, consumers and the public in the form of transactions electronic.

On transactions electronic (e-commerce), where businessmen and consumers don't relate directly and do not make a deal directly. This can be analyzed related problem legitimately terms of an agreement.

1. To Analyze The Transactions Electronic (E-Commerce) Against Legitimate Terms Of A Purchase Agreement

In a purchase agreement be it selling offline and online in Indonesia law still refers to the law of civil law (KUHPerdata). As for the provisions governing an agreement valid in 1320 Article KUHPerdata are met, to legitimately an agreement needed four conditions, namely:

a. Agreed those tying himself;
b. Qualified to make an Alliance;

c. A particular thing;
d. A lawful reason.[2]

First, set the terms of the deal: it is stipulated between the parties that hold the Treaty must have wanted to hold the Treaty freedoms must not be the existence of coercion, the pressure, in whatever form that allows the handicapped to the embodiment of the will of. In this transactions electronic first agree to terms have been met, the parties have said the deal in selling such items.

The second requirement, capable to make an Alliance: proficiency according to KUHPerdata there is in article 330 i.e. someone 21 years while a deemed not ably contained in article 1330 KUHPerdata. In electronic transactions, not a few people who do electronic transactions is still immature, it is considered not qualified in accordance with the provisions of article 1330 letters a KUHPerdata. If this is the case then the second requirement in no electronic (e-commerce) are not met.

The third requirement, a specific case it means the presence of a diperjanjian object in the form of goods in accordance with the provisions of article 1332 KUHPerdata. In this third requirement transaction often they where objects that diperjanjian sometimes do not match what diperjanjian as one example of the goods received by the consumer is not in accordance with the specifications of the offered by the seller, suppose the boots brand is famous for the quality of the original (original) shoe turned out to be received is fake or quality 1 (KW1). If this is the case then the third condition is not met.

Fourth, a requirement for the halal means that the object of the agreement must be halal or not forbidden, according to section 1337 KUHPerdata, in terms of these four probably most transactions electronic (e-commerce) does not violate what specified in article 1337 KUHPerdata, but it does not cover the possibility of goods being traded violates the provisions of article 1337 KUHPerdata. Suppose goods are traded result from theft or embezzlement, for in no consumer electronics did not know for certain the origin of the goods, kosher or prohibited by law. If this is the case then the transactions electronic (e-commerce) the fourth requirement is not met.

So in transactions electronic (e-commerce) even though there is agreement in the purchase agreement the goods electronically, but overall transactions electronic (e-commerce) is not fulfilled the terms of an agreement which governed the provisions of legitimately in article 1320 KUHPerdata.

2. Analysis Of The Legal Protection Of The Consumer In The Buying And Selling Of Goods Electronically (E-Commerce) The Tort Occurred

Buying and selling of goods electronically (e-commerce), that they would not satisfy the terms of an agreement that there are legitimate in article 1320 KUHPerdata. This would give rise to legal issues related to liability issues consumer trade in selling through electronic (e-commerce) contractual liability and related liability product can be called also with tort liability. The Government in conducting the legal protection of consumers refers to the provision of article 1 point 1 of the Act number 8 of year 1999 on the protection of the consumer, that: "Consumer protection is any effort that ensures the existence of legal certainty to provide protection to consumers".[3]

In the theory of legal protection H. Salim HS dan Erlies Septiana Nurbani, which is given to the public (consumers) is "an effort or other services provided by law to subject the law and things into objects that are protected".[4] This means that the theory is a theory of legal protection which review and analyze about the existence and purpose of form or protection, the subject of the law of protected objects and the protection afforded by the law to its subject. In any legislation that became a manifestation or form or the purpose of the protection given to the subject and the object of protection is different between each other.

Law number 8 of year 1999 on the protection of consumers, provide legal protection of consumers over violations committed by businessmen in the business of electronic transactions, one example of that is the specification of the goods delivered do not correspond to the specification of what was ordered or ordered goods the original (original) received by consumers false (KW 1).

For the offender who commits the above offences in the trading of electronic transactions, it is contrary to the provisions of article 9 of law number 11 Year 2008 Of the information and Electronic Transaction, that:

2 The book of the law of civil law, section 1320.

3 Law number 8 of year 1999 on the protection of the consumer, article 1 point 1.

4 H. Salim HS dan Erlies Septiana Nurbani, Application of theory of law on research theses and dissertations, Jakarta: RajaGarfindo Persata, 2014, page. 262.

"Businessmen who offer products through the electronic system must provide complete and correct information relating to the terms of the contract, the manufacturer, and the products offered".[5]

Is a "complete and correct information" include: information that contains the identity and status of the subject of law and competencies, whether as manufacturers, suppliers, providers or intermediaries and other information that explain certain things into the terms of the agreement as well as legitimately describe the goods and/or services being offered, such as name, address, and description of the goods/services.

Technically in law number 11 Year 2008 Of the information and electronic transactions, do not set the subject of consumer protection when transacting with utilizing electronic media or the occurrence of tort. Then if the tort committed by businessmen are obliged to fulfill the agreement or according to what has been exchanged, when businessmen do not meet their obligations so the consumer has the right to demand damages or lawsuit in The Court. Referring to the provisions of article 1338 KUHPerdata formulated that "All treaties made legally valid as legislation for those who create it". That is to say an agreement is legal for the parties who did purchase agreement. Thus not the laws that mentukan the magnitude of the damages fixed by the parties who determine the Treaty or agreement. It will be difficult for consumers to ask for accountability over the tort committed by the perpetrators of the attempt to meet other demands such as compensation (article 1243 KUH Perdata), cancellation of contract or ask for the fulfillment of the contract (Article 1267 KUH Perdata), because the parties to the agreement do not buy and sell face-to-face, the identity of the seller was not obviously only give status in website or social media only.

F. CONCLUSION

In the conclusion of this discussion what menyimpulan in this research are:

1. Transactions Electronic (e-commerce) even though there is agreement in the purchase agreement the goods electronically, but overall transactions electronic (e-commerce) is not fulfilled the terms of an agreement that legitimately provided for in the provisions of article 1320 KUHPerdata.
2. Transaction purchase agreement through an electronic (e-commerce), in case of occurrence of a tort committed by businessmen, not satisfy the rights of the consumer, then the consumer is not protected by law because of the existence of rules has not been technical about the subject of consumer protection when transacting with utilizing electronic media.

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5 Law number 8 of year 1999, *Op.cit.,* article 9.

RECONSTRUCTION OF TYPES OF PUNISHMENT TYPES *(STRAFSOORT)* IN INDONESIA'S CRIMINAL LAW

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Abstract

This study discusses the types of punishment (Straf soort) in Indonesian criminal law. This is based on the absence of alternative penalties other than prison sentences that can be imposed by judges on perpetrators of crime. This causes more prison residents to grow. It is evident that currently most of the trips in Indonesia have been over capacity. Therefore the government as a legislator must add to the types of penalties contained in Article 10 of the Criminal Code with new types of penalties, namely punishment for social work and / or by applying diversion to certain criminal acts.

A. INTRODUCTION

The existence of humans as social beings certainly has the consequences of the need to create a harmonious relationship between humans with one another. This condition can be realized through life of mutual respect and respect that among them are the existence of rights and obligations. This has been in accordance with what was mandated by Pancasila as the basis of the Indonesian state and the explanation of the 1945 Constitution before the amendment.

Humans as individuals will have meaning and can develop their lives if they are together with other humans.[1] No human being can live without involving other people in meeting their needs and interests. Humans in order to meet their different needs and interests are in a relationship with others. In carrying out this relationship norms are needed as a benchmark or guideline.

Society consists of a collection of individuals and groups who have different backgrounds and interests, so that in carrying out the interaction process there are often conflicts of interest that can lead to conflict between conflicting parties. If in their lives violates the rules of law, whether in the form of crime or violation, then sanctions will be subject to criminal.[2]

Crime is a social problem that always occurs in every social life. According to Durkheim, crime is considered a normal symptom in every society characterized by heterogeneity and social development.[3] Heterogeneous communities and have dynamics in them, can be found in communities in urban areas. Some studies that have been carried out at least show that urban areas in a number of countries such as the United States, Scandinavia, Japan, Poland and Uganda, have higher crime rates than other areas. This was also confirmed by Arief Gosita, who stated that crime will develop in quality and quantity along with the development of the city.[4]

In the process of interaction sometimes only benefits one party, while the other party is harmed. This is where the law acts as the enforcer of justice. It can be said that actions that harm others and only benefit their individual or group are evil actions. So naturally, if every evil deed has to deal with the law, then the perpetrators must be accountable for their actions before the law fairly, one of them by serving a sentence.

In Indonesian criminal law the types of punishment (strafsoort) that can be imposed on someone are regulated in Article 10 of the Criminal Code (KUHP). The types of punishment consist of: capital punishment, imprisonment, light imprisonment, fine and close penalty. Of the straftsort that have been determined, the prison penalty seems to have become the favorite punishment imposed by the judge.

1 Humans besides being individual beings, humans are also referred to as social beings. This means that humans have needs and abilities and habits to communicate and interact with other humans, this interaction takes the form of groups. The ability and habits of human groups are also called 'zoon politicon'. Aristotle in Raihan Wilino, Human Nature as a Social Being and Economic Being, http://bokuwaraii.blogspot.com, on. October 28, 2018

2 Moeljanto, *Principles of Criminal Law*, PT. Rineka Cipta, Jakarta, 1993, hal. 54

3 Sudjono Dirdjosisworo, *Socio-Criminology: Practice Social Sciences in Crime Studies*, Sinar Baru, Bandung, 1984, hal. 170

4 Arif Gosita, *Problems with Victims of Crime: Collection of Writings*, Akademika Pressindo, Jakarta, 1993, hal. 1

This is understandable because there is no alternative punishment that can be applied by the judge.

The consequences of the punishment use have had an impact on the increasing number of criminals who inhabit prison. The following is illustrated the data obtained by the author from the South Sumatra Regional Office of the Ministry of Law and Human Rights regarding residents of correctional institutions and detention centers in South Sumatra.

Data on Number of Occupants of Correctional Institutions and State Detention Houses at South Sumatra Regional Offices

No	Year	Number of Occupants		Total	Capacity	Percentage
		Prisoner	Inmate			
1	2014	827	2.195	3.022	2.179	139%
2	2015	962	2.486	3.448	3.109	111%
3	2016	1.249	3.094	4.343	3.109	140%
4	2017	1.118	3.643	4.761	3.109	148%
Jumlah		**4.156**	**11.418**	**15.574**	**11.506**	

data source: http://smslap.ditjenpas.go.id/public

The data above illustrates that more and more residents of correctional institutions will be increasing. Minister of Law and Human Rights Yasonna Laoly said that the capacity of detainees in Indonesia is overcapacity. This brings the consequence of increasing the burden of the State. He explained that the cost of feeding prisoners per month only reached Rp. 1 trillion.[5]

If such a situation will continue continuously then it can be ascertained that the State will be increasingly heavy in taking care of the prisoners. This happens from the criminal law system itself, and the most influential is the *strafsoort* that has been stipulated in the Criminal Code. Based on this matter, the author assesses the urgency of the reconstruction of the type of punishment (*strafsoort*) in Indonesian criminal law.

B. PROBLEM STATEMENT

Based on the description on the background above, there are indeed several problems underlying the occurrence of overcapacity in prisons. However, for more focus on this paper, the problem discussed is how should the type of sanction arrangement (*strafsoort*) be able to reduce the number of prisoners in prisons.

C. RESEARCH METHOD

This study uses normative legal research with secondary data in the form of primary legal material in the form of legislation, secondary legal materials in the form of library books and tertiary legal materials in the form of legal dictionaries, Indonesian dictionaries and encyclopedias. The collected data was analyzed using qualitative analysis.

D. DISCUSSION

1. Reconstruction

The definition of reconstruction according to the Black's Law Dictionary is interpreted as the act or process of re-building, re-creating, or re-organizing something.[6] From this understanding reconstruction is defined as an activity or process to rebuild / re-create / reorganize something. In the legal context, legal reconstruction means a process to rebuild the law. If reconstruction is associated with a concept or idea or idea of law, it means that legal reconstruction is interpreted as a process to rebuild or rearrange ideas, ideas or concepts about law in relation to the strafsoort in criminal law in Indonesia.

5 Menkum HAM: Detentions Over Capacity, Prisoner Costs Rp 1 Trilion per month, https://news.detik.com/, diakses tanggal. 2 November 2018

6 Bryan A. Garner, *Black's Law Dictionary*, Edisi ke-7, West Group, S.T. Paul. Minn, 1999, hal. 1278

Reconstruction means building or returning something based on the original event, in which the reconstruction contains primary values that must remain in the activity of rebuilding something according to the original condition. For the sake of rebuilding something, whether it is an event, past historical phenomena, to the conception of thought that has been issued by previous thinkers, the obligation of the reconstructors is to look at all sides, so that something that is tried to be rebuilt is in accordance with the circumstances actually and avoid the excessive subjectivity, which later can obscure the substance of something that wants to be built.

2. Strafsoort in Criminal Law

Sanctions are a logical consequence of an act committed. In the legal field there are two forms of sanctions, namely moral sanctions and legal sanctions. legal sanctions can be distinguished based on their legal field, for example civil sanctions, state administrative sanctions and criminal sanctions. Sanctions can have the same meaning as punishment, but the meaning is different from criminal. Sanctions *(straf*) is a sanction that is only applied in the field of criminal law. In criminal law the type of criminal can be seen in the provisions of Article 10 of the Criminal Code which consists of:[7]

2.1. Capital Punishment

Mors dicitur ultimum supplicium: capital punishment is the heaviest punishment. Capital punishment is intended for cruel crimes committed by the state as a representation of victims for bad moral actors.[87] The implementation of capital punishment as specified in Article 11 of the Criminal Code states that: capital punishment is carried out by executioners on hangers by strapping a rope tied to a hanging hook on the convict's neck then dropping the board where the convict stands.

Such execution of capital punishment is deemed inhuman so that the Law Number No. is issued. 5 of 1969 concerning the Procedures for the Implementation of the Death Penalty Submitted by Courts in the General and Military Courts are stipulated that: by not reducing the provisions of criminal procedural law concerning the running of court decisions, the execution of capital punishment imposed by courts in the general court or military justice, carried out by being shot to death according to the provisions of the law.[9]

2.1.2. Imprisonment

Imprisonment punishment is one of the criminal forms of deprivation of liberty which may only be imposed by a judge through a court decision. According to Foucault, prison cannot be separated from the manifestation of state power, therefore its implementation begins with various symbolic ceremonies for the benefit of the wider community. Prison sentences are originally intended for members of the lower classes of society characterized by hard work or forced labor.

A.Z. Abidin Farid and Andi Hamzah stressed that imprisonment is a criminal form in the form of losing independence. Criminal prison or criminal loss of independence is not only in the form of imprisonment but also in the form of exile. Pris8on sentences vary from temporary prison to at least one day to life imprisonment. As confirmed by Roeslan Saleh, that: imprisonment is the main criminal offense of losing independence, and the imprisonment can be imposed for a lifetime or for a while.[10]

2.1.3. Light Imprisonment

Light imprisonment is indicated by criminal acts that qualify as violations. Nevertheless there are also some crimes that are threatened with imprisonment, if carried out because of a negligence and the threat of imprisonment against these crimes that are alternative with imprisonment. The nature of imprisonment is basically the same as imprisonment, both of which are types of criminal deprivation of independence. Imprisonment limits the freedom of movement of a convict by confining the person in a social institution.

Light imprisonment is lighter than imprisonment, this is determined by Article 69 (1) of the Criminal Code, that the severity of the crime is determined by the order in Article 10 of the Criminal Code which

7 Slamet Siswanta, *Criminal Supervision in the Criminal System in Indonesia*, Tesis, Universitas Diponegoro, Semarang, 2007, hal. 39 Barda Nawawi Arief, *Kapita Selekta Criminal Law*, Citra Aditya Bakti, Bandung, 2003, hal. 136

8 Karen S. Miller, *Wrongful Capital Convictions And The Legitimacy Of The Death Penalty*, LFB Scholarly Publishing LLC, New York, 2006, hal. 63

9 Article 1 Law Number 5 Tahun 1969 About the Procedures for Implementing the Death Penalty Dropped by the Court in the General and Military Courts

10 *Ibid*, hal. 92

turns out that criminal confinement ranks third. The sentence of imprisonment is at least one day and at most one year. If there is a weighting, a third of the highest principal penalties may be added. The meaning is at most one year four months.

2.14. Fine

One reason for criminal penalties for not agreeing to criminal bodies in a short period of time. Fine punishment are the oldest criminal form even older than imprisonment. Criminal penalties are a person's obligation to pay a certain amount of money because he has committed an act that can be punished. According to P.A.F. Criminal penalties can be found in Book I and Book II of the Criminal Code which have been threatened both for crimes and for violations. This fine penalty is also threatened both by the sole principal punishment and alternatively by imprisonment only, or alternatively with the two principal penalties together.[11]

Fines punishment are imposed against minor offenses, in the form of violations or minor crimes. As stated by Van Hattum that this is because the legislators have demanded that the criminal fine be imposed only on the perpetrators of minor criminal acts. Therefore, criminal penalties can be borne by someone other than the convicted person. Although fines were imposed on personal convicts, there was no prohibition if these fines were voluntarily paid by others on behalf of the convicted person.[12]

2.1.5. Close penalty

Close penalty in the context of Indonesian criminal law is based on Law Number 20 of 1946 concerning the Close Penalty. This close penalty is essentially a prison sentence, but in the case of adjudicating a person who commits a crime that is threatened with imprisonment because it is motivated by an intention that deserves respect, the judge may impose a slose penalty.

It can be said that criminal cover is intended for perpetrators of political crime. Convicts undergoing criminal cover must carry out work, as well as all regulations relating to imprisonment, it will also apply to those who carry out criminal cover. Criminal cover is one of the main forms of crime stipulated in Article 10 of the Criminal Code (KUHP). The addition of close penalty to the provisions of the Criminal Code is based on the provisions of Article 1 of Law No. 20 of 1946 concerning the Close Penalty (Law 20/1946).

3. Reconstruction of types of punishment *(Strafsoort)* In Indonesian Criminal Law

The philosophy of criminal law essentially contemplates the values of criminal law, seeks to formulate and harmonize pairs of values, but which may conflict. Objects in dogmatic criminal law are positive criminal law, which includes rules and systems of sanctions. The science aims to conduct analysis and systematic rules of criminal law in the interests of correct application. The science also seeks to find principles of criminal law which form the basis of positive criminal law, which then becomes a benchmark for systematic formulation and preparation.[13]

Criminal philosophy is inseparable from legal philosophy because the concept of punishment is contained in written norms, namely legal norms. Legal philosophy is part of general philosophy because the philosophy of law offers philosophical reflections on the general legal basis. Therefore philosophy of law is a sub-branch of philosophy, called ethics or behavioral philosophy.[14]

Radbruch talks about legal ideals (*idee des Rechts*) which functions to guide people in legal life. According to Radbruch, this legal ideal is supported by three pillars, which he calls the basic values of law (*grundwerten*), namely justice, expediency, and certainty. Although ideally these three basic values must be reflected as the contents of the law, in reality all three are in a situation that is not always in harmony with one another.

In reality, the three of them face each other, contradict, and tension. Benefit can collide with justice, justice can collide with certainty, certainty can collide with benefits, and so on. In the modern legal repertoire, the tension between the three basic values has greater potential. Compared to traditional law, the tension between (certainty) law and justice almost does not occur, given the existing law grows naturally

11 P.A.F. Lamintang dan Theo Lamintang, *Indonesian Penitentiary Law Second Edition*, Sinar Grafika, 2010, hal. 69

12 Tolib Setiady, *op cit*, hal. 104

13 Joachim Friedrich, *Legal Philosophy: Historical Perspective*, Terjemahan Raisul Muttaqien, PT Nuansa Media, Bandung, 2004, hal. 3

14 H. Siswanto Sunarso, *Philosophy of Criminal Law, Concepts, Dimensions and Applications*, PT. RajaGrafindo Persada, Jakarta, 2015, hal. 184

in line with the growing feeling of justice in the community. But since the law was made (positively) and became public through an organization called the state, the issue of legal certainty became more advanced, and tended to negate other basic values.

This is also the case in Indonesia today. Legal certainty has eliminated the benefits of the law. This was said because the perpetrators of crimes who had been convicted and put in jail and after completing their crimes still committed crimes as well. This shows the ineffectiveness of the imprisonment. The imprisonment imposed by the judge is to provide legal certainty.

On the other hand, the consequences of imprisonment imposed on perpetrators of crime have led to overcapacity of prisons in general in Indonesia. From the data there are a large number of penitentiary and state detention centers that have experienced overcapacity, which has resulted in an increase in the burden of the State to take care of these inmates.

On the other hand justice and usefulness as legal objectives other than justice should ideally be applied in establishing sanctions against perpetrators of crime. This is so that it can provide positive access for victims of crime, as well as the utility value for the perpetrators of the crime themselves. The existence of a criminal alternative in criminal law has become a necessity in Indonesia. This will be able to change the stigmatization in the community who think that the prison sentence is the favorite criminal punishment of every judge in the court. Therefore it becomes urgent to carry out reconstruction of the strafsoort in Indonesian criminal law.

Reconstruction means rearranging what already exists. Likewise the case with sanctions that have been established in Indonesia's positive law requires reconstruction. This view of the current symptoms tends to cause a very high burden on the State. There are several ways that can be done to overcome the problems of the prisoners, apart from those stipulated in Article 10 of the Criminal Code, namely:

a. Determination of punishment for Social Work

Determination of criminal social work becomes urgent to be carried out in Indonesia. A social work sentence is a crime that has been used by other countries as an alternative in punishment. This is in accordance with the spirit of imprisonment as stated in Law Number 12 of 1995 concerning Corrections. Criminal social work is based on:

(a) Conformity of purpose to re-make an inmate become a complete human being while upholding his dignity. The criminal social work stems from the idea of still humanizing a convicted human being as a whole. Therefore the rights and freedoms remain respected. Thus it is clear that the differences between the two do not eliminate the same essence, but only arise with different implementations. Social workplace crimes arise in the form of criminal off-agency, while the idea of correctional practices appears in the form of criminal acts within the institution

(b) The idea of correctionalism is essentially the idea of carrying out a criminal (prison) while still upholding human dignity Judging from such objectives, the idea of correctional practices has essentially the same goals as criminal social work. By placing convicts within the framework of "social work" it is also intended that convicts can still socialize with the surrounding community. Thus, convicts do not experience "dehumanization" and other negative effects due to the application of criminal acts in the institution

(c) The idea of correctionalism requires the treatment of more human prisoners. This trial is carried out, among others, by placing convicts according to the severity of the crime committed. This effort is carried out on consideration to minimize the possibility of communication between professional criminals and beginner criminals.

Thus avoiding inmates from bad influences and negative values living in prison who can interfere with the goals and objectives of the coaching process itself. In other words, the idea of correctionalism also requires the avoidance of prisoners against prisonization. Then there is the suitability of the idea of correctionalism with criminal social work as a type of crime outside the institution clearly will avoid convicts from the possibility of prisonization, so that it will open up the possibility of the risk of recidivists. This shows that criminal social work can be one of the tools used in repelling crime in Indonesia.[15]

If criminal social work is applied in Indonesian criminal law, it can be ascertained that the value of benefits will be higher than the imposition of imprisonment. It can be ascertained that the prison inmates will diminish in Indonesia and the State burden for prisoners will be smaller, and it is possible that someday

15 Shinta Rukmi, *Prospects for Social Work Crime in Indonesia*, Wacana Hukum volume VII , NO.1, April 2008, hal. 83

Indonesia will follow in the footsteps of the Netherlands which has closed 24 (twenty four) prisons from 2013 to 2016.[16]

b. Application of Diversion

In the criminal justice system, the diversion process is new, because so far the diversion process is unknown in the criminal justice system in Indonesia. Diversion only emerged after the enactment of the Number Law. 11 of 2012 concerning Child Criminal Justice System. Diversion is an alternative to solving criminal cases outside the court.

Diversion is the authority of law enforcement officials who handle criminal cases to take action to continue cases or stop cases, take certain actions in accordance with the policies they have.[1716] Based on this there is a policy whether the employment is continued or stopped. If the case is continued, then we will face the criminal system and there will be criminal penalties that must be carried out.

However, if the case is not forwarded, then from the start the case investigation will be terminated for the benefit of both parties where the principle is to restore relations that occur due to criminal acts for the sake of the future for both parties. The purpose of diversion is to find ways to deal with legal violations outside the court or the formal justice system.

As is known that the purpose of the law is justice, benefit and legal certainty. Likewise, ideally with criminal law, the imposition of criminal acts on perpetrators must provide the value of justice, benefit and legal certainty for all parties. However, the current reality of the majority of judges is only for legal certainty. Therefore legal justice is needed for the victims of this fact.

The application of diversion as an alternative solution to cases outside the court becomes urgent to be applied in Indonesia. Indeed, there is a legal principle of "peace does not eliminate crime" but if the State has set an exception to this principle, then automatically the principle can be set aside / excluded. The application of diversion in criminal law can be carried out for crimes which are threatened with a maximum of 7 (seven) years of criminality.

The application of diversion will provide a sense of justice for victims of crime. This is because sikorban can complete the case by deliberation with the perpetrators of crime. For example the occurrence of theft, the victim will again get the property that has been stolen by my guardian. This would be more beneficial for the victim than the criminal officer was put in prison. The application of this diversion will be very good for all parties, both for the State, victims, criminals and the community.

Benefits for the State, it can be ascertained that fewer prison residents will be. This is as has happened to a child correctional facility. Since the adoption of diversion for children in accordance with the provisions of Law Number 11 of 2012, most child correctional institutions in Indonesia are no longer overcapacity. If the occupants diminish, it has a positive impact, namely the reduced burden on the State to finance the prisoners.

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1. Conclusion

Based on the description, it can be concluded that the reconstruction of the strafsoort in criminal law is urgent, seeing that the current strafsoort has led to the majority of prisons in Indonesia experiencing overcapacity. The way that can be done by the State is to add the strafsoort contained in Article 10 of the Criminal Code with punishment for social work. In addition, the application of diversion can be done to create social justice, namely justice for victims, for the State and the perpetrators of the crime itself.

2. Sugestion

Based on these conclusions, the government must immediately make the punishment for social work as part of the basic penalty in article 10 of the Criminal Code and the future rules will be immediately made regarding diversion in criminal acts.

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CRIMINAL ACTION IN TAX FIELD BY THE TERMS OF TAXATION LAWS IN INDONESIA

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Abstract

Tax law is a set of regulations that govern the legal relationship between the government and taxpayers, about who; in what cases is taxed; tax liability; the method of collection and collection. The most potential state revenue is from tax revenue. Tax revenue can be said to provide a significant portion of state revenues, because that tax receives serious attention from the government in its implementation. The research method in making this paper is done by using normative juridical research which is also often referred to as doctrinal research with objects or research targets in the form of regulations, laws and other legal materials. The formulation of the problem in this study are: 1) Have all criminal acts in the tax field been regulated in the tax law? 2) How to punish the offender in the tax field if the criminal act committed has not been regulated in the tax law? Crime in the field of taxation is an act that violates the laws and regulations of taxes that cause losses to the state finances where the perpetrators are threatened with criminal penalties, can be in the form of: negligence, or intentional. From the results of the research conducted concluded: 1) Crimes in the tax field have not all been regulated in the current tax law, 2) To punish perpetrators of criminal acts in the tax field if the criminal acts committed have not been regulated in the tax law available, it can use the provisions set out in the Criminal Code (KUHP) as Lex Generalis, as contained in Article 103 of the Criminal Code. While the suggestions that can be conveyed by the author at the end of this study, namely: 1) In order for the Law in the Tax field which regulates criminal acts carried out in the field of taxation to be implemented effectively and efficiently, since the beginning all the parties involved interest, 2) So that before the Law in the Tax field which regulates criminal acts committed in the field of taxation is implemented, long and continuous socialization should be carried out using all available facilities, so that understanding and legal awareness of the community becomes increasingly high and clearly know, that compliance in implementing the Act is to avoid tax criminal sanctions.

A. INTRODUCTION

The state aims to prosper the entire population equally and to achieve these goals the state must carry out development which of course needs to pay attention to the financing problem in its implementation. One of the efforts to realize the independence of a nation or State in financing development is to explore sources of funds originating from within the country in the form of taxes. Taxes are used to finance development that is useful for mutual interests.

Many experts give their understanding of taxes, including those stated by Prof. Dr. PJA Adriani, "Tax is a contribution to the state (which can be imposed) which is owed by those who are obliged to pay according to regulations with no return, which can be directly shown, and the purpose is to finance general expenses related to state duties. hold a government ", while according to Law No. 28 of 2007 "Tax is a compulsory contribution to the state owed by an individual or an entity that is a force based on the Act, by not getting compensation directly and used for state needs for the greatest prosperity of the people". Thus taxes have elements, including the following:

1. Taxes are collected under applicable laws. The principle is in accordance with the third amendment to Article 23A of the 1945 Constitution.
2. Unable to get reciprocal services shown directly. For example, there are people who obey to pay motor vehicle tax to the state will be able to go through a road that has the same quality as people who are not obedient in paying taxes on motorized vehicles.
3. Tax collection is very necessary for government funding in carrying out the functions of government, both routinely and in development.
4. Tax collection has the property that forces you. Taxes can be forced if a taxpayer does not fulfill these obligations and will be subject to a sanction in accordance with the applicable legislation.

5. In addition to taxes having a function for the budget, namely the function to fill in the State Budget needed to cover financing in the administration of government, taxes also have a function as a tool to implement and regulate state policies in the social and economic fields.

Indonesia is a legal state based on Pancasila and the 1945 Constitution whose purpose is to ensure the realization of justice and prosperity in national life and state, the implementation of national development that is evenly distributed throughout Indonesia. In line with that in terms of taxation, there must be a law that regulates the course of taxation in Indonesia, namely tax law. Tax law is a set of regulations that govern the legal relationship between the government and taxpayers, about who; in what cases is taxed; tax liability; the method of collection and collection. The 1945 Constitution is the main legal source of all existing laws, Article 23 contains rules in terms of state finances which include the preparation of budgets, state currencies, and regulations on taxation. Specifically taxation is compiled in article 23A which reads, "Taxes and other levies that are compelling for state purposes are regulated by law". From the contents of the article, it is clear that Article 23A is the main legal source of the regulations that stipulate the system and procedures for all taxation applicable in Indonesia. The current tax laws in Indonesia are:

1) Law of the Republic of Indonesia Number 28 of 2007 concerning Third Amendment to Law Number 6 of 1983 concerning General Provisions and Tax Procedures;
2) Law of the Republic of Indonesia Number 36 of 2008 concerning the Fourth Amendment to Law Number 7 of 1983 concerning Income Tax;
3) Law of the Republic of Indonesia Number 42 of 2009 concerning Third Amendment to Law Number 8 of 1983 concerning Value Added Tax on Goods and Services and Sales Tax on Luxury Goods;
4) Law of the Republic of Indonesia Number 19 of 2000 concerning Amendments to Law Number 19 of 1997 concerning Tax Collection with Forced Letters;
5) Law of the Republic of Indonesia Number 20 of 2000 concerning Amendments to Law Number 21 of 1997 concerning Customs and Land Acquisition Rights;
6) Law of the Republic of Indonesia Number 12 of 1994 concerning Amendments to Law Number 12 of 1985 concerning Land and Building Taxes;
7) Law of the Republic of Indonesia Number 13 of 1985 concerning Stamp Duty;
8) Law of the Republic of Indonesia Number 28 of 2009 concerning Regional Taxes and Regional Levies;
9) Law of the Republic of Indonesia Number 14 of 2002 concerning Tax Court;
10) Law of the Republic of Indonesia Number 11 of 2016 concerning Tax Amnesty.

Since the enactment of the Law of the Republic of Indonesia Number 28 of 2009 concerning Regional Taxes and Regional Retributions, all provisions governing the Fees for Acquisition of Land and Building Rights and Land and Building Taxes all refer to the Law. In the tax law also regulated various provisions of criminal acts in the field of taxation, criminal acts in the field of tax means an act that violates the laws and regulations of taxes that cause losses to state finances where the perpetrators are threatened with criminal penalties. Therefore, the author will conduct research under the title "CRIMINAL ACTION IN TAX FIELD BY THE TERMS OF TAXATION LAWS IN INDONESIA"

B. RESEARCH METHODS

The research in making this paper was conducted using normative juridical research which is also often referred to as doctrinal research with objects or research targets in the form of regulations, laws and other legal materials. The results of this legal research are not to find new legal theory but to look for alternative arguments, namely by examining the subject matter as mentioned above. In addition, this research will also complement other relevant aspects based on the scope and identification of the problems formulated.

C. PROBLEMS

The formulation of the problem in this study is about criminal acts in the tax field according to the provisions of the taxation law in Indonesia. The focus of the research is limited to the following research:

1. Have all the criminal acts in the tax field been regulated in the tax law?
2. How to punish the criminal offender in the tax field if the criminal act committed has not been regulated in the tax law?

D. DISCUSSION

1. Definition of Tax Crime

Crime in the field of taxation is an act that violates the laws and regulations of taxes that cause losses to the state finances where the perpetrators are threatened with criminal penalties, the provisions governing criminal acts of tax are contained in the tax criminal law which contains regulations concerning:

a. what actions can be threatened with punishment,
b. anyone who can be punished, and
c. what penalties can be imposed.

So this tax crime is an act that violates the laws and regulations of taxes that cause losses to the state finances where the perpetrators are threatened with criminal penalties.

Violations of taxation obligations carried out by taxpayers insofar as it relates to tax administration measures are subject to administrative sanctions, while those concerning criminal acts in the field of taxation are subject to criminal sanctions. And to find out if a criminal act has occurred in the field of taxation, an examination is needed to find, collect, process data and / or other information to test compliance with the fulfillment of tax obligations and for other purposes in order to implement the provisions of tax laws and regulations. The Legal Basis and Location of Tax Crime Arrangements in Indonesia is contained in Article 103 of the Criminal Code, as follows: "The provisions in Chapters I to Chapter VIII of this book also apply to acts which are subject to criminal provisions under the law, unless by the law is determined differently ". Article 103 of the Criminal Code is often referred to or termed as a bridge article for regulations or laws that regulate criminal law outside the Criminal Code. Article 103 of the Criminal Code is in book I of the General Code of the Criminal Code, which contains terms that are often used in criminal law. This article bridges that all terms / definitions contained in chapter I-VIII of book one of the Criminal Code can be used if there are no other rules or laws governing criminal law outside the Criminal Code, which means that as long as the Law in the Tax Sector exists regulating the criminal acts committed, the Act must be used, but if there is no Law in the field of tax that regulates it, then the provisions in the Criminal Code as Lex Generalis, that will be used.

2. Types of Tax Crimes

Crime in the field of taxation can be in the form of:

a. Violation (negligence)
This omission is called "schuld" or "culpa" which in Indonesian is translated as "error". But the meaning is in the narrow sense as a kind of mistake of the offender who is not as equal as intentional, namely: not careful so that unintentional consequences occur.

b. Intentional
Intentionality in criminal law is part of the error. The intent of the offender has a closer psychological connection to an action (which is forbidden) compared to the omission (culpa). Therefore the criminal threat to an offense is far more severe, if there is intentional rather than negligence. In fact, there are certain actions, if done with negligence, it is not a criminal act, which if done intentionally, is a crime.

Crime in the field of taxation is as referred to in Article 38 of the KUP Law, which reads: "Anyone who is due to negligence:

a. does not submit a Notification Letter; or
b. submit a Notice, but the contents are incorrect or incomplete, or attach information that the contents are incorrect so that it can cause losses to state revenues and the act is the act after the first act as referred to in Article 13A, fined at least 1 (one) time the amount of tax payable that is not or less paid and is at most 2 (two) times the amount of tax payable that is not or less paid, or is sentenced to a minimum of 3 (three) months or a maximum of 1 (one) year ".

In addition to being negligent, tax crimes can also occur due to intentions. This is regulated in Article 39 of the KUP Law, which reads:

(1) Everyone who intentionally:
   a. do not register to be given a Taxpayer Identification Number or do not report their business to be confirmed as a Taxable Entrepreneur;
   b. misuse or use without the right of a Taxpayer Identification Number or the Inauguration of a Taxable Entrepreneur;
   c. does not submit a Notification Letter;

d. submit Notification and / or information whose contents are incorrect or incomplete;
e. refuse to be examined as referred to in Article 29;
f. show bookkeeping, recording, or other documents that are fake or falsified as if they were true, or do not describe the actual situation;
g. does not hold books or records in Indonesia, does not show or does not lend books, records or other documents;
h. does not store books, records, or documents that are the basis of bookkeeping or recording and other documents including the results of processing data from books managed electronically or held on-line application programs in Indonesia as referred to in Article 28 paragraph (11); or
i. do not deposit taxes that have been deducted or collected.
so that it can cause losses to state revenues punishable by imprisonment for a minimum of 6 (six) months and a maximum of 6 (six) years and a fine of at least 2 (two) times the amount of tax payable that is not or less paid and at most 4 (four) times the amount of tax payable that is not or is underpaid.

(2) Criminal as referred to in paragraph (1) is added 1 (one) time to 2 (two) criminal sanctions if a person commits a criminal offense in the field of taxation before passing 1 (one) year, starting from the completion of imprisonment imposed

(3) Any person conducting an experiment to commit a crime of misusing or using without the right of a Taxpayer Identification Number or the Inauguration of a Taxable Entrepreneur as referred to in paragraph (1) letter b, or submitting a Notice and / or statement whose contents are incorrect or not complete, as referred to in paragraph (1) letter d, in order to submit a request for restitution or conduct tax compensation or tax crediting, shall be punished with imprisonment for a minimum of 6 (six) months and a maximum of 2 (two) years and a minimum fine of 2 (two) times the amount of restitution requested and/ or compensation or crediting carried out and no more than 4 (four) times the amount of restitution applied and / or compensation or crediting made.

3. Elements of Tax Crime

Based on the provisions in Law Number 28 of 2007 concerning the Third Amendment to Law Number 6 of 1983 concerning General Provisions and Tax Procedures (Law No. 28 of 2007), which are included in the elements of tax crime are:

a. Anyone, both personal and legal entity.
Those included in the category of "anyone" element are taxpayers and tax employees. According to the provisions of Article 1 Paragraph (2) Law No. 28 of 2007, taxpayers are individuals or legal entities, including tax payments, tax deductions, and tax collectors, who have tax rights and obligations in accordance with the provisions of tax laws and regulations. Not only taxpayers, but also tax employees can be sentenced to criminal offenses in the field of taxation. Criminal sanctions for perpetrators of tax crime include imprisonment and criminal penalties for lack of tax payments, which are regulated in the provisions of Article 37A, 38, 39, 39A, 41, 41A, 41B, and 41C Law No. 28 of 2007.
b. Acting in violation of taxation obligations
As an example of criminal provisions to taxpayers who violate tax obligations is the provision of Article 38 of Law No. 28 of 2007. In the article mentioned, every person (taxpayer) who due to his negligence: (a) did not submit a Notice of Letter, or (b) submitted a Notice, but the contents were incorrect or incomplete, or attached information that was incorrect , so that it can cause losses to state revenues and these actions constitute an act after the first act as referred to in Article 13A, a fine of at least one amount of tax payable that is not or less paid and at most twice the amount of tax payable that is not or less , or be sentenced to a minimum of three months or a maximum of one year.
c. Losses state revenues.

4. Subject of Tax Crime

The subject of tax crime is of two kinds, namely "Everyone who ..." (Article 38 and Article 39 of the Law on Cooperatives) and "Officials who ...." (Article 42 of the Law on Cooperatives). So based on these provisions, there are 3 (three) forms of subjects who can be accused of tax crime, namely:

1. Taxpayers who commit criminal acts. The definition of Taxpayers here is including people who represent taxpayers in carrying out tax obligations (tax bearers), for example:
   a. agency by management, including people who clearly have the authority to participate in determining policies and / or making decisions in running the company;
   b. entity declared bankrupt by the curator;
   c. the body in dissolution by the person or body assigned to do the settlement;
   d. the body is liquidated by the liquidator;
   e. an inheritance that has not been shared by one of his heirs, the executor of his will or who manages his inheritance; or
   f. children who are minors or people who are in custody by the guardian or their guardian;
   g. people who receive special powers from taxpayers to exercise their rights and fulfill certain tax obligations from taxpayers in accordance with the provisions of tax laws and regulations.

2. Tax Administration Officer or State administrator in tax collection. Included in this sense are experts appointed by the Director General of Taxes. Criminal acts carried out by these officials are included in the sense of complaint offenses (not general crimes), meaning that the actions of these officials as criminal acts are based on complaints from parties who feel disadvantaged / taxpayers.

3. Third party. The definition of a third party is another person not a taxpayer who, according to the provisions of tax legislation, is obliged to provide information in the implementation of tax laws and regulations in tax audits and tax investigations.

5. Criminal sanctions under the Taxation Law

The criminal sanctions stipulated in the tax law are of an alternative nature, and some are cumulative. These criminal sanctions can be in the form of minimum sanctions or maximum sanctions or a combination of both.

1) Arrangement of Alternative Criminal Sanctions.
   The settings are in:
   a. UU KUP Article 38 and Article 41C
   b. United Nations Law Article 24 and Article 25
   c. PDRD Law Article 174 and Article 176 PDRD Law

2) Setting Cumulative Criminal Sanctions
   Meanwhile, cumulative criminal sanctions are contained in:
   a. UU KUP Article 39, Article 39A, Article 41, Article 41A, Article 41B
   b. PPSP Law Article 41A

E. CLOSING

1. Conclusion

Based on the description and analysis in the previous section, finally this research arrived at several conclusions regarding the findings of the problem under study, as follows:

a. Criminal acts in the tax field have not all been regulated in the current tax law, therefore legislation in the field of taxation needs to be made more complete so that all types of fraud in the taxation sector as well as tax crimes in the form of negligence or negligence or deliberation that is likely to occur can be invited, because criminal acts in the field of taxation are special crimes which of course the criminal threat is more severe.

b. To punish the criminal offender in the tax field if the criminal act has not been regulated in the existing tax law, then it can use the provisions set out in the Criminal Code (KUHP) as Lex Generalis, as stated in the from Article 103 of the Criminal Code which reads "The provisions in Chapters I to Chapter VIII of this book also apply to acts which are subject to criminal provisions under other laws, unless otherwise stipulated by law". Article 103 of the Criminal Code is often referred to or termed as a bridge article for regulations or laws that regulate criminal law outside the Criminal Code, it means that insofar as the Law in the Tax field regulates criminal acts committed then the Law must be used, but if there is no law in the field of tax that regulates it, then the provisions in the Criminal Code as Lex Generalis, that will be used.

2. Suggestions

In connection with the conclusions above, at the end of this study the author presents several suggestions as follows:

a. In order for the Law in the Tax Sector to regulate criminal acts committed in the field of taxation, it can be implemented effectively and efficiently, so that since the beginning of the construction it has involved all interested parties.

b. So that before the Law in the Tax field which regulates criminal acts committed in the field of taxation is implemented, long and continuous socialization should be carried out using all available facilities, so that the understanding and legal awareness of the community becomes increasingly high and know clearly, that its compliance in implementing the Act is in the interest of itself to avoid tax criminal sanctions.

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CONCEPT OF THE CONSTRUCTION OF HUMAN BASIC RIGHTS TOWARDS SUBSTANCE OF CHANGES IN 1945 CONSTITUTION

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Abstract

Indonesia as one of the countries that adhere to the concept of the rule of law (*rechtsstaat)*, regulated in Article 1 Paragraph (3) of the 1945 Constitution, which states; The Unitary State of the Republic of Indonesia is a legal state. The concept of the rule of law, one of the elements of the most basic element is: the Constitution is the basis of all laws for the country concerned. In this case the law based on the constitution must prohibit any violation of the rights and independence of the people. As recognition of basic human rights more, the concept of basic human rights known as human rights (HAM) is stated in the amendments to the constitution of the 1945 Constitution.

A. INTRODUCTION

It cannot be denied by the legal community who understand the study of constitutional perspectives that are rolling from time to time, that the transition conditions of political behavior and the behavior of constitutional law are able to make changes that can be beneficial or detrimental to a constitutional system.[1] In Indonesia, every time there is a change in the transition of political behavior and the behavior of constitutional law, the result tends to be a change in the political behavior system and constitutional system that is better than the previous conditions. Such conditions occur in the political, legal, social, economic aspects as well as various aspects related to the administration of state administration.

The dynamics of development in some cases, the transition of the behavior of the political system generally leads to a system of democracy, which is developed by means of restoring a form of democratic government that has been damaged by a dictatorial regime. In fact, the legal political behavior is carried out through strategic policies to form a new democratic government, without the involvement of parties from the previous regime. In some other countries, new regimes have not been democratically elected, or even they have entered power through force, but they have developed respect for human rights.[2]

In the perspective of constitutional law, a discussion of the concept of transitional justice relates to the nature and role of constitutionalism in the political transition period and which has a correlation with basic human rights or known as Human Rights which has universal recognition as referred to in the declaration of human right 1948.

By considering the current conception of the relationship between constitutional change and political change, in particular, the modern demands of constitutionalism as the basic foundation of the rule of law and democracy, then substantially amendments to the 1945 Constitution adapting to the will of the people who have entered the reform era since 1998,[3] especially the law-based will and the realization of human rights.

In the experience of many countries, constitutional changes based on changes in strategic legal political behavior have become commonplace. Although generally, these changes are not comprehensive, at the level of classification which is under the state constitution (the Basic Law), it is very likely that these changes can occur in a moderate manner. The reason is because the community wants changes that touch the interests of life and can guarantee a prosperous, just and prosperous society.

1 Sudaryatin, *Asas Hukum Tata Negara*, Jakal Press, Yogyakarta, 1997, hal 27

2 Satya Arinanto, *HAM dalam Transisi Politik di Indonesia*, Jakarta; Pusat Studi Hukum Tata Negara, Fakultas Hukum Universitas Indonesia, 2011, hal.45

3 Denu Abraham, *Konsep Hak Dasar Manusia dan Konstitusi Negara*, Jakarta; Pamator Press, 2016, hal 151.

In a concise hypothesis, if constitutionalism in a period of political transition is contested in a constructive group position in relation to the political order prevailing at a certain time, then what is possible will be that transitional constitutionalism is not only determined by the political order that was in effect at that time, but it is also a provision of changes in political behavior to the interests of more formal policy strategies as the will of the community.[4] Transitional constitutions appear in the form of a variety of processes, often playing a variety of roles: serving the purposes of constitutional conventions, as well as having more radical goals in political transformation.[55] The preparation of a transitional constitution is also responsible for the previous rules, through the principles that critically filter the current legal system, streamlining changes in legal politics further within the system, including the constructive laying down of the concept of basic human rights known as human rights (HAM) in constitutional changes.

Since the reform era in 1998, if we have tried to theorize about the nature and role of constitutionalism in the period of political transition in general, then from that perspective it will lead to two views: the views of realist groups or idealist groups.[66] In the view of realist groups, the constitution in the period of political transition is only considered as a means to reflect the prevailing balance of political power. Based on a view that does not fully distinguish between the making of a constitution and making the concept of constituting legitimate human rights constitutionally in a constitution during the era of reforming legal politics, the brief review approach of this paper can be used as an introduction to understanding significant policies as a contribution to constructive constitutional changes.

B. PROBLEMS

The problem with this paper is; What is of pouring out the concept of basic human rights to the substance of the changes to the 1945 Constitution?

C. DISCUSSION

Indonesia as one of the countries that adhere to the concept of the rule of law (rechtsstaat), and is not based on power (machtstaat). This concept is very clearly regulated in Article 1 Paragraph (3) of the 1945 Constitution, which states; *The Unitary State of the Republic of Indonesia is a legal state.*[77] As a consequence of the rule of law, putting the law above everything else. This means that state institutions and the organizers of countries and communities must comply with the law. Law is a regulation that applies to society, therefore the law in its implementation can be forced and aimed at achieving justice and legal certainty.

Regarding the justice of this law, it is necessary to pay attention to what Aristotles said:

that the one who rules in the state is not human, but a just mind, while the real ruler is only the holder of law and balance. Decency that will determine whether or not it is good the rules of law and making laws are part of skills to run state government.[8]

Therefore, in the rule of law, the most important thing is to educate people to be good citizens, because from their fair attitude, the happiness of their citizens' lives will be guaranteed. The basic principle in the rule of law, including legal (supremacy of the law) or government based on law (equality before the law), and law enforcement in a way that is not against the law (due process of law).[9] This means that state and political power is not unlimited (not absolute). Need restrictions on the authorities of the authorities. Where restrictions on state and political power in the rule of law must be clearly carried out.[10]

Limitation of state power by law, according to Dicey that the law is:

"La ley est la plus haute inheritance, que le roi had; car par la ley in meme et to ses sujets sont rules; et la ley ne fuit, nut roi et nui inheritance sera".[11] This means that the law occupies the highest place, higher than the position of the king, a king and the government must submit to the law, without the law there is no king and there is no reality of this law.[12]

4 Ibid, hal 49

5 A. Budianto, *Sistem Hukum Ketatanegaraan di Indonesia*, Jakarta; Cempaka Media, 2011, hal 52

6 Herman Suntojo, *Politik Hukum di Indonesia,* Bandung; Bayu Penamas, 2012, hal 75

7 UUD 1945 Pasal 1 butir (3)

8 Moh. Kusnardi dan Harmaily Ibrahim, *Hukum Tata Negara Indonesia*, Jakarta: Sinar Bakti, 1998, hal 154

9 Munir Fuady, *Teori Negara Hukum Modern (Rechtstaat*), Bandung : Refika Aditama, 2010, hal-46.

10 *Ibid*, hal 15.

11 Dicey, A.V., *Introduction to Study of The Law of The Constitution*, Ninth Edition, ST. Martin's Street, London: Macmillan And Co, Limited. 1952, hal 41

12 Miriam Budiardjo, *Dasar-dasar Ilmu Politik*, Jakarta : Gramedia Pustaka Utama, 2008, hal 57

The concept of the rule of law can be interpreted as an attempt to limit the power and authority possessed by institutions and state apparatus including law enforcement officers. Explore the concept of the rule of law, according to A.V. Dicey has several elements of the legal state, the most important of which are:

1. Supremacy of law (the supremacy of law that eliminates arbitrariness, meaning that a person may only be punished if violating the law).
2. The application of the principle of equality before the law.
3. The constitution is the basis of all laws for the country concerned. In this case, the law based on the constitution must prohibit any violation of the rights and independence of the people.[13]

The concept of the rule of law implies legal aspects that guarantee the rights of the people so that the government does not violate these rights. Ideally, that uncontrolled state power will lead to the tyranny that ignores the interests of the people. Unlimited power tends to be unfair. Likewise, absolute state power is certain to be arbitrary in government. This is the main basis of the concept of the rule of law. Another essence of the rule of law, namely the state has a fair law, the enactment of the principle of distribution of power against all people, including the state authorities must submit to the law, all people receive equal treatment in law, and legal protection for people's rights.[14]

The rule of law guarantees justice to its citizens. To understand how the ideas, concepts and principles of the rule of law, it was stated that the state of law. (rechtsstaat), aims to carry out law and order, which is an order that is generally based on the law found in the people. The rule of law maintains legal order so that it is not disturbed and everything goes according to law.

In the concept of the rule of law, a state constitution is a ground norm that is domiciled as one of the basic legal sources that can be used as a philosophical basis, when a country wishes to create legislation for the benefit of society, state administration, governance and regulation of basic human rights. In Indonesia, the form of the state constitution, namely the 1945 Constitution, since 1945 until now has undergone several changes, according to the wishes of the people and considering the politics of constitutional law.

Constitutionalism since the era of political reform has emerged reconciled by positioning constitutionalism to function as the foundation of the new legal-political order, as a demand for constitutional grounding, especially if it is associated with accommodating people's basic rights. In this context, then the concept of renewal is related to human rights, as evidence that in the reform era like in Indonesia in 1998 which was ongoing at that time, then gave birth to a new order that led to the realization of the rule of law based on human rights and justice.

In Indonesia related to human rights, constitutional changes occur. Several articles in the torso of the 1945 Constitution after the Reformation era was amended, especially determining matters that provide guarantees for human rights recognition, such as; "All citizens are at the same time in law and government and are obliged to uphold the law and the government with no exceptions. Everyone has the right to recognition, guarantee, protection and fair legal certainty and equal treatment before the law. Every person has the right to work and receive compensation and fair and proper treatment in work relations.[15]

> *The conception, the reality of the placement of the concept of basic human rights which then substantially gained legitimacy and stated in the constitution in the form of articles in the 1945 Constitution of Amendment is the enactment of a special chapter governing "Human Rights" in Chapter XA, the second amendment to the 1945 Constitution. The contents of the Chapter extend Article 28 of the 1945 Constitution which originally consisted of 1 Article and 1 paragraph, into several Articles and several verses. The articles and verses are listed in Articles 28 A to Article 28 J.*[16]

This very substantial change can be concluded that in a relatively long period of time since Indonesia's independence from 1945 to 1999 it turned out that the nation's children did not fully enjoy their basic rights or could be said to lose some of their rights, which had been shackled by two old-order and order regimes new. In the proper case, in the development of state administration in many countries, the recognition of the laying of basic human rights through the constitution of a country is a fundamental thing that should not be

13 Ibid, hal 117.

14 A. Hamid S. Attamimi, *Peranan Keputusan Presiden Republik Indonesia dalam Penyelenggaran Pemerintahan Negara; Suatu Studi Analisa Mengenai Keputusan Presiden yang Berfungsi Pengaturan dalam Kurun Waktu Pelita I – Pelita IV*, Disertasi, Fakultas Pascasarjana UI, Jakarta, 1990, hal 310.

15 Undang-Undang Dasar 1945 Amandemen

16 Satya Arinanto, *Hak Asasi Manusia dalam Transisi Politik Indonesia*,Jakarta; Pusat Studi Hukum Tata Negara, Fakultas Hukum Universitas Indonesia, 2011, hal 20

ignored.[17]

In Indonesia, with the inclusion of basic rights in the form of provisions on articles on human rights in the amendment to the 1945 Constitution, despite the shortcomings in its formulation, it implies that the community has a strong foundation in implementing human rights. To uphold and protect human rights in accordance with the principles of a democratic legal state, the implementation of human rights is guaranteed, regulated, and set forth in the legislation. In exercising their rights and freedoms, everyone is obliged to submit to the law for the sole purpose of guaranteeing recognition and respect for basic human rights and the freedoms of others and to fulfill just demands in accordance with moral considerations, religious values, security and public order in a democratic society.[1818] Despite the character caused by the development of a growing generation, it is possible to include elements of human rights in the amendments to the 1945 Constitution, as a form of basic rights of the community that cannot be ignored. Commitment in Indonesia, since the establishment of the state has guaranteed and protected human rights.[19]

In its current implementation, even though we are a state of law and recognize basic rights or human rights,[20] even though it is complex, that right must be respected and applied. A contextual and integral approach to placing human rights as part of an existing constitution. His philosophy, interpreting the concept of basic human rights can not be separated from the concept of the constitution, specifically in the Unitary State of the Republic of Indonesia. In reality, the concept of basic human rights substantially has been stated in Chapter XA Articles - 28 a to Article 28 j Changes to the 1945 Constitution.

D. CONCLUSION

In a legal state with a democratic government system, the concept of basic human rights commonly known as Human Rights (HAM), this is one of the responsibilities of state administrators to be stated in the state constitution. Without human rights, humans will not be able to enjoy equal rights, the right to freedom, the right to life, the right to express opinions and so forth. Therefore, the implementation of human rights is bound by formal rules that respect the existence of human rights themselves. Recognition of basic human rights in the form of the concept of human rights as outlined in the constitutional amendments to the 1945 Constitution, consequently every human being who respects human rights means that they are obliged to submit to the will that is regulated by law. Human rights are inherent rights of every human being to be able to maintain life, dignity and dignity. In carrying out these rights, a balance between rights and obligations and between public interests and individual interests is carried out in a balanced manner.

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Undang-Undang Dasar 1945 Amandemen.

THE PUNISHMENT IMPOSEMENT OF THE SOLVENT BANKRUPT DEBTOR IN LAW ENFORCEMENT OF BANKRUPTCY IN INDONESIA (VIEWED FROM LEGAL JUSTICE PERSPECTIVE)

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Abstract

In the law number 37 of 2004 concerning Bankruptcy and Postponement of Debt Payment Obligations, there are problems related to the requirements provisions of the bankrupt debtor application which is very simple. The application of the bankrupt debtor must be granted, the provisions on the confiscation of bankrupt debtors' assets, and the provisions on the revocation of bankrupt debtor's right to do legal deed which is later taken over by curator. The above provisions lead to problems of legal injustice, especially for insolvent bankrupt debtors. This paper will analyze the aspects of legal injustice contained in this Act. The method of this research is normative legal research with the approach of legislation and analyzed qualitatively through literature study. The answer to the above problem is the legal injustice in the determination of the insolvent bankrupt debtor which is viewed from the perspective of justice include legal justice, sociological justice and philosophical justice, including in the aspects of legal substance which is the whole legal norms, which include the rules of written and unwritten law, legal principles and legal institutions (legal concept) to realize the purpose of law. The legal policy that needs to be taken in this problem of injustice is the need to make new provisions on the application of the insolvency requirements principle through the establishment of institute or an insolvency test instrument and the application of the remedium ultimum principle and the application of the principle of debt forgiveness, the principle of corporate rescue and the principle of comercial exit from financial distress.

Keywords: Bankruptcy Law, Justice, Insolvency Test Instrument, and Remedium Ultimum

A. INTRODUCTION

1) Background

Article 2 Paragraph 1 of Law Number 37 of 2004 concerning Bankruptcy and Postponement of Obligation of Debt Payment which explicitly stipulates "Debtor having two or more creditors and not paying off at least one debt which has matured and can be billed, declared bankrupt by Court Decision, either on his sole petition or on the request of one or more of his creditors ". Such provision poses a problem when it is applied to a solvent bankrupt debtor, since in paragraph 4 explicitly a bankruptcy petition must be granted if a fact or condition is proven simply that the requirements for declaring bankruptcy have been met. The logical consequence of such provision is to the bankrupt debtor that his/ her civil rights are revoked in the settlement of accounts payable taken over by the subsequent curator of all property belonging to the bankrupt debtor by public confiscation. The authority to settle the debts of bankrupt debtors is carried out by a curator authorized by law to resolve the interest of the creditor. The settlement by the curator uses the general seizure mechanism for the entire debtor's wealth as mandated in article 1, paragraph 1 "Bankruptcy is the common confiscation of all the debtor's assets whose management and release are carried out by the curator under the supervision of a supervisory judge as provided for in this Law", then reinforced in Article 21 "Bankruptcy encompasses the whole debtor's wealth on the declaration of bankruptcy declaration and all that is obtained during the bankruptcy". Furthermore in article 24 paragraph 1 it is stipulated that "Debtor by law loses its right to control and manage its assets included in the bankruptcy property". In addition Article 25 stipulated "All debtors' engagement issued after the decision of bankruptcy declaration can no longer be paid from bankrupt property unless the agreement is in favor of bankruptcy ", and in article 27 it states that" During the bankruptcy of the demand to by the fulfillment of the engagement of the bankrupt property addressed to a bankrupt debtor, may only be filed by registering it for provision ", which is in line with article 26 paragraph 1 "The claim concerning the rights or obligations concerning the bankruptcy property shall be filed by or against the curator ".

Against the rules of law in bankruptcy law which is currently applicable in Indonesia which imposes legal liability for debtor debts that have not been paid to creditors in particular are treated for solvent bankrupt debtors as described above. They are viewed from the perspective of legal justice contains elements of legal injustice, because the legal norms should have legal certainty, legal justice and legal benefit, therefore these three conditions should ideally be present in every legal substance. In reference to Act No. 37 of 2004 concerning bankruptcy and postponement of debt obligations.In that case the authors believe that this law does not meet the requirements in the legal certainty aspect particularly in relation to the provisions set forth in article 2, paragraph 1, where the debtor may be mocked for are declared bankrupt through the Commercial Court only. That case on condition that the requirement of the debtor being filed for bankruptcy is proved "has two or more creditors and fails to pay off at least one debt which has fallen and may be collected either on his own request or on the sole request of one or more creditors ". The provision indicates that it does not reflect sociological justice, since the concept of debt settlement in a container of bankruptcy law which can be declared not a bankruptcy concept that lives and applies to the business community, namely in the case of the punishment of the debtor declared bankruptcy which is actually the state of the company or the circumstances the wealth of the debtor is still solvent, so it can be declared contrary to justice stating that individual human beings should be respected and treated as absolute values.Therefore, those provisions do not meet the requirements of justice in relation to the fulfillment of requirements from the perspective of Philosophical Justice. It should fulfill the requirements of the elements in the substance of the law and the conditions for the people who want justice that should fulfill the ideals of justice for the debtor as well as the justice for creditors in debt securities settlement through bankruptcy mechanism. The authors therefore consider that the debtor's treatment can be declared bankrupt only applicable to the debtor who is really insolvent, and must be verified first by the institution by using the insolvency test instrument, so that to fulfill the requirements of the justice becomes important to do research related to the question:

a. Urgent condition background of the formation of the enactment of Law No.37 of 2004.
b. What concepts are accommodated in the debt settlement efforts set forth in Law No. 37 of 2004?
c. Which ideal concepts can be offered to answer the problem so that the legal justice value in the collapse of bankruptcy status for the debtor who is still solvent is fulfilled, viewed from the perspective of legal justice, sociological justice and philosophical justice and legal benefit.

2) Problem Formulation

Based on the above description the authors formulate the following problems:

1. Why did Indonesia see Urgen in the enactment of Law No. 37 of 2004 on Bankruptcy and Suspension of Debt Payment Payable as the legal basis for settlement in the handling of debts including debt of debtors to the government and debtor debts to private creditors affected by the Banking, Monetary, Economic and Political crisis of 1998?
2. To what extent the philosophy of the concept of debt settlement of accounts receivable through the mechanism of bankruptcy and postponement of debt payment obligation set forth in Law No. 37 of 2004 can meet the ideals of justice?
3. What is the ideal concept for improving the legal system in the settlement of debt indebtedness problems that satisfy the fairness of the debtor and creditors?

3) Research Methods

This research uses Normative Law Research method. There are three approaches to examine the three issues that will be discussed with this nomative research method of statute approach, case approach and conseptual approach. A statutory approach is needed in order to track the legislation ratio and the ontological basis of the birth of legislation (Marzuki, 2014: 93-94). The case approach is used to find the ratio decidendi or reasoning, ie the court's judgment to arrive at a decision, where the legal breakthrough is aimed at providing access to justice (Irianto and Liem Sing Meij, 2011: 191).

The conceptual approach is used to understand precisely and accurately the various concepts used by the legal principles in the Law as well as the doctrins of the jurists (Marzuki, 2014: 178). Sources of data used in this study is secondary data consisting of primary legal materials in the form of legislation, Bankruptcy Law in some countries as a comparison, the Civil Code, the Law of Treaties and Court Decisions, as well as secondary legal materials in the form of literature and research results. The laws and regulations used include the Civil Code, the trade Law, the Law of Contract, the Constitution, the Bankruptcy Regulation,

the Government Regulation in Lieu of Law No. 1 of 1998 on Amendment to the Bankruptcy Law, Based on Law No. 4 of 1998, Law No. 37 of 2004. The literature used in this study is expected to avoid errors related to philosophical justice and legal justice, sociological justice, and related studies with the principles of balance, business continuity, justice and the principle of integration. Legal materials and literature are collected through systematic methods and recorded in the cards among others, problems, principles, implementation arguments which is taken, alternative solutions and so forth. The data that has been collected is then described and interpreted as the subject of the matter which is then systematized, explained, and argued. The method of analysis applied to derive conclusions on the issues discussed through qualitative juridical analysis.

B. DISCUSSION

In the study of the law through the approach of the elements of law because the law itself, the reality consists of three elements (Laurance M Firedman, American Law, Translation Wisnu Basuki, 2001: 323) that is the substance of law, legal apparatus and legal culture.

What is meant by the substance of the law herein is the whole legal norms which include the rules of the written and unwritten law, the legal principles and legal institutions to realize the objectives of the law, therefore the rules of law must be legal certainty, legal justice, and legal benefit, so that the substance of law has aspects of legal certainty, aspects of legal justice and legal benefits.

In the field of bankruptcy law in Indonesia, the legal substance is formulated in Law No.37 of 2004 challenging Bankruptcy and Delay of Obligation of Debt Payment, as described in the above background, the authors argue that this law does not guarantee legal certainty, because the substance of the existing law in particular related to the provision of article 2, paragraph 1, is irrational because in this article the debtor's determination may be filed and imposed only if there is a minimum of two or more creditors (*concursus creditorom*), there must be a debt, not paying off the credit of one debt that has fallen and can be billed (due and payable), which applies to the insolvent debtor in a solvent or insolvent state, and which becomes irrational is when charged or applied to a solvent debtor. This requirement in practice raises some problems that originate from differences in interpretation of substances that do not expressly regulate matters relating to the requirements for bankruptcy application (Anisah : 42-43). To prevent differences in interpretation, consideration should be given to the definition of debt-related, debt maturing billable, and simple verification as the basis of the decision of bankruptcy declaration.

The substance of law has an aspect of legal certainty, when the law is built on the basis of a rational legal framework (Dinyati, 2004: 62), as Tom Cambell (Cambell, 2004: 2).

The legal positivism on this view, is to provide an accurate account of law as it is actually rather than as it ought to be. It is, assumed, follows from the positivist insistence that natural law theory neglects the logical distinction between description and prescription, and in particular confuses the analysis of law with its critique.

According to Ad Peperzak (Peperzak, 2008), that within the framework of a system of positive legal rules, good words, true and fair, is lawful, wrong and unjust means unlawful.

The flow of legal positivism is only willing to base itself on the positive legal system itself. The extreme flow of legal positivism will state: "we must obey the law, for it is the law" (Sidharta, 2008: 1).

Lon Fuller in B Arief Sidharta distinguishes moral content on two aspects, namely internal and external aspects (Sidharta, 2008: 8). The internal aspect of legal morality, pointing out the technical rules of the embodiment of the law in the rules or rules of law as a means enabling the external aspects of legal morality can be realized. While the external aspects of legal morality, indicate the moral demands to the law that must be met for the law to function properly and fairly. The starting point is the sole principle of recognition and respect for human dignity, which is the parent of other principles. This principle implies the right of each individual human being to be himself as a whole. This right is a very fundamental right.

As noted earlier, the internal aspect of legal morality is the rules or rules of law as the means by which the external aspects of legal morality can be realized. These principles can also be viewed as the basis and terms of legitimacy for the implementation of the legality principle (legal certainty).

Referring to the problem of legal injustice in Law No. 37 of 2004 as described above, the authors deem it necessary to discuss the historical background of legislation related to the Law on Bankruptcy in Indonesia, which previously used the instruments of verilening faillisements essentially in this bankruptcy law further protect the interests of debtors, which in 1998 as Indonesia was hit by the monetary crisis

triggered by the currency exchange rate fluctuation in early 1997 that caused negative impacts resulting in banking crisis, economic crisis until the national banking confidence crisis to catapult interbank money market interest rate (PUAB) reached 300% / year and in the event of systemic banking system crisis with a very high risk (systemic risk) and the amount of risk borne by the society (economic cos), especially the business community and forced the government to bear the consequences of the occurrence of problems in Bank Indonesia liquidity support (BLBI), which is also due to the violation of credit provisions that violate the maximum limit (BMPK), including the risk of non-performance loan debtors (NPLs) that are very large. This has forced the government through a limited cabinet meeting to help surviving banks, ordering banks to merge or sell some banks to better-off banks and revoke permit banks that have no hope of life, as well as government as a guarantor of a letter of credit issued by national banks that are not accepted abroad, and at the same time the government guarantees against the debts of national banks to foreign creditors through reschedule mechanism. This situation forced the government to get loan assistance from International Monetery Bank (IMF) starting from 3 September 1997. Banking, Monetary and Belief crisis that hit the nation of Indonesia is then the government issued the government regulation no 1 year 1998 about Bankruptcy later this Perpu (Rules of constitution substitution) in year 2004 was passed into Law No. 37 of 2004 on Bankruptcy and Postponement of Debt Payment Obligations which subsequently in the substance of the articles in this Law further protects the interests of creditors, due to the background in defending the interests of the government as creditors to the obligors of the owners of national banks that have received bailouts through a recapitulation bank mechanism that uses the BLBI instrument, which ignores aspects of legal justice that live in the business community in general.

Justice of Law

From the aspect of justice, the thinkers as well as legal practitioners, sort out the aspects of justice into: Legal justice, sociological justice, philosophical justice.

Legal jusctice, according to Hans Kelsen, a positivist, that all laws are for him only the arrangements established and imposed by the state power, which apply at a certain time and in a particular region (Scholten, Bandung 2003:11). In relation to the current bankruptcy law, as the Indonesian government at the time of International Monetary Fund (IMF) pressure to enact a government regulation in lieu of Law No. 1 of 1998, reality shows that the rule is issued with the legal form of Government Regulation in Lieu of Law , then it can be interpreted that the provisions of the legislation is formed by the state power, namely the Indonesian government, so that the category legal justice has been fulfilled.

Sociological justice, a law that lives in the consciousness of society and perceives its justice for society, as Ehrlich puts it. Its relationship to the current bankruptcy law is that this bankruptcy law, especially Article 2, paragraph 1, does not reflect sociological justice (Morrison, 2000: 79), since that provision is not a provision in accordance with the concept of bankruptcy, in business community awareness.

Philosophical justice, according to Ad Peperzak (Peperzak, 2008: 12), can not be based on a positive law or a positive rule of law system, because in that way, philosophical justice will deny itself as an endeavor to think radically.

A thought of philosophical justice will morally bring out the necessary elements and conditions for a truly just human life.

The declaration of bankruptcy against a solvent debtor is contrary to the principle of justice which states that every individual human being must be respected and treated as absolute value, or as Kant says:" man must be viewed as an end in itself ". According to the writer's opinion, however, individual debtors must be respected and treated as absolute value and as self-intended, *etre pour soi*, if in reality he is still solvent, but otherwise declared insolvent to the debtor who is still the solvent, his status as subjects (*etre pour soi),* then only become mere objects (*etre en soi*). This appears to be made publicly seized on all of its assets and no authority to manage assets and business ventures that are still running profitably should be stopped.

There are several examples of cases that have been sentenced to be declared as bankrupt debtor in the case of the state which is still solven while the applicant's creditor's debt is very unequal to the amount of assets owned by the debtor who is still very solvent, whose legal considerations by the Commercial Court judges are very irrational, thus containing legal injustice among others:

The application case of Bankrupt debtor of PT Asuransi Jiwa Manulife Indonesia with case number 13/ bankruptcy / 2004 / PN.Niaga. Jkt. Pst filed by its own shareholder on behalf of PT Darmala Sakti Sejahtera, only for reasons of PT Asuransi Jiwa Manulife Indonesia which is considered not to pay dividend

of corporate profits in 1998, where the request was granted by the Commercial Court while the financial position or assets owned by PT Asuransi Jiwa Manulife Indonesia at that time were very solvent. It is about 1.3 trillion and 400,000 policy holders, while the amount of debt demanded from the applicant ranged 30 billion (The Danish verdict shook Manulife, 2005: 46).

In order for the current bankruptcy law to fulfill the philosophical justice aspect, that is, to bring out the necessary elements and conditions for a society's life is truly fair, then only the real debtor can be declared bankrupt. The condition in question is a status that can empower the debtor because the amount of assets is greater than the debt and the business is still running smoothly and bring profits. From such a debtor, it will bring out the necessary elements and conditions for a truly just society life, the debtors that depend on the lives of many people not only for the business community in particular: the stakeholders of the goods suppliers and services, but also society in general, ie by not declaring bankruptcy to the debtor who is still solvent, because the business obtained, the debtor can pay taxes, and is indispensable for the welfare of society and the development of the state, so that the elements and conditions necessary for a truly just society life are created, as John Rawls states, who formulated the principles of justice as follows:

First, each person is to have an equivalent system of liberty compatible with a similar system

Second: Social and economic inequalities are to be arranged so that they are both:

a. Reasonably expected to be to everyone 's advantaged, and
b. Attached to the position and office open to all.

First: everyone has equal rights over the most extensive basic freedoms in harmony with a similar system of freedom for others.

Second: social and economic inequality should be arranged in such a way that

a. Providing rationalistic (accountable) benefits to everyone,
b. At the same time make opportunity for every position and title.

However, when the book was reissued with a revision in 1999, the formulation of the principles of justice changed to:

First Principle: each person to have an equal right to the most extesive total system of equal basic liberties compatible with a similar system of liberty for all

Second Principle: social and economic inequalities are to be arranged so that they are both:

a. To the greatest benefit of the least advantaged, consistent with the just saving principle, and
b. Attached to offices and position open to all under conditions of fair equality of opportunity

First Principle: everyone has equal rights over the most extensive system of all basic freedoms in harmony with a system of freedom similar to all.

The second principle: social and economic inequality should be arranged in such a way that

a. Gives the greatest benefit to the disadvantaged, consistent with the principle of saving / just saving.
b. At the same time open opportunities for every person over every position and position in the same opportunity conditions fair.

Meanwhile, in another book entitled political liberalism published in 1993 (edition paperback 1996) the formulation of principles of justice that reads as follows:

a. Each person has an equivalent schema of equal basic right and liberties. Which scheme is compatible with the same scheme for all; and in this scheme the equal political liberties, and only those liberties, are to be guaranteed their fair value.
b Social and economic inequalities are to satisfy two conditions:

First: they are to be attached to positions and offices open to all under the conditions of fair equality of opportunity.

Second: they are to be the greatest benefit of the least advantaged members of society

a. Everyone has the same demands on a fully adequate pattern of equal rights and fundamental freedoms. The pattern is in harmony with the same pattern for everyone. In this pattern the same political freedoms, and only this freedom alone, are guaranteed justice.
b. Social and economic inequalities must meet two requirements:

First: to be associated with positions and title open to all people in accordance with (the principle demands) equal opportunity equality.

Second: with the greatest benefit for the most disadvantaged citizens

Yet in any case, these principles of justice depart from a more general concept of justice, which reads: (Rawls : 54).

All social values - liberty and opportunity, income and wealth, and social bases of self respect are all the values of all social values - freedom and opportunity , income and wealth, social-based personal dignity - should be distributed equally.the unequal distribution of social values is permitted when it is indeed beneficial for everyone). Furthermore, the principles of justice are governed on the basis of the order he calls the lexical other or serial order. On that basis, the priority formulation appears in the execution, as follows: (Ujan: 2001).

The priority of liberty provides that the principles of justice are structured in such a way that the freedom (equal right and equal liberties principles) can only be limited for the sake of freedom itself.

The second priority (the priority of the justice over efficiency and welfare) establishes that on fair equality of oppertunity applies first to the difference principles.

Aspects of injustice in the Law on Bankruptcy in Indonesia from the start of the provisions concerning Bankruptcy (*Faillissments Verodening*), the law number 4 of 1998 and the law number 37 of 2004 are concerned with the requirements of a very simple bankruptcy application that does not consider the requirements aspect Insolvency test.

In law number 37 of 2004 even though in the Act explicitly has been determined about the principles and principles of bankruptcy law, which has been determined about the four principles of bankruptcy law, the principle of balance, the principle of business continuity, the principle of justice, and the principle of intergation. In these principles although it is expected to satisfy the sense of justice for the parties concerned but in practice does not concern other creditors due to the execution of the right of the holders of pawns, fiducia, mortgages, mortgages or collateral right suspended for a period of not more than 90 days since the decisions of bankruptcy declaration are established which applies both solvent and insolvent debtors, which in their implementation because formal law in this bankruptcy law has special procedural law including the determination of filing requirements and the bankruptcy decision has caused injustice because it does not consider that the debtor is still solvent, and there is not any provision governing the requirements or instrument of nsolvency test.

Whereas in Law No. 37 of 2004 does not accommodate the sense of justice in relation to the absence or non-consideration of the principles of international bankruptcy law related to the three principles covering:
1) The principle of bankruptcy decision can not be imposed on the debtor who is still solvent (the principle of insolvent requirements). This is essentially aimed at the debtor being proposed or filed for bankruptcy is a debtor who is in an insolvent state, which means that the debtor's financial condition really does not allow it to pay off all debts. Debtors who have been in the same state as above in financial management theory are referred to as insolvency in bankruptcy, the book value of the total liabilities exceeds the basic value of the company's assets, which in the end is a sign of the economic failure that leads to business liquidation (Bank Indonesia, 1999: 7). If simplified, it can be said that insolvency in bankruptcy is a state in which the total debt of debtors far exceeds the total amount of its assets. Such circumstances necessarily require a financial audit by an independent public accounting firm to prove it and to prevent the abuse of the insolvency agency itself from the parties of bad faith in its utilization. This financial audit is commonly referred to as insolvency test.

The next objective of the existence of this principle is to protect the debtor from the insistence, coercion and possible threats made by creditors to invalidly collect their receivables while the debtor is in an insolvent state. Therefore, it is a wise consideration if the insolvency condition is determined not only from the debtor not paying the debt to one of his creditors, but also not paying the bulk, or more than 50% of his debt (Sjahdeini : 41). Similarly, if the debtor does not pay only to one creditor who does not control as the debtor's debt while the other creditors are still carrying out their obligations well, this case is not a case to be examined by the Commercial Court, but becomes the competence of the ordinary Civil Court.

2) Principles of Encouraging Foreign Investment

This principle has the sense that the insolvency institution should also be able to create an attractive investment climate, and able to encourage the development of economic passion in Indonesia as in the field of capital market and infrastructure and can participate and provide convenience for Indonesian companies in obtaining foreign credit.

In order to create these objectives, the Bankruptcy Law should contain globally accepted principles. These principles must be in line with the principles of bankruptcy law of the investors (state) and foreign creditor countries desired by the government and the Indonesian business world to invest their capital

into Indonesia. Therefore, the creation of an attractive investment climate must surely be in line with Law No. 25 of 2007 on Investment, Especially Article 4 paragraph 1 jo paragraph 2 letter b which states that the government sets the basic policy of investment to encourage the creation of national business climate conducive to investment and to accelerate improvement by providing assurance of security and certainty to investors since the licensing process until the end of investment activities.This assurance of business security and certainty must also be supported by a bankruptcy legal instrument while maintaining the business continuity of a debtor on a bankruptcy request.

3) Ultimum Remedium Principle

This principle aims to insure bankruptcy institutions as a last resort (ultimum remedium) for creditors to obtain their debts repayment from debtors. From this the bankruptcy institution bias becomes a means of punishment for the debtor to pay off its debts that have matured.

This principle can in essence be an effective means for creditors to secure repayment of its matured receivables as long as the creditors have a good understanding that the insolvency institution should be placed as a last resort and the debtor also has the good faith to settle the debts that have been due date for the present, but is able to pay off its debts when restructuring is done. However, in the implementation of this, of course, there must be financial evidence from the company that the debitor is still solvent, that the debtor can still continue its business in the future with good business prospect, of course it can be done with the application of insolvency test.

C. CONCLUSION

The legal norms concerning the requirements of the bankruptcy debtor application are very simple and the provisions giving the authority of the commercial court judges shall grant the request of the debtor of bankruptcy, as well as the provisions concerning the revocation of the debitor's bankruptcy rights to all of its assets. Then its authority is taken over by the curator based on the decision of the commercial judge and the provisions of the public confiscation against all assets belonging to the bankruptcy debtor applicable to the insolvent bankruptcy debtor as governed by the law of bankruptcy of the State of the Republic of Indonesia as Law No. 37 of 2004 which was born and enacted on the initiative of the state underpinned by circumstances of force as made in the interest of overcoming the banking, monetary and the belief of the state and the government of Indonesia in 1998. Viewed from the perspective of philosophical justice, sociological justice, contains legal injustice, because in Indonesian Bankruptcy Law as regulated in Law No. 37 of 2004, for the solvent debtor, where the philosophically insolvent debtor in a legal position individually should be respected and treated as an absolute value and as a self-serving destination, *etre pour soi*, if in fact it is still a solvent anyway declared bankrupt as well, whose status should be the subject (*etre pour soi*). Then by the rule of law in the Indonesian Bankruptcy Act against the solvent insolvent debtor turned out to be positioned into a mere object *(etre en soi*). This is apparent with the public confiscation of all of its assets and there is no authority to manage the assets and business that are still running, which should be profitable but because of the unfair bankruptcy law, it must be stopped.

In order for the current Indonesian law of bankruptcy to comply with the philosophical justice aspect, it is better to apply for and be granted the bankrupt debtor applies only to insolvent debtors who can be declared bankrupt, and the necessity of being treated as insolvent requirements by establishing insolvency institutions and instruments test, and the enactment of ultimum remedium principle in debt settlement through bankruptcy mechanism, so as to create the necessary elements and conditions for the life of a truly just society as stated by Jhon Rawls, and the application of the principle of debt forgiveness, the principle of corporate rescue, and principle of comercial exit from financial distress.

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LEGAL REVIEW OF REQUIREMENTS AND FIELDS OF FOREIGN CAPITAL INVESTMENT IN INDONESIA BASED ON LAW NUMBER 25 YEAR 2007 CONCERNING CAPITAL INVESTMENT

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Abstract

Investment has an important role in Indonesia, namely for the implementation of the national economy. the term investment shows direct investment where investors are directly involved in determining the course of the investment company. Investment in Indonesia does not only originate from within the country, but also comes from foreign investment because to be able to accelerate development, investment funds are also needed directly from foreign investors. The regulation regarding Foreign Investors is currently regulated in the Law Number 25 Year 2007 concerning Capital Investment wherein it regulates the requirements that must be met by Foreign Investment in order to invest in Indonesia, as well as the regulation of business fields declared closed to be run by Foreign Investors in Indonesia who aim to protect the interests of the Indonesian people which will be discussed in this journal. This journal has 2 (two) problem formulations, first; how the requirements of Foreign Investment in order to invest their capital in Indonesia are reviewed from the Law Number 25 Year 2007 concerning Capital Investment. Second; how the regulation regarding business fields allowed for Foreign Investors to invest their capital in Indonesia is reviewed from the Law Number 25 Year 2007 concerning Capital Investment. The research method used in this journal is a normative legal research method, with primary legal materials, namely Law Number 25 Year 2007 concerning Capital Investment, secondary legal material which includes reference books relating to Investment, and tertiary legal material which includes articles, as well as other materials that are in accordance with the writing of this journal.

Keywords: Capital Investment, Foreign Investors, Requirements, Business Fields

A. INTRODUCTION

Investment has an important role in Indonesia because investment is an important part of the implementation of the national economy and is placed as an effort to increase national economic growth, create jobs, increase sustainable economic development, increase national technological capacity and capabilities, encourage economic development popularism, as well as realizing people's welfare in an economic system that is competitive.

The word investment which is a legal term in Indonesia has a narrower meaning than the word investment which is an economic and business term. Although both are English translations of the word investment,[1] the term capital investment shows direct investment, while the term investment shows both direct investment and indirect investment.[2] Direct investment is investment capital that is directly involved in determining the course of the investment company,[3] while indirect investment (indirect investment) is capital investment that the investors do not directly involved in determining the course of investment companies, which is done through the capital market.[4]

The definition of investment is regulated in Article 1 point 1 of Law Number 25 Year 2007 concerning Capital Investment, which reads: "All forms of investment activities, both by domestic investors and foreign investors to conduct business in the territory of the Republic of Indonesia." From this definition it is clear that the term investment used is in a narrow sense, namely only direct investment in capital. Investment in Indonesia is not only from within the country or can be referred to as Domestic Investment, but also comes from Foreign Investment because the funds owned by the government are quite limited so that development

1 Ida Bagus Rahmadi Supancana, 2005, *Direct Investment Policy Framework In Indonesia,* Ghalia Indonesia, Jakarta, 2005, page. 1.

2 *Ibid.*

3 Hulman Panjaitan dan Abdul Mutahib Makarim, 2007, *Article by Article Comments on Law Number 25 Year 2007 concerning Capital Investment,* CV Indhill Co., Jakarta, page. 15.

4 *Ibid.*

activities cannot be carried out entirely only with government funds only, so that in order to accelerate developmentalso requires direct investment funds (direct investment) from foreign investors.[5]

In the case of Foreign Investors wishing to invest their capital in the territory of the Republic of Indonesia, they must comply with the positive law in Indonesia so that the implementation of Foreign Investment in Indonesia runs well. For this reason, there is a need for legal certainty governing Foreign Investment in Indonesia. Initially, arrangements regarding Foreign Investment in Indonesia were regulated in Law Number 1 Year 1967 concerning Foreign Investment as amended by Law Number 11 Year 1970 concerning Amendments and Additions to Law Number 1 Year 1967 concerning Foreign Investment but with the enactment of Law Number 25 Year 2007 concerning Investment has revoked the previous law regarding the Foreign Investment.[6]

The LawNumber 25 Year 2007 concerning Capital Investment regulates the requirements that must be met by Foreign Investment in order to invest in Indonesia, besides that, even though Indonesia accepts the widest possible Foreign Investors to invest in Indonesia so that National economic development can be realized, but basically not all business sectors can be run by Foreign Investors in Indonesia. There is business sectors that are declared closed to be run by Foreign Investors in Indonesia. It aims to protect the interests of the Indonesian people themselves.

B. RESEARCH METHOD

Methods basically provide guidance, about the ways a scientist studies, analyzes and understands the environments he faces.[7] The research used is normative legal research, where the data studied are library materials or secondary data which includes primary legal materials, namely Law Number 25 Year 2007 concerning Capital Investment, secondary legal material which includes reference books relating to Investment, and tertiary legal material which includes articles, as well as other materials that are in accordance with the writing of this journal. This research includes descriptive research, which aims to provide data as detailed as possible about humans, circumstances or other symptoms.[8]

C. PROBLEM FORMULATION

Based on the introduction described above, the formulation of the problem in writing this journal is:

1. How are the requirements of Foreign Investment in order to invest their capital in Indonesia in terms of the Law Number 25 Year 2007 concerning Capital Investment?
2. How is the regulation regarding business fields permitted for Foreign Investors to invest in Indonesia in terms of the Law Number 25 Year 2007 concerning Capital Investment?

C. DISCUSSION

1. Requirements Of Foreign Investment In Order To Invest Their Capital In Indonesia reviewed from The Law Number 25 Year 2007 Concerning Capital Investment

Foreign Investment (PMA) is a form of investment by building, buying or acquiring a company. The meaning of Foreign Investment is based on Article 1 point 3 of Law Number 25 Year 2007 concerning Capital Investment, namely: "investing activities to do business in the territory of the Republic of Indonesia carried out by foreign investors, both using foreign capital fully and join forces with domestic investors."

The requirements for foreign investment in order to invest their capital to do business in the territory of the Republic of Indonesia are regulated in the LawNumber 25 Year 2007 concerning Capital Investment, which regulates the requirements of companies to invest their capital in Indonesia. However, this law not only regulates the requirements of Domestic Investment, but also regulates the requirements for Foreign Investment, namely those carried out by Foreign Investors, both those who use foreign capital fully and those who are associated with domestic investors. In particular, the article governing the requirements for Foreign Investment is in Article 5 paragraph (2) of the Law Number 25 Year 2007 concerning Capital Investment, which the article reads: "Foreign investment must be in the form of a limited liability company under Indonesian law and domiciled within the territory of the Republic of Indonesia, unless otherwise stipulated by law."

5 Jonker Sihombing, 2009*, Investment Law In Indonesia,* Penerbit Alumni, Bandung, page. 27.

6 Indonesia*, Law Number 25 Year 2007 concerning Capital Investment.,* Article 38.

7 SoerjonoSoekanto, 1986, *Introduction To Legal Research,*UI Press, Jakarta.

8 *Ibid*., page. 10.

Based on the article, it is known that Foreign Investors who can invest in the territory of the Republic of Indonesia are Foreign Investors in the form of Limited Liability Companies under Indonesian law, meaning that the Limited Liability Company must have been registered as a limited liability company in the Republic of Indonesia through the Ministry of Law and Human Rights Indonesia, and also domiciled within the territory of the Republic of Indonesia, which means that the Foreign Investors must have a representative office domiciled in the jurisdiction of the Republic of Indonesia (from Sabang to Merauke), in addition to the head office in each of the Foreign Investors, so if a Foreign Investor does not have a representative office in the jurisdiction of the Republic of Indonesia, the Foreign Investor does not meet the requirements of foreign investment as stipulated in Article 5 paragraph (2) of the Law Number 25 Year 2007 concerning Capital Investment.

However, in Article 5 paragraph (2) of Law Number 25 Year 2007 concerning Capital Investment also regulates the exemption from this article, if it is determined otherwise by law, the deviation from this article is permissible as long as it is mandated by law. legislation, both this law itself and other laws governing investment in Indonesia.

Based on Article 5 paragraph (2) of Law Number 25 Year 2007 concerning Capital Investment if it is associated with Article 1 point 6 of Law Number 25 Year 2007 concerning Capital Investment, which reads: "Foreign investors are individual citizens foreigners, foreign business entities, and / or foreign governments that make investments in the territory of the Republic of Indonesia." that we can conclude, even though in Article 1 point 6 of the LawNumber 25 Year 2007 concerning Capital Investment regulates who are the legal subjects or Foreign Investors, namely Foreign Citizens, Foreign Business Entities, and / or Foreign Governments, but from all foreign investors if they wish to carry out their capital investment activities in the territory of the Republic of Indonesia must be carried out in the form of a Limited Liability Company based on Indonesian law, so that it cannot be done only by an individual W the price of foreign countries, foreign business entities, and / or foreign governments, without establishing a limited liability company, therefore the importance of the requirements for foreign investment in Indonesia as stipulated in the Law Number 25 Year 2007 concerning Capital Investment is so that investment activities foreigners in Indonesia are carried out in accordance with the applicable legal corridors in Indonesia.

2. Regulation Regarding Business Fields Permitted For Foreign Investors To Invest In Indonesia In Terms Of The LawNumber 25 Year 2007 Concerning Capital Investment

Regulations concerning any business sector that can be carried out by Foreign Investors in Indonesia are regulated in Article 12 paragraph (1) to paragraph (5) of the Law Number 25 Year 2007 concerning Capital Investment. The sound of Article 12 paragraph (1) of the Law Number 25 Year 2007 concerning Capital Investment, namely: "all business fields or types of businesses are open to investment activities, except for business fields or types of businesses that are declared closed and open with conditions."

Based on the article it can be concluded that basically all business sectors or types of businesses are open to investment activities, both open to foreign investors and domestic investors, but with the exception of only those businesses that are declared closed which are not permitted to run and open business fields with requirements, meaning that the business field can be carried out as long as it meets the requirements as stipulated in the legislation related to Investment.

Concerning closed business fields are regulated in Article 12 paragraph (2) of the Law Number 25 Year 2007 concerning Capital Investment, which determines several business fields that are closed to Foreign Investors, namely: a) production of weapons, munitions, explosive devices, and war equipment; and b) business sectors that are explicitly stated to be closed under the law. The regulation regarding business fields that can be carried out by foreign investors is not enough to only be regulated in this law, but further arrangements must be made on this matter so that it is based on the mandate of Article 12 paragraph (3) to paragraph (5). The Law Number 25 Year 2007 concerningCapital Investment, that the regulation regarding business sectors that are closed for investment is regulated in the Presidential Regulation.

Regulations regarding the investment business sector in the Presidential Regulation Article 3 of the Regulation are regulated in the Republic of Indonesia Presidential Regulation Number 44 Year 2016concerning List of Closed Business Fields and Open Business Fields with Requirements in theCapital Investment Sector wherein Article 2 paragraph (1) of the Presidential Regulation stipulates that business fields in Investment activities consist of: a) open business fields; b) closed business fields; and c) business

fields that are open to requirements. The Presidential Regulation does not only regulate business sectors carried out by Foreign Investors only but also on business sectors carried out by Domestic Investors.

Based on the Presidential Regulation Number 44 Year 2016 concerning List of Closed Business Fields and Business Fields Open with Requirements in theCapital Investment Sector, that: "Business Fields that are not listed in Closed Business Fields and Business Fields Open with Requirements are Business Fields Open. "So based on the regulation, all business fields are open except those that are declared closed and which are open to conditions.

The Business Fields Opened with Requirements are regulated in Article 2 paragraph (2) of the Presidential Regulation Number 44 Year 2016 concerning List of Closed Business Fields and Business Fields Open with Requirements in theCapital Investment Sector, which consist of: a) Business Fields Open With Requirements: reserved or partnership with Micro, Small and Medium Enterprises and Cooperatives; and b) Business Fields Opened with certain Requirements, namely: 1) limits on foreign capital ownership; 2) certain locations; 3) special licensing; 4) domestic capital 100% (one hundred percent); and / or 5) limits on capital ownership within the framework of the Association of Southeast Asian Nations (ASEAN) collaboration. While the regulation regarding closed business fields is regulated in Article 4 of the Presidential Regulation Number 44 Year 2016 concerning List of Closed Business Fields and Business Fields Open with Requirements in the Capital Investment Sector, which reads: "Closed Business Fields as referred to in Article 2 paragraph (1) letter b is listed in Appendix I and is an integral part of this Presidential Regulation."

The need for regulation regarding the business sector of Investors, especially Foreign Investors, is due to the consequence of the openness of business fields for foreign investors, namely the tendency to arise business competition which ultimately leads to business competition where parties with strong capital will be able to control business competition, especially foreign investors in the field of business driven by large businesses and national scale, so that this arrangement aims to protect Indonesia from exploitation of resources whose profits will flow abroad.

E. CONCLUSION

Based on the previous discussion, the conclusion that can be obtained is that the requirements of Foreign Investment in order to invest their capital to do business in the territory of the Republic of Indonesia are regulated in Article 5 paragraph (2) of Law Number 25 Year 2007 concerning Capital Investment, where Foreign Investors must be in the form of a Limited Liability Company under Indonesian law (already registered in the Ministry of Law and Human Rights of the Republic of Indonesia), and also domiciled within the territory of the Republic of Indonesia. Then any business sector that can be carried out by Foreign Investors in Indonesia is regulated in Article 12 paragraph (1) to paragraph (5) of Law Number 25 Year 2007 concerning Capital Investment, and further stipulated in the Presidential Regulation Number 44 Year 2016 concerning List of Closed Business Fields and Business Fields Open with Requirements in the Field of Capital Investment.

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ANALYSIS OF BAD CREDIT IN BANKING LEGAL PERSPECTIVE

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Abstract

National development can be realized with the support of the country's economic capabilities. One of the efforts is to improve the economy by increasing business in the banking sector. The bank is an intermediary for parties who have excess funds with those who lack and need funds. Distribution of bank funds to the community is by giving credit. Efforts to manage and minimize the likelihood of non-performing loans are by analysis known as "5C Principles" and "4P Principles", and the Bank wants collateral or collateral in lieu of repayment of debts if in the future the debtor is unable to pay the bank credit or default. But the business still cannot be avoided from the possibility of bad credit, which is the credit that has been channeled by the bank, but the customer / debtor cannot make payments in accordance with the agreement. This journal has 2 (two) formulation of the problem, namely how the factors that cause bad credit and how the settlement action for the Debtor / Customer and Creditors / Banks in the event of bad credit. This research was conducted using normative legal research methods. The legal material used in this writing consists of primary legal materials, namely Law Number 10 Year 1998 concerning Banking, and Bank Indonesia Circular Number 30/16 / UPPB dated 27-02-1998, secondary legal materials, namely reference books about banking law, and tertiary legal materials, namely articles, as well as other legal materials.

Keywords: Banking Law, Bad Credit, Bank.

A. INTRODUCTION

National development is a tangible manifestation of the sincerity of the Indonesian people as one of the countries that is in the stage of developing and developing in order to achieve the goals and ideals of realizing the welfare of Indonesian citizens. National development can be realized with the support of the country's own economic capacity, which is the ability to increase income fairly and evenly. Various efforts were also made by the Indonesian people to improve the economy, one of which was by increasing business in the banking sector.

Based on Article 3 of Law Number 7 Year 1992 as amended by Law Number 10 Year 1998 concerning Banking, that the main function of banking is to collect and channel public funds.[1] The bank is an intermediary for parties who have excess funds with those who lack and need funds. In Indonesia, banking institutions have a very important role, namely as Agent of development in order to realize equity, economic growth and national stability, as mandated in Law Number 10 Year 1998 concerning Banking states that Indonesian Banking aims to support the implementation of national development in order to improve equity, economic growth and national stability in the direction of increasing the number of people.[2]

Banking business as it is known is not an ordinary business entity such as companies engaged in trade and services, but a business entity engaged in financial services. The Bank has special business activities as regulated in Article 6 and Article 17 of Law Number 10 Year 1998 concerning Banking, namely:

a. Collecting funds from the public in the form of deposits in the form of demand deposits, time deposits, deposits, savings, and / or other similar forms.
b. Give credit
c. Conduct foreign exchange activities with the conditions stipulated by Bank Indonesia.

One form of bank business activities related to channeling bank funds to the public is credit. The purpose of giving credit to the community is to develop and enlarge each of their businesses, so that they indirectly contribute to the distribution of income in the community. In addition to developing businesses, banking credit facilities can also be used by the community to fulfill their secondary needs such as for the purchase of houses, electronic goods, vehicles, and others.

1 Indonesia, *Law Number 10 Year 1998 concerning Banking,* Article 3.
2 Malayu, S. P. Hasibuan, *Banking Basics,* (Jakarta: PT Bumi Aksara, 2005), page 4.

Credit facilities provided by banks to meet community needs are classified into three based on the purpose of their use, namely, investment loans, working capital loans and consumer loans. Investment loans and working capital loans are productive loans because they are used for business or business purposes, both in the form of working capital and investment in purchasing company assets, so that they can be produced in the future. While consumptive credit is used to meet the secondary needs of the community.[3]

Before credit is channeled to the public, an in-depth economic analysis of prospective borrowers who will receive credit is needed. The analysis aims to manage and minimize the possibility of arrears or referred to as bad credit which is included in the banking conditions that are problematic because it has a direct impact on the health of the bank itself. An analysis conducted by banks to find out and determine whether someone is worthy or not to obtain credit. In general, banks use analytical instruments known as "5C Principles" and "4P Principles". 5C Principles include character, which is an assessment of the character or character of the prospective debtor, capacity, namely prediction of business ability and business performance of the debtor to pay off debts, capital, namely the assessment of the financial ability of debtors who have a direct correlation with the level creditors' repayment ability, economic conditions, namely an analysis of the condition of the debtor's economy both micro and macro and collateral, namely the debtor's assets as collateral for repayment of debts if credit is in a state of default. Whereas the 4 P Principle consists of Personality, Purpose, Payment and Prospect. Personality concerns the personality of prospective customers, such as curriculum vitae, hobbies, family circumstances, and social status. Purpose concerning the purpose and purpose of using credit. Payment is the ability of prospective customers to repay their credit, and Prospect is the future hope of the prospective customer's business.[4]

If from the results of the analysis, the bank approves the application submitted by the prospective debtor, then the credit facility will be set forth in a written agreement between the bank and the debtor as the credit applicant which is referred to as the bank credit agreement. In the case of granting credit, the Bank requires collateral or collateral which can be used as a substitute for debt repayment if the debtor is unable to repay his credit to the bank or default. The value of collateral submitted by the debtor is generally greater than the amount of credit received. This is intended to maintain the possibility of falling collateral value, or the difficulty of finding buyers who are willing to buy collateral at market prices, when they are sold when the debtor is unable to repay the debt to the bank.

Even though an in-depth analysis has been carried out in accordance with the principle of granting credit and the Bank has secured a loan repayment from the debtor, it still cannot be avoided from the possibility of bad credit. Bad credit is credit that has been channeled by the bank, and the customer / debtor cannot make payments or make installments in accordance with the agreement signed by the bank and the customer / debtor. The assessment of credit classification, whether credit or not problematic or problematic, is carried out quantitatively, as well as qualitatively. Quantitative assessment is seen from the ability of the debtor to make repayments on loan installments, both installments of loan principal and / or interest. Qualitative credit assessments can be seen from the business prospects and financial conditions of the debtor.[5] Based on this, it is necessary to discuss the factors that cause bad credit and legal protection in the event of bad credit.

B. RESEARCH METHOD

This research was conducted using normative legal research methods. The legal material used in this writing consists of primary legal materials, namely Law Number 10 Year 1998 concerning Banking, and Bank Indonesia Circular Number 30/16 / UPPB dated 27-02-1998, secondary legal materials, namely reference books about banking law, and tertiary legal materials, namely articles, as well as other legal materials.

C. PROBLEM FORMULATION

Based on the introduction described above, the formulation of the problem that can be taken as follows:

1. What are the factors that cause bad credit?
2. What is the settlement action for the Debtor / Customer and the Creditors / Banks in the event of a bad credit?

3 Hermansyah, *Indonesian National Banking Law,* (Jakarta: Kencana Prenada, 2008), page 60.
4 Malayu, S. P. Hasibuan, *op.cit.,* page 108.
5 Ismail, *Banking Management From Theory to Application,* (Jakarta: KencanaPrenada Media Group, 2010), page 123.

D. DISCUSSION

1. Factors Causing Bad Credit

Bad credit can occur because it is caused by 2 (two) factors, namely factors originating from the debtor/ customer and factors originating from the creditor / bank. The explanation is as follows:

a. Factors from the Debtor / Customer

1) Customers misuse credit

Every credit obtained by a customer has been agreed in a credit agreement about the purpose of using the credit. By having agreed so, the customer after receiving credit must use it according to the purpose. The use of deviant credit from its use will result in customers who do not return the credit properly.

2) Customers are less able to manage their business

Customers who have received credit facilities, in practice, do not manage businesses financed by bank loans. Customers are unprofessional in doing work because they lack technical mastery of the business being carried out. As a result, the work results are not maximal and lack quality so that it influences people's interest in consuming the products they produce. This situation affects the income of customers, which also influences the smooth repayment of credit.

3) The customer has bad intentions

There are some customers who may not have a large number who intentionally try to get credit from the bank, but after credit is obtained it is used without accountability. So there is an element of intent. In this case the customer / debtor intentionally does not intend to pay his liabilities to the bank so that the credit given is stalled. It can be said that there is no element of willingness (good faith) to pay, even though the customer is actually capable.

4) There is an accidental element.

The customer wishes to pay but is unable because of being hit by a disaster, such as fire, pest, flood and so on, so there is no ability to pay credit

b. Factors Originating from Creditors / Banks

Banks can also be one of the causes of bad credit. In providing credit to customers, banks always make judgments or analyzes that have been determined by the Banking Act. The bank's inaccurate consideration will make the credit given by its customers will not work as expected.

1) Quality of Officers and Bank Officials

Every officer or bank official is required to carry out his work professionally so that adequate service can be provided to the community. Nevertheless not all bank officials have the quality as expected. Bank officials who are less professional are certainly difficult to expect to get maximum work results. Especially officials in the credit department, the quality can influence the credit distribution decisions that are not as they should. For example, in conducting a credit analysis, the analyst is not thorough, so what should happen, is not predicted beforehand or may be wrong in carrying out calculations. It can also occur due to collusion from the credit analyst with the debtor so that the analysis is carried out subjectively.

2) Interbank competition

The number of banks that are increasing every day is a natural thing with the increasing number of population affecting the number of needs for banks to increase as well. With the increase in the number of banks it will affect the increasingly fierce bank competition. In conducting business competition, each bank in addition strives to provide the best service to the community, including convenience in providing credit facilities. With the best service that aims to get as many customers as possible and existing customers will continue to be cooperated so as not to move to another bank. With the existence of intense business competition, it will affect banks to act speculatively by providing easy facilities to customers, but on the other hand steps taken by banks have ignored sound banking principles.

3) Bank supervision

Starting from the process of granting credit, the occurrence of a credit agreement until the implementation of the credit agreement is always supervised. Bank work is overseen by the bank's internal supervisor and external bank supervisor, namely BI and BPKP specifically for state-owned banks.

The existence of an unhealthy bank or even a bank that is exposed to liquidity cannot be separated from bad credit as the cause. One of the factors in the occurrence of bad credit is due to weak supervision of banks.11 According to the authors, the occurrence of problem loans can also be caused because of among other unfavorable conditions, namely those concerning changes in the economy and also because of the loss of objects guaranteed by the credit recipient.

2. What are the Settlement Measures for Debtors / Customers and Creditors / Banks in the event of Bad Credit

Settlement actions taken by creditors / banks in the event of bad credit are carried out as an effort to save the bank from greater losses, while the debtor / customer, saving against bad credit also aims to protect customers / debtors legally from inability to carry out obligations from the agreement ongoing credit, so that each has benefits in carrying out the settlement of bad credit.

The action of resolving bad credit which is commonly pursued in the banking world based on Bank Indonesia Circular Number 30/16 / UPPB dated 27-02-1998 as an effort to save credit or better known as 3 R is carried out in the following ways:

a. Rescheduling

That is a change in credit terms that only concerns the payment schedule and / or time period. Rescheduling is an action taken by extending the credit period or the installment period. In this case the debtor is given relief in the matter of the term of credit payment credit, for example the extension of the credit period from 1 (one) year to 2 (two) years so that the debtor has a longer time to return it. Extending installments is almost the same as the credit period. In this case the period of the installment of the loan is extended, for example, from 36 times to 48 times and this of course the amount of installments becomes smaller along with the increase in the number of installments.

b. Restructuring is a change in credit terms concerning:

1) Addition to the amount of bank funds, time period, type, installments, basic conditions and others according to the requirements previously agreed.
2) Conversion of all or part of interest arrears becomes a new credit principal, which in banking practice is more commonly known as the term / ceiling ring / and may not be executed.
3) Conversion of all or part of the credit into participation in the company.
4) Which can be accompanied by rescheduling and or return requirements.

Restructuring is the bank's action to customers / debtors by increasing the capital of customers / debtors considering that the customer / debtor does need additional funds and the business financed is still feasible.

c. Reconditioning

Reconditioning is to change the condition of the loan, conditions and covenants from the credit agreement previously received by the debtor or change in part or all of the credit terms that are not limited to changes in the payment schedule, time period and or other requirements insofar as it does not involve changes in maximum balance credit. Reconditioning is intended to change the various requirements of the bank such as:

1) Capitalization of interest, that is, interest is used as principal debt.
2) Postponement of interest payments until a certain time. In the case of postponing the payment of interest to a certain time, it means that only the interest can be postponed, while the loan principal must still be paid as usual.
3) Decrease in interest rates. The reduction in interest rates is intended to ease the burden on customers/ debtors. For example, if the interest per year previously charged 20% per year is reduced to 18% per year. This depends on the consideration of the bank concerned. Decreasing interest rates will affect the amount of installments that are getting smaller, so that it is expected to help alleviate customers / debtors.
4) Exemption of interest. Interest rate exemption is given to the customer / debtor with the consideration that the customer/debtor will not be able to repay the loan, but the customer / debtor still has an obligation to pay the loan principal to be paid off.

E. CONCLUSION

Based on the previous discussion, the conclusions are related to the factors causing the occurrence of bad credit, namely those originating from the debtor / customer and the factors originating from the creditor / bank. First, the factors originating from the debtor / customer, namely the customer misusing the credit, the customer is less able to manage the business, the customer is not in good faith. Second, factors originating from creditors / banks, namely the quality of bank officials, competition between banks, and bank supervision. While the settlement action in the event of bad credit can be done in various ways including: Rescheduling, which is an action taken by extending the credit period or the installment period. Reconditioning means that banks change various existing requirements such as: Interest capitalization, that is, interest is used as a principal debt. Postponement of interest payments until a certain time. Decrease in interest rates. Interest exemption. Restructuring is the bank's action to customers / debtors by increasing the capital of customers / debtors considering that the customer / debtor does need additional funds and the business financed is still feasible.

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EMPOWERMENT OF SOCIAL ORGANIZATIONS AS A TOOL OF NKRI INTEGRITY

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Abstract

Development must continue in order to create a just and prosperous society based on the Pancasila. Community life cannot be avoided by the birth of many community organizations. The existence of this community institution must be properly addressed by the government, because this social organization can be a good partner for the government. Community organizations that are less supportive of the government think of it as a critic so that government performance gets better. Law enforcement remains to be carried out and there are no exceptions, so that the law as commander in guarding development in Indonesia.

Key word: community organization,

A. Introduction

The 1998 reforms, opening up Indonesian civilization from a society confined to freedom of expression and association became free to do so. The emergence of political parties, community organizations and non-governmental organizations such as responding to the birth of reforms in their existence.

Ongoing National Development and the need for continuous sustainability and must be maintained. This is to realize the ideals of the nation to make a prosperous country for the people as fair as possible in accordance with the mandate of the 1945 Constitution. Therefore, qualified and qualified human resources are needed and have clear legal rules to carry out development both individually or in groups.

Two important sentences that need to be observed in the 1945 Constitution are "Indonesia is a state based on law (rechtsstaat) not based on mere power (machtsstaat). This means that all activities that take place in Indonesia are based on law. Activities that rely on power and arbitrage are not permitted in Indonesia.

The birth of community organizations in the midst of society has a broad meaning in supporting the government to optimize the development that is currently taking place in all sectors.

Maintaining the integrity of the nation, through the empowerment of mass organizations is not an easy thing at the moment, as it is known that what is meant by Integrity is consistency and determination that is unshakable in upholding noble values and beliefs.

Law plays a very important role in maintaining the integrity of the nation so that Community Organizations in carrying out their activities always adhere to the legal norms that apply in the community and help to enforce the law in the community.

Various problems that occur in the community and in state life such as Indonesia, this should be associated with the existence of law. Basically, because Indonesia is a country based on law (rechts-staat) and not a country based on power (machtstaat). When there is a case involving the social, cultural (economic), economic (education), education (religion), religion (political) and political (political) dimensions, then it cannot help, the existence of the law is again questioned and even sued by the community, let alone when the law is assessed or evaluated it has failed to carry out its sacred mission. Maintain order for the community.

The term "legal state" is often translated with rule of law or rechstaat, although Randall Peerenboom, believes that rechstaat is the equivalent of rule by law.[1]

Dicey writes that the elements of rule of law in the classical sense are as follows:

1. Supremacy of the rules of law (supremacy of law),
2. Equality before the law,
3. Guaranteed human rights by law and court decisions[2]

In a country that is currently developing Indonesia, it must really carry out the actual application of the law to ensure that Indonesia's state based on the law runs as it should. Since the reformation in 1998 until now the author has felt how the law has become a gamble for the survival of a government.

Freedom of opinion, freedom of expression, freedom of association as inexhaustible to be present in Indonesia, so that there were three times the election in Indonesia was always attended by dozens of political parties. The presence of dozens of political parties was also followed by the birth of Community Organizations to attend to the development in Indonesia. The presence of CSOs is as a government partner to fill development in order to realize prosperity for the Indonesian people.

Community Organizations are organizations that are established and formed voluntarily based on the common aspirations, desires, needs, interests, activities and objectives to participate in development in order to achieve the goals of the Unitary State of the Republic of Indonesia based on Pancasila.[3]

In the implementation and activities of many organizations that deviate from the original ideals that want to realize unity and help the government to create order and comfort. Many organizations act anarchically in achieving their organizational goals and sometimes even lead to radicals. This if it is left unregulated and unregulated will cause inconvenience and security of the Unitary State of the Republic of Indonesia.

More and more elements in the community are using public campaign mode issues (opinion formation) to manipulate and roll out mass actions to achieve their aspirations or interests, both social, economic and political dimensions, which often lead to violence and mass clashes. Citizens are vulnerable to being dragged into a vortex of battles between parties with the dynamics of change and high importance of pragmatism, which raises tension and even prolonged conflicts between citizens.

Security, peace and public order is a dynamic condition of the community as one of the prerequisites for the implementation of a national development process in order to achieve national goals, is a shared responsibility between the government and the community.

According to data released by the Ministry of Home Affairs of 380,908.[4] community organization. It is conceivable that the existing CSOs are always at odds with the policies issued by the government, what happens with the Unitary State of the Republic of Indonesia. Considering the extent of the Unitary State of the Republic of Indonesia, and the wide variety of existing CSOs that make diversity and handling different according to regional character and move within what organizations the CSOs, whether in the fields of religion, law, corruption eradication, socio-political fields, or other fields which matches the character and not the character of the Unitary State of the Republic of Indonesia.

By noting that the provincial, regency and municipal governments in carrying out the broadest spirit of autonomy in managing and managing their own regional government affairs, the need for supervision of the sustainability of mass organizations for their role and participation in development in the regions.

We have chosen democracy and law as a way of life for nation and state. The main guarantee needed in democratic life is freedom of expression, speech, opinion, organization, and press freedom. So far, we feel that the guarantee has been relatively obtained. Furthermore, in parallel we fight for economic, social and cultural democracy.

The existence of CSOs in the unitary state of the Republic of Indonesia is regulated in Law Number 8 of 1985 concerning Community Organizations and Government Regulations Number 18 of 1986. Surprisingly, the government on 20 April 2012 issued Minister of Home Affairs Regulation Number 33 of 2012 concerning Guidelines for Registration of Community Organizations in environment of the Ministry of Home Affairs and Regional Government. The DPR through a plenary meeting has ratified Perppu No. 2/2017 about CSOs being Laws. Let's look back at the perppu issued by President Joko Widodo in July 2017. The Community Organization Perppu is a change to Law 17/2013 concerning Community Organizations.

1 Randall Peerenboom, *Asian Discourses of Rule of Law: Theories and implimentation of rule of law in twelve Asian Countries, France and the US*, Routledge Curzon, London 2004, p 2.

2 Ibid, p, 11.

3 Undang-undang No. 8 tahun 1985 tentang organisasi kemasyarakatan

4 Sumber Kementrian Dalam Negeri 2018

Many parties questioned the question of transparency and accountability of civil society organizations. For this reason, in addition to the Law on Foundations and Staatsblad on associations, there have been issued, among others, the Law on Public Information Openness. This law requires Civil Society Organizations to provide public information, such as principles and objectives, programs, financial resources, and financial management. Likewise the obligation in the field of taxation.

Every implementation of duties to create security and comfort in the implementation of development needs to be carried out with strong political will by the power holders through strict legal instruments so that the CSOs in their participation do not deviate, while providing answers that the law has an interest in the rights and obligations of the legal community.

From a philosophical point of view, according to Roscou Pound, the benefits of the classification of legal interests are because (1) law as an instrument of social interest, (2) helping to make premise that is not clear becomes clear, and (3) making legislators aware of the principles and values that are related to each specific issue. Law as protection of human interests is different from other norms. Because the law contains orders and / or prohibitions, and divides rights and obligations.[5]

According to Sudikno Mertokusumo, about the purpose and function of the law that:
"In its function as the protection of the interests of human law, it has a purpose to be achieved. The main objective of the law is to create an orderly society, create order and balance. With the achievement of order in society, it is hoped that human interests will be protected. dividing rights and obligations between individuals in society, dividing authority and regulating how to solve legal problems and maintaining legal certainty "[6]

In various forms of various civilizations, not necessarily the law is always adhered to or obeyed by community members, so that there are violations or crimes (criminal acts) that are carried out individually, in groups, in an organized or unorganized manner, which in the acts of violation or crime resulted in various types of criminal acts.

B, Research Method

This paper is written using descriptive analysis method, which is drawing how the activities of community organizations in the community, after that are analyzed using laws that are relevant in the empowerment of mass organizations.

C. Problems, What is the Role of Civil Society Organizations in Empowerment as an Integrity Tool of the NKRI.

The Unitary State of the Republic of Indonesia is a fixed price that must be maintained from Sabang to Merauke, issuing opinions and expressions as long as it does not conflict with legal norms, disturbing the community and threatening the orderliness of society and the state.

The birth of CSOs after reformation like mushrooms in the rainy season is inseparable from the political dynamics in Indonesia, which tend to seek as much power as possible. Contrary to legal politics which must apply in maintaining the integrity of the nation;

D. Discussion

Community organizations in carrying out their activities after post-reform have experienced very significant developments, various kinds of legal problems continue to occur. Many CSOs have come out or deviated from their sacred intentions to get involved in legal development in Indonesia.

The actions and behavior of many CSOs violate the agreement that Indonesia is a state based on law, and they (mass organizations) are not law enforcement officers but what they do exceeds as law enforcement officers. By carrying out various levies under the pretext of security, contributions, etc.

Not infrequently by carrying out sweeping actions (raids) to various entertainment venues on the pretext, whether the entertainment place sells liquor, prostitution, or so on. So that this action disturbs the community.

5 Lili Rasyidi, *Dasar-dasar Filsafat Hukum*, Bandung: Alumni, 1988, p. 232

6 Sudikno Mertokusumo, *Mengenal Hukum: Suatu Pengantar*, Yogyakarta: Liberty, 1999, p. 71

Along with the passage of time and changes in the system of government from New Order to the Reformation Era. Accompanied by excessive euphoria resulting in many CSOs (Community Organizations). Their existence should add to order, security and comfort in the community, on the contrary it causes restlessness.

Many residents complained about the existence of CSOs, they forced, intimidated in various ways to request coordination money, when there were residents who were building / renovating houses or buildings. They ignore the environmental administrators such as Rt / Rw, they are like small kings, only based on the names of CSOs, such as Forkabi, FBR, PP, Youth etc. Feel their actions are justified. As a result, many residents complained to the Chairperson of the Rt / Rw, even many residents openly and openly conveyed to the government (Ministry of Home Affairs), to ask for legal action both at the legal level and at the level of dissolution of the Mass Organizations that disturbed the community.

Many residents asked for their existence to be dispersed because it was not in accordance with the objectives in the form of the CSOs. Their activities in the environment only become a burden on the community. His daily work is just traveling around in a controlling environment to monitor, in case the environment is building or renovating a house. Only by capitalizing on small buildings on the side of the road, precisely above the waterways they open offices. In front of him was a sign bearing the names of each of the CSOs that showed their existence. And what is even greater is their existence as if they will be supported by related parties.

The atmosphere like this is increasingly uncontrollable, it is proven that the police from the lower levels, such as the police Bimas, do not dare to take action if they get reports from the public. When is this country free from thuggery that is guilty of mass organizations.

The rebellion carried out by a group of people against the Ahmadiyya community in Pandeglang Banten some time ago triggered a government plan to dissolve community organizations (organizations) that were considered anarchist and disturbing the community. The emergence of the idea of dissolving the mass organization has practically received mixed responses from the wider community. There are some people who agree but also not a few people question the idea, where some say "agree to be dissolved, not to use it for long". But there are also those who think that "the mass organization is not wrong but the people inside it who behave unsettling".

Whatever the reason, all forms of violence are not justified. Whether it is done by individuals or by a group of people who gather in a mass organization container. In relation to the discourse of dissolving mass organizations by the government, of course it must be understood in advance why and for what a mass organization was established. Basically, the existence of a mass organization is nothing but not to participate in nation and state development. As for then there are unsettling actions carried out by a group of people with certain mass organizations, of course not necessarily the organization is wrong and must be dissolved

The author believes that every mass organization is good, has good regulations and rules of the game. If only every member of a mass organization carries out its duties in accordance with its rules, certainly no unconstitutional actions will be taken by a group of people in the organization concerned.

The problem that then arises if the discourse on the dissolution of a mass organization is truly carried out is why should the mass organization be disbanded even though the mass organization is legally innocent? Of course this must be the government's responsibility to monitor and manage each existing organization in accordance with the provisions that apply.

From the analysis, we can analyze together that the discourse of dissolving mass organizations is a discourse that is not final. Because it turns out there are still many ways to solve without ignoring the initial spirit of the establishment of a mass organization. Because once again the existence of mass organizations is essentially a place to participate in developing the State, and it should be remembered also that the existence of mass organizations today is a manifestation of Article 28 of the 1945 Constitution on freedom of association.

Very deep thought is needed to see the roles and functions of CSOs in participating in the fulfillment of independence by carrying out development and the manifestation of freedom of association contained in the 1945 Constitution.

E. Conclusion

From the upfront discussion of Community Organizations as an NKRI integrity tool, it can be summarized as follows:

That the Politics of Law concerning Community Organizations has indeed permitted the existence of these CSOs, because of the Law on Community Organizations No. 8 of 1985, and strengthened with the existence of Article 28 of the 1945 Constitution concerning freedom of association, which has been amended many times.

The noble intention of the establishment of CSOs is to partner with the government and all components of society to fill independence and uphold legal development in Indonesia. But what happened was that many community organizations did not carry out what they had agreed to at the time of the establishment of the Community Organization.

The rule of law is an option that cannot be negotiated by the Founding Fathers and that is what is written in the opening of the 1945 Constitution, Indonesia is a country based on the Law. So that CSOs in their activities must not violate applicable legal norms.

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DISPUTES RESOLUTION THROUGH MEDIATION WITH LOKAL WISDOM

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Abstract

Economic activity must continue and business is one thing to gain profit for the parties that run the business activities. Business disputes are common to business people. Completion is the main thing to do. In this article how business dispute resolution is done by using mediation based on local wisdom into the topics in this article. Using the descriptive method of analysis used in this paper. In this writing will be seen how law enforcement is done in a business dispute by the parties by using mediation by promoting local wisdom. Businesses must continue to run as expected in dispute resolution through mediation based on local wisdom.

Keywords: Dispute, Mediation, Local Wisdom

Introduction

Growth and business activity in Indonesia is currently growing rapidly supported by a fast-moving society and supported by technological advances and information indicating businesses can't stop. Indonesian society has entered a very global world to add to the business itself is increasingly varied. Business does not always work smoothly, conflicts and disputes can't be avoided if no trust is put forward.

Conflict and business disputes should not be allowed to drag on. The courts are a matter that is often done by the people of Indonesia to solve legal problems that occur as well as business disputes. In the legal system in Indonesia settlement of disputes can be done outside the court, that is by way of mediation.

People who grow and develop certainly have a different background with each other, because their business is reunited. So that diversity is visible from the area where it is derived so that have the customs inherent in it must be different. There will be different customs among the people with each other, but there is the same principle in the Indonesian nation that is the existence of togetherness and consensus that became the basis.

Ongoing National Development and the need for continuous sustainability and must be maintained. This is to realize the ideals of the nation, to become a prosperous society just and prosperous and create a civil society. To make the civil society we have to see two sentences in the 1945 Constitution.

Two important sentences that need to be observed in the 1945 Constitution, is "Indonesia is a state based on law (rechtsstaat) not based on mere power (machtsstaat). This means that all activities that take place in Indonesia based on the law. Activities that rely on power and arbitrary are not permitted in Indonesia.

Various problems that occur in the middle of society and in the life of a country like Indonesia, this should be associated with the existence of law. Basically, because Indonesia is a state based on law (rechtsstaaat) and not a state based on power (machtstaat) alone. When there is a case involving social, cultural, economical (aconomic), education, religion and political dimensions, then the existence of law is questioned and even sued by society, let alone when the law is judged or evaluated has failed to carry out its holy mission (Faisal Santiago: 2007)

The progress of science and technology as well as information on the background of how law is very necessary in social life. Even in its development into the era of liberalization and globalization the role of law is necessary in the implementation.

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With the advancement of science and technology has eroded the physical boundaries between groups of nations to interact so that the nations of the world become global, and the affairs of his life was running for 24 hours without any pause at all. In economic activity is obtained by the system of free trade (AFTA), investment (investment) to a country. So this needs to be an arrangement, how not, if this is not done an arrangement what happens ?. This is where the role of law that needs to be put forward so that all activities can run well and correctly according to the rules of law and legal norms that apply. (Faisal Santiago: 2010).

The role of mediation is necessary so that the economic activities that have been run should not be stopped by the existence of conflict and legal disputes between the parties. The mediator in this case plays a very important role to solve the case.

Literature Review

Mediation

Mediation is a part of law enforcement in Indonesia, mediation, mediation is a means of settlement by involving a third party, ie an acceptable third party. It means the parties to the dispute allow third parties to assist the disputing parties and assist the parties to reach a settlement. Despite this lack of validity does not mean that the parties always intend to fully accept or accept what the third party proposes. Mediation according to PerMa No.2 Year 2003: That is a dispute resolution through negotiation process of the parties assisted by mediator (Azis: 2014).

Characteristics of Mediation:

1. Mediator intervention is acceptable to both parties;
2. The mediator is not authorized to make decisions, just listen to persuade and inspire the parties.

Mediation by Positive Law: Regulation of the Supreme Court. No. 2 Year 2003 Concerning the Mediation Procedure in court, the considers are; to reduce the accumulation of cases, is one way to resolve cases faster and cheaper, in accordance with Article 130 HIR or Article P 153 RBg.

Definition of Mediation is the process of dispute resolution through negotiation process or consensus of the parties assisted by mediator who has no authority to decide or impose a settlement. The main characteristic of the mediation process is that negotiations are essentially the same as consensus processes. In accordance with the nature of negotiations or deliberations or consensus, there shall be no compulsion to accept or reject any ideas or remedies during the mediation process. Everything must get approval from the parties. Background Mediation The basic law of Mediation implementation in the Court is the Supreme Court Regulation No. RI. 1 of 2008 on Mediation Procedures in Courts which is the result of revision of the Supreme Court Regulation no. 2 Year 2003 (PERMA No. 2 Th 2003), where in PERMA No. 2 Year 2003 there are still many weaknesses Normatif that make PERMA is not reaching maximum desired, and also various input from judge about problem of problem in PERMA.

Background of why the Supreme Court requires the parties to mediate before the case is decided by the judges described below. The MA-RI policy of enforcing mediation into court proceedings in the Court is based on the following reasons: (www.pta-bandung.go.id: 2018).

1. mediation process is expected to overcome the problem of congestion case. If the parties can resolve their own dispute without having to be judged by the judge, the number of cases that the judge should review will be reduced. If the dispute can be resolved through peace, the parties will not take a cassation action because the peace is the result of the mutual will of the parties, so they will not file a legal action. Conversely, if the case is terminated by a judge, then the verdict is the result of the judge's judgment and judgment of the facts and legal standing of the parties. Judge's views and judgments are not necessarily in line with the views of the parties, especially the losers, so that the losers always take the legal action of appeal and cassation. In the end all the cases lead to the Supreme Court which resulted in the accumulation of cases.

2. the mediation process is seen as a way of solving more disputes. quick and cheap compared to litigation process. In Indonesia there is no research that proves the assumption that mediation is a faster and cheaper process than litigation process. However, if it is based on logic as described in the first reason that if the prcara is terminated, the losing party will often file a legal action, appeal or cassation, so that the settlement of the case may take years, the first level up to the Supreme Court appeal. Conversely, if the case can be resolved by peace, then the party can automatically accept the outcome because it is

the result of their work reflecting the mutual will of the parties. In addition to the logic described above, literature has often mentioned that the use of mediation or other forms of settlement which fall into the definition of alternative dispute resolution (ADR) is a faster and cheaper dispute resolution process than litigation.

3, the enactment of mediation is expected to broaden access for the parties to gain a sense of justice. The sense of justice can't only be obtained through litigation process, but also through consensus deliberation process by the parties. With the enactment of mediation into the formal justice system, the public justice seekers in general and the disputing parties in particular can first seek to resolve their dispute through a consensus-deliberative approach aided by a mediator called a mediator. Even if in fact they have pursued a consensus deliberation process before one of the parties brings the dispute to the Court, the Supreme Court still considers it necessary to oblige the parties to a mediated mediation-assisted peace effort, not only because the provisions of applicable procedural laws, namely HIR and Rbg, requires the judge to first reconcile the parties before the disconnection process begins, but also because of the view that a better and satisfactory settlement is a settlement process that provides an opportunity for the parties to jointly seek and find the outcome.

4. the institutionalization of the mediation process into the justice system can strengthen and maximize the function of the judiciary in dispute resolution. If in the past the more prominent function of the court institution was the disconnect function, with the enactment of PERMA on Mediation expected to reconcile or mediate function can go hand in hand and balance with the disconnect function. PERMA on Mediation is expected to encourage a change in the perspective of the perpetrators in the civil justice process, namely judges and advocates, that the court institutions not only decide, but also reconcile.

Procedure For Mediation formulated in Article 24 of the PERMA;(www.pta-bandung.go.id: 2018)

1. After the case is numbered, and has been appointed by the panel of judges, then the panel of judges to make determination for the mediator to be mediated.
2. After the parties are present, the Assembly shall submit the mediation stipulation to the mediator following the parties to the litigation.
3. The mediator then advises the litigants to end this case peacefully by trying to reduce the harm of each litigant.
4. The mediator shall serve for 21 calendar days, succeeded in peace or not on the 22nd day shall hand back to the assembly which gives the stipulation.

Mediator

The mediator is a neutral party who helps the parties in the negotiation process to find the various possibilities of dispute resolution without resorting to the disconnection or enforcement of a settlement. The important features of the mediator are:

1. neutral
2. help the parties
3. without using a method of disconnecting or enforcing a settlement.

Thus, the mediator's role is only to assist the parties by not interrupting or forcing their views or judgments on the issues during the mediation process to the parties. Mediator Duties:

1. The mediator shall prepare the proposal of the mediation meeting meeting to the parties to be discussed and agreed upon.
2. The mediator shall encourage the parties to directly play a role in the mediation process.
3. Where appropriate, the mediator may conduct a caucus or separate meeting during the mediation process.
4. The mediator shall encourage the parties to explore and explore their interests and seek the best possible solutions for the parties.

Local Wisdom

It has been said that people have different diversity can be used as a means of resolving legal disputes. Local wisdom is what needs to be put forward.

Local wisdom is part of the culture of a society that can not be separated from the language of society itself. Local wisdom is usually passed down from generation to generation through word-of-mouth. Local wisdom is in folklore, proverbs, songs, and people's games. Local wisdom as a knowledge found by a particular local community through a collection of experiences in trying and integrated with an understanding of the culture and nature of a place (wikipedia.org/wiki/Kearifan_lokal: 2018)

It can be said that local wisdom can be very effectively implemented if applied with high awareness by the parties to the dispute. Business continuity is the main thing that should be put forward so that the parties are not much disadvantaged if they continue to dispute.

There are several Principles of the legal state that must be considered in local wisdom (Jimly Asshiddiqie: 2010):

1. Supremacy of Law
   The existence of normative and empirical recognition of the principle of rule of law, namely that all problems are solved by law as the highest guidance. In the perspective of supremacy of law, in essence the supreme leader of the real state, is not human, but constitution which reflects the supreme law. The normative recognition of the rule of law is an acknowledgment reflected in the formulation of law and / or constitution, while empirical recognition is an acknowledgment reflected in the behavior of most societies that the law is indeed 'supreme'. In fact, in a republic that embraces a purely presidential system, it is the constitution that is more appropriate to be called the 'head of state'. That is why, in the presidential government system, there is no recognition of the distinction between heads of state and heads of government as in the parliamentary system of government.

2. Equality before the law
   The existence of equality of every person in law and government, which is recognized normatively and implemented empirically. Within the framework of this principle of equality, all discriminatory attitudes and acts in all its forms and manifestations are recognized as prohibited attitudes and actions, except for special and temporary acts called affirmative actions to encourage and accelerate certain groups of people or groups of citizens certain to pursue progress so as to achieve the same level of development and the equivalent of a much more advanced community group. Certain groups of people who can be given special treatment through affirmative actions that do not include the definition of discrimination for example is a group of indigenous tribes or certain groups of adat communities whose condition is backward. While certain groups of people who can be given special treatment that is not discriminatory, for example, are women or abandoned children.

3. Legality principle
   In every State of the Law, a requirement of law is required, namely that all acts of government shall be based on legitimate and written legislation. The written rules of legislation must exist and apply in advance or precede the action or conduct of the administration. Thus, any act or administrative action should be based on rules or 'rules and procedures' (regels). Such normative principles seem to be very rigid and can cause bureaucracy to be sluggish. Therefore, in order to secure the space for the administrative officers of the state in performing their duties, as a counterweight, there is also recognized the principle of 'frijsermessen' which enables state administration officials to develop and establish their own 'beleid-regels' or 'policy rules' internally and independently in the course of performing official duties imposed by legitimate regulations.

Law enforcement

The challenge of the dynamics of legal events occurring especially in Indonesia, is a country challenge in its position as a state of law. Conceptual dynamics, enforcement and enforcement, are elements of the legal system that are constantly being addressed, in order to bring about legal standing in the law and beneficial to the interests of society, nation and state.

In a responsive law, legal validity is based on substantive justice and rules subject to principles, and wisdom. Dikresi implemented in order to achieve goals. Coercion is more visible in the form of positive alternatives such as positive incentives or independent liability systems. The apparent morality is "cooperation morality", while legal and political aspirations are in an integrated state. Injustice is judged

in substantive measurements and losses and is seen as a growing problem of legitimacy. Opportunities for integration are expanded through the integration of legal aid and social assistance.

So according to Soerjono Soekanto that for the law to function in the community required the existence of harmony between four factors, namely first, the systematic synchronization between the rules of law or regulation either vertically or horizontally so as not to contradict each other; secondly, law enforcement officers have clear guidance on their authority in performing their duties, as well as the quality of the officer's personality to implement and comply with the regulations imposed; third, the degree of legal compliance of the public to the law greatly affects the implementation of the law. This degree of legal compliance depends on the legal process. Fourth, facilities or supporting facilities for the implementation of the law must be physically adequate (Soerjono Soekanto: 1979)

It is undeniable that legal norms are the means by which society directs the behavior of community members when they relate to one another. If here is touched on "directing behavior", then the question within us, "directing where" ?. The norm that directs human behavior is a priority that exists in society itself. Society is the one that determines these directions and therefore we can see the norm as a reflection of the will of society. The will of society to direct the behavior of the members of society is made by making a choice between agreed and unapproved behavior which then becomes the norm in that society. Therefore, the legal norm is a requirement of judgments (Satjipto Rahardjo: 2000)

All the living people always wanted to be protected from their rights and duties as intelligent sentient beings. Equity in all sectors becomes a basic necessity that immediately gets the way out, so that each field gets protection. One form of protection provided by law is if enforced by law enforcement agencies. The definition of law enforcement can be formulated as an effort to implement the law as it should, overseeing its implementation in order to avoid infringement, and in case of violation of law then restore the violated law to be reestablished.

In the era of liberalization and globalization as it is today, idealized law enforcement is not as easy as someone to turn his palm, because in this era of globalization, various forms of great challenges, especially in the field of state administration will undoubtedly try to continually bring forth many problems (Faisal Santiago : 2012).

The legal condition is still a homework, for the Indonesian nation to be accepted in its own country "court mafia and law mafia" a sentence that becomes a polemic for the nation's children in upholding the law, in its own country as what has been exposed in the 1945 Constitution.

Research Methods

This writing uses descriptive method of analysis, which describes and analyzes business law dispute amid Indonesian society and analyzes how to solve the ideal dispute in the problem.

Problems

Disputes in business issues are common, but how to resolve business disputes by mediating and putting forward local wisdom should be discussed.

Results and Analysis

In law enforcement there is no "right authority" for law enforcement to act discriminatively against those suspected of committing a crime. In his philosophy is quite clear, that one of the principles adopted in law enactment that is principled "Equality before the law". And the principle is also recognized by the state as a protection against human dignity as well as a form of recognition and protection of human rights.

Law enforcement that does not heed the principle of "equality before the law", resulting in discriminatory behavior, this will damage the order of the criminal justice system, as well as structured injury (failure in implementing the system) that can cause a bad image in all societies who are moral including the international community.

The role of mediation by promoting local wisdom is the right choice nowadays in the midst of law enforcement in Indonesia, it is necessary to run because the process is very fast because it is based on high awareness of the parties to the dispute.

Local wisdom is built on the same perception that it can facilitate the settlement of a dispute. Deliberation and consensus is a reflection of the dispute resolution, so don't do the process of omission so that will drag on a problem will not be completed.

The failure of the system encourages the aggrieved party to try or experiment with other means, meaning that this other way is made as an option after the normal way of impartiality. Indiscriminate means as a form of infringement, confiscation, harassment and custody of their rights, so such practice shall not be allowed to continue to the detriment of it.

When understood from a system point of view, the failure of law enforcement may stem from the ineffectiveness of the system or the inhibition of one component of the system to perform its role properly. The system is "a complex or organized whole, a set or combination of things or parts that constitute a complexity or whole".

Conclusions

Dispute resolution by using mediation based on local wisdom needs to be carried out and enhanced, in order to further accelerate the settlement of a business dispute. The sooner the completion of a legal issue will be the better the sustainability of the business of the parties to the dispute.

The well-known people of Indonesia who forgive each other-forgive the main capital to run the principle of local wisdom in the midst of a growing and developing society. Law enforcement by means of mediation by promoting local wisdom is the right choice for the community.

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LEGAL CULTURE AND LIFE IN MEDIEVAL KOREA - FOCUSING ON KOREAN DYNASTY (GORYEO)

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I. Preface

Korean dynasty(Goryeo) is a kingdom built by King Tae-jo(Wang. Gun) in 918. and it was ruled by King Wang for 474 years until 1392. In 935. he received the reward of Silla. and in 936. the next year. he destroyed the Baekje. finally unifying the latter three nations. Goryeo tried to establish a national consciousness as a true single nation by the convergence of the nation and the recovery of Goguryeo. By combining Confucianism with the Buddhist culture since Silla and making Taoism united in it. it laid the foundation for national unity.

Goryeo established a new system in the early days and improved its operating system. During the era of military official. the government was carrying out abusing his authority in state affairs. but the form was maintained. This seems to have been the systemization of the rate through the accumulated monarchy. However. by the time of the intervention of the Yuan Dynasty(원나라) in China. the disorder became severe and the legal system itself changed. In other words. it was modified by removing the control. and the intervention of the court such as the revolt of the slavery system(nobije) was carried out. which eventually led to the weakening of the kingship and eventually to the reduction of the jurisdiction.

Social conflicts in Goryeo made reformists such as Jeong. Do-jeon appear. They tried various reforms with the appeal and emotion of the people. which was in line with the kings' reforms at the time. Their attempts at reforms have not been able to achieve in the end. but they are the result

of the founding of Joseon. The land system, which had a big problem at the time and which was subject to reform by them, was to stabilize the fundamentals of the state finances and to expand the finances. However, this effort to overhaul the order and overcome the flood of lawsuits led to the improvement of the litigation system and the preparation of the ruling guidelines, and contributed to the operation of the legal system and the court system in the Joseon Dynasty.

In the following, I will consider Legal awareness of King and the bureaucrat, the legal system, laws and customs, and specific legal life in Goryeo.[61]

II. Legal awareness of king and the bureaucrat

In Goryeo, how the kings and officials perceived the execution of the law and what kind of attitude they put into practice can be confirmed through the following contents. Myeong-jong(11th king: reign 1.046 ~ 1.083) repeatedly emphasizes that punishment should be done with extreme caution and that there should be no ill-treatment.

In February,

"The punishment should be appropriate, and the yin and yang(음양: 陰陽) shall be equal, the wind and the rain shall be in order, and if the law loses its righteousness, the resentment shall arise, the rebellious servants and the harsh administration are common in the world. I am very cautious in punishment according to the teaching of the previous King, and I always worry that my servant is oppressive and that his administration is harsh and that he will not attain his modesty. From now on, there shall be no wrongful death in prison."[62]

The officials also emphasize the fairness and importance of the order, and

61) Ryu, Seung-hun. History travel by law. Seoul, Law Publishers. 2015. 166pp.
62) Goryeosajeolyoo IV. Mun-jong 1. Sin-chuk 15(1.061).

they were cautious about it.

Prime minister Lee, Ja-yeon(during the period of Mun-jong) said.

"If you look closely at the officials and investigate whether they are diligent or negligent, you will achieve a beautiful harmony of heaven and earth according to your will to be diligent in his affairs and pity when prisoner is punished"[63]

In light of these contents, the king and his bureaucrats at that time recognized the importance of the penal government. King emphasized the attitude of officials who practice penal government and he tried hard not to suffer the troubles of the people because of unjust lawsuits. In addition, it can be seen that the government is in the midst of showing the strictness of the law.
By the end of Goryeo, lawsuits related to land and peasants had run wild without precedent. The main reason for this can be found in the situation of the times, namely the tyranny of the ruling class and the collapse of the peasantry, the disorder of the land system.[64]

III. Legal system and norm

In the early days of Goryeo, following the rules of unification Silla, the kingship was stabilized, and the independent korean ordinance was enacted. 'Goryeoyul(고려율)' is the oldest law in Korea which was made in the beginning of Goryeo. It is composed of 71 articles.[65] The historical meaning of 'Goryeoyul' is that it occupies an absolute weight in our ancient law and medieval law study in the bridge position connecting the ancient Silla with Josun.[66]

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63) Goryeosajeolyoo IV, Mun-jong I, Eul-mi 9(1,055).
64) Ryu, Seung-hun, 171-177pp.
65) It is said that the 'Goryeo' criminal law enacted a Tang dynasty system and enacted a rate of 71, which means that there was a rate of 69 kyung except for the second set of jokbang orders.
66) When Goryeo period collapsed after the invasion of Mongolia and the Chosun dynasty

In addition to law, customary law has also had a great impact on the real life as a law enforcement officer. The most common customary law of Goryeo is Hoonyho 10 articles(훈요 10조). It is the first customary law of the Goryeo dynasty to refer to the ten wonders that the Wang Kun of Goryeo built in 942(Tae-jo 25) to discipline the descendants. Hoonyho 10 articles served as the main life guideline as a standard of living and behavior of the general public including the royal family in real life.

Article 1: Take good care of Buddhism, because the nation's fortunes were patronized and graced by the Buddha.
Article 2: Forbidding the struggle and excessive production of the temple
Article 3: The succession to the throne shall be based on the principle of legitimate child and grandson. But when the firstborn is incongruous, a person with longing succeeds him.
Article 4: Disregard the customs of the barbarians such as Golan(거란)
Article 5: Focus on Seo-kyeong(평양)
Article 6: Do not neglect important Buddhist events such as the lanterns(연등회 및 팔관회)
Article 7: A person who becomes a king shall treat fairly and gain public opinion.
Article 8: Do not use people, who live in the south of Cha Hyun(차현: 공주), in the public office
Article 9: Set the salary of management equitably
Article 10: Read historic record to watch out for the present[67]

In addition to the Hoonyho 10 articles, Choi Seung-roh's Article 28 is not a common law but it shows what the basic guideline in the national policy is and has a strong normative character. The 28th article for the requirements of the time is written by him, who proposed to the 6th king

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was compiled, most of the data were lost and it is difficult to confirm the accurate picture of the ruling ritual. In the case of 'Goryeo,' there is no record of independent enactment, and it is merely a matter of adopting the Tangyul(唐律).

67) http://terms.naver.com/entry.nhn?docId=571599&cid=1591&categoryId=1591:http://terms.naver.com/ entry.nhn?docId=891115&cid=2711&categoryId=2711(한국학중앙연구원, 한국민족문

Seong-jong. He wrote about the contents needed to create a new Korean society. In other words, it is pointed out that the politics of Tae-jo should be idealized, the Confucian thought should be central, and the king should make politics for the people. The present texts are 22 articles.[68] If you look at the contents by subject, they are the issues of defense, Buddhism, social problems, royal family, China related, faith related matters.[69]

IV. Individual legal life

1. Land ownership system

Goryeo allowed people in public and private offices to retain their livelihood by giving them cedar rights or ownership of land.[70] Originally, the state-owned land system was only a product from the ancient kingdom idea, the Royal domain idea(왕토사상). For example, the land in Goryeo was not allowed to inherit, but In fact the descendants became heirs again. Especially, Gongyeumjeon(공음전)[71] is a legal entity that inherited to its descendants. There is no difference from private land, which is inheritable. Land owned by national and local governments was public land, and land owned by ordinary people was private land. However, they were also called public land, because it paid taxes to the tenth of the harvest in the nation.[72] This is because all lands come from the notion of statehood.

In the aftermath of the collapse of the land system, for the sake of the livelihood of the officials, a temporary land was paid, but this also did not prevent the monopoly of the influential men. The influential men used their power to form large farms by collecting large-scale land and land of collapsed farmers. This has been an important cause of the state financial

68) http://ko.wikipedia.org/wiki/%EC%8B%9C%EB%AC%B4_28%EC%A1%B0.
69) Ryu, Seung-hun, 177-185pp.
70) The land system of Goryeo is divided into Yeokbunjun(역분전) and Junsigua(전시과). Yeokbunjun was a land system that distributed a certain amount of land according to the difference of contribution in Tae-jo. Junsigua was a land system to distribute different in grade to the officials according to their positions and roles.
71) Gongyeumjeon(공음전) was the land paid to the senior officials of more than five degrees In the Goryeo Dynasty, and it was possible for the descendants to inherit.
72) Land owned by ordinary people, Minjeon(민전), is a private land in terms of ownership, but it was a public land in terms of right of taxation.

ruin. In the end, the land system of Goryeo led to the reform by the new generation and the land re-classification for the reform of the land, which the aristocracy owned.[73]

2. Family and marriage system

Goryeo society has formed a kinship community from common people to upper noble people, and a family group has consisted of eight degrees of kinship in the lateral, five successive reigns vertically.[74] The reason for the organization was to facilitate the convenient operation of the tax, the levy of military service, and the offerings. When the surname became universalized, the place of origin was designated as the family clan and the family clan was used as the standard for the evaluation of power.

In Goryeo, marriage was carried out between relatives and same sex and monogamy was practiced in general. In royal family, marriage among relatives became popular. Even though it was abolished after the middle period, it persisted and became social problems. By marriage age, women married around 18 years old, and men married around 20 years old. After marriage, it was common for a man to live in his wife's house. All that was needed was the wife's. Therefore, at that time, the grace of father-in-law and mother-in-law was regarded as the grace of the parents. Since then, the living in his wife's home has remained in the form of a half-wife in the Joseon Dynasty, and in the middle of the Joseon Dynasty, it was transformed into a normal form of marriage.[75]

3. Status system

Goryeo society was a society based on the hereditary inheritance. The status system consisted of the upper class, the middle class, the commoner class and the lowest class. The upper class formed by the royal family and

73) Ryu, Seung-hun, 236-239pp.
74) In Goryeo, there was a comprehensive consciousness of blood, and there was no discrimination between father's side and mother's side.
75) Ryu, Seung-hun, 239-240pp.

the aristocrat formed the clan forces. and possessed not only the economic wealth but also the regime by owning the lands, It also monopolized the road of success. In particular. aristocrat over five grades was allowed to appoint his descendants as officials(음서제: 蔭敍制) and land(Gongsinjeon: 공신전: 功臣田)[76] was awarded to aristocrat. It can be seen that this class is publicly recognized as a privileged class.

The middle class was the end of the ruling class as southern squad officials. technicians and subordinate officials. In particular. the southern zone was the only official in charge of the king's affairs. Namban(남반) was in charge of the subsidiary affairs of the king, including the transfer of the king's order while remaining in the palace. It existed only in Goryeo.

The commoner class was the farmers who lived in general provinces, counties. mainly engaged in agriculture and production. They did not have a specific position. They paid taxes. subsidies. and labors to the state. and the system was guaranteed to be able to stand up as a government official, but it was almost impossible. This can be seen from the fact that they could not enter the national school.[77]

The lowest class(Cheonmin class) consisted of Butcher. Jaein(재인: a man of talent). and the public and private slaves(novi). The slaves were hereditary and subject to sale. Regarding Goryeo's slaves. there were two laws. One of them was that if one of the parents was a slave. the child became a slave (일천즉천법: 一賤則賤法). The other is that ownership of offspring caused by marriage between slaves is attributed to the master of slaves(천자수모법: 賤者隨母法).

Goryeo was established as a union of the Barons, so the kingship in early Goryeo was relatively unstable. The fourth king Gwang-jong took institutional measures to oppress the barbarian forces and strengthen their kingship(956). This refers to the examination of the status of the slave(novi), and the person who was originally a farmer was freed and returned to farmer. It was an attempt to weaken Baron's economic and

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76) Gongsinjeon is the land awarded to a person who has a special virtue in the country or royal family.

77) The middle class working at the central government office was called seori(서리: 胥胥). and the general farmers in Goryeo were called bakjeung(백정: 白丁).

military base and to stabilize the kingship by reducing the number of slave owned by the Barons.[78]

4. Inheritance system

In Goryeo, principle of property distribution is share property of the parents' living years(생전분배의 원칙). In the case of the missing property, it is customary for the offspring to share property after the parents' death. The basic principle of inheritance law in Goryeo was the Law for Inheritance of Children, which divides inheritance property into equal shares for children. It seems to be a unique inheritance under Confucian culture. Regardless of whether they are sons or daughters, it is law and custom to divide evenly. If there is a monopolist who does not evenly divide legacy among the brothers and sisters after the parents' death, the lawsuit can be filed without any limit of time. In cases where a lawsuit was filed, the judges distributed the same on behalf of their parents. Inherited property was land, slave, house and movables, and the slave was the subject of the main disputes.

The order and scope of the heirs is as follows. First rank is a direct child and daughter inherited regardless of whether or not they go out. When the child died, the grandchild inherited the patriarchal succession.

Second, in case of the husband or wife, who had no offspring, husband inherited her succession. Wife inherited during her lifetime, provided that she would not remarry.[79]

5. Status of women

In Goryeo, there was no discrimination between men and women. Women's status in the home was high. The social activities of women were relatively free in the Goryeo period. Women, like men, rod horses, played fighting games, participated in commercial activities, and had property rights.

78) Ryu, Seung-hun, 240-243pp.
79) Ryu, Seung-hun, 243-246pp.

Goryeo was a society that emphasized monogamy and women were listed in genealogy.

It was also possible for the daughter to hold a memorial service for her ancestors. In the absence of a son, a woman could go on without adopting son and women could continue their families. In the case of inheritance, it was divided equally to women.[80]

6. Solicit and Epithelium

Solicit is also called the "Yeopkwan Movement(엽관우동)" and refers to the promotion of public servants who are looking for people with high positions or powers, who were in charge of the appointment. In Goryeo, the king seemed to have become a big problem, because he was socially ordinary enough to tolerate solicit. This is confirmed by the following records. When the king used a man, he only talked with his close servants and his eunuchs. By it, there were many solicits and bribes were made publicly. When the king asked, "How much did you get a bribe?", if they received a lot of bribes, the king complied with them. If not, he put off the seal and waited for the bribe to increase. For this reason, it is said that the servants, who were near the king were exercising more power than the previous kings.[81]

In Goryeo, to prevent the concentration of power by epithelium, a certain range of relatives were banned from working in the same bureaucratic institution or in public office. The system was enacted in 1092(Sung-jong 9). And the extent of the kinship applied is defined within the four degrees of kinship of relatives of the paternal family, mother family, wife family and their spouses.[82] Goryeo's epithelium is similar to the Song Dynasty system in china, but its main application is greatly reduced.[83]

7. The influence of religion on the normative life

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80) Ryu, Seung-hun, 246-247pp.
81) Goryeosajeolyoo XII. Myeng-jong 1. Gap-jin 14(1.184).
82) http://terms.naver.com/entry.nhn?docId=1674077&cid=49630&categoryId=49797.
83) Ryu, Seung-hun, 247-248pp.

1) Influence of Buddhism

Buddhism in the Goryeo period was a political and social ideology and contributed positively to social integration through religion. Buddhism was not only an exaggeration to say that it was practically a state religion, because it had a political influence on the daily life of the people ideologically.

Since Tae-jo, Buddhism was worshiped as a state religion. Temples enjoyed secular riches and status by occupying a vast temple complex. At the time of Mun-jong, the land was also paid to the monks(별사전; 別賜田) and the temple was also granted the privilege of tax exemption and immunity.

Buddhism combined with the folk customs of the Taoism influenced the public sphere and made efforts for rehabilitation and relief. In Goryeo rituals were related to funerals and rituals followed Buddhist tradition and Taoist beliefs that were fused with indigenous beliefs, unlike the government's intention to enforce Confucian norms. Buddhism became the political, ideological, and cultural basis as means of moral training related to religious life, and Buddhism and traditional beliefs were still meaningful to ordinary people. However, in the time of Mongolian intervention, Lama Buddhism, which is a superstitious one, has become a bigger problem and the waste of finance has increased due to Buddhist events and the construction of Tower. The accumulation of the Buddhist scandals has become a cause of the inclination of Goryeo. Buddhism finally came to be rejected by the neo-Confucian scholars(사대부) of Goryeo.[84]

2) Influence of Confucian

Goryeo established an independent state system based on Confucian political thought. Confucian moral norms became popularized by the introduction of Jujahak(주자학).[85] Confucian literacy also guaranteed social success as a

84) Ryu, Seung-hun, 249-250pp.
85) Jujahak(주자학) is the doctrine of Chu-tzu(주희).

bureaucrat. At the national dimension, the development of Confucian culture was closely related to the political, educational and ethical aspects in Goryeo. Therefore, if the Goryeo period(Tae-jo ~ Euy-jong) is called as the promotion and the flourishing period of the Confucian culture, the late Goryeo period(Myeong-jong ~ Gong-yang) can be regarded as a transition period in which the Confucianism era is over.

Looking at the changes by age, Tae-jo established a school in Seo-kyung(평양). Sung-jong established Gukjakam(국자감) in the center. Gukjakam was a sort of comprehensive university that taught martial arts, poetry and literature, and has helped to promote Confucian culture by teaching Confucian scriptures as basic textbooks. In the 11th Mun-jong's reign(1,046 ~ 1,083), he founded the private schools in the center. They were managed only for excellent people among the general public and made efforts in order to educate the Confucian tradition with a basic teaching material and to promote Confucian culture.[86] With the development of private schools, the students became able to write Chinese sentences freely. Seven professional lectures(7재) were established in the Gukjagam for the promotion of the national study in 16th Ye-jong(1109). Yuhakjjae(유학재), Six of them, were the Confucian lectures, each teaching the Confucian scriptures.[87]

In the race of the 17th In-jong(1,122-1,146), the school system was further strengthened to prescribe interdisciplinary education, while expanding and complementing the past system. And in the provinces and counties there was a Hynghak(향학).[88] However, after the seizure of power era of military group and the political domination of Mongolia, Confucianism in Goryeo is on its way to cloak.

Then, in the year 1,289(Chung-ryol 15) Anhyang(안향) brought firstly Jujahak to Goryeo, which led to the academic tradition of seeking and studying the history and Confucian scriptures based on the linguistics.

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86) At that time, Choi, Chung was highly acclaimed to be called 'Haitong Confucius(해동공자: 海東孔子)'. Choi, Chung founded the Munhungongdo(문헌공도). The Munhungongdo was the largest private school and replaced the function of national school. 9 Jae(재) of Choi, Chung has a historical significance as a prelude to the private school of our country.

87) Jae(재) means accommodation or learning place for students with educational institutions in Goryeo. It means also professional lectures in the Gukjagam.

88) It refers to the educational institution established in Goryeo. It is an educational institution established in the province with respect to the national school or Gukjagam, which is installed in the center.

Later, Lee, Saeck will emit new scholars such as Jung, Mong-ju, Jeong, Do-jeon, Ha, Loon, and Gil, Jae, focusing on Koreanology.[89]

V. To conclude

Goryeo has great significance in that it plays a role of a stepping stone to lead our historical tradition and culture from the Three Kingdoms period to Joseon. The foundation of the legal system of the Joseon has already been established in this period. It is regrettable that there are not enough historical records, relics and artifacts to study legal culture and legal life in Goryeo. As the capital of Goryeo at that time is located in North Korea, I am very sorry that I have difficulty in doing more research. However, if the atmosphere of reconciliation between South and North Korea is further matured, I hope that there will be more research results on legal culture and life in Goryeo through joint research between South and North Korea.

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89) Ryu, Seung-hun, 250-252pp.

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INDONESIAN LEGAL EDUCATION ON FACING GLOBALISATION AND DIGITAL ERA

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Abstrack

Higher education in the future is to increase competitiveness and competitive advantage by relying on human resources, technology, and management capabilities without compromising the comparative advantage our nation has. The challenge of universities in the global era is marked by the development of science and technology filled with competition. Sooner or later, universities, especially in Indonesia to come, must face the improvement of the quality of universities as educational institutions that must produce qualified human resources and have advantages in various aspects of life. Universities are one of the national education subsystems that can not be separated from other subsystems both inside and outside the education system. Therefore, every college should be a Center for creating of science and civilization, so that the high burden is the home of science production. As a science production house, colleges must be able to create new science, spread knowledge to society at large, and use science for the welfare of people.

Keywords: Higher education, education quality, civilization

I. Introduction

The existence of a college as a center of excellence to create reliable human resources who have qualifications as human resource university, and as well as research universities become urgent and strategic. Therefore, as an academic arena to educate and enhance the intellectual capacity of academics and practitioners in their fields, Universities not only skilled and professional in studying and finding solutions to solve of social problems and development problems but also responsive to the development of science and technology, or skilled in the field of research and development of science. In other hand, universities also must have a good academic character ethics and good morals.[1] Nationally has been established the vision of national development in 2005-2025, namely: Indonesia Yang Mandiri, Maju, Adil and Makmur. The vision of national development is formulated into a measurable statement to be able to know the level of independence, progress, justice, and prosperity to be achieved. In the perspective of Indonesian higher education, the formulation of national development is translated into the national vision of higher education is, "The realization of high-quality education and the ability of science and technology and innovation to support the competitiveness of the nation".

Therefore, the noble intentions formulated in the vision of higher education, in implementation need to be poured in the work credo in the form of programs directed at the establishment of a scientific college environment in a democratic and dynamic atmosphere, with the characteristics; a) upholds the moral value of the life of the college to give the characteristic of an environment that every citizen strives to apply the noble mind in the order of his life and with all his might also try to distance himself from the despicable acts; b) upholds the value of intellectuality, ie, the life of the college gives the characteristic of an environment where every citizen strives to apply the habits and culture of intellectuals, the intellectual culture capable of receiving, understanding and developing science as the historical heritage and the richness of universal human civilization; and c) uphold the value of professionality, that is life of the colleges give the trait of an environment that is ready to try hard and to train their self according to the rules of work demanded by the profession their choose. In this perspective, every university is responsible to produce graduates who qualified, superior, productive and produce science and technology used for the society in the framework of achieving an independent, advanced, and prosperous Indonesian society.

1 J. Delors et.al., *LEARNING: The Treasure Within, Report to UNESCO of the International Commision on Education for the Twenty First Century*, Paris UNESCO (1996), p. 131. Secara ringkas dinyatakan bahwa, *" Nowhere is the universities' responsibility for the development of the society as a whole more acute than in developing countries, where research done in institutions of higher learning plays a pivotale role in providing the basis for development programmes, policy formulation and the training of middle – and higher-level human resources"*

Thus, every college should be the "Center of Science and Civilization".[2] High brigade, none other than the "production house" of Science. As a science production house, universities must be able to create new knowledge, disseminate knowledge to the public widely (To disseminate knowledge), and use knowledge for the welfare of the people (To apply and utilize knowledge). In addition, universities are able to contribute ideas for the progress of the nation and civilization, strengthen civil society, and innovate for economic progress through a concept known as "knowledge-based economy". Even colleges can play a role no one else can do, that is to fill in the unspoiled space, "protected space," by doing unthinkable thinking, to push the limits of possibly, to reflect and re-assess, to the birth of social transformation and cultural approach to a society that is advanced, independent and prosperous and civilized.

Among the factors that led to globalization according to Scott P,[3] first, the human nature as a social homo; second, economic needs, and third, the availability of modern means of communication and transportation. These three factors are closely related to each other and encourage the formation of various regional and global cooperation, especially in the economic field, such as ASEAN (Association of South-East Asian Nations), AFTA (Asian Free Trade Area), and WTO (World Trades Organization). Globalization causes competition in the economy increasingly hard and tight, but always within the scope of cooperation. The increasingly popular term is "compete with", which implies the existence of cooperation, than "compete against" which implies free competition as it did for decades earlier 20th century. In that competition, the victory will be determined, especially by the quality of Human Resources (HR). The fundamental change generated by globalization is openness, which implies democracy and freedom, both in individuals and society and in the management of the state and nation. When humans shut down, their association will be limited and their experience of social solidarity is difficult to develop. So it is with nation and country. Progress will not be achieved if a country does not open itself to other nations in international relations. The era of globalization will be marked by the great economic competition coincided with the revolution of information technology, communication technology, and industrial technology. This competition is still controlled by three economic giants namely Japan from Asia, EU, and America.

The great challenge facing the world of higher education in the era of globalization that eliminates the barriers of territoriality and primordialism, such as the level of competition in this era of globalization is high and tight, so the lack of university awareness in the face of this era of competition will result in the collapse of the credibility of higher education institutions and replaced by universities that have readiness both in terms of infrastructure and quality of education. Therefore, opening up to cooperation with other universities is a necessity in improving the quality of the organization of higher education.

II. Education and Civilization in the Era of globalization

Historically every change of society or nation to a superior civilization, not apart from the changing role (role-changing) members of the community concerned. Roles and changes are a condition that is planned through various activities both structured and natural. Because changes are sunatullah, and change will be predictable if the change is planned systematically, continuously and organized.[44] In general, any change can be done and run, if supported by the availability of qualified human resources, have the integrity to the future of society and its environment. Such human resources are the real change leaders who are able to grasp the meaning and direction of change and organize all available potentials in order to encourage and even create the necessary changes in the process of growth and development of the community environment.[5]

One approach that has a strong influence to create quality human resources, is through education. This is because education is a tool like a vehicle where the quality of human resources is formed, born and developed. In essence, the quality of human resources of a nation is a mirror of the quality of education, because the crisis of a nation and even a humanitarian crisis, is essentially a crisis of education. Thus, any planned step of change can not be separated from the direction desired by the world of education. [6]

In a civilized country, the educational institutions receive considerable attention and position from decision-makers and the public. They believe that any civilized progress cannot be achieved if the driving

2 ***ibid***

3 Scott, P. (Ed.). *The Globalization of Higher Education*. Buckingham: Open University Press. 1988, p. 13

4 Yehezkel Dror, ***Law and Social Change***, dalam Vilhelm Aubert (Editors), ***Sociology of Law***, (Penguin Books, 625 Madison Avenue, New York, 1977), pag. 91 - 92

5 Deliar Noer***, Partisipasi Dalam Pembangunan,*** (Kuala Lumpur: Angkatan Belia Islam Malaysia, 1977), hal.55.

6 Ibid.

force is uneducated, untrained and has not integrity. Educational institutions for civilized countries, serve as a center of change and progress of civilization. In this connection, the world of education is a struggle between the progress and destruction of a civilization, so that if the world of education is not able to maintain and develop a civilization, then by itself civilization will be defeated and destroyed. Therefore, education has a position, role and strategic function in developing human civilization. Reality illustrates that the quality of human resources in Indonesia is still not balanced between the potential of the self with the available natural potential. Imbalance of human resource potentials with available natural resources, resulting in low productivity of communities that impact on the quality of life or the level of community welfare. [7]

Theoretically, development is an effort of change planned by a certain agent of change. [8] In developing countries, governments are generally the main agents in the planning, implementating, and monitoring of development outcomes. Generally, the former independent colonies after the end of World War II used the Modernization Paradigm as a paradigm in developing their country. According to this paradigm, development is a progressive undertaking by transforming the total agrarian-traditional society into modern-industrial society by passing through the stage of transitional society.[9] In the course of total transformation towards modern-industrial society, there are fundamental changes at the individual, social group, social order as well as the whole society. Changes to these four levels of analysis sometimes run in harmony so that there is orderly sustainable change but more often the opposite is true. Therefore, a responsible social engineering effort requires very high planning caution. However, since the linkage between change at the individual level and changes in the institutional and social change levels is so complex, the precautionary level of any planning will not be able to anticipate all the possibilities that can occur.[10]

The whole process of planned change is basically an effort to realize the modern region and society of its environment which is done through social engineering assisted by technology. Therefore, technology is not only limited to equipment/machine technology, but also includes social technology that is capable for creating the main driving forces of the modernization process. In this regard, the process of modernization is a process of total transformation from agrarian-traditional society into modern-industrial society using the latest equipment of science and technology.[11] In this connection identified the ten challenges in the 21st century are : 1. speed), 2. convenience, 3. wave generation (age wave), 4. choice, 5. various lifestyles (life style) 6. price competition (discounting), 7. added value 8. customer service 9. technology as a mainstay (techno age), 10. quality assurance (quality control). [12]

III. The Role of Universities in Developing Civilization in the Era of Globalization

1. Higher Education: Quality Demands

The development of information technology brings a tendency to the pattern of human relationships from the pattern of humanist relations to mechanical patterns.[13] Communication through a mechanical model requires the calculation of efficiency and effectiveness so that every action requires a well-balanced and balanced calculation of capital, targets, processes, and benefits to be achieved. If this tendency is not matched by ethics and morals or the balance of patterns of human relations and mechanical relationships patterns, it will produce smart and rational generations but they have low morals. This trend is a formidable challenge for the world of formal education because the media with a variety of audio-visual technology is also a medium of community education This can be seen from the phenomenon of the current evil tendency that is indirectly the influence and impact of education through information technology.

Therefore, the tendency of social change through the packaging of information technology not only requires intelligent human resources, but also capable of controlling and utilizing information technology for the benefit of the ummah. This means that the quality of human resources that are expected to be able to create and develop various technologies are human resources who are intelligent, morality (berakhlaq),

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7 ***Ibid.***

8 Sudjatmoko, Sudjatmoko, , *Pembangunan dan Kebebasan*, Jakarta: LP3ES, 1984. hal. 9

9 Wolfgang Friedman, ***Law in a Changing Society***, (Penguin Books, First Published by Stevens & Sons, 1972) p. 31

10 ***Ibid***

11 J.H. Schoorl, ***Modernisasi – Pengantar Sosiologi Pembangunan Negara-Negara Sedang Berkembang,*** terjemahan dari ***"Sociologie Der Modernisering***", (PT. Gramedia, Jakarta, 1980), hal. 4-5. Bandingkan Earl Rubington and Martin S. Weinberg, ***The Study Of Social Problems,*** (Oxford University Press, New York, 1989), p. 15 -20

12 Scot P., *op.cit*, p. 21

13 Dragan Milovanovic, *A Primer in The Sociology of Law*, Edisi ke-2, ,Harrow and Heston Publishers, 1994, . P 57.

responsible and have a social alignment (integrity). Because if the trend of change and development of the world, not balanced by qualified human resources, then the community and the nation concerned becomes a dependent nation, has no position and role. Even a parasite of other nations In micro, the phenomenon will describe a weak person and become a parasite of the community environment.

The development of the quality of human resources has relevance to the quality of education. The value of the relationship lies in the position and role of education (institutional) in processing and directing input into the desired output. The trend of world development suggests the existence of a level of intense competition, so the opportunities available only utilized by those who able to catch and ready to take advantage. Trends that occur both by the development of science and technology, especially information technology, social culture, and politics, requires every individual and institution to prepare themselves. Preparation in anticipation of the trend of change, one of the key is through institutions of higher learning.

The position of higher education, on the one hand, is largely determined by human resources, curriculum, methods, facilities and infrastructure, and on the other hand by managers of educational institutions, both in the form of certain institutions and government. These three components have different positions and authorities, but they still have a connection or point and tangent line in terms of value (ideological), as well as managerial terms.[14] If the three components are not able to create linkages in a process of education, then by itself the education will experience setbacks and stagnancy that is low insight and low ethics/moral.

An institution of higher education can be categorized as qualified, if *first*, its curriculum structure reflects the balance of thought structure and moral / integrity structure; *second*, the availability of competent educators; *third*, rich method; *fourth*, the existence of support facilities and infrastructure appropriate for the learning process; *fifth*, a conducive learning environment; *sixth*, the harmony of the relationship between the institution of the family with school institutions in terms of value, process and responsibility (responsibility), and *seventh*, management support. If the components are not yet or cannot be fulfilled, then by itself the education system run will be crippled and not normal, so the output of human resources are less qualified. Therefore, these components are both a problem and a challenge to be an opportunity for the educational process. This phenomenon illustrates how much the tendency of the higher education institution needs to be able to process input into superior output, able to create and move the change towards the promotion of the quality of life collectively.

Thus, the need for the quality of education both in terms of processes and institutions becomes the collective needs of society

IV. Higher Education: Readiness to be competitive

In the framework of entering a competitive world, the improvement of the quality of higher education institutions becomes an urgent demand for higher education institutions, learning processes, human resources, facilities and infrastructure and other support. Therefore, to improve the quality of college and ready to complete with other universities (foreign) there are some things that need to be considered and prepared carefully, including:

a. Trans-Disciplinary Approach

One of the new trends in today's global era is the emergence of the phenomenon of integralism. If in the modern era, the world of science demands a very strict specification and specialization, then today in the post-modern era the scientific world actually demands a more loose integralist. This is because the boundless nature that arises as a result of globalization, not only means the loss of the territorial and cultural boundaries of a nation but also implies the loss of the barriers of disciplines in the narrow sense. Scientific approaches and epistemologies tend to shift from the dichotomic-atomistic approach to interdisciplinary and even trans-disciplinary approaches. The trans-disciplinary science approach perceives a problem seen in many perspectives. To support the realization of this trans-discipline approach, a new epistemology, called "Reflective-Integrative Epistemology, should be developed. Research and study using this epistemology, must move from text to context, then from the context back to the text so that the development of science and technology development and the change of society arising from the progress of science and technology is always up-date. With new approach and epistemology college is expected to be superior and contributive

14 Emma Reinhardt, ***American Education – An Introduction,*** (Harper & Brother, New York, 1960), p.15-158. Bandingkan Ali Masykur Musa, ***Politik Anggaran Pendidikan Pasca Perubahan UUD 1945,*** Jakarta: Mahkamah Konstitusi, 2009, hal. 57 - 81

in the mastery and development of science and technology in the future.

b. New Perspective of Research Capacity Building

The main mission of universities is to develop science through research. This main task will not work well without excellence in research (research excellence). Honestly, we have not a strong research tradition, while the world's top university ranking is now primarily based on the excellence of every college in research. Not surprisingly, not many universities in Indonesia are listed in the list of 500 World Rank University. To address this issue, every college should pay special attention to research, even shifting from the University of Teacher University to Research University. In some more advanced countries, in the Americas, OECD countries, and some Asian countries, research capacity building is conducted not only on the basis of science but also economics, as research is now is seen as value enhancement, under the principle of "more value and less cost", and not vice versa as in the old paradigm, "low value and high cost". In line with this shift, the learning paradigm must also be changed, from simply accumulating knowledge to creating knowledge (To change from knowledge seeking to knowledge creation).

During this learning process is still focused on the transfer of knowledge, not knowledge creation. The paradigm the kind of learning like that is time to the end. Because, if the lecture is just to get and collect knowledge, the students in the digital age now, no longer need to go to campus. With their smart-phone or over the internet without leaving their home, they can searching whatever information and knowledge they want. With this paradigm, learning must be based on research, and oriented to the development of science. Here the students do not need to be stuffed with excessive material. They only need to be more strongly linked to the way of thinking (logic of science) either deductive or inductive logic, or a way of thinking that emphasizes the way or procedure of problem solving which by Helpern is called "Critical or Reflective Thinking" This new learning paradigm is believed to encourage and foster innovation and creativity for lecturers and students.

V. Conclusion

The essence of the organization of education is the intellectual counterpart to change. The value or quality of the desired change depends on the extent to which the actors of the change are directly involved and have the sincerity to change. Because the mission of higher education is to develop the human potential to become a superior human being, and able to create and develop a culture of high and useful values, so in their self, the actors in the education process must have strategies and policies in building a supportive environment for the development of higher education goals.

Challenge of Indonesia's future in education is to increase competitiveness and competitive advantage by relying on human resources, technology, and management capabilities without compromising the comparative advantage our nation has. The challenge of universities in the global era is marked by the development of science and technology filled with competition. Sooner or later, universities, especially in Indonesia to come, must face the improvement of the quality of universities as educational institutions that must produce qualified human resources and have advantages in various aspects of life. Universities are one of the national education subsystems that cannot be separated from other subsystems both inside and outside the education system.

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"MULTICULTURALISM AND DIASPORA ENGAGEMENT-EXPERIENCE OF LATIN AMERICAN COUNTRIES"[1]

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I. INTRODUCTION

In the international law, the nation-state is a political organization made artificially by the Peace of Westphalia in 1648. It sets territory, people, and government as constitutional requirements for forming an independent sovereign state, and set the specific requirements for each element. Territory defines territorial boundaries, people defines nationality, and government sets the recognition of government requirements. So the sovereign state decided to be national when deciding on nationality. And this national assumed to be the same ethnics. In other words, it was the logic that the people in the nation should be formed as one race or ethnics. However, since the Westphalia, there were many ethnics in one territory forming sovereign state, the one nation-one state theory or myth which the Westphalia System introduced as a sovereign state was based on wrong pretension from the start. The Westphalia regime assumes that a large number of dominant ethnic groups of a nation should represent one nation.

The movement to question, rebel, and to be independent in this one nation - one state system has been steadfast throughout the world. This phenomenon appeared to be an interesting way for the central government to legally recognize after the democratic upheaval of the 1990s. While human rights and environmental rights have been recognized as universal values, Latin American countries have recognized them as an important value in the constitution. Human rights and environmental rights are a constitutional right that cannot be properly protected in Latin America, but are considered very important for constitutional or social values. So, for example, neo-constitutionalism states, such as Colombia, Venezuela, Ecuador and Bolivia, have defined constitutional protection for ethnic minorities and made these traditional ethnic minorities to have their own nationality. In other words, it is legally recognized that there are several nationals within a country. Instead of one nation- state system, they recognize multi-nations - one state system. It allows the use of multiple nationalities within the country and recognizes the diversity of nationals. This constitutional attempt is meaningful in that it restores its identity to the original owner of the territory. On the other hand, in terms of shaking the framework of the international law, it raises to us a meaningful question: Is nationality the only means of connecting the people and the state?

In addition to these questions, as human rights and environmental rights are spread throughout the world, through on and off globalization and migration, people are becoming more and more connected in common interests such as human rights, minority protection and environmental protection(Lee, Chulwoo, 2018). Thus, the meaning of nationality has been greatly reduced. The reason why international law links country and nationality through a genuine connection concept is that it is necessary for the diplomatic protection. In modern society, however, the change and recovery of nationality are easier than in the past. (Athletes and entrepreneurs often change their nationality for personal gains.) Can the nation achieve its state interests only through nationality?

The state is in the tendency to actively use the dual citizenship system and the diaspora engagement policy in the view of the new national power theory. The dual nationality system is a system that increases the absolute number of its citizens, and the diaspora engagement policy is a system that enlarges the cultural territory of its own country. Recently, Latin American countries are paying great attention to these two

1 This paper is an excerpt of a part (IV. CONSTITUTIONALIZATION OF TRANSBORDER NATIONHOOD IN LATIN AMERICA) of the following article: Jo, Hee-moon (2018), "Constitutionalizing Transborder Nationhood: From Latin American Perspective," Paper presented at the Asian Law and Society Association Annual Meeting, Bond University, Gold Coast, Australia, 30 November – 1 December 2018. To quote, please cite the original paper.

schemes and putting them into practice. The study is intended to reveal why Latin American countries, which are immigration nations, have had such a policy and what it means.

II. TRANSBORDER NATIONHOOD AND STATE POWER ENLARGEMENT THEORY

Academic research on migration policy was initially approached from the perspective of protection of migrants' human rights. For example, Dowty (1989) concludes that human rights violations have been achieved by blocking the departure from the country or by forcing departure from the country, analyzing the policy of totalitarian states in the Closed Borders from the point of view of their control policy. For example, Fascist totalitarian nations such as Italy, Spain, and Germany, have allowed intellectuals from an ideological point of view to forced or voluntary departure. This phenomenon was present in Hitler's government, and in the communist countries where allowed the departure of the ideological dissidents in terms of system choice. On the other hand, in the case of North Korea, individuals were, instead, restricted from entering and leaving the country, by imposing punishment of being branded as a reactionary rather than being forced to leave their own country.

Therefore, the freedom of migration of the people regardless of nationality could be analyzed from the viewpoint of international human rights, transcending the domestic policy of migration policy. Regardless of the political system, if entry and departure is restricted, there can be reasonable doubt that human rights can be violated.

Another research approach is to study migration policies from the perspective of national development. If migration is freedom of individual mobility, collecting high quality human capital, regardless of nationality, can have considerable influence on state power. Adams and Rieben(1968) explain the mobility of human resources in a cosmopolitan and nationalist perspective. The cosmopolitan and nationalist theory analyzes how the movement of human resources has affected countries after globalization. From a nationalist point of view, immigration is negative for national development because it is an outflow of human resources, while in cosmopolitan's view it is positive in the world's production systems, because it is moving according to the need for human resources.[2]

However, in a country where migrants' freedom of movement is ensured, foreign immigration policy cannot be used as a policy to limit mobility of human resources, with the exception of statutory restrictions on workers in industrial sectors that are crucial to national interest. The limitation of the movement of human resources should be approached from the viewpoint of competitiveness of the people rather than the policy based limitation. In other words, just like investment incentives, the flow of key labor force requires attractive incentives to stay or return to the home country.

In the nation-state, personal jurisdiction has weaker connection than territorial jurisdiction. Because territorial jurisdiction is fixed, there is no major conflict with other countries when the border is defined. However, personal jurisdiction can always cause jurisdiction conflict because of the fact that foreign people live in the country and nationals live in foreign countries. Moreover, there is always a possibility of conflict of personal jurisdiction in the international society where dual nationality is generalized.

In the nation-state, national is based on a single nation (mono-national). Some countries, such as Korea and Japan, are mono-national (and mono-ethnic), but most countries are multi-national. Because Latin American countries are immigrant based countries, a multi-national state is common. So the nation-state theory based on a single nation does not adequately reflect the real world. Because nationals are determined through the grant of nationality, there may be other ethnics in the country and same ethnics in other countries.

A single ethnic nation-state such as Korea often displays hostile attitude to other ethnics in the country, and it is common to feel brotherhood for the same ethnics abroad (this is called the transborder nationhood). As single ethnic nation-state has both internal and external homogeneity, they have strong explosive power in the age of individual mobility as it is currently. In the same sense, ROGERS BRUBAKER (2010: 66) also analyzed the reciprocally connected states between overseas and home countries in terms of internal and external politics of belonging. In modern society, it is impossible to expand territory by force anymore. In this situation, capital and technology mobility and personal mobility are the most important factors in expansion of state competence.

2 For example, when South Korea proclaimed the nuclear phase-out policy, nuclear scientists and engineers move to China, where nuclear industry is a core industry promoted by the government. It is a decline in Korean state power in terms of nationalist perspective, but a positive move in terms of cosmopolitan position.

Thus, the transborder nationhood can be driven by a nation-state based on personal mobility and with active political will. ROGERS BRUBAKER (2010: 77) also observed that the nation-state is rather capable of implementing a migration control policy that could have influence on the transborder persons. ("The nation-state remains the decisive locus of membership even in a globalizing world.") In this manner ROGERS BRUBAKER's "external politics of belonging" can be explained by the New National Power Theory. Professor ROGERS BRUBAKER argues that this phenomenon does not necessarily mean postnational nor transnational, but rather a form of transborder nationalism (2010: 77). Specifically, transborder nationalism is most often used as a policy to enhance transnational nationalism, through such mechanisms as the dual nationality system, the easiness of acquiring nationality of descendants, the recognition of the right to vote by overseas diaspora, and the support system for overseas diaspora.

However, this policy does not apply equally to all overseas diaspora. For example, the tendency to expand *de facto* territory over *de jure* territory based on transborder nationalism seems to be prominent in Korea. On the other hand, in the case of Korea, there is regional discrimination against overseas diaspora. On the one hand, it is a humanistic approach based on the long history of national unification. On the other hand, there is a political purpose underlying the expansion of state power. The reason for this diagnosis is that there is an immigration policy applicable to only Chinese and Russian compatriots in accordance with the size of immigration and economic contribution, and their stay in Korea.

If a country expands national power in a way that brings overseas diaspora together, a new territory can be designed. De Villiers (2014) proposed the concept of cultural autonomy by considering that the same minorities are distributed in different regions within a country. By expanding the concept of De Villiers internationally, the concept of cultural territory can be used, instead of traditional physical territories, in a way that brings together overseas diaspora spread across the globe. It is effective to expand cultural territory by gathering overseas diaspora spread abroad. As De Villiers said, home country should give a certain level of political power and autonomy so that overseas diaspora can find and decide what they need in order to consolidate their capabilities into one.

III. CONSTITUTIONALIZATION OF TRANSBORDER NATIONHOOD IN LATIN AMERICA

I have the opportunity to analyze the constitutionalization trends of the transborder nationhood with two professors. We compared the constitutions of 35 countries, including OECD and some non-member countries. Not all countries in the world have been surveyed, but the survey sample is significant. As a result of the survey, the tendency to link overseas diaspora with their home countries became clearer(Kang, *et.al.,* 2018).

—A comparison of the tendencies of some Latin American countries is shown in the following chart. Spain and Portugal, formerly empire countries, are adopting *jus sanguine* as a standard of nationality. Both countries recognize dual nationality. In the case of Portugal, the right to vote and the parliamentary seats are assigned to overseas diaspora, and they are actively pursuing policies for overseas diaspora. However, Spain has a relatively weaker diaspora policy than Portugal. On the other hand, Latin American countries are all adopting *jus soli* on the basis of nationality, and most countries recognize dual nationality. Brazil enacted the Immigration Act in 2017 and strengthened its protection policy for overseas diaspora. I will look at the policies of some countries that were surveyed for overseas diaspora.

Latin America is a country formed by immigration that went through colonial experience. So immigration was a major source of Latin American formation. The common feature of immigration countries is that the criterion of nationality is based on *jus soli* without exception. The territory and nationality are the most important connecting elements that bind the people of the immigration nation. In addition, because immigrants often have the nationality of their home country, the place of residence is an important link in the legal sense. In other words, nationality and place of residence are important reference points in immigration policy.

So, it was common for Latin American countries to design immigration policies based on national security. Foreign migrants who migrated to country were treated from the viewpoint of national security, and state did not pay much attention to the people who migrated abroad. In fact, due to the nature of the immigration country, there were not many nationals abroad, and the governments did not pay much attention to their inhabitants abroad. It is because the brotherhood is not big. Thus, the migration policy of

Latin America is traditionally an immigration policy, and the emigration policy for overseas diaspora was not of interest, except for some countries such as Mexico and Colombia.

This passive migration policy has changed significantly over the past 30 years as globalization progresses. For economic reasons, immigration has increased in Latin America and the number of out-of-state migrants has surged. Mexico is the country with the largest number of overseas emigrants. Mexico accounts for more than half of Latin American immigrants in the United States and has the largest number of immigrants in other areas, followed by Colombia and Brazil (Bela Soltezs, 2016: 51; UN, 2017). The United States and Spain were the overwhelmingly preferred country of destination, followed by Argentina. In the case of regional integration such as Mercosur, free movement of peoples is guaranteed, so migration in the member countries of the region occurs greater numbers.

As a result of migration, the phenomenon that occurs in home country is remittance from abroad. If the purpose of migration is economic and there is family in the home country, the remittance amounts become larger. Following Mexico, Guatemala, Colombia, El Salvador and Dominican Republic have many remittances (UN, 2017). As such, the number of overseas diaspora increased, remittances from overseas increased, and the world began to recognize dual nationality. Migration policy is in the trend of encompassing diaspora as well as emigration. This policy change is recognized as a means of protecting the citizens and diplomatic means in the host country by increasing the number of overseas diaspora living abroad. In particular, investment promotion and remittance became an interest in diaspora policy for economic development of home country. As a secondary reason, the protection of overseas diaspora is also an important diplomatic issue because a large number of foreign immigrants are illegal. Migration policy, including many because of these reasons, approaches the new theory of state power, but the formal reason is the international human rights theory of protection and ties to its own nationals and their descendants.

From the point of view of the new state power theory, the foreign nationals are a great asset to expand the personal territory. If settled well and socially successful in the country of residence, it is a good way to expand the influence of the home country in the country of residence. In the same sense, in the case of a resident country, not only can immigrants help to maintain good relations with the immigrant's home country, but there is no reason to object his support to immigrants for settlement in society, Of course, if the problem of domestic intervention does not occur, there is no reason to object.

Bela Soltezs (2016) attempted to categorize diaspora policy in Latin American countries through data measurements. In the 1990s, as migration liberalization progressed, he measured how much interest these countries have in the diaspora policy. Bela Soltezs concluded that the diaspora phenomenon and diaspora governance capability were not significantly correlated. In other words, countries with high emigration rates, such as Bolivia and Honduras, have weak diaspora governance, while Brazil and Chile have less policy interest, despite diaspora governance capacity. On the other hand, the most active countries in diaspora policy were Mexico, Ecuador and Colombia and the government's diaspora policy was also active.

So, what is the reason for a country to set up a diaspora policy or a dedicated agency and its driving forces? The biggest motive is to use diaspora resources abroad, which fits well into the perspective of the new state power theory. Bela Soltezs (2016) suggested the three most important factors that constitute diaspora engagement policy: 1) dual citizenship regimes and extraterritorial voting rights; 2) diaspora-related laws and policy documents; and 3) specialized institutional bodies in a country's governance.

First, the dual citizenship regimes are factor to legally relate to the home country through the granting of nationality.

Second, the diaspora vote system gives overseas diaspora the right to vote for their country's president or legislators. The qualifications and conditions vary from country to country.

Third, where is in the statutory structure to promulgate the laws related to diaspora policy? If it is stipulated in the Constitution, it shows the political importance of the diaspora policy.

Fourth, we need to see what government agencies are dedicated to diaspora policy. If diaspora policy is stipulated in the Constitution, it is highly likely to establish a central agency of ministerial level dedicated to the building and enforcement of diaspora policies. In general, the Ministry of Foreign Affairs is in charge of the diaspora policy, but if the diaspora inclusion policy is strengthened, it is highly likely that an independent institution will take charge of it.

Boyle & Kitchin (2014), on the other hand, argues that countries are affected by the following five factors when setting up a diaspora strategy. 1) the nature and history of a country's state institutions; 2) the nature, scale, timing and geography of their diaspora; 3) the prior and existing relationships with their diaspora; 4)

the capacity of domestic private, public, and community organizations; and 5) the countries' geopolitical strengths, weaknesses, and challenges that may influence the countries formulate and implement their diaspora strategies (Boyle & Kitchin, 2014, p.23). These requirements are merely lists of subjective factors, and one country's experience is difficult to apply to other countries. Based on the factors of Bela Soltezs (2016) and the factors of Boyle & Kitchin (2014), let us examine the following factors. It is not an analysis that quantifies each factor by weighting it, but rather an objective indicator for quantitative analysis.

1) Number of overseas Koreans relative to population
2) Economic power of the country
3) Constitutional provisions for overseas Koreans
4) Regulations of the law on overseas Koreans
5) Overseas Citizens' Task Force
6) Permission for dual citizenship
7) Whether the granting of nationality to descendants is easy
8) Voting rights for overseas Koreans
9) Election of overseas residents (presence of overseas election districts)

countries	Legislation for diaspora	Dispora institution	Dual nationality	Preferential citizenship for descendents	Voting rights abroad	Overseas voting districts
Portugal	Constitution, art.74, para.2		Yes	Yes	Yes	Yes
Brazil	2017 Immigration Law, Chapter 7	In 2007, General Subsecretariat for Brazilians Abroad [280] Department for Consular Affairs and for Brazilians Abroad, Division of Brazilian Communities Abroad	Yes	No	1965, presidential election	No
Argentina	No Migration Law (Nº 25.871, 2004)	Directorate of Argentineans Abroad[281], within the General Directorate of Consular Affairs	Yes	No	1993, presidential, parliamentary	No
Mexico	Migration Law (in 2011)	Institute of Mexicans Abroad (*Instituto de los Mexicanos en el Exterior, IME*) 2000	Yes		2006, postal, presidential	No
Chile	Decree-Law on Alien Affairs (Nº1094, in 1975)	Directorate for the Community of Chileans Abroad [282], within the General Directorate of Consular Affairs and Immigration of the Ministry of Foreign Affairs.	Yes		since 2017 for the presidential election	No
Colombia	Law on the National Migration System(Nº 1465, in 2011) Law on Return Migration (Nº 1565, in 2012) Decree on the National Intersectorial Commission on Migration (Nº 1239, in 2003) Integral Migration Policy (*Politica Integral Migratoria*, Document Nº 3603 CONPES, in 2009)	Directorate of Consular and Migratory Affairs and Citizen Service (*Direccion de Asuntos Consulares, Migratorios y de Atencion al Ciudadano*)	Yes		1961, presidential, parliamentary (upper house)	
Bela Soltezs (2016) revised						

3 Directorate of Argentineans Abroad (*Direccion de Argentinos en el Exterior*), within the General Directorate of Consular Affairs (*Direccion General de Asuntos Consulares*)

4 Directorate for the Community of Chileans Abroad (*Direccion para la Comunidad de Chilenos en el Exterior, DICOEX*), within the General Directorate of Consular Affairs and Immigration (*Direccion General de Asuntos Consulares y de Inmigracion, DIGECONSU*) of the Ministry of Foreign Affairs. The DICOEX is divided in two Subdirectorates: of Development (*de Desarrollo*) and of Operations (*de Operaciones*) 2000

5 Niall McCarthy, The Countries with The Most Native-Born People Living Abroad [Infographic], Forbes, Jan 15, 2016.

1. Portugal's diaspora policy

Portugal, which ruled the huge colonies in the past, estimates that there are more than 100 million Portuguese descendants abroad. Brazil estimates that there will be more than 40 million Portuguese descendants. Currently, more than 4 million Portuguese nationals live abroad. So Portugal is very interested in overseas diaspora policy. Ireland (17.5%) and New Zealand (14.1%) followed Portugal (14%) are countries with native-born population living abroad, followed by Mexico (12.2%), Luxembourg (12.1%) and Iceland (11.7%).

1) In the Portuguese Constitution (1976), there is no direct reference or disposition on overseas diaspora, but in Article 74 (2) i), referring to 'emigrant' in relation to the implementation of educational policy, indirectly referred to overseas Portuguese. The current Constitution of Portugal (1976) has provisions on overseas diaspora in Article 14. In other words, Article 14 (Overseas Portuguese) has the following provisions regarding rights and duties to Portuguese staying or living abroad. "Article 14: Portuguese abroad. Portuguese citizens who find themselves or who reside abroad shall enjoy the state's protection in the exercise of such rights and shall be subject to such duties as are not incompatible with their absence from the country. "

2) Institutional authority for Overseas diaspora

3) Whether dual nationality is allowed. Portugal recognizes dual citizenship. Portuguese nationals will not lose their Portuguese nationality unless they voluntarily renounce their nationality. Similarly, foreign nationals who acquire Portuguese nationality do not have to renounce nationality. The constitutional provisions on the overseas diaspora appear in several places. In particular, Portugal has constitutional provisions related to the election of president by allowing voting rights to overseas diaspora, as well as the seats of national congress for overseas Portuguese.

4) Whether the granting of nationality to descendants is easy. The Nationality Act (*lei da nacionalidade*, Law No. 37/81) sets forth the easiness of obtaining descendants' nationality. Portugal, which had experienced colonial empire in the past, shows great interest in the acquisition of nationality of overseas diaspora and cultural bond ~~in~~ with Portugal. The Portuguese government can grant Portuguese citizenship to a descendant of the Portuguese or to a member of the Portuguese community (*membros de comunidades de ascendência portuguesa*). It is distinguished from the naturalization rights granted to the grandsons of the citizens of Portugal (*netos*). In other words, in the case of Portuguese descendants, most apply to great grandson(*bisnetos*) of Portuguese citizens. Article 6 of the Act on the Acquisition of Nationality (*Aquisição da nacionalidade por naturalização*) sets forth the requirements for the acquisition of nationality, which is related to the acquisition of nationality of overseas diaspora.[6]

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6 Section III Acquisition of nationality by naturalization
Article 6 (Requirements)
1 - The Government grants the Portuguese nationality, by naturalization, to the foreigners that satisfy cumulatively the following requirements:
a) Be greater or emancipated under Portuguese law;
b) Have been legally resident in Portugal for at least six years;
c) Know the Portuguese language sufficiently;
d) Have not been convicted, with a final and unappealable decision, for the commission of a crime punishable by a term of imprisonment not exceeding 3 years, according to Portuguese law.
e) Do not constitute a danger or threat to national security or defense, for their involvement in activities related to the practice of terrorism, in accordance with the respective law.
2 - The Government grants nationality, by naturalization, to minors, born in Portuguese territory, children of foreigners, provided they meet the requirements of sub-paragraphs c) and d) of the previous number and provided, at the time of following conditions:
a) One of the parents has been legally resident for at least five years;
b) The minor here has completed the 1st cycle of basic education.
3 - The Government grants naturalization, with exemption from the requirements set forth in paragraphs b) and c) of paragraph 1, to individuals who have had Portuguese nationality and who, having lost it, have never acquired another nationality.
4 - (Revoked).
5 - The Government may grant nationality, by naturalization, with exemption from the requirement established in paragraph b) of paragraph 1, to individuals born in Portuguese territory, children of foreigners, who have usually stayed here in the 10 years immediately prior to the request.
6 - The Government may grant naturalization, with exemption from the requirements set forth in sub-paragraphs b) and c) of paragraph 1, to individuals who, not being stateless, have Portuguese nationality, to those who are descended from Portuguese, to members of communities of

5) The right to vote for overseas diaspora and the parliamentary seats for overseas diaspora. Since 1976, Portugal has assigned a House of Representatives seat to overseas Portuguese. To this end, of the 230 seats in the total seats, the overseas voting region was divided into Europe and other regions, with two seats in Europe and two seats in the other regions (equivalent to 1.7%). In order to secure two seats, there must be more than 55,000 votes in the voting area, and if it is less votes, only one seat will be allocated.

2. Brazil's diaspora policy

Brazil traditionally implemented immigration policies based on national security. Although there was no special policy for overseas diaspora, the interest in diaspora policy increased due to the increasing number of overseas migrants because of the market opening in the 1990s. The new Immigration Act enacted in 2017 states the protection disposition of overseas diaspora. In other words, Brazil has established the emigrant rules of Brazilian emigrants who migrate abroad to Chapter 7 (emigrants abroad) of the immigration law in 2017. Emigrant in immigration law is defined "emigrant - Brazilian who establishes temporarily or definitively abroad (emigrante - brasileiro que se estabeleça temporária ou definitivamente no exterior)".[7]

The organization dedicated to overseas diaspora is the Brazil General Subsecretariat for Brazilians Abroad (*Subsecretaria-Geral das Comunidades Brasileiras no Exterior,* SGEB), Department for Consular Affairs and for Brazilians Abroad (*Departamento Consular e de Brasileiros no Exterior*, DCB), Division of Brazilian Communities Abroad (*Divisao das Comunidades Brasileiras no Exterior*, DBR). The General Subsecretariat for Brazilians Abroad (SGEB) was established in 2007, at the time of the Lula government.

Easiness to descendants in nationality acquisition and recognition of multiple nationality. In 1988, Article 12 of the Federal Constitution of Brazil stipulates birth and naturalization as a method of acquiring Brazilian nationality. Article 12 of the Federal Constitution classifies the acquisition of Brazilian nationality into two categories by naturalization.

a) those who, as set forth by law, acquire Brazilian nationality, it being the only requirement for persons originating from Portuguese-speaking countries the residence for one uninterrupted year and good moral repute;
b) foreigners of any nationality, resident in the Federative Republic of Brazil for over fifteen uninterrupted years and without criminal conviction, provided that they apply for the Brazilian nationality.

Brazil also acknowledged dual citizenship through amendments to the constitution when European nations recognized dual citizenship. Article 12 (b) of the Federal Constitution stipulates that Brazilian nationals residing abroad shall not lose their Brazilian nationality if they are forced to naturalize in order to exercise their permanent residence status or citizenship under local regulations. It recognizes dual citizenship for involuntary naturalization.

3. Argentine's diaspora policy

Argentina's nationality standard is *jus soli* and *jus sanguinis* as complementary. Dual nationality is allowed under limited reciprocity principle. If dual national is staying in Argentina for more than 90 days, he/she must use an Argentine passport. A foreign passport must be used for stay of less than 90 days.

Portuguese ancestry and foreigners who have rendered or are called to render services relevant to the Portuguese State or the national community.

7 - The Government may grant nationality by naturalization, with exemption from the requirements set forth in paragraphs b) and c) of paragraph 1, to the descendants of Portuguese Sephardic Jews, by demonstrating the tradition of belonging to a Sephardic community of Portuguese origin, based on proven objective requirements of connection to Portugal, namely nicknames, family language, direct or collateral descent.

7 CHAPTER VII OF THE MIGRANT

Section I From Public Policies to Emigrants

Art. 77. Public policies for emigrants shall observe the following principles and guidelines:

I - protection and provision of consular assistance through the representations of Brazil abroad;

II - promotion of decent living conditions through, inter alia, the facilitation of consular registration and the provision of consular services in the areas of education, health, labor, social security and culture;

III - promotion of studies and research on emigrants and communities of Brazilians abroad, in order to subsidize the formulation of public policies;

IV - Diplomatic action, in the bilateral, regional and multilateral spheres, in defense of the rights of the Brazilian emigrant, in accordance with international law

V - integrated governmental action, with the participation of government agencies working in the thematic areas mentioned in items I, II, III and IV, in order to assist Brazilian communities abroad; and

VI - permanent effort to reduce bureaucracy, update and modernize the service system, with the aim of improving assistance to the emigrant.

Argentina, like Brazil, does not recognize involuntary abandonment of nationality. In other words, if an Argentine should give up his nationality of Argentina as a requirement to acquire a foreign nationality, his Argentine nationality will remain the same.

In Argentina, the economic importance of their diaspora is as low as in Brazil.

4. Chile's diaspora policy

As in Argentina and Brazil, the impact of diaspora on the national economy is low in Chile. Overall, diaspora policy is very passive. However, interest in Chile's diaspora policy has been increasing since the 2000s when compared to the past. Chile's principle of nationality is based on *jus soli* and *jus sanguinis* as complementary.

In the case of acquisition of nationality by naturalization, the preferential acquisition of nationality for descendants is recognized. In other words, the granting of a Chilean nationality of a descendant is permitted if one of the grandparents is a Chilean national.

The government department responsible for overseas diaspora is the Foreign Ministry, which was established in 2000. Directorate for the Community of Chileans Abroad (*Direccion para la Comunidad de Chilenos en el Exterior*, DICOEX), within the General Directorate of Consular Affairs and Immigration (*Direccion General de Asuntos Consulares de Inmigracion*, DIGECONSU) of the Ministry of Foreign Affairs. The DICOEX is divided into two subdirectorates: of Development (*de Desarrollo*) and of Operations (*de Operaciones*).

The Chilean government has established the Talent Network for Innovation of ChileGlobal to promote the networking of human and material resources of overseas diaspora. It is a network of experts built to support the time, experience, knowledge, capital, network, etc. of Chilean overseas to grow internationally.

5. Colombia's diaspora policy

Colombia is the country with the largest number of foreign immigrants next to Mexico in Latin America and has a great interest in diaspora policy. The department responsible for overseas diaspora is the Directorate of Consular and Migratory Affairs and Citizen Service (*Direccion de Asuntos Consulares, Migratorios de Atencion al Ciudadano*).

Colombia's principle of nationality is *jus soli* (principle) and *jus sanguinis* (complementary). Although dual nationality is allowed, certain civil servant rights are limited for dual citizens. As other Latin American countries, Colombian nationality is retained if Colombian nationality is compelled to abandonment as a condition to obtain nationality of the residence country.

The characteristic of the Colombian law is that it distinguishes between nationality and citizenship. The Constitution of Colombia (Article 98) states that nationality is a proof of relationship with the state under international law, and citizenship is a qualification to bear rights and obligations to nationals over 18 years of age. (For example, a right to vote, a right to unconstitutionality claim, etc.)

Colombia has recognized the right of overseas diaspora to vote in presidential and senatorial elections since 1961. In the 1991 Constitution, a special electoral district was created for political minorities, ethnic minorities, and overseas diaspora, giving Congress seats of up to five seats. The seat assigned in the National Assembly to overseas diaspora is one seat (one seat out of a total of 166 seats, equivalent to 0.60%).

6. Mexico's diaspora policy

From the theoretical point of view of the diaspora policy of the migrants sending state, Mexico demonstrates fully the evolution of the diaspora policy in accordance with international circumstances. Mexico is the most emigrated country in Latin America. From the viewpoint of the migration policy of this paper, Mexico, which has a lot of overseas compatriots in the United States, initially implemented a passive approach on migration policy. However, after the establishment of Nafta in 1994, Vincent Fox (2000-2006) Government began to launch active diaspora policy. This phenomenon is a major driver of the Mexican economy's openness and the American Mexican diaspora's expansion of influence in both countries' politics and economy (Délano, 2011). According to Délano's research, the diaspora engagement policy in Mexico is more beneficial to the Mexican national interest than what could be lost because of such policy. It is also emphasized that lobbying in the USA through diaspora is a very effective diplomatic means.

Mexico established the Institute of Mexicans Abroad (*Instituto de los Mexicanos en el Exterior* in 2003. From 2006, he recognized the right of the overseas diaspora to vote in the presidential election.

The nationality standard of Mexico is *jus soli* (principle) and *jus sanguinis* (complementary). Mexico, like Colombia, distinguishes between nationality and citizenship. Nationality is a proof of linking the people and the nation in international law, and citizenship is the ability to exercise certain rights and duties. Citizenship is granted for persons 18 years of age or older (Article 34 of the Constitution). Mexican nationals who have acquired a foreign nationality due to their overseas birth are subject to some restrictions on the right to public service.

Mexico gives overseas diaspora the convenience of nationality acquisition. The general naturalization requirement is more than five years in Mexico, but if one of the parents is a Mexican national, it will be shortened to two years. These residence requirements are exempted if the applicant has outstanding achievements that benefit Mexico in the fields of culture, society, science, technology, sports or business. The rules of residence are reduced from five years to one year in the case of second generation Mexican (grandparents are Mexican nationals).

IV. CONCLUSION

The Latin American countries' tendency to strengthen the environmental and human rights in the Constitution and to emphasize the principle of decentralization shows that the nation-state system is not robust. Even if the concept of the nation is not mandatory connection element in the sovereign state, there is no big problem in acting as a sovereign state in the international society. Recognizing the rights of Aboriginal people who lived in Latin America before the colonization and recognizing their territory and autonomy within the sovereign state show that there are various forms of state apart from the nation-state. As people move into common interests, and the universal values of international law increase, the control of the state on people will decrease.

The dual nationality system and the diaspora engagement policy can be analyzed from the viewpoint of the nationality inducement policy marketing to the all people in order to expand the state power as a way to survive.

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ETHICS, PRIVATE SPHERE AND FUNDAMENTAL RIGHTS : A COMPARING REVIEW ON TWO DECISIONS OF THE KOREAN CONSTITUTIONAL COURT ON 'CRIMINAL ADULTERY', AND 'SAME-SURNAME-SAME-ORIGIN MARRIAGE BAN'*

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I. Introduction

In not a few issues of modern societies in the world, conventional morality arguments and fundamental rights arguments have conflicted. State laws against adultery, same-sex marriage, abortion, prostitution, masturbation, bigamy would be examples. However, when we look closely at these issues, we see that one of the key points is: whether the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is a sufficient reason for upholding a law prohibiting the practice, or not.[1] By far the most common response, at least in the countries such as U.S.A., Germany, France where have been regarded to have relatively long-developed constitutional adjudications, has been to abandon the idea that morality alone provides a sufficient basis for law. Recapture or explicitly invoking John Stuart Mill's harm principle,[2] many scholars argue that courts should "permit morality-inspired government action only when it is supported by reference to empirical or otherwise demonstrable harms."[3]

In this paper, in order to clarify how these issues are expressed and resolved in the Korean Constitutional Court, I will review on and compare two decisions of the Korean Constitutional Court on 'criminal adultery', and 'same-surname-same-origin marriage ban'. This two decisions as distinct examples can show how the debate on conventional morality arguments and fundamental rights arguments has developed in Korea.

II. Case on Adultery [27-1(A) KCCR 20, 2009Hun-Ba17 et al., February 26, 2015][4]

The Korean Constitutional Court (KCC) has recently made the decision (27-1(A) KCCR 20, 2009Hun-Ba17·205 (Consolidated), February 26, 2016 (hereinafter the "2015Decision"))[5] that Article 241 of the Criminal Act related to adultery goes against the constitution due to its abuse of sexual autonomy and the freedom and privacy of personal life. It was a change of stance from the previous constitutional decisions ruled over four times.

Adultery is defined generally in legal academia and praxis as the "[v]oluntary sexual intercourse between a married person and someone other than the person's spouse."[6] In the meantime, the criminal regulation of adultery[7] has been deemed constitutional by the Constitutional Court four times, where six Justices provided constitutional opinions for the 1990Decision[8] and the 1993Decision[9] and eight Justices

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* *Work in progress. Please do not cite or quote.*

1 For ex. see Lawrence v. Texas, 539 U.S. 558, 577 (2003) (quoting Bowers v. Hardwick, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)).

2 As Mill put it, "the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others." JOHN STUART MILL, ON LIBERTY 52 (Edward Alexander ed., Broadview Press 1999) (1859); see also H.L.A. HART, LAW, LIBERTY, AND MORALITY 4-6 (1963).

3 Suzanne B. Goldberg, Morals-Based Justifications for Lawmaking: Before and After Lawrence v. Texas, 88 MINN. L. REv. 1233, 1240 (2004).

4 Writing this part, I have quoted largely from my previous work. See Seokmin Lee, Adultery and the Constitution: A Review on the Recent Decision of the Korean Constitutional Court on 'Criminal Adultery'. Journal of Korean Law Vol.15 No.2 (2016).

5 KCCR=Korean Constitutional Court Report.

6 See Black's Law Dictionary 10th ed. (West Group, 2014) at 62.

7 For historical perspective about adultery, for example, *see* Gung-Sik Jung, *Historical Review on the Crime of Adultery in Korea* [*hankuk eui kantongchoe eui byeopjesajeol kochal*], in DONG-WOON SHIN, A STUDY ON THE ADULTERY AND THE ABORTION FROM THE VIEWPOINT OF CRIMINAL LAW REFORM IN KOREA [NAKTAEJOE MIT KANTONGJOE E KWANHAN YEONKU] (1991) ; Kuk Cho, *The Crime of Adultery in Korea: Inadequate Means for Maintaining Morality and Protecting Women*, J. Korean L. 2 (2002) at 84-86.

8 2 KCCR 306, 89Hun-Ma82, September 10, 1990.

9 5-1 KCCR 18, 90Hun-Ga70, March 11, 1993.

gave constitutional opinions for the 2001Decision.[10] However, in the most recent decision, known as the 2008Decision,[11] four Justices ruled it as constitutional, four Justices ruled it as unconstitutional, and one Justice provided constitutional discordance adjudication that aroused interest from the public about the decision from the Constitutional Court.

In fact, after the unconstitutional ruling in 2015, the illegality of adultery apart from the criminal law has been maintained as approved. It was demonstrated in the case where the ex-trainee in the Judicial Research and Training Institute (JRTI)[12] who was expelled for adultery filed a suit against the president of the institute due to the invalidity of the expulsion but lost both the original and appellate trials, and furthermore, the civil liability of the trainee was acknowledged.

A. Background

In this case, the Constitutional Court held that Article 241 of the Criminal Act, which punishes adultery or fornication with a punishment of no more than two years of imprisonment (hereinafter referred to as the "Adultery Provision"), violates the Constitution. Before this Court decision, the Constitutional Court had decided on four occasions that adultery set forth in the Criminal Act does not violate the Constitution (89HunMa82, September 10, 1990; 90Hun-Ka70, March 11, 1993; 2000Hun-Ba60, October 25, 2001; and 2007Hun-Ka17 et al., October 30, 2008). In its decisions 89Hun-Ma82 and 90Hun-Ka70, the Court held that while the Adultery Provision did restrict the right to sexual self-determination of individuals, it was inevitable to regulate the adultery of those with spouses to sustain the virtues of sexual morality or prevent the social harm that adultery may cause. Thus, the Court reasoned that the Adultery Provision constituted the minimum amount of restriction that should be imposed on sexual self-determination. Justices Han Byung-Chae and Lee Shi-Yoon dissented, saying that the criminal punishment of adultery was constitutional, but providing only statutory punishment available as imprisonment was unconstitutional; meanwhile, Justice Kim Yang-Kyun dissented entirely, saying that the crime of adultery itself was unconstitutional. The Court's opinion was that the right to sexual self-determination can be restricted to maintain and guarantee marriage and family life, although such right is included in the right to pursue happiness stipulated in Article 10 of the Constitution. In the decision 2000Hun-Ba60, Justice Kwon Seong stated the dissenting opinion that the crime of adultery in essence pointed to the adultery of married women, and this should be the subject of criticism and moral repentance, not a crime to be punished through the intervention of the state. Thus, the Adultery Provision deprives one of the right to sexual self-determination, effectively violating the Constitution. As to the decision 2007Hun-Ka17 et al., a majority (5) of the justices (9) declared that the Adultery Provision is unconstitutional, although the number failed to constitute a quorum (6) to deliver a decision of unconstitutionality. Specifically, Justices Kim Jong-Dae, Lee Dong-Heub, and Mok Young-Joon stated that the Adultery Provision was unconstitutional for subjecting the intimate domain of an individual's sexual life to criminal punishment. Justice Song Doo-Hwan stated an opinion of unconstitutionality because he considered the statutory sentence of imprisonment, with no other option, to be excessively severe, although the criminal punishment of adultery itself was constitutional. Justice Kim Hee-Ok shared the opinion of unconstitutionality on the grounds that imposing criminal punishment on acts that should at most be subject to moral reprehension does not conform to the Constitution.

B. Summary of the Decision[13]

The Constitutional Court decided that the Adultery Provision infringes upon the right to sexual self-determination and to secrecy and freedom of privacy, for the following reasons. Justices Park Han-Chul, Lee Jin-Sung, Kim Chang-Jong, Seo Ki-Seog and Cho Yong-Ho declared that there is no longer any public consensus regarding the criminalization of adultery, along with the change of public perception on social structure, marriage, and sex and the growing awareness on the idea that sexual self-determination should be valued. It should also be left to the free will and affection of the person in question to decide whether to maintain marriage and family, which are the legally protectable interests of the crime of adultery, and the

10 13-2 KCCR 480, 2000Hun-Ba60, October 25, 2001.

11 20-2(A) KCCR 696, 2007Hun-Ga17, October 30, 2008.

12 Under the then judiciary exam (as of around 2010), the number of new lawyers admitted each year was limited to 1,000. Then, successful candidates had to complete the mandatory two years of training courses at the Judicial Research & Training Institute (JRTI) in order to join the bar in Korea. The JRTI is managed by the Supreme Court.

13 For this summary, see "Thirty Years of the Constitutional Court of Korea", Constitutional Court of Korea, 2018. pp.188-191. (https://library.ccourt.go.kr/en/bbs/Extend.Detail.ax?bbsID=8&articleID=46. Last access: 2019.01.15)

matter should not be forced by another through criminal punishment. In addition, because the current rate of punishing adultery and the degree of social condemnation against adultery have decreased considerably, it is hard to anticipate a deterrence effect from the perspective of criminal policy. Therefore, the criminal punishment of adultery infringes on the right to sexual self-determination as well as secrecy and freedom of privacy as it violates the principle against excessive restriction. Regarding the Court's decision, Justice Lee Jin-Sung presented the concurring opinion that practices regarding compensation, division of property and custody arising out of the dissolution of a family due to adultery should be improved, and a system to protect and support spouses and children should be developed. Justice Kim Yi-Su expressed an opinion of unconstitutionality, as follows. Certain types of adultery, which are committed in a situation where marriage is de facto dissolved and the spousal obligation of faithfulness no longer exists, and fornication by an unmarried person, are neither morally reprehensible nor anti-social. Nevertheless, the provision at issue uniformly punishes all modes of adultery and fornication. This violates the Constitution for the excessive exercise of the state's criminal punishment authority in that it excessively restricts the right to sexual self-determination. Justice Kang Il-Won also stated an opinion of unconstitutionality, as follows.

The meaning of condone or pardon, which constitutes the prosecution requirement, is not clearly defined, suggesting that the people subject to the law cannot predict the scope and limits of governmental power. Therefore, the provision at issue infringes on the principle of clarity. In addition, the provision at issue states that all modes of adultery and fornication shall be uniformly punished by imprisonment. It excludes the possibility to consider singularities and specificities of individual cases, violating the principle of proportionality between responsibility and punishment. In contrast, Justices Lee Jung-Mi and Ahn Chang-Ho presented a dissenting opinion, on the grounds that the act of adultery would damage the social system, which is marriage based on monogamy; it is difficult to assume that the legislature's judgment to criminally punish such an act is arbitrary; in certain cases, adultery would not be punished for the lack of illegality; and the punishment is not excessively severe.

III. Case on Same-Surname-Same-Origin Marriage Ban [9-2 KCCR 1, 95Hun-Ka6 et al., July 16, 1997]

A. Background

In this case, the Constitutional Court delivered a decision of nonconformity to the Constitution for Article 809 Section 1 of the Civil Act, which prohibited same-surnamesame-origin marriage. Article 809 Section 1 of the Civil Act prohibited marriage between two persons who are blood relatives, who share the same family name and come from the same ancestral line ("Dongsungdongbon" in Korean). The ban on same-surname-same-origin marriage had been the subject of a long dispute between Confucian adherents who emphasize that it is part of the country's tradition and women's groups who demand its revision or abolition on the grounds that it is not only too broad a prohibition on marriage without any genetic evidence, but also a relic of patriarchy and male supremacy. As an interim solution, the National Assembly, through the Act on Special Cases concerning Marriage, saved many same-surnamesame-origin couples from hardships in the schooling of their children and their marriage lives by recognizing their de facto marital status. However, it failed to provide a fundamental solution and eventually, the provision was brought to the Constitutional Court for constitutional review. The petitioners sought the nullification of the administrative action that rejected their marriage registrations on the grounds that they were same-surname-same-origin marriages in the Seoul Family Court and requested constitutional review of the provision, which was accepted.

B. Summary of the Decision[14]

The Constitutional Court delivered the decision on the Case on Same-Surname-Same-Origin Marriage Ban (9-2 KCCR 1, 95Hun-Ka6 et al., July 16, 1997. Hereinafter the "1997Decision"). This is a decision of nonconformity to the Constitution for Article 809 Section 1 of the Civil Act, which prohibited same-surname-same-origin marriage. Even setting aside Article 809 Section 1 of the Civil Act, the scope of consanguineous marriage prohibited by other provisions is sufficiently broad. Yet Article 809 Section 1 not only voids all same-surname-same-origin marriages regardless of the degree of kinship, but prohibits the registration of their marriage report. Korean society has changed drastically from the period in which the ban on same-surname-same-origin marriage was tolerated, and the institutional foundation of the ban is being

14 For this summary, see "Thirty Years of the Constitutional Court of Korea", Constitutional Court of Korea, 2018. pp.403-405. (https://library.ccourt.go.kr/en/bbs/Extend.Detail.ax?bbsID=8&articleID=46. Last access: 2019.01.15)

greatly questioned. First, modern society is a free democratic society that is based on the fundamental ideas of freedom and equality and opposes sexism and any form of caste or class. Accordingly, Article 36 Section 1 of the Constitution not only mandates that the establishment and maintenance of marriage and family life be based on gender equality and individual dignity but even provides for the state's responsibility to guarantee the fulfillment of this mandate. Secondly, the prevailing view of marriage changed from that of a union between two families to that of a union between two individuals whose free will should be respected. The prevailing idea and form of family also changed from that of an extended family based on patriarchy to that of a nuclear family. The idea of gender equality has also become widely accepted due to the expanding education of women since the founding of the country. Thirdly, the self-sustaining agrarian society or the feudal and isolated rural-centered society has transformed itself into a highly advanced industrial society. In line with the growth of the population, the numbers of those with major family names reached 3,892,342 for Kim from Gimhae, 2,379,537 for Lee from Jeonju, and 2,704,819 for Park from Miryang, according to 1985 figures, making surnames and origins difficult to accept as rational standards of a marriage ban. Further, the growing urbanization of the population is diluting such concept as a household or a lineal origin ("bon-gwan" in Korean). Based on such an evaluation, Article 809 Section 1 of the Civil Act loses its social acceptability or rationality as a marriage ban and is in direct conflict with the principle of sexual self-determination, especially, the constitutional ideas and provision on human dignity and worth and the right to pursue happiness (Article 10 of the Constitution), which is the basis of the right to choose one's destiny including the freedom of marriage and freedom to choose one's partner in marriage. It also directly conflicts with the constitutional provision calling for establishment and maintenance of marriage and family life on the basis of individual dignity and gender equality (Article 36 of the Constitution). In addition, since the scope of prohibition is limited to the same surnames, in other words, those with the same patrilineal blood ties, it constitutes gender discrimination, thus violating the constitutional principle of equality (Article 11 of the Constitution). Among the seven justices who found it unconstitutional, Justices Chung Kyung-Sik and Koh Joong-Suk advocated for respect of the National Assembly's power of legislative formation. Therefore, the Court delivered a decision of nonconformity to the Constitution for the provision and prohibited its application, setting a deadline of December 31, 1998. On this matter, Justices Lee Jae-Hwa and Cho Seung-Hyung provided a dissenting opinion by arguing that even if the above provision restricts the people's right to pursue happiness, in other words, the freedom of marriage and the freedom to choose with whom to marry, it does not violate the rule against excessive restriction. In addition, it does not constitute arbitrary gender discrimination because the Civil Act adopted the provision as a codification of a traditional custom.

III. Comparison, Significance And Aftermath Of The Cases

A. Criminal Adultery Case

(a) Significance, especially in terms of decriminalization

Since the 1960s, there has been an international tide of decriminalization (in order to prevent the abuse of over-criminalization). After the Second World War, as Maihofer's "soziale Handlungslehre" emerged in 1961, ideologies of liberalization of criminal law or demoralization were disseminated. The idea of "decriminalization," that "actions that are unethical yet do not violate the benefit and protection of the law should not be criminalized," has been widespread internationally. South Korea is also engaged in discussions on decriminalization.

According to criminal policy studies, "criminalization" refers to the conditions in which new types of violations of the benefit and protection of the law occur due to changes in the social structure. In order to deal with the rise of potential situations, new legislation is written for criminal justice regulation, and this is the first step in "criminalization." On the other hand, due to changes in law strategy to reduce the range of states' administrative justice, there are cases in which what has been considered a crime is now permitted. This is called "decriminalization." It mainly emerged due to criticism against the hypertrophy of criminal law, stigma theory, and the failure of the national public execution system.

In terms of constitutional theory, this is directly related to the topic of "equal individual freedom" or "the right to pursue one's happiness."

In relation to "decriminalization," detailed discussion of the unconstitutionality of laws that have been ruled unconstitutional by the Constitutional Court, such as "sex under false promises of marriage" or "adultery," now seems practically insignificant in South Korea. However, in this writing, the chronological order and rationale of the several constitutional decisions made on the same topic will be discussed.

This analysis is meaningful, in that one can now determine suitable constitutional decisions on similar moral-related topics (such as banning prostitution, homosexual marriage, etc.) in South Korea. This can also serve as comparative data[15] for other countries.

(b) Aftermath

This crime of adultery had been the subject of endless controversy, despite the numerous occasions on which the Court held the Adultery Provision as constitutional. The controversy was finally settled when the Court declared the provision to be unconstitutional. Some evaluated that this decision was favorable to fundamental rights (Chung Pil-Woon and Cho Jae-Hyun, A Critical Summary of Leading Constitutional Decisions in 2015).

The decision of the case has brought enormous impact to Korean society, and currently, the pros and cons of the decision are being debated. Park, a civil activist and president of the cooperative office in the People's Solidarity for Participatory Democracy, claimed that the state should not intervene in the problems of couples by means of penalty. He stated that it is rather more righteous for the state to ask for civil liability, and he commented, "[I]t is justified from the viewpoint of the judicial perspective and the flow of the times."[16] Moreover, the United Women's Association provided the following opinion through reviews: "[T]he decision from the Constitutional Court to rule the criminal regulation of adultery as unconstitutional should be respected since it lacked actual effect until now." [17] The association also stated, "[E]ven though the adultery law is abolished, the moral and ethical responsibility agreed to by the couple does not necessarily disappear, and there should be an amendment requiring the partner to bear the civil liability from imputation."[18] Professor Young-Su Chang of the Korea University law school also advised that "in the long-term, it is right to deem the criminal regulation of adultery unconstitutional" and that "setting the case study of developed countries as a model for solving the adultery problem through civil law would be a desirable way toward a solution." [19]

On the other hand, Sungkyunkwan University's Confucian scholar Seo-Chan Ryu responded differently, arguing, "[I]t is desirable that the state should be the arbitrator for penalizing the adultery crime." [20] Conversely, Dr. Ha from the Christian Association (Korea Association of Christian Family Counseling) mentioned that "abolishing the adultery crime has a considerable relationship with social and domestic problems, and therefore, there is a higher possibility that abolishment of the criminal regulation of adultery may lead to negative results, such as less attention for dysfunctional family problems." [21] He further added, "[R]ather than complete dissolution of the adultery law, an alternative method of amendment should be employed according to the times." [22]

On the other hand, in order to analyze the changes in the perceptions of the general public based on gender after the decision on the case, one recent poll[23] conducted a comparison of male and female respondents after the abolishment of the criminal regulation of adultery.[24] At the executive level, the National Assembly or the Ministry of Justice did not show any tangible movement or discussion on any measures related to the gap created from the abolished space. In addition, if it was abandoned the consequence of weakening marriage ties had been worried, and the retrial case from the decision triggered debate on human rights

15 For comparative legal perspective about adultery, for example, *see* Kuk Cho, *The Crime of Adultery in Korea: Inadequate Means for Maintaining Morality and Protecting Women*, J. Korean L. 2 (2002), p. 83-84. ; A. Black, & K. S. Jung, *When a Revealed Affair Is a Crime, but a Hidden One Is a Romance: An Overview of Adultery Law in the Republic of Korea*, Int'l Surv. Fam. L., 275 (2014) ; J. Corrin, *It Takes Two to Tango, But Three to Commit Adultery: A Survey of the Law on Adultery in Post-Colonial South Pacific States*, Int'l. J. of Law, Policy and the Family, 26(2), 187, 219 (2012) ; ANTHONY R. BESSETTE, REGULATING AND PUNISHING ADULTERY IN KOREA AND EAST ASIA, University of Richmond School of law (2009).

16 Sejun Park et al., *(Adultery is Unconstitutional) "Era's change to admit" "Demolition of family and collapse of discipline"*[*(gantongjoe wiheon) "sidae byeonhwa injeonghaeya" "gajeong haeche gigang bung goe*] , World Daily [segyeilbo], Feb. 26, 2015, http://www.segye.com/content/html/2015/02/26/20150226004864.html (last visited Aug. 16, 2015).

17 *Id.* (United Women's Association, in its comment)

18 *Id.*

19 *Id.* (Young-Su Chang, in his comment)

20 *Id.* (Seo-Chan Ryu, in his comment)

21 *Id.* (Hyeon-Cheol Ha, in his comment)

22 *Id.*

23 Seoul News [seoulsinmun], Sep. 16, 2015, http://www.seoul.co.kr/news/newsView.php?id=20150916500037 (last visited Dec. 16, 2015).

24 The results showed that 24.2% of married people had experienced extramarital affairs, which was 2.8% higher than when the Korean Women's Development Institute researched the same topic eight months before the abolishment of the criminal regulation of adultery. http://www.fnnews.com/news/201502261520510963 (last visited Aug. 16, 2015).

issues as private information of the involved person and the related people leaked out during the process. Finally, issues had been raised from the decision of the case regarding the wider scope for the Korean court to select the breakdown principle, but recently, the Supreme Court maintained the principle of liability with a unanimous vote.[25] In addition, a study argued[26] that we should move henceforth the discussion centered on not 'criminal characteristic' of adultery but illegal breach of marriage contract. In other words, adultery is just one type of breach, as he pointed out. This argument seems proper and reasonable.

The Criminal Act was amended by Act No. 13719 on January 6, 2016, and the Adultery Provision was deleted accordingly. Under the former provision of Article 47 of the Constitutional Court Act, any Act or provision relating to criminal punishment decided as unconstitutional shall lose effect retrospectively without limitations. The above provision was amended by Act No. 12597 on May 20, 2014. Under the amended provision, any relevant Act or provision previously decided as constitutional shall lose effect retrospectively on the day following the date such decision is made. As a result, Article 241 of the Criminal Act lost effect retrospectively on the day following October 30, 2008, when the previous decision on constitutionality, 2007Hun-Ka17 et al., was delivered. Despite the aforementioned amendment, however, there was still controversy over whether to allow retrial for a case for which a judgment was finally affirmed after the base point for retroactive effect, but a criminal act had been committed before the base point. In response, the Supreme Court held, in its decision 2015Mo1475 delivered on November 10, 2016, that "if a judgment of guilt was finally affirmed after the day following the date a decision of constitutionality was delivered, such a judgment was made under any Act or provision which lost effect retroactively due to a decision of unconstitutionality although the criminal act was committed before the judgment. As such a judgment constitutes a 'finally binding judgment rendered pursuant to the Act or provision decided as unconstitutional,' a request for retrial for the relevant case can be made."[27]

2. Same-Surname-Same-Origin Marriage Ban case

The Court emphasized that the tradition and social order themselves change over time, and the basis for this law had already lost its legitimacy as a tradition protected under the boundary of Article 9. The Court also noted that this type of prohibition had been abolished in China, where this tradition originated, as early as 1930s. The Court did not go further with the proportionality test, finding that preserving an outdated social order cannot be a legitimate government purpose to restrict constitutional rights. On the other hand, two dissenting justices took the position that citizens' constitutional rights and equality are protected within the boundary of the tradition. They regarded that preserving the social order by enforcing a traditional custom of marriage was a legitimate state reason to restrict rights and equality, and that the extent of rights restriction under this law was not excessive.

After the decision suspended the effect of the ban, the estimated two hundred thousand couples who had been forced to remain only in de facto marriages were now able to obtain legal marital status. The decision also provided a breakthrough for the attempts to revise other related family law statutes that were at a standstill. Confucian adherents criticized the decision as "a shameful sell-out of the entire people, going beyond the sell-out of the nation," while women groups welcomed it as "a calm announcement but a thunderous impact that took down an evil practice in a time of change (Chosun Daily, July 17, 1997)." Meanwhile, parts of the Rules of the Supreme Court on Family Register that prohibited the registration of same-surname-same-origin marriage (Rule No. 172) and that concerned the mistaken registration of same-surname-same-origin marriage (Rule No. 176) were abolished. On March 31, 2005, long after the deadline of December 31, 1998, provided by the Constitutional Court, the National Assembly revised Article 809 of the Civil Act by Act No. 7427 and deleted the ban on marriage between persons of the same surname and same family origin, instead establishing measures that prohibited consanguineous marriage between blood relatives within the eighth degree of relationship.[28]

25 *Judgment of Sep.15, 2015, 2013Meu568 (Supreme Court of Korea).*

26 Do-Jin Og, *Civil liability after decision of constitutional violation on adultery punishment* [*wiheongyeoljeong hu gantong-e daehan minsa chaeg-im], Vol. 450 Human Rights and Justice [ingwongwa jeong-ui*] 19 (2015).

27 See "Thirty Years of the Constitutional Court of Korea", Constitutional Court of Korea, 2018. pp.190-191. (https://library.ccourt.go.kr/en/bbs/Extend.Detail.ax?bbsID=8&articleID=46. Last access: 2019.01.15)

28 See "Thirty Years of the Constitutional Court of Korea", Constitutional Court of Korea, 2018. pp.404-405. (https://library.ccourt.go.kr/en/bbs/Extend.Detail.ax?bbsID=8&articleID=46. Last access: 2019.01.15)

IV. Conclusion

(1) Generally speaking, it is not easy for the legislative (lawmakers) to change law which is forcing 'conventional morality' it even if it infringes on fundamental rights. It does not help individual parliamentarians to be re-elected. It is rather a risk. So the legislative is often criticized for their lack of contribution to solve these issues (the same is true of the executive branch with the authority of administrative legislation.). Therefore, the decisions by the Constitutional Court, which leads to a change of law which is forcing 'conventional morality'(especially leads to 'decriminalizing'), are of particular importance. The KCC decision of 2009, declared that punishing sex under false promises of marriage was unconstitutional, as well as this "2015Decision", also declared that punishing adultery as crime was unconstitutional. Also in the decision on the issue on Same-Surname-Same-Origin Marriage Ban ("1997Decision"), the Court found this law unconstitutional in violation of human dignity and the right to pursue happiness as well as the gender equality principle under the Constitution (although the final form of the decision was a decision of nonconformity to the Constitution, not a decision of simply "unconstitutional").

However, one must admit that there remain many issues to be dealt. In Korea, for example, punishment for homosexual acts in the military, punishment for the act of abortion of the pregnant women and punishment for the act of prostitution are still under debate. Moreover, in terms of administrative law, numerous cases involve disproportionate levels of punishment. In order to estimate the possibility of resolving such issues, it is important to recognize the current subject and criteria that would make it practically feasible. In the process of examining such subjects and criteria, the preceding cases, especially the adultery case of 2015, involved the KCC as an organization that makes constitutional decisions based on general constitutional rights and values, and enjoys the relative trust of the people. Its contributions towards better arguments and reasoning are thus to be encouraged.

Understanding these cases by putting emphasis on the criteria and subjects more deeply and in more detail is highly important. Because this understanding is essential since it could be used for predicting and realizing the future of the decriminalization movement in South Korea or other countries which have similar social issues. In this paper, I tried to explain and emphasize such criteria and subjects, especially related to the "2015Decision" and also "1997Decision".

(2) Especially "2015Decision", that is the decision on unconstitutionality, reflects the trend in other parts of the world, where many countries are banning the criminal regulation of adultery and thus casting some doubt over whether criminal regulation is helpful for maintaining household integrity and marriage purity. The decision also reflects the criticism that the criminal law intervenes in the privacy of the individual and represents an abuse of the state's punishment power. It also reflects a weakening of the justification in the recent era for protecting women as a socially vulnerable class. There are now various opinions regarding the appropriateness of abolishing the criminal regulation of adultery, but the most important fact is that it has now been abolished in Korea by this landmark decision of the KCC.

(3) Also, I would say that these developments of constitutional decisions might be seen in the structures of moral development. Researchers in developmental studies have uncovered a series of demonstrable developmental stages. There is considerable cross-cultural evidence for the general stages of moral development. Ongoing research in psychology suggests that structures of moral development are constantly at work, so much so that it is almost impossible to see the world beyond one's own developmental structure. When judges apply changing cultural values and ideas like fairness and justice to open-ended constitutional ideas like equal protection, due process, liberty, and freedom, they invariably work within developmental structures.

(4) There are two main ways to protect fundamental/human rights. The first is to guarantee it by the domestic institutions, such as judicial body or the national human rights commission, and the second is by the international institutions. Thus, an effective approach to develop the level of human rights protection may be either developing protecting methods and skills by a domestic institution or developing protecting methods and skills by international institutions. And the former could be stimulated by the latter, too. The former has been regarded as mainly the domain of 'comparative constitutional law' discipline and the latter as mainly the domain of 'international law' discipline. This former one especially, so-called 'judicial dialogue' or 'dialogue among constitutional courts', is not direct human rights protection methods by international

institutions, but still a domestic-institution-oriented-approach. However this dialogue also bears an interest in 'international legal norms' in any case. So this dialogue requires interdisciplinary studies between the comparative constitutional law and international law. This is a relatively new global phenomenon and a very interesting movement in that it is based on the belief that international exchange and knowledge-sharing can promote the level of guarantee of the domestic institution. I hope these mentioned precedent cases, and also this paper, contribute to this dialogue.

JURIDICAL REVIEW OF THE *ULTRA PETITA* VERDICT DONE BY CONSTITUTIONAL COURT JUDGES

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Abstract
One of the most dominating authorities of the Constitutional Court is its authority in examining the material of a law against the 1945 Constitution. In making a decision on the case of testing the law ideally the Constitutional Court decides in accordance with what was requested by the applicant in his application, but in practice the Constitutional Court often decide a case which exceed what is requested by the applicant or in other words ultra petita. Based on the background of the problem stated above, the formulation of the problem in this study is:Why does making an ultra petita verdict become something that needs to be done by the Constitutional Court in its authority to examine an Act against the 1945 Constitution (judicial review)? The study shows that in principle ultra petita is only prohibited in the realm of civil justice, because of the dispute among individuals, whereas in the realm of state justice there is no principle prohibition. It is precisely if the ultra petita is banned, it is feared that it will cause constitutional harm to the wider public
Keywords: Juridical Review, Ultra petita Verdict, Constitutional Court Judge

Introduction

The history of institutions that play a role in conducting constitutional testing activities in the world is developing rapidly through various stages of experience in each country. Some have linked the function of the test to an existing institution, the Supreme Court. There is also a duty to carry out the function of the test to specialized bodies within the framework of other institutions such as existing judicial bodies. Some also institutionalized the constitutional testing function in a separate institution called the Constitutional Court. In fact, some do not accept the testing function at all (Asshidiqie, 2010).

The idea of constitutional testing has been so widely accepted and practiced in the world as a result of the development of state administration in each country. Therefore, the development in each country is different from one another. What is clear is that the tradition of upholding the constitution as a barometer of the implementation of state activities in the world continues to grow widely and it is increasingly recognized that the idea of constitutional testing is indeed needed in order to protect and oversee the implementation of law and constitution in everyday practice (Asshidiqie, 2010). Indonesia is a country that institutionalizes the constitutional testing function within the Constitutional Court.

The Constitutional Court is a state institution that is new in the constitutional system in Indonesia which is the result of the third amendment to the 1945 Constitution which was ratified on August 10, 2002. As a constitutional organ, this institution was formed to carry out judicial powers in the constitutional system, to become guardians of the constitution and at the same time become interpreters of the constitution.

The decision of the Constitutional Court in testing the law is *declaratoir constitutief*. That is, the decision of the Constitutional Court creates or eliminates a new legal situation. Some judicial reviews conducted by the Constitutional Court are also of legal discovery (*rechtsvinding)*.

The Constitutional Court's decision is ideally in accordance with what was requested by the applicant in his petition to the Constitutional Court to test a law against the 1945 Constitution. However, the Constitutional Court often overtakes what is requested by the applicant or in other words is *ultra petita*.

Whereas, what should have happened is in accordance with what has been regulated in Article 45A of Law Number 8 of 2011 concerning Amendments to Law Number 24 of 2003 concerning the Constitutional Court which was ratified on June 21, 2011, that the Constitutional Court Decision may not contains a ruling that is not requested by the applicant or exceeds the request of the applicant, except for certain matters related to the subject matter of the request. Furthermore, Article 50A of Law Number 8 of 2011 concerning Amendments to Law Number 24 of 2003 concerning the Constitutional Court also stipulates that the Constitution in examining the laws of the 1945 Constitution of the Republic of Indonesia does not use other laws as the Principle which stipulates that the decision must not exceed what is requested listed in Article 178 paragraph (3) HIR, Article 189 paragraph (3) RBG and Article 50 RV. This ban is called

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ultra petitum partium. Judges who grant more than *posita* or *petitum*, are considered to have exceeded the authority limit or ultra vires which is acting beyond their authority (beyond the powers of his authority) (Harahap, 2008).

Based on the description stated above, the authors are interested in discussing the verdict that is ultra petita, especially after the decision of the Constitutional Court itself which eliminated the ultra petita ban in the Law of the Constitutional Court.

Based on the background of the problem stated above, the formulation of the problem in this study is: Why does making an ultra petita verdict become something that needs to be done by the Constitutional Court in its authority to examine an Act against the 1945 Constitution (judicial review)?

Discussion

In exercising its authority to carry out a judicial review of the law, the Constitutional Court often decides cases that are not requested by the applicant or exceeds the request of the applicant, commonly referred to as *ultra petita*. The ultra petita verdict includes the Decision of the Constitutional Court Number 012-016-019 / PUU-IV / 2006 concerning Testing of Law Number 30 of 2002 concerning the Corruption Eradication Commission, Decision of the Constitutional Court Number 001-021-022 / PUU-I / 2003 concerning Testing of Law Number 20 of 2002 concerning Electricity, Decision of the Constitutional Court Number 003 / PUU-IV / 2006 concerning Testing of the Law of the Republic of Indonesia Number 31 of 1999 in conjunction with Law Number 20 of 2001 concerning Eradication of Acts Corruption Crime, Decision of the Constitutional Court Number 005 / PUU-IV / 2006 concerning Testing of Law Number 22 Year 2004 concerning Judicial Commission and Law Number 5 Year 2004 concerning Amendment to Law Number 4 Year 2004 concerning the Power of Justice, and Decision The Constitutional Court Number 006 / PUU-IV / 2006 concerning Testing of Law Number 27 of 2004 concerning the Truth and Reconciliation Commission. In this paper, the author will only take a sample of the Constitutional Court Decision Number 001-021-022 / PUU-I / 2003.

Legal Considerations That Become the Basis of Decision of the Constitutional Court Number 001-021-022 / PUU-I / 2003.

According to the Court, the petition for formal testing of the Electricity Law submitted by the Petitioner Case No. 001 / PUU-I / 2003 has no grounds and must be rejected because the Court considers that what is argued by Petitioner I in case No. 001 / PUU-I / 2003 has been denied by the House of Representative (DPR) in a written statement submitted in the trial of the Court attached to the Minutes of the House of Representative plenary session and it turns out that Petitioner I cannot provide evidence to the contrary.
The Court is of the opinion that the provisions of Article 33 of the 1945 Constitution do not reject privatization, insofar as privatization does not negate the control of the state to be the main determinant of business policy in production branches that are important to the state and / or control the livelihoods of many people. Article 33 of the 1945 Constitution also does not reject the idea of competition among business actors, as long as the competition does not negate control by the state which includes the power to regulate (*regelendaad*), take care (*bestuursdaad*), manage (*beezersdadad*), and supervise (*toezichthoudensdaad*) branches production which is important for the state and / or that controls the livelihood of the people for the purpose of maximizing the prosperity of the people.

The Court considers in the petition for judicial review, Petitioner I (Case No. 001 / PUU-I / 2003) argues that in principle, the Electricity Law is not in accordance with or contradicts Article 33 of the 1945 Constitution, because it has encouraged the privatization of electricity as an important production branch and mastering the lives of many people who should be controlled by the state will result in detrimental to the constitutional rights of Indonesian citizens, including the Petitioners I, which are guaranteed by the 1945 Constitution. Therefore, Petitioner I in his petition requests that the Electricity Law be declared contrary to the 1945 Constitution and does not have binding legal force.

The Court considers that in the petition for judicial review, petition II (Case No. 021 / PUU-I / 2003) postulating Article 8 paragraph (2), Article 16, Article 17 paragraph (3), and Article 30 paragraph (1) of the Electricity Law contrary to Article 33 paragraph (2) of the 1945 Constitution argues that the policy of separation of electricity supply business with the unblundling system is stated in Article 8 paragraph (2) which includes Generation Business, Transmission, Distribution, Sales, Sales Agents, Market Managers and Managers of Electricity Power System by different business entities (vide Article 16), moreover with

the provision that State-Owned Enterprises (BUMN) are only for Transmission and Distribution businesses, so they are not competed [vide Article 17 paragraph (1)], while others are competed by all business entities (including the private sector), have reduced the meaning of "controlled by the state for important production branches that control the lives of many people, as referred to in Article 33 paragraph (2) of the 1945 Constitution.

The Court considers that electricity has been proven to be an important branch of production for the state and which controls the livelihood of many people so that in accordance with Article 33 paragraph (2) branches of electricity production must be controlled by the state. The Court considers that state control must be judged based on Article 33 of the 1945 Constitution as a whole, including the implementation of a national economy based on economic democracy, the principle of togetherness, fair efficiency, and environmental insight which is interpreted that state control is also included in the meaning of private ownership which does not have to be fully. That is, the Government legally retains a decisive position in decision making in the said business entity.

The Court considers that based on the above considerations, the Court has opinion that to save and protect and further develop state enterprises (BUMN) as assets of the state and nation so that the provisions of Article 16 of Law No. 20 of 2002 which instructs a system of separation / solving of an unbundling system with different business actors will increasingly make the state-owned enterprise worse off, which will lead to the insecurity of electricity supply to all levels of society that will harm the community, nation and state. The expert information submitted by the applicant has explained the empirical experience that has taken place in Europe, Latin America, Korea and Mexico, that the unbundling system in electricity business restructuring is actually not profitable and is not always efficient and even a heavy burden on the state, therefore the Court is of the opinion that this is contrary to article 33 of the 1945 Constitution.

Considering that the Court has opinion that the legislators also consider that electricity is still an important branch of production for the state and controls the livelihood of many people, therefore according to article 33 paragraph (2) the 1945 Constitution must be controlled by the state, in meaning that it must be managed by the state through state companies funded by the government (state) or by partnerships with national or foreign private sector that include domestic and foreign loan funds or by involving national / foreign private capital with a good and mutually beneficial partnership system. This means that only State-Owned Enterprise /BUMN can manage electric power businesses, while national or foreign private companies only participate if they are invited to cooperate by State-Owned Enterprise /SOEs.

The Court considers that with the considerations outlined above, the Petitioners' petition must be partially granted by stating Article 16, 17 paragraph (3), and 68 Law No. 20 of 2002 concerning Electricity is contrary to the 1945 Constitution and therefore must be declared as having no binding legal force;

The Court considers that although provisions deemed contrary to the constitution are basically Article 16, 17 paragraph (3), and 68, especially those concerning unbundling and competition, these articles constitute the "heart" of Law No. 20 of 2002. Thus, even though only articles, verses, or parts of certain verses in a quo law are declared not to have binding legal force, but this results in Law No. 20 of 2002 as a whole cannot be maintained, because it will cause chaos that creates legal uncertainty in its application.

This is because the entire paradigm that underlies the Electricity Law is competition or competition in management with a unbundling system in electricity which is reflected in the consideration of "Considering" letters b and c of the Electricity Law. This is not in accordance with the spirit of Article 33 paragraph (2) of the 1945 Constitution which is the basic norm of Indonesia's national economy.

Then the Court was of the opinion that because Articles 16 and 17 were declared to be contrary to the 1945 Constitution which resulted in Law No. 20 of 2002 as a whole is declared not to have a legally binding force because the underlying paradigm is contrary to the 1945 Constitution. Therefore in order to prevent misunderstandings and doubts that result in the appearance of an absence of legal certainty in the electricity sector in Indonesia, it is necessary to emphasize that with Article 58 of Law No. 24 of 2003 concerning the Constitutional Court, the Constitutional Court Decision has legal consequences since it is said and applies in the future (prospective) so that it does not have retroactive conduct. Thus, all agreements or contracts and business licenses in the electricity sector have been signed and issued under Law No. 20 of 2002 remains valid until the agreement or business contract and permit is exhausted or no longer valid;

The Court considers to avoid a legal vacuum (*rechtsvacuum*), then the old law in the electricity sector, namely Law No. 15 of 1985 concerning Electricity (State Gazette of the Republic of Indonesia of 1985 Number 74, Supplement to State Gazette Number 3317) applies again;

The Court weighs, with the stated whole Law No. 20 of 2002 does not have binding legal force, it is recommended that the legislators prepare a new Electricity Bill in accordance with Article 33 of the 1945 Constitution.

Opinion of Legal Experts on *Ultra petita*Verdict

The *ultra petita* ruling by the Constitutional Court does not need to be banned. In certain cases and conditions, the ultra petita ruling may be very necessary as a solution when it comes to legal deadlock. A complete ban on the Constitutional Court overturning decisions that are *ultra petita* will have the potential to discourage the creation of constitutional justices in making legal discoveries. However, on the other hand, the Constitutional Court may not impose an *ultra petita* ruling indefinitely on the pretext of the judge's freedom. This limitation is needed so that the Constitutional Court does not use the *ultra petita* ruling line for the purpose of justifying its interests.

This is a controversy in the decision of the Constitutional Court which is *ultra petita*. The decision of the *ultra petita* Constitutional Court raises accusations of the tendency of the Constitutional Court to become a superbody state institution, because of its sole authority to translate the constitution.

There is a concern that the Constitutional Court has become a superbody state institution that seems to be above other state institutions because the Constitutional Court interprets the Law against the 1945 Constitution without question considering its final and binding decision. Constitutional judges do have the freedom to interpret the constitution because there are no provisions governing procedures and standards on how the Constitutional Court should interpret the constitution. The freedom to interpret the constitution is part of the independence of constitutional justices in carrying out their judicial duties.

Related to the debate about the controversy over the decision of the Constitutional Court, Moh. Mahfud MD once said that in exercising his authority in examining laws against the Constitution, the Constitutional Court did not exceed the limits or enter the realm of other powers and become political, then there were some signs in the negative formulation (prohibition) which he felt must be applied by the Constitutional Court. One of the signs is in testing the constitutionality of the law, the Constitutional Court may not make ultra petita (decisions that are not requested by the applicant) because by making *ultra petita* means the Constitutional Court intervenes in the legislative domain.

According to Jimly Asshidiqie, there are 4 (four) legal considerations as to why the Constitutional Court made *ultra petita* decisions, namely:

1. Disputes in the Constitutional Court are not disputes of individuals such as in civil courts, but concerning issues of constitutional law whose principles are very different from those of civil courts. Moreover, the petitum of the applicant often includes a request for a fair judgment (*ex aequo et bono*) which gives the authority to grant the decision requested by the applicant.
2. Testing the law concerns public interests, even though those who submit individuals, so that the legal consequences of the Constitutional Court ruling are *erga omnes*, which is valid for the whole community or party. Therefore, if the public interest requires the Constitutional Court Judge not to be confined only to the petition or petitum submitted.
3. The article of the law petitioned for review of its constitutionality is invited so that if the article is declared not to have binding legal force, it means that all articles of the law cannot be implemented.
4. Ultra petita verdicts are also commonly carried out by the Constitutional Court in other countries (Munafrizal, 2012).

The Constitutional Court needs to place a verdict that is *ultra petita* for several reasons, namely:

1. The article material in the Law that is requested to be tested is a Law so that all articles cannot be implemented;
2. *Ultra petita* practices by the Constitutional Court are prevalent in other countries;
3. Testing the Law concerning public interests whose legal consequences are *erga omnes*, in contrast to civil (private) law;
4. Community needs demanding *ultra petita* do not apply absolutely;
5. If the public interest requires, the judge may not only be fixated on the petition (petitum);
6. Requests for justice (*ex aequo et bono*) are considered legally submitted and grant unsolicited matters.

Of the six reasons above, the reason for the *ultra petita* that is often carried out by the Constitutional Court is the reason for the first point, namely the Laws so that all articles cannot be implemented.

In addition, in principle ultra petita is also only prohibited in the realm of civil justice, because of the disputes among individuals, whereas in the realm of state administration there are no restrictions in principle. It is precisely if the *ultra petita* is banned, it is feared that it will cause constitutional harm to the wider public. That the authority of judicial review itself comes from an *ultra petita*, in the Marbury vs. Madison case, at United States Federal Supreme Court.

Decisions dimensioning legal discovery are actually legal breakthroughs commonly carried out by Constitutional Justices. Legal breakthroughs in the form of legal discovery are basically a result of the freedom of judges and the impossibility of always complete written rules. In this context, Constitutional Justices appear to have intelligently and keenly taken advantage of the shortcomings or the frivolity of the Constitutional Court Procedure Law and the strength of the Constitutional Court's decision as the first and last level of court whose decision is final.

Conclusion

Based on the discussion described in the previous chapter, the writer can draw conclusions as follows:

1. The article material in the Law that is requested to be tested is an Act therefore all articles cannot be implemented;
2. *Ultra petita* practices by the Constitutional Court are prevalent in other countries;
3. Testing the Law concerning public interests whose legal consequences are *erga omnes*, in contrast to civil (private) law;
4. Community needs demanding *ultra petita* do not apply absolutely;
5. If the public interest requires, the judge may not only be fixated on the petition (petitum);
6. Ex *aequo et bono* requests are considered legally submitted and granted unsolicited matters.

The *ultra petita* verdict is reflected in the Decision of the Constitutional Court Number 001-021-022 / PUU-I / 2003 concerning the Testing of Electricity Law Number 20 of 2002 and the Constitutional Court Decision Number 006 / PUU-IV / 2006 concerning Testing the Law Truth and Reconciliation Commission (KKR) Number 27 of 2004. In both of these decisions the Constitutional Court decided to cancel the entire Law, because the article material tested was an Act. Constitutional Justices can decide only certain articles of the law to be canceled. However, if the article cancels certain articles, it will cause legal uncertainty regarding the implications of the decision on other articles originating from the canceled article. As a result, the implementation of the Law became very vulnerable in contradiction with the 1945 Constitution.

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DIFERING FORMS OF DECOUPLING THE NATION AND THE STATE: MULTICULTURALISM AND DIASPORA ENGAGEMENT

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I

My talk is to examine differing ways of challenging the notion of nation and state that underpins the Westphalian international order and the discursive practices that reproduce that order. Nowadays, many people say that the nation and the state are being decoupled. Yet the now clichéd phrase "decoupling of the nation and state" employed by different scholars does not signify the same thing, and it is often unclear what those scholars point to by the phrase, as their usages of the term "nation" differ. In this brief talk, I show that the "decoupling of the nation and state" may signify very different realities which may even have opposite implications. I shed light on two different forms of decoupling the nation and the state. The first is multiculturalism, which questions the myth of congruence between state and nation by recognizing the multiplicity of nations bearing "societal cultures" within a single state. The second is the attempts of states that effect incongruity between nation and state by bringing diasporas or ethnic kin outside of the borders into their nationhood and thereby creating transnational or transborder nations. Despite their possibly clashing political implications, the two approaches have some common ground. Furthermore, the discrepancy between nation and state that the two approaches bring about is not new, but has been inherent in the very notion of nation-state and the international order based on that concept.

II.

The Westphalian order is made up of "nation-states" as its fundamental units. The organizing logic of the Westphalian state system is predicated on the belief that the nation and state are congruent or should be congruent – the myth that the nation squarely coincides with the population that constitutes the state, which renders the concept of nation redundant. This belief allows for little imagination of the dissonance

between the nation as a cultural community of people and the state as a territorially bounded unit organized by political power.

An increasing number of Western scholars say that the dominant notion of nation-state is under challenge and being disintegrated. They use phrases such as "decoupling of," "dissociation of," "dissonance between," "incongruity between," "disjuncture between" and "mismatches between" the nation and state in highlighting the change. For example, Tomas Hammar (1990) in his now classic work suggested that membership of nation and that of state were no longer congruent with each other. Yasemin Soysal (1994) echoed by referring to "the dissociation of nationness from the state and identity from rights." David Jacobson (1997) proclaimed, "'Nation' and 'state' are no longer wedded together." When these scholars speak about the decoupling of the nation and state, they are arguing that national citizenship is giving way to a postnational membership. They point to the decreasing significance of membership of the state in enjoying rights. They contend that so many of the rights that modern people enjoy emanate from international human rights law that it does not really matter which state's citizen they are. Then what do they mean by the term nation when they talk about the decoupling of the nation and the state?

These scholars make little reference to the identity of the population that they capture by the term nation. This group emphasizes the equalization of the rights of the members of the population regardless of their state membership, thanks to strengthening protection by international human rights law. Not only does this group overstate the actual impact of international norms but it also exposes terminological shortcomings – when using the term "nation" in particular.

III

This brings us to the question of how to define the nation. The original Latin term *natio* meant the same thing as the Greek term *ethnos* – a prepolitical community of people into which one is born. But in the modern West the nation is often identified with the people of a state or *Staatsvolk*. For example, Anthony Giddens (1985) defines the nation as "a collectivity existing within a clearly demarcated territory, which is subject to a unitary administration, reflexively monitored both by the internal state apparatus and those of other states." It is synonymous with the "permanent population" that constitutes a state in international law and the nation-state is simply another term for a sovereign member of the modern system of states. But the nation is not the self-same as the state. It cannot be held together simply by administrative power. Giddens agrees that the nation is a "conceptual community" held together by some sense of cultural homogeneity and a "common symbolic historicity." But the nation defined in the above way is an *ex post facto* community in the sense that its identity derives from statehood – state-building programs and also the governmentality of the state. The nation is coterminous with the citizenry (see Brubaker 1992 on France). Hence, the nation and the state are decoupled when the congruence between the nation and the citizenry is broken. For scholars such as Hammar, Soysal and

foreigners is blurred in the allocation of rights – in other words, when citizenship is debundled to the extent that many of its component rights are extended to immigrants lacking formal citizenship.

At the other end of the pole to Anthony Giddens in the definition of nation is Walker Connor. Connor (1994) defines a nation as "a group of people who believe they are ancestrally related." So Connor's definition is close to the meaning of the original Latin word *natio*, which, like the Greek term *ethnos*, signifies a people of the same descent. Anthony Smith (1986) is close to Connor in stressing the ethnic origins of nations. He identifies several chief features of an *ethnie* – a common collective name, a common myth of descent, a shared history, a distinctive shared culture, an association with a specific territory, and a sense of solidarity. It is based on this notion of nation that the phrase "decoupling of the nation and the state" is more clearly understood. If the nation is understood in this way, there are many instances of the nation being decoupled from the state, and that kind of decoupling is not new. If you look at ethnic fault lines in Eastern Europe, you see discrepancies between the boundaries of identity and state borders.

IV

Multiculturalism is one of the approaches that level potent attacks on the dominant ideology that equates the nation with the state citizenry and enforces the equation sanctified by the nationalizing nationalism of the nation-state. Multiculturalism is a countermovement against that equation and the nationalizing nationalism in that it protects the autonomy of minority cultures against the homogenizing forces of the dominant culture. To be sure, there are many different versions of multiculturalism based on different notions of culture. Here, I focus on the multiculturalism of Kymlicka (1995), who has staged vigorous theoretical campaigns for the rights of national minorities and indigenous peoples. When Kymlicka talks about the multiplicity of cultures, he gives primacy to what he terms "societal culture" vis-à-vis the cultures of diverse social groups. A "societal culture" is "a culture which provides its members with meaningful ways of life across the full range of human activities, including social, educational religious, recreational and economic life, encompassing both public and private spheres." Multiculturalism means to Kymlicka the coexistence of multiple societal cultures and therefore national cultures, since Kymlicka (1995: 18) asserts that "just as societal cultures are almost invariably national cultures, so nations are almost invariably societal cultures." Amongst many minorities, only national minorities and ethnic groups including indigenous peoples are the repositories of societal cultures. Kymlicka expresses a strong objection to conceiving the nation in terms of race or bloodline. But he shares the viewpoint of the ethno-symbolic school in nationalism studies represented by Anthony Smith. Kymlicka's societal culture is very similar to the "organizational culture" conceptualized by Anthony Smith (1986), and he indeed cites Smith's notion in a positive way (Kymlicka 1995: 80). An organizational culture is a culture that lies at the level of ethnonational life and is distinguishable from all other cultures transpiring at different levels of society.

Similar notions of culture are found in situations in many countries in Southeast Asia as well as former communist countries where officially recognized ethnic belonging forms an important part of a citizen's legal identity, although it is problematic to what extent the term multiculturalism can apply to these experiences (Kymlicka and He 2005).

V

Another instance of discrepancy between nation and state is seen in various attempts of states to engage with emigrants, diasporic populations or kin-minorities outside of their territory, which I put under the category "diaspora engagement," although some of those cases have not involved diasporic experiences in the sense of diffusion of populations, but changes of borders without much movement of people.

Many examples come from the former Soviet Union and Eastern Europe, where states broke up and many people found themselves in states the citizenship of which they lacked (Lee 2018). The changes in these regions also rekindled the sense of identity people had possessed before the current borders were fixed as a result of peace settlements following the world wars, which often drives states to reconnect with their kin-minorities. Similar phenomena are found in situations where diasporic communities or emigrants share a common sense of identity with the population in their homeland (Jo 2018). The homeland state often engages with the diaspora or emigrants beyond its borders in the name of the "nation," which does not coincide with the formal citizenry. The members of the diaspora or kin-minorities who are not citizens of the kin-state are often given special status, which Rainer Bauböck (2007) termed "ethnizenship." South Korea's "overseas Korean" status is an example among many similar cases (Lee 2010, 2012, 2013).

Over many years I have been grappling with the so-called "status law" syndrome in Eastern Europe, which became an issue when Hungary enacted its Status Law in 2001. This law is mainly to give benefits to "persons of Hungarian ethnic origin" in six neighboring states. These persons of Hungarian ethnic origin are not Hungarian citizens but citizens of neighboring countries. Hungary's concern to embrace such ethnonational kin living in other states was symbolized by the remarks in 1990 of Hungary's first postcommunist Prime Minister József Antall that "in spirit and sentiment" he wanted to act "as the prime minister of 15 million Hungarians" beyond the 10 million citizens of the Hungarian Republic (Waterbury 2010: 4-5). Even more interesting are the observation by the Hungarian Foreign Minister at the time when the Status Law was enacted, János Mártonyi.

> In the future it won't be the territorially defined state that determines everything. Its role will remain important, but alongside it national communities, for example, will also strengthen. For me, in the future there

> won't be minorities, only communities. And I believe that our continent will become a community of communities (quoted in Fowler 2002: 5).

The East European status law syndrome is regarded by Western Europeans as more or less dangerous and is reminiscent of Hans Kohn's now discredited dichotomy of civic and ethnic nation and characterization of the East European ethnic nationhood as susceptible to totalitarianism. But there are similar notions in Western Europe and other parts of the world, which are regarded as moderate and benign ways of diaspora engagement. For example, Mary Robinson, President of the Republic of Ireland, professed to represent "over 70 million people living on this globe who claim Irish descent" in her inaugural address (1990).

This kind of transnational (or transborder) nation-building is quite widespread and it in this context that we most clearly observe the decoupling of the nation from the state. The British researcher Brigid Fowler (2002) even acclaimed the Hungarian Status Law as "a 'postmodern' alternative to the territorial state and its citizenry as the only means of organizing political space."

VI

My discussion so far has been intended to highlight the diversity in attempts to break the myth of congruence between nation and state, the organizing logic of the Westphalian international system. Yet it has also shown that the two distinct transformations – the multiculturalization of the nation-state and transnationalization of the nation-state – have more commonalities than often thought. Both of them are based on the notion of "societal culture" or "organizational culture."

Many scholars that talk about the decoupling of nation and state whom I have cited – from Hammar, Soysal and Jacobson to Fowler – exaggerate the novelty of the phenomenon. They neglect the fact that the nexus between nation and state has been precarious throughout the history of the nation-state. In whatever way the nation is defined, dissonance between nation and state has been the norm rather than an exception. I argue that the notion and institution of nation-state have constantly been plagued by uneasy permutations of unity and opposition between nation and state, that the nation and state have been linked in divergent ways in differing situations and conjunctures, and that the state-nation nexus is being managed and readjusted rather than disconnected or attenuated amidst global population movements.

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OBLIGATION TO EMBRACE A RELIGION IN INDONESIA

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Chapter 1
1. INTRODUCTION

In the context of human rights, the guarantee of the right to freedom of religion and belief is contained in Article 18 of the International Covenant on Civil and Political Rights (ICCPR). Indonesia has ratified the ICCPR through ratification of Law Number 12 of 2005 concerning the Ratification of the Convention on Civil and Political Rights.

The fundamental right to freedom to embrace a religion called Human Rights is inherent in every human being who is an inalienable right. Human Rights are legal rights granted by the state for respect for independent human dignity. In the perspective of human rights, the state only has obligations and has no rights. The state must protect human rights, which means the state must guarantee human rights, and the existence of *Negative Obligations* on the state which means that the state must respect the freedom and rights of individuals. In the context of civil and political rights, the *Positive Obligation* of the state is to create conditions that support the right of everyone to enjoy full rights and freedoms, while the Negative obligation of the state is to respect the implementation of individual rights and freedoms. The Positive obligation of the State must be realized maximally by utilizing all the resources of political power, starting from the legislature, executive and judiciary.

By law, the differentiation of human rights rationality is important to provide guidance on the "territory" of the state about what is allowed and to limit. None of the practices of religion or belief can be used as propaganda to fight or advocate for national hatred, racial hatred; or religious hatred, which can encourage discrimination, hostility or violence. This distinction also produces components of the right to religious freedom itself, namely: first, is the right to move to another religion (right to change and maintain religion), *private intervirum* (internal religious freedom), and secondly, the right to manifest religion in terms of teaching, practicing and carrying out worship.

Freedom of religion is the right of an individual or community, in public or private, to manifest religion or belief in teaching, practice, worship, and observance. It is also include the freedom to change religion or ***to not follow any religion*** or freedom from religion. Freedom of religion is closely associated with separation of religion institution, influence of religious institutions religious affairs and state. The First Amendment to the U.S. Constitution, written in 1791, reads: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The territory of the country to limit the right to freedom of religion and belief has also been regulated in such a way, even though it is included in *non-derogable* rights, or cannot be reduced under any circumstances, but it is not

whole.Thescopeoftheprovisionsconcerningpermittedrestrictionsmustbecarriedoutbytheı CCPRStatesPartieswiththeneedtoprotecttherightsguaranteedbytheCovenant,includingthe righttoequalityandnon-discriminationinanyfield.

In addition to the limitations, there are also restrictions, namely the prohibition of coercion which is aimed directly at the right to have or adhere to a religion or belief.Suchcoercionincludesphysicalcoercion,andindirectcoercion.

Many countries, even the United States, make restrictions on matters relating to religion or organizing religious services. The Supreme Court of the United States has consistently held, however, that the right to free exercise of religion is not absolute. For example, in the 19th century, some of the members of a religion, traditionally practiced polygamy, yet in a case heard in 1879, the Supreme Court upheld the criminal conviction of one of these members under a federal law banning polygamy. The Court reasoned that to do otherwise would set a precedent for a full range of religious beliefs including those as extreme as human sacrifice, stating that "Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may interfere with practices." So, if one were part of a religion that believed in vampirism, the First Amendment would protect one's belief in vampirism, but not the practice. This principle has similarly been applied to those attempting to claim religious exemptions for using drugs.

Chapter 2
2. CONDITIONS IN INDONESIA

The legal basis that guarantees religious freedom in Indonesia is in Article 28E paragraph (1) of the 1945 Constitution: "Everyone is free to embrace religion and worship according to his religion, choose education and teaching, choose a job, choose citizenship, choose a place to live in the territory of the country and leave it, and has the right to return."

Article 28E paragraph (2) of the 1945 Constitution also states that everyone has the right to freedom to believe in a belief. Besides, in Article 28I paragraph (1) of the 1945 Constitution, it is also recognized that the right to adhere to a religion is a human right. Furthermore, Article 29 paragraph (2) of the 1945 Constitution also states that the State guarantees independence for each of its people to embrace religion.

However, these rights are not without restrictions. In Article 28J paragraph (1) of the 1945 Constitution, it is stipulated that everyone must respect the human rights of others. Article 28J Paragraph (2) of the 1945 Constitution further stipulates that the implementation of these rights must be subject to restrictions regulated by law. So, these human rights, in their implementation, remain compliant with the restrictions regulated by law. The inclusion of 10 new articles governing human rights in the second amendment to the 1945 Constitution, including the articles above, the provisions of human rights issues from Articles 28A to 28I of the 1945 Constitution have been limited or "locked" by Article 28J of the 1945 Constitution.

In the implementation of the articles concerning human rights in the 1945 Constitution, the Law Number 1/PnPs/1965 concerning Prevention of Abuse (or Blasphemy of Religion) in conjunction with Law Number 5 the Year 1969

concerning Statements of Various Presidential Decrees and Presidential Regulations as Laws, and Joint Decree by the Minister of Religion, Attorney General and Minister of Home Affairs No. 03 of 2008, No. KEP-033/ A/JA/6/2008 and No. 199 of 2008 concerning Warnings and Commands to Adherents, Members and/or Managers of "Jamaah Al Islamiah (JAI)-Ahmadiyah ", and Community Residents ("Three Ministerial SKB (Surat Keputusan Bersama"). The two regulations have created polemics for adherents of the Believers/*Kepercayaan* (Sunda Wiwitan, Kaharingan, Parmalim, Aliran Kepercayaan, etcetera), outside of the five religions which are officially recognized by the Indonesian government (Islam, Christianity, Buddhism, Hinduism, Judaism). In addition, other problems that arise are adherents of Belief, outside of the official religion recognized by the government, having difficulties in obtaining population documents (such as Identity Cards or "*Kartu Tanda Penduduk*" , Family Cards or "*Kartu Keluarga*").

Chapter 3

3. ANALYSIS

According to Article 28I paragraph (1) of the 1945 Constitution, the right to life, the right not to be tortured, freedom of mind and conscience, mercy, the right not to be enslaved, these rights cannot be reduced for any reason. But then, in Article 28I paragraph (5) of the 1945 Constitution, to uphold and protect human rights by the principles of a democratic legal state, the implementation of these human rights is guaranteed, regulated and further stipulated in legislation.

So, there are opinions that the human rights provisions in the 1945 Constitution are still unfair and inconsistent. There are some adherents of a religious teaching declared heretical. Many adherents of a belief outside the religion officially recognized by the government have difficulty obtaining population documents, and other things that are very important, Indonesian citizens may not be atheists (do not embrace any religion).

According to Article 2 paragraph (1) the Blasphemy of Religion Law is stated, in the event that someone violates the prohibition of abuse and/or blasphemy of religion, is given strict orders and warnings to stop their actions in a decision with the Minister of Religion, Attorney General and Minister of Home Affairs. An example is the three ministerial decree "Commands to followers and administrators of Indonesian Ahmadiyaa followers" issued on June 9, 2008 (SKB Minister of Religion, Attorney General and Minister of Home Affairs No. 03 of 2008, No. KEP-033/A/JA/6/2008 and No. 199 of 2008 concerning Warnings and Commands to Members, Members and/or Administrators of JAI/Ahmadiyaa and Community Residents).

Who concluded that certain beliefs were heretical? According to article 2 paragraph (2) of the Blasphemy Law, the authority to declare an organization / sect of faith that violates the prohibition of abuse and/or desecration of religion as a prohibited organization / stream is with the President, after being considered by the Minister of Religion, Attorney General and Minister of Home Affairs. In practice, there is a Coordinating Board for Monitoring Beliefs Community or commonly abbreviated as *Bakor PAKEM*. Actually what *Bakor PAKEM* meant was the Beliefs Monitoring Coordination Team which was formed based on the

Indonesian Attorney General's Decree No .: KEP004 / J.A / 01/1994 dated January 15, 1994, concerning the Establishment of a Monitoring Coordination Team on the Flow of a Belief Community (PAKEM). The "Pakem" team discusses and analyzes believers who grow and live in society. The PAKEM team will then make a letter of recommendation to the Minister of Religion, Attorney General and Minister of Home Affairs, regarding actions to be taken. In the case of the Indonesian Ahmadiyya Community ("JAI"), for example, the PAKEM Team approved so that JAI was given a strong warning, to stop the activity.

가. 3.1. Legal Basis

Is there a legal basis that confirms that religion in Indonesia has only five? In the elucidation of article 1 of the Blasphemy Law, it is stated that the religions embraced by the Indonesian population are Islam, Christianity, Catholicism, Hinduism, Buddhism and Confucianism (Confucius/Confucianism, finally Confucianism is considered not a religion). But, this does not mean that other religions are prohibited in Indonesia. Adherents of religions outside the five religions above are fully guaranteed as provided by Article 29 paragraph (2) of the 1945 Constitution and they are left to their existence, as long as they do not violate Indonesian laws and regulations. Indonesian law protects religious freedom specifically for five recognized religions, namely Islam, Catholicism, Christianity, Buddhism, Hinduism (including Judaism to be six).

The version of the 1945 Constitution after the changes, especially the second amendment relating to the following articles:

CHAPTER XA. HUMAN RIGHTS,
Article 28E

(1) Everyone has the right to embrace religion and worship according to his religion, choose education and teaching, choose a job, choose citizenship, choose a place to live in the territory of the country and leave it, and has the right to return.
(2) Everyone has the right to freedom to believe in a belief, express their thoughts and attitudes, according to their conscience.

Article 28I
(1) The right to life, the right not to be tortured, the right to freedom of mind and conscience, religious rights, the right not to be enslaved, the right to be recognized as a person before the law, and the right not to be prosecuted on retroactive law are human rights , which cannot be reduced under any circumstances.

CHAPTER XI. RELIGION
Article 29

(1) The state is based on the Belief in the One Supreme God (the only God);
(2) The state guarantees the independence of each resident to embrace his own religion and to worship according to his religion and belief.

The aforementioned articles are limited by the rights of other people as stipulated in article 28J as follows:

(1) Every person is obliged to respect the human rights of others in the context of orderly life in the community, nation and state.

(2) In exercising their rights and freedoms, each person must submit to the restrictions set by law with the sole purpose of guaranteeing recognition and respect for the rights and freedoms of others and to fulfill just demands in accordance with moral considerations, religious values , security, and public order in a democratic society.

Stipulation of the People's Consultative Assembly of Republic of Indonesia on *Pancasila* (The Five Basic Principles as State Ideology):

The points of practice of the Pancasila are outlined in the Decree of the People's Consultative Assembly No. II/MPR/1978 concerning "Ekaprasetia Pancakarsa" into 36 items, specifically for the First Principle, broken down into 4 items. The Education Development Agency for Implementation of the Engagement Guidelines, and Practice of Pancasila (BP7) recounts the 36 points in 1995 to 45 points, 7 of which are the points of the First Principle,asfollows:

1. The nation of Indonesia expresses its belief and devotion to God Almighty;
2. Indonesian people believe and obey the Almighty God, by their respective religions and beliefs according to the basis of just and civilized humanity.
3. Develop respectful attitudes, respect and cooperation between religious adherents with different believers towards God Almighty.
4. Fostering harmony of life among fellow religious people, and the Beliefs in God Almighty.
5. Religion and adherents the Belief in God Almighty is a matter that concerns the personal relationship of mankind to the God Almighty.
6. Develop mutual respect in the freedom to worship according to their respective religions and beliefs.
7. Do not impose a religion and belief in God Almighty to others.

In 1998, (Decree of the People's Consultative Assembly) TAP MPR No. II / MPR / 1978, along with the Pancasila Decree as the sole principle revoked through MPR TAP No. XVIII / MPR / 1998,forpoliticalreasons,namelytheabolitionoftheproductsoftheNewOrderregime.Thisabolitionisconsideredasamistakebecauseitcauses SARAconflicts(ethnicity,religion,race,intergroup)tobecomeunstoppable.

Law Number 39 of 1999 concerning Human Rights:

Article 4:

"Therighttolife,therightnottobetortured,therighttopersonalfreedom,mindandconscience,religiousrights,therightnottobeenslaved,therighttoberecognizedasapersonandequalitybeforethelaw,andtherightnottobeprosecutedonretroactivelawisahumanrightthatcannotbereducedunderanycircumstancesandbyanyone."

Article 22 (1): "Everyone is free to embrace their respective religion and to worship according to their religion and belief."

Article 22 (2): "The state guarantees the freedom of each person to embrace their respective religion and to worship according to their religion and belief."

Law Number 13 of 2003 concerning Labor:

Article 80: "Employers are required to provide sufficient opportunities for workers / laborers to carry out worship that is required by their religion."

Article 185 (1): "Whoever violates the provisions referred to in Article 80 ... is subject to imprisonment sanctions ... and / or fines ....

Indonesian Criminal Code (KUHP)

Article 175: "Anyone with violence or threat of violence hinders religious meetings that are general and permissible, or permissible religious ceremonies, or funeral services, are threatened with imprisonment for at most one year and four months."

나. 3.2. The background of the Beliefs is considered not Religion.

The fall of the communists in Indonesia (whose members were generally atheists or recorded as embracing one religion but never carrying out worship) caused the Islamic-Christian conflict to escalate, which erupted several times into open conflict. Alwi Shihab estimates that around two million Abangan Muslims (claiming to be Muslim but not practicing religion) converted to Christianity and Catholicism to avoid mass confinement of communists (followers of the Indonesian Communist Party are generally Abangans).TherebellionoftheIndonesianCommunistPartyin1948inMadiun,CentralJava, wasapoliticalmovementbuthadtheeffectofattackingandkillingIslamicstudents/*Santri* (from the Masyumi Islamic Party) who subsequently took revenge against Abangans in Surakarta, Central Java. then the Indonesian Communist Party (PKI) was seen as a leftist (rebel) extremist.Since1952inIndonesia,theincreaseinthenumberofnewfaiths(theBeliefs)accordi ngtotheMinistryofReligiondata(1951-1965)hasexperiencedaveryrapidincrease,soitisfear edthatitwillhaveanimpactontheincreaseofheresies.In1952,theMinistryofReligionpropose daminimumdefinitionofreligion,namely:"thereisaprophet,hasaholybook,andthereisintern ationalrecognition".Thishasanimpactonsectsofbeliefnotrecognizedasreligion.TheMinistr yofReligion'sproposalwasrevokedbecauseitgainedoppositionfromBalineseHinduism.In1 961,toavoiddisintegrationasaresultofthemanynewreligions/Beliefs,theMinistryofReligio nproposedthatreligionmusthaveaholybook,aprophet,theabsolutepowerofGodAlmighty,a ndalegalsystemforitsfollowers.Ofthevariousreligioustraditionsandbeliefsthatexist,onlysi xreligionshavesucceededinfulfillingthesecriteria,namelyIslam,Christianity,Catholicism, Hinduism,BuddhismandConfucianism,andreaffirmedinPresidentialDecreeNo.1/Pnps/19 65.Therearesafeguardsagainstsixofficialreligions,buttheindigenousreligionsoftheArchipe lagodidnotgainrecognitionasareligioninIndonesia,butonlyasaculture.

다. 3.3. State Official Religion

The events of rightist extremist separatism (in the 1950s), the emergence of a variety of new beliefs that were considered contrary to religious teachings, and tensions between the Indonesian Communist Party and *Nahdlatul Ulama* (Islamic Organization) in the mid 1960s caused Minister of Religion Saifuddin Zuhri to urge President Soekarno to issue Presidential Decree No. 1/PnPs/1965 concerning Prevention of Blasphemy of Religion which is later stipulated as Law through Law No. 5/1969. The Law on Prevention of Blasphemy of Religion (PPA Law) gives authority to the government to enter into private territory between its citizens and their beliefs. The PPA Law discriminates against groups

that are deemed to have deviant beliefs by a particular religious group, and should not have been valid since 10 November 2008 with the issuance of the Elimination of Racial and Ethnic Discrimination Law. Minister of Religion Suryadharma Ali in 2010 argued that the PPA Law must be maintained to prevent horizontal conflicts in the community because legal protection from the government is lost, and the perpetrators of blasphemy will escape legal snares. The Chairperson of the MUI Interfaith Harmony Commission, Slamet Effendy Yusuf (in 2010), stated that the Constitutional Court must be careful because there is no substitute law.

The application of the PPA Law led to discrimination against followers of indigenous Indonesian religions, which were not included in the six official religions. Adherents of indigenous religions often receive discriminatory social and legal treatment.anditisdifficulttoarrangedeedssuchasidentitycardsandmarriagecertificates.

In addition to the PPA Law, several regulations are also considered to violate religious freedom, for example Circular of the Minister of Home Affairs No. 477/74054/1978 concerning instructions for filling in the religious column on the National Identity Card, which states "Religion recognized by the government, namely Islam, Catholicism, Christianity / Protestantism, Hinduism and Buddhism". Since the issuance of this Minister decree, the term official and unofficial religion has emerged, resulting in the neglect of the rights of other religions such as indigenous religions and Confucian teachings. Recognition of the "official state religion" is explicitly affirmed in the Amendment Law on Law Number 23 of 2006 concerning Population Administration, that the state only recognizes six official religions.TheDecreeofthePeople'sConsultativeAssemblyNumberII/MPR/1998concerningtheOutlineofStatePolicyisalsoconsideredtobeverydiscriminatoryandattacksthefollowersoftheoriginalreligion.Thearticleinquestionis Point6concerningReligionandBeliefinGodAlmightywhichreads:"*The Believers in God Almighty* are fostered and directed to support the maintenance of an atmosphere of harmony in community life. Through harmony of life, religious people and the believers need to continue to strengthen their understanding, **that *the Beliefs* are not religion** and by therefore, guidance must be taken so as not to lead to the formation of a new religion, and its followers are directed to embrace one of the religions recognized by the state. The formation of believers is the responsibility of the government and society."

Those provision caused indigenous religious communities such as *Sunda Wiwitan*, *Parmalim*, *Tolotang*, and *Kaharingan* to become targets of Islamization or Christianization of immigrant religions.Someadherentsofindigenousreligionssuchas*Sunda Wiwitan* try to defend their beliefs even though they have to face discrimination in daily life, and choose to vacate the religious column on the National Identity Card since the issuance of Law No. 23 of 2006 concerning Population Administration.Meanwhile,severalothernativereligionssuchas*Kaharingan* and *Tolotang* chose to join the Hindu religion despite dissatisfaction.

On the last occasion before the proclamation of Indonesian independence, precisely on June 1, 1945, Sukarno expressed his opinion on the basis of the state which was later given the name *Pancasila* (The Five Principles). Soekarno stated that it was not just the Indonesian people who were God, but each Indonesian should be God. But let us all be God. The State of Indonesia should be a country each person can worship his God in a free manner. All the people

Indonesia has God in a culture that is with no religious selfishness. And Indonesia should be one country that has God.

Pancasila as the philosophical foundation of the Indonesian nation places the principle of the Supreme God in the first place. So the existence of religion became a spirit for the Indonesian people to fill independence and uphold justice. So that protection of religion from all forms of abuse and / or blasphemy must be minimized. but not only that, the things mentioned above indicate that "**Indonesian people must be religious**", there is no place for atheists.

4. CONCLUSION

Pancasila as the philosophical foundation of the Indonesian nation places the principle of *the Belief in God Almighty* in the first place. So the existence of religion became a spirit for the Indonesian people. It is truly impossible if various laws and regulations, which are based on the Constitution and Pancasila, oblige the Indonesian people to be religious, as well as speeches from the First President of the Republic of Indonesia who have stated that the Indonesian people are religious people, then there are non-religious citizens, it will be declared as not "Pancasilaism", if not subject to the first principle of Pancasila as a basic philosophy of the state, namely " Belief in God Almighty". let alone not religious (Atheist), having a belief that is not recognized as a religion, will get tremendous difficulties, what if you do not have a religion, surely your existence is ignored.

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MULTICULTURALISM AND DIASPORA ENGAGEMENT-EXPERIENCE OF LATIN AMERICAN COUNTRIES

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I. INTRODUCTION

In the international law, the nation-state is a political organization made artificially by the Peace of Westphalia in 1648. It sets territory, people, and government as constitutional requirements for forming an independent sovereign state, and set the specific requirements for each element. Territory defines territorial boundaries, people defines nationality, and government sets the recognition of government requirements. So the sovereign state decided to be national when deciding on nationality. And this national assumed to be the same ethnics. In other words, it was the logic that the people in the nation should be formed as one race or ethnics. However, since the Westphalia, there were many ethnics in one territory forming sovereign state, the one nation-one state theory or myth which the Westphalia System introduced as a sovereign state was based on wrong pretension from the start. The Westphalia regime assumes that a large number of dominant ethnic groups of a nation should represent one nation.

The movement to question, rebel, and to be independent in this one nation - one state system has been steadfast throughout the world. This phenomenon appeared to be an interesting way for the central government to legally recognize after the democratic upheaval of the 1990s. While human rights and environmental rights have been recognized as universal values, Latin American countries have recognized them as an important value in the constitution. Human rights and environmental rights are a constitutional right that cannot be properly protected in Latin America, but are considered very important for constitutional or social values. So, for example, neo-constitutionalism states, such as Colombia, Venezuela, Ecuador and Bolivia, have defined constitutional protection for ethnic minorities and made these traditional ethnic minorities to have their own nationality. In other words, it is legally recognized that there are several nationals within a country. Instead of one nation- state system, they recognize multi-nations - one state system. It allows the use of multiple nationalities within the country and recognizes the diversity of nationals. This constitutional attempt is meaningful in that it restores its identity to the original owner of the territory. On the other hand, in terms of shaking the framework of the international law, it raises to us a meaningful question: Is nationality the only means of connecting the people and the state?

In addition to these questions, as human rights and environmental rights are spread throughout the world, through on and off globalization and migration, people are becoming more and more connected in common interests such as human rights, minority protection and environmental protection(Lee, Chulwoo, 2018). Thus, the meaning of nationality has been greatly reduced. The reason why international law links country and nationality through a genuine connection concept is that it is necessary for the diplomatic protection. In modern society, however, the change and recovery of nationality are easier than in the past. (Athletes and entrepreneurs often change their nationality for personal gains.) Can

the nation achieve its state interests only through nationality?

The state is in the tendency to actively use the dual citizenship system and the diaspora engagement policy in the view of the new national power theory. The dual nationality system is a system that increases the absolute number of its citizens, and the diaspora engagement policy is a system that enlarges the cultural territory of its own country. Recently, Latin American countries are paying great attention to these two schemes and putting them into practice. The study is intended to reveal why Latin American countries, which are immigration nations, have had such a policy and what it means.

II. TRANSBORDER NATIONHOOD AND STATE POWER ENLARGEMENT THEORY

Academic research on migration policy was initially approached from the perspective of protection of migrants' human rights. For example, Dowty (1989) concludes that human rights violations have been achieved by blocking the departure from the country or by forcing departure from the country, analyzing the policy of totalitarian states in the Closed Borders from the point of view of their control policy. For example, Fascist totalitarian nations such as Italy, Spain, and Germany, have allowed intellectuals from an ideological point of view to forced or voluntary departure. This phenomenon was present in Hitler's government, and in the communist countries where allowed the departure of the ideological dissidents in terms of system choice. On the other hand, in the case of North Korea, individuals were, instead, restricted from entering and leaving the country, by imposing punishment of being branded as a reactionary rather than being forced to leave their own country.

Therefore, the freedom of migration of the people regardless of nationality could be analyzed from the viewpoint of international human rights, transcending the domestic policy of migration policy. Regardless of the political system, if entry and departure is restricted, there can be reasonable doubt that human rights can be violated.

Another research approach is to study migration policies from the perspective of national development. If migration is freedom of individual mobility, collecting high quality human capital, regardless of nationality, can have considerable influence on state power. Adams and Rieben(1968) explain the mobility of human resources in a cosmopolitan and nationalist perspective. The cosmopolitan and nationalist theory analyzes how the movement of human resources has affected countries after globalization. From a nationalist point of view, immigration is negative for national development because it is an outflow of human resources, while in cosmopolitan's view it is positive in the world's production systems, because it is moving according to the need for human resources.

However, in a country where migrants' freedom of movement is ensured, foreign immigration policy cannot be used as a policy to limit mobility of human resources, with the exception of statutory restrictions on workers in industrial sectors that are crucial to national interest. The limitation of the movement of human resources should be approached from the viewpoint of competitiveness of the people rather than the policy based limitation. In other words, just like investment incentives, the flow of key labor force requires attractive incentives to stay or return to the home country.

In the nation-state, personal jurisdiction has weaker connection than territorial jurisdiction. Because territorial jurisdiction is fixed, there is no major conflict with other countries when the border is defined. However, personal jurisdiction

can always cause jurisdiction conflict because of the fact that foreign people live in the country and nationals live in foreign countries. Moreover, there is always a possibility of conflict of personal jurisdiction in the international society where dual nationality is generalized.

In the nation-state, national is based on a single nation (mono-national). Some countries, such as Korea and Japan, are mono-national (and mono-ethnic), but most countries are multi-national. Because Latin American countries are immigrant based countries, a multi-national state is common. So the nation-state theory based on a single nation does not adequately reflect the real world. Because nationals are determined through the grant of nationality, there may be other ethnics in the country and same ethnics in other countries.

A single ethnic nation-state such as Korea often displays hostile attitude to other ethnics in the country, and it is common to feel brotherhood for the same ethnics abroad (this is called the transborder nationhood). As single ethnic nation-state has both internal and external homogeneity, they have strong explosive power in the age of individual mobility as it is currently. In the same sense, ROGERS BRUBAKER (2010: 66) also analyzed the reciprocally connected states between overseas and home countries in terms of internal and external politics of belonging. In modern society, it is impossible to expand territory by force anymore. In this situation, capital and technology mobility and personal mobility are the most important factors in expansion of state competence.

Thus, the transborder nationhood can be driven by a nation-state based on personal mobility and with active political will. ROGERS BRUBAKER (2010: 77) also observed that the nation-state is rather capable of implementing a migration control policy that could have influence on the transborder persons. ("The nation-state remains the decisive locus of membership even in a globalizing world.") In this manner ROGERS BRUBAKER's "external politics of belonging" can be explained by the New National Power Theory. Professor ROGERS BRUBAKER argues that this phenomenon does not necessarily mean postnational nor transnational, but rather a form of transborder nationalism (2010: 77). Specifically, transborder nationalism is most often used as a policy to enhance transnational nationalism, through such mechanisms as the dual nationality system, the easiness of acquiring nationality of descendants, the recognition of the right to vote by overseas diaspora, and the support system for overseas diaspora.

However, this policy does not apply equally to all overseas diaspora. For example, the tendency to expand *de facto* territory over *de jure* territory based on transborder nationalism seems to be prominent in Korea. On the other hand, in the case of Korea, there is regional discrimination against overseas diaspora. On the one hand, it is a humanistic approach based on the long history of national unification. On the other hand, there is a political purpose underlying the expansion of state power. The reason for this diagnosis is that there is an immigration policy applicable to only Chinese and Russian compatriots in accordance with the size of immigration and economic contribution, and their stay in Korea.

If a country expands national power in a way that brings overseas diaspora together, a new territory can be designed. De Villiers (2014) proposed the concept of cultural autonomy by considering that the same minorities are distributed in different regions within a country. By expanding the concept of De Villiers internationally, the concept of cultural territory can be used, instead of traditional physical territories, in a way that brings together overseas diaspora spread across the globe. It is effective to expand cultural territory by gathering overseas diaspora spread abroad. As De Villiers said, home country should give

a certain level of political power and autonomy so that overseas diaspora can find and decide what they need in order to consolidate their capabilities into one.

III. CONSTITUTIONALIZATION OF TRANSBORDER NATIONHOOD IN LATIN AMERICA

I have the opportunity to analyze the constitutionalization trends of the transborder nationhood with two professors. We compared the constitutions of 35 countries, including OECD and some non-member countries. Not all countries in the world have been surveyed, but the survey sample is significant. As a result of the survey, the tendency to link overseas diaspora with their home countries became clearer(Kang, *et.al.*, 2018).

A comparison of the tendencies of some Latin American countries is shown in the following chart. Spain and Portugal, formerly empire countries, are adopting *jus sanguine* as a standard of nationality. Both countries recognize dual nationality. In the case of Portugal, the right to vote and the parliamentary seats are assigned to overseas diaspora, and they are actively pursuing policies for overseas diaspora. However, Spain has a relatively weaker diaspora policy than Portugal. On the other hand, Latin American countries are all adopting *jus soli* on the basis of nationality, and most countries recognize dual nationality. Brazil enacted the Immigration Act in 2017 and strengthened its protection policy for overseas diaspora. I will look at the policies of some countries that were surveyed for overseas diaspora.

Latin America is a country formed by immigration that went through colonial experience. So immigration was a major source of Latin American formation. The common feature of immigration countries is that the criterion of nationality is based on *jus soli* without exception. The territory and nationality are the most important connecting elements that bind the people of the immigration nation. In addition, because immigrants often have the nationality of their home country, the place of residence is an important link in the legal sense. In other words, nationality and place of residence are important reference points in immigration policy.

So, it was common for Latin American countries to design immigration policies based on national security. Foreign migrants who migrated to country were treated from the viewpoint of national security, and state did not pay much attention to the people who migrated abroad. In fact, due to the nature of the immigration country, there were not many nationals abroad, and the governments did not pay much attention to their inhabitants abroad. It is because the brotherhood is not big. Thus, the migration policy of Latin America is traditionally an immigration policy, and the emigration policy for overseas diaspora was not of interest, except for some countries such as Mexico and Colombia.

This passive migration policy has changed significantly over the past 30 years as globalization progresses. For economic reasons, immigration has increased in Latin America and the number of out-of-state migrants has surged. Mexico is the country with the largest number of overseas emigrants. Mexico accounts for more than half of Latin American immigrants in the United States and has the largest number of immigrants in other areas, followed by Colombia and Brazil (Bela Soltezs, 2016: 51; UN, 2017). The United States and Spain were the overwhelmingly preferred country of destination, followed by Argentina. In the

case of regional integration such as Mercosur, free movement of peoples is guaranteed, so migration in the member countries of the region occurs greater numbers.

As a result of migration, the phenomenon that occurs in home country is remittance from abroad. If the purpose of migration is economic and there is family in the home country, the remittance amounts become larger. Following Mexico, Guatemala, Colombia, El Salvador and Dominican Republic have many remittances (UN, 2017). As such, the number of overseas diaspora increased, remittances from overseas increased, and the world began to recognize dual nationality. Migration policy is in the trend of encompassing diaspora as well as emigration. This policy change is recognized as a means of protecting the citizens and diplomatic means in the host country by increasing the number of overseas diaspora living abroad. In particular, investment promotion and remittance became an interest in diaspora policy for economic development of home country. As a secondary reason, the protection of overseas diaspora is also an important diplomatic issue because a large number of foreign immigrants are illegal. Migration policy, including many because of these reasons, approaches the new theory of state power, but the formal reason is the international human rights theory of protection and ties to its own nationals and their descendants.

From the point of view of the new state power theory, the foreign nationals are a great asset to expand the personal territory. If settled well and socially successful in the country of residence, it is a good way to expand the influence of the home country in the country of residence. In the same sense, in the case of a resident country, not only can immigrants help to maintain good relations with the immigrant's home country, but there is no reason to object his support to immigrants for settlement in society, Of course, if the problem of domestic intervention does not occur, there is no reason to object.

Bela Soltezs (2016) attempted to categorize diaspora policy in Latin American countries through data measurements. In the 1990s, as migration liberalization progressed, he measured how much interest these countries have in the diaspora policy. Bela Soltezs concluded that the diaspora phenomenon and diaspora governance capability were not significantly correlated. In other words, countries with high emigration rates, such as Bolivia and Honduras, have weak diaspora governance, while Brazil and Chile have less policy interest, despite diaspora governance capacity. On the other hand, the most active countries in diaspora policy were Mexico, Ecuador and Colombia and the government's diaspora policy was also active.

So, what is the reason for a country to set up a diaspora policy or a dedicated agency and its driving forces? The biggest motive is to use diaspora resources abroad, which fits well into the perspective of the new state power theory. Bela Soltezs (2016) suggested the three most important factors that constitute diaspora engagement policy: 1) dual citizenship regimes and extraterritorial voting rights; 2) diaspora-related laws and policy documents; and 3) specialized institutional bodies in a country's governance.

First, the dual citizenship regimes are factor to legally relate to the home country through the granting of nationality.

Second, the diaspora vote system gives overseas diaspora the right to vote for their country's president or legislators. The qualifications and conditions vary from country to country.

Third, where is in the statutory structure to promulgate the laws related to diaspora policy? If it is stipulated in the Constitution, it shows the political importance of the diaspora policy.

Fourth, we need to see what government agencies are dedicated to diaspora policy. If diaspora policy is stipulated in the Constitution, it is highly likely to

establish a central agency of ministerial level dedicated to the building and enforcement of diaspora policies. In general, the Ministry of Foreign Affairs is in charge of the diaspora policy, but if the diaspora inclusion policy is strengthened, it is highly likely that an independent institution will take charge of it.

Boyle & Kitchin (2014), on the other hand, argues that countries are affected by the following five factors when setting up a diaspora strategy. 1) the nature and history of a country's state institutions; 2) the nature, scale, timing and geography of their diaspora; 3) the prior and existing relationships with their diaspora; 4) the capacity of domestic private, public, and community organizations; and 5) the countries' geopolitical strengths, weaknesses, and challenges that may influence the countries formulate and implement their diaspora strategies (Boyle & Kitchin, 2014, p.23). These requirements are merely lists of subjective factors, and one country's experience is difficult to apply to other countries. Based on the factors of Bela Soltezs (2016) and the factors of Boyle & Kitchin (2014), let us examine the following factors. It is not an analysis that quantifies each factor by weighting it, but rather an objective indicator for quantitative analysis.

1) Number of overseas Koreans relative to population
2) Economic power of the country
3) Constitutional provisions for overseas Koreans
4) Regulations of the law on overseas Koreans
5) Overseas Citizens' Task Force
6) Permission for dual citizenship
7) Whether the granting of nationality to descendants is easy
8) Voting rights for overseas Koreans
9) Election of overseas residents (presence of overseas election districts)

countries	Legislation for diaspora	Dispora institution	Dual nationality	Preferential citizenship for descendents	Voting rights abroad	Overseas voting districts
Portugal	Constitution, art.74, para.2		Yes	Yes	Yes	Yes
Brazil	2017 Immigration Law, Chapter 7	In 2007, General Subsecretariat for Brazilians Abroad Department for Consular Affairs and for Brazilians Abroad, Division of Brazilian Communities Abroad	Yes	No	1965, presidential election	No
Argentina	No Migration Law (N° 25.871, 2004)	Directorate of Argentineans Abroad,withintheGeneralDirectorateofConsularAffairs	Yes	No	1993, presidential, parliamentary	No
Mexico	Migration Law (in 2011)	Institute of Mexicans Abroad (*Instituto de los Mexicanos en el Exterior, IME*) 2000	Yes		2006, postal, presidential	No
Chile	Decree-Law on Alien Affairs (N°1094, in 1975)	Directorate for the Community of Chileans Abroad,withintheGeneralDirectorate of Consular Affairs	Yes		since 2017 for the presidential election	No

		and Immigration of the Ministry of Foreign Affairs.				
Colombia	Law on the National Migration System(N° 1465, in 2011) Law on Return Migration (N° 1565, in 2012) Decree on the National Intersectorial Commission on Migration (N° 1239, in 2003) Integral Migration Policy (*Politica Integral Migratoria*, Document N° 3603 CONPES, in 2009)	Directorate of Consular and Migratory Affairs and Citizen Service (*Direccion de Asuntos Consulares, Migratorios y de Atencion al Ciudadano*)	Yes		1961, presidential, parliamentary (upper house)	
Bela Soltezs (2016) revised						

1. Portugal's diaspora policy

Portugal, which ruled the huge colonies in the past, estimates that there are more than 100 million Portuguese descendants abroad. Brazil estimates that there will be more than 40 million Portuguese descendants. Currently, more than 4 million Portuguese nationals live abroad. So Portugal is very interested in overseas diaspora policy. Ireland (17.5%) and New Zealand (14.1%) followed Portugal (14%) are countries with native-born population living abroad, followed by Mexico (12.2%), Luxembourg (12.1%) and Iceland (11.7%).

1) In the Portuguese Constitution (1976), there is no direct reference or disposition on overseas diaspora, but in Article 74 (2) i), referring to 'emigrant' in relation to the implementation of educational policy, indirectly referred to overseas Portuguese. The current Constitution of Portugal (1976) has provisions on overseas diaspora in Article 14. In other words, Article 14 (Overseas Portuguese) has the following provisions regarding rights and duties to Portuguese staying or living abroad. "Article 14: Portuguese abroad. Portuguese citizens who find themselves or who reside abroad shall enjoy the state's protection in the exercise of such rights and shall be subject to such duties as are not incompatible with their absence from the country. "

2) Institutional authority for Overseas diaspora

3) Whether dual nationality is allowed. Portugal recognizes dual citizenship. Portuguese nationals will not lose their Portuguese nationality unless they voluntarily renounce their nationality. Similarly, foreign nationals who acquire Portuguese nationality do not have to renounce nationality. The constitutional provisions on the overseas diaspora appear in several places. In particular, Portugal has constitutional provisions related to the election of president by allowing voting rights to overseas diaspora, as well as the seats of national congress for overseas Portuguese.

4) Whether the granting of nationality to descendants is easy. The Nationality Act (*lei da nacionalidade*, Law No. 37/81) sets forth the easiness of obtaining descendants' nationality. Portugal, which had experienced colonial empire in the past, shows great interest in the acquisition of nationality of overseas diaspora and cultural bond in with Portugal. The Portuguese government can grant Portuguese citizenship to a descendant of the Portuguese or to a member of the Portuguese community (*membros de comunidades de ascendência portuguesa*). It

is distinguished from the naturalization rights granted to the grandsons of the citizens of Portugal (*netos*). In other words, in the case of Portuguese descendants, most apply to great grandson(*bisnetos*) of Portuguese citizens. Article 6 of the Act on the Acquisition of Nationality (*Aquisição da nacionalidade por naturalização*) sets forth the requirements for the acquisition of nationality, which is related to the acquisition of nationality of overseas diaspora.

5) The right to vote for overseas diaspora and the parliamentary seats for overseas diaspora. Since 1976, Portugal has assigned a House of Representatives seat to overseas Portuguese. To this end, of the 230 seats in the total seats, the overseas voting region was divided into Europe and other regions, with two seats in Europe and two seats in the other regions (equivalent to 1.7%). In order to secure two seats, there must be more than 55,000 votes in the voting area, and if it is less votes, only one seat will be allocated.

2. Brazil's diaspora policy

Brazil traditionally implemented immigration policies based on national security. Although there was no special policy for overseas diaspora, the interest in diaspora policy increased due to the increasing number of overseas migrants because of the market opening in the 1990s. The new Immigration Act enacted in 2017 states the protection disposition of overseas diaspora. In other words, Brazil has established the emigrant rules of Brazilian emigrants who migrate abroad to Chapter 7 (emigrants abroad) of the immigration law in 2017. Emigrant in immigration law is defined "emigrant - Brazilian who establishes temporarily or definitively abroad (emigrante - brasileiro que se estabeleça temporária ou definitivamente no exterior)".

The organization dedicated to overseas diaspora is the Brazil General Subsecretariat for Brazilians Abroad (*Subsecretaria-Geral das Comunidades Brasileiras no Exterior*, SGEB), Department for Consular Affairs and for Brazilians Abroad (*Departamento Consular e de Brasileiros no Exterior*, DCB), Division of Brazilian Communities Abroad (*Divisao das Comunidades Brasileiras no Exterior*, DBR). The General Subsecretariat for Brazilians Abroad (SGEB) was established in 2007, at the time of the Lula government.

Easiness to descendants in nationality acquisition and recognition of multiple nationality. In 1988, Article 12 of the Federal Constitution of Brazil stipulates birth and naturalization as a method of acquiring Brazilian nationality. Article 12 of the Federal Constitution classifies the acquisition of Brazilian nationality into two categories by naturalization.

a) those who, as set forth by law, acquire Brazilian nationality, it being the only requirement for persons originating from Portuguese-speaking countries the residence for one uninterrupted year and good moral repute;

b) foreigners of any nationality, resident in the Federative Republic of Brazil for over fifteen uninterrupted years and without criminal conviction, provided that they apply for the Brazilian nationality.

Brazil also acknowledged dual citizenship through amendments to the constitution when European nations recognized dual citizenship. Article 12 (b) of the Federal Constitution stipulates that Brazilian nationals residing abroad shall not lose their Brazilian nationality if they are forced to naturalize in order to exercise their permanent residence status or citizenship under local regulations. It recognizes dual citizenship for involuntary naturalization.

3. Argentine's diaspora policy

Argentina's nationality standard is *jus soli* and *jus sanguinis* as complementary. Dual nationality is allowed under limited reciprocity principle. If dual national is staying in Argentina for more than 90 days, he/she must use an Argentine passport. A foreign passport must be used for stay of less than 90 days.

Argentina, like Brazil, does not recognize involuntary abandonment of nationality. In other words, if an Argentine should give up his nationality of Argentina as a requirement to acquire a foreign nationality, his Argentine nationality will remain the same.

In Argentina, the economic importance of their diaspora is as low as in Brazil.

4. Chile's diaspora policy

As in Argentina and Brazil, the impact of diaspora on the national economy is low in Chile. Overall, diaspora policy is very passive. However, interest in Chile's diaspora policy has been increasing since the 2000s when compared to the past. Chile's principle of nationality is based on *jus soli* and *jus sanguinis* as complementary.

In the case of acquisition of nationality by naturalization, the preferential acquisition of nationality for descendants is recognized. In other words, the granting of a Chilean nationality of a descendant is permitted if one of the grandparents is a Chilean national.

The government department responsible for overseas diaspora is the Foreign Ministry, which was established in 2000. Directorate for the Community of Chileans Abroad (*Direccion para la Comunidad de Chilenos en el Exterior*, DICOEX), within the General Directorate of Consular Affairs and Immigration (*Direccion General de Asuntos Consulares de Inmigracion*, DIGECONSU) of the Ministry of Foreign Affairs. The DICOEX is divided into two subdirectorates: of Development (*de Desarrollo*) and of Operations (*de Operaciones*).

The Chilean government has established the Talent Network for Innovation of ChileGlobal to promote the networking of human and material resources of overseas diaspora. It is a network of experts built to support the time, experience, knowledge, capital, network, etc. of Chilean overseas to grow internationally.

5. Colombia's diaspora policy

Colombia is the country with the largest number of foreign immigrants next to Mexico in Latin America and has a great interest in diaspora policy. The department responsible for overseas diaspora is the Directorate of Consular and Migratory Affairs and Citizen Service (*Direccion de Asuntos Consulares, Migratorios de Atencion al Ciudadano*).

Colombia's principle of nationality is *jus soli* (principle) and *jus sanguinis* (complementary). Although dual nationality is allowed, certain civil servant rights are limited for dual citizens. As other Latin American countries, Colombian nationality is retained if Colombian nationality is compelled to abandonment as a condition to obtain nationality of the residence country.

The characteristic of the Colombian law is that it distinguishes between nationality and citizenship. The Constitution of Colombia (Article 98) states that nationality is a proof of relationship with the state under international law, and citizenship is a qualification to bear rights and obligations to nationals over 18 years of age. (For example, a right to vote, a right to unconstitutionality claim,

etc.)

Colombia has recognized the right of overseas diaspora to vote in presidential and senatorial elections since 1961. In the 1991 Constitution, a special electoral district was created for political minorities, ethnic minorities, and overseas diaspora, giving Congress seats of up to five seats. The seat assigned in the National Assembly to overseas diaspora is one seat (one seat out of a total of 166 seats, equivalent to 0.60%).

6. Mexico's diaspora policy

From the theoretical point of view of the diaspora policy of the migrants sending state, Mexico demonstrates fully the evolution of the diaspora policy in accordance with international circumstances. Mexico is the most emigrated country in Latin America. From the viewpoint of the migration policy of this paper, Mexico, which has a lot of overseas compatriots in the United States, initially implemented a passive approach on migration policy. However, after the establishment of Nafta in 1994, Vincent Fox (2000-2006) Government began to launch active diaspora policy. This phenomenon is a major driver of the Mexican economy's openness and the American Mexican diaspora's expansion of influence in both countries' politics and economy (Délano, 2011). According to Délano's research, the diaspora engagement policy in Mexico is more beneficial to the Mexican national interest than what could be lost because of such policy. It is also emphasized that lobbying in the USA through diaspora is a very effective diplomatic means.

Mexico established the Institute of Mexicans Abroad (*Instituto de los Mexicanos en el Exterior* in 2003. From 2006, he recognized the right of the overseas diaspora to vote in the presidential election.

The nationality standard of Mexico is *jus soli* (principle) and *jus sanguinis* (complementary). Mexico, like Colombia, distinguishes between nationality and citizenship. Nationality is a proof of linking the people and the nation in international law, and citizenship is the ability to exercise certain rights and duties. Citizenship is granted for persons 18 years of age or older (Article 34 of the Constitution). Mexican nationals who have acquired a foreign nationality due to their overseas birth are subject to some restrictions on the right to public service.

Mexico gives overseas diaspora the convenience of nationality acquisition. The general naturalization requirement is more than five years in Mexico, but if one of the parents is a Mexican national, it will be shortened to two years. These residence requirements are exempted if the applicant has outstanding achievements that benefit Mexico in the fields of culture, society, science, technology, sports or business. The rules of residence are reduced from five years to one year in the case of second generation Mexican (grandparents are Mexican nationals).

IV. CONCLUSION

The Latin American countries' tendency to strengthen the environmental and human rights in the Constitution and to emphasize the principle of decentralization shows that the nation-state system is not robust. Even if the concept of the nation is not mandatory connection element in the sovereign state, there is no big problem in acting as a sovereign state in the international society. Recognizing the rights of Aboriginal people who lived in Latin America before the colonization and recognizing their territory and autonomy within the sovereign state show that there are various forms of state apart from the

nation-state. As people move into common interests, and the universal values of international law increase, the control of the state on people will decrease.

The dual nationality system and the diaspora engagement policy can be analyzed from the viewpoint of the nationality inducement policy marketing to the all people in order to expand the state power as a way to survive.

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For example, when South Korea proclaimed the nuclear phase-out policy, nuclear scientists and engineers move to China, where nuclear industry is a core industry promoted by the government. It is a decline in Korean state power in terms of nationalist perspective, but a positive move in terms of cosmopolitan position.

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Directorate of Argentineans Abroad (*Direccion de Argentinos en el Exterior*), within the General Directorate of Consular Affairs (*Direccion General de Asuntos Consulares*)

Directorate for the Community of Chileans Abroad (*Direccion para la Comunidad de Chilenos en el Exterior, DICOEX*), within the General Directorate of Consular Affairs and Immigration (*Direccion General de Asuntos Consulares y de Inmigracion, DIGECONSU*) of the Ministry of Foreign Affairs. The DICOEX is divided in two Subdirectorates: of Development (*de Desarrollo*) and of Operations (*de Operaciones*) 2000

Niall McCarthy, The Countries with The Most Native-Born People Living Abroad [Infographic], Forbes, Jan 15, 2016.

Section III Acquisition of nationality by naturalization

Article 6 (Requirements)

1 - The Government grants the Portuguese nationality, by naturalization, to the foreigners that satisfy cumulatively the following requirements:

a) Be greater or emancipated under Portuguese law;

b) Have been legally resident in Portugal for at least six years;

c) Know the Portuguese language sufficiently;

d) Have not been convicted, with a final and unappealable decision, for the commission of a crime punishable by a term of imprisonment not exceeding 3 years, according to Portuguese law.

e) Do not constitute a danger or threat to national security or defense, for their involvement in activities related to the practice of terrorism, in accordance with the respective law.

2 - The Government grants nationality, by naturalization, to minors, born in Portuguese territory, children of foreigners, provided they meet the requirements of sub-paragraphs c) and d) of the previous number and provided, at the time of following conditions:

a) One of the parents has been legally resident for at least five years;

b) The minor here has completed the 1st cycle of basic education.

3 - The Government grants naturalization, with exemption from the requirements set forth in paragraphs b) and c) of paragraph 1, to individuals who have had Portuguese nationality and who, having lost it, have never acquired another nationality.

4 - (Revoked).

5 - The Government may grant nationality, by naturalization, with exemption from the requirement established in paragraph b) of paragraph 1, to individuals born in Portuguese territory, children of foreigners, who have usually stayed here in the 10 years immediately prior to the request.

6 - The Government may grant naturalization, with exemption from the requirements set forth in sub-paragraphs b) and c) of paragraph 1, to individuals who, not being stateless, have Portuguese nationality, to those who are descended from Portuguese, to members of communities of Portuguese ancestry and foreigners who have rendered or are called to render services relevant to the Portuguese State or the national community.

7 - The Government may grant nationality by naturalization, with exemption from the requirements set forth in paragraphs b) and c) of paragraph 1, to the descendants of Portuguese Sephardic Jews, by demonstrating the tradition of belonging to a Sephardic community of Portuguese origin, based on proven objective requirements of connection to Portugal, namely nicknames, family language, direct or collateral descent.

CHAPTER VII OF THE MIGRANT

Section I From Public Policies to Emigrants

Art. 77. Public policies for emigrants shall observe the following principles and guidelines:

I - protection and provision of consular assistance through the representations of Brazil abroad;

II - promotion of decent living conditions through, inter alia, the facilitation of consular registration and the provision of consular services in the areas of education, health, labor, social security and culture;

III - promotion of studies and research on emigrants and communities of Brazilians abroad, in order to subsidize the formulation of public policies;

IV - Diplomatic action, in the bilateral, regional and multilateral spheres, in defense of the rights of the Brazilian emigrant, in accordance with international law

V - integrated governmental action, with the participation of government agencies working in the thematic areas mentioned in items I, II, III and IV, in order to assist Brazilian communities abroad; and

VI - permanent effort to reduce bureaucracy, update and modernize the service system, with the aim of improving assistance to the emigrant.

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